Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case

PollyBeth Proctor*

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* J.D. 2003, University of Georgia; B.A. 1999, Davidson College.
I. INTRODUCTION

In the past few years, the legal communities in both the United Kingdom and the United States have been engaging in heated debates about a prisoner's right to procreate. It is not conjugal visits, which are generally prohibited in both countries, but rather the prisoner's right to access facilities for artificial insemination (AI) that have taken center stage. The idea that a man serving a life sentence might have a right to artificially inseminate his wife so that he can father a child while behind bars provokes strong and opposing reactions from members of these legal communities.

In two United States cases, appeals courts employed strict constitutional analyses in addressing this issue. In 1990, the 8th Circuit addressed the issue, and the 9th Circuit addressed the issue again in 2001. While these U.S. cases provide insights into the issue at hand, and while this Note will survey them in consideration of the English judicial approach to the same matter, it will focus primarily on the development of the prisoner's right to procreate in the United Kingdom.

The discourse that surrounds the debates in the United Kingdom is particularly engaging because of the many competing interests that emerge. Constitutional rights, human rights, penological objectives, public policy, and family issues like privacy and marriage must all be evaluated. The English

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1 See 60 AM. JUR. 2D, Penal and Correctional Institutions § 84 at “Conjugal Visits” (1987) (stating that prisoners in the United States traditionally have been denied opportunities for conjugal, overnight familial visits while incarcerated; while some states now allow some form of conjugal or extended family visitation, the general practice is still not to permit such contact); see also infra notes 89-90 and accompanying text for the status of conjugal visits in the United Kingdom.

2 Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990). Without determining whether the right to procreate survives incarceration, the court states instead that the policy behind the restriction is reasonably related to the penological interest of equal treatment of men and women (since prisons could never practically support female inmates' pregnancies). See id. at 1399-1400.

3 Gerber v. Hickman, 264 F.3d 882 (9th Cir. 2001), rev'd en banc, 291 F.3d 617 (9th Cir. 2002), cert. denied, 123 S. Ct. 558 (2002). The 2001 court found the right to procreate does survive incarceration and that the prohibitive policy did not further any legitimate penological objectives. The 2002 court reversed the decision, precluding the right for prisoners to procreate via AI under a similar analysis, weighing penological objectives against the individual right.

courts must prioritize these obligations, a duty which has assumed unprecedented importance in recent years, as the country undergoes what some scholars have speculated to be a peaceful constitutional revolution.\(^5\)

In November of 1998, the United Kingdom officially incorporated the European Convention on Human Rights\(^6\) (ECHR) through the Human Rights Act\(^7\) (HRA), which became effective in October of 2000.\(^8\) The Convention, which sets forth a number of fundamental rights and freedoms, guarantees citizens of Member States a forum in which to secure these rights.\(^9\) While most other Member States had entrenched the Convention’s human rights law securely in their legal systems, the United Kingdom remained one of only three States who had not.\(^10\) Thus, until only recently, Convention law carried only persuasive authority in English national courts.\(^11\) The Act is therefore a powerful piece of legislation that aims to integrate the common law system of human rights with the continental system of Convention law.\(^12\) The Act gives courts a new power of statutory interpretation that shares features of the judicial review function of the U.S. Supreme Court,\(^13\) and yet allows the

the Home Dep’t, *ex parte* Mellor, [2001] H.R.L.R. 38, available at 2001 WL 272920. This is the only case in England after the passage of the Human Rights Act in which a prisoner asserted his right to artificially inseminate his wife; the House of Lords’ very lengthy opinion discusses prison policy, domestic law, European Convention on Human Rights law and other societal concerns before denying the request. See id.

\(^5\) Ian Loveland, *Incorporating the European Convention on Human Rights into UK Law*, 52 PARL. AFFAIRS 113, 117 (1999). Loveland argues that judges and politicians interpret the Human Rights Act to assume supra-legislative status; judges envision the ECHR as offering them a “‘side door’ approach to using Convention principles to disapply acts of Parliament which contravene its requirements.” *Id.* at 117.


\(^7\) Human Rights Act, 1998, c. 42 (Eng.).

\(^8\) BOSMA, *supra* note 4, at 3.


\(^10\) Loveland, *supra* note 5, at 114 (naming Norway and Ireland as the other two).

\(^11\) *Id.* The Convention itself does not require incorporation by the signatory states into their domestic law, and English courts have been therefore unable to invoke its provisions to override parliamentary legislation or other governmental decisions that violate Convention terms. *Id.*

\(^12\) BOSMA, *supra* note 4, at 3.

\(^13\) Lord Irvine of Lairg, *Activism and Restraint: Human Rights and the Interpretive Process*, in HUMAN RIGHTS FOR THE NEW MILLENNIUM 4-7 (Frances Butler ed., 2000) (suggesting that the
United Kingdom to retain elements of parliamentary sovereignty that have always characterized its government.  

One area of law that has attracted significant attention since the Act became effective is prisoners' rights. British prisoners have generally been denied the right to procreate by AI except in exceptional medical circumstances, although the policy has been applied with some inconsistency. Prisoners consistently base their claims on ECHR Article 8, the Right to Respect for Family Life, and Article 12, the Right to Found a Family; yet neither the English courts nor the European Court of Human Rights in Strasbourg have found a violation where the right to procreate was at issue. The limited and inconsistent national and international case law on this subject only renders supposition about the future of these prisoner claims in light of novel human rights legislation even more speculative; this Note will seek guidance from the one case that has considered the issue in the United Kingdom since the passage of the HRA.

In a timely response to the Act, British inmate Gavin Mellor sued the British Secretary of State in 2000 alleging a breach of his guaranteed fundamental rights when his request to artificially inseminate his wife was denied. The case was brought before the Act's incorporation of the ECHR,
and the denial of the prisoner’s request was upheld.\textsuperscript{19} Mellor appealed in April of 2001, after the Act’s incorporation, and denial was again upheld.\textsuperscript{20} Although the Court considered national prison policy and domestic precedent in its reasoning, it also expressly recognized its new obligations under the Human Rights Act. Did the Mellor case sound the death-knell for hopes that the new Act would bring procreative freedom to the British prisoner at home? Does post-incorporation Convention compliance even require recognition of such a right?

This Note will consider how the prisoner’s right to procreate will develop in light of the United Kingdom’s passage of the Human Rights Act. It will first survey the United Kingdom’s human rights history. The Note will then trace the passage of the Human Rights Act and describe its provisions. It will then examine the body of English law surrounding the prisoner’s right to procreation before the passage of the Human Rights Act.

The analysis evaluates the 2001 Mellor case under the cautious presumption that a comparison of the English Courts’ approach to the procreation issue both before and after the Act’s passage is indicative of the country’s vision of this right in the wake of a human rights movement. The development of these ideas will depend on English judges’ willingness to step into their new role and apply what the Convention requires of them. Pursuit of more progressive notions of human rights will be determined by the judges’ perceptions of their new interpretive role.\textsuperscript{21}

The English judiciary might increasingly perceive incorporation of the ECHR to mandate a more proactive judicial role in scrutinizing legislation or executive actions to ensure human rights at home. Yet, it seems clear that in the less than three years since incorporation took legal effect, the Mellor court is announcing that granting prisoners’ rights to procreate by AI is not required for compliance with the ECHR. Close scrutiny of English jurisprudence and societal values, as well as Convention case law and article provisions, provides ample justification for the United Kingdom’s understanding of the prisoner’s right to procreate at present. Because the ECHR affords the United Kingdom a measure of deference in its understanding of its responsibilities under the

\textsuperscript{19} See id.


\textsuperscript{21} See Loveland, \textit{supra} note 5, at 124. The Act provides for the possibility of the English judiciary shifting their traditional deference to Parliament to a higher commitment to uphold EU laws. \textit{Id.} at 124-25. See also BOSMA, \textit{supra} note 4, at 32.
Convention, the Mellor decision is arguably true to the United Kingdom's values and legal obligations.

