SEXUAL INTIMACY AS A FUNDAMENTAL, HUMAN RIGHT: CONJUGAL VISITS AND THE RIGHT TO BE UNMARRIED

By Deema Nagib[†]

I. INTRODUCTION

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[1]

The United States incarcerates approximately 2 million people on any given day, more than any other country in the world.[2] Over the years,

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† Deema Nagib is an attorney, circle-keeper, and perpetual student. Through her work, she strives to ask the right questions—rather than have the right answers—and aims to center the dignity and humanity of all people.

[1] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[2] *United States Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/SMZ8-EMGX (last visited Apr. 23, 2023).

we've seen growing emphasis on the rights and human needs of the incarcerated. Specifically, there have been growing movements to end the use of solitary confinement;[3] reduce or eliminate the costs of phone calls, visits, and other methods of communication;[4] end prison slavery and implement living wages for incarcerated people;[5] and increase opportunities for education and other meaningful programming.[6]

However, little emphasis has been placed on an incarcerated person's right and ability to be sexual. A desire for sexual intimacy, like many other human needs, does not disappear with incarceration. People who are in prison should have the right to explore their sexuality and sexual intimacy with consenting partners, regardless of their incarceration. To ignore this is to ignore an integral part of incarcerated individuals' humanity.

Sex has often been used as a tool of oppression. One more recognizable example is that of wartime rape.[7] In times of war, military forces (specifically men) would rape women in order to "dishonor" them and "dishonor" the men who cared for them.[8] However, preventing individuals from expressing sexuality in ways that are meaningful to them is similarly an oppressor's tool. Forcing people in times of war to enter into marriages and relationships against their will, thus stifles their ability to express their sexuality freely with a partner of their choice, in turn facilitating conflicts and ethnic cleansing.[9]

Incarceration is similarly a political tool often used to quell uprisings and unrest and punish individuals who choose to stand up to oppressive leaders.[10] The United States is no different. Prisons in the United States began to grow simultaneously with the abolition of slavery across the

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[3] *See, e.g.*, Meredith Gallen, *Criminal Justice Advocates Convene to End Solitary Confinement*, BRENNAN CTR. FOR JUST. (Oct. 18, 2012), https://perma.cc/QU97-C3HP.

[4] *See, e.g.*, Christie Thompson, *Fighting the High Cost of Prison Phone Calls*, MARSHALL PROJECT (Feb. 25, 2023), https://perma.cc/8VKE-43CX.

[5] *See, e.g.*, Edwin Rios, *Movement Grows to Abolish US Prison Labor System that Treats Workers as 'Less Than Human,'* GUARDIAN (Dec. 24, 2022), https://perma.cc/99J7-W99B.

[6] *See, e.g.*, Christy Visher & John Eason, *A Better Path Forward for Criminal Justice: Changing Prisons to Help People Change*, BROOKINGS (Apr. 2021), https://perma.cc/4X5B-HXR9.

[7] *See, e.g.*, Teresa Godwin Phelps, *Feminist Legal Theory in the Context of International Conflict*, 39 UNIV. BALT. L. F. 153, 168-69 (2009).

[8] *Id.*

[9] *Id.*

[10] *See* Dominique Moran & Jennifer Turner, *Carceral and Military Geographies: Prisons, the Military, and War*, 46 PROGRESS HUM. GEOGRAPHY 829, 833 (2022) ("[L]ong histories of war-making and colonialism underscore the deployment of imprisonment and detention within imperialism and capitalism.").

nation and have disproportionately incarcerated Black people ever since.[11] Given the origins of the American prison system and the disproportionate number of Black and other people of color who are incarcerated in this nation, incarceration in the United States is inherently political. This also means that the conditions of incarceration also disproportionately affect Black and other people of color.

As a result, safeguarding the rights of incarcerated individuals is that much more important. Honoring the fact that people, regardless of their incarceration, are sexual beings is an important aspect of the bodily integrity and autonomy of incarcerated people. In other contexts, individual bodily autonomy and self-determination is held so sacred in the American legal tradition that it may be abridged in only the most necessary of circumstances,[12] at least as applied to white, cisheterosexual, able-bodied men.[13] The men who founded this nation and laid the groundwork for this nation's common-law-based jurisprudence spoke unambiguously of the importance of bodily autonomy and self-determination.[14] They might not have anticipated that the rights they envisioned for themselves would eventually also protect women, people of color, and other marginalized people, but all people deserve the same right to self-determination.

Undoubtedly, incarceration further oppresses and marginalizes people who are already on the margins. While it is possible for members of the oppressor class to become incarcerated, it is incredibly rare. Nonetheless, incarceration is, itself, marginalizing. For this reason, it might be difficult to understand why a person who is incarcerated, who is no longer free to move about as they please, still retains this right, albeit limited, to bodily autonomy. Incarcerated individuals have a right to decide what to do with their own body, and it should only be infringed in the most necessary of circumstances and only if it is reasonably related to legitimate penological interests. People who are incarcerated, for example, are able to exercise their bodily autonomy in their ability to make their own

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[11] *See, e.g.,* Samantha Melamed, *Inventing Solitary*, PHILA. INQUIRER (June 8, 2022), https://perma.cc/H5QX-HRYG.

[12] *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022). *Dobbs* unfortunately calls much of this and the subsequent substantive due process analysis into question. *Dobbs* is a general aberration on the right of personal liberty and bodily autonomy as a whole, and this Article will continue on with the assumption that previous substantive due process holdings articulated by the Court still stand in the areas that are relevant to the analysis at issue here.

[13] *See* Amy Gajda, *The Founding Fathers Were Very Interested in the Right to Privacy—For Men*, TIME (July 16, 2022), https://perma.cc/U8US-P2AX.

[14] *See generally* Chester James Antieau, *Natural Rights And The Founding Fathers—The Virginians*, 17 WASH. LEE L. REV. 40 (1960) (explaining the Virginia founding fathers' focus on self-government).

medical decisions.[15] This includes retaining a right to refuse medication and medical treatment, even if it is lifesaving.[16] Courts, both state and federal, have specifically ruled that incarcerated individuals retain this right as part of their right to substantive due process, and specifically their right to liberty and privacy, despite their incarceration.[17]

This then begs the question: What other rights do individuals inherently hold regardless of their incarceration that should be acknowledged similarly to this above-articulated right to refuse medical treatment? Again, it may not seem the clearest at first glance, but incarcerated adults who are able to consent should have the right to both choose their sexual partner regardless of their marital status and be afforded the opportunity to have private visits. Sex and sexuality are so inherently ingrained in what it means to be human, it is hard to understand it as anything other than a biological human need. Sex is as human as human gets.

