Constitutional Law—A Call for Strict Scrutiny: Eighth Circuit Denies Inmate's Request for Artificial Insemination—Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990)

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I. INTRODUCTION

In 1987, Steven J. Goodwin, a federal prisoner, requested permis-

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sion to artificially inseminate his wife.\(^1\) After unsuccessfully exhausting prison administrative remedies and petitioning a federal district court, Goodwin's request was denied by the Eighth Circuit Court of Appeals.\(^2\)

Although the Eighth Circuit found that the right to procreate is a fundamental constitutional right, it held that the restriction on Goodwin's right to procreate imposed by the Bureau of Prisons was reasonably related to a legitimate penological interest.\(^3\) In reaching this decision, the court applied the test set out by the Supreme Court in the Turner v. Safley\(^4\) opinion.\(^5\) Despite the fact that the majority applied the Turner test in a more liberal manner than any other circuit previously has, legitimate questions remain as to whether this was the appropriate standard of review for Goodwin's request.\(^6\) This liberal application of the Turner test could have serious implications on the constitutional rights of prisoners in the United States.

First, this Note will review the subject of artificial insemination and inmates. Next, it will review the development of judicial review of prisoners' constitutional rights. Of particular concern will be the appropriate standards of review employed by the Supreme Court. After considering the approach utilized by the Eighth Circuit in Goodwin II, this Note will focus on the implications of that decision. Finally, a standard of review for determining the constitutionality of actions and regulations instituted by prison officials in situations similar to Steven Goodwin's will be proposed.

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2. Goodwin II, 908 F.2d at 1400.
5. Turner v. Safley, 482 U.S. 78 (1987). To avoid confusion, the reader is advised that Warden C.A. Turner was a named party in Goodwin I, Goodwin II and Turner.
6. Turner v. Safley, 482 U.S. 78 (1987). The Turner test asks whether the regulation is "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. Thus, the test involves a "reasonable" standard of review. The Turner test consists of four factors, the most important of which is the existence of a valid, rational connection between the prison regulation and the legitimate penological interest advanced. Id. at 89-91.
7. In his dissent, Judge McMillian stated: "Goodwin makes a colorable argument that this case should be reviewed under a heightened scrutiny standard . . . ." Goodwin II, 908 F.2d at 1401 (McMillian, J., dissenting). However, Judge McMillian did not pursue this argument since he found that Goodwin's request should be granted even under the lower, Turner standard of review. Id.
II. BACKGROUND OF THE LAW

A. Artificial Insemination and Prisoners

The right to procreate is regarded as a fundamental constitutional right of free citizens. However, the right to procreate has never been fulfilled in the prison context because prisons are not required to provide inmates access to conjugal visitation. While a small number of state prison systems have allowed conjugal visitation since the 1970s, the United States Bureau of Prisons (Bureau), the federal prison system, has never implemented such a program. Consequently, the affirmative right to procreate has always been denied to federal inmates and a majority of state inmates.

With the development of human artificial insemination over two hundred years ago, and the lack of conjugal rights for inmates, it is surprising that the Goodwin decisions did not occur until 1990. Judicial treatment of prisoners and artificial insemination was addressed in Holland v. Hutto. However, in denying an inmate's request for marriage, the Holland court merely mentioned in dictum that a state prisoner was denied his request for artificial insemination. Further, the Bureau has never implemented a policy or program regarding artificial insemination.


The Griswold Court, in Justice Douglas' renowned opinion, found that the guarantees set forth in the Bill of Rights protect privacy interests and create a "penumbra" or "zone" of privacy. Griswold, 381 U.S. at 484. This zone of privacy, as defined by subsequent Supreme Court cases, expressly includes what Professor Tribe refers to as the right of "reproductive autonomy." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1339 (2d ed. 1988). As discussed in this Note, references to "fundamental rights" include those personal rights enumerated under the Constitution and the foregoing privacy rights.

8. Goodwin I, 702 F. Supp. at 1455 ("No court has required an institution to provide conjugal visits for inmates [on constitutional grounds.").

9. See Note, Rethinking Conjugal Visitation in Light of the "AIDS" Crisis, 15 NEW ENG. J. CRIM. & CIV. CONFINEMENT 121, 121 (1989) [hereinafter Note, Conjugal Visitation] (Seven states allow conjugal visits in their prison systems.).

10. Id.

11. Human artificial insemination was performed in England as early as 1790 by a surgeon named John Hunter. Shapiro, New Innovations in Conception and Their Effects upon Our Law and Morality, 31 N.Y.L. SCH. L. REV. 37, 41 (1986). An American physician achieved similar success in 1866. Id. Today, in the United States alone, 20,000 babies are born each year as a result of artificial insemination. Id.


13. Id. at 196.

B. Federal Prison System

As with most agencies, management of federal prisons lies exclusively within the province of the executive branch.\textsuperscript{15} Congress permits the Attorney General to delegate management of the federal prison system to the Bureau.\textsuperscript{16} The Bureau's Director promulgates the rules governing classification, government, treatment, care, discipline, reformation, and rehabilitation of the inmates.\textsuperscript{17} The Bureau promulgates its regulations in accordance with the Administrative Procedure Act (APA).\textsuperscript{18}

When a federal inmate has a grievance about a prison condition, her fate initially lies with the Bureau's administrative remedies.\textsuperscript{19} Under the doctrine of exhaustion of administrative remedies, an inmate asserting that a Bureau regulation is unconstitutional must initially seek administrative relief.\textsuperscript{20} A federal inmate can petition the federal courts for relief only after she has exhausted her administrative options.\textsuperscript{21} Then, a federal inmate can challenge unconstitutional

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\item \textsuperscript{15}72 C.J.S. \textit{Prisons} § 10 (1987). Similarly, state prison systems are generally governed by the executive branch of the respective state. \textit{Id.} § 7.
\item \textsuperscript{16}18 U.S.C. § 4042 (1988) ("The Bureau of Prisons, under the direction of the Attorney General, shall—(1) have charge of the management and regulation of all Federal penal and correctional institutions.").
\item \textsuperscript{17}28 C.F.R. § 0.96(q) (1990).
\item \textsuperscript{18}See 28 U.S.C. §§ 500-76 (1988). \textit{See also} 28 C.F.R. §§ 500-572 (1990) (Bureau regulations). The Bureau regulations provide for every aspect of a prisoner's life—from religious practices to food services. \textit{Id.}
\item \textsuperscript{19}See \textit{Pyles v. Carlson}, 698 F.2d 1131, 1132 (11th Cir. 1983) ("Federal prisoners are generally required to exhaust administrative remedies available to them."). The Bureau Administrative procedures are outlined in the \textit{Code of Federal Regulations}. 28 C.F.R. § 542 (1990). The Bureau's Administrative Remedy Program is utilized when informal procedures have not resolved an inmate's grievance. \textit{Id.} § 542.10. The process begins with the warden of the particular institution and is then appealed to the Bureau's regional director. \textit{Id.} § 542.15. Finally, the appeal is sent to the Bureau's General Counsel at the national level. \textit{Id.}
\item \textsuperscript{20}See \textit{Miller v. Stanmore}, 636 F.2d 986, 991 n.5 (5th Cir. 1981). However, prisoners may be excused from this requirement if they can show that the administrative remedy itself violates due process. \textit{Id.} at 991 n.8.
\item A general exception to the exhaustion requirement exists for state inmates' claims under the Civil Rights Act. \textit{Preiser}, 411 U.S. at 500. However, this exception is limited. See 42 U.S.C. § 1997 (1988); \textit{see also} \textit{Lay, Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act}, 71 \textit{Iowa L. Rev.} 935, 936-37 (1986). Title 42, section 1997 of the United States Code requires inmates to exhaust state remedies only if a state has an administrative remedy program that complies with federal standards under section 1997. \textit{Id.} at 936. Only a small minority of the
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tional prison conditions under the habeas corpus statute.22

C. Judicial Review of Inmate Petitions

1. Agency’s Regulation or Order That Impinges on a Free Citizen’s Constitutional Rights

In 1920, the Supreme Court held that an agency regulation implicating a free citizen’s constitutional rights should not be afforded any deference by a court upon judicial review.23 Although the holding has eroded with respect to constitutional property rights, it has not with respect to a free citizen’s personal or fundamental rights.24 A strict scrutiny standard of review applies to these agency determinations.25 “A regulation that significantly interferes with the exercise of a fundamental right requires more rigorous scrutiny: It must be supported by a compelling interest and closely tailored to effectuate only that interest.”26

The standard of review a court gives to an agency is directly related to the citizen’s chances for success. Where a strict scrutiny standard is not employed and the court affords the agency deference, it is less likely that the regulation or order will be invalidated.27


22. 28 U.S.C. § 2241 (1988). Until the early 1960s, habeas corpus was only available to release a person from actual physical confinement. Today, the habeas corpus statute can be used to challenge an unconstitutional prison practice. J. LIEBMAN, supra note 21, at 85-86.