II. BACKGROUND

A. The United Kingdom's Human Rights History

The United Nations' 1948 Universal Declaration of Human Rights marked the first worldwide effort to protect and promote human rights. The preamble of this landmark document states that "recognition of the inherent dignity and of the equal and inalienable rights of all ... is the foundation of freedom, justice and peace in the world." The Council of Europe responded with its own regional commitment to human rights. On November 4, 1950, the United Kingdom, together with eleven other countries, signed the Convention for the Protection of Human Rights and Fundamental Freedoms. Based on this Convention, the twelve countries then founded the European Convention on Human Rights, which organized civil and political rights and freedoms, as well as a system of enforcement for the contracting states. The Convention protects freedom of speech, religion and expression, privacy, the most fundamental rights of the criminally accused, and it protects against discrimination, among other guarantees.

Despite its commitment to sign and ratify, the United Kingdom was bound by Convention law only at the European Court of Human Rights in Strasbourg, but not in its national courts, since it had not officially incorporated the Convention into its domestic law. However, ratification was an important embrace of human rights because British citizens could still take their

26 Id.
28 Id. (describing the legal effect of domestic application of the Convention through Article 1 of the ECHR); see also Loveland, supra note 5, at 114 (describing the courts' limitations in protecting human rights before Convention incorporation).
allegations of human rights infringements to Strasbourg and be guaranteed a forum for complaint there.\textsuperscript{29} Still, taking a case to an international tribunal imposes burdensome delays and costs for the petitioner; moreover a suit can only be filed after domestic remedies have been exhausted.\textsuperscript{30} Thus, a country’s ratification of the Convention does not promise the protections that incorporation would deliver.

Unlike the United States, the United Kingdom has no written constitution or enumerated bill of rights. While American judges have invalidated both national and state legislation based on constitutional principles for two centuries,\textsuperscript{31} British judges could creatively manipulate case outcomes before incorporation through two very limited avenues. First, through a legal presumption, the courts assumed in their reasoning that Parliament did not intend to restrict fundamental freedoms when it drafted the law.\textsuperscript{32} Second, any ambiguities in statutory language should be construed consistently with the ECHR.\textsuperscript{33} But since legislation cannot be overturned by British courts, then in cases where the judge’s limited interpretive freedom would not permit him to find a Convention right violated, the plaintiff had to take his case abroad.

One scholar notes that “the last few decades have witnessed a notable decline in the culture of liberty—the community’s shared sense that individual privacy and dignity and freedom of speech and conscience are crucially important. . . .”\textsuperscript{34} The United States and every member of the European Community are committed to the idea of democracy as witnessed by a higher law document assuring fundamental rights and freedoms; yet Great Britain’s insistence that Parliament must have absolute legal power to do as it wishes seems to inhibit British judges from following through with such commitment in some cases.\textsuperscript{35}

In the United Kingdom, freedoms are not regulated by an exhaustive, documented list, so that liberty is not rights-based but rather freedom-based.\textsuperscript{36}

\textsuperscript{29} See \textit{Human Rights in the United Kingdom} 102 (Richard Gordon, QC & Richard Wilmot-Smith, QC eds. 1996) [hereinafter Gordon & Wilmot-Smith]. The United Kingdom granted a right of petition in 1966 that allowed citizens to enforce their rights at the European Court of Justice. Rights were enforced by the international body by either asking Parliament to legislate or by initiating a change in the offending administrative practice. \textit{Id}.

\textsuperscript{30} \textit{Id.} at 6.

\textsuperscript{31} \textit{Id.} at 59.

\textsuperscript{32} BOSMA, \textit{supra} note 4, at 8.

\textsuperscript{33} \textit{Id}.

\textsuperscript{34} Gordon & Wilmot-Smith, \textit{supra} note 29, at 59-60.

\textsuperscript{35} See \textit{Id.} at 61.

\textsuperscript{36} BOSMA, \textit{supra} note 4, at 4.
The British system may seem democratic in light of Sir Robert Megarry's description of the protection of rights in the United Kingdom: "[t]he United Kingdom is . . . a country where everything is permitted except what is expressly forbidden."37 Yet a stronger argument maintains that people's liberties are indeed threatened as long as there is no entrenched constitutional foundation to which judges can turn to bring about a desired outcome.38 Modern judicial review, the citizen's constitutional safeguard, is absent.39 Without a written constitution, judges can only protect fundamental rights and freedoms to the extent that general common law principles and judicial creativity will allow.40

The system thus exposes its hypocrisies and inefficiencies by not guaranteeing at home in national courts those rights enforceable by citizens under Convention law abroad in Strasbourg.41 The United Kingdom has one of the highest numbers of cases brought against it before the Court of Human Rights, with over half of the resulting violations being issued after 1990;42 this seems to signal a need for a more committed and official adoption of the Member States' pledge of more than half a century ago to uphold fundamental rights.

B. The Human Rights Act

1. Impetus for the Act

Since the 1960s, members of the Houses of Commons and Lords have tried to persuade English legislators to promote legislation incorporating the ECHR into domestic law.43 The 1998 Human Rights bill initiates this important reform, finally integrating the Convention into national law.44 The Home Secretary described it as "the first major Bill on human rights for more than

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38 See Gordon & Wilmot-Smith, supra note 29, at 19-20.
39 Id. at 19.
40 Id.
41 See Bradshaw, supra note 25, at 58.
42 Id.
43 Loveland, supra note 5, at 114.
300 years,” and “a key component of our drive to modernize our society and refresh our democracy. . . .” The white paper that introduced the Act explained its needed role in British legal culture:

[i]n this country it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law. In the last two decades, however, there has been a growing awareness that it is not sufficient to rely on the common law and that incorporation is necessary. In the government’s view, the approach which the UK has so far adopted . . . does not reflect its importance and has not stood the test of time.”

The HRA suggests that the government has begun promoting the development of a culture of rights and responsibilities. The HRA promises that every citizen will be guaranteed a specific and comprehensive catalogue of fundamental rights. Thus, the Act is primarily curative of the perceived deficiencies of the State in fulfilling their obligations to the ECHR.

2. The Act’s Principal Provisions

Generally, the Act works in two principal ways. First, it requires the courts to account for Convention precedent and interpret legislation compatibly with Convention rights. Second, it requires public authorities to act compatibly with Convention rights unless primary legislation makes it impossible.

Several key features and sections of the Act are important in evaluating the prisoner’s right to procreate. First, the Convention grants signatory states a
“margin of appreciation” as they consider the rights at issue.\footnote{See Loveland, \textit{supra} note 5, at 113; BOSMA, \textit{supra} note 4, at 132-33.} This means that instead of imposing rigid restrictions, incorporation of the Convention still allows the United Kingdom to preserve cultural and political traditions, at least to the extent that they coexist with fundamental rights and freedoms.\footnote{See generally BOSMA, \textit{supra} note 4, at ch. 6.2.} This degree of deference is necessary since many human rights issues are linked to social conditions, attitudes and values, including family and private life.\footnote{Paul Mahoney, \textit{Principles of Judicial Review as Developed by the European Court of Human Rights: Their Relevance in a National Context, in THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS} 73 (Lammy Betten ed., 1999).} Courts will likely exercise a degree of discretion by assigning definitions to these indeterminate concepts in light of the national culture and time period.\footnote{See id.; see also Human Rights Website, \textit{supra} note 27 (describing the Convention as a living instrument to be interpreted in light of present day conditions).}