Even the United States Supreme Court understood this. In his opinion, Justice Kennedy described sexual intimacy as "the most private human conduct," and explained that there is a fundamental right to liberty and privacy that protects "adult persons in deciding how to conduct their private lives in matters pertaining to sex."[18] While the number of prisons offering overnight visits for married couples is rapidly declining,[19] overnight visits for non-married individuals is now non-existent. That was not always the case. In fact, there was historically no requirement that individuals be married in the prisons that offered them.[20]

An incarcerated person should have the right to have sex with an adult, consenting partner in a private space. Prison officials can limit this right for reasons that are related to their penological interests such as

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[15] *See infra* Section II.D.

[16] *See infra* Section II.D.

[17] *See infra* Section II.D.

[18] *See* Lawrence v. Texas, 539 U.S. 558-59 (2003).

[19] Kim Severson, *As Conjugal Visits Decline, a Lifeline to Inmates' Spouses is Lost*, N.Y. TIMES (Jan. 12, 2014), https://perma.cc/X72E-2KVJ.

[20] *See, e.g.*, Christopher Hensley et al., *Inmate Attitudes Toward the Conjugal Visitation Program in Mississippi Prisons: An Exploratory Study*, 25 AM. J. CRIM. JUST. 137 (2007) (describing how the conjugal visit system in Mississippi did not initially include a marriage requirement). It should be noted that the origin of conjugal visits in the United States had an incredibly racist origin. *See id.* at 137-38 ("Two racial stereotypes fueled the conjugal visitation program" where only Black men were eligible: "One popular notion was that black males were promiscuous and could not control their libidos. A second belief was that black males possessed superhuman strength. [Therfore], conjugal visitation was introduced [to] control aggression against corrections officials and other inmates."). As an aside, it is telling that there was historically no requirement that incarcerated individuals be married, nor even be in a romantic relationship to participate in conjugal visits when the purpose was anti-Black and racially motivated. *See generally* Colombus B. Hopper, *The Conjugal Visit at Mississippi State Penitentiary*, 53 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 340 (1962).

safety, but marital status should not have any bearing. This Article will argue that incarcerated individuals do have a substantive due process right to have sex with a consenting partner, regardless of marital status, which stems from their fundamental right to make decisions regarding their bodily autonomy.

Part II will define and explain substantive due process and dive into its origins. Section II.C will specifically explain how substantive due process affects people who are in prison and Section II.D will be dedicated to the analysis of state and federal jurisprudence regarding the incarcerated individual's right to refuse medical treatment. Both will explain the legal reasoning behind the broader notion that an incarcerated person still retains a right to bodily autonomy, as well as demonstrate how state and federal prison administrators should approach balancing their interests in the safety and security of the facility with the incarcerated population's right to their bodily autonomy.

In Part III, this Article will explore psychological and other social science scholarship in the areas of sex and sexuality. Specifically, Section III.A explains that sexual rights, including the ability to freely choose a sexual partner without governmental interference, are fundamental. Section III.B will briefly demonstrate that sex, sexual intimacy, and intimate physical touch are fundamental to physical and mental well-being.[21] Finally, Section III.C will explore the history of sexual intimacy and the role that it played in this Nation's history.

In Part IV, this Article will balance the prison administrator's interest in maintaining a secure facility with the incarcerated individual's right to bodily autonomy and integrity. Part IV will show that first and foremost, any limitation on the participation in an overnight or "conjugal" visit on the basis of marital status is not reasonably related to a penological interest and the ability to participate in such visits is protected by substantive due process.[22] However, this Article will ultimately conclude that regardless of the legal argument that incarcerated individuals should retain a right to such visits, it is ultimately still in the best interest of prison administrators to provide them.

II. SUBSTANTIVE DUE PROCESS: AN OVERVIEW

A. A General History

> "The principle and true meaning of [substantive due process] has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 17 U.S. 235, 4 Wheat.

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[21] *See infra* Section III.B.

[22] *See infra* Part IV.

> 235–244: 'As to the words from Magna Carta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'"[23]

Substantive due process has eluded legal scholars and the courts since its inception.[24] There are a few undisputed truths, however. The first is that there are some fundamental, natural rights that pre-date the founding of this nation.[25] Second is that the Supreme Court has interpreted this right both expansively as well as narrowly.[26] And finally, that the right to substantive due process does not have to lie in any enumerated right in the bill of rights or the Constitution as a whole.[27]

Despite Supreme Court Justices attempt to define what exactly substantive due process protects, they cannot. In *Moore v. City of East Cleveland*, Justice Powell quoted a dissent by Justice Harlan to say:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decision it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.[28]

This is because the doctrine of substantive due process attempts to encompass a much broader guarantee than the basis of common law, the

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[23] Hurtado v. California, 110 U.S. 516, 527 (1884).

[24] *See, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 81 VA. L. REV. 493, 502 (1997) (calling substantive due process a "textual conundrum" and writing, "[a] reader of the Supreme Court's substantive due process cases can come to feel like a moviegoer who arrived late and missed a crucial bit of exposition.").

[25] *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L. J. 585 (2009); *see also*, Griswold v. Connecticut, 381 U.S. 479, 486 (1964) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.").

[26] Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 249 (2017) ("These competing objectives of upholding certain nontextual liberty rights on the one hand while exercising judicial self-restraint on the other have led the Court to adopt two contrasting approaches to substantive due process.").

[27] *See* Moore v. City of East Cleveland, 431 U.S. 494, 502 (1976).

[28] *Id.* at 501-02 (holding, in a plurality, that a zoning ordinance violated the substantive due process clause with regard to the ordinance's definition of and regulation of the family unit).

