Judicial Birth Control?: The Ninth Circuit's Examination of the Fundamental Right to Procreate in Gerber v. Hickman

Joseph J. Bozzuti
COMMENT

JUDICIAL BIRTH CONTROL?: THE NINTH CIRCUIT'S EXAMINATION OF THE FUNDAMENTAL RIGHT TO PROCREATE IN GERBER V. HICKMAN

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INTRODUCTION

Judicial inquiry into the rights of prison inmates has long been at the forefront of American jurisprudence. Although the Constitution unquestionably applies to incarcerated men and women, the status of prison inmates often demands that certain rights be curtailed or denied to them for the duration of their confinement. One example of this judicial inquiry is the Ninth Circuit's examination of the fundamental right to procreate in Gerber v. Hickman.

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2 See Herbert Ira Handman, The Rights of Convicts 1 (1975) ("[T]he field of prisoners' rights is ever-changing, ever-expanding."). See generally James F. Anderson & Laronistine Dyson, Legal Rights of Prisoners: Cases and Comments (2001) (compiling important prisoners' rights cases from the past three decades and discussing their relevance in interpreting the effects of constitutional amendments on prison inmates); John A. Fliter, Prisoners' Rights: The Supreme Court and Evolving Standards of Decency (2001) (recounting the progression of Supreme Court and other federal court decisions from the framing of the Constitution to the present Rehnquist Court); Chadwick L. Shook & Robert T. Sigler, Constitutional Issues in Correctional Administration (2000) (chronicling the history of prisoners' rights and categorically summarizing issues that may be raised in inmate litigation).


625
imprisonment. As a result, the penitentiary setting has been the backdrop of many fascinating judicial debates interpreting which rights prisoners should maintain while incarcerated. Recently, in *Gerber v. Hickman*, the Court of Appeals for the Ninth Circuit added to the ever-growing interpretations of prisoners' rights when it held that the right of procreation is fundamentally inconsistent with incarceration and, thus, endorsed the act of a warden who refused to accommodate a prisoner's request to provide sperm to artificially inseminate his wife. With the Supreme Court's subsequent denial of certiorari, the Ninth Circuit's determination stands as final, definitively ending one family's saga. The issues contemplated,
however, warrant further discussion because they are here to stay.⁹

In Gerber, the plaintiff, an inmate at Mule Creek State Prison in California, was forty-one years old.¹⁰ Despite his sentence of 100 years to life plus another eleven years, the plaintiff and his wife wished to have a child.¹¹ To realize this goal, the plaintiff requested the warden's permission to allow a laboratory to mail him the appropriate plastic container, which he could ejaculate into and return to the laboratory via a prepaid mailer.¹² In the alternative, the plaintiff asked that his attorney be allowed to personally deliver the container from the prison to the appropriate medical facility.¹³ In either scenario, the plaintiff prisoner and his wife agreed to pay any and all costs associated with the procedure.¹⁴ Nevertheless, the defendant warden refused to accommodate the plaintiff's request.¹⁵ The court summarized the warden's reasons for refusal as follows:

L.A. TIMES, Nov. 19, 2002, at A17 (noting that the decision “bitterly split” the Ninth Circuit yet was dismissed without comment by the Supreme Court).

⁹ Perhaps Judge Silverman of the Ninth Circuit put it best when he remarked that “[t]his is a seminal case in more ways than one.” Gerber v. Hickman, 264 F.3d 882, 893 (9th Cir. 2001) (Silverman, J., dissenting), vacated en banc, 273 F.3d 843 (9th Cir. 2001).

¹⁰ Gerber, 291 F.3d at 619; see also John Gibeaut, Court Finds No Constitutional Right to Artificial Insemination, 1 NO. 22 A.B.A. J. E-REP. 4, June 7, 2002 (noting that the state imprisoned Gerber as a “habitual felon under California’s ‘three strikes’ law, for negligently discharging a firearm, making terrorist threats and being an ex-felon in possession of a handgun”). Gerber has since switched prisons and currently resides at Ironwood State Prison in Riverside County, California. See Harriet Chiang, Court Won’t Let Inmate Ship Sperm to Wife, S.F. CHRON., Nov. 19, 2002, at A3.

¹¹ Gerber, 291 F.3d at 619. Evelyn Gerber, the plaintiff’s wife, was forty-four years old. See id. The outcome of this case undoubtedly had much bearing on Mrs. Gerber. Thus, in the second dissent, Judge Kozinski noted that because the burden of the prison regulation at issue fell not only on those inside prison walls but also on a member of society-at-large, the instant case called for enhanced scrutiny. Id. at 631 (Kozinski, J., dissenting).

Acknowledgement of Evelyn Gerber’s interest in this case was further evinced by the filing of an amicus curiae brief by the Pechanga Band of Lucieno Mission Indians of Riverside County. Mrs. Gerber is a member of the tribe. See Chiang, supra note 10.

¹² Gerber, 291 F.3d at 619.

¹³ Id.

¹⁴ See id. (stating that the Gerbers would pay for the costs linked to the transporting of the container and also compensate the California Department of Corrections for any costs it incurred).

¹⁵ Id.
The Warden cites three governmental interests that he claims are furthered by the policy of denying inmates the right to provide semen to their spouses for artificial insemination: the policy of treating men and women prisoners the same, when possible; safety risks caused by prisoners collecting semen; and concerns about the cost of litigation relating to the procedure.\textsuperscript{16}

In response, the plaintiff brought suit in federal district court in California, alleging a violation of his constitutional right to procreate.\textsuperscript{17}

The plaintiff's specific justifications for his claimed entitlement to procreative rights rested largely on the Supreme Court's decision in \textit{Skinner v. Oklahoma}.\textsuperscript{18} In \textit{Skinner}, a man twice convicted of armed robbery and once of stealing chickens was sentenced to surgical sterilization under a state recidivism statute grounded in eugenics.\textsuperscript{19} The Court held the statute unconstitutional as violative of equal protection because it arbitrarily limited a severe punishment to those convicted of crimes of "moral turpitude" and excluded other equally serious crimes.\textsuperscript{20} In support of his argument that he had a constitutional right to artificially inseminate his wife, the plaintiff in \textit{Gerber} relied on the \textit{Skinner} Court's declaration that procreation is a fundamental right in conjunction with subsequent cases upholding prisoners' rights to marry.\textsuperscript{21} The district court granted the defendant's motion to dismiss.\textsuperscript{22}

