QUEEN MARY UNIVERSITY OF LONDON

Prison and Planned Parenthood? Prisoners and the Conception of a Right to Procreate.

Submitted in partial fulfilment of the requirements of the Degree of Doctor of Philosophy

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Statement of Originality

I, Mary Kathleen Yarwood, confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by others, that this is duly acknowledged below and my contribution indicated. Previously published material is also acknowledged below.

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Abstract

The decision to have a child is normally considered a private matter between consenting adults. The state only intervenes if individuals require medical treatment to conceive. The ability to choose if, and indeed when, to have children is recognised as an important human right. In contrast, prisoners inhabit a public space where all decisions regarding procreation are subject to public scrutiny.

In the USA, prisoners are completely prohibited from procreating, unless they are granted the privilege of private visits. In contrast, in *Dickson*, the European Court of Human Rights recognised that prisoners retain all of their convention rights, including the right to a private and family life. Rights can only be restricted if necessary and the restriction must be proportionate to the objective that the state is trying to achieve.

This thesis will examine the question of whether prisoners should retain a right to procreate and whether restricting prisoners from procreating should form a part of their punishment. Many characteristics of the Victorian penal regime including isolation from family members and the concept of 'less-eligibility' continue to affect how prisoners in England and Wales and the USA are treated. Prohibiting prisoners from procreating is often justified as part of a prisoner's punishment. Many argue that it is a direct consequence of imprisonment. Alternatively, if one accepts the premise that prisoners retain all of their human rights apart from the right to freedom, then there appears to be little justification for removing their right to procreate in most cases. Removing the right to procreate is in effect an additional method of punishing the offender that is not

explicitly stated as part of the prisoner's sentence and is normally given very little consideration by prison officials or by government authorities.

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Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952 meeting of the Ministers' Deputies). (EPR)

International Covenant on Civil and Political Rights, GA Res 2200A (XXI) of 16 December 1966, 21. (ICCPR)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

Council of Europe, 'Recommendation 1340 on the Social and Family Effects of Detention' (Parliamentary Assembly, Council of Europe, 1997)

Table of Abbreviations

AI- Artificial Insemination
ECHR- European Court of Human Rights
ECtHR- European Court of Human Rights
EPR- European Prison Rules
FOI- Freedom of Information Request
HRA- Human Rights Act
ICCPR- International Covenant on Civil and Political Rights
IEPS- Incentives and Earned Privileges Scheme
IPP- Indeterminate Sentence for Public Protection
IUI- Intrauterine Insemination
IVF- Invitro Fertilisation
MBU- Mother and Baby Unit
PLRA- Prison Litigation Reform Act
SHU- Secure Housing Unit
SIPD- Society for the Improvement of Prison Discipline
UNSMR- United Nations Standard Minimum Rules for the Treatment of Prisoners

Chapter One: Introduction to the Thesis

Within England and Wales, and the United States of America (USA), the vast majority of prisoners are prevented from procreating whilst in prison by highly restrictive policies. In England and Wales, prisoners are unable to have sexual intercourse with their partners. In the USA, only three states: New York, Washington, and California allow private visits between prisoners and their adult partners for a few selected prisoners as a privilege.[1] This thesis aims to explore why such restrictions exist, by considering the origins of this approach, as well as the reasons that are given by state authorities to maintain the current restrictive policies.

The overarching research question that I seek to examine within this thesis is: 'Do prisoners have a fundamental right to procreate?' If one assumes that prisoners do retain a fundamental right to procreate, this leads to questions such as 'is it ever acceptable to punish prisoners by removing their right to procreate?' One also needs to examine whether it is ever acceptable to prohibit prisoners from procreating for reasons other than to punish the offender, such as when it is judged to be in the best interests of the putative child? If it can be argued that there is no fundamental right to procreate, then this raises the alternative view that procreation itself is seen as a privilege. In this case, questions can be then asked about how these decisions should be made, and what criteria should be used to decide which prisoners are allowed to procreate.

[1] For general information regarding conjugal visits see Rachel Wyatt, 'Male Rape in US Prisons: Are Conjugal Visits the Answer?' 37 (2005) Case W Res Int'l L 576, 600. The State of Connecticut also allows conjugal relations between prisoners and their partners, but the partner is required to bring the child of the prisoner to the visit, as enhanced family relations are the main purpose. State of Connecticut Department of Corrections, 'Directive 10.6 Inmate Visits' (*State of Connecticut Department of Corrections)* sF <http://www.ct.gov/doc/lib/doc/PDF/ad/ad1006.pdf> accessed 18 November 2015.

The cases of *Mellor* and *Dickson* provided the initial starting point for this thesis. From a preliminary search on 'prisoner procreation' case law, I identified another three cases from the USA: *Goodwin, Percy* and *Gerber* all of which had similar facts.[2] On first appearances, it seems accepted fact that losing certain family rights, including the right to procreate is simply part of the punishment of imprisonment. Some of the judges argued that prisoners did not possess any procreative rights.[3] Within this thesis, I aimed to challenge the assumptions that are made about prisoners procreating. I have done this by taking each of the justifications given for prohibiting prisoners in turn and testing whether they stand up to scrutiny.

The thesis will examine the literature surrounding human rights and eugenics in Chapter Two: Literature Review. This will be followed by an examination of the development of prisons in Chapter Three. Chapters Four and Five will consider the case law from England and Wales and the USA respectively. Chapter Six undertakes a comparative analysis of the case law from each jurisdiction. Chapter Seven considers punishment in more detail and how procreative restrictions fit with justifications of punishment. Chapter Eight considers procreation and parenting in 'free society.' This is contrasted in Chapter Nine with parenting in prison. Chapter Ten concludes the thesis, evaluating the findings of this research and makes suggestions for future reform.

This introduction will now turn to the methodology utilised, in order to explain the scope of the thesis and the reasons for choosing a comparative approach.

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[2] *Goodwin v Turner* 908 F2d 1395 (1990); *Percy v State of New Jersey* 278 NJ Super 543, 545 (1995); *Gerber v Hickman* 273 F3d 843 (2001); *Gerber v Hickman* 291 F3d 617 (2002).
[3] *Gerber v Hickman* 291 F.3d 617, 621 (2002) (Silverman J); *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 (Lord Phillips MR) para 43.

Methodology

This section will firstly discuss the initial process of establishing the parameters of the research, including the identification of relevant case law, statutes and treaties, as well as the secondary literature related to prisoner procreation. The initial doctrinal analysis and literature review established the boundaries of the research. Discussion will then turn to the reasons for adopting a comparative approach, between the chosen jurisdictions of England and Wales, the Federal criminal jurisdiction of the USA and the US states of New Jersey and California. The comparative approach will be discussed in relation to case law, statute law and international treaties. Rather than taking a purely doctrinal approach to the analysis of prisoner procreation, it is imperative to consider the effects of culture and society on the way the law is operated. This is important in order to appreciate the legal culture of the jurisdiction. As Cotterell states 'To remove a focus on legal doctrine from sociological inquiry would 'prevent legal sociology from integrating, rather than merely juxtaposing, its studies with other kinds of legal analysis.'[4]

Defining the Question: Do prisoners have a fundamental right to procreate whilst in prison?

The overarching question posed by all of the case law and literature that I examined was do prisoners have a fundamental right to procreate? This is the one question that the cases returned to time and time again. The one reason it is necessary to explore this question in more depth is that case law and government policy from both England and Wales and from the USA lack any detailed

[4] Rodger Cotterell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 JL & Soc 171, 172.

examination of this point.[5] The literature and cases have largely focussed on the specific right of male prisoners to procreate via AI rather than a more general investigation as to why prisoners in general continue to be punished by the removal of their right to procreate.[6] Within the historical context of punishment and the prison, the development of a prohibition against procreation in prison was a fairly recent development.[7] Prior to the Victorian reforms of the prisons, procreation would have been possible for many prisoners, such as debtors, who kept their families with them whilst incarcerated.

From reading the case law and reviewing the literature, it can be seen that most judicial and state actors view prohibition of procreation is a part of the natural consequences of imprisonment.[8] This raises a secondary question of whether removing the right to procreate is a legitimate part of the punishment given to prisoners. Further questions follow, such as: what justifications are given by those in authority to remove the right of prisoners to become parents? Do these justifications stand up to scrutiny?

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[5] Domestic cases from England and Wales fail to consider female prisoners: *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472; *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477.

[6] Some authors state that prisoners do have a right to procreate, especially from the perspective of male prisoners procreating via AI, due to the minimal burdens placed upon the prison service. Helen Codd, 'The Slippery Slope to Sperm Smuggling: Prisoners, Artificial Insemination and Human Rights' (2007) Med L R 220; Emily Jackson, 'Case Commentary: Prisoners, Their Partners and the Right to Family Life' (2007) 19 Child Fam L Q 239; John Williams, 'The Queen on the Application of Mellor v Secretary of State for the Home Department. Prisoners and artificial insemination- have the courts got it right?' (2002) 14 Child & Fam L Q 217

[7] See footnote 217.

[8] In *Goodwin v Turner,* 980 F2d 1395, 1396 (1990) it was accepted by the majority judgment that prisoners retain the right to procreate but that this right does not survive incarceration. In *Gerber v Hickman* 264 F3d 882, 890 (2001) the majority judgment stated that the right to procreate survived incarceration, albeit in an attenuated form due to legitimate penological interest. The en-banc reversal completely changed this judgment stating that the right to procreate is inconsistent with incarceration, thus avoiding the direct question of whether prisoners retain the right to procreate *Gerber v Hickman* 291 F3d 617, 619 (2002). In both *Mellor* and *Dickson*, the domestic courts stated that prisoners do not retain the right to procreate. *Secretary of State for the Home Department, Ex parte Mellor* [2001] EWCA Civ 472 para 54 *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 10.

The Literature Review: Identifying the Issues and Doctrinal Research

In order to research the basis of the thesis, it was important to firstly identify the available literature surrounding prisoner procreation. My initial starting point was interest arising from the *Dickson* case.[9] This case and subsequent discussions of prisoners having children appear to illicit strong reactions in the media.[10] After first reading the ruling from the Grand Chamber of the ECtHR, which appeared to dispute the accepted approach that prisoners automatically lose the right to procreate, I returned to the domestic cases of *Dickson* and *Mellor*, using these as a springboard to find further information. From these two cases, I was then able to search for similar cases in both England and Wales and in other jurisdictions.

Whilst this thesis takes a socio-legal approach to the question of prisoner procreation, it was first necessary to take a doctrinal approach to identify the relevant case and statute law. Hutchinson claims that most, if not all legal projects commence with a doctrinal approach, even if the project later builds upon this work with either an empirical study or another methodological approach.[11] I initially used both Google and Google Scholar to identify relevant cases worldwide, finding cases in England and Wales, the USA, Spain and Australia.[12]

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[9] *Dickson v United Kingdom* (2008) 46 EHRR 41.

[10] Anonymous, 'Killer in prison wins right to father a child by artificial insemination' (*Evening Standard,* 5 December 2007) <http://www.standard.co.uk/news/killer-in-prison-wins-right-to-father-a-child-by-artificial-insemination-6681501.html> accessed 18 February 2015; Jack Doyle 'Prisoner allowed to father a child from jail because of 'human right to a family life"' (Daily Mail, 1 June 2011) http://www.dailymail.co.uk/news/article-1392885/Prisoner-allowed-father-child-jail-human-right-family-life.html accessed 18 February 2015.

[11] Terry Hutchinson 'Doctrinal Research: Researching the Jury' in Dawn Watkins, Mandy Burton, (eds) *Research Methods in Law* (Routledge, 2013) 7. See also Susan Bartie, 'The lingering core of legal scholarship' (2010) 30 Legal Studies 345, 350.

[12] Within the search field I searched for the following terms 'Prisoner IVF', 'Prisoner AI', 'Prisoner Artificial Insemination', 'Prisoner Invitro Fertilisation/ Fertilization', and 'Prisoner Procreation.' I found these relevant cases: *ELH and PBH v United Kingdom* (1997) 91A DR 61; *Secretary of State for the Home Department, Ex parte Mellor* [2001] EWCA Civ 472; *Secretary of State for the Home Department, Ex parte Dickson*; [2004] EWCA Civ 147; *Dickson v United Kingdom* (2007) 44 EHRR 21; (2008) 46 EHRR 41; *Percy v State of New Jersey* 278 NJ Super

After I had identified case names and background literature, I then used specialised law databases Westlaw and Lexis Library in order to find cases from England and Wales, the USA, and the ECtHR. To identify other cases such as *Castles,* I used the World Lii database resource. Once I had identified relevant cases, I then grouped them into jurisdictional and then 'country' areas to make them more manageable. I chose to concentrate on England and Wales, as this is the jurisdiction of my home country and the legal system with which I am most familiar. To compare with the cases from England and Wales, I then selected cases from the USA, as they provided the greatest number of cases with similar facts. Both countries used common law systems, which would make it more straightforward to make meaningful comparisons. Potential case law from Spain was rejected because my language skills are not sufficiently fluent enough to read the cases and relevant statutes.[13] The Australian case of *Castles* was also rejected in order to maintain the number of jurisdictions covered at a manageable level.

Once I had identified the relevant cases that would form the basis of the research, I began a more detailed analysis of the law within the context of how it is applied. Van Gestel and Micklitz establish some of the core features across both common and civil law jurisdictions. These are legal arguments that originate from authoritative sources, such as existing legal rules, such as statutes, case law, precedents, principles and academic publications.[14] To identify the relevant law, I

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543 (1995); *Goodwin v Turner,* 980 F2d 1395 (1990); *Gerber v Hickman* 264 F3d 882 (2001); *Gerber v Hickman* 291 F3d 617 (2002); *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 (9 July 2010) (Victoria Supreme Court, Australia), Graham Keeley, 'Eta killers given IVF treatment in prison' The Times (London, October 2 2010) 49.

[13] Anonymous 'Anger at IVF treatment for jailed terrorist couple' (*The Daily Telegraph,* Sydney, 2 October 2010) http://www.dailytelegraph.com.au/anger-at-ivf-treatment-for-jailed-terrorist-couple/story-e6freuz9-1225933221553 accessed 18 February 2015.

[14] Rob van Gestel, Hans W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (European University Institute, EUI Working Paper LAW 2011/05, 2011) 26.

examined all of the cases, including all of the relevant statutory and treaty provisions in order to establish what the legal basis was for allowing or denying prisoners the right to procreate. This primary analysis formed the basis for the structure that the thesis would take, and for the formulation of the answer to the research question.

To provide greater context for the main thesis question, I then undertook a literature review, which I expanded to relevant non-legal sources. The wider questions raised by the case law and academic commentary covered issues such as who should be allowed to procreate and parent, as well as the purpose of punishment and questions about limiting the fertility of population groups within society. These in turn raise interesting and occasionally controversial questions about eugenics, the historical development of penal punishment and the history of restricting prisoner's rights, parental and children's rights, as well as a more general examination of human rights. Answers and insights to these questions can be provided by relevant criminological, sociological, philosophical and historical sources.

I attempted to firstly identify the actual law governing prisoner procreation and analyse this (which could be described as an internal approach). After this had been completed, I then took an 'external' approach, to examine how the law applied within the context of the different cultural and political contexts of the USA and the UK.[15] McCrudden acknowledges that most legal research is a mixture of both of these approaches.[16] The initial doctrinal analysis is therefore built upon in subsequent chapters, to highlight how the law itself is

[15] For an explanation of 'internal' and 'external' examinations of the law and doctrinal analysis, see Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) LQR 632, 634-635.
[16] ibid 364.

expressed in theory and how it is operated in practice. The initial information gathering and subsequent data analysis also aimed to be inductive, rather than deductive, through the analysis of the qualitative data: the relevant case law, statutes and treaties that govern the treatment of prisoners.[17]

Categories, Coding and Data Analysis

Due to the small sample size of cases available, I decided to undertake a qualitative analysis to examine the cases.[18] A qualitative analysis can however allow for a deeper analysis of the case law in order to assess the reasons behind prisoners being denied the right to procreate, as well as encapsulate the nature of the cases.[19] I analysed each case in detail manually in order to identify commonly occurring themes. These themes are 'induced' from reading the text and gaining some familiarity with the subject.[20] The categories I decided to use are explained next.

Rights of prisoners to privacy and family life

This category includes any references made in the case law and statutory materials to prisoners having a right to privacy, references to prisoners planning to become parents, as well as any provisions designed either to promote or inhibit access to their existing children and families.

[17] Graham Gibbs, *Analyzing Qualitative Data* (Sage, 2007) 4.
[18] Benoît Rihoux, 'Qualitative Comparative Analysis (QCA) and Related Systematic Comparative Methods: Recent Advances and Remaining Challenges for Social Science Research' (2006) 21 Intl Sociology 679, 682.
[19] ibid 680.
[20] Gery W Ryan, H Russell Bernard, 'Techniques to Identify Themes' (2003) 15 Field Methods 85, 88.

Right of prisoners' families to a private and family life

This category refers to the ability of the prisoner's family and partner to maintain and develop a relationship with their imprisoned relative or partner.

Punishment and what constitutes the punishment of imprisonment.

This category is concerned with punishment and whether prohibition of procreation is a valid part of the punishment of a prison sentence. It is also concerned with more general references to punishment and its justifications.

Judgments about the nature of prisoners, criminality and their families.

This category includes references to prisoners and their families having different lifestyles, different values and deviant behaviour, especially when the data makes reference to them becoming parents.

Welfare of the Child Concerns.

This category refers to direct consideration of the putative child that would be produced by prisoners procreating. This may make reference to the putative parents and their suitability to parent the child, provide for the child, as well as the stability of their relationship.

Legitimate penological aims and government policies

This category refers to the aims of imprisonment: such as incapacitation of the offender, deterrence, rehabilitation, and protection of the public and punishment of the offender. These can be both legitimate penological aims, (the more general aims of the prison system), as well as separate government aims. These aims can diverge from one another and cause conflict, such as the need to punish and the desire to reform.

Once I had defined these categories from a preliminary reading of the cases and literature, I returned to the cases in detail, to look within the text for references that fell within these different categories. This allowed me to systematically analyse the commentary contained within the case law itself.

Comparative Analysis

Within this thesis, I have utilised a comparative analysis approach due to the small number of cases within my 'home' jurisdiction of England and Wales. The intention, rather than being purely doctrinal, is to explore some of the wider normative issues surrounding prisoner procreation. It is hoped that that comparing England and Wales with other jurisdictions would allow for more relevant cases to be selected and analysed. In turn, this should provide a fuller explanation of why these particular jurisdictions are reluctant to allow prisoners to procreate. More generally, it will allow examination of whether prohibition of procreation is a justified part of punishment.

The jurisdictions that were selected for comparison were chosen for practical reasons. The majority of the relevant cases are from jurisdictions within the USA. All of the jurisdictions studied are based upon the common law system, with English as the first language. One of the main functions of the comparative analysis is to ensure that the explanation has to 'not only [to] be faithful to the system which it explains, it has to be understandable in the system to which that foreign system is explained.'[21] Each legal term may have a slightly different meaning within each jurisdiction, but through analysing the statutes, cases and political background to each of the jurisdictions, I aim to express how the law

[21] John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart Publishing, 2011) 172.

stands in each jurisdiction. As well as the differences between each jurisdiction, there is also the further interaction between State and Federal law to be considered within the analysis.

I compared each of the cases in turn, which I then used as a starting point to identify and analyse the case law, as well as statute provisions that govern prisoner procreation. It was imperative to ensure that the scope of analysis of the statute law was wide enough to encompass everything that may be relevant. Once the law was identified, I was able to find common features between the legal provisions, the so-called 'common-core' of the law. Using the categories that I selected for the analysis of the case law as a starting point, I was able to pick up the common themes running through each of the cases. Once this was complete, I then took a step back to analyse whether the arguments used by the courts to justify prohibition of procreation as punishment had any basis within the theoretical explanations of punishment. The law surrounding prisoner procreation exists within the social and cultural contexts of each jurisdiction and cannot be examined in isolation from these influences.[22]

[22] Michael Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing, 2013) 39.

Summary

The main question that this thesis aims to answer is: do prisoners retain a right to procreate whilst incarcerated, and whether removal of the ability to procreate is justified as a part of their punishment. The initial starting point for the thesis originated with the cases of *Mellor* and *Dickson*.

In order to answer the research question fully, I took a comparative approach to analyse the relevant legal and ethical issues. I firstly identified the relevant cases from case law databases, and was able to find cases that showed some similarity in their facts to *Mellor* and *Dickson*. Selecting cases from English speaking common law jurisdictions, helped to reduce some of the problems associated with attempting to compare common law and civil law jurisdictions. Each case was then manually analysed in turn using identified codes. This allowed the cases to be explored for justifications for either the removal of the right to procreate or support for the existence of a right for prisoners to procreate. Once this was complete, the relevant statute law could then be examined to see whether there was any statutory guidance or support in these cases for the decisions made. I then widened the examination to non-legal materials which could shed light on the context and the background of prisoners wanting to have children, looking at socio-legal research related to imprisonment, punishment, criminology and parenting.

Chapter Two: Literature Review

Introduction

Reproduction is usually a private issue that is not regulated by law. For many people, their choice of partner, and the decision to have children are intertwined issues, related to their self-expression and the desire to create a family.[23] These decisions are often undertaken with a great deal of thought, and are imbued with cultural importance. For others, having a child is not a conscious decision, but an unplanned occurrence. So long as the child is conceived naturally, the manner of conception is considered private and is not generally regulated by the state.[24] Modern technology, along with advances in contraception and fertility treatment have allowed for sexual intercourse and human reproduction to be successfully separated. Medical treatment for infertility, including artificial insemination (AI), in vitro fertilisation (IVF), and intra-uterine insemination (IUI) allows reproduction to take place without sexual intercourse.[25] This has created new possibilities for those who would otherwise be infertile and also allows prisoners that are prevented from having sexual intercourse to have children.[26]

Male prisoners in both England and Wales and the USA have litigated their right to procreate within the last 20 years. All of the cases have turned on similar facts. The claimants were convicted of serious offences and given long

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[23] David Archard, *Children: Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 139.
[24] Nikolas Rose, *Governing the Soul: The Shaping of the Personal Self* (2 edn, Free Association Books, 1999) 127. Rose argues that the state itself dictates what it considers private, and then refuses to intervene in these areas because they are private.
[25] For a general guide to the treatments available, see Human Fertilisation and Embryology Authority, 'your fertility treatment options' (*Human Fertilisation and Embryology Authority*, 5 August 2014) http://www.hfea.gov.uk/fertility-treatment-options.html accessed 3 July 2015.
[26] It is also acceptable for the state to maintain a blanket ban on conjugal visits, even when a couple wish to conceive and their religion prevents them from using AI. *ELH and PBH v United Kingdom* (1997) 91A DR 61.

sentences ranging from fourteen years in the case of Steven Goodwin to 100 years to life plus 11 years in the case of William Gerber.[27] The other claimant from the USA, Robert Percy, and the two litigants from England and Wales, were both sentenced to life in prison for murder, although were due to be released on licence after serving the 'punishment' part of their tariff.[28] All of the cases concerned heterosexual prisoners who each wanted to have a child with their wife outside of prison. Because sexual intercourse was denied to each of the prisoners, they had no other option than to apply for permission to produce a semen sample, which would then be taken to inseminate their partner outside of prison. Each of the cases raises the same questions about the nature of the right to procreate, including whether procreation restrictions should form part of the punishment of a prison sentence. Each of the cases also raises the issue of the prisoner's partner and the extent that prison policy restricts their choices. In turn, questions are raised about how justified the courts are in preventing prisoners from having children in order to protect the putative child from being raised by a single parent mother and a prisoner father.

Considering the overall picture of prisoners' rights, having children might be seen as a minor point of interest, in comparison with debates over prisoner enfranchisement, the need to reduce overcrowding and improve prison regimes. The numbers of prisoners affected by life or long-term imprisonment is small

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[27] Steven Goodwin was sentenced to 14 years imprisonment for drugs offences. William Robbins, 'Court to Decide Missouri Prisoner's Right to Father a Child' (*New York Times,* 20 February 1990) <http://www.nytimes.com/1990/02/20/us/court-to-decide-missouri-prisoner-s-right-to-father-a-child.html> accessed 10 July 2015. William Gerber was sentenced under the three-strikes-and-your-out rule for discharging a firearm, use of narcotics and making terrorist threats. *Gerber v Hickman* 264 F3d 884 (2001).

[28] *Percy v State of New Jersey* 278 NJ Super 543, 545 (1995); *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385; [2000] H.R.L.R. 846 para 9; *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 2.

when compared with the overall prison population.[29] However, prisoner procreation has the potential to become increasingly important as more prisoners are sentenced to longer periods in prison and so may litigate over the right to procreate.

There has been a considerable amount of academic literature on the subject of 'prisoner procreation' cases, although interest has been mostly concentrated on the US cases of *Goodwin* and *Gerber*. Much of this literature concentrates upon the legal regulation of procreation, mainly from the perspective of male prisoners claiming the right to procreate via AI.[30] Some articles have examined the legal perspective of the right of prisoners in England and Wales to procreate, in some cases comparing England and Wales to US jurisdictions.[31] A

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[29] The overall prison population for England and Wales stands at 86,164 week ending 3 July 2015. Howard League for Penal Reform, 'Weekly Prison Watch: Week Ending Friday July 3 2015' (Howard League for Penal Reform, 3 July 2015) <http://www.howardleague.org/weekly-prison-watch/>accessed 4 July 2015. In England and Wales, the prison population rose 1% between January to December 2014. 6% more prisoners were serving sentences longer than four years due to the Extended Determinate Sentence (EDS), which replaces the Indeterminate Sentence for Public Protection (IPP). As of 31 March 2015 1,742 prisoners were serving an EDS. The number of people serving an IPP sentence was down 3% to 12,203. Ministry of Justice, Offender *management statistics bulletin England And Wales Quarterly October to December 2014 Annual January to December 2014* (Ministry of Justice, 2015) 3, 5-6. 12% of the total prison population in England and Wales is serving a life or indeterminate sentence. Ministry of Justice, *Story of the Prison Population: 1993 – 2012 England and Wales* (Ministry of Justice, 2013) 15. In the USA in 2012, 159,520 people were serving a life sentence, including 49,081 people serving whole-life without parole sentences. The Sentencing Project 'Fact Sheet: Trends in US Corrections' (*The Sentencing Project*, November 2015) http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf accessed 5 January 2015. The USA, at the end of 2013 also held 2,979 prisoners under sentence of death. Tracy L. Snell, *Bureau of Justice Statistics Statistical Table: Capital Punishment 2013- Statistical Tables* (US Department of Justice, 2014) 1.

[30] Tammi Michele Kipp, 'Should the Right to Procreate be Imprisoned?: The Debate of Gerber v Hickman' (2003) 29 New Eng J Crim & Civ Confinement 125; Rachel Michael Kirkley, 'Prisoners and Procreation: What Happened Between Goodwin and Gerber?' (2003) 30 Pepperdine L Rev 93; Richard Guidice Jr, 'Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right' (2002) 29 Fordham Urb LJ 2277.

[31] Helen Codd, 'Policing Procreation: Prisoners, Artificial Insemination and the Law' (2006) 2 Genomics, Society & Policy 110 <http://www.lancaster.ac.uk/fss/journals/gsp/docs/vol2no1/HCGSPVol2No12006.pdf >accessed 1 May 2015; Helen Codd, 'Regulating reproduction: prisoners' families, artificial insemination and human rights' (2006) 6 EHRLR 39; Helen Codd, 'The Slippery Slope to Sperm Smuggling: Prisoners, Artificial Insemination and Human Rights' (2007) Med L R 220; Emily Jackson, 'Case Commentary: Prisoners, Their Partners and the Right to Family Life' (2007) 19 Child Fam L Q

few of these articles explored the legal and practical effects of extending this right to women prisoners.[32] Others raise the question of the legacy of eugenics, touching on the point of *Skinner*, of whether denying prisoners the chance to become parents is akin to sterilisation.[33] This thesis will attempt to bridge the gap between the legal analysis of the cases and how the historical context of imprisonment, punishment and eugenics has affected how the law has developed in this area.

The main justification given by the courts for preventing prisoners from having children is that it forms part of the punishment of imprisonment. The ruling from the Grand Chamber in *Dickson* confirms that prisoners do not lose all of their rights when incarcerated, at least within the member states of the ECHR.[34] In both England and Wales and the USA, it is accepted that prisoners retain all of those rights that are not removed by or incompatible with incarceration.[35] The cases appear to contradict this basic premise by denying male prisoners the ability to become fathers. The answer for this reluctance may lie within the very foundations of the modern penal system and how it has evolved from its beginnings of austerity and less-eligibility. It may stem from ideas of punitiveness, the need to make prison an unpleasant and isolating place. Restrictions on

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239; PollyBeth Proctor, 'Procreating from Prison: Evaluating British Prisoner's Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case' (2003) 31 GA J Int'l & Comp L 459; John Williams, 'The Queen on the Application of Mellor v Secretary of State for the Home Department Prisoners and artificial insemination- have the courts got it right?' (2002) 14 Child & Fam L Q 217.

[32] Jerri Munsterman, 'Procreation from Prison Via Fedex and the Extension of the Right to Imprisoned Women' (2002) 70 UMKC L Rev 733; Rachel Roth, 'No New Babies? Gender Inequality in Prison Systems (2004) 12 Am UJ Gender Soc Pol'y & L 391,

[33] Elaine E Sutherland, 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?' (2003) 82 Or L Rev 1033; John Williams, 'The Queen on the Application of Mellor v Secretary of State for the Home Department. Prisoners and artificial insemination- have the courts got it right?' (2002) 14 Child & Fam L Q 217, 228.

[34] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 68.

[35] *Wolff v McDonnell* 418 US 539 (1974); *Raymond v Honey* [1983] 1 AC 1.

procreation may also be influenced by ideas of punishment. From this viewpoint, imprisonment is more than just the removal of freedom. It is also the removal of personhood and autonomy from the prisoner and thus the ability to procreate. Finally, the dark past of eugenics may still cast a faint shadow over the present, leading those who make decisions about prisoners' access to AI facilities to shy away from allowing prisoners to procreate.

The ability to procreate is one of a range of human rights. Human rights are the rights one possesses for being human.[36] Some human rights, such as the right to be free of torture or degrading treatment are absolute rights.[37] Other rights, such as the right to procreate, are rights that can arguably be limited or interfered with, should exceptional circumstances justify it. Historically, there have been attempts to limit the fertility of 'undesirable' people who were considered to be 'outside' of society. One example of this is the US Supreme Court case of *Skinner*. The Court examined the legality of Oklahoma's Habitual Criminal Sterilization Act 1935, which mandated that offenders be forcibly sterilised after their third conviction for an offence of 'moral turpitude'.[38] This was held to be unconstitutional, as removal of the right to marry and procreate was the removal of an essential liberty. In the recent past, several countries in Europe have been responsible for the sterilisation of hundreds of people with learning disabilities.[39] Although, there is no currently known programme to sterilise offenders in either England and Wales or the USA, it has been argued that preventing prisoners from

[36] Jack Donnelly, *Universal Human Rights in Theory & Practice* (2 edn, Cornell University Press, 2003) 7.
[37] This itself can be contested, as 34 states within the USA retain the death penalty. Deborah Fins, *Death Row USA Spring 2015: A Quarterly Report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc* (*NAACP Legal Defense and Educational Fund, Inc,* 2015) 1.
[38] *Skinner v Oklahoma* 316 US 535 (1942).
[39] Gunnar Broburg, Nils Roll-Hansen, *Eugenics and the Welfare State: Sterilization Policy In Demark, Sweden, Norway and Finland* (2nd edn, Michigan State University Press, 2005)

having children is akin to the eugenic control and sterilisation of prisoners.[40] Restrictions upon reproductive ability must be carefully navigated, and any reasons for restricting the ability of others to bear or produce children must to be made upon a robust foundation.

Understanding the historical basis for the current punishment of prisoners can highlight why prison authorities and governments are so reluctant to allow prisoners to procreate, especially when compared to more liberal penal regimes in Europe. The concept of 'less-eligibility' gained prominence in the Victorian era. It was thought that because of their crimes, prisoners were 'less eligible' or less deserving of the equivalent minimum standards of living than those in free society.[41] This same standard was also used to ensure that the workhouse became a place of last resort to the destitute poor, so that throughout the nineteenth century both the workhouse and prison as an institution developed in tandem in England and Wales.[42] The Victorian ideal of the prison was clean, ordered and uniform, but Spartan and devoid of any physical comforts.[43] In a similar way to how the workhouses operated, prison was designed to be as unattractive as possible to act as a deterrent to the potential criminal.[44] Standards of incarceration in prisons in both England and Wales and the USA continue to operate using the concept of less eligibility as a basis for standards, which in turn is exacerbated by high levels of overcrowding and poor accommodation due to declining funding

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[40.] John Williams, 'Have the Courts Got it Right?--The Queen on the Application of Mellor v. Secretary of State for the Home Department' (2002) 14 Child Fam LQ 217; Elaine E Sutherland, 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?' (2003) 82 Ore L Rev 1033, 1034.
[41] David Garland, *Punishment and Welfare: A History of Penal Strategies* (Gower, 1985) 11; Edward W Sieh, 'Less Eligibility: Upper Limits of Penal Policy' (1989) 3 CJPR 159, 173.
[42] Edward W Sieh, 'Less Eligibility: Upper Limits of Penal Policy' (1989) 3 CJPR 159, 160.
[43] David Garland, *Punishment and Welfare: A History of Penal Strategies* (Gower, 1985) 13.
[44] ibid 13.

and longer sentences being handed to prisoners.[45] The relationship between living standards in free society and the resources allotted to prisoners is summed up by Sieh in this quotation: 'With decreasing prosperity among the poor it is possible to spend even fewer resources on prisons if one is to adhere to the basic precepts of less eligibility.'[46] In conjunction with notions of 'less-eligibility' is the development of the prison as discrete, cut off from society. Prior to reforms in the eighteenth century prisons could house entire families, mainly debtors.[47] With ordered Victorian regimes isolated prisoners from their families. Access to prisoner's family members became a privilege and not a right. Prisoners existed in a separate social space, a *total institution,* as highlighted by Goffman.[48]

Becoming a parent is extremely difficult for prisoners in both England and Wales and the USA. Prisoners in England and Wales are prohibited from having sexual intercourse with their partners. They can however request permission to access artificial insemination (AI) facilities, to enable them to become parents without the need to have sexual intercourse, which may be granted in a few

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[45] Her Majesty's Chief Inspector of Prisons has noted how poor some prison conditions continue to be seen in routine prison inspections, with budget cuts impacting upon access to meaningful activities and courses for prisoners. See HM Chief Inspector of Prisons for England and Wales, *Annual Report* 2010-2011 (The Stationary Office, 2011) 30; Prison Reform Trust, 'New Prison App reveals major challenges to rehabilitating our penal system' (Prison Reform Trust 4 July 2013). http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/191 accessed 29 Jan 2015. US Federal Prisons have suffered from increases in prison population, with Federal prisons operating at an average of 30% over capacity. This has lead prisons to pay state institutions to incarcerate federal offenders, which now accounts for more of the Bureau of Prison's budget than the amount spent on care for prisoners. Nathan Jones, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (Congressional Research Service, 2014) 20, 23. The Bureau of Prisons also employs fewer corrections officers than it requires according to a 2010 Government Accountability Office report due to the increased financial requirements of providing for prisoners medical and living requirements. United States Government Accountability Office, *Bureau Of Prisons*, *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* (GAO-12-743, Washington, 2012) 23 <http://www.gao.gov/assets/650/648123.pdf >accessed 10 July 2015.

[46] Edward W Sieh, 'Less Eligibility: Upper Limits of Penal Policy' (1989) 3 CJPR 159, 173.

[47] Randall McGowan, 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 73.

[48] Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961) xiii.

limited circumstances.[49] Prohibiting prisoners from having sexual intercourse makes them reliant upon the assistance of the state to conceive. Within the USA, access to conjugal or private visits depends upon whether they are in a state jail or a federal prison. Access to private visits between partners is restricted to the three states that currently allow this as a privilege for selected prisoners.[50] Federal prisoners are not permitted private visits.[51] Access to AI treatment was eventually denied to the prisoners in *Goodwin*, *Percy* and *Gerber*. The prohibition on AI does not appear as restrictive as these cases would suggest however. Last year, Gerardo Hernandez, a Cuban spy incarcerated within the US federal prison system was granted permission to provide a semen sample so that his wife Adriana Perez, still resident in Cuba could become pregnant.[52] It appears that the request was allowed because of petitioning from US diplomats and because it was part of a larger political deal to release Cuban prisoners from the US in exchange for US prisoners.[53] For much less high profile and politically important prisoners however, the current case law and the restrictive Prison Litigation Reform Act, approval for AI is still highly unlikely.[54]

Central to this thesis, and to the cases is the scope and purpose of punishment and more specifically, the punishment of imprisonment. Punishment is given to individual offenders because they have committed a crime. The

[49] Freedom of Information Request Reply to Author from the Ministry of Justice (29 July 2011) (Appendix). The Howard League for Penal Reform found in their Commission on Sex In Prison that prisoners themselves report having had both consensual sexual relationships and coercive sexual encounters whilst in prison. Alisa Stevens, *Sex in prison: Experiences of former prisoners* (Howard League for Penal Reform, 2015) 1.
[50] See footnote 1.
[51] The Federal Bureau of Prisons, 'General Visiting Information' (*Federal Bureau of Prisons*) http://www.bop.gov/inmates/visiting.jsp accessed 2 February 2015.
[52] Anonymous, 'US jail sent Cuban prisoner's sperm to wife in Havana' (*The Telegraph,* 23 December 2014) http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/cuba/11309576/US-jail-sent-Cuban-prisoners-sperm-to-wife-in-Havana.html accessed 15 July 2015.
[53] ibid.
[54] Prison Litigation Reform Act 1996: United States Code Title 42 s1997e Suits by Prisoners.

offender receives an appropriate punishment to redress the balance.[55] The institution of punishment itself is justified for many reasons, to exact retribution for the crime and to deter potential offenders.[56] Imprisonment remains the most serious of a range of available punishments at the disposal of the courts in England and Wales and one of the most serious in most states of the USA. The purpose of a prison sentence is therefore to deter and punish, but also has the associated aims of protecting the public and rehabilitating the offender. These are not justifications for punishment in general, but are justifications for the specific use of imprisonment as a method of punishment. The thesis will examine whether there is any basis for the restriction of access to AI facilities, to explain why it is seen as a part of the punishment of prisoners in England and Wales and the USA but not in other countries. Public perception of punishment and the need to be *seen* to be punishing effectively was considered of great importance by the court in *Mellor* and *Dickson*.[57] This ties in with ideas of public punitiveness and may provide some explanation over why imprisonment often means far more restrictions than just the removal of liberty. The effects of increased public punitiveness on prisoner's rights are relevant to prisoners having children, as these attitudes affect the conditions in which prisoners are kept and whether they are allowed by the authorities to start a family. Any increase in rights given to prisoners has the potential to be controversial, and is seen as a politically unpopular move.[58] Public punitiveness taps into what Garland terms the

[55] Immanuel Kant, *Metaphysical Elements of Justice: The Complete Text of The Metaphysics of Morals, Part 1* (Tr John Ladd, Hackett Publishing Company, 1999) 138.
[56] Herbert Lionel Adolphus Hart, 'Prolegomenon to the Principles of Punishment' in Robert M Baird, Stuart E Rosenbaum, (eds) *Philosophy of Punishment* (Prometheus Books, 1988) 16.
[57] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [65]; *Dickson and Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department* [2004] EWCA Civ 1477 [20].
[58] Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing', in C. Clarkson

'criminology of the other.' Some criminals are seen by society as so intrinsically evil that they cannot be defined or understood:

> 'Being intrinsically evil or wicked, some offenders are not like us. They are dangerous others...The appropriate reaction for society is one of self-defence: we should defend ourselves against these dangerous enemies rather than concern ourselves with their welfare and prospects for rehabilitation.'[59]

If prisoners are viewed as 'other' and irredeemable, then attempting to rehabilitate the offender is seen as pointless. Imprisonment becomes a method of warehousing and containment of those who are to be separated from society, with the potential to humiliate and degrade the offender. In contrast with this, is another approach that views the main punishment of imprisonment as the removal of liberty. Any interference with the rights of prisoners should be justified and done on a case-by-case basis.[60] In a similar vein, Richardson argues for a minimalist approach to imprisonment.[61] Regardless of the aims of imprisonment, the imprisonment itself justifies 'only the removal of those rights necessarily affected by the need to segregate, or more specifically by the need to maintain security and control.'[62] It should be enough to punish the offender simply by removing them from society. This is the approach of the Swedish penal system,

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and Rod Morgan (eds) *The Politics of Sentencing Reform* (Clarendon Press, 1995). For a discussion of how populist punitiveness can affect political decision making with regards to penal policy. For an investigation of why some members of society support harsh sentencing and punishment see Shadd Maruna, Ann King, 'Once a Criminal, Always a Criminal?: "Redeemability" and the Psychology of Punitive Public Attitudes' (2009) 15 Eur J Crim Policy Res 7. The authors identified four underlying theories of people's beliefs in crime causation and redeemability, in opposition to the classical two views held about crime being a choice (classical theory) or due to external forces and pressures (positivist theory). A total of 941 participants responded. One particular group of 232 participants, were extremely punitive, believing that 'crime is always a choice' but that criminals cannot be rehabilitated, they are in effect criminal for life.

[59] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 184.

[60] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 68.

[61] Genevra Richardson, 'From Rights to Expectations' in Elaine Player and Michael Jenkins (eds) *Prisons After Woolf: Reform through Riot* (Routledge 1994) 78.

[62] ibid.

which states that the removal of liberty is the actual punishment, coercive and punitive measures are the minimum necessary to achieve penal aims and maintain good order.[63]

Allowing prisoners to have children can be seen as a balancing act between several different competing factors. The ability to have a child is central to an individual's right to self-determination and autonomy.[64] Interference with the ability to have a child can impinge greatly upon a person's quality of life.[65] There are also the rights of the putative child to consider and whether the potential lower quality of life experienced by the children of offenders would justify a general restriction of the ability to procreate. There is a large literature on prisoners and the effects of imprisonment on their ability to parent.[66] Whereas the privacy and autonomy afforded to individuals in free society is high, prisoners have to subject the normally private decision of when to become a parent to public scrutiny. Prisons in both the USA and England and Wales also vary greatly

[63] Act on Imprisonment Swedish Penal Code 2010:610 (English Translation) Section 6 (*Kriminalvardan,* 2010) https://www.kriminalvarden.se/globalassets/om_oss/lagar/fangelselagen-engelska.pdf accessed 2 July 2015.
Enforcement may not entail limitations of the prisoner's liberty other than those that follow from this Act or are necessary to maintain good order or security.'

[64] John Harris, 'Rights and Reproductive Choice' in John Harris, Søren Holm (eds) *The Future of Human Reproduction: Ethics, Choice and Regulation* (Clarendon Press, 2000) 36.

[65] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, Oxford 2001) 7.

[66] For a specific examination of women prisoners and parenting in prison see Sandra Enos, *Mothering from the Inside: Parenting Inside a Women's Prison* (State University of New York Press, 2001). Pat Carlen examines how women in prison respond to their imprisonment and the effects of a prison sentence on family relationships. She also interviews people who work within the criminal justice system and explores what effects the status of 'mother' can have upon the sentencing and treatment of women offenders. Pat Carlen, *Women's Imprisonment: A Study in Social Control* (Routledge and Keegan Paul, 1983) Other studies touch upon the impact of incarceration upon parenting while a male partner is in prison; for example Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2007). Ben Crewe's prison ethnography *The Prisoner Society: Power, Adaptation and Social Life in an English Prison* (Oxford University Press, 2009) touches upon family relationships from the male prisoner's perspective. Research carried out by Ormiston and Cambridge University examined imprisonment and family relationships from the perspectives of the male prisoner, their partner and their children. See Friedrich Lösel, Gill Pugh, Lucy Markson, Karen A. Souza, Caroline Lanskey, *Risk and protective factors in the resettlement of imprisoned fathers with their families: Final Report January 2012* (Final Report, University of Cambridge and Ormiston, 2012).

in what provision is given to prisoners who are already pregnant and who are already parents. Prison and government officials make assumptions about how male and female prisoners should be given access to their families. Prisoners' access to their families is often used a tool to control their behaviour through incentive schemes.[67] Gendered notions about the importance of the maternal and unimportance of the paternal relationships are also evident in penal policy in both England and Wales and the USA. The provision of Mother and Baby Unit (MBU) places in England and Wales and in some US prisons is seen as vital as developing a bond between mother and infant is thought to reduce offending on release and promote proper infant attachment.[68] On the other hand, access to enhanced family visits is seen as a privilege to be earned by male prisoners, and no such unit exists which allows a prisoner's children to live with their father, even if he was the sole carer prior to imprisonment.[69] In contrast to this, Sweden allows both male and female prisoners to have their babies with them in prison, so long as it is in the best interest of the child.[70] Imprisonment does not have to be a barrier to parenthood. Whilst prison undoubtedly affects the children of offenders greatly, many measures can be taken to ameliorate the negative effects of

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[67] Alice Diver, The 'Earned Privilege' of Family Contact in Northern Ireland: Judicial Justification of Prisoners' Loss of Family Life' (2008) 47 How J 486.

[68] Guidelines for Mother and Baby Units are highlighted in National Offender Management Service, *Prison Service Instruction 49/2014 Mother & Baby Units* (NOMS, 2014). The importance of Mother and Baby Units (MBU) is outlined in research by Mary W. Byrne, Lorie Goshin, Barbara Blanchard-Lewis, 'Maternal Separations During the Reentry Years For 100 Infants Raised in a Prison Nursery' (2012) 50 Fam Court R 77.

[69] The National Offender Management Service views women prisoners' family visits of vital importance in maintaining links with their children, and should not be linked to incentive schemes. See HM Prison Service, *Prison Service Order 4800 Women Prisoners* (HM Prison Service, 2008) 17. This contradicts the Incentives and Earned Privileges Scheme framework which that states that prisoners who progress to enhanced level can gain access to longer and more frequent family visits. See National Offender Management Service, *Prison Service Instruction 30/2013 Incentives and Earned Privileges* (National Offender Management Service, 2015) 9.5.

[70] Act on Imprisonment Swedish Penal Code 2010:610 (English Translation) Authorisation to have an infant in prison Section 5 (*Kriminalvardan,* 2010) https://www.kriminalvarden.se/globalassets/om_oss/lagar/fangelselagen-engelska.pdf accessed 2 July 2015.

imprisonment. Schemes that are used to help existing prisoner parents to maintain a relationship with their children could also be extended to those who wish to become parents, which in turn would foster better relationships with their families and may reduce reoffending.[71]

[71] Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721.

Human Rights

The legal framework that governs prisoners' access to procreation is centred on the concept of human rights. Donnelly states that human rights are 'literally the rights one has simply because one is a human being.'[72] Some rights, such as the right to life are inalienable and absolute. No qualifications can be placed upon honouring them. In contrast, some authors would argue that the right to reproduce is a qualified right, which could be subject to limitations if necessary.[73]

Human rights are seen as moral rights, which have later become recognised as legal rights both nationally and internationally. A general 'liberal' approach to rights is one taken by authors such as Dworkin, Rawls and Fenwick.[74] The basis of the liberal approach to rights is the social contract, which exists between the individual and the state.[75] One of the first authors to conceive of an actual social contract was Locke, who argued that humankind originally existed in a state of total liberty, but that life was precarious and dangerous.[76] To protect the interests of the majority, citizens handed over certain powers of theirs to the state (such as the power to coerce) in return for state protection of their interests. The concept of a 'social contract' existing between the state and the individual has been adopted by both Rawls and Dworkin, with some differences. In Rawls' view,

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[72] Jack Donnelly, *Universal Human Rights in Theory & Practice* (2 edn, Cornell University Press, 2003) 7.
[73] The right to a private and family life protected by Article 8(1) of the ECHR is a qualified right which can be restricted if required under Article 8(2) in order to protect the public's safety, security, economic well-being of the country or for the protection of health or morals. See Human Rights Act 1998, Sch 1 Art 8(1), 8(2).
[74] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 2-4; Helen Fenwick, *Civil Liberties and Human Rights* (4 edn, Routledge Cavendish, 2007) 6-12; John Rawls, *A Theory of Justice* (Oxford University Press, 1973, 1978 reprint) 11-15.
[75] Helen Fenwick, *Civil Liberties and Human Rights* (4 edn, Routledge Cavendish, 2007) 6-8.
[76] John Locke, *The Second Treatise of Government* (Hackett Publishing Company, 1690, 1980)

the social contract is a hypothetical one, not an actual one. Each citizen makes decisions behind 'a veil of ignorance.' Therefore, because the hypothetical citizen has no conception of what their future role will be in society they taken an approach of tolerance. This leads to the first principle, which is that 'each person is to have an equal right to the most extensive, total system of equal basic liberties compatible with a similar system of liberty for all.'[77] Dworkin, on the other hand, adopts the view that the contract between the state and the individual is an actual contract, in which the interests of the majority are protected by the state.[78] Dworkin does not feel that majority interests have to be protected by being labelled as 'rights', as the democratic process should protect the interests of the majority. What is of more importance is that minority rights are protected, which would not otherwise be protected by any democratic process. This protection arises from the standpoint that states are under an obligation to treat each citizen 'with equal concern and respect'.[79] As such, the validity of rights is therefore not tested democratically as this could lead to them being undermined and thus minority interests would not be adequately protected.

Under this liberal definition of rights, one must be considered to be a citizen to have full recognition of their rights. Who is accepted as a citizen is often a contested point: some countries view those without the right to hold a passport of that country as a 'non-citizen'.[80] The minority groups that Dworkin is concerned about protecting are considered full citizens. These are often not democratically represented. Prisoners, as a vulnerable minority group should be

[77] John Rawls, *A Theory of Justice* (Oxford University Press, 1973, 1978 reprint) 11-15.
[78] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 2-4.
[79] ibid. See also Helen Fenwick, *Civil Liberties and Human Rights* (4 edn, Routledge Cavendish, 2007) 7.
[80] Davis Weissbrodt, *The Human Rights of Non-citizens* (E-book, Oxford University Press, 2009) 20.

included in this definition. This 'social contractarian' approach also implies the imposition of obligations, like any contract.[81] The terms and conditions of the social contract create an obligation upon the state to respect all citizens equally and to look after the interests of all citizens. Through the organs of the state, the individual is supposed to be protected from unjust interference and harm from other individuals. In return for this protection, the individual cedes their coercive power to the state, which is exercised on their behalf by the criminal justice system and legal processes. The individual is obliged to adhere to the laws of the state and respect the authority of the state, or face the judicial consequences.

Positive and Negative Rights

Human rights can be classified as either 'negative' or 'positive'.[82] Whether a right is 'negative' or 'positive' has a bearing on the obligations that the state has regarding that right. How far that responsibility extends also depends upon the individual right in question, and how 'fundamental' the right in question is within the overall hierarchy of rights. To take one example, under the ECHR framework, Article 2, the right to life, and Article 3, the right to remain free of inhuman and degrading treatment, are fundamental rights. The state is under a positive obligation to ensure that they are respected under all circumstances.[83] This means that the state has to intervene and positively assist in preventing any individuals suffering from the loss of a positive right. Other rights may be seen as 'negative' in the sense that the state does not have to positively promote a particular right for the individual, but rather has to ensure that they do not unjustly interfere with that right. The right to a private and family life as well as the right

[81] Helen Fenwick, *Civil Liberties and Human Rights* (4 edn, Routledge Cavendish, 2007) 6.
[82] John Finnis, *Natural Law and Human Rights* (2 edn, Oxford University Press, 2011) 205.
[83] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 2, Art 3.

to found a family have been identified as a 'negative rights' in the sense that the state is not under a positive duty to provide people with the means to have children. The state must refrain from interfering with an individual's ability to either have children or get married unless they have a justified reason.[84] For example, a person may claim that their rights have been infringed unjustly if they are forcibly sterilised against their will and so are unable to have children. If a law prevented couples from marrying because they both had the same hair colour, for example, then that couple could claim their right to marry and found a family had been unjustly interfered with by the state. This does not however impose a positive obligation upon a state to provide free fertility treatment to anyone who wants a child. In the case of prisoners, this distinction becomes extremely problematic. Prisoners are dependants of the state who require assistance to procreate because of the blanket prohibition on sexual relationships. Some authors argue that the line between positive and negative rights is far from clear. Donnelly, citing Shue, states that the distinction between negative and positive rights 'is of little moral significance and in any case fails to correspond to the distinction between civil and political rights and economic and social rights.'[85] One example is the prohibition on states torturing their subjects. Whilst this is characterised as a negative right, Donnelly argues that this particular right requires a great deal of state intervention, and so is in fact a positive duty.[86] However, it is inaccurate to state that in practice this distinction is irrelevant. In the case of prisoners, it makes a significant difference in the provision of reproductive rights. If a prisoner in

[84] Archard characterises reproduction as a negative right, in that there is no 'general right' to have children that compels the state to treat the infertile or allocate each wanting couple a child. David Archard, *Children: Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 137.
[85] Jack Donnelly, *Universal Human Rights in Theory & Practice* (2 edn, Cornell University Press, 2003) 30.
[86] ibid.

England and Wales wants to have children then they require some positive action on the part of the state, whether it is the provision of a quiet room for a male prisoner to produce a sperm sample, or access to medical facilities to allow a female prisoner to become pregnant. It is far simpler to characterise the right to beget children as a negative right if prisoners are given the opportunity to have sexual intercourse with a partner of their choice. In this situation, all the authorities would be required to do is refrain from enforcing compulsory contraception and ensure that conjugal visits were not excessively restricted to certain times, in order that prisoners could time their intercourse with ovulation. No positive assistance would be required from the prison services. Arguably they would not be required to provide fertility treatment to prisoners either.[87]

Autonomy, Privacy and Human Rights

Human rights are not enforced passively. They assume a level of agency and autonomy in the rights holder, which is especially important when considering prisoners, who are often subject to regimes that seek to reduce their individual autonomy and agency.[88] As Donnelly argues, a human right creates a special type of claim which in turn creates a 'right-holder' known as A and a 'duty-bearer' known as B.[89] So, if A is entitled to a right, and B violates A's entitlement to the right, a human-rights framework provides for a way of A to

[87] However, there may be another argument, which would require the state to provide fertility treatment as a requirement to provide equivalent healthcare to that enjoyed by free citizens.
[88] Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011). Some prison regimes also seek to make prisoners responsible for their own rehabilitation by creating the false illusion to prisoners that they have the ability and power to control their own rehabilitation, even when they have no control over their environment or lack of resources. Research by Bosworth of prison handbooks shows that in comparison to the 1960s and 1970s to the 2000's, modern handbooks emphasise the role of the individual and de-emphasise the role of the prison authorities. Expensive specialist psychological support has been reduced in favour of 'self-help.' It assumes prisoners have autonomy to make the correct choices. See Mary Bosworth, 'Creating the responsible prisoner: Federal admission and orientation packs' (2007) 9 Punishment & Society 67.
[89] Jack Donnelly, *Universal Human Rights in Theory & Practice* (2nd edn, Cornell University Press, 2003) 8.

enforce that right, to make B fulfil his duties. However, A is required to enforce her rights actively. Human rights 'empower, not just benefit.' Rights are generally only recognised and discussed when they are in jeopardy, and active enforcement is required.[90] A liberal approach to rights, such that set out by Dworkin, has a strong political tradition of respecting individual autonomy. The individual is respected as being the best placed to make decisions about their own life, although this right is subject to some limits to ensure equal respect for others autonomy.[91]

Eugenics: Control of Offender's Fertility and Modern Biological Criminology.

The term 'eugenics' was first coined by Francis Galton in the late nineteenth century to describe the 'scientific' development which aimed to improve the qualities of future generations of human populations through the use of policies which encouraged those with desirable qualities to have more children, whilst preventing those who were seen to 'weaken' the race from procreating.[92] These ideas, abhorrent to most modern sensibilities, were taken to their deadly extreme in Nazi Germany, where millions of people deemed racially inferior were murdered in state controlled and state organised genocide. Thousands of people with mental or physical abnormalities were also sterilised, murdered and experimented on.[93] Prisoners incarcerated in regular prisons were also sterilised, although this was justified as a punishment rather than for entirely eugenic

[90] ibid.
[91] ibid 47.
[92] Francis Galton, *Inquiries into Human Faculty and its Development* (Everyman, 1907, 1st electronic corrected edition, ed Gavan Tredoux, 2001).
[93] Tessa Chelouche, 'Doctors, Pregnancy, Childbirth and Abortion during the Third Reich' (2007) 9 Israeli Med Assoc J 202.

reasons.[94] Those prisoners who were deemed 'criminally insane' were killed in the 'euthanasia' programme T4 started in 1939.[95] Prior to the atrocities committed in Nazi Germany, many leading politicians and thinkers of the time saw eugenics policies as a legitimate aim. As Kevles states 'Eugenics was not therefore unique to the Nazis. It could, and did, happen everywhere.'[96] Eugenic sterilisation programmes spread to the USA, Britain, Canada and Scandinavia, and were generally targeted at those who had learning disabilities, so-called 'feebleminded' individuals.[97] Dikötter argues that 'eugenics was a fundamental aspect of some of the most important cultural and social movements of the twentieth century.' It had widespread appeal to many individuals in the first part of the twentieth century. Eugenics continues to have an influence in other parts of the world. In 1994, China passed a law that allows doctors to counsel a mother who is pregnant to have an abortion at any gestational age if it is identified as carrying a physical defect, or if the mother herself is mentally or physically disabled.[98] If a person with a mental illness, learning disability or physical problem wishes to get married, then they are 'encouraged' by doctors to be sterilised.[99] In other countries, eugenics theory and biological criminology continues to have a minor influence in the development of genetic approaches to criminology.[100] In the

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[94] Stefan Kuhl, *The Nazi Connection Eugenics: American Racism and German National Socialism* (Oxford University Press, 2002); Nicole Rafter, 'Criminology's Darkest Hour: Biocriminology in Nazi Germany (2008) 41 Aust & New Zel J Criminology 287.
[95] Nicole Rafter 'Criminology's Darkest Hour: Biocriminology in Nazi Germany 41 (2008) 2 Aust & New Zel J Criminology 287, 298.
[96] Daniel J Kevles, 'Eugenics and human rights' (1999) BMJ 435.
[97] In the USA, between 1927 and 1957, 60,000 Americans who were deemed 'feebleminded' or insane were sterilised. See Anna Stubblefield, ' "Beyond the Pale": Tainted Whiteness, Cognitive Disability, and Eugenic Sterilization' 2 (2007) 22 Hypatia 162. In Sweden, between 1935 and 1975, 63,000 people were sterilized. There were similar laws in operation in Denmark and Norway. See Gunnar Borberg, Nils Roll- Hansen, *Eugenics and the Welfare State: Norway, Sweden, Denmark and Finland* (2 edn, Michigan State University Press, 2005) ix.
[98] Veronica Pearson, 'Population Policy and Eugenics in China' (1995) 167 BJP 1.
[99] ibid.
[100] Nicole Hahn Rafter, *Creating Born Criminals* (University of Illinois Press, 1997) 237; *The*

following sections, the historical context and influence of eugenics will be explored in relation to England and Wales and the USA, and how the conception of the criminal 'other' continues to be played out in current debates surrounding prisoner procreation.

Development of the Eugenics Movement in the UK

As well as the writings of Galton, other authors such as Rentoul and Chappel also wrote about what they perceived to be the great 'social problem' of the deterioration of the British race.[101] Data for these claims came from the Army Medical Department, the Commissioners in Lunacy, and the Prison Commission, as well as family case studies.[102] Eugenics married two different fields of study, the study of the 'genetic' transmission of human characteristics from one generation to the next, and a 'biometric method' of studying phenomena that occurs in nature and biology, which is analysed using statistical methods.[103] Eugenics theory itself has two components, 'positive eugenics', where those of 'superior stock' are encouraged to reproduce, and 'negative eugenics' where those who have 'inferior racial qualities' are prevented from procreating.[104] Galton and others were concerned about the degeneration of urban society because of the perceived uncontrolled fertility of the unproductive criminal and pauper classes.[105] Rather than being a marginal interest group, the Eugenics Education Society, which was formed in 1907, had 1,047 members by 1914. [106] Paul also

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Criminal Brain: Understanding Biological Theories of Crime (New York University Press, 1998) 8.

[101] David Garland, *Punishment and Welfare: a History of Penal Strategies* (Gower 1985) 143.

[102] ibid.

[103] ibid 145.

[104] Nicole Rafter, 'Criminology's Darkest Hour: Biocriminology in Nazi Germany 41 (2008) 2 Aust & New Zel J Criminology 287, 293.

[105] David Garland, *Punishment and Welfare: a History of Penal Strategies* (Gower 1985) 143.

[106] David Garland lists several influential people who were members of the British Eugenics Society, including George Bernard Shaw, Beatrice and Sidney Webb, Dr Barnardo, and William

notes that eugenics was supported by all political persuasions; both the political left as well as the more conservative right wing were supporters. Eugenists adopted the idea of 'Social Darwinism' a theory that emphasised leaving society to its natural devices to ensure the 'strongest' members of society win out over the 'weaker' members.[107] Under this approach, welfare would not be provided to those unable to work. Instead, they would starve leaving 'ineffective' and weaker members of society to naturally die out. One key implication noted by eugenists was the inherent futility of trying to treat or rehabilitate those who were classed as mentally defective. This was in contrast to psychiatrists and criminologists, both of whom saw rehabilitation as important.[108] Eugenists such as Leonard Darwin were convinced that some individuals had an inherited disposition to criminality.[109] He refers to them as 'weak, stupid or otherwise worthless' and stated that they should be prevented from having children.[110]

Unlike the USA, England and Wales did not pass any formal legislation requiring the sterilisation of prisoners, the learning disabled or mentally ill. There were attempts to put eugenic measures within the Mental Deficiency Act 1913. Some supporters of the Mental Deficiency Act wanted powers to sterilise anyone certified by two doctors as 'mentally defective.'[111] Whilst the Act did not mandate

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Beverage. David Garland, *Punishment and Welfare: a History of Penal Strategies* (Gower, 1985) 150. See also Victoria Brignell, 'The eugenics movement Britain wants to forget' (*New Statesman*, 9 December 2010) http://www.newstatesman.com/society/2010/12/british-eugenics-disabled accessed 16 July 2015. It is worth noting that the Eugenics Education Society continues to exist today under the name The Galton Institute. The Galton Institute has a wider remit than the EES did, covering contraception access, abortion access, and the study of genetics and human sexuality. See Galton Institute, 'About Us' (*Galton Institute*) <http://www.galtoninstitute.org.uk/about.htm> (accessed 3 July 2015).

[107] Diane Paul, 'Eugenics and the Left' (1984) 45 J Hist Ideas 567, 568.

[108] David Garland, *Punishment and Welfare: a History of Penal Strategies* (Gower, 1985) 152.

[109] Leonard Darwin, 'The Habitual Criminal' (1914) 6 Eugenics Rev 204, 210.

[110] ibid 212.