Magna Carta, provided. The Magna Carta was broadly a "limitation on the crown." It was a check on royal power and based on the principle that there are some "natural" rights that human beings hold regardless of whether their political leaders thought to enumerate them.[29] It is clear that this idea prevailed in the early battle over whether to include a "Bill of Rights" in the Constitution.[30] The Federalists felt that it was both pointless and dangerous to enumerate specific rights because (1) it would be impossible to actually name all of the rights that human beings are entitled to, and (2) if there are certain enumerated rights, that there would be a dangerous assumption that the unnamed rights would be "ceded to the national government."[31] While the Federalists lost the battle with regard to whether a Bill of Rights would be incorporated into the Constitution, this idea of "natural" or "higher" moral law was nonetheless embedded into the Due Process Clauses of the Fifth and Fourteenth Amendments.[32]

B. Definition

The Due Process Clause of the Fifth and Fourteenth Amendments[33] protects individuals from governmental actions in two distinct ways. First, due process protects individuals from government action and limitations on a protected liberty interest sans the proper procedural protection. This is referred to as "procedural due process" and requires government actors to comply with certain requirements to ensure the proper process is followed before an individual is deprived of a particular liberty interest. Essentially, the right lies in the process itself—if an individual has a protected liberty interest, the government *may* deprive the individual of that interest if the proper procedure is followed.[34] Generally, proper process means notice and a right to a hearing.[35]

On the other hand, substantive due process protects individuals from governmental actions and deprivations regardless of the procedures implemented.[36] In other words, there are rights that are so fundamental that

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[29] *See* Gedicks, *supra* note 25, at 596, 598-99, 619, 625 ("It is universally agreed that the concept of "due process of law" is rooted in Magna Carta.").

[30] *See* Gedicks, *supra* note 25, at 595.

[31] *See* Gedicks, *supra* note 25, at 635-36.

[32] *See* Gedicks, *supra* note 25, at 596, 634-35.

[33] See Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 23 (2005) ("[T]he word "due" in the Fifth and Fourteenth Amendments has the same objectivistic meaning as in the original Constitution.").

[34] *See, e.g.*, Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUMBIA L. REV. 833, 882-83 (2003).

[35] *Id.* at 884.

[36] Daniels v. Williams, 474 U.S. 327, 331 (1986) (discussing the fact that the Due Process Clause bars certain governmental actions "regardless of the fairness of the procedures used to implement them.").

no amount of process will allow a government actor to infringe on those rights. Substantive due process protects individuals from governmental overreach and oppression.[37] For this reason, substantive due process protects individuals from governmental actions that infringe on fundamental rights, even if the rights asserted are not enumerated in other, more specific laws (such as the Bill of Rights or other federal laws).[38] Courts especially find that rights are "fundamental" and worthy of enhanced protection via substantive due process when they are deeply ingrained in this nation's history.[39] Also, the Court has sometimes found that a protected liberty interest exists even if it is not deeply rooted in this nation's history because it is otherwise enumerated in state laws.[40] Finally, the Court has even held that there is a substantive due process right or interest at issue when neither of these things are true, where scenarios involve social relationships that "are guarded fiercely as a hallmark of American liberty."[41]

In ascertaining whether a substantive due process right has been infringed upon, the Court first asks whether the right asserted is "fundamental."[42] To determine whether a right is fundamental, it must be both "deeply rooted in this Nation's history," and "implicit in the concept of ordered liberty."[43] When a person convicted of a crime asserts a violation of substantive due process, courts perform a balancing test weighing the substantive due process right and the penological interest.

C. Substantive Due Process in Prisons

A conviction itself does not render due process protections obsolete.[44] Incarcerated individuals still retain their right to due process protections, both procedural and substantive. For example, the United States Supreme Court has established that in certain cases, incarcerated individuals have a protected liberty interest in parole, good time credits, freedom

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[37] *See id.* at 331-32 (1986); s*ee also* DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989).

[38] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 502 (1976).

[39] *Id.* at 503 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is *deeply rooted in this Nation's history and tradition*.") (emphasis added); *see also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are objectively . . . deeply rooted in this Nation's history and tradition.") (quoting *Moore*).

[40] Kentucky v. Thompson, 490 U.S. 454, 461 (1989).

[41] Watson, *supra* note 26, at 270.

[42] *Glucksberg*, 521 U.S. at 720.

[43] *Id.* at 721.

[44] *See Thompson*,490 U.S. at 460 ("This is not to say that a valid conviction extinguishes every direct due process protection.").

from involuntary transfer to a mental hospital, and freedom from more restrictive forms of confinement within prison.[45]

The Supreme Court has acknowledged that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and that courts, and judges by extension, are not experts at running prisons.[46] In *Turner v. Safley*, the Supreme Court established that prison regulations that infringe upon fundamental rights must be "reasonably related to legitimate penological objectives."[47] There must be a valid connection between the prison regulation and the stated government interest, and this stated interest must be "legitimate and neutral."[48] Additionally, courts examine "whether there are alternative means of exercising the right that remain open."[49] If there is an alternative means of exercising the right that incarcerated individuals are asserting, then courts typically should give deference to the prison administrators.[50] Third, courts must examine the costs of accommodating the asserted right on other incarcerated individuals as well as prison resources generally. Similar to the above considerations, if the asserted right will have a significant impact on others and prison resources, courts should once again defer to correction officials.[51]

Finally, the absence of easy alternatives could also lean in favor of the prison regulation being reasonable. In other words, if there is no way to accommodate a possible asserted right without compromising legitimate safety concerns, courts might find that a regulation is reasonable.[52] Courts must perform this balancing test each time an incarcerated individual asserts that a prison regulation infringes on their fundamental rights. Nonetheless, incarcerated individuals retain "rights that are not inconsistent with [their] status as a prisoner."[53]

D. Substantive Due Process in Practice: The Right to Refuse Medication

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[54]

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[45] *Id.* at 461.
[46] Turner v. Safley, 482 U.S. 78, 84 (1987).
[47] *Id.* at 89.
[48] *Id.* at 89-90.
[49] *Id.* at 90.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Pell v. Procunier, 417 U.S. 817, 822 (1974).
[54] Schloendorff v. Society of N.Y. Hospital, 105 N.E. 92, 93 (N.Y. 1914).

