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RETHINKING PRISON SEX: SELF-EXPRESSION AND SAFETY

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At the risk of buying into popular stereotypes about sex behind bars and the archetypes of the dyke prison matron providing better treatment to women in prison in exchange for sex,¹ or torrid sex between women in prison,² or the burly male prison rapist who creates prison wives,³ or the young man “turned out” in prison,⁴ I plan to explore the complexity of

* Professor of Law, American University, Washington College of Law. Special thanks to my Research Associate, Nairi Simonian, and Dean's Fellows, Emily Balogh, Elizabeth Flesher, and Joyce Kosak. I would also like to thank the many advocates, inmates, researchers, and correctional practitioners who work to explain the lives and experiences of persons in custody. The work of Anadora Moss, Professor Barbara Owen, and Dr. Allen Beck was crucial in writing this Article.

¹ See, e.g., QUEEN LATIFAH, *When You're Good To Mama*, on CHICAGO MOVIE SOUNDTRACK (Epic Records/Sony Soundtrax 2002):

Ask any of the chickies in my pen, they'll tell you I'm the biggest mother hen, I love 'em all and all of them love me, because the system works, the system called reciprocity. Got a little motto always sees me through, when you're good to Mama, Mama's good to you. There's a lot of favors I'm prepared to do, you do one for Mama, she'll do one for you. They say that life is tit for tat, and that's the way I live. So, I deserve a lot of tat, for what I've got to give. Don't you know that this hand washes that one too. When you're good to Mama, Mama's good to you! If you want my gravy, pepper my ragout. Spice it up for Mama, she'll get hot for you. When they pass that basket folk contribute to, you put in for Mama, she'll put out for you. The folks atop the ladder are the ones the world adores. So, boost me up my ladder, kid and I'll boost you up yours. Let's all stroke together like the Princeton crew. When you're strokin' Mama, Mama's strokin' you. So what's the one conclusion, I can bring this number to? When you're good to Mama, Mama's good to you!

See also generally Chicago (Miramax Films 2002); Fred Ebb & Bob Fosse, Chicago (Chapelle Music Co. 1975).

² See generally GAYL JONES, *EVA'S MAN* (1987) (offering a fictional account of an African-American woman in prison and her sexual experiences with men and women inside and outside of prison); *THE BIG BIRD CAGE* (New World Pictures, 1972) (using the marketing slogan, “women so hot with desire they melt the chains that enslave them”).

³ See generally *AMERICAN HISTORY X* (New Line Cinema 1998) (detailing the story of the main protagonist's journey away from extreme right-wing racist violence after being gang raped by white supremacists while in prison).

⁴ See generally *GRANDMASTER FLASH*, *THE MESSAGE* (Sugarhill Records 1982):

prison sex and the challenges that it raises in the context of recently enacted federal legislation, the Prison Rape Elimination Act (“PREA”).⁵

The primary focus of this Article is to begin to frame the discussion of prison sexuality and to chart an analytical framework for examining it. This Article is by no means exhaustive and seeks primarily to mark the terrain—leaving unexplored many areas that might prove fruitful for further research.⁶ This is the beginning of a project that will hopefully result in greater scholarship and analysis of prison sexuality from a multidisciplinary perspective.

In Part I, this Article briefly discusses the enactment of the Prison Rape Elimination Act and prior attempts to enact legislation addressing the sexual abuse of persons in custody. Part II examines the historical underpinnings of prisons in the United States and how that framework has shaped attitudes toward the sexual expression of prisoners today. Part III, using the narratives of prisoners, describes the range of motivations that prisoners have articulated in sexual expression and attempts to disentangle prisoners’ rights in sexual expression and from the state’s legitimate interest in regulating that expression. Part IV outlines six legitimate interests that prison officials have in expanding sexual expression of inmates—such as furthering the goals of the Prison Rape Elimination Act. This Part concludes that in many situations the prison does not have a legitimate interest in prohibiting prisoner sexual expression and would be better served by using scarce resources to protect prisoners from nonconsensual and coercive sex by staff or other inmates.⁷ This Article concludes by acknowledging that the

Turned stickup kid, look what you done did. Got sent up for a eight year bid. Now your manhood is took and you’re a maytag. Spend the next two years as an undercover fag. Being used and abused, and served like hell. Till one day you was find hung dead in a cell.

⁵ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2003) [hereinafter “PREA”].

⁶ For example, this Article does not address in depth the economic or other costs of acknowledging the full range of sexual expression in prison—including conjugal visits, increased family visitation, prison nurseries, and public health challenges. It also does not address the complex issues that lesbian, gay, bisexual, and transgender inmates face in custodial settings and their vulnerability to sexual violence.

⁷ This Article’s discussion is confined to adult inmates. The issue of sexual expression among youth in custody is beyond the scope of this Article. Curiously, most research on the sexual behavior of youth in custody has focused on the outcome of sexual behavior—pregnancy, and sexually transmitted diseases—and not on sexuality and sexual expression of juveniles in custody and how sexual conduct might occur in juvenile custodial settings. See, e.g., Nadine Lancot & Marc Le Blanc, *Explaining Deviance by Adolescent Females*, 2002 CRIME & JUST. 113, 168 (2002) (discussing girls who join gangs and their sexual exploitation, which often leads to pregnancy); Aracely Munoz Contreras, *Girls in America: Sex and Deviancy in the Age of HIV/AIDS*, 7 J GENDER RACE & JUST. 357, 358 (2003) (discussing how the juvenile justice system, particularly in Cook County, Illinois, ignores that many adolescent girls are engaged in sexual activities that put them at risk for contracting STDs and HIV/AIDS); Laurie Schaffer, *Female Juvenile Delinquency: Sexual*

desire for sexual intimacy and sexual expression survive imprisonment and that correctional authorities must find workable and humane approaches to balancing their interests in safety and security with an inmates' interests in self-expression.

I. THE PRISON RAPE ELIMINATION ACT OF 2003 AND ITS PRECURSOR

The moving force behind the first modern piece of legislation to address prison rape was the Women's Rights Division of Human Rights Watch. In an effort to bring to light human rights abuses in the United States, the Women's Rights Division had begun a project to document human rights abuses in women's prisons. The Women's Rights Division published a series of reports documenting the sexual abuse of women in custody⁸ and sought to follow-up those reports with the enactment of legislation. In 1999, the Prevention of Custodial Sexual Assault by Correctional Staff Act ("Custodial Sexual Assault Act") was introduced by Congressman John Conyers (D-MI), as part of omnibus legislation reauthorizing the Violence Against Women Act.⁹

The Custodial Sexual Assault Act called for the establishment of a database of correctional employees previously found to be involved in

Solutions, Gender Bias, and Juvenile Justice, 9 HASTINGS WOMEN'S L.J. 1, 20 (1998) (discussing gender-specific sexualization of the female experience as a way to uncover explanations for some female delinquency, and explaining that "[a]n urgent need exists for gender-specific research on behalf of the plight of lesbian teenagers as they are processed in juvenile justice systems"). See generally, e.g., Diane M. Morrison et al., *Sexual Risk Behavior, Knowledge, and Condom Use Among Adolescents in Juvenile Detention*, 23 J. YOUTH & ADOLESCENCE 271 (1994) (analyzing to what extent adolescents in juvenile detention engage in sexual behaviors that put them at risk for AIDS and other STDs); Patricia J. Kelly et al., *Risk Behaviors and the Prevalence of Chlamydia in a Juvenile Detention Facility*, 39 CLINICAL PEDIATRICS 521 (2000) (analyzing the prevalence of chlamydia and the association of selected behavioral risk factors in a population of adolescents in two juvenile detention facilities).

⁸ See, e.g., HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN UNITED STATES PRISONS (1996) (detailing sexual abuse of women in custody in D.C., Georgia, Illinois, Michigan, and California as human rights violations); HUMAN RIGHTS WATCH, MODERN CAPITAL OF HUMAN RIGHTS?: ABUSES IN THE STATE OF GEORGIA 99-119 (1996) (discussing the problem of sexual abuse in Georgia's women's prisons); WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998) (describing events surrounding HRW's exclusion from Michigan prisons and the retaliation suffered by female inmates who provided information about sex abuse for the HRW report).

