NOTES

THE FUNDAMENTAL RIGHT TO SEXUAL AUTONOMY IN PRISON

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Introduction

Incarcerated persons in America face countless restrictions on their behaviors and freedoms. Accepting for the purposes of this Note the tragic place of the carceral system in American society, some of these restrictions are a necessary part of punishment and order maintenance. Others are so arbitrary and cruel that they violate the Constitution. The draconian restrictions on individual sexual autonomy in many United States jurisdictions belong to the latter category. As it stands, millions of incarcerated persons face harsh punishments like solitary confinement for the simple act of private masturbation. This Note will argue masturbation bans are unconstitutional and immoral.

In Part I, I will explore the legal landscape surrounding masturbation in the correctional context. I will examine federal regulations, illustrative state and international regulations, and some anecdotal accounts of enforcement. In Part II, I will demonstrate that correctional masturbation bans are unconstitutional under the four-prong *Turner v. Safley* test. Finally, in Part III, I will argue that correctional masturbation bans are not only unconstitutional, but immoral because they are unrelated to any legitimate punishment rationale.

I. The Legal Landscape

In this section, I will explore how different correctional systems regulate private sexual conduct. I will begin by discussing the blanket ban on "engaging in sexual acts" in the federal system.[1] I will then use illustrative examples to show how masturbation is regulated in different states around the country and internationally. I will conclude this section with a discussion of the reality of enforcement and how masturbation bans can affect the lives of individual incarcerated persons.

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1. 28 C.F.R. § 541.3 (a)(205) (2011).

A. The Strict Prohibition on Any Sexual Activity in the Federal System

The Federal Bureau of Prisons ("BOP") currently prohibits any and all sexual activity for incarcerated persons.[2] The BOP *Inmate Admission Orientation Handbook*, a guide to assist newly incarcerated persons "in their initial adjustment to incarceration,"[3] advises that masturbation is a form of "inappropriate sexual behavior."[4] The handbook further states that masturbation will be "disciplined and sanctioned . . . through the inmate discipline process."[5]

BOP regulations classify "engaging in sexual acts" as a "High Severity Level Prohibited Act."[6] Other High Severity Level Prohibited Acts include extortion,[7] bribing a correctional officer,[8] theft,[9] and fighting.[10] High Severity Level Prohibited Acts can be punished in any number of ways. Available sanctions include the loss of privileges like visitation, phone calls, commissary, and recreation,[11] the loss of earned good time credits, and the rescission or extension of parole dates.[12] Most disturbingly, an incarcerated person can be punished for "engaging in sexual acts" with up to six months in "disciplinary segregation," better known as solitary confinement.[13] If an incarcerated person is caught masturbating more than once within eighteen months, they can be punished with up to a year in solitary confinement.[14]

To be sure, studies show that the vast majority of incarcerated persons can and do masturbate while imprisoned, without finding themselves subject to discipline each time.[15] Despite its prevalence, however, the practice is not a safe one. If an

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2. *Id.*

3. U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, INMATE ADMISSION & ORIENTATION HANDBOOK 2 (Oct. 19, 2017).

4. *Id.* at 29.

5. *Id.*

6. 28 C.F.R. § 541.3 (a)(205).

7. § 541.3 (a)(204).

8. § 541.3 (a)(216).

9. § 541.3 (a)(219).

10. § 541.3 (a)(201).

11. § 541.3 (a)(F).

12. §§ 541.3 (a)(A), (B).

13. § 541.3 (a)(C). Although this article uses disciplinary segregation and solitary confinement interchangeably, it should be noted that disciplinary segregation can include both solitary confinement and double celling, which is the practice of imprisoning two people into one solitary confinement cell. Most people held in disciplinary segregation in the federal system are double celled. *See* Christie Thompson and Joseph Shapiro, *Doubling Up Prisoners In 'Solitary' Creates Deadly Consequences*, NAT'L PUB. RADIO (Mar. 24, 2016), https://www.npr.org/2016/03/24/470824303/doubling-up-prisoners-in-solitary-creates-deadly-consequences.

14. 28 C.F.R. § 541.3 (a), Table 2 (2011).

15. *See* Christopher Hensley et al., *Exploring the Dynamics of Masturbation and Consensual Same-Sex Activity within a Male Maximum Security Prison*, 10 J. MEN'S STUDS. 1 (2001) (reporting that in a study of 142 men in a Southern correctional facility, all but one reported having masturbated while incarcerated); *see also* Hanna Kozlowska, *Female Prison Workers, Harassed By Inmates and Ignored By Bosses, Stood Up For Their Rights—and Won*, QUARTZ (Feb. 16, 2017), https://qz.com/910810/female-prison-workers-harassed-by-inmates-and-ignored-by-bosses-stood-up-for-their-rights-and-won/ (detailing a lawsuit in which female correctional officers sued BOP for hostile work conditions because incarcerated persons frequently masturbated).

incarcerated person chooses to masturbate in federal prison, they run the risk of severe disciplinary sanctions.[16]

B. Regulations of Sexual Expression Among the States

The vast majority of incarcerated persons in the United States are held in state-run facilities, not in federal prisons. While all state prisons are subject to constitutional constraints, they each have their own administrative policies dictating how their individual prison systems are run.[17] Although some states have more restrictive policies than others, masturbation is generally heavily regulated in state prison systems. I will present four illustrative examples of state policies to demonstrate the range of how states regulate masturbation in prison.

In North Carolina, it is a Class B offense for an incarcerated person to "commit any sexual act" or to "touch the sexual or intimate parts of oneself or another person for the purpose of sexual gratification."[18] Other Class B offenses include flooding cells, instigating assaults, and deliberately destroying or damaging state property.[19] Potential punishments for violating the masturbation ban include losing telephone and visitation privileges for up to four months, losing good time credits, and facing up to forty-five days in solitary confinement.[20]

The Tennessee Department of Corrections defines "any behavior intended for the sexual gratification of the subject" as sexual misconduct.[21] Sexual misconduct within Tennessee prisons is classified as a Class B or C disciplinary violation along with sexual harassment, indecent exposure, fighting, or flooding cells.[22] Under the Tennessee Department of Corrections disciplinary procedures, guards have a range of disciplinary options to choose from. In less serious cases, a guard may simply issue a warning.[23] However, punishments for masturbating can result in a loss of privileges, reclassification to a higher custody level, loss of sentence credits, or, as always, solitary confinement.[24]

Unlike many other states, Ohio does not separate its rule violations into distinct classes according to the severity of the violation.[25] Infractions ranging from "being out of place" to homicide are classified simply as rule violations by Ohio's

16. *See, e.g.*, 28 C.F.R. § 541.3 (a)(C) (2011).