The proportionality principle, another key feature of the act, is central to the operation of the HRA; proportionality requires the judiciary to consider whether a restriction on human rights is legitimate and not in excess of what is appropriate and necessary in order to fulfill the policy’s purpose.\footnote{BOSMA, \textit{supra} note 4, at 133.} The application of proportionality strives to ensure a fair balance between the general interest of community and the protection of the individual’s fundamental rights.\footnote{Id.} Proportionality recognizes that while rights are important, the pursuit of rights to the exclusion of a wider public interest may be subversive of the ideal of a tolerant and liberal democracy.\footnote{Richard Clayton, \textit{Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle, 5 E.H.R.L.R.} 504, 505 (2001).}

Section 8 of the Convention, which is central to the discussion of the prisoner’s right to procreate, states generally that there shall be no interference by a public authority with the right to respect for private and family life.\footnote{ECHR, \textit{supra} note 6, at art. 8(1).} But the second clause lists exceptions, such as where the interference is in “accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country.”\footnote{Id. at art. 8(2).} In the case of a prisoner’s claim that a right was violated when his request to artificially inseminate his wife was denied, a court would ask whether the restriction was proportionate to the prison’s aims, whether the prohibition represents a pressing social need, and whether the justifications are
relevant to prison policy. Essentially, the application of proportionality engages a means-end balancing test, whereby the seriousness of the restriction is weighed against the interest in realization of the legitimate aim.

Section 2 of the Act is pivotal in defining the new role of the courts. It requires the English courts to “take into account” the judgments and decisions of the ECHR. This means that Convention law is not directly binding precedent for national courts, but rather judges are only obligated to seriously consider ECHR law. Because of the margin of appreciation, courts still retain discretion in evaluations of fundamental rights and are thus free to consider national principles and policies within the greater context of the ECHR scheme. It is unclear whether this new commitment to “take into account” ECHR judgments and resolutions will result in obligatory concurrence with the Strasbourg position on the prisoner’s right to procreate.

Further, although the courts cannot invalidate a statute under the Act, Section 3 states that courts are nonetheless obligated to interpret the statute in accordance with Convention principles; if in a good faith effort they cannot, a Declaration of Incompatibility may be issued. Although powerless to nullify legislation, the authority behind the Declaration may prove to become an important political instrument for the judiciary.

Section 6 of the Act requires public authorities to bring their policies more strictly in line with the ECHR. The Act does not define exactly who is considered to be a public body, but the White Paper introducing the Bill seemed to contemplate prisons when it included legal persons “exercising functions which would otherwise be exercised by government.” The provision compels courts not only to review public authorities’ activities when they are a party to litigation, but also to initiate a critique of private law as

61 BOSMA, supra note 4, at 133.
62 Id. at 142.
63 Human Rights Act 1998, c. 42, § 2(1)(a) (Eng.).
64 BOSMA, supra note 4, at 25.
65 See Human Rights Act 1998, c. 42, § 3(1) (Eng.).
66 Id. at sec. 4.
67 See Loveland, supra note 5, at 116 (explaining that these Declarations do not invalidate legislation or require Parliament to take remedial action, but they are at least effective in putting Parliamentary responsibility and human rights issues in the public eye).
68 See Human Rights Act, c. 42, § 6 (Eng.).
69 Gillespie, supra note 44.
well. Impliedly then, courts must scrutinize the prison policies prohibiting conjugal visits and access to facilities for artificial insemination in order to determine those policies' compatibility with the Convention. Courts will decide whether prison authorities have exceeded their powers or have failed to fulfill their duties. Yet, "despite the provisions in the HRA, judicial modifications of existing policy will still largely depend on the extent to which the courts are willing to participate in judicial review.

3. Projected Impact of Prisoners' Claims in HRA Litigation

The Human Rights Act of 1998 was expected to come into force in 1999, but was delayed a full year due to a confidential Whitehall audit suggesting an overwhelming multitude of laws under scrutiny. Officials feared an onslaught of litigation against the government concerning, in particular, rights to privacy and to a fair trial. Yet, one year after it came into force, the London Times reported that, "[d]ire warnings that [the Human Rights Act] would be a charter for crackpots and a goldmine for lawyers have proved unfounded." While there has been no inundation of prisoner claims, the number of judicial reviews under HRA guidelines notably doubled as expected in the first year of incorporation. One year after the Act's incorporation, the Scotsman reported: "The [ECHR] has been used and abused on several occasions since it was incorporated into UK law. The sheer audacity of some of the claims since the [HRA] was passed has led critics to dub ECHR the 'chancers' charter.' The article cited prisoners who have appealed to the Convention to change their conditions in jail. These types of appeals indicate

\* See BOSMA, supra note 4, at 27.
\* See Beloff, supra note 37.
\* See id.
\* See Clarke, supra note 15 (predicting that the number of judicial reviews in which a judge is asked to overrule a decision by a government minister will double from 300 to 600 a year); Beloff, supra note 75 (confirming that 600 cases in which HRA issues were considered reached the High Court and above).
\* See id. The article cites a prisoner who appealed to the ECHR to be paid in cash rather than vouchers for his work in prison as a printer, arguably opening up the floodgates for
that prisoners are an influential group who are helping to shape the new human rights culture.

C. Prisoners' Historical Requests for Artificial Insemination

British judicial policy regarding prisoners' requests to procreate behind bars before the Act's incorporation of the ECHR is a helpful beginning point in consideration of how, if at all, that privilege could now be asserted as a right. A survey of prisoners' claims filed in the United Kingdom and then taken to Strasbourg reveals inconsistent and wavering attitudes of British prisons and British courts on the matter. Yet what is clear is that, historically, the prisoner's right to procreate was considered neither absolute nor fundamental.

Prison regulations are one source of legal authority which have traditionally limited the prisoner's right to procreate. The Prison Rules of 1999 supplemented the Prison Act 1952. According to the Prison Rules, the Secretary of State promulgates rules for the management of prisons and for the treatment, discipline, and control of the detainees. Requests and complaints are made to the Governor or the Board of Visitors, but the Secretary of State is ultimately responsible for policies. The Rules are not explicit about a prisoner's conjugal rights or about other means of procreation, like artificial insemination or in vitro fertilization, and the Secretary of State retains considerable discretion over these matters as a result. Just as prison officials may extend visiting privileges, they may also restrict them by prohibiting either a particular visitor or the visit duration, so long as it is both necessary and proportionate to the stated objectives. Conjugal visits, therefore, are not a right but a very narrowly conferred privilege.

Beyond these regulations, the right to procreate is also guided by the United Kingdom's commitment to the ECHR. Procreative opportunities were addressed in Hamer v. United Kingdom when the European Commission of

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prisoners to push for employment rights. *Id.* It also cites a prisoner who claims being made to "slop out" is a cruel and unusual punishment under ECHR Article 3. *Id.*

80 Prison Act 1952, c. 52 (Eng.).
82 *Id.* at pt. II, r. 11(1).
83 See *id.* at r. 35(2)(b) (permitting the Secretary to restrict prisoners to one visit a month).
84 *Id.* at pt. IV, r. 73(1).
85 Hamer v. United Kingdom, 4 EUR. H.R. REP. 139 (1982).
Human Rights confirmed that Convention Article 12, the Right to Found a Family, guaranteed the right to marry as an absolute right. In Hamer, the court also noted that "[the right to found a family] does not mean that a person must at all times be given the actual possibility to procreate his descendants." 

Conjugal rights were revisited once more in a case where the United Kingdom was a party before the European Commission on Human Rights; in 1997, a prisoner and his wife requested conjugal visits to follow up pre-conviction efforts to conceive with fertility treatments. After their request was denied by the prison, the applicants took their case to Strasbourg, claiming an unjustified interference with their right to privacy under Article 8. The prohibition was upheld because the court found the prison policy proportionate to prison objectives.