⁹ See Violence Against Women Act of 1999, H.R. 357, 106th Cong. (1999) [hereinafter VAWA I]; Press Release, Rep. John Conyers, Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), available at <http://www.house.gov/conyers/pr051299.htm>. The Custodial Sexual Assault Act is found at §§ 341-346 of VAWA I.

custodial sexual misconduct.¹⁰ It also called for withholding federal law enforcement funds from those states that failed to enact legislation criminalizing staff sexual misconduct with inmates.¹¹ While VAWA eventually passed with specific prohibitions on using any of its funds for individuals in custody—even if they were the victims of sexual abuse—the Prevention of Custodial Sexual Assault by Correctional Staff Act failed to be included in the version of VAWA that was enacted into law.¹²

Two years later, Human Rights Watch authored another report, “No Escape: Male Rape in U.S. Prisons,” this time documenting the sexual abuse of male prisoners.¹³ Teaming with Stop Prisoner Rape, an organization originally founded by male prison rape survivors,¹⁴ Human Rights Watch pushed for the enactment of another piece of legislation, the Prison Rape Reduction Act of 2002.¹⁵ The initial legislation, which was introduced with bipartisan support, focused primarily on prisoner-on-prisoner sexual assault and provided for penalties only in cases of prison rape.¹⁶ While there was bipartisan support for the bill, the failure to include

¹⁰ VAWA I at § 343. *See also* AFSCME Opposes Measure on Sexual Assault, AFSCME Corrections United (1999), *available at* <http://www.afscme.org/publications/acunews/acu19907.htm> (voicing objection to the creation of the national database and questioning its necessity since “corrections facilities do not hire officers convicted of sexual misconduct”).

¹¹ VAWA I § 344.

¹² The reauthorization of VAWA finally passed as part of the Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 7101-7110 (2000) [hereinafter VAWA II]. The Attorney General makes funds available to assist victims of abuse pursuant to the Victims of Crime Act Victims Assistance Grant Program, which states that “[s]ubgrantees cannot use VOCA funds to offer rehabilitative services to perpetrators or offenders. Likewise, VOCA funds cannot support services to incarcerated individuals, even when the service pertains to the victimization of that individual.” 67 Fed. Reg. 56,444 (Sept. 3, 2002). It is notable that the Custodial Sexual Assault Act was included in the VAWA omnibus legislation, but could not secure enough support for passage; yet VAWA II includes protections for immigrant battered women and trafficked women.

¹³ HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001).

¹⁴ *See* Stop Prisoner Rape, <http://www.spr.org> (last visited Nov. 29, 2005). Stop Prisoner Rape was founded in 1980 by Russell D. Smith as People Organized to Stop the Rape of Imprisoned Persons. Smith was a survivor of rape behind bars himself. Renamed Stop Prisoner Rape, the organization is now a national 501(c) (3) human rights advocacy group that works to end sexual violence against men, women, and youth. The scope of its mission also now includes all forms of custody, including immigration detention. *Id.* (follow “About” hyperlink; then follow “History” hyperlink).

¹⁵ H.R. 4943, 107th Cong. (2002).

¹⁶ *See Hearing on the Prison Rape Reduction Act of 2002*, 107th Cong. (2002) (statement of Wendy Patten, U.S. Advocacy Director, Human Rights Watch), *available at* <http://www.hrw.org/reports/2001/prison/rapebill-statement.pdf> (discussing the organization’s

the perspectives of accrediting organizations, such as the American Correctional Association, the Association of State Correctional Administrators, and groups who had worked primarily on issues related to sexual abuse of prisoners by staff, slowed enactment of the bill.¹⁷

The Prison Rape Reduction Act was reintroduced in 2003 with significant amendments—changing the name to the Prison Rape Elimination Act, adding coverage of staff sexual abuse of persons in custody and grants to assist states in their efforts to prevent, reduce, and prosecute prison rape.¹⁸ The legislation passed unanimously in the Senate on July 25, 2003.¹⁹

As enacted, the Prison Rape Elimination Act establishes “a zero-tolerance standard” for rape in custodial settings,²⁰ requires data collection on the incidence of rape in each state, and establishes the National Prison Rape Elimination Commission. The Commission is required to issue a report on the causes and consequences of prison rape²¹ and to develop national standards on the prevention, detection and punishment of prison rape.²² While PREA does not create a private right of action for prisoners,²³

report, NO ESCAPE: MALE RAPE IN U.S. PRISONS, and proposing several changes to the legislation, none of which included expanding the Act’s scope to address sexual abuse of women prisoners); *see also* NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 13; Learn About Federal Legislation, <http://www.hrw.org/reports/2001/prison/learn.html> (last visited Dec. 23, 2005) (discussing PREA’s proposal to provide federal funding in order to investigate allegations, and its aim to prevent and impose punishment for male rape).

¹⁷ Interestingly, unions who had been quite vocal in their opposition to the Prevention of Custodial Sexual Assault by Correctional Staff Act of 1999 took no position on PREA, likely believing that the initial bill’s focus on prisoner rape excluded custodial sexual abuse by correctional staff. Unions were not represented at Congressional hearings on PREA, and the AFSCME Corrections United did not publicly take a stand on the bill. It appears that unions were relatively unconcerned about PREA’s impact on their members.

¹⁸ S. 1435, 108th Cong. (2003). *See also* H.R. 1707, 108th Cong. (2003); H.R. 1765, 108th Cong. (2003).

¹⁹ 149 CONG. REC. S9659 (daily ed. July 21, 2003); 149 CONG. REC. H7764 (daily ed. July 25, 2003). The speed of passage and the bi-partisan support for this legislation, when compared to the lack of support for the Custodial Sexual Abuse Act of 1998—which sought to address staff sexual abuse against primarily women inmates—supports and reinforces gendered notions of the acceptability of violence against women.

²⁰ Prison Rape Elimination Act of 2003, 42 U.S.C. § 15602(1) (2003). PREA applies to prisons, jails, immigration detention facilities, police lockups, and juvenile facilities. § 15606(3), (7).

²¹ § 15606(d).

²² § 15606(e).

²³ *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by

it does create a system of incentives and disincentives for states, correctional agencies, and correctional accrediting organizations who fail to comply with its provisions. Each correctional agency must, upon request by the Bureau of Justice Statistics ("BJS"), report the number of instances of sexual violence in its facilities.²⁴ Each year, the three states with the highest incidence and the two states with the lowest incidence of prison rape must appear before the Review Panel on Prison Rape to explain their

statute). However, in its purpose section, it notes that one purpose of PREA is to "protect the Eighth Amendment rights of Federal, State, and local prisoners." § 15602(7).

²⁴ § 15603(a). The Bureau of Justice Statistics produces an annual comprehensive statistical review of prison rape based on a representative sample of correctional facilities, departments of corrections, former inmates, and other experts. *Id.*; see also ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 10-12 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf> (describing the methodology used to produce the study); *id.* at 3 (stating that sexual violence was measured "by disaggregating sexual violence into two categories of inmate-on-inmate sexual acts and two categories of staff sexual misconduct"). The methodology of the survey was explained as follows:

The inmate-on-inmate categories reflected uniform definitions formulated by the National Center for Injury Prevention and Control in "Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements," Center for Disease Control and Prevention. . . . Definitions of staff sexual misconduct and harassment were based on "Training for Investigators of Staff Sexual Misconduct," prepared by the National Institute of Corrections.

Id. Nonconsensual acts are defined as:

[c]ontact of any person without his or her consent, or of a person who is unable to consent or refuse; and [c]ontact between the penis and the vagina or the penis and the anus including penetration, however slight; or [c]ontact between the mouth and the penis, vagina, or anus; or [p]enetration of the anal or genital opening of another person by a hand, finger, or other object.

Id. Abusive sexual contacts were defined as: "[c]ontact of any person without his or her consent, or of a person who is unable to consent or refuse; and [i]ntentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person." *Id.* Staff sexual misconduct was defined as:

[a]ny behavior or act of a sexual nature directed toward an inmate by an employee, volunteer, official visitor, or agency representative. Romantic relationships between staff and inmates are included. Consensual or nonconsensual sexual acts include: [i]ntentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; or [c]ompleted, attempted, threatened, or requested sexual acts; or [o]ccurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.