17. *See* Procunier v. Martinez, 416 U.S. 396, 404–06 (1974).

18. N.C. DEP'T OF CORR., RULES AND POLICIES GOVERNING THE MANAGEMENT AND CONDUCT OF INMATES UNDER THE CONTROL OF THE DIVISION OF PRISONS 10 (2010) http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf.

19. *Id.* at 9–10.

20. *Id.* at 13.

21. TENN. DEP'T OF CORR., INMATE RULES AND REGULATIONS 4 (2014) https://www.tn.gov/content/dam/tn/correction/documents/502-04OffenderHandbook.pdf.

22. *Id.* at 7–10.

23. *Id.* at 5.

24. *Id.* at 5–6.

25. OHIO ADMIN. CODE 5120-9-06(C) (2014).

Rehabilitation and Correction Department.[26] The Ohio Administrative Code also expressly prohibits masturbation.[27] Potential punishments for rule violations, including masturbation, include loss of privileges, loss of earned sentencing credits, and placement in restrictive housing or limited privilege housing.[28]

One example of a relatively lenient institutional policy on masturbation is in California. While California's regulation of sexual behavior in prison prohibits illegal sexual acts and sexual activity between an incarcerated person and a visitor, the policy leaves room for some private sexual expression.[29] Incarcerated persons can be cited for "Sexual Disorderly Conduct" if they, without exposing themselves, touch their genitals "in a manner that demonstrates it is for the purpose of sexual arousal."[30] However, the language of California's regulation seems to cover only public masturbation, because the regulation speaks to "behavior of a sexual nature between an inmate and a visitor,"[31] which theoretically permits private masturbation. Although the reality of prison life and administrative constraints like overcrowding make privacy hard to come by on the inside, California's policy does make room for some autoerotic expression, unlike the federal policy or other states' policies described above.

C. Some International Correctional Institutions Preserve Sexual Rights for Incarcerated Persons

Prison rules and regulations are essential to combating threats to safety and security and to maintaining order within the institution. An appeal to the "orderly operation of the institution" often undergirds the justification for a ban on sexual activity and masturbation while in custody.[32] However, the experience of correctional facilities in the rest of the English-speaking world suggests that institutional order can be maintained without a draconian ban on masturbation.

In Australia, incarcerated persons enjoy rights that remain unavailable to people locked up in many prisons in the United States. For example, those serving sentences of three years or less retain the right to vote in federal elections in Australia.[33] Significantly, prison regulations in Queensland, Australia, do not contain categorical prohibitions on masturbation or other consensual sexual activity.[34] In the State of Western Australia, condoms are made available to incarcerated persons of all

26. 5120-9-06(C)(35).
27. 5120-9-06(C)(14).
28. 5120-9-08(L).
29. CAL. CODE REGS. tit. 15, §§ 3000, 3007 (2018).
30. § 3000.
31. *Id.* (defining "sexual activity").
32. *See* OHIO ADMIN. CODE 5120-9-06(A) (2014).
33. Queensland Government, *Prisoner's Rights*, https://www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/prisoners-rights/ (last visited Nov. 12, 2018).
34. *Corrective Services Regulation 2017* (Qld), sub-div 2(i) (Austl.) (prohibiting indecent or offensive acts only in someone else's presence).

genders.[35] Far from encouraging an over-sexualized and dangerous institutional environment, Australia's relatively liberal attitude towards sex in prison is correlated with institutional order. A recent study from the University of South Wales found that sex in prison was a relatively rare phenomenon and when it did happen between two prisoners, it was overwhelmingly consensual.[36]

Canadian prisons also recognize significantly more sexual rights than American prisons. In Ontario, the Ministry of Correctional Services Act authorizes the promulgation of regulations "respecting the . . . discipline, control, grievances, and privileges of inmates."[37] The regulations do not include any prohibition on sexual activity or masturbation.[38] Other Canadian provinces go even further than Ontario; prisons in Nova Scotia provide condoms and dental dams to facilitate safe sex while incarcerated.[39] The lack of prohibitions on sexual activity, ready availability of condoms and dental dams, and a generous conjugal visit policy[40] all suggest that Canadian corrections officials recognize that an opportunity to establish healthy sexual practices is important for rehabilitation and consistent with maintaining institutional order.

D. Enforcement of Sexual Regulations in Prisons is Sporadic and Arbitrary

Although masturbation may be punishable with harsh sanctions up to and including solitary confinement, correctional officials in the United States enforce masturbation bans only sporadically.[41] Data on disciplinary enforcement inside prison walls is scarce and it is difficult to accurately discern who is being thrown in solitary confinement, why, and for how long.[42] Likewise, the phenomenon of

35. *Adult Custodial Rules 2002* (WA) AC 9, Prioision of Condoms and Dental Dams to Prisoners (Austl.), http://www.correctiveservices.wa.gov.au/files/prisons/adult-custodial-rules/ac-rules/ac-rule-09.pdf.

36. UNIV. OF NEW SOUTH WALES, SEX IN AUSTRALIAN PRISONS: THE FACTS (Apr. 13, 2011), https://newsroom.unsw.edu.au/news/health/sex-australian-prisons-facts.

37. Ministry of Correctional Services Act, R.S.O. 1980, c 275, s 47(d) (Can.).

38. MINISTRY OF COMMUNITY SAFETY & CORR. SERVS., *Inmate Information Guide for Adult Institutions* 30 (S.O.) (Sep. 2015) (Can.) https://www.mcscs.jus.gov.on.ca/english/corr_serv/PoliciesandGuidelines/CS_Inmate_guide.html.

39. NOVA SCOTIA CORR. SERVS., *Offender Handbook* 29 (S.N.S.) (2016) (Can.), https://novascotia.ca/just/Corrections/_docs/Adult_Offender_Handbook_EN.pdf.

40. CORR. SERV. OF CAN., PRIVATE FAMILY VISITS WITH OFFENDERS (Mar. 27, 2018) (Can.), www.csc-scc.gc.ca/family/003004-1000-eng.shtml.

