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CASE COMMENTS

GOODWIN V. TURNER: CONS AND PRO-CREATING

THE DUE PROCESS clause of the fourteenth amendment of the United States Constitution[1] protects the individual's right of personal privacy from intrusion by the State.[2] This right encompasses various personal rights including the right to bear or beget children.[3] " 'If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' "[4]

In *Goodwin v. Turner*,[5] the Eighth Circuit affirmed the decision of the District Court for the Western District of Missouri[6] and held that the policy of the defendant, Bureau of Prison ("Bureau"), prohibiting inmates from artificially inseminating other persons, did not violate plaintiff Goodwin's constitutional rights.[7]

1. The fourteenth amendment states in relevant part: "[N]or shall any State deprive any person of . . . liberty . . . without due process of law . . . ." U.S. CONST. amend. XIV.

2. Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) ("Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy . . . .' " (quoting Roe v. Wade, 429 U.S. 589, 599-600 (1977))).

3. *Id.* at 685.

4. *Id.* (quoting with insignificant error Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis omitted)).

5. 908 F.2d 1395 (8th Cir. 1990).

6. Goodwin v. Turner, 702 F. Supp. 1452 (W.D. Mo. 1988).

7. *Goodwin*, 908 F.2d at 1396. The policy statement of the Bureau provides in part that

Goodwin is a federal prisoner incarcerated at the United States Medical Center for Federal Prisoners in Springfield, Missouri ("Medical Center"). At the time of the Eighth Circuit's decision, Goodwin's wife was thirty years old and not incarcerated. The couple did not want to delay conception until the time of Goodwin's release because of the increased risk of birth defects that accompanies escalating maternal age.[8] By "the time of Goodwin's latest release date in 1995, his wife will be thirty-five years old," and the likelihood of her bearing a child with genetic abnormalities will have doubled.[9] In the face of these discouraging statistics, Goodwin requested that the Bureau provide him with a clean container in which to deposit his ejaculate and that the container be transported outside the prison to his wife. Mrs. Goodwin would then be able to artificially inseminate herself and become pregnant before her husband would be released from prison. When the Bureau denied his request, Goodwin filed a petition for habeas corpus pursuant to 28 U.S.C. § 2241 for incarcerating him in violation of his constitutional right to beget a child.[10]

The Eighth Circuit held that the Bureau's denial of Goodwin's request was a reasonable restriction related to achieving the legitimate penological interest of equal treatment of male and female prisoners. Therefore, it did not violate Goodwin's constitutional right to beget a child. The court deferred to the Bureau's decision to deny Goodwin's request based on the interest of equal treatment of inmates. The Bureau reasoned that if male inmates were permitted to artificially inseminate other persons, female inmates would have to be granted the right to be inseminated. Since the Bureau believed that this would jeopardize prison security and

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> sound correctional policy dictates against allowing inmates to artificially inseminate another person. . . . [I]f [artificial insemination were] allowed in one case, all of [the Bureau's] institutions would either have to develop collection, handling, and storage procedures for semen or be opened up to private medical or technical persons to come in to collect the semen. This situation would either require a significant drain on resources or create significant security risks, especially in connection with inmates with a high security classification. . . . The Bureau strives, to the extent possible, to treat all inmates equally. Therefore, in connection with indigent inmates, the Executive Staff felt that the Bureau would be in the position of having to either provide or pay for these services for these inmates and, with respect to female inmates, to significantly expand the medical services available.

Id. at 1397-98.

8. *Id.* at 1397.
9. *Id.* at 1406 n.6 (McMillian, J., dissenting).
10. *Id.* at 1397; *see* 28 U.S.C. § 2241 (1988).

would require costly expenditures for additional medical services, the Bureau prohibited male inmates from inseminating others.[11]

This comment will examine in detail both the majority and dissenting opinions, concluding that the Bureau's equal treatment policy does not require the Bureau to permit female inmates to be inseminated if male inmates are permitted to inseminate noninmates. Therefore, the Bureau's interest of equal treatment is not legitimate, and the Eighth Circuit should have granted Goodwin's petition for habeas corpus.