[111] Theo Hyslop, 'The Mental Deficiency Bill, 1912 : A discussion on the legislative proposals for the Care and Control of the Mentally Defective, opened by Dr. Theo Hyslop at the Annual Meeting of the Medico-Psychological Association held at Gloucester on July 12th1912' (1912) 58

forcible sterilisation, it did provide for individuals to be forcibly confined for life or placed under the care of a guardian.[112] This effectively prevented them from associating freely with others and thus prevented them from procreating. As well as those who were considered mentally defective, there was another category of interest, that of the 'moral imbecile' who were defined as those who 'display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.'[113] Walmsley states that women in particular were policed by this system and the legislation was used to control women's sexual behaviour.[114] Women who had illegitimate children in some cases were classified as mentally defective and placed in institutions.[115] The law itself remained in place until 1959.[116]

The Development of the Eugenics Movement in the USA

'The direct effect of industrial training is to curb licentiousness… In this way the log huts and hovels which now form hot-beds where human maggots are spawned, will disappear.'[117]

In nineteenth century America, many viewed poverty as the result of personal weakness. The 'feckless poor' did not possess the virtues of sexual restraint, economy, and thrift, which resulted in them producing more children than they could cope with. If these 'human maggots' survived their brutal childhoods, they themselves would then give birth to more children in dire poverty. Eugenic ideals thrived in this climate of 'alarm about the spread of

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BJP 548, 555
[112] Mental Deficiency Act 1913 S2(1)
[113] Jan Walmsley, 'Women and the Mental Deficiency Act of 1913: citizenship, sexuality and regulation' (2000) 28 Brit J Learning Disabilities 65.
[114] ibid.
[115] ibid.
[116] ibid.
[117] Richard L Dugdale, *The Jukes: A Study in Crime, Pauperism, Disease and Heredity* (4th edn reprint (from 1910), Arno Press 1970 Digitised by the Internet Archive 2007) 61.

poverty'.[118] Dugdale, and his supporters, including Josephine Shaw Lowell, recommended the indefinite incarceration and industrial training of the 'feeble-minded' criminal.[119] By incarcerating those who were deemed 'inferior stock' and preventing them from procreating, it was thought that the birth of future generations of 'imbeciles' and 'feeble-minded' state dependants could be prevented.[120] Some eugenists saw feeble-minded individuals as possessing an excessive sexuality, others saw them as merely lacking the necessary inhibition to act as a rein on excessive lust.[121] As well as controlling the ability of 'undesirable' people to reproduce, sterilisation of these individuals was mistakenly seen as a cure for excessive sexual urges.[122] Rafter states that Lowell instigated one of the first American eugenics campaigns of the late nineteenth century. [123] Incarceration of feeble-minded women became a 'fashionable cause' in late nineteenth century.[124] The publication of books such as Darwin's *The Origin of Species* in 1859 created interest in selective breeding. Science was beginning to provide answers to public health problems and people sought answers in science to the social problems of poverty and crime.[125] Eugenics and the

[118] Nicole H Rafter, 'Claims-Making and Socio-Cultural Context in the First U.S. Eugenics Campaign' (1992) 39 Social Problems 17, 20.
[119] Nicole H Rafter, 'Claims-Making and Socio-Cultural Context in the First U.S. Eugenics Campaign' (1992) 39 Social Problems 17; Nicole H Rafter *Creating Born Criminals* (University of Illinois Press, 1997) 55. Josephine Shaw Lowell was the instigator of the first US eugenics campaign, founding the Newark Custodial Asylum, the primary aim of which was to incarcerate feeble-minded women and prevent them from reproducing.
[120] ibid.
[121] Kevles notes that the trustees of the New York state Custodial Asylum for Feeble-minded Women stated that their patients gave in easily to lust. Henry Goddard noted that feeble-minded people were not overly sexualised but lacked inhibition. Daniel J Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (Alfred A Knopf, 1985) 107.
[122] ibid 108.
[123] Nicole H Rafter, 'Claims-Making and Socio-Cultural Context in the First U.S. Eugenics Campaign' (1992) 39 Social Problems 17.
[124] Nicole H Rafter, *Creating Born Criminals* (University of Illinois Press, 1997) 55.
[125] Leslie Clarence Dunn, 'Cross Currents in the History of Human Genetics' (1962) 14 Am J Human Genetics 1, 3-4; Paul A Lombardo, 'Taking Eugenics Seriously: Three Generations of ??? are Enough?' (2002) 30 Florida State Uni L R 191.

professionalisation of those caring for the learning disabled became part of a 'scientific custodialism': the incarceration of the mentally disabled to ensure that they could not reproduce.[126] Lowell and others primarily targeted women, criminalising their body and status as 'feeble-minded' women, not their actions.[127] Differentiation was used by the eugenists to justify their position of authority, an authority over those deemed 'feeble-minded' and 'idiotic'. They portrayed themselves as altruistic and at the service of society.[128] The learning disabled were not separated from the 'born criminal' in this analysis, but were part of a larger category of degenerates.[129]

Over time, these eugenic theories took hold, and were used to develop laws and policies relating to the treatment of both criminals and those with learning disabilities. Twenty-nine US states passed laws permitting the sterilisation of those who were deemed mentally deficient, epileptics, and some criminals.[130] The sterilisation of criminals was only ruled unconstitutional in 1942 in *Skinner v Oklahoma*.[131] As Lombardo states: 'The most powerful vehicle of the eugenic ideology was the law.'[132] There were over 100 pieces of legislation drafted and passed at the state level in the USA between 1900 and 1970.[133] Between 1927 and 1967, the Supreme Court adjudicated the legality of three statutes based on eugenic principles.[134] The case of *Buck v Bell* confirmed the

[126] Nicole H Rafter, *Creating Born Criminals* (University of Illinois Press, 1997) 62.
[127] ibid 88.
[128] ibid 89.
[129] ibid 90.
[113] Katherine Castles, 'Quiet Eugenics: Sterilization in North Carolina's Institutions for the Mentally Retarded, 1945-1965' (2002) Vol LXVIII J Southern History 849, 850.
[131] Nicole H Rafter, *Creating Born Criminals* (University of Illinois Press, 1997) 56.
[132] Paul A Lombardo, 'Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom' (1996) 13 J Contemp Health L & Pol'y 1.
[133] ibid 1.
[134] ibid 2.

legality of sterilising learning disabled people against their will.[135] *Skinner v Oklahoma* stated that it was illegal to sterilise habitual offenders against their will.[136] The case of *Loving v Virginia* overturned state anti-miscegenation laws.[137]

Of these three cases, *Buck v Bell* demonstrated the legal and political rationale behind the enactment of laws such as the Virginia Sterilization Act of 1924.[138] Initially, the Colony Board (based at the Colony of Epileptics and Feeble Minded, in Virginia) approved patients selected for sterilisation without any formal legal processes. Mainly women were selected for sterilisation prior to their release in the community, often to work in domestic service.[139] They were subjected to a bilateral salpingectomy, which is removal of both fallopian tubes, rendering the woman infertile. On occasion, men were sterilised by vasectomy, and in some instances they were castrated.[140] These surgical operations continued unchecked until the case of *Mallory v Priddy* in 1916.[141] Following the arrest of Willie Mallory and her two eldest daughters, they were removed to the Colony where Willie and her daughter Jessie were sterilised.[142] Mr Mallory submitted a claim for damages on behalf of Willie Mallory, for being deprived of her liberty against her will, for being sterilised against her wishes and for being forced to

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[135] (1927) 274 US 200.
[136] (1942) 316 US 535.
[137] (1967) 388 US 1.
[138] Paul A Lombardo, 'Three Generations, No Imbeciles: New Light on Buck v Bell' (1985) 60 NYUL Rev 30, 54.
[139] ibid 37.
[140] ibid 38. Lombardo notes that in 1916 the Colony Board approved the castration of two 'feebleminded men' who were thought to be a danger to women if they absconded. This demonstrates one of the links made between learning disability and criminality, and how criminality was thought to be controllable by orchidectomy.
[141] George Mallory, a sawyer, worked away from home. His wife Willie and eight children lived with him. On occasion, his wife and eldest daughter worked to supplement the family income. One evening when he was away, the police arrested the entire family, along with two male visitors. Mrs Mallory was charged with keeping a 'disorderly house.' Paul A Lombardo, 'Three Generations, No Imbeciles: New Light on Buck v Bell' (1985) 60 NYUL Rev 30, 41.
[142] ibid 41, 42.

work for no pay. Dr Priddy denied all of these charges, in turn claiming that Mrs Mallory was deficient and immoral.[143] The jury accepted that Dr Priddy operated under 'therapeutic necessity', but the judge warned Priddy that legal authority would be required for further operations.[144] Thus, once the sterilisation of Carrie Buck was approved in court, following the later case of *Buck v Bell*, legal sanctioning for the sterilisation of the learning disabled and mentally ill was confirmed.[145] Mr. Justice Holmes stated that Carrie Buck would potentially have 'socially inadequate offspring' and thus 'she may be sexually sterilized without general detriment to her general health and that her welfare and that of society will be promoted by her sterilization.'[146] His judgement shows the extreme bigotry of the time, and the generally held view that sterilisation was a justifiable procedure to prevent future criminality and thus future state dependents from being born. This was confirmed in the final part of the short judgment: 'It is better for all the world, if instead of waiting to execute degenerate offspring for crime...society can prevent those who are manifestly unfit from continuing their kind...Three generations of imbeciles are enough.'[147]

The most directly relevant case law relating to prisoner procreation and eugenics is *Skinner v Oklahoma.*[148] Under the broad terms of the Sterilization of

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[143] ibid 42.
[144] Paul A Lombardo, 'Medicine, Eugenics and the Supreme Court: From Coercive Sterilization to Reproductive Freedom' (1996) 13 J Contemp Health L 7 Policy 9.
[145] ibid. It is important to note at her trial, Irving Whitehead, a former Colony director and a friend of the attorney representing Dr Priddy, represented Carrie Buck. He was a long-time supporter of eugenics and provided an inadequate defence of Carrie's interests in court. See also Paul A Lombardo 'Three Generation, No Imbeciles: New Light on Buck v Bell' (1985) 60 NYUL Rev 30, 51.
[146] *Buck v Bell* 274 US 200 (1927) 207.
[147] ibid. It is also vital to remember that sterilisations of the learning disabled continued well beyond the 1930s in other states. The Eugenics Board of North Carolina, for example, which formed in 1933 and decided who was to be sterilised for eugenic reasons remained in operation until the early 1970's see Katherine Castles, 'Quiet Eugenics: Sterilization in North Carolina's Institutions for the Mentally Retarded, 1945-1965' (2002) 4 J Southern Hist 849, 850.
[148] (1942) 316 US 535.

the Insane Act 1931, those with learning disabilities or those in mental institutions could be sterilised.[149] This Act was strengthened in 1935 with the passage of the Habitual Criminal Sterilization Act, which also specified that offenders could be sterilised.[150] The Habitual Criminal Sterilization Act allowed for habitual criminals to be permanently sterilised if they were convicted more than three times of a crime of 'moral turpitude.'[151] 'White collar' crimes such as 'violation of prohibitary laws, revenue acts, embezzlement or political offenses' were excluded.[152] Skinner was used as a test case for the new legislation.[153] He had been convicted of stealing six chickens at the age of 19, and was imprisoned twice for armed robbery, for the last time in 1934.[154] In each instance, he pleaded guilty to the crimes, stating that it was to provide food for his wife and family. It was decided that Skinner's criminal record meant that he fulfilled the legal criteria for being defined as a 'habitual criminal.' When Oklahoma's Supreme Court affirmed the decision of the lower court, Skinner appealed to the Supreme Court of the USA, and was successful.[155] Lombardo highlights an important point about this case. It did not fail because it was a eugenic measure against a vulnerable group of prisoners, but because it did not apply to all habitual *criminals*. By excluding 'white collar' crimes, it failed the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.[156] Justice Douglas devised the

[149] Sterilization of Insane Act 1931 (Oklahoma); The Habitual Criminal Sterilization Act 1935 (Oklahoma); Paul A Lombardo 'Medicine, Eugenics and the Supreme Court: From Coercive Sterilization to Reproductive Freedom' (1997) 13 J Contemp Health L 7 Policy 9, 14.
[150] Paul A Lombardo, 'Medicine, Eugenics and the Supreme Court: From Coercive Sterilization to Reproductive Freedom' (1996) 13 J Contemp Health L 7 Policy 9, 14.
[151] ibid.
[152] ibid 14-15.
[153] Paul A Lombardo, 'Medicine, Eugenics and the Supreme Court' (1997) 13 J Contemporary Health, L & Policy 1, 15.
[154] ibid.
[155] ibid.
[156] ibid 17; US Const amend. XIV; *Skinner v Oklahoma* US 535, 541 (1942).

'strict scrutiny' test under which the contested law was analysed to ensure that it did not discriminate against a certain group of people, whether that discrimination was intended or not.[157] The other Justices, agreed with Skinner's appeal, but for different reasons. Chief Justice Stone disapproved of the law because it asked an extremely narrow question of jurors at the trial to decide whether Skinner should be sterilised. They were asked merely whether the defendant was a habitual criminal within the meaning of the statute. There were no opportunities for the defendant to demonstrate whether or not he possessed the qualities of a hereditary criminal, which Chief Justice Stone contended failed the demands of due process.[158]

Although the judgment of *Skinner* may be seen of limited relevance to modern jurisprudence, Lombardo makes the claim that currently accepted case law is based upon the eugenically based cases of *Skinner, Loving* and *Buck*.[159] The Supreme Court case of *Grimswold v Connecticut* struck down state laws that prohibited distribution of birth control.[160] The Court based its ruling on the finding in *Skinner* that marriage and procreation are fundamental rights. The measure of these rights, the strict scrutiny test, was confirmed in *Griswold*.[161] The iconic case of *Roe v Wade*, used the cases of *Skinner, Loving and Buck* to define and 'qualify' the decision made in *Roe.*[162] *Skinner* and *Loving* were both used to demonstrate that the right to privacy also included marriage and having children.

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[157] ibid.
[158] ibid 544, (Chief Justice Stone).
[159] *Buck v Bell* 274 US 200 (1927); *Skinner v Oklahoma* US 535 (1942); *Loving v Virginia* 388 US 1 (1967); Paul A Lombardo 'Medicine, Eugenics and the Supreme Court' (1996) 13 J Contemporary Health, L & Policy 1, 15, 23.
[160] *Griswold v Connecticut* 381 US 479 (1965); Paul A Lombardo 'Medicine, Eugenics and the Supreme Court' (1996) 13 J Contemporary Health, L & Policy 1, 23.
[161] *Griswold v Connecticut* 381 US 479 503-504 (1965).
[162] Paul A Lombardo 'Medicine, Eugenics and the Supreme Court' (1996) 13 J Contemporary Health, L & Policy 1, 15, 23-24.

The spectre of *Buck* continued to be raised however, and was used as a justification to place limits on the right of privacy, and was used to justify limits upon privacy and some state interference in reproductive rights.[163]

Biological Criminology and the Legacy of Eugenics

Eugenics may be seen to have just a marginal influence on penal policy and prisoner procreation today. Prisoners, like those in free society, have a right to bodily integrity, and cannot be operated on against their will.[164] Sterilisation of people with learning disabilities has to be justified by being in their best interests, free from utilitarian concerns regarding the state support of potential offspring.[165] Nonetheless, there are similarities between the arguments that had been used to justify eugenics and some of the arguments that are now used to justify restricting prisoner procreation.

Whilst prisoners are generally no longer sterilised in prison, barriers are placed in the way of prisoners actively conceiving, often with the justification that it is in the best interests of a child to not have a prisoner as a parent.[166] In England

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[163] *Roe v Wade* 410 US 113, 154 (1973); Paul A Lombardo 'Medicine, Eugenics and the Supreme Court' (1996) 13 J Contemporary Health, L & Policy 1, 23-24.

[164] *Skinner v Oklahoma* 316 US 535 (1942). In England and Wales, the Mental Capacity Act 2005 s3(1) is used to determine whether an individual can consent to medical treatment, and this provision applies to both prisoners and non-prisoners alike. Treatment can only be administered against the will of a prisoner if they incapable of consenting to medical treatment through age or disability, or because they are mentally ill.

[165] *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. Medical staff and carers sought permission to sterilise a 36-year-old woman with severe learning disabilities she was in sexual relationships and pregnancy would be completely deleterious to the health of the women. A male patient with severe learning disabilities was also sterilised in his best interests in *Re A (Medical Treatment: Sterilisation)* [2000] 1 FLR 549.

[166] One exception to this was recent findings that 144 female prisoners in Californian State prisons had been sterilised in the eight-year audit period 2005/6 to 2012/13. Of these, 39 of those women had been sterilised following deficiencies in the consent process. Sterilisation of prisoners in California is considered an unnecessary medical procedure and has to be approved by two committees, one in the prison and one in the Receiver's office. California State Auditor, Sterilization of Female Inmates Some Inmates Were Sterilized Unlawfully, and Safeguards Designed to Limit Occurrences of the Procedure Failed (Report 2013-120, California State Auditor, 2014) 2-3 <https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf> accessed 14 July 2015. See also California Code of Regulations Title 15 § 3350.1.(D) Medical and Dental Treatment/Service Exclusions

and Wales, prisoners have to satisfy the authorities that their relationship is sufficiently stable and strong enough to support a child and that they will make 'good parents'.[167] These justifications, cloaked in the language of child welfare, sound quite similar to Victorian arguments that society should not have to support the offspring of the dysgenic.[168] In a concurring opinion from the ECtHR, Judge Bonillo shows how deeply entrenched this idea is:

> 'I am far from persuaded that kick-starting into life a child in the meanest circumstances, could be viewed as an exercise in promoting its finest interests. The debut of life in a one-parent family, deprived of the presence of the father and a father-figure, offspring of a life prisoner convicted for the most serious crime of violence, would not quite appear to be the best way of giving a child-to-be a headstart in life.'[169]

Although the judgment is devoid of the overtly offensive language that characterises the quotation about the Jukes, Justice Bonillo echoes the same concern over criminals having children in the 'meanest circumstances.'[170] Both the Jukes and the Dickson's were judged by the same barometers of criminality and poverty. Measures to prevent them from procreating were justified in the same terms.

One of the enduring legacies of eugenics is the development of biological criminology and positivist criminology. Many elements of positivist criminology, such as the importance of long prison sentences to rehabilitate offenders (as

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<https://govt.westlaw.com/calregs/Document/IB2525DA0141411E281FBE8F9D9FEDCA9?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default> accessed 14 July 2015. The judgments of *Mellor* and *Dickson* both stated that the restriction of access to AI facilities was justified because of the disadvantages of being raised in a de-facto single parent family where one parent was in prison. See: *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 17 (Lord LJ) *Secretary of State for the Home Department Ex parte Dickson* [2004] EWCA Civ 147 para 20 (Phillips LJ).

[167] See Appendix.

[168] *Secretary of State for the Home Department, Ex parte Dickson* [2004] EWCA Civ 147. *Secretary of State for the Home Department, Ex parte Mellor* [2001] EWCA Civ 472.

[169] *Dickson v UK* (2007) 44 EHRR 21 Concurring opinion of Justice Bonello para 7.

[170] Robert L Dugdale *The Jukes: A Study in Crime, Pauperism, Disease and Heredity* (4 edn reprint 1910, Arno Press 1970 Digitised by the Internet Archive, 2007) 61 https://ia700404.us.archive.org/5/items/jukesstudyincrim00dugd/jukesstudyincrim00dugd.pdf accessed 1 July 2015.

opposed to using prison in order to merely 'manage' their criminal tendencies) have gone out of favour. The idea that criminality is innate and derives from within the individual, continues to have some influence over theories of penality today. Lombroso is credited as one of the first individuals involved with the development positivist criminology.[171] Simon highlights that his identification of a 'criminal other' is largely forgotten in modern interpretations of positivist criminology. However, in the USA at least, it continues to exert an important influence:

> 'At the heart of this project is the conviction-which American penal policies continue to reflect-that crimes are committed by a distinguishable group of persons with a proclivity toward law-breaking and that crime control policies should seek to isolate and repress these dangerous classes'[172]

Prisoners are considered 'other', somehow different to those outside of prison by political elites and the mass media, 'alien' and 'dangerous.'[173] Garland argues that offenders are treated as 'a different species' that prison has 'taken out of circulation' for the public good.[174] Hallsworth argues that the punitive turn taken by state authorities shows that proportionality and utility in punishment is no longer considered the most important reason to punish. This almost leads to the point that there is no longer any rational reason to punish other than to be

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[171] Nicole Hahn Rafter, Mary Gibson, 'Editors Introduction' in Cesare Lombroso, Guglielmo Ferrero, *Criminal Woman, the Prostitute and the Normal Woman* (tr Nicole Hahn Rafter, Mary Gibson, Duke University Press 2004) 3; Jonathon Simon, 'Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first' (2005) 84 Tex L R 2135, 2138.

[172] Jonathon Simon, 'Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first' (2005) 84 Tex L Rev 2135, 2138.

[173] David Garland, 'The limits of the sovereign state: strategies of crime control in contemporary society' (1996) 36 Brit J Criminology 445, 461.

[174] ibid.

punitive.[175] Given such views, it is unsurprising that the UK Government and prison authorities in *Percy, Goodwin* and *Gerber* were so unwilling to contemplate allowing prisoners to procreate.

One of the underlying reasons for the distaste at prisoners procreating could be due to the notion that they will 'infect' the next generation with inherited criminality. Lombroso is most often remembered for his theory of the 'born criminal.' The 'born criminal' was an individual that Lombroso stated had reverted to an earlier stage of evolution and could not be rehabilitated.[176] Whilst there is little credibility for a theory of innate criminality in a modern context, there are groups within society that recognised to be so dangerous to others that they are incarcerated indefinitely.[177] Incarceration within this context is not based upon purely punitive reasons, but instead upon utility, that it is in the best interests for the majority of society that someone who is deemed dangerous should be incapacitated in order to protect the public.

Although it is extremely unlikely, should a gene be discovered that predisposes an individual to criminal tendencies, this would raise real ethical dilemmas as to how people who possess the gene should be treated, and would have genuine relevance for prisoner procreation. Rose states the potential for

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[175] Simon Hallsworth, 'Economies of excess and the criminology of the other' (2000) 2 Punishment & Modern Soc 145, 155.

[176] Mary Gibson, *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology* (Praeger, 2002) 3; Jonathon Simon, 'Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first' (2005) 84 Tex L Rev 2135, 2150.

[177] Simon identifies groups that such as sex offenders who can be imprisoned for life following an offence to prevent them from reoffending. Jonathon Simon, 'Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first' (2005) 84 Tex L Rev 2135, 2139. Offenders also tend to be categorised by 'class characteristics' rather than individual characteristics that form the basis of a risk assessment, which is then used to decide whether they can be subject to preventative detention. This has been termed as actuarial criminology. See Jonathon Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4 Psychology, Public Policy & L 452; George S Rigakos, 'Risk society and actuarial criminology: prospects for a critical discourse' (1999) 41 Canad J Criminology 137.

genetic discrimination would be high, and could even lead to preventative detention.[178] There is also the possibility of those found guilty of a crime being held to not have criminal responsibility as they are genetically programmed to become criminal and are therefore incapable of controlling their behaviour.[179]

[178] Nikolas Rose, 'The biology of culpability: Pathological identity and crime control in a biological culture' (2000) 4 Theoretical Criminology 5.
[179] Joachim Richter, 'Are some people born criminal? What impact would the discovery of a "criminal gene" have on existing justifications of punishment?' (2003) UCL Juris R 191.

Summary

The foundation of the prisoner's claim to procreate is based upon the premise that all individuals, including prisoners retain all of their human rights that are not obviously removed by imprisonment. Whilst the courts in both the USA and England and Wales have argued that the right to procreate is 'placed on hold' by imprisonment, there is nothing that supports this stance in statute law. Human rights can be categorised as either positive or negative, which can alter the obligations placed upon states to either protect, or positively promote those rights. Procreative rights are generally characterised as negative rights, in that whilst the state will not interfere with an individual or couple procreating, they are not under a positive obligation to provide assistance with fertility. However, in the case of prisoners who are not allowed to have sexual intercourse, this would create a dependency on the state to provide positive assistance to any prisoner who wants to have children.

One of the severest ways in which the state could interfere with an individual's human rights is to sterilise them in the name of eugenics. Until the advent of the Holocaust in the Second World War, support for eugenics was a mainstream political concern. In Britain, the Eugenics Education Society had several supporters, and continues to exist today as the Galton Institute.[180] The campaigning of the Eugenics Education Society and others led to the passage of the 1913 Mental Deficiency Act. This Act fell short of compulsorily sterilising those deemed to be 'imbeciles' but did place them under residential care, thus preventing them in practice from procreating.

[180] The Galton Institute 'About' (*The Galton Institute)* <http://www.galtoninstitute.org.uk/about.htm> accessed 12 June 2015).

In the USA, support for eugenics crystallised in the form of the Virginia Sterilization Act 1924 and the test case of *Buck v Bell.*[181] Once the sterilisation of Carrie Buck had been approved, this led to the sterilisation of many other learning disabled individuals. The case of *Skinner v Oklahoma* reinforced the idea that some state legislators thought that sterilisation was a good way of preventing future criminality.[182] The US Supreme Court struck down the Habitual Criminal Sterilization Act because it failed to apply to all offenders and provide the offender with adequate opportunity to argue his case in court. The legislation was not explicitly struck down because it was considered inherently wrong to remove a prisoner's ability to procreate.[183] Many countries in Europe sterilised thousands of individuals, including some offenders.[184]

For most people, having children is undertaken in private, with very little interference from the state. The autonomy of the individual is respected to such a degree that any person, regardless of any addiction to harmful substances, can procreate and beget a child without restriction, save for paying heed to laws on consent and consanguinity. A woman bearing a child, whilst subject to a significant number of moral and social pressures, is not subject to many specific legal restrictions regulating her behaviour. She is prohibited from aborting her foetus after a certain gestation in most circumstances, but she is free to smoke, drink and engage in risky behaviour even if it may damage her foetus. The autonomy of the competent woman is respected to such a degree that she may not

[181] *Buck v Bell* 274 US 200 (1927).
[182] *Skinner v Oklahoma* 316 US 535 (1942).
[183] Paul A Lombardo, 'Medicine, Eugenics and the Supreme Court' (1997) 13 J Contemporary Health, L & Policy 1, 15; Skinner v Oklahoma 316 US 535, 541 (1942).
[184] In Sweden, between 1935 and 1975, 63,000 people were sterilized. There were similar laws in operation in Denmark and Norway. See Gunnar Borberg, Nils Roll- Hansen, *Eugenics and the Welfare State: Norway, Sweden, Denmark and Finland* (2 edn, Michigan State University Press, 2005) ix.

be operated on against her will, even if this will lead to the death of her foetus. Strong protection of the woman's autonomy is justified. Subjecting a pregnant woman to legal restrictions would place her interests below those of a foetus that has no legal rights or existence separate from the pregnant woman. The right to procreate is a negative right, in the sense that no state can be forced to provide the infertile with medical treatment, but this distinction becomes blurred in the penal complex. Prisoners are dependent upon the state to provide positive assistance to allow them to procreate. Their autonomy is not protected in the same way as those in free society. Procreation for prisoner is seen as a discretionary privilege.

The reasons for prohibiting or restricting prisoners from reproducing can be said to stem from their categorisation as 'other', a contagion in society that must be contained and prevented from reproducing. This idea of 'other' derives from a number of different sources, the historical legacy of the development of the prison where the isolation of the prisoner was perfected, in the hope of reforming a damaging individual. Foucault identifies also the creation of the criminal as other, an easily identified person whom could be monitored, controlled and punished efficiently by modern society. The shadow cast by eugenics continues to have some influence, the notion of the 'born' criminal has been recast as the violent repeat offender who cannot be reformed. The prisoner parent is seen as someone who will pass on their criminality to the next generation, to produce children born into poverty, who will themselves become criminals.

The next chapter will turn to consider the prison and the development of imprisonment as one of the gravest method of punishment a society can inflict.

The historical context of imprisonment will be shown to have a large impact on modern conceptions of prisons and the prisoners held within them.

Chapter Three: The Prison

Introduction

To enable an understanding of how preventing procreation may be considered a punishment of the prisoner, an examination of the development of the prison as the main form of punishment is necessary. The prison is shown in the context of its development from a holding place for felons and for the containment of debtors to becoming a punishment in its own right. This is linked to an exploration of the purpose and intention of imprisonment. Next, the limitations of incarceration as a punishment will be considered in reference to the concept of populist punitiveness and legitimate penological aims.

Imprisonment itself causes psychological pains, which Sykes argues can be as equally damaging as earlier physical methods of punishment.[185] Crewe revisited these pains of imprisonment, stating that modern penality also creates the additional pains of indeterminacy and uncertainty for life-sentenced prisoners and those imprisoned for public protection.[186] In addition to this, Crewe details the pain that psychological assessment and self-government causes prisoners.[187] These pains of imprisonment will be considered in relation to how they could affect prisoners who wish to procreate.

[185] Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 64.
[186] Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13 Punishment & Society 509, 513.
[187] ibid 515, 518.

Punishment and the Historical Context of Imprisonment

'In earlier eras imprisonment was mainly a period in limbo, a way-station in the legal process where the suspected offender looked forward to the hangman's noose or the lash.'[188]

As the main method of punishment, prisons are a relatively recent historical development. Originally, prisons were designed to hold the criminal, in order for them to await their fate. Those who were suspected of a crime were sometimes tortured in custody prior to confession.[189] Corporal punishment in early modern Europe entailed an element of public humiliation and infliction of pain and damage to the body of the offender.[190] Spierenburg stated that the punishments the offender was subjected to had both a public element and a physical element, which often overlapped. The public element shamed the offender in front of the local population, whilst the physical punishment that the offender was subjected to demonstrated the power of the state. It showed the offender the power that the sovereign held over their body. For the most heinous crime, treason, male offenders in England and Wales could be punished by being hung, drawn and quartered.[191] Foucault argues that the punishment and torture was required to be 'spectacular', so that the public can see the consequences of the crime. When a criminal was being punished, it was their task to 'bear openly his condemnation and the truth of the crime that he had committed. His body, displayed, exhibited in procession, tortured...in him, on him, the sentence had to

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[188] Gresham M Sykes, *The Society of Captives* (Princeton University Press, 1958) xi.
[189] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Tr Alan Sheridan, Penguin Books, 1977) 34.
[190] Pieter Spierenburg, 'The Body and the State: Early Modern Europe' in Norval Morris, David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 47.
[191] Christopher Hibbert, *The Roots of Evil: A Social History of Crime and Punishment* (Sutton Publishing, 2003) 9.

be legible for all.'[192] Spierenburg argues that this focus upon the body of the offender, and the lack of respect for bodily integrity reflected a society that relied upon and accepted, physical punishment in other areas. Questions of prisoners' rights were not pertinent to the authorities prior to the beginning of prison reform in the eighteenth century.[193]

One reason for the rise in the use of imprisonment was the result of a political need to control the increase in property crime, as 'blood' crime levels reduced.[194] The apparatus of criminal justice was in France at least, rearranged to ensure that it evenly distributed. This allowed punishment to be used more efficiently and to punish more crimes, which under the Ancien Régime: 'not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity.'[195]

With the increase in wealth due to industrialisation, there was a required change in legal regulation and penality that would protect the interests of those with money and property. The organisation of the state into a system of laws and surveillance that can punish those who offend produces what Foucault calls a 'terrible super-power' that requires 'a principle of moderation for the power of punishment.' Punishment itself becomes a calculation, designed to prevent the crime from being repeated. Deterrence is therefore also an important

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[192] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Tr Alan Sheridan, Penguin Books, 1977) 3. In graphic and repulsive detail, the execution of Damiens, an individual who committed regicide was described by the *Gazette d'Amsterdam.* Firstly, his flesh was pulled away by red-hot pincers and his right hand holding the knife with which he committed the murder was burned with sulphur. Then, whilst he was still conscious, he was finally executed by each limb being pulled by horses until his torso was ripped apart with the torso and limbs being burned to ash and scattered to the wind.
[193] ibid.
[194] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Tr Alan Sheridan, Penguin Books, 1977) 77.
[195] ibid 82.

consideration when considering what punishment to give in response to a certain crime.[196]

Other authors however, demonstrate that the evolution of a system of punishment, and what is deemed acceptable punishment is a more complex question. Garland states that modern society thinks of punishment in terms of a means to an end, which is in purely administrative terms.[197] However, what are considered acceptable forms of punishment will depend upon what people view as 'emotionally tolerable.'[198] Garland argues that there is little discussion about moral questions when deciding what types of punishment are acceptable because limits have already been set about what forms of punishment are considered acceptable.[199] This is certainly true when one considers what punishments are considered acceptable for domestic crimes. Imprisonment is considered acceptable and just for certain types of crime, or in the face of repeat offences, but whipping prisoners, or depriving them of an adequate diet is not considered an acceptable form of punishment. These boundaries may appear fixed, cornerstones of acceptable behaviour which are not open to challenge, but the wider debates on the acceptability of the use of torture on suspected terrorists as well as other debates shows how this is untrue.[200]

Spierenburg argued that imprisonment and public forms of punishment continued in conjunction for some time. In England and Wales this continued

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[196] ibid 95.
[197] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1991) 214.
[198] ibid.
[199] ibid.
[200] A discussion about the acceptability or otherwise of torture on suspected terrorists is beyond the scope of this thesis, although these kinds of debate themselves highlight how notions of what is acceptable do change. For debates surrounding the acceptability about the use of torture see Conor Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) CLP 25; Michael Ignatieff, *The Lesser Evil: Politics in an Age of Terror* (Edinburgh University Press, 2005).

until 1870 when executions were removed to the privacy of the prison.[201] The use of imprisonment, along with other sentencing options such as fines or banishment grew out of gradual changes in the previous centuries, and the removal of punishment to the privacy of the prison.[202] Speirenburg, used the thesis from Elias's seminal work, *The Civilizing Process* to explain why punishment and repression have become privatised, hidden away from public view.[203] An increase in mutual interest increases and the physical power of punishment and revenge is shifted to a state authority.[204] The decrease in the use of physically punitive methods of punishment and execution was due to individuals in a society collectively inhibiting their primary wants and urges, and behaving in ways that were more refined.[205] A change in sensibilities is not only affected by political decision-making, but that it is also caused by a psychic element.[206] Open aggression against fellow people is suppressed. Speirenburg argued that there was a 'repugnance' to physical punishment being viewed in public. Punishment itself has become shameful and so remains hidden away within the prison, away from view.[207]

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[201] Pieter Spierenburg, 'The Body and the State: Early Modern Europe' in Norval Morris, David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 55.
[202] ibid 58.
[203] Pieter Spierenburg, *The Spectacle of Suffering: Executions and the evolution of repression: from a preindustrial metropolis to the European experience* (Cambridge University Press, 1984) 183.
[204] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1991) 202.
[205] ibid 219.
[206] Norbert Elias, *The Civilizing Process: The History of Manners* (tr Edmund Jephacott, Basil Blackwell,1978) xii; David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press 1991) 219.
[207] Pieter Spierenburg, *The Spectacle of Suffering: Executions and the evolution of repression: from a preindustrial metropolis to the European experience* (Cambridge University Press 1984) 205.

Punishment and Penitence: the Development of the Modern Prison

The 'Prison' Before Reform

Prisons have not always been strict and orderly places. Prior to Victorian reforms that had their roots in the eighteenth century, they were chaotic, disorganised and noisy places. As McGowan writes: 'The jail appeared to be a peculiar kind of lodging house with a mixed clientele.'[208] The idea of a 'peculiar lodging house' sums up some of the defining features of the prison prior to the work of prison reformers such as Howard and Fry. Many of the features of modern prison, such as the categorisation and segregation of prisoners by sex, offence and age did not exist. Incarceration for punishment purposes was relatively rare, and was used for minor offences.[209] The system of imprisonment was organised at a local level, and there was often confusion between the two types of 'prison', the house of correction and the jail. The house of correction was supposed to take offenders for short terms of imprisonment following sentencing. The jail was supposed to take those awaiting trial, awaiting execution of a sentence, and debtors. However, many institutions had blurred distinctions between the different types of prisoners, and kept them all together.[210] Prisons themselves varied in size, with some being small cells or cellars, along with larger prisons in cities such London and Warwick and were controlled locally.[211] One problem that presented itself was the presence of debtors within the jails. Those who owed a debt were not felons, and as such authorities could do very little to

[208] Randall McGowan, 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 71.
[209] ibid 72.
[210] ibid 73.
[211] ibid.

control their behaviour.[212] Debtors were expected to pay an entrance fee to the other prisoners, called a 'garnish.'[213] The local community did not finance prisons, and those that ran and worked in the prisons were not paid. John Howard notes that felons were often provided with food, but debtors were not.[214] The prison warders were not paid for their work, so many charged their prisoners for food, lodgings and other services.[215] Many jails had their own 'taproom' and sold beer, and gambling was common.[216] Most debtors were also incarcerated with their families, and many female prisoners were also imprisoned with their children.[217] One such inspection by John Howard in 1776 found a total of 242 debtors in Fleet prison along with 475 wives and children.[218] These institutions were porous, into which free people would enter to drink in the taproom and mix with those who were detained.[219] As families were not excluded from the prison, it is likely that prisoners did become pregnant or became fathers whilst in prison. This is in sharp contrast to the prisons of today, which are highly regulated, restricting the ability of prisoners to associate with their families, let alone live together.

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[212] ibid.
[213] ibid 74.
[214] John Howard, *State of the Prisons in England and Wales, with Preliminary Observations, and an Account of some Foreign Prisons* (Digitised by Google, William Eyres 1777) 6-7.
[215] Randall McGowan 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 74.
[216] John Howard, *State of the Prisons in England and Wales, with Preliminary Observations, and an Account of some Foreign Prisons* ((Digitised by Google, William Eyres 1777) 26; Randall McGowan 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 74-75.
[217] John Howard, *State of the Prisons in England and Wales, with Preliminary Observations, and an Account of some Foreign Prisons* (Digitised by Google, William Eyres, 1777) 34; Randall McGowan, 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 73. .
[218] John Howard, *State of the Prisons in England and Wales, with Preliminary Observations, and an Account of some Foreign Prisons* (Digitised by Google, William Eyres, 1777) 160.
[219] ibid 159. John Howard notes how people enter the prison as if it was a regular public house, and how on Monday they held a 'wine night' and on Thursday a 'beer night'.

The disorder and chaos that Howard found prompted him to press for penal reform and so the Penitentiary Act 1779 was passed.[220] The Act intended to create a 'network of hard labour houses' by building new houses or by upgrading existing facilities.[221] These ambitious plans were downgraded to build two prisons, one male and one female.[222] Eventually these plans collapsed and it was not until 1816 that a new prison was built.[223] Reformers throughout the 1820's became increasingly frustrated with the lack of proper reform.[224] The Gaol Act 1823 was enacted to create more uniformity between prisons and forbade the use of alcohol. Whilst the Act fell short of enacting independent prison inspectors, it was the first attempt to set guidelines as to how prisons should be run.[225] The Prison Inspectorate was established in 1835, and whilst it did not have the power to order changes or close prisons, it did help to undermine the tradition of locally administered prisons.[226] Another great influence on prison reform came from The

[220] The Penitentiary Act was drafted by John Howard, William Eden and Sir William Blackstone and was intended to replace transportation and hanging as the main method of 'disposing' of serious offenders. Transportation was no longer seemed such a viable option following the claim of independence of the USA. Whilst the Act was drafted with the aim of replacing local prisons with those controlled centrally, only two new prisons, both in London were constructed. Simon Devereaux, 'The Making of the Penitentiary Act, 1775-1779' (1999) 42 The Historical J 405.
[221] Keith Soothill, 'Prison Histories and Competing Audiences, 1776- 1966' in Yvonne Jewkes, (ed) *Handbook on Prisons* (Willan Publishing, 2007) 33.
[222] Simon Devereaux, 'The Making of the Penitentiary Act, 1775-1779' (1999) 42 The Historical J (1999) 405.
[223] ibid 406; Keith Soothill, 'Prison Histories and Competing Audiences, 1776- 1966' in Yvonne Jewkes, (ed) *Handbook on Prisons* (Willan Publishing, 2007) 33. Millbank Prison was completed in 1816 and was designed to be a more austere and rigid experience than other prisons. The prison was beset with problems from the beginning: continued rioting and the first two governors were dismissed for incompetence, and eventually recourse to restrictive diets and flogging was used to subdue the prisoners. In 1823 outbreaks of typhus, dysentery and scurvy killed 31 prisoners and left 400 severely ill. See Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (Penguin Books, 1978). Millbank was closed in 1890. See Keith Soothill 'Prison Histories and Competing Audiences, 1776- 1966' in Yvonne Jewkes, (ed) *Handbook on Prisons* (Willan Publishing, 2007) 35.
[224] Randall McGowan, 'The Well-Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 85.
[225] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (Macmillian, 1978) 168; Keith Soothill, 'Prison Histories and Competing Audiences, 1776-1966' in Yvonne Jewkes, (ed) *Handbook on Prisons* (Willan Publishing, 2007) 36.
[226] Keith Soothill, 'Prison Histories and Competing Audiences, 1776- 1966' in Yvonne Jewkes,

Society for the Improvement of Prison Discipline (SIPD), which was formed in 1816 counting influential politicians among its members.[227] One of the most striking things about the influence and ideals of the SIPD was how it diverged from the ideals and practice of other prominent Quaker prison reformers such as Elizabeth Fry. The SIPD cultivated a technical knowledge of prison reform, and were invited to appear before Parliamentary select committees. They developed knowledge on prisons by visiting and collecting information, and relying upon technical advances such as the tread wheel.[228] One of their reports published in 1822 stated that 'uniform' punishment was necessary.[229] 'Scientific' knowledge and 'rational uniformity' gave the SIPD legitimacy in the eyes of a male dominated and patriarchal society. The approach of Fry differed greatly from this, and her contribution was valued as a respectable 'mother' figure who was teacher and minister to the 'childlike and ignorant' women prisoners.

In *Discipline and Punish,* Foucault reiterates the totality of the control of the carceral environment, which has the control of the body as its primary objective, through the use of the organisation of the prison, as a total entity, almost like a machine. Discipline can be both at once repressive and productive: discipline creates docility, repressing individuality and resistance. It also ensures that the maximum productivity can be achieved with the minimum of effort.[230] The same principle applies to the organisation of schools, hospitals and other

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(ed) *Handbook on Prisons* (Willan Publishing 2007) 36.

[227] Randall McGowan, 'The Well-Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 87.

[228] ibid 87.

[229] Society for the Improvement of Prison Discipline, *Fourth Report of the Committee of the Society for the Improvement of Prison Discipline, and for the Reformation of Juvenile Offenders* (T Bensley, 1822, Digitised by Google) 14.

[230] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (tr Alan Sheridan, Penguin Books, 1977) 138.

institutions.[231] The carceral environment is designed around the needs of the institution; the arrangement of subjects and the environment ensures the maximum amount of control with the minimum amount of effort. Foucault takes Bentham's vision of the Panopticon, the prison of which the primary purpose is to house prisoners separately from one another, whilst simultaneously allowing for their complete observation at all times. He states that such power should be 'visible and unverifiable.'[232] The prison complex, the tower, the architecture of power is visible at all times, but the prisoner cannot be sure when they are actually being watched.

Punishment and Penitence: the Victorian Prison

The discrepancy between the claims for reforming the individual on the one hand and the reality of the creation of a punitive and harsh system reflect the different approaches to penality and types of power. These continue to coexist within the prison environment today. The modern drive for uniformity comes from a scientific approach to penality, which needs to objectively measure outcomes. The approach of Fry and other reformers in this period made the prisoner's soul the key subject of their attention. Religion has a long history in the development of penality and had a central influence in the types of punishment used to control populations.[233] The idea of penitence was central to the ideals of Fry and other reformers. It was thought that through austere conditions and spiritual guidance, offenders would repent of their wrong doings and become reformed subjects. When Victorian prison reforms began in earnest with the

[231] ibid 172.
[232] ibid 201.
[233] Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (University of Toronto Press, 2001) 31; Pieter Spierenburg, *The Spectacle of Suffering: Executions and the evolution of repression: from a preindustrial metropolis to the European experience* (Cambridge University Press 1984).

construction of Pentonville Prison in 1842, penitence as well as deterrence was at the heart of the reforms. Prisoners were subjected to the 'separate system' which itself was based upon the system of imprisonment practiced in Philadelphia Penitentiary.[234] Silence was enforced between prisoners and they had to don masks to prevent themselves from being seen and being recognised by fellow prisoners. Hard labour was punctuated with chapel services and visits from workers who were charged with ensuring prisoners reformed and repented of their sins.[235] Prisons today retain a 'Victorian' flavour, through the use of strict regimes, uniforms, and Spartan living conditions.[236]

Many of these Victorian prisons, including Pentonville are still in use today.[237] Although the roots of Victorian policy can be seen with the early eighteenth century reformers, Garland argues that the way it was organised, as well as the new structure and agencies of Victorian criminal justice amounted to a new form of penality.[238] These included, the 'separate system' in many prisons, in which criminality was treated as a contagion. The prevailing view was that the contagion of criminality could be passed from prisoner to prisoner so all prisoners were completely isolated.[239] The separate system was relaxed in Pentonville

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[234] Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (University of Toronto Press, 2001) 37.
[235] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (Penguin Books 1978) 6-7.
[236] For example, the Criminal Justice Act gives guidance on the expected purposes of sentencing.
Criminal Justice Act 2003 s142 Purposes of sentencing
(1)Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing--
(a)the punishment of offenders,
(b)the reduction of crime (including its reduction by deterrence),
(c)the reform and rehabilitation of offenders,
(d)the protection of the public, and
(e)the making of reparation by offenders to persons affected by their offences.
[237] David Garland, *Punishment and Welfare: A History of Penal Strategies* (Gower, 1985) 5.
[238] ibid.
[239] Randall McGowan, 'The Well-Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society*

throughout the 1840s and 1850s as it became clear that it provoked insanity amongst the prisoners.[240] However, certain elements of the separation of prisoners remain today. Solitary confinement is still used as a punishment, and association of prisoners is restricted in certain circumstances.[241] Generally, in this period, prisons developed much more uniform and austere conditions. Diets were sparse and monotonous, restrictions existed with relations with the outside world, and prisons became more closed institutions with characteristics that are recognisable today.[242] Prison staff developed a professional scientific knowledge of criminality, classification and methods of dealing with prisoners.[243] The Prison Act 1877 nationalised prisons and brought them under the control of the Prison Commission.[244] The system became more rigid and hierarchical, and local magistrates ceased to have control or any influence over local prisons.

The Prison Today

> 'A total institution may be defined as a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead a closed, formally administered round of life. Prisons serve as a clear example, providing we appreciate that what is prison-like about prisons is found in institutions where members have broken no laws.' [245]

(Oxford University Press 1998) 91.

[240] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (Penguin Books, 1978) 200.

[241] For example, 'supermax' prisons in the USA isolate those prisoners who are subjected to the highest levels of security. See Daniel P. Mears, Michael D. Reisig, 'The theory and practice of supermax prisons' (2006) 8 Punishment & Society 33.

[242] Randall McGowan, 'The Well-Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 97.

[243] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1991) 145.

[244] The Prison Act 1877; David Garland, *Punishment and Welfare: a History of Penal Strategies* (Gower 1985) 9.

[245] Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961) xiii.

In both the USA, and in England and Wales, there are various kinds of prison, some with much higher levels of security than others.[246] Whilst some prisons have 'open' conditions, in which prisoners are not enclosed by security and bars, most prisons are 'closed'. Many resemble the Victorian 'ideal' of a prison, with security restrictions, high walls and limited access to the outside world. Those dwelling within the prison are constrained in their ability to contact those outside of the prison. Whereas in 'free society' the public arena of work and the private arena of home are generally separate, in a closed institution, the entire space becomes public. Activities of daily living often occur in the same physical space, and the element of compulsion is constantly palpable.[247] The prisoner has no choice over where they are accommodated. Their day is a succession of regimented rules, which leave little room for autonomy and self-determination.[248] The prison itself becomes the site of coercion and power, which is used to control and maintain order over prisoners.[249] Crewe describes coercion as the 'bulwark of the penal institution.'[250] Often the threat of coercion or punishment is used to effectively control prisoners, or the routines that restrict movement can achieve this.[251] The social dynamics Goffman observed within a mental asylum are also common to prisons, boarding schools, military training barracks and individuals collected together in religious orders. The modern prison governs every single

[246] Norval Morris, 'The Contemporary Prison: 1965- Present' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 203.
[247] Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961) 6.
[248] Norval Morris, 'The Contemporary Prison: 1965- Present' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 202.
[249] Ben Crewe, *The Prisoner Society: Power Adaptation and Social Life in and English Prison* (Oxford University Press, 2009) 80.
[250] ibid.
[251] ibid 81; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (tr Alan Sheridan, Penguin Books, 1977) 149.

aspect of the prisoner's life, controlling whom they associate with and how they contact the outside world. The prisoner can no longer pay for extra services, have his family live with him or carry on his business behind bars. Even the work a prisoner undertakes is strictly regulated and controlled. Sexual intercourse with partners is forbidden. In the words of Sykes, they become 'an unwilling monk of the 20th Century' and are deprived of family, sexual relationships, relationships with partners.[252] The 'religious order' analogy is a strong one, in many different ways. There is no separation of an offender's public and private persona. Prison, like religious orders, integrates both the 'public face' of the offender, including 'work' with the 'private face' of living that would normally be shared in private with family. In essence, everything in a prisoner's life becomes 'public', and so becomes something to be publically governed. Prisoners do have certain rights to enable them to maintain contact with friends and family on the outside, but they have no privacy. Their desire, and the decision to have children becomes a public one, subjected to official scrutiny. Whilst today's prison is not the' impervious' environment as described by Sykes and Goffman, it is still a discrete, cut-off microcosm of society, with its own social norms. Despite the fact that many prisoners and relatives find it difficult to maintain family relationships whilst incarcerated, some relatives have even recast the prison as a place for maintaining family contacts.[253]

[252] Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, 1958) 4.

[253] Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2008) 99-125. In her research, Comfort identifies how women see the prison as a place in which family relationships develop, such as in the conjugal accommodation that was at the time provided for certain prisoners. Other partners of prisoners identified how the prison gave them the space they needed from relationship circumstances (such as violent partners) on the outside to maintain their marriages.

The Pains of Imprisonment

Sykes first used the term 'pains of imprisonment' in his classic prison study *The Society of Captives* to describe the non-physical pains that prisoners experience during their incarceration.[254] These non-physical pains of imprisonment cause as much distress to prisoners as the older physical punishments of flogging and deprivation of food.[255] They attack the very core of individual prisoners' self-esteem.[256] In conjunction with this, Goffman described how a 'total institution' as a series of mortifications and humiliations in which the individual's concept of self is eroded and attacked.[257] These add to, and form part of, the pains of imprisonment that the prisoner experiences. Sykes classified the psychological pains of imprisonment into five groups, each of which are affected to a different extent by a prohibition on procreation. These will be discussed in turn.

The Deprivation of Liberty

This is the loss of liberty and removal from society, with the according loss of social status and loss of relationships with loved ones.[258] This is the most obvious pain of imprisonment, which physically isolates the prisoner from their family and loved ones. Should a prisoner wish to procreate this places them at the mercy of the prison officials and requires the prisoner and their family to subject their wishes to their scrutiny. Some prisons have layers of bureaucracy and have requirements that prisoners on indeterminate and life sentences are required to

[254] Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 64.
[255] ibid 64, Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13 Punishment & Society 509, 510.
[256] Alison Liebling, Shadd Maruna, (eds), 'The Effects of Imprisonment' (Routledge, 2011) 6; Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 78-9.
[257] Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961) 14.
[258] Gresham M Sykes, *Society of Captives: a Study of a Maximum Security Prison* (Princeton University Press, 1958) 65-67.

meet before their release. Using Gidden's term 'ontological insecurity,' Crewe describes how in England and Wales prisons over the last 20 years, whilst the regime and conditions of confinement have improved, prisoners complain about uncertainty, about what courses they need to attend in order to be released, about psychological assessments where they feel under constant scrutiny, unsure of whether their behaviour has been misinterpreted.[259] Prisons can be bureaucratic places, and requesting access to AI facilities or private visits when time is limited for couples seeking to conceive (perhaps due to age or illness), could engender feelings of ontological insecurity.

The Loss of Possessions and Services

Sykes is careful to differentiate between basic needs and choice within his analysis.[260] As Sykes argues, each prisoner in his study was provided with adequate shelter, clothing and food. He states 'material possessions are so large a part of the individual's conception of himself that to be so stripped of them is to be attacked at the deepest layers of personality.'[261] On a practical level, some prisoners claim that their medical needs are not provided for and in some cases the treatment offered was poor.[262] Those prisoners who may want children may find themselves unable to care for their reproductive health adequately. Should

[259] Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13 Punishment & Society 509, 524; Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press, 1991) 53.
[260] Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 67-68.
[261] ibid 69.
[262] Examples cited by Thompson included one prisoner in a Massachusetts prison whom after he was treated for an orbital fracture and was not given adequate pain relief or orthopaedic or neurological follow up. Due to the prisons neglect in taking him to hospital for treatment, his bones set and healed incorrectly which required the surgeon to drill through the bones, causing nerve damage and epilepsy. Joel H Thompson, 'Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs' (2010)) 45 Harv CR-CL Law Rev 635.

they be granted access to IVF or AI facilities, they may be restricted to certain providers.[263]

The Deprivation of Heterosexual Relationships

Of all the pains of imprisonment, this is the one deprivation that causes prisoners the most obvious difficulty when it comes to the conception of children. Prisoners are prevented from conceiving children through sexual intercourse and thus become reliant upon other methods being allowed to them by the prison authorities to procreate. Sykes refers to sexual deprivation as the prisoner being 'figuratively castrated by his involuntary celibacy.[264] Prisoners are prevented from maintaining close physical relationships with a partner outside of prison, which can lead to strain and the breakdown of family relationships.

The Deprivation of Autonomy

According to Sykes, the multitude of rules and restrictions that prisoners are subject to operates as another pain of imprisonment, assaulting their individuality and sense of self.[265] These rules provide another barrier to prisoners choosing how and when to procreate, mostly by preventing procreation entirely. Prisoners cannot exercise autonomy over their reproductive choices, because those choices are removed and regulated by the prison.

Deprivation of Security

Prisoners are 'thrown together' in enforced company with sometimes violent and unpredictable people.[266] This can cause the prisoner considerable

[263] It is accepted that prisoners in the USA would most likely have to pay for treatment themselves in the unlikely situation that they are granted access to fertility treatment. Prisoners in England and Wales would most likely be treated under the same circumstances as people within the community, paying for treatment that is normally charged for, such as IVF.
[264] Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 70.
[265] ibid 73.
[266] Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 76-8; Alison Liebling,

anxiety and may be worrying for pregnant prisoners. Crewe highlighted in his research that male prisoners could feel the need to put on a 'front' in order to check potential bullying and exploitation of weaknesses.[267]

Other Pains' of Imprisonment: Psychological Assessment and Uncertainty

'Perhaps the simplest conclusion is that while the pains of confinement can be reduced, pain is intrinsic to imprisonment, and it is much easier to alter its form than to eliminate it from the prison experience.'[268] As Crewe argues, the pains of imprisonment cannot be entirely removed from the prison experience, and many might argue that they should remain in order to maintain the punitive elements of the prison sentence. Crewe describes three additional types of pains that prisoners serving long sentences experience: continuous psychiatric assessment, uncertainty and the requirement to self-govern.[269] For prisoners who want to become parents, these pains can also affect their chances of parenthood, because they affect how they negotiate with prison staff and the bureaucracy that surrounds prisoners making requests. The increased use of indeterminate sentences, where release depends upon behaviour and public safety assessments can lead to much uncertainty for prisoners. For those that want to have children, they may feel unable to plan for the future. Within England and Wales, to be granted access to AI facilities, a prisoner's release date must not be either too far in the future that he will not be present when the child is growing up, or too close

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Shadd Maruna, (eds), 'The Effects of Imprisonment' (Routledge, 2011) 5-6.
[267] Ben Crewe, *The Prisoner Society: Power, Adaptation, and Social Life in an English Prison* (Oxford University Press, (2009) 409.
[268] Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13 Punishment & Society 509, 524.
[269] ibid 513, 518, 524.

to his release date that means he could simply wait until he gets out of prison.[270] The prisoners most likely to want to have children whilst serving a prison sentence are most likely to be these kinds of prisoners, serving long prison sentences who are seeking to try and maintain family relationships with those on the outside of prison. In conjunction with indeterminate sentencing, prisoners on long sentences are continually psychologically assessed. Crewe argues that prisoners often feel that in order to work with the system for release, which they have to perform, as their truthful responses may be at odds with the viewpoint of the psychological assessor.[271] Crewe terms this anxiety 'performance purgatory.'[272] The determination of psychological assessment would be another factor taken into account when deciding whether to allow the prisoner access to AI facilities. Prisoners are also expected to take an active role in their rehabilitation, termed as 'responsibilisation.'[273] This assumes that they have a greater deal of control over their surroundings and access to courses than they in reality do as prisoners.[274]

In their research with wrongly convicted and politically sentenced prisoners, Jamieson and Grounds found that all family relationships suffered during long term incarceration.[275] Increasing the difficulties for prisoners to maintain family relationships, including conceiving children, can only increase this estrangement and alienation from existing family. As the psychological

[270] See Appendix.
[271] Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13 Punishment & Society 509, 516.
[272] ibid.
[273] ibid 519.
[274] Mary Bosworth, 'Creating the responsible prisoner: Federal admission and orientation packs (2007) 9 Punishment & Society 67, 72. See footnote 88 for details of Bosworth's research on responsibilisation.
[275] Ruth Jamieson, Adrian Grounds, 'Release and adjustment: perspectives from studies of wrongly convicted and politically motivated prisoners' in Alison Liebling, Shadd Maruna, (eds), *The Effects of Imprisonment* (Routledge, 2011) 37.

effects of imprisonment with loss of relationships and 'life history' continuing long after the imprisonment of individual, Jamieson and Grounds argue that it becomes increasingly difficult to argue that long term prison sentences remain proportionate in the punishment that they effect.[276]

[276] ibid 60.

Summary

Prisons have evolved from holding places for the offender to the main method of punishment for serious offenders in both England and Wales and the USA. Prisoners remain separated from society, and prevented from close association with family and loved ones. Punishment has moved away from mortification of the flesh to the psychological pains of imprisonment described by Sykes.[277]

Prior to the modern conception of the prison as an isolated 'total institution' they were porous places, often run with little centralised control.[278] Howard noted that they were often places where debtors could have their family residing with them.[279] Prisoners were often kept in a destitute condition, with only some prisoners being allocated a small bread allowance.[280] Warders were not often paid for their duties, making up the shortfall by extracting a fee from their debtor prisoners.[281] However, prison reform begun by Howard and continued in the Victorian times by others such as Fry began to change prisons into the institutions we recognise today. Prisoners were subject to a Spartan system, with basic human needs only just met: in some circumstances, they were not.[282] Prison

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[277] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Tr Alan Sheridan, Penguin Books, 1977) 34; Gresham Sykes, *Society of Captives: a Study of a Maximum Security Prison* (Princeton University Press, 1958) 64.
[278] Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961) xiii; Randall McGowan, 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 71.
[279] John Howard, *State of the Prisons in England and Wales, with Preliminary Observations, and an Account of some Foreign Prisons* (Digitised by Google, William Eyres, 1777) 34.
[280] ibid.
[281] Randall McGowan, 'The Well- Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 74.
[282] Seán McConville argues that under Colonel Edmund Du Cane the Government's chief penal advisor from 1877, prisoners became subject to a near starvation diet under hard futile labour such as the tread wheel. Seán McConville, 'The Victorian Prison, England, 1865-1965' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in*

regimes were designed to increase the pains of imprisonment and not alleviate it. Prisoners were also separated in earlier prisons in order to prevent the contagion of criminality from passing from prisoner to prisoner.[283]

Today, prisoners are not subject to separation and isolation, unless they are confined in solitary cells in maximum security, but elements of the Victorian prison system remains. Many of the prisons built during the Victorian period remain in use as prisons, especially in England and Wales and the effects of the Victorian ideal of less-eligibility still linger. Prisoners are not generally afforded accommodation or varied cuisine, but rather the minimum that is deemed acceptable to meet physical needs.[284] Barriers to procreation for prisoners arise from the austerity of prison and its development into a total institution. This restricts the offender from associating with his or her loved ones, from making autonomous choices over when and how to have children or how to maintain family relationships. The uncertainty of serving a life sentence or an indeterminate sentence creates further anxieties.[285]

As some authors have detailed, these restrictions continue to have an effect even after prisoners are released, as prisoners become estranged from their family members, life plans are thwarted and relationships strained. Some argue

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Western Society (Oxford University Press 1998) 130-133.

[283] Randall McGowan, 'The Well-Ordered Prison: England 1780-1865' in Norval Morris, David J Rothman, (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 91.

[284] David Fox, 'The changing face of the English prison: a critical review of the aims of imprisonment' in Yvonne Jewkes, (ed), *Handbook on Prisons* (Willan Publishing, 2007) 51. See also the Ministry of Justice press release for the review of Incentives and Earned Privileges in 2013, which quotes Chris Grayling as saying 'For too long the public has seen prisoners spending their days languishing in their cells watching TV, using illegal mobile phones to taunt their victims on Facebook or boasting about their supposedly easy life in prisons. This is not right and it cannot continue.' Ministry of Justice ' Major shake up to prisoner incentives' (*Ministry of Justice*, 1 November 2013) https://www.gov.uk/government/news/major-shake-up-to-prisoner-incentives accessed 2nd March 2015.

[285] Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13 Punishment & Society 509, 513.

that because these effects continue long after the imprisonment part of the sentence ends, that the punishment itself is disproportionate.[286] Snacken and Van zyl Smit argue that the punishment given to offenders is imprisonment only and that other 'pains' of imprisonment should not be added to 'enhance' the punishment.[287]

[286] Ruth Jamieson, Adrian Grounds, 'Release and adjustment: perspectives from studies of wrongly convicted and politically motivated prisoners' in Alison Liebling, Shadd Maruna, (eds) 'The Effects of Imprisonment' (Routledge, 2011) 60.
[287] Dirk van Zyl Smit, Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press, 2009) 352.

Chapter Four: Case Law Review- England and Wales

Introduction

The right to procreate within England and Wales is protected by Article 8(1) of the ECHR, which has been codified within the Human Rights Act 1998.[288] Article 8(2) allows for this right to be interfered with only if it is necessary to protect the health, morals and the prevention of crime or for the promotion of economic welfare.[289] Article 12 protects the right of citizens of 'marriageable age' to marry and found a family.[290] Within free society there is a high protection afforded to the right of individuals to marry, form relationships and procreate.

In contrast to this, prisoners inhabit a public domain, where all actions and decisions are subject to public scrutiny. In theory, prisoners retain all of their Convention rights that are not removed by incarceration.[291] The Prison Act 1952 allows for the minister responsible for prisons to make rules as necessary to administer and govern the specific regime and day to day running of custodial institutions.[292] The Prison Rules 1999 provide the current guidelines for the prison regimes including the minimum allowed number of visits, as well as the contact prisoners can expect to have with their family members. The Prison Rules themselves are not legally enforceable by prisoners, even though it is a statutory instrument.[293] By setting minimum levels of contact allowed between prisoners and their families, however, the Prison Rules do demonstrate some commitment

[288] Human Rights Act 1998 Schedule 1 Part 1 Art 8(1).
[289] ibid Part 1 Art 8(2).
[290] ibid 1 Part 1 Art 12.
[291] *Raymond v Honey* [1983] 1 AC 1; *Dickson v United Kingdom* (2008) 46 EHRR 41 para 68.
[292] The Prison Act 1952 S47(1).
[293] Nancy Loucks, Nicola Padfield, 'Basis and Status of the Prison Rules' in Nancy Loucks, (ed) *Prison Rules: A Working Guide* (Prison Reform Trust, 2000) 7.

to the idea that prisoners should maintain a relationship with their families. This minimum level of visits may be increased if desired by the governor in accordance with the Incentives and Earned Privileges Scheme.[294] Rule 4(2) states that the prison has a duty to enable the prisoner to maintain family relationships in order to promote the prisoner's rehabilitation, which places the prisoners' family in the central position of helping offenders desist.[295]

Another standard that is of relevance to prisoners in England and Wales are the European Prison Rules (EPR).[296] The EPR are not based upon prisoners' rights, but on minimum standards of imprisonment.[297] They are not themselves legally binding on member states of the Council of Europe, but are used as a guide by the ECtHR to help examine questions around prisoners' rights and prison conditions.[298] The EPR were considered relevant by the Grand Chamber in *Dickson*, especially Rule 2, which states that prisoners retain all rights that are not 'lawfully taken away by the decision sentencing them.'[299]

This chapter will begin with a description of the legal background to prisoners claiming a right to procreate in England and Wales, examining how the framework of the Prison Act, the Prison Rules and the provisions made for contact between prisoners and their families interact. The chapter will then turn to an examination of the facts of the *Mellor* and *Dickson* cases within the domestic courts before proceeding to discuss the *Dickson* case in the ECtHR.

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[294] The Prison Rules 1999 (SI 728/1999) 35(2)(a) Convicted prisoners are entitled to send 1 letter per week and (b) can receive two visits per four week period, but this may be reduced to one visit if directed by the Secretary of State.
[295] ibid 4(2).
[296] Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952 meeting of the Ministers' Deputies).
[297] ibid 54.
[298] ibid 55.
[299] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 31.

