



# SEXUAL AUTONOMY IN PRISON ADMINISTRATION IN SPECIAL REFERENCE TO PRISON INMATES IN POST-MODERNISM ERA

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## ABSTRACT

*This article investigates prisoners' sexual autonomy by justifying isolation, sexual fulfilment, and quality of life among inmates in heterosexual romantic relationships with fellow inmates, inmates with outside partners, and inmates without a partner. Sexuality and sexual partnerships should be approached positively and respectfully, according to the Consultation, in order to achieve sexual wellbeing. The author explores the prisoners' sexual autonomy and their right to it. Furthermore, every person's sexual rights must be secured by laws and policies that represent a positive and respectful attitude toward sexuality and sexual relationships among inmates. In this paper, the author will take a post-modernist approach to the sexual wellbeing of prisoners.*

**KEYWORDS:** Prisoner Right, Human Rights of Prisoner, Prison Administration, Sexual Health of Prisoners.

## INTRODUCTION

Sexual indulgence is a biological need of human beings. The theories and norms of rehabilitation and sexuality has evolved over the years. Depriving or not giving privacy to prisoners' for masturbation is cruel and inhuman in nature and also violates the right to live in a stress free environment. The advocacy for rehabilitation of the incarcerated is incomplete without seeking provisions granting sexual freedoms. Long-term sexual deprivation, according to those with psychological experience, has a negative impact on the prisoner's self-image, self-esteem, and attitude toward authority. This is particularly true in prison, where

heterosexual deprivation is linked to a high rate of homosexuality<sup>1</sup> and homosexual rape,<sup>2</sup> as well as with more diffused expressions of violence. Many negative long-term implications can go unnoticed.

## RIGHT TO SEXUAL AUTONOMY

*“The body implies mortality, vulnerability, agency: the skin and the flesh expose us to the gaze of others but also to touch and to violence. The body can be the agency and instrument of all these as well, or the site where ‘doing’ and ‘being done to’ become equivocal. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension; constituted as a social phenomenon in the public sphere, my body is mine is not mine.” – Butler.*

Butler describes a body that is both “mine and not mine” in the passage above. Indeed, our experiences with our bodies in carceral spaces in this free world are an exaggerated but fitting illustration of this truth: bodies are not only constrained, but also contingent, restricted, and conditional under white supremacy and capitalism. Different bodies, whether sexual or not, are given different access to humanising contact as sexual beings. Touching inmates is considered a type of sexual deviance, despite the fact that touch in yoga is non-sexual.<sup>3</sup>

In *Turner v. Safley*,<sup>4</sup> the Supreme Court articulated the standard of review for the constitutional challenges on prison regulations. The Court attempted to strike a balance between ensuring that prisoners retain the right to seek redress of constitutional grievances and making sure that courts accord appropriate deference to the expertise of prison administrators. The Court recognized that “prison walls do not form a barrier separating prison inmates from the protections of the Constitution” and that the “expertise, planning, and the commitment of resources” that go into running a prison are “peculiarly within the province of the legislative and executive branches of government.” 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.” Court considered 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;” (2) whether there are alternative means available for exercising the asserted right; (3) how the accommodation of the asserted right will impact guards, other incarcerated persons, and the allocation of prison resources; and (4) that “the absence of ready alternatives is evidence of the reasonableness of a prison regulation” and vice versa.<sup>5</sup>

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* implies a constitutional right to masturbation. The right to masturbate may be the correctional context

<sup>1</sup> 28 C.F.R. § 541.3 (a), Table 2 (2011)

<sup>2</sup> 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)

<sup>3</sup> Raechel Tiffe, *Toward A Decarceral Sexual Autonomy: Biopolitics And The Compounds Of Projected Deviance In Carceral Space*, Journal Of Prison Education And Reentry, Vol. 4 No. 2, December 2017

<sup>4</sup> 482 U.S. 78, 89 (1987).