41. Anecdotal evidence suggests that masturbation is a ubiquitous practice in prison. The fact that most incarcerated persons do not spend the entirety of their sentences in solitary confinement suggests that masturbation bans are not rigorously enforced. *See* Hensley et al., *supra* note 15; *see* Bert Burykill, *The Right to Blow Loads*, VICE (Jan. 11, 2012), https://www.vice.com/en_us/article/pen-pals-the-right-to-blow-loads (anecdotal account from a formerly incarcerated person reporting of extensive masturbation in New York State correctional facilities).

42. *See* Anna Flag et al., *Who's in Solitary Confinement?*, MARSHALL PROJECT (Nov. 30, 2016), https://www.themarshallproject.org/2016/11/30/a-new-report-gives-the-most-detailed-breakdown-yet-of-how-isolation-is-used-in-u-s-prisons#.wouAkJkML; *see also* THE LIMAN PROGRAM, YALE L. SCH. & ASS'N OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015) https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf (discussing solitary confinement demographics but not the violations that led to disciplinary segregation).

prison sexuality, particularly masturbation practices, is understudied.[43] However, the available research and anecdotal accounts suggest that masturbation in prison is a near-ubiquitous practice.[44] This evidence of masturbation's relative omnipresence in prison supports the inference that the practice goes largely unpunished.[45] Indeed, many jurisdictions in the United States have relatively lenient policies on masturbation that permit the practice so long as it remains unnoticed by guards and staff.[46]

The sporadic and arbitrary enforcement of masturbation bans runs to the heart of what makes these regulations so unconscionable. The rigid regulation of sexual expression is not only egregious because people are punished for touching their genitals. It is egregious because it gives correctional officials the unchecked power to arbitrarily inflict harsh punishments on incarcerated persons. While comprehensive data on the numbers of prisoners punished for masturbating is slim, the anecdotal accounts presented below demonstrate the impact of these policies.

In South Carolina, Freddie Williams was convicted of sexual misconduct for masturbating in the shower of the Lieber Correctional Institution.[47] Mr. Williams maintained that he did not intend to expose himself and that the reporting officer happened to walk by while he was masturbating.[48] Nonetheless, the officer recommended that he be charged with sexual misconduct.[49] Mr. Williams was convicted and lost 240 days of good time credits.[50] Mr. Williams lost nearly eight months of his life for getting caught masturbating.

In a similar incident, Terry Lee Alexander, was caught masturbating while incarcerated at the Broward County Jail in Florida.[51] He was convicted of indecent exposure by a jury.[52] Unlike Mr. Williams, Mr. Alexander was masturbating in his bunk, alone.[53] In Mr. Alexander's case, the reporting officer did not walk by to catch him in the act, but observed him from a control room over 100 feet away.[54] This was not a first for that particular officer; she had filed reports on seven other persons for masturbating while incarcerated.[55]

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43. *See* Deanna McGaughey & Richard Tewksbury, *Masturbation*, *in* PRISON SEX: PRACTICE AND POLICY 9, 141 (Christopher Hensley ed., 2002) ("Although masturbation is an important issue in prison, there has been little research that has focused on . . . masturbation within the range of other sexual practices in prison . . . .").

44. *See* Hensley et al., *supra* note 15; *see* Burykill, *supra* note 41.

45. *See* Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 229 (2006); *see also* Hensley et al., *supra* note 15.

46. *See* David Merritt Johns, *Free Willy*, SLATE (Jan. 10, 2012), http://www.slate.com/articles/health_and_science/science/2012/01/should_prison_inmates_have_the_right_to_masturbate_.html (noting that California, Connecticut, and other states permit unnoticed masturbation).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Perhaps the highest profile person to be punished for masturbating in prison was Whitey Bulger.[56] Mr. Bulger was serving a life sentence at United States Penitentiary Coleman II in Florida.[57] One morning at 3:00 a.m., a correctional officer alleged that he caught Mr. Bulger masturbating alone in his cell with the lights on.[58] Mr. Bulger denied the charge, claiming that, at eighty-five years old, his "sex life is over."[59] He claimed that he was applying medicated powder to his genitals for a yeast infection that he was too embarrassed to report to the female nurses at the prison.[60] Notwithstanding his explanation, Mr. Bulger was sentenced to thirty days in solitary confinement for masturbating.[61] In addition, his personal property was confiscated for thirty days and his commissary and email privileges were revoked for 120 days.[62]

The correctional officer who caught Mr. Bulger in the act allegedly yelled, "I got you!" before referring Mr. Bulger for disciplinary sanctions.[63] The guard's apparent glee at finding a reason to further punish Mr. Bulger adds an even more sinister edge to the excessive punishment noted above. The guard's attitude illustrates the central problem with prison masturbation bans. Arbitrary enforcement of a ban on a widespread, natural activity gives correctional officers the power to impose harsh disciplinary sanctions on a whim. As I will show below, this power is not constitutional.

II. MAKING THE CASE FOR A THE FUNDAMENTAL RIGHT TO SEXUAL AUTONOMY IN PRISON

As articulated above, the broad moratoriums on sexual activity in place in federal and state prisons are unnecessary, especially in light of the more lenient policies in place elsewhere. This section will argue an incarcerated person has a constitutional right to privately masturbate while incarcerated.

As the following analysis will demonstrate, the regulations most vulnerable to constitutional attack are those that impose blanket prohibitions on sexual activity in prison.[64] Therefore, incarcerated persons could challenge regulations such as the

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56. Shelley Murphy, *'Whitey' Bulger Placed in Solitary Confinement for Sexual Activity*, BOS. GLOBE (Feb. 25, 2016) https://www.bostonglobe.com/metro/2016/02/25/whitey-bulger-disciplined-florida-prison-for-sexual-activity/9HRWu5qzhGHv5K47OhfUGO/story.html.

57. *Id.*

58. *Id.*

59. *Id.*

60. Regina F. Graham, *'My Sex Life Is Over': Whitey Bulger, 85, Put in Solitary Confinement for a Month After Being Caught Masturbating in His Cell with the Lights On*, DAILYMAIL.COM (Feb. 25, 2016) http://www.dailymail.co.uk/news/article-3464799/My-sex-life-Whitey-Bulger-85-solitary-confinement-month-caught-masturbating-cell-lights-on.html.