Legal Background to Prisoner Procreation in England and Wales

A prisoner who wishes to procreate within England and Wales has to submit an application to the Family Ties Unit of the Prison Administration Group.[300] This application is considered centrally. As prisoners do not retain the right to private or conjugal visits in England and Wales, the applicants in both *Mellor* and *Dickson* accepted that procreation would only be achieved through the use of AI.[301] Only a Minister from the Ministry of Justice can make the final decision whether or not to allow a prisoner to have children. The Minister would consider several factors when making the decision. The safety and welfare of the putative child is considered and the putative parent's home must be judged adequate for the child. Both parties must be medically fit to undergo the required procedures, and both must consent to the required procedures. The prisoner's release date is also considered and must not be too distant for them to assume the responsibilities of parenthood and not so near that the prisoner could simply wait until their release. Information about the prisoner and their offending history are considered, such as the risk of harm that they present to either a putative child or to society and whether it would be in the public interest to allow access to AI facilities. The stability of the relationship between the prisoner and their partner is considered and whether it would endure after the prisoner's release. Finally the Minister making the decision considers whether the only way that a pregnancy

[300] Appendix; HM Prison Service *PSO 2510 Prisoner's Requests and Complaints Procedure* (HM Prison Service, 2002) Annex H; Helen Codd, 'The Slippery Slope to Sperm Smuggling: Prisoners, Artificial Insemination and Human Rights (2007) 15 Med LR 220, 222.
[301] *ELH and PBH v United Kingdom* (1997) 91A DR 6.

will be achieved is through the provision of AI or assisted conception.[302] The decision is discretionary and other relevant facts can be taken into account.[303] Sexual intercourse is prohibited in all circumstances due to security concerns and this restriction is not relaxed under any circumstances, even when the prisoner and their partner cannot use assisted conception for religious reasons.[304] Although prisoners are no longer required to show that they have an exceptional reason for wanting to procreate, it is still difficult in practice for prisoners to gain access to AI.[305]

The Secretary of State for Justice is entitled to make rules governing the management of prisoners and prisons within Section 47 of the Prisons Act 1952.[306] The current incarnations of these are the Prison Rules 1999.[307] There are no specific provisions for prisoners to have children whilst in prison. There is however a general rule about prisoners having contact with their family outside of prison.[308]

Raymond v Honey provides the basis for assessing what rights prisoners have. All prisoners retain rights that are not expressly removed or removed by

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[302] See Appendix.
[303] ibid.
[304] *ELH and PBH v United Kingdom* (1997) 91A DR 6.
[305] Only one successful applicant for AI has been recorded. See Nick Collins, 'Prisoner granted right to father child from jail' (*The Telegraph,* 1 June 2011) http://www.telegraph.co.uk/news/uknews/law-and-order/8549149/Prisoner-granted-right-to-father-child-from-jail.html accessed 3 July 2015.
[306] Prisons Act 1952 s47(1)
'The Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions or secure training centres, and for the classification, treatment, employment, discipline and control of persons required to be detained therein.'
[307] Prison Rules 1999, SI 1999/728
[308] ibid Rule 4(1) 'Special attention shall be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both.'
4(2) 'A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the Governor, best promote the interests of his family and his own social rehabilitation.'

necessary implication.[309] This was affirmed in *Simms* where Lord Steyn stated that although prison was intended to restrict the freedoms and rights of the prisoner, the starting point should be to assume a right is preserved unless it has been expressly removed or its loss is an inevitable consequence of imprisonment.[310]

The Mellor Case

Gavin Mellor was sentenced to life for murder in 1995 and met his wife Tracey whilst she was working at the prison. Tracey Mellor resigned her post in the Prison Service prior to marrying Gavin Mellor in 1997. That year, they requested permission to access AI facilities so that they could have a child.[311] In his application, Gavin Mellor argued that Tracey Mellor would be at increased risk of conceiving a child with abnormalities, because of the long tariff period that he was required to serve as a life-sentenced prisoner.[312] The tariff period for Gavin Mellor was due to expire in 2006, after which time he would be eligible for release on licence. At the projected date of Gavin Mellor's possible release on licence in 2006, Tracey Mellor would be 31 years old. On the advice of medical professionals, it was judged that the couple should have no difficulties in conceiving naturally after his release on licence after he served the tariff element of his sentence. The Mellors' request was refused, as the Home Office only

[309] *Raymond v Honey* [1983] 1 AC 1.
[310] *R v Secretary of State for the Home Department, ex Parte Simms* [2000] 2 AC 115. In this case a prisoner was unlawfully deprived of interviews with journalists. The HL ruled that it was an unjust infringement of his right to freedom of expression.
[311] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 paras 3-6.
[312] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385; [2000] H.R.L.R. 846 para 9.

granted assistance with reproductive matters for prisoners when there were exceptional reasons to allow AI to take place.[313]

High Court: First Instance Refusal

Gavin Mellor argued that judicial review was justified on two grounds. Firstly, he stated that the decision made by the Home Secretary interfered with his Article 8 human right as a prisoner to a family and private life.[314] Gavin Mellor relied upon the judgement in *Raymond v Honey* which stated that a convicted prisoner 'retains all of their civil rights which are not taken away expressly or by (necessary) implication.'[315] Eastman describes this as a 'residual' approach to prisoners' rights.[316] Article 8(1) of the ECHR was codified into UK statutory law in 1998. [317] Interference with this Article right must be proportionate and can only be justified in certain circumstances. These are: the need to protect the interests of national security, to prevent crime, protect health and morals, or to protect the rights and freedoms of others.[318] Article 12 was also raised as relevant by Gavin Mellor, arguing that this supported his right to found a family and marry. Gavin Mellor contested that the decision of the Home Secretary interfered with this decision.[319] The second limb of Gavin Mellor's challenge was that the Home Secretary had taken into account irrelevant and irrational factors when refusing

[313] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 68.
[314] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385 [23]; [2000] H.R.L.R. 846 para 24.
[315] *Raymond v Honey* [1983] 1 AC 1, 9 (per Lord Wilberforce). The case concerned a governor who blocked a prisoner's application to court. See *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385; [2000] HRLR 846 para 17.
[316] Susan Easton *Prisoners' Rights: Principles and Practice* (Routledge, 2011) 29.
[317] Human Rights Act Art 8(1).
[318] ibid, Art 8(2).
[319] ibid, Art 12; *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385; [2000] HRLR 846 paras 17-18.

him permission to artificially inseminate Tracey Mellor.[320] He argued that consideration of the applicant's relationship and the welfare of the potential child was irrelevant, stating that the only relevant considerations were concerns over security and discipline. It was also argued that Tracey Mellor suffered unfair restriction as a free citizen of her Article 8 right to a private and family life with the partner of her choice.[321] In the first instance decision, counsel for Gavin Mellor argued that the Commission's ruling in *Hamer v United Kingdom* did not necessarily restrict a prisoner's right to procreate via AI, just that conjugal visits were justifiably restricted because of security concerns.[322]

The Secretary of State argued that prisoners had no legal right granted to procreate whilst in prison.[323] He stated that the right to a family life did not extend to allowing the prisoner who was in 'lawful custody' the right to use assisted reproductive technology (ART) because he was unable to cohabit with his partner.[324] Article 12 did give the right to a prisoner to marry, but did not impose an obligation upon the state to make provision for the conception of a child.[325] It was held that in *X and Y v Switzerland* that an interference with a right that was justified under Article 8(2), could not also constitute an interference with Article 12.[326] Forbes J ruled that as there was no legal right to reproduce in prison, there could be no violation of Article 12. Rather than having a right to access AI facilities, Gavin Mellor was actually seeking the granting of a privilege from the

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[320] *R v Secretary of State for the Home Department, Ex parte Mellor* [2000] EWHC Admin 385; [2000] HRLR 846 para 18.
[321] ibid.
[322] *Hamer v UK* (1982) 4 EHRR 139; *R v Secretary of State for the Home Department, Ex parte Mellor* [2000] EWHC Admin 385; [2000] HRLR 846 para 26 .
[323] *R v Secretary of State for the Home Department, Ex parte Mellor*; [2000] EWHC Admin 385, [2000] HRLR 846 para 43.
[324] ibid.
[325] ibid para 40
[326] ibid para 41; *X & Y v Switzerland* (1978) 13 DR 241.

Home Secretary.[327] Because he was seeking assistance rather than asserting a right, the Government stated that they were free to develop what they felt was an appropriate policy, provided that it took into account the requirements of the Human Rights Act.[328] The only ground remaining for judicial review therefore would be whether or not the policy itself was irrational, or whether the decision to refuse Gavin Mellor's request was considered irrational. Forbes J did not feel that the policy developed by the Secretary of State was irrational and that it took into account many relevant factors.[329] Finally, Forbes J stated that the public interest of maintaining prison as deterrence was justification enough to refuse permission to prisoners to access AI.[330] The decision was not seen as 'Wednesbury unreasonable', as Tracey Mellor would still be young enough to conceive when Gavin Mellor was due to be released.[331]

Court of Appeal Decision

When the decision was reviewed in the Court of Appeal it was unanimously rejected. The Mellors again argued that the request itself would not lead to any disruption to prison security or create undue burdens to the Prison

[327] *R v Secretary of State for the Home Department, Ex parte Mellor*; [2000] EWHC Admin 385, [2000] HRLR 846 para 43.
[328] ibid para 44.
[329] ibid para 48.
[330] ibid para 51.
[331] ibid para 54. 'Wednesbury unreasonableness' is a three-limbed test derived from the case *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223. In this case, Associated Provincial Picture Houses was granted a licence from Wednesbury Corporation, a local government authority to show films on the condition that under 15s were not admitted to the cinema on a Sunday. The only reasons a court could overturn a decision of a public body was because the authority took into account irrelevant factors, or failed to take into account relevant factors. The third limb is that the decision was so unreasonable was that no reasonable authority could have made it. This has become known as 'Wednesbury unreasonableness'. This was later stated by Diplock LJ in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 who stated that it meant 'So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

Service.[332] The Secretary of State stated that the purpose of imprisonment was to deprive Gavin Mellor of the right to found a family. Lord Phillips agreed with the Home Secretary's submission, noting that the original drafters of the Convention would not have intended a prisoner, lawfully deprived of his liberty, to have the right to artificially inseminate his wife. He stated that rights are not merely restricted because of a need to promote good order in the prison, but because of the need to promote the punitive element of the prisoner's punishment. This was seen as a legitimate aim of imprisonment.[333] This was affirmed in *Simms* where Lord Steyn stated that although prison was intended to restrict the freedoms and rights of the prisoner, the starting point should be to assume a right is preserved unless it has been expressly removed or its loss is inevitable because of imprisonment.[334] The Mellors' counsel submitted that because of *Simms,* a prisoner should be allowed to exercise any rights he would be entitled to in free society, so long as they were compatible with the smooth running of the prison. Lord Phillips argued that this interpretation of *Simms* was incorrect. The question was one of proportionality, the interference with the right had to be proportionate to the inference with the rights of the individual prisoner.[335] Mellor's application to appeal to the House of Lords was refused.

The Dickson Case

The facts of the *Dickson* case are very similar to those of *Mellor*. Kirk Dickson was a life-sentenced prisoner who met his wife Lorraine Dickson

[332] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 40.
[333] ibid para 54.
[334] *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115. In this case a prisoner was unlawfully deprived of interviews with journalists. The HL ruled that it was an unjust infringement of his right to freedom of expression.
[335] ibid para 58.

through a prison pen-pal scheme, as she was also serving a prison sentence.[336] The Dicksons married in 2001, whilst they were both serving prison sentences. At the time of the case, Kirk Dickson was due to be released at the earliest in 2009, at which point he would be 37 and Lorraine Dickson be 51. Lorraine Dickson had been released from prison at the time of the case and she owned her own four-bedroom house. She was unemployed and claiming benefits, but was undertaking a university-based course. Lorraine had three grown up children from a previous relationship.[337]

In October 2001, Kirk Dickson applied for the right to inseminate Lorraine, who joined the application in December 2002. In the application to the Home Secretary, the Dickson's claimed the exceptional circumstances of Lorraine's advancing age in support of their request. If they had to wait until his release in 2009, Lorraine Dickson would most likely be post-menopausal and be unable to conceive. On the 28th May 2003, the Secretary of State refused their application. The Dickson's then sought leave to seek judicial review of the decision, which was refused on the 29th July 2003. This application was then renewed and the High Court again refused leave to appeal on the 5th September 2003. On the 13th October 2003 the Dickson's applied to the ECtHR, but as they had failed to exhaust domestic remedies it was deemed inadmissible. Finally, the case was allowed to go to appeal in the UK in September 2004, where it was unanimously rejected.[338]

[336] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 2.
[337] ibid para 4.
[338] ibid para 29.

The Court of Appeal Judgment

Like the Mellor's application, the Dickson's application was unanimously rejected in the Court of Appeal. In their favour, the Home Secretary considered Lorraine Dickson's advanced age at the time of his earliest possible release, which would have been 51.[339] However, this was weighed against other competing factors, namely those considering the welfare of the child and public concern reasons. The main reason given by the Home Secretary for refusing the application were concerns about the welfare of the putative child and concerns about Lorraine Dickson's ability to provide materially for the child. The Home Secretary also felt that the Dicksons' relationship was 'untested' in the outside world, as they met whilst Kirk Dickson was in prison. There was also concern about the fact that Lorraine Dickson would be bringing up the child as a single parent whilst waiting for Kirk Dickson to be released.[340] The other major concern was about the fact that Kirk Dickson had been convicted of murder, and by allowing him to procreate, the public might be concerned that his sentence was not sufficiently punitive enough. There was also an argument that by allowing prisoners to procreate that the deterrent effects of the sentence would not be sufficiently stringent enough.[341]

In their judgment, the CA agreed with the Home Office policy in their judgment. Auld LJ made reference to *Mellor*, emphasising how similar the cases were, to emphasise the importance of the policy to limit the procreation of prisoners in the public interest. [342] In this case, however, rather than arguing the policy was irrational, the counsel for the Dickson's argued that it was a

[339] ibid para 7.
[340] ibid para 7
[341] ibid.
[342] ibid para 10.

disproportionate interference with Lorraine Dickson's Article 8 rights because she was close to the menopause. By preventing the Dickson's from using AI, their chance to have a child together would be 'totally extinguished.'[343]

The Court of Appeal argued that the ECtHR ruling in *Hirst* should not affect the reasoning of the court in *Dickson*.[344] Auld LJ argued that *Hirst* was referring to a complete ban on voting for prisoners, and as there was no blanket ban on access to AI, *Hirst* was irrelevant. He stated that the Government was allowed to use their discretion to allow cases in exceptional circumstances.[345] However, by placing the bar so high, arguably the policy amounted to a complete ban for the vast majority of prisoners. There is a tension between the judges and the Dickson's counsel, about what is an appropriate consideration for penal policy. The CA argued that rather than public concern and welfare of the child considerations being irrelevant; they were centrally important to the policy. Auld LJ ruled that it was appropriate for both the policy and the courts to consider child welfare and public opinion when deciding which prisoners should be allowed to procreate.[346] He argued that the restrictive policy was Convention compliant, as the Convention allowed for derogation from Article 8(1) rights, so long as it was for the protection of morals and the rights of others.[347] The Dicksons were refused leave to appeal to the House of Lords, so appealed directly to the ECtHR.

[343] ibid para 13.
[344] ibid para 16; *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41.
[345] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 16.
[346] ibid para 20.
[347] ibid.

Dickson v UK

Chamber Ruling

Once the Dicksons had exhausted their domestic appeal options, they were given leave to appeal to the ECtHR. Their claim was denied on their first hearing in the First Chamber on the basis that there was no existing general right to have children whilst incarcerated.[348] The majority verdict firstly restates the law as set out in the CA judgement, and reiterates the UK's reliance on the decision in *Mellor.* Member states had wide appreciation afforded to them with the application of Article 8(2).[349] The Dickson's counsel submitted that if the aim of the restriction upon procreation was to be punitive, then it made no legal sense to allow exemptions. Criticising the Home Office, they stated that social factors were not factors relevant or considered by Article 8(2), relying upon the ruling of *Hirst*.[350] The Dicksons claimed that the starting point for the policy was wrong.[351] In order to remove a fundamental right, there had to be a 'considerable' justification. Instead, the Government had set the bar towards the opposite end, stating that there had to be an exceptional reason for access to AI to be allowed. There was also no logical link between the offence and the refusal to access to AI, according the Dickson's. Dickson argued that whilst AI could be justifiably withheld in certain circumstances, such as for those convicted of offences against children, the indiscriminate withholding of facilities was unjustified.[352]

There was also dispute from the Dickson's about the claims made by the Home Secretary and the Court of Appeal in justification of refusing to allow them

[348] *Dickson v United Kingdom* (2007) 44 EHRR 21 paras 39-40.
[349] ibid paras 11-17; *R v Secretary of State for the Home Department, Ex parte Mellor*; [2000] EWHC Admin 385, [2000] HRLR 846 [43].
[350] *Dickson v United Kingdom* (2007) 44 EHRR 21 para 21, *Hirst v United Kingdom (no 2)* 42 EHRR 41 paras 42-44.
[351] *Dickson v United Kingdom* (2007) 44 EHRR 21 para 21.
[352] ibid para 22.

access to AI. They claimed that the statement given by the Government that there was no financial provision made for the child was unfair. Lorraine Dickson owned a house outright that was worth £200,000 and was undertaking a course that would allow her to work as a counsellor. Restricting access to AI on the basis that their relationship had not been 'tested' outside of prison was also unfair. It was not necessarily true that any relationship was guaranteed to fail or succeed. It was a circular argument that could prevent any long-term prisoner from accessing AI.[353] Finally, it was argued that the policy was an unjust infringement of Lorraine Dickson's Article 8 rights, especially as she was no longer serving a prison sentence, but was still affected by the policy.

The Government then argued that the policy was consistent with the ECHR. The restriction on procreation was a necessary part of the punishment of the prisoner.[354] The Government then argued that by allowing discretion within the policy, it meant that each case could be examined on its merit. If prisoners were allowed to procreate, they argued, it would undermine public confidence in the criminal justice system.[355] The narrow margin between the majority and minority judgement in the Chamber demonstrates how contentious and difficult the decision was to make. The ruling that there was no violation of either Article 8 or 12 was held at four to three, showing how easily a different make up of judges could have affected the final ruling. It also demonstrates how murky the lines are between legitimate punishment and unjust infringement of Convention rights. This raises questions about what the appropriate margin of appreciation is that should be allowed to member states. The majority judgment accepted that

[353] ibid para 23.
[354] ibid para 24.
[355] ibid para 24.

prisoners enjoy all of their Convention rights apart from the right to liberty.[356] However, they accepted that some curtailment of these rights was a necessary and inevitable part of imprisonment. The majority judgment said that there was no interference with the Dicksons' Article 8 right because there was no general restriction of a general entitlement present within the prison environment.[357] The Chamber reasoned that there was a wide margin of appreciation between the member states and there was no consensus on the issue of either conjugal visits or procreative provision for prisoners.[358] The provision of AI was not seen as a negative right to not be interfered with by the authorities, but rather that it was the state refusing to take exceptional steps to allow the fulfilment of a positive obligation.[359] The Chamber also explained that the burden for promoting a positive right should not be too great, and should not infringe others rights disproportionately.[360]

The Court in this instance ruled that the policy itself considered relevant matters as the government had a positive duty to protect the future welfare of children under Article 8(2), as well as positive obligation to the prisoner and his partner.[361] The considerations of public opinion were also thought to be important, and a relevant factor in developing the policy, although they accepted that a balance had to be struck between the needs for recognition of public opinion and the need for tolerance on the other hand.[362] The decision made by the Home Secretary was deemed lawful in the light of the Government policy, and was

[356] ibid para 26.
[357] ibid para 30.
[358] ibid para 31.
[359] ibid para 30.
[360] ibid para 32.
[361] ibid para 34.
[362] ibid para 34.

allowed under the wide margin of appreciation afforded to member states under the Convention. Because there was no infringement of Article 8, according to the Court, there could therefore be no infringement of Article 12.

Grand Chamber Ruling

In 2006, a panel of the Grand Chamber granted the applicants a request to refer the case to the Grand Chamber. In the final judgment, the judges held twelve to five that there had been a violation of Article 8, and decided that it was not necessary to examine whether or not there had been a violation of Article 12. Although there was some dissent, in the Grand Chamber the case did not cause such a close split as that in the Chamber.

As well as reiterating the legal framework for governing prisoners' access to AI, it also examined the role and objectives of a prison sentence.[363] The judgment refers to a 'progressive principle' in which the earlier parts of a longer prison sentence focuses on retribution and punishment, and the later stages of the sentence should see the prisoner progressing through the categories, into lower security settings, focussing on rehabilitation and reintegration into the community. It is hoped that during this time the prisoner will develop a sense of personal responsibility. The judgment refers to various international human rights instruments, all of which encourage this important principle.[364] The main point of

[363] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 28.
[364] International Covenant on Civil and Political Rights (ICCPR) Article 10(3) states that imprisonment should aim to 'seek the reformation and social rehabilitation of the prisoner.' International Covenant on Civil and Political Rights, GA Res 2200A (XXI) of 16 December 1966, 21 UN GOAR Supp (No 16) 52, UN Doc A/6316 (1966), entry into force 23 March 1976, (ICCPR). The United Nations Standard Minimum Rules for the Treatment of Prisoners 1957 states that institution should use all means possible to promote the rehabilitation of the prisoner into the community. Standard Minimum Rules for the Treatment of Prisoners, UN DocA/Conf611, annex 1; subsequently endorsed by United Nations Economic and Social Council: ESC Res 663 C (XXIV), 31st July 1957, 24 UN ESSCOR Supp (No 1) 11 Un Doc E/3048 (1957) and 2076 (LXII) (1957) Article 37 Annex 1 (UNSMR). The EPR 2006 emphasizes that prisoners retain all rights, bat that of liberty, apart from those legitimately removed when they are sentenced. See

reiterating these various instruments was to demonstrate the importance of rehabilitation and reintegration into the community for the prisoner. These instruments highlighted how the Government policy of England and Wales which restricted access to AI conflicted with the aim of rehabilitation with the premise that prisoners retain all of their convention rights bar liberty.

The majority judgement in the Grand Chamber firstly considered whether the Dickson's Article 8 right had been infringed. Again, they reiterated the fundamental principle ruled on in *Hirst,* that a prisoner only loses the right to liberty when incarcerated, and does not any other of his fundamental rights.[365] Any justification for the restriction of rights has to take place on a case-by-case basis.[366] The Grand Chamber declined to judge whether procreation was a positive or negative obligation, instead of confining itself to whether a 'fair balance' struck between public and private interests.[367] This was a lost opportunity to explore in more detail whether there is a fundamental right to reproduce and whether that takes the form of a positive or negative state obligation. The Grand Chamber did however examine the Governments' justification for the policy. They stated that whilst the inability to have children might be a consequence of imprisonment, it was not an 'inevitable' one.[368] The majority took the view that as there was no financial burden placed upon the Prison Service, so a fair balance was not struck between the rights of the

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Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules
(Adopted by the Committee of Ministers on 11 January 2006 at the 952 meeting of the Ministers' Deputies).

[365] *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41 para 69.
[366] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 68.
[367] ibid para 71.
[368] ibid para 74.

individual and the prison authorities' requirements.[369] This in itself may cause an issue if the prisoner in question as female and the question of balancing the burden between the prisoner and the prison authorities arose. The thorny issue of the role that public confidence played was also discussed.

Whilst the Grand Chamber accepted the importance of public confidence with the penal system, they stated policy should not be solely dictated by what could offend the public. It also reiterated the importance of rehabilitation and the vital role of the family to help reintegrate the offender back into society. The Grand Chamber stated that the Government seemed to retain the policy with the overall aim of punishing the offender, even if this was not explicitly stated.[370] Regarding the policy itself, considerations of child welfare were relevant, but could not in themselves be used to prevent potential parents from conceiving, especially as Mrs Dickson was a free citizen and would have taken primary responsibility for any child.[371]

The main challenge of the majority judgment to the UK government was concerning the margin of appreciation. It stated 'where a particularly important facet of an individual's existence or identity is at stake…the margin of appreciation accorded to a State will in general be restricted.'[372] However, in complex social issues that have little consensus across member states this margin would be wider. The real problem with UK policy lay with the exceptionality clause, as that prisoners would generally be denied AI unless exceptional reasons existed which meant that these should be granted.[373] The way the policy was

[369] ibid.
[370] ibid para 75.
[371] ibid.
[372] ibid para 78.
[373] ibid para 82.

structured prevented a proper and proportionate weighing of the competing interests of state and individual.[374] In conclusion, the Grand Chamber ruled that the absence of a proportionality assessment fell outside the margin of appreciation and thus a violation of Article 8 had occurred.[375]

In a concurring opinion, Bratza J, who sat in the Chamber and was required to sit in on the Grand Chamber explained why he changed his decision from the first hearing. He highlighted how the first Chamber decision was more concerned with whether the policy itself was compatible with Article 8. This was differentiated from *Hirst* because the removal of suffrage for prisoners operated as a blanket ban. Bratza J agreed that a fair balance between the needs of the state and individual had not been struck. The burden placed upon the prisoner to show that he was deserving of AI because of exceptional circumstances demonstrated a lack of a fair balancing of interests.[376]

The dissenting judges highlighted in their judgment that they thought that the majority judgment itself was contradictory.[377] Whilst there is no recognised right to conjugal visits, they claim that there has now been a right recognised for prisoners to access AI facilities. The issue of conjugal visits is given a wide margin of appreciation by the Member States, but AI is not. The dissenting judgment highlights that this margin of appreciation affords the member state the ability to apply the Convention in line with their own laws and aims, as long as the legal restrictions applied are because of a legitimate policy aim.[378] In answer

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[374] ibid.
[375] ibid para 85.
[376] ibid (Joint Concurring Opinion of Bratza J).
[377] *Dickson v United Kingdom* (2008) 46 EHRR 41 (Dissent of Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer, JJ) argued that this should be considered under the individual country's margin of discretion, highlighting the contradiction that conjugal rights are considered under the 'margin of discretion' doctrine, but that a right to AI is not.
[378] ibid Joint Dissenting Opinion of Judges Wildhaber, Zupancic, Jungwiert, Gylumyan and

to this particular point, the margin of appreciation with regards to conjugal rights can be understood from the perspective of balancing the burdens on the prison service with the rights of prisoners. Conjugal visits place a large resource burden upon the prison, as they require the provision of secure and private accommodation for conjugal visiting, extra staffing for the visit areas, as well as the increased risk of security issues arising. Male prisoners producing semen for AI produce minimal burdens upon the prison service. The only requirement is an appropriate receptacle and a private room in which to produce the required semen sample. The health risks to staff can be minimised by passing the sample straight to a health care professional. The dissenting judges then argued that the majority judgement in the Grand Chamber failed to address the issues of whether the Member States should retain their margin of appreciation when considering whether AI should be accessible to either homosexual prisoners or female prisoners. The dissenting judges claim that the member states should retain this margin of appreciation when considering different types of prisoners and partnerships, which deviate from the case of the male prisoner wishing to inseminate a female partner outside of prison.[379]

Myjer.
[379] ibid.

Summary

Litigation and judicial review remain one of the few avenues open to prisoners who wish to have certain rights recognised. In theory, prisoners in England and Wales do not automatically lose their right to procreate, unlike those in the USA, but in practice they find it extremely hard to successfully gain access to AI or other medical assistance in order to become a parent.

Until *Dickson v UK,* prisoners were only granted access to AI in exceptional circumstances.[380] This was argued by the court in both *Mellor* and *Dickson* to reflect the principle that lawfully detained prisoners were responsible for their own misfortune and that they lost their right to procreate once committed to prison until their release.[381] The starting point for defining exceptional circumstances was set out by Phillips LJ in *Mellor* who stated that the starting point was 'if facilities for artificial insemination are not provided, the founding of a family may not merely be delayed, but prevented altogether.'[382] This was reaffirmed at the same time by Auld LJ in *Dickson,* but Mance LJ the prospect of childlessness was not enough to pass the 'exceptional circumstances' test.[383]

The Grand Chamber felt that the decision to refuse access to AI did not strike a fair balance between the public interests claimed by the Government and the private interests that the Dicksons' held in procreation.[384] The Grand Chamber emphasised the importance of the progression of the prisoner through their

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[380] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 16.
[381] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 62; *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 10.
[382] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 68.
[383] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 25.
[384] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 82.

sentence, which firstly focuses on retribution and punishment, but later on concentrates on rehabilitation and resettlement within the community.[385]

In practice it appears that it is still extremely difficult to obtain permission for access to AI. There were no known applications from women prisoners in 2011 for access to AI, and as stated earlier, only one successful male application. The Joint Committee on Human Rights stated in their 2007-8 report that it appears that the only concession made by the Government was to remove the reference to exceptional circumstances.[386] The Government continued to factor into their decision matters that related to public interest, which the Grand Chamber had objected to in Dickson.[387] This leaves the Government open to further claims for human rights breaches.[388] Whilst prisoner procreation appears to be a fringe issue in the greater debate surrounding prisoners' rights; it is likely that further litigation claims may reach the domestic courts, as well as the ECtHR, especially as the Government is unwilling and unlikely to change their approach. The Freedom of Information request received in 2011 still showed the same policy being used to make decisions as stated by the Joint Committee in 2008.[389]

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[385] ibid 39.
[386] Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments Annual Report 2008 Thirty- first Report: 4 Issues Monitored by the Committee* (2007-08, HL 173, HC 1078) para 39.
[387] ibid paras 39-40.
[388] ibid para 43.
[389] Appendix; see also Nick Collins, 'Prisoner granted right to father child from jail' (*Telegraph*, 1 June 2011) http://www.telegraph.co.uk/news/uknews/law-and-order/8549149/Prisoner-granted-right-to-father-child-from-jail.html accessed 1 July 2015.

Chapter Five: Case Law Review- The United States of America

Introduction

In the USA, prisoners have a similar 'guarantee' to prisoners in England and Wales that protects their constitutional rights when imprisoned, although in practice these are extremely restricted.[390] There is no specific right to a private and family life, rather there is an acknowledged protection of areas of family life, such as the right to use contraception, the right to abortion, as well as the right for individuals to make decisions about their family without interference from the state.[391] These cases were generally based upon the 14th Amendment of the US Constitution, under the Due Process Clause and the Equal Protection Clause.[392] Neither state nor Federal jurisdictions are compelled to consider prisoners as candidates for AI, even under exceptional circumstances. Prison authorities can restrict a prisoner's constitutional rights so long as the authorities meet the four-part test outlined in *Turner v Safley*.[393] Only the case of *Goodwin* considered how the restrictions also affected the rights of the free partner of the prisoner. They stated that infringement of the right of a free citizen to have children was not enough to warrant subjecting the prison ruling to strict scrutiny.[394] Prisoners are further compounded in their ability to litigate on rights issues following the passage of the Prison Litigation Reform Act.[395] The Act places restrictions on a prisoner's ability to bring an action to court, requiring them to wait until they

[390] *Wolff v McDonnell* 418 US 539 (1974).
[391] *Skinner v Oklahoma*, 316 US 535, 541(1942); *Griswold v Connecticut*, 381 US 479 (1965); (*Roe v Wade* 410 US 113; *Carey v Population Servs Int'l* 431 US 678, 685 (1977).
[392] US Const. amend. XIV, s 1.
[393] *Turner v Safley* 482 US 78, 95, 96 (1987).
[394] *Goodwin v Turner,* 980 F.2d. 1395, 1399 (1990).
[395] Prison Litigation Reform Act 1996: United States Code Title 42 s1997e Suits by Prisoners.

have exhausted all internal procedures for settling the dispute.[396] Time limits also apply to bringing a case. This places prisoners in a less favourable position than members of free society in bringing cases to court.

This chapter will firstly examine the background to prisoner procreation in the USA, including the constitutional protection of procreative rights for free members of society. The chapter will then turn to look at the facts and ruling of the three cases examined from the USA: *Percy*, *Goodwin* and *Gerber*. In common with *Mellor* and *Dickson*, all three cases concern male prisoners sentenced to either life imprisonment or very long sentences whom wanted to produce semen samples so that their wives could be artificially inseminated. Apart from the ruling in Gerber II, none of the prisoners gained support for access to AI. The legal situation remains uncertain as the Supreme Court declined to rule on Gerber's case.[397]

[396] ibid.
[397] *Gerber v Hickman* 537 US 1039 (2002).

Legal Background to Prisoner Procreation in the United States of America

Several United States Supreme Court judgments have recognised that in different situations, individuals have reproductive rights, based mostly upon the 14th Amendment, the right to due process.[398] The United States Supreme Court have also recognised that former prisoners also had the right to retain their reproductive capabilities, stating that procreation was central to the reproduction of the human race.[399] The case of *Skinner* is not as protective of a prisoner's right to procreate as it may first appear. The case itself turned not on the invasion of a prisoner's right to procreate, but rather on how the statute mandating sterilisation of offenders operated in a discriminatory manner only targeting repeat offenders, who committed offences of 'moral turpitude.' So-called 'white collar' offenders were excluded, as the statute itself had eugenic aims.

Generally, it is accepted that prisoners possess all of the same civil rights that free people possess bar those removed by imprisonment.[400] The 1960s and

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[398] Many cases protect several constitutional rights attached to privacy and reproduction. *Skinner v Oklahoma*, 316 US 535, 541(1942) (procreation is 'one of the basic civil rights of man', based on the 14th Amendment Equal Protection Clause); *Griswold v Connecticut*, 381 US 479 (1965) (right to privacy regarding contraceptive decisions within marriage, founded within the 5th Amendment against self-incrimination); *Roe v Wade*, 410 US 113 (1973) (a woman has right to abortion based upon her right to privacy under the Due Process Clause of the 14th Amendment); *Carey v Population Servs Int'l* 431 US 678, 685 (1977) (right of privacy to make decisions that relate to marriage, procreation, contraception, family relationships, and child rearing and education, based upon the 14th Amendment and protection of due process); *Stanley v Illinois* 405 US 645, 651 (1972) (right of unmarried fathers to attend fitness to parent hearing in the same capacity as mothers and married fathers); *Planned Parenthood v Casey* 505 US 883 (1992) (provision in Pennsylvania Abortion Act 1982 s3209 that required married women to inform their husbands that they were having an abortion was deemed unconstitutional); *Eisenstadt v Baird* 405 US 438, 453 (1972) (right of unmarried mothers to access contraception).

[399] *Skinner v Oklahoma*, 316 US 535, 541(1942).

[400] *Wolff v McDonnell* 418 US 539 (1974); Prisoners retain many constitutional rights such as the right to free exercise of religion (*O'Lone v Estate of Shabazz* 482 US 342 (1987); the right to access the courts (*Bounds v Smith* 430 US 817 (1977); the right to protection against cruel and unusual punishment (*Estelle v Gamble* 429 US 97 (1976); Rights to due process in prison disciplinary procedures (*Wolff v McDonnell* 418 US 539 (1974); and the right to freedom of speech (*Pell v Procunier* 417 US 817 (1974).

1970s provided the greatest activity in the Supreme Court in support of prisoner's rights.[401] Prisoners gained recognition of the right to freedom of religion,[402] and the right to express their opinion about the prison without being censored in mail, [403] as well as the right to due process in disciplinary matters.[404] However, in practice, rights have become increasingly limited as the US Supreme Court has become more conservative. The right to be provided with an adequate law library or trained professionals was challenged by *Lewis v Casey.*[405] Following this judgment, prisoners retain the right of access to the courts, but do not have a 'free-standing' right to a law library or assistance with litigation. Furthermore, prisoners are also subjected to the restrictive Prison Litigation Reform Act (PLRA) 1996 which seek to limit 'frivolous' litigation.[406] Amongst other restrictions, the PLRA requires that prisoners exhaust the internal appeals processes within their institutions before bringing a case to court.[407] This serves to make it increasingly difficult for any prisoner who wants to challenge a prohibition on AI to take their claim. Deadlines imposed by the court can be missed, preventing prisoner litigants pressing their claims through the court.

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[401] Jack E Call, 'The Supreme Court and Prisoner's Rights' (1995) 59 Federal Probation 36.
[402] *Cruz v Beto* 405 US 319 (1972) (a prison could not prevent a Buddhist prisoner from using the chapel, from writing to religious advisors and from distributing religious material to other inmates, if these activities were permitted to other inmates).
[403] *Procunier v Martinez* 416 US 396 (1974) Right of correspondent outside of prison infringed by prison censorship. Prisons should only censor that which is necessary to further the aims of prison security, order or rehabilitation.
[404] *Wolff v McDonnell* 418 US 536 (1974).
[405] *Johnson v Avery* 393 US 483 (1969); *Bounds v Smith* 430 US 817 (1977); *Lewis v Casey* 516 US 804 (1996).
[406] See footnote 395, Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States* (Human Rights Watch, 2009). Human Rights Watch makes the important point that unlike other western democracies, the USA lacks a national prison inspectorate to enforce minimum decent standards. Litigation is often a prisoner's only recourse to improve debilitating standards of living. See also Kermit Roosevelt III, 'Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error' (2003) 52 Emory LJ 1771, 1772.
[407] ibid sec (a).

The strict scrutiny approach used in *Procurier v Martinez* was eroded by the latter case of *Turner v Safley*.[408] *Procurier v Martinez* provided a more robust protection for prisoner's rights than the test introduced by *Turner v Safley*. *Turner* introduced a four-part test that was termed the 'rational basis test' to be used when deciding whether it was legal to restrict a prisoner's rights.[409] When restricting a prisoner's rights it is easier for a state to pass the rational basis test.[410] To establish whether a restriction on a prisoner's constitutional rights are reasonable, the court must be satisfied that a) there is a rational connection between the legitimate penological objective and the restriction, b) whether there is an alternative way for the prisoner's constitutional rights to be met, c) what effect accommodating the right has on other prisoners and staff, and d) whether the prisoner can point to alternatives to the regulation which come at minimal cost to the prison and allows for the prisoner's right to be accommodated. If there is an absence of alternatives this may provide evidence that a restriction is exaggerated.[411] Court action can only be commenced when all other institutional avenues to appeal have been extinguished.

The Goodwin Case

This case originated in the Western District of Missouri. The plaintiff, Steven Goodwin was a federal prisoner who was sentenced in 1986 to a 14-year sentence for drugs offences.[412] In 1987 he requested permission from the Warder to be able to be provided with the facilities to produce a semen sample to allow

[408] *Procunier v Martinez* 416 US 396 (1974).
[409] *Turner v Safley* 482 US 78 (1987)*;* Jack E Call 'The Supreme Court and Prisoner's Rights' (1995) 59 Federal Probation 36, 42.
[410] Jack E Call, 'The Supreme Court and Prisoner's Rights' (1995) 59 Federal Probation 36, 42.
[411] *Turner v Safley* 482 US 78, 90-91 (1987).
[412] Tim Bryant, 'Barred Reproduction: Inmate's Request to Father Child is Denied' *St. Louis Post-Dispatch* (Missouri, 18 July 1990) 3A.

his wife to be artificially inseminated.[413] His request was justified by the concern that on his earliest release from prison his wife, Sabrena Goodwin would be at an age that would put her at increased risk of birth defects.[414] This was initially refused because the Federal Bureau of Prisons had no policy on AI and prisoners.[415] Steven Goodwin then pursued a court order to force the prison authorities to allow him to provide a sperm sample, and to allow for his doctor to collect the sample from prison. He also requested that he was tested for sexually transmitted diseases and given a guarantee that he would not be transferred from the prison until the situation had been resolved.[416] The magistrate ruled that Bureau of Prison's refusal on the grounds merely on absence of a policy did not meet minimum due process requirements and so recommended that Steven Goodwin be allowed to resubmit his claim in detail.[417]

The District Court Ruling

Steven Goodwin asserted that his right to reproduce was a fundamental constitutional right, which survived incarceration and was 'compatible with his status as a federal prisoner.'[418] In this respect, Steven Goodwin argued that the right to reproduce should be treated the same way as the right to marriage, which had been ruled by the United States Supreme Court to survive incarceration.[419] Steven Goodwin argued that his wife Sabrena Goodwin's constitutional rights to procreate were also affected by the ruling.[420] The magistrate supported Steven Goodwin's claim in this respect, stating that the right to procreate survives

[413] *Goodwin v Turner* 980 F2d 1395, 1397 (1990).
[414] *Goodwin v Turner* 702 F Supp 1452, 1452 (1988).
[415] *Goodwin v Turner* 980 F2d 1395, 1397 (1990).
[416] ibid.
[417] *Goodwin v Turner* 702 F Supp 1452 (1988).
[418] ibid 1453.
[419] ibid. *Turner v Safley* 482 US 78 (1987).
[420] ibid 1453, *Goodwin v Turner* 980 F2d 1395, 1397 (1990).

incarceration.[421] Collinson J began his judgment by citing the principle that prisoners are not separated from the state by an 'iron curtain' but that they retain all of their rights that are not incompatible with either their status as a prisoner, or incompatible with legitimate penological aims.[422] The rights that Collinson J lists as being retained by the prisoner are: the right to be free of racial discrimination, the right to petition the government for 'redress of grievances' and the right to practice one's religion.[423] He then ruled that incarceration remained an 'insurmountable obstacle' to Goodwin procreating whilst in prison.[424] Collinson J stated that Steven Goodwin 'does not have a fundamental constitutional right to father a child through artificial insemination that survives incarceration' because his ability to procreate was inconsistent with his status as a prisoner.[425] Steven Goodwin had argued his right to procreate survived on a number of levels, stating that he had a fundamental right to procreate as set out under *Skinner.* This was dismissed by the judge, however, stating that *Skinner* merely stood for the right to not be forcibly sterilised against one's will, thus suffering permanent deprivation of the ability to reproduce.[426] Similarly, Steven Goodwin failed to press his claim under the right to marry. Collinson J stated that the right to marry was subject to a number of restrictions. The right to bear and rear children fall under the 'unavailable incidents of marriage,' which are not open to prisoners.[427] Neither was Steven Goodwin's right to procreate protected by the right to privacy, as loss

[421] *Goodwin v Turner* 702 F Supp 1452, 1453 (1988).
[422] ibid. On the point of the 'iron curtain' the court cited *Hudson v Palmer* 468 US 517, 523 (1983). On the point that prisoners retain all rights that are not inconsistent with legitimate penological aims or their status as a prisoner, Collinson J cited *Turner v Safley* 482, US 78, 94 (1987).
[423] *Goodwin v Turner* 702 F Supp 1452, 1453 (1988).
[424] ibid.
[425] ibid 1453, 1454 citing *Hudson v Palmer* 468 US 517, 523 (1983).
[426] *Goodwin v Turner* 702 F Supp 1452, 1454 (1988) citing *Skinner v Oklahoma* 3169 US 535, 544 (1942).
[427] *Goodwin v Turner* 702 F Supp 1452, 1454 (1988).

of the right to privacy was considered to be an inherent part of imprisonment.[428] Finally, his claim failed under the proposition that denial of the right to procreate constitutes a cruel and unusual punishment, which violated his Eighth Amendment right.[429] Collinson J argued that denial of AI facilities did not constitute an excessive punishment also adding that even though the restriction affected Sabrina Goodwin as well, this did not justify subjecting the restriction to the strict scrutiny approach detailed in *Procurier v Martinez.* [430]

Court of Appeal Ruling (Eighth Circuit)

The Court of Appeal for the Eight Circuit of the United States also refused to allow Goodwin's appeal, however, its reasoning turned on other grounds. The leading judgment did not examine the question of whether Goodwin's right to procreate survived incarceration, but merely stated that the restriction on AI was reasonable because it was connected to the legitimate penological interest of treating all prisoners the same.[431] Magill J did accept that there is a constitutionally protected fundamental right to reproduce, but the judgment itself concentrated upon examining whether the restriction on AI implemented by the Bureau of Prisons met the appropriate standards.[432] Goodwin argued that because the case affected his wife that the restriction should be subjected to a strict scrutiny test, stating that incarceration causes deprivation of family connections as a matter of course.[433] The four-part test in *Turner* was applied. Restrictions in the prisoner's rights are permissible so long as the restriction is reasonably related to

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[428] *Goodwin v Turner* 702 F Supp 1452, 1455 (1988), citing *Bell v Wolfish* 441 US 520, 537 (1978).
[429] ibid 1455.
[430] ibid.
[431] *Goodwin v Turner,* 980 F2d 1395, 1396 (1990).
[432] The general right to reproduce is recognised in many cases, see footnote 398.
[433] *Goodwin v Turner,* 980 F2d 1395, 1399 (1990) citing *Morrissey v Brewer*, 408 US 471, 482 (1972).

achieving a legitimate penological objective.[434] Magill J argued that a complete restriction was justified as it was 'rationally related to the Bureau's interest in treating all inmates equally, to the extent possible.'[435] The major concern of the Bureau and the court was that women prisoners would start requesting permission to become pregnant whilst serving their sentence. The Bureau and Magill J argued that the demand from women prisoners wanting to procreate would cause an unacceptable burden upon the Bureau of Prisons, who would need to expand their medical services.[436] The need to identify an alternative method to conjugal visits to maintain prisoner's constitutional to the prisoner under the test in *Turner* was not seen to be necessary by the court. They argued that allowing AI as an alternative would lead to the Bureau having to accommodate female prisoners wanting to have children.[437]

The dissenting judgment in *Goodwin* refuted the claim that the restriction of procreation was in furtherance of a legitimate penological aim. McMillan J argued that the *Turner* test had been improperly applied, and that the prohibition was not related to a legitimate penological aim.[438] He also stated that Goodwin's request was narrowly defined, and that he retained some right to procreate.[439] The complete prohibition upon AI was judged by McMillan J as an 'exaggerated response' and not related to a legitimate penological aim This, along with the Bureau of Prison's changing reasons for refusing Goodwin's request made a refusal unconstitutional according to McMillan.[440] Importantly, he also notes that

[434] *Goodwin v Turner,* 980 F2d 1395, 1399 (1990).
[435] ibid.
[436] ibid 1400.
[437] ibid.
[438] ibid 1401.
[439] ibid 1403.
[440] ibid 1405. McMillian J notes that the reasons given for denying Goodwin's request have changed, firstly from the Bureau not having a policy to allow AI, to then having a legitimate

equal treatment of male and female prisoners is not a legitimate penological interest when accommodating it results from the denial of a request that could otherwise be accommodated.[441] As far as gender equality is concerned, McMillan argues that the State would be justified in prohibiting female prisoners from reproducing in prison because of the larger burden on prison staff and services, which would satisfy the requirement in Turner.[442]

The Percy Case

Robert Percy was a 45-year-old prisoner of the State of New Jersey who was convicted of homicide in 1985 and was sentenced to a life term in prison. He had to serve a minimum of a 30-year period where he was ineligible for parole. This minimum 30-year term would expire on November 23rd 2014. Robert Percy married in prison in 1986. At the time of the court hearing, Robert Percy was 45 and his wife was 36. They had one child together, who was 15. Robert Percy's wife had a fulltime job and the case stated that she also had medical benefits.[443] They wished to have another child together and applied to the New Jersey Department of Corrections in 1988 and again in 1990.[444] Robert Percy made a final application in July 1993 in which he requested permission to either be conveyed to a medical facility in order to produce a sperm sample, which would then be used to inseminate his wife. As an alternative, he requested that he was provided with a sterile container in order to produce a sperm sample. His wife would convey from the prison to the nearest medical facility. Robert Percy stated that he and his wife would bear all of the costs for the transport, medical costs and

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penological concern in the request opening the door to women prisoners wanting to become pregnant in prison.

[441] ibid 1405.

[442] ibid 1406.

[443] *Percy v State of New Jersey* 278 NJ Super 543, 545 (1995).

[444] ibid.

treatment. His request was refused by the Department of Corrections on the grounds that insemination was an elective medical procedure and could not be authorised without a court order.[445] Robert Percy then appealed to the Superior State Court of New Jersey in 1995.[446] The appeal hearing took place in front of three judges who unanimously ruled against the claimant.

The Ruling

The appeal hearing consisted of three judges, King, Muir Jr and Eichen who unanimously ruled in favour of the Californian Department Of Corrections, strongly disagreeing with Percy that prisoners should have the right to AI facilities. The judgment itself is very short. The single opinion of the court was delivered by King J. Percy's request to be able to produce a sperm sample in order that his wife could be artificially inseminated was refused. The judgment stated that no court in the USA had ever recognised that prisoners retained the right to procreate, citing the decision of *Goodwin* as justification.[447] King J further justified the refusal by citing the United States Supreme Court ruling of *Turner v Safley* in which the right of the prisoner to marry was upheld, but the right to procreate was not.[448]

Percy argued that the right to procreate had been recognised by the United States Supreme Court in several instances.[449] He then went on to argue that the right to procreate is not itself inconsistent with the status of prisoner.[450] In support

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[445] ibid 546.
[446] *Percy v State of New Jersey* 278 NJ Super 543, 545 (1995). The choice to appeal to a State court rather than a Federal court is an interesting point to consider, as both Goodwin and Gerber chose the Federal Court circuit.
[447] *Percy v State of New Jersey* 278 NJ Super 543, 547 (1995), citing *Goodwin v Turner* 908 F2d 1395.
[448] 482 US 78, 84 (1987).
[449] *Carey v Population Services Int'l* 431 US 678, 685 (1977); *Stanley v Illinois* 405 US 645, 651, (1972); *Skinner v Oklahoma* 316 US 535, 536, 541, (1942).
[450] *Percy v State of New Jersey* 278 NJ Super 543, 547 (1995).

of his request he also stated that there was no valid penological interest furthered by refusing his request to allow his wife to be artificially inseminated. Percy attempted to rely on *Monmouth County Correctional Institutional Inmates v Lanzaro* in which female inmates were deemed to have a right to access abortion services without a court order to obtain an abortion. He claimed that the right to procreate should also share the same status as the right to an abortion.[451] The Court stated that legitimate penological interests justified refusing prisoners the right to procreate via AI and that equal protection measures were an important consideration.[452] There was great concern that allowing female prisoners to procreate would create an onerous burden for the Department Of Corrections and would reduce the available income for rehabilitation and other 'desirable programs.'[453] The court acknowledged that they gave 'considerable deference' to the expertise of the Department Of Corrections who are best placed to make decisions about the effects of allowing prisoners to procreate which they stated carried risks to security, scarcity of resources and equal protection measures.[454]

Gerber Case

William Gerber was a state prisoner sentenced to 100 years to life plus 11 years imprisonment under the 'three strikes and out rule' after shooting his television set.[455] Under Californian prison rules, he was ineligible for family visits, which were only granted to prisoners who had a set parole or release date. Gerber wanted permission to mail a semen sample in a special overnight service to his

[451] 486 US 1006, (1988); *Percy v State of New Jersey* 278 NJ Super 543, 548 (1995).
[452] ibid citing *Turner v Safley* 482 US 89 (1984) that a 'valid rational connection' exists between the prison rule and the legitimate penological interest.
[453] *Percy v State of New Jersey* 278 NJ Super 543, 549 (1995).
[454] ibid 550.
[455] Anonymous, 'High Court refuses bid for artificial insemination' (2002) 8 Corrections Professional 574.

doctors. The doctors would then use this sample to artificially inseminate his wife Evelyn Gerber.[456] As Evelyn Gerber was 44 years old at the time of the hearing, the Gerber's were approaching, if not already passing the possible time frame for conceiving a biological child of their own.[457] Initially, William Gerber applied to the Warder of Mule Creek State Prison for permission to produce a semen sample that would be mailed overnight in an appropriate package. If this was not acceptable to the Warder, he asked alternatively whether his legal counsel could be permitted to collect the sample.[458] This was refused by the District Court (Gerber I), allowed initially by a panel of three judges in the Californian Appeal Court (Gerber II), and then refused a year later en-banc by the full panel of 12 Justices in the Appeal Court in Gerber III. Finally, William Gerber attempted to appeal to the United States Supreme Court, who refused to hear the case.[459] William Gerber's case rested upon the presumption that all people, including prisoners, retained a right to procreate.[460] This argument is based upon a series of Supreme Court cases, in which procreation itself has been recognised as a fundamental constitutional right in different situations.[461] However, there have been no cases that specifically rule that procreation in prison is a fundamental constitutional right.

Gerber 1

William Gerber initiated his case by claiming that the denial of the right to mail his semen was in contravention of his constitutional right to procreate. In

[456] *Gerber v Hickman* 291 F.3d 617, 619 (2002).
[457] ibid.
[458] ibid.
[459] First instance decision: *Gerber v Hickman* 103 F Supp 2d 1214 (2000); *Gerber v Hickman* 264 F3d 882 (2001); *Gerber v Hickman* 291 F3d 617 (2002); *Gerber v Hickman* 537 US 1039 (2002).
[460] *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000).
[461] Control of procreation is a fundamental right for women (statute requiring doctors to inform married women's' husbands when an abortion is requested was ruled unconstitutional) *Planned Parenthood v Casey* 505 US 883, 851 (1992).

addition to this, William Gerber claimed that the refusal to allow him to procreate was in contravention of the California Penal Code 2600, which stated that prisoners can only be deprived of the rights which are linked to the pursuance of legitimate penological interests, thus he also claimed a statutory right to procreate.[462] He also claimed that his rights under section 2601 were violated.[463] William Gerber's request was refused in the District Court by Damrell Jr. J, who stated that William Gerber's right to procreate did not survive incarceration.[464] Damrell Jr. J, started by setting out that following *Pell,* prisoners retain all of those rights not expressly removed by incarceration, or those rights that are inconsistent with the status of prisoner.[465] *Turner v Safley* however highlighted that not all rights survive incarceration and those that do may be subject to specific restrictions.[466] Damrell Jr. J argued that *Goodwin* stated that a right to artificial insemination is 'fundamentally inconsistent with imprisonment itself.'[467] The case of *Anderson v Vasquez* was also quoted in support of the fact that prisoners do not retain a right to either preserve sperm or have conjugal visits.[468] Gerber also argued that the restriction on procreation was tantamount to his sterilisation due to his wife's age and the length of his prison sentence. Finally, Gerber cited that the Warden's refusal to accommodate his request violated equal

[462] California Penal Code s2600.
[463] ibid s2601. This section allows prisoners the right to marry, inherit, convey and dispose of property, including written property from the period of imprisonment, subject to restrictions made on conveyances done for business reasons. Section 2601 also allows prisoners to correspond with a lawyer, make a will, appoint a power of attorney, receive and read papers, books and periodicals legally available in the US, subject to restrictions on content which may incite criminal or violent behaviour.
[464] *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000).
[465] *Pell v Procunier* 417 US 883, 851 (1974).
[466] *Turner v Safley* 482 US 78 95-96 (1987).
[467] *Goodwin v Turner* 702 F Supp 1453 (1990).
[468] 827 F Supp 617, 620 (CA, 1992) In this case, death row inmates claimed that they had a constitutional right to conjugal relationships and the right to preserve their sperm. The court held that the right to conjugal rights did not survive incarceration. The claim of the right for inmates to preserve their sperm was not 'ripe for consideration' because the prisoners had failed to exhaust the administrative process for appealing a decision first.

protection rights, as women prisoners were not required to have abortions on entry to prison. Gerber argued that as such women prisoners had a right to procreate and make decisions about procreation. The court argued that male and female prisoners are not similarly situated, as male prisoners cannot become pregnant, so the question of forced abortion or forced pregnancy does not apply to them. Both life-sentenced male and female prisoners are treated similarly in that both groups are prohibited from having conjugal visits.[469] Damrell Jr. J was more troubled by the 'chaos' that recognition of a general right to procreate might cause in female prisons, where women would request insemination.[470] Gerber argued that the prohibition on AI also violated 14th Constitutional Amendment, which guarantees equal protection under the law for all people. Those convicted after the passage of the 'three strikes and out' law were treated more harshly than those convicted before its passage. Those convicted of similar offences before the 'three strikes and out' law were given much more lenient sentences than those convicted afterwards, and so would have access to contact and private visits.[471] This difference in treatment was justified by the entitlement of the legislature to pass sentencing policies, which were designed to have a strong deterrent effect on habitual criminals.[472]

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[469] *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000).
[470] ibid.
[471] California Penal Code § 667. The 'three strikes and out' legislation in California passed in March 1994 made it mandatory for offenders convicted of two prior serious felonies to be sentenced to an indeterminate life sentence (with eligibility for parole only after 25 years has been served) if the offender was convicted of a third felony. The third felony did not have to be serious and could be for a non-violent offence. For a comparison of different state laws see John Clark, James Austin, D Alan Henry, *"Three Strikes and You're Out": A Review of State Legislation'* (National Institute of Justice, Research in Brief, US Department of Justice, 1997). Since *Gerber*, a vote in November 2012 has since made the life sentence for the third offence mandatory only for those convicted of a serious felony, not any felony. Anonymous, 'ELECTIONS 2012; Crime and punishment; Voters softened the three-strikes law but kept the death penalty. What does it mean for California?' *Los Angeles Times* (Los Angeles, 11 November 2012) 33.
[472] ibid.

Gerber II

In contrast to *Gerber I*, the three judge panel appeal hearing found that Gerber did retain a right to procreate via AI. Bright J, giving the verdict of the court, stated that the right to procreate survives incarceration, albeit in a restricted form due to legitimate penological interests.[473] The court firstly addressed the claim that the Warder had denied Gerber his due process rights under 42 United States Code s1983.[474] The Court stated that for a claim to be successful, Gerber had to establish whether a fundamental right was involved and whether that fundamental right is not inconsistent with the status of prisoner. Then, it had to be assessed whether there were any legitimate penological interests, which justified restricting the prisoner's exercise of their fundamental right.[475] The majority of the Court agreed that the United States Supreme Court recognised a fundamental right to reproduce in both *Carey* and *Stanley*.[476] The United States Supreme Court held in *Skinner* that the right to procreate is a basic civil right central to the perpetuation of a race, and that prisoners' had the right to retain their procreative capacities for use after their release.[477] The Court firstly established that prisoners retain a right to procreate whilst still in prison because of *Skinner*. If prisoners had the right to procreate after release from prison, and their ability to procreate cannot be destroyed, the court reasoned that some form of right to procreate must survive incarceration. The Court demonstrated that there was a line of constitutional cases that supported Gerber's application that prisoners retain a range of rights after incarceration. Prisoners do not lose the protection of the

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[473] *Gerber v Hickman* 264 F3d 882 890 (2001).
[474] Title 42 United States Code s1983.
[475] ibid 886-7.
[476] *Carey v Population Services* 431 US 678, 684-85 (1977); *Stanley v Illinois* 405 US (1972) (right to conceive and raise one's children essential).
[477] *Skinner v Oklahoma* 316 US 536 (1942).

Constitution, and all prisoners retain all of their constitutional rights that are not inconsistent with their imprisonment.[478] The court also listed several United States Supreme Court cases that dealt with prisoner's constitutional rights, to demonstrate how some rights survive incarceration.[479]

The case of *Turner* also lent some support to the ruling that the right to procreate survives incarceration in some form. The right to marriage survives imprisonment, albeit in an attenuated and restricted form.[480] The acceptance that conjugal visits are legally prohibited for those serving life sentences does not mean that the right to procreate does not survive incarceration, as the alternative of AI still exists.[481] Bright J also argues that conjugal visitation and childbirth in prison are not inherently inconsistent with incarceration, as some prisoners in California give birth and have access to family visits whilst in prison.[482]

The issue of gender was also addressed by Bright J. He argued that the male prisoner seeking to provide sperm for AI is different to the female prisoner who wants to become pregnant, as they are not similarly situated. The Court of Appeal dismissed the Warden's claim, that allowing male prisoners to provide semen samples for their partners would lead to women prisoners requesting to be artificially inseminated under equal protection claims.[483] It was seen as unacceptable to restrict the rights of one group of prisoners because of the

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[478] *Hudson v Palmer* 468 US 517 (1977) 523; *Pell v Procunier* 417 US 822 (1974).
[479] Prisoners retain many constitutional rights, see footnote 400.
[480] *Turner v Safley* 482 US 78 (1978) Sufficient attributes of marriage survive imprisonment for marriage to continue to exist within *Gerber v Hickman* 264 F3d 882, 890 (2001) the context of the prison.
[481] *Gerber v Hickman* 264 F3d 882, 890 (2001). Many cases demonstrate that prisoners do not have the right to 'contact' visits. *Hernandez v Coughlin* 18 F3d 133 (1994). The court in *Gerber* suggested that whilst *Hernandez* restricted the right to contact visits and physical intimacy, it did not restrict the wider right to procreate. See also *Toussaint v McCarthy* 801 F2d (1986).
[482] *Gerber v Hickman* 264 F3d 882, 891 (2001).
[483] ibid.

burdens that might arise from another group making a claim.[484] The state law claim made under the Californian Penal Code 2600-2601 was assessed to have an identical legal analysis, which was that procreation was a fundamental protected right.[485]

The dissent provided by Silverman J demonstrates complete disagreement with the majority ruling, by stating that the majority's ruling is 'unprecedented as it is ill-conceived.'[486] Silverman's dissent reflects the District Court judgment, as well as the majority judgments of *Goodwin* and *Percy* stating that the right to procreate does not survive incarceration.[487] The case of *Skinner* was not taken by Silverman to imply that prisoners had a constitutional right to procreate, but rather that they had a right to protection from being forcibly sterilised whilst in prison. Similarly, the case of *Turner* was taken to mean that prisoners had the right to marry whilst in prison, but did not have the right to procreate.[488] The cases of *Goodwin* and *Anderson* are also used to demonstrate that previous case law did not support the notion that prisoners had procreative rights.[489] Judge Silverman states that 'common sense also suggests that procreation is fundamentally inconsistent with incarceration' as prisoners can be legitimately deprived of their liberty and subjected to prison rules.[490] He stated that prisoners do not have a right to procreate and so analysing whether there is a legitimate penological reason to

[484] ibid 891-892. Bright J also dismissed the argument made by the Warden who stated the restriction on AI was justified as allowing prisoners to provide sperm samples would place prison staff at risk of tortuous liability.
[485] ibid 892.
[486] ibid 893.
[487] ibid.
[488] ibid.
[489] ibid See also *Anderson v Vasquez* 827 F supp 617, 620 (1992); *Goodwin v Turner* 702 F Supp 1452, 1453-54 (1988).
[490] ibid 894.

restrict this right is pointless.[491] His final point was that denial of the right to procreate does not constitute cruel and unusual punishment as prohibited by the Eighth Amendment of the US constitution.[492]

Gerber III

The en-banc reversal of Gerber III arose due to the negative reaction of male prisoners being granted a right to procreate.[493] The Court reversed the decision of the court in Gerber II, following a 12-judge panel. This decision demonstrated a division between those judges who thought that there was no right to procreate and the large minority of judges who stated that the right to procreate did survive incarceration. There was a close majority of seven judges who ruled that there was no right to procreate, with the five judges dissenting. The leading judgment was delivered by Silverman J, who had dissented in the three-judge panel in Gerber II. [494] The primary rationale given by Silverman J for refusing Gerber's claim was that 'the right to procreate is fundamentally inconsistent with incarceration.'[495] The legal framework that Silverman J sets out addresses the two questions asked by the court in Gerber II, although the legal conclusion reached was different. Silverman J firstly addresses the issue of whether the right to procreate is fundamentally inconsistent with incarceration. He states that if the claim fails on this first test, then analysing the second limb of the *Turner* test is unnecessary, which examines whether the restriction of the right claimed by the prisoner can be justified because of legitimate penological aims.[496] The basis for

[491] ibid.
[492] US Const. amend. VIII; ibid.
[493] Lisa Walgenbach, 'Artificial Insemination behind Bars: The Boundaries of Due Process' (2003) 36 Loyola LA L Rev 1357, 1361; *Gerber v Hickman* 291 F3d 617, 624 (2002).
[494] *Gerber v Hickman* 291 F3d 617, 619 (2002).
[495] ibid.
[496] ibid. For the test in *Turner* see *Turner v Safley* 482 US (1978) 96-99.

the ruling that procreation is fundamentally inconsistent with incarceration is that the primary purpose of prison is to remove the prisoner from society, isolating them from their family and partners.[497] The physical isolation of the prisoner leads to the prevention of physical intimacy with their outside partners.[498] Marriage survives imprisonment as a legally recognised partnership, but the right to have children, according to Silverman J, does not.[499] He stated that the 'attributes' of marriage, such as cohabitation, intimate relationships and procreation do not survive imprisonment because they are inconsistent with incarceration.[500] Silverman J argued that basis that procreation is inconsistent with incarceration, which is founded upon principles of 'the legitimate policies and goals of the corrections system.'[501] The main purpose of imprisonment he argued was the removal of offenders, 'quarantining' them away from society, in order to protect the public and act as deterrence against future crime.[502] Silverman J also justified physical isolation of the prisoner in order to enable the rehabilitative effects of prison to work, although this justification cannot be used in Gerber's case as he was incarcerated for his natural life. Arguably, rehabilitation is not considered relevant for prisoners who will never be released.[503] Imprisonment

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[497] *Gerber v Hickman* 291 F3d 617, 620 (2002).
See also *Montanye v Haymes* 427 US 236, 242 n4 (1976) (noting the hardships of being separated from family and loved ones).
[498] *Roberts v United States Jaycees* 468 US 609, 618 (1984).
[499] *Goodwin v Turner* 702 F Supp 1452, 1454 (1988). The right to marry survives incarceration *Turner v Safley* 482 US (1978).
[500] ibid 621. Normal rights within a marriage are restricted and abridged within a prison: *Hernandez v Coughlin* 18 F3d 133,137 (1994).
[504] *Gerber v Hickman* 291 F3d 617, 621(2002); *Pell v Procunier* 417 US 883, 851 (1974).
[502] ibid; *Hudson v Palmer* 468 US 517 (1983) (quoting *Wolff v McDonnell* 418 US 539, 555 (1974).
[503] ibid.

makes the curtailment of certain features of an offender's life necessary as a practical issue, as institutional needs must be accommodated.[504]

Silverman J takes it 'for granted' that prisoners are subject to physical restrictions upon their freedom, which includes restrictions upon the right to procreate.[505] The majority judgment was very dismissive of the idea that there is a constitutional right to procreate. Procreation is characterised as a privilege to be granted as and when the prison authorities see fit.[506] The avoidance of sexual intercourse was seen as irrelevant too, as he stated that procreation is inconsistent with incarceration, regardless of the method of conception. This seems to suggest any prisoners procreating is inherently wrong, and that justifications about avoiding sexual intercourse are peripheral to the real issue, which is whether any serving prisoner should be allowed to have children at all.[507] This is based upon the notion that prohibiting procreation itself is based upon legitimate penological aims of 'isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation.'[508] The argument advanced by William Gerber, (and supported by the majority in Gerber II) was that *Skinner* combined with the right to marriage (in *Turner*) creates a right for prisoners to procreate is dismissed by the majority. According to the majority, *Skinner* stands for the right of the prisoner to be free from forced surgical sterilisation, and nothing more.[509] Procreative abilities are preserved for later use after release, not current use.[510] It is irrelevant that a person is incarcerated for life and will never be able to exercise their procreative abilities.

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[504] *Gerber v Hickman* 291 F3d 617, 621 (2002); *Hudson* 468 US 524 (quoting *Wolff v McDonnell* 418 US 539, 555 (1974).
[505] *Gerber v Hickman* 291 F3d 617, 621(2002); *State v Oakley* 2001 WI 103 (2001).
[506] *Gerber v Hickman* 291 F3d 617, 622 (CA, 2002).
[507] ibid.
[508] ibid.
[509] ibid; *Skinner v Oklahoma* 316 US 535 (1942).
[510] *Gerber v Hickman* 291 F3d 617, 622 (2002); *Hernandez v Coughlin* 18 F3d 133, 136 (1994).

The right to marry in *Turner* did not include the right to consummate the marriage or the right to beget children.[511] The division between the majority and the minority judgments is clear from the statement: 'A holding that the State of California must accommodate Gerber's request to artificially inseminate his wife as a matter of constitutional right would be a radical and unprecedented interpretation of the Constitution.'[512]

The majority decision of the court felt no need to evaluate whether the regulation prohibiting AI was linked to a legitimate penological interest.[513] The statutory claim under the California Penal Code s2600 and s2601 was ruled to mirror the test under *Turner v Safley* and also failed.[514] Equal protection claims also failed, because as stated earlier, the majority saw granting of conjugal visits to some prisoners as a privilege, not a right. Gerber was not seen to be 'similarly situated' to those prisoners who were allowed contact visits because he had been sentenced to life imprisonment with no possibility for release.[515] On the majority's reasoning, Gerber's case also fails on his Eighth Amendment claim against cruel and unusual punishment. The legal definition of 'cruel and unusual punishment' is defined in *Hudson v McMillan* as the deprivation of 'the minimal civilized measure of life's necessities.'[516] The divisiveness of the case is demonstrated by the two dissenting judgments delivered by Judges Tashima and Kozinski.[517] The divisive nature of the cases and the difficulty in deciding the correct legal position is shown by the way that both the leading and dissenting

[511] *Gerber v Hickman* 291 F3d 617, 622 (2002); *Turner v Safley* 482 US (1978) 965-96.
[512] *Gerber v Hickman* 291 F3d 617, 622 (2002).
[513] ibid.
[514] ibid; *Turner v Safley* 482 US 965-96 (1978).
[515] *Gerber v Hickman* 291 F3d 617, 623 (2002).
[516] ibid 624; *Hudson v McMillan* 503 US 1, 9 (1992).
[517] ibid 624, 628.

opinions of the court used the same cases and came to very different conclusions. The first dissenting opinion was delivered by Tashima J, who was joined by Judges Kozinski, Hawkins, Paez and Berzon.