Id. Staff sexual harassment is defined as: "[r]epeated verbal statements or comments of a sexual nature to an inmate by employee, volunteer, official visitor, or agency representative, including: [d]emeaning references to gender or derogatory comments about body or clothing; or [p]ropane or obscene language or gestures." *Id.*

designations as states with either the lowest or highest incidence of prison rape.²⁵ States and accrediting organizations stand to lose five percent of federal funds for criminal justice activities for failure to implement or develop national standards.²⁶ As an incentive to comply, PREA provides for the withholding of grants from states that fail to adopt standards for reducing, preventing, and eliminating prison rape.²⁷

While PREA does not substantially change the traditional definition of rape,²⁸ it recognizes that sexual assault can be accomplished not only by actual force, but by the “exploitation of the fear or threat of physical violence or bodily injury.”²⁹ Additionally, PREA gives the BJS authority to

²⁵ § 15606(b)(3)(A). A high incidence does not necessarily mean that a state does not address prison rape. In fact the contrary may be true. A state with a credible grievance process and aggressive investigation may have higher reporting than a state that does poor investigations and has a compromised grievance process. See Susan W. McCampbell & Allen L. Ault, *Lessons Learned: Miles to Go in Preventing Staff Sexual Misconduct with Offenders*, AMERICAN JAILS, Jan.-Feb. 2005, at 37. The information in this article is based on work done under four National Institute of Corrections’ Cooperative Agreements by the Center for Innovative Public Policies, Inc. The article highlights how correctional agencies “[b]eliev[e] that if there are no reported incidents of sexual misconduct that no misconduct is occurring.” *Id.* at 3. The article also discusses that

[a] key operational priority is the orientation of offenders to the agency’s policies and how to report misconduct. . . . Agencies who orient inmates find that there is an initial testing of the system—both by employees and inmates. Complaints may be made to see if the agency is serious about accepting all allegations as well as investigating.

Id. at 8. See also generally Michele Deitch, *Deitch: On Prison Rape, Texas Tries to Report it Right*, AUSTIN AMERICAN STATESMAN, Nov. 9, 2005, available at http://www.statesman.com/opinion/content/editorial/stories/11/9prisonrape_edit.html (explaining that “[w]e need to encourage the reporting of prison rape, and those states that take the problem seriously enough to use expansive definitions of rape and broad data collection methodologies—despite the risk of being penalized—should be applauded, not criticized”).

²⁶ § 15607(c)(2).

²⁷ § 15608(a).

²⁸ PREA defines “rape” as:

(A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.

§ 15609(9).

²⁹ § 15609(9)(c).

create another definition of rape for purposes of conducting its annual statistical analysis and review.³⁰ That distinction is very important, because the BJS has chosen to collect data on a broader range of sexual conduct—nonconsensual acts, abusive sexual contact, staff sexual misconduct, and staff sexual harassment.³¹ The BJS data collection includes inmate-on-inmate conduct as well as staff-on-inmate conduct, and will include data collection from a variety of sources: records, reviews of correctional agencies, victim self-reports while in custody, and surveys of former and soon to be released inmates.³² Yet any discussion of rape necessarily includes a discussion of consent.³³ Recognizing the complexity of sexual behavior in correctional settings, the proposed BJS victim self-report survey asks about consensual sex as well.³⁴

³⁰ § 15603(a)(2)(A).

³¹ See BECK, *supra* note 24, at 3.

³² *Id.* at 2.

³³ See generally Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195 (1999) (analyzing the shortcomings of current legal doctrine on the issue of rape and sexual misconduct in prison, focusing on *Farmer v. Brennan*, 511 U.S. 825 (1994)); Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751 (2005) (discussing rape of women in U.S. prisons); Ian O'Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241 (2004) (comparing occurrences and magnitude of prison rape in the U.S. and the U.K.); Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1224-1229 (2004) (discussing whether some consensual sexual experiences in prison have elements of coercion); James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433 (2003) (discussing prison rape in male prisons and prison rape litigation); Rachel Roth, "No New Babies?" *Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER SOC. POL'Y & L. 391 (2004) (examining conflicts over the rights of prisoners and probationers to have sex or to procreate).

³⁴ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, REVISION OF A CURRENTLY APPROVED COLLECTION (PRETESTING ACTIVITIES FOR SURVEYS IMPLEMENTING THE PRISON RAPE ELIMINATION ACT OF 2003, OMB No. 1121-0303) (2005) (on file with author). Ninety percent of the respondents are randomly routed to answer questions about consensual and non-consensual sex in the facility. Section E of the questionnaire, entitled "Activity With Inmates," asks about both wanted and unwanted sex or sexual contact the inmate has had with other inmates in the facility. *Id.* at 17-24; see also BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SURVEY ON SEXUAL VIOLENCE, 2004, STATE PRISON SYSTEMS 2, 5 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ssv2.pdf> (referencing non-consensual sexual acts between inmates, thus implicitly recognizing that there can be consensual sexual acts as well, and defining staff sexual misconduct as consensual or non-consensual sexual acts). Similar language appears in the surveys given to the local jail jurisdictions and state juvenile systems. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SURVEY ON SEXUAL VIOLENCE, 2004: LOCAL JAIL JURISDICTIONS 3, 6 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ssv3.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SURVEY ON SEXUAL VIOLENCE, 2004, STATE JUVENILE SYSTEMS 3, 7 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ssv5.pdf>; see also

The BJS data collection efforts have engendered a climate where a number of communities concerned about prisoners are beginning to discuss whether there can be consensual sexual interactions in prisons between inmates and between staff and inmates. While correctional officials, advocates, and prisoners are clear about the need to end prison rape, there are other more complex agendas. Correctional authorities may have an interest in minimizing the number of sexual interactions between inmates that can be defined as rape in order to lower their numbers for purposes of data collection.³⁵

Human rights organizations are concerned that correctional authorities will respond to PREA by strictly enforcing existing prison policies that prohibit sex between inmates, which could result in discipline or criminal prosecution for prisoners who engage in consensual sex.³⁶ They are also concerned about the backlash against people who engage in same-sex relationships in institutional settings, either because of their sexual orientation or because they engage in situational same-gender sex. Furthermore, they are concerned that the acknowledgment of consensual sex in correctional settings will allow prison authorities to cast actual rape as consensual, thereby reducing the number of rapes reported to the BJS. Lastly, prisoners are rightfully concerned that this heightened scrutiny,

BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, STATUS REPORT 4 (2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/dcprea03.pdf> (discussing the Bureau's plans to implement a project that includes cognitive testing of the questionnaire, conduct a national pretest, and deliver a national implementation plan in 2006 on self-reports by inmates in adult correctional facilities).

³⁵ See DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, STATUS REPORT, *supra* note 34, at 1 ("Corrections administrators have concerns about legal liability, reliability of self-reports, and potential disruption of facility operations.").

³⁶ See, e.g., Lara Stemple, Executive Director, Stop Prisoner Rape, Address at the Public Hearing before the National Prison Rape Elimination Commission: The Costs of Victimization: Why Our Nation Must Confront Prison Rape (June 14, 2005), *available at* http://www.nprec.us/docs/MoralandEthicalQuestions_V1_1.pdf. Stemple comments that

the commissioner has heard me speak about the challenges of implementing the Prison Rape Elimination Act at Notre Dame in March when I emphasized there the need to grapple realistically with prisoners' sexuality and with the grim fact that rape is essentially the only socially acceptable sexual outlet in many men's prisons.

Id.; see also Cal. Sexual Abuse in Detention Elimination Act, § 2639(f), 2005 Cal. Adv. Legis. Serv. 303 (Deering) ("Consensual sodomy and oral copulation among inmates is prohibited by subdivision (e) of Section 286 and subdivision (e) of Section 288a, respectively. Without repealing those provisions, the increased scrutiny provided by this article shall apply only to consensual sexual contact among inmates and custodial sexual misconduct.").

while it may result in fewer assaults, also gives correctional authorities a potent tool to selectively sanction inmates for any sexual expression.³⁷

Most advocates and correctional authorities agree in principle that sex between staff and inmates can never, from a legal standpoint, be consensual. Nonetheless, there are many instances where consent is contested and the staff, the inmate, and/or the Court believe that the prisoner and staff member engaged in a consensual sexual interaction.³⁸ The situation of sex between inmates is just as complicated. Recent research among prisoners indicates that relations between both men and women are much more complex than initially thought.³⁹ While there is some acceptance that women are more amenable to same-sex relations, given their relational nature,⁴⁰ recent research seems to indicate that many sexual

³⁷ See Derrick Corley, *Prison Friendships*, in PRISON MASCULINITIES 107 (Don Sabo et al. eds., 2001). Derrick Corley is a writer and prisoner at Clinton Corrections Facility, Dannemora, New York. He queries, "If it is true that healthy people have healthy relationships, and, if these relationships are systematically denied prisoners, then how can we be expected to eventually live in society as normal, law-abiding, productive people?" *Id.*

³⁸ See generally *Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999) (prison inmate alleged that a sexual encounter with the defendant—a former corrections officer at the prison—was not consensual, as defendant contended, but was in fact a sexual assault that violated her constitutional rights); *Phillips v. Bird*, No. 03-247-KAJ, 2003 U.S. Dist. LEXIS 22418 (D. Del. Dec. 1, 2003) (inmate agreed to engage in sexual relations with prison guard, and later claimed that the sexual relations were a violation of her right to be free from cruel and unusual punishment); *Fisher v. Goord*, 981 F. Supp. 140 (W.D.N.Y. 1997) (the court held that there was no credible evidence that the prisoner was raped, and that the evidence showed that the action was part of a plan by plaintiffs to get the prisoner transferred out of the state facility to one closer to home); see also CRISTINA RATHBONE, *A WORLD APART, WOMEN, PRISON AND LIFE BEHIND BARS* 49-54 (2005) (narrating non-fictional accounts of women inmates in Framingham penitentiary and their relationships with male staff).