Thus, ECHR case authority governing both the United Kingdom's and the European Court's interpretation of Convention Articles establish judicial concurrence that conjugal rights are not necessary to comply with Convention principles. Whether a growing domestic liberalization of European human rights law will encourage or obligate English judges to rethink this policy will be discussed shortly.

Currently, the right to procreate behind bars via artificial insemination is not an established right, but has been recognized within very narrow and unclear circumstances. Prisons have granted permission based on medical necessity, but also denied it under the same compelling conditions. English courts have upheld denials in national courts and then granted permission once the United Kingdom was named a participating respondent in Strasbourg.

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86 Human Rights Website, supra note 27 (clarifying that Protocol 11 of the ECHR abolished the European Commission of Human Rights; the Convention is now administered by the European Court of Human Rights and the Committee of Ministers of the Council of Europe).
87 Hamer, 4 EUR. H.R. REP. 139.
88 Id. at 140 (citing X v. F.R.G., 4 Y.B. EUR. CONV. ON H.R. 240 (1961)).
90 Id.
91 Id.
92 See supra note 16 and accompanying text; see also supra note 18 and accompanying text.
Clearly, Great Britain believes this privilege should be granted only in exceptional circumstances, but has wrestled to define their human rights obligations in the face of this issue.

III. THE MELLOR CASE

The recent case of Gavin Mellor offers the most insightful perspective as to how the right of a prisoner to procreate is developing in light of the ECHR's incorporation into domestic law. Mellor applied through the prison system for permission to have access to facilities for artificial insemination. After the request was denied, he took his case to the High Court in July 2000, just three months before the Act's incorporation of the Convention, and the judge upheld the Secretary of State's denial. On appeal from the Queen's Bench Division, the Court of Appeal considered and dismissed his complaint in April of 2001, six months after incorporation. The opinion is enlightening because it goes to great lengths to balance domestic laws and precedent, Convention principles and Strasbourg jurisprudence, while striking the appropriate compromise that is true to national traditions and to Great Britain's ECHR commitment. The Mellor case is seminal because it reflects the current legal and cultural approach to the prisoner's right to procreate by artificial insemination; moreover, it provides a window into the development of the right at issue in light of new human rights legislation.

Mr. Mellor was twenty nine years old serving a life sentence for murder when he met and subsequently married a prison official in 1997. They immediately applied for permission to artificially conceive by insemination. The couple claimed no exceptional circumstances that would normally qualify them for assistance with this procedure; because Mellor's wife had no medically pressing conditions, such as fertility problems or high-risk age, she and Mellor could attempt to procreate naturally upon his release. The couple simply argued that they were in love, anxious to have a child, and that

97 Id. at paras. 14, 55.
99 Id. at paras. 3-5.
100 Id. at para. 10.
101 Id. at paras. 12-14; see also id. at para. 3 (explaining that the tariff element of Mr. Mellor's life sentence is due to expire in 2006).
Mrs. Mellor was fit to assume the responsibilities of motherhood since she worked and had live-in help from Mr. Mellor's mother.102

A. Consideration of Societal Values and the ECHR

The Mellor opinion indicates that both before and after the ECHR became law, the courts have remained expressly concerned with social values. Because Section 6 of the Human Rights Act makes courts responsible for ensuring that public authorities, like prisons, act in accordance with Convention principles,103 the Act consequently requires courts to critique legislation like the prison policy at issue in Mellor.104 It is in this evaluation that social values emerge.

The Mellor court noted that the Prison Service developed a set of considerations—as opposed to rigid criteria—to guide officials' decisions, and that while usually only medical necessity will qualify a prisoner for permission to procreate, there are also other factors that carry weight in the decision.105 Whether both parties want the procedure, whether the couple is in a stable relationship before imprisonment, the stability of the couple's domestic circumstances, and the public's best interest are among those factors enumerated.106 The court justified these additional considerations by recalling that an inevitable consequence of imprisonment is the loss of opportunity to beget children, and that single parent families often disadvantage both the child and society.107 In the Mellor case, the courts were primarily concerned with the stability of the couple's recently consummated marriage and the risks and dangers of Mrs. Mellor's single parenting situation.108

Mellor's appeal claimed that it was inappropriate for the Secretary to consider the strength of the marital relationship and the best interests of a child with a father in prison.109 To the contrary the prisoner argued that the Secretary should only evaluate the request in light of prison policy objectives.
to maintain security and discipline. The High Court disagreed, asserting that the Secretary appropriately formulated a policy governing access to the facility for artificial reproduction, and the factors considered by him were both lawful and relevant. The Court of Appeals agreed that the Secretary of State legitimately considered public perceptions and the consequences of single-family parenting. The Mellor case therefore suggests that it is still both appropriate and desirable for the courts to account for social values as they step into their new roles and responsibilities under the HRA.

B. Application of Domestic Legal Principles under ECHR

In addition to considering prison policy, the British courts must also consider other applicable domestic law principles. The Mellor opinions expound on the United Kingdom’s domestic case law guidance as to prisoners’ liberties. Citing a 1999 case, the 2000 Mellor Court stated:

[a] sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner. Thus the prisoner’s liberty, personal autonomy, as well as his freedom of movement and association are limited. On the other hand, it is well established that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are taken away not expressly or by necessary implication.

This sweeping statement suggests an underlying legal presumption that liberty exists unless it is expressly removed. Thus, judicial evaluation of human rights turns on the court’s interpretation of what rights have been or should be ‘necessarily’ or ‘impliedly’ removed.

C. Application of ECHR Articles in Mellor

In the 2001 Mellor case, the court found no major tension between domestic law and ECHR dictates, as Lord Philips recognized when he said,

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111 Ex parte Mellor, 2001 WL 272920, at para. 66.
112 Id.
113 Ex parte Mellor, 2000 WL 1027083, at para. 17(iv) (citing Raymond v. Honey, A.C. 1, 10G (1983)).
"the approach under Strasbourg jurisprudence and under English domestic law is the same." Both the Queen's Bench Division and the High Court evaluated the legitimacy of the English prison policy in light of Convention Articles 12 and 8. The policy allows assistance for prisoners to artificially reproduce only in exceptional (medical) circumstances and assumes that denying the right to procreate is a fair and necessary consequence of incarceration. Yet Article 8 protects the right to respect for private and family life, and Article 12 assures the right to found a family. Can the policy and the articles be reconciled?

Addressing Article 12, the Mellor court maintained that because this right does not include the right to procreate at all times, Article 12 fails to provide legal support to the prisoner's argument. The court distinguished the right to marry from the right to conceive, because marrying is not incompatible with a prisoner's deprivation of liberty since it only confers a status, whereas the right to conceive can potentially threaten prison security or public interest. The court emphasized that a purpose of imprisonment is to punish by depriving prisoners of certain rights and pleasures, and since it requires the positive assistance of the Prison Service to effectuate procreation under Article 12; since the right can still be enjoyed either in exceptional circumstances or after the prison sentence is completed, the court seemed satisfied that Article 12 has been upheld.

Likewise, the Mellor court ultimately found the policy prohibiting AI to be a justified interference under Article 8(2). In other words, the court found that under the HRA, it is permissible for the State (i.e. the Prison Service) to interfere with the right to private and family life because the policy meets the stipulations set out by the Act for qualified rights: the limitation is

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114 Ex parte Mellor, 2001 WL 272920, para. 58.
115 Id. at para. 20; ex parte Mellor, 2000 WL 1027083, at para. 17(v)(a-b).
116 Ex parte Mellor, 2001 WL 272920, at paras. 12-14, 62 (a).
117 ECHR, supra note 6, at art. 8.
118 Id. at art. 12.
119 Ex parte Mellor, 2001 WL 272920, at paras. 26(ii), 30-33 (citing Hamer v. United Kingdom, 4 EUR. H.R. REP. 139 (1979)).
120 Id. at para. 32.
121 Id.
122 Id. at para. 41.
123 Id. at para. 33.
124 Id. at paras. 36 and 39.
125 ECHR, supra note 6, at art. 8; ex parte Mellor, 2001 WL 272920, at paras. 36 and 39.
126 See infra note 137 and accompanying text.
prescribed by law (the Prison policy); it pursues a legitimate aim (Article 8(2) lists national security, public safety, prevention of crime and disorder, protection of morals or rights of others, etc.); and the limitation is necessary in a democratic society. For these reasons, the court found the policy to be proportionate to the prison's objectives and therefore justified. This view does not seem to have changed upon assumption of a new judicial role under the HRA.