I. HISTORY

The Constitution protects both single and married individuals from "unwarranted governmental intrusion into matters so fundamentally affecting [them] as the decision whether to bear or beget a child."[12] While it is "clear that imprisonment carries with it the circumscription or loss of many significant rights,"[13] "[n]o 'iron curtain' separates" prisoners from the Constitution.[14] Limitations on a prisoner's constitutional rights "arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security."[15] "In *Turner v. Safley*, [the Supreme Court] held that the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.' "[16] The Supreme Court has "made quite clear that [this] standard of review . . . applies to all circumstances in which the needs of prison administration implicate constitutional rights."[17] The Court has held that "such a standard is necessary if 'prison administrators . . ., and not the courts, [are] to make the

11. *Goodwin*, 908 F.2d at 1398-1400.

12. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

13. Hudson v. Palmer, 468 U.S. 517, 524 (1984); *accord* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("We start with the familiar proposition that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . .' " (quoting Price v. Johnston, 334 U.S. 266, 285 (1948))).

14. *Hudson*, 468 U.S. at 523.

15. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

16. Washington v. Harper, 110 S.Ct. 1028, 1037 (1990) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

17. *Id.* at 1038; *see* Thornburgh v. Abbott, 109 S.Ct. 1874, 1879 (1989) (Heightened scrutiny is "not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons.").

difficult judgments concerning institutional operations.' "[18]

While the Supreme Court has made the applicability of the reasonableness standard clear, the Court has struggled to reconcile previous decisions suggesting that a heightened level of scrutiny may be appropriate in some prison cases. For example, in *Procunier v. Martinez*,[19] the Supreme Court applied a heightened level of scrutiny to review a regulation permitting prisoner mail censorship.[20] In a subsequent opinion, however, the Supreme Court has characterized *Martinez* as a special case.[21] Specifically, the Court stated that

> a careful reading of *Martinez* suggests that our rejection of the regulation at issue resulted not from a least restrictive means requirement, but from our recognition that the regulated activity centrally at issue in that case—outgoing personal correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security.[22]

Martinez, therefore, may require a heightened level of scrutiny only when the prison regulation at issue is justified by a concern other than security.

The *Turner v. Safley* reasonableness standard has also been irregularly applied in cases raising equal protection challenges to prison regulations. Some courts apply the reasonableness standard;[23] others apply a heightened level of scrutiny;[24] still others have not found it necessary to decide this issue.[25] Since Goodwin's

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18. Turner v. Safley, 482 U.S. 78, 89 (1987) (quoting Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977)).

19. 416 U.S. 396 (1974).

20. *Id.* at 413-14. The Court applied the following level of scrutiny:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413.

21. *See* Thornburgh v. Abbott, 109 S.Ct. 1874, 1880 & n.10 (1989).

22. *Id.* at 1880.

23. *See* Timm v. Gunter, 917 F.2d 1093, 1099 (8th Cir. 1990); Jackson v. Thornburgh, 907 F.2d 194, 197 (D.C. Cir. 1990) (lower level of scrutiny appropriate when statute does not facially draw a gender-based distinction).

24. Pitts v. Thornburgh, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); McMurry v. Phelps, 533 F. Supp. 742, 767 (W.D. La. 1982); Batton v. State Gov't, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980); Glover v. Johnson, 478 F. Supp. 1075, 1078 (E.D. Mich. 1979).

25. Smith v. Bingham, 914 F.2d 740, 742 (5th Cir. 1990) (even under the heightened level of scrutiny the plaintiff's constitutional rights were not violated); Madyun v. Franzen, 704 F.2d 954, 962 (7th Cir.) (same), *cert. denied*, 464 U.S. 996 (1983).

constitutional right to beget children has been violated, even under the *Turner v. Safley* deferential standard of review, it is unnecessary to decide which standard should apply here.

In deciding whether the challenged regulation meets the reasonableness test, four factors are to be considered. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[26] Second, where the prisoner retains alternative means of exercising the right, courts should be "particularly conscious of the 'measure of judicial deference owed to correction officials.' "[27] Third, a court must consider "the impact of accommodation of the asserted constitutional right . . . on guards and other inmates, and on the allocation of prison resources generally."[28] "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[29] Prison officials, however, are not required "to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[30] Despite the fact that all Goodwin requested was a clean container in which to deposit his ejaculate and a means of swiftly transporting the container outside the prison, the majority held that the Bureau's denial of this request was reasonable.