The starting point taken by Tashima J was the same as the majority. He concluded that there is a fundamental right to procreate protected by the American Constitution. The nature of this right is one of a right to privacy over the various decisions involved in human reproduction, the right to make decisions over contraception, procreation, marriage and family relationships.[518] *Skinner* again reinforced the central importance given the ability to procreate. Procreation is 'one of the basic civil rights of man' and 'fundamental to the very existence and survival of the race.'[519] The question asked by the dissenting judgment was the same as that asked by the majority; that is whether the right to procreate is fundamentally inconsistent with incarceration, and if it is not, whether there are any legitimate penological justifications for restricting this right.[520] Tashima J was unconvinced by the repeated assertions of the majority that procreation is inconsistent with incarceration. He stated that the majority has relied upon the repetition of 'glittering generalities' that 'the right to procreate is inconsistent with incarceration.'[521] There was no definitive reason given by the majority as to why the right to procreate is fundamentally inconsistent with incarceration. Tashima J accepts that the right to intimate association and the right to privacy were inconsistent with incarceration, but the use of AI was not subject to these

[518] *Gerber v Hickman* 291 F3d 617, 624 (2002); *Carey v Population Services Int'l* 431 US 678, 685 (1977).
[519] *Skinner v Oklahoma* 316 US 535, 541 (1942).
[520] *Gerber v Hickman* 291 F3d 617, 624 (2002); *Hudson v Palmer* 468 US 517 (1977) 523; *Turner v Safley* 482 US 95-96; *Pell v Procunier* 417 US 883, 822 (1974).
[521] *Gerber v Hickman* 291 F3d 617, 624 (2002).

concerns.[522] The whole procedure could be monitored and supervised by appropriately trained medical staff, and procreation via AI can circumvent security concerns.[523] The dissent stated that the cases used by the majority ruling to support their views on the 'nature and goals of the penal system' do not actually support this finding.[524] Recognising that the right to marriage survives in *Turner* (despite the fact that the marriage itself cannot be consummated until the prisoner is released) supported the premise that the right to procreate survived incarceration. Tashima J stated that to use this reason to justify the position that the right to procreate is inconsistent with incarceration was to 'twist logic.'[525] The practical restrictions in place against intimate contact have their basis within legitimate security concerns, but this does not lead to the 'conclusion that procreation itself is *fundamentally* inconsistent with incarceration.'[526] Tashima J also stated that *Hudson* cannot be used as justification for restricting the right to procreate either, as this case merely refers to prisoners claiming a Fourth Amendment right to not be subjected to unreasonable searches. In this case, the need to maintain security is of far greater importance than a prisoner's claim to privacy.[527] In contrast to this, Gerber was not requesting privacy to have sexual intercourse with his wife, but to be medically supervised whilst he produced a sperm sample, away from his wife.[528] The dissent judge makes the point that the majority has no facts to demonstrate why procreation via AI should be treated in the same way as the Fourth Amendment right in *Hudson*.[529] Tashima J also

[522] ibid 624, 625.
[523] ibid.
[524] ibid 625.
[525] ibid.
[526] ibid.
[527] ibid.
[528] ibid.
[529] ibid.

distinguishes *Pell,* which considered whether the prison could legitimately restrict prisoners from meeting face to face with journalists for interviews. In *Pell*, the restriction was justified by security concerns.[530] The alternative avenues of communication open to prisoners meant that the restriction on visits was seen as constitutional.[531] There is no alternative method left for a male prisoner to procreate if both sexual intercourse and medically assisted fertility treatment are denied to him.[532] The procedure itself that involves producing a sperm sample and mailing it in a container was argued to not cause any inherent problems, as prisoners were using the same identical procedure to mail samples to attorneys to prove their innocence in court cases. Tashima J states that there is no justification for treating the two procedures differently when the physical processes required are exactly the same.[533] The majority judgment relied upon reference to the 'nature and goals of the prison system' as to why procreation was considered inconsistent with legitimate penological aims.[534] However, there was no attempt to demonstrate why preventing prisoners having children via AI was inconsistent with maintaining public confidence in the prison system, or how the prohibition ensured that prisoners were both punished and rehabilitated, whilst deterring potential offenders.[535] Tashima J makes the point that if prohibiting prisoners from procreating is part of their punishment, then this is a ruling that should be made by the legislature not the judiciary, and that there was no statutory basis to this claim.[536] The Warden's justification for prohibition of procreation was based

[530] ibid; *Pell v Procunier* 417 US 883*,* 826 (1974).
[531] ibid 626.
[532] ibid.
[533] ibid.
[534] ibid.
[535] ibid.
[536] ibid.

upon the California Penal Code s3350(a), which only provides for medical treatment that is medically necessary.[537] However, this statute did not justify the prohibition upon procreation, as Gerber was not seeking medical treatment.[538] Furthermore, permitting the privilege of conjugal visits for some prisoners allows for the possibility of procreation for thousands of prisoners, which means that procreation cannot be fundamentally inconsistent with incarceration.[539] He argued that Gerber was not seeking conjugal visits, but permission to mail a sample of sperm to medical staff. Tashima J dismissed the question of conjugal visits as irrelevant, because Gerber was not seeking permission for a private visit with his wife.[540] The denial of conjugal visits also relied upon legitimate penological objectives for their restriction, not the fact that conjugal visits themselves were fundamentally inconsistent with incarceration.[541] As Tashima J highlights, there were no concrete reasons given by the majority judgment to justify why procreation is fundamentally inconsistent with incarceration. It was based upon the 'impression' that prisoners should not have the right to procreate via AI.[542]

Finally, the majority used a very narrow reading of *Skinner*, confining its application merely to the question of the forced surgical sterilisation of habitual criminals. *Goodwin* was used as support to the notion that refusing access to AI facilities was not the same as permanently sterilising an offender.[543] The court in *Goodwin* and the majority in *Gerber III* argued that depriving an individual of procreative opportunities in prison was merely delaying procreation, not

[537] California Penal Code s3350(a).
[538] *Gerber v Hickman* 291 F3d 617, 626 (2002).
[539] ibid.
[540] ibid 627.
[541] ibid.
[542] ibid.
[543] ibid 628; *Goodwin v Turner* 702 F Supp 1452 1454 (1998)*, Skinner v Oklahoma* 316 US 531 (1942).

permanently preventing it. In *Goodwin*, this could be argued to be the case as he was sentenced to 14 years in prison, but Gerber was sentenced to life imprisonment without parole. Any deprivation of Gerber's ability to procreate would have the same overall effect as surgical sterilisation as the deprivation would be permanent.[544] Tashima J also argued that by taking such a narrow view of *Skinner*, the majority missed the wider point, which was the 'fundamental importance of the right to procreate.'[545]

Whilst *Skinner* was interpreted narrowly, *Turner* was interpreted very broadly according to Tashima J. The physical aspects of marriage were judged by *Turner* to not survive incarceration, which led to the majority judging that procreation is inconsistent with imprisonment. However, on a basic level, Gerber is merely requesting permission to allow his lawyers to collect, or for the prison to post, a sample of semen. There is no request for the prisoner to be allowed to engage in the physical aspects of marriage.[546] Tashima J states that general restrictions upon physical intimacy and marriage do not support the premise that there should be a broad prohibition upon the fundamental right to procreate.[547]

The second, and final dissenting judgment was delivered by Kozinski J, who was joined by Paez and Berzon JJ. This judgment concentrated upon the majority proposition that procreation is fundamentally inconsistent with incarceration.[548] The practical steps of Gerber's request were broken down into their constituent parts, in order to raise the question about what it is in particular that made procreation via AI fundamentally inconsistent with incarceration. The

[544] ibid.
[545] ibid.
[546] ibid 628, 629.
[547] ibid 629.
[548] ibid.

stages that Kozinski J identified are: ejaculation into a plastic cup, the prison mailing the container to the laboratory, or Gerber handing the container to his lawyer, the delivery to a laboratory and finally the insemination of Evelyn Gerber.[549] As Kozinski J states, 'I gather that the first step of this process is not fundamentally inconsistent with incarceration and prison guards don't patrol cell blocks at night looking for Onan's transgression.'[550] The prison would also have no legitimate penological interest in the choice of receptacle for the semen, so long as the sample is not used in a 'gassing' incident.[551] Posting parcels to laboratories or handing them to lawyers was also not inconsistent with incarceration. When a sample arrives to a destination outside the prison the authorities have a greatly reduced legitimate interest in what happens to that sample: 'Whether it is used to inseminate Mrs Gerber, or create a clone Gerber, or as a paperweight has no conceivable effect on the safe and efficient operation of the California prison system.'[552]

Kozinski J then examined if what the majority meant was a more general ideal of prisoners being prohibited from freedom to choose where to live for example. He defined this as a restriction of the right to 'locomotion.'[553] Whilst private visits could be considered under this term 'locomotion', procreation via AI could not.[554] The legislature did not create a statutory punishment that included removal of the right to procreate. Dismissing the right to procreate based purely upon this assumption, is in effect is deciding upon an extra punishment

[549] ibid.
[550] ibid .
[551] ibid. 'Gassing' is where a prisoner throws semen at another individual in order to assault them.
[552] ibid.
[553] ibid 630.
[554] ibid.

that was not expressly intended by the legislature.[555] To claim that the right to procreate is implicitly removed just because an individual is in prison is a slippery slope, which could lead to prisoners' other essential rights being abridged unfairly.[556] The state cannot also have intended to cut off the prisoner's right to procreate as some prisoners still retain the privilege of conjugal visits, which leaves the possibility of procreation.[557] If the state had intended all prisoners to be deprived of the right to procreate, then prisons would be forbidden from allowing some prisoners the privilege of private visits.[558] Kozinski J felt that the punishment aspect of a prisoner's sentence should be set by the legislature alone and that by denying William Gerber the right to procreate, the prison authorities were enhancing his punishment beyond what was legally permitted by the state.[559] Evelyn Gerber, who was an innocent party, was also considered to be unfairly punished by this stance, and has been 'consigned to a childless marriage.'[560]

[555] ibid 630.
[556] ibid.
[557] ibid 631.
[558] ibid.
[559] ibid 632.
[560] ibid.

Summary

Even though *Percy, Goodwin* and *Gerber* have almost identical circumstances, each judgement was justified in a different way. There were varying reasons given between the first instance decision and the Court of Appeal decision. Each case raised three questions. The judges had to decide whether prisoners retain a right to procreate. They then had to decide whether that right survived incarceration, or whether it was compatible with incarceration. If the right did survive incarceration, the next question was whether there was a legitimate penological concern that justified limiting the right. Concentrating on the first question, the starting point was the recognised protection that the Constitution normally gives to individuals over the private sphere of procreation.[561] Each case also reiterated that imprisonment did not automatically mean that prisoners forfeited their constitutional rights, citing *Woolf v McDonnell*.[562] Ultimately though, only Gerber II stated that a prisoner should be allowed to produce a semen sample for AI purposes and this was overturned in the en-banc rehearing.[563] The District Court in *Goodwin* and Gerber I both stated that prisoners do not have a right to procreate that survives incarceration.[564] *Percy* did not directly state that prisoners retain a right to procreate that survived incarceration, but stated that even if they did, the restriction was justified by legitimate penological objectives of equal treatment of all prisoners.[565] Magill J in *Goodwin* similarly stated that it was unnecessary to decide whether prisoners have

[561] *Skinner v Oklahoma*, 316 US 535, 541(1942); *Griswold v Connecticut*, 381 US 479 (1965); *Roe v Wade*, 410 US 113 (1973); *Carey v Population Servs Int'l* 431 US 678, 685 (1977).
[562] *Wolff v McDonnell* 418 US 539 (1974).
[563] *Gerber v Hickman* 264 F3d 882 890 (2001); *Gerber v Hickman* 291 F3d 617, 619 (2002).
[564] *Goodwin v Turner* 702 F Supp 1452, 1453 (1988); *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000).
[565] *Percy v State of New Jersey* 278 NJ Super 543, 549 (1995).

a right to procreate that survives imprisonment because the restriction on procreation was justified by the legitimate penological objective of treating all prisoners equally.[566] Gerber II recognised that prisoners retained a right to procreate in some form.[567] The Court limited this to recognition of the right of male prisoners to provide a semen sample for AI and did not extend it as a general right to procreate for all prisoners.[568] In doing this, the majority circumvented the argument that this could lead to women prisoners claiming a right to become pregnant.[569] The Court in Gerber II did state that an analogous situation for women may be if a prisoner was to donate her eggs to a lesbian partner or a surrogate mother, but this is not a similar situation either, apart from the donation of gametes. Egg donation requires clinic visits, medication and invasive methods of retrieval, all of which could be claimed to place too much of an onerous burden on the prison.[570]

All of the dissenting judgments in Gerber III and Goodwin stated that prisoners retained a right to procreate when incarcerated.[571] McMillian J in Goodwin justified his dissent by demonstrating that the Federal Bureau of Prisons failed to apply the *Turner* test correctly.[572] The Federal Bureau of Prisons stated that the restriction was in place to further the objective of treating all prisoners equally, when it was in reality about reducing the potential costs and burdens of female prisoners claiming a right to procreate.[573] These burdens are hypothetical in this case argues McMillian and so should not have been considered by the

[566] *Goodwin v Turner,* 980 F2d 1395, 1398 (1990).
[567] *Gerber v Hickman* 264 F3d 882, 889 (2001).
[568] ibid.
[569] ibid 891.
[570] ibid.
[571] *Goodwin v Turner,* 980 F2d 1395, 1403 (1990).
[572] ibid 1405 (1990).
[573] ibid.

Court.[574] In Gerber III, the two dissenting judgments by Tashima and Kozinski JJ concentrated on the purpose of imprisonment, and whether prohibiting procreation is an explicit part of the punishment of imprisonment. They each concluded that prohibiting procreation was not a punishment required or justified by statute.[575]

The rulings of *Percy, Goodwin* and *Gerber* demonstrate that the similar difficulties faced by Mellor and Dickson when claiming a right to procreate, even through AI. The next chapter will consider all of these cases together to demonstrate what the justifications are for removing a right to procreate and whether these are sufficient to remove a prisoner and their partner's right to procreative self-determination.

[574] ibid 1406.
[575] *Gerber v Hickman* 291 F3d 617, 630, 632 (2002).

Chapter Six: Joint Analysis of Cases

Introduction

Each of the cases and jurisdictions studied show a different approach to the question of whether prisoners should be given access to AI and the wider question of whether prisoners have the right to procreate. The judges in *Dickson* and *Mellor* took a strong stance against the possibility of prisoners becoming parents unless there were exceptional circumstances, justifying the provision of AI.[576] This strong stance was justified by protecting the welfare of the unborn child whom it was assumed would not develop as well in a family where one of the parents was in prison. Enquiries were made about the suitability of the potential parents, the status of their relationship and their ability to provide for their putative child. In contrast, the judges in *Goodwin*, *Percy* and *Gerber* confined their judgments to the question of whether the prisoner had the right to procreate, and whether that right was consistent with their status as prisoners.[577]

There was no explicit judgment of the suitability of whether the prisoners and their partners would make good parents, apart from the reference in *Percy* to the fact that Robert Percy's wife (her name was not given) worked as a book keeper and was not reliant upon public welfare.[578] Apart from the court ruling in Gerber II, the American cases in both Federal and State courts favoured a blanket

[576] *R v Secretary of State Ex parte Mellor* [2000] EWHC Admin 385 [2000] HRLR 846*; R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472; *Dickson and Dickson v Premiere Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477.
[577] *Goodwin v Turner* 702 F Supp 1452 (1988); *Goodwin v Turner* 908 F2d 1395 (1990); *Percy v State of New Jersey,* 278 NJ Super 543 (1995); *Gerber v Hickman* 103 F Supp 1214 (2000); *Gerber v Hickman* 264 F3d 882 (2001); *Gerber v Hickman* 291 F3d 617 (2002).
[578] *Percy v State of New Jersey,* 278 NJ Super 543, 545 (1995).

prohibition for all prisoners, stating that procreation was inconsistent with imprisonment.

The starting point taken by the judges in all of these cases was that prisoners retain those civil rights that are not removed by or incompatible with imprisonment. Prisoners are not legally in a state of civil death (apart from those under a life sentence in those states that retain civil death as a punishment).[579] The right to make decisions about children, marriage, contraception and abortion are protected by the US Constitution.[580] In England and Wales, the right to a private and family life is protected by the Human Rights Act 1998.[581] The right to procreate in both the USA and in England and Wales for those in free society is a right to make private decisions about procreation free from unnecessary state interference.[582] Applying the same statement to prisoners however, causes controversy. Many commentators state that prisoners do not have the right to procreate.[583] This was the view taken by the domestic courts in England and

[579] In England and Wales, The Forfeiture Act 1870 allowed for prisoners convicted of treason and felony to retain their property, as it has previously been forfeit to the Crown upon conviction. It also expressly removed their right to vote or hold public office whilst in prison. In the USA, the status of civil death was expressed in *Ruffin v Commonwealth* 62 Va 790, 796 (1871) in which the court held that the prisoner 'has, as a consequence of his crime not only forfeited his liberty, but all his personal rights, except those in which the law in its humanity accords to him. He is for the time being the slave of the State.' The US states that retain civil death as a punishment are New York and Rhode Island. See New York Civil Rights - Article 7 - § 79-A Consequence of Sentence to Imprisonment for Life; State of Rhode Island General Laws, Title 13 Criminals- Correctional Institutions Chapter 13-6 Loss of Rights by Prisoners, 13-6-1 Life Prisoners Deemed Civilly Dead.

[580] Several US Supreme Court cases have established the importance of the right to procreate. See footnote 398.

[581] Schedule 1 Art 8(1)(2).

[582] The state does not have a positive obligation to provide every person who wants to become a parent with the means to become one, but rather procreation is a negative right that should not be interfered with. See David Archard, *Children: Rights and Childhood'* (2 edn, Routledge, 2004, 2010 reprint) 137.

[583] A recent example of is the Justice Secretary Chris Grayling stating that he wants to completely ban prisoners in the UK from procreating via AI or IVF, even though this right was upheld by the Grand Chamber in *Dickson*. See Jack Doyle 'I'll ban IVF for prisoners, says Grayling: Justice Secretary vows to take on Strasbourg Judges' *Daily Mail* (London, 28 February 2013); John-Paul Ford Rojas 'Grayling seeks to ban inmates from access to IVF treatment' *The Daily Telegraph* (London, 28 February 2013) 15.

Wales and the USA, but was not supported by the Grand Chamber in *Dickson v UK*.[584] Prisoners do not retain the same rights to privacy, but should still be able to negotiate their procreative decisions under the 'public gaze' of prison officials.

The starting point for evaluating prisoner's rights in England and Wales and the USA is slightly different. *Raymond v Honey* stated that: 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'[585] For a right to be refused to a prisoner, it has to be shown that the right in question is removed by imprisonment. The prisoner in the USA is subject to a similar restriction upon their rights: 'Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen'.[586] The prisoner however does not necessarily lose all of their rights: 'There is no iron curtain drawn between the Constitution and the prisons of this country.'[587] Since *Turner v Safley* however, the robust protection of prisoner's rights has been eroded.[588] Prisoners in both the USA, and England and Wales have certain rights automatically removed that are inconsistent with prison, such as the right to privacy or freedom of movement. However, the prisoner in the USA is subject to a further restriction. American prisoners' rights can be restricted if those rights are deemed to be inconsistent with 'legitimate penological aims.'[589] Therefore, if their rights conflict with the aims of the prison system they can be legitimately curtailed. Deciding what is a legitimate

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[584] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 39 (Phillips LJ); *Dickson and Dickson v Premiere Prison Service Ltd.,* Secretary of State for the Home Department [2004] EWCA Civ 1477 para 23 (Auld LJ); *Dickson v United Kingdom* (2008) 46 EHRR 41 para 70.
[585] [1983] 1 AC 1, 10 (Wilberforce LJ). The appellant was the Governor of Albany Prison and was accused by a prisoner of interfering with his correspondence with his solicitors. Interference with legal correspondence can constitute contempt of court.
[586] *Woolf v McDonnell* 418 US 539, 555 (1974).
[587] ibid 555-6.
[588] *Pell v Procunier* 417 US 817, 822 (1974).
[589] ibid.

penological aim and what rights are inconsistent with imprisonment adds another layer of discretion allowed to prison officials.[590] Prison officials can attenuate or completely restrict those rights that conflict with legitimate penological aims, which are defined largely by the prison authorities.[591] The four-part test enunciated in *Turner* does give the prisoner some protection against unfettered discretion, as the restriction must have a 'valid, rational connection' between it and the legitimate penological objective. The penological objective itself must be 'legitimate and neutral.'[592] *Turner* then goes on to state that a restriction is reasonable if there are alternative means available to the prisoner to exercise their right.[593] Another important consideration that is taken into account is the effect of accommodating the right in question on the prison staff and prisoners, and the effect upon prison resources.[594]

When considering the specific question of how the courts deal with requests for AI, the judgments can be broken up and considered under the following areas: the rights of the prisoner to procreate, the rights of the prisoner's partner and their family, legitimate penological considerations, welfare of the child considerations, gender considerations, and judgments that cast prisoners and their families as outside of society. This will allow for a comparative analysis between the legal judgments of England and Wales, the USA and the ECtHR.

[590] *Turner v Safley* 482 US 78 (1987).
[591] The legitimate aims of imprisonment are protecting the public, deterring crime, rehabilitation and the internal security of the prison itself. See *Pell v Procunier* 417 US 817 822-3 (1974); *Turner v Safley* 482 US 78, 79 (1987).
[592] *Turner v Safley* 482 US 78, 89-90 (1987).
[593] ibid 90.
[594] ibid.

The Right of the Prisoner to Procreate

Whilst the domestic cases from both the USA and England and Wales accepted that prisoners retain some civil and human rights, the majority of judges failed to accept that prisoners retained a right to procreate. Apart from the appeal ruling in *Gerber II*, the majority of judges were of the opinion that prisoners do not have a right to procreate, and emphasised point in the strongest way. Phillips LJ stated this succinctly in *Mellor*, stating that 'A lawfully convicted prisoner is responsible for his own situation and cannot complain that on that account that his right to found a family has been infringed.'[595] In both *Dickson* and *Mellor*, the UK Government's position was that prisoners could request the privilege of being accorded AI facilities, but these would only be granted in exceptional circumstances.[596] The rights to procreate and a family life were the preserve of free citizens alone and these rights were lawfully affected by incarceration.[597] State interference with the prisoner's Article 8 right to a private and family life was, according to the judges, justified under the margin of appreciation outlined in Article 8(2).[598] The judges in *Mellor* and *Dickson* made the point that justice occasionally requires that prisoners should be allowed access to AI, but that this should be the exception. The majority of the US judgments took a firm stance against all prisoners procreating, stating that procreation was inconsistent with

[595] *R v Secretary of State for the Home Department, Ex-parte Mellor* [2001] EWCA Civ 1472, [2001] HRLR 38 para 26.
[596] ibid; *Dickson and Dickson v Premiere Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 6 (Auld LJ).
[597] *R v Secretary of State for the Home Department, Ex-parte Mellor* [2001] EWCA Civ 472, [2001] HRLR 38 para 26 (Phillips LJ) *Dickson and Dickson v Premiere Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 20 (Auld LJ).
[598] ibid. Human Rights Act 1998 Art 8(2)

incarceration itself.[599] The reason why incarceration itself is inconsistent with incarceration was not explored in any detail in any of the US judgments opposing procreation. The minority decision in Gerber III stated 'There is absolutely nothing in the record indicating that procreation ... is fundamentally inconsistent with incarceration.'[600] Collinson J, in the first instance decision in *Goodwin* simply stated that the right to procreate did not survive incarceration.[601] He distinguished *Skinner,* stating that case stood for the right to not be permanently denied the right to procreate after release from prison, not that they should be allowed to procreate whilst serving their sentence.[602] On appeal in *Goodwin,* the majority stated that the court did not have to decide whether the right to procreate survives incarceration, as restricting AI was related to pursuing a legitimate penological objective.[603] This possibility was also reiterated in Gerber I where Judge Damrell Jr stated that the prospect of women prisoners having access to AI would cause 'institutional and societal chaos.'[604] Silverman J, in his dissenting judgment in Gerber II and majority judgment in Gerber III avoided engaging with the theoretical issue of whether the right to procreate does survive incarceration by simply stating that the right to procreate is inconsistent with incarceration.[605] In a similar vein to *Mellor* and *Dickson*, this rationale was stated as a 'common sense' approach; as prison isolates the prisoner from their family, their right to procreate must be automatically inconsistent with their status as a prisoner. The

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[599] *Goodwin v Turner* 702 F Supp 1452, 1453 (1988); *Gerber v Hickman* 103 F Supp 2d 1214, 1217 (2000).
[600] *Gerber v Hickman* 291 F3d 617, 624 (2002) (Tashima and Kozinski JJ).
[601] *Goodwin v Turner* 702 F Supp 1452, 1454 (1988).
[602] ibid.
[603] The restriction was justified by preventing the possibility of women prisoners demanding the right to be impregnated whilst serving their sentence, which would have far greater costs than would male prisoners providing AI samples to impregnate their partners outside of prison. *Goodwin v Turner* 908 F2d 1395, 1398 (1990).
[604] *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000).
[605] *Gerber v Hickman* 264 F3d, 882, 894 (2001); *Gerber v Hickman* 291 F3d 617, 620 (2002).

argument that because prisoners retain the right to marry that they also retain the right to procreate is also dismissed in both *Goodwin* and *Gerber*. Silverman J stated in Gerber III, the concept of marriage as a legally recognised relationship survives, but the attributes that make up marriage, such as physical intimacy and family life do not.[606] In *Percy,* the court refused to concede that prisoners retain a right to procreate highlighting that the case of *Turner* stated that whilst many of the rights arising from marriage survived imprisonment, procreation did not.[607]

The divisive nature of the debate is demonstrated by the narrow margins that exist between the majority and minority judgments in *Goodwin* and Gerber and the ECtHR case of *Dickson.* Unlike the domestic cases of England and Wales, there were minority judgments in the appeal cases of *Goodwin* and *Gerber* in support of the assertion that the right to procreate did survive incarceration.[608] The lack of minority judgments in the domestic cases of *Mellor* and *Dickson* could be because there was no absolute ban on AI. [609] It may have been the case, that in their mind, the judges in these cases were only ruling on those specific cases, and were not asked to decide whether all prisoners should be able to procreate. If there had been an absolute ban on all prisoners accessing AI, then judges may have raised objections on these grounds.[610] When deciding whether prisoners did retain

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[606] *Gerber v Hickman* 291 F3d 617, 621 (2002).
[607] *Percy v State of New Jersey* 278 NJ Super 543 (1995) 547
[608] *Goodwin v Turner* 908 F2d 1395, 1402 (1990) (McMillian J) 'Our society places special emphasis on procreation within the marriage relationship, and the two rights are viewed in tandem. Because of its fundamental nature and importance to the marriage relationship, the right to procreation, like the right to marry must survive incarceration.'
[609] In Gerber II there was a split of 2:1 in favour of Gerber's assertion that procreation as a right survived incarceration. The en-banc reversal in Gerber III showed a 6:5 split for the majority decision. The Chamber held in *Dickson v United Kingdom* (2007) 44 EHRR 21that there had been no breach of Article 8 by four votes to three, which was reversed in the Grand Chamber in *Dickson v United Kingdom* (2008) 46 EHRR 41 by 12 votes to five.
[610] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472, [2001] HRLR 38 paras 39, 45 (Phillips LJ); *Dickson and Dickson v Premiere Prison Service Ltd.,* Secretary of State for the Home Department [2004] EWCA Civ 1477 para 11 (Auld LJ) The 'exceptionality clause' was regarded as important by both Lords Mance and Auld to recognise that

the right to procreate whilst incarcerated, the minority judges from the US cases started from the same legal position as the majority position. Prisoners do not automatically lose all of their rights when incarcerated. The *Turner* test applies: to decide if a prisoner retains a right, it first has to be judged consistent with incarceration and any restriction has to be justified by a legitimate penological objective.[611] The minority judgments agreed with the majority arguments, in that the right to procreate is a fundamental right protected by the US Constitution.[612] After this point they diverged by stating that the right to procreate was not inconsistent with incarceration.[613] Arguably the dissenting judgments in Gerber III highlight the weaknesses in the majority argument. The judgment in Gerber I and the majority judgment in Gerber III provided no real explanation of how procreation itself is inconsistent with procreation. Some prisoners are allowed access to conjugal visits as a privilege and so procreation itself cannot be inconsistent with imprisonment.[614] The majority judgment relied upon a very narrow reading of *Skinner*, justifying the total prohibition with a very wide reading of *Turner*.[615] The cases of *Turner, Hudson* and *Pell* that were cited by the majority were based upon specific concerns about security and privacy, not a

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the restriction of a prisoner's human rights was an exercise in proportionality, and that in exceptional circumstances the restriction on a prisoner's ability to procreate would be a disproportionate to the aims of restricting that right.

[611] *Turner v Safley* 482 US 78, 89-90 (1987).

[612] *Gerber v Hickman* 291 F3d 617, 627 (2002) (Tashima J); *Hernandez v Coughlin* 18 F3d 133 (1994); *Toussaint v McCarthy* 801 F2d 1080, 1113-1114 (1986).

[613] *Goodwin v Turner* 908 F2d 1395, 1402 (1990); *Gerber v Hickman* 264 F3d, 882, 884 (2001); *Gerber v Hickman* 291 F3d 617, 629 (2002).

[614] Judges Tashima and Kozinski argue that the majority's reasoning is vague, and the existence of some prisoners having access to conjugal visits means that procreation itself cannot be inconsistent with incarceration if some prisoners are already becoming parents behind bars. *Gerber v Hickman* 291 F3d 617, 627 (2002).

[615] *Gerber v Hickman* 291 F3d 617, 629 (2002). Kozinski J argues that the court in *Turner* was arguing that physical intimacy was inconsistent with incarceration, not AI itself, which does not involve private visits or physical intimacy.

more general concern about being 'inconsistent with incarceration.'[616] The cases used by the majority to support their assertion that procreation itself was prohibited in prison, only prohibited conjugal visits. The cases of *Hernandez v Coughlin* and *Toussaint v McCarthy* did not extend this prohibition to AI facilities.[617] The majority in Gerber III cited the 'nature and goals of the prison system' without stating how allowing a prisoner to provide a sample for AI would be inconsistent with the prison regime.[618] Kozinski J, in his dissenting judgment reduced Gerber's request for AI into steps to demonstrate how the request itself is not fundamentally inconsistent with incarceration.[619] The first of the two required steps, ejaculation into a plastic cup is itself not inconsistent with incarceration.[620] The other steps identified by Kozinski J, the mailing of the package, or giving it to his lawyer are also things that commonly happen within the prison environment.[621] Arguably, the prison authorities have little legitimate interest in what happens to the sperm sample once it is outside of the prison environment, although the domestic courts in *Mellor* and *Dickson* argued that they have a primary interest in the creation of new life, because of child welfare concerns.[622]

The dissenting judgments in *Goodwin* and Gerber III had a stronger legal foundation than the majority judgments, which relied upon accepted 'common sense' that prisoners lost the right to procreate when incarcerated, even though

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[616] *Gerber v Hickman* 291 F3d 617, 626 (2002).
[617] *Hernandez v Coughlin* 18 F3d 133 (1994); *Toussaint v McCarthy* 801 F2d 1080, 1113-1114 (1986).
[618] *Gerber v Hickman* 291 F3d 617, 622 (2002).
[619] ibid 629, Kozinski J.
[620] ibid 629. The posting of samples to a laboratory is standard procedure for suspects attempting to prove their innocence in a crime, especially in such cases as rape and violent attacks.
[621] ibid
[622] ibid, *Gerber v Hickman* 264 F3d, 882, 891 (2001); *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 67 (Phillips LJ); *Dickson and Dickson v Premiere Prison Service Ltd., Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 20 (Auld LJ)

this is not explicitly required for security concerns or mandated by statute. That prisoners are not explicitly denied the right to procreate when incarcerated, that there are no statutory provisions denying prisoners the right to procreate supports the stance that prisoners retain a legal right to procreate.[623] Those arguing against prisoner procreation stated that *Skinner* merely stood for the right of the prisoner to not to be subjected to compulsory sterilisation. In other words, their ability to have children was not being permanently removed, but merely delayed by incarceration.[624] The minority judgments highlight how this argument could be used a slippery slope to deprive prisoners of many other rights that should be accorded to them. The consequences of using this argument would have serious consequences for many other civil rights that prisoners currently enjoy, such as the right to free expression of their religion.[625] The minority argued that testing whether the restriction merely delays a constitutional right is irrelevant for life-sentenced prisoners.[626] Prisoners that are not sentenced to life at least have the prospect of being released from prison eventually, and so may retain some chance of having children after release.[627] This raises the question of whether prisoners sentenced to whole-life tariffs should be treated differently to prisoners who may eventually be released. In the case of the prisoner who may be released, there may be some substance to the argument denying them the ability to procreate whilst in

[623] *Gerber v Hickman* 264 F3d, 882, 891 (2001); *Gerber v Hickman* 291 F3d 617, 626 (2002) (p626, Tashima J), (p630, Kozinski J).
[624] *Goodwin v Turner* 702 F Supp 1452, 1454 (1988); *Gerber v Hickman* 103 F Supp 2d 1214, 1217 (CA, 2000); *Gerber v Hickman* 291 F Supp 3d 617, 622 (2002).
[625] *Gerber v Hickman* 291 F Supp 3d 617, 630-631 (2002) (Kozinski J). This argument was rejected in many Supreme Court judgments such as *O'Lone v Shabazz* 482 US 342 (1983) (free exercise of religion); *Bounds v Smith* 430 US 817 (1974) (right to meaningful access to the courts); *Wolff v McDonnell* 418 US 539, 555 (1974) (due process rights in disciplinary proceedings); *Pell v Procunier* 417 US 817 (1974).(First Amendment rights to free speech); *Lee v Washington* 390 US 333 (1968) (Equal protection against racial discrimination).
[626] *Goodwin v Turner* 908 F2d 1395 (1990).
[627] However, it is acknowledged that in the case of Dickson, Lorraine Dickson was extremely unlikely to be able to conceive after Kirk's release, as she would have been 51.

prison is not constructive sterilisation, but merely *suspending* their rights until they are released. The prisoner serving a whole-life or for that matter, a prisoner sentenced to death, is a person who will die in prison. One of the main differences between *Mellor*, *Dickson*, *Percy* and *Goodwin* and *Gerber* was that William Gerber was destined to die in prison. If William Gerber were denied access to AI facilities, he would never become a father. He has been 'constructively sterilised.'[628] In specific cases such as when prisoners have been convicted of the murder or abuse of children there would be valid justification for prohibiting prisoners from procreating whilst in prison and it may be necessary to introduce legislation in particular jurisdictions to achieve this. It may also be argued that some crimes committed by some offenders are especially heinous and that preventing these prisoners from procreating would also be justified.

Another important question raised by some of the cases is whether the fertility and age status of the partner's prisoner should be a factor in the decision making process. Like Lorraine Dickson and Evelyn Gerber, who were both approaching the menopause, female prisoners are also vulnerable to the effects of age upon their fertility. They stand a higher chance of losing their fertility than a male prisoner whilst serving a relatively short prison sentence. In order to promote equal protection of male and female fertility, this would justify allowing women to access AI or IVF during short sentences if they are nearing their menopause, if access to procreation assistance continues to be controlled. In theory, the stance of the government in *Dickson* and *Mellor* arguably took into account all relevant factors, which should include whether the prisoner or their

[628] John Williams, '*The Queen on the Application of Mellor v Secretary of State for the Home Department'* Prisoners and artificial insemination- have the courts got it right?' (2002) 14 Child & Fam LQ 217.

partner is nearing the end of their reproductive life. Age and naturally declining fertility alone may not be sufficient to allow a prisoner to procreate, and in *Dickson* was not considered to be an exceptional reason that should have compelled the Home Secretary to allow fertility treatment. The complete denial of AI for all prisoners in all US cases apart from than Gerber II meant that the judges could completely avoid engaging with questions about the age or fertility of the prisoner or their partner.

The Rights of the Prisoner's Partner

The rights of prisoner's families are often forgotten, intentionally or otherwise, or dismissed as 'collateral damage'.[629] The domestic cases of *Dickson* and *Mellor* demonstrated this reasoning. The judges dismissed the procreative restrictions affecting Tracey Mellor and Lorraine Dickson as an inevitable consequence of imprisonment.[630] Similarly on appeal, Magill J dismissed Mrs Goodwin's rights as irrelevant because the prohibition was related to a legitimate penological aim and so could be dismissed.[631] The judgment in *Percy* did not even mention Robert Percy's wife, other than to set out the facts of the case.[632]

Rather than just dismissing the rights of Tracey Mellor and Lorraine Dickson, the domestic courts failed to consider them at all. Even though Lorraine Dickson was named as the second applicant, her individual situation was not

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[629] Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2007). Comfort shows that the 'collateral consequences' of imprisonment suffered by relatives manifests themselves in numerous ways. Prisoner's families find that when trying to maintain contact with their loved one that they are subjected to many different 'collateral' consequences, including undergoing demeaning procedures in order to visit their loved one (63), the requirement to alter their dress or their personal appearance in order to conform to prison requirements in order to visit their relative (52-55), and financial penalties from having their partner who may be a wage earner in prison, as well as having to support them financially (92).

[630] *Goodwin v Turner* 702 F Supp 1452, 1455 (1988) Collinson J.

[631] *Goodwin v Turner* 908 F2d 1395, 1399 (1990).

[632] *Percy v State of New Jersey* 278 NJ Super 543 (1995).

considered separately from her husband, apart from when the Government queried her ability to support her putative child. When one considers the consequences of denying a non-incarcerated individual a human right, the decisions themselves should be subjected to strict scrutiny as they affect non-imprisoned partners of prisoners. Strictly speaking, the partners of prisoners arguably retain the same rights as any other person in free society, but this is untrue when one considers how restrictions that affect the prisoner also affect the partner as well.[633]

The domestic cases of *Mellor* and *Dickson* failed to consider the needs of the partners of the prisoners at all, whilst in *Goodwin* and *Gerber*, the infringement of the rights of the free partners was considered in the most detail by the dissenting judges.[634] The rights of the free partners of the prisoner were in direct conflict with the aims and decisions of the prison authorities, with penological concerns given more weight. The judges in *Dickson* and *Mellor* also had very little sympathy with the partners of the male prisoners who wanted to have children. The Prison Rules 1999 state that 'special attention' should be paid to the maintenance of the relationships between prisoners and their families and that prisoners should be able to maintain contact with agencies outside of the

[633] Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 110- 111.

[634] In the District Court ruling in *Goodwin,* Mrs Goodwin was mentioned only to say that it was not essential to ensure against hardship of third parties affected by the lawful imprisonment of an offender. *Goodwin v Turner* 702 F Supp 1452, 1455 (1988). The majority ruling in *Goodwin* also rejected the argument that because the regulation affected a non-prisoner that it should be subjected to strict scrutiny (*Goodwin v Turner* 908 F2d 1395, 1399 (1990). In *Percy*, the claimant's wife is not even mentioned by name, she is referred to as the 'Appellant's wife' and was discussed in terms of her age of 36 and occupation. *Percy v State of New Jersey* 278 NJ Super 543, 545 (1995). In *Gerber,* the only mention of Mrs Gerber's right to procreate is made by the Kozinski J, who dissented in Gerber III, stating that the decision would confine Mrs Gerber to a childless marriage. (*Gerber v Hickman* 291 F3d 617, 631 (2002).

prison that can assist with their rehabilitation.[635] In both *Mellor* and *Dickson,* one of the reasons for denying the request was that neither the Mellors', nor the Dicksons' relationships had been tested outside of the prison.[636] Both relationships started after the prisoners had started their sentence. There was no real consideration of the collateral consequences of the infringement of the Article 8 rights of either free partner of the prisoners, even though Lorraine Dickson was named as a second party to the application. The appeal decision of *Mellor* summed up the view of the judges: 'a lawfully convicted prisoner is responsible for his own situation and cannot complain on that account that his right to found a family has been infringed.'[637] It is only when the case of *Dickson* reached the ECtHR that the issue of collateral damage to Mrs Dickson's Article 8 rights were discussed in any detail in the Chamber. The concurring opinion of Judge Bonello, whilst agreeing with the first decision of the Chamber to deny that there had been a violation of the Dickson's Article 8 right to found a family, at least mentioned Lorraine Dickson in person, specifically highlighting the difficulty of balancing her Article 8 rights separately to her husband's.[638] The minority judges had greater sympathy with Mrs Dickson's application, considering her human rights claims separately from her husband's. Judges Casadevall and Garlicki felt that the advancing age of Lorraine Dickson and her greatly reduced chances of procreating was exceptional enough to allow the Dicksons access to AI

[635] Prison Rules 1999, SI 1999 No 728 rule 4.
[636] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385; [2000] H.R.L.R. 846. [16], *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [15] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 [7].
[637] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [26] (Phillips MR).
[638] *Dickson v United Kingdom* (2007) 44 EHRR 21 (Concurring Opinion of Bonello J)

facilities.[639] In the second dissenting opinion, Borrego Borrego J called Lorraine Dickson the 'forgotten person' highlighting that Lorraine Dickson was a free person, whom had not been mentioned in the main judgment at all.[640] Kirk Dickson's role was minor compared to Lorraine Dickson's who would be required to carry the pregnancy to term, give birth and care for the child.[641] Borrego Borrego J added, 'It really would be regrettable if a real problem became, through the passage of time, a purely theoretical one.'[642] In the Grand Chamber, Lorraine Dickson was finally recognised as an applicant in her own right, the court referred to the 'applicants' jointly.[643] Lorraine Dickson herself reiterated that the policy, which applied to prisoners, should not apply to her as a free person.[644] In the main however, the applicants were considered jointly by the majority judgment, and the Grand Chamber failed to grapple with the important question of how far should restrictions affect the free partner of the prisoner. This could be simply because they did not feel it was necessary, having found that there had been a breach of Kirk Dickson's Article 8 rights.

The American cases of *Goodwin* and *Gerber* did make some mention of the constitutional rights of the free partners of the prisoners. The case of *Percy* was silent on this issue however.[645] In the District Court ruling of *Goodwin*, it was accepted that Mrs Goodwin's right to procreate had been violated, but that the Eighth Amendment prohibition on cruel and unusual punishment was not intended to require the state to ensure that third parties such as partners were not

[639] ibid (Joint Dissenting Opinion of Casadevall and Garlicki JJ)
[640] ibid.
[641] ibid.
[642] Ibid (Dissenting Opinion of Borrego Borrego J).
[643] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 65 onwards.
[644] ibid para 56.
[645] *Percy v State of New Jersey* 278 NJ Super 543 (1995).

subjected to hardship.[646] It was seen as 'inevitable' that the incarceration of the prisoner would also affect his family members and friends adversely.[647] On appeal, the court rejected Steven Goodwin's argument that the prison regulation required strict scrutiny because it affected his wife's right to procreate. Magill J argued that it was inevitable that many elements of imprisonment affect the rights of the prisoner's family and friends, and that 'such restrictions on the prisoner's liberty would be sustained if they were reasonably related to achieving a legitimate penological objective. To that extent, the wife's associational rights are not relevant.'[648] In Gerber III, the specific rights of Evelyn Gerber were not mentioned by the majority decision, but were raised in one of the dissenting judgments. Kozinski J, stated that the authorities must have compelling reasons to prohibit prisoners from procreating, because they affect not only the prisoner but the prisoner's partner from procreating as well. Because of their importance, he argued that they should be subject to a stricter standard of scrutiny because of the effect on non-prisoners.[649] Kozinski J then points out that through its decision the court had consigned Evelyn Gerber to a 'childless marriage.'[650] The majority judgment makes little mention of Evelyn Gerber, other than to say that William Gerber has no right to have private visits.[651]

Legitimate Penological Objectives

All of the cases demonstrate the same conflict: the balancing of the rights of the prisoner and the aims and goals of the penal system. The aims of

[646] *Goodwin v Turner* 702 F Supp 1452, 1455 (1988).
[647] ibid.
[648] *Goodwin v Turner* 908 F2d 1395, 1398 (1990).
[649] He argues that the Supreme Court ruling in *Turner v Safley* 482 US 78, 85 (1987) states that when a prison regulation creates a 'consequential restriction' on those who are not prisoners then it should be subjected to a 'more searching scrutiny' *Gerber v Hickman* 291 F3d 617, 631 (2002).
[650] *Gerber v Hickman* 291 F3d 617, 632 (2002).
[651] ibid 621.

imprisonment are largely concerned with protecting society, preventing recidivism, as well as deterrence, retribution and punishment.[652] The practical concerns of the prison as an institution would be the maintenance of prison security, the safety of prisoners and staff, protection of the public, punishing the prisoner in accordance with their sentence, promoting individual prisoners contact with their families and promoting the rehabilitation of offenders through the delivery of courses and the provision of meaningful work. These institutional requirements often clash with the prisoner's desire to start a family: for example conjugal visits are prohibited in England and Wales because of the perceived risk that they pose to prison security. In the USA they are allowed in certain states as a privilege for selected groups of prisoners.[653] The cases have shown that even when prisoners and their relatives attempt to mitigate these security concerns through the use of AI, they still face opposition from officials who claim that their requests conflict with both legitimate penological aims and the operational issues concerned with running the prison. Often the punitive and security aims of the penal system, as well as the operational demands of the prison itself, are prioritised over rehabilitating offenders and maintaining contact between offenders and their families. This is often due to the punitive nature of the

[652] Criminal Justice Act 2003 s142 (a)(b)(c)(d)(e) (which details the purposes of sentencing); SC Busch 'Notes: Conditional Liberty: Restricting Procreation of Convicted Child Abusers and Dead Beat Dads' (2006) Case W Res L R 479.

[653] See footnote 1; also Christopher Hensley, Rutland S, Gray-Ray P 'Conjugal Visitation Programs: the Logical Conclusion' in Christopher Hensley (ed) *Prison Sex: Practice and Policy* (Lynne Reinner Publishers, 2002) 143 Previously, Mississippi and New Mexico allowed certain prisoners conjugal visits, but removed this privilege from February 2014, citing budgetary concerns, STI transmission and the worry of babies being born to prisoners, leading to single parent families outside of the prison. Mississippi Department of Corrections, Press Release 'MDOC Ends Conjugal Visits' (Mississippi Department of Corrections, Office of Communications, 15 December 2013) <http://www.mdoc.state.ms.us/PressReleases/2013NewsReleases/ConjugalVisits.htm> accessed 20 April 2015; Joseph J Kolb, 'New Mexico to eliminate conjugal visits for prisoners' (*Reuters,* 16 April 2014) http://www.reuters.com/article/2014/04/16/us-usa-prisons-newmexico-idUSBREA3F21220140416 accessed 20 April 2015.

criminal justice system and the desire of politicians to be seen as being tough on crime and criminals, thus mandating a harsher and more punitive penal regime.[654]

In the US, all of the justifications given by the state and the courts to prohibit procreation concerned reference to 'legitimate penological aims.'[655] The first priority was isolating the prisoner from the rest of society in order to deter potential criminals.[656] The term used in *Pell* is quite revealing: the criminal is 'quarantined' to allow 'the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity.'[657] This statement makes two assumptions, firstly, that for some offenders, rehabilitation can only take place away from their normal lives in prison, and secondly, that the offender is somehow 'diseased' and so are placed in 'quarantine' for the public's protection. For some offenders, there is certainly a valid argument that removing a person from a chaotic environment where they may be addicted to drugs or may associate with other offenders, for example, helps some offenders to refrain from these behaviours and rehabilitate themselves. It is also correct to say that many offenders are dangerous individuals, for whom incarceration is necessary in order

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[654] Comfort notes that legislation allowing Californian prisoners serving a life sentence access to private family visits was repealed in 1996. Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2007) 117; Tyler Davidson 'Jail Date: Wives of San Quentin Inmates Protest Politicians' Efforts to Restrict the Family Visitation Program' *SF Weekly* (San Francisco, 7 February 1996) 6. Liebling highlights how in England and Wales in the mid 1990's following the Prison Disturbances April 1990: Report of an Enquiry (Woolf Report) that prisons underwent a period of reform to reduce liberal regimes and increase tighter controls. These changes served to make the prison environment more controlled and punitive. Prisoners who had previously enjoyed more than the minimum visit contact time with their children had their entitlements reduced, and their relationships with their families was placed second to discipline. Families were thus enlisted as additional pressure to 'encourage' prisoners to behave. Alison Liebling, 'Incentives and Earned Privileges Revisited: Fairness, Discretion, and the Quality of Prison Life' (2008) J Scandinavian Stud Criminology & Crime Prev 9, 25, 28-29, 33.

[655] *Gerber v Hickman* 291 F3d 617, 621 (2002) citing *Hudson v Palmer* 468 US 517, 524 (1983); *Goodwin v Turner,* 980 F.2d. 1395, 1396 (1990); *Percy v State of New Jersey* 278 NJ Super 543, 548 (1995).

[656] *Gerber v Hickman* 291 F3d 617, 621 (2002).

[657] *Pell v Procunier* 417 US 817, 852 (1974).

to protect wider society. This line of argument fails to address the positive effects of closer ties to family and how the promotion of strong social bonds aids in offender desistance, as well as negating the more harmful effects of incarceration.[658] Other general aims of imprisonment referred to in the judgment are deterrence, justice and retribution.[659] The case of *Percy* directly turns on the furtherance of legitimate penological aims, even when it concedes that *Percy* may retain a right to procreate.[660] King J in *Percy* states the main reason for giving 'considerable deference' to the Department of Corrections is that prison administrators are those best placed to judge whether prisoner procreation poses risks to prison security, and risks overburdening the penal system.[661] In *Mellor* and *Dickson*, rather than making direct references to the aims of imprisonment, the judges refer to the 'explicit consequences of imprisonment.'[662] The justifications for a restrictive AI policy included maintaining public confidence in the penal system and outrage at the thought of prisoners having babies before their release.[663] The prohibition was justified on appeal in both *Goodwin* and

[658] Alice Mills, Helen Codd, 'Prisoners' families and offender management: Mobilizing social capital' (2008) 55 Prob J 9; William D Bales, Daniel P Mears, 'Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?' (2008) 45 J Res Crime & Delinquency 287. Bales and Mears conducted a cohort study of 7,000 inmates released in the period November 2001 and March 2002 who had served at least 12 months were followed up for 24 months post release. 58% of the inmates had no visitation prior to release. Recidivism rates were 30.7 % lower in those who had received a visit in the 12 months prior to their release than those who had not been visited.

[659] *Pell v Procunier* 417 US 817, 822 (1974); *Goodwin v Turner* 702 F Supp 1452, 1463 (1988); *Gerber v Hickman* 291 F3d 617, 621 (2002); *Pell v Procunier* 417 US 817, 822 (1974).

[660] *Percy v State of New Jersey* 278 NJ Super 543, 548-549 (1995).

[661] ibid 549.

[662] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 26; *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 10.

[663] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] H.R.L.R. 846 para 16; [2000] EWHC Admin 385 para 16 (the policy is in place because serious public concern would result if prisoners had children whilst serving prison sentences, it is an explicit consequence to of imprisonment that prisoners cannot have children whilst serving a prison sentence) para 51 (it is important to maintain public confidence in the system of imprisonment by only allowing procreation in exceptional circumstances and is necessary to maintain the deterrent effect of prison); *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 1472

Percy because it was related to the 'legitimate penological aim of treating all prisoners equally.'[664]

Taking each penological aim in turn, the arguments for prohibiting procreation based upon preserving these aims are weak. The most cited justification in both England and Wales and the USA cases was the need to maintain the deterrent effect of imprisonment. This was especially important in *Dickson* and *Mellor.* The deterrent effect depends upon the would-be criminal making an objective decision about whether or not to engage in the planned criminal enterprise, before committing the offence. The suggestion that a potential criminal would be deterred from his planned course of action because he wanted to start a family and imprisonment would prevent this seems unconvincing. Many crimes are committed in situations where no planning or rational decisions have been made.

The argument that prohibiting procreation is part of the punishment of imprisonment is also quite weak, and as previously stated, prohibiting the procreation is not stipulated by statute in either England and Wales or the USA.[665] The Grand Chamber in *Dickson* also stated that losing the right to procreate is not

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para 17 (reiterating the Government's policy as not being able to procreate is an explicit consequence of imprisonment, as well as justified and serious public concern over prisoners procreating) para 58 (it is justifiable for imprisonment to interfere with human rights so long as they are not disproportionate to the aim of maintaining a penal system which is designed to punish and deter), para 65 (penal sanctions are given to 'exact retribution' for the wrong committed and that public perceptions is an important consideration when deciding penal policy). *Dickson and Dickson v Premiere Prison Service Ltd.,* Secretary of State for the Home Department [2004] EWCA Civ 1477 para 3 (the policy is justified because of the legitimate public concern that may arise if prisoners procreate that they are getting around the punitive and deterrent elements of their sentence) para 7 (concern the public will have if prisoners circumvent the punishment and deterrent effects of their sentence) para 10 (Government policy justifications repeated: prisoners may get around the punishment and deterrent elements by having children).

[664] *Goodwin v Turner* 980 F.2d. 1395, 1399-1400 (1990), *Percy v State of New Jersey,* 278 NJ Super 543, 548-549 (1995).

[665] *Gerber v Hickman* 291 F3d 617, 626 (2002); *Dickson v United Kingdom* (2007) 44 EHRR 21 (Dissenting Opinion of Borrego Borrego J).

a necessary consequence of imprisonment.[666] The arguments put forward that prisoners procreating may offend public opinion was given little credit in the Grand Chamber of the ECtHR. They stated that prisoners should not automatically lose their rights because of fear of offending public opinion.[667] There is a place for taking into account public discourse when shaping penal policy, but the weighing up between prisoners' rights and public opinion should always be proportionate. It is especially important to ensure that penal policy guards against excessively punitive public opinion, which could potentially see prisoners kept in conditions that are degrading. One reason for the use of the criminal justice system is that punishment should to be just, measured and objective. In some respects this acts as a bulwark against public opinion. Public opinion, left unchecked, could lead to vigilante 'justice' being meted out by certain groups of people. The Grand Chamber also makes another important point; that is, one aim of imprisonment is rehabilitation, which should be balanced against the requirement for punishment.[668]

The justification used by the State in *Goodwin, Percy and Gerber* was that it was in the interests of equal opportunities to ban all prisoners from procreating is explored more fully in the section concerning gender. It disingenuous to suggest that by prohibiting all individuals from exercising their right to procreate is acting in the interests of both fairness and equal opportunities. Nobody can benefit from a complete absence of opportunities.

[666] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 74.
[667] ibid para 75.
[668] ibid.

Welfare of the Child and Judgments about Parental Suitability

One of the fundamental differences between the England and Wales cases and the cases from the USA was how they tackled the 'child welfare' issue and whether it informed any part in the decision-making process. For the government of England and Wales, the consideration of the welfare of any child born to a serving prisoner is central to the decision-making process and forms part of official Government policy.[669] In *Goodwin, Percy* and *Gerber,* the putative child was not considered as a potential person, and no discussion was given over to the ethical issues of creating a single parent family. In contrast to the England and Wales, the USA does not have an overarching statute, which governs how fertility treatment is licensed and administered.[670] Due to the lack of any 'child welfare' considerations in either *Goodwin Percy* or *Gerber*, this section will concentrate exclusively on *Mellor* and *Dickson.* Forbes J stated in *Mellor* that the requirement for the Government to consider the welfare of the child was the 'the same basic principle which underlies the Human Fertilisation and Embryology Act 1990.'[671] This principle required that the doctors treating infertile couples must have regards to the need for a father, which has since been amended to 'supportive parenting.'[672] It seems unlikely that had the requirement for 'supportive parenting'

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[669] Appendix, *R v Secretary of State for the Home Department Ex parte Mellor* [2000] H.R.L.R. 846 paras 16, 54; [2000] EWHC Admin 385 paras 16, 54; *R v Secretary of State for the Home Department Ex parte Mello*r [2001] EWCA Civ 472 [17], [67]; *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home Department* [2004] EWCA Civ 1477 paras 3, 6, 7, 10, 20.

[670] The Fertility Clinic Success Rate and Certification Act 1992 is a Federal Act which requires all fertility treatment clinics to report their pregnancy and success rates directly to the Centres for Disease Control and Prevention. For details of the legal regulation of IVF more generally in the USA see David Adamson, 'Regulation of Assisted Reproductive Technologies in the United States' (2005) 39 Fam L Q 727.

[671] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] H.R.L.R. 846 para 54; [2000] EWHC Admin 385 para 54.

[672] Human Fertilisation and Embryology Act 1990 13(5), amended by The Human Fertilisation and Embryology Act (2008) s14(2)(b). Treatment will only be given if the patient can demonstrate

been current at the time of the cases whether it would have made any practical difference to the decision made by the Government, as it seems that many other factors also worked against the applicants, as both the Mellors' and Dicksons' relationships had not been 'tested' in outside society. It is worth noting that the Government minister made direct reference to the fact that each child would lack a father until the prisoners were released.[673] It is also worth noting that in this particular situation, that a person undergoing simple AI would only be covered by the HFEA if the treatment took place in a licensed clinic.[674]

In both *Mellor* and *Dickson*, the reasons for the Secretary of State's refusal were given in a letter, which had been received by the applicants and was quoted in both judgments. In *Mellor*, the letter noted that the Secretary of State refused their request because they had no extenuating medical reason to require immediate fertility treatment, and, more tellingly, because their relationship had not been 'tested under normal circumstances' as it was formed after Gavin Mellor had entered prison.[675] In contrast, one of the reasons (amongst others) given for refusing permission to the Dicksons was the fact that there was a 'seeming insufficiency of resources to provide independently for the material welfare of any child who might be conceived' as well as concern about the lack of a father

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they meet the need for 'supportive parenting' rather than the need 'for a father.'

[673] *R v Secretary of State for the Home Department Ex parte Mello*r [2001] EWCA Civ 472 (Government considerations for the length of time the child will be without their prisoner parent [17] consideration about the disadvantage of single parent families para 67; *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home Department* [2004] EWCA Civ 1477 [7] (factors taken into account by the government minister making the decision, including how long the child would be without their parent; the welfare of the child born as a result of treatment and how the imprisonment of the parent would affect child welfare paras 19- 20.

[674] Human Fertilisation and Embryology Act 1990 Sec 11 1(a) Licences authorising treatment with gametes and embryos; 1(b) Licences authorising the storage of gametes and embryos.

[675] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] H.R.L.R. 846 paras 16, 54; [2000] EWHC Admin 385 [14].

for a considerable part of the child's early life.[676] In comparison, to this the current guidance from the HFEA states that a single woman or a couple can only be provided with licensed fertility treatment if regard is given to the need for 'supportive parenting' and the welfare of the child. Supportive parenting is defined by the HFEA as: 'a commitment to the health, wellbeing and development of the child.' [677] Factors to consider include where the putative parents have past convictions for child abuse or neglect, have had child protection measures taken against existing children, and when there is 'violence or serious discord in the family environment.'[678] Other considerations include where the parents themselves may be impaired from caring for their child due to mental or physical conditions, or where the putative parents suffer from alcohol or drug addiction.[679] Whilst there is a general aspiration towards a 'commitment to the health, well being and development of the child' there is no stipulated requirement for one of the parents to be working or earning above a certain level to be granted fertility treatment.[680] In practice, the lack of funded IVF treatment may prove a barrier to those on low incomes accessing treatment, but there are no official guidelines suggesting that the clinic should enquire as to the amount that putative parents earn. The court assumed that Lorraine Dickson would have to claim state benefits to support herself. They also assumed that Kirk Dickson would be unable to act as an active parent to the child whilst in prison.[681] An

[676] *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 7.
[677] Human Fertilisation and Embryology Authority *Code of Practice* (Human Fertilisation and Embryology, 8th ed, 2009, revised April 2015) para 8.10.
[678] ibid para 8.10.
[679] ibid.
[680] One case where a minimum required level of financial support was required by a court was in *State v Oakley,* which appears to require non-resident parents to pay minimum levels of child support, or face criminal sanctions. *State v Oakley* 2001 WI 103 (2001).
[681] The applicants submitted to the Chamber of the ECtHR that Mrs Dickson owned a property

important difference between the decision-making process for those applying for IVF and prisoners applying for the right to procreate are that the Ministers responsible for making the decision of whether to allow prisoners to procreate may give far more weight to the political consequences of the decision than any human rights considerations of the prisoner and their family. It is in effect the same kind of decision being made by two very different bodies. Codd highlights that a couple applying for IVF will have their case judged by appropriately trained doctors, with a HFEA appointed panel appointed to investigate difficult cases. The prisoner who applies for permission to inseminate his partner will instead have his or her decision made by people in the Prison Service, who would not have the specialised knowledge or training of healthcare practitioners.[682] Their decision would be based upon the needs of the prison service and the needs of the prisoner and their family would come second to this.

Mellor and *Dickson* raise questions about the legitimacy of deciding who should become a parent. There are several critics of the requirement for people to have to satisfy a child welfare provision, including that it subjects infertile people to a degree of public scrutiny over their private decision to start a family, which fertile people are not subject to.[683] In the case of prisoners, Codd argues that prisoners may in fact be subjected to a higher threshold to which they have to prove their suitability to become a parent, and in turn, the prisoner's free partner is also subjected to a far higher standard of scrutiny than they would happen were

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worth £200,000 and that she was following a counselling course and would be able to charge £30 an hour once qualified. *Dickson v United Kingdom* (2008) 46 EHRR 41 para 23.

[682] Helen Codd, 'Policing Procreation: Prisoners, Artificial Insemination and the Law' (2006) 2 Genomics, Society & Policy 110, 115 http://www.lancaster.ac.uk/fss/journals/gsp/docs/vol2no1/HCGSPVol2No12006.pdf accessed 1 May 2015.

[683] Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176, 202.

their partner not also a prisoner.[684] Whilst the domestic cases make no specific judgments about the suitability of the prisoners and their partners as potential parents, the judges are willing to say, that in effect it is in the child's best interests to not exist.[685] Both *Mellor* and *Dickson* stated that children thrive better in two-parent rather than single families and that it is a legitimate Government aim to prevent the creation of single-parent families.[686] The first instance decision of *Mellor* justified having regulatory standards in the case of prisoners, because the state was being asked to be an active party to the creation of a child into a de-facto single parent family.[687]

The ECtHR dealt with the question of child welfare in both the Chamber and the Grand Chamber in *Dickson*. Ultimately, whilst they reached different conclusions, both judgments contained important considerations for how the child welfare principle should be applied in the case of prisoners. The majority in the Chamber felt that it was legitimate for any Government to have regard for the welfare of any child conceived as a result of AI.[688] Some clue as to the strength of feeling that the judges may have felt about the suitability of the applicants to become parents can be gleaned from the concurring opinion of Bonello J who was disparaging about the prospects of a child born to a prisoner and his partner in a

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[684] Helen Codd, 'Policing Procreation: Prisoners, Artificial Insemination and the Law' (2006) 2 Genomics, Society & Policy 110, 115 http://www.lancaster.ac.uk/fss/journals/gsp/docs/vol2no1/HCGSPVol2No12006.pdf accessed 1 May 2015.

[685] The philosophical problem caused by the welfare principle has been termed the 'non-identity' problem. See John A Robertson 'Procreative Liberty and Harm to Offspring in Assisted Reproduction' (2004) 30 Am JL & Med 7.

[686] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472; *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 8.

[687] *R v Secretary of State for the Home Department Ex parte Mellor* [2000] EWHC Admin 385 [54]; [2000] H.R.L.R. 846.

[688] *Dickson v United Kingdom* (2007) 44 EHRR 21 para 34.

de-facto single-parent family.[689] He then makes reference to the potential parents requiring social welfare support to raise their child, as well as the 'dysfunctional ambience' of a relationship founded when both applicants were in prison.[690] In contrast to the strong and vitriolic language of Bonello J, the dissenting opinion of Judges Casadevall and Garlicki state that the Government was being overly paternalistic in determining 'who may have children and when.'[691] The government of England and Wales used Article 8(2) as a justification for removing the right of prisoners to procreate if necessary to protect the health and morals of citizens.[692] Interestingly, Auld LJ in the domestic hearing of *Dickson* stated that this could apply to the protection of the rights of the unborn: 'It seems to me that… concern for the rights of a putative child in the upbringing it would receive depending on the circumstances and length of imprisonment involved, are highly relevant circumstances, for the purpose of Article 8.2.' [693] The Grand Chamber, was quite firm on how far the Government should be able to consider the welfare of the child as a reason for refusing access to AI. They stated that whilst it was legitimate that the government of a country could consider the welfare of the child as a relevant matter under Article 8(2), this consideration did not extend to preventing prisoners and their partners from conceiving a child.[694]

Jackson finds this reasoning flawed however: firstly it considered the rights of a non-existent person, over an actual person, again encountering the 'non-identity' problem.[695] Neither a foetus nor a non-existent child has rights

[689] ibid concurring opinion of Bonello J.
[690] ibid.
[691] ibid, dissenting opinion of Casadevall and Garlicki JJ.
[692] Human Rights Act 1998, Article 8(2)
[693] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 20.
[694] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 76.
[695] Emily Jackson, 'Case Commentary Prisoners, Their Partners and the Right to Family Life'

under the ECHR, whereas the Dicksons' did. The policy is in effect stating that it is in the best interests of the child to not exist at all than to have a prisoner as an absent parent.

Gender and prisoner reproduction

One of the most important issues explored by the US cases, but not explicitly examined in *Mellor* and *Dickson* is the question of whether male and female prisoners should have equal access to AI facilities. One of the apparent difficulties faced by the courts was defining the exact right that the prisoners possessed when they are litigating for access to AI. What troubled the courts most in the USA was the subsequent effect that this could have on gender equality, especially the increased burdens of providing for female pregnant prisoners.[696]

Women prisoners require substantial antenatal and postnatal care, with transfer to an appropriate maternity facility to give birth following ART. The prison would be required to make some significant amendments to the normal prison regime to accommodate the physical and psychological needs of the pregnant prisoner, including provision for protecting the health and wellbeing of the foetus. In certain cases the prison may provide a mother and baby unit, which is another considerable expense. The responsibility of caring for babies also creates another substantial burden and duty of care upon the prison services. This situation raises some problematic areas that need to be tackled and addressed such as whether male and female prisoners be treated differently when requesting AI facilities.