24. In the past, the Supreme Court has distinguished between economic and noneconomic rights. Economic rights have not been subjected to a strict scrutiny standard since the Supreme Court rejected the “freedom of contract” philosophy espoused in Lochner v. New York. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392, 392 n.1 (1937) (citing Lochner v. New York, 198 U.S. 45); see also L. TRIBE, supra note 7, § 11-1, at 769-72 (discussing the collapse of Lochner). The Court generally attaches a strict scrutiny standard to those rights explicitly guaranteed under the Constitution and fall within what Professor Ely refers to as “the ‘area’ . . . of sex-marriage-childbearing-childrearing.” Ely, Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 5, 11 (1978).


26. B. SHWARTZ, supra note 23, at 634.

27. Id. at 629-32; see also infra note 111 and accompanying text.
The judicial review of prisoners' constitutional rights has not paralleled the judicial review of free citizens' rights. Traditionally, courts have avoided adjudicating claims involving prisoners' rights, adopting what became known as the "hands-off" doctrine. Under this doctrine, courts simply left issues of prison management to the discretion of prison officials. Under American common-law, an inmate could not petition a court for relief of an alleged unconstitutional prison condition. When faced with an inmate's petition claiming an unconstitutional prison condition, some courts have held that there was no jurisdiction to hear the complaint. Other courts have held that a habeus corpus action would only allow a court to discharge a prisoner, but would not allow the court to actu-
ally correct the complained-of prison practice.32

For example, in the 1952 case, Williams v. Steele,33 an inmate claimed that prison officials imposed cruel and unusual punishment by severely burning his body and submitting him to extended periods of solitary confinement.34 Further, the inmate claimed that these prison practices were performed in violation of his procedural due process rights.35 The Eighth Circuit maintained that no other court had entertained such a complaint, and held that a court could only determine whether or not an inmate was unlawfully detained.36

Using Cooper v. Pate37 as a starting point, the Supreme Court began to retreat from the “hands-off” doctrine. A number of decisions during the 1971 to 1972 term further drove the Supreme Court away from the doctrine.38 One commentator suggested that this retreat was in response to abhorrent prison conditions.39 Today, it is firmly

32. See Williams v. Steele, 194 F.2d 32, 34 (5th Cir.) (citing Eagles v. U.S. ex rel. Samuels, 329 U.S. 504, 315 (1946) (“The function of habeus corpus is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention.”), aff’d on rehearing, 194 F.2d 917 (5th Cir.), cert. denied, 344 U.S. 822 (1952); Hunter, 172 F.2d at 331.
33. Williams, 194 F.2d at 32.
34. Id. at 33. The prisoner was allegedly put into solitary confinement multiple times, once for a period of seventeen days. The complaint also alleged that the inmate was administered “excrutiatings” multiple times, and one “excrutiating” resulted in a severe burn to the inmate’s arm. The court gave no explanation or definition for “excrutiating.” The prisoner protested to numerous officials on several occasions, but to no avail. Id.
35. Id.
36. Id. at 34. “[T]he courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline, but only on habeas corpus to deliver from prison those who are illegally detained.” Id. For another example of the Eighth Circuit applying the “hands-off” doctrine, see Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) (Courts do not have supervisory jurisdiction over the conduct of institutions provided by law for the confinement of federal prisoners.)
37. 378 U.S. 546 (1964). In Pate, the Court held that it was error to dismiss a claim by an inmate who claimed he was denied permission to purchase certain religious publications. Id. at 546.
39. Millemann, supra note 30, at 29 (“[W]holesale invalidations on constitutional grounds of system-wide prison policies and practices at Arkansas, Mississippi, Alabama, and Virginia evidence the growing judicial concern for the rights of inmates.”).
established that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."40

3. Determining the Constitutionality of a Prison Regulation or Action

Although the Supreme Court, in the 1970s, recognized that the judiciary must address prisoners' constitutional claims, it did not firmly establish a standard of review for determining the constitutionality of a prison's regulation or action.41 The Court finally attached a standard of review to inmate constitutional challenges in the 1974 term.42 During that year, the Court applied two different standards of review to inmates' challenges of prison regulations in two different cases.43 The distinction as to which standard applied hinged on whether the prison regulation affected the rights of a free citizen.

The first of these decisions was Procunier v. Martinez.44 In Martinez, the California Department of Corrections instituted a regulation prohibiting inmates from writing about grievances in their correspondence to outsiders.45 The Court noted that this regulation affected the liberties of free citizens—those to whom the correspondence was sent.46


41. See Morales v. Schmidt, 494 F.2d 85, 86 (7th Cir. 1974) (A lack of guidelines in definitive Supreme Court opinions presents difficulty in determining prisoners' rights.).

42. Martinez, 416 U.S. at 406. The Court determined that the circuits applied at least five different standards of review to prison regulations restricting constitutional rights, including the "hands-off" doctrine, a rationally related standard, a strict scrutiny standard, a "clear and present danger" standard, and a reasonableness standard. Id.

43. See id. at 396; Pell v. Procunier, 417 U.S. 817 (1974).

44. 416 U.S. at 396.

45. Id. at 399. The rule directed inmates not to write letters in which they unduly complained, magnified grievances, or expressed inflammatory political, racial, religious, or other views or beliefs. Id. Any objectionable letter could have been put in the inmate's file, where it might have been a factor in setting a date for parole eligibility, or in determining the inmate's work and housing assignments. Id. at 400.

46. Id. at 408. The Court held:
While the *Martinez* Court recognized that courts are ill-equipped to deal with prison administration and reform, the Court applied the strict scrutiny test applicable to free citizens. In so doing, the Court held that the regulation was an unconstitutional restriction on the rights of those who correspond with inmates.

In the other 1974 decision, *Pell v. Procunier*, the California Department of Corrections implemented a regulation that prevented inmates from face-to-face interviews with members of the press. The Court found that the rights of the press were not sufficiently implicated to mandate the strict scrutiny standard. Consequently, the Court adopted the lower "reasonable" standard of review, which had previously been utilized by the Eighth Circuit. The reasonable standard balanced the need for the regulation in furthering prison security against the constitutional rights of the inmate. The *Pell* Court found that the regulation promoted prison security.

Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter.

