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# Inmates, Incarcerated and In Love: Predicting How the United States Would Respond to Marriages between Inmates by Evaluating Case Law and The United Kingdom's Decision

Madison H. Kyger

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Inmates, Incarcerated and In Love: Predicting How the  
United States Would Respond to Marriages between  
Inmates by Evaluating Case Law and The United  
Kingdom’s Decision

*By: Madison H. Kyger<sup>1</sup>*

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### **Introduction**

The United States should allow same sex inmates that are incarcerated together to marry one another, in order to coincide with the principles of fundamental rights. The Supreme Court of the United States has established in *Turner v. Safley*, that prisoners have the right to marry, and in *Obergefell v. Hodges*,<sup>2</sup> that same-sex marriage is legal. These two variables collectively demonstrate that same-sex marriage between two inmates should and would be granted, unless the potential negative effects outweigh the fundamental right to marry. The possible adverse consequences from the marriage between two inmates are not sufficient reasons to interfere with the right to marriage. Those who would advocate for the restriction of gay inmate marriage may assert that this regulation is necessary for security measures and safety concerns. However, there is a lack of empirical evidence asserting inmate marriage would create such a disturbance so a logical connection is unable to be established. The United States can rely on the United Kingdom’s decision on this issue and their rationale in support for permitting marriage between inmates.

In March 2015, The United Kingdom permitted two male inmates, who were incarcerated in the same prison, to marry one another.

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2. See *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987); see also *Oberfell v. Hodges*, 135 S. Ct. 2584 (2015).

er.<sup>3</sup> The combination of two independent pieces of Britain legislation conferred the right for them to marry each other: The Marriage Act 1983,<sup>4</sup> which granted all inmates the fundamental right to marry<sup>5</sup> and The Marriage Act 2013,<sup>6</sup> which legalized same-sex marriage. Therefore, the two required elements are individually satisfied by the United Kingdom: the right for prisoners to marry and the right to same sex marriage, subsequently allowing gay inmates to marry one another. The United States has already established these two factors, but could consider the United Kingdom's policies for support in their reasoning. Due to the historical similar approaches in addressing fundamental rights issues, the United Kingdom's rationale could be influential on the United States when making a decision.

The United States and the United Kingdom have demonstrated many similarities in their beliefs throughout history,<sup>7</sup> placing significant emphasis on the values of civil rights and personal autonomy.<sup>8</sup> Through the force of judicial intervention, decisions are made in regards to when regulations are permitted to impede on fundamental rights.<sup>9</sup> The decision-making methods employed by the United States and the United Kingdom are alike, in which a balancing test is typically implemented to decide if a right was reasonably infringed upon.<sup>10</sup> Both decisional frameworks consist of establishing a connec-

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3. Helen Pidd, *Gay Couple Serving Life Sentences to Marry in Prison*, THE GUARDIAN, Feb. 20, 2015, <http://www.theguardian.com/society/2015/feb/20/gay-couple-serving-life-sentences-marry-prison-marriage-full-sutton>.
  4. See MARRIAGE ACT 1983, Chapter 32 (United Kingdom 1983).
  5. See *id.*; POPULATION EUROPE RESOURCE FINDER AND ARCHIVE, 1983- MARRIAGE ACT 1983 <http://www.perfar.eu/policies/marriage-act-1983> ("The main purpose of the act is to enable marriages of house-bound or detained persons to be solemnized at the place where they reside.").
  6. See MARRIAGE ACT 2013, Chapter 32 (United Kingdom 2013).
  7. Jim DeMint, *Britain and the U.S.: Two Peoples United by an Attachment to Self-Determination*, THE HERITAGE FOUNDATION, Jul. 2, 2013 <http://www.heritage.org/research/reports/2013/07/britain-and-the-us-two-peoples-united-by-an-attachment-to-self-determination> ("The United Kingdom and the United States are a force for good in the world. Both countries are liberal democracies that believe in the rule of law and economic freedom [. . .]the U.S. and the U.K. are facing similar challenges. Both are stronger when they face these challenges together.").
  8. *Id.* ("The U.S. historically has had no closer friend than Great Britain. Both nations are liberal democracies that continue to share a fundamental interest in economic freedom and a belief in personal liberty.").
  9. See *infra* notes 16-24, 80-85 and accompanying text.
  10. See *infra* notes 24-33, 80-91 and accompanying text.

tion between a regulation and the objective.<sup>11</sup> Since the United States and the United Kingdom follow a similar analysis, it is likely that the United States would come to the same conclusion as the United Kingdom.

Although there are fundamental similarities, it is important to note that United States and the United Kingdom differentiate on their underlying policy concerns for prison incarceration.<sup>12</sup> The United States relies on a theory of retributive correction and places sufficient emphasis on punishment to deter reoffending,<sup>13</sup> whereas the United Kingdom primarily intends to rehabilitate and reintegrate the offenders into a normal social life.<sup>14</sup> These implicit differences are essential to the analysis because the United States could learn something from the United Kingdom.

This comment will analyze the reasons why United States' prison facilities should afford inmates the right to marry other inmates. The basis of the presented arguments is if an inmate is restricted in their choice of whom they can marry, then there is an interference with a fundamental right. However, it will be discussed whether certain restrictions may be implemented by prisons to regulate the marriage and interactions between the spouses, without interfering with this fundamental right. This comment will draw comparisons and distinctions on the underlying policy implications of the United Kingdom and the United States prison systems. At the conclusion of this comment, it will be established what the United States could learn from United Kingdom to ensure that inmates are afforded the right to marry whom they want, even if it is another inmate.

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11. See *infra* notes 20-24, 86-91 and accompanying text.

12. *Lessons From European Prisons*, THE NEW YORK TIMES (Nov. 7, 2013), <http://www.nytimes.com/2013/11/08/opinion/lessons-from-european-prisons.html> (“The American and European systems differ in almost every imaginable way, beginning with their underlying rationale for incarceration”).

13. Austin McCormick, *The Prison's Role in Crime Prevention*, 41 J. CRIM. L. & CRIMINOLOGY 36, at 38 (1950-1951) (“[. . .] the public means that it is expected to deter potential offenders through fear of punishment. But, as a matter of fact, the primary function of the prison, as of probation and parole, is to reduce crime by preventing its repetition.”).

14. *Lessons, supra* note 12 (“Public Safety is ensured by separating offenders from society, but by successfully reintegrating them[. . .] Upon release, European inmates do not face the punitive consequences that American ex-prisoners do from voting bans to restrictions on employment, housing and public assistance, all of which increase the likelihood of re-offending.”).