The Mellor court supplemented their decision concerning AI with a discussion of conjugal rights in the context of the right to conceive. It noted that the Commission considers the policy of prohibiting sexual relations of married couples in prison justified for the prevention of disorder in prison. Prison security and good order would be seriously endangered if married prisoners were allowed to maintain their conjugal life in the prison. Conjugal visits would require that prison authorities renounce their right to constant supervision, and uncontrolled visits could facilitate smuggling or illegal exchanges. The court concluded that the prohibition of conjugal visits is justified under Article 8(2). Again, British judicial perspectives on prisoners' reproductive freedoms seem to have changed little from pre- to post-incorporation of the Convention.

IV. ANALYSIS

The Mellor case sends the message that, at least as it concerns the prisoner's right to procreate by AI, incorporation of the ECHR has not significantly altered the United Kingdom's understanding of its obligations to uphold the right to found a family and to respect private and family life. Yet, since incorporation, English courts have ruled on several landmark prisoners' rights cases and exhibited a heightened awareness of their new human rights

127 ECHR, supra note 6, at art. 8.
128 See ex parte Mellor, 2001 WL 272920, at para. 27.
129 Id.
130 Id. at paras. 36 and 63.
131 Id. at para. 27.
132 Id. at para. 39.
133 See, e.g., R. v. Sec'y of State for the Home Dep't, ex parte Mahmood [2001] 1 W.L.R. 840 (holding that substantial justification is required of executive decision makers who restrict fundamental rights); R. v. Sec'y of State for the Home Dep't, ex parte Daly [2001] 2 W.L.R. 1622 (striking down prison cell-searching policy in so far as it excludes prisoners from being present when staff examines their legal correspondence); R. v. Sec'y of State for the Home Dep't, ex parte P & Q [2001] 1 W.L.R. 2002 (holding prison policy that babies born to mothers
obligations. In a 2001 opinion in a prisoner’s rights case, the House of Lords proffered its perspective of the court’s role in this time of transition:

[i]n this instance, therefore, the common law and the convention yield the same result. But this need not always be so. In Smith and Grady v. United Kingdom . . . , the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy . . . because the threshold of review had been set too high. Now, following the incorporation of the Convention . . . domestic courts must themselves form a judgment whether a convention right has been breached . . . and . . . grant an effective remedy.\textsuperscript{134}

It appears that the judiciary is conscientiously participating in and shaping a new human rights culture in the United Kingdom. The question remains, however, as to whether the country’s new role in protecting human rights obligates Great Britain to extend procreative freedoms to prisoners, despite the conclusions drawn by the 2001 Mellor court.

A. Should Conjugal Visits Be Revisited?

Generally, prisoners’ rights to conjugal visits falls outside the realm of rights that the United Kingdom usually grants prisoners.\textsuperscript{135} Firstly, the United Kingdom has a strong tradition of prohibiting them\textsuperscript{136} and secondly, conjugal rights pose a more imminent threat to security and discipline, which would

\textsuperscript{134} Ex parte Daly, [2001] 2 W.L.R. 1622, at para. 23.

\textsuperscript{135} See supra notes 90-92 and accompanying text.

\textsuperscript{136} See id.
more easily qualify as a justified interference under HRA Article 8. This is not to suggest that challenges to the restriction will not take place or that the policy will never change, but at least in this current, cautious and evolving human rights culture, it seems unlikely. Thus, this analysis will focus on the United Kingdom’s approach to the right to procreate via Al.

B. Convention Articles Considered

Articles 8 and 12 of the Convention are the crucial provisions implicated in discussions about family life and privacy. Article 8 grants a qualified right, meaning it is set out in positive form but is subject to a limitation or restriction clause that makes the right conditioned on certain circumstances. The operation of the limitation is critical in the execution of Convention rights because restrictions can only be justified according to strict standards. Both articles will be considered in light of the Mellor court’s reasoning.

1. Article 12

The Mellor court rather quickly assessed Article 12, concluding it does not require the prison to assist Mellor with an AI procedure. The Court recalled case law establishing that the right to marry does not mean the right to procreate at any time, and that a limitation justified under Article 8 could not also be a violation of Article 12. Furthermore, since the European Commission has expressly supported prohibition of conjugal visits, the United Kingdom is assured that their prison policy upholds Convention principles. In fact, the High Court in Mellor qualified the right to marry as merely acquiring a legal status, saying simply, "[i]t is for [the Mellors] to

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137 See Starmer, supra note 45 (categorizing rights under the HRA as absolute rights (those that cannot be restricted in any circumstances), limited rights (rights which are derogable, but otherwise not to be balanced against public interest), and qualified rights (like the articles at issue).


140 See id. at para. 28 (citing X and Y v. Switz. (1978) 13 D.R. 105 (husband and wife prisoners denied conjugal rights)).

141 See E.L.H & P.B.H. v. United Kingdom, [1997] 91 A.D.R. 61 (recognizing the importance that prisoners keep and develop family ties in preparation for their return to the community, but lamenting reform movements of European countries that facilitate conjugal visits).
decide whether or not they wish to enter such an association in circumstances where they cannot cohabit." Thus, the Mellor court seemed quite comfortable with the notion that Article 12 imposes no obligations to secure procreative opportunities for prisoners.

It is worth probing beyond the Mellor court's application of Article 12 to seek other possible meanings of that Article within the United Kingdom's evolving human rights context. Notably, the Mellor court was not concerned with whether the prison policy's stated objectives of crime prevention and public interest are truly proportional to the gravity of the restriction that inhibits prisoners from having children. It is significant that procreative freedom for prisoners has mostly been considered in the context of conjugal visits that more clearly pose the problems with which the prison policy is concerned. But there is also an argument that the simple collection and delivery of semen to a reproduction facility for AI poses little, if any, threat to security (assuming the procedure is monitored). Consequently, it seems the restriction on AI procedures could or should not be justified as easily as prohibitions of conjugal rights under Article 8(2). Perhaps the court should more rigorously scrutinize the means the policy employs to achieve its end.

Furthermore, there is room for argument that the English courts are not capitalizing on the power of Section 6 of the HRA to secure human rights. That section declares it unlawful for public authorities (e.g. the prisons) to act incompatibly with the Convention. Because the Secretary has discretion to formulate his policy regarding prisoner procreation, the courts could more rigorously scrutinize the justification for the interference in light of the policy's goals. Under the current scheme, as long as the Secretary is afforded discretion, the executive remains entitled to define the policy's parameters. Unless and until procreation in prisons becomes a fundamental right, the Secretary of State has only to formulate prison policy and identify objectives that conceivably support its restrictions.

Contrary to the arguments that the United Kingdom should assume more responsibility in enforcing rights, the European Court has itself stated that Article 12 is mainly concerned with protecting marriage as the basis of the

142 Ex parte Mellor, 2001 WL 272920, at para. 32.
143 Id. at para. 40 (argument of Mr. Pannick, Q.C., lawyer for Mr. Mellor).
144 See Foster, supra note 109.
145 Human Rights Act 1998, c. 42, § 6(1) (Eng.).
146 See supra notes 82-84 and accompanying text.
147 See id.
family. The Court has also found that the stability of marriage is a legitimate aim because it is in the public interest. While the right to found a family is absolute, procreation does not necessarily follow as an equally protected corollary of that right. An emphasis on the importance of stable marriages in British society and the clear delineations between the right to marry and to procreate will strengthen the validity of the current prison policy within the human rights context.