On appeal, the plaintiff contended that the district court wrongly concluded that the right to procreate does not survive incarceration.\textsuperscript{23} The Ninth Circuit reversed and vacated the district court's judgment, holding that the right to procreate survives imprisonment and is limited only by the demands of

\textsuperscript{16} Gerber v. Hickman, 264 F.3d 882, 890 (9th Cir. 2001), vacated en banc, 273 F.3d 843 (9th Cir. 2001).
\textsuperscript{17} In the district court, the plaintiff asserted, among other things, that the defendant's refusal impeded his constitutional and statutory right to procreate, violated his equal protection rights, and conflicted with two Californian Penal Code provisions. See Gerber v. Hickman, 103 F. Supp. 2d 1214, 1215 (E.D. Cal. 2000), rev'd, 264 F.3d 882 (9th Cir. 2001), vacated en banc, 273 F.3d 843 (9th Cir. 2001), aff'd en banc, 291 F.3d 617 (9th Cir. 2002).
\textsuperscript{18} 316 U.S. 535 (1942).
\textsuperscript{19} \textit{Id.} at 537.
\textsuperscript{20} \textit{See id.} at 541.
\textsuperscript{21} \textit{Gerber}, 291 F.3d at 622.
\textsuperscript{22} \textit{Gerber}, 103 F. Supp. 2d at 1219.
\textsuperscript{23} Gerber v. Hickman, 264 F.3d 882, 886 (9th Cir. 2001) (observing that Gerber asserted that the district court's decision violated 42 U.S.C. § 1983).
"legitimate penological interests."24 Approximately three months later, however, the Ninth Circuit granted the state's application for a rehearing and vacated its earlier judgment for the plaintiff, ordering a rehearing en banc.25 Upon this rehearing, an eleven-judge panel affirmed the district court's dismissal.26 The plaintiff subsequently petitioned the Supreme Court for a writ of certiorari,27 which the Court has since denied.28

In a six to five decision, the Ninth Circuit relied heavily on previous Supreme Court opinions.29 The majority noted that the inquiry into whether the plaintiff was impermissibly deprived of a constitutional right was two fold.30 The court must first examine whether incarceration is fundamentally inconsistent with procreation. If it is, the plaintiff's argument would be without merit.31 If not, the court must then inquire whether the applicable prison regulation that abridged the prisoner's right is "reasonably related to legitimate penological interests."32 This question determines its constitutionality.33

Relying largely on its reading of the Supreme Court's decisions in Skinner and Turner, as well as its "understanding of the nature and goals of a prison system," the Ninth Circuit determined that the right to procreate is fundamentally inconsistent with imprisonment.34 The majority, therefore, did

24 See id. at 892 (concluding that the district court erred in determining that procreation is inconsistent with incarceration and remanding for further development of a record which could enable the court to ascertain whether "legitimate penological interests exist that would justify a total ban on Gerber's exercise of his procreative rights"). See generally Recent Case, 115 HARV. L. REV. 1541 (2002) (probing the Ninth Circuit's since-vacated decision in Gerber, 264 F.3d 882).

25 See Gerber v. Hickman, 273 F.3d 843, 843-44 (9th Cir. 2001) (ordering a rehearing before an en banc court pursuant to Circuit Rule 35-3).

26 Gerber v. Hickman, 291 F.3d at 623 (finding that the only right Gerber may have is the right to marry).


28 Id.

29 See Gerber, 291 F.3d at 620-23. The court cited other circuits throughout the majority opinion, but its analysis focused primarily on decisions of the Supreme Court. See id.

30 Id. at 620 (adopting the constitutionality test set forth by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987)).

31 Id. (declaring that "[p]risoners cannot claim the protection of those rights fundamentally inconsistent with their status as prisoners").

32 Id. (citing Turner, 482 U.S. at 96-99).

33 Id.

34 Id. at 622-23.
not consider the second prong of its constitutional inquiry.\textsuperscript{35} In \textit{Skinner}, the Supreme Court invalidated a statute imposing sterilization on certain habitual criminals on equal protection grounds, reasoning that "procreation [is] fundamental to the very existence and survival of the race."\textsuperscript{36} In \textit{Turner}, the Court's standard of review required that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."\textsuperscript{37} Having drawn analytical analogies from the above cases and others involving a variety of rights denied to prison inmates because of their status as prisoners, the Ninth Circuit reasoned that requiring the State of California to grant the plaintiff's request as a matter of constitutional right would be an extraordinary and unprecedented reading of the Constitution.\textsuperscript{38} Thus, it concluded that the right to procreate through marriage remained a basic human right only outside of prison.\textsuperscript{39}

Furthermore, the majority stated that notions of equal protection are not offended when some inmates, namely those eligible for parole, are permitted conjugal visits. The plaintiff, however, was not eligible for parole.\textsuperscript{40} Additionally, the majority observed that technological advances, particularly procedures

\textsuperscript{35} See \textit{id.} at 623.
\textsuperscript{36} \textit{Skinner} v. \textit{Oklahoma}, 316 U.S. 535, 541 (1942). The Court explained: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." \textit{id.} (citing \textit{Yick Wo} v. \textit{Hopkins}, 118 U.S. 356, 369 (1886)).
\textsuperscript{37} \textit{Turner}, 482 U.S. at 89. The \textit{Turner} Court was faced with a regulation barring inmate-to-inmate correspondence, as well as one prohibiting marriage absent permission, which was only to be given upon a showing of compelling reasons. \textit{id.} at 81–82. The mail provision was upheld based on security reasons. \textit{id.} at 91–93. The marriage provision was struck down as unrelated to any legitimate interests. The marriage provision, the Court noted, was enacted in response to largely illusory security concerns. \textit{id.} at 97–98.
\textsuperscript{38} See \textit{Gerber}, 291 F.3d at 622. The majority looked largely at cases dealing with marriage and the effect of incarceration on different aspects of the marital relationship. \textit{See id.} at 621.
\textsuperscript{39} \textit{See id.} (observing that "[i]ncarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy").
\textsuperscript{40} See \textit{id.} at 621–22 (citing other circuit courts and noting that "[t]he fact that California prison officials may choose to permit some inmates the privilege of conjugal visits is simply irrelevant to whether there is a constitutional right to conjugal visits or a right to procreate while in prison").
simplifying how artificial insemination can be performed, would not change its decision-making process.\(^{41}\)