³⁹ See BARBARA OWEN, *OVERVIEW REPORT: FACILITY FOCUS GROUPS* 15 (Dec. 2005) (on file with author). According to the report,

Many also suggested that a large part of sexual victimization was tied to "domestic violence" in both male and female institutions and rooted in relationships that may have begun as consensual and turned coercive over time. While the relational component of violence has been well known in female facilities, the focus groups in the male facilities also described this situation.

Id. at 15. See generally Corley, *supra* note 37, at 107.

⁴⁰ BARBARA BLOOM ET AL., NAT'L INSTITUTE OF CORRECTIONS, U.S. DEPT. OF JUSTICE, *GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS* 65-66, 69 (2003), available at <http://www.nicic.org/pubs/2003/018017.pdf> (addressing the needs of women inmates to have gender-specific policies, programs, and services by collecting and summarizing multidisciplinary research and practitioner expertise on gender-responsive strategies).

interactions between male prisoners may be just as relational and not the brutal rapes that pervade the media.⁴¹

There has been a great deal of legal scholarship about rape and consent—particularly in analyzing acquaintance rape⁴²—and feminist scholarship about the inherent gender imbalance of power and the inability of women to consent to sex with men.⁴³ Most legal scholarship addressing prison rape has focused on the unconstitutionality of sexual abuse in institutional settings.⁴⁴ However, while there has been little scholarly *legal* discussion of consensual sex in prisons,⁴⁵ there has been robust scholarly discussion by social scientists about consent and agency in institutional

⁴¹ See OWEN, *supra* note 39, at 15, 17.

⁴² See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 254-73 (1998) (discussing what counts as consent in the context of dating/acquaintance rape); ILENE SEIDMAN & SUSAN VICKERS, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 484-91 (2005) (discussing the definition of consent used in acquaintance rape cases and the distinction between seduction and assault).

⁴³ See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 239 (1989) (explaining that no law explicitly gives men the right to rape women, yet no law has undermined men's entitlement to sexual access to women); NICOLA LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 104-24 (1998) (analyzing a woman's autonomy in the context of rape and criminal law). *But see* Katharine T. Barlett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 CAL. L. REV. 1559, 1565 (1987) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987)) ("MacKinnon has given inadequate attention to how power *should* be used. Indeed, she seems entirely uninterested in what women should do with power, should they ever get any."); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (questioning how feminists might formulate theories that highlight both women's oppression and the possibilities of women's agency under oppression).

⁴⁴ See, e.g., Peek, *supra* note 33 (discussing transgender prisoners and the Eighth Amendment's prohibition against cruel and unusual punishment); Jeffrey P. Brinkman, *Veney v. Wyche: Not in My Cell—The Constitutionality of Segregating Prisoners Based on Their Sexual Orientation*, 12 LAW & SEXUALITY 375 (2003) (discussing the implications of the Equal Protection Clause for a homosexual male inmate who was repeatedly denied the right to move into a double occupancy cell based on his sexual orientation); Lisa Davie Levinson, *Tenth Circuit Survey: Prisoners' Rights*, 75 DENV. U. L. REV. 1055 (1998) (discussing cases concerning the Eighth Amendment's prohibition against cruel and unusual punishment and Fourth Amendment claims of unreasonable searches and seizure as it applies to a prisoner's cell).

⁴⁵ *But see*, e.g., Ronald G. Turner, *Sex in Prison*, 36 TENN. B.J. 12, 12 (Aug. 2000) (encouraging conjugal visits for prisoners, stating, "Except for the vague notion that homosexuality sometimes happens behind bars, we assume that once the gate clangs shut, inmates' sexuality and sexual needs do, too"); Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 WOMEN'S STUD. Q. 102, 110 (2004) (noting that the legal system has "turned a blind eye" to discussing consensual and nonconsensual sex between staff and inmates).

settings, including prisons.⁴⁶ The lack of scholarly legal discussion in the area of prison sexuality conveys that there is need to address this topic, as I have begun to do with this Article.

II. PRISONER SEX AND THE BIRTH OF U.S. PRISONS

Prisons in the United States, like those in Europe, are a relatively recent phenomenon. The first U.S. prisons were created shortly after the Revolutionary War.⁴⁷ Before these prisons were established, most punishments were meted out by local authorities and involved physical punishment on a continuum that included beating, maiming, branding, or even execution.⁴⁸ Other punishments entailed elements of public shaming and could even result in banishment from a community.⁴⁹ Beginning in the 1800s, penitentiaries were created.⁵⁰ These institutions were formed largely

⁴⁶ See, e.g., THE ARC, POSITION STATEMENT: SEXUALITY 1 (2004), available at <http://www.thearc.org/posits/sexualitypos.doc> ("People with mental retardation and related developmental disabilities, like all people, have inherent sexual rights and basic human needs. These rights and needs must be affirmed, defended and respected."); Janet K. Feldkamp, *Navigating the Uncertain Legal Waters of Resident Sexuality*, 52 NURSING HOMES: LONG TERM CARE MANAGEMENT 62 (2003) (discussing residents' rights to sexual expression and the complicated issues that the topic creates for facilities and family members); Kathleen S. Mayers, *Sexuality and the Demented Patient*, 16 SEXUALITY & DISABILITY 219, 219 (1998) (stating that "[t]he management of sexuality in this population [individuals with dementia], including consensual sexual activity as well as forced sexual encounters, are topics which merit attention and should be addressed by the facility and for individual patients"); Jamie P. Morano, *Sexual Abuse of the Mentally Retarded Patient: Medical and legal Analysis for the Primary Care Physician*, 3 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 126, 129 (2001) (noting that "[a]ccording to a 1982 article in *Pediatric Annals*, the 'mentally retarded adolescent is a sexual being, whose reproductive ability, sexual interests, and sexual activity range from high to low, identical to the range in the general population.'"); Robert Worley et al., *Prison Guard Predators: An Analysis of Inmates Who Established Inappropriate Relationships with Prison Staff, 1995-1998*, 24 DEVIANT BEHAVIOR: AN INTERDISC. J. 175 (2003) (discussing how some inmates pursue consensual, romantic relationships with correctional employees).

⁴⁷ See NICOLE HAHN RAFTER, *PARTIAL JUSTICE, WOMEN IN STATE PRISONS 1800-1935*, at xix (1985).

⁴⁸ See CYNDI BANKS, *WOMEN IN PRISON: A REFERENCE HANDBOOK* 4 (2003).

⁴⁹ See NICOLE HAHN RAFTER & DEBRA L. STANLEY, *PRISONS IN AMERICA* 3 (1999).

⁵⁰ As Banks explains,

After 1815, many states erected penitentiaries based on two competing models—the Pennsylvania system used by Quakers, which isolated prisoners in individual cells and required complete silence both day and night; and the Auburn model, named after a prison in New York that opened in 1817, where the inmates, although isolated in cells at night, worked together in silence during the day and were subjected to extensive scrutiny and surveillance backed up by a rigid system of discipline.

BANKS, *supra* note 48, at 4.

on the model that prisoners should repent for their crimes through hard labor, silence, studying the scriptures, and corporal punishment.⁵¹

While the majority of prisoners were male, women did find themselves in the first U.S. prisons.⁵² Initially, women were held in the same facilities as men.⁵³ Not surprisingly, male prisoners and jailers preyed upon women in these early institutions. Conversely, some women traded sex for food, better treatment, and even their freedom. Either way, it was routine for women to conceive in prison.⁵⁴ In fact, there was a well-known practice of women “pleading their bellies”—seeking lenient treatment because of their pregnancies.⁵⁵ Pregnant women were allowed to escape the most severe punishments until after they delivered, at which point they typically were released to care for their infants.⁵⁶ Therefore, sexual exploitation has been a subtext of imprisonment since its inception.

Seeking to address the appalling conditions of prisons and the treatment of women in them, Elizabeth Gurney Fry, an early English reformer, began visiting women and children in English prisons. She began a campaign to push for better treatment for these women.⁵⁷ She saw this as a religious mission and recruited other religious women.⁵⁸ Not surprisingly, the standard of behavior that many reformers sought to promote for women prisoners was one that mirrored their own, particularly as it related to sexuality. During this period, women’s sexuality was severely proscribed.⁵⁹ Good women were not supposed to enjoy sex,⁶⁰ although they were obliged to have sex because it was their duty and because they were expected to produce heirs for their husbands. Therefore, the way to start reforming women in prison was by controlling their sexuality, training them for domesticity either as a wife or servant, and then saving their souls.⁶¹

⁵¹ *Id.*

⁵² *Id.*

⁵³ RAFTER, *supra* note 47, at 10.