(2007) 19 CFLQ 2 239, 242.

[696] *Goodwin v Turner,* 980 F.2d. 1395, 1400 (1990); *Gerber v Hickman* 291 F3d 617, 629 (2002).

One way that the majority in Gerber II and minority decision judgments in *Goodwin* and Gerber III avoided directly tackling the question of women prisoners procreating was by characterising the right at question within the narrow context of providing a sample for AI, rather than by the end of result, which is parenthood. In Gerber II, the majority judgment argued that the request of a male prisoner to provide a sample for AI was fundamentally different to a female prisoner requesting to be artificially inseminated.[697] The minority judgment in *Goodwin* argued that what was being claimed was the narrow right to provide a sperm sample, not the right of a prisoner to be artificially inseminated themselves.[698] The minority judgment also stated that denying a right that could be easily accommodated to one group in order to prevent another group from claiming a right did not further the penological aim of treating male and female prisoners equally. By denying rights to all prisoners could not be seen to be promoting fairness and equality for all prisoners.[699] Prisons often allow the exercise of some rights in some circumstances for some prisoners and the denial of some rights for other prisoners. As such, this prohibition also failed the *Turner* test because the complete prohibition on AI did not leave any other method of allowing the prisoner to exercise their right to procreate, so it could be argued that the prohibition was disproportionate.[700] In Gerber III, the minority judgment of Kozinski J examined the actual process of producing a semen sample for AI and found nothing in the process itself that was inconsistent with procreation.[701]

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[697] *Gerber v Hickman* 264 F3d 882, 891 (2001).
[698] *Goodwin v Turner,* 980 F2d 1395, 1405 (1990).
[699] ibid.
[700] ibid
[701] *Gerber v Hickman* 291 F3d 617, 629 (2002).

On a basic level, this argument is true, as on the face of it the request to provide a semen sample has a different set of requirements to allowing a woman to be artificially inseminated whilst in prison. The practical consequences are different for male and female prisoners as well as for the prisons in these situations. It may be that the male prisoner producing a semen sample is more similarly situated to the female prisoner having her ova frozen for future use. Gerber II stated that the female prisoner who wished to donate eggs to a lesbian partner outside of the prison were similarly situated to the male prisoner who also donates gametes for conception and gestation to occur outside of the prison.[702] Whilst ovum retrieval is the female equivalent of providing a semen sample, it is incorrect to claim both procedures are equally straightforward. As Roth highlights, a claim based upon ovum retrieval would be as likely to fail as a claim to be artificially inseminated because of the specialised medical treatment required to stimulate the ovaries to produce more than one egg and the surgical procedure that would be required to extract the eggs.[703] Dunn however recommends that women prisoners should be allowed to preserve their eggs, and that to ensure equal protection, male prisoners should be allowed to preserve their sperm or have them used for AI.[704] Ovum donation may be seen as a 'middle-ground solution' when compared to IVF treatment of female prisoners. There would be no pregnancy in prison, and the prisoner retains some hope of retaining their chance to have a genetically related child. However this does not leave the woman prisoner in the same position as the male prisoner: she is reliant upon

[702] *Gerber v Hickman* 273 F3d 843, 891 (2001).
[703] Rachel Roth, 'No New Babies? Gender Inequality in Prison Systems (2004) 12 Am UJ Gender Soc Pol'y & L 391, 401.
[704] Sarah L Dunn, 'The Art of Procreation: Why Assisted Reproductive Technology Allows for the Preservation of Female Prisoners' Right to Procreate' (2001) 70 Fordham L Rev 2561, 2599.

another person such as a surrogate or release from prison before she can become a mother. Whilst a male prisoner is reliant upon his partner gestating the pregnancy, the chances of this happening are far higher than the female prisoner finding a surrogate or becoming pregnant herself.

Intrinsically, however, the overall aim of all of these procedures is the same, the prisoner intends to become a parent. From a gender equality perspective, the ruling in Gerber II is unjust towards women prisoners. For a fair system of punishment and rehabilitation, equality of outcome rather than exact parity of treatment is required to ensure fairness between male and female prisoners. Roth makes a valid point that judges use unfairly the concept of women's rights as a reason to restrict the rights of all groups of prisoners and by 'doing so they manage both to hold women responsible for men's grievances and to compromise women's claims to constitutional equality.'[705]

This reasoning is evident in *Goodwin,* where the judgment states that 'male prisoners cannot be allowed to procreate while incarcerated because the Bureau cannot afford to expand its medical services for its female prisoners.'[706] King J also used the same point in *Percy* to justify prohibiting all prisoners from procreating.[707] As Roth states the argument made is that men cannot exercise their rights because women's rights are far too costly and burdensome.[708]

Kirkley argues however, that a prohibition on procreation for all prisoners was in the interest of promoting equal treatment for all prisoners.[709] She states

[705] Rachel Roth, 'No New Babies? Gender Inequality in Prison Systems (2004) 12 Am UJ Gender Soc Pol'y and L 391, 393.
[706] *Goodwin v Turner,* 980 F2d 1395, 1400 (1990).
[707] *Percy v State of New Jersey* 278 NJ Super 543, 548 (1995).
[708] Rachel Roth, 'No New Babies? Gender Inequality in Prison Systems (2004) 12 Am UJ Gender Soc Pol'y & L 391, 401.
[709] Rachel Michael Kirkley, 'Prisoners and Procreation: What Happened Between *Goodwin* and *Gerber*? (2002) 30 Pepperdine L Rev 93, 118.

that allowing access to fertility treatment creates a situation where resources are diverted away from other necessary prison work, and so these rights should be restricted for everyone. Furthermore, she argues that should the United States Supreme Court recognise a constitutional right for prisoners in the USA to access reproductive medicine, it could lead to unfair outcomes.[710] In the case of women who are artificially inseminated, she hypothesises that those on death row could get a stay of execution and stay alive longer than men who could produce their sperm sample but would still be put to death in the time scale demanded by the judicial process.[711] The Ministry of Justice in England and Wales appears to avoid addressing this issue explicitly because of the approach of the Minister for Justice, who assesses each application individually. There is no complete prohibition on requests in theory, although in practice it appears difficult to make a successful application, even for male prisoners.[712] Some authors have argued adopting a discretionary strategy in US prisons would allow authorities the option of refusing applications from women because of the increased burden of allowing them to procreate.[713] This would inevitably lead to concerns about discrimination. The only mention of the policy applying specifically to both male and female prisoners in England and Wales was made in *Mellor,* where it was clarified that

[710] ibid.
[711] ibid quoting Ellen Goodman. Kirkley further notes that it could be possible for women to keep getting pregnant until the menopause, thus creating a potential stay of execution for several years. Ellen Goodman, 'Prisoners of Love? Death Row Inmates' Demands to Procreate Were Inevitable' *Chicago Tribune* (Chicago, 12 January 1992) 4C.
[712] See Appendix. Note only 1 male prisoner is known to have been successful in his claim to procreate via AI. Nick Collins, 'Prisoner granted right to father child from jail' (*The Telegraph*, 1 June 2011) http://www.telegraph.co.uk/news/uknews/law-and-order/8549149/Prisoner-granted-right-to-father-child-from-jail.html accessed 20 June 2015.
[713] Richard Guidice Jr, 'Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right' (2001) 29 Fordham Urb LJ 2227, 2321.

the policy applies to both men and women prisoners equally.[714] The ECtHR judgment of *Dickson* only mentions the possibility of women prisoners in the Grand Chamber, where the dissenting judges highlight how the majority decision has failed to grapple with the issue of how to apply the principle of procreative rights to women prisoners, homosexual couples and those who require fertility treatment.[715] In England and Wales, there may be more scope for officials to use their discretion to deny applications from women prisoners because of the burdens to the prison service, or even the welfare of the child arguments because the child would be born in prison and this would not be in their best possible interests.[716]

Returning to the proposition that prisoners should be treated as citizens as far as is possible, both male and female prisoners would ideally be allowed to procreate, so long as they do not have convictions involving children. In England and Wales and in most US jurisdictions, this would entail using reproductive technologies to reproduce. It is undeniable however that when a woman enters prison pregnant or becomes pregnant in prison, then this creates significant disruption for the prison and places far greater burdens on the prison service. Munsterman argues however, that prisons already make provision for pregnant women and that accommodating some extra prisoners who choose to procreate would not necessarily increase burdens placed upon the prison and correctional services. [717] The burden of providing healthcare in England and Wales would be

[714] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [17].
[715] *Dickson v United Kingdom* (2008) 46 EHRR 41. The joint dissenting opinion of Judges Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer argued that this should be considered under the individual country's margin of discretion.
[716] ibid.
[717] Jeri Munsterman, 'Procreation from Prison Via Fedex and the Extension of the Right to Imprisoned Women' (2001) 70 UKMC L Rev 733, 746.

met by the NHS. The authorities may wish to deny the individual parenthood if they feel that they are unsuitable as parents, but this should be separated from the right to procreate.

Punishment and Civil Death

All of the cases examined here reflect the wider debate surrounding prisoners' rights, and what rights a prisoner keeps after incarceration. Some of the cases make direct reference to punishment and what constitutes the punishment of imprisonment.[718] The references to 'public concern' about murderers procreating raises a number of questions, such as whether the 'general public' might think that all prisoners should be prevented from having children as part of their punishment, or whether it is a privilege which should be limited to those who have been convicted of non-violent crimes. The immediate assumption of many is that prisoners lose access to many rights that free people take for granted: the right to vote, the right to earn their own living and the right to have children. However, the minority judgment in Gerber III and the Grand Chamber in *Dickson v UK* question this stance, stating that there is no automatic forfeit of the right to have children.[719] The judges in *Mellor* and *Dickson* considered the inability to have children as a part of the punishment of prison.[720] Part of this argument derives from the 'natural consequences' of imprisonment argument.

In both *Mellor* and *Dickson,* public concern at prisoners having children was cited as justification for not allowing Dickson and Mellor access to AI

[718] *Percy* does not make a direct reference to punishment, confining it's short judgment to whether the prisoner retained a right to procreate and whether any legitimate penological objectives justified removing the right.
[719] *Gerber v Hickman* 291 F3d 617, 626 (2002); *Dickson v United Kingdom* (2008) 46 EHRR 41 para 68.
[720] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [62]; *Dickson and Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department* [2004] EWCA Civ 1477 [20].

facilities. Linked to this, Lord Phillips MR argued in *Mellor* that public concern and perception was an appropriate influence on penal policy.[721] This point was also reiterated by Auld LJ in *Dickson*.[722] In the first instance decision of *Goodwin,* the claimant argued that refusing his request for AI facilities was tantamount to a cruel and unusual punishment. This argument was dismissed, stating that refusing Goodwin permission to artificially inseminate his wife did not constitute excessive punishment.[723] In Gerber I, the District Court stated that restricting the prisoner's right to procreate was a legitimate part of their punishment.[724] Similarly, public confidence in the system was also seen as important in the US decisions. Gerber argued that the three strikes law violated equal treatment as his offence was sentenced far more harshly (a life sentence without parole) than a similar offender convicted of their first offence.[725] The court viewed the statute as valid because it maintained public confidence in the system and acted as deterrence.[726] Restriction of procreation was seen as a legitimate part of the punishment of imprisonment and this was affirmed in the en-banc reversal in Gerber III.[727] In comparison with this, the Grand Chamber judgment in *Dickson v UK* was unconvinced by the Government citing 'public opinion' as justification

[721] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [65] Phillips LJ
[722] *Dickson and Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department* [2004] EWCA Civ 1477 [19] [20].
[723] *Goodwin v Turner* 702 F Supp 1452, 1455 (1988). The restriction was seen as legitimate punishment and not excessive.
[724] ibid.
[725] *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000). In 2012 California voted to amend the law on three strikes to only sentence to mandatory life when the third crime was serious, rather than a misdemeanour. See Lorelei Laird, 'California begins to release prisoners after reforming its three strikes law.' (*American Bar Association*, 1 December 2013) <://www.abajournal.com/magazine/article/california_begins_to_release_prisoners_after_reforming_its_three-strikes_la> accessed 3 March 2015.
[726] ibid.
[727] *Gerber v Hickman* 291 F3d 617, 620 (2002).

for prohibiting prisoners from accessing AI.[728] The exceptionality reasons required by the UK Government to allow a prisoner to procreate prevented a proper weighing up of the competing factors of both the prisoner's and their partner's human rights claims, as well as the legitimate aims of the prison system to punish.[729] The Grand Chamber also emphasised the importance of considering the rehabilitation of the offender in the decision making process.[730] This implies that if the inability to conceive is not an inevitable consequence of imprisonment, then it cannot automatically form part of the punishment that the prisoner endures. The dissenting judgments in Gerber III, argued that inability to have children is not an automatic part of the punishment that prisoners suffer. Kozinski J stated that the legislature has not specified that prisoners be automatically denied the right to procreate, and that prison authorities cannot 'supplement' the punishment meted out to offenders simply to enhance 'deterrence and retribution.'[731] Tashima J also makes the point that should denial of procreation be a part of the prisoner's sentence, then the decision should lie with the legislature and should not solely arise at the discretion of the prison authorities.[732] The ECtHR has reiterated the principle that the only punishment that a prisoner should be subjected to in prison is the removal of liberty. Prisoners retain all of their other convention rights.[733] It appears that the legal arguments against an automatic forfeiture of the ability to procreate are quite weak when one is also claiming that prisoners retain all of their civil rights unless they are incompatible with incarceration. There is no

[728] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 74.
[729] ibid para 82.
[730] ibid para 75.
[731] *Gerber v Hickman* 291 F3d 617, 632 (2002).
[732] ibid 630.
[733] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 67 citing *Hirst v United Kingdom* (no 2) (2006) 42 EHRR 41 para 69.

legislative support for the explicit removal of a prisoner's right to procreate whilst incarcerated in either England and Wales or the USA. Such a legislative demand may be accused of having eugenic overtones. The extreme reluctance may be due in large part to the public disgust towards the notion of prisoners convicted of very serious offences having children. Politicians are extremely cautious of giving concessions to prisoners, such a move would be extremely unpopular with the majority of the electorate. There are valid and legitimate arguments against some classes of serious offender being prohibited from having children, including those convicted of murdering children, or those convicted of child abuse. It is arguable that a more transparent decision-making process could justify denying certain individual prisoners their right to procreate under Article 8(2) if it was necessary to protect the potential child from the real risk of harm. In this situation, the denial of the right to procreate would be a proportionate weighing of competing factors and not rooted in the simple claim that denial of procreation is part of the punishment of the prisoner. [734]

[734] See footnote 672. Treatment cannot be given by a licensed clinic without considering the welfare of the child including the need for supportive parenting. This of course depends upon whether the treatment required falls under the Act and is carried out under the supervision of medical professionals at a licensed fertility clinic.

Summary

Apart from the majority ruling in Gerber II and the Grand Chamber ruling in *Dickson v UK*, the case law demonstrates the extreme reluctance of the judiciary to contemplate the notion that prisoners have a legal right to procreate via ART whilst in closed prison conditions. The Government of England and Wales and the judiciary in *Dickson* and *Mellor* acknowledged that a complete ban would be unjust and incompatible with the HRA.[735] However, their exceptionality requirement set the bar so high as to render most applications unsuccessful.[736] In practice, little appears to have changed since the ruling in the Grand Chamber in *Dickson v UK*, with the Joint Select Committee for Human Rights claiming that 'We do not share the Government's confidence that the minor changes to existing policy agreed so far will be adequate to eliminate the risk of a further finding of a breach of the right to respect for private and family life of prisoners and their partners by the ECtHR.' [737] The FOI request made by the Daily Mail also shows that since the ruling, only one prisoner has been successful in their application to gain access to AI, which is a further indication that in reality prisoners' access to ART is extremely restrictive.[738] Within the USA, there is still no Supreme Court ruling on whether prisoners have a constitutional right to procreate, and the three

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[735] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 [17]; *Dickson and Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department* [2004] EWCA Civ 1477 [10].
[736] (2008) 46 EHRR 41 para 82.
[737] Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008 Thirty-First Report: 4 Issues Monitored by the Committee* (2008-9, HL 173, HC 1078) para 43.
[738] See Nick Collins, 'Prisoner granted right to father child from jail' (The Telegraph, 1 June 2011) <http://www.telegraph.co.uk/news/uknews/law-and-order/8549149/Prisoner-granted-right-to-father-child-from-jail.html> accessed 3 July 2015.

current judgments to date show an extreme reluctance to allow prisoners the right to procreate.

The justifications made for maintaining either a complete prohibition on procreation or for maintaining a very restricted access to procreation for prisoners at first appear to make sense. Prisoners are incarcerated because they need to be punished for their crime, isolated from society to ensure that the deterrent effect of a prison sentence is maintained. However, this premise depends upon certain assumptions, which, under close inspection, fail to stand up to scrutiny. The first assumption is that prisoners must be punished by being removed from their families. The 'punishment' element of the prison sentence is determined by the length of time that the prisoner remains incarcerated. Denial of the ability to have children is not stipulated in any statute in either the USA or in England and Wales.[739] Prisoners are not placed on compulsory contraception medication on incarceration, nor are they surgically sterilised. The denial of private or conjugal visits to all prisoners in the England and Wales and the majority in the USA could be justified by security concerns. It is not justified specifically because prison is explicitly intended to deprive prisoners of the ability to procreate. The claim that prisoners retain all of their civil rights unless those rights are incompatible with prison would also give strength to the claim that prisoners retain the right to procreate, not weaken it. The fact that many prisoners are already parents when incarcerated shows that prison itself is not incompatible with parenthood. In the USA, it is even harder to maintain that prison is incompatible with parenthood when there are groups of prisoners who are allowed private visits, with the result that many prisoners must have become parents whilst serving their sentences.

[739] In the USA, prohibition on procreation is a condition of parole in certain situations: *State v Oakley* 2001 WI 103 (2001).

This also weakens the argument that removal of the right to procreate is a natural consequence of imprisonment. As argued in *Dickson v UK,* the loss of the right to procreate may be a consequence of imprisonment but is not necessarily an inevitable one.

If the removal of the right to procreate is not based in statute, then the root for the common law justification of the removal of the right to procreate must come from another source. One of the reasons may be simply that it has been accepted by courts and the state that prisoners do not possess that right without examining whether there is any strong legal or theoretical basis for that justification. One theoretical justification might be that prisoners are not full citizens. This approach is evident from other prisoner's rights issues, such as the right to vote or earn a living. By using the definition of standing developed by Shklar, prisoners are not considered to be full citizens.[740] One of the reasons may be that the current understanding of prisoners as 'semi-citizens' it is a remnant of a legal system, which treated prisoners as civilly dead, which itself evolved from the rule of attainder.[741] Arguing that a right is merely delayed rather than removed can also lead to a slippery slope where prisoners are denied essential rights because the deprivation is not characterised as permanent. In the case of a life or death sentenced prisoner, this argument becomes academic as prisoners are in practice permanently deprived of certain rights.

The minority judgments in *Goodwin* and Gerber I and III as well as the majority judgments in Gerber II and *Dickson v UK* demonstrate why it cannot be assumed that prisoners automatically lose their right to procreate when

[740] Judith N Shklar, *American Citizenship: The Quest for Inclusion* (1991, Tanner Lectures on Human Values, Harvard University Press, 1991) 16.
[741] See footnote 579 for details.

incarcerated. Procreation is far too an important right for prisoners and their free partners who suffer collateral damage to their right to procreate because of their partner's imprisonment.[742] When a prisoner's right to procreate is removed, their fundamental rights are often dismissed without real consideration of whether there is a legitimate foundation for removing those rights. The judgments in *Mellor* and *Dickson* in particular make several value judgments about the individual prisoner and their partner's suitability to parent.[743] Whilst it could be argued that similar decision making processes are used by clinicians when deciding whether to provide a couple with fertility treatment, clinicians, these individuals are trained to make these decisions and are only concerned about the welfare of the child and best interests of their patients. Government officials, on the other hand are not trained to make these kinds of decisions and may tend to give greater weight to the desire to punish the offender and political ramifications of decisions, rather than considering the importance of maintaining family ties and promoting rehabilitation.

[742] Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 110- 111.
[743] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 67 (the disadvantage of single parent families); *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 7 (Government assessment of their suitability to parent, including lack of financial resources and lack of supportive family for Mrs. Dickson) paras19-20 (discussing justifications for derogations under 8(2) for the prevention of single parent families; *Dickson v United Kingdom* (2007) 44 EHRR 21 (Concurring Opinion of Bonello J referring to the union of the Dicksons as being 'engendered in a dysfunctional ambience' and the 'kick-starting into life a child in the meanest circumstances.'

Chapter Seven: Punishment

Introduction

'The power to convict and punish represents the most vivid exercise in relation to individual citizens.'[744]

Identifying different forms of punishment is fairly straightforward. It is harder to define what is meant by punishment itself. In its most simple form, punishment can be defined as 'the infliction or imposition of a penalty as retribution for an offence.' [745] Punishment is the normative response of a society to an individual who has broken the agreed legal codes of behaviour. When the court passes sentence over the offender, they are imposing the legally defined punishment for the crime. Going beyond a legal or normative definition of punishment however, Foucault views punishment itself as a type of power, as a method of controlling the individual citizen.[746] Sentencing and imprisonment can thus be argued to be a method of controlling citizens and to maintain the power balance of elites in society. A recent example that could be seen is the creation of the criminal offence of squatting in England and Wales. Prior to 2012, squatting was a civil matter, but it is now considered to be a criminal offence.[747]

In England and Wales, when sentencing offenders, magistrates and judges have to consider the five aims of sentencing, as detailed in the Criminal Justice Act 2003. These are: 'the punishment of offenders', the need to reduce crime, the

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[744] Nicola Lacey, 'Principles, Politics, and Criminal Justice' in Lucia Zedner, Andrew Ashworth *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (Oxford University Press, 2003) 85.
[745] Oxford Dictionaries 'Punishment' (*Oxford Dictionaries,* 2015) http://oxforddictionaries.com/definition/english/punishment accessed 1 July 2015.
[746] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Tr Alan Sheridan, Penguin Books, 1977) 23, David Garland *Punishment and Modern Society* (Clarendon Press 1990) 162
[747] Legal Aid, Sentencing and Punishment of Offenders Act 2012 s144.

need for rehabilitation, the protection of the public, and the reparation of individuals affected by the crime.[748] Ashworth highlights that at any one time, multiple competing demands are made when a judge or magistrate passes a sentence.[749] In passing sentence, it is not possible to give equal weight to all of these competing demands, rehabilitation often takes second place to the aim of deterrence, if the judge has decided to 'make an example' of an individual.

The punishment of those that offend against society through an impartial criminal justice system is seen as vitally important in a civil society. Boonin states that it is simple enough to give examples of legal punishment: such as fines, imprisonment and death in some jurisdictions.[750] The term 'punishment' is used in a variety of contexts both legal and non-legal, including the use of non-criminal civil sanctions and within discussions over parenting.[751] For the purposes of this thesis, 'punishment' will be considered as the formal response of the criminal justice system to a legally defined wrong, however that is defined. Similarly, the phrase 'theories of punishment' has been argued to be inaccurate. Rather than being theories of punishment, 'retribution' and 'utilitarian' theories of punishment could be more accurately described as justifications of the institution of punishment.[752]

The majority of the leading judgments in the cases of *Goodwin*, *Percy, Gerber*, *Mellor* and *Dickson* all suggest that deprivation of the right to procreate

[748] Criminal Justice Act 2003 s142.
[749] Andrew Ashworth, 'Sentencing' in Mike Maguire, Rod Morgan and Robert Reiner (eds) *The Oxford Handbook of Criminology* (4th edn, Oxford University Press, 2007) 997.
[750] David Boonin, *The Problem of Punishment* (Cambridge University Press, 2008) 3.
[751] For an example of a discussion of punishment within the context of parenting see Lawrence S Wissow, 'Ethnicity, Income and Parenting: Contexts of Physical Punishment in a National Sample of Families with Young Children' (2001) 6 Child Maltreatment 118.
[752] Antony Flew, 'The Justification of Punishment' (1954) 29 Phil 291, 297; Leo Zaibert, *Punishment and Retribution* (Ashgate, 2006) 1.

is a legitimate part of the punishment of imprisonment.[753] Other penal systems and academics argue that the removal of freedom, and nothing more, is the only punishment explicitly imposed by imprisonment.[754] Any restrictions that are imposed should only be the minimum necessary to achieve legitimate penological aims.[755] This stance contrasts greatly from the USA, where indeterminate sentencing, even for non-violent offences, 'three-strikes-and-you're-out laws,' 'Supermax' prisons and novel methods aimed at publically humiliating and shaming of offenders are commonplace.[756] Other aspects of the prison sentence, such as courses that attempt to deal with offenders' behaviour, are not considered to be punishment but as rehabilitation. However, this difference may be meaningless to a prisoner who is coerced into complying with the regime. In addition, for prisoners who are sentenced to long periods in prison for public protection, the difference between the 'punishment' part of their tariff and the incarceration for public protection part may also seem artificial.

To begin with, this chapter will start by considering punishment itself and how it is defined. It will then turn to investigate what general justifications support

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[753] *Goodwin v Turner* 702 F Supp 1452, 1455 (1988) (Restriction of procreation is a valid method of punishment and is not cruel and unusual); *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000); *Gerber v Hickman* 291 F3d 617, 620, 624 (2002) (imprisonment naturally deprives prisoners of their ability to associate with family and friends and deprivation of procreation did not constitute cruel and unusual punishment); *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 62 (prisoners being unable to procreate is an 'explicit consequence' of imprisonment); *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 20-21 (Secretary of State is entitled to limit rights under 8(2) in order to maintain public confidence in the prison system, who think prisoners should have their rights to procreation limited or removed).

[754] 'Normalisation' is the concept that prisons should reflect local communities with the same services such as health, education and benefits in order to minimise the negative effects of imprisonment. David Scott, 'The changing face of the English prison: a critical review of the aims of imprisonment' in Yvonne Jewkes, (ed) *Handbook on Prisons* (Willan Publishing, 2007) 55.

[755] Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952 meeting of the Ministers' Deputies) Part I 3; Roy D King, Rod Morgan, with JP Martin, JE Thomas *The Future of the Prison System* (Gower, 1980) 36-39.

[756] Daniel P. Mears, Michael D. Reisig, 'The theory and practice of supermax prisons' (2006) 8 Punishment & Society 33; James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2003) 56-57.

judicial punishment of offenders. Utilitarianism will be examined along with deterrence and incapacitation. Retributivism will then be discussed. Rehabilitation, although not strictly part of punishment will be considered next as it is often intertwined with discourses on punishment, and in some circumstances is used as a punitive tool in itself. Finally, legalistic justifications will then be examined.

The chapter will explore whether these justifications support a removal of the right to procreate. There is nothing explicit in statute law of England and Wales, the Federal law of the USA, or the states laws of California or New Jersey that demands that prisoners be deprived of their right to procreate. The punitive aspects of punishment may arise from a source other than statute; it may be that custom or the norm that prison should be an unpleasant and austere place. It is doubtful whether many jurisdictions have ever undertaken an objective analysis of whether prohibition of procreation should form part of the punishment of imprisonment. Many studies of the effect of punishment on prisoners and family relationships concentrate on the effects on existing family ties and the more immediate pains of imprisonment, such as lack of autonomy, lack of control over one's environment and lack of contact with family or loved ones. They do not pay any specific attention on how punishment affects prisoners developing new family relationships through procreation.

The chapter will then conclude with an examination of what explanations exist to justify the punishment of prisoners by prohibiting their right to procreate, if they are not provided with by the justifications of punishment of deterrence, incapacitation and retribution. These justifications are for the rehabilitation of offenders, the deterrence of crime, and the punishment of the offender. One explanation refusing prisoners in the USA and England and Wales the right to

procreate could be due to the treatment of prisoners in the degraded status of prisoners and the history of treating prisoners with increased punitiveness and severity.[757]

[757] James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2003) 41-67.

Definitions of Punishment

Before beginning an analysis of the specific aspects of prohibiting procreation as a part of punishment, it is useful to return to a basic definition of punishment to see what the essential elements are. Flew suggests that five elements are required to constitute punishment.[758] The punishment must 'be an evil, an unpleasantness, to the victim.'[759] The punishment must be for an offence that had been committed by the person being punished, the person being punished must be the offender. The punishment must arise from human agency, and the punishment must be handed down from an agency or institution that has been invested with special authority to punish, such as a court.[760] Other authors, such as von Hirsh take a similar approach but state it more simply: 'Punishment …means the infliction by the state of consequences normally considered unpleasant, on a person in response to his having been convicted of a crime.'[761] Both of these definitions are uncontroversial: a law prohibits a certain activity, an individual disobeys that law, a legitimate authority finds him guilty of that breach and passes sentence.[762] These definitions justify the punishment with reference to legal means, without exploring the underlying moral and utilitarian reasons that are often cited as justification. Mabbott argues that punishment is a purely legal matter, which itself is done for retributive reasons. The judgment for the wrong

[758] Antony Flew, 'The Justification of Punishment' (1954) 29 Phil 291, 293-294. These categories are also later reiterated in Stanley I Benn, 'An Approach to the Problems of Punishment' (1958) 33 Phil 325,325-326; Herbert Lionel Adolphus Hart, 'Prolegomenon to the Principles of Punishment' in Robert M Baird, Stuart E Rosenbaum *Philosophy of Punishment* (Prometheus Books, 1988) 17.
[759] Antony Flew, 'The Justification of Punishment' (1954) 29 Phil 291, 293.
[760] ibid 294.
[761] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 35.
[762] John David Mabbott, 'II: Punishment' (1939) XLVIII Mind 152, 154.

committed is a purely legal judgment, not a moral one. 'A "criminal" means a man who has broken the law, not a bad man…'[763]

Similarly, Boonin attempts to systematically analyse what punishment is in morally neutral terms. His definition of punishment includes a conception of 'authorized reprobative retributive intentional harm.'[764] Boonin explains what he means by this:

> 'On the stronger version, *P's* act *a* is a legal punishment of *Q* for offense *o* if and only if
>
> *P* is a legally authorized official acting in his or her official capacity and
>
> *P* does *a* because *P correctly* believes that *Q* has committed *o* and
>
> *P* does *a* with the intent of harming *Q* and
>
> *P's* doing *a does in fact* harm *Q* and
>
> *P's* doing of *a* expresses official disapproval of *Q* for having committed *o*.'[765]

Boonin's definition encapsulates a definition for punishment, which takes into account the actual practice of punishment, and the primary reason for the punishment that is the legally recognised and legally defined wrongdoing. Boonin also emphasises the intention requirement of the state to cause harm to the offender because of their legal transgression, which differentiates it from other kinds of harm, such compulsory quarantine because of illness or charges for a service.

[763] ibid 154.
[764] David Boonin, *The Problem of Punishment* (Cambridge University Press, 2008) 23.
[765] ibid 24.

The Purpose of the Institution of Punishment: Why Punish?

'..the overriding purpose of the CJS is to reduce crime. Catching and punishing offenders deters crime and provides justice to victims.'[766] This statement encapsulates two commonly held beliefs that justify the institution of punishment, as well as the punishment of offenders. One, punishment deters others from committing crime, and two, punishing an offender is essential in providing a just outcome to a victim of crime and to wider society. Punishment ensures that offenders get their 'just deserts', in order to exact retribution for their crimes. Utilitarian concerns such as deterrence and incapacitation, are not concerned with moral judgments. These justifications appear to be common sense and somewhat obvious; but when just deserts and deterrence are both considered together they can cause considerable conflict.

One can consider the justification of punishment in two separate but related entities: firstly the justification for the institution of punishment, that is the general institution or system of rules, and then, secondly, the allocation of the punishments to individual offenders.[767] Many accounts of punishment employ a mixed concept employing both retributive and utilitarian concepts. Rawls states that

> '…one must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.'[768]

[766] Ministry of Justice, *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System* (Policy Paper, Cmd 8658, 2013) 7.
[767] John Rawls, 'Two Concepts of Rules' (1955) Philosophical Rev 3, 5.
[768] ibid.

Hart stated that when considering punishment, rather than merely considering the terms retribution, deterrence or rehabilitation, one should ask: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?'[769] This may be one way of viewing what appears at first to be opposing justifications for punishment. Hart also supported a 'mixed' approach, stating that:

> 'what is most needed is not the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some single question concerning the justification of punishment. What is needed is the realisation that different principles (each of which may in a sense be called a "justification") are relevant at different points in any morally acceptable account of punishment.'[770]

The two approaches of deterrence and retribution and their effects on legal punishment will be considered next.[771]

Utilitarian Justifications

'But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.'[772]

Punishment, according to Bentham was an evil that should only be permitted if it prevented the greater evil of crime. This judgment was made according to the principle of utility, where an action provides greater happiness and benefit for society than if the action was not taken.[773] Utilitarian justifications are often

[769] Herbert Lionel Adolphus Hart, 'Prolegomenon to the Principles of Punishment' in Robert M Baird, Stuart E Rosenbaum, (eds) *Philosophy of Punishment* (Prometheus Books, 1988) 16.
[770] ibid.
[771] Ministry of Justice, *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System* (Policy Paper, Cmd 8658, 2013) 7.
[772] Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (Dover Philosophical Classics, 2007, reprint of Clarendon Press, 1907) 170.
[773] ibid 1-2.

viewed in opposition to retributive theories.[774] Utilitarian, or consequentialist views, are forward looking, concerned over the prevention of future crime, not past conduct.[775] In essence, the institution of punishment is justified because it improves the wellbeing of society by preventing crime by deterring criminals.[776] Benn argued that this justification works by the use of the threat of punishment to potential criminals, but that each time an offender is punished is 'an admission of failure' because for the individual being punished has failed to be deterred by punishment.[777] However, von Hirsch argued that the measure for the effectiveness of deterrence should be the overall crime level, as deterrence may have a greater effect over the general population than the smaller group of incarcerated offenders.[778]

Rawls argued that utilitarianism aims to create the greatest happiness for the greatest number in society justifies the use of punishment as an institution. He states that 'utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.'[779]

As well as the general justification of punishment of deterrence, supporters of the utilitarian approach also justify the use of punishment at the individual level. This is in effect justified by the social results of the punishment

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[774] Kevin M Carlsmith, John M Darley, 'Why do we Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 J Personality and Social Psychology 284. John Rawls, 'Two Concepts of Rules' (1955) Philosophical Rev 3, 5.
[775] John Rawls, 'Two Concepts of Rules' (1955) Philosophical Rev 3, 6;
Bernard Weiner, Sandra Graham, Christine Reyna, 'An Attributional Examination of Retributive Verses Utilitarian Philosophies of Punishment' (1997) 10 Social Jus Res 431, 432.
[776] John Rawls, 'Two Concepts of Rules' (1955) Philosophical Rev 3, 5.
[777] Stanley I Benn, 'An Approach to the Problems of Punishment' (1958) 33 Phil 325, 330.
[778] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 38-39.
[779] John Rawls, 'Two Concepts of Rules' (1955) Philosophical Rev 3, 5.

rather than by the actions of the offender.[780] Weiner et al break down this general aim of future crime prevention into specific categories. The first one of these is isolation of the offender, by removing them from society for a given length of time; imprisonment prevents them from committing further offences.[781] Secondly, rehabilitation of offenders is seen to 'open the eyes' of the perpetrator which prevents recidivism.[782] Thirdly, creating fear in the offender may prevent future crime because they are scared of undergoing another prison sentence.[783] Individuals who agree with this justification would support harsh prison conditions primarily for their deterrent effects, rather than their punitive effects.

In addition to the specific criticisms of prohibiting procreation for utilitarian reasons, there are other, more general criticisms of a completely utilitarian justification of punishment. Because the punishment is justified by reference to future utility, it is assumed by some authors that the punishment of innocent people could be justified so long as the conviction is publicised and leads to an overall reduction of crime within society. Carritt argues that this can be justified by utilitarianism, stating that: 'utilitarianism has forgotten rights; it allows right to a man because he is innocent or because he has worked hard…It thinks only of duties or rather of a single duty, to dump happiness wherever it conveniently can.' [784]

Carritt is disparaging of the value of utilitarianism and the lack of protection it offers to the individual. In this sense he is correct, individual rights are of little concern to the utilitarian, Bentham famously stating that natural rights

[780] Jeffrie G Murphy, 'Marxism and Retribution' (1973) 2 Phil and Public Affairs 217, 219.
[781] Bernard Weiner, Sandra Graham, Christine Reyna, 'An Attributional Examination of Retributive Verses Utilitarian Philosophies of Punishment' (1997) 10 Social Jus Res 431, 433.
[782] ibid.
[783] ibid.
[784] Edgar Frederick Carritt, *Ethical and Political Thinking* (Clarendon Press, 1947) 65.

are ‘simple nonsense: natural and inprescriptable rights, rhetorical nonsense,-nonsense upon stilts.’[785]

Rawls however argues that a truly utilitarian approach would not justify such an approach, stating that an institution that selected innocent people for punishment would not have any effective deterrent effects. He terms the institution ‘telishment’ and imagines how it may operate if it is accepted that people may be punished or ‘telished.’ As well as the concerns about discretion, Rawls argues that people would wonder whether a person punished by the criminal justice system should be pitied or not because they may have been the victims of telishment. This would lead to an undermining of the system of punishment as a whole.[786] When an individual is punished by a court for a wrong that they have not committed, whether by the process of telishment or wrongful conviction, then the injury meted out to them cannot be considered to be punishment. Boonin argues that only the guilty can suffer punishment, as only guilty people can require the reprobative requirement to be fulfilled.[787] Quinton also argues that the innocent cannot be punished, but suffer some other harm, as following the established legal rules of punishment requires that the person being punished is guilty of the offence.[788]

Another criticism levelled at a utilitarian justification of punishment is that it allows too much discretion to officials. von Hirsch argues that judges possess wide discretion in sentencing, which leads to disparate punishment between

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[785] Jeremy Bentham cited in John Hill Burton, (ed) *Selected Extracts from the Works of Jeremy Bentham: with an Outline of His Opinions on the Principal Subjects Discussed in his Works* (Philadelphia: Lea & Blanchard, 1844, Digitised by Google Books) 91.
[786] John Rawls, ‘Two Concepts of Rules’ (1955) Philosophical Rev 3, 12.
[787] David Boonin, *The Problem of Punishment* (Cambridge University Press, 2008) 19.
[788] Anthony M Quinton, ‘On Punishment’ (1954) 14 Analysis 133, 141. This stance is also supported by Susan Dimmock, ‘Retributivism and Trust’ (1997) 16 L & Phil 37, 42 (stating that the innocent mistakenly ‘punished’ for an offence are not punished by the criminal justice but are ‘victimized’ by it).

offenders. In the past this approach been justified by reference to predictive restraint and the need to rehabilitate.[789] Whilst discretion comes under the question of how severely one should punish, the underlying justifications themselves rely upon utilitarian principles. Andrew von Hirsch argues that this discretion should be limited by proportionality.[790] However, Rawls argues that if judges follow appropriate rules within a utilitarian framework, their discretion is limited. He states that in similar cases the rules have to be applied, and only in the case of novel circumstances is one required to make a decision based upon utilitarian principles.[791] In the circumstances where rules are used consistently for a specific situation, Rawls refers to them as a practice, which itself is defined by certain rules.[792] The use of practices predefines the action of the state actor (e.g. judges in sentencing) thus reducing the use of discretion.[793] The main issue that some academics have with judicial discretion is that sentencing decisions based upon utilitarian principles are unjust because their decision is made based upon societal concerns, not because of the actual past behaviour of the offender.[794] In some cases, however, judges are granted wide discretion by the legislature and so may use utilitarian principles or whatever other principles they see fit to decide what punishment to grant to particular offenders. One of the arguments used by the UK Government in both *Dickson* and *Mellor* was that prohibiting procreation was justified by the need to deter potential criminals from committing crime. This argument supports an austere and harsh prison system, in which lack of contact

[789] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 98.
[790] ibid 98-99.
[791] John Rawls 'Two Concepts of Rules' (1955) Philosophical Rev 3, 22.
[792] ibid.
[793] ibid.
[794] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 69.

with one's family leads to the existing offender to be deterred from committing future crimes. Inability to procreate could be argued to form part of the overall regime of harsh punishment. Arguably it forms a small part of the visible deterrent of punishment, as the prison is the public symbol of the power of the state to punish. Physical means of punishing offenders are no longer acceptable methods of punishment. It does however seem far-fetched to suggest however that potential criminals may be deterred from offending by the knowledge that they may be imprisoned and thus prevented from starting a family. As for other utilitarian concerns, the justification provided by punishment for the incapacitation of offenders is not served by removing a prisoner's ability to have a child. The imprisonment, of an individual, the removal of a person to a place of residence against their will is what incapacitates a prisoner, preventing them from committing crime, rather than the prevention of them having children. Many jurisdictions allow prisoners access to private visits, during which they may procreate, but they are still effectively prevented from leaving the prison to commit further crimes. If disruption to the prison regime is the utilitarian justification for removing the right to procreate, then this can be countered with the use of assisted reproductive technologies (ART) thus removing the need for prisoners to have access to private visits with their partner.

Prohibiting procreation is not justified by reference to utilitarian justifications of punishment, when one considers the weak arguments offered by deterrence and incapacitation. When considering the specific questions of whom and how we punish, restrictions upon procreation may be only be justified by utilitarian reasons in a few offender's cases, such as those who are being punished for murdering a child, or for abusing a child. It could be argued that society would

benefit from preventing a child abuser from begetting a child that may be then abused or murdered. However, one has to be extremely cautious about using this argument. One could argue on utilitarian grounds that preventing all prisoners from procreating would increase society's overall happiness, as the prisoner is in prison and allowing them to procreate is creating a single parent family. This was the justification used by the judges in both *Mellor* and *Dickson*. Lord Phillips argued that whilst many single parents do raise children successfully, children do better with two parents.[795] Preventing prisoners from procreating however appears to be repeating the arguments used by those who supported the sterilisation of prisoners such as Skinner.

Another final criticism of utilitarianism is that it does not recognise the rights of the individual.[796] 'What the utilitarian theory cannot capture, I would suggest, is the notion of persons having rights. And it is just this notion that is central to any Kantian outlook on morality.'[797] Murphy argues that the right to punish an individual should not depend upon the social utility of that punishment, but whether one has the moral right to punish. This is the basis of retributive justification of punishment, which will be considered next.

[795] *R v Secretary of State for the Home Department, Ex parte Mellor* [2001] EWCA Civ 472 para 67 (Phillips LJ). Baroness Deech also used this argument in her lecture at Gresham College in which she argues that the Grand Chamber in *Dickson* failed to take into account the most important principle in English law, which is the welfare of the child. Ruth Deech, 'Human Rights and Welfare' (*Gresham College*, 11 May 2009) http://www.gresham.ac.uk/lectures-and-events/human-rights-and-welfare accessed 31 March 2015.
[796] Jeffrie G Murphy, 'Marxism and Retribution' (1973) 2 Phil and Public Affairs 217, 220.
[797] ibid.

Retribution

'Judicial Punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime.'[798]

According to Kant, punishment is justified solely by the act of the offender. The person has committed a wrong and so deserves to be punished. Justice is served when all crimes are punished every time they are committed and the offender is deprived of the advantage gained by the crime.[799] The punishment is justified by a 'morally obligatory norm of conduct.'[800] Any other effects of punishment such as deterrence, rehabilitation and desistence from crime are incidental. In this way, it is the opposite to utilitarian justifications of punishment. It is backward looking, considering what the offender has done, not what may happen in the future.[801] Retribution itself can mean two things, just deserts, and retaliation. These are sometimes seen as a continuum of the same concept; however, Gerber and Jackson argue that their ideological basis is different.[802] Just deserts, or proportionate punishment is justified by the basis that Kant justifies punishment: that the offender has committed a crime.[803] The root of the meaning is in the word 'deserts', the offender 'deserves' to be punished.[804]

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[798] Immanuel Kant, *Metaphysical Elements of Justice: The Complete Text of The Metaphysics of Morals, Part 1* (Tr John Ladd, Hackett Publishing Company, 1999) 138.
[799] Guyora Binder, 'Punishment Theory: Moral or Political?' (2002) 5 Buff L Rev 321, 360
[800] ibid.
[801] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 46; John Rawls, 'Two Concepts of Rules' (1955) 64 Philosophical Rev 3, 4-5.
[802] Monica M Gerber, Jonathon Jackson, 'Retribution as Revenge and Retribution as Just Deserts' (2013) 26 Social Just Res 61.
[803] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 76.
[804] ibid.

Weiner et al characterises punishment as maintaining a social equilibrium; the offender has to pay an equal debt for the harm caused by their action.[805] Some countries may take this quite literally, in that a murderer pays for their crime by losing their own life.[806] Strictly applied, the principle means that punishment would only be judged according to the severity of the wrong. In practice, many jurisdictions make a decision based upon many factors, such as the culpability or mens rea of the offender as well as any other mitigating or aggravating factors.[807] According to the scheme outlined by von Hirsch, equality would be maintained by 'the commensurate deserts principle' whereby all defendants, impoverished and affluent would be treated the same.[808] He argues that this is more just than utilitarianism, which could allow for greater discretion and wide disparities in sentencing between offenders who have committed the same offence. Commensurate deserts, proportionate deserts or just deserts is based upon equity 'severity of the punishment should be commensurate with the seriousness of the wrong.'[809] The difficulty lies in quantifying how much suffering should be caused by the punishment in order to repay the wrong committed by the offender.

The second justification for retribution is expiation or making the offender suffer.[810] This is based on the idea that 'the victims or society at large obtain satisfaction from the suffering of another.'[811] This justification appears to be what

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[805] Bernard Weiner, Sandra Graham, Christine Reyna, 'An Attributional Examination of Retributive Verses Utilitarian Philosophies of Punishment' (1997) 10 Social Jus Res 431, 434.
[806] Michael L Radelet, Marian J Borg, 'The Changing Nature of Death Penalty Debates' (2000) Annu Rev Sociology 43, 52.
[807] Bernard Weiner, Sandra Graham, Christine Reyna, 'An Attributional Examination of Retributive Verses Utilitarian Philosophies of Punishment' (1997) 10 Social Jus Res 431, 434
[808] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 147.
[809] ibid 66.
[810] Bernard Weiner, Sandra Graham, Christine Reyna, 'An Attributional Examination of Retributive Verses Utilitarian Philosophies of Punishment' (1997) 10 Social Jus Res 431, 434.
[811] ibid 434.

drives the desire for extremely punitive sanctions in the USA, such as indeterminate sentences for non-violent drugs offences and the death penalty.[812] Other developments, such as super maximum or 'super max' prison facilities also reflect increasingly punitive measures, which not only isolate prisoners from one another, but also actively restrict human contact with prison staff.[813] Retribution for retaliation means not just making things even again, but using the suffering caused by punishment to retaliate.[814] Expiation and the desire for revenge, were found by McKee and Feather to be linked to aspects of vengeance and incapacitation, and negatively linked to rehabilitation.[815] Dolinko links the resurgence of 'born-again retributivism' to the continued support that the death penalty holds in the USA.[816] Basing punishment upon revenge could be seen to be the opposite of justice.[817] However, there is an acceptance within legal institutions that society demands retribution for the crimes committed against society.[818] The limit placed on the retribution exacted by punishment varies according to the jurisdiction and depends upon the offence committed. Many jurisdictions view imprisonment itself as the punishment. In contrast to this, proportionate

[812] David Dolinko, 'Some Thoughts about Retributivism' (1991) 101 Ethics 537, 538;
[813] Prisoners are typically kept in cells six to eight feet long for 22-23 hours a day; they typically have solid steel doors. There are no shared activities with other prisoners, they remain completely isolated. In Marion SHU, there is no natural light and no windows. Bruce A Arrigo, Jennifer Leslie Bullock, 'The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change' (2008) 52 Int'l J Off Therapy Comparative Criminology 622, 624-625.
[814] Monica M Gerber, Jonathon Jackson, 'Retribution as Revenge and Retribution as Just Deserts' (2013) 26 Social Just Res 61, 62.
[815] Norman T Feather, Jacqueline Souter, 'Reactions to Mandatory Sentences in Relation to the Ethnic Identity and Criminal History of the Offender' (2002) 26 L Human Behav 417.
[816] David Dolinko, 'Some Thoughts About Retributivism' (1991) 101 Ethics 537, 538.
[817] Monica M Gerber, Jonathon Jackson, 'Retribution as Revenge and Retribution as Just Deserts' (2013) 26 Social Just Res 61.
[818] Criminal Justice Act 2003 s142 (1)(a); *Gregg v Georgia* 428 US 153, 158 (1976) citing *Furman v Georgia* 408 US 238, 308 (1972) justifying why there is a societal right to retribution 'The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice services an important part in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.'

punishment that provides 'a buffer against the negative effects of revenge.'[819] This does not mean that the punisher cannot make a moral judgment against an offender. One reason for using punishment as opposed to another form of social control is to display censure, in order to communicate to the offender that their conduct is wrong.[820] Application of blame forms an important function of punishment.

One criticism that can be made of Kant's view of retributivism is that citizens themselves do not consent explicitly to any laws. In effect, Kant 'substitutes' collective consent for individual consent.[821] This, according to Bender is because Kant was an 'institutional positivist' who thought that for consent to have any meaning it had to be part of a legalised method of expressing and enforcing that consent.[822] Thus, democracy fulfils the consent requirement.[823] It could be argued that the basis for justifying punishment under a retributive scheme of punishment is a moral one: the offender has somehow gained an unfair advantage over the victim and this creates the moral right for the punisher to punish the offender.

Quinton states however, that: 'retributivism, properly understood, is not a moral but a logical doctrine, and that it does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word.'[824] He views retributive theory, which states who should be punished and by how much, as 'annulment theory' essentially utilitarian in origin.[825] This argument, that the

[819] Monica M Gerber, Jonathon Jackson, 'Retribution as Revenge and Retribution as Just Deserts' (2013) 26 Social Justice Research 61.
[820] Andrew von Hirsch *Censure and Sanctions* (Clarendon Press, 1993) 15.
[821] Guyora Binder 'Punishment Theory: Moral or Political?' (2002) 5 Buff Crim L Rev 321, 361.
[822] ibid 364.
[823] ibid.
[824] Anthony Quinton, 'On Punishment' (1954) Analysis 133, 134.
[825] ibid 135.

punishment must fit the crime does not always work because it is not always possible to find punishments to fit the crime. Restricting the right to have children is a very severe punishment if one is incarcerated for life and will never be released. It could be argued that this punishment, on top of the restriction involved in being incarcerated is done primarily to enhance the punitive and expiation aims of the punishment. It some cases, such as prisoners who are convicted of abusing or killing children, restricting them from having children could be argued to be a proportionate punishment in response to their crime. However, this could be explicitly stated as part of their sentence by the judge at the time of sentencing. Restricting an individual who has been convicted of offences unrelated to child abuse or killing could be argued to a disproportionate punishment. Andrew von Hirsch argues that adopting an approach to punishment that respects the autonomy of the individual, 'of the kind which such persons should accept, as a way of assisting them to resist their own temptations, in a manner that respects their capacity for choice.'[826] Proportionality is important in determining how much an offender should be punished. This is termed by von Hirsch as 'commensurate deserts' and the restriction of a prisoner's family life during prison could continue to have effects long after they are released from prison.[827] When considering this, it is important to ensure that the punishment given to prisoners is proportionate to their crime.

Rehabilitation

Rehabilitation can be defined as 'any measure taken to change an offender's character, habits, or behavior patterns so as to diminish his criminal

[826] Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993) 5.
[827] Andrew von Hirsch, *Doing Justice The Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 75.

propensities.'[828] Whilst not generally considered to be part of the punishment of imprisonment, rehabilitation could be viewed as punishment by offenders, who are obliged to engage with compulsory courses. Opportunities are provided for rehabilitation in prison because it is an essential 'administrative' measure that can reduce recidivism and help improve the future potential of offenders. Some prisoners can find these measures beneficial and engage with opportunities provided by the prison, whilst others could resent being coerced into taking part in activities that they view as punishment. Robinson takes this concept one step further. She argued that following the government reforms in England and Wales, which removed the requirement for probation officers to hold a social work qualification and created the idea of 'rehabilitation as punishment.'[829]

Rehabilitation itself has regained prominence, in part due to the rise of utilitarian, managerial and expressive accounts of penology.[830] Robinson argues that within the UK, the rehabilitative approach has gained legitimacy because the government has taken an increasingly utilitarian approach, claims to ensure the best outcome for the largest number of prisoners, whilst protecting the public.[831] This late modern evolution of rehabilitation is not concerned with welfare but risk management. Rehabilitation can be seen as part of an approach to penology that is actuarial or managerial in origin.[832] It has the modest aim of managing risk, with

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[828] Andrew von Hirsch, *Doing Justice the Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 11.
[829] Gwen Robinson, 'Late-modern Rehabilitation' (2008) 10 Punishment & Modern Society 429, 436-7.
[830] Malcolm M Feeley, Jonathon Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30 Criminology 449, 450; Kelly Hannah-Moffatt 'Criminogenic needs and the transformative risk subject : Hybridizations of risk/need in penality' (2005) 7 Punishment & Society 29, 30; Gwen Robinson, 'Late-modern Rehabilitation' (2008) 10 Punishment & Modern Society 429, 430.
[831] Gwen Robinson 'Late-modern Rehabilitation' (2008) 10 Punishment & Modern Society 429, 430, 434.
[832] ibid 433.

prisoners being assessed and managed by reference to assessments of their group characteristics, as opposed to a completely individualised assessment.[833] There is a moral dimension highlighted by Robinson however, that focuses on personal responsibility, and choices made by the offender.[834] This approach engages with the offender as a moral actor, separate from utilitarian concerns. Rehabilitation becomes part of the process of enabling the prisoner to make positive choices. When one considers this point, it is difficult to see how preventing a prisoner from procreating would promote his rehabilitation when it has been shown that recidivism rates reduce when prisoners released back into the community with the support of family are less likely to offend than those without support.[835]

Legalistic Justifications of Punishment

Mabbott states that deterrence and reform, whilst good in themselves, are not reasons for punishment, but are instead 'additional goods' which arise from the punishment of the offender. He states 'the only justification for punishing any man is that he has broken a law.'[836] This alternative view of punishment takes a purely legalistic approach. If a person breaks a rule, then it is this alone that provides the justification for punishing them. This rather narrow interpretation of punishment refers to the allocation of punishment itself to a particular offender, rather than to a more general justification of the system of punishment. The state itself makes no moral judgment about offenders.[837] It is necessary to have

[833] Malcolm M Feeley, Jonathon Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30 Criminology 449, 451.
[834] Gwen Robinson, 'Late-modern Rehabilitation' (2008) 10 Punishment & Modern Society 429, 438.
[835] Helen Codd, 'Prisoners' Families and Resettlement: A Critical Analysis' (2007) 46 How J 225; Alice Mills, Helen Codd, 'Prisoners' families and offender management: Mobilizing social capital' (2008) 55 Prob J 9, 10.
[836] John David Mabbott, 'II: Punishment' (1939) XLVIII Mind 152, 158.
[837] ibid 154.

punishment to ensure that that all individuals can live in a society with controlled levels of crime.[838] This is in direct contrast to the retributive account that makes a moral judgment of the individual who commits crime. Some authors, such as Binder have also tried to recast punishment not as a moral question, but as 'theories about politically legitimate institutional action rather than as theories about morally correct individual action.[839] Nino supports the view that punishment is a coercive legal measure that is used in times of extremis, for social protection. He includes measures for infectious diseases, confinement the mentally ill for safety and requisition of supplies and buildings during wartime during this definition. In this way, punishment becomes a method of social protection, to which individuals all consent, comparing this kind of consent to other forms of legal consent such as in contract law.[840] By giving voluntary consent to a contractual obligation, one provides the justification for enforcing it.[841] Nino argues 'The individual who, for instance, consents to undertake some legal obligation is, in principle, morally obliged to do the act which is the object of that obligation.'[842] He then highlights that an offender consents to be punished because he has assumed a legal responsibility to not act in a way that contravenes the law. [843] This is justified by the benefits and burden distribution in society, in which the offender enjoys the protection of the law, and so accepts the risk of being punished, in a similar way to the voluntary assumption of risk in tort law.[844] Instead of taking Kant's view that punishing people respects their autonomy

[838] ibid.
[839] Guyora Binder, 'Punishment Theory: Moral or Political?' (2002) 5 Buff Crim L Rev 321, 367.
[840] Carlos Santiago Nino, 'A Consensual Theory of Punishment' (1984) 12 Phil & Public Affairs 289, 295.
[841] ibid.
[842] ibid 296.
[843] ibid 298.
[844] ibid 305.

because they are not 'mere things' to be used, Nino claims that the law relies upon autonomy by making the individual liable for their crime because of the 'free and conscious undertaking of it.'[845] This approach does assume that all crime is a considered decision, which itself is flawed. It also assumes that the offender has made the decision to commit a crime with the full cognizance of the punishment that awaits them. However, many things are currently included within the package of the punishment of a prison sentence, such as losing the ability to have children. The offender may not even realise how seriously an offence will be punished.

Duggan provides another view to how punishment can be justified from a fair play perspective. The justification has to be provided at two levels, 1) What justifies punishment 'as a social practice' and 2) what justifies punishing an individual.[846] Society requires cooperation, and occasionally this requires individuals to do things that can be burdensome, so coercion is required to ensure that everyone cooperates.[847] In one sense this justification is utilitarian because it appeals to the individual desire to avoid painful consequences. In another sense however, the basis behind it is retributive as it appeals to the rule that one person should not take advantage of others by breaking the law.[848]

Factors Affecting the Application of Punishment

The principles that guide and underpin sentencing are in effect the same principles that underpin legitimate penological aims. Prisons themselves also aim to protect the public, rehabilitate offenders, act as a measure of deterrence, and

[845] ibid 306.
[846] Richard Dagger, 'Playing Fair with Punishment' (1993) 103 Ethics 473, 474.
[847] ibid 475.
[848] ibid 467.

ensure that offenders receive their 'just deserts.' In developing penal policy, many countries may want to limit a prisoner's human rights to promote penological aims. Thus, a prisoner's right to a private and family life is often subordinate to the need to promote discipline within the prison and maintain public confidence in the system of punishment. In order to exact an 'adequate' punishment, prisoners have little control or autonomy over their daily lives. Those in authority rule every aspect of the prisoner's existence. Whilst this may make prison a sufficiently unpleasant and punishing experience, it does not serve to rehabilitate the offender, depriving them of the opportunity to take responsibility for their own lives or decisions. Garland makes the point that all public institutions such as schools, and hospitals as well as prisons only partially achieve the multiple aims and objectives that they have.[849] Foucault argues that prisons 'fail' in that they produce more delinquents than criminals than they reform, but Garland argues if one takes a more realistic approach to penological aims, then prisons can be seen as very successful.[850] Prisons succeed very well at incapacitating those judged to be dangerous or harmful to society. Prisoners themselves are defined as abnormal, different to law-abiding members of society who deserve punishment, not the chance to start a family.[851] They are seen as legitimate subjects for harsh and

[849] David Garland, *Punishment and Modern Society* (Clarendon Press 1990) 165.
[850] ibid. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Tr Alan Sheridan, Penguin Books, 1977) 272. Although Foucault also argues that the prison is allowed to fail because it maintains the differentiation of the criminal classes, and maintains the power of the 'ruling class.'
[851] Anonymous, 'IVF? This Ghastly Twosome Should be Sterilised' (*Mail Online,* 12 Jan 2007) <http://www.dailymail.co.uk/debate/columnists/article-428314/IVF-This-ghastly-twosome-sterilised-.html> accessed 5 March 2015; Anonymous, 'Convicts "Should Be Allowed IVF Treatment When in Jail"' (*Evening Standard*, 15 January 2008 <http://www.thisislondon.co.uk/news/article-23432216-convicts-should-be-allowed-ivf-treatment-while-in-jail.do> accessed 5 March 2015. Both of these newspaper articles detailing the Dickson case paint a less than flattering portrait of Kirk Dickson and his wife Lorraine, referring to their crimes and stating that they should be sterilised and prevented from procreating rather than assisted.

punitive treatment. In the arena of sentencing, punitiveness would be require the excessive use of pain for the offender, either physical or emotional, above and beyond that which is proportionate to the crime.[852] This punitiveness can be exercised at the individual level in relations between staff and prisoners, in the conditions prisoners are kept it, and in the way the overall prison regime controls prisoners. Matthews argues that in British prisons at least, conditions have improved for offenders, which disproves the 'myth' of punitiveness in the UK.[853] The improved conditions that are present within the UK under the Incentives and Earned Privileges Scheme (IEPS) have reduced the physical pains of imprisonment for some prisoners. The scheme is designed however to punish those who break prison rules by reducing them to basic living conditions. It is still a form of coercion and prisoners still keenly feel its effects.[854] Prison is intended to be punitive, as many of these improvements are a privilege, not a given right for every prisoner.[855] In a Green Paper from the Ministry of Justice, the need for prison to be a place of punishment is reiterated: 'A prison sentence provides immediate and tough punishment.'[856] An overly punitive penal system would leave little room for the possibility of prisoners planning to become parents whilst serving the prison sentences. Within the USA, many prison regimes and punishments are designed to be humiliating by the prison authorities and serve no

[852] Rodger Matthews, 'The Myth of Punitiveness' (2005) 9 Theoretical Criminology 175, 179.
[853] ibid 193.
[854] Ben Crewe, *The Prisoner Society: Power Adaptation and Social Life in and English Prison* (Oxford University Press, 2009) 108. Some prisoners interviewed for example stated how the introduction of televisions in cells was a double-edged sword. Whilst it made prison more bearable, the coercive nature of the threat of removal was a powerful one, which helped maintain the power of the prison officers over the prisoners.
[855] National Offender Management Service, *Prison Service Instruction 30/2013 Incentives and Earned Privileges* (National Offender Management Service, 2015).
[856] Ministry of Justice, Breaking the Cycle, Effective Punishment, Rehabilitation and Sentencing of Offenders (Green Paper, 2010) para 50.

legitimate penological purpose.[857] Matthew's argument that these examples are limited and exceptional is unconvincing when incarceration rates continue to increase, and many different sources demonstrate both punitive opinions held by both the general public and officials such as politicians.[858] Bottoms first coined the phrase 'populist punitiveness' in reference the effects of various influences over sentencing practice.[859] He was not merely referring to public opinion regarding sentencing, but used the phrase 'to convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance.'[860] In this interpretation, sentencing policy is driven by a need for the politician to be seen to be fulfilling the public's desire for punitiveness, thus increasing their chances for election. This can lead to politicians adopting policies that they feel would be popular with the general public, even if privately they think it is not the most appropriate response to the

[857] For example in the USA in California, Illinois, Louisiana, Pennsylvania, Texas, Virginia and Washington, the family of a murder victim can watch the condemned prisoner being put to death. See Marla L Domino, Marcus T Boccaccini 'Doubting Thomas: Should Family Members of Victims Watch Executions?' (2000) 24 Law 7 Pscyhol Rev 59. Other instances that have been reported in the press include male inmates being forced to wear pink underwear and inmates being forced to strip in front of other inmates when being transferred. Fox Butterfield, 'Mistreatment of Prisoners Is Called Routine in US' (*The New York Times,* 8 May 2004) <http://www.nytimes.com/2004/05/08/national/08PRIS.html> accessed 1 July 2015. Mistreatment can also occur as a result of individual staff actions within the prison, which may be at odds with the official philosophy and aims of a corrective facility. Evidence of extreme prison officer brutality exists in litigation claims against the state, including instances of assault and grievous bodily harm (see Andrea Jacobs, 'Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability' (2004) 42 Cal W L Rev 277).

[858] Rodger Matthews, 'The Myth of Punitiveness' (2005) 9 Theoretical Criminology 175, 185. Garland lists a large number of examples of developments which indicate increased levels of punitiveness towards offenders, such as increased sentence lengths, 'supermax' prisons, and increased prisoner populations. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 142. Surveys of the general public indicate favouring harsher sentencing: Shadd Maruna, Anna King, 'Once a Criminal, Always a Criminal?: 'Redeemability' and the Psychology of Punitive Public Attitudes' (2009) 15 Euro J Crim Policy Res 7; Nigel Walker, Mike Hough, Helen Lewis, 'Tolerance of leniency and severity in England and Wales' in Nigel Walker, Mike Hough, (eds) *Public Attitudes to Sentencing: Surveys from Five Countries* (Gower, 1988).

[859] Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in Chris Clarkson, Rod Morgan, (eds) The Politics of Sentencing Reform (Clarendon Press, 1995) 18.

[860] ibid.

situation.[861] Bottoms also describes is how politicians adopt a 'twin-track approach' to sentencing, in which there is a drive to incarcerate serious offenders for longer periods, whilst reducing sentence lengths for less serious offences.[862] The perceived desire of the population for a tougher approach to crime and prison would make the provision of reproductive assistance to many prisoners problematic, as it would be extremely unpopular with the majority of the electorate.