II. *Goodwin v. Turner*

A. The Majority Opinion

The issue on appeal to the Eighth Circuit was whether the policy of the Bureau prohibiting all inmates from inseminating another violates their right of privacy. The two member majority, Judge Magill writing, held that the prohibition was reasonable and did not offend the inmates' due process right to beget children.[31]

The majority first assumed, without deciding, that Goodwin retained his right to procreate while incarcerated.[32] It then considered the appropriate level of scrutiny for reviewing the prison reg-

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26. Turner v. Safley, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
27. *Id.* at 90 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).
28. *Id.*
29. *Id.*
30. *Id.* at 90-91.
31. Goodwin v. Turner, 908 F.2d 1395, 1400 (8th Cir. 1990).
32. *Id.* at 1398.

ulation. Goodwin argued that since "the prison regulation has a direct impact on his wife's right to procreate, it should be subject to strict scrutiny."[33] The majority rejected this argument, reasoning that incarceration by its nature affects the rights of family members.[34] Applying the reasonableness test, the majority first held that even though Goodwin's request was relatively simple, the prohibition of insemination was rationally related to the legitimate penological objective of equal protection among inmates.[35] Second, the majority held that the absence of alternatives open to Goodwin to exercise his right to procreate was additional evidence of the reasonableness of the regulation. Finally, the majority held that the accommodation of Goodwin's request would "force the Bureau to grant its female inmates expanded medical services, thereby diverting resources from security and other legitimate penological interests."[36]

B. The Dissenting Opinion

Judge McMillan dissented, arguing that the majority was incorrect in holding the regulation reasonable.[37] The dissent maintained that an inmate retains his or her right to procreate while incarcerated.[38] The dissent, therefore, did not reach the issue of the appropriate level of scrutiny for the prison regulation,[39] since the dissent would overturn the regulation even under the deferential reasonableness standard.[40]

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33. *Id.* at 1399.

34. *Id.*

35. *Id.* at 1399-1400. The majority noted that the Bureau asserted several other interests that were not relevant to Goodwin's request to artificially inseminate his wife. *Id.* at 1399 n.7. These other asserted interests were decreased burden on the welfare rolls, tort liability, and interests relating to a sophisticated artificial insemination procedure. *Id.*

36. *Id.* at 1400.

37. The dissent also disagreed with the majority as to whether it was appropriate to apply the reasonableness test when the District Court had failed to do so. The District Court never reached the question of the reasonableness of the regulation, since it held that an inmate has no fundamental right to procreate. Goodwin v. Turner, 702 F.Supp. 1452, 1453-54 (W.D. Mo. 1988). Thus, the dissent argued that it was improper for the Court of Appeals to review the regulation de novo under this reasonableness test. The dissent asserted that at a minimum, the case should be remanded to the District Court with instructions to apply the reasonableness test "in the first instance." Goodwin v. Turner, 908 F.2d 1395, 1401, 1404 (8th Cir. 1990) (McMillian, J., dissenting). However, a thorough analysis of this issue is beyond the scope of this comment.

38. *Goodwin*, 908 F.2d at 1401-03 (McMillian, J., dissenting).

39. *Id.* at 1401 & n.1 (McMillian, J., dissenting).

40. *Id.* at 1405-07 (McMillian, J., dissenting).

III. ANALYSIS

The novel issue that confronted the Court of Appeals was whether prohibiting male inmates from inseminating noninmates is a violation of the constitutional right to father a child. When reviewing regulations to determine their constitutionality, the appropriate level of scrutiny must first be determined.[41] There are two levels of scrutiny that federal courts apply in cases that challenge prison regulations on equal protection grounds.[42] However, Goodwin's constitutional right to beget children has been violated even under a deferential standard.