⁵⁴ *Id.* at xxiv.

⁵⁵ See Wikipedia, Pleading the Belly (2005), available at http://en.wikipedia.org/wiki/pleading_the_belly.

⁵⁶ *Id.* In Britain, transportation to the colonies was another alternative. *Id.*

⁵⁷ ESTELLE B. FREEDMAN, THEIR SISTERS’ KEEPERS; WOMEN’S PRISON REFORM IN AMERICA, 1830-1930, at 123 (1981).

⁵⁸ *Id.*

⁵⁹ *Id.* at 18-20.

⁶⁰ *Id.*

⁶¹ BANKS, *supra* note 48, at 7.

Women who found themselves in prison either because of sexual crimes—like prostitution—or who engaged in sex in institutional settings—like prison—were thus prime targets for restrictions on sex in order to save them. Sex was seen as the primary vector for sin, and the best way to address this issue was to prohibit sex in these institutions—both for men and for women.

The reformist ideas of Elizabeth Fry soon gained ground in the United States.⁶² Christian women, primarily Quakers, looking to do their duty to God and country, set about caring for the poor and making visits at prisons.⁶³ What they found shocked them: women housed in male facilities were made available sexually for male inmates and male jailers.⁶⁴ Several scandals involving women who had conceived while in prison caught the attention of reformers and created the impetus for the Reform Movement in prison.⁶⁵

One of the major characteristics of the Reform Movement was the establishment of separate prisons for women.⁶⁶ These prisons were often directed and managed by all-female staff.⁶⁷ Women inmates were trained in the domestic arts—cleaning, cooking, and needlework.⁶⁸ They were taught to be modest and to abandon behaviors that had brought them into prison. Because most of these early reformers had religious ties to Christianity, there was a strong focus on teaching the Bible and, of course, denial of the need for sexual expression for all women, particularly women prisoners. Early reformers believed that sex was at the root of the problems that brought women into conflict with the law.

At the same time that the Reform Movement held sway, there was also a movement to look more into genetic or hereditary markers for a number of illnesses.⁶⁹ Criminality was seen as a mental illness, almost a congenital problem that affected criminals. There was a sense that it was possible to predict the behaviors of children by looking at the trajectory for

⁶² FREEDMAN, *supra* note 57, at 28.

⁶³ BANKS, *supra* note 48, at 6.

⁶⁴ See FREEDMAN, *supra* note 57, at 59.

⁶⁵ *Id.* at 60.

⁶⁶ *Id.* at 35, 47-52.

⁶⁷ See M. MORASH & P.J. SCHRAM, THE PRISON EXPERIENCE: SPECIAL ISSUES OF WOMEN IN PRISON 123 (2002) (nineteenth century social reforms called for separate institutions, and in 1873 the first institution with an all-female staff was founded).

⁶⁸ See RAFTER, *supra* note 47, at 39.

⁶⁹ FREEDMAN, *supra* note 57, at 41.

their parents.⁷⁰ Of course, this view was contested,⁷¹ but it informed much of the correctional practice in the early twentieth century.

It was only in 1942, with the *Skinner v. Oklahoma* decision, that the Supreme Court struck down statutes which permitted states to involuntarily sterilize prisoners and recognized that an individual's procreative ability was a fundamental right that deserved constitutional protection.⁷² In *Skinner*, the defendant had been convicted of more than two felonies. Under Oklahoma's Habitual Criminal Sterilization Act (the "Sterilization Act"),⁷³ the Court ordered Mr. Skinner's sterilization.⁷⁴ Mr. Skinner claimed that the Sterilization Act violated the Fourteenth Amendment of the Constitution.

Ruling for Mr. Skinner, the Supreme Court held that the Sterilization Act failed to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment. The Court found that the Sterilization Act treated defendants convicted of larceny and embezzlement the same, except that those convicted of larceny faced sterilization.⁷⁵ The Court found that, while "the equal protection clause does not prevent the legislature from recognizing degrees of evil" and

the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the

⁷⁰ RAFTER, *supra* note 49, at 10-13.

⁷¹ *Id.*

⁷² 316 U.S. 535 (1942).

⁷³ See *id.* at 536 (defining a habitual criminal under Oklahoma's Habitual Criminal Sterilization Act as a person who, having been convicted two or more times for crimes amounting to felonies involving moral turpitude, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution). The Act further provides that "a proceeding against such a person may be instituted for a judgment that such person shall be rendered sexually sterile." *Id.*

⁷⁴ See *id.* at 537 (noting that the sterilization would be through "the operation of a vasectomy in case of a male").

⁷⁵ This is akin to the debate over differences in penalties for powder cocaine and crack cocaine. See Elizabeth Tison, Comment, *Amending the Sentencing Guidelines for Cocaine Defenses: The 100-to-1 Ratio is Not As "Cracked" Up As Some Suggest*, 27 S. ILL. U. L. J. 413, 431 (2003) (noting that "data suggests that it is possible that African-Americans comprise the majority of crack-related offenses due to the simple fact that, statistically, African-Americans use and sell crack more than Caucasians. Caucasians, in contrast, use and sell powder cocaine more than African-Americans"); see also Deleso Alford Washington, "Every Shut Eye, Ain't Sleep": *Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women From a Critical Race Feminist Perspective*, 13 AM. U. J. GENDER SOC. POL'Y & L. 123, 135 (2005) (stating that "[t]he devastating aspect of the 100-to-1 quantity ratio is the disproportionate impact on Blacks and people of color who become incidental collateral in the so-called 'war on drugs'"). Then, as now, criminal penalties fell disproportionately on poor people and on people of color.

same . . . , [w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . [t]he equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.⁷⁶

The Court found that larceny and embezzlement were fundamentally the same except for the sterilization penalty, which made for “invidious discriminations . . . in violation of the constitutional guaranty of just and equal laws.”⁷⁷

Against this backdrop of religious proscription of sexual activity and foundational notions that criminality is in some way inherited, it is not surprising that restrictions on sexual expression in prison remain today. At the same time, these proscriptions that ostensibly prohibit sex create a system where prison staff are the gatekeepers of sexual expression, using sex as a management tool by either allowing or prohibiting sexual expression as they wish.⁷⁸ In every state, correctional policies prohibit sexual behavior by inmates, whether that conduct is with staff or other inmates.⁷⁹ In many states, policies also prohibit any conduct that a prisoner may engage in for her own sexual gratification, whether that is masturbation or the use of objects.⁸⁰ There is a sense among correctional leaders that, if

⁷⁶ *Skinner*, 316 U.S. at 540-42.

⁷⁷ *Id.* at 542.

⁷⁸ See, e.g., *Lucas v. White*, 63 F. Supp. 2d 1046 (N.D. Cal. 1999) (finding that Bureau of Prison officials placed women in an otherwise all-male security housing unit, opened plaintiff female inmates’ cell doors for male prisoner’s access, allowed the physical and sexual harassment of plaintiffs, allowed correctional officers and male prisoners to assault and rape plaintiffs in retaliation for previous claims of wrongdoing, and failed to properly evaluate, train, discipline, and supervise custodial personnel so as to prevent such occurrences); *Cumbey v. Meachum*, 684 F. 2d 712, 713 (10th Cir. 1982) (alleging that cross-gender supervision where female staff can view male inmates showering, undressing, and using the toilet is a violation of privacy).

⁷⁹ See, e.g., MICH. DEPT. OF CORR., WOMEN PRISONER’S GUIDE TO IDENTIFYING AND ADDRESSING GENDER-BASED MISCONDUCT 11 (2001) (advising that “sex between prisoners and staff is never ok”); CAL. DEPT. OF CORR., SEXUAL ABUSE/ASSAULT PREVENTION AND INTERVENTION: AN OVERVIEW FOR OFFENDERS, KNOW YOUR RIGHTS & RESPONSIBILITIES (2000). The California document notes that

the [California Department of Corrections] specifically forbids sexual activity between inmates/parolees and staff, contractors, volunteers. The CDC will prosecute the staff regardless of your agreement. The law, Penal Code Section 289.6, will not allow the employee to use your consent as a defense to prosecution. **There is no exception to this.**

Id. (emphasis in the original).