One right that incarcerated individuals retain which has consistently satisfied the *Turner* test outlined above is the right to refuse medication and medical treatment. All people have a protected liberty interest in refusing unwanted medical treatment,[55] and incarcerated people are no different. In 1990, the Supreme Court held that this protection extends to incarcerated individuals in *Washington v. Harper*.[56] The respondent in the case, Harper, had been incarcerated in the State of Washington on a robbery conviction where he was predominantly held in the mental health unit.[57] The Washington Department of Corrections had a policy in the event that an incarcerated person refused medical treatment. An incarcerated person could only be forcibly medicated if they (1) were diagnosed with a "mental disorder," and (2) posed a likelihood of harm to themselves or others.[58]

The regulation at issue also allowed an incarcerated person to attend a hearing where they retained many procedural rights to contest any decision about the involuntary medication order.[59] The Court ultimately held that the deprivation of the asserted right was reasonably related to the asserted governmental objective, but emphasized that there is a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."[60] The *Washington* Court was clear in articulating that the prison administration's ability to usurp an individual's right to refuse medical treatment is not absolute. Rather, the prison administrators must articulate a policy whereby forced medical treatment is only possible if it is tailored to the specific interests that prison administrators hold in maintaining the security of the facility.

Notably, in the aftermath of the Supreme Court's decision in *Washington*, circuit courts consistently acknowledged that incarcerated people have a protected liberty interest in their bodily autonomy as it pertains to making decisions regarding their medical care.[61] In 2006, the second circuit extended this due process right not only to the right to refuse medical treatment, but also to the right to informed consent.[62] In acknowledging that there is a substantive due process right to refusing medical treatment, the Second Circuit explained that such right would be eroded if

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[55] *See generally* Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) (describing the interest in being able to deny medical care).

[56] Washington v. Harper, 494 U.S. 210 (1990)

[57] *Id.* at 210.

[58] *Id.*

[59] *Id*.

[60] *Id.* at 221-22.

[61] *See, e.g.*, Pabon v. Wright, 459 F.3d. 241 (2d Cir. 2006).

[62] *Id.* at 249.

individuals were not given the information needed in order to exercise that right, if need be.[63] Specifically, the court wrote "the Fourteenth Amendment . . . protects the individual's liberty interest in making decisions that affect his health and bodily integrity."[64] In 2019, the seventh circuit finally joined the rest of the circuits in acknowledging that there is a constitutionally protected right in the refusal of medical treatment and in informed consent, making this area of law effectively undisputed on the federal level.[65]

These decisions are necessarily rooted in the importance that bodily integrity and autonomy have held in the American legal tradition.[66] However, these decisions and analyses are not limited to federal courts. State courts have also followed suit and ruled that an individual's right to their bodily autonomy regardless of their incarceration involves their ability to refuse medical treatment. In California, the state supreme court relied on the *Turner* test to hold that incarcerated individuals' right to freedom of choice regarding medical treatment is clear and deeply-rooted.[67] However, the California state supreme court qualified that the freedom of incarcerated individuals to choose or refuse medical treatment is not an absolute right, but instead must consider penological objectives.[68] In doing so, the court found that, "health care decisions intrinsically concern one's subjective sense of well-being," and that "personal autonomy and the right of self-determination . . . reflects our society's long-standing tradition of recognizing the unique worth of the individual."[69] The court importantly noted that while incarceration "inevitably restricts an individual's freedom," "prison administrative authority is not unqualified."[70]

The Louisiana Supreme Court, in 1992, further adopted much of the same language seen in federal and other state court decisions restricting forcible medical treatment and extended the legal protections further. In *State v. Perry*, the court held that individuals who might otherwise be deemed "incompetent" for the purposes of execution have a right to be

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[63] *Id.* at 249-50.

[64] *Id.* at 253.

[65] *See* Knight v. Grossman, 942 F.3d 336, 342 (7th Cir. 2019) ("We now join all other circuits to have considered the question in holding that prisoners have a Fourteenth Amendment right to informed consent.").

[66] *See, e.g.*, Thor v. Superior Court, 855 P.2d 375, 380 (Cal. 1993) ("This preeminent deference derives principally from the 'long-standing importance in our Anglo-American legal tradition of personal autonomy and the right of self-determination.'").

[67] *Id.* (citing Penal Code § 2600, which essentially codifies the *Turner* test).

[68] *See, e.g.*, *id.* at 383 ("By the same token, we will not sanction or condone manipulation of a prisoner's medical circumstances to the prejudice of either institutional safety and security or the constitutional and regulatory obligations of prison authorities.").

[69] *Id.* at 381-82.

[70] *Id.* at 387.

free from forcible medication. The court found this to be a protected liberty interest even if such medication would make an individual legally competent for the purposes of execution. So that Perry was "able to function at a minimum level of rationality," Louisiana sought to medicate him to escape the prohibition on the execution of people with intellectual disabilities and severe mental health issues.[71] The court held that medication solely for the purpose of rendering an individual competent for the purposes of execution is unlawful based on an individual's right to privacy and personhood.[72]

Courts across this nation have found that people who are in prison retain the most fundamental aspects of their personhood, as demonstrated in the above section.[73] Yet, the right to refuse medication and medical treatment, as well as the right to informed consent in the medical context, should not be the only fundamental rights with respect to bodily autonomy that incarcerated individuals retain. The following Part will first explore the nature of sexual rights to make the case that the ability to have sex with a consenting partner free of governmental intrusion is as fundamental a right as the right to refuse medication.

III. SEX AND INTIMACY: NATURAL AND HUMAN

A. Sexual Rights: Foundational and Fundamental

Sexual intimacy and desire are inherently human. While positive scholarship about sex and sexuality is new and emerging[74] the reality is that sex itself has been an important facet of human life since humans existed.[75] Sex for the sake of pleasure and connection alone is just as important as sex for the purpose of procreation. The International Planned Parenthood Federation ("IPPF") specifically stated that "[s]exuality is . . . an essential and fundamental part of our humanity" and that the right to sexuality and sexual pleasure must be protected.[76]

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[71] State v. Perry, 610 So.2d 746, 746, 749-50 (La. 1992).

[72] *Id.* at 761.

[73] *See supra* Section II.C.