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47. *Id.* at 404-05 (Prison administrators face "Herculean obstacles" that "are complex and intractable.").
48. *Id.* at 413. The Court held that the prison would have to show "that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation." *Id.* The Court also held that the restriction "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.*
49. *Id.* at 416. The Court found that the regulation furthered institutional security. However, the regulation failed the second prong of the strict scrutiny standard in that it was overly broad: "The regulation . . . is not narrowly drawn to reach only material that might be thought to encourage violence nor is its application limited to incoming letters." *Id.*
51. *Id.* at 820. The regulation provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." *Id.* at 819.
52. *Id.* at 824.
53. *Id.*
54. Moore v. Ciccone, 459 F.2d 574, 576 (8th Cir. 1972) ("[A] court must balance the asserted need for the regulation in furthering prison security or orderly administration against the claimed constitutional right and the degree to which it has been impaired." (citing Smith v. Robins, 328 F. Supp. 162, 164 (D. Me. 1971)), aff'd, 454 F.2d 696 (1st Cir. 1972)).
55. Moore, 459 F.2d at 577.
56. *Pell*, 417 U.S. at 831. The regulation was implemented in response to a "violent episode that the Department of Corrections felt was at least partially attributable to the former policy with respect to [allowing] face-to-face prisoner-press interviews." *Id.* Apparently, inmates who granted interviews gained notoriety and influence. *Id.* Because of this popularity, the inmates became the source of disciplinary problems. *Id.* at 832. The Court did not explain the causal connection between an inmate's popularity and his resultant social deviance.
Thus, the Court deferred its judgment to prison officials in upholding the regulation.57

In three subsequent cases, the Court followed the "free citizen distinction" and applied the lower reasonable standard, where constitutional rights of free citizens were not substantially impaired. In Jones v. North Carolina Prisoners Labor Union, Inc.,58 the North Carolina Department of Corrections promulgated rules restricting prison unions.59 The Court determined that the regulations were reasonably consistent with the penal goal of prison security.60 The regulation was upheld.61

In Bell v. Wolfish,62 pretrial detainees challenged prison regulations including, restrictions on the delivery of hardback books sent from outsiders to detainees.63 Again, the Court found that the regulation was rationally related to the legitimate penal goal of security, and held that prison administrators should be afforded deference.64 The

57. Id. at 835.
59. Id. at 121 (Restrictions prohibited solicitation of inmate members, barred all meetings of the union, and barred the delivery of the union's bulk mailings.).
60. Id. at 127. The prison administrators argued that inmate unions naturally caused friction between inmates and prison personnel. One administrator, quoted by the Court, stated: "Work stoppages and mutinies are easily foreseeable. Riots and chaos would almost inevitably result." Id.
63. Id. at 549. Other challenged regulations included body-cavity searches after contact visits, a prohibition against receipt of packages of food and personal items, the requirement that detainees remain outside their rooms during routine room searches, and the practice of placing two detainees in one room. Id. at 530.
64. Id. at 550. The Court grappled with the issue of whether pretrial detainees, due to the presumption of innocence, should be afforded a higher standard of review. Id. at 538. The Court found that the reasonable standard should apply. Id. at 539. The majority held that, in order to uphold a regulation, the challenged rule had "to be a reasonable ... regulation ... necessary to further significant governmental interests ..." Id. at 552 (quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972)). The Court also criticized the lower courts for not affording prison administrators more deference:

[Recently] many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges ... have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination .... The wide range of "judgment calls" [as to whether a regulation does] meet constitutional and statutory require-
regulation was upheld. 65

The Supreme Court utilized the same reasonable standard as the other post-Martinez decisions in Block v. Rutherford. 66 Pretrial detainees in Block challenged a prohibition of contact visits with members of their family. 67 The Court found that the regulation was a rational response to security interests and the family members' constitutional rights were not substantially impaired. 68 The regulation was upheld. 69

These post-Martinez cases demonstrate the importance of the strict scrutiny standard of review. In applying a reasonable standard of review, the Court has given wide deference to prison regulations and consequently, they always uphold the regulation. Since the invalidation of prison practices occurs only when the Court applies the strict scrutiny standard, the distinction between these two standards of review is critical: an inmate's success in challenging a prison regulation is conditioned upon application of the strict scrutiny standard of review.

4. The Turner v. Safley Test: Elimination of Strict Scrutiny?

Turner dealt with the constitutionality of two regulations: one restricting inmate-to-inmate correspondence, 70 the other banning marriages. 71 Justice O'Connor, writing for the majority in a sharply divided Court, 72 reviewed the decisions of Martinez, Pell, Jones, Bell,
Justice O'Connor noted that the strict scrutiny standard of *Martinez* had not been applied in the other cases. She reasoned that applying the strict scrutiny test would hinder the ability of prison officials to handle security problems. The result, it was feared, would be that "[c]ourts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem . . . ." Consequently, the Court applied a reasonable standard of review, rather than the strict scrutiny standard, to the first regulation.

Justice O'Connor codified the factors relevant to the reasonable standard: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether alternative means of exercising the right remain open to the prisoner; (3) the asserted right's impact accommodation on guards, other inmates, and prison resources; and (4) the absence of alternatives to the regulation. After discussing these factors, the Court upheld the first regulation dealing with inmate mail, finding that the regulation was rationally related to security concerns.

However, the Court did not apply the reasonable standard to the

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**Notes**

73. *Id.* at 83-91. The Court took special care to distinguish *Martinez* from the other decisions. *Id.* at 84-86. According to Justice O'Connor, *Martinez* was not a prisoners' rights case so much as it was a nonprisoners' rights case. *Id.* at 85-86. Although a prisoner's rights may not be violated by censored correspondence, such practice restricts the first and fourteenth amendment rights of those sending the correspondence to the prisoner. *Id.*

74. *Id.* at 89.

75. *Id.* Justice O'Connor found that the second prong of the strict scrutiny standard, that the regulation be the least restrictive means of achieving the regulatory goal, "would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.*

76. *Id.*

77. *Id.* at 89-91. Justice O'Connor developed the factors from the *Pelt*, *Bell*, and *Jones* decisions. *Id.* at 89.

78. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). This is the primary factor, since the other factors relate to the reasonableness of the relationship between the regulation and the legitimate penological interest.

79. *Turner*, 482 U.S. at 90. If there are alternative means of exercising the right, additional deference should be given to prison officials. *Id.*

80. *Id.* This is the "ripple effect" factor. The larger the impact on inmates or prison staff, the more "courts should be particularly deferential to the informed discretion of corrections officials." *Id.*

81. *Id.* "The absence of a ready alternative is evidence of the reasonableness of the prison regulation." *Id.* On the other hand, a ready alternative at *de minimis* cost to penological interests is evidence of unreasonableness. *Id.* at 91.

82. *Id.* at 93. The security concern was that inmate-to-inmate mail could be used to coordinate criminal activities of prison gangs. *Id.* at 92.
second regulation prohibiting inmate marriages. In fact, the Court did not choose between the new *Turner* test or the *Martinez* strict scrutiny standard. The Court stated: "We need not reach this question... because even under the reasonable relationship test, the marriage regulation does not withstand scrutiny." Further, the Court hinted that application of the *Martinez* standard might have been appropriate because the regulation placed a substantial restriction on the rights of nonprisoners. The Court, in striking down the regulation, noted that prison officials advanced two legitimate penological objectives—security and rehabilitation. The Court rejected the security concern because: (1) the ceremony imposed a *de minimis* burden on security; (2) other security concerns of violent "love triangles" were illogical; and (3) no "ripple effect" could occur since the decision to marry is a private one. The Court invalidated the prison regulation that substantially affected the rights of a free citizen. Therefore, *Turner* did not abandon the free citizen distinction or the strict scrutiny standard of review. In fact, the decision affirmed the importance of the free citizen distinction.

5. **The Court's Movement Away From the "Free Citizen" Distinction and Towards the "Presumptively Dangerous" Distinction**

Since *Turner*, the Supreme Court has applied the reasonable standard of review and upheld challenged prison regulations in three sig-

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83. *Id.* at 97.
84. *Id.*
85. *Id.*
86. *Id.*

Some commentators and courts have concluded that the *Turner* court held that the reasonable standard of review should apply to all constitutional challenges to prison conditions. The strong language in the beginning of the *Turner* opinion gives this impression. "If Pell, Jones, and Bell have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.