In the first of two dissenting opinions, Judge Tashima criticized the majority on several levels. First and foremost, he stated that the majority's conclusion that procreation is fundamentally inconsistent with incarceration had no evidentiary support in the record.\(^{42}\) Judge Tashima asserted that the majority improperly construed Supreme Court precedent that was readily distinguishable, relying largely on vague statements in a self-serving manner.\(^{43}\) Likewise, he pointed out that the majority placed much emphasis on the "nature and goals of a prison system" yet never identified how allowing the plaintiff to donate his sperm would conflict with preserving such an environment and its objectives.\(^{44}\) Furthermore, Judge Tashima emphasized that the majority failed to acknowledge that allowing conjugal visits to some inmates is at variance with holding that procreation is fundamentally inconsistent with incarceration. Surely conjugal visits can lead to the fertilization of an egg.\(^{45}\)

\(^{41}\) See id. at 622 (commenting that the court's decision was not dependent on scientific technology but rather on various utilitarian principles of punishment).

\(^{42}\) See id. at 624 (Tashima, J., dissenting) (finding fault with the majority and stating that they have "cited no facts to support such a conclusion and common sense does not lead to such a result.")

\(^{43}\) Judge Tashima first stated that the majority "twist[ed] logic" by wrongly construing a statement from Turner. Id. at 625 (Tashima, J., dissenting). Thus, the Turner Court stated that inmate marriages are often formed in the expectation that man and wife will one day fully consummate the marriage—if anything, Judge Tashima argued, this statement weighs in favor of the plaintiff. See id.

Similarly, Judge Tashima took issue with the majority's reliance on Hudson v. Palmer, 468 U.S. 517 (1984), where the Court based its decision to abridge prisoner privacy rights by denying application of the Fourth Amendment's prohibition of unreasonable search and seizures within prison cells, purely due to safety concerns. See Gerber, 291 F.3d at 625. Judge Tashima stressed that the majority did not "explain why the right to procreate should be treated in the same manner as the right to Fourth Amendment privacy." Id.

Furthermore, Judge Tashima pointed out that the majority's reliance on Pell v. Procunier, 417 U.S. 817 (1974), was unfounded because the issue in Pell, face-to-face media contact, was readily distinguishable. See id. at 625–26. Unlike Pell, the instant case did not raise security or administrative concerns. Id.

\(^{44}\) See Gerber, 291 F.3d at 626 ("The majority identifies correctional goals . . . yet does not explain how the right [of procreation] is inconsistent with any of these goals. If, in fact, the purpose behind prohibiting procreation is to punish offenders, this is a determination that should be made by the legislature, not the Warden.").

\(^{45}\) See id. at 627 ("If [hundreds or thousands of] other prisoners are permitted to procreate, how can procreation, per se, be fundamentally inconsistent with
Judge Kozinski, in Gerber's second dissent, took a more straightforward approach in reaching his conclusion: He dissected the plaintiff's proposal.\textsuperscript{46} Noting that each individual step in the plaintiff's proposed scheme was not inconsistent with incarceration, Judge Kozinski reasoned that the sum of these parts, could not be fundamentally inconsistent with incarceration.\textsuperscript{47} Moreover, he stated that the California legislature did not intend such consequences when subjecting criminals to its definition of "imprisonment."\textsuperscript{48} Therefore, he asserted that the majority, in determining that disallowing the plaintiff the right to procreate would serve penological goals, simply rubber-stamped the state administrative agency.\textsuperscript{49} Accordingly, the majority wrongly endorsed the "personal opinion of prison bureaucrats" at the expense of the prisoner plaintiff and his wife.\textsuperscript{50}

On its face, Gerber stands only for the notion that the plaintiff and his wife cannot legally realize their dream of conceiving a child. Thus, the forty-four year-old plaintiff and his

\textsuperscript{46} See id. at 629 (Kozinski, J., dissenting) (commenting that all the plaintiff wished to do was "(1) Ejaculate (2) into a plastic cup, which is then to be (3) mailed or given to his lawyer (4) for delivery to a laboratory (5) that will try to use its contents to artificially inseminate Mrs. Gerber").

\textsuperscript{47} Judge Kozinski sarcastically noted:
I gather that [masturbation] is not fundamentally inconsistent with incarceration .... Similarly, the prison has no penological interest in what prisoners do with their seed once it's spilt .... That a package contains semen, rather than a book or an ashtray ... would seem to make no rational difference from the prison's point of view. Once the package is outside prison walls, the prison's legitimate interest in it is greatly diminished.... Whether [the semen] is used to inseminate Mrs. Gerber, to clone Gerber or as a paperweight has no conceivable effect on the safe and efficient operation of the California prison system.

\textsuperscript{48} Id. at 631. The California Department of Corrections (CDC) is the agency charged with administering the applicable state law invoked by the instant case. Id. Insofar as the CDC interpreted the term "imprisonment," Judge Kozinski noted that it did so in a manner which permitted conjugal visits for some California inmates. See id. Thus, Kozinski asserts that because courts owe deference to state agency interpretations, the majority should not have adopted a contrary interpretation, i.e. held that procreation is inconsistent with incarceration. See id.

\textsuperscript{49} See id. (declaring that "we have no explicit, or even implicit, decision by the state legislature that imprisonment means loss of the right to procreate"). Judge Kozinski added that "[this decision] is nothing more than the ad hoc decision of prison authorities that Gerber may not procreate." Id.