61. *Id.*

62. *Id.*

63. Ginger Adams Otis, *Whitey Bulger caught masturbating with lights on in Florida jail cell, says he was 'set up' by correction officer*, N.Y. DAILY NEWS (Feb. 25, 2016) http://www.nydailynews.com/news/crime/whitey-bulger-caught-masturbating-florida-jail-cell-article-1.2544190.

64. *See, e.g.*, 28 C.F.R. § 541.3 (a)(205) (2011); N.C. DEP'T OF CORR., *supra* note 18, at 10; TENN. DEP'T OF CORR., *supra* note 21, at 4.

Federal Bureau of Prisons' ("BOP") prohibition against "engaging in sexual acts"[65] or North Carolina's restriction against committing "any sexual act"[66] or touching "the sexual or intimate parts of oneself or another person for the purpose of sexual gratification."[67] More lenient institutional policies, like the one in California, would more likely pass constitutional muster.[68]

In *Turner v. Safley*, the Supreme Court articulated the standard of review for constitutional challenges of prison regulations.[69] The Court attempted to strike a balance between ensuring that prisoners retain the right to seek redress of constitutional grievances[70] and making sure that courts accord appropriate deference to the expertise of prison administrators.[71] The Court recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution"[72] and that the "expertise, planning, and the commitment of resources"[73] that go into running a prison are "peculiarly within the province of the legislative and executive branches of government."[74] Ultimately, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[75] Courts consider four factors to determine whether a prison regulation is reasonably related to a legitimate penological interest: (1) whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it;"[76] (2) whether there are alternative means available for exercising the asserted right;[77] (3) how the accommodation of the asserted right will impact guards, other incarcerated persons, and the allocation of prison resources;[78] and (4) that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation" and vice versa.[79]

First, Supreme Court precedents arguably support a general constitutional right to masturbate. While the Supreme Court has never directly addressed this question, *Griswold v. Connecticut* and *Lawrence v. Texas* imply a constitutional right to masturbate. Next, I will consider the right to masturbate in the correctional context by applying the four *Turner* factors.

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65. 28 C.F.R. § 541.3 (a)(205).
66. N.C. DEP'T OF CORR., *supra* note 18, at 10.
67. *Id.*
68. *See* CAL. CODE REGS. tit. 15, §§ 3000, 3007 (2018).
69. 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").
70. *Id.* at 84.
71. *Id.* at 85.
72. *Id.* at 84.
73. *Id.* at 85.
74. *Id.* at 84–85.
75. *Id.* at 89.
76. *Id.*
77. *Id.* at 90.
78. *Id.*
79. *Id.*

A. Establishing a General Constitutional Right to Sexual Autonomy

The Supreme Court has not directly addressed whether the Fourteenth Amendment includes a constitutional right to masturbate. One reason for this might be the sheer un-administrability of a masturbation ban outside of the prison context.[80] The right itself may also be so obvious that states simply would not seek to prevent the practice in the first place.[81] Whatever the reason, the fact that the right to masturbate has not been specifically upheld by the Court does not make that right any weaker or less fundamental.[82] Indeed, Supreme Court precedent strongly implies a fundamental right to masturbate in private.[83] The strongest support for this right derives from the Court's decision in *Lawrence v. Texas*.[84] Before discussing *Lawrence*, it is instructive to consider the decisions undergirding the Court's holding in that case.

At the root of the Supreme Court's jurisprudence surrounding sexual privacy rights is its decision in *Griswold v. Connecticut*.[85] In *Griswold*, the Court found that a state law prohibiting the use of contraceptives and any consultation regarding contraceptives violated a fundamental right to privacy.[86] The Court held that the "sacred precincts of marital bedrooms"[87] were protected by a right to privacy that was "older than the Bill of Rights" itself.[88]

Seven years after the decision in *Griswold*, the Court extended the right to make decisions regarding contraception and sexual conduct beyond the marriage relationship.[89] In *Eisenstadt v. Baird*, the Court recognized that the right of privacy articulated in *Griswold* was dependent on the marital relationship, and extended it to unmarried couples as well.[90] The Court also recognized that the marital couple is made up of two individual people. It ultimately held that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion" into family planning decisions.[91]

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80. *See* David Oshinsky, *Strange Justice: The Story of* Lawrence v. Texas *Book Review*, N.Y. TIMES (March 16, 2012), https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html (March 16, 2012) (noting that the sodomy law at issue in *Lawrence* was rarely enforced in private and that it is likely that the defendants in *Lawrence* were not even engaged in sexual conduct when the police arrived at their home).

81. *See generally* Williams v. Pryor, 220 F. Supp. 2d 1257, 1296 (N.D. Ala. 2002) ("[M]asturbation is not now, nor has it ever been, a crime in any state of the Union.").

82. *See* Lawrence v. Texas, 539 U.S. 558, 565 (2003) (acknowledging that laws sometime conflict with "fundamental" personal and human rights).

83. *See id* at 559 ("[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

84. *See id*.

85. 381 U.S. 479 (1965).

86. *Id*. at 485.

87. *Id*.

88. *Id*. at 486.

89. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

90. *Id*. at 453; *see Griswold*, 381 U.S. at 485.

91. *Eisenstadt*, 405 U.S. at 453.

Throughout the 1970s, the Court continued to expand on the privacy doctrine outlined in *Griswold* and *Eisenstadt*. In *Roe v. Wade*, the Court held that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[92] Although the right to an abortion has been limited since, the Court, as of now, has stood by *Roe*'s core holding that personal decisions regarding contraception and family planning "are central to the liberty protected by the Fourteenth Amendment."[93] The Court further extended the penumbra of privacy protections in *Carey v. Population Services International*, invalidating a New York law that forbade the distribution of contraceptives to people under sixteen years old.[94]

The Court's strongest proclamation in favor of sexual autonomy and the constitutionally protected privacy interest in private sexual conduct came in *Lawrence*.[95] In *Lawrence*, the Court overruled *Bowers v. Hardwick* and invalidated a Texas statute prohibiting sodomy.[96] In doing so, the Court reaffirmed the "promise of the Constitution that there is a realm of personal liberty which the government may not enter."[97] Most significantly for present purposes, the Court held that the right to be free from governmental intrusion into "the most private human conduct, sexual behavior" is a liberty protected by the Constitution.[98] Finding no legitimate state interest in prohibiting homosexual sex, the Court proclaimed that the government is not permitted to "demean [the] existence or control [the] destiny" of anyone who chooses to engage in homosexual conduct in the privacy of their homes.[99]

Although the Court did not explicitly address masturbation in *Lawrence*, it is difficult to imagine how a masturbation ban would pass constitutional muster in the wake of the Court's holding. After *Lawrence*, it is clear that individuals are entitled to "respect for their private lives"[100] and that "private sexual conduct"[101] between two consenting adults falls under the penumbra of the constitutionally protected private life.[102] If private sexual conduct between two consenting adults is constitutionally protected under the Due Process Clause, then it can be inferred *a fortiori* that private sexual conduct between an individual *and no one else* is also constitutionally protected under the Due Process Clause.