Applying the reasonableness standard, therefore, the Supreme Court has directed lower courts to consider four factors in determining whether the regulation is reasonable.[43] The first factor requires a rational connection between the prison regulation and the legitimate governmental interest claimed to justify the regulation.[44] Both the majority[45] and dissent[46] agreed that, as a general matter, equal protection among inmates is a legitimate government interest. However, the majority and dissent disagreed as to whether the equal protection interest had to be the constitutional standard or merely a Bureau-created policy of equal treatment of the sexes. The majority, citing *Madyun v Franzen*,[47] held that while the Constitution may not require equal protection among inmates for the right of procreation, the Bureau-created policy of equal treatment would.[48] Thus, the majority reasoned that the Bureau did not have to accommodate Goodwin's simple

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41. Goodwin v. Turner, 908 F.2d 1395, 1398 (8th Cir. 1990). When considering prison regulations, however, the court must first determine whether the asserted right is constitutionally protected and whether that right survives incarceration. The majority assumed, without deciding, that the right to procreate survives incarceration. *Id.* at 1398. The dissent analyzed this issue and held that the right survives incarceration. *Id.* at 1401-03 (McMillian, J., dissenting). Since a thorough analysis of this issue is beyond the scope of this comment, this comment assumes, as the majority assumed, that the right to procreation survives incarceration.

42. *See supra* text accompanying notes 23-25.

43. *See supra* text accompanying notes 26-29.

44. Turner v. Safley, 482 U.S. 78, 89 (1987).

45. *Goodwin*, 908 F.2d at 1399.

46. *Id.* at 1405 (McMillan, J., dissenting).

47. Madyun v. Franzen, 704 F.2d 954, 962 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983).

48. *Goodwin*, 908 F.2d at 1400 ("We merely note that *as a matter of the Bureau s established prison policy*, and not as a matter of constitutional law, if male inmates are allowed to procreate, the Bureau will either be forced to accord some similar benefit on its female inmates or compromise its legitimate policy.").

request. The accommodation would, at the very least, compromise prison policy "because the Bureau cannot afford to expand its medical services for its female prisoners to accommodate their desire to procreate.[49] The majority concluded that since Bureau policy would be compromised, the denial of Goodwin's request was rationally related to the Bureau-created policy of equal protection.[50]

The majority also rejected Goodwin's argument that the accommodation of female inmates' right to procreate in prison was an issue to be decided another day in the context of an actual case.[51] The majority's rejection of Goodwin's argument followed from its acceptance of the Bureau's own analysis of its obligations under its equal treatment policy. The Bureau claimed that if male inmates were permitted to inseminate noninmates, Bureau policy would require that significant financial and prison resources be devoted to support a similar benefit for female inmates.[52]

The dissent argued that the Bureau-created equal treatment policy was legitimate "as a general matter [but] not . . . when it [was] accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right."[53] The dissent further argued that denying Goodwin this right was not rationally connected to the equal treatment policy. The dissent reasoned that if the Bureau-created policy of equal treatment was a sufficient basis to deny accommodatable constitutional rights, prisons would never be required to accommodate such rights "because it is quite likely that any asserted right might legitimately be withheld from some inmates somewhere."[54] Additionally, the dissent asserted that male and female inmates did not have to be treated similarly with respect to the right of procreation.[55]

The majority's holding on the first *Turner v. Safley*[56] factor is deficient for several reasons. First, the majority cited *Madyun v.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See supra* note 47.

53. *Goodwin*, 908 F.2d at 1405 (McMillian, J., dissenting).

54. *Id.* (McMillan, J., dissenting). The dissent did not, however, indicate whether the constitutional equal protection interest would be sufficient to deny an otherwise accommodatable constitutional right.

55. *See id.* at 1405 (McMillan, J., dissenting) ("[E]qual treatment is not *rationally* furthered by denying all inmates a constitutional right simply because it might be legitimately be denied to some." (emphasis in original)).

56. 482 U.S. 78 (1987).