⁸⁰ See, e.g., TEX. DEPT. OF CRIM. JUST., CORRECTIONAL INSTITUTIONS DIVISION, DISCIPLINARY RULES AND PROCEDURES FOR OFFENDERS 27 (2005), available at <http://www.tdcj.state.tx.us/> (prohibiting masturbation when performed in such a way that others become aware that the offender is masturbating, and designating the activity as sexual

sex were permitted, it would compromise the safety and security of institutions, the core correctional mission.⁸¹ While this may be true for some sexual interactions, there is a range of legitimate prisoner interests in allowing sexual expression that do not threaten this core correctional mission of safety and security.

III. INMATES' INTERESTS IN SEXUAL EXPRESSION

While there are certain sexual interactions that clearly have the potential to affect safety and security in an institution, there are others that are non-threatening. In particular, sexual interactions between inmates and staff have the clear potential to affect prison safety and security. First, there is an inherent imbalance of power between staff and inmates. Correctional staff control every aspect of the prisoner and the prison experience: housing, recreation, discipline, communication with the outside, and even the length of an inmate's sentence. Second, there have been many reported incidents of staff relationships with inmates that resulted in escapes, loss of life, and issues that compromised the safety and security of not only staff but also other inmates.⁸² Finally, as a policy matter, state recognition of relationships

misconduct). Because the prison environment, by its very nature, provides very little privacy to an inmate, it is more likely than not that someone would become aware that an inmate is masturbating. See also CHRISTOPHER HENSLEY ET AL., *Masturbation Uncovered: Autoeroticism in a Female Prison*, 81 PRISON J. 491, 499 (2001) (reporting that "masturbation in prison is almost always a rule infraction" and that the proportion of females reporting that they do masturbate in prison is nearly twice the proportion of free society women).

⁸¹ See Mission of the Mississippi Department of Corrections, <http://www.mdoc.state.ms.us/mission.htm> (last visited Dec. 3, 2005) (stating its mission as "provid[ing] and promot[ing] public safety through efficient and effective offender custody, care, control and treatment consistent with sound correctional principles and constitutional standards"); Agency Mission of the Arizona Department of Corrections, <http://www.azcorrections.gov/Ethics.html> (last visited Dec. 3, 2005) (seeking to recruit "a well-trained, professional work force to serve and protect our communities and its crime victims by effectively employing the field's best security practices and proven pre-release programming to prepare for the release and reintegration ex-offenders as civil, productive citizens"); WYOM. DEPT. OF CORR., POLICIES AND PROCEDURES § IV, *available at* http://doc.state.wy.us/pdf/field_services/1-201.pdf (last visited Dec. 3, 2005) (describing its goal to "contribut[e] to public safety by exercising reasonable, safe, secure and humane management, while actively providing offenders opportunities to become law-abiding citizens").

⁸² See, e.g., *Dragnet out for fugitive and wife, both escape in hail of gunfire that killed guard*, CNN.COM, Aug. 10, 2005, *available at* <http://edition.cnn.com/2005/US/08/09/inmates.escape/> (describing the manhunt for an escaped prisoner liberated by former prison nurse who he had married and the death of a corrections officer shot pursuant to the escape); *McNairy County Sheriff found guilty of helping inmate escape*, WBIR.COM, OCT. 28, 2005, *available at* <http://www.wbir.com/news/news.aspx?storyid=29706&provider=tss> (describing the sheriff's conviction for early release of a female inmate after she was reportedly impregnated by a jailer).

between staff and inmates as “consensual” puts the legitimacy of the state’s care and custody of inmates in question.

While there is abundant authority on the inappropriateness, inadvisability, or ethical concerns raised by sex between lawyers and clients,⁸³ priests and parishioners,⁸⁴ physicians and patients,⁸⁵ and teachers

⁸³ See MODEL CODE OF PROF’L RESPONSIBILITY R.1.8(j) (2005) (stating that “[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced”). See generally *In re Pellizzari*, 726 A.2d 451 (R.I. 1999) (holding that engaging in sexual relations with a client during divorce proceedings warranted public censure); *In re Adams*, 428 N.E.2d 786 (Ind. 1981) (holding that grabbing a female client, kissing her, and raising her blouse warranted a public reprimand pursuant to an agreement for discipline); Comm. on Prof. Ethics and Conduct of the Iowa State Bar Ass’n v. Durham, 279 N.W.2d 280 (1979) (holding that sexual contacts between attorney and client in a manner which does not constitute an illegal act and is not inherently wrong, not extending beyond caressing and fondling between the female attorney and the male client, but occurring during the attorney’s visits to client in penitentiary in a professional capacity, warranted reprimand).

⁸⁴ See THE CODE OF CANON LAW, Book II, Part I, Tit. III, ch. III: The Obligations and Rights of Clerics (1983), available at <http://www.ourladywarriors.org/canon/c0204-0329.htm>. It states that

[c]lerics are to behave with due prudence in relation to persons whose company can be a danger to their obligation of preserving continence or can lead to scandal of the faithful. The diocesan Bishop has authority to establish more detailed rules concerning this matter, and to pass judgment on the observance of the obligation in particular cases.

Id.; see also THE CODE OF CANON LAW, Book VI, Part II, Tit. V: Offenses Against Special Obligation, available at <http://www.ourladywarriors.org/canon/c1364-1399.htm#par2874>. The Code of Canon Law states that

a cleric living in concubinage, and a cleric who continues in some other external sin against the sixth commandment of the Decalogue which causes scandal, is to be punished with suspension. To this, other penalties can progressively be added if after a warning he persists in the offence, until eventually he can be dismissed from the clerical state. A cleric who has offended in other ways against the sixth commandment of the Decalogue, if the crime was committed by force, or by threats, or in public, or with a minor under the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

Id. See generally Ellen Whinnett, *Priest Sacked for Sex Proposals, Senior Catholic ‘hit on’ Two Men*, THE MERCURY, Oct. 25, 2003, at 2; *Santa Fe Bishop Replaced After in Sex Scandal*, CHI. TRIB., Aug. 18, 1993, at 3M; Patricia Corrigan, *Belleville Diocese Removes Fourth Accused Priest*, ST. LOUIS POST-DISPATCH, Mar. 31, 1993, at 3A; Jonathan Friendly, *Roman Catholic Church Discusses Abuse of Children By Priests*, N.Y. TIMES, May 4, 1986, at 26.

⁸⁵ See AM. MED. ASS’N CODE OF ETHICS § E-8.14 (2005) (discussing sexual misconduct in the practice of medicine); § E-8.145 (describing sexual or romantic relations between physicians and key third parties); § E-10.015 (discussing the patient-physician relationship); § E-3.08 (addressing sexual harassment and exploitation between medical supervisors and trainees).

and students,⁸⁶ there is very little scholarly literature on consensual relations between prisoners and correctional staff.⁸⁷ That is not surprising since the prisoner/prison staff pairing epitomizes the inequality of power and the potential for abuse of that power. Seemingly, there is little to discuss or critique. However, viewing sexual expression in prison from the prisoner perspective yields a different result. Prisoners have an interest in sexual expression separate from that of the state, even in sexual interactions with staff.⁸⁸ Outlined below are various types of sexual expression that occur in penal settings, and the respective interests of the state or correctional authorities and of prisoners in recognizing inmate sexual expression.

⁸⁶ See generally *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (seeking monetary damages under Title IX for a teacher's sexual harassment of a student); see also generally *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (determining for the first time that discrimination on the basis of sex for purposes of Title IX and its regulations included sexual abuse of a student by a teacher); *Byanard v. Lawson*, 112 F. Supp. 2d 524 (E.D. Va. 2000) (bringing an action against a school principal and school board after a teacher sexually abused a student).

⁸⁷ AMNESTY INT'L, USA (NEW YORK STATE), AMNESTY INTERNATIONAL CALLS FOR RESTRICTION OF THE ROLE OF MALE GUARDS IN FEMALE FACILITIES (2000). According to Amnesty,

[i]n April 2000 a guard at Albion Correctional Facility, a state prison, was charged with third-degree rape and official misconduct. This resulted from a three-month sexual relationship with a female prisoner. According to information submitted to the court from the victim's attorney, during the three-month period, the guard was alleged to have attempted to rape the female prisoner and to sodomize her and commit acts of sexual abuse. The guard pleaded guilty to official misconduct as the sex was seen as 'consensual'.

Id. at 1-2.