## **Historical Background on The Protection of Fundamental Rights**

### **United Kingdom Allows Same-Sex Marriage Between Inmates**

#### The Principle of Proportionality

Despite the possibility of Britain leaving the European Union, the nation currently still abides to the European Convention of Human Rights and the European Court of Human Rights.<sup>15</sup> The European Convention of Human Rights (“The Convention”) explains the rights and protections afforded to European citizens.<sup>16</sup> The European Court of Human Rights (“The Court”) has jurisdiction to hear claims by the citizens of the United Kingdom (and other European countries) alleging that governmental authorities have abridged the rights afforded by the Convention.<sup>17</sup> In order to decide how to respond to these allegations, the Court has employed the principle of proportionately.<sup>18</sup> This principle examines if regulations that infringe on fundamental rights are appropriate.<sup>19</sup> The proportionality framework relies on four considerations in cases dealing with fundamental rights restrictions.<sup>20</sup> First, there must be a measure that is important, otherwise known as a legitimate objective.<sup>21</sup> Next, there must be a rational connection between the means and the objective.<sup>22</sup> The third consideration is minimal impairment; the means only extend to affect what

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15. See Angus Evans and Iain McIver, *European Convention on Human Rights in the United Kingdom*, SPICE INFORMATION CENTRE, Sep. 25, 2015, at 3.

16. *Id.*

17. *Id.*

18. ALAN D. P. BRADY, *PROPORTIONALITY AND DEFERENCE UNDER THE UK HUMAN RIGHTS ACT 1* (Cambridge University Press 2012); Mark Elliott, *Proportionality and Contextualism in Common View: The Supreme Court’s Judgment in Pham*, PUBLIC LAW FOR EVERYONE, April 2015 <https://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/> (“One mechanism that has been of great assistance to the courts in performing their HRA duties is the principle of proportionality.”).

19. *Id.*

20. *Id.* at 7.

21. *Id.*

22. *Id.*

is necessary.<sup>23</sup> Lastly, the rights of the individual and the interests of the community are balanced.<sup>24</sup>

Generally, prisoners are entitled to the same fundamental rights as the public, unless the rights are inconsistent with incarceration.<sup>25</sup> If there is a link between the “justification for interfering with a fundamental right and is proportionate to its perceived importance” of a restriction on inmates rights, then the restriction is permitted.<sup>26</sup> The Court has applied the proportionality standard in prisoner right cases by evaluating the connection between the crime and the punishment to be rendered.<sup>27</sup> This theory was exemplified in the case of *Hirst v. United Kingdom*,<sup>28</sup> where the Court held that a voting disenfranchisement on all prisoners violated The Convention.<sup>29</sup> Hirst was convicted of manslaughter in 1980, which was during a time when voting disenfranchisement was applied to all prisoners, regardless of the crime they committed.<sup>30</sup> Twenty-five years later, Hirst challenged this ban arguing that it was a violation of his rights and inconsistent with the Convention.<sup>31</sup> The Court agreed that the blanket ban could not be upheld because it was excessive and over inclusive, but, under the proportionately principle of punishment, some of the most heinous criminals could be deprived of the right to vote.<sup>32</sup> These serious offenders can be stripped of their right to vote because it is proportionate, or in other words “in so far as it takes into account the nature and

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23. *Id.*

24. *Id.*

25. CHIVERS SOLICITORS, <http://www.chiverssolicitors.co.uk/prison-law/prisoner-rights>. (last visited Jan. 3, 2016) (Prisoners retain certain basic rights, which survive despite imprisonment. Given the brief nature of the Prison Act 1952 and the Prison Rules prisoners have very few ‘absolute’ rights. [. . .]Prisoners lose only those civil rights that are taken away either expressly by an Act of Parliament or by necessary implication).

26. European Court of Human Rights Press Release, Prisoners Right to Vote (July 2015), [http://www.echr.coe.int/Documents/FS\\_Prisoners\\_vote\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf) (“Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention [. . .] Any restrictions on these rights must be justified.”).

27. *Id.* (“[T]he principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.”).

28. *Hirst v. United Kingdom*, (No. 2), 2005 EUR. CT. H.R. 681.

29. *See id.*

30. *Id.*

31. *Id.*

32. *Id.*

gravity of the criminal offence committed and the duration of the penalty.”<sup>33</sup>

### **Legislation and Case Law Amounts to Same-Sex Inmate Marriage**

In 1979, the Court held that prisoners have the right to marry in *Hamer v. United Kingdom*<sup>34</sup> in order to accord to the Convention.<sup>35</sup> The Conventions explicitly mention in Article 12 that the right to marriage is an absolute right.<sup>36</sup> Subsequently, the United Kingdom initiated The Marriage Act 1983, which allowed prisoners to marry outside civilians with hopes that family relationships would aid in rehabilitation.<sup>37</sup> The legislation placed emphasis on the notion that incarcerated individuals should be afforded the same rights as those who are free.<sup>38</sup>

With gay marriage being legally conferred under The Marriage Act of 2014, British prison officials considered how to adapt to these legislative changes.<sup>39</sup> When two United Kingdom inmates, serving life-sentences, decided they wanted to marry each other in the United Kingdom, the prison had to determine whether it was permissible.<sup>40</sup> Those advocates in support of allowing the marriage claimed that inmates are incarcerated in order to protect the public from criminals, but inmates should still be entitled to the same civil rights as those who are free.<sup>41</sup> Additionally, previous rulings allowing a prisoner to marry, and recent enactments conferring same-sex marriage, support-

33. Alan Travis, *Voting Ban on Prisoners Convicted of Serious Crimes is Lawful, EU Court Rules* THE GUARDIAN, Oct. 6, 2015, <https://www.theguardian.com/politics/2015/oct/06/uk-ban-on-prisoner-voting-is-lawful-eus-highest-court-rules>.

34. *Hamer v. United Kingdom*, [1979] 4 EUR. CT. H.R. 139.

35. *See id.*

36. Evans and McIver, *supra* note 19.

37. Pidd, *supra* note 3 (“When passed, the 1983 law was intended to allow heterosexual prisoners to marry their partners from the outside world. The logic was that prisoners should largely enjoy the same human rights as their free counterparts, and that building and retaining family ties can help with the rehabilitation process.”).

38. CHIVERS SOLICITORS, *supra* note 25.

39. Pidd, *supra* note 3.

40. *Id.*

41. Pidd, *supra* note 3 (“As a general principle, [. . .]prisoners should be allowed the same civil rights as people outside. They are in prison for public safety reasons, not to stop them asserting their civil rights.”).

ed this notion. On March 27, 2015, the two inmates were the first same-sex couple to marry in a Britain prison facility.<sup>42</sup> However, they are not allowed to share a prison cell because this would be giving them a right that heterosexual couples do not have.<sup>43</sup>

Relying on prior enacted legislation, The United Kingdom found legal support that two inmates could marry each other. Additionally, the United Kingdom's emphasis on rehabilitation and the cultural importance on family ties are potential considerations when coming to this decision.