88. *Id.* at 97-98. The Court also rejected the rehabilitative objective, finding the prison officials' concerns to be paternal and unexplainable. *Id.* at 98-99.
89. *Id.* at 97.

The prison regulation in *O'Lone* restricted Muslim religious services.93 The Court upheld the regulation after determining that it promoted institutional security.94 Justice Brennan, writing for the dissent, argued for a "presumptively dangerous" distinction in order to determine situations in which the strict scrutiny standard of review should apply.95 Thus, using that distinction, a reviewing court would apply the strict scrutiny standard where the regulated activity is not dangerous.96 Otherwise, where the regulation deals with presumptively dangerous activities, the reasonable standard applies.97 Therefore, the dissent would have a court focus on the level of danger inherent in a prison regulation when determining whether strict scrutiny is the appropriate standard of review.

In 1989, the *Thornburgh* court analyzed a prison regulation which allowed censorship of incoming mail under the reasonable standard of review.98 The *Thornburgh* decision showed acceptance of the presumptively dangerous distinction, and a corresponding rejection of the free citizen distinction.

Justice Blackmun, a dissenter in *Turner* and *O'Lone*, wrote for the majority in *Thornburgh*.99 First, Justice Blackmun stated that "any attempt to forge separate standards for cases implicating the rights of

93. *O'Lone*, 482 U.S. at 345. The challenged regulation resulted in the Muslim's inability to attend Jumu'ah, a weekly congregational service. Jumu'ah is commanded by the Koran and must be held every Friday after the sun reaches its zenith. This prison policy was promulgated by the New Jersey Department of Corrections. *Id.* at 353. An inmate seeking to attend Jumu'ah required passage through the front gate, thereby stopping incoming traffic and allowing inmates potential access to outsiders. *Id.* at 346.
94. *Id.* at 358 (Brennan, J., dissenting with Justices Marshall, Blackmun, and Stevens).
95. *Id.* The presumptively dangerous distinction follows Judge Kaufman's approach set out in *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985). That approach maintains that the level of scrutiny should depend upon "the nature of the right being asserted by the prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right." *Id.*
96. *Id.* The reasonableness standard also applies when a regulation "merely restricts the time, place, or manner in which prisoners may exercise a right." *Id.*
97. *Id.*
98. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). The challenged regulation permitted an inmate to subscribe to or to receive a publication without prior approval. *Id.* at 404. The regulation authorized the warden to reject a publication if he determined that the publication was potentially detrimental to prison security. *Id.* at 405; *see also* 28 C.F.R. §§ 540.70-.71 (1988) (the challenged regulation).
outsiders is out of step with [Pell, Jones, and Bell]...". This statement could be read to eviscerate the free citizen distinction. However, the Court held that the Martinez free citizen distinction still applied to outgoing mail, and therefore, regulations restricting mail to a free citizen were still subject to strict scrutiny. Because the Court allowed this exception, the free citizen distinction may still have life.

While the Thornburgh Court restricted the free citizen distinction, it laid the foundation for the presumptively dangerous distinction. Justice Blackmun found that the Martinez standard should be applied in situations where "the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion..." These situations would involve circumstances that are not "typical of the problems of prison administration." Since the primary function of prison administration is security, the Court focused on whether the regulation involved danger or security concerns in determining the appropriate standard of review. Thus, the Thornburgh decision could be interpreted as a movement towards the presumptively dangerous distinction articulated by the O'Lone dissent, without explicit adoption of this distinction.

The most recent case, Harper v. Washington, dealt with a prisoner's right to due process before undergoing involuntary drug therapy. The majority held that the Turner standard applied and therefore, the regulation was upheld. Because neither the free citizen distinction nor the presumptively dangerous distinction were

100. Id. at 410. However, in his dissent, Justice Stevens determined that the free citizen distinction properly took account of the rights of nonprisoners. Id. at 424-27 (dissenting with Justices Brennan and Marshall).
101. For a discussion of the strict scrutiny standard of review and its application in cases involving free citizens, see supra notes 41-49 and accompanying text.
102. Thornburgh, 490 U.S. at 413.
103. Id. at 412.
104. Id.
106. The outcome of Thornburgh followed this interpretation. Justice Blackmun determined that the correspondence regulation was enacted because of "'reasonably founded' fears." Thornburgh, 490 U.S. at 419. In light of the danger involved in the regulation, the Court applied the Turner standard. Id. at 414.
108. Harper, 110 S. Ct. at 1033. Washington's institutional regulation provided that an inmate may be involuntarily treated only if he "(1) suffers from a 'mental disorder' and (2) is 'gravely disabled' or poses a 'likelihood of serious harm' to himself, others, or their property." Id.
109. Id. at 1059. The Court found that a psychotic inmate posed a security threat to himself and others. Id. In his dissent, Justice Stevens noted that alternatives were available, including segregation and alternative medications. Id. at 1051 (Stevens, J., dissenting). The dissent warned that, by not applying the least restrictive means to a
implicated by the facts, situations where application of the strict scrutiny standard of review should be appropriate are unclear.\textsuperscript{110}

Despite application of the reasonable standard in the foregoing cases, the strict scrutiny standard of review remains important, particularly since support for the free citizen and presumptively dangerous distinctions still exists. Moreover, the decision to apply either a reasonable or a strict scrutiny standard of review determines the success of an inmate's constitutional challenge.\textsuperscript{111} The reason, according to Justice Stevens (who wrote for the dissent in \textit{Turner}, \textit{Thornburgh}, and \textit{Harper}), was the weakness of the reasonable standard of review.\textsuperscript{112} His dissents criticized the majority for providing too much deference to prison officials' speculations.\textsuperscript{113} Since mere speculation satisfied the nexus between the regulation and the penological interest, Justice Stevens concluded that the \textit{Turner} standard of review was "toothless."\textsuperscript{114}

6. \textbf{Appellate Courts' Standards of Review}

\textit{a. "Free Citizen" Distinction}

Under the free citizen distinction, a court utilizes a strict scrutiny standard whenever the rights of free citizens are implicated.\textsuperscript{115} As discussed earlier, the \textit{Thornburgh} Court determined that a court should not "focus" on the rights of nonprisoners nor carve out a heightened standard of review.\textsuperscript{116} However, the Court retained the free citizen distinction applicable to outgoing mail, thus, keeping this distinction alive.\textsuperscript{117} Since the decision is recent, its impact on the circuits is yet to be determined.

Prior to the limitations of the \textit{Thornburgh} decision, the Eighth Circuit applied the \textit{Turner} standard of review, even where the rights of

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\textsuperscript{110} Since security risks were clearly implicated, the presumptively dangerous distinction was satisfied by application of the \textit{Turner} standard. The \textit{Harper} Court, however, did not explicitly recognize this distinction. \textit{Id.} at 1031.

\textsuperscript{111} All three post-\textit{Turner} decisions applied the reasonable standard and upheld the challenged prison regulations.


\textsuperscript{113} Turner, 482 U.S. at 100-01 ("[I]f the standard can be satisfied by nothing more than a 'logical connection' between the regulation and any legitimate penological concern perceived by a cautious warden ... it is virtually meaningless."); Thornburgh, 490 U.S. at 430 ("No evidence supports the Court's assumption that ... these publications will circulate within the prison and cause ... disruption.").

\textsuperscript{114} Thornburgh, 490 U.S. at 454 n.18.


\textsuperscript{116} Thornburgh, 490 U.S. at 412.

\textsuperscript{117} \textit{Id.} at 413.
free citizens were impaired. In *Benzel v. Grammer*, the court upheld a prison policy prohibiting telephone calls.

This conservative approach to the free citizen distinction is followed by most circuits. To illustrate, the Second Circuit has applied the reasonable standard even to outgoing mail, the Supreme Court's only undisputable exception to the application of the *Turner* standard.