⁸⁸ Mumia Abu-Jamal, *Caged and Celibate*, in PRISON MASCULINITIES 139, 141 (Don Sabo et al. eds., 2001). Abu-Jamal discusses two cases where prisoners attempted to give some expression to their sexuality:

One prisoner, struck by a nurse's gentle manner, badly misinterpreted a simple smile for genuine affection, and in his mind there arose the belief that she was his wife. He went so far as to argue with and threaten fellow prisoners who dared to talk with her. This grew into a fixation so pointed that, after several suicide attempts, which were probably staged in order to gain her sympathy or access her nursing skills, he was committed to a regional mental facility for several weeks. After his return, he no longer claimed that the female staffer was his wife, but his fingers fidgeted constantly and his tongue perpetually darted in and out of his mouth. . . . Another prisoner, imprisoned for more than a decade, since his midteens, developed a jailhouse reputation for flashing au naturel whenever a female staffer, usually a nurse, came to his cell. Orders and repeated misconduct reports failed to deter his practice. The administration finally assigned a male nurse to attend to his medical needs. The flashings and many of his illnesses ceased.

Id.

A. Sex for Pleasure

*It was a complete surprise, therefore, when V., now known to Denise and Julie almost exclusively as Bubble Gum Man, popped the lock of their cell during count one afternoon. This was how it always happened, Denise knew by now, and the sound of that lock being undone prompted something close to panic. She'd allowed herself to chat with him for a few minutes earlier that day, but she hadn't meant anything by it. She certainly didn't want to go out to him now. Didn't want to fool around at all. Not with Bubble Gum Man. Julie, of course, was thrilled. It was safe, she kept saying. No one would ever know. All the girls were locked in their rooms, and he was an officer, for chrissake. Didn't she want some? All she had to do was walk out of her cell and across the corridor maybe five feet to the bubble, and there he'd be, waiting for her. He was wicked good-looking, she said, even by outside standards (maybe), and his cute little earring? Just go! Go!*⁸⁹

Notwithstanding the desire to think otherwise, individuals continue to have an affirmative interest in sexual expression even during institutionalization. That is certainly the case in nursing homes, residential drug treatment facilities, juvenile detention facilities, psychiatric institutions, and certainly in prisons.⁹⁰ Yet institutional policy in each of these settings, including prisons, denies that this basic drive exists. A staple of institutional policy is the prohibition on sex between residents⁹¹ and between staff and residents.⁹² Interestingly, this policy has shifted recently in some residential settings. Both nursing homes and residential programs for the mentally retarded, for example, have begun to allow sex between residents.⁹³ However, in psychiatric settings, drug treatment facilities,

⁸⁹ RATHBONE, *supra* note 38, at 64.

⁹⁰ See *supra* note 46 and accompanying text.

⁹¹ See, e.g., Mayers, *supra* note 46, at 219 (reporting on a study to obtain information, through surveys of nursing staff, about the extent of sexual behavior among geriatric patients with dementia, nurses' desire for training, and their views about the effectiveness of varying management approaches).

⁹² See Peter B. Gruenberg, *Boundary Violations*, in ETHICS PRIMER OF THE AMERICAN PSYCHIATRIC ASS'N 3, 4 (2001), available at http://www.psych.org/edu/res_fellows/ep/DL01.pdf (discussing the American Psychiatric Association's longstanding principle against a doctor engaging in sexual activity with a former or current patient and the patient's inability to provide informed consent to such a relationship).

⁹³ See generally Dirk Johnson & Julie Scelfo, *Sex, Love and Nursing Homes*, NEWSWEEK, Dec. 15, 2003, at 54 (reporting on how nursing homes are coping with the desire for sex and intimacy among residents); Feldkamp, *supra* note 46 (focusing on sexuality among elders in long-term care facilities in the United States, rights of nursing homes residents, the role of facility personnel in teaching safe sex among residents, and tips in handling the sexual activities of a resident). See generally THE ARC, POSITION STATEMENT: SEXUALITY, *supra* note 46 ("People with mental retardation and related developmental

juvenile settings, and prisons, the prohibition by and large remains.⁹⁴ One cannot help but wonder if a reason for this continued denial is the perceived unworthiness or unreliability of these individuals in the expression of their sexuality.

In spite of society's sense of either the desirability or deservedness of prisoner sex, prisoners have an interest in sex simply for pleasure,⁹⁵ and there are few outlets for expression in prison. In the last decade, "get tough on crime" has meant removing recreation for prisoners,⁹⁶ cutting education programs,⁹⁷ and limiting opportunities for furlough.⁹⁸ Tight state budgets

disabilities, like all people, have inherent sexual rights and basic human needs. These rights and needs must be affirmed, defended and respected.").

⁹⁴ But see Henry E. Cauvin, *Hinckley Wants Girlfriend, Psychologist Says in Court*, WASH. POST, Sept. 20, 2005, at A10 (reporting on John Hinckley's request for more freedom in order to seek out intimate relationships and the psychologist's assessment that Hinckley's desire for such a relationship was natural).

⁹⁵ See Stephen "Donny" Donaldson, *A Million Jockers, Punks, and Queens*, in PRISON MASCULINITIES 118, 125 (Don Sabo et al. eds., 2001). According to Donaldson,

These prisoners, who are perhaps focused more on the physical and less on the psychological dimensions of sexual activity than are members of the middle class, insist that the difference between the experience of entering a female mouth and of entering a male mouth is not significant, that the experiential difference between entering a vagina or female anus and a male anus is not significant. In all of these cases, they are aggressive, thrusting, dominating, stimulating the nerves in their own penis in quite similar fashion, inserting their energy and themselves into another body, and obtaining orgasms for themselves.

Id.

⁹⁶ See Carl M. Cannon, *Punishment, Not Rehabilitation*, NAT'L L. J., Aug. 15, 1998, at 1910 (discussing California's removal of weight-lifting equipment from prisons).

⁹⁷ See *id.* ("Congress has cut educational opportunities in prison by eliminating Pell Grants for inmates."). See generally, Charles B. A. Ubah, *Abolition of Pell Grants for Higher Education of Prisoners: Examining Antecedents and Consequences*, J. OFFENDER REHAB. 39, 73 (2004) (discussing how rehabilitative and reintegrative correctional philosophies view prison inmate college education as an effective approach to reduction of inmate recidivism rate); see also Bobbie L. Huskey, *Think Twice Before Abolishing Inmate Privileges*, 57 CORR. TODAY 6 (1995):

Studies have shown that inmates who have obtained their GED and a marketable skill while in prison have a lower recidivism rate. In Illinois, for example, inmates who earned their GED while incarcerated have a return-to-custody rate of only 4.5 percent—compare this to the 40 to 50 percent rate that some states have reported for inmates who have not obtained their GED.

⁹⁸ See generally George M. Anderson, *Parole Revisited*, AM. MAG., Mar. 4, 2002, available at <http://www.americamagazine.org/gettext.cfm?articleTypeID=1&textID=1621&issueID=363> (describing how, in the last thirty years, the opportunities for prisoners to obtain early release has decreased dramatically because of get-tough-on-crime laws).

have meant that there is tremendous idle time in prisons and jails,⁹⁹ leaving inmates with few productive activities. Thus, prisoners find a way to occupy themselves and experience pleasure with tools that they control—their bodies.

From my perspective, the state has little interest in regulating inmates' sexual expression for pleasure, except to the extent that it compromises safety and security or other legitimate penological goals.¹⁰⁰ While there is often an argument that men and women cannot “program” because they are too interested in sex,¹⁰¹ sexuality is a feature of life both on the inside and in the free world. A more nuanced and informed reading of the correctional mission would recognize the importance of assisting inmates to make responsible decisions about sexual engagement and about whether sex in an institutional environment, with its limited range of choices, is wise. As described above, correctional authorities have an interest in prohibiting sex between staff and inmates, but the value of prohibiting sex for pleasure—with appropriate boundaries for inmates—is less clear. Indeed, in enforcing the prohibition, correctional authorities miss an opportunity to educate inmates about violence in relationships, to talk about safe sex, and to encourage healthy relationships that could offer support upon reentry.

B. Sex for Trade

I started talking real nice to the officer where I worked, in the laundry.

⁹⁹ See Huskey, *supra* note 97. Huskey comments,

Unfortunately, because of budget constraints, we don't have enough productive work and treatment programs throughout the prison and jail system. Often, we are left with inmates who are lying in their cells doing nothing or are doing unproductive work. Idleness and mindless work many times lead to trouble. Trouble then can translate into injury not only to other inmates but especially to corrections staff.

Id.

¹⁰⁰ See *Turner v. Safley*, 482 U.S. 78, 92 (1987) (finding that the correspondence regulation was reasonably related to legitimate security interests, while the marriage regulation did not satisfy the reasonable relationship standard because it was an exaggerated response to rehabilitation and security concerns and there were obvious, easy alternatives to the regulation).