\textsuperscript{50} See id. at 632 (claiming that the prison officials acted by their own social prerogative in keeping the plaintiff from having a child).
wife, three years his elder, both remain condemned—\textsuperscript{51}—he to live out the duration of his life in prison, and she to live out the remainder of her childbearing years unable to give birth to her husband's child. The instant case, however, has implications far beyond William and Evelyn Gerber. In attempting to analyze the relationships among prison officials, administrative agencies, state legislatures, and the judiciary, the Ninth Circuit held that procreation is fundamentally inconsistent with incarceration.\textsuperscript{52} This drastic decree undoubtedly reaches beyond the instant litigants and may play a role in the way the courts handle the emergence of remarkable advances in reproductive technology.\textsuperscript{53}

This Comment sets forth that the Gerber court ignored its obligatory deference to the California legislature's judgment by judicially aggravating California's notion of "imprisonment." Moreover, the court, though facially endorsing the warden's decision, frustrated the function of the California Department of Corrections (CDC), the state agency charged with administering the law, when it wholeheartedly declared that "imprisonment" within the State of California necessarily precludes the right to procreate. This Comment also argues that the Ninth Circuit's holding was dangerously broad and rooted in vague principles rather than concrete facts and furthermore takes issue with the Ninth Circuit's manipulation of Supreme Court precedent as a means to a socially desirable end. Finally, this Comment thus affirms the proposition that the majority illogically construed from this precedent a loose patchwork of varied legal reasoning with questionable applicability to the instant case, all at the

\textsuperscript{51} See Frank J. Murray, Two Appeals to Supreme Court Assert Right to Procreate, WASH. TIMES, Oct. 1, 2002 (stating the plaintiff's and his wife's current age), available at 2002 WL 2918952.

\textsuperscript{52} Gerber, 291 F.3d at 623.

\textsuperscript{53} The emergence of reproductive technology and any potential effect it may have on judges' ideas about prisoners' rights to procreation is beyond the scope of this Comment. It is intriguing to think that in the not-too-distant future male prisoners may be able to simply clip hairs off of their heads and mail them to their wives, providing them with adequate genetic material from which a child can be brought into this world. One can only wonder, among other things, whether the courts would still emphatically uphold prisoners' access to the mail when and if that time comes. Would denial of rights in such a situation serve any compelling governmental interest? See Sarah L. Dunn, Note, The "Art" of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate, 70 FORDHAM L. REV. 2561 (2002) (providing an interesting look at some current issues in this context).
expense of the plaintiff, his wife, and their yet-to-be-conceived child.\textsuperscript{54}

I. PRISON ADMINISTRATION AND THE COURTS

The penal institutions of America, at both the state and federal levels, are complex establishments.\textsuperscript{55} They are multifaceted entities, the running of which involves, among other things, great financial expenditure, management of the day-to-day affairs of convicted criminals, and an abundance of problems and issues.\textsuperscript{56} Accordingly, policy dictates that the judiciary should not interfere with prison administration and discipline absent extreme circumstances.\textsuperscript{57} Nonetheless, situations arise where the courts are asked to intervene in some aspects of the penal system, whether through statutory interpretation or otherwise.\textsuperscript{58} When doing so, it is imperative

\textsuperscript{54} The author recognizes that the plaintiff is a professional criminal, thrice convicted of serious crimes. The plaintiff's character, however, should not and cannot interfere with his and his wife's civil rights. It is this author's contention that such interference would be a tragedy.


\textsuperscript{56} In California, for example, the CDC disperses its $5.2 billion budget to over ninety penal institutions, manages a prison population of over 148,000 inmates, and controls a parole population totaling 117,135. See generally CDC FACTS, supra note 55.

\textsuperscript{57} See Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955) (exploring an inmate's right to bring a civil action from prison and affirming the district court's denial of a prisoner's request to do so); see also Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed . . . ."). Bell held, among other things, that housing two inmates in a cell intended to house one and prohibiting the receipt of certain personal items by an inmate did not violate due process. See id. at 541, 544-45.

\textsuperscript{58} See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976). In Estelle, the Court was called upon to determine what constituted an adequate level of medical care for a prison to provide an inmate in need of critical care. See id. at 103-04. The Court held "that deliberate indifference to serious medical needs of prisoners [violates] the Eighth Amendment" but concluded that the prisoner was never subjected to such neglect. Id. at 104, 107.
that courts respect the bounds of their authority. Therefore, the judiciary has traditionally been disinclined to inject its views on prison administration to resolve disputes unless absolutely necessary.

**A. The Gerber Court Overstepped its Bounds**

In California, the state legislature decreed that the director of the CDC has control over state penal institutions and inmates. Implicit in such a declaration is the notion that the state agency is better equipped to deal with the penal system than the legislature as a whole. Upon this grant of authority from the legislature, the CDC promulgated rules governing family visitation of inmates, which permit, with some exceptions and conditions, prisoners to share overnight visits with their spouses, termed "conjugal visits."

The plaintiff in the instant case recognized that any attempt at a conjugal visit would be fraught with difficulty.

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59 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) (reiterating that "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts").

60 See Turner v. Safley, 482 U.S. 78, 85 (1987) ("Prison administration is \... a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint.").

61 "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director." CAL. PENAL CODE § 5054 (Deering 1992).

62 See CAL. CODE REGS. tit. 15, § 3177 (2002) (specifying California prisoners' rights with respect to visitation of family members and setting forth several institutional guidelines to regulate the visitation process).

63 Of notable importance to the instant case is the regulation exempting, among others, life-term prisoners without the possibility of parole and life-term prisoners who have not yet been provided with a parole date. See id. at § 3177(B)(2). The plaintiff, Gerber, had not yet been given a parole date and acknowledged that the setting of such a date was unlikely. See Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002).

64 See, e.g., CAL. CODE REGS. tit. 15, § 3177 (stating that, at certain CDC institutions, visitors must provide food for themselves and the inmate being visited).

65 See, e.g., id. § 3177 (noting that "[e]ach institution shall provide all necessary accommodations, except for food, at no cost to the inmates and their visitors" and shall permit extended and overnight visitation between eligible inmates and members of the inmate's immediate family).

66 The plaintiff was well aware that it was unlikely that a parole date would be set for him, which would make state conjugal visit rules applicable to him and his wife. See Gerber, 291 F.3d at 619.
Nevertheless, he made the request at issue, which did not require a prison officials' assistance. The warden initially denied his request, and much to his discomfort, the Ninth Circuit's decision on rehearing dealt his request a fatal blow. Common sense, however, illuminates the critical flaws with the majority's decision. On its face, Gerber's holding sanctioned the warden's assessment of the situation, perhaps solidifying his discretion in such scenarios. Nevertheless, a deeper look reveals that the Ninth Circuit undermined the authority of the CDC.