Franzen,[57] as support for the proposition that the Bureau-created equal treatment interest was legitimate.[58] However, the facts of *Madyun* are not sufficiently analogous to those in *Goodwin* to support the majority's conclusion. *Madyun* involved a prison regulation that permitted male and female prison guards to frisk search male inmates while female inmates were subject to frisk searches only by female guards.[59] Madyun's claim was that male inmates were treated unequally and should be afforded the right to be frisk searched only by male guards. *Maydun* unlike *Goodwin*, thus involved a regulation that treated inmates unequally and did not seek to justify the regulation at issue by reference to a policy of equal treatment of prisoners. Instead, the *Madyun* court denied the male inmates' equal protection challenge and held that the disparity in treatment of male and female prisoners was justified by the state's policy of providing job opportunities for women guards.[60] Thus, the focus in *Madyun* was not equal protection among the inmates, as in *Goodwin*, but equal protection among prison guards. The state's interest in equalizing opportunity for guards prevailed over the male prisoner's right to be searched by a member of the same sex.[61] In addition, while the *Madyun* court did state that male and female inmates should be treated equally while in prison, that court also stated that "prison administrators should have a reasonable degree of flexibility in affording different treatment to male and female inmates in the interest of security or other legitimate penological functions."[62] Thus, *Madyun* does not persuasively support the majority's holding that the Bureau-created policy of equal treatment of prisoners is sufficient to deny an otherwise accommodatable constitutional right to those prisoners.

The majority's holding also opens the door for prison officials to fabricate policies to deny prisoners accommodatable rights. The majority uncritically accepted the Bureau's equal treatment pol-

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57. *Goodwin*, 908 F.2d at 1399 (citing Madyun v. Franzen, 704 F.2d 954, 962 (7th Cir.) ("male and female inmates must receive substantially equal facilities and conditions while in prison"), *cert. denied*, 464 U.S. 996 (1983).

58. *Id.* at 1399 ("[T]he prison prohibition on inmate procreation . . . is rationally related to the Bureau's interest of treating all inmates equally . . . .").

59. *Madyun*, 704 F.2d at 961.

60. *Id.* at 962.

61. *Id.* ("The right to be searched by a member of one's own sex . . . is hardly a right that can be analogized to the . . . vocational programs that courts have required prisons to provide on an equal basis.").

62. *Id.*

icy. Once accepted, the equal treatment policy could be used to deny "any asserted right."[63]

Furthermore, the majority recognized a second interest in not compromising the Bureau-created policy of equal treatment. The Bureau could, therefore, fabricate a policy designed to deny prisoner rights and then defend the deprivation based on the interest of not compromising the policy. In fact, it is possible that the equal treatment interest in *Goodwin* was fabricated. The Bureau asserted several interests to deny Goodwin's request to inseminate his wife.[64] Both the majority[65] and the dissent[66] held that all the interests asserted by the Bureau, with the exception of the equal treatment interest, were not legitimate. Thus, the Bureau may have fabricated as many interests as possible including the equal treatment interest in order that at least one interest would be accepted by the reviewing court.

Finally, the Bureau did not indicate how its policy of equal treatment would be compromised if Goodwin's request were granted while female inmates were denied the right to be inseminated. Obvious physical differences between males and females should justify treating the two groups differently. Male inmates' requests may be accommodated by providing them with a clean container and means for swiftly transporting the container outside the prison. Female inmates who wish to carry a fetus until delivery, however, would require " 'special medical services . . . [and] special diet, exercise, and other pre- and post-natal care.' "[67] Thus it is clear that accommodating male inmates has different consequences than accommodating female inmates. Granting only the male inmates' requests, therefore, would be permissible, since "[c]ourts have recognized that different treatment of male and female inmates does not necessarily offend equal protection."[68]

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63. *Goodwin*, 908 F.2d at 1405 (McMillian, J., dissenting).

64. *See supra* note 31 (describing the interests asserted by the Bureau).

65. *Goodwin*, 908 F.2d at 1399 n.7.

66. *Id.* at 1404 n.4 (McMillan, J., dissenting).

67. *Id.* at 1400 (quoting Appellant's Brief at 2223).