[74] *See, e.g.*, Eli Coleman et al., *Advancing Sexual Pleasure as a Fundamental Human Right and Essential for Sexual Health, Overall Health and Well-Being: An Introduction to the Special Issue on Sexual Pleasure*, 33 INT'L J. SEXUAL HEALTH 473, 473 (2022). In contrast, research on the risks associated with sex like sexually transmitted infections ("STIs")is much more established.

[75] See Zaria Gorvett, *Here's What We Know Sex With Neanderthals Was Like*, BBC (Jan. 13, 2021), https://perma.cc/J262-4ZRV.

[76] Jacqueline Sharpe, *Foreword* to INT'L PLANNED PARENTHOOD FOUND., SEXUAL RIGHTS: AN IPPF DECLARATION at i (2008).

Sexual rights are fundamental rights because sex, sexual pleasure, and intimacy are instrumental for individuals' physical and mental well-being. This is more widely understood in the international human rights context, where organizations like the IPPF work to advance the rights of gender-marginalized people with regards to sexual choice, sexual pleasure, and sexual freedom. Those organizations advocate that people have both the right to be free from coercion and abuse, as well as the right to pursue pleasure for pleasure's sake.[77] In the IPPF's declaration on sexual rights, a right to sexual autonomy, specifically the right that "[a]ll persons are entitled to sexual autonomy and shall be able to make decisions about their sexuality, sexual behavior and intimacy without arbitrary interference," is specifically articulated as part of a broader right to privacy.[78]

Though the public discussion of sex has historically been taboo, it is undeniable that sex is inherently a part of humanity. It evaded mainstream, public discussion because it was considered so deeply private.[79] However, governments have controlled and used sex and sexuality to oppress people.[80] Governments have done this by both depriving individuals of their right to be sexual and express their sexuality in ways that are meaningful to them,[81] as well as by creating conditions where individuals are either coerced, sexually harassed, or raped.[82]

However, this history of rape, coercion, and deprivation of sexual pleasure as an oppressive tool, as well as other risks, should not detract from the importance of healthy and positive sexuality. In fact, it should be understood as the reason that the right to experience sexual pleasure

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[77] *Id.* at 14 ("All persons are entitled to the conditions that enable the pursuit of pleasurable sexuality.").

[78] *Id.* at 18.

[79] *See ,e.g.*, Jessie Ripes, *Why is Talking Sex So Taboo?*, MODERN INTIMACY (Feb. 21, 2022), https://perma.cc/J4LC-BCZ8 (opining that "society has socialized individuals to believe that sex . . . should be kept secret").

[80] Woet L. Gianotten et al., *The Health Benefits of Sexual Expression*, 33 INT'L J. SEXUAL HEALTH 478, 478 (2021) ("The power to control and regulate human sexuality has been wielded by governments, religious leaders, parents, and broader community members.").

[81] Sarah Pugh, *Politics, Power, and Sexual and Reproductive Health and Rights: Impacts and Opportunities*, 27 SEXUAL & REPRODUCTIVE HEALTH MATTERS 1, (2019) ("pronounced shifts towards far right-wing and conservative politics are threatening hard-won progress in [sexual and reproductive health and rights].").

[82] Elizabeth Hira, *The Government Has a Long History of Controlling Women—One That Never Ended*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021) (noting that "[r]ape was initially deemed a property crime against the victim's father" as support for the idea that "[t]hroughout modern history, government control over women's bodies—and by extension, women—has been a prevalent theme, built into our very systems").

free from governmental interference is so important.[83] Beyond just sexual intercourse, physical touch, both intimate and romantic, is instrumental in neurological and mental development. "The idea that our mind is rooted in the body is not new," as Eli Coleman, Esther Corona-Vargas, and Jessie V. Ford declare in their study.[84] Physical touch has positive, long-term effects, and the necessary other side of this coin is that a consistent lack of physical touch is detrimental to an individual's physical and mental well-being. The onset of the COVID-19 pandemic saw increased research and scholarship about a phenomenon that has been coined "touch starvation"[85] or "touch hunger,"[86] but the phenomenon itself is not new.[87] Incarcerated individuals, elderly individual's whose loved ones have all passed, and people who are otherwise isolated have all experienced long-term and systemic touch starvation. Humans are social animals, and so it should come as no surprise that a lack of touch can weaken one's immune system, negatively impact mood, decrease the quality of sleep, and influence overall physiological well-being in adults.[88]

Touch starvation has long been accepted as a necessary evil of imprisonment. Prison officials and the general public have seen the call to expand overnight or "conjugal" visitation as too "friendly" and lenient on individuals who have committed crimes or caused harm.[89] But human

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[83] *See* Coleman et al., *supra* note 74, at 473 ("In addition, with the increased recognition of sexual abuse and harassment, the pleasurable aspects of consensual activity should not get lost in necessary prevention efforts.").

[84] Elena Capelli et al., *An Update on Social Touch: How Does Humans' Social Nature Emerge at the Periphery of the Body*, 43 SPECIAL ISSUE: NEW INSIGHTS FROM OTHER PSYCHOL. DISCIPLINES FOR RORSCHACH USERS 168 (2022).

[85] *See, e.g.*, Maham Hasan, *What All That Touch Deprivation Is Doing to Us*, N.Y. TIMES (Oct. 6, 2020), https://perma.cc/2KBN-QJ5C (chronicling various experts' outlooks on stress-inducing or risky touch in the face of infectious disease along with individuals' experiences being "touch starved").

[86] Joanne Durkin & Debra Jackson, *Touch in the Times of COVID-19: Touch Hunger Hurts*, 30 J. CLINICAL NURSING e4, e4 (Sept. 2, 2020) (noting "[w]hen touch is limited or eliminated, people can develop what is termed touch starvation" and that "[t]ouch hunger impacts all facets of our health and has been associated with increases in stress, anxiety and depression").

[87] *See, e.g.*, Cindy Chang, *No Touching. No Human Contact. The Hidden Toll on Jail Inmates Who Spend Months or Years Alone in a 7x9 Foot Cell*, L.A. TIMES (Sept. 25, 2016), https://perma.cc/3UBP-PRLZ (describing the tolls of lack of access to touch for people in solitary confinement).