The CDC's definition of imprisonment necessarily included the right to procreate, at least for some inmates; after all, it flies in the face of common sense to contend that conjugal visits cannot give rise to procreation. The majority, however, ignored requisite deference to the CDC as the administrative agency charged with administering the prisons. It is well understood in our system of government that when a legislative body entrusts the executive branch with composing a statutory scheme, the judiciary must, as a general rule, be cognizant of such entrustment and must bestow upon the executive branch significant deference in its determination. Unfortunately for

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67 In reasoning that the plaintiff could not artificially inseminate his wife, the court's holding used expansive language; it declared procreation and incarceration fundamentally inconsistent. See id. at 623.

68 See id.

69 See, e.g., CAL. CODE REGS. tit. 15, § 3177 (allowing overnight visitation between eligible inmates and members of the inmate's immediate family).

70 The majority discussed conjugal visits only in the context of denying the plaintiff's constitutional claims. It noted that such visits are not guaranteed by the text of the Constitution. See Gerber, 291 F.3d at 621-22. The majority, however, did not examine the relevance of conjugal visits when deciding the state law questions. See id. at 623. The majority chose not to contemplate how holding that procreation and incarceration are fundamentally inconsistent contradicts the state policy that allows some of its inmates the privilege of conjugal visits.

71 See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (noting that administrative deference has long been recognized and stating that legislative entrustment to an administrative agency necessarily requires a level of agency autonomy). The Chevron case is a landmark case in the realm of federal agency/judiciary relations. See generally Thomas W. Merrill & Kristin E. Hickman, Chevron's Domain, 89 GEO. L.J. 833, 834 (2001) (examining different applications of the case's doctrine and reiterating that the standard of deference is two-prong: The court must "ask[] whether the statute has a gap or ambiguity, and if the answer is yes, ask[] . . . whether the agency's interpretation is reasonable"); Theodore L. Garrett, Judicial Review After Chevron: The Courts Reassert Their Role, ALI-ABA COURSE OF STUDY MATERIALS, Feb. 11, 1998, SC56 ALI-ABA 615 (detailing the origin of administrative deference through Chevron and discussing some of the decision's ramifications).
the plaintiff, the Ninth Circuit seemingly took the path of convenience, holding against the plaintiff without so much as a legislative or administrative decision on point declaring that imprisonment necessarily involves loss of procreative rights.

B. Gerber’s Pitfall: Flagrantly Vague

Closer examination of the totality of issues in Gerber raises a concern regarding the principle of judicial restraint. Judicial restraint is defined as “the principle that, when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues.” A necessary corollary of this doctrine is that courts should not decide cases in a gratuitously broad manner or by using expansive terms. In

72 By convenience, this author has in mind judicial reluctance to hold differently because of the danger inherent in its application to women, as well as the potential uncertainty surrounding its application to men. Thorough examination of this theory is beyond the scope of this Comment, but a brief glimpse is nonetheless worthwhile.

Clearly the plaintiff in the instant case could have donated his sperm without causing much disturbance. The female donation of an egg, however, involves considerable medical treatment, as does pregnancy itself. Though occasions have called for recognizing the inherent differences between the sexes, and thus permitting different treatment of the sexes, if and how such recognition would be made in this case remains unknown. Could the court authorize male procreation via artificial insemination and not make a similar authorization to women prisoners? See Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981). In discussing a statutory rape provision that could hold only males criminally liable, the Court noted:

Underlying [cases demanding more scrutiny for gender classifications] is the principle that a legislature may not “make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.” But because the Equal Protection Clause does not “demand that a statute necessarily apply equally to all persons” or require “‘things which are different in fact . . . to be treated in law as though they were the same,’” this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. As the Court has stated, a legislature may “provide for the special problems of women.” See id. at 469 (citations omitted). Accordingly, countless questions remain as to what the consequences would have been for inmates of both sexes had the Gerber court ruled in favor of the plaintiff.

73 See Gerber, 291 F.3d at 631 (Kozinski, J., dissenting) (pronouncing that the court has “no explicit, or even implicit, decision by the state legislature that imprisonment means loss of the right to procreate; there is no statute or regulation on point”).

74 BLACK’S LAW DICTIONARY (7th ed. 1999).

deciding the instant case, however, the Gerber majority stated that procreation is fundamentally inconsistent with incarceration.\textsuperscript{76} It held that procreation in general, not procreation under the circumstances of the instant case, cannot be reconciled with imprisonment.\textsuperscript{77} This broad proclamation was based on nothing more than vague generalities about the goals of the prison system\textsuperscript{78} that could have been discussed suitably in the second prong of the majority's inquiry, which was not formally reached.\textsuperscript{79} Nonetheless, even assuming the appropriateness of such a wide-ranging decree, the instant case did not have a record sufficient to support it.\textsuperscript{80} This vague
analysis, in combination with the court's subtle contradiction of the CDC's policy, leads to the notion that the Gerber majority failed to exercise judicial restraint.

The majority's holding that procreation is fundamentally inconsistent with incarceration significantly impacts America's sizable prison population. The decision takes away inmates' procreative rights, considered fundamental to free people. They may now exercise these rights only upon discretionary grants of permission for conjugal visits. The majority's vague rationale makes this ruling disturbing. When dealing with rights deemed fundamental, courts apply strict scrutiny. The states must assert a compelling governmental objective in order to abridge such rights. In Gerber, the majority determined that

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profund notion that incarceration and procreation are fundamentally inconsistent. See id. This is especially true with regard to the unique circumstances raised by the plaintiff's request to mail his sperm overnight; no security concerns of note arise.

81 By the end of 2001, America's state and federal penal institutions incarcerated nearly 1.5 million adult prisoners. See Paige M. Harrison & Allen J. Beck, Prisoners in 2001, BUREAU JUST. STAT. BULL., July 2002, at 1 (undertaking a detailed statistical examination of the state of affairs in our nation's prison system), available at http://www.ojp.usdoj.gov/bjs/pub/pdY pOl.pdf. Despite the fact that the national prison population increased at the lowest rate since 1972, one out of every 112 men in America remains incarcerated. See id. These startling numbers explain why twenty-two state prison systems, as well as the federal system, are operating at or above capacity. See id. at 9.