*b. "Presumptively Dangerous" Distinction*

Since *Turner*, only one circuit has followed the presumptively dangerous distinction and found that application of the strict scrutiny standard is appropriate in situations where danger or security concerns are not implicated. In *Pitts v. Thornburgh*, female inmates challenged the correctional policies of their institutions, which placed female prisoners farther away from their homes than it placed male prisoners. The District of Columbia Circuit held that the strict scrutiny standard was appropriate where day-to-day security concerns were not implicated. The court upheld the practices of the institution even under the strict scrutiny standard of review, because the practices furthered important governmental interests, such as reducing overcrowding.

c. "Regulation" Distinction

Although never recognized by the Supreme Court, some circuits have recognized that application of the strict scrutiny standard might

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118. 869 F.2d 1105 (8th Cir. 1989). In *Benzel*, new telephone procedures were implemented in the prison handbook which resulted in several telephone restrictions for certain segregated prisoners. *Id.* at 1107.

119. *Id.* at 1109. The court found that rehabilitation and internal security concerns justified the telephone policy. *Id.*

120. *See* Rodriguez v. James, 823 F.2d 8, 12 (2d Cir. 1987). New York's penal regulation censored outgoing mail to businesses. *Id.* at 10. The regulation was devised after a number of inmates had ordered merchandise or services without having sufficient funds to make payment. The regulation required that any business mail requiring inmate funds receive prior approval by the prison superintendent. *Id.* The court held that the regulation promoted institutional security. *Id.* at 12.


122. *Id.*

123. *Id.* at 1451. District of Columbia women who were sentenced to more than one year served their time in West Virginia. Men who were sentenced to more than one year served in institutions near or in the District of Columbia. *Id.* The discrimination was a result of budgetary practices and not day-to-day security management. *Id.* at 1457.

124. *Id.* at 1456. The court relied upon *Turner* in finding that the reasonable standard applies to "the necessarily closed environment of the correctional institution." *Id.* at 1454.

125. *Id.* at 1463.
be appropriate in situations where the inmate challenges a prison official’s action and not an implemented regulation. The Supreme Court decisions applying the Turner standard of review had always dealt with prison regulations promulgated by a federal or state agency.

Like most other federal agencies, when the Bureau seeks to adopt a rule, it must comply with the APA. The APA requires an agency to provide for public notice and commentary on proposed rules. Only after this notice and comment period can a regulation be implemented and given the force and effect of law.

The cases recognizing this distinction are scarce. In Meriwether v. Coughlin, a class of forty prisoners were allegedly abused by jailers and transferred to other facilities in violation of their civil rights. The Second Circuit, although resting on other grounds, found that use of the strict scrutiny standard might “be appropriate due to the fact that this case involved an official response to a supposed immediate threat, while Turner . . . involved regulations.” In Jackson v. Cain, the Fifth Circuit also recognized this distinction, but held that the same standard is applicable whether the issue involves an action or a regulation.

The Fifth Circuit’s position is clearly the majority rule. Most circuits indiscriminately apply the Turner test to actions and regulations

126. See infra notes 131-35 and accompanying text.
129. Id. § 555(b).
130. Id.
131. 879 F.2d 1037 (2d Cir. 1989).
132. Id. at 1040. The lengthy allegations included retaliatory transfers and physical abuse by prison officials. Id.
133. Id. at 1043.
134. 864 F.2d 1235 (5th Cir. 1989).
135. Id. at 1248. The court provided no authority for this determination. Id. The inmate alleged that he was assigned to work in a rat-infested area, was permanently injured by handcuffs applied too tightly, and was refused medical treatment—all in retaliation for letters he sent to the warden. Id. at 1239.
alike. The courts fail to explain this application, and a colorable argument can be made in favor of applying the *Martinez* standard to a prison official's actions. While some appellate courts have recognized the distinction, none have applied the strict scrutiny standard of review based upon the regulation/action distinction. Accordingly, the regulation/action distinction has not been addressed by the Supreme Court.

III. GOODWIN V. TURNER

A. Facts and Procedure

Steven J. Goodwin is an inmate at the Medical Center for Federal Prisoners in Springfield, Missouri. On June 8, 1987, he requested that prison officials allow him to artificially inseminate his wife. Goodwin explained that potential risks to his wife and future child could result if conception was delayed until he was released. Be-

136. See, e.g., Burton v. Nault, 902 F.2d 4, 5 (6th Cir. 1990) (Actions of prison officials in reading inmate's mail after suicide attempt were analyzed under reasonable standard of review.); Robinson v. Palmer, 841 F.2d 1151, 1157 (D.C. Cir. 1988) (Prison official's actions in banning particular spouse from visiting inmate were analyzed under reasonable standard of review.); Lane v. Griffin, 834 F.2d 403, 407 (4th Cir. 1987) (Reasonable standard applied to policy decision to deny specific inmate request for Muslim services.). This author has failed to find a circuit decision giving detailed reasoning behind the application of the reasonable standard to prison official's actions.


138. Id. at 1397. Goodwin's request complied with the Bureau's informal procedure requirements. See 28 C.F.R. § 542.13 (1990) (Informal Administrative Procedure). This request read, "My wife and I are requesting authorization and medical assistance in conceiving a child while I am incarcerated by means of artificial Insemination [sic]. your cooperation would be greatful [sic] in this matter." Brief for Appellant, Joint Appendix at A.9, Goodwin II, 908 F.2d 1395 (8th Cir. 1990) (No. 89-1101WM). Case Manager Bill Wunderle's response read, "The Bureau of Prisons has no program or provisions for such a request." Id.

Goodwin's original request sought several medical doctors and one medical assistant to assist with the procedure and also sought provisions for freezing the sperm. *Goodwin II*, 908 F.2d at 1397. After seeking the advice of Doctor Shelley Kolton, an expert in fertility, Goodwin changed his request to (1) a place to masturbate; (2) a clean container; and (3) a means to swiftly transport the semen outside. See Brief for Appellant, Joint Appendix at A.62, Goodwin II, 908 F.2d 1395 (8th Cir. 1990) (No. 89-1101WM). The Bureau of Prisons' expert, Dr. Dante Landucci, found that "it is necessary that the recipient be present locally, that there be prompt delivery of the sperm, and that there be an appropriately experienced gynecologist available." Id. at A.42. However, it is likely that Doctor Landucci was not an expert in fertility, since he admittedly spoke to an expert in coming to his conclusion. See id.

139. *Goodwin II*, 908 F.2d at 1397. At the time of his request, Goodwin's wife was twenty-seven years old and Goodwin was eight years from his latest possible release date. Id. (potential for earlier release existed). The risks associated with pregnancies of older women are primarily Down's syndrome and other chromosomal abnormalities. Id.
cause the Bureau had never promulgated any rules regarding artificial insemination, \(^{140}\) Goodwin’s request was denied.\(^{141}\)

Goodwin appealed the decision to the regional and national administrators of the Bureau without success.\(^{142}\) Finally, on August 19, 1987, Goodwin filed a pro se writ of habeus corpus seeking the right to artificially inseminate his wife.\(^{143}\) On November 18, 1987, Federal Magistrate James C. English held that the rejection of Goodwin’s complaint on the grounds that the prison did not have a policy violated Goodwin’s right to due process.\(^{144}\) Magistrate English granted a partial order including a requirement that the federal prison administrators form an artificial insemination policy within 120 days.\(^{145}\)

Counsel for the Bureau took exception to Magistrate English’s or-

140. Id. See 28 C.F.R. §§ 500-72 (1990) (As of this time, the Bureau has still not promulgated a regulation regarding an inmate’s right to artificial insemination.).