### **The Emphasis on Rehabilitation and Family Relationships**

The United Kingdom prison system has acknowledged that prison does not completely deter one from reoffending after release.<sup>44</sup> In response to this realization, the United Kingdom made significant reforms to their prison system in 2010, by adopting a rehabilitation approach and implementing programs to achieve goals of individual recovery and personal improvement for the inmates.<sup>45</sup> The appropriate resources are provided to each inmate based on their personal needs.<sup>46</sup> Such programs include drug and alcohol recovery,<sup>47</sup> restorative justice by making amends between victim and offender,<sup>48</sup> vocational training,<sup>49</sup> as well as other means and tactics.<sup>50</sup> These individualized

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42. *Id.*

43. *Id.*

44. MINISTRY OF JUSTICE, 2010 TO 2015 GOVERNMENT POLICY: REOFFENDING AND REHABILITATION, (2015). <https://www.gov.uk/government/publications/2010-to-2015-government-policy-reoffending-and-rehabilitation/2010-to-2015-government-policy-reoffending-and-rehabilitation#background>.

45. *Id.* (“We need to reduce reoffending to reduce both the number of victims and the costs to the taxpayer. To achieve this, we need a tough but intelligent criminal justice system that punishes people properly when they break the law, but also supports them so they don’t commit crime in the future.”).

46. *Id.* (“[M]anaging the majority of offenders in the community [. . .], which includes identifying any changes in risk [. . .] designing and delivering an innovative new service to rehabilitate offenders [. . .] delivering a range of specific interventions and services for offenders.”).

47. *Id.* (stating that the interventions for drug use are: access to drug treatment and support services, drug testing, individual assessments and talking with police and drug workers).

48. *Id.*

49. *Id.*

50. *Id.*

plans are primarily offered during incarceration, but some programs continue to be provided to the individual after their release.<sup>51</sup>

The emphasis on familial ties in the United Kingdom may facilitate certain offenders to reintegrate into society.<sup>52</sup> The underlying policy of The Marriage Act 1983, which allowed prisoners to marry outside civilians, was that family relationships would facilitate rehabilitation.<sup>53</sup> Additionally, The European Penitentiary Rules,<sup>54</sup> which Britain adheres to, indicates that maintaining family relationships while incarcerated is important and that prison officials are to provide prisoners with the resources to make contact with those they have a relationship with.<sup>55</sup> The policy implications from United Kingdom legislation illustrates the cultural importance of maintaining family relationships. Research also supports this notion. One specific report<sup>56</sup> observed life after incarceration of British offenders to understand what factors aid in rehabilitation.<sup>57</sup> The findings of the report determined that family relationships were essential for rehabilitation because given the the lack of resources upon release, the former inmate was dependent on these individuals for a home, transportation,

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51. *Id.* (“[R]eorgani[z]e our prisons to resettle offenders ‘through the gate’, with continuous support from custody to community.”).
  52. *Families Vital for Prisoner Rehabilitation*, CRIMINAL JUSTICE JOINT INSPECTION, Sep. 16, 2014, <https://www.justiceinspectorates.gov.uk/cjji/media/press-releases/2014/09/families-vital-for-prisoner-rehabilitation/> (“The role families and friends play in the rehabilitation of prisoners on release is crucial and must not be overlooked[.]”).
  53. Pidd, *supra* note 3 (“When passed, the 1983 law was intended to allow heterosexual prisoners to marry their partners from the outside world. The logic was that prisoners should largely enjoy the same human rights as their free counterparts, and that building and retaining family ties can help with the rehabilitation process.”).
  54. *See* EUROPEAN PENITENTIARY RULES (1987).
  55. Monica Aranda, *National Monitoring Bodies of Prison Conditions and The European Standards*, 18, EUROPEAN PRISON OBSERVATORY (Jan. 2015), <http://www.prisonobservatory.org/upload/National%20monitoring%20and%20EU%20standards.pdf> (“The European Penitentiary Rules [e]stablish that ‘Prisoners shall be allowed to communicate [...] with their families[.]’The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible”).
  56. *Id.* (citing CRIMINAL JUSTICE JOINT INSPECTION, *RESETTLEMENT PROVISION FOR ADULT OFFENDERS: ACCOMMODATION, AND EDUCATION, TRAINING AND EMPLOYMENT* (2014)).
  57. *Id.* (“The findings of this report are striking. It absolutely confirms the central importance of an offender’s family and friends to their successful rehabilitation.”).

and other basic living needs.<sup>58</sup> The family relationships also offered stability and resettlement during this transitional period.<sup>59</sup>

## **United States Case Law Supports Same-Sex Inmate Marriage**

### **The Constitutional Right to Marry**

The Supreme Court has interpreted certain restrictions on marriage a violation of Equal Protection and Due Process. In *Loving v. Virginia*,<sup>60</sup> the Supreme Court evaluated the state's ban on interracial marriages as a violation of the Equal Protection Clause because the statute relied on racial classification, as well as a violation of Due Process because there was a deprived fundamental without the fair protection of the law.<sup>61</sup> This case consisted of a married white man and an African American woman who violated a statute that prohibited interracial marriages, and subsequently sentenced to a year in jail.<sup>62</sup> The *Loving* court stated in their rationale that the freedom to marry (or not to marry) should not be infringed on by the state without due process of law<sup>63</sup> because whom they choose to marry is a "basic civil rights of man."<sup>64</sup> The *Loving* is a rationale evaluated the personal importance of marriage and considered it a fundamental to "existence and survival."<sup>65</sup>

The Supreme Court stated in *Zablocki v. Redhail*<sup>66</sup> that state regulations must not unreasonably interfere with one's ability to marry.<sup>67</sup> Relying on this principle, the *Zablocki* Court held that the statute prohibiting individuals to marry if they had failed to pay timely child support payments was not valid because there was not a clear connec-

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58. *Id.* (stating that ex-offenders move back in with family and rely on them to help get work).

59. *Id.*

60. *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967).

61. *See id.*

62. *Id.*

63. *Id.* ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.")

64. *Id.* at 1824 (citing *Skinner v. Oklahoma*, 216 U.S. 535, 63 S. Ct. 1110 (1942) "Marriage is one of "basic civil rights of man," fundamental to our very existence and survival.").

65. *Id.*

66. *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673 (1978).

67. *Id.* at 387.

tion between the states interest and the statutes requirement.<sup>68</sup> The Court held that a statute could not unreasonably interfere with exercising a fundamental right unless there is a sufficient state interest and the regulation is narrowly tailored to achieve this interest.<sup>69</sup> Here, the acclaimed objective was to protect the welfare of children, but the Court said that this was not narrowly tailored because restricting a marriage would not provide any extra money and the State may use other methods extract the payments.<sup>70</sup> This precedent forbids government regulations that burden a fundamental right, unless there is a logical connection.