82 See M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971))); Carey v. Population Serv., Int'l, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of [a] cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy . . . ."); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

83 See Gerber, 291 F.3d at 623–24 (noting that California inmates who are eligible for parole or will otherwise one day be released from prison remain eligible for conjugal visits); McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975) ("Visitation privileges are a matter subject to the discretion of prison officials.").

84 See Reno v. Flores, 507 U.S. 292, 302 (1993) ("[Substantive due process] forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); 2 ROTUNDA & NOWAK, supra note 75, § 15.4, at 609 (3d ed. 1999) ("In fundamental rights cases, the Court has often stated that the
a compelling objective existed based entirely on general declarations about prisoners’ rights; this ultimately endorsed the warden’s prerogative at the expense of the plaintiff’s fundamental right.85

One telling example of the majority’s vagueness is its use of the phrase “the nature and goals of a prison system.”86 Though the majority opinion contains many examples of past rulings regarding prisoners’ rights and policy concerns,87 both a definition of the “nature and goals” of the penal system and an explanation of how accommodating the plaintiff’s request would conflict with the “nature and goals” are conspicuously absent from the opinion.88 The majority, however, integrally relied upon this phrase and noted the impossibility of reconciling applicable precedent and the “nature and goals” of the prison system with the Constitution.89 Furthermore, the majority relied upon the Supreme Court’s decision in Hudson v. Palmer,90 which stated that “‘restrictions [on prisoners] serve . . . as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction.’”91 There was, however, no mention of how denying the plaintiff the right to mail his sperm

classification must be necessary or narrowly tailored to promote a compelling or overriding governmental interest.”); see also Ann MacLean Massie, Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act, 18 HASTINGS CONST. L.Q. 487, 500-01 (1991) (discussing procreative liberty).

85 This criticism was raised by Judge Kozinski in Gerber’s second dissent. See Gerber, 291 F.3d at 631 (Kozinski, J., dissenting). Judge Kozinski asserted that the Supreme Court has held procreation to be a fundamental right in Griswold v. Connecticut, 381 U.S. 479 (1965), and that the burden of abrogating such rights must be compelling. See id. at 631 (Kozinski, J., dissenting). This author tends to agree with Judge Kozinski’s declaration: the personal views of prison officials do not rise to the level of a compelling interest. See id. at 632 (Kozinski, J., dissenting).

86 See id. at 622.

87 Among the multitude of cases cited were some dealing with family visitation, conjugal visits, marriage restrictions, and access to the mail. These cases led the majority to discuss policy matters including prison safety and general marital relations in the prison context. See generally id. at 620–23.

88 If included, this information could have perhaps been quite persuasive support. Nonetheless, the majority chose to present a fragmentary argument.

89 See Gerber, 291 F.3d at 622. The court discussed three cases it felt dictated the outcome of the instant case. As the court summarized, “It is difficult, if not impossible, to reconcile the holdings of cases like Turner, Hudson, and Pell and an understanding of the nature and goals of a prison system, with a . . . reading of the constitution” that would allow the plaintiff’s request. Id.


91 See Gerber, 291 F.3d at 621 (quoting Hudson, 468 U.S. at 524).
to his wife would serve deterrence goals.\(^{92}\) Moreover, logic does not dictate that a life inmate's inability to mail sperm to artificially inseminate his wife discourages or deters criminal behavior; surely there is no empirical evidence to support this conclusion,\(^ {93}\) yet this notion served as just another loose brick in the wall of support upon which the majority built its wide-ranging decision "to deprive [the plaintiff of a] basic liberty without so much as one fact to support the deprivation [resulting in] an 'exaggerated response' to vague penological objectives."\(^ {94}\)

## II. THE GERBER COURT AND SUPREME INJUSTICE

A careful examination of the Gerber majority's use of precedent reads more like a who's who of Supreme Court cases than a well-reasoned analysis, at least for the precise issue at hand.\(^ {95}\) After drawing multiple conclusions on what it perceived to be critical "sub-issues," the court gallantly declared that granting the plaintiff's request would be an act submersed in unconstitutionality.\(^ {96}\) The precedent looked to in reaching this determination, however, was largely distinguishable and

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\(^ {92}\) This is proof that the choice to deny a plaintiff's request, which would serve deterrence objectives, is a legislative choice. In the instant case, such a decision is within the province of the California legislature or the CDC; therefore, the court seems to be overreaching.

Over two hundred years ago, James Madison discussed the threat of judicial overreaching:

> The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. . . . [To quote Montesquieu,] "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."


\(^ {93}\) Even from a common sense point of view, denying male prisoners who are ineligible for parole the privilege of mailing sperm to their wives would not decrease criminal behavior in the masses.

\(^ {94}\) Gerber, 291 F.3d at 628 (Tashima, J., dissenting) (quoting Turner v. Safley, 482 U.S. 78, 98 (1987)).

\(^ {95}\) Surely, no two cases are exactly alike. Thus, the need for the courts to draw analogies from similar cases is undeniable. Nevertheless, the Gerber majority's reasoning reads more like a verbal hodgepodge than sound legal analysis.

\(^ {96}\) See Gerber, 291 F.3d at 622 ("It is difficult, if not impossible, to reconcile the holdings of cases like Turner, Hudson, and Pell and an understanding of the nature and goals of a prison system, with a wholly unprecedented reading of the constitution that would [grant] Gerber's request . . . as a matter of right.").
seemingly misconstrued. Moreover, this plunge into precedent, combined with ambiguous statements about the diminution of prisoners' rights, demonstrates that the cumulative reasoning of the Gerber majority sheds no light on the asserted fundamental inconsistency of incarceration and procreation.