141. Goodwin II, 908 F.2d at 1397.

142. Id. In his complaint, Goodwin requested: (1) permission to produce acceptable semen; (2) medical personnel to enter the prison to collect the semen; (3) proper testing to insure that he was free of the HIV virus; and (4) not to be transferred until his grievance was fully resolved. Goodwin was found to be HIV negative. Id. at 1397 n.4. Goodwin also offered to pay for all expenses. Further, Goodwin’s wife and child had never drawn governmental assistance in any form, including welfare, and claimed that any child fostered by Goodwin would not be a burden on society. Brief for Appellant, Joint Appendix at A.6, Goodwin II, 908 F.2d 1395 (8th Cir. 1990) (No. 89-1101 WM).

143. Goodwin II, 908 F.2d at 1395.

144. Brief for Appellant, Joint Appendix at A.6, Goodwin II, 908 F.2d 1395 (8th Cir. 1990) (No. 89-1101 WM). The order did not require officials to form a uniform policy or individually evaluate Goodwin’s request. Id. Consequently, the order either allowed the Bureau to create a rule through legislative means or to adjudicate Goodwin’s request.

145. See Goodwin I, 702 F. Supp. 1452, 1453 (W.D. Mo. 1988). The Bureau submitted a report to the district court which provided justifications for denying Goodwin’s request. The gravamen of the report was that similar requests would have to be granted to indigent male inmates and to all female inmates because of equal protection goals. Id. The result would be a burden on prison resources. Brief for Appellant, Joint Appendix at A.36-41, Goodwin II, 905 F.2d 1395 (8th Cir. 1990) (No. 89-1101 WM).

The Bureau’s report resulted in an agency action adopting a rule with a retroactive effect. That is, the Bureau sought to apply its newly adopted policy to Steven Goodwin’s request. The distinction between retroactive and prospective rulemaking is the touchstone of the distinction between adjudicative and legislative rulemaking. See Davis, Administrative Law of the Eighties § 7 (1989). As the Supreme Court indicated in NLRB v. Wyman-Gordon Company, agency adoption of a prospective rule through adjudication is prohibited and prospective rules must be adopted pursuant to the APA. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 769 (1952).

Since the Bureau adjudicated Goodwin’s request, a strong argument exists for subsequent requests by federal inmates seeking artificial insemination that the Bureau has not yet adopted a rule, since it has not complied with the APA. See B. Schwartz, Administrative Law 193 (1984).
INMATE'S REQUEST

order and the matter went before the United States district court. Judge Collinson, writing for the majority, recognized that procreation is a fundamental right guaranteed under the Constitution. However, the court found this right to be inconsistent with incarceration and therefore forfeited by prisoners. To justify the holding, the court relied on Southerland v. Thigpen and the conjugal rights cases.

In Southerland, the Fifth Circuit rejected a female inmate’s request to breastfeed her child. The Goodwin I court quoted the Southerland court: “The considerations that underlie our penal system justify the separation of prisoners from their spouses and children...” The court then stated that no court has found that a prisoner has a constitutional right to conjugal visits. The court found artificial insemination analogous to conjugal visits and outside the “reasonable contours” of an inmate’s protected rights.

Goodwin appealed the decision denying his petition for writ of habeas corpus to the Eighth Circuit Court of Appeals. The basis for his appeal was that the Bureau’s refusal to allow him to ejaculate into a clean container so that his semen could be used to artificially inseminate his wife violated his constitutional right to procreate.

B. Court’s Analysis

Judge Magill, writing for the majority, first recognized that the right to procreate is guaranteed under the Constitution and conflicts with a regulation prohibiting a prisoner from artificially inseminating his spouse. In choosing a standard of review, the majority rejected the free citizen distinction, utilizing the reasonable standard of review. The court found Goodwin’s wife’s constitutional rights

147. Id. at 1454.
148. Id.
149. 784 F.2d 713 (5th Cir. 1986) (The right to breastfeed a child is a privacy right under the Constitution but is inconsistent with incarceration.).
150. Goodwin I, 702 F. Supp. at 1455. The court did not cite any particular case but simply stated that no court has ever held that the right to conjugal visitation is a constitutionally protected right. Id.
151. Southerland, 784 F.2d at 719.
152. Goodwin I, 702 F. Supp. at 1455 (quoting Southerland, 784 F.2d at 716).
154. Id. at 1454.
155. Goodwin II, 908 F.2d 1395, 1396 (8th Cir. 1990).
156. Id.
157. Id. at 1398. Judge Magill was joined by Judge William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, who was sitting by designation. Id. Judge McMillian dissented. Id. at 1400.
158. Id. at 1398–99.
to be "irrelevant." 159

Under the Turner analysis, the majority found that the legitimate penological interest served was the equal treatment of female prisoners. 160 Specifically, female inmates' requests for impregnation through artificial insemination with resultant pregnancies and infant care would be too burdensome for the prison system. 161 The court explicitly acknowledged that the equal treatment of women prisoners was not based on constitutional grounds but on the Bureau's own policy to treat male and female prisoners equally. 162

Second, the court noted that there was no readily available alternative to the regulation. 163 The court found the absence of a ready alternative to be evidence of the reasonableness of the Bureau's policy. 164

Finally, the court held that accommodation of Goodwin's request would have a "ripple effect" on female inmates and, therefore, the court should bow to the "informed discretion" of the prison officials. 165 Goodwin filed for a rehearing en banc on July 30, 1990. 166 This request was denied on September 25, 1990. 167

IV. IMPLICATIONS OF THE GOODWIN DECISION

A. Denial of Artificial Insemination to Inmates

In Skinner v. Oklahoma, 168 Justice Douglas stressed the importance of not allowing the government to determine who should be allowed to procreate, especially inmates. "[P]rocreation [is] fundamental to

159. Id. at 1399. The majority rejected the notion that implication of free citizens' constitutional rights mandates a strict scrutiny standard. Id.
160. Id. at 1399 n.7 ("Other interests advanced by the Bureau are not legitimate penological interests because . . . they have nothing to do with prison administration." (emphasis in original)).
161. Id. at 1400.
162. Id. Assuming that Steven Goodwin's request was allowed, a female inmate could not bring an equal protection claim under the Constitution to receive a reciprocal right. In Jones v. North Carolina Prisoners' Labor Union, Inc., the Court held that inmates bringing equal protection claims under the Constitution must show that "the . . . groups are so similar that discretion has been abused." Jones v. North Carolina Labor Union, Inc., 433 U.S. 119, 136 (1977). A class of female inmates is completely distinct for the purposes of sexual reproduction. See Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 471-72 (1981) (Men and women are not similarly situated with respect to pregnancy under the Equal Protection Clause.); cf. Rostker v. Goldberg, 453 U.S. 57, 78 (1981) (Because of biological differences, women and men are not similarly situated with respect to combat and draft registration.).
163. Goodwin II, 908 F.2d at 1400.
164. Id.
165. Id.
166. Id. at 1395 (rehearing and rehearing en banc denied).
167. Id.
the very existence and survival of the race . . . [The power over pro-
creative rights] [i]n evil or reckless hands . . . can cause races or types
which are inimical to the dominant group to wither and disappear.”

Currently, the United States has the highest percentage of incar-
cerated persons in the world. A disproportionate number of
those incarcerated are minorities. A recent report concludes that,
because the recent “war on drugs” targets inner-city residents which
are highly represented by minorities, the current trend is a growth in
the minority population of prisons.

Justice Douglas’ statement may be prophetic. That is, restrictions
on procreative alternatives in the American penological system has a
disproportionately large impact on minority communities. Obvi-
ously, the ability to artificially inseminate will not cure the effects of
the current trends in the criminal justice system. It is, however, an
inexpensive method to achieve procreation without the security
problems associated with conjugal visitation.

Finally, the use of artificial insemination ensures that wives of in-
mates are not punished for their spouses’ crimes. These innocent
parties are denied one of the fundamental rights of humanity, the
right to bear children. Artificial insemination is a practical alterna-
tive that minimizes harm to the innocent.