Indeed, Justice Scalia explicitly worried that *Lawrence* would implicitly include a constitutional right to masturbate.[103] Detailing a parade of horribles, Justice

92. Roe v. Wade, 410 U.S. 113, 153 (1973).
93. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
94. 431 U.S. 678, 681–82 (1977).
95. 539 U.S. at 579.
96. *Id.* at 564, 578–79.
97. *Id.* at 578 (quoting *Casey*, 505 U.S. at 847).
98. *Id.* at 567.
99. *Id.* at 578.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 590 (Scalia, J. dissenting) (emphasis added).

Scalia laments that "laws against . . . same-sex marriage, . . . prostitution, *masturbation*, adultery, fornication, . . . and obscenity" are only sustainable in light of *Bowers*.[104] Justice Scalia understood that private masturbation could not be regulated once *Lawrence* overruled *Bowers* and granted "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[105]

Although lower courts are split as to the precise scope of the holding in *Lawrence*,[106] the Fifth Circuit has held that, in the wake of *Lawrence*, individuals enjoy a constitutional right to "to engage in private intimate conduct" without interference from the government.[107] In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit relied on *Lawrence* to invalidate a Texas statute that criminalized "the selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation."[108] The court held that the Texas statute heavily burdens the constitutional right of an individual who "wants to legally use a safe sexual device during private intimate moments alone or with another" and that the state's interest in public morality "cannot constitutionally sustain the statute."[109]

Given the Supreme Court's proclamations in *Lawrence* and the Fifth Circuit's extension of the right to sexual privacy to "intimate moments alone,"[110] there is a strong argument in favor of a constitutional right to masturbate under the Due Process Clause. I will now analyze that right in the correctional context under the *Turner v. Safley* rubric.

B. Establishing a Right to Sexual Autonomy in the Prison Context

Although the Supreme Court strongly implied the right to masturbate in *Lawrence*, the question remains whether incarcerated people can assert that right. Unlike ordinary assertions of substantive due process rights, an assertion of a constitutional right in the correctional context falls under a different standard of review.[111] Under *Turner*, the standard of review for adjudicating the assertion of constitutional rights in a correctional context calls for an evaluation of whether a prison regulation that impinges on an incarcerated person's constitutional rights is "reasonably related to legitimate penological interests."[112] When evaluating whether a regulation is reasonably related to legitimate penological interests,

104. *Id.*

105. *Id.* at 559.

106. *Compare* Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1236–37 (11th Cir. 2004) (holding that there is no fundamental, substantive due process right of consenting adults to engage in private intimate sexual conduct) *with* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746 (5th Cir. 2008) (interpreting *Lawrence* and holding that an individual has a substantive due process right to engage in private intimate conduct).

107. *See Reliable Consultants, Inc.*, 517 F.3d at 744.

108. *Id.* at 741.

109. *Id.* at 744–45.

110. *Id.* at 744.

111. *See Turner*, 482 U.S. at 81.

112. *Id.* at 87, 89.

courts must consider four factors: (1) whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it;"[113] (2) whether there are alternative means available for exercising the asserted right;[114] (3) how the accommodation of the asserted right will impact guards, other incarcerated persons, and the allocation of prison resources;[115] and (4) that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation" and vice versa.[116]

1. Is There a "Valid, Rational Connection Between the Prison Regulation and the Legitimate Governmental Interest Put Forward to Justify It?"

In *Turner*, the Supreme Court invalidated a Missouri prison regulation that prohibited incarcerated persons from marrying "unless the prison superintendent has approved the marriage after finding that there are compelling reasons for doing so."[117] Recognizing that the right to marry is fundamental under *Zablocki v. Redhail*[118] and *Loving v. Virginia*,[119] the Court applied the right in the prison context and analyzed whether Missouri's restrictions on marriage in prison were reasonably related to a legitimate governmental interest.[120]

Missouri asserted two legitimate governmental interests in support of its marriage prohibitions: (1) a security concern that competition for mates in facilities that house both male and female prisoners might lead to potentially violent "love triangles" between incarcerated persons;[121] and (2) a concern that marriage would distract female prisoners from focusing on developing self-reliance skills, thereby contravening the state's interest in rehabilitation.[122] The Court held that the Missouri regulation was not reasonably related to either of these governmental interests.[123]

The Court noted that, while legitimate security concerns might justify certain marriage restrictions, the Missouri regulation was an "exaggerated response" because the State could easily accommodate the asserted right to marry while imposing only a "de minimis burden on the pursuit of security objectives."[124] Furthermore, the Court found no connection between marriage and a concern over love triangles, noting that "in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as

113. *Id.* at 89.
114. *Id.* at 90.
115. *Id.*
116. *Id.*
117. *Id.* at 96.
118. 434 U.S. 374 (1978).
119. 388 U.S. 1 (1967).
120. *Turner*, 482 U.S. at 94.
121. *Id.* at 97.
122. *Id.*
123. *Id.* at 97–98.
124. *Id.* at 98.

with one."[125] Finally, the Court held that refusing marriages absent a compelling reason was an overbroad restriction given testimony that prison officials "generally ... had experienced no problem with the marriage of male inmates."[126]

In the context of the right to masturbate, there are a few legitimate interests that correctional institutions might invoke. First, correctional institutions are likely to cite an interest in security and in maintaining institutional order.[127] They will likely argue that masturbation is linked to sexual abuse and that incarcerated persons use masturbation to terrorize or harass guards and other people in prison.[128] Therefore, they might argue, prison regulations prohibiting masturbation are necessary to deter and punish those who may use masturbation to engage in assaultive behavior.[129]

While a correctional institution's interest in maintaining security is unquestionably a legitimate one, a blanket ban on masturbation is an impermissibly overbroad response to the problem, just as the marriage restrictions were in *Turner*.[130] Masturbation bans are overbroad because they prohibit presumptively permissive, non-violent, non-assaultive, and non-aggressive conduct to deter assaultive behavior. Studies have shown that nearly all incarcerated persons engage in masturbation at least once while imprisoned.[131] However, not all prisoners engage in violent and assaultive behavior while incarcerated. In an effort to deter would-be assaulters, the masturbation ban would serve to punish non-violent, non-assaultive persons who need no deterrence.