68. *Id.* at 1406 (McMillian, J., dissenting) (citing Pitts v. Thornburgh, 866 F.2d 1450, 1454-59 (D.C. Cir. 1989) (prison policy of incarcerating female and male inmates in different prisons does not violate equal protection because of the government's interest in preventing overcrowding and the tradition of gender separation); Morrow v. Harwell, 768 F.2d 619, 626 (5th Cir. 1985) (prison policy granting more visiting hours to male inmates does not violate equal protection since male inmates constitute a greater portion of the prison population)); *see* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 136 (1977) ("There is nothing in the Constitution which requires prison officials to treat all

A careful analysis of *Turner v. Safley* supports the proposition that male inmates need not be deprived of an accommodatable right because female inmates are denied that right, if the right may be provided to male inmates without having a negative effect on prison security and resources. *Turner v. Safley* concerned a regulation prohibiting inmate marriages unless the inmate could demonstrate compelling reasons for the marriage. The Supreme Court held that the regulation swept too broadly. "Prison officials testified that generally they had experienced no problem with the marriage of male inmates . . . . The proffered justification thus does not explain the adoption of a rule banning marriages by these [male] inmates."[69] Thus, the Supreme Court acknowledged that prison officials may permit male inmates to marry while prohibiting female inmates if the interests in security and rehabilitation were threatened only by the female inmates' marriages. Therefore, *Turner v. Safley* supports the proposition that the Bureau could permit male inmates to inseminate noninmates while prohibiting female inmates from being inseminated. The dissent's argument that the Bureau-created policy of equal treatment was not legitimate or rationally furthered by denying all inmates the right to procreate is persuasive.

The second *Turner v. Safley* factor teaches that where the prisoner retains alternative means of exercising the right denied by prison officials, courts should be particularly aware of the deference owed to prison officials.[70] The majority and the dissent agreed that there were no obvious alternatives to Goodwin's simple request to be provided with a clean container and means for transporting the container to his wife.[71] The dissent reasoned, therefore, that the prison officials' determination need not be afforded as much deference as it would have been were several alternatives available to Goodwin. The dissent concluded that the second factor weighed in favor of Goodwin's right of

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inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence."); Timm v. Gunter, 917 F.2d 1093, 1102-03 (8th Cir. 1990) (equal protection not violated by allowing female prison guards to pat search male inmates in one prison and prohibiting male guards from pat searching female inmates in a different prison due to differences between the two prisoner populations); *Id.* at 1101 n.12 (listing cases in accord from the Seventh and Ninth Circuits).

69. Turner v. Safley, 482 U.S. at 98-99.

70. *Id.* at 90.

71. *Goodwin*, 908 F.2d at 1400; *Id.* at 1405-06 (McMillan, J., dissenting).

procreation.[72]

The majority, however, drew a different conclusion. "The lack of . . . alternative avenues stems from the fact that none can exist without compromising prison policy . . . ."[73] The majority then discounted the lack of alternatives and held that the second factor weighed in favor of the prison regulation.[74] The dissent specifically took issue with the majority for considering prison administration interests as part of this factor. The dissent appears to have the more persuasive argument, since *Turner v. Safley* mandates that prison interests be weighed in the third factor and not the second.[75] In *Turner v. Safley*, the Supreme Court considered a regulation prohibiting inmate-to-inmate correspondence except for compelling reasons. The Supreme Court found that there were alternative means of exercising the right available to the inmates; "the . . . regulation does not deprive prisoners of all means of expression. Rather, it bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned—inmates at other institutions . . . ."[76] The Supreme Court's clear focus is on the prisoners' ability to exercise their right to correspond with others, not the administration's reason for curtailing that right. Thus, the dissent's interpretation that prison interests should not be considered in the second factor was correct, and the second factor weighs in favor of granting Goodwin's request to inseminate his wife.

The third *Turner v. Safley* factor assesses the impact of accommodating the right at issue on guards, other inmates, and on the allocation of prison resources.[77] The majority and the dissent disagreed on what right was to be accommodated. The majority reasoned that if male inmates were permitted to inseminate noninmates, the Bureau-created policy of equal treatment would require that female inmates be afforded the right to be inseminated. The majority therefore considered the right at issue to be that of male prisoners to inseminate others *and* female prisoners to be inseminated by others. The risks and costs of accommodat-

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72. *Id.* (McMillan, J., dissenting).

73. *Id.* at 1400.