B. Analysis

1. High Level of Deference to Prison Officials

The Goodwin II decision marked a high level of court deference to
prison officials’ decisions regarding prison regulations. The ma-

169. Id. at 541.
tencing Project, a nonprofit research organization that promotes sentencing reforms
and alternatives, concluded that 426 out of every 100,000 United States residents are
incarcerated. The annual cost to incarcerate these people is $16 billion. Id.
171. Id. The rate of incarceration for black American men is 3,109 out of every
100,000. Id.
172. Id. at 7A, col. 2. New sentencing guidelines and tougher penalties for drug
offenses have resulted in the growth of the minority prison population. Id.
173. See generally Note, Conjugal Visitation, supra note 9.
174. The circuits are not consistent as to what level of deference to apply. The
Seventh Circuit has required a “strong showing.” See DeMallory v. Cullen, 855 F.2d
442, 448 (7th Cir. 1988) (“Generalized security concerns, however, are insufficient to
support such a ban. Instead, prison officials must come forward with evidence that
the specific contact at issue threatens security . . . .”); Williams v. Lane, 851 F.2d 867,
878 (7th Cir. 1988) (Despite state prison administrators’ showing that offering differ-
rent religious services would increase security risks due to increased inmate move-
ment, administrators “offered no tenable ground for overruling the conclusion . . .

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that female inmates be allowed to be artificially inseminated if Steven Goodwin's request was granted.\textsuperscript{175} The court concluded that female inmates would seek permission to be artificially inseminated and this would burden the prison system with pregnant prisoners and infants.\textsuperscript{176} The dissent noted, however, that it was mere speculation that a female inmate would ultimately request artificial insemination and that, in any event, this situation would present a different case.\textsuperscript{177}

The real flaw in the majority's hypothetical situation is that it fails to distinguish between artificial insemination and \textit{in vitro} fertilization. Artificial insemination occurs by placing the male's sperm into a woman.\textsuperscript{178} \textit{In vitro} fertilization is the procedure in which an ova is removed from a woman and fertilized in a culture dish.\textsuperscript{179} The culture dish, instead of a womb, provides the reproductive environment for the egg and sperm. After fertilization, a doctor may place the embryo in the uterus of the genetic mother who supplies the egg for fertilization, or in the uterus of another woman.\textsuperscript{180} The procedure divides the definition of "mother" into two aspects: the genetic mother who supplies the egg for fertilization, and the carrying mother in whose womb the child develops.\textsuperscript{181} In the future, technol-
ogy may give a woman even more options to have children, without actually bearing them. 182

The equal treatment of prisoners would mandate the accessibility of in vitro fertilization to female inmates, not impregnation by artificial insemination. Equal treatment would allow a woman to give her egg, just as a man gives his semen. Allowing in vitro fertilization would not necessarily burden the prison system with pregnant inmates or infants. Unfortunately, the court failed to explore the technological differences between artificial insemination and in vitro fertilization. Consequently, the court's acceptance of conjecture and hypothetical threats resulted in the denial of Steven Goodwin's constitutional rights.

2. Creation of a New Penological Interest

The Goodwin II decision also weakened the existing Turner standard of review by applying the test in a manner no other circuit has utilized. The Goodwin II court identified a new penological interest, the equal treatment of female inmates. 183 No other circuit court using the Turner standard of review has applied this penological interest or created a new non-traditional penological interest. 184

The most important factor in the Turner standard is the rational connection between the regulation or action and a legitimate penological interest. 185 The Supreme Court has identified these traditional penological interests as institutional security, rehabilitation of prisoners, and deterrence of crime. 186 An overwhelming majority of the circuit courts that apply the Turner standard of review advance genetic mother, the carrying mother, the nurturing mother, the genetic father, and the nurturing father.); Williams, supra note 178, at 468. It is appropriate to call this procedure by its generic and popular term, "surrogate motherhood." "Surrogate motherhood," however, refers to a pregnancy created using several techniques, including fertilization through artificial insemination and in vitro fertilization. Id.; see also Smith, The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers, 5 W. New Eng. L. Rev. 639, 641, 649 (1983) (reviewing the potential legal problems involving surrogate mothers and artificial fathers).

182. See C. Austin, supra note 179, at 32-81 (exploring the future of procreation technology in such areas as hybrids, cloning, and genetic engineering).

183. Goodwin II, 908 F.2d at 1399-1400.

184. The author was unable to find a federal court of appeals case utilizing the Turner standard of review with a penological objective other than security, rehabilitation, deterrence, or costs.

185. See supra text accompanying notes 77-82.

the penological interest of security. Some circuits also utilize the
listed. For example, "punishment," "retribution," and "discipline" are within the
scope of rehabilitation. Similarly, "order" promotes institutional security.

Prior to Goodwin II, the Eighth Circuit was in accord with these objectives. See
Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989).

187. Most circuit court decisions utilizing or attempting to utilize the legitimate
penological goal of institutional security fall into five categories:

1) Denial of religious rights.
See, e.g., Blankenship v. Gunter, 898 F.2d 625 (8th Cir. 1990) (regulations
prohibiting inmates from using money from inmate trust fund for religious dona-
tions); Whitney v. Brown, 882 F.2d 1056 (6th Cir. 1989) (restrictions on Jewish wor-
ship services); McCorkle v. Johnson, 881 F.2d 993 (11th Cir. 1989) (restrictions on
Satanist's religious practices); Siddiqi v. Leak, 880 F.2d 904 (7th Cir. 1989) (restrict-
ions prohibiting Jewish inmates from participating in a minyan); Johnson-Bey v. Lane,
863 F.2d 1308 (7th Cir. 1988) (regulation restricting Moorish inmates from
practicing ceremonies); Mumin v. Phelps, 857 F.2d 1055 (5th Cir. 1987) (restricting
Hebrew literature); Higgins v. Burroughs, 834 F.2d 769 (3d Cir. 1987) (prohibiting
inmate from carrying rosary); Hadi v. Horn, 830 F.2d 779 (7th Cir. 1987) (regulation
prohibiting worship services without Muslim chaplain present); McCabe v. Arave,
827 F.2d 634 (9th Cir. 1987) (regulation restricting Aryan Nation member's wor-
ship); Allen v. Toombs, 827 F.2d 563 (9th Cir. 1987) (regulations restricting Native
Americans' religious ceremonies).

2) Restrictions on access to legal resources.
See, e.g., Smith v. Erickson, 884 F.2d 1108 (8th Cir. 1989) (restrictions on postage
and supplies for legal matters); Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988) (de-
nil of access to legal resources); Valentine v. Beyer, 850 F.2d 951 (3d Cir. 1988)
(regulations on legal assistance programs); Sturm v. Clark, 835 F.2d 1009 (3d Cir.
1987) (restrictions on attorney entering prison); Howland v. Kilquist, 833 F.2d 639
(7th Cir. 1987) (restrictions to legal resources); Abel v. Miller, 824 F.2d 1522 (7th
Cir. 1987) (restrictions on attorneys and paralegal entering prison).

3) Beard and hair length grievances.
See, e.g., Friedman v. Arizona, 912 F.2d 328 (9th Cir. 1990) (beard regulation),
cert. denied, 111 S. Ct. 996 (1991); Iron Eyes v. Henry, 907 F.2d 810 (8th Cir. 1990)
(Hair length regulation did not impinge on Native American's free exercise of religi-
one); Dunavant v. Moore, 907 F.2d 77 (8th Cir. 1990) (Beard regulation impinged
on Aryan Nation member's religious beliefs.); Benjamin v. Coughlin, 905 F.2d 571
(2d Cir.) (Haircut regulation impinged on Rastafarians' religious beliefs.), cert. denied,
111 S. Ct. 372 (1990); Swift v. Louis, 901 F.2d 730 (9th Cir. 1990) (grooming policy);
Soloman v. Zant, 888 F.2d 1579 (11th Cir. 1989) (shaving regulation for death-row
inmates); Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988) (Hair length regulation
impinged on Rastafarians' religious beliefs.).