[88] *See* Capelli et al., *supra* note 84, at 176 ("[T]he absence of social touch for prolonged periods can have a relevant and long-lasting psychosocial and neurobiological impact on human behavior and well-being in adults."); *see, e.g.*, Sirin Kale, *The Life of the Skin-Hungry: Can You Go Crazy from a Lack of Touch*, VICE (Nov. 8, 2016), https://perma.cc/8PEF-8BHB.

[89] *See* Molly Hagan, *Controversy and Conjugal Visits*, AM. PRISON NEWSPAPERS 1880-2020, JSTOR DAILY (Feb. 13, 2023), https://perma.cc/B75Y-3JGN (linking "tough-on-crime" policies with a shift in public opinion about people in prison, resulting in "more punitive

beings, regardless of the harm they have caused others, may forfeit some rights but necessarily retain others, especially the most fundamental and human of them all. If an incarcerated individual has the right to refuse medication and medical treatment, they also retain arguably one of the most important rights to their own bodily integrity.

Without more specific guidelines about who may or may not participate in private, overnight visits with a consenting partner, prison officials begin to mimic the same governmental oppression and overreach that prevents marginalized communities across the globe from experiencing and participating in meaningful, pleasurable sex, as a tool of oppression. Marital status alone should not be determinative in assessing who may or may not participate in such visits.

Many other countries approach conjugal visitation according to the IPPF's rights-based framework. Incarcerated individuals do not lose their ability to make private connections with their loved ones simply by virtue of being convicted of a crime.[90] However, as the next section will explain in more detail, it is generally a public, social good for prison officials to allow incarcerated individuals to participate in such visits.

B. The Ability to Have Sex as a Net Positive: Increased Quality of Life and Well-Being

In romantic and other intimate partnerships, "social touch . . . plays a pivotal role in promoting personal well-being and mental health, with long term effects."[91] Sex can result in pain reduction, improved mood, and improvement in sleep—all of which have significant impacts on other markers of physical health.[92] Additionally, sexual arousal is correlated with lower levels of cortisol, benefiting both physical and psychological health.[93] While positive sexual experience can increase one's quality of life, negative or reduced sexual experience can have an undeniably negative impact on quality of life.[94] In other words, the relationship between sex and improved mental well-being and quality of life is "bi-

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policies in prisons themselves. In 1996, the state of California drastically reduced its conjugal visitation program. At San Quentin, this meant conjugal visits would no longer be available for people serving life sentences.").

[90] *See* Alexandra Vladu et al., *Benefits and Risks of Conjugal Visits in Prison: A Systematic Literature Review*, 31 CRIM. BEHAV. & MENTAL HEALTH 343, 359 (2020) ("[C]onjugal visits in prison are currently supported in most European countries.").

[91] *See* Capelli et al., *supra* note 84, at 175.

[92] *See* Gianotten et al., *supra* note 80, at 481, 484.

[93] *See* Gianotten et al., *supra* note 80, at 482-84.

[94] *See generally* Niki Oveisi, *Relationship of Sexual Quality of Life and Mental Well-Being in Undergraduate Women in a Canadian University*, 31 CANADIAN J. HUM. SEXUALITY 422 (2022).

directional"[95]—increased positive sexual experiences can improve these things, and decreased sexual behavior can negatively impact them. Given that incarcerated individuals retain fundamental rights the net positives of sex should apply to them, as well.

In the prison context, the ability to have private, intimate touch with a romantic or other intimate partner can reduce overall levels of prison violence while also supporting the continued connection of families and loved ones.[96]

C. Sex: Is It Deeply Rooted in This Nation's History?

As mentioned above, public discussion and writing about sex was rare because of its private nature, but that did not stop the Supreme Court from emphasizing that the government should not interfere in people's private sex lives. In 2003, the Court in *Lawrence v. Texas* wrote that sex is the "most private human conduct," and held that a law criminalizing two men for having sex was a violation of substantive due process.[97] The Court specifically wrote that "the Nation's laws and traditions in the past half century are the most relevant," in that "[t]hey show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[98] The recent holding in *Dobbs v. Jackson Women's Health Organization* aside,[99] this Nation's history clearly demonstrates that the right of an individual to make decisions about their private, sexual life is a protected, fundamental right.[100]

Whether or not private individuals had the right to engage in sex with other consenting adults rarely found its way into legal jurisprudence, because there was a puritanical social more that people, especially women, are to be chaste and pure.[101] Despite the public messaging, sex for pleasure and not just procreation was an important facet of individual life not only in this country but in the world and across time.[102] Even today, people seem to have an obsession with the sex lives of the founding fathers

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[95] *Id.* at 423.

[96] *See* Vladu et al., *supra* note 90; *see also* Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. POL. REV. 149, 151 (2013); Alex Mierjeski, *Reasons Prisoners Should Be Having More Sex*, ATTN: (Sept. 22, 2015), https://perma.cc/TSJ3-D33B.

[97] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[98] *Id.* at 559.

[99] Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228 (2022).

[100] *See, e.g.*, *id.*; *see* Griswold v. Connecticut, 381 U.S. 479 (1964).

[101] Kristin Fasullo, *Beyond* Lawrence v. Texas*: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 3003 (2007).

[102] *See* Gorvett, *supra* note 75.

and other historical figures because this somehow normalizes them as relatable.[103]

Purity culture is not evidence of the prominence that sex played and continues to play in American society.[104] There is no question that sex played a major role in people's private lives, despite public messaging.[105] In the more expansive definition of substantive due process, the standard is not that the right asserted was explicitly addressed in the law, nor did it have to be an open and notorious facet of American history, only that it is "deeply rooted" in this Nation's history, private or not. In fact, it is in its privacy, in its intimate nature, and in the social and biological necessity, that there can be no question that healthy and positive sex is as "deeply rooted" as "deeply rooted" gets.

IV. PUTTING *TURNER* TO THE TEST: IS THE RIGHT TO HAVE SEX IN PRISON FUNDAMENTAL?

It is abundantly clear that sexual intimacy is deeply rooted in this nation's history. However, even if it were not as abundantly clear as it is, the Supreme Court has often asserted outright that certain rights are "deeply rooted" when they in fact, are not.[106] One explanation could be that certain behaviors, needs, wants, and rights seem so clearly and fundamentally integral to our lives that no one felt the need to actually assert it. It is almost like the right is so obvious that no one thought to write it down.