2. Article 8 and Proportionality

There is considerable uncertainty among contracting states and within the European human rights judiciary as to how to apply Article 8. The provision requires courts to identify one of four interests to which each person is entitled. The duty "to respect" implies a duty to protect the individual from arbitrary interference. After establishing the existence of a duty, "the State and the individual stand in rough equality [and] the court must seek a 'fair balance' between the interests . . . of the individual and the community as a whole." Developing sound jurisprudence for the concept of proportionality is the most difficult, but also the most important problem facing the English courts under the HRA. Applied to the procreation issue, courts are challenged to weigh the interests of the prisoner who wants to father a child against the interests of society, including national security, the prevention of disorder and crime, and the protection of morals and of freedoms of others. The Mellor court's decision to uphold the restriction takes the position that the policy is

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149 Id.
150 Id.
151 Colin Warbrick, The Structure of Article 8, 1 E.H.R.L.R. 32 (1998) (stating that there has been criticism within the court itself about lack of legal certainty arising out of Article 8 judgments, including incoherence and arbitrariness).
152 ECHR, supra note 6, at art. 8 (1). Requiring respect for the "duty" to respect private and family life, home and correspondence. Id. See also Warbrick, supra note 151, at 34.
153 Warbrick, supra note 151, at 34-35.
154 Id. at 35.
155 See id.
156 ECHR, supra note 6, at art. 8(2) (specifying reasons which would justify interference with privacy).
proportional to the aims pursued by the government, and that the interests of Mr. Mellor in fathering a child through AI while in prison do not outweigh the perceived dangers that prisoner reproduction presents.

Article 8 readily lends itself to the three-part test used by many English courts to ensure that restrictions are adequately justified. First, the limitation in question must be prescribed by law.\textsuperscript{157} Second, the restriction must pursue a legitimate aim.\textsuperscript{158} Finally, the limitation must be necessary in a democratic society.\textsuperscript{159}

The Mellor court did not use this test per se, but it addressed many of the principles implicit in the test.\textsuperscript{160} The prison policy meets the first prong of the test requiring the limitation in question to be prescribed by law. Under the Prison Act, the Secretary of State retains discretion to make rules for the management of prisons, including discipline, treatment, and control of the detainees.\textsuperscript{161} The regulation meets other requirements of prescribed law: (1) it is adequately accessible, since prisoners can facilitate the process through application to the governor, and (2) it is sufficiently precise so as to enable the prisoner to regulate his conduct accordingly.\textsuperscript{162}

Under the second prong, the policy pursues the aims listed in the article, namely security, crime prevention, and the protection of morality and rights of others. The third requirement under the test is that the restriction be necessary in a democratic society. One human rights scholar argues that while the word 'necessary' is not synonymous with 'indispensable', it is also not as flexible as 'reasonable' or 'desirable'.\textsuperscript{164} But it seems the English courts have interpreted the phrase simply to mean "proportionate to the legitimate aim,"\textsuperscript{165} which is a more flexible application. This more general formula does not necessarily lower the standard of necessity. However, the standard calls for


\textsuperscript{159} Starmer, supra note 45.


\textsuperscript{161} Prison Act 1952, c. 52 (Eng.), at s. 47.

\textsuperscript{162} Starmer, supra note 45.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} See Beloff, supra note 37, at 44.
interpretation and the words acquire their meaning when placed in the context of the circumstances. Even more importantly, provisions do not take on a static definition, but rather evolve with time. Therefore, as the United Kingdom develops its human rights culture and begins to assign specific values to rights and freedoms guaranteed under the HRA, the level of 'necessity' required to justify a limitation will become clearer.

Whether this indicates that the United Kingdom’s application of proportionality in the Mellor case squares with that of Strasbourg jurisprudence is unclear, however. Since the HRA was passed, several cases reviewing the decision-making of government executives have suggested that the United Kingdom has not consistently been committed to an adequately strict standard of review. Particularly, in R. (Mahmood) v. Home Secretary, the court of appeal reviewed whether the decision-maker’s determination was reasonable and afforded the executive such a measure of deference that readily justified interferences with privacy rights. Yet in other cases, a much stricter application of proportionality was applied in Strasbourg. In one example, the court heavily criticized the Ministry of Defence’s justification for its policy, which was contrary to Article 13. Another case followed the same approach, finding that the Secretary of State’s policy requiring prisoners to be absent while their cells were searched could not be fairly justified under Article 8.

Thus, English courts have applied proportionality with varying rigor. One ECHR scholar urged that, “perhaps it is unrealistic to expect too great a degree

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167 Id. at 68.
168 Id. at 73.
169 R. v. Sec’y for the Home Dep’t, ex parte Mahmood, [2001] 1 W.L.R. 840 (upholding Secretary of State’s decision that applicant did not acquire leave to remain in the United Kingdom after marrying British citizen, nor after applicant became a father to the couple’s child).
170 See Clayton, supra note 58, at 508-09; see also, e.g., R. v. Sec’y for the Home Dep’t, ex parte Samaroo (C.A., 17 July 2001 [unreported]) (holding similarly that Secretary of State’s decision to make deportation order fell within his discretionary area of judgment and could evaluate what was necessary in a democratic society).
172 Id. (arguing high standard of review effectively excluded the possibility of finding the aims were not proportionate to the restriction).
173 R. v. Sec’y of State for the Home Dep’t, ex parte Daly, [2001] 2 W.L.R. 1622.
174 See id.
of coherence or too consistent an outcome of cases in what is still an international experiment. Yet overall, British courts have more frequently applied a rigorous standard for proportionality, and the Mellor court arguably meets those standards.

C. Does The United Kingdom have an Affirmative Duty to Promote Private and Family Life?

This analysis has examined whether the United Kingdom has adequately protected private and family life as required by the Convention. Yet another argument might postulate that contracting states have a duty not only to protect, but also to promote those values. Overall, the Convention imposes a set of negative obligations on the States, dictating what they may not do. The duty not to interfere with respect for private and family life in Article 8 is such an example. Thus, a literal interpretation of this article would not require states to secure the rights they protect. But some human rights scholars argue otherwise, and, furthermore, certain provisions in both EU legislation and in British prison policy may suggest that such a duty is inherent in the spirit of the Act.

A belief that the HRA is an opportunity to effect changes in the protection of human rights on a grand scale suggests that the State can be the catalyst for that change. For example, Francesca Klug, who sees the HRA as representative of history’s “third wave” bill of rights, argues that “the State has a major proactive role in modern human rights thinking, even to the point of interfering between private relationships where necessary.” Penny Booth argues that part of balancing competing interests (between individual interests and society’s needs) in Article 8 includes the courts’ obligation to define the

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175 Warbrick, supra note 151, at 34.
177 See infra notes 179-180 and accompanying text.
178 See infra notes 181-183 and accompanying text.
boundaries between the state’s duty not to interfere and the obligation to secure measures to promote respect for family life.\textsuperscript{180}

Moreover, a viable argument remains that applicable human rights law also calls for a more liberal interpretation of the State’s duty to effect human rights guarantees, especially in the prison context. For example, in 1999, the European Union published its Resolution on Improvements and Alternative Penalties for Prison Conditions.\textsuperscript{181} The resolution stresses:

\begin{quote}
[the firm belief] that prisoners’ families in particular should be taken into account . . . by ensuring that wherever possible prisoners are held in a place close to the homes of their families and by encouraging family and conjugal visits with special areas set aside for this purpose, given that spouses and children always play an extremely positive role in helping prisoners change their ways. . . \textsuperscript{182}
\end{quote}

The United Kingdom’s Prison Rules also contain a provision obligating the State, via prison officials, to effect stable private and family life for prisoners. One rule states that “special attention shall be paid to the maintenance of such relationships between a prisoner and his family,” and that prisoners “shall be encouraged and assisted to establish and maintain such relations.”\textsuperscript{183}

Charging the State with obligations to ‘ensure,’ ‘encourage’ and ‘assist’ paints a potentially paternalistic view of the State in its role in the emerging human rights culture. This idea was put forth by the European Court even before the HRA was in force:

\begin{quote}
[a]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain . . . there may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life. . . \textsuperscript{184}
\end{quote}

\textsuperscript{180} Booth, \textit{supra} note 148.