4) Searches.
See, e.g., Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990) (pat-downs by female
guards on male inmates); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702 (9th
Cir. 1989) (body cavity searches); Dunn v. White, 880 F.2d 1188 (10th Cir. 1989)
(testing for AIDS); Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988) (strip
search); Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988) (digital rectal searches),

5) Mail, communication, or visitation grievances.
See, e.g., Mason v. Clark, 920 F.2d 493 (8th Cir. 1990) (prohibiting possession of
AM/FM radio); Sands v. Lewis, 886 F.2d 1166 (9th Cir. 1989) (prohibiting posses-
sion of typewriter with memory); Holloway v. Pigman, 884 F.2d 365 (8th Cir. 1989)
(denying certain incoming mail); Harper v. Wallingford, 877 F.2d 728 (8th Cir. 1989)
penological interest of cost efficiency,\textsuperscript{188} although this interest has been rejected by the Third Circuit.\textsuperscript{189}

The equal treatment concern advanced in \textit{Goodwin II} is tenuous. Nowhere in the Bureau's promulgated regulations is this interest identified.\textsuperscript{190} In fact, the federal courts of appeals, including the Eighth Circuit, have recognized that disparate treatment on the basis of sex is often a necessary part of prison management.\textsuperscript{191} Male prisoners simply pose a greater security threat.\textsuperscript{192}

The traditional penological goals of internal security, rehabilitation, deterrence of crime, and efficiency of prison spending are left to prison administrators because these administrators have expertise in these areas.\textsuperscript{193} To defer judgment in an area outside of this ex-
pertise, as in *Goodwin II*, could bring troubling consequences.

A recent *60 Minutes* newsreport illustrated this point. The report examined the medical staff at the Medical Center for Federal Prisoners at Springfield, Missouri, the facility where Steven Goodwin is incarcerated. The report detailed the incompetence of that facility's medical staff. This was the same medical staff that gave the Bureau the "informed discretion" upon which the court relied to disallow the artificial insemination procedure.

V. Proposal

The weakness of the *Turner* standard of review shows the need for the utilization of the strict scrutiny standard of review, especially where fundamental privacy rights, such as the right to procreate, are at issue. The free citizen, presumptively dangerous, and regulation/action distinctions could bring about this result. Strong policy arguments can be made for the application of each distinction.

A. "Free Citizen" Distinction

First, when the rights of free citizens are implicated, a strict scrutiny standard has been utilized. This distinction, while creating a heightened standard of review, did not result in the Court's large scale invalidation of prison regulations. Justice O'Connor's fear that the judiciary would eventually manage the prison system did not materialize.

Second, a free citizen's access to inmates is an important tool to keep a check on the practices of the prison system. Strict scrutiny of prison regulations would ensure sufficient public access to maintain public awareness of prison practices.

Finally, *Goodwin II* demonstrates that the Bureau's regulations and measures are inadequate. For example, the medical staff at the Medical Center for Federal Prisoners at Springfield, Missouri, failed to provide adequate medical care to inmates. This failure highlights the need for a strict scrutiny standard of review.

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*Id.* The 1971 *Tippett* decision is in accord with the 1991 report by The Sentencing Project which concluded that, despite the United States' high incarceration rate and expenditure, the prison system fails to make the United States a safer nation. Mpls. Star Tribune, *supra* note 170, at 7A, col. 1. Consequently, additional consideration should be given as to whether prison administrators should be afforded deference to the extent the Court has provided.

195. *Id.*
196. *Id.*
197. *Goodwin II*, 908 F.2d at 1400.
199. Under the free citizen distinction, the Court's only invalidation of a prison regulation occurred with respect to the mail regulation at issue in *Martinez*. *Id.* at 409.
200. *Pell v. Procunier*, 417 U.S. 817, 824-25 (1973) (Visitation policies may not control content of information visitor receives, and prison administrators cannot conceal conditions and practices of prison to outside world.).
actions reach beyond the prison walls to control fundamental rights of free citizens. Procreation regulations have a more substantial impact on the rights of free citizens than do the mail regulations the Court has examined. The Court, by reaffirming the viability of the free citizen distinction, could limit the reach of prison administrators to inmates.

This is not to say that prison administrators cannot promulgate rules that restrict the rights of free citizens, but the strict scrutiny standard requires the regulation to be the least intrusive means of accomplishing the regulatory goal. Prison administrators seeking to impinge on the rights of nonprisoners should be forced to examine every possible alternative before promulgating such a regulation.

B. "Presumptively Dangerous" Distinction

The presumptively dangerous distinction applies strict scrutiny where a regulation does not involve dangerous activities. If an inmate's grievance does not involve a dangerous activity, it is likely that the challenged action is outside the scope of a prison administrator's area of expertise. Unfortunately, no court has yet accepted this distinction. In Goodwin II, the court gave deference to prison officials' judgment in the area of artificial insemination, not a presumptively dangerous activity.201

The traditional penological goals are useful in determining what practices fall within this distinction. Clearly, security of the prison is strongly connected with the level of danger inherent in a regulation, and deference should be afforded to this penological interest.

Rehabilitation can also be related to the danger of a practice. If a criminal is released without reformation of her behavior, public safety is jeopardized. Again, deference should be afforded when this interest is implicated. Similarly, deterrence of other criminal acts by inmates or by third persons is also a strong public safety concern. Prison officials have expertise in this area and their decisions should be subject to a lower level of scrutiny.

The penological concern of cost efficiency may or may not be related to the dangerousness of the activity. If prison spending is related to one of the other penological goals, deference to prison officials should be allowed. If not, then the denial of a constitutional right because of monetary concerns should be carefully scrutinized.202

Therefore, the presumptively dangerous distinction could be effectively applied using the traditional penological concerns as guide-

201. Goodwin II, 908 F.2d at 1400.
202. Some circuits have already recognized this type of scrutiny where monetary considerations are involved. See, e.g., supra note 187 and accompanying text.
lines. The result would be to apply strict scrutiny where prison officials are acting outside the area of their expertise.

C. "Regulation/Action" Distinction

The regulation/action distinction would apply strict scrutiny where the challenged prison rule is not promulgated according to the APA. The APA's rulemaking provisions allow for public notice and comment, which informs the agency and helps create well-reasoned laws.  

If the rulemaking procedures are not followed, poorly reasoned rules can be given effect by local prison officials. The public may not be aware of these local prison practices because there is not a requirement that they be given notice in a federal or state register. A warden or jailer acting outside of the scope of these regulations is acting outside the regulations imposed by the governing body of the agency. Consequently, prison regulations not enacted according to state or federal rule making procedures should be subject to strict scrutiny.

VI. Conclusion

Goodwin II demonstrates the weakness of the Turner standard of review. By accepting a new penological interest, the equal treatment of female prisoners, the court further debilitated the standard into a rubber-stamping of prison officials' practices. The court, by not providing an appropriate level of judicial scrutiny of prison regulations, ignored medical advances in the use of artificial insemination and prevented a sizeable portion of the American population from procreating. Strict scrutiny can ensure that the results of Goodwin II are not duplicated. The use of the free citizen, presumptively dangerous, and regulation/action distinction would allow for appropriate application of the strict scrutiny standard in situations and would better protect the basic constitutional rights of both inmates and free citizens.

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203. B. Schwartz, Administrative Law 171 (1984). "The APA requirement of antecedent publicity was designed to assure fairness and mature consideration of rules. Its purpose is to allow the agency to benefit from the expertise and input of those who file comments . . . ." Id.

204. Id. ("The notice of any proposed rulemaking must be published in the . . . Register.").