Relying on the tenets of *Loving* and *Zablocki*, the Supreme Court established in *Obergefell v. Hodges*, that the fundamental right to marry could not be denied to same-sex couples.<sup>71</sup> The Court rationale indicated that the freedom to marry is essential to individual autonomy<sup>72</sup> and that each person is entitled to the unique two-person bond created by marriage.<sup>73</sup> Further, the *Obergefell* Court held that marriage is the foundation for society and family<sup>74</sup> and the “keystone of our social order” because of the nation’s emphasis on the importance of marriage.<sup>75</sup> The Court classified marriage as one of the most intimate decisions an individual can make.<sup>76</sup> The ability to make this decision is essential to personal liberty.<sup>77</sup> Moreover, the ability to procreate has never been a prerequisite for marriage, so marriage should

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68. *Id.* at 390.

69. *Id.*

70. *Id.*

71. *See Obergefell*, 135 S. Ct. 2584 (2015).

72. *Id.* at 2589 (“The fundamental liberties protected by the Fourteenth Amendments Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.”).

73. *Id.* at 2590 (“The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.”).

74. *Id.* (citing *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888) “the Court [. . .] explaining that marriage is “the foundation of the family and society.”).

75. *Id.* (“[.]this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of the Nation’s social order. *See Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this [. . .]”).

76. *Id.*

77. *Id.*

not be restricted solely to those who are capable of biologically reproducing.<sup>78</sup>

These precedents illustrate the emphasis on the importance to marry freely without unreasonable restriction. The fundamental right of marriage has evolved overtime and been interpreted as personal importance and a basic liberty. However, these cases demonstrate what independent and free citizens were entitled to, not incarcerated individuals.

### **The *Turner* Test is Established**

In *Turner v. Safley*<sup>79</sup>, the Supreme Court was faced with determining whether two regulations utilized by a Missouri correctional facility were constitutionally permitted: the restriction of written letters between inmates at different prisons, as well as the restraint on inmate marriages, requiring permission by warden of the prison, which could only be granted upon a compelling reason.<sup>80</sup> Although the Court had interpreted prior decisions dealing with prisoner rights, the *Turner* rationale critiqued precedent cases dealing with prison regulations,<sup>81</sup> because the court failed to: consider the fundamental rights of inmates,<sup>82</sup> decide whether there is an alternative less restrictive regulation by the facility that would still achieve their goals,<sup>83</sup> and establish a sufficient connection between means and ends based on a factual basis.<sup>84</sup>

Due to the dissatisfaction with previous interpretation of prisoner rights, the *Turner* Court constructed a four-prong<sup>85</sup> test to assess the

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78. *Id.*

79. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987).

80. *Id.*

81. *Id.* at 84-84 (describing the past principles applied by courts in inmate regulation cases).

82. *Id.* (arguing the rationale did not consider the inmates constitutional rights but the outside members in *Procunier v. Martinez*, 416 U.S., 396 at 405-406 (1974)).

83. *Id.* at 87 (addressing that the court failed to consider other regulations and relied too heavily on the prison officials discretion in *Pell v. Procunier*, 417 U.S. 817 (1974)).

84. *Id.* (addressing a counter argument to the holding in *Bell v. Wolfish*, 441 U.S. 520 (1979)).

85. *Id.* at 89-91 (“First, there must be a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it[. . .]A second factor relevant in determining the reasonableness of a prison restriction, as *Pell* shows, is whether there are alternative means of exercising the right that remain open to prison inmates. Where “other avenues” remain available for the exercise of the as-

reasonableness of prison regulations.<sup>86</sup> First, the prison officials must demonstrate that there is a rational connection between the regulation and the legitimate governmental interest.<sup>87</sup> Next, the possibility of alternative means to exercise the right is analyzed.<sup>88</sup> The third factor is considering the potential affect that there may be on prison guards and other inmates, in the absence of the regulation.<sup>89</sup> Lastly, the possibility of accessible alternatives that would not restrict the constitutional right is considered to determine the reasonableness of the regulation.<sup>90</sup>

The correspondence regulation was upheld because it surpassed the test.<sup>91</sup> The Supreme Court in *Turner* decided that the restriction of mailing letters to other inmates was reasonably related to security measures because the letters promoted violence, therefore satisfying prong one.<sup>92</sup> In the analysis of prong two, the rationale indicated that the prisoners were not being completely deprived of their ability to express themselves, but were just restricted from writing to a certain group of people.<sup>93</sup> The Court found that the third prong had been satisfied because the correspondence encouraged violence, subsequently creating a “potential ripple effect” which could eventually negatively affect the guards and other inmates.<sup>94</sup> Lastly, the possible alternative of monitoring the correspondence by reading every piece of mail be-

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serted right [. . .]A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. [. . .]Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.”).

86. *See id.*

87. *Id.* at 89 (stating that a rational connection consists of a logical connection between the regulation and a legitimate goal).

88. *Id.* at 90 (stating that reasonableness of a prison restriction requires considering other avenues to exercise the fundamental right that is allegedly being deprived).

89. *Id.* (discussing the consequences of a ripple effect if the accommodation, with no regulation, were to affect other inmates or prison officials).

90. *Id.* (addressing that easy alternatives may be evidence that the regulation is unreasonable).

91. *Id.* at 91.

92. *Id.* at 91-92 (“Prison officials testified that mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts [. . .] [there] had [been] a growing problem with prison gangs.”).

93. *Id.*

94. *Id.*

fore delivering would be too much of a burden for the prison officials.<sup>95</sup>

The Court decided differently on the marriage regulation because it failed under prong one, given that there was no rational connection.<sup>96</sup> The prison officials asserted that the legitimate reason for the regulation restricting opposite-sex inmate marriage was the fear of “love triangles.”<sup>97</sup> The Supreme Court claimed that this was an “exaggerated response”<sup>98</sup> to the prison’s objectives, and subsequently did not find a logical connection between the restriction and objective.<sup>99</sup> Aside from employing the test, the *Turner* Court relied on the tenets from *Zablocki* and *Loving*, asserting that no state governance should impede a fundamental right of an individual without legal justification.<sup>100</sup> This principle applies to inmates as well, as long as the constitutional right is not contrary to being incarcerated or inconsistent with the goals of the prison.<sup>101</sup>

The *Turner* rationale further emphasized the importance of marriage, which provides many emotional benefits to an individual.<sup>102</sup> Given the personal choice of marriage and the intangible aspects marriage offers, the prison is not required to provide extra accommodation for one to enjoy these benefits, nor would it limit security measures.<sup>103</sup> Therefore, there is no justification to deprive an inmate entirely of these interests.<sup>104</sup> This is unlike the correspondence regulation because sending mail does not constitute a fundamental right.