\textsuperscript{181} \textit{Resolution on Prison Conditions in the European Union: Improvements and Alternative Realities}, 1999 O.J. (c 98) 299.

\textsuperscript{182} Id. at para. 2 (emphasis added).


While this perspective finds some support in the interpretations and legal documents discussed, British courts are not presently approaching their human rights obligations in that light.

V. APPROACHES TO PROCREATIVE FREEDOMS FOR PRISONERS: THE UNITED KINGDOM AND THE UNITED STATES COMPARED

There are two compelling reasons to survey the United States' approach to the prisoner's right to procreate and pinpoint the commonalities between the two Anglo systems. First, it is of interesting coincidence that a prisoner in each country petitioned for the doctrinally unfounded right to procreate by AI to the Appeals Court level within five months of each other. In both cultures, prisoners' rights, and especially procreative rights, are hotly contested areas of constitutional uncertainty.¹⁸⁵

Second, a look at the U.S. approach may provide insight into the development of the prisoner's right to procreate in the United Kingdom. In transitioning to a rights-based human rights system, the United Kingdom designs its own constitutionally protected rights and experiments with judicial review through the HRA. The United States subscribes to a written, rights-based Constitution enforced by the power of judicial review.¹⁸⁶ Both countries evaluate the right at issue in light of privacy rights and under the standard proscribed by each country for reviewing infringements on prisoners' rights.¹⁸⁷ Though the prisoners in both countries were denied their petitions, it is still compelling to examine the courts' approaches.

American prisoner William Gerber is serving a 111-year sentence in California.¹⁸⁸ Like British prisoner Gavin Mellor, he has no conjugal rights,¹⁸⁹ which explains why he and his almost 50-year-old wife pursued the opportunity to conceive by AI.¹⁹⁰ Just as Strasbourg jurisprudence has not yet definitively shaped prisoners' procreation rights, neither has the U.S. Supreme Court taken a position on the parameters of that right for prisoners.

¹⁸⁵ See supra notes 1-5 and accompanying text.
¹⁸⁶ See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803) (establishing the doctrine of judicial review under the Constitution).
¹⁸⁸ Gerber, 264 F.3d at 884.
¹⁸⁹ Id.
¹⁹⁰ Id.
Prior to *Gerber*, the Eighth Circuit, considering the issue for the first time in 1990, struck down a prisoner's claim that his Constitutional rights were violated when his request for assistance with AI was denied. The *Goodwin* court found that the prison regulation was valid as reasonably related to furthering the legitimate penological interest of treating male and female inmates equally.

In 2001, the Ninth Circuit considered the issue again in *Gerber* and disagreed, asserting that the right to procreate does survive incarceration and the policy does not qualify as a legitimate objective, the court found that it is impermissible to restrict the constitutional rights of one group for fear that another would then assert its constitutionally protected rights, and therefore, this explanation did not provide the requisite justification for the prison regulation. The Ninth Circuit court focused on past Supreme Court endorsements of the fundamental right to procreate. Contrary to the *Goodwin* case, the 2001 *Gerber* court recognized prisoner procreation as a fundamental right and remanded the case for further inquiry into more legitimate reasons to restrict the right. It was on remand that the Ninth Circuit ultimately reversed its holding.

Two important similarities between the countries' approaches become evident. First, like the United Kingdom's domestic law principle that prisoners retain liberties not expressly removed, the appeals court recalled Supreme Court notions that "no iron curtain separates prisoners from the Constitution," such that "they retain those rights not inconsistent with their

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191 Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990).
192 Id. at 1401.
193 See Gerber v. Hickman, 264 F.3d at 891 (9th Cir. 2001).
194 Id.
195 Id. at 892. The Court here gave examples of Supreme Court cases supporting a general, fundamental right to procreate, including: "[i]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage . . . [and] procreation' (citing Carey v. Population Serv. Int'l, 431 U.S. 678, 684-85 (1977)), as well as "[t]he rights to conceive and to raise one's children have been deemed 'essential' . . . [and] 'basic civil rights of man' (citing Stanley v. Ill., 405 U.S. 645, 651 (1972))." Id.
196 Id. at 892-93.
197 See Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002). Upon the vote of a majority of non-recused, regular, active judges of the court, it was ordered that this case be reheard en banc. The court declared that the right to procreate in prison is not conferred as a right by the U.S. Constitution. Id.
198 Raymond v. Honey (1983) A.C. 1, 10G.
199*Gerber*, 264 F.3d at 887 (citing Hudson v. Palmer, 468 U.S. 517, 523 (1984)).
status as prisoner or with the legitimate penological objectives of the corrections system.\textsuperscript{200}

Second, the notion of weighing the legitimacy of the policy justifications against the severity of the restriction is a method applied on both sides of the Atlantic. As noted, the HRA calls on English judges to apply proportionality and engage in a means-end balancing test between the competing interests of the state and the petitioner.\textsuperscript{201}

In the United States, a standard articulated in \textit{Turner v. Safely}\textsuperscript{202} is applicable, setting a standard of review for infringements on prisoners' substantive due process rights.\textsuperscript{203} The \textit{Turner} court promulgated a reasonableness standard whereby a connection between the regulation and the objective is required and the availability of an alternative is highly desirable.\textsuperscript{204} In both cases, the courts' approach is to balance the merits of a means against the consequences of its end.

In evaluating the prisoner's request, the 2001 \textit{Gerber} court considered other case law indirectly addressing the issue and the authority of the 14th Amendment. In terms of case law, Supreme Court precedent, like ECHR precedent, acted only as a guide for the judges in both the \textit{Gerber} and \textit{Mellor} cases. Strasbourg law recognized the right to found a family and the right to respect for private life under the ECHR, but applicable case law established only that marriage does not mean the right to procreate at all times\textsuperscript{205} and that only exceptional circumstances legitimated the procedure for prisoners.\textsuperscript{206}

Similarly, while the U.S. Supreme Court has recognized a fundamental constitutional right to procreate,\textsuperscript{207} neither it nor any federal appeals court has decided whether inmates have the right to procreate while incarcerated.\textsuperscript{208}

Just as the ECHR acts as supranational law for the United Kingdom under the HRA, so does the Constitution provide the ultimate authority for issues of human rights protection in the United States. The Supreme Court has

\textsuperscript{200} \textit{Id.} (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).
\textsuperscript{201} See supra notes 56-62 and accompanying text.
\textsuperscript{202} 482 U.S. 78 (1997).
\textsuperscript{204} \textit{Turner}, 482 U.S. at 89-90.
\textsuperscript{205} Hamer v. U.K., 4 EUR. H.R. REP. 139 (1982).
\textsuperscript{206} See supra notes 16, 101 and accompanying text.
\textsuperscript{207} See Gerber v. Hickman, 264 F.3d 882, 887 (9th Cir. 2001).
consistently recognized a liberty interest in the privacy guaranteed by the 14th Amendment. Included are personal choices concerning marriage, procreation, contraception, child rearing, and abortion. Gerber asserted that his 14th Amendment rights had been violated because California denied him his fundamental right to procreate in violation of the Constitutional guarantee of substantive due process. The court's approach was that if the right to procreate is found to survive incarceration, then the 14th Amendment would require that restrictions on that right be related to prison system objectives and be sufficiently legitimate to justify the infringement. In fact, the court initially found that the right survived in prison and that the objective of equal treatment of males and females was not legitimate, but then reversed its holding on rehearing.