Furthermore, correctional institutions have regulations in place to deter and punish assault and indecent exposure,[132] which includes public masturbation.[133] Since the use of masturbation to assault or terrorize guards is necessarily public, a ban on private masturbation is useless to cure the evil that the regulation seeks to prevent. A masturbation ban is not only overbroad, but totally unnecessary to promote institutional security. If the harsh sanctions that inure from violent assault violations fail to deter assaultive conduct, it is unlikely that the comparatively light punishments for masturbation violations would have any deterrent effect.

Another possible interest that correctional institutions may assert when defending a masturbation ban is a rehabilitation interest. It has been suggested that masturbation may improperly distract incarcerated persons from meaningful reflection on their crimes, thus impeding their rehabilitation.[134] Cusack is concerned that *any*

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125. *Id.*
126. *Id.*
127. OHIO ADMIN. CODE 5120-9-06(C) (2014).
128. *See* Carmen Cusack, *No Stroking in the Pokey: Promulgating Penological Policies Prohibiting Masturbation Among Inmate Populations*, 7 J. L. & SOC. DEVIANCE 80, 107 (2014).
129. *Id.* at 107–08.
130. *Turner*, 482 U.S. at 98–99.
131. *See* Hensley et al., *supra* note 15.
132. *See, e.g.*, OHIO ADMIN. CODE 5120-9-06(C)(11), (12), (14) (2014).
133. *See, e.g.*, *id*; CAL. CODE REGS. tit. 15, § 3007 (2018) (prohibiting illegal sexual acts).
134. Cusack, *supra* note 128 at 102.

time spent masturbating in prison "could allow an inmate to reenter society without improved coping skills or [a] work ethic."[135] Correctional institutions may argue that the practice of masturbation provides a distraction from prison life that impedes the legitimate goal of rehabilitation.

Distractions other than masturbation exist in prison and not every waking second of an incarcerated person's life can or should be devoted to rehabilitative programming. People incarcerated in North Carolina, for example, will find themselves with at least six hours of unstructured time per day, during which they are allowed to watch television, play checkers, chess, or cards, or write letters.[136] The fact that watching television and playing chess are allowed at all suggests that correctional institutions recognize the need for distractions while in prison. Given the fact that distractions are permitted, banning masturbation because it might distract from reflection and thus impede rehabilitation is an "exaggerated response" to the legitimate state interest of promoting rehabilitation.[137]

Furthermore, a buildup of unresolvable sexual tension can be, on its own, incredibly distracting.[138] Allowing masturbation as an outlet to "release pent-up tension and stress" may have the effect of *decreasing* distraction and allowing incarcerated persons to focus on rehabilitation.[139]

Contrary to the view outlined above, studies suggest that allowing incarcerated persons a greater degree of sexual expression, in terms of both masturbation and consensual sex among incarcerated persons, would actually serve, rather than hinder, the State's interest in rehabilitation.[140] Brenda Smith posits that allowing "a greater degree of sexual expression recognizes the inherent dignity of human beings, which survives imprisonment"[141] and that appropriate regulation of sexual expression can "encourage rehabilitation of inmates."[142] Smith's analysis drives at the heart of what makes masturbation bans so insidious: They strip away the "inherent dignity of human beings" and represent yet another way in which the penal system dehumanizes the people stuck inside it. If we accept Smith's recognition that "sexual identity and expression [are] core to personhood,"[143] then meaningful rehabilitation cannot be achieved in an environment that stifles and criminalizes sexual expression.

A masturbation ban is an overbroad response to the state's legitimate security interests and an exaggerated response to the state's interest in promoting

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135. *Id*. at 106.

136. N.C. DEP'T OF PUB. SAFETY, *24 Hours in Prison*, http://www.doc.state.nc.us/DOP/HOURS24.htm#A%20CLOSE%20CUSTODY%20INMATE%20AT%20CENTRAL%20PRISON (last accessed Apr. 9, 2017).

137. *Turner*, 482 U.S. at 98.

138. *See* Hensley et al., *supra* note 15, at 69–70

139. *Id*.

140. *See* Smith, *supra* note 45, at 232–33; *see also* Hensley et al., *supra* note 15, at 69 ("Masturbation provides an alternative outlet so that inmates may release pent-up tension and stress.").

141. Smith, *supra* note 45, at 232.

142. *Id*. at 234.

143. *Id*. at 233.

rehabilitation. These premises, combined with the fact that a more permissive masturbation policy might actually further the goals of rehabilitation, indicates that a masturbation ban fails to maintain a "valid, rational connection" to the legitimate state interests articulated above.[144]

2. Are There "Alternative Means of Exercising the Right That Remain Open To Prison Inmates?"

The next consideration under *Turner* is whether there exist "alternative means of exercising the right that remain open to prison inmates."[145] *Turner* teaches courts should be particularly deferential to the judgment and expertise of correctional officials if the policy in question leaves room for other avenues through which to exercise the asserted right.[146]

In *Overton v. Bazzetta*, the Supreme Court considered whether a Michigan Department of Corrections (MDOC) regulation that limited visitation privileges violated the constitutional rights of incarcerated persons.[147] In applying the *Turner* factors, the Court in *Bazzetta* found that alternative means of communicating with people outside the prison, such as by telephone or mail, remained open to those who lost visitation privileges under the MDOC policy.[148] The availability of an alternative means of exercising their right to communicate with people outside of the prison supported the constitutionality of MDOC's regulation.[149]

By contrast, masturbation bans leave no available alternatives to incarcerated persons. Regulations such as BOP's prohibition on "engaging in sexual acts"[150] or Tennessee's classification of "any behavior intended for the sexual gratification of the subject" as sexual misconduct[151] leave no doubt that *all* sexual activity is prohibited. If courts are prepared to recognize a right to personal sexual autonomy or a right to masturbate, then these regulations flatly provide incarcerated persons with no alternative means of exercising their rights. The absence of such alternatives is evidence that the bans are unreasonable.[152] As such, courts considering the constitutionality of these regulations should not use the same deferential standard that would apply if the regulations left "other avenues" open for the exercise of constitutional rights.[153]

144. *Turner*, 482 U.S. at 89.
145. *Id.* at 90.
146. *Id.*
147. 539 U.S. 126 (2003).
148. *Id.* at 135.
149. *Id.*
150. 28 C.F.R. § 541.3 (a)(204).
151. TENN. DEP'T OF CORRS., *supra* note 21, at 4.
152. *See Overton*, 539 U.S. at 135.
153. *Turner*, 482 U.S. at 90.