More realistically, the Court often substituted its own judgment based on rights that are otherwise "implicit in the concept of ordered

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[103] Eric Herschthal, *What the Sex Lives of the Founding Fathers Reveal About Us*, DAILY BEAST (July 12, 2017), https://perma.cc/FK7L-QVTK.

[104] *See generally* Angie Hong, *The Flaw at the Center of Purity Culture*, ATLANTIC (Mar. 28, 2021), https://perma.cc/9ARK-UZRU (describing the author's personal experience of purity culture in a subculture of evangelical Christianity); Clyde Haberman, *How an Abstinence Pledge in the '90s Shamed a Generation of Evangelicals*, N.Y. TIMES (Apr. 12, 2021), https://perma.cc/6BA6-WPFL (describing the present effects of "purity pledges" that teenagers took in the '90s in the evangelical church, absolving to abstain from sex).

[105] *See generally* Katherine Harvey, *The Salacious Middle Ages*, AEON (Jan. 23, 2018), https://perma.cc/EM7F-BPVU (discussing how contrary to the popular belief that sexuality was repressed throughout Christian history, physicians in Medieval, Christian Europe were preoccupied with sex, prescribing not too much but also not too little sex).

[106] *See generally* Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How* Obergefell v. Hodges *Illuminates the Modern Substantive Due Process Debate*, 49 MARSHALL L. REV. 1021, 1022, 1024 (2016) ("Does the Due Process Clause carefully protect only those rights 'deeply rooted in this Nation's history and traditions' or does it also closely safeguard other, uniquely personal conduct—conduct 'implicit in the concept of ordered liberty?' . . . '[T]he Court is informed by, but not necessarily confined to, those rights deeply rooted in this Nation's history and traditions'").

liberty."[107] Given this nation's history, it is not difficult to see how such an approach might have left marginalized people out of the substantive due process equation. It is unclear if any right that protects marginalized people could be deeply rooted in America's history since the nation was founded on marginalization of racially subordinated peoples. [108] To acknowledge this reality without more would then mean that marginalized people would never see the benefit of substantive due process jurisprudence, which cannot be true. So the better way to approach the question of whether a right is "deeply rooted" or not is to ask whether those in power had implicit access to the right in question, regardless of whether it was enumerated or otherwise available to the masses. This democratizes people's access to rights that were otherwise only available to the few.

As mentioned previously, despite the public narrative, sex was undoubtedly an important and integral part of everyday life.[109] Sex for pleasure was important in its own right, not just as a means for procreation, which is based on the historical fact that sex was an important facet of everyday, private life, and the fact that the Supreme Court upheld the fact that sex is "the most private human conduct."[110]

Given the fact that the right to freedom of choice with regards to one's sex life is undoubtedly deeply rooted in this country's history, people in prison should be afforded that right. People who are in prison have an inherent need and fundamental right to have sex with an adult, consenting partner during a private visit, regardless of marital status. The question now is not whether incarcerated people lose all rights by virtue of their incarceration, but how to strike a balance between an asserted right and a prison administrator's interest in maintaining a safe and secure facility.

This is where courts and lawmakers should apply the *Turner* test. They must first ask whether there is a connection between the regulation at issue and a legitimate government interest.[111] Courts and lawmakers should examine whether there is a connection between the right to have sex while incarcerated regardless of marital status, and the sweeping prohibition across the nation. Prison administrators would likely argue that there is a connection for the following reasons: (1) that such a sweeping opportunity would be detrimental to the prison environment, (2) that it

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[107] *See id.* at 1061-1062.

[108] *See, e.g.*, *id.* at 1061.

[109] *See generally supra* Section III.C.

[110] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("The laws involved . . . here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.")

[111] *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

might be taken advantage of by incarcerated people,[112] (3) that it will not reduce sexual assaults, and (4) that it would facilitate a greater introduction of contraband into prisons across the country.[113]

There is simply no evidence to suggest that such visitation would be detrimental to the prison environment. In fact, the research suggests the opposite.[114] Further, prison administrators have many tools at their disposal that they may use to ensure that private visits are beneficial to the prison environment. Similarly, the argument that the incarcerated population will take advantage of private visits is unfounded because prison administrators may place reasonable limitations on such visits. For example, they might be able to institute some or all of the following requirements: only a certain number of visits per year, a certain required number of regular visitation before eligibility, only one partner at a time with a possible buffer period in between relationships, etc.

There is also no evidence that conjugal or overnight visits encourage or increase the rate of sexual assault in prisons. Again, the evidence suggests the opposite, that the rate of sexual assault in prisons is lower in facilities that offer conjugal visitation than facilities that do not.[115] As far as coercion or sexual assaults of participating visitors, prison administrators can implement policies to reduce such risk. In reality, marital status alone is not a category that can signal that a relationship is free from coercion. Research suggests that conjugal visits alone will neither exacerbate nor reduce the likelihood of coercion in intimate or romantic partnerships.

Finally, contraband is an oft-cited reason to curb contact visitation in general, let alone private visitation. Once again, prison administrators can and do employ many procedures to prevent the introduction of contraband into the facilities that they oversee. These procedures include, but are not limited to, strip searches of incarcerated individuals after visitation[116] and

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[112] *See* Jill Gordon & Elizabeth H. McConnell, *Are Conjugal and Familial Visitations Effective Rehabilitative Concepts?*, 79 PRISON J. 119, 125 (1999) (explaining that prison officials often object out of fear that prisons would become "legal brothels").

[113] *See id.* at 127.

[114] *See* Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 WOMEN'S RTS. L. REP. 358 (2009) ("Many studies have concluded that allowing inmates to have overnight or extended visits with their partners benefits rehabilitation and reentry and increases prison safety.").

[115] Hensley et al., *supra* note 20, at 139; Steward J. D'Alessio & Jamie Flexon, *The Effect of Conjugal Visitation on Sexual Violence in Prison*, 38 AM. J. CRIM. JUST. 13, 20 (2013).