The general analysis employed by the courts in each country is arguably more alike than different. In fact, legal analysts quickly predicted the 2001 U.S. ruling in Gerber would be overturned, given the unusually liberal leanings of the Ninth Circuit concerning prisoners' rights. Ultimately, the

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209 See, e.g., Roe v. Wade, 410 U.S. 113, 152 (1973) (affirming a "right of personal privacy, or a guarantee of certain areas or zones of privacy").
210 Loving v. Va., 388 U.S. 1, 12 (1967) (holding unconstitutional a statute that prohibited interracial marriages).
212 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the constitutional right of privacy includes an individual's decision whether or not to use contraceptives).
213 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (according parents a privacy right in deciding whether their children should attend public or private school).
214 Roe, 410 U.S. at 152.
215 See U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law.").
216 Gerber v. Hickman, 264 F.3d 882, 886 (9th Cir. 2001).
217 Id. (explaining that a two step analysis requires the Court to first determine whether there is a fundamental right involved and whether that fundamental right is not inconsistent with [Gerber's] status as a prisoner, and second, to ask whether there are legitimate penological interests that justify the restriction of that fundamental right).
218 See supra notes 191-97 and accompanying text.
219 Analysis: U.S. 9th Circuit Court of Appeals Rules on Inmates' Right to Procreate, NPR: WEEKEND ALL THINGS CONSIDERED (NPR radio broadcast, Sept. 8, 2001) (quoting Professor Charles Whitebread of the University of Southern California, that in "virtually every single rights of prisoners case heard by the United States Supreme Court over the last decade, the prisoners' rights claim has been rejected"); see also Greg Krikorian, Judges Back Procreation by Inmates Courts, L.A. TIMES, Sept. 6, 2001, at A1 (noting that the Ninth Circuit has a record of producing liberal decisions on prisoners' rights issues that have been overturned by the Supreme Court).
ruling was reversed, although not by the Supreme Court. Undoubtedly, the initial ruling had evoked hostile reactions from those who passionately disagreed that the U.S. Constitution offered any such guarantees. If these reactions and the subsequent ruling reversal are indicative of a Supreme Court ruling, then arguably neither rights-based system embraces the prisoners’ right to procreate at will by artificial insemination.

Regardless of what the prisoners’ procreation cases in each country indicate about current attitudes toward private and family life, the two countries share a very fundamental and important similarity in their political structures. The Convention, like the U.S. Constitution, represents an attempt to fashion a type of democracy based on a broad consensus, on principles that cut across party politics as well as historical and geographical frontiers. While the new law does not permit judicial review on the same scale as the United States, where legislation can actually be invalidated, English courts’ steps toward review of the merits of executive policies and the power of the Declaration of Incompatibility nonetheless underscores the same principles of democratic liberalism. Incorporation of the ECHR, viewed in this light, is a highly ambitious and potentially very powerful instrument with which to shape and secure a strong human rights regime, much in the way the U.S. Constitution shapes rights for its citizens.

VI. CONCLUSION

Several factors will influence the evolution of the prisoner’s right to procreate in the United Kingdom’s new human rights culture. First, the scrutiny with which courts will review public authorities’ policies for consistency with the Convention will be of pivotal importance. Secondly,

220 See Greg Krikorian, State Fights Procreation for Prison Inmates Courts, L.A. TIMES, Sept. 13, 2001, at B1 (citing the California Attorney General’s motion for appeal that the ruling “has cast the lower courts into hopeless conflict, created a right that is unprecedented under Supreme Court case law, and triggered ramifications that will far exceed the bounds of this case”); see also Bob Egelko, Court OKs Remote Fatherhood for Inmates, SAN FRAN. CHRON., Sept. 6, 2001 at A3 (quoting the frustrations of California Deputy Attorney General Gregory Walston toward the ruling allowing an inmate who will never be a father to create a child, exclaiming, “[i]s that what prisons are for?”); Greg Krikorian Court Says Jails Can’t Deny Right to Procreate, SEATTLE TIMES, Sept. 6, 2001, at A7 (quoting Ron Zumbrun, former president of the Pacific Legal Foundation, inquiring “[i]f you are having lifetime criminals furthering their genes, is that in the best interests of society?”).

221 Loveland, supra note 5, at 119.

222 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).
evolving notions of privacy and family values provide a background against which courts can measure the intrusiveness of the restriction. But the development of these ideas will only be instrumental if the judges are willing to step into their new role and apply what the Convention requires of them.

As one scholar has predicted: "[w]e can expect to see a much more pronounced 'rights consciousness' such as exists in the USA government, in the legislature, in the media and among the public at large. This is likely to lead to an increasingly powerful and prominent role for the senior judiciary. . . ."223 The 2001 Mellor court, the only court to consider a prisoner's petition for access to AI facilities after incorporation of the ECHR, conditioned its denial to the prisoner on the particular circumstances of the case, suggesting the possibility of a different outcome under different facts:

[i]t is not obvious that the signatories to the Convention would have agreed that a man who had, by imprisonment, been justifiably deprived of the enjoyment of family life and the exercise of conjugal rights, should be entitled to inseminate his wife artificially . . . it does not follow from this that it will always be justifiable to prevent a prisoner from inseminating his wife artificially, or indeed naturally. The interference with fundamental rights . . . involves an exercise in proportionality. Exceptional circumstances may require the normal consequence of imprisonment to yield, because the effect of its interference with a particular human right is disproportionate.224

While an appreciation of the development of a human rights culture is crucial to an understanding of how prisoners' rights will be treated in the future, it seems clear nonetheless that the prisoner's right to procreate by either conjugal visits or artificial insemination is not required for compliance with the ECHR.

Article 8, which accords individuals respect for private and family life, and Article 12, which protects the right to found a family, are the two Convention rights implicated when a prisoner asserts a right to procreate behind bars. Before the Human Rights Act incorporated the ECHR into domestic law, neither Article had been interpreted by the Strasbourg courts to require prison authorities to allow access to facilities to procreate by conjugal visits or AI.

223 Loveland, supra note 5, at 126.
Under the new Act, British courts still refuse to view their human rights obligations as so extensive that prisoners should retain the freedom to procreate while incarcerated.

The essence of the United Kingdom’s position is the belief that prisoners should be granted civil rights to the extent that they preserve the purpose and status of incarceration. Furthermore, valid justifications must be put forth to permit infringements on prisoners’ liberties. So, while the right to found a family includes an absolute right to marry, it does not encompass an absolute right to procreate. The right to respect for private life does not inhibit the Secretary of State in designing prison policies that prohibit prisoners from procreating by AI when the reasons are legitimately tied to important penological objectives. The United Kingdom recognizes the importance of protecting, but not promoting or facilitating, private family life or the founding of a family when it conflicts with restrictions on prisoners that are proportionate to the aims pursued by the executive.

The 2001 Mellor case illustrates the persistence of the United Kingdom’s traditional approach to this issue as evidenced by the High Court’s denial of the right to procreate by AI to a lifetime prisoner. Despite the denial, however, the Mellor court demonstrates a veritable commitment to upholding their new obligations under the HRA, and a heightened awareness of the burgeoning rights-based legal culture. The denial of permission to inmate Mellor does not signify a breach of the United Kingdom’s pledge under the HRA, but rather a cautious and thorough evaluation of their own historical and legal traditions, as well as a fair understanding of the obligations underlying the Act.