3. What Impact Will The Asserted Right Have "On Guards and Other Inmates, and on The Allocation of Prison Resources Generally?"

The next factor that courts must consider under *Turner* is what impact the asserted right will have on the prison, the guards, the incarcerated persons, and the allocation of prison resources.[154] In *Turner*, the Court instructed that correction officials should be afforded considerable deference where the accommodation of an asserted right has a significant "'ripple effect' on fellow inmates or on prison staff."[155] On the issue of marriage, the Court in *Turner* found such a "completely private"[156] decision would not have a sufficient ripple effect to justify the broad marriage restriction at issue in that case.[157] Likewise, lifting the blanket prohibitions on masturbation, which include *completely private* masturbation, would not cause a sufficient ripple effect to justify the restriction.[158]

In *Beerheide v. Suthers*, the Tenth Circuit found that the Colorado Department of Corrections (DOC) violated Jewish prisoners' rights when they failed to provide Kosher meals for observant Jews.[159] In considering the third prong of *Turner*, the Tenth Circuit acknowledged that Kosher meals would cost more than regular prison meals but held that, without a showing that it was more than *de minimis*, the extra cost was not a burden on the allocation of prison resources sufficient to trigger the deference to the judgement of correction officials.[160] The DOC also argued that the policy would lead to tension between guards and incarcerated persons because guards would initially be unfamiliar with the Kosher policy.[161] The Tenth Circuit rejected this argument as well, noting that the difficulties outlined by the DOC were inherent in implementing any new policy and that "tensions will likely ease" as guards become familiar with the new Kosher meal policy.[162]

Rescinding blanket bans on masturbation in correctional facilities would not burden prison resources or cause a significant ripple effect triggering deference to the judgement of correctional officials.[163] First, lifting the masturbation ban would not significantly affect the allocation of prison resources. If anything, lifting the ban would likely conserve prison resources. Some scholars have suggested that allowing masturbation may "reduce the amount of sexual coercion in correctional facilities" because it "provides an alternative outlet so that inmates may release

154. *Id.*
155. *Id.*
156. *Id.* at 98.
157. *Id.*
158. *See id.*
159. 286 F.3d 1179, 1192 (10th Cir. 2002).
160. *Id.* at 1190; *see Turner*, 482 U.S. at 90.
161. *Beerheide*, 286 F.3d at 1190.
162. *Id.* at 1190–91.
163. *Turner*, 482 U.S. at 90.

pent-up tension and stress."[164] Prisons with less sexual coercion are safer prisons, and safer prisons are generally cheaper to run.[165] The prison resources currently used to police private masturbation could be channeled into more productive avenues.

Beyond the issue of prison resources, lifting the ban on masturbation would not have a significantly negative impact on guards or incarcerated persons. Correctional institutions would likely argue that permitting masturbation will open them up to Title VII liability if female correctional officers are subjected to a hostile work environment as a result of sexual misconduct from incarcerated persons.[166] In *Freitag v. Ayers*, the Ninth Circuit held that a female correctional officer's exposure to exhibitionist masturbation while on the job could create a hostile work environment in violation of Title VII.[167] Correctional institutions would likely argue that permitting incarcerated persons to masturbate would create such a hostile work environment for female correctional officers and constitute a significant negative impact on the guards as a result.

Ultimately, the argument that lifting the masturbation ban would create a hostile work environment for female correctional officers misses the mark. First, the asserted right here is the right to masturbation, not the right to *exhibitionist* masturbation. A person masturbating in the privacy of their cell or a bathroom stall would not create the kind of hostile work environment at issue in *Freitag*.[168] Second, the kind of conduct at issue in *Freitag* is already prohibited by prison regulations against indecent exposure and assaultive conduct.[169] Therefore, masturbation bans do not protect correctional officers from assault. Rather, they impose an unreasonable burden on incarcerated persons.

4. Are There "Obvious, Easy Alternatives" Such That "The Regulation Is . . . An 'Exaggerated Response'" To Prison Concerns?

The final prong of the *Turner* test asks courts to consider whether there is an alternative to the contested regulation that "accommodates the prisoner's rights at *de minimis* cost to valid penological interests."[170] The *Turner* Court held that the

164. Hensley et al., *supra* note 15, at 69–70. *See also* Smith, *supra* note 45, at 232 ("[G]ranting inmates a degree of sexual expression may enhance inmate safety by decreasing prison rape.").

165. *See* 34 U.S.C. §§ 30301(14)(A), (15)(A) (2012) (noting in congressional findings that a high incidence of prison rape increases the cost of administering a prison system); Representative Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. ON LEGIS. 1, 15 (2015) (noting that solitary confinement facilities cost two to three times more than conventional facilities).

166. *See* Freitag v. Ayers, 468 F.3d 528, 539–40 (9th Cir. 2006) (holding that correctional institutions are required by Title VII to protect female guards from sexual abuse).

167. *Id.* at 540.

168. *Id.* (noting that the plaintiff "witnessed inmates masturbating in an exhibitionist manner, oftentimes while they directed verbal taunts and crude remarks at her").

169. *See, e.g.*, OHIO ADMIN. CODE 5120-9-06(C)(11)(12)(14) (2014).

170. *Turner*, 482 U.S. at 91.

"existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[171]

As explained above, lifting the masturbation ban in correctional institutions would impose no burden on the legitimate penological interests of ensuring safety and order within correctional institutions and promoting rehabilitation. Indeed, lifting the masturbation ban would *promote*, rather than burden, the interests of rehabilitation and institutional security. Ample evidence for ready alternatives to a moratorium on masturbation exists.[172] As discussed above, Australian prisons, Canadian prisons, and even some American prisons do not impose a blanket masturbation ban, and they do not suffer from chaos in their correctional institutions. Indeed, lifting the masturbation ban would better serve the policy goals of rehabilitation and institutional safety than the ban itself. Applying *Turner*, the success of Australian and Canadian prisons and American prison systems like California is evidence that masturbation bans are unreasonable and an "'exaggerated response' to prison concerns."[173]

Total bans on masturbation in prison do not pass constitutional muster under *Turner*. The underlying right to masturbate coupled with a lack of legitimate penological reasons for maintaining the ban render the regulations described above clearly unconstitutional.