A. The Gerber Court’s Misreport on Hudson and Pell

The Gerber court looked primarily to the Supreme Court to support its rationale, yet rather than take these decisions at their face value, the court repeatedly misconstrued the Court’s holdings. The majority first looked at Hudson v. Palmer. In Hudson, the Court held that prisoners cannot reasonably expect privacy within their individual cells and consequently could not claim protection of the Fourteenth Amendment. The majority used this broad dicta to classify the plaintiff's request as conflicting with the legitimate goals of the penal system. As Judge Tashima's dissent pointed out, any potential clash between sperm donation and the legitimate goals of the penal system would not raise the same security concerns raised in Hudson. Security concerns were the cornerstone of the Court’s

97 See discussion infra Part II.A.
98 Gerber’s first dissent conveyed this insight quite persuasively. See Gerber, 291 F.3d at 624–29 (Tashima, J., dissenting). The gist of this line of reasoning is that nothing in the record confirms that procreation is fundamentally inconsistent with incarceration and that the precedent relied upon does not provide adequate enlightenment to so conclude at this point in time. See id. Judge Tashima’s word choice seems to leave open the possibility of endorsing the denial of the plaintiff's request, but notions of “not now” and “not yet” pervade his opinion. Thus, he called for remanding the case so that an evidentiary hearing could determine the legitimacy of the prison system’s interest in denying the plaintiff's request. See id. at 629. Should a convincing factual record be established, Judge Tashima’s opinion would seemingly change.
100 See id. at 536. In Hudson, an inmate claimed he was deprived of his Fourteenth Amendment right not to be deprived of property without due process; this claim stemmed from a prison official performing a shakedown of his cell. See id. at 519–20.
101 Writing for the majority, Judge Silverman first used Hudson in asserting that prisoners necessarily lose some rights upon incarceration. See Gerber, 291 F.3d at 620. Later on, however, the judge once again quoted the case, remarking, “[R]estrictions or retractions [of rights] also serve . . . as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction.” See id. at 621 (quoting Hudson, 468 U.S. at 524).
102 See id. at 625 (Tashima, J., dissenting) (“Hudson’s holding that inmates’ privacy rights are abridged by the fact of incarceration does not support the conclusion that the fundamental right to procreate is similarly abridged.”). Indeed,
reasoning in *Hudson*; there simply were not comparable reasons underpinning the *Gerber* decision.

Likewise, the majority's reliance on *Pell v. Procunier* was also ill advised. This case, too, is readily distinguishable. In *Pell*, the Court held that a prison regulation denying face-to-face access to the media did not violate inmates' constitutional rights. The holding relied largely on security concerns and the availability of a reasonable alternative. With respect to the instant case, *Pell* raises the same story as *Hudson*, though perhaps more blatantly. In this manner, the majority relied upon *Pell* for the sole purpose of pronouncing that imprisonment necessarily removes some rights from an inmate's constitutional repertoire. As a result, the court's fault lay in never

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103 *See Hudson*, 468 U.S. at 526-27. Chief Justice Burger cited a plethora of security concerns necessitating *Hudson*'s holding:

[A] partial survey of the statistics on violent crime in our Nation's prisons illustrates the magnitude of the problem.... Within this volatile "community," prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors . . . [and] the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises . . . ; must prevent . . . the flow of illicit weapons . . . ; [and] must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize.

*Id.*

104 This author confidently maintains that sperm, a plastic container, and a Federal Express envelope do not rise to the level of the *Hudson* Court's demonstrated need to protect the integrity of a secure penal environment.


106 *Id.* at 835 (reversing the district court's holding that the regulation infringes upon the First Amendment rights of inmates).

107 *See id.* at 827 (reasoning that "security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates").

108 *See id.* at 827-28 (commenting that although prisoners may be denied certain face-to-face visitation privileges, they are still allowed to have such visits with family members, may still use the mail, and will always be guaranteed access to petition the government).

109 The term "blatantly" is used because the *Pell* Court unquestionably relied on the availability of an alternative, while the *Gerber* court outright avoided that line of reasoning altogether. There, of course, is no alternative available to the plaintiff in *Gerber*.

110 *See Gerber v. Hickman*, 291 F.3d 617, 620 (9th Cir. 2002) (citing *Pell* to provide only general principles governing prisoners' rights).
establishing a factual or analytical nexus between Pell's prohibition and that of Gerber's. Interestingly, Pell reiterated a prisoner's right to use the postal system. Thus, as the first Gerber dissent observed, "the Warden has conceded that he could not prevent prisoners from sending [fluid samples] to a forensic laboratory in order to establish their innocence. Gerber's request involves essentially the same procedure; yet, the Warden has failed to explain why Gerber's request is distinguishable." Thus, yet again, the majority left itself without the proper foundation for its argument.

B. Déjà Vu: The Gerber Majority's Opportune Looks at Skinner and Turner

The plaintiff in the instant case relied on the rationales in the Supreme Court's decisions in Turner and Skinner to formulate his main argument on appeal. In short, he argued that the "right to be free from forced surgical sterilization combined with the right to marry while in prison, inevitably leads to the conclusion that inmates have a constitutional right to procreate while in prison." The majority disagreed with the plaintiff's contention and proceeded to label each case as conflicting with the plaintiff's allegations. In short, the Gerber court reasoned that Skinner held only that forced surgical sterilization for certain offenders, but not others, is unconstitutional and that the right to procreate, though

111 See Pell, 417 U.S. at 827 n.5.
112 Gerber, 291 F.3d at 626 (Tashima, J., dissenting).
113 See id. at 622. Marriage and mail regulations were challenged in Turner v. Safley, 482 U.S. 78, 81 (1987). The Court's reasoning for holding unconstitutional the Missouri regulation demanding that prisoners demonstrate a compelling reason before being permitted to marry is relevant to the instant case. See id. at 95–96. Skinner involved an Oklahoma statute that required the sterilization of habitual criminals, undoubtedly an eugenics-based statute. See Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). In reasoning that the statute was unconstitutional, the Court noted:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.

Id. at 541.
114 Gerber, 291 F.3d at 622 (citations omitted).
115 Id. at 622–23.
preserved, is nonetheless preserved only for when an inmate is released from prison. Similar, *Turner's* preservation of marriage rights, the court reasoned, did not safeguard the right to procreate while incarcerated.