Having a punitive view does not necessarily exclude a belief in redemption, as one can favour long and harsh sentences for other reasons, such as to deter potential offenders and to incapacitate the actual offender.[863] In the context of prisoner reproduction this could mean that some support for prisoners having children may exist if it could be shown that it increased the likelihood of encouraging desistence and showed that prisoners were conforming to social expectations of being a good parent. However, a sizeable portion of Maruna and King's sample believed that offenders were both evil and irredeemable, reflecting a view of prisoners as a dangerous other.[864] This portion of the population are unlikely to view prisoners having children as compatible with a belief in harsh

[861] The Labour sound bite 'tough on crime, tough on the causes of crime' was coined in 1993 by Tony Blair, and became the foundation for New Labour policy and featured in their election manifesto of 1997. It tapped into a belief that the public wanted crime control to be given a much bigger priority following the murder of James Bulger in 1993 and the Strangeways prison riots in 1990. See John Muncie, Eugene McLaughlin, *Controlling Crime* (Open University Press/ Sage, 2001) 6.
[862] Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in Chris Clarkson, Rod Morgan, (eds) *The Politics of Sentencing Reform* (Clarendon Press, 1995) 40.
[863] Paul J Hirschfield, Alex R Piquero, 'Normalization and Legitimation: Modeling Stigmatizing Attitudes Towards Ex-offenders' (2010) 48 Criminology 27.
[864] Interestingly, they explored the link between irredeemability and punitiveness, and found 232 people out of their sample of 941 thought that offenders were evil and incapable of change, irredeemable. These were the most punitive. Shadd Maruna, Anna King, 'Once a Criminal, Always a Criminal?: 'Redeemability' and the Psychology of Punitive Public Attitudes' (2009) 15 Euro J Crim Policy Res 7.

punishment and may even view it as a way of offenders propagating their social deviancy to the next generation, thus continuing a social ill.

Prison, Degradation and the Purpose of Punishment

Arguments given by the relevant states and judiciary in favour prohibiting procreation as part of a prisoner's punishment are weak and appear to be unsupported by statute law. They rely upon the 'consequences' argument: that removal of the right to procreate is a natural consequence of imprisonment and that imprisonment is a consequence of the individual prisoner's offending. In other words, they are the authors of their own misfortune, and being unable to procreate is a legitimate part of that misfortune. There is no statutory basis to the prohibition of procreation, unlike the general prohibition on voting.[865] This leaves the question of where the justification lies for continuing to prohibit procreation lies. It may be that these practices are not properly questioned and so continue unchallenged. There is little appetite to reform the approach of the courts and prison authorities in this area. It could be that prohibition on procreation has simply arisen as a consequence of the harsh prison regime that developed in England and Wales and the USA in the nineteenth and late twentieth century. As there are no ready legal justifications for the practice of stopping prisoners from becoming parents, it then becomes necessary to examine what other reasons may exist to continue to perpetuate these policies. One explanation may be the persistence of degradation and humiliation in the system of punishment, especially within the USA.

[865] The case of *Hirst* however argues that a blanket ban on all prisoners voting is unjustified, even if it is backed up with the force of legislation. *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41 para 69.

To examine the effect and role of degradation within punishment it is important to return to imprisonment and examine 'what' imprisonment itself entails. Imprisonment is defined by von Hirsch as 'collective residential restraint.'[866] The prisoner is kept against their will in a place not of their choosing, the place is residential and becomes the prisoner's main or only place of residence. It is collective because the prisoner has to live with people who are not members of his family. He is restrained from leaving and socialising with whom he wants, when he wants. Nothing 'extra' is included in the von Hirsch definition of imprisonment, such as solitary confinement or physical torture, deprivation of sleep or humiliating rituals. He argues that dignity in prison is important, and that punishment should respect the inherent dignity of the individual prisoner, regardless of the offences they have committed.[867] The offender is to be punished, or 'censured' as von Hirsch terms it, not humiliated.[868] Being 'censured' or punished legitimately make the offender feel shame at their actions as an autonomous moral individual.[869] Humiliation on the other hand creates shame not at their crime, but at the process of making them feel like inferior persons.[870] The aim of a decent prison regime, if it must exist, is to attempt to retain the dignity of the offender.[871]

The question may be then raised as to why prison regimes continue to be so punitive and humiliating. One answer may be the concepts of blame and guilt, which are seen to justify the treatment of offenders in humiliating ways. Some

[866] Andrew von Hirsch, *Doing Justice The Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 107.
[867] Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993) 82.
[868] ibid.
[869] ibid.
[870] ibid.
[871] ibid 84.

accounts of punishment involve blame being directed to the offender, and thus guilt is attributed to them. As explored earlier, blame is an important part of the process of punishment and, as many authors argue, justifies the punishment given to the offender. When blame is attributed to an offender, then so is guilt. In a formalised system of criminal punishment, guilt is attributed and established as part of the court system. As well as punishment being justified as a 'rebalancing' of the advantage taken by the offender, harsh punishment could also be seen as the expression of a desire for a society seeking atonement for guilt from the offender. This may be one of the reasons that a punitive penal system has evolved in the USA, and to some extent, England and Wales based upon harsh and austere prison conditions. Whitman, in his comparative study of American, French and German penal systems, makes the point that central to the concept of punishment is the concept of degradation.[872] He states that 'degradation is at once one of the most obvious aspects of punishment and one of the most neglected. It is clear that offenders feel punished partly because they feel degraded.'[873] The processes of debasement and degradation serve other purposes rather than just to punish. Goffman, although referring to mental institutions, states that the process of institutionalisation of the individual begins by removing their sense of self, mortification of the individual and the removal of their sense of identity.[874] This is done to make the individual more compliant to the regime and these ideas can

[872] James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003, Oxford University Press) 19.
[873] ibid.
[874] Goffman refers to the process of institutionalisation that occurs with an inmate as 'disculturation' or an 'untraining' in which the person incarcerated loses their ability over time to manage the day-to-day requirements of life outside of the institution. The process of personal defacement then includes removal of personal effects and clothing and obliteration of the individual's self-identity. Erving Goffman *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961) 13, 23.

also apply to imprisonment. Clemmer also notes similar processes in the assimilation of the prisoner into the prison:

> 'The first and most obvious integrative step concerns his status. He becomes at once an anonymous figure in a subordinate group. A number replaces a name. He wears the clothes of the other members of the subordinate group. He is questioned and admonished.'[875]

The prisoner is being placed in a subordinate position as part of their punishment, but both patient and prisoner are being subdued in order to create a more compliant member of the 'inferior' group. This is the continuation of a practice that was instigated by the penal reformers of the late nineteenth century in which the tread wheel and humiliating uniforms and prison routines were designed to degrade the prisoner.[876]

Whitman argues that the current drive towards punitiveness in prisons is also due in part to the 'harshness' of American culture, racism and evangelical religion.[877] Some evidence of these practices can be seen in prison sentences in the USA and to a lesser extent in England and Wales. Some prisons in the USA require prisoners to wear bright and humiliating clothes, and some states have introduced chain gangs and boot camps.[878] Some solitary confinement regimes deprive prisoners of all physical human contact, even automating the opening of doors to reduce the contact the prisoner has with a human being.[879]

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[875] Donald Clemmer, *The Prison Community* (First Pub 1940, 1966 Holt, Rinehart and Winston) 299

[876] Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993) 80.

[877] James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003, Oxford University Press) 7.

[878] One example is Sheriff Joe Arpaio requires all male prisoners to wear black and white striped convict uniforms and pink boxer shorts in Maricopa County Arizona, as well as be incarcerated under canvas. Tim Mak 'Arizona's Tent City Jail: Where prisoners wear pink underwear, eat meatless meals and swelter in the 120-degree heat' (*Washington Examiner,* 8 April 2014) <http://www.washingtonexaminer.com/tent-city-jail-where-prisoners-wear-pink-and-swelter-in-120-degree-heat/article/2546924> accessed 31 March 2015.

[879] Jesenia Pizarro, Vanja M. K. Stenius, 'Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates' (2004) 84 Pri J 248.

It may be seen as puzzling that a country, which on the surface has many markers of an egalitarian society, such as an absence of hereditary titled privilege and a strong written constitution, can promote more degrading punishment than other countries. Whitman argues that it is the lack of an aristocratic element in the USA, which provides the clue as to why it has developed a degrading system of punishment. Countries, such as France and Germany made a commitment to abolishing the distinction between low and high status offenders, such as high status offenders being beheaded, whilst those of a lower status were hanged.[880] Over time, these high status punishments replaced low status punishments, whilst America abolished high status treatment for all, levelling down.[881]

Restricting prisoners from having children could also be seen as a result of the desire for authorities to create punitive regimes and in some circumstances, humiliating regimes, thus reinforcing their lower status. Whilst this may not be as prominent in England and Wales as it is in the USA, certain aspects of the penal regime are designed to make prisoners feel their inferior status. Prison authorities in England and Wales would deny that any of the restrictions placed upon prisoners are designed to humiliate and degrade, but requiring an individual who wants children to submit to public scrutiny for permission to become a parent could be argued to be humiliating. Even in the case of male prisoners, where the practical logistics of AI places a minimal burden on the prison, a prisoner is still required to submit to intrusive and extensive examination of their motives to become a parent to a Government Minister. This is often justified by stating that the restriction of the ability to have children is part of the punishment of

[880] James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003, Oxford University Press) 9.
[881] ibid 10.

imprisonment. If one returns to the framework sketched by von Hirsch, of a penal system that is limited to physical incarceration alone, which are designed to censure and not humiliate, then it could be argued that these restrictions go beyond that which is required to censure prisoners.

Punishment and Civil Death

The concept of civil death, where the law treats individual prisoners as if they are actually dead, originally arose in English common law. An individual convicted of a felony or treason received the death penalty and was considered to be dead in the eyes of the law.[882] This medieval doctrine of attainder, along with slavery, argues Dayan, has enabled the law to conceive of the modern prisoner as someone who is dead in law, but still exists in living, breathing form.[883] Attainder meant that the offender's blood was considered tainted. Legally this meant that he could no longer inherit property or pass it to his heirs, the condemned person's property passed to the state. As the prisoner was dead in the eyes of the law, the law no longer protected him, he could not enter into contracts or stand in court. Civil death was not the punishment itself, the execution of the prisoner was the punishment, civil death reflected the prisoner's status of condemned. This allowed for his property and effects to be settled prior to death.[884] Within England and Wales, the law of attainder was removed by statute in 1870.[885] The US

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[882] Anonymous, 'Note: Civil Death Statutes Medieval Fiction in a Modern World' (1937) 50 Harv L R 968, 969.
[883] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press, 2011) 49; see also William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (4 edn, Oxford, 1750, digitised on Internet Archive) 373-374. <https://ia902705.us.archive.org/0/items/commentariesonla04blac/commentariesonla04blac.pdf> accessed 20 June 2015.
[884] Susan N Herman, 'Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue (1998) 77 Or L Rev 1229, 1238; Harry David Saunders, 'Civil Death: A New Look at an Ancient Doctrine' (1970) 11 Wm & Mary L Rev 988, 990.
[885] Forfeiture Act 1870 s1.

Constitution also prohibits Bills of Attainder.[886] Some principles of civil death in England and Wales survive in the form of the disenfranchisement of prisoners whilst serving their sentence and prohibition from standing for public office.[887] Prisoners in the USA have greater limitations placed on them. In many states, prohibitions on voting extend after their sentence, either requiring the offender to fulfil a time period after release before voting again, or by barring the ex-prisoner from voting for life.[888] In New York and Rhode Island, prisoners sentenced to life are classed as having died a civil death, with the exception that they can sue in court.[889]

Even though prisoners are no longer seen as legal slaves, they 'are not quite seen as full-fledged human beings either.'[890] In other words, prisoners occupy a space as a kind of inferior citizen. Whilst this is a departure from the status of the prisoner as a 'slave of the state' as described in *Ruffin,* there are still barriers to prisoners becoming parents created by a prisoner's treatment as less than a citizen.[891] Whilst incarcerated, prisoners lack the rights normally associated with citizenship, the ability to earn a living in comparable conditions to those

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[886] Legislative Bills of Attainder are prohibited under US Const. Art. 1 Sec. 9. State Bills of Attainder are banned under US Const. Art. 1 Sec. 10.
[887] Prisoners cannot vote, see Representation of the People Act 1983 s3(1); *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41 para 22. Current prisoners and former prisoners who have served more than 12 months in prison cannot stand for election to Parliament, see Representation of the People Act 1981 s1.
[888] There are estimated to be 5.3 million people are disenfranchised in the USA because they have a criminal conviction and that 4 million of these are living in the community outside of prisons. It is also estimated that one in seven African American males are disenfranchised because of a felony conviction. Kentucky and Virginia remove the vote permanently from all people convicted of a felony, and a further eight states remove the right to vote permanently from some categories of offenders. In 20 other states, the right to vote is only restored once probation and parole have been completed. Erika Wood, *Restoring the Right to Vote* (Brennan Center for Justice, 2009) 3; Susan Easton *Prisoners' Rights: Principles and Practice* (Routledge, 2011) 231.
[889] New York Civil Rights - Article 7 - § 79-A Consequence of Sentence to Imprisonment for Life; State of Rhode Island General Laws, Title 13 Criminals- Correctional Institutions Chapter 13-6 Loss of Rights by Prisoners, 13-6-1 Life Prisoners Deemed Civilly Dead.
[890] Susan N Herman, 'Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue (1998) 77 Or L Rev 1229.
[891] *Ruffin v Commonwealth*, 62 Va. 790, 796 (Va. 1872).

outside in free society and the right to vote.[892] Prisoners are thus disabled in many ways from being an active parent by the state. As well as physical confinement precluding many prisoners from actively caring for existing or future children, enforced idleness through solitary confinement or poorly paid prison work prevent prisoners from financially contributing to their children either. Many countries attempt to minimise the 'collateral effects' of imprisonment, allowing prisoners to retain continued access to the social security system, so that their benefits are retained on release from prison.[893]

Links between slavery and imprisonment and consequent civil death are not a coincidence.[894] Patterson highlights that in many societies from the Middle Ages until the nineteenth century, some prisoners were held as penal slaves and put to work.[895] Whilst England and Wales is not exempt from the effects of racism within the criminal justice system, the prominent position of slavery within the consciousness of the USA creates even further reaching effects for minority populations.[896] The USA continues to suffer the direct effects of racial segregation and the past history of slavery at a fundamental level.[897] With high

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[892] In Maine and Vermont prisoners can continue to vote whilst serving prison sentences. This is prohibited in all other states. Jean Chung, 'Felony Disenfranchisement: A Primer' (*The Sentencing Project'* April 2014) http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf accessed 20 June 2015.

[893] Vivien Stern, 'Prisoners as Citizens: A Comparative View' (2002) 49 Probation J 130, 134 135. Stern notes Russian prisoners continue to accrue and maintain their social security benefits whilst serving their prison sentence and prison work in Poland allows prisoners to continue to accrue pension and workers' rights. More generally, countries such as Norway use the 'import' model, which means that prisoners are entitled to the same services as all free citizens.

[894] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press, 2011) 57-63; Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge, 2011) 21.

[895]Penal slavery was practiced in Spain, France, Italy and Russia. Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press, 1982) 128.

[896] Jean N Shklar, *American Citizenship: The Quest for Inclusion* (The Tanner Lectures on Human Values, Harvard University Press, 1991) 48.

[897] Chain gangs, reminiscent of slaves working on plantations are increasing in popularity in the USA. Browne compares these modern developments to the convict leasing system in operation after the abolition of slavery in 1865. See Jaron Browne, 'Rooted in Slavery: Prison Labor

levels of incarceration in the USA and a bias towards imprisoning African American and Hispanic people, it could be argued that any restriction on prisoners having children or maintaining a relationship with their existing children will have a disproportionately negative effect on minority populations.[898] Patterson terms the process through which slaves become civilly dead is through the process of 'natal alienation.'[899] He states 'I prefer the term "natal alienation" because it goes directly to the heart of what is critical in the slave's forced alienation, the loss of the ties of birth in both ascending and descending generations.'[900] Whilst prisoners are not in the position of slaves in the sense that they are completely restricted from knowing about their ancestors and family members, it could be argued that prisoners experience some form of natal alienation when incarcerated. Access between prisoner and family member is limited, restricted and defined by the prison authorities. The ability to procreate is most circumstances is removed, prisoners are unable to continue their family line once they are incarcerated. Visits, rather than being viewed as a human right, are seen as a privilege to be given as a reward for good behaviour and removed for bad behaviour.[901] Nagel compares the slave who loses the right to their children when they are sold off into slavery to the prisoner who loses custody and parental

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Exploitation' (2007) Race Poverty & Environ 42.

[898] Nearly 3% of the total black male population of the US (all ages) was incarcerated on December 31, 2013. This compares to 1% of Hispanic men resident in the US and 0.5% of white men. See E. Ann Carson, *Bureau of Justice Statistics Prisoners in 2013* (Office of Justice Programs, 2014) 8.

[899] Orlando Patterson, 'Slavery and Social Death: A Comparative Study' (Harvard University Press, 1982) 7.

[900] ibid.

[901] Joseph Murray, 'The effects of imprisonment on families and children of prisoners' in Alison Liebling, Shadd Maruna, (eds), *The Effects of Imprisonment* (Routledge, 2005) 454; Alice Diver, 'The 'Earned Privilege' of Family Contact in Northern Ireland: Judicial Justification of Prisoners' Loss of Family Life' (2008) 47 How J 486.

rights over their children.[902] Individual prisoners may be prevented from either having children or from maintaining a relationship with their existing children, and so natal alienation occurs.

The desire to remove rights from prisoners, especially those convicted to a life sentence or a death sentence appears to stem from the notion that a person 'lacks the right to himself.'[903] The life-sentenced prisoner is being punished by being treated as though they are dead whilst still physically alive.[904] Whilst it could be argued that prisons in England and Wales may not operate such under such a punitive system as the USA, prisoners are still denied the ability to start under the same principle that they do not have the right to parent, develop families and relationships. Kirkley argues that the right to procreate should not be granted to any prisoners, especially those serving life sentences, citing civil death as one of justifications.[905]

Kirkley may mean the phrase 'life term' to only mean individuals who are serving a 'whole life' tariff for especially grievous crimes and will never be released from prison. In the USA, the number of 'whole life' sentences is larger, as in many states it is the 'lesser' sentence for homicide or murder, with the most heinous crimes being punished with the death sentence.[906] If, as Kirkley suggests, a line is drawn between those serving a life sentence and those who are not, this leads to further issues. If a prisoner has the prospect of being released on licence

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[902] Mechthild E Nagel, 'Patriarchal Ideologies and Women's Domestication' in Mechthild E Nagel, Anthony J Nocella II, (eds) *The End of Prisons: Reflections from the Decarceration Movement* (Rodopi, 2013) 164.
[903] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press, 2011) 57.
[904] ibid.
[905] Rachel Michael Kirkley, 'Prisoners and Procreation: What Happened Between *Goodwin* and *Gerber*? (2002) 30 Pepperdine L Rev 93, 119.
[906] In the USA in 2012 there were 49,000 prisoners serving a whole life tariff compared with 49 in the UK. Ashley Nellis, assisted by Jean Chung, *Life Goes On: The Historic Rise of Life Sentences in America* (The Sentencing Project, 2012) 16.

at some stage, and thus 'redeemable' then this arguably justifies procreation being permitted on rehabilitative grounds. To take the idea of civil death further, one may ask whether those prisoners serving a whole life tariff are considered so irredeemable, corrupt and evil that they are deemed to have died a civil death, which requires removal of their right to procreate. It could be argued that in specific circumstances, where prisoners have been convicted of harming children, or worse, killing them, that their tariff in prison specifically excludes their right to procreate based upon a proportionate assessment of the punishment that they should suffer.

This concept of civil death becomes even more pronounced in the case of prisoners sentenced to death. The case of *Anderson v Vasquez*, raises the question of whether those on death row should be allowed to become parents, even in the face of their own, usually inevitable deaths.[907] Whilst many prisoners languish on death row negotiating the appeals process for years, it would also be possible that a person on death row may predecease the conception and birth of his child, or die shortly after birth. Many may question whether someone should become a parent with the knowledge that the only possible type parenthood open to them would be genetic reproduction, as they would not be able to care for the child. In the case of female death row prisoners, some have suggested that allowing them to have children could lead to some prisoners delaying their sentence by becoming pregnant and having a child.[908] A prisoner may be sentenced to death for

[907] *Anderson v Vasquez* 827 F Supp 617 (1992). The case concerned death row sentenced prisoners who were claiming that they should be allowed access to conjugal visits from their partners, and if this was not allowed then they should be allowed to provide semen so that their partners can become pregnant. The case is not considered legal authority on the question of whether prisoners have the right to access AI facilities because the prisoners failed to exhaust their grounds of appeal through the prison avenues first.

[908] Goodman argues that female death row prisoners could potentially ensure they are pregnant until they pass the menopause. Ellen Goodman, 'And Now, The Right to Keep Genes in Pool' *St.*

murdering a child, and allowing that prisoner to procreate via AI would be morally repugnant to many.

The loss of the ability to have children when in prison may not just adversely affect prisoners killed by the state or those sentenced to prison for their whole life. The continuing collateral consequences of imprisonment can last far longer than an initial prison sentence.[909] This loss of rights has been termed as the 'new civil death.'[910] Losing the ability to have children whilst in prison could also be included as one of these continuing collateral consequences of imprisonment, especially in the case of women who undergo the menopause when incarcerated, thus losing the opportunity to have children naturally. Thus restrictions on procreation can potentially affect all prisoners and their partners, not just those sentenced to life.

Louis Post-Dispatch (Missouri, 12 January 1992) Everyday Magazine 2C.
[909] Chin GJ, 'The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration' (2012) 160 U Pa L Rev 1789, 1791.
[910] ibid 1792.

Summary

The question of what is punishment, how it should be defined and justified are problematic and difficult to answer. Traditionally, two main strands of thought, utilitarianism and retributivism have all been used at one point been used to justify punishment in general and imprisonment more specifically imprisonment as a method of punishment.

Hart's definition of punishment provides a useful starting point for considering state sanctioned punishment within the criminal justice system. It states that the punishment must be unpleasant, it must have official legitimacy, usually in the form of a judicial court, and it must be in response to an offence committed by the offender. This account of judicial punishment is fairly uncontroversial; the offender commits a crime against the law and is punished by an officially recognised body. The controversy arises in the justification of the institution of punishment, and the seemingly opposed justifications of utilitarianism and retributivism.

The utilitarian account of punishment is forward-looking; it is justified by the consequences of the punishment, such as the deterrent effect of the punishment and the reduction in crime. On the other hand, the retributive account of punishment is backwards looking, justified solely by the offence that the offender committed. Some authors, such as Rawls have attempted to provide a mixed account of punishment which takes into account both utilitarianism and retributivism. It could be argued that this makes sense on one level, that utilitarian concerns justify political interventions that create punishments for crime, whilst on an individual level offenders are punished because they have wrongly

infringed on another person's rights, in effect, using them as a means to an end. Retributive punishment aims to redress the imbalance between offender and victim. This does not provide a complete account, however as it does not take into account strict liability offences, or actions that may be morally wrong, but are legally permissible.

When one examines the practical expression of punishment, such as imprisonment and community sentences that involve offenders being publically punished, it can be seen that retributive justifications are of more importance to government bodies. The primary moral justification for the punishment does not arise from the fact that society needs to be protected from an offender, but because they have done something wrong. Some mentally ill patients are incarcerated against their will, but their hospitalisation, whilst arguably stigmatised, does not carry the shame and stigma of prison. Utilitarian justifications are also important, but are secondary to this one consideration. Andrew von Hirsch refers to this as 'censure' although some retributivists take punishment to equate with humiliation. This is evidenced by expressions of punishment, mainly in the USA, which are primarily designed to humiliate the offender, to dehumanise them and remove their human dignity.

As the 'punishment' part of a prison sentence is the physical incarceration of the individual prisoner, it could be argued that preventing the prisoner from procreating is not an explicit part of the punishment that is meted out to them. Whilst there are rules enacted in legislation and policy documents that explicitly state the parameters of the punishment (such as the duration of the prison sentence) there are other aspects of the prison regime, which are left to local prison authority discretion.

Prohibition of procreation is not adequately justified by any of the conventional arguments used to justify punishment in general. If one considers utilitarian justifications, then few prisoners are deterred from crime by the specific knowledge that should that they be caught, they will be prevented from having children. This may not even be general knowledge for many offenders, and may only become a concern after many years of childless incarceration. From a more practical perspective, prisoners having children does not endanger society itself, especially as ART can facilitate reproduction without intercourse. Rehabilitation, another concern of utilitarianism, may be enhanced and not stunted by prisoners who have strong links with family members who give them additional reasons to desist from crime.

From a retributive perspective, if society is aiming to move beyond humiliation to 'commensurate deserts' and 'censure' then punishing prisoners by simply stating that they cannot have children is also unjustified except in a few cases where prisoners have abused or murdered children. In the USA and in England and Wales, prison means far more than simple incarceration in a place against the prisoner's wishes. Although it depends upon the institution itself, there is wide evidence that the aim of many regimes is to humiliate with uniforms that denote inferior status of the prisoner, making them out as 'other.' This debasement or degradation may be the real reason that prisoner procreation continues to be prohibited, even if this is not explicitly expressed by any statute law or case law.

Chapter Eight: Reproduction and Parenting Outside of Prison

Introduction

How children are raised is of primary importance not just to children, but also to society in general. Parents in particular are often judged on how well or how badly they raise their children. Offending behaviour is often blamed on poor parenting and 'troubled families', and was thought to be one cause of the unrest of the riots of 2011, which affected London and other British cities.[911]

This chapter begins with an examination of the normally private sphere of reproduction and what is required to become a parent, including whether legal regulation is justified at the stage of conception. To appreciate the challenges that may face prisoner parents as well as how reproduction itself may be regulated, it is necessary to examine reproduction in free society. The right to procreate within free society is given strong protection because of the value given to privacy and autonomy. However, any putative parent who requires licensed fertility treatment in England and Wales and in some US states will be required to satisfy a test, which determines their suitability as parents.[912] Legal restriction of an individual's right to procreate is generally limited to a small number of cases in the USA where non-procreation has been made a condition of parole.[913] In a small group of people a court may also decide it is in their best interests to be sterilised

[911] The Riot Communities and Victims Panel found in their survey of the evidence that many family backgrounds of the rioters, whilst not as troubled as those identified by the Troubled Families Programme set up by the UK Government in the aftermath of the riots, still had problematic backgrounds. Riot Communities and Victim's Panel, *After the Riots: The final report of the Riots Communities and Victims Panel* (Riots Communities and Victims Panel, 2012) 37-39.
[912] For more details of assisted treatment in England and Wales see footnote 672. David Adamson, 'Regulation of Assisted Reproductive Technologies in the United States' (2005) 39 Fam L Q 727.
[913] One example is *State v Oakley* 2001 WI 103 (2001).

as they are mentally disabled and would not be able to cope with the realities of pregnancy and parenting.[914]

The chapter will then turn to the right to rear or parent. In contrast to the strong private autonomy protection of the right to procreate, parenting itself is more subject to legal regulation. Rules providing a minimal threshold of expected care exist to protect children from negligent and abusive parents. On the other end of the scale, ideal and expected standards of parenting are high, and are often described as unrealistic and intensive.[915] This has the knock-on effect of only those parents who conform to these standards being seen as fit parents. The language of risk and child welfare is used to describe children that are not at risk of child abuse.[916]

Next, the role of mothers and fathers will be considered. Parenthood itself is still seen as a gendered activity, with the majority of the childcare seen as the responsibility of the mother.[917] Traditional standards of fatherhood view the 'good' father as a financial provider, with the mother acting as gatekeeper to a closer relationship with children.[918] This is reflected in law by the special protection given until very recently, to heterosexual and monogamous unions in the UK.[919]

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[914] One example from England and Wales is the case of *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.
[915] Charlotte Faircloth, 'Intensive Parenting and the Expansion of Parenting' in Ellie Lee, Charlotte Faircloth, Jan Macvarish, (eds) *Parenting Culture Studies* (Palgrave Macmillan, 2014) 25-37.
[916] Diane M Hoffman, 'Risky Investments: Parenting and the production of the 'resilient child.' (2010) 12 Health, Risk & Soc 385.
[917] Sharon Hays, *The Cultural Contradiction of Motherhood* (Yale University Press, 1996) 8.
[918] Donald Woods Winnicott, *The child, the family and the outside world* (Pelican, 1964) 115; David Pepinoe, 'American Family Decline, 1960- 1990: A Review and Appraisal' (1993) 55 J Marriage & Fam 527, 528.
[919] Martha Albert Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies'* (Routledge, 1995) 15. Same sex civil partnerships became legal in England and Wales in 2004 with the passage of the Civil Partnership Act 2004. Same sex marriages became legal in 2014 with the passage of the Marriage (Same Sex Couples) Act 2013. In the USA, states are compelled to legalise same sex marriages and recognise marriages from other states. under the Fourteenth Amendment *Obergefell v Hodges* 576 U. S. ____ (2015) (Decided 26 June

2015).

Autonomy and the Right to Procreate.

Deciding whether or not to have children is one of the most personal, and sometimes, one of the most difficult decisions an individual can make. It can affect every aspect of an individual's life, altering their role within their social sphere as well as within society as a whole. There are many reasons behind why a person decides to have a child. Parenthood can mark the beginning of 'adult life' for some, with the responsibility that comes of being sole carer of a vulnerable infant. It marks the creation of a family, and in some circumstances cements a relationship with their life partner. The right to beget a child is in essence the right to create new life, to create an embryo that will be born. Most children are conceived naturally through sexual intercourse. Individuals have the right to choose their sexual partner, the right to marry the partner of their choice and the right to found a family with the partner of their choice. The state does not pry into the many reasons people have for procreating, providing that they do not require fertility treatment that is governed by the state.[920] Whilst the care of children is subject to certain legal and social controls, the state itself has little interest in preventing competent and consenting adults from becoming parents. Many different 'arrangements' that may fall outside legally regulated fertility treatment are considered a private matter, regardless how 'undesirable' they may be.[921] Individuals, who smoke, take illegal drugs, abuse alcohol and are on state benefits

[920] Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176.
[921] See footnote 672. Human Fertilisation and Embryology Authority Guidance requires a clinician to make judgments about the suitability of the potential parent, including whether they have a criminal background and whether they have a history of drug or alcohol abuse. Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) MLR 176; Human Fertilisation and Embryology Authority *Code of Practice* (Human Fertilisation and Embryology, 8th ed, 2009, revised April 2015) para 8.10. Surrogacy itself is also controlled to some extent by the Surrogacy Arrangement Act 1985 2(1), which in the UK prevents the commercialisation of the surrogacy arrangement and prevents it from turning into an enforceable contract.

can have children with no restrictions made upon their fertility. Children can be born to individuals who are not in a relationship with one other, or who have made private AI arrangements.[922] Even though these people may not be in the ideal situation to start a family, the state still does not interfere with competent adults who want to have children. To do so would be an unjust interference with the autonomy of the person and legally very difficult to regulate. Conception, pregnancy and to some extent, parenthood, are well within the private domain and central to the personhood of the individual. Jackson states that individual reproductive autonomy should be respected so long as is not 'incompatible with other more important social values'.[923] The liberal view is that a competent individual is free to use their body in whatever way they wish, which includes exercising their reproductive choice.[924] Some authors argue that reproductive autonomy is central to the individual's ability to live a decent life. Restriction of the ability to control reproductive capability prevents an individual from conducting their life according to their own beliefs and wishes.[925] It is inaccurate however, to claim that a person has an absolute right to reproduce. There are legal restrictions on 'absolute' reproductive autonomy in place: for example, incest and

[922] Within England and Wales there are concerns about unlicensed sperm donation where private individuals make arrangements for donation. Women are at risk of abuse from men insisting on having sexual intercourse, as well as disease transmission. Male donors remain financially responsible for any children that may result. Whilst individual private arrangements are not illegal, distributing sperm without a license from the HFEA is. See Thelma Etin, 'Sperm websites addressing growing demand for donors?' (*BBC*, 12 October 2010) http://www.bbc.co.uk/news/uk-england-11344661 accessed 22 April 2015; Ciaran Jones, 'Revealed: The 'frightening' world of unregulated internet sperm donation sites' (*Wales Online,* 19 January 2014) <http://www.walesonline.co.uk/news/wales-news/frightening-world-unregulated-internet-sperm-6520753> accessed 22 April 2015.

[923] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, Oxford 2001) 9. Jackson refers to this autonomous decision as a 'self-regarding' decision, not subject to public scrutiny. Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176, 182.

[924] ibid 2; Harry Brighouse, Adam Swift, 'Parent's Rights and the Value of the Family' (2006) 117 Ethics 80.

[925] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, Oxford 2001) 7.

sexual intercourse with a minor are both criminal offences in the UK and in the USA.[926] It is more accurate to describe a right to beget as a right to have a child from state interference, subject to the legally necessary restrictions on consent and consanguinity. There is no positive obligation upon the state to promote reproduction as a right.[927] Rather, it is a negative right that should not be interfered with.[928] For example, Article 12 does not give claimants a positive right to assistance with reproduction.[929] It was drafted to enable people to marry and found a family without fear of being sterilised or limited in their reproductive choices in the aftermath of Nazi atrocities in World War II. As Deech acknowledges, many of the Articles are now interpreted in ways far removed from the intentions of the original drafters.[930] This could be argued, however, to be how a human rights document should be used, as it is interpreted to reflect the current realities and aspirations of human rights provision in the 21st century. Deech argues there is no positive right to have a baby in UK law, as there is no corresponding legal responsibility to ensure access to medical treatment for infertility if a couple is unable to conceive naturally.[931] The right to choose not to have children is a matter of personal autonomy over what happens to one's own

[926] Sexual Offences Act 2003 s64- 65. The ECtHR ruled that the domestic law of Germany and other member states that outlaw consanguineous relationships between siblings is permissible under the doctrine of appreciation in pursuit of a legitimate aim, which is the protection of family life. The Court therefore found there had been no breach of Patrick Stübing's Article 8 right to a private and family life when he was imprisoned for having sexual intercourse with his sister. *Stübing v Germany* (2012) 55 EHRR 24. The minimum age of consent in the UK is 16. In the USA it varies from 16 to 18 depending upon the state. See Kate Sutherland, 'From Jailbird to Jailbait: Age of Consent Law and the Construction of Teenage Sexualities' (2003) 9 Wm. & Mary J Women & L 313.
[927] Mary Warnock, 'The Limits of Rights-based Discourse' in JR Spencer, Anje Du Bois-Pedain (eds), *Freedom and Responsibility in Reproductive Choice* (Hart Publishing, 2006).
[928] David Archard, *Children, Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 138.
[929] Human Rights Act 1998 Schedule 1 Art 12.
[930] Ruth Deech, 'Human Rights and Welfare' (*Gresham College*, 11 May 2009) <http://www.gresham.ac.uk/lectures-and-events/human-rights-and-welfare> accessed 31 March 2015.
[931] ibid.

body. To have a child involves the creation of a human being and with it come serious implications. The right to choose to use contraception argue O'Neill and Archard is not the same thing as the right to have a child.[932]

Western societies place a high importance upon individual bodily autonomy; including respect for the right for competent adults to procreate. To remove this right by force would be seen as the ultimate infringement of personal autonomy. Robertson argues that a right to reproduce comes from the right to procreative liberty. He states 'procreative liberty is the freedom to either have children or to avoid having them.'[933] Quigley argues that this argument stems from the view that all people have a general right to liberty.[934] Robertson argues that reproducing is central to the identity and culture of many people, and if the right is to be controlled or restricted, it must be for a legitimate reason. The presumption that people possess the right to procreate should remain high.[935] Other authors argue that the right to reproductive autonomy is rooted in bodily autonomy, and as one is entitled to do whatever one wants with their body, they are also entitled to have children. The Fourteenth Amendment protects privacy and individual freedom. The protection of individual freedom, argues Dworkin, also extends to the protection of procreative autonomy when deciding whether to abort a foetus.[936] This is a right rooted in the importance of 'individual human dignity: that people have the moral right- and the moral responsibility-to confront

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[932] David Archard, *Children: Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 138; Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2002) 61.
[933] John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1994, Princeton University Press) 22.
[934] Muireann Quigley, 'A Right to Reproduce?' (2010) 24 Bioethics 403, 404.
[935] John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, 1994) 22.
[936] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Vintage, 1993) 166.

the most fundamental questions about the meaning and values of their own lives for themselves.'[937]

Whilst Dworkin used this argument in support of the right to abortion, Harris states that it also extends to choices made about procreation. His stance on procreative autonomy is strongly in favour of the individual making choices for themselves, even if this causes 'offence.'[938] Harris then states that this reasoning can justify the use of controversial technologies such as cloning oneself in order to have a child, or using the gametes from a dead spouse.[939] However, as Archard states, abortion and procreation decisions are different. Abortion is about primarily about personal autonomy, deciding what happens to one's own body. Procreation is concerned with making a positive decision to create new life that will become external to it's mother's body. Archard states for this reason 'the right to bear children is not the simple corollary of the right not to bear children.'[940] Floyd and Pomerantz argue, the body can be seen as 'an owned object' and as such it follows from that premise that a person is free to create new life.[941] They do go on to argue however that it is not justifiable to treat the child as a mere appendage of the woman's body, instead of as another individual with their own moral rights.[942] Archard disagrees however, and views the right to beget children as having different qualities to the right to not beget them.[943] Archard states that the right to refuse to have children relates to self-determinism, the right to decide what happens to one's own body. This is different, he argues to

[937] ibid.
[938] John Harris, 'Rights and Reproductive Choice' in John Harris, Søren Holm (eds) *The Future of Human Reproduction: Ethics, Choice and Regulation* (Clarendon Press, 2000) 36.
[939] ibid.
[940] David Archard, *Children: Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 138.
[941] SL Floyd, D Pomerantz, 'Is there a Natural Right to Have Children?' in Peg Tittle, (ed*) Should Parents Be Licensed? Debating the Issues* (Promethieus Books, 2004) 230.
[942] ibid 231
[943] David Archard, *Children: Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 138.

begetting children, which is the right to bring another human into existence.[944] This is a conditional right, which means that the putative parent should consider the responsibility that rearing a child entails.[945] Robertson, however views reproductive autonomy as an extension of the right to self-determinism, which applies equally to having children as well as not having them.[946] Archard represents a view of responsible parenthood, which could be argued to be the ideal situation, in which every child is wanted and planned for. This isn't the reality for many parents however, who do not plan to conceive. It may be more accurate to conceptualise voluntary procreation deriving from individuals exercising their autonomy to procreate or have sexual intercourse. They are exercising free choice over how to use their own bodies, without specifically considering the child that may result from sexual intercourse. In the case of prisoners, in most cases in the USA and in England and Wales, they are prevented from having heterosexual sex so the only avenue left open to them is through the use of AI.[947] This means that any child born to a prisoner who cannot have sexual intercourse would result from a conscious decision to have a child. There may be criticism of the reasons behind why a prisoner may wish to have a child and whether the prisoner has selfish reasons, which fail to consider the needs of their putative child first. Under the current regime in England and Wales, prisoners are

[944] ibid.
[945] ibid 139.
[946] John A Robertson, 'Procreative Liberty' in Peg Tittle (ed) *Should Parents Be Licensed? Debating the Issues* (Promethieus Books, 2004) 214.
[947] The Howard League for Penal Reform concluded that prisoners do have consensual sex with other prisoners whilst imprisoned through their research with former prisoners. See Alisa Stevens, *Sex in prison: Experiences of former prisoners* (Howard League for Penal Reform, 2015) 1. There is no specific rule which prohibits consensual sexual intercourse between prisoners see National Offender Management Service, *Prison Service Instruction 47/2011 Prisoner Discipline Procedures* (Ministry of Justice, 2011, updated 2013) 1.76 If seen by a third party however, they could be disciplined under PR 51 (20) / YOI R 55 (22). Sexual intercourse with partners outside of the prison is prohibited. For details of private or conjugal visits in the USA see footnote 653.

required to justify why they should be allowed AI treatment, in a way that those accessing fertility treatment are not required to do.[948]

Fertility Treatment

For some people, the desire to have children stems from a deep biological drive, with infertility and involuntary childlessness causing intense frustration and distress.[949] If a couple or an individual in England and Wales requires licensed fertility treatment to achieve conception, then they lose the right to privacy that individuals enjoy when conceiving their child through sexual intercourse.[950] In this situation, those seeking treatment are required to satisfy the child welfare requirements, in effect the treating clinicians have to judge whether those to be treated will be good parents.[951] Jackson has argued that the decision to reproduce is a private one and it is inappropriate to require potential parents to satisfy the 'child welfare' requirement before beginning treatment.[952] Putative parents who require IVF are forced to justify their suitability to parent in a way that individuals procreating naturally are not. This child welfare requirement is similar to Victoria in Australia, which prohibits access to IVF treatment for those

[948] See Appendix for the conditions that prisoners have to satisfy to apply for AI. The welfare of the child requirements for AI do not ask the putative parents to say why they want a baby, but are to ensure that they do not have a history of abusing children or could give cause for concern for the safety of children born as a result of treatment. See Human Fertilisation and Embryology Authority *Code of Practice* (Human Fertilisation and Embryology, 8th ed, 2009, revised April 2015) para 8.10.

[949] One example is McQuillan et al's study of a random sample of 580 American women showed that infertility linked with involuntary childlessness caused significant distress. Julia McQullian, Arthur L Griel, Lynn White, Mary Casey Jacob, 'Frustrated Fertility: Infertility and Psychological Distress Among Women' (2003) 65 J Marriage & Fam 1007.

[950] Human Fertilisation and Embryology Authority, 'your fertility treatment options' (*Human Fertilisation and Embryology Authority*, 5 August 2014) http://www.hfea.gov.uk/fertility-treatment-options.html accessed 25 April 2015.

[951] See footnote 672. The treating clinician has to have regard to the welfare of any children born to those treated for infertility. Human Fertilisation and Embryology Authority 'Welfare of the Child and Patient History Form' (Human Fertilisation and Embryology Authority, 2010).

[952] Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176, 193.

convicted of sexual or other serious offences, even after their release from prison.[953]

In the USA, access to treatment varies from state to state, and is usually not covered by healthcare insurance.[954] There is very little legal regulation in the USA governing access to fertility treatment, at either state or federal level.[955] The Federal Fertility Clinic Success Rate and Certification Act passed in 1992 requires that data for all IVF cycles performed in the USA are collected and published, allowing for clinic comparisons to be made.[956] Section 3 of the same Act requires that the Secretary of Health and Human Services in conjunction with the Center for Disease Control devise a model program for certifying embryo laboratories.[957] Adoption of this certification scheme on a state level is optional however. All medical centres that deal with gametes and embryos are required to register with the Food and Drug Administration.[958] Access to IVF treatment and the number of embryos that can be transferred to women varies from state to state.

Right to Bear

The right to bear can only extend to those who are biologically female, as only those who are biologically female can become pregnant.[959] Pregnancy is

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[953] The Assisted Reproductive Treatment Act 2008 s14 (1) (i) (ii) (State of Victoria, Australia) prohibits the provision of assisted fertility treatment in the case of a criminal conviction for a serious sexual or violent offence in either the woman seeking treatment or the partner who is being treated with her at the same time. See *Patient Review Panel v ABY & ABZ* [2012] VSCA 264.
[954] Michelle Andrews, 'Health law could affect fertility treatment coverage' (*NBC News.com,* 26 January 2011) http://www.nbcnews.com/id/41254553/ns/health-health_care/t/health-law-could-affect-fertility-treatment-coverage/#.UDeUI0RreJU accessed 1 July 2015. According to Andrews, fewer than 20% of healthcare insurers cover fertility treatment.
[955] Melinda B Henne, M Kate Bundorf, 'Insurance mandates and trends in infertility treatments' (2008) 89 Fertility & Sterility 66.
[956] Fertility Clinic Success Rate and Certification Act 1992 s2 (USA).
[957] ibid s3.
[958] Code of Federal Regulations Title 21 Part 1271 Human Cells, Tissues, and Cellular Tissue-Based Products; Subpart B Procedures for Registration and Listing revised 1 April 2014 (USA).
[959] The rather clumsy phrase 'biologically female' is used here to recognise that transgender men who retain their female sexual organs can also become pregnant and carry that pregnancy to term.

seen by many cultures as a pivotal moment in the life of a woman. There are feminist critiques of pregnancy and childbirth that describe it as a horrific experience. The feminist Firestone describes childbirth as a 'barbaric' experience, akin to 'shitting a pumpkin.'[960] Part of the negative response to the prospect of pregnancy and motherhood during the second-wave of feminism could have been due to feminists at the time rejecting mothering entirely as a patriarchal trap.[961] More positively, there are feminist accounts of pregnancy and childbirth that reclaim it as a positive and empowering experience.[962] One example of a more positive outlook is that of de Marneffe's who states that the 'women's desire to *have* children has survived the vagaries of feminist suspicion and is now fully respectable and in public view.'[963] Whilst de Marneffe argues that the desire to have children is not contentious, the desire to want to actively care for them is taboo. For women in free society to admit that she wishes to 'stay at home' to look after her children is 'embarrassing.'[964] As such, de Marneffe is reacting against the matrophobia that was evident from other authors such as Firestone.

Gender becomes prominent in the debate between maternal and foetal rights, especially when there is conflict between the actions of the pregnant woman and the foetus. Jackson notes that many feminists have argued for a 'de-medicalisation' of pregnancy, with some viewing the increasing medicalisation of

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[960] Shulasmith Firestone, *The Dialectic of Sex: The case for feminist revolution* (Bantam Books, 1971) 198, 199.
[961] D Lynn O'Brien Hallstein, 'Conceiving Intensive Mothering' (2006) 8 J Assoc Res Mothering 96, 103 Andrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (Virago, 1977); Diane Taylor 'Overview: The Uneasy Relationship Between Motherhood and Feminism' in Alexis Jetter, Annelise Orleck, Diane Taylor, (eds) *The Politics of Motherhood: Activist Voices from Left to Right* (University Press of New England, 1997) 349-350; D Lynn O'Brien Hallstein, 'Conceiving Intensive Mothering' (2006) 8 J Assoc Res Mothering 96, 103.
[962] Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (Virago, 1977) 36-37.
[963] Daphne de Marneffe, *Maternal Desire: Children, Love and the Inner Life* (Virago 2004; UK edition 2006) xi.
[964] ibid 4-5.

childbirth as another example of male control over women's bodies.[965] Although there is evidence of a number of situations where the behaviour of pregnant and parturient women is controlled through a variety of social methods, there are very few legal requirements for women to behave in a certain way to ensure the health of her foetus.[966] Whilst there are certain legal conflicts over what behaviour is morally acceptable for pregnant women, there is no legal foundation to govern the desired behaviour for the benefit of the foetus. In England and Wales, women cannot be forced to give up smoking, or drinking to excess.[967] In the USA some states have enacted laws to protect foetuses that have died as a result of a pregnant woman's actions.[968] This is not controlling pregnant women's behaviour directly however, as it retrospectively punishes women after the foetus has died. Likewise, pregnant women cannot be forced to undergo a forced caesarean section even if their refusal could lead to the death of themselves or their foetus.[969]

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[965] Janet Gallagher, 'Prenatal Invasions & Interventions: What's Wrong With Fetal Rights' (1987) 10 Harv Wom LJ 9; Emily Jackson *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001) 130.

[966] For an account of births in the USA where medical staff are alleged to deny women the right to make informed decisions about their care by abusing them, see Henci Goer 'Cruelty in Maternity Wards: Fifty Years Later' (2010) 19 J Perinatal Education 34.

[967] The Court of Appeal ruled late in 2014 that a child cannot gain compensation from the Criminal Injuries Compensation Authority for damage caused by her gestational mother's excessive drinking. The child suffered severe Foetal Alcohol Spectrum Disorder and tried to claim her mother's drinking was a crime of violence under the section 23 of the Offences Against the Persons Act 1861. *CP (A Child) v CICA* [2014] EWCA Civ 1554.

[968] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001). Lorna Weir details how in the USA and Canada how foetuses have been recast in need of protection from the 1980's. Lorna Weir, *Pregnancy, Risk and Biopolitics: On the Threshold of the Living Subject (Transformations)* (Routledge, 2006) 148. There is some evidence in the USA that women are convicted of foetal homicide when their babies were born and died as the result of attempted suicide, and cocaine addiction. See Ed Pilkington, 'Outcry in America as pregnant women who lose babies face murder charges' (*The Guardian*, 21st June 2011). http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges accessed 25 April 2015.

[969] A caesarean section operation which is carried out against the consent of the woman constitutes a battery or unlawful touching in England and Wales (*St Georges NHS Trust v S* [1998] 3 WLR 936, 967 where a woman that was subjected to a caesarean section against her will was found to have been the victim of an unlawful trespass against her person). In the USA, the tragic case of Angela Carder who was subjected to an unwanted caesarean section against her consent whilst suffering from terminal cancer reinforced the obligation upon doctors to put the consent and wishes of pregnant woman first. See *Re AC* 573 A.2d 1235 (1990).

Right to Rear

Once the putative child has been conceived and birthed, the next right to consider is what O'Neill terms the 'right to rear.'[970] Biologically reproducing does not necessarily grant biological parents the right to rear the child.[971] A prisoner may claim the right to beget a child, but the physical limitations of imprisonment may prevent them from parenting. Some people are given the right to rear by adoption, for example. She terms this as a 'duty to bear responsibly' and this is duty is especially pertinent to prisoners.[972] Some authors go even further, suggesting that parents themselves should be licensed. LaFolette, in his classic paper 'Licensing Parents' and in his later paper revisiting the issue, argues that parents hold such a responsible position over such vulnerable subjects, that they should be licensed like doctors or other professionals.[973] This legal regulation would flow from accepted minimum standards of parental knowledge and competence, using professional models of regulation as a framework. Putative parents would need to pass competency tests to ensure that they meet minimum standards before they are licensed. This would have a massive impact upon the western liberal notion of privacy within family life, which views the decision to have and rear children a private decision, and one which the state should only interfere with when the care the children receive falls below a legal minimum standard.[974] Filtering out those who show child-abusing tendencies through licensing could reduce child abuse. This approach may seem far-fetched and

[970] Onora O'Neill, William Ruddick, (eds) *Having Children: Philosophical and Legal Reflections on Parenthood* (Essays for the Society for Philosophy and Public Affairs) (Oxford University Press, 1979) 25.
[971] ibid.
[972] ibid.
[973] Hugh LaFollette, 'Licensing Parents' (1980) 9 Phil & Pub Affairs 182; Hugh LaFollette, 'Licensing Parents Revisited' (2010) 27 J Applied Phil 327.
[974] Harry Brighouse, Adam Swift, 'Parent's Rights and the Value of the Family' (2006) 117 Ethics 80.

outside the realms of conventional discourse on parenting and rights. In a similar vein to LaFollette, Cassidy supports the self-vetting of potential parents, stating that those judge themselves to be less than 'excellent' potential parents should make the active decision to refrain from parenting at all.[975] This contrasts greatly with the accepted level of 'good enough' parenting and goes far beyond a minimum threshold of acceptable parenting.[976] However, the policy of restricting access to AI for prisoners in England and Wales could be seen as a form of licensing. The relationship of the potential parents is examined, along with their suitability for parenthood, their ability to support the potential child and the availability of support for the 'free' parent outside of the prison.[977]

Parenting, as opposed to procreating, gives less emphasis to autonomy, as the competing rights and needs of the child have to be weighed against the parent. The state can step in to remove the child if the minimum threshold of care is not being met. Historically, the domestic sphere was delineated as private, and so not subject to legal regulation, as this was not politically desired.[978] Children were viewed as property, and had few, if any legal rights.[979] In general, there is no set 'state' method for parenting, as it is expected to be diverse within a modern society.[980] Winnicott's concept of the 'good enough mother' (or in more modern terms the 'good enough parent') is not a perfect mother, but one that meets her

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[975] Lisa Cassidy, 'That Many of Us Should Not Parent' (2006) 21 Hypatia 40, 46.
[976] M Hoghughi, ANP Speight, 'Good enough parenting for all children- a strategy for a healthier society' (1998) 78 Arch Disease Childhood 293.
[977] Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008 Thirty-First Report: 4 Issues Monitored by the Committee* (2008-9, HL 173, HC 1078) para 38.
[978] Nikolas Rose, *Governing the Soul: the Shaping of the Private Self* (2 edn, Free Association Books, 1999) 127.
[979] Stuart N Hart, 'From Property to Person Status: Historical Perspective on Children's Rights' (1991) 46 Am Psychologist 53.
[980] Jonathon Herring, 'The Welfare Principle and the Rights of Parents' in Andrew Bainham, Shelley Day Sclater, Martin Richards, (eds) *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999) 91.

infant's needs and adapts as the child grows.[981] In contrast to this, there is the development of 'intensive mothering' in which caring for the child is seen as the main responsibility of the mother. The work of mothering is seen as '*child-centered, expert-guided, emotionally absorbing, labor-intensive* and *financially expensive.*'[982]

Parents are granted wide discretion to decide to educate their child at home, or at selective schools if they do not wish to use the state school sector. Parents can insist that their children are bought up in their own religion if desired. This autonomy is not absolute however, and if parental behaviour or decision-making is detrimental to the health or wellbeing of the child the state can intervene. An example of this is the English case of Neon Roberts, in which his mother refused to allow him to receive radiotherapy to treat a brain tumour, and wanted to try alternative therapies first. Without immediate medical treatment, doctors treating Neon Roberts stated that he would die.[983] Mr Justice Bodley ruled against the wishes of his mother, ordering that Neon should start radiotherapy as soon as possible. The courts in England and Wales emphasise the responsibilities that parents have, rather than their rights.[984] In the USA, Federal legislation was passed to ensure the welfare of children, limiting the absolute control that parents have over their children, although the primary responsibility for child welfare remains at state level.[985] The first Federal legislation passed to ensure the welfare

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[981] Donald Woods Winnicott, 'Transitional Objects and Transitional Phenomena- A Study of the First Not-Me Possession (1953) 34 Int'l J Psycho-Anal 89, 93.
[982] Sharon Hays, *The Cultural Contradiction of Motherhood* (Yale University Press, 1996) 8.
[983] Peter Walker, 'Neon Roberts to have radiotherapy against mother's wishes' (*Guardian,* 22 December 2012) http://www.guardian.co.uk/society/2012/dec/21/neon-roberts-radiotherapy-mother-wishes?INTCMP=ILCNETTXT3487 (accessed 1 July 2015).
[984] Jonathon Herring, 'The Welfare Principle and the Rights of Parents' in Andrew Bainham, Shelley Day Sclater, Martin Richards, (eds) *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999) 90.
[985] Child Abuse and Prevention and Treatment Act 1974 (USA); National Clearinghouse on Child

of children was the Child Abuse and Prevention and Treatment Act in 1974. This has subsequently been amended numerous times to take accounts of identified changing needs.[986]

Masson identifies that people who beget children are considered to be parents even if they have no parental responsibility for their child. Situating her definition within English law, she states that parenthood covers three interrelated concepts: 'being a parent', 'having parental responsibility' and having Article 8 rights under the ECHR.[987] There are a large variety of people who come under the term parent who do not live fulltime with their children. Some parents share custody of their children with a person that they do not live with, so that their children will live in two places. Some parents have no custody of their child, may or may not have contact with their child and do not have parental responsibility. They are, nonetheless, still given the label 'parent.' Some children may reside in single-parent families. Single-parent families are created in many ways: divorce, separation, and death of one of the parents. In some cases becoming a single parent is not forced on an individual by circumstance but may be actively chosen: a person may adopt, or engage the services of a surrogate, or may use AI in order to achieve a pregnancy.

Another strand of the debate relevant to parenting and intensive parenting is the concept of risk. This has been used as a construct from which to understand childhood and parenting. The concept of risk has moved away from being used to

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Abuse and Neglect Information, *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* (National Clearinghouse on Child Abuse and Neglect Information, 2003) 1.

[986] National Clearinghouse on Child Abuse and Neglect Information, *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* (National Clearinghouse on Child Abuse and Neglect Information, 2003).

[987] Judith Masson, 'Parenting by Being; Parenting by Doing- In Search of Principles for Founding Families' in JR Spencer, Ante Du Bois- Pedian, (eds) *Freedom and Responsibility in Reproductive Choice* (Hart Publishing, 2006) 131.

develop strategies to protect children who are in danger from abusive parents or suboptimal living conditions, and is now being used to refer to all children.[988] Parents themselves can be seen as sources of risk if they cannot cope with the stresses of parenting.[989] Hoffman's exploration of how to develop resilience in children in all families, not just those deemed 'at risk' shows this wider trend towards 'intensive parenting' which demonstrates a 'cultural and class bias' towards a middle class parenting ethos.[990] Parenting itself is seen as a 'risky business', and if one gets it 'wrong' than this can have life-changing and devastating consequences for the child in question.[991] Avoiding risk is seen as an important part of responsible parenting. Misjudging any potential risks can be cause for allegations of irresponsible parenting.[992] Some authors argue this aversion to risk has gone too far, creating an overreliance on parenting experts and not allowing children to develop the ability to cope with small elements of risk, which affect their ability to function well as adults.[993] Risk and child welfare was the primary concern of the courts in *Dickson* and *Mellor,* and remains one of the main factors by which prisoners in England and Wales applying for AI are assessed.[994] If perceived standards of parenting are set high for parents in free

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[988] Ellie Lee, Jan Macvarish, Jennie Bristow, 'Risk, health and parenting culture.' (2010) 12 Health, Risk & Society 293, 295.
[989] Diane M. Hoffman, 'Risky investments: Parenting and the production of the "resilient child" ' (2010) 12 Health, Risk & Society 385.
[990] ibid 387.
[991]Ellie Lee, Jan Macvarish, Jennie Bristow, 'Risk, health and parenting culture.' (2010) 12 Health, Risk & Society 293, 295
[992] One example of this from the UK is the case of the Schonrocks who let their children aged five and eight cycle to school unsupervised. The headteacher threatened to contact the authorities if they continued to let their children cycle to school unsupervised. Richard Savill 'Couple warned over allowing children to cycle to school alone' (*The Telegraph,* 04 July 2010) <http://www.telegraph.co.uk/news/uknews/7871046/Couple-warned-over-allowing-children-to-cycle-to-school-alone.html> accessed 25 April 2015.
[993] Jennie Bristow, 'The Double Bind of Parenting Culture: Helicopter Parents and Cotton Wool Kids' in Ellie Lee, Jennie Bristow, Charlotte Faircloth, Jan Macvarish (eds) *Parenting Culture Studies* (Palgrave Macmillan, 2014) 202.
[994] See Appendix.

society, it may be argued that prisoners and their single partners would struggle to reach them. This may make it difficult to gain the right to procreate, and make it difficult for their decision to procreate gain social acceptance from the wider community. This will be discussed in greater detail in the next chapter.

The Mother

In order to explore what mothering is and whether this differs to what fathers do, thus justifying a different approach for male and female prisoners, it is important to define what 'mothering' means. Forcey defines mothering as 'a socially constructed set of activities and relationships involved in nurturing and caring for people.'[995] Arendell describes the 'ideology' of 'intensive mothering.'[996] This ideology requires mothers to be completely devoted to the needs of others, and is tied up with traditional ideas of a nuclear family formed from a traditional heterosexual, Caucasian, and middle class marriage.[997]

Rich divides motherhood up into two distinct meanings: '… the *potential relationship* of any woman to her powers of reproduction and to children; and the *institution*, which aims at ensuring that the potential- and all women- shall remain under male control.'[998] When discussing mothering, Rich recognises that mothering as an individual status can be disempowering for women.[999] Some authors argue that a gendered approach to parenting in which the mother takes primary care and responsibility for childcare is based upon biological principles. In studies of mammalian animals, higher levels of the hormone oxytocin have

[995] Linda Rennie Forcey, 'Feminist Perspectives on Mothering and Peace' in Evelyn Nakano Glenn, Grace Chang, Linda Rennie Forcey, *Mothering: Ideology, Experience and Agency* (Routledge, 1994) 357.
[996] Terry Arendell, 'Conceiving and Investigating Motherhood: the Decade's Scholarship' (2000) 62 J Marriage & Fam 1192, 1194.
[997] ibid.
[998] Adrienne Rich, *Of Woman Born; Motherhood as Experience and Institution* (Virago, 1977) 13.
[999] ibid.

been associated with bonding behaviours and maternal care.[1000] Similarly, mothers who have higher level of oxytocin demonstrate more bonding behaviours than other mothers who had lower levels. Some authors argue that physiology alone is not enough to explain the wide variations in how childcare arrangements are made and expressed in different cultures.[1001] Hays argues that the care of children is only reliant in a small part on biology; the majority of approaches to parenting are due mainly to social norms and constructions of parenthood.[1002]

As society evolved into the modern age, mothers were viewed as the moral keeper of the domestic sphere, with primary responsibility for child rearing.[1003] In terms of the dominant norms of parenting, it is assumed that most women will have children and will want to be their primary carers, and will do so with devotion.[1004] The 'ideology' of mothering and stories about mothers perpetuates the ideal of self-sacrifice, which avoids discussing whether one can choose to be a mother after birth has occurred.[1005] Hays explored the concept of gendered ideology of parenting which emphasised the primary importance of the mother.[1006] She found through qualitative interviews with mothers, regardless of social status, that they thought of the work of mothering as intensive and child centred. Their approaches were expressed in different ways due to the lack or availability of resources, but all approaches had a child-centred ideology at their

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[1000] Megan Galbally, Andrew James Lewis, Marinus van Ijzendoorn, Michael Permezel, 'The Role of Oxytocin in Mother- Infant Relations: A Systematic Review of Human Studies' (2011) 19 Harv Rev Pysch 1.
[1001] Sharon Hays, *The Cultural Contradiction of Motherhood* (Yale University Press, 1996) 13.
[1002] ibid.
[1003] ibid 33.
[1004] Evelyn Nakano Glenn, 'Social Constructions of Mothering' in Evelyn Nakano Glenn, Grace Chang, Linda Rennie Forcey, (eds) *Mothering: Ideology, Experience and Agency* (Routledge, 1994) 3.
[1005] Katherine O'Donovan, Jill Marshall, 'Chapter 6 After Birth: Decisions About Becoming a Mother' in Alison Diduck, Katharine O'Donovan, (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006) 109.
[1006] ibid 45.

core.[1007] This creates a cultural contradiction between the intensive methods of childcare espoused by guidance and parenting discourses and the reality of mothers who spend more time in paid work. Whilst in recent years, it can be argued that the focus has moved away from just 'mothers' towards intensive parenting, Shirani et al argue that debates about intensive parenting have tended to focus on mothers, with the assumption that they provide the majority of childcare.[1008]

Douglas and Michael's work follows on from Hay's, by explaining that the development of intensive mothering is a method of patriarchal oppression that controls women, by creating impossible demands and high standards that most women can never reach.[1009] These demands are created by the media, who highlight celebrity women, who appear to be juggling all of the requirements to be a successful intensive mother: a good job, wage, and child-centred approach. This then induces guilt in mothers by referring to the dangers of not parenting correctly.[1010]

The work of 'parenting' and the role of 'parent' have widened as the importance of different aspects of childhood have been explored and researched.[1011] Enos identifies the 'dominant' family ideology, which she specifically relates to mothering. She states that the 'ideal family' will live at one

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[1007] Sharon Hays, *The Cultural Contradiction of Motherhood* (Yale University Press, 1996) 115.
[1008] Fiona Shirani, Karen Henwood, Carrie Coltart, Meeting the Challenges of Intensive Parenting Culture: Gender, Risk Management and the Moral Parent' (2012) 46 Sociology 25, 26.
[1009] Susan Douglas, Meredith Michaels, *The Mommy Myth* (Simon & Schuster, 2005) 50; D Lynn O'Brien Hallstein, 'Conceiving Intensive Mothering' (2006) 8 J Ass Res Mothering 96, 98.
[1010]Susan Douglas, Meredith Michaels, *The Mommy Myth: The Idealization of Motherhood and How it Has Undermined Women* (Free Press, 2005) 50, 85.
[1011] Susan J Douglas, Meredith W Michaels, *The Mommy Myth: The Idealization of Motherhood and How it Has Undermined Women* (Free Press, 2005) 235; Sharon Hays, *The Cultural Contradiction of Motherhood* (Yale University Press, 1996) 13.

address, have a male who provides economic support for the family unit.[1012] Each individual family member is socialised according to their gender role. The interests of all family members are 'harmonious' and families are self-sufficient economically.[1013]

Mothers who do not have custody of their children, either through choice or because of circumstances such as imprisonment are thought of as deviant mothers. These women 'go against the natural tendency' for women to be the primary caregivers of children. Fischer stated that it is considered 'noteworthy' for a father rather than a mother to not have primary custody of children. [1014] In her doctoral research, Bemiller noted that some of the 16 women that she interviewed suffered social stigmatisation because of their 'deviant' status as non-custodial mothers.[1015] She noted that women related feelings of embarrassment about losing custody, and found themselves accused of being unfit mothers. Many people assumed that that their child was removed for their own safety. This was often not the case, but was mostly because the mother was unable to provide for her child financially.[1016] Separation from their children is often not voluntary. Herrerías' research with 285 mothers found that 84% of mothers had been separated from their children against their will, even in some cases despite evidence of spousal abuse.[1017]

[1012] Sandra Enos, *Mothering from the Inside: Parenting in a Women's Prison'* (State University of New York Press, 2001) 22.
[1013] Ibid.
[1014] Judith L Fischer, 'Mothers Living Apart From Their Children' (1983) 32 Fam Rel 351
[1015] Michelle L Bemiller, 'Mothering on the Margins: The Experience of Noncustodial Mothers' (PhD Thesis, University of Akron, December 2005) 142.
[1016] ibid 142-145.
[1017] Catalina Herrerías, 'Inequities Faced By Noncustodial Mothers' (2008) 3 J Interdiscip Fem Thought Article 3 http://digitalcommons.salve.edu/cgi/viewcontent.cgi?article=1021&context=jift accessed 25 April 2015.