95. *Id.* at 93. (“[T]he monitoring of inmate correspondence, clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals.”).

96. *See id.* at 97-98.

97. *Id.* at 98.

98. *See id.* (“[P]etitioners have pointed to nothing in the record suggesting that the marriage regulation would preventing such entanglements [“love triangles”]).

99. *Id.*

100. *See supra* text and accompanying notes 29-61.

101. *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800 (“[a prisoner] retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”).

102. *See Turner*, 482 U.S. at 96 (“Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. [. . .] [I]nmate marriages, like others, are expressions of emotional support and public commitment.”).

103. *See id.* (“These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.”).

104. *See id.* (“Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.”).

Furthermore, correspondence does not have the personal and unique value that marriage offers.<sup>105</sup> Marriage and written correspondence are two methods of expression but they are inherently different.<sup>106</sup> There are numerous ways to correspond and send mail, but there is only one way to become a married person and enjoy such benefits. Accordingly, the Court held that the restriction on marriage was a violation of fundamental rights under the application of the *Turner* standard.<sup>107</sup>

### **Issue**

Would same sex inmates, who are incarcerated together, be able to marry one another in the United States? This answer will depend on whether the fundamental right to marry outweighs the potential negative effects, such as the fear of increased violence and the need for extra security measures.

In support for the analysis, what can the United States learn from the rationale for the United Kingdom's decision in already allowing it? What comparisons can be made between the United States and the United Kingdom's that would help this prediction?

### **Analysis**

#### **The Precedential Decisions On Gay Marriage and Prisoner Marriage Support Same Sex Marriage Between Inmates**

The holdings in *Turner* and *Obergefell* illustrate that the elements for same-sex marriage between two inmates is satisfied from United States case law. These same two factors were fulfilled by United Kingdom legislation, with support from European Court of Human Rights case law. The United Kingdom Acts were interpreted to allow two inmates to marry one another because one legalized same-sex marriage, and the other allowed prisoners to marry.

In the United States, the Supreme Court stated in *Turner* that is prisoners have the right to marry.<sup>108</sup> This equates to the ruling in

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105. *See id.* at 93-94 (stating that the correspondence regulation does not deprive prisoners of all means of expression, just restricted from corresponding with a limited group of people, whereas marriage has been defined as a fundamental right).

106. *See id.*

107. *Id.* at 99.

108. *See id.*

*Hamer*, which was a decision in the European Court of Human Rights that stated prisoners are allowed to marry free citizens in the United Kingdom.<sup>109</sup> Additionally, the legal effect of Marriage Act 1983 allowed inmates to marry outside civilians in the United Kingdom.<sup>110</sup> Both nations have universally identified the rights of prisoners to be married. In recent years, the United Kingdom and the United States have decided that gay marriage is legal. The Marriage Act 2013 legalized same sex marriage in the United Kingdom.<sup>111</sup> This is comparable to the *Obergefell* holding, allowing same sex marriage in the United States.<sup>112</sup>

Both the United States and the United Kingdom have allowed prisoner marriage and same-sex marriage. The legislation and case law have similar effects on the United Kingdom and United States, given that the authority is binding across the respective nations. The United Kingdom relied on the Marriage Act 1983 and the Marriage Act 2013 when determining if inmates could marry each other, which is equivalent to *Turner* and *Obergefell* in the United States. Given that these Supreme Court rulings are the highest law in the United States, the United States would rely on these cases to formulate their decision. In interpreting these two rationales, it is likely that it would be decided that same sex inmates could marry each other.

### **The Similar Decisional Frameworks in The United Kingdom and The United States**

The *Turner* test and the proportionately test, as employed by the United States and the United Kingdom, respectively, share commonalities. Both of these decisional frameworks subject the infringement on fundamental rights to a means-end balancing test.<sup>113</sup> In assessing the legality of the regulation, it must be determined if there is a compelling objective for the regulation, as well as a rational connection between the proposed restriction and the goal.<sup>114</sup> Since these tests are applied and interpreted in a similar fashion, it is likely that the United

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109. *See supra* notes 34-39 and accompanying text.

110. *See supra* notes 40-43 and accompanying text.

111. *Id.*

112. *See Obergefell*, 135 S. Ct. 2584 (2015).

113. *See supra* notes 19-24 and 89-91 and accompanying text.

114. *Id.*

States would rule the same way Britain did in deciding that two same-sex inmates can marry.

The underlying premise of both tests is to limit the fundamental rights only when necessary.<sup>115</sup> A rational connection has been interpreted by United States case law as a restriction that does not function as an implicit bias to the extent that it impedes on the substance of one's expression.<sup>116</sup> The substance of expression is a genuine feeling, which Americans are entitled to, but the way it is expressed can be limited.<sup>117</sup> The United Kingdom considers if the restriction does more harm than is necessary and if there is a fair balance between the individual's fundamental rights and the interest of the general population.<sup>118</sup> Both nations identify the importance of basic civil liberties, including the freedom of expression, but understand the methods in which they are expressed can be limited in certain situations. Given the emphasis on the same values of basic rights, and the similar considerations between the *Turner* test and the proportionality test, it is conceivable that the United States would come to the same finding as the United Kingdom when deciding if two inmates can marry each other.

### **Applying The Turner Test to A Regulation Against Marriage Between Same Sex Inmates**

#### **Prong One: Empirical Evidence Doesn't Support A Rational Connection**

Under the first step of *Turner*, there must be a rational connection between the regulation and the legitimate goals of the facility.<sup>119</sup> It is likely that objectives to be proposed in support of a restriction would be security concerns. As indicated in *Turner*, the argument that permitting marriage would start "love triangles," which would

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115. *Id.*

116. *See Turner*, 482 U.S. at 96. (citing *Pell v. Procunier*, 417 U.S. at 828 ("We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression.")).

117. *Id.*

118. *See supra* notes 19-24 and accompanying text.