A thorough examination of the majority's analysis reveals that the *Gerber* court's reliance on what it set forth to be dispositive precedent was instead a paradigm for judicial massaging of the truth. In contrast to its reliance on *Pell* and *Hudson*, where the majority utilized only the generalities of prisoners' rights principles expressed by the Court, in relying on *Skinner*, the majority deciphered the Court's holding rather narrowly and only found that the applicable statute was unconstitutional. This allowed the court to tiptoe around the general import of *Skinner*: its reinforcement of procreative rights as paramount to civil liberty. *Goodwin v. Turner* was similarly manipulated by the *Gerber* majority when the court took a statement out of context and contrived it to connote a different notion from what the *Goodwin* court had intended. As pointed out in Judge Tashima's dissent, "the majority relied on *Goodwin* to state that there is no comparison between sterilization and denial of the facilitation of artificial insemination." That statement, however, was made in the context of the *Goodwin* court's denial of assistance with artificial insemination.

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116 See id. at 622. The court relied upon *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988), to distinguish surgical sterilization from disallowance to procreate. *See Gerber*, 291 F.3d at 622. The *Goodwin* court held that "[w]hatever privacy interests an inmate might have, nowhere does it appear that such interests impose an affirmative duty on the government, whether it be to provide facilities for conjugal visits or the means to assist in artificial insemination." 702 F. Supp. at 1455. *Hernandez v. Coughlin*, 18 F.3d 133,137 (2d Cir. 1994), demonstrated that procreation rights, though maintained, may not be exercised until the inmate is released from prison. *See Gerber*, 291 F.3d at 622. *Hernandez* held that denying inmates conjugal visitation rights does not violate due process. 18 F.3d at 137.

117 See *Gerber*, 291 F.3d at 623. The Court in *Turner*, it was asserted, intended to preserve marriage rights but never envisioned a prison marriage to encompass the right of procreation inherent in an everyday marriage. *See id.*

118 See discussion supra Part II.A.

119 See *Gerber*, 291 F.3d at 622 ("*Skinner* stands only for the proposition that forced surgical sterilization of prisoners violates the Equal Protection Clause.") (emphasis added).

120 See supra note 113 and accompanying text. Even a cursory reading of the *Skinner* opinion will convey this notion.


122 *See Gerber*, 291 F.3d at 622.

123 *Id.* at 628 (Tashima, J., dissenting).
insemination to an inmate who was not in jail for life, as the plaintiff in the instant case is. A significant difference exists between temporary and permanent deprivation of procreative liberty.

Thus, to combine *Skinner* and *Goodwin* with the court's treatment of *Turner* is a recipe for disaster. This is because the Ninth Circuit, as it did with *Goodwin*, construed *Turner* to mean just what it wanted it to mean, rather than what an objective judiciary would take it to mean. *Turner*, however, provides much support for the plaintiff's argument. In *Turner*, the Court struck down a prison regulation banning inmates from getting married unless the prison superintendent found compelling reasons to allow it. Furthermore, compelling reasons were limited to pregnancy or birth of a child. While recognizing that some security concerns could justify restricting prisoners' rights, the *Turner* Court discarded the prison's asserted "love triangle"-inmate rivalry justification for restricting the right to marry. In doing so, the Court implicitly set a high threshold

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124 See id. Judge Tashima further distinguished *Goodwin* in noting that the plaintiff there required the prison's assistance in supplying an appropriate container and transporting such container to a suitable laboratory. Id.

125 The *Gerber* court apparently construed *Turner* as previous judicial recognition that procreation is inconsistent with incarceration. It achieved this recognition by twisting the Supreme Court's words regarding marriages. In *Gerber*, the court noted that because inmate marriages are formed "in the expectation that they ultimately will be fully consummated," the Court necessarily recognized that the physical aspects of marriage do not survive incarceration. See id. at 623 (citing *Turner v. Safley*, 482 U.S. 78, 96 (1987). In *Turner*, however, the full sentence reads, "[M]ost inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Turner*, 482 U.S. at 96. Hence, the *Turner* Court's provided reason to protect prisoner marriage rights was distorted by the Ninth Circuit in *Gerber*.

126 See *Turner*, 482 U.S. at 96–97.

127 See id. at 97–98. The Court remarked:

[With respect to the security concern emphasized in petitioners' brief—the creation of "love triangles"—petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements. Common sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles: surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one. Finally, this is not an instance where the "ripple effect" on the security of fellow inmates and prison staff justifies a broad restriction on inmates' rights—indeed, where the inmate wishes to marry a civilian, the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one.]

for using security concerns to abridge inmates' rights. The instant plaintiff's request surely does not meet this threshold. The state did not put forth any legitimate security justifications that establish a dire penological need to disallow sperm donation in this matter. Furthermore, if recent headlines are any indication, just the opposite may be true. Disallowing conjugal visits and sperm donation may actually raise a serious safety issue as a result of attempts to smuggle sperm out of prisons. This raises an entirely different aspect of the prisoner sperm donation scenario.

CONCLUSION

In holding on the current record that procreation is fundamentally inconsistent with incarceration, the Ninth Circuit decisively terminated William and Evelyn Gerber's prospects of conceiving a child. Through its questionable construction of precedent and possible over stepping of its constitutionally mandated bounds, the Gerber court undoubtedly raised concerns about the judiciary's viewpoint on prisoners' rights in the twenty-first century. Unfortunately, the Supreme Court denied Gerber's petition for a writ of certiorari, leaving the sphere of prisoners' procreative liberty in its present condition. Hopefully, the Court will soon entertain a case it perceives to be an appropriate vehicle in which it can reexamine the issues raised by Gerber, resolving them in a manner more consistent with the other rights of privacy.

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Id. at 98.

128 Within all of the vagaries of the majority opinion, not once was a single security concern explicitly put forth as justification for disallowing the plaintiff's request. Surely, if security was one of the warden's justifications for denying the plaintiff's request, some unequivocal discussion of how sperm donation would compromise security would be expected.

129 See Dan Kadison & Murray Weiss, Mob Sperm Bust, N.Y. POST, Dec. 3, 2002, at 7. Kevin and Regina Granato were recently indicted by a federal grand jury for conspiring to smuggle sperm out of a prison and into a fertility clinic. Mr. Granato is a convicted mobster, but he is now also the proud father of a three-year old daughter Gianna. Ineligible for conjugal visits, the couple allegedly bribed prison guards to smuggle his sperm out of prison in the fall of 2000. See id.