The Father

'What of Father?' The title of the chapter concerning fathers in *The Child, The Family and the Outside World'* by Winnicott consider fathers almost as an afterthought. Winnicott sees the role of the father as peripheral to the mother.[1018] Traditional definitions of fathering view the male parent as someone who provides. The 'good father' was seen as a provider, an individual who earns money for the family outside of the home.[1019] In comparison with definitions of 'mothering' definitions of the responsible father concern providing financially and emotionally for their child, and sharing responsibility with the mother.[1020]

Modern interpretations of parenting have moved away from the distant father figure. It could still be argued however that fathers are still viewed as taking a more peripheral role in the care of infants and young children. Sunderland terms this as the 'Part-time father/Mother as main parent.'[1021] Within some heterosexual relationships, mothers are seen as the main gatekeeper of the relationship between fathers and children. The father's role is seen as secondary to that of the mother, he is a 'helper' rather than as an active, fulltime parent.[1022] In the same way, Winnicott views the father as mother's 'helper': the '…father is needed to give mother moral support, to be backing for her authority…'[1023] This idea is further reinforced by Biblarz and Stacey who state:

> 'The argument that the children need both a mother and father presumes that mothering and fathering involve gender-exclusive capacities. The "essential father" is a disciplinarian, problem solver and playmate who

[1018] Donald Woods Winnicott, *The Child, the Family, and the Outside World* (Pelican, 1964) 111.
[1019] Berit Brandth, Elin Kvande, 'Masculinity and child care; the reconstruction of fathering' 46 (1998) Sociological Rev, 293, 299.
[1020] William J. Doherty, Edward F. Kouneski, Martha F. Erickson, 'Responsible Fathering: An Overview and Conceptual Framework' (1998) 60 J Marriage & Fam 277, 279.
[1021] Jane Sunderland, 'Baby Entertainer, Bumbling Assistant and Line Manager: Discourses of Fatherhood in Parentcraft Texts' (2000) 11 Discourse Society 249, 257.
[1022] ibid 260.
[1023] Donald Woods Winnicott, *The Child, the Family, and the Outside World* (Pelican, 1964) 115.

> provides crucially masculine parenting…Mothers provide nurturance, security, and caretaking.'[1024]

Evidence exists of these stereotypes being reinforced in mainstream parenting guidance for parents.[1025] The majority of children in the UK and the USA still live in two-parent families, and the majority of these are heterosexual.[1026] A father's role as the main wage earner for the family is still a relevant concern, as many women work part time.[1027] Despite these traditional divisions, fathers have been asserting their legal rights to fatherhood and have been moving towards more equal division of the work of parenting.[1028] In their review of twentieth century literature on fatherhood, Atkinson and Blackwelder argue that the increase in the term 'parenting' as opposed to either 'mothering' or 'fathering' indicates that 'most people think that fathers and mothers should be engaging in the same behavior regardless of what they actually do.'[1029] Other

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[1024] Timothy J Biblarz, Judith Stacey, 'How Does the Gender of Parents Matter?' (2010) 72 J Marriage & Fam 3, 4

[1025] Jane Sunderland, 'Parenting or Mothering? The case of modern childcare magazines' 17 (2006) Discourse Society 503, 519.

[1026] 60% of children in 2012 were living in families where both parents were married (this is heterosexual marriage as this was prior to the Marriage (Same Sex Couples) Act 2013 (UK). Office for National Statistics *Families and Households 2013* (Office for National Statistics, 2013) 4 (Table 1); 68% of children in the USA live within a two-parent family, and 64% of these parents are married. See Office for US Census Bureau 'Family Structure and Children's Living Arrangements' (*Forum for Child and Family Statistics,* 2014). <http://www.childstats.gov/americaschildren/tables/fam1a.asp?popup=true> accessed 25 April 2015.

[1027] Brid Featherstone, 'Taking Fathers Seriously' (2003) 33 Brit J Social Work 239, 240.

[1028] Sheldon notes that the case of *Re D* is one example of a father claiming paternal rights rather than trying to evade them (see Sally Sheldon 'Reproductive Technologies and the Legal Determination of Fatherhood' (2005) 13 Feminist L Stud 349, 355). In *Re D (A Child Appearing by Her Guardian Ad Litem) (Respondent)* [2005] UKHL 33 an unmarried couple had commenced IVF treatment with donor sperm. The first treatment was unsuccessful. The woman then had further embryos implanted, without informing the clinic that she and her partner had split up. Once the mother had given birth to the child, R, her former partner B, applied for a declaration of paternity. In the first instance of *Re D (A Child Appearing by Her Guardian Ad Litem) (Respondent)* [2002] 2 FLR 843 Hedley J considered B as the legal father within the meaning of S28(3) of the Human Fertilisation and Embryology Act 1990. Hedley J granted indirect contact between R and D. D appealed in both the Court of Appeal and House of Lords. It ruled that R did not have paternity but refused to change the ruling of the lower court. R retained contact with the child.

[1029] Maxine P Atkinson, Stephen P Blackwelder, 'Fathering in the 20th Century' (1993) 58 J Marriage & Fam 975, 984

research, such as that by Henwood and Proctor highlight how the majority of the new fathers that they interviewed valued the 'new father' role, citing the ideal father as one who is child-centred, selfless and sensitive.[1030] Many of the fathers also noted the conflict they felt between the desire to care for their children, and be 'hands on' whilst the social expectation that required them to work outside of the home full time remained. As well as involved and concerned fathers, a man can also be considered to be a 'father' without being involved with his children, or even in contact with them.[1031] However, 'fathering' can only occur when the father and child are in a relationship with regular contact.[1032]

Biblarz and Stacey argue that one of the reasons that many studies point to differences in parenting styles and roles between men and women is because the majority of studies examine traditional heterosexual couples who 'fall into' socially accepted gender roles for parenting.[1033] In these studies, mothers concentrate upon childcare and domestic work whilst fathers spend more time on traditional roles such as earning money, and more 'masculine' tasks.[1034] However, there has been little attempt to examine how families operate when there are two parents of the same sex, and how gender roles affect these parents.[1035] Some research shows that lesbian parents are raising children with similar outcomes to those in heterosexual two-parent families, demonstrating that gender is not the

[1030] Karen Henwood, Joanne Proctor, 'The 'good father': Reading men's accounts of paternal involvement during the transition to first-time fatherhood' (2003) 42 Brit J Social Psych 337, 347.
[1031] Brid Featherstone 'Taking Fathers Seriously'(2003) Brit J Soc Work 239, 242.
[1032] ibid.
[1033] ibid 4.
[1034] Leslie D. Hall, Alexis J. Walker, Alan C. Acock, 'Gender and Family Work in One-Parent Households' (1995) 57 J Marriage & Fam 685, 690 (Even in single-parent families, whilst the time spent with children did not differ between mothers and fathers, the type of household work was gendered, with men spending more time on traditionally masculine work). Daniel N. Hawkins, Paul R. Amato, Valerie King, 'Parent-Adolescent Involvement: The Relative Influence of Parent Gender and Residence' (2006) 68 J Marriage & Fam 125, 133 (Separated parents still showed a gendered bias towards some parenting activities).
[1035] Timothy J Biblarz, Judith Stacey, 'How Does the Gender of Parents Matter?' (2010) 72 J Marriage & Fam 3, 5.

primary factor in deciding whether children flourish or founder within a family unit.

Summary

The majority of people procreate without public interference, as their autonomy is strongly protected. A pregnant woman may be subject to significant moral and social pressures, but she is not subject to many specific legal restrictions. She is prohibited from aborting her foetus after a certain gestation in most circumstances, but she is free to smoke, drink and engage in risky behaviour even if it may damage her foetus. The autonomy of the competent woman is respected to such a degree that she may not be operated on against her will, even if this will lead to the death of her foetus. This is justified; as to subject a pregnant woman to legal restrictions would place her interests below those of a foetus that has no legal or actual existence separate from the mother. Restrictions on the fertility of those in free society are very rare, apart from some US cases, which restrict fertility as a condition of probation.

It can be seen that there is a strong presumption in favour of autonomy in the choices individuals make when selecting a partner with whom to procreate. When the foetus is born and gains a separate existence from the mother, state interest in the process of parenting then increases, and parenting itself becomes subject to a number of legal and social requirements, such as minimum educational requirements. These act as a minimum legal threshold, which is designed to protect the child. A parent's relationship with their child reflects this change, with reference made to parental 'duties' and 'responsibilities' rather than parental rights.

Gender and parenting still have a large influence over how children are reared within heterosexual partnerships. Whilst fathers take on more childcare in

addition to the view of the traditional role of provider, mothers are still seen as the primary carers of small children. The perceptions of expected standards of parenting have become more intensive since Winnicott's described the 'good enough mother.' These standards are often unrealistic, leading to parents becoming increasingly risk averse. Also, these standards of parenting are hard enough for those in free society to cope with, many would argue that prisoners would not have the resources to meet these standards. Whether prisoners can parent effectively from prison and what the adverse effects of parental imprisonment on children are will be considered in the final chapter.

Chapter Nine: Prisoners and Parenthood from Prison

Introduction

In both England and Wales and the USA, many children are affected by the imprisonment of either one or both prisoners. In the USA it is estimated that 1.7 million children experienced the imprisonment of a parent in 2007.[1036] In England and Wales in 2009, there were estimated to be around 200,000 children affected each year affected by the imprisonment of a parent.[1037] The figure across Europe is estimated to be around 800,000.[1038] In both England and Wales and the USA, there appear to be few official and systematic schemes to collect this data.[1039]

This chapter will examine the challenges of parenting from prison. Parenting from within prison, especially behind closed and restricted conditions can be extremely difficult. Many prison regimes view family contact as a privilege and this approach can cause prisoners to become alienated from their relatives, leading to increased risks of recidivism on release.[1040] Children can display negative behaviours and suffer negative consequences as a result of a

[1036] Lauren E Glaze, Laura M Maruschak, *Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children* (US Department of Justice, 2008, revised 2010) 1.
[1037] Kim Williams, Vea Papadopoulou, Natalie Booth, *Prisoners' childhood and family backgrounds: Results from the Surveying Prisoner Crime Reduction (SPCR) longitudinal cohort study of prisoners* (Ministry of Justice Research Series 4/12, 2012) 18.
[1038] Agnieszka Martynowicz, *Children of Imprisoned Parents* (The Danish Institute for Human Rights, 2011) 6.
[1039] Joyce A Arditti, Jennifer Lambert-Shute, Karen Joest, Saturday Morning at the Jail: Implications of Incarceration for Families and Children' (2003) 52 Fams Relations 195, 196; John Murray, 'The cycle of punishment: Social exclusion of prisoners and their children' (2007) 7 Criminology & Criminal Just 55.
[1040] In the USA, certain visitors can be excluded for security or other reasons if required and prisoners do not have a right to receive visits from certain visitors (*Kentucky Department of Corrections v Thompson* 490 US 454, 460 (1989). Many jurisdictions view prison visits as a privilege and not a right. Alice Diver, 'The 'Earned Privilege' of Family Contact in Northern Ireland: Judicial Justification of Prisoners' Loss of Family Life' (2008) 47 How J 486.

parent being imprisoned. These negative consequences can include mental health issues; lower educational achievement and an increased likelihood for entering prison themselves.[1041] The theoretical causes of the adverse effects the children of prisoners suffer will be discussed. In order to tackle and ameliorate the negative effects of a parent's imprisonment, it is important understand the root cause of the negative effects, so that they can be addressed effectively.

Next the realities of parenting from behind bars will be considered. There are considerable barriers towards both men and women being effective parents, which are caused by their offence, by the physical situation of imprisonment and by restrictions, which affect their ability to remain in contact with their children. These restrictions can affect both genders differently. Fathers are traditionally expected to be financial providers for their families, which is impossible for prisoners prevented from earning a wage. Mothers are traditionally expected to provide care and support to their children, but this is hindered when women remain physically separated from their children, who often cannot visit because of the cost and expense involved.

The chapter will finally consider methods that can be used to ameliorate the negative effects of having a parent in prison. Various initiatives exist within prisons, community based facilities and 'halfway' houses. These schemes are designed to help prisoners and their families to maintain a relationship with their existing children and partners, including babies enabling them to actively parent their children. Mother and baby units, enhanced visits, family and parenting courses and groups run by voluntary organisations promote normal family

[1041] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 135; Marieke van de Rakt, Joseph Murray, Paul Niewbeerta, 'The Long-Term Effects of Paternal Imprisonment on Criminal Trajectories of Children' (2012) 49 J Res Crime & Delinquency 81, 83.

relationships as far as possible within the prison system, increasing attachment between children and their parents in prison. If these interventions were more widely adopted, then prisoners' links with their families could be improved and procreation should then be seen as a step towards prisoners realising a normal family life.

Child Welfare

Child welfare is a vital concern of prison authorities, governments and of course, parents. It is one of the primary concerns of Ministers in England and Wales when a prisoner applies for access to AI.[1042] The Children Act 1989 in England and Wales makes the welfare of the child a primary consideration in all legal cases concerning children.[1043]

'Child welfare' is vague term however and can mean different standards of parenting and care in different situations. Storrow highlights that within law,

> '…child welfare is a multi-faceted concept ranging from narrow inquiries about protecting children from physical harm and abusive parents on the one end of the spectrum to expansive questions about what promotes a child's best interests on the other.' [1044]

Within child protection situations, child welfare is what Budd terms a 'minimal parenting standard.'[1045] It is a safety net, the minimal level at which the child's safety, mental and physical needs can be cared for.[1046] In the case of the ministerial assessment of prisoners' parental suitability, it could be argued that their expected standard of welfare is higher. On the face of it, this test appears similar to the welfare test that putative parents have to pass when applying for licensed fertility treatment in England and Wales. Jackson argued that in the context of fertility treatment, the requirement to turn down potential parents because being conceived would not be in the putative child's best interests is

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[1042] See Appendix.
[1043] Children Act 1989 s1.
[1044] Richard F. Storrow, 'The Bioethics of Prospective Parenthood: in Pursuit of the Proper Standards of Gatekeeping in Infertility Clinics' (2007) 28 Cardozo L Rev 101, 118. See also John A Robertson 'Procreative Liberty and Harm to Offspring in Assisted Reproduction' (2004) 30 Am JL & M 7.
[1045] Karen S Budd, 'Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model' (2001) 4 Clinical Child & Fam Psychology R 1, 3.
[1046] ibid.

'puzzling.'[1047] Non-existence for the child would never be conceivably in their best interests, apart from in the direst of circumstances.[1048] She suggests instead, that the test is intended as a test of 'aptitude' of the ability of the potential parents to raise a child successfully.[1049] In *Dickson,* reference was made to the 'insufficiency of resources to provide for the material welfare of any child.'[1050] Both Court of Appeal judgments in *Dickson* and *Mellor* suggested that the applicants' relationships had not been properly tested outside of the prison environment, also causing concern for the stability of the family home.[1051] This suggests that what is also being tested by is parental competence, which judging from the case law and FOI request, requires two parents in a strong relationship who are financially independent. This is a higher standard than one which is normally required by social workers and child protection agencies do not take children into care just because their parents rely on state benefits or because they are raised in a single parent family. Child welfare concerns are also considered very closely by corrections departments in US states when deciding whether or not women are allowed access to mother and baby unit facilities, or whether parents resume legal custody of their children on release from prison.[1052]

[1047] Emily Jackson, *Regulating Reproduction, Law, Technology and Autonomy* (Hart Publishing, 2001) 192; Human Fertilisation and Embryology Authority, *Code Of Practice, 8th Edition* (Human Fertilisation and Embryology Authority, 2009, revised 2014) s8.10-8.11.
[1048] ibid.
[1049] Emily Jackson, *Regulating Reproduction, Law, Technology and Autonomy* (Hart Publishing, 2001) 192.
[1050] *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 7.
[1051] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 1472 para 6; *Dickson and Dickson v Premier Prison Service Ltd and Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 7.
[1052] The criteria applied to women for access to these facilities does not appear to be as high as the standard prisoners applying for children are expected to meet, there is no requirement for women to be in a stable relationship or financially independent. The standards are designed to ensure minimum thresholds of safety from harm. For example, in California, requires that the offenders be non-violent and be capable of caring for them to enter the Community Mother Prisoner Program. See California Department of Corrections & Rehabilitation 'Community Prisoner

Corrections officials share the concern of prisoners procreating during private visits, who then produce children that they cannot financially support. New Mexico removed private visits for its prisoners after reports about a prisoner Michael Guxman fathering four children by four different women, whilst not paying any child support.[1053]

One justification for prisoners being required to satisfy higher welfare standards is that the state is asked to be a party to the creation of new life and they want to reduce the risk that any prisoner may fail to be an adequate parent. Parenting itself has become closely associated with risk and risk avoidance. The development of a culture of risk management and the 'concept of children at risk' is argued to be recent.[1054] The concept of risk, both Furedi and Lee argue, has developed from a neutral concept of 'probability' is now associated with negative outcomes.[1055] Thus, the foetus in utero or even putative child can be perceived to be at risk, even though these risks can often be unknown or unquantifiable.[1056] In the same way as parents are seen as a 'manager of risk', it could be argued that the Government Minister responsible for giving prisoners permission to access AI

Mother Program (CPMP) Eligibility Criteria' (*California Department Corrections & Rehabilitation)* http://www.cdcr.ca.gov/Adult_operations/FOPS/docs/CPMP%20Brochure%20(2-25-13).pdf accessed 1 May 2015. To access the Federal Bureau of Prisons Mothers and Infants Nurturing Together (MINT) programme, the prisoners must be a non-violent offender serving less than 5 years in prison. See Bureau of Prisons 'Female Offenders' (*Federal Bureau of Prisons,)* http://www.bop.gov/inmates/custody_and_care/female_offenders.jsp accessed 1 May 2015.

[1053] Anonymous, 'Convicted 'rapist and killer' marries four times and fathers as many children from New Mexico prison… prompting lawmakers to rethink conjugal visits' (*Daily Mail,* 26 October 2012) http://www.dailymail.co.uk/news/article-2223327/Convicted-rapist-killer-marries-times-fathers-children-New-Mexico-prison--prompting-lawmakers-rethink-conjugal-visits.html accessed 5 May 2015.

[1054] Frank Furedi, *Paranoid Parenting: Why Ignoring the Experts May be Best for Your Child* (Continuum, 2008) 41; Ellie Lee, 'Introduction' in Ellie Lee, Jennie Bristow, Charlotte Faircloth, Jan Macvarish, (eds) in *Parenting Culture Studies* (Palgrave Macmillan, 2014) 10.

[1055] ibid.

[1056] Ellie Lee, 'Introduction' in Ellie Lee, Jennie Bristow, Charlotte Faircloth, Jan Macvarish (eds) in *Parenting Culture Studies* (Palgrave Macmillan, 2014) 11.

is also managing risk.[1057] The risks of potential adverse outcomes for the children of prisoners has been researched in some detail, but that is not to say that every child of a prisoner conceived through AI would be guaranteed to suffer these outcomes. The single successful known prisoner who was granted access to AI in

England and Wales shows the normal presumption that people are competent parents is reversed in the situation of prisoners and their partners.[1058] Parents who conceive their children naturally are presumed by the state to act in their child's best interests unless shown otherwise by their circumstances or actions.[1059] A prisoner's fitness to parent is called into question because they have a criminal record, but this does not automatically mean that all prisoners are unfit parents. If all prisoners were thought to be unfit parents because of their criminality then this would mean that all prisoners would have parental responsibility terminated on admission to prison. This usually happens only if the parent poses a danger to their child, or if their incarceration is of such a long duration that they will not be released until after their child has grown up. The negative consequences of parental incarceration could be used as a justification to prevent prisoners from having children. The origins of these negative consequences and the likelihood of children being affected by a parent in prison will be considered next.

[1057] ibid.
[1058] *Dickson v United Kingdom* (2008) 46 EHRR 41; Nick Collins, 'Prisoner granted right to father child from jail' (*Telegraph*, 1 June 2011) http://www.telegraph.co.uk/news/uknews/law-and-order/8549149/Prisoner-granted-right-to-father-child-from-jail.html accessed 1 July 2015.
[1059] Heather Draper, Ruth Chadwick, 'Beware! Preimplantation genetic diagnosis may solve some old problems but it also raises new ones' (1999) 25 JME 114, 117; Emily Jackson, *Regulating Reproduction, Law, Technology and Autonomy* (Hart Publishing, 2001) 195; Richard F. Storrow, 'The Bioethics of Prospective Parenthood: in Pursuit of the Proper Standards of Gatekeeping in Infertility Clinics' (2007) 28 Cardozo L Rev 101, 119.

Causes of Adverse Consequences in Children Following Parental Incarceration

It is undeniable that the children of prisoners are at risk of a range of negative outcomes, but the extent to which individual children are affected depends upon the crime their parent has committed, whether the child and parent continue to have contact and the support systems available to the child and their family. Murray and Farrington highlight four key theories, which explain how the negative consequences suffered by the children of prisoners arise. These are: trauma theories, modelling and social learning theories, strain theories and stigma and labelling theories and will be discussed in term.[1060] Knowing the root cause of the negative consequences suffered by children could help agencies involved with prisoners and their families to develop schemes to minimise and mitigate the negative effects that children suffer.

Trauma Theories

Trauma theories state that the separation of parent and child creates trauma, which leads to adverse outcomes for the child both at the time of the separation and in the future. Attachment theory argues that attachment to a primary carer as a baby and child is essential for the child to feel secure. This secure attachment is argued by some to be essential for the child to develop healthy relationships, as they grow older.[1061] It has been argued that anything that disrupts this process is traumatising to the children in the shorter-term leading to

[1060] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 172-176.
[1061] John Bowlby *Attachment and Loss: Vol 2: Separation: Anxiety and Anger* (Pelican Books, 1975; Reprinted 1987) 22-23; Joseph Murray, David P Farrington 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 172; Donald Woods Winnicott, 'Transitional Objects and Transitional Phenomena- A Study of the First Not-Me Possession' (1953) 34 Int'l J Psycho-Anal 89.

sadness and disruptive behaviour.[1062] Children of offenders, due to their disrupted attachment may be at increased risk for delinquent behaviour.[1063] Poehlmann found in her research of incarcerated mothers and their 54 children aged between 2.5 years and 7.5 years of age that the majority of the children displayed responses to their mother's imprisonment such as sadness, crying and repeatedly looking for their mothers. Half of the children were confused about what had happened to their mother, 40% of children demonstrated anger, or 'acting out' behaviours and 33% of children showed detachment

Strain Theories

Strain theory states that due to parental imprisonment, there is a loss of both social and economic capital. Social capital can be defined as 'an instantiated informal norm that promotes co-operation between two or more individuals.'[1064] According to Fukuyama this can be a simple reciprocal relationship between two people or complex doctrines such as religions, which encourage cooperation between people.[1065] Social capital is essential for the smooth running of modern society and social cohesion. The imprisonment of a parent places their child and the carer of the child under strain. Children may be required to leave the family home and enter social care, or may be cared for by their other parent or a grandparent, leaving their relationship under strain. The imprisonment of a parent can also reduce the income of a family unit.[1066] The prisoner's family is expected

[1062] John Bowlby, *Attachment and Loss: Vol 2: Separation: Anxiety and Anger* (Pelican Books, 1975, Reprinted 1987) 22-23; Julie Poehlmann, 'Representations of Attachment Relationships in Children of Incarcerated Mothers' (2005) 76 Child Development 679, 687.
[1063] Marieke van de Rakt, Joseph Murray, Paul Niewbeerta, 'The Long-Term Effects of Paternal Imprisonment on Criminal Trajectories of Children' (2012) 49 J Res Crime & Delinquency 81, 83.
[1064] Francis Fukuyama, 'Social capital, civil society and development' (2001) 22 Third World Q 7.
[1065] ibid.
[1066] The prisoner's family may have to meet large expenses to visit their relative. Christian conducted an ethnographic study on prison relatives using a bus to visit prisoners, and found that they could spend $80 on the visit, not including additional goods for the prisoner. Johnna

to meet a number of out of pocket expenses attached to supporting the offender, as well as the more obvious drop in income that can result from the incarceration of a family wage earner. Imprisonment may also reduce the ability of the prisoner to get a job once they are released, thus having a long-term negative effect on finances.[1067] Social capital is brought under pressure by the loss of the parent, increasing the strain of care giving as a single parent, which in turn can adversely affect the prospective life chances of the child.[1068] Children may often have unstable care arrangements that result from the imprisonment of their parents, such as being placed in care.[1069] They may have to move out of their family home, which often occurs if their mother is imprisoned and is a single parent.[1070]

Labelling/ Stigma Theories

Children can be bullied and stigmatised as a result of their parent's imprisonment, which affects their self-esteem and behaviour.[1071] Children of prisoners may experience bullying and stigmatisation at school, which affects their academic performance. Boswell and Wedge found that children experienced

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Christian 'Riding the Bus: Barriers to Prison Visitation and Family Management Strategies' (2005) 21 J Contemp Crim Just 31, 37-38. Comfort found that the relatives of the prisoners in her study had additional costs such as telephone and costs when visiting such as buying food from the visitors areas. Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2008) 102-108.

[1067] Marieke van de Rakt, Joseph Murray, Paul Niewbeerta 'The Long-Term Effects of Paternal Imprisonment on Criminal Trajectories of Children' (2012) 49 J Res Crime & Delinquency 81, 84.

[1068] Susan D Phillips, Alaattin Erkanli, Gordon P Keeler, E Jane Costello, Adrian Angold, 'Disentangling the risks: parent criminal justice involvement and children's exposure to family risks' (2006) 5 Criminology & Pub Pol 677, 693-4.

[1069] Marieke van de Rakt, Joseph Murray, Paul Niewbeerta, 'The Long-Term Effects of Paternal Imprisonment on Criminal Trajectories of Children' (2012) 49 J Res Crime & Delinquency 81, 84.

[1070] Only 5% of children of women prisoners in the UK remain in their family home after their mother is sentenced to prison. Prison Reform Trust *Reforming Women's Justice: Final report of the Women's Justice Taskforce* (Prison Reform Trust, 2011) i. In the USA, more than 40% of mothers arrested in state prison with minor children lived in single parent households, which would lead to those children being moved into alternative accommodation during their mother's incarceration. Lauren E Glaze, Laura M Maruschak, *Bureau of Justice Statistics: Special Report Parents in Prisons and Their Minor Children* (US Department of Justice, 2008, reviewed 30 March 2010) 5.

[1071] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 189; Gwyneth Boswell, Peter Wedge *Imprisoned Fathers and their Children* (Jessica Kingsley Publishers, 2002) 65

verbal abuse from their peers, which made them reluctant to attend school.[1072] Condry highlighted in her research with the families of offenders that many of them were treated as tainted, or guilty by association. She terms this 'secondary stigma', the offender's family are stigmatised by the conviction of their relatives. [1073] An example of this, identified by a study into the media reporting of sex crimes by Soothill and Walby shows how devastating the effects of stigmatisation can be on the offender's families. The wife and young children of a man convicted of rape experienced 'men urinating through the letter-box, and the children being roughed up at school.' [1074]

In the USA the problem is exacerbated further with the active publication of details of offenders online in various 'mugshot' galleries, which are publically accessible without restriction.[1075]

Modelling and Social Learning Theories

Social learning theory states that children imitate their elder's behaviour.[1076] This may be because the child is made aware of their parent's criminal tendencies when they are incarcerated.[1077] Sutherland states that through differential association theory, children learn criminal behaviour in the same way

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[1072] Gwyneth Boswell, Peter Wedge, *Imprisoned Fathers and their Children* (Jessica Kingsley Publishers, 2002) 67.
[1073] Condry's ethnographic research of the relatives of serious male and female offenders identified that relatives suffered 'secondary stigmatisation' arising from their conviction, which was based upon 'kin contamination.' Rachel Condry, *Families Shamed: The Consequences of Crime for Relatives of Serious Offenders* (Willan Publishing, 2007) 62, 69.
[1074] Keith Soothill, Sylvia Walby, *Sex Crime in The News'* (Routledge, 1991) 127.
[1075] Many states in the USA have publically available records for offenders and former offenders. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003). 107-12. One particularly disturbing example is the Maricopa County Mugshot board, where website viewers can actually vote for the 'best mugshot of the day.' Details of all detainees, including their alleged crime, is put online for anyone to view. Maricopa County Sheriff's Office, 'Mug Shots' (Maricopa County Sheriffs Office, 2015) <http://www.mcso.org/Mugshot/Default.aspx> accessed 10 May 2015.
[1076] Ross L Matsueda, 'The Current State of Differential Association Theory' (1988) 34 Crime & Delinquency 277, 296-298.
[1077] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 173.

that socially accepted behaviour is learned. Criminality is learned through small personal groups such as within a family group.[1078] Van de Rakt et al hypothesise that this 'modelling' behaviour may become stronger after early childhood and during adolescence when children have a greater understanding of their parent's offending.[1079] They hypothesise that children model offending behaviour, thinking it is normal.[1080] There is, however, no rigorous way to test whether the children of prisoners offend because they model their parent's behaviour or because of other factors such as poverty.[1081]

Effects of Parental Incarceration on Children

> 'We conclude that parental imprisonment is a strong risk factor (and possible cause) for a range of adverse outcomes for children, including antisocial behavior, offending, mental health problems, drug abuse, school failure, and unemployment.'[1082]

Risk of Imprisonment

One of the most studied areas of concern to both penologists and researchers is the risk that having a parent who has been in prison leads to the children themselves offending when they get older, thus continuing a cycle of imprisonment.[1083] Many authors claim that the children of prisoners are 5-6 times

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[1078] Ronald L Ackers, 'Is Differential Association/Social Learning Cultural Deviance Theory? (1996) 34 Criminology 229, 233.
[1079] Marieke van de Rakt, Joseph Murray, Paul Nieuwbeerta, (2012) 'J Res Crime & Delinquency' 49 J Res Crime & Delinquency 81, 84.
[1080] ibid.
[1081] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 173.
[1082] ibid 135.
[1083] John Hagan, Ronit Dinovitzer, 'Collateral Consequences of imprisonment for Children, Communities and Prisoners' in Michael Tonry, Joan Petersilia, (eds) *Prisons Vol 26 Crime and Justice: A Review of Research* (University of Chicago press, 1999) 146-7; Ann L Jacobs, 'Protecting Children and Preserving Families: a Cooperative Strategy For Nurturing Children of Incarcerated Parents' Paper Presented at the Family to Family Initiative Conference, Annie E Casey Foundation, Baltimore (*Banard Center for Research on Women,* October 1995) http://bcrw.barnard.edu/archive/prison/ProtectingChildren.pdf (accessed 29 April 2015); Marilyn C Moses, *Keeping Incarcerated Mothers and Their Daughters Together: Girl Scouts Beyond Bars* (US Department of Justice, 1995) 3; Charlene Wear Simmons, *Children of Incarcerated Parents* (California Research Bureau, 2000) 6; David W Springer, Courtney Lynch, Alan Rubin, 'Effects of a Solution-Focused Mutual Aid Group for Hispanic Children of Incarcerated Parents' (2000) 17

more likely to be incarcerated or convicted of a crime than their peers who do not have a parent in prison.[1084] In their review, Murray and Farrington were unable to find evidence for this statistic, claiming that the risk for antisocial behaviour for the children of offenders is more likely to be about three times that than the children of non-offenders.[1085]

One of the most comprehensive longitudinal studies on the effects of parental incarceration on children and their risk of adult offending behaviour is the Cambridge Study in Delinquent Development. It has followed 411 boys born in inner London in 1952-1953. The initial sample was created by selecting all of the boys in primary school in a one-mile radius of a research office. The subjects were divided into five different groups. The experimental group contained 23 boys who experienced parental imprisonment during the first 10 years of life. These boys were compared with the first control group of 227 boys who were not separated from a parent during the first 10 years of life. The second control group contained 77 boys whose parents were not imprisoned but were separated from

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Child & Adolescent Social Work J 431. See also Friedrich Lösel, Gill Pugh, Lucy Markson, Karen A Souza, Caroline Lanskey, *Risk and protective factors in the resettlement of imprisoned fathers with their families: Final Report January 2012* (University of Cambridge and Ormiston, 2012) 52. Researchers questioned family groups: male prisoners, their partners or former partners and children, looking at protective factors for resettlement and preventing reoffending on release. The sample size was 54 family sets (during imprisonment) and 40 family sets at follow up after release. At the time of the first interview, 3 of the children between 10-18, had received a police caution or warning whilst one had received a community punishment.

[1084] John Hagan, Ronit Dinovitzer, 'Collateral Consequences of imprisonment for Children, Communities and Prisoners' in Michael Tonry, Joan Petersilia, (eds) *Prisons Vol 26 Crime and Justice: A Review of Research* (University of Chicago Press, 1999) 146-7; Ann L Jacobs, 'Protecting Children and Preserving Families: a Cooperative Strategy For Nurturing Children of Incarcerated Parents' Paper Presented at the Family to Family Initiative Conference, Annie E Casey Foundation, Baltimore (*Banard Center for Research on Women,* October 1995) http://bcrw.barnard.edu/archive/prison/ProtectingChildren.pdf (accessed 29 April 2015), Marilyn C Moses, *Keeping Incarcerated Mothers and Their Daughters Together: Girl Scouts Beyond Bars* (US Department of Justice, 1995) 3; Charlene Wear Simmons, *Children of Incarcerated Parents* (California Research Bureau, 2000) 6; David W Springer, Courtney Lynch, Alan Rubin, 'Effects of a Solution-Focused Mutual Aid Group for Hispanic Children of Incarcerated Parents' (2000) 17 Child & Adolescent Social Work J 431.

[1085] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 140.

parents during the first 10 years because of hospitalisation or parental death. The third control group contained 61 boys whose parents were not imprisoned but were separated for reasons other than hospitalisation or death. The fourth control group contained 17 boys whose parents were imprisoned before their birth, but not after their birth or before their 18th birthday.[1086] Murray and Farrington found that parental imprisonment strongly indicated risk for 'antisocial personalities' at aged 32; thus 71% of boys compared with 19% of boys who were not separated from their parents and whose parents were not imprisoned.[1087] The authors did concede that the small sample size may have made the sample statistically unreliable, and that other risk factors for delinquency may have existed in conjunction with parental imprisonment.[1088] The same data set was reanalysed with data from the Swedish Project Metropolitan, which studied 7,719 males and 7,398 females born in 1953.[1089] Incarceration rates in Sweden were low; within Project Metropolitan 2% of children suffered the incarceration of a parent by the time they were 19 and 2% of children had a parent incarcerated prior to their birth.[1090] In comparison, 7% of children from the Cambridge study had a parent incarcerated during any time from age 0-19 and 4% had a parent incarcerated before birth (but not during childhood).[1091] In order to compare like with like between the cohorts, Murray et al compared the Cambridge study cohort with those families identified as working class in the Metropolitan study. Whilst

[1086] Joseph Murray, David P Farrington, 'Parental imprisonment: effects on boy's antisocial behaviour and delinquency through the life-course' (2005) 46 J Child Psychology and Psychiatry 1269, 1271.
[1087] ibid 1272-1273.
[1088] ibid 1276.
[1089] Joseph Murray, Carl-Gunnar Janson, David P Farrington, 'Crime in Adult Offspring of Prisoners: A Cross-National Comparison of Two Longitudinal Samples (2007) 34 Criminal Justice and Behavior 133,135.
[1090] ibid 137.
[1091] ibid.

Murray and Farrington identified that imprisonment carried an additional risk of children developing delinquent tendencies that were independent of separation, the Swedish data found that having a parent in prison did not predict whether the child would do on to offend, after controlling for parental convictions.[1092] Murray et al hypothesise that this was because Swedish prison sentences were shorter and that Swedish prison policies that promoted better contact between prisoners and their families ameliorated the effects of incarceration to some extent.[1093] There was also some evidence that children were diverted away from the criminal justice system into welfare more effectively in Sweden, thus reducing the likelihood of those children at risk ending up in prison.[1094]

Huebner and Gustafson's study of American children used data from the National Longitudinal Survey of Youth that initially studied men and women aged between 14 and 22 in 1979. In 1986 the study was expanded to include children born to mothers who were part of the 1979 survey. Huebner and Gustafson used data on 1697 adult offspring who were between 18 and 24 in 2000 and their mothers (1,258).[1095] A total of 26 or 2.1% of these mothers had been incarcerated between 1979 and 2000, and 31 or 1.8% of children had mothers who had ever been incarcerated (including before the children's birth).[1096] When maternal and offspring behaviours were considered together, maternal

[1092] Joseph Murray, David P Farrington, 'Parental imprisonment: effects on antisocial behaviour and delinquency through the life-course' (2005) J Child Psychology and Psychiatry 46 1269, 1274. For all 11 factors of delinquency measures (Antisocial personality at age 14, Antisocial personality at age 18, Antisocial personality at age 32, Poor life success, convicted juvenile, self-reported delinquency, self-reported violence, convicted of crime aged 17-25, convicted adult (age 26-40), and imprisoned by age 40) The weighted mean of all these measures of antisocial personality was large at 2.7 and significant (CI=1.8-4.2). Joseph Murray, Carl-Gunnar Janson, David P Farrington, 'Crime in Adult Offspring of Prisoners: A Cross-National Comparison of Two Longitudinal Samples (2007) 34 Criminal Justice and Behavior 133, 142.
[1093] ibid 145.
[1094] ibid.
[1095] Beth M Huebner, Regan Gustafson, 'The Effect of Maternal Incarceration on Adult Offspring Involvement in the Criminal Justice System' (2007) 35 J Crim Just 283, 286
[1096] ibid.

incarceration had a powerful effect on offspring. Adult offspring of incarcerated mothers were nearly three times as likely to be convicted of a crime and four times more likely to have been on probation.[1097] Maternal absence (without incarceration) also significantly increases the likelihood of the offspring of mothers in the study being convicted.[1098] Surprisingly though, there was no significant relationship between maternal incarceration and child offspring experiences of delinquency, peer pressure or 'emotional home environment.'[1099]

Mental Health Problems

Murray et al undertook a systematic review in order to investigate whether research does demonstrate a definitive link between parental incarceration and mental health problems in offspring.[1100] They found that there was 'a moderate overall association between parental imprisonment and child mental health outcomes, once covariates were controlled for.'[1101] The meta-analysis also found that there was a slightly elevated odds ratio for boys developing mental health problems over girls and a mother's incarceration was linked to a higher odds of mental health problems than a father being incarcerated, but the small sample sizes meant that these relationships require further detailed research.[1102] One large-scale study, the COPING study took four European jurisdictions: England and Wales, Romania, Germany and Sweden, and interviewed over 1500 children

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[1097] ibid 290.
[1098] Ibid.
[1099] ibid 291.
[1100] Joseph Murray, David P Farrington, Ivana Sekol, Rikke F Olsen, 'Effects of parental imprisonment on child antisocial behaviour and mental health: a systemic review' (*Campbell Systematic Reviews,* 2009) http://www.campbellcollaboration.org/lib/download/683/Murray_Parental_Imprisonment_Review.pdf accessed 1 May 2015. The research articles reviewed by Murray et al for this part of the analysis were
[1101] ibid 48.
[1102] ibid 50.

of prisoners and their parents and carers.[1103] The majority of the children had a father in prison, whilst 25% of the children interviewed in England and Wales had a mother in prison.[1104] Most children had visited their imprisoned parent; these figures were highest for England and Wales at 92.9%, with the lowest visits being received in Sweden at 75.9%.[1105] Children over 11 years old were asked to complete a Strength Difficulties questionnaire in order to measure risks of mental health problems and 25% of prisoners children demonstrated that they were at risk of mental health problems.[1106] The study concluded that in general children suffer poorer mental health outcomes when a parent is imprisoned and this effect is largest in children over 11 years old.[1107] Factors which promoted resilience were strong family relationships and looking to the future when the incarcerated parent was released.[1108] Contact with the incarcerated adult also helped to maintain family bonds and increase a child's wellbeing.[1109] The authors recommended that once a prisoner had been arrested, that his status as a parent should be taken into account when being sentenced.[1110] If a prisoner is to be sent to prison then he should be kept as local to his family as possible, with children being allowed regular contact visits (if appropriate).[1111] Relevant NGOs should be available to support parents and children in maintaining family relationships.[1112]

[1103] Adele Jones, Bernard Gallagher, Martin Manby, Oliver Robertson, Matthias Schützwohl, Anne H Berman, Alexander Hirschfield, Liz Ayre , Mirjam Urban, Kathryn Sharratt, Kris Christmann, *Children of Prisoners: Interventions and mitigations to strengthen mental health* (University of Huddersfield, 2013) 36.
[1104] ibid 210.
[1105] The authors argue that Swedish prisoners probably received fewer visits because they received home furlough, or short home stays in preparation for release, so there was less need for prisoners to receive visitors ibid 217.
[1106] ibid 275.
[1107] ibid 292.
[1108] ibid 296-297.
[1109] ibid 304.
[1110] ibid 552.
[1111] ibid 553.
[1112] ibid 577.

Poorer Academic Outcomes

The COPING study found that 12.9% of children in the England and Wales sample had been excluded from school, as opposed to 2.8% in Sweden.[1113] This could be due in part to a greater use of welfare provisions in Sweden, which divert children with behavioural problems down a child welfare route rather than a more punitive route. Children in Sweden may arguably get better quality contact with their imprisoned parent through residential furloughs or home leave. Trice and Brewster found that 36% of the children of prisoners dropped out of school compared to 7% of their counterparts whose parents were not imprisoned.[1114] It is difficult to say whether imprisonment itself is the major factor causing children to be excluded or drop out, or whether it is a combination of different social factors causing the children of prisoners to experience poor educational attainment.

Prisoners Parenting from Prison

If it is accepted that prisoners do retain a right to procreate then it becomes necessary to examine what this means in practice for prisoners. Prisoners within England and Wales and the USA are not afforded the same level of protection. Legally, whether the right to procreate is removed or just suspended was not resolved consistently within the cases. If a prisoner is permanently sterilised then it is clear that their right to procreate is removed. In the case of prohibiting procreation by preventing either sexual intercourse or the use of medical alternatives, then some may argue that the right is merely suspended, to be regained once the prisoner leaves. For a prisoner who will never be released from prison, this distinction is meaningless, as they will be prohibited from procreating

[1113] ibid 265.
[1114] Ashton D Trice, JoAnne Brewster, 'The Effects of Maternal Incarceration on Adolescent Children' (2004) 19 J Police & Crim Psych 27.

for their natural life. Stating a right is suspended implies that the prisoner will one day have a chance of regaining it once they leave prison. It is inaccurate to claim that rights are suspended if the prisoner is never to be released, or will be executed. With the current restrictions against procreation for the vast majority of prisoners in both countries, it may be more accurate to say the right to procreate is removed on incarceration and regained on release from prison.

Restrictions on the right of prisoners to procreate could arguably be justified by three broad reasons. The first reason would be the right of the putative child to be born into a more favourable situation where their one parent (or perhaps even both parents) are not serving prison sentences. There are certainly proven risks associated with having a parent in prison, which have been covered earlier in this chapter. To argue that the child is better off not being born at all however would render the child out of existence, so the benefit in this particular situation could not be to the child itself, but perhaps to society in preventing an increase in single parent families.[1115] Sutherland argues that appeals to 'child welfare' are often used to justify limiting the rights of adults without considering the positive upbringing a child could receive in a single parent family, or without considering how non-resident and prisoner parents can use a number of methods to maintain contact with their families.[1116] She cautions: 'Let us not pretend that the protection of the welfare of the child is either simple or scientific in turning it into the new eugenics.'[1117] Williams states that the refusal of the authorities to

[1115] Elaine E Sutherland, 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?' (2003) 82 Or L Rev1033, 1049.
[1116] ibid 1065.
[1117] ibid.

allow prisoners to procreate is 'tantamount to the constructive sterilisation of prisoners while incarcerated.'[1118]

The second justification for limiting a prisoner's right to procreate may be the need to consider how respecting their right to procreate affects other prisoners and prison staff. Allowing prisoners to procreate could divert valuable resources away from other areas of prison life. Prisons on both sides of the Atlantic are subject to financial restraints, which might be stretched further if prisoners were allowed private visits, medical procedures to achieve pregnancy. Caring for pregnant prisoners in particular would cost a large sum of money, especially if they were to be allowed to keep their children in special facilities. Allowing male prisoners to procreate via AI with a female partner outside of prison would not create additional financial burdens as the prisoner's partner would raise the child. If one justified preventing women prisoners from procreating whilst allowing male prisoners however, this would be unjust discrimination based upon gender. Equally, however, removing all prisoners' rights because of the cost of allowing one group of prisoners to exercise their rights is also unjust. Facilities to promote family relationships should be given budgetary priority, considering how important the family is in helping prisoners to desist from offending once they are released. Families can have a positive effect on prisoners even whilst still in prison, giving prisoners a reason to concentrate on rehabilitation.

The third justification often given to remove the right of prisoners to procreate, is the collective right of society to punish offenders. This assumes that prohibiting procreation is central to the punishment of imprisonment. The reasons

[1118] John Williams, 'The Queen on the Application of Mellor v Secretary of State for the Home Department. Prisoners and artificial insemination- have the courts got it right?' (2002) 14 Child & Fam L Q 217, 228.

for punishing are argued to be that society demands payment for the debt of the crime by the punishment, as well as the additional effects of deterrence and rehabilitation. It can be argued that the removal of freedom is the primary purpose of imprisonment, not the removal of the right to procreate. Removing the right to procreate for all prisoners does not further deterrence, as such little thought would be given at the time of the offence to the prospect of being childless whilst incarcerated. Removing the right to procreate also does nothing to further rehabilitation, in fact it could damage family relationships, leading to an increased risk of reoffending.

Women Prisoners and Obstacles to Pregnancy

A female prisoner who wants to become a mother would in most circumstances have to gestate a pregnancy in prison.[1119] It is because of this biological fact that most health services for new parents are directed at mothers, rather than fathers, and only prisons for women have mother and baby units in England and Wales and the USA. The primacy of the role of the mother is acknowledged by prison authorities in England and Wales and the USA, arguably given more importance than the role of the father. This can in turn be linked to normative constructions of motherhood and the importance of mothering.[1120]

[1119] The female prisoner may also donate eggs for a surrogate or for her female partner to gestate, but it is most likely that the prisoner will gestate the pregnancy herself, especially if she is in a heterosexual relationship.

[1120] In England and Wales prison staff must ensure all prisoners deal with urgent childcare needs on arrival: National Offender Management Service, *Prison Service Instruction 74/2011 Early Days In Custody: Reception In, First Night in Custody and Induction to Custody* (National Offender Management Service, 2011) paras 3.25- 3.27. General guidance is supplemented with specific guidance for women: National Offender Management, Service *Prison Service Order 4800 Women Prisoners* (National Offender Management Service, 2008) 10-11. Issue B. It is also stressed that enhanced prison visits should not be linked to the IEP Scheme for women prisoners. See National Offender Management Service, *Prison Service Order 4800 Women Prisoners* (National Offender Management Service, 2008) Issue G 17 and National Offender Management Service, *Prison Service Instruction 30/2013 Incentives and Earned Privileges* (National Offender Management Service, 2015) paras 9.6- 9.7.

Female prisoners who enter prison are more likely than the general population to be addicted to drugs, have blood borne diseases, or smoke.[1121] These factors are often combined with prior maternal histories of surviving abuse, poorer mental health and low levels of social support outside of the prison.[1122] Ironically, prisons can have an ameliorating effect on some prisoners, who may find that their removal from chaotic lives, where they receive regular meals and can reduce their drug intake increases the chances of them having a healthy baby.[1123] Prisoners may however be subject to poor or substandard maternity care, which can adversely affect the health of themselves and their babies.[1124] Prisoners may be shackled during pregnancy and labour.[1125] There are also reports of

[1121] Women prisoners have higher levels of blood borne infections and sexually transmitted infections as well as chronic drug addiction. Noelle E Fearn, Kelly Parker, 'Washington State's Residential Program: An Integrated Public Health, Education, and Social Service Resource for Pregnant Inmates and Prison Mothers' (2004) 2 Cal J Health Prom 34, 36-37; Nicolas Freudenburg, 'Adverse Effects of US Jail and Prison Policies on the Health and Well-Being of Women of Color' (2002) 92 Am J Pub Health 1895, 1896; Marion Knight, Emma Plugge, 'The outcomes of pregnancy among imprisoned women: as systemic review' (2005) 112 BJOG 1467. In research, of 505 female prisoners in England, Plugge et al found that that prior to entering prison 85% of prisoners smoked cigarettes, 75% had used illegal drugs in the previous six months before admission, 42% drank more alcohol than the recommended amount and 16% of them self-harmed in the month before they were imprisoned. Emma Plugge, Nicola Douglas, Ray Fitzpatrick, *The Health of Women in Prison Study Findings* (University of Oxford, 2006) 7.

[1122] Barbara A Hotelling 'Perinatal Needs of Pregnant, Incarcerated Women' (2008) 17 J Perinatal Ed 37, 39.

[1123] A systemic review by Knight and Plugge suggests that women who lead chaotic lives benefit from having medical care and meals in prison, which improves the outcomes they may have otherwise experienced in the community, including reducing the risk of low birth weight babies. Marion Knight, Emma Plugge, 'The outcomes of pregnancy among imprisoned women: as systemic review' (2005) 112 BJOG 1467, 1471. See also accounts from women describing prison as a place of stability whilst pregnant, in comparison with their life outside with regular meals and medical care. Katherine J Ferraro, Angela M Moe, 'Mothering, Crime and Incarceration' (2003) 35 J Contemp Ethnography 9, 25.

[1124] Jenni Vainak, 'The Reproductive and Parental Rights of Incarcerated Mothers' (2008) 46 Fam Court R 670; Barbara A Hotelling 'Perinatal Needs of Pregnant, Incarcerated Women' (2008) 17 J Perinatal Ed 37, 38.

[1125] There are 18 states that have legal restrictions on the use of shackles in pregnancy, specifically during labour, 24 states only have policy limitations on the use of shackles for pregnant women. Brian Citro, Jamil Dakwar, Amy Fettig, Sital Kalantry, Gail Smith, 'The Shackling of Incarcerated Pregnant Women: A Human Rights Violation Committed Regularly in the United States. An Alternative Report to the Fourth Periodic Report to the International Covenant on Civil and Political Rights' (*International Human Rights Clinic, University of Chicago Law School,* August 2013) <https://ihrclinic.uchicago.edu/sites/ihrclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf> accessed 23 April 2015. Shackling of pregnant prisoners in England and Wales is allowed during the transport of

inadequate medical care, including delays in getting women to hospital, which sometimes result in the injury or death of either mother or their foetus/ baby.[1126] Many prisoners are required to remain in the general prison population until their delivery date, and following the birth of their baby, will be separated following a short stay in hospital.[1127]

Women Prisoners and Obstacles to Parenting

Women prisoners, especially violent offenders, are often cast as 'doubly deviant.' They act against the expected role of women in society, who see women in general as more cooperative, nurturing and less aggressive than men. Violent women are 'doubly deviant' as they defy the expect role of nurturer.[1128] Women prisoners who try to maintain and claim a role as mother may well find themselves to be judged to be lacking, even though many try to actively parent from inside prison.[1129]

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women to hospital or clinic, but restraints are removed on arrival. They can be carried and used if necessary in clinic areas. Pregnant women in labour are not shackled on transport to hospital or during their stay. See HM Prison Service *Prison Service Order 4800: Women Prisoners* (HM Prison Service, 2008) 50.

[1126] Barbara A Hotelling 'Perinatal Needs of Pregnant, Incarcerated Women' (2008) 17 J Perinatal Ed 37, 39; Natalia D Tapia, Michael S Vaughn, 'Legal Issues Regarding Medical Care for Pregnant Inmates' (2010) 90 Prison J 417, 421; Jenni Vainak, 'The Reproductive and Parental Rights of Incarcerated Mothers' (2008) 46 Fam Court R 670, 677-678;

[1127] Admission to a prison Mother and Baby Unit in England and Wales must be in the best interests of the child and is not automatic. National Offender Management Service, *Prison Service Instruction 49/2014 Mother & Baby Units* (National Offender Management Service, 2014) s2.16. In the USA, only 13 states have any provision to allow women and babies to stay together. The Federal Bureau of Prisons has a community-based scheme, which allows mothers and babies to remain together, from 3 months to 1 year. See Malkia Saada Saar, *Mothers Behind Bars: A state- by state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children* (National Women's Law Center, 2010) 7.

[1128] Ann Lloyd, *Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women* (Penguin Books, 1995) 36

[1129] Sandra Enos, *Mothering from the Inside: Parenting in a Women's Prison* (State University of New York Press, 2001) 84-88; Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* (New York University Press, 2009) 144.

Enos states that women prisoners may have different ideas of what constitutes a 'good mother' due to different cultural and social influences.[1130] In her qualitative interviews with 25 subjects, she highlighted how woman prisoners have to manage multiple identities such as prisoner and mother.[1131] Women prisoners can place great importance upon claiming the role of mother, especially one that is considered fit to care for her children.[1132] Enos demonstrated how some women prisoners resisted the label of 'bad mother' and the identity of prisoner by distancing themselves from their inmate status. They used this to differentiate themselves from other prisoners.[1133] Others performed 'bracketing', where they placed a space between their behaviour at the time of the offence and their current rehabilitated self.[1134] Similarly, Ferraro and Moe's qualitative research with 30 mothers in prison found that many of them had low self-esteem, and that 'mothering was critical in sustaining perceptions of value and goodness.'[1135] Mothers undertook the parenting role from inside the prison by arranging for visits, proving fitness with frequent contact, improving their parenting skills by enrolling in parenting classes and by demonstrating knowledge of their children's daily lives.[1136]

Women prisoners have unique barriers to maintaining relationships with their children. Because women prisoners are fewer in number than their male counterparts, there are fewer women's prisons, which means that prisoners

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[1130] Sandra Enos, *Mothering from the Inside: Parenting in a Women's Prison* (State University of New York Press, 2001) 27.
[1131] ibid 34.
[1132] ibid 75.
[1133] Ibid 77.
[1134] Ibid 81.
[1135]Katherine J Ferraro, Angela M Moe, 'Mothering, Crime and Incarceration' (2003) 35 J Contemp Ethnography 9, 33.
[1136] Sandra Enos, *Mothering from the Inside: Parenting in a Women's Prison* (State University of New York Press, 2001) 84-88.

families are often required to travel longer distances to visit their mothers.[1137] Many women prisoners were the sole carers of their children before their incarceration and so most of these children are cared for away from their family home for the duration of their mothers' sentence.[1138] This is in direct contrast to the children of male prisoners who rely upon the children's mother to care for their child.[1139] As women prisoners rely upon others to care for their children, they are potentially more likely to lose custody of their child, especially if they do not receive regular visits from that child.[1140] Finally, women may have contact with their and other children prohibited because of the nature of the crimes that they committed.

Male Prisoners and Obstacles to Parenting

Male prisoners may be seen to have deviated from the traditional role of provider for his children. In many situations, the female partner is expected to

[1137] In England and Wales 2013, 63% of women prisoners were held a distance of less than 50 miles away from their home address, 23% were held a distance of under 100 miles away and almost 14% were held more than 100 miles away. There is currently no women's prison in Wales, exacerbating the problem. See Cathy Robinson, *Women's Custodial Estate Review* (National Offender Management Service, 2013) 10. In the USA, most prisoners are kept over 100 miles from their previous home address (men included) See Christopher J Mumola, *Bureau of Justice Statistics Special Report: Incarcerated Parents and Their Children* (US Department of Justice, 2000) 5. As there are fewer women's then men's prisons in the USA, this distance is probably larger for women.

[1138] In the USA, in state prisons, 41.7% of women were the sole parent living with their minor child in the month before arrest compared to 17.2% of men. Whilst serving their sentence, 88.4% of men reported that person caring for their child was the other parent, whereas 37% of women said this. For women prisoners, 44.9% stated that a grandparent cared for their child, with 10.9% of prisoners stating that their child was being cared for by social services. See Lauren E Glaze, Laura M Marushak, *Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children* (US Department of Justice, 2008 revised 2010) 4-5. In England and Wales, only 9% of children are cared for by their fathers when their mothers are in prison and only 5% of them remain in their home. Jean Corston, *A Review of Women with Particular Vulnerabilities in the Criminal Justice System* (Home Office, 2007) 20.

[1139] In the USA, whilst serving their sentence, 88.4% of men reported that person caring for their child was the other parent, whereas 37% of women stated that the other parent cared for their child. Lauren E Glaze, Laura M Marushak, *Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children* (US Department of Justice, 2008 revised 2010) 4-5.

[1140] Timothy Ross, Ajay Khashu, Mark Wamsley, *Hard Data on Hard Times: An Empirical Analysis of Maternal Incarceration, Foster Care and Visitation* (Vera Institute for Justice, 2004) 1; Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* (New York University Press, 2009) 45.

assume sole responsibility for the support of the family unit whilst the father is imprisoned.[1141] This support can extend to the prisoner himself, with the free partner being expected to provide the prisoner with items such care packages, and payments into their prisoner accounts to enable prisoners to buy toiletries and food from the prison shop.[1142] The imprisonment of a non-resident father may still impact the child's family financially as the father cannot afford usually to provide financial maintenance whilst in prison.[1143] Contact between prisoner fathers and their children can also be problematic. Non-resident fathers may lose contact with their children as families refuse to visit them.[1144] The expense and distance in visiting a prisoner may be prohibitively high which also prevents contact.[1145] Provision for male prisoners to keep in touch with their children is often not seen as a priority. There are no provisions made for male prisoners to care for their children in residential facilities in either England and Wales or the USA. Moreover, the visiting environment can be unpleasant and intimidating to

[1141] Pauline Morris, *Prisoners and their Families* (George Allen & Unwin, 1965) 153; Jeremy Travis, Michelle Waul, *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities* (The Urban Institute Press, 2003) 18-20; Joyce A Arditti, Jennifer Lambert-Shute, Karen Joest, 'Saturday Morning at the Jail: Implications of Incarceration for Families and Children' (2003) 52 Fam Relations 195, 199.
[1142] Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2007) 80-90.
[1143] This was the justification for releasing Oakley on parole in *State v Oakley*, in order so that he could earn money to back pay his child support arrears *State v Oakley* 2001 WI 103 (2001) para 14-15.
[1144] In research with male prisoners in England, Boswell and Wedge found that 1 in 12 prisoners received no visits from their children, and for some prisoners it was because their ex-partners did not want to bring them to the prison. See Gwyneth Boswell, Peter Wedge, *Imprisoned Fathers and Their Children* (Jessica Kingsley Publishers, 2002) 37; Amanda Gekker 'Paternal Incarceration and Father- Child Contact in Fragile Families' (2013) 75 J Marriage & Fam 1288, 1290. In the USA, 42% of state prisoners reported receiving a visit since incarceration, 55% of parents in federal prison had received a visit from their child. Visits were equally likely to have occurred for both mothers and fathers. See Laura M Marushak *Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children* (US Department of Justice, 2010) 6.
[1145] Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press) 81; Amanda Gekker, 'Paternal Incarceration and Father- Child Contact in Fragile Families' (2013) 75 J Marriage & Fam 1288, 1290.

children.[1146] Male prisoners may also have contact with children prohibited because of the nature of their crimes.

Ameliorating the Effects of Imprisonment

The obvious option to Murray and Farrington to reduce the impact of imprisonment upon children is to 'imprison fewer parents.'[1147] Whilst this may be a better longer-term solution, considering the rising levels of incarceration, a large reduction in the overall prison population in England and Wales and USA is unlikely. Effective interventions can be targeted towards the root causes of the problems that the children of prisoners experience: trauma, strained care giving, economic strain and stigma.[1148] Interventions in the jurisdictions of England and Wales, the state jurisdictions of New Jersey, California, and the Federal jurisdiction of the USA will be considered in turn.

Attachment Based Interventions

Basing interventions on trauma theory aims to prevent or reduce the harm suffered by children by increasing the attachment of children to their parents, mainly by improving contact and improving relationships between parents and child.[1149] For the mothers of infants and young children, some jurisdictions have used prison-based MBU, or community-based alternatives to enable suitable pregnant prisoners to care for their child. It is hoped that allowing mothers to care for their babies would promote bonding between mother and child and allow them to benefit from help within the prison to overcome any parenting difficulties.

[1146] Gwyneth Boswell, Peter Wedge, *Imprisoned Fathers and Their Children* (Jessica Kingsley Publishers, 2002) 38.
[1147] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 187.
[1148] ibid 188-189.
[1149] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 188; Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721, 724.

Within England, there are six prisons with a mother and baby unit (MBU) available to female prisoners since the closure of HMP Holloway's MBU in October 2013.[1150] Access to the MBU is only allowed if it is in the best possible interests of the child.[1151] Children are allowed to stay on the MBU up to 18 months.[1152] Provision for prisoners in the USA is more scant, only 13 states in the USA have any access to prison nurseries, and out of that 13, three states only allow prisoners to stay with their babies for up to 30 days.[1153] The Federal Bureau of Prisons do not run prison nurseries, but instead allow a few low risk prisoners to enter a residential programme called Mothers and Infants Nurturing Together.[1154] Prisoners enter the residential facility for the final trimester of their pregnancy and spend three to twelve months following the birth of their baby caring for them whilst living in the facility. If their sentence ends before their infant is three months old, they have to return to the prison to finish their sentence whilst the baby is cared for by relatives or social services.[1155] New Jersey Department of Corrections does not allow any prisoners to keep their infants with them in any facilities.[1156] Six prison units in California allow women to keep their babies until they turn two, but most women have to give up their children at

[1150] There are no female prisons in Wales; all female Welsh prisoners have to serve their time in an English prison. HC Deb, 5 March 2014, vol 576 Column 868 W (Simon Hughes MP). The MBU at HMP Holloway was closed following a MoJ review of the female prison estate in January 2013.
[1151] National Offender Management Service, *Prison Service Instruction 49/2014 Mother & Baby Units* (NOMS, 2014) para 2.16.
[1152] ibid.
[1153] Malkia Saada Saar, *Mothers Behind Bars: A state- by state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children* (National Women's Law Center, 2010) 20.
[1154]Federal Bureau of Prisons 'Female Offenders' (*Federal Bureau of Prisons*) <http://www.bop.gov/inmates/custody_and_care/female_offenders.jsp> accessed 1 May 2015; Chandra Kring Villanueva, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* (Women's Prison Association, 2009) 34.
[1155] ibid.
[1156] Malkia Saada Saar, *Mothers Behind Bars: A state- by state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children* (National Women's Law Center, 2010) 20.

birth.[1157] The Community Prisoner Mother Program (CPMP) allows female offenders to live with their children under 6 with them in a supervised facility for three years followed by three years supervision on parole.[1158]

Supporters of prison nurseries argue that children of prisoners can suffer attachment disorders.[1159] Allowing prisoners to reside with their babies can promote attachment and it is hoped can prevent future offending in the women and reduce the likelihood of their children entering prison themselves when they get older.[1160] Some opponents of prison nurseries argue than rather than being a positive move which breaks the recidivism cycle and reduces the likelihood of the child entering prison themselves as an adult, they state it is an 'instrumental' use of mainly babies of ethnic minorities, who are incarcerated with their mothers, on the basis of increasing attachment and reducing reoffending.[1161] Dwyer argues that babies are being imprisoned in a way that would be thought of as intolerable

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[1157] Karen Shain, Carol Strickman, Robin Rederford, *California's Mother- Infant Prison Programs: An Investigation* (Legal Services for Prisoners with Children, 2010) 1 ,http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.prisonerswithchildren.org%2Fwp-content%2Fuploads%2F2013%2F01%2FCA-Mother-Infant-Prison-Programs_report.pdf&ei=CeGqU6mCHs_H7AbFo4HIDQ&usg=AFQjCNHHhNPIAHAvTBJvFViRyEcSxemyXw&bvm=bv.69620078,d.ZGU accessed 20 June 2014.

[1158] California Department of Corrections & Rehabilitation 'Community Mother Infant Program' <http://www.cdcr.ca.gov/Adult_operations/FOPS/Community_Prisoner_Mother_Program.html> (*California Department of Corrections & Rehabilitation,* 2014) accessed 25 May 2015.

[1159] Christina Jose Kampfner, 'Post-traumatic stress reactions in children of imprisoned mothers' in Kathering Gabel, Denise Johnston, (eds) *Children of Incarcerated Parents* (Lexington, 1995) 89-100.

[1160] Goshin and Byrne argue that recidivism rates in mothers who have been able to keep their babies with them in a MBU is lower than those who were separated from their babies at birth. Lorie Smith Goshin, Mary Woods Byrne, 'Converging Streams of Opportunity for Prison Nursery Programs in the United States' (2009) 48 J Offender Rehabilitation 271. A report by the University of Indianapolis found that participants in a MBU programme at Indiana Women's State Prison had significantly lower readmission to prison one year after release (10% vs 18%). Kevin Whiteacre, Stephanie Fritx, James Owen, *Assessing Outcomes for Wee Ones Nursery at the Indiana Women's Prison* (*University of Indianapolis*, 2013) <http://www.uindy.edu/documents/Assessing_Outcomes_for_Wee_Ones_Nursery_at_Indiana_Womens_Prison.pdf >accessed 10 July 2015. See also Julie Campbell, Joseph R Carlson, 'Correctional Administrators' Perceptions of Prison Nurseries' (2012) 39 Crim Just & Behaviour 1063, 1066-1067.

[1161] James G Dwyer, 'Jailing Black Babies' (2014) 3 Utah L R 465, 466.

with other dependants, such as 'senile adults' or disabled dependents.[1162] To make such comparisons is to miss the point however; the relationship between very young children and their parents is different, based upon developing an attachment to a parent who is expected to act as their primary carer on release. Dwyer also argues that the research evidence justifying prison nurseries in this way is scant.[1163] One longitudinal study of a 100 babies within a New York prison nursery that the children raised within the prison nursery with their mothers developed better than expected levels of attachment to their mothers.[1164]

For all fathers and for the majority of mothers who cannot have their children with them in prison, the next best way to deal with separation is to ensure that children are placed with appropriate caregivers that remain stable and allow for open and honest communication between caregiver and child.[1165] As previously stated stable childcare is more problematic for women prisoners who are more likely to be single parents. In conjunction with this, prisoners and children should be able to see each other regularly to maintain contact, in an environment that is conducive to developing and maintaining a family relationship.[1166] In the case of prisoners sentenced to life, improving contact with children can help maintain a relationship with their children. For children of prisoners sentenced to death, there are very few, if any arrangements to foster a

[1162] ibid 2.
[1163] ibid, see also Chandra Kring Villanueva, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* (Women's Prison Association, 2009) 15.
[1164] A follow up in 2012 (third year re-entry into the research) found that out of 59 babies released from prison with their mothers as primary care givers, 44 were still being cared for by their mothers. Mary W. Byrne, Lorie Goshin, Barbara Blanchard-Lewis, 'Maternal Separations During the Reentry Years For 100 Infants Raised in a Prison Nursery' (2012) 50 Fam Court R 77, 83.
[1165] Julie Poehlmann, 'Representations of attachment relationships in children of incarcerated mothers' (2005) 76 Child Development 679; 682, 691; Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721, 725.
[1166] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 188.

relationship between prisoners and their children, or support them as vulnerable minors.[1167] As the rehabilitation of the prisoner is deemed inconceivable, it follows that no effort would be made to promote a prisoner's relationship with their family.