74. *Id.*

75. Turner v. Safley, 482 U.S. at 90 ("A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.").

76. *Id.* at 92.

77. *Id.* at 90.

ing male and female inmates were then considered under this factor. The majority concluded that these costs weighed in favor of denying both male and female inmates the right to procreate.[78]

The dissent, however, assessed the impact of accommodating a more narrow right. Judge McMillan concluded that male and female inmates did not have to be treated equally with respect to the right to procreate.[79] The dissent, therefore, argued that the impact of permitting the insemination of female inmates should not be considered in the third factor. The majority implicitly acknowledged that Goodwin's request could be accommodated without any impact on the inmates or prison resources by focusing its assessment of the third *Turner v. Safley* factor on the costs of providing "expanded medical service"[80] to female inmates. Since accommodating Goodwin's request would require only the nominal expense of supplying a clean container and transporting the container outside the prison, his request would not jeopardize prison security or resources. Therefore, the third factor also weighs in favor of granting Goodwin's request.

Finally, the fourth *Turner v. Safley* factor indicates that the lack of ready regulatory alternatives is proof of the reasonableness of the prison regulation.[81] The majority held that there were no alternatives and, therefore, this factor weighed against accommodating Goodwin's request.[82] The dissent presented two alternatives to the Bureau's policy of categorically prohibiting all inmates from procreating. The first alternative was that insemination requests should be considered on a case-by-case basis. If the individual request would unduly burden the prison, then it need not be granted.[83] The second alternative would be to promulgate a policy permitting insemination only if the inmate's request would not significantly burden the prison.[84] In *Turner v. Safley*, the Supreme Court endorsed alternatives that accommodate constitutional rights on a case-by-case basis. One prison regulation at issue pro-

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78. *Goodwin*, 908 F.2d at 1399-1400.

79. *See supra* text accompanying note 55.

80. *Goodwin*, 908 F.2d at 1400.

81. Turner v. Safley, 482 U.S. at 90-91.

82. *Goodwin*, 908 F.2d at 1400. The dissent apparently missed the majority's holding on the fourth factor, possibly because it was contained in a single paragraph along with the third factor. *Id.* at 1407 (McMillan, J., dissenting) ("The final *Turner* factor, which the majority does not apply . . . .").

83. *Id.* at 1407 (McMillan, J., dissenting).

84. *Id.* (McMillan, J., dissenting).

hibited all inmate marriages unless the prisoner was able to show compelling reasons for the marriage. The Supreme Court held that there were simple alternatives that would only impose a de minimis cost on the prison. The alternative the Court suggested was to permit inmate marriages as a general rule unless the warden found it a threat to prison security.[85] Thus, the Supreme Court clearly favors alternatives that do not unconditionally deny a constitutional right to prisoners. Therefore, since alternative prison regulations may be found, the fourth *Turner v. Safley* factor weighs in favor of accommodating Goodwin's request.

All four *Turner v. Safley* factors, therefore, weigh in favor of granting Goodwin's request. The policy of equal treatment of prisoners is a legitimate governmental interest as a general matter, but it is not rationally related to prohibiting all inmates from inseminating others. Other than artificial insemination, there were no alternative means available to Goodwin to exercise his right of procreation. Goodwin's request could be accommodated with a minimal impact on the prison. Finally, there were alternatives to the absolute prohibition of insemination. Since all four *Turner v. Safley* factors favor granting Goodwin's request, the majority was incorrect in denying it.

CONCLUSION

The majority opinion in *Goodwin v. Turner* is flawed on a number of grounds, suggesting that the dissent should have prevailed. Chief among these is the majority's deference to the Bureau-created interest of equal treatment of prisoners and the majority's recognition of a rational connection between the interest and the regulation at issue. There is no reason female inmates must be permitted to be inseminated if male inmates are permitted to inseminate noninmates. There was, therefore, no rational connection between the Bureau-created interest of equal treatment and the prohibition of all inmates from inseminating others. Thus, the dissent had the more persuasive argument. The prison regulation violated Goodwin's right to procreate, and Goodwin's writ of habeas corpus should have been granted.

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85. *Turner v. Safley*, 482 U.S. at 98.