<sup>5</sup> Ibid.

by applying the four *Turner* factors. 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 unadministrability of a masturbation ban outside the prison context.<sup>6</sup> The right itself may also be so obvious that states simply would not seek to prevent the practice in the first place.<sup>7</sup> 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.<sup>8</sup> Indeed, the Supreme Court's precedent strongly implies a fundamental right to masturbate in private.<sup>9</sup> The strongest support for this right derives from the Court's decision in *Lawrence v. Texas*.<sup>10</sup> 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*.<sup>11</sup> In *Griswold*, the Court found that a state law prohibiting the use of contraceptives and any consultation regarding contraceptives violated the fundamental right to privacy.<sup>12</sup> The Court held that the "sacred precincts of marital bedrooms" were protected by a right to privacy that was "older than the Bill of Rights" itself.<sup>13</sup>

In *Eisenstadt v. Baird*,<sup>14</sup> seven years after the decision in *Griswold*, the Court extended the right to make decisions regarding contraception and sexual conduct beyond the marriage relationship. 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.<sup>15</sup> The Court also recognized that the marital couple is made up of two individual people. It ultimately held that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion" into family planning decisions.<sup>16</sup> The Court's strongest proclamation in favor of sexual autonomy and the constitutionally protected privacy interest in private sexual conduct came in *Lawrence*.<sup>17</sup>

In *Lawrence*, the Court overruled *Bowers v. Hardwick* and invalidated a Texas statute prohibiting sodomy. 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." 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. 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. Although the Court

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<sup>6</sup> 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-carpenier.html>

<sup>7</sup> *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1296

<sup>8</sup> *Lawrence v. Texas*, 539 U.S. 558, 565 (2003)

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> 381 U.S. 479 (1965)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 405 U.S. 438, 447 (1972)

<sup>15</sup> *Id.*

<sup>16</sup> *Eisenstadt*, 405 U.S. At 453

<sup>17</sup> 539 U.S. At 579

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" and that "private sexual conduct" between two consenting adults falls under the penumbra of the constitutionally protected private life. 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. Detailing a parade of horrors, Justice Scalia laments that "laws against . . . same-sex marriage, . . . prostitution, *masturbation*, adultery, fornication, . . . and obscenity" are only sustainable in light of *Bowers*. 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." Although lower courts are split as to the precise scope of the holding in *Lawrence*,<sup>18</sup> 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.<sup>19</sup> 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." 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."<sup>20</sup>

As prisoners first arrive in jail, they adjust to the "prison lifestyle" and the subcultures that exist there. They are preventing them from taking part in the idea of "prisonization." Several scholars have attempted to provide theoretical reasons for prison inmates' transition and behaviour, with two major hypotheses gaining the most support. According to the deprivation model, the main effect on an individual's reaction to incarceration is deprivations (or losses of liberties) encountered in jail. Gresham Sykes (1958) enumerates five main pains (or losses or results) from imprisonment:

- “1. Liberty and freedoms available to those not incarcerated.
2. Goods and services, ranging from choosing a grocery store to picking a mechanic.
3. Heterosexual relationships with men and women of an individual's choice.
4. Autonomy and self-sufficiency.
5. Security and protection from harm.”<sup>21</sup>

Inmates develop a new set of beliefs and norms as a coping mechanism for the lack of these freedoms and liberties, some of which contribute to unacceptable actions while incarcerated. Individuals on the outside, for example, have the right to engage in heterosexual relationships whenever they want. Since imprisonment

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<sup>18</sup> Compare *Williams V. Att'y Gen. Of Alabama*, 378 F.3d 1232, 1236–37 (11th Cir. 2004)

<sup>19</sup> *Reliable Consultants, Inc.*, 517 F.3d At 744

<sup>20</sup> *Id.*

<sup>21</sup> [https://en.wikipedia.org/wiki/Prison\\_sexuality](https://en.wikipedia.org/wiki/Prison_sexuality)

only permits cohabitation with persons of the same sex, many inmates prefer to partake in homosexual relationships, which are illegal in jail.<sup>22</sup>

However, research has shown that, despite the prohibition, male inmates can rationalise their actions in order to continue masturbating. Although most correctional facilities have policies against public autoerotism, it is still common in jail, even to the point of creating a hostile atmosphere for inmates and staff. In *Beckford v. Department of Corrections*<sup>23</sup>, a federal appellate court ruled that the “Florida Department of Corrections failed to fix a hostile work environment for female health-care workers and correctional staff. Male inmates in maximum security continuously masturbated in the presence of fourteen female employees over the course of three years. They would participate in ‘gunning’ where the inmates openly masturbated in the presence of the employees by standing on toilets or mattresses to ensure the victims could see the behavior. They would ejaculate through the food slot on their doors. The staff resorted to wearing sunglasses and headphones to avoid the harassment, as the Department of Corrections refused to attempt to amend the inmates’ behaviour.”<sup>24</sup>

## COMPARATIVE ANALYSIS OF SEXUAL AUTONOMY

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.<sup>25</sup> 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. Prison regulations in Queensland, Australia, do not contain categorical prohibitions on masturbation or other consensual sexual activity.<sup>26</sup>

In the State of Western Australia, condoms are made available to incarcerated persons of all genders.<sup>27</sup> 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.<sup>28</sup>

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.”<sup>29</sup> The regulations do not include any prohibition

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<sup>22</sup> Catherine D. Marcum And Tammy L. Castle, *Sex In Prison: Myths And Realities*, 2014

<sup>23</sup> 605 F.3d 951 (2010)

<sup>24</sup> Ibid.