[116] *See, e.g.*, Kerri O'Brien, *Family Members Detail Experiences While Visiting Virginia's Prisons: 'It's Very Abrasive*,*'*ABC 8 NEWS, https://perma.cc/3LH5-PBUM (Jan. 30, 2020); Jan Ransom, *Women Describe Invasive Strip Searches on Visits to City Jails*, N.Y. TIMES (Apr. 26, 2018), https://perma.cc/K5P4-PX24.

the monitoring of phone and other communication.[117] It is impossible to entirely eliminate the risk that contraband will enter a prison because incarcerated individuals will always have contact with the outside world, if not via their family and loved ones, then via correctional officers (who are known to introduce contraband to prisons at equal or even higher rates than the loved ones of incarcerated individuals).[118]

For all the foregoing reasons, prohibiting overnight and private visits are not reasonably related to the government's interest in prison safety. The restriction of such visits in the facilities that do offer them to married couples alone is certainly not reasonably related to such interests. Ultimately, private visitation between romantic or intimate partners is limited or outright prohibited in prisons and jails across the country because of the puritanical belief that "bad" people cannot and should not experience pleasure and resources should not be used for that purpose.[119] The motivation is retributive and punitive rather than concerned with safety.[120]

Next, we must examine whether there are other alternative means for incarcerated individuals to avail themselves of this asserted right. The reality is that there is no meaningful alternative. Many incarcerated individuals still find ways to be intimate with their partners and to experience sexual pleasure, but it often occurs in public visitation spaces, in front of other individuals who do not consent to see such behavior, and possibly even in front of children.[121] The lack of available alternatives in addition to the fact that incarcerated individuals will nonetheless find ways to explore sexual intimacy is more reason that they should be permitted to participate in private visits.

Finally, the *Turner* test requires an examination of the toll such a program would take on prison resources. First and foremost, prison administrators can place reasonable limitations on such programming to ensure that it is both available for whoever is eligible and that it does not exhaust prison resources. These can take the form of a limitation on the number of visits that an individual can engage in per year, restrictions on visitations for individuals currently serving a disciplinary sanction, etc.

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[117] *See* Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates' Calls Could Track You, Too*, N.Y. TIMES (May 10, 2018), https://perma.cc/SM85-YAZ4.

[118] *See, e.g.*, Walter Pavlo, *Corrections Officers Often Key to Contraband Introduced into Prison*, FORBES (Sept. 30, 2021), https://perma.cc/F2K7-629S.

[119] *See* David Reutter, *Mississippi First to Begin Conjugal Visits, Latest to End Them*, PRISON LEGAL NEWS (Jan. 11, 2016), https://perma.cc/8RXE-LR8F (quoting Mississippi Department of Corrections' Commissioner who said, "You are in prison[] for a reason. You are in there to pay your debt, and conjugal visits should not be part of the deal.").

[120] *See id.*

[121] *See, e.g.*, Natasha Mari Wangen Krahn et al., *Conjugal Visits in the Context of the Incarceration of Women and Girls in the State of Bahia, Brazil: Permission, Prohibitions and (In)Visibilities*, 10 ONATI SOCIO-LEGAL SERIES 415, 426 (2020).

The prohibition on sex in prisons across the country does not survive the *Turner* test, despite the fact that many courts defer too much to prison authorities.[122] It is this Article's position that the analyses in those cases do not appropriately account for the test outlined in *Turner v. Safley* and err on the side of being far too deferential to prison administrators.[123] Additionally, they are inconsistent with the Supreme Court's holding in *Skinner v. Oklahoma* that unambiguously holds that incarcerated individuals have a fundamental right to procreation.[124] While the concern here is not a right to procreation, but rather a right to sexual intimacy and privacy, they all stem from the same idea: that there is a specific, and articulable privacy interest in issues involving sex, marriage, and family and this includes the right to private visitation.[125]

Nonetheless, there might still be an interest to provide private visitation nationwide, regardless of whether courts and lawmakers agree about the above. Providing overnight visitation regardless of marital status is otherwise a net positive for the prison environment, regardless of whether nonmarital visits meet the above test. It is in prison administrators' best interest to expand and implement such programs. Overall, conjugal and overnight visits offer incentives for incarcerated individuals to maintain clean disciplinary histories,[126] they maintain ties to loved ones that can facilitate success post-release,[127] they reduce overall rates of violence,[128] and they improve well-being overall.

V. CONCLUSION

At the end of the day, people in prison are still human and retain their humanity regardless of their incarceration. The United States incarcerates approximately 2 million people on any given day and has the highest incarceration rate in the world.[129] People will often advocate that people in prison are entitled to rights like free phone calls, increased access to

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[122] *See, e.g.*, Gerber v. Hickman, 291 F. 3d 617 (9th Cir. 2002) (holding that procreation is fundamentally inconsistent with incarceration and that an incarcerated person has no fundamental right to procreate); *see also* Hernandez v. Coughlin, 18 F. 3d 133 (2d. Cir. 1994).

[123] Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1515 (2005) ("[D]espite the gains of the brief period of prison reform, the Supreme Court transformed the informal policies of the hands-off period into explicit exhortations to the federal courts to defer to prison administrators.").

[124] Skinner v. State of Okla. ex rel. Williamson, 316 U.S. 535 (1942).

[125] *See, e.g.*, Carey v. Population Services, Int'l., 431 U.S. 678 (2010); Lawrence v. Texas, 539 U.S. 558 (2003); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[126] Jill Gordon & Elizabeth H. McConnell, *Are Conjugal and Familial Visitations Effective Rehabilitative Concepts?*, 79 PRISON J. 119, 121 (1999).

[127] *Id.*

[128] *See* Hensley et al., *supra* note 20, at 139; Vladu et al., *supra* note 90, at 358.

[129] PRISON POLICY INITIATIVE, *supra* note 2.

packages and mail from home, increased access to programming, etc. However, even the staunchest advocates will often forget what is at the core of incarceration: stripping people that society has deemed "bad" for what is often one mistake in a history of struggle of their humanity.

Whether or not it is socially taboo, people who are incarcerated still have important and undeniable needs, and the failure to meet those needs has serious consequences for both their own well-being as well as their ability to re-adjust upon release. Sexual desire and a need for physical intimacy does not just disappear upon incarceration. As a result, prison administrators everywhere should seriously consider implementing and expanding conjugal visitation programs to allow incarcerated individuals to participate in them regardless of marital status.