III. MASTURBATION BANS ARE IMMORAL

I have articulated a legal right to masturbate in prison under *Lawrence* and *Turner*. I will now proceed to make the moral case that prison masturbation bans have no place in our society by evaluating the merits of the restriction under each of the four generally accepted rationales for punishment: (*A*) deterrence; (*B*) rehabilitation; (*C*) incapacitation; and (*D*) retribution.

A. Masturbation Bans Do Not Deter Criminal Activity

A ban on masturbation in prison likely has little deterrent effect on citizens considering whether to break the law. It could be argued that rescinding the right to masturbate should be an inherent part of a person's punishment for breaking the law because stripping people of the right to masturbate would deter potential offenders from committing crimes. Since this author knows of no studies that have evaluated the effect of prison masturbation bans on deterrence, analogizing the bans to harsh sentencing is instructive.

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171. *Id.* at 90.

172. *See, e.g.*, *Prisons Regulations 1982* (WA) (Austl.), http://www.austlii.edu.au/au/legis/wa/consol_reg/pr1982233/ (last accessed Apr. 8, 2017); MINISTRY OF COMMUNITY SAFETY & CORR. SERVS., *supra* note 38, at 30; NOVA SCOTIA CORR. SERVS, *supra* note 39, at 29; CAL. CODE REGS. tit. 15, §§ 3000; 3007 (2018).

173. *See Turner*, 482 U.S. at 90.

Research has shown that increased sentence length has little deterrent effect on potential offenders.[174] People are deterred by the *certainty* of punishment, not the *severity* of punishment.[175] Given the evidence that the general public tends to underestimate the severity of punishment in the criminal justice system,[176] it is little surprise that imposing longer prison terms has little effect on public safety.[177] Even though longer prison terms mean harsher punishments, people remain undeterred by the severity of punishment.[178] If long, potentially life-long, prison sentences fail to deter crime, then it would be a stretch to imagine that a masturbation ban would.

B. Masturbation Bans Do Not Encourage Rehabilitation

One scholar argues that prohibiting masturbation serves the end of rehabilitation.[179] As noted above, Cusack maintains that allowing people to masturbate in prison might distract them from reflection, vocational training, or some other rehabilitative goal.[180] This is nonsense. Plenty of distractions exist in prison outside of masturbation, and prohibiting the practice only serves to deprive incarcerated persons of a basic human need.[181]

Ultimately, denying incarcerated persons the right to masturbate is a denial of their humanity. The "desire for sexual intimacy and sexual expression"[182] is a fundamental human desire that survives incarceration.[183] Pretending that sexual urges do not or should not exist in prison cannot possibly rehabilitate. But by embracing sexuality in prison, correctional officials can prepare incarcerated persons for a productive life on the outside, which often includes forming healthy sexual relationships.[184] As Smith observes, when prisons reflexively prohibit any and all sex for pleasure in prison, they "miss an opportunity to educate inmates about violence in relationships, to talk about safe sex, and to encourage healthy relationships that could offer support upon reentry."[185]

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174. Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 4, SENT'G PROJECT (Nov. 2010), http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf.

175. *Id.*

176. *Id.* at 3.

177. *Id.* at 9.

178. *Id.* at 1, 6.

179. Cusack, *supra* note 128, at 102.

180. *Id.* at 105–06.

181. McGaughey & Tewksbury, *supra* note 43, at 140 ("[S]exuality is a basic and fundamental human need"); WORLD HEALTH ORG., *Teaching Modules for Basic Education in Human Sexuality* 3 (1995), http://apps.who.int/iris/bitstream/handle/10665/207015/9290611154_eng.pdf?sequence=1&isAllowed=y.

182. Smith, *supra* note 45, at 233.

183. *Id.*

184. *See id.* at 206.

185. *Id.*

C. Masturbation Bans are Unrelated to Incapacitation

The incapacitation rationale for punishment is premised on protecting society at large.[186] If a person poses a danger to the community, punishing them with prison time is justified because the person is removed from the community and cannot commit further crimes against society.[187] Since the goal of incapacitation is to remove an individual from society, it follows that the incapacitation rationale does not reach within prison walls.[188] Indeed, a hypothetical prisoner could be enjoying champagne and caviar in a five-star correctional institution, but so long as he is separated from the community, the incapacitation rationale is satisfied. Therefore, prohibiting masturbation is flatly unrelated to the goal of incapacitation.

D. Pure Punishment is the Only Justification for a Masturbation Ban

Perhaps the strongest argument in favor of a masturbation ban is a retributive one. Under a retributivist punishment theory, the intentional infliction of suffering is imposed on the convicted person as a form of revenge.[189] A retributivist would argue that taking away a person's right to sexual autonomy or expression is justified vengeance for criminal activity.[190] The same could be said for more traditional punishments like flogging, branding, or forced sterilization.[191] If one truly believes that stripping a person of their humanity is the appropriate response to criminal activity, there is not much left to argue. In response, I can only claim on first principles that taking revenge on a person by depriving them of a basic human need like sexual expression is never morally justified.

CONCLUSION

The protections of the Constitution do not end at the prison walls. It is incumbent upon our criminal justice system to respect and protect the rights of the accused and of the convicted. Those rights include the right to sexual autonomy. A system that can punish a natural, private activity like masturbation with solitary confinement is an extraordinarily flawed system. If prisons refuse to lift these draconian restrictions on a fundamental right, courts must step in to protect those whose constitutional rights are being trampled.

186. *See* Wayne R. LaFave, 1 SUBST. CRIM. L. § 1.5(a)(2) (3d ed.) (2018).

187. *Id.*

188. *Cf. id.*

189. LaFave, *supra* note 186, at § 1.5(a)(6).

190. *See id.*

191. *Cf.* Smith, *supra* note 45, at 196, 199 (discussing how beating, maiming, branding, and forced sterilization were traditionally used as punishments before the advent of the modern prison system).