<sup>25</sup> Ohio Admin. Code 5120-9-06(A) (2014).

<sup>26</sup> *Corrective Services Regulation 2017* (Qld), Sub-Div 2(I) (Austl.) (Prohibiting Indecent Or Offensive Acts Only In Someone Else’s Presence).

<sup>27</sup> Adult Custodial Rules 2002 (Wa) Ac 9, Provision 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](http://www.correctiveservices.wa.gov.au/files/prisons/adult-custodial-rules/ac-rules/ac-rule-09.pdf).

<sup>28</sup> 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](https://newsroom.unsw.edu.au/news/health/sex-australian-prisons-facts).

<sup>29</sup> Ministry Of Correctional Services Act, R.S.O. 1980, C 275, S 47(D) (Can.).



on sexual activity or masturbation.<sup>30</sup> Other Canadian provinces go even further than Ontario; prisons in Nova Scotia provide condoms and dental dams to facilitate safe sex while incarcerated.<sup>31</sup> The lack of prohibitions on sexual activity, ready availability of condoms and dental dams, and a generous conjugal visit policy<sup>32</sup> 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.

## CONCLUSION & SUGGESTION

Since sexual act is a physiological need that strengthens a couple's bond, some prisoners' request to be permitted to fulfil their sexual needs in order to minimise sodomy in prisons is rational. Sexual wellbeing in prisons can not be achieved until these gender and sexuality misconceptions and misunderstandings based on hegemonic masculinity ideals are dispelled. It necessitates reforming laws and policies to embrace sexual and gender diversity, protect everyone from sexual harassment, and encourage everyone to participate in sexual relationships safely and freely without fear of prejudice, coercion, or violence. The safeguards provided by constitutional principles do not stop when an individual enters a jail. 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 in solitary confinement is an extraordinarily flawed system. If prisons refuse to lift these draconian restrictions on a right as fundamental as access to sexual autonomy, courts must step in to protect those whose constitutional rights are being trampled. The right to procreate through artificial insemination may be coined as supplement to sexual freedom. However, due to the state's limited resources, it will first concentrate on improving facilities for conjugal visitation in prisons, and this approach must be included in long-term planning. The state should make liberal use of parole and furlough clauses to ensure that inmates will have sexual contact with their families. The government should set aside funds to construct facilities for conjugal visitations. Despite the fact that there are powerful forces on both sides of the debate, there is a compelling case to be made that a court must rule that married inmates and their partners have a fundamental right to engage in a conjugal visiting programme. If rehabilitation remains the favoured goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner's favour. Prisons will remain unpleasant places even if conjugal visiting is allowed several times a month. Imprisonment will confer no less of a social stigma because of the presence of such a program. Imprisonment is a legal punishment imposed upon the offender by the state but in the meanwhile we should also look after the reformation theory in practice for the betterment of the prisoners' family. It is suggestive to outgrow the majority narrative on the sexual autonomy of prisoners and evolve a system where the right to engage in sexual activities is but the choice of the person even if he/she is incarcerated. The right extended shall aim to include individuals with all orientations and provide them equal access without discrimination or stigma within the jail premises.

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<sup>30</sup> Ministry Of Community Safety & Corr. Servs., Inmate Information Guide For Adult Institutions30(S.O.)(Sep.2015)(Can.),[https://www.mcscs.jus.gov.on.ca/english/corr\\_serv/policiesandguidelines/cs\\_inmate\\_guide.html](https://www.mcscs.jus.gov.on.ca/english/corr_serv/policiesandguidelines/cs_inmate_guide.html).

<sup>31</sup> Nova Scotia Corr. Servs., Offender Handbook 29 (S.N.S.) (2016) (Can.), [https://novascotia.ca/just/corrections/\\_docs/adult\\_offender\\_handbook\\_en.pdf](https://novascotia.ca/just/corrections/_docs/adult_offender_handbook_en.pdf).

<sup>32</sup> Corr. Serv. Of Can., Private Family Visits With Offenders (Mar. 27, 2018) (Can.), [www.csc-sec.gc.ca/family/003004-1000-eng.shtml](http://www.csc-sec.gc.ca/family/003004-1000-eng.shtml)