Whilst adult convicted prisoners in England and Wales have the right to receive two one hour social visits per month, the Prison Rules allow for these visits to be cancelled or modified in order to promote the good order and running of the prison.[1168] Not all prisons have a visitor centre, but many prisons do, which are normally run by charities.[1169] Some prisons also run family visit days in conjunction with prisoners' families' charities although access to these varies from prison to prison and depend upon the security risk of the offender.[1170] The first unit for overnight visits between mothers and families has also been opened at HMP Drake Hall, which allows for 25 prisoners to live in open conditions with overnight visiting allowed for children.[1171] Schemes provided by some voluntary organisations in England and Wales also help to ameliorate some of the attachment problems faced by the prisoners of children.[1172] Other schemes such as

[1167] As well as restrictions on visiting death row prisoners, including refusing to allow physical contact between relatives, children of death row prisoners in the USA are often not entitled to any state aid or support services following the sentence of death. See Rachel King, 'No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners' (2006) 16 Boston U Pub Interest LJ 195, 215-217. Some prisons may also bar minors from visiting. Child Rights Connect, *Children of parents sentenced to death or executed: How are they affected? How can they be supported?* (Child Rights Connect, 2013) 5.

[1168] Prison Rules SI 1999/728 35(1); National Offender Management Service, *Prison Service Instruction: 16/2011 Management Service Providing Visits and Services to Visitors* (National Offender Management Service, 2011) 2, 6.

[1169] Spurgeons, 'Visitors' Centres' (*Spurgeons* 2015) http://www.spurgeons.org/visitorscentres/ accessed 23 April 2015.

[1170] For example see the Supervised Play Services run by PACT, 'Supervised Play Services' (*PACT*) <http://www.prisonadvice.org.uk/our-services/supporting-prisoners-children-and-families/supervised-play-services> accessed 05 May 2015.

[1171] Anonymous, 'New unit for children to stay over with prison mums opens at Drake Hall Prison in Eccleshall' (*Staffordshire Newsletter,* 5 February 2015) http://www.staffordshirenewsletter.co.uk/New-unit-children-stay-prison-mums-opens-Drake/story-25979828-detail/story.html accessed 2 March 2015.

[1172] One example of the Banardo's run scheme to enhance and improve the visiting within HMP

Storybook Mum/ Dads also aims to promote more normal family relationships by providing children with a CD recording of their prisoner parent reading a story and interactive DVDs featuring the prisoner parent.[1173]

In the USA, provision made for visits varies depending on the jurisdiction. The Federal Bureau of Prisons does not allow for private family visits, but contact visits where physical contact at the start and end of the visit is allowed. Visitors in death row or on Secure Housing Units (SHU) are only permitted closed visits where prisoners remain behind a Perspex screen.[1174] Family private visits are allowed for some categories of offender (not life sentenced or death row prisoners) in California, with contact visits allowed depending on circumstances to most prisoners.[1175] In New Jersey, there are contact and closed visits only, depending on the offender, and no private or conjugal visits are allowed.[1176]

Strain Theory Based Interventions

The economic strain of attempting to maintain a relationship with a prisoner has been mentioned previously in this thesis. Attempts to ameliorate

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Dorchester with family visiting days thus improving the attachment between prisoners and their children. Naomi Clewett, Jane Glover, 'Supporting prisoners' families How Barnardo's works to improve outcomes for children with a parent in prison' (Banardo's, 2009) 11-12 http://www.barnardos.org.uk/supporting_prisoners_families.pdf accessed 10 July 2015.

[1173] Storybook Dads, 'Home' (*Storybook Dads*) http://www.storybookdads.org.uk/page120.html accessed 5 May 2015.

[1174] Federal Bureau of Prisons, 'General Visiting Information' (*Federal Bureau of Prisons*) <http://www.bop.gov/inmates/visiting.jsp> accessed 5 May 2015.

[1175] California Department of Corrections & Rehabilitation, *Visiting A Friend or Loved One in Prison* (*California Department of Corrections & Rehabilitation*) <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCUQFjAA&url=http%3A%2F%2Fcdcr.ca.gov%2FVisitors%2Fdocs%2FInmateVisitingGuidelines.pdf&ei=ZOWqU5bVNOWy7AaP2YGIBA&usg=AFQjCNGajdCixGmX7gAoUnYrFHf8wpp6Gw&bvm=bv.69620078,d.ZGU> accessed 05 May 2015.

[1176] An example of the standard visiting policies is evident from the New Jersey State Prison visiting guidelines. New Jersey Department of Corrections, 'New Jersey State Prison: Visit Program http://www.state.nj.us/corrections/pdf/cia_visitation/NJSP.pdf. Visits are also considered a privilege and not the right of a prisoner. New Jersey Department of Corrections, 'Understanding the New Jersey Department of Corrections Prison System' (*New Jersey Department of Corrections*, 2007) 38 http://www.state.nj.us/corrections/pdf/OTS/090311_Understanding%20the%20NJDOC%20Prison%20System.pdf accessed 25 June 2014.

these problems are practical in nature, making it easier for prisoners' families to visit the prison, perhaps by providing subsidised transport or assistance with costs. It also may entail providing help with welfare assistances or benefits and providing prisoners with paid work to enable them to support their families.[1177] In England and Wales, the Assisted Prison Visits Scheme provides assistance with the costs of visits for low-income families, and families are entitled to claim benefits if they meet the criteria.[1178] In the USA, there is no federal assistance to help pay for prison visits.[1179] In California, charities run assistance to help prisoners maintain contact with their families with the annual 'Get on the Bus' scheme which provides free transportation and extended visitation to prisoner's children.[1180] A few organisations in New Jersey provide limited assistance with enhanced family visitation, providing transport and organising parenting programmes.[1181]

Inadequate Parenting/ Strained Care giving Interventions

Parenting programmes could have a beneficial effect in helping parents both outside and inside of prison develop strategies to cope with the stress of

[1177] Council of Europe, 'Recommendation 1340 on the Social and Family Effects of Detention' (Parliamentary Assembly, Council of Europe, 1997) s6 (iii); Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721, 728.
[1178] In England and Wales, the Assisted Prison Visits Scheme can provide some assistance to prisoners' relatives on a low income to enable them to visit offenders. See National Offender Management Service, *Assisted Prison Visits Scheme: Customer Guide Help with the cost of prison visits if you are on a low income.* (National Offender Management Service, 2013). There are no federal schemes to assist with the cost of visiting prisoners in USA, some charitable organizations aim to fill some of the need. See Assisting Families of Inmates, 'About AFOI' (*Assisting Families of Inmates*) http://www.afoi.org/ accessed 03 May 2015.
[1179] As there are no federal schemes to assist with the cost of visiting prisoners in USA, some charitable organizations try to fill some of the need. See Assisting Families of Inmates, 'About AFOI' (*Assisting Families of Inmates*) http://www.afoi.org/ accessed 3 May 2015.
[1180] California Department of Corrections & Rehabilitation, 'Visitation: Get on the Bus' (*California Department of Corrections & Rehabilitation,* 2014) http://www.cdcr.ca.gov/Visitors/Get_On_The_Bus.html accessed 05 May 2015.
[1181] There are limited services provided by the Girl Scouts of America and the New Jersey Association on Correction. See Human Rights Watch, 'New Jersey: Prison Resources' (*Human Rights Watch,* 20 July 2010) http://www.hrw.org/news/2010/07/20/new-jersey-prison-resources accessed 03 May 2015.

parenting whilst one parent is in prison.[1182] In the Cambridge Study in Delinquent Development, boys whose parents were imprisoned in the first ten years of life were more likely to have fathers who had cruel and neglectful attitudes and used harsh or inconsistent punishment.[1183] Prisons in England and Wales offer parenting courses, as does the Federal Bureau of Prisons, New Jersey Department of Corrections and California Department of Corrections and Rehabilitation. The prison authorities provide some of these programmes; others are run by voluntary and children's organisations.[1184] Murray and Farrington argue that prison based parenting courses should be evaluated in the same way as community based interventions to determine their efficacy.[1185]

[1182] Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721, 726; Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 189.

[1183] Joseph Murray, David P Farrington, 'Parental Imprisonment: Effects on Boys' antisocial behaviour and delinquency through the life-course.' (2005) 46 J Child Psychology & Psychiatry 1269, 1272.

[1184] One example of the voluntary organizations that provides support to prisoners is PACT, who has an integrated family support officer who provides parenting courses, and liaises on behalf of individual prisoners. PACT, 'Integrated Family Support Service: Evaluation report' (*PACT,* June 2012) <http://www.prisonadvice.org.uk/sites/default/files/resources/EvaluationReport.pdf> accessed 03 May 2015. In the Federal system, the Bureau of Prisons provides parenting courses. Federal Bureau of Prisons, 'Custody & Care: Education' (*Bureau of Prisons*) <http://www.bop.gov/inmates/custody_and_care/education.jsp> accessed 03 May 2015. California provides parenting courses to women prisoners participating in its Mother Infant Prison Program. Karen Shain, Carol Strickman, Robin Rederford, *California's Mother- Infant Prison Programs: An Investigation* (Legal Services for Prisoners with Children, 2010) <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.prisonerswithchildren.org%2Fwp-content%2Fuploads%2F2013%2F01%2FCA-Mother-Infant-Prison-Programs_report.pdf&ei=CeGqU6mCHs_H7AbFo4HIDQ&usg=AFQjCNHHhNPIAHAvTBJvFViRyEcSxemyXw&bvm=bv.69620078,d.ZGU> accessed 20 June 2014.

In New Jersey, female prisoners can attend a specific 'Every Person Influences a Child' parenting course, whilst male prisoners are offered the 'Help Offenders Parent Effectively' Course. See New Jersey Department of Corrections, 'Understanding the New Jersey Department of Corrections Prison System (New Jersey Department of Corrections, 2007) 16.

[1185] Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721, 728. Some evidence for the efficacy of parenting courses exists, such as research by Sandifer, which compared 161 prisoners who underwent a parenting course with 42 prisoners who had never enrolled on a parenting course. Sandifer found that prisoners who had undergone positive attitude changes in areas of child discipline, child development, dealing with crises, and a decrease in negative parenting attitudes. Jacquelyn L. Sandifer, 'Evaluating the Efficacy of a Parenting Program for Incarcerated Mothers' (2008) 88 Prison J 423, 442.

Interventions Based Upon Stigma Theories

These interventions would include protecting the identity of offenders, not publicising their crime and details of their offence.[1186] The use of restorative justice and the use of community-based punishments to 'emphasize the positive contributions that ex-offenders can make to the community' would also reduce the stigma suffered by the families of offenders.[1187] None of the jurisdictions studied protect the identity of offenders, and whilst community sentences are used in some instances, prison is still often used as a punishment in a large range of offences.

[1186] Joseph Murray, David P Farrington, 'Evidenced-based Programs for Children of Prisoners' (2006) 5 Criminology & Pub Pol 721, 729.
[1187] ibid.

Summary

In comparison with the strong protection for autonomy afforded to those in free society, prisoners are not permitted to procreate in England and Wales without justifying their family relationships, their reasons for becoming parents and their suitability for parenthood. This position is defended by claims that making it more difficult for prisoners to procreate protects child welfare. Whilst it is understandable in some respects, considering the negative outcomes that some children of prisoners suffer, it is in effect stating that being the child of a prisoner is worse than not existing at all. In the USA, prisoners are completely prohibited from claiming a right to reproduce.

With the estimates of children affected by imprisonment in England and Wales and the USA so large, one may question why anyone would advocate allowing prisoners to procreate, thus increasing these numbers. This is to misjudge the point, which is that no civil rights should be restricted or removed from prisoners unless it is justified by either their offence or because of the physical situation of imprisonment. Removing rights cannot be justified because of the sheer number of family members affected by incarceration. These numbers can only be dealt with on a societal level, by making active moves towards decarceration, restricting imprisonment for only the most serious offences.[1188]

Longitudinal studies on the life course of the children of prisoners, such as the Cambridge Study on Delinquent Development, and the Great Smoky Mountains study both demonstrate that the prisoners of children have a greater

[1188] Bosworth highlights that decarceration in the USA is necessary for justice for the large numbers of people incarcerated for decades at a time, especially when one considers the large racial bias against African Americans. Mary Bosworth, 'Penal moderation in the United States? Yes we can' (2011) 10 Criminology & Pub Policy 335, 341.

risk of becoming offenders themselves.[1189] These studies acknowledge however, that as well as the offending of the parents of the children studied, other risk factors for offending such as poverty were present.[1190] The more punitive nature of incarceration in England and Wales and in the different jurisdictions of the USA could account for the effect of parental incarceration on the children. In a cross national study, comparing children of prisoners in England with Sweden, it was found that whilst the children of prisoners in Sweden were more likely to engage in criminal behaviour than the children of non-prisoners, this result disappeared when the criminality of the parent had been statistically controlled for.[1191] The authors hypothesise that shorter prison sentences, prison regimes that fostered family contact and more considerate public attitudes to offenders may have protected prisoners' children against the worst effects of their parents' incarceration.[1192]

Rather than insisting that all prisoners should refrain from procreating, the different approaches used to ameliorate the worst effects of incarceration on children could be employed with greater use in prisoners and their partners who wish to start a family. Strengthened family relationships could be fostered with better visitation facilities for families, including private family visits. The purpose of private visits would not just be for prisoners to procreate and engage in sexual relationships, but to allow them to develop their relationships with partners to

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[1189] Joseph Murray, David P Farrington, 'Parental Imprisonment: Effects on Boys' antisocial behaviour and delinquency through the life-course.' (2005) 46 J Child Psychology & Psychiatry 1269, 1272; Susan D Phillips, Alaattin Erkanli, Gordon P Keeler, E Jane Costello, Adrian Angold, 'Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks' 5 (2006) Criminology & Pub Pol 677.
[1190] ibid.
[1191] Joseph Murray, Carl-Gunnar Janson, David P Farrington, 'Crime in Adult Offspring of Prisoners: A Cross-National Comparison of Two Longitudinal Samples' (2007) 34 Crim J & Behavior 133.
[1192] ibid 146-147.

develop in a manner that reflects those in the outside world. One of the arguments used against both Gavin Mellor's and Kirk Dickson's AI applications, was that their relationships had not been 'tested' in the real world. Unless prisoners are allowed to develop relationships with family members and partners in this way, then their relationships will always remain untested until their release, by which time the opportunity to strengthen their family ties prior to release has been lost. In conjunction with improved access to visiting facilities, access to the prison itself must be improved. Costs and prison protocols remain a barrier to many prisoners' relatives to visiting, especially in those US states that provide no assistance to often low-income families. Parenting courses and positive interventions such as family support workers can help prisoners and their relatives to make positive changes to their attitudes to parenting, drugs intake and criminality. Again, if prisoners can make changes which strengthen their social capital and support on the outside of prison they are more likely to desist from crime.

It could be argued that these interventions would be expensive in an age of austerity where prisons in both England and Wales and the USA have reduced levels of staff may seem like a luxury that cannot be afforded. Imprisonment itself is an expensive process, but by increasing the social capital of prisoners and their families, by providing support for pregnant prisoners and new mothers in the form of prison nurseries, by allowing the few prisoners that wish to have children to do so, recidivism and the associated costs could be reduced. It could be argued that promoting prisoner procreation as a means to rehabilitation that one is using a child as a means to an end, which is the rehabilitation of the offender. In this case

though, the child is not produced merely to rehabilitate the offender, but instead because a couple wish to exercise their right to have a child.

If one returns to the primary punishment of imprisonment, which is the removal of freedom, this does not necessarily need to include the removal of the right to procreate. Individual's rights, including those of prisoners should only be limited as necessary. This would justify curtailing the rights of child abusers to procreate, but this should be done on a case-by-case basis, with the presumption that all prisoners retain all of their rights, bar that of liberty unless there are compelling reasons otherwise. This would be a massive shift in the attitudes of the criminal justice systems, corrections systems and political views in all the jurisdictions within the USA and within England and Wales. A longer-term strategy of decarceration and abolition of the death penalty would remove all but the most serious offenders from prison and prisoners off death row, but it is acknowledged that this occurring would be extremely unlikely in both England and Wales and within the US as it would be politically unpopular.

Chapter Ten: Conclusions

Introduction

The first part of the title of this thesis 'Prison and Planned Parenthood' brings into focus two of the main issues raised by the prisoner procreation cases of *Mellor*, *Dickson*, *Goodwin*, *Percy* and *Gerber*. Prisoners who are prevented from having sexual intercourse have to plan for parenthood, making special arrangements such as applying for permission to access AI or IVF treatment. The focus of the decision-making does not end at conception, or even at delivery of the child. The prisoner and their partner are planning for parenthood. A 'conception of a right to procreate' sees imprisonment as the removal of freedom and not necessarily the automatic removal of other rights, such as the right to procreate. If state and prison authorities can 'conceive' or think of prisoners as having rights, then the concept of a prisoner planning parenthood and conceiving a child would not be viewed as something that should only be allowed in exceptional circumstances. Instead, the converse would apply, rights would only be restricted if justified and necessary. The 'conception of a right' to procreate applies more generally: conceiving of the actual right to procreate itself and what it should consist of.

The main question that this thesis has examined is whether prisoners retain the right to procreate whilst incarcerated and whether any justifications exist for removing a prisoner's right to have children whilst in prison. A comparative analysis of the case law from England and Wales and the USA demonstrates that such blanket prohibitions on procreation are unsupported. The cases of *Raymond v Honey* and *Wolff v McDonnell* both state that prisoners retain all civil rights that

are not removed by incarceration.[1193] Arguably, it therefore follows that prisoners do not automatically lose the right to procreate, or even to a sexual relationship with their partners outside of prison.

This chapter will firstly consider the issue of prisoners' procreative rights and human rights, moving on to the case law analysis, in order to draw out the actual legal status of the prisoner's right to procreate in England and Wales and the USA. After this, the chapter will turn to the main factors that have contributed to the highly restrictive policies of both England and Wales and the USA. These include the historical context of the development of the prison, along with concepts of less-eligibility and how this has contributed to the pains of imprisonment that continues to have detrimental effects on prisoners today. Punishment will also be discussed, as denial of the right to procreate is often justified as an appropriate punishment for prisoners.

The reality of parenting from prison and creating a family can be very difficult. The next part of the concluding chapter will discuss the effects of imprisonment on prisoners and their children, and how interventions can reduce some of these negative effects. Finally, the chapter will conclude with a discussion of the future implications of this research, and recommendations for how prisoners' procreative rights should be dealt with in future.

[1193] See footnote 35.

Main Conclusions

This thesis began with a question: do prisoners retain the right to procreate when incarcerated? At first, the answer to this question may seem obvious. The courts and government officials from both the USA and England and Wales answer negatively. It is assumed that both sexual intercourse and the creation of a family are incompatible with imprisonment. Even if medical methods of reproduction are introduced as alternatives, restrictions are justified by the courts for a variety of reasons, including child welfare, punishment and the status of prisoners as non-citizens. Further study however, demonstrates that these reasons in themselves are not strong justifications for large, blanket bans on procreation or sexual intercourse. The main finding of this thesis is that the restrictions on procreation exist because of how imprisonment itself has developed as a punishment since Victorian reforms. Prisoners are isolated away from their families, their criminality treated as a contagion that must be isolated from society.[1194] These rules are reinforced by conceptions of the prisoner as 'other' or undesirable, a person that should be preventing from procreating by the state. The historical legacy of eugenics has continued to influence ideas of inherited criminality, leading to prisoners being thought of as 'different' to non-offenders.[1195] These restrictions are further cemented by an assumption that prisoners undergo a process of civil death. This is thought to make them ineligible for the benefits of citizenship, including the ability to create and maintain a family. The loss of citizenship and rights are linked to a perception of punishment as an all-encompassing experience which goes far beyond the incarceration of the

[1194] See Silverman J *Gerber v Hickman* footnote 502 reference to 'quarantining the prisoner.'
[1195] See footnote 172.

individual and loss of liberty. Some members of the public, judiciary and politicians have a view of imprisonment that involves the prisoner experiencing punitive, humiliating and degrading conditions. Not only is the freedom of the prisoner restricted to their physical location, but also the pains of imprisonment are used as a tool to enhance the unpleasant and degrading effects of punishment. Contact with family members and procreation is viewed as a privilege to be earned rather than as a human right deserving of respect. Legally, however, there are few, if any justifications for highly restrictive procreative policies. In no country or state in either the USA or in England and Wales does statute dictate that prisoners are unable to procreate whilst in prison. In fact, case law in both the USA and England and Wales makes the explicit point that prisoners retain all rights that are not removed by incarceration.[1196]

Human Rights and the Right to Procreate

It has been argued that procreation itself is not an absolute right, but a conditional one.[1197] Archard argues that the right to have children is conditional, putative parents should consider their responsibilities in raising a child before procreating. A more liberal approach views procreation as an extension of the right to self-determination, rooted in individual autonomy.[1198] The law also takes this approach, so long as the individuals involved wish to procreate via sexual intercourse and do not require fertility treatment. Procreation itself is often characterised as a negative right. States should not interfere with individuals exercising their right to procreate unless necessary.[1199] It is, however, under no

[1196] See footnote 35
[1197] David Archard, *Children: Rights and Childhood* (2 edn, Routledge, 2004, 2010 reprint) 139.
[1198] John A Robertson, 'Procreative Liberty' in Peg Tittle (ed) *Should Parents Be Licensed? Debating the Issues* (Promethieus Books, 2004) 214.
[1199] John Finnis, *Natural Law and Human Rights* (2 edn, Oxford University Press, 2011) 205.

obligation to provide positive assistance to those wishing to procreate, by providing fertility treatment for example. If necessary, a state can derogate from protecting an individual's right to procreate providing there is sufficient legal justification.[1200] This is in contrast to what could be characterised as 'absolute' human rights, such as the right to be free from torture and the right to life.[1201] Certain rights, such as the right to life are characterised as positive rights, and the state itself is under a positive obligation to ensure that they are protected.[1202] The lines between positive and negative rights are sometimes unclear. Prohibiting prisoners from having heterosexual intercourse requires the state to provide positive assistance to prisoners who wish to procreate.

Comparative Analysis

A comparative approach was used within this thesis in order to find a common core between the cases and applicable statute law. This was relatively straightforward, as all of the cases were based upon common law, with English as the primary language. However, it was important to be mindful of the differences present between the different jurisdictions, especially those within the USA. Within the USA, it is also important to be aware of the interplay between state and federal law. The framework of the ECHR and the US Constitution was analysed within the case law chapter. Arguably, the ECHR provides prisoners with greater protection for their rights than the US Constitution, as the ECtHR provides another mechanism of scrutiny for the government of the member states.

[1200] This is expressed in the Human Rights Act Part 1 Sch 1 Art 8(2), which lists acceptable reasons for derogation.
[1201] Teraya Koji, 'Emerging Heirarchy in International Human Rights and Beyond: From the perspective of Non-Derogable Rights' (2001) 12 EJIL 917, 919-920.
[1202] John Finnis, *Natural Law and Human Rights* (2 edn, Oxford University Press, 2011) 205.

The Legal Rights of Prisoners and their Families

The cases of *Dickson v UK*, *Raymond v Honey* and *Woolf v McDonnell* all state that prisoners retain all rights that are not removed by imprisonment. Legally, any restriction on a prisoner's rights must be justified, so arguably all prisoners retain a right to procreate and that curtailment must be justified. The way in which restrictions are justified varies within each jurisdiction. For prisoners from England and Wales, the ECHR applies, so that all rights restrictions must be proportionate. This means that each case should be weighed on its merit, as the circumstances of each prisoner would alter this balance. The starting point should be that a prisoner retains those rights unless removing them would be proportionate and justified in the circumstances. It may be proportionate to remove the right to procreate from a person convicted of child abuse who is beginning their sentence, and who may pose a danger to children. It would be more difficult to argue that removal of the right to procreate would be proportionate for a prisoner convicted of murder, but who is progressing through their sentence and is likely to be released on licence in the near future.

In the USA, any request to access AI facilities would be assessed under the four-part 'rational basis' test arising from *Turner v Safley*. In order to remove a prisoner's right, there must be a rational connection between the legitimate penological objective and the restriction on the prisoner's right. A second consideration is whether there is an alternative way for a prisoner's right to be met. The Court argued that deference should be given to correctional officials, as they are best placed to understand the options available. Consideration must also be given to the effects of meeting the prisoner's right on other prisoners and staff. If no alternatives exist to the prison regulation, then this is taken as evidence of a

reasonable objective. If easy alternatives exist, that can accommodate a prisoner's request at minimal cost to the institution, then this may be evidence that the regulation is unreasonable. The current case law that exists within the USA found different answers to the question of whether prisoners have a right to procreate and how this right could be accommodated, even when using the same four-part test, with similar facts in each case. This answer varied, from stating that prisoners do not have a right to procreate that survives incarceration, to supporting the idea that prisoners retain a right to procreate when incarcerated. In one sense, the rulings of *Percy*, *Goodwin*, Gerber 1 and Gerber III are consistent in that they all denied the prisoners the right to procreate via AI, but they arrived at these decisions via inconsistent routes. Should future cases come to court, it is likely that prisoners would continue to be denied the ability to procreate. Women prisoners in particular stand little chance of being allowed to procreate due to the perception that large burdens that would be placed on the correctional services. There is some debate within the literature and the cases of whether the right to procreate is suspended or removed for prisoners serving a life sentence. It is more accurate to state that legally in practice the right to procreate is removed on imprisonment and regained on release from prison. A right that is 'suspended' implies that there is a chance that a person may be released from prison and will in turn regain that right. Clearly, that would be impossible if a person dies in prison following a whole-life or a death sentence. This removal is not absolute within England and Wales as it is within the USA, but in practical terms the numbers of prisoners being allowed to procreate is very low.

The rights of the prisoner's partner to procreate are similarly affected in both the US jurisdictions and within England and Wales. Only the Grand

Chamber in *Dickson,* and the minority judgments in Gerber and in the Chamber ruling in *Dickson* considered the plight of the free partner of the prisoner. The free partner is not serving a prison sentence; yet will find themselves similarly restricted from having a child with the partner of their choosing. Considering the large collateral consequences that affect the partners of prisoners, it is inaccurate to state that the partners of prisoners retain the same rights as all other free citizens.[1203]

All of the judgements touched upon the aims of imprisonment and legitimate penological objectives. Within *Mellor* and *Dickson*, the courts had great concern with whether public confidence would be maintained within the system if prisoners were allowed to procreate.[1204] This ties in with deterrence: if the public perceives prison as a harsh place, the idea is that this will reduce future crime.[1205] The courts in *Percy*, *Goodwin* and *Gerber* were concerned with the burden that allowing prisoners to procreate would pose to correctional officials and other prisoners.[1206] They restricted the right of the prisoners to procreate based upon the argument of treating all prisoners equally. The majority judges in all of the US cases apart from Gerber II argued that allowing male prisoners to procreate would lead to women prisoners requiring access to AI treatment, which would be prohibitively burdensome for the correctional services. Prisons in both England and Wales and the USA run on limited budgets, and are subject to periodic cuts. It could be argued that prisoners having children when in prison

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[1203] Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 110-111.
[1204] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472 para 62; *Dickson and Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 20.
[1205] ibid.
[1206] *Goodwin v Turner* 980 F.2d. 1395, 1399-1400 (1990); *Percy v State of New Jersey* 278 NJ Super 543, 549 (1995); *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000).

could be a drain on resources, diverting money away from other vital services provided to prisoners. This could certainly be true when one considers women prisoners getting pregnant, the costs of providing healthcare to pregnant and parturient women, the provision of MBU places, and the increased staffing necessary could prove to be expensive for prisons. In the case of male prisoners who require very little more than a cup to provide a sample this argument fails. Prison and government officials may wish to protect themselves from claims of discrimination by removing the ability of all prisoners to procreate. If only male prisoners were allowed to procreate, this would provide grounds for women prisoners to sue. Using 'gender equality' concerns as an excuse to prohibit all prisoners' rights makes women responsible for male rights claims and reduces women's rights. [1207] In order to protect gender equality for women prisoners, there is often a requirement to provide greater resources for women in order to create parity between men and women, to meet different needs. One example is that women prisoners are more likely to enter prison with greater mental health needs than men, so their mental health service provision may be more costly per head than in a male prison.[1208] The right to procreate is of such importance that denying the right of women prisoners because of cost would have lifelong effects that could extend beyond their sentence and so would be unjust. In particular, women prisoners may lose their fertility when incarcerated for relatively short periods of time, depending upon their age. It is also assumed by many that allowing women prisoners the ability to procreate would open the floodgates to

[1207] Rachel Roth, 'No New Babies? Gender Inequality in Prison Systems (2004) 12 Am UJ Gender Soc Policy & L 391, 393.
[1208] Women prisoners make up around 5% of the total prison population, but 25% of the total self-harm incidents reported every year in England and Wales. See Ministry of Justice, *Safety in Custody Statistics England and Wales Update to March 2014: Ministry of Justice Statistics bulletin* (Ministry of Justice, 2014) 7.

many women seeking to become pregnant, creating great strain on the various prison authorities. Potential demand could by gauged by conducting empirical research by asking women prisoners themselves whether they would take the chance to have children were it offered. It may be that the reality of being pregnant and giving birth whilst in custody would dissuade many prisoners from making that choice, especially if they did not have the opportunity to enter a MBU. The small number of cases appearing in court, plus the complete absence of women prisoners in England and Wales pressing a claim to access AI could be evidence that there is little demand for prisoners to procreate. Low demand, however, should not be used as an argument for withholding a prisoner's rights, as it is not 'important' to many prisoners. Conversely, it should be viewed as support for the claim that the prison system may not find allowing women prisoners to procreate as burdensome as it claims.

Welfare of the Child Concerns

One of the major concerns of the court in both *Mellor* and *Dickson* was the welfare of the child. In contrast to the US cases, which failed to consider the putative child, the domestic courts had great concern over the welfare of the child, reflecting the focus of UK Government policy. It continues to have a central place in the decision-making process as to whether a prisoner is granted access to AI facilities in England and Wales. The child welfare standard that prisoners have to satisfy is higher than the standard that those having licensed fertility treatment. Prisoners are required to be in a partnership, which must have been in existence and tested outside of prison, which automatically excludes any prisoner who has developed a relationship since their confinement. Enquiries are made to the financial status of prisoners and their partners, including the kind of

accommodation the prisoner's partner has.[1209] Within England and Wales the threshold used for assessing putative parents for licensed fertility treatment is limited to checking that they have not been convicted of abusing children, that there is no risk of neglect or serious harm to the child.[1210] There are no requirements to ensure that the child will not be born into a single parent family and no checking of whether putative parents are financially self-sufficient. Considering the serious nature of preventing someone from having a child, the bar against prisoners having children should use a similar standard; prisoners could justifiably be prevented from procreating if there is a risk of serious harm or neglect to the child. The risk of serious harm is fairly obvious in some cases. Those convicted of the abuse and murder of children would pose a very grave risk to children. The domestic courts in both *Mellor* and *Dickson* justified prisoners being restricted because of concerns over creating single parent families whilst the prisoners served their sentences.[1211] Whilst the Grand Chamber did feel that it was appropriate to have regard for the welfare of the child, this did not extend to preventing procreation because of concerns over creating a single parent family, so long as there was one competent parent to care for the child.[1212]

Eugenics and Biological Criminology

The case of *Buck v Bell* highlights the ultimate interference that the state can have over an individual's right to procreate, compulsory sterilisation.

[1209] Appendix; *R v Secretary of State for the Home Department Ex parte Mello*r [2001] EWCA Civ 472 paras 17-67; *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home Department* [2004] EWCA Civ 1477 paras 7, 19, 20; *Dickson v UK* (2007) 44 EHRR 21 para 23.
[1210] Human Fertilisation and Embryology Authority *Code of Practice* (Human Fertilisation and Embryology, 8th ed, 2009, revised April 2015) paras 8.10, 8.11.
[1211] *R v Secretary of State for the Home Department Ex parte Mellor* [2001] EWCA Civ 472; *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home Department* [2004] EWCA Civ 1477 para 8.
[1212] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 76.

Reproductive autonomy is completely removed by a single operation. Whilst the compulsory sterilisation of prisoners was never approved in *Skinner*, the historical legacy of eugenics still casts a shadow over current discussions over whether prisoners should be able to procreate. Sterilisation of the mentally ill and the learning disabled continued in some countries in Europe and in the USA up until the 1970's.[1213] Modern criminology does not support the notion of 'innate criminality' such as that espoused by Lombroso. There are, however, some offenders that are thought to have committed crimes that are so heinous that they are beyond rehabilitation. Prisoners who thought of as beyond redemption are given the maximum sentences allowed, either the death sentence in some states of the USA, or a whole-life tariff, which is the maximum sentence, allowed in England and Wales. Wilson argues that current punishments such as chemical castration for sex offenders and three strikes laws are examples of 'new eugenics' laws, methods, designed to stop offenders from procreating.[1214] Recently, women prisoners in California were sterilised without following the correct consent procedures.[1215] Whilst this was not a systematic attempt to sterilise all women prisoners, the fact that 39 out of the 144 female prisoners sterilised between 2005 and 2012 were sterilised without the proper safeguards demonstrates the lack of importance given to ensuring the reproductive autonomy of vulnerable prisoners.[1216] Eugenics also contributed to prisoners being seen as 'other,' intrinsically different to 'normal' non-offenders.[1217]

[1213] There were similar laws in operation in Denmark and Norway. See Gunnar Borberg, Nils Roll- Hansen, *Eugenics and the Welfare State: Norway, Sweden, Denmark and Finland* (2 edn, Michigan State University Press, 2005) ix; Anna Stubblefield, ' "Beyond the Pale": Tainted Whiteness, Cognitive Disability, and Eugenic Sterilization' 2 (2007) 22 Hypatia 162.
[1214] Debra Wilson *Genetics, Crime and Justice* (Edward Elgar, 2015) 19-21.
[1215] See footnote 166.
[1216] ibid.
[1217] David Garland, 'The limits of the sovereign state: strategies of crime control in contemporary

Less Eligibility and the Pains of Imprisonment.

Prior to the Victorian period, imprisonment was mainly used as a place to hold offenders prior to their physical punishment or to house debtors. It was not unusual for a debtor's immediate family, including wife and children to be imprisoned with the debtor. The isolation of the prisoner from their family and society as the main form of punishment for serious offences gradually began to take over from physical punishment in the eighteenth century. Punishment moved away from the public sphere, becoming private, shameful and hidden away.[1218] It became possible to hide and isolate the offender behind the closed gate of the prison. Prison reformers led by Howard and Fry challenged conditions within the poorly run prisons. Following reforms, prison conditions improved to the point that prisoners were provided with basic clothes and Spartan food, but they were isolated from one another, receiving visits from religious ministers.[1219] Prisoners today remain cut-off behind the prison wall, within the 'total institution of the prison.' By design, prisoners are physically isolated from their families. In conjunction with strict regimes, the concept of less-eligibility developed. Prisons were designed to have a standard of living below the normal situations of the poorest worker, in order to deter people from committing crime.[1220] The effects of less-eligibility persist today. Prisoners are routinely housed in overcrowded and unpleasant surroundings, often on purpose to enhance the punitive effects of their

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society' (1996) 36 Brit J Criminology 445, 461.

[1218] Pieter Spierenburg, 'The Body and the State: Early Modern Europe' in Norval Morris, David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) 58.

[1219] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (Penguin Books 1978) 6-7.

[1220] Ahmed A White, 'The Concept of "Less Eligibility" and the Social Function of Prison Violence in Class Society' (2008) 56 Buff L Rev 737, 739-740.

incarceration.[1221] Restricting access to non-essential items for prisoners is a popular political aim, as many feel they do not deserve luxuries such as televisions and equipment for hobbies. [1222] The pains of imprisonment are enhanced intentionally in many prisons. For example in 'super max' prisons, individuals have extremely limited contact with other humans, including prison staff, increasing the prisoner's isolation and loneliness, even to the point of causing mental disorder.[1223] Arguably, restrictions on prisoners' living conditions and restrictions on prisoner's accessing their families should be the minimum necessary to ensure public protection and good order.[1224]

The physical isolation of the prisoner from loved ones, the rigid regime and limited facilities of prison creates an environment where the pains of imprisonment are keenly felt. These are listed by Sykes as: the deprivation of liberty, possessions and services, heterosexual relationships, autonomy, and security.[1225] All of these pains of imprisonment have practical consequences for prisoners who wish to become parents. The most obvious side effect to restrictions on heterosexual sex is that the prisoner cannot have sex in order to procreate. All of the other pains of imprisonment impinge upon the prisoner's ability to procreate. The loss of autonomy means that in most circumstances prisoners are unable to act upon the decision that they would like to start a family. Lack of resources makes supporting a family financially impossible for most

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[1221] See footnote 878.
[1222] An example from England and Wales shows the government 'clamping down' on prisoners watching TV. Robert Winnett, 'Prisoners stripped of right to watch TV' (*Daily Telegraph,* 29 April 2013) http://www.telegraph.co.uk/news/uknews/law-and-order/10026566/Prisoners-stripped-of-right-to-watch-TV.html accessed 20 July 2015.
[1223] See footnote 813.
[1224] Andrew von Hirsch, *Doing Justice The Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976) 107; Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993) 80.
[1225] Gresham Sykes, *Society of Captives* (Princeton University Press, 1958) 64-78.

prisoners. The removal of the right to freedom means that prisoners will not be able to physically care for their child, unless they are one of a minority of women in a mother and baby unit. In addition to these five pains of imprisonment identified by Sykes, Crewe identifies a further two that are relevant: the pains of continual psychological assessment and the pains of uncertainty. Prisoners who are sentenced for serious offences will be subject to psychological assessment in order to establish if it is safe to release them back into the community, or to see what interventions may improve their chances of rehabilitation. In England and Wales, these assessments could possibly be used to assess a prisoner's suitability for access to AI. The other pain of imprisonment, the pain of uncertainty would certainly apply to prisoners who are prevented from procreating. Prisoners serving life sentences or those with indeterminate sentences may not be given a definite release date, as they have to satisfy parole criteria and attend specific offending courses. These prisoners are most likely to be prevented from accessing AI and so will not be able to plan their future.

Punishment

The complete prohibition of prisoners in the USA and the restriction of prisoners in England and Wales on procreating is unjustified if one accepts that prisoners retain all of their rights apart from those that are explicitly removed as a consequence of their imprisonment. This is especially true when one considers the seriousness of removing a person's ability to have children. These include detrimental effects on family relationships, and the collateral damage suffered by the free partner who is unable to procreate with a person of their choosing. The loss of a chance to create a family may have continuing effects for many years after the completion of a prisoner's sentence- so any justifications for restricting

procreation should be given serious consideration. In the case of prisoners who have committed serious offences there may be good cause to restrict their right to procreate, but this should explicitly stated during sentencing.

Some argue that society has a right to punish offenders, which can include prohibitions on procreation whilst incarcerated. This view makes the assumption that prisoners automatically lose their right to procreate, a view that was reflected in all of the domestic case law apart from Gerber II. Steven Goodwin argued that removing his right to procreate was a cruel and unusual punishment, a claim that was dismissed.[1226] William Gerber argued that the three strikes law was a punishment, which treated him differently to other offenders, as his punishment of whole life incarceration was disproportionately more severe than first time offenders.[1227] In Gerber III the restriction of procreation was affirmed as a legitimate part of the 'punishment' of imprisonment.[1228]

The dissenting judgments in Gerber III offered a contrasting view, criticising the approach that prohibiting procreation formed a part of the prisoner's sentence. In his dissenting judgement, Kozinski J made the vital point that legislature has not specifically stated that prisoners be automatically denied the right to procreate.[1229] In deciding whether to prohibit procreation, Tashima J reiterates that this decision should lie with the legislature alone as only they have the legitimacy to decide what punishments should be meted out for what

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[1226] *Goodwin v Turner* 702 F Supp 1452, 1455 (1988). The restriction was seen as legitimate punishment and not excessive.
[1227] *Gerber v Hickman* 103 F Supp 2d 1214, 1218 (2000). In 2012 California voted to amend the law on three strikes to only sentence to mandatory life when the third crime was serious, rather than a misdemeanour. See Lorelei Laird, 'California begins to release prisoners after reforming its three strikes law.' (*American Bar Association*, 1 December 2013). <://www.abajournal.com/magazine/article/california_begins_to_release_prisoners_after_reforming_its_three-strikes_la> accessed 3 March 2015.
[1228] *Gerber v Hickman* 291 F3d 617, 620 (2002).
[1229] ibid 632.

crime.[1230] The Grand Chamber in *Dickson* made it clear to the government that the only punishment prisoners should receive is the removal of liberty.[1231]

One needs to return to the original justifications of punishment to evaluate how imprisonment and removing the ability to procreate fits in with these justifications. Punishment is imposed on an offender because they have committed a crime. The crime justifies the punishment for the individual offender.[1232] If the legislature deems the crime serious enough, then the offender will be incarcerated, or in some jurisdictions sentenced to death. In a more general context, the common justification for maintaining the institution of punishment is to deter potential and current offenders, to punish offenders and to protect society by incapacitating the offender.[1233] On a general level, deterrence is ineffective in reducing the overall levels of crime.[1234] If prison itself is not enough to deter potential offenders away from crime, it is extremely unlikely that the prospect of enforced childlessness will also have a specific deterrent effect. Protecting society is not furthered by a general prohibition on procreation for prisoners, as the prisoner themselves would not be released from prison before their sentence has expired. It could be argued that the prohibition on prisoners having children is justified by the punitive effect of the restriction. This is a decision that should be

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[1230] ibid 630.
[1231] *Dickson v United Kingdom* (2008) 46 EHRR 41 [67] citing *Hirst v United Kingdom* (no 2) (2006) 42 EHRR 41 para 69.
[1232] Immanuel Kant, *Metaphysical Elements of Justice: The Complete Text of The Metaphysics of Morals, Part 1* (Tr John Ladd, Hackett Publishing Company, 1999) 138.
[1233] Herbert Lionel Adolphus Hart, 'Prolegomenon to the Principles of Punishment' in Robert M Baird, Stuart E Rosenbaum, (eds) *Philosophy of Punishment* (Prometheus Books, 1988) 16.
[1234] In a sample of 130 prisoners, Burnett and Maruna sought to test the hypothesis that prison deters offenders from committing crime by following the post release trajectories. They found that 10 years post release; only 18% had no convictions for serious crime after a ten-year period (serious crime excluding parole violations, minor traffic offences and offences which only resulted in fine or conditional discharge) Ross Burnett, Shadd Maruna, 'So 'Prison Works', Does It? The Criminal Careers of 130 Men Released from Prison under Home Secretary, Michael Howard' (2004) 43 How J 390, 397; Francis T. Cullen, Cheryl Lero Jonson, Daniel S. Nagin, 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science' (2011) 9 Prison J Supp 49S, 50S.

specifically made by the legislature. Removal of a prisoner's freedom is already the most powerful punishment that society can exert over an offender and the specific punishment inflicted by a prison sentence. Apart from the death penalty, the punishment given to a prisoner at sentencing is the length of time to be spent in prison.

One of the more 'positive' aims of any punishment is encouraging the prisoner to desist from committing further crimes. Having children is a life changing decision for many, and in the case of prisoners, may help them desist from crime. Prisoners re-entering the community more often than not rely upon the support of their families to help them desist from crime. Rehabilitation and family ties are of primary importance to former prisoners seeking to desist from crime and prisoners who have stronger family ties are more likely to desist from crime.[1235] For some prisoners, being able to procreate would help cement these ties and help them to create a future for themselves and their families outside of prison. For a few prisoners who are convicted of serious offences against children, it would be appropriate to prevent them from procreating. It is very difficult to make generalised statements about which prisoners should have their right to procreate restricted, especially when one considers the variations in sentence given for the same offences in different jurisdictions.

Civil Death

Prisoners today in both the USA and in England and Wales continue to be affected by concepts of slavery and civil death, where the prisoner is presumed to no longer exist as a legal entity. Civil death in the medieval sense, of the person

[1235] William D Bales, Daniel P Mears, 'Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?' (2008) 45 J Res Crime & Delinquency 287, 312; Alice Mills, Helen Codd, 'Prisoners' families and offender management: Mobilizing social capital' (2008) 55 Prob J 9, 10.

who is legally dead to the world, no longer exists outside of some states in the USA, which mandate civil death for offenders convicted of murder.[1236] Slavery and imprisonment are also intrinsically linked with social death. These create practical barriers to parenthood, as prisoners are not able to earn a wage to support a family and are prevented from being involved with their family. Patterson highlights the historical links between slavery and imprisonment, where prisoners were subject to forced labour.[1237] Links between slavery and imprisonment in the USA are profound, where high numbers of Hispanic and African American individuals are incarcerated.[1238] Due to the large numbers of African American and Hispanic individuals incarcerated, restrictions to their ability to start a family will have profound effects on wider minority populations.[1239] Similar to the slave who loses all rights to their family, Nagel argues that prisoners undergo a process of natal alienation.[1240] The prisoner may have parental rights terminated; they are prevented from seeing their partner and may be prevented from having children. These collateral consequences go beyond the concept of penal punishment as just removing a person's freedom.

Prohibitions on procreation also stem in part, to the notion that following the commission of a crime, prisoners have a 'shattered character.' This 'shattered character' is used as a justification for a raft of collateral consequences, restrictions and intrusions into a prisoner's life which often extend beyond the

[1236] See footnote 889
[1237] Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press, 1982) 128.
[1238] See footnote 897
[1239] See footnote 898.
[1240] Mechthild E Nagel, 'Patriarchal Ideologies and Women's Domestication' in Mechthild E Nagel, Anthony J Nocella II, (eds) *The End of Prisons: Reflections from the Decarceration Movement* (Rodopi, 2013) 164.

length of their prison sentence.[1241] Chin applies this unwritten rule to the ex-offender and the multitude of restrictions that face him on release. It equally applies to the current prisoner, who is thought of as deserving punitive treatment because of their past wrong which has 'shattered' their good character.[1242] Dayan goes further, stating that the law enables the prisoner to be seen as civilly dead, living in body but dead in legal existence.[1243] Such a person has no ability to assert a right to procreate, as he is not viewed as a full person in the eyes of the law.

Parenting from Prison

When deciding when to have children individuals are usually afforded a great deal of privacy and autonomy. Some individuals may be criticised for making a decision which appears foolish, but no legal means will be taken to prevent otherwise competent adults from procreating via sexual intercourse. Prisoners on the other hand are subject to the full glare of the public gaze, having to justify personal decisions. They are completely stripped of their autonomy because the whole of prison is a public place. When a prisoner does submit to scrutiny in England and Wales, the prisoner and their partner will find that they may be refused for any number of reasons as they are subject to higher parenting standards than those in free society. The Dicksons were refused because of the 'seeming material insufficiency' of the provision made for the putative baby.[1244]

[1241] In his dissenting judgment in *Gaunt v United States,* Clark J refers to the Swiss philosopher Amiel who stated that 'character is an historical fruit and is the result of a man's biography' and that the criminal convictions of the former offender can shatter that character, justifying the removal of civil rights for an immigrant claiming citizenship. *Gaunt v United States* 364 US 350, 358- 360 (1960).

[1242] Gabriel J Chin, 'The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration' (2012) 160 U Pa L Rev1789, 1790-1791.

[1243] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press, 2011) 49.

[1244] *Dickson and Dickson v Premier Prison Service Ltd Secretary of State for the Home*

It was only mentioned in the Grand Chamber that Lorraine Dickson owned her own house and was completing a course, which would enable her to earn a living.[1245] It is as if the prisoner, and by extension the prisoner's partner are stripped of their autonomy, in order that the interest that they possess as competent adults can be taken over by the state. The state, in removing the prisoner's autonomy over their own body has in a way taken ownership of the prisoner's body. The state has an interest in the prisoner's physical self, which it expresses by not only physically restraining them in a prison, but by physically preventing them from procreating.

Parenting or rearing is subject to closer scrutiny than the decision to beget a child. This scrutiny is generally a societal pressure to perform a certain way as a parent, such as the development of 'intensive parenting' that treats parents themselves as a source of risk.[1246] This high standard is not a legal threshold for removing children. The legal threshold of child welfare which would mandate the removal of a child is a low one, just enough to prevent a child from being neglected or seriously harmed.[1247] It appears unfair that prisoners are required to meet higher standards than those in free society and even those prisoners who are already parents. Prisoners in England and Wales do not automatically lose custody of their children if they claim benefits or are single parents. That is not to say that prisoners do not lose custody of their children- they do, especially if they are serving a long prison sentence, or they are a danger to their children because

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Department [2004] EWCA Civ 1477 para 7.
[1245] *Dickson v United Kingdom* (2008) 46 EHRR 41 para 55.
[1246] Frank Furedi, *Paranoid Parenting: Why Ignoring the Experts May be Best for Your Child* (Continuum, 2008) 41; Ellie Lee, 'Introduction' in Ellie Lee, Jennie Bristow, Charlotte Faircloth, Jan Macvarish (eds) in *Parenting Culture Studies* (Palgrave Macmillan, 2014) 10.
[1247] Karen S Budd, 'Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model' (2001) 4 Clinical Child & Fam Psychology R 1, 3.

of their offence.[1248] The threshold for losing a child however is far lower than the threshold for prohibiting the creation of a new one. Sutherland argues that this higher welfare standard is used as a way of preventing prisoners from procreating, acting as a new form of eugenics.[1249]

Prisoners face many challenges parenting from prison, as do the children of prisoners. This may be used as a justification for restricting the ability of prisoners to procreate, in order to protect the interests of the putative child. Instead of ensuring that the putative child will never exist, a more positive approach would be to take steps to reduce the negative effects of imprisonment upon children and families. Improving visitation facilities and access for families, including financial support would provide prisoners with better contact with their families, allowing their children to develop better attachment to their parents. Private visits could be introduced for this purpose, so that prisoners develop normal healthy relationships with their partners and children, helping them to desist from crime on release, as well as giving them a connection with their family whilst they are still in prison.

Parenting courses and positive interventions such as family support workers can help prisoners and their relatives to make positive changes to their attitudes to parenting, drugs intake and criminality. Again, if prisoners can make changes which strengthen their social capital and support on the outside of prison they are more likely to desist from crime. Parenting courses and if necessary,

[1248] In the USA, prisoners can be subject to the Federal statute Adoption and Safe Families Act 1997 §103(a)(3) which mandates that all states automatically begin adoption proceedings for children who have been in foster care for 15 months within the last 22 months. Whilst there are exceptions, such as children who are being cared for by relatives, this means prisoners serving longer sentences can automatically lose parental rights.

[1249] Elaine E Sutherland, 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?' (2003) 82 Or L Rev 1033.

prison based nurseries can help prisoners improve their parenting skills, thus helping to reduce some of the negative effects of imprisonment. The potentially higher costs from allowing these measures could be offset by a reduction in the recidivism rate.

Suggestions for Reform

This research highlights that the legal status of prisoners who want to procreate needs reform. All of the jurisdictions studied had restrictive policies, none of which were justified by statute law. Given the fundamental importance of procreation to individual prisoners, their families and the wider community from which they come, the way requests from prisoners are dealt with requires reform. The potentially stabilising influence of closer family relationships justifies prisoners in all of the jurisdictions studied being allowed to exercise the right to procreate unless there are compelling reasons for restricting their right. It is important to separate the removal of the right to procreate from the punishment that the prisoner undergoes. The punishment of the prisoner sentenced to prison is that they lose their freedom, not their right to procreate.

The first stage in this process would be recognising that prisoners have a right to procreate that survives incarceration. Interpreting an individual prisoner's right to procreate as either a privilege or a right that is 'suspended' during their incarceration creates legal uncertainty and undermines the case law that states that prisoners' retain all of their rights apart from freedom. Allowing the state to treat procreation as a privilege opens the door to treating other rights that prisoners possess as a privilege. The second important change after recognising that prisoners retain a right to procreate, would be to protect this right by only prohibiting individual prisoners from procreating unless there is a compelling

reason not to. In England and Wales, procreation is not currently viewed as a human right. Whilst the Grand Chamber ruling in *Dickson* removed the requirement for prisoners to have an exceptional reason to request access to AI treatment, in practice it seems that the Ministry of Justice will still require specific justification as to why individual prisoners should be able to have children. In the USA, procreation only appears to be sanctioned when it serves a political need, such as in the case of Cuban spy Gerardo Hernandez.[1250] It may be that other jurisdictions and the Federal Department of Corrections have allowed other applications from prisoners to access AI, but would remain unreported unless pertinent to the media. Further research would be valuable in this area to highlight whether prisoners get permission to procreate without having to take a case to court, but in practice gaining access to this information would be extremely difficult. Within England and Wales the Freedom of Information Act 2000 would provide access to this information.[1251]

In all of the jurisdictions studied, the right to marry is respected as an important right for prisoners.[1252] This demonstrates that the state recognises the importance of prisoners creating enduring family relationships. It follows that if the right to marry deserves respect, then the right to have children is also important and equally deserving of respect. There may be justifications for restricting the right of certain prisoners to procreate, such as in the case of prisoners convicted of offences against children, or for prisoners convicted of

[1250] Anonymous, 'US jail sent Cuban prisoner's sperm to wife in Havana' (*The Telegraph,* 23 December 2014) http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/cuba/11309576/US-jail-sent-Cuban-prisoners-sperm-to-wife-in-Havana.html accessed 15 July 2015.
[1251] s1 (a), (b).
[1252] The exception to this is New York where prisoners sentenced to live for murder are deprived of civil rights and cannot marry. See footnote 579.

violent offences that may be at risk of harming a child. Similarly there may be justifications for restricting the ability of some prisoners to have sexual intercourse due to their convictions. The courts in both England and Wales and the USA argue that restricting sexual intercourse for all prisoners can be justified because of security concerns. Other jurisdictions manage the security concerns of private visits, even for high security prisoners, showing that a blanket ban is unjustified.[1253] Any necessary restrictions on private visits and procreation should be stated at the time of conviction.

Murray and Farrington argue that one of the quickest and most effective ways of reducing the effects of incarceration on children would be to imprison fewer parents.[1254] In the longer term, this would be the most sensible move, in both England and Wales and the USA. If only the most serious offenders were incarcerated, then prisoners who request the right to have a child could be accommodated more realistically. Considering the current punitive climate that affects both the USA and England and Wales, however, this is unlikely to occur in the near future. The prison population in both jurisdictions has undergone great growth over the last 30 years.[1255] Recognising that prisoners retain a right to

[1253] Most prisoners in Russia not subject to disciplinary measures can apply for private visits with family members. Dominique Moran, 'Between outside and inside? Prison visiting rooms as liminal carceral spaces' (2013) 78 GeoJournal 339, 344. European countries that provide access to private visits include Sweden, Denmark and Spain. Wyatt R, 'Male Rape in US Prisons: Are Conjugal Visits the Answer?' 37 (2005) Case W Res Int'l L 576, 602.
[1254] Joseph Murray, David P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 Crime & Just 133, 187.
[1255] In the USA the prison population (in both state and federal detention) in 1982 stood at 400,000, and in 2014 stood at 1,508,636. The Sentencing Project 'Fact Sheet: Trends in US Corrections' (*The Sentencing Project*, November 2015) http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf accessed 5 January 2015. In England and Wales in 1980, the prison population stood at just over 40,000. Ministry of Justice, *Story of the Prison Population: 1993-2012 England and Wales* (Ministry of Justice, 2013) 5. The overall prison population for England and Wales stands at 86,164 week ending 3 July 2015. Howard League for Penal Reform, 'Weekly Prison Watch: Week Ending Friday July 3 2015' (Howard League for Penal Reform, 3 July 2015) <http://www.howardleague.org/weekly-prison-watch/>accessed 4 July 2015.

procreate via sexual intercourse (or AI treatment if necessary) would be a radical move for all of the jurisdictions studied. Immediate change may be unrealistic, but as a first step, prisons in the USA should consider prisoners claims on a case-by-case basis, rather than dismissing all claims. It may be that some prisoners are allowed to procreate, but that these cases are never reported because they do not reach court. In England and Wales, the Ministry of Justice should consider prisoners claims without applying the exceptional reasons justification. This was made a condition of the Grand Chamber in *Dickson*, however the one successful applicant for AI known of shows that little has changed in practice.

Future Policy Implications of this Research

This research highlights that a prisoner's right to procreate, either by AI or sexual intercourse, is given very little respect or protection by either prison authorities or the judiciary in England and Wales and the USA This is despite having children being of fundamental importance to many prisoners and their partners. This thesis has shown that removing a prisoner's right to procreate without considered reasoning is unjustified and has collateral consequences that may reach far beyond the actual incarceration of the prison sentence. Further qualitative research conducted with prisoners may reveal the extent of the effects of enforced childlessness, such as failed relationships, increases in mental health issues and loneliness. It would also be valuable to compare prisoners in both the USA and in England and Wales with prisoners in other jurisdictions who do have access to private visits, and the opportunity to start a family. This could possibly demonstrate the value of improved relationships between prisoners and their partners, including those who have started families whilst incarcerated. Prisoners in the USA who have access to private visits and the ability to procreate could be compared with those who do not have access to the same facilities to see whether there are positive effects on rates of recidivism and prisoner behaviour. From a practical perspective, gaining access to prisons to conduct such research may be difficult. Prison authorities may feel that even conducting research would create an awareness of fertility options that prisoners themselves may never have considered. Such research in future would require careful preparation and ethical approval, as there may be the potential to leave research participants upset and requiring debriefing after participating. This would not be a reason to avoid

conducting research of this type however, as much research conducted with prisoners deals with sensitive issues, but has the potential to generate positive change within prisons. It is accepted that it may be difficult to gain permission for research of this type in England and Wales due to the current administration. Such reluctance was recently demonstrated by of the Ministry of Justice who refused the Howard League for Penal Reform permission to conduct empirical research about the prevalence of sex within prisons with serving prisoners and those released on licence. It is probable that a research proposal to question serving prisoners about their desire to become parents may also be refused.

Whilst prisoner procreation may seem a marginal issue compared to other problems such as prison voting and conditions of confinement, denying a person the ability to procreate goes to the very heart of an individual's self-expression and hopes for the future. In each of the jurisdictions studied, the state often removes other important rights from prisoners such as the right to vote and the right to maintain close family relationships. These rights are often removed with little consideration of whether their removal is justified by either law, or to increase the punitiveness of an offender's punishment. Therefore, a similar analysis to that undertaken by this thesis should also be applied to the many rights assumed to be withheld from prisoners by virtue of their incarceration. This will show whether their continued denial is justified. Furthermore, this research highlights the vital importance of immediate reform within the English and Welsh and American prison systems, with a focus on removing the enduring legacy of less eligibility. Prisoners should be allowed to retain all of their citizenship rights, including the right to sexual self-expression and procreation, unless there are compelling reasons to the contrary. This would include prisoners within society,

helping them to build social capital and so resist reoffending when they are released.

This research also shows that prisoners will continue to litigate to expand the recognition of their rights, including the right to procreate. In practical terms, this has been made difficult in the USA because of the PLRA and may be difficult in England and Wales because of reductions in Legal Aid funding.[1256] The current climate of punitiveness may continue to stifle these attempts, making it harder for prisoners in England and Wales to access the ECtHR. Equally, the case of Gerardo Hernandez highlights that the door for reform may have been left slightly ajar in the USA, since it has become known that the Federal Department of Corrections may make exceptions in certain cases.

[1256] For details of the PLRA see footnote 54. In England and Wales, Legal Aid for Prison Law cases is no longer allowed in certain circumstances, such as challenging the conditions of their detention, which can include women prisoners applying to a MBU or Parole Board hearings. See The Criminal Legal Aid (General) (Amendment) Regulations 2013 SI 2013/2790 Part 4; HL Deb 29 January 2014, vol 751 cols 1271-1280. Judicial review should still be available to prisoners, but they have to apply to the Special Cases Unit of the Legal Aid Agency, which may potentially cause delays. See Legal Aid Agency, *VHCC - Prison Law Judicial Review April 2013 v1* (Legal Aid Agency, 2013) 3.

Appendix Freedom of Information Request

Offender Safety, Rights and Responsibiliti
NOMS
Room G 20 Abell House
London
SW1P 4LH
Tel 0207 217 8561

Mary Yarwood,

Our Reference: FOI 70869 29 July 2011

Freedom of Information Request

Dear Ms Yarwood,

Thank you for your email of 8 June, in which you asked for the following information from the Ministry of Justice (MoJ):

(I have numbered your requests for ease of reply)

1. The amount of requests made by male prisoners in the period 1st January 1990 and 3rd December 2007 for access to artificial insemination facilities.

2. I would like to know how many of those requests were granted, and when they were granted.

3. If at all possible I would like to know the current policy considerations which are taken into account by decision makers when making this decision, and a copy of the policy, if one exists.

4. In the same period from 1st January 1990 to 3rd December 2007 I would also like to know if there were any requests from female prisoners for access to reproductive facilities, i.e. to enable them to conceive a child whilst incarcerated. This could include direct artificial insemination with donor or their partner's sperm, in-vitro fertilisation using either their own or donor gametes and partner or donor sperm.

5. I would also like to know this same information for the period 4th December 2007 to today, the 8th June 2011 to enable me to make any comparisons between the two time periods.

6. Finally I would also like to know if any separate policy exists to allow officials

to make a decision regarding access to fertility treatment for female prisoners. If so, I would be very grateful for some details of the policy, and if possible a copy.

7. I am particularly interested in the factors which decision makers take into account when deciding whether or not to allow access to treatment, such as relationship considerations, the offence committed by the prisoner, public policy issues, Article 8 rights of the prisoner and welfare of the child considerations.

Your request has been handled under the Freedom of Information Act 2000 (FOIA).

Please note that if a request is made for information and the total figure amounts to five people or fewer, the Ministry of Justice (MoJ) must consider whether this could lead to the identification of individuals and considers the information in line with the Data Protection Act 1998 (DPA).and some information has been withheld under Section 40 of the Freedom of Information Act.

It is the general policy of the Ministry of Justice not to disclose, to a third party, personal information about another person. This is because the MoJ has obligations under the DPA to protect this information. It has been concluded that some of the information you have requested is exempt under Section 40(2) of that Act. Section 40(2) of the FOIA states that personal data relating to third parties (i.e. a party other than the person requesting the information) is exempt information if one of the conditions in Section 40(3) is satisfied. It is my view that disclosure of the smaller figures requested would breach one or more of the Data Protection Principles in the DPA. For example, disclosure would breach the fair processing principle, as it would be unfair on the person who the personal data relates to, and they have a reasonable expectation that the Department would hold that information in confidence

In answer to your questions:

1. Between 1 January 1990 and 3 December 2007 43 applications were received from male prisoners for access to artificial insemination (AI) facilities.

2. As per the above guidance on section 40, it is not our policy to give this information as this could enable the individuals to be identified.

3. There is no policy document which addresses this type of request other than Prison Service Instruction 10/2011 and Prison Service Order PSO 2510, Prisoners' Request and Complaints Procedures, chapter 10 which identify this as a reserved subject. As such, this is dealt with centrally rather than at prison establishment level.

When considering an application of this kind particular attention is paid to the following considerations:

- The welfare of any child born. Evidence would need to be produced to show that the arrangements for the welfare of the child and the couple's home would be satisfactory.

- Whether both parties want the procedure and medical authorities inside and outside the prison are satisfied that both parties are medically fit to proceed with treatment.
-
- Whether the prisoner's expected release date is neither so near that delay would not be excessive, nor so distant that they would be unable to assume the responsibilities of a parent.
-
- Information about the prisoner's offending history, including an assessment of the risk of harm they present, as well as other factors which might suggest it would not be in the public interest to allow access to AI facilities in the particular case.
-
- Whether the prisoner and their partner are in a well established and stable relationship which is likely to endure after the prisoner's release.
-
- Whether the provision of AI facilities and/or the continuation of assisted conception treatment is the only means by which conception is likely to occur.

This information is shared with both the prisoner and their partner on receipt of a request for access to AI facilities and both parties are asked to comment. This list of considerations is not exhaustive and applicants are at the same time encouraged to submit any other relevant information which they think may help their application.

There is no delegation to officials to approve applications for access by prisoners to AI facilities. Any approvals are granted by Ministers.

4. From 1 January 1990 to the present day, according to our records, no applications have been received from female prisoners.

5. Since 4 December 2007, 22 applications have been received from male prisoners.

6. The same policy applies to male and female prisoners.

7. As at 3 above.

The Prison Service Instruction 10/2011 and Prison Service Order PSO 2510, Prisoners' Request and Complaints Procedures, chapter 10, referred to above is available on the MoJ website at the following address:

http://www.justice.gov.uk/guidance/prison-probation-and-rehabilitation/psipso/psos.htm

We hope that you have found this information helpful.

You can also find more information by reading the full text of the Act (available at http://www.legislation.gov.uk/ukpga/2000/36/contents) and further guidance http://www.justice.gov.uk/guidance/freedom-of-information.htm.

You have the right to appeal our decision if you think it is incorrect. Details can be found in the 'How to Appeal' section attached at the end of this letter.

Yours sincerely

How to Appeal

Internal Review
If you are not satisfied with this response, you have the right to an internal review. The handling of your request will be looked at by someone who was not responsible for the original case, and they will make a decision as to whether we answered your request correctly.

If you would like to request a review, please write or send an email to the Data Access and Compliance Unit within two months of the data of this letter, at the following address:

Data Access and Compliance Unit (6.25),
Information & Communications Directorate,
Ministry of Justice,
102 Petty France,
London
SW1H 9AJ

E-mail: data.access@justice.gsi.gov.uk

Information Commissioner's Office
If you remain dissatisfied after an internal review decision, you have the right to apply to the Information Commissioner's Office. The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if he considers that we have handled it incorrectly.

You can contact the Information Commissioner's Office at the following address:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire
SK9 5AF

Internet address: https://www.ico.gov.uk/Global/contact_us.aspx

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