119. *See Turner*, 482 U.S. at 96.

subsequently affect the safety as others was unwarranted.<sup>120</sup> There, the Court stated that inmate rivalries are likely to form regardless of a formal marriage ceremony being conducted.<sup>121</sup> In the absence of evidence suggesting that marriage would increase inmate rivalries, the Supreme Court found the argument of the prison officials to be without merit.<sup>122</sup>

In applying the same notion, evidence would be required to assert that marriage between inmates would create a security issue. In 1983, The Federal Prison System conducted special research<sup>123</sup> in response to intensity of crimes and violence in a Pennsylvania prison facility.<sup>124</sup> The task force, that was responsible for the investigation, concluded that there was a correlation between violence and homosexual relationships between inmates.<sup>125</sup> Furthermore, five out of every eight inmates had sexual motivations towards other inmates, including jealously and pressuring individuals into sexual encounters.<sup>126</sup> A quarter of the major assaults were connected to inmate homosexual relationships.<sup>127</sup> The examination further concluded homosexual violence was initiated by accidental or unintended between consenting lovers, or a direct motive of sexual pressuring.<sup>128</sup>

According to a Department of Justice Report on Sexual Victimization in Prison,<sup>129</sup> some of the characteristics of the prison facilities contribute to an increase or decrease of sexual victimization rate.<sup>130</sup> The prisons that had a low incidence of sexual assault were found to have greater internal management, extensive programming for in-

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120. *Id.* at 2266. (“Common sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles.”).

121. *Id.* (“[I]nmate rivalries are as likely to develop without a formal marriage ceremony as with one.”).

122. *See id.*

123. *See* PETER L. NACCI, PH.D., AND THOMAS R. KANE, PH.D., THE INCIDENCE OF SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS, 47 FED. PROBATION 31 1983.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (“Homosexual activity produced violence [by] [. . .] incidental force (as when there was strong affection between lovers and one partner acted out violently when spurned) and, as a direct motive ([. . .] sex pressuring that becomes a violent exchange).”).

129. DEPARTMENT OF JUSTICE, REPORT ON SEXUAL VICTIMIZATION IN PRISONS, JAILS AND JUVENILE CORRECTIONAL FACILITIES (2016).

130. *Id.* at viii.

mates, better-trained staff and procedures to respond to victimization, and other security measures.<sup>131</sup> The high incidence facilities had poor management, lack of means to separate victim and perpetrator, and lack of funds to implement other protective measures.<sup>132</sup> According to a survey conducted by the Bureau of Justice,<sup>133</sup> the three main factors that determine if an inmate is prone to sexual victimization is their sexual orientation, whether they have been previously sexually assaulted, and the mental health of the victim.<sup>134</sup> Furthermore, 12.2% of inmates who identified as bisexual or gay in a federal prison were sexual victimized, compared to their heterosexual counter-parts at 1.2%.<sup>135</sup>

Although statistics prove that homosexual individuals are more susceptible to sexual violence, this is not conclusive evidence establishing that a formal relationship increases the amount of violence or hostility between inmates. These statistics do not prove what initiated the violence between the prisoners or indicate a causal connection. Furthermore, there is no evidence that would warrant an increase in safety concerns solely because of a formal marriage ceremony commencement. Even if a private marriage had a capacity to start rivalries because outsiders are jealous or aggressive, not only is the relation too tenuous to prove, but it also would be unfair to deny someone this private function just because other individuals are not accepting of their personal decision. Marriage is not intended to include or to have a negative effect on outsiders. This is consistent with the *Obergefell* rationale, which placed extreme emphasis on marriage being a personal choice between two people.<sup>136</sup>

There is not a reliable or consistent methods implemented to account for the crime that goes on inside prison.<sup>137</sup> Given the lack of a uniform method to track the cause of violence between inmates, there

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131. *Id.*

132. *Id.*

133. *Id.* at 2-3 (citing Allen J. Beck et al., Survey, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, Bureau of Justice Statistics (2013)).

134. *Id.*

135. *Id.*

136. *See supra* notes 72-79.

137. Josh Voorhees, *A City of Convicts*, SLATE, June 30, 2014 [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/06/prison\\_crime\\_rate\\_the\\_us\\_violent\\_crime\\_rate\\_is\\_falling\\_partly\\_because\\_the.html](http://www.slate.com/articles/news_and_politics/politics/2014/06/prison_crime_rate_the_us_violent_crime_rate_is_falling_partly_because_the.html) (arguing that that reports don't consider what crimes goes on inside prisons, only outside crimes).

are not basic statistics but a wide-range of theories to base a conclusion on why homosexual relationships increase crime.<sup>138</sup> One assertion from the importation theory is that the values of individuals coincide with one another, which promotes violent behavior.<sup>139</sup> The exchange theory claims that there are sexual hierarchies between inmates.<sup>140</sup> A consequence of this is that there are roles of inequality, where some inmates assert dominance and define their label to their inferiors.<sup>141</sup> This promotes victimization because it identifies this group of individuals as vulnerable.<sup>142</sup> These theories provide a general reason for why inmates may be violent in a prison setting, but they do not present evidence asserting formal marriage will increase violence or require additional security measures. Theories are not specific enough to establish a logical connection. Creating a bridge between objectives and means would not prevail in this situation because it is too tenuous.

The proposed objective for security measures is a legitimate one, but the connection between security measures and restriction on marriage is irrational. In *Turner*, the court found that the marriage restriction was an “exaggerated response” to security concerns without a basis forming a connection.<sup>143</sup> It is likely that an assertion stating same-sex marriage between inmates increased violence would be considered an exaggerated response, in the absence of empirical evidence to prove otherwise.

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138. Heather Heitfield, *Prison Violence and Social Capital: An Analysis of Adult State Correctional Facilities*, 1 AM. U. JUST., LAW AND SOC'Y 43, 49 (2003) (“Empirical evidence is scarce administ often [. . .] theories of prison assaults.”).

139. *Id.* (“Importation theories [. . .] suggest that lower-class inmates entering prison often bring in external components that contribute to individual prisons violence [. . .] [including] the values, norms, and beliefs found in violent subcultures, gender-role definitions, racist perspectives, and tension related to homosexuality.”).

140. Terry, A. N., *Sexual Behavior in Prison Populations Understood Through the Framework of Rational Choice and Exchange Theory* 8 INQUIRIES J. 1 (2016) (“The prison subculture operates [. . .] with forms of “authority.” Some inmates enter the prison with a higher level of authority than others while some earn this placement within the prison hierarchy. This hierarchy must be obeyed as should the inmate code.”).

141. *Id.*

142. *Id.*

143. *Turner*, 482 U.S. at 98 (“[P]etitioners have pointed to nothing in the record suggesting that the marriage regulation would preventing such entanglements [“love triangles”]).

In *Turner*, prison officials presented an additional concern claiming that allowing marriage would negatively affect the rehabilitation of the inmate because they would be distracted and overly dependent on their significant other.<sup>144</sup> The Court denied this argument because there was no proof that established married prisoners were less capable of becoming rehabilitated or being more vulnerable to other problems.<sup>145</sup> Contrary to the prison official's arguments, studies have concluded that social support during incarceration is positively correlated to successful rehabilitation because inmates are provided with encouragement and motivation.<sup>146</sup>

### **Prong Two: There is No Other Avenue to Exercise the Right**

Given the distinct nature of marriage and the personal benefits that are provided from marriage, it is evident that there is not an alternative method if there is a complete restriction. The fundamental rights and intimate choices protected by Due Process are at the heart of individual dignity and autonomy.<sup>147</sup> The nature of marriage is private because it is a personal commitment that provides a type of emotional support that cannot be fulfilled another way.<sup>148</sup> Since it is such an intimate decision, explicit constraints would be depriving a fundamental right. Marriage is not just a label, but may have spiritual or religious significance to the couple.<sup>149</sup> Furthermore, upon release, marriage is a prerequisite for certain government or tangible benefits.<sup>150</sup> These functions of marriage are not contrary to being incarcerated or the objectives of correctional facilities.<sup>151</sup>

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144. *Id.*

145. *Id.*

146. Joseph E. Jacoby, Ph.D and Brenda Kozie-Peak, M.A., *The Benefits of Social Support for Mentally Ill Offenders: Prison-to-Community Transitions* 15 BEHAVIOR SCI.'S & THE L. 483, 499 (arguing that social support of prisoners is highly associated with their quality of life by proving encouragement).

147. *Oberfgell*, 135 S. Ct. at 2589 ("The fundamental liberties protected by the Fourteenth Amendments Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.").

148. *Id.* (explaining the importance of marriage in the United States culture).

149. *Id.*

150. *See Turner*, 482 U.S. at 96 (explaining the implications of prisoners being married).

151. *See id.*

As illustrated in *Turner*, restrictions on marriage are distinguishable from regulating mail correspondence to other inmates.<sup>152</sup> In *Turner*, the mail regulation, which prohibited inmates to mail correspondence to inmates at other prison facilities, did not completely infringe on all methods of expression and did not completely deprive an inmate from corresponding.<sup>153</sup> The restriction only limits correspondence with a group of people due to the violent nature of the messages.<sup>154</sup> The inmate correspondence intended to invoke disorder, which could potentially encourage violent behavior between inmates, or include numerous of inmates in systematic violent behavior, and thus, create a “ripple effect.”<sup>155</sup> Marriage is a much more private function, which consists solely of two people. The purpose of marriage is not to harm anyone or cause disruption, but to fulfill personal emotional benefits. People typically do not engage in marriage to start such commotion, whereas that was arguably intent behind the inmate correspondence.<sup>156</sup>

Furthermore, the United States emphasizes the inherent benefits from marriage as fundamentally valuable, private and unique.<sup>157</sup> A regulation that prohibits an individual to marry who they want, completely denies a fundamental right that cannot be exercised in another way. This is distinguishable from a mail regulation because that only restricts the inmates from corresponding with a certain class of individuals. This is a limitation implemented for the better protection of the prison. However, marriage cannot be limited in this same manner because that would be prohibiting an individual to marry freely. This would be preventing them to express themselves completely and consequently denying a fundamental right.

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152. *See id.*

153. *Id.* at 93.

154. *Id.*

155. *Id.* (“When accommodation of an asserted right will have a significant “ripple effect” on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”).

156. *Id.* at 91-92 (arguing that communication between felons has potential to create criminal behavior).

157. *See Oberfell*, 135 S. Ct. at 2589 (“The fundamental liberties protected by the Fourteenth Amendments Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.”).

### **Prong Three: Would Not Impact Prison Officials and Inmates**

Prison officials, fellow inmates and other individual in the facility would not be disturbed or affected by a marriage between two inmates. Marriage is a private decision.<sup>158</sup> It is a unique two-person bond<sup>159</sup> and not intended to affect a third party.<sup>160</sup> Prison officials can decide the time, place and manner in which the marriage ceremony is conducted, but cannot completely deprive inmates of this right.<sup>161</sup>

If there is a belief that conducting a marriage ceremony in the prison institution would present safety concerns, then the marriage venue can be disapproved at that time, but the opportunity to marry must eventually be presented.<sup>162</sup> There would be no increased financial impact on the staff or prison facility because marriages are already being conducted, but another couple demographic would now be included.

### **Prong Four: No Alternatives That Would Not Be Restricting**

This prong allows the prisoner to present a possible alternative that does not limit their rights, but takes into consideration the goals of the prison.<sup>163</sup> In regards to the prisoner correspondence regulation, the *Turner* court considered the *de minimus* burden on the possibility of reading every piece of mail as an alternative so prisoners could continue to correspond as they please.<sup>164</sup> The court rejected this alternative method, claiming that it would be impossible to read every piece of mail and that there could be hidden codes only the inmates could interpret.<sup>165</sup> In sum, the Court found the regulation to be reasonable.<sup>166</sup>

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158. *See Turner*, 482 U.S. at 85. (“[t]he decision to marry (apart from the logistics of the wedding ceremony) is a completely private one.”).

159. *Id.*

160. *Id.* (“When accommodation of an asserted right will have a significant “ripple effect” on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 92.

166. *Id.*

Contrastingly, in regards to the marriage restriction, the *Turner* Court determined it was unconstitutional because it was an exaggerated response to security measures, but the prison could regulate the time, place and manner of the marriage ceremony.<sup>167</sup> This same principle would apply to marriage between same sex inmates.

### **Married Inmates Should Not Be Able to Share the Same Cell**

Allowing married inmates to share the same cell would be providing them with a

benefit that other inmates, who are married to an outside civilian, are not guaranteed. According to the United Kingdom, inmates who choose to marry must be split up while incarcerated, but will be entitled to meet together according to the procedures other incarcerated individuals adhere to see their significant other.<sup>168</sup> The purpose of this regulation is to treat all inmates the same way and for purposes of good order and discipline.<sup>169</sup>

If the United States were to adopt this same theory, it would constitutionally coincide with the concept of restricting fundamental rights of prisoners. Engaging in sexual activities is typically an integral aspect of marriage. As an inmate, this aspect of marriage is restricted; the deprivation of intimate association is consistent with being incarcerated.<sup>170</sup> The fundamental right to marry survives imprisonment, in order to provide the emotional and religious aspects inherent in marriage.<sup>171</sup> However, the physical attributes of marriage, including cohabitation, sexual intercourse, and procreation are not consistent with being incarcerated.<sup>172</sup> Imaginably, inmates seek for

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167. *Id.*

168. Helen Pidd, *supra* note 10 (“it would be fair for the couple in Full Sutton to be split up, so as not to give them a privilege heterosexual prisoners cannot enjoy. [. . .] Access to such facilities should also be extended to inmates married to each other.”).

169. *Id.*

170. *Pell*, 417 U.S. 817, 822 (“[a prisoner] retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”).

171. *Gerber v. Hickman*, 291 F.3d 617, 621 (“During [. . .] prison, the right of intimate association [is] [. . .] abridged. Intimate association protects the kinds of relationships that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives. The loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime.”).

172. *Id.*

contact visits to see family or their loved ones, but a prison is constitutionally allowed to deny contact and conjugal visits, without it amounting to a Due Process violation.<sup>173</sup> Accordingly, it would be unfair to allow a couple to share the same cell, affording them to engage in the most intimate acts of marriage (except procreation), when others inmates are deprived of such.

### **What Could the United States Learn From the United Kingdom's Prison System to Support this Decision?**

The theoretical motivations for the purpose of prisons are distinguishable between the United States and the United Kingdom.<sup>174</sup> The United Kingdom's primary objective of incarceration is to rehabilitate and reintegrate the prisoner into a normal social life.<sup>175</sup> Whereas, The United States places a strong emphasis on correcting offenders through fear of punishment, so they do not reoffend.<sup>176</sup> Although these objectives are implicitly manifested, such different goals could influence what regulations are implemented in the respective nations.<sup>177</sup>

The United States and the United Kingdom governments evaluate policy goals when considering what course of action should be taken to address a particular issue.<sup>178</sup> Policy is goal-oriented and assists in determining what strategy should be taken in a given situation, by considering what is important to the government.<sup>179</sup> Enacting

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173. See *id.* (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

174. Austin MacCormick, *supra* note 13 at 38 ("European countries where [ . . . ] American correctional philosophy is far from being generally accepted."); THE NEW YORK TIMES, *supra* note 12 (The American and European systems differ in almost every imaginable way, beginning with their underlying rationale for incarceration. [t]he primary goal of prison [in Europe] is to enable prisoners to lead a life of social responsibility free of crime upon release. Public safety is ensured not simply by separating offenders from society, but by successfully reintegrating them.").

175. *Id.*

176. *Id.*

177. See THE NEW YORK TIMES, *supra* note 12 (arguing that the differing rationales for prison affects what restrictions are in place).

178. Michael Hallsworth and Jill Rutter, *Making Policy Better*, INSTITUTE FOR GOVERNMENT, Apr. 2011, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Making%20Policy%20Better.pdf>;

*Policy Making: Political Interactions*, INDEPENDENT HALL ASSOCIATION, <http://www.ushistory.org/gov/11.asp>

179. *Id.*

a policy in order to achieve a goal consists of a series of steps.<sup>180</sup> The goal drives the interpretation of these steps.<sup>181</sup> In sum, the objectives could affect what position is taken on a certain issue.<sup>182</sup> These principles could explain why the United Kingdom has already decided in the affirmative on same sex inmate marriage and why the United States has not. It is not that the United States does not care about rehabilitation, it is just that there is more emphasis on the punitive response to crime to deter future offender.<sup>183</sup> Conversely, the United Kingdom's main objective is rehabilitation, which guides their decision making process.<sup>184</sup> This goal difference has the potential to affect what regulations are implemented.

The decision by the United Kingdom could have been influenced by their underlying prison policy of rehabilitation,<sup>185</sup> as well as the emphasis on the importance of maintaining family relationships while incarcerated.<sup>186</sup> These goals could have aided the decision because marriage and family is important to the rehabilitation process. Whereas the United States prison system has a different main objective of punishment and punitive responses to crime.<sup>187</sup> The United Kingdom rehabilitative theory attempts to create normalcy by allowing inmates to have control over their life and personal privacy.<sup>188</sup> Different innovations have been implemented to provide a smooth transition into a normal life outside upon release.<sup>189</sup>

In addition to adhering to the Convention and relying on case law, it is likely that these considerations were influential in allowing

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180. *Id.*

181. *Id.*

182. *Id.*

183. *See supra* text accompanying notes 13-14.

184. *Id.*

185. *See supra* text accompanying notes 51-59.

186. *Id.*

187. *Id.*

188. Peter Zachariadis, *Some European Prisons Are Shrinking and Closing—What Can America Learn?* TAKEPART, Nov. 14, 2014, <http://www.takepart.com/article/2013/11/14/some-european-prisons-are-shrinking-and-closing-what-can-america-learn> (arguing that treating prisoners more humanely and normalizing prison conditions can lower the amount of prisoners and aid in rehabilitation).

189. THE NEW YORK TIMES, *supra* note 106 (“[I]nmates are given a remarkable level of control over their lives and their personal privacy. Some wear their own clothes and prepare their own meals. They interact with staff trained not only in prison security, but in educational theory and conflict management.”).

same sex inmates to marry one another in the United Kingdom. The United States could learn from these United Kingdom's approaches and their outlook on prison rehabilitation. If these theories were adopted by the United States, then it would be a persuasive factor in deciding affirmatively if two inmates could marry each other.

### **Conclusion**

If two incarcerated same-sex inmates in the United States were to seek marriage, it would and should be granted in order to accord to the Constitution and American values. This comment's conclusion was established by relying on United States Supreme Court case law and the United Kingdom rationale. Such prediction comes down to a basic equation; the *Turner* holding, the *Obergefell* holding, and the similarities between the two nations, in that they invoke a similar balancing test when addressing fundamental rights issues and both place emphasis on the importance of all individuals being afforded basic civil liberties.

In support for their decision, the United Kingdom relied on two independent pieces of legislation, which fulfilled the two factors of same sex marriage and prisoner marriage. The United States has satisfied these same two variables through case law. Such legal authorities have a similar binding effect upon the respective nations. Both cultures have recognized the importance of marriage and have identified marriage as a civil liberty that cannot be infringed on without reasonable justification. However, the United States could rely on the United Kingdom as a model and learn from their underlying prison policies of rehabilitation by means of promoting familial ties. By adopting such objectives, the United States might find greater support in deciding that inmates can marry each other because of the potential personal benefits.

Regulations on marriage between inmates would not surpass the *Turner* test. Precedent case law has established the personal significance of being able to marry freely, as well as the intangible benefits of marriage that should be afforded to all individuals. Restricting the person an inmate can marry would be contrary to these principles, as well as violating a fundamental right. However, the marriage ceremony and the marriage itself may be appropriately monitored by the prison facility. The inmates should be separated and only visit one another in a similar manner that the heterosexual inmates adhere to.

The United States has historically grappled with fundamental rights issues dealing with prisoner rights, as well as the right to marriage. These two areas of law have significantly evolved over time through judicial intervention and interpretation. Restrictions on marriage once permitted only the traditional model of marriage, however, today such rights have been liberally construed to include interracial and gay marriage, which would be considered historically unconventional. By creating this flexibility, it is evident that the intent is to protect fundamental rights and personal autonomy without any discrimination. Such progress demonstrates the cultural and legal importance of an inmate being able to freely marry, whether the spouse is a man, woman, black, white, or even another incarcerated inmate. Otherwise, the United States would fail to ensure fundamental rights are afforded to all, which is contradictory to precedential case law and the American principles.