¹⁰¹ In correctional parlance, “program” is often used to refer not to a particular program or activity, but as a verb to refer to inmates' participation in programs and activities. Often “programming” is tied to reduced sentences or greater privileges in institutional settings.

*He was married but I told him how his old lady didn't pay him enough attention. You know that if he was my man how I would treat him. He started writing me notes and cards. Pretty soon I got him to bring in eyeliner, perfume, and some cigarettes. I sold the stuff. Oh it was fun to talk to him and stuff but I never it get any further. I mean I never let him touch me or anything. I used him to make my life easier in here. Why not? You'd do the same thing.*¹⁰²

In prison, sex is both a highly valued item and a relatively cheap commodity. In the prison environment, items that are prohibited, such as sex, cigarettes, "street food," money, drugs, and commissary,¹⁰³ become extremely valuable. Prisoners and staff engage in trade for items they want and cannot get. Prisoners, however, are limited in what they have to exchange. For many prisoners, the only item they have to trade is themselves. In some institutions, there is a menu of sexual practices that are bartered for common items like cigarettes, candy, chips, or a phone call.¹⁰⁴ In still other iterations of the exchange, prisoners who have money are exploited sexually and intimidated for their commissary.¹⁰⁵

Certainly prisoners have an interest in using their resources to get what they want, even if that means using their bodies.¹⁰⁶ However, the prison's interest in the safety and security of the institution suggests that sex for trade should be prohibited. The potential for violence is great, particularly when people do not deliver what they agreed to in exchange for either sex or the sought after item.¹⁰⁷ Moreover, this system of bartering

¹⁰² See Worley, *supra* note 46, at 186.

¹⁰³ Commissary is essentially a canteen where prisoners can purchase non-prison food and items with their personal funds. Prisoners with more money can purchase food, shoes, toiletries, and phone cards from the commissary. See Memorandum from Richard L. Shiffrin, Office of Legal Counsel, to the Assistant Attorney General, Civil Division §1 (May 22, 1995), available at <http://www.usdoj.gov/olc/bptrust1.htm>.

¹⁰⁴ See OWEN, *supra* note 39, at 23 (reporting the staff's belief "that when inmates were victimized sexually, they were also more likely to be exploited in other ways," and discussing the fact that "[r]eports of sexually victimized inmates giving their assaulter money, clothes, food, commissary items and other commodities appeared in several of the focus groups"); *c.f.* Ice v. Dixon, No. 4:03CV2281, 2005 U.S. Dist. LEXIS 13429 (N.D. Ohio July 6, 2005) (alleging that defendant Dixon promised to arrange for Ice's release if she performed oral sex and other sex acts upon him).

¹⁰⁵ See Worley, *supra* note 46, at 185-89 (discussing "exploiters," or inmates who aggressively forge inappropriate relationships with staff members to make illicit profits in the underground prison economy).

¹⁰⁶ See Susan E. Thompson, *Prostitution—A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217 (2001) (supporting women using their bodies through prostitution as an acceptable means of obtaining care for themselves and their families).

¹⁰⁷ See Worley, *supra* note 46, at 186. He quotes one inmate as follows:

often occurs because there are not legitimate ways for inmates to gain access to those items or to decrease the desire for them, e.g., tobacco.

For example, in *Women Prisoners v. D.C.*,¹⁰⁸ some of the incidents of sexual misconduct that fueled the litigation developed in exchange for cigarettes, candy, food, and work assignments at the D.C. Correctional Treatment Facility.¹⁰⁹ The D.C. Department of Corrections converted a facility that had initially been intended to do assessments and provide drug and mental health treatment to a facility for general population inmates who needed jobs, recreation, and contact with the outside. Because of the original mission of the facility, the facility was a smoke-free environment for both staff and inmates. Staff continued to smoke and marketed their cigarettes to prisoners in exchange for sex.¹¹⁰ Additionally, the lack of employment opportunities for women in the institution meant that women were more vulnerable than men to sexual predation. Unable to buy commissary with money they would have earned had they been permitted to work, women traded sex for candy, potato chips, and phone calls.¹¹¹

The harm to the municipality, the agency, and the prison facility was immense. In addition to civil litigation brought by women prisoners against the District of Columbia, the D.C. Department of Corrections, corrections officials, and individual officers, the culture fostered an environment where even female staff felt at risk for sexual abuse and ultimately filed a Title VII suit against the District of Columbia Department

If a boss wants to stop, I'll give her a couple of months. But you never let them quit. An inmate can always threaten to go to rank, and if that don't work then I tell him something like, "I ain't got but 15 months to go before I discharge. I know you love your kids. I'd hate to see them get hurt." Bosses with kids won't want anything to happen to their family.

Id.

¹⁰⁸ 877 F. Supp. 634 (D.D.C. 1994), *vacated and modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995), *rev'd in part and remanded on other grounds*, 320 U.S. App. D.C. 247, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997), *on remand*, 968 F. Supp. 774 (D.D.C. 1997) (order regarding sexual harassment, medical care, programs, environmental health, and fire safety).

¹⁰⁹ *Id.* at 664-67.

¹¹⁰ The author was co-counsel in this litigation, which challenged a pattern and practice of sexual abuse of women incarcerated in a D.C. correctional facility and unequal educational, vocational, and religious opportunities for female inmates. The litigation was dismissed with prejudice with the consent of the parties in 2004. *See also* RATHBONE, *supra* note 38, at 59-61 (describing sex-for-cigarettes scandal where women inmates agreed to correctional staff's fondling in exchange for cigarettes).

¹¹¹ *See Women Prisoners*, *supra* note 108; *see also* RATHBONE, *supra* note 38, at 47 (explaining that "[g]iving a [correctional officer] a blow job could get you a couple of cigarettes, or a box of matches, or an order of take-out Chinese food, delivered direct from the restaurant and still hot").

of Corrections, alleging a pattern and practice of sexual harassment that included behavior very similar to that which formed the basis for the female prisoners' claims for constitutional protection.¹¹² Sex for trade therefore created an environment where both prisoners and staff had to negotiate for items that should have been either readily available or entirely unavailable to both staff and inmates, such as tobacco. These abuses resulted in several inmate pregnancies, some of which were carried to term and others which ended in abortion.¹¹³ For many women inmates who had long histories of physical and sexual abuse both as children and adults by people in authority, it reinforced a pattern of behavior where sex was commerce and detached from self. This is sexual expression that should be prohibited by corrections' authorities as it creates an environment where both staff and inmates are at risk for sexual violence and harassment.

C. Sex for Freedom

*The first time they touched, they were in the utility closet, shortly after she started to work on his crew, Julie told me. She'd been trying to get down a box of mops and dropped them on his head by mistake. He made use of the confusion to grab the back of her jeans and turn her around to face him. Thinking, "Fuck it, why not?" she let him kiss her. From then on they did it everywhere – in the basement where they keep the lawn mowers, in the broom closet right by the entrance to the institution, even in the small chapel.*¹¹⁴

For many prisoners sexual expression is a corollary of freedom. Whether they are imprisoned for short or long sentences,¹¹⁵ sexual expression, though limited, is one of few acts within their control. There is a wealth of literature on the "situational" sexuality that occurs in prison: men who have sex with men or women who have sex with women, but do not

¹¹² See generally *Neal v. District of Columbia*, No. 93-2420 (RCL), 1995 U.S. Dist. LEXIS 11461 (D.D.C. Aug. 9, 1995) (finding for female employees in a Title VII suit alleging that the employer engaged in a pattern of sexual harassment by creating a hostile working environment, by making job benefits conditioned upon the grant of sexual favors, and by retaliating against those who challenged the harassment).

¹¹³ *Women Prisoners*, 877 F. Supp. at 641.

¹¹⁴ RATHBONE, *supra* note 38, at 51.

¹¹⁵ See LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, WOMEN OFFENDERS 10-11 (1999) (indicating types of sentences served by women); PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONERS IN 2004, at 4 (2005) (indicating in Table 4 prisoners sentenced to one or more or one or less years in prison according to the jurisdiction of State or Federal correctional authorities under which they are sentenced).

consider themselves as gay or lesbian.¹¹⁶ While incarcerated, those prisoners' sexual expression has been constrained by the state, and thus in prison they are forced to pursue sex with partners who they may not have sought in the community. Still other prisoners seek out staff members of either the same or opposite gender in order to have sex. While prisoners' choices are constrained during incarceration, even making the choice to have sex when it is prohibited is an expression of freedom, albeit in a situation of constraint.

D. Sex for Transgression

*I've had sex with the wives of two different wardens. One night around Christmas, I went over the house of one warden and his wife asked me to put her son's bicycle together. You know it was a Christmas present. Then she cooked dinner for me and we had sex right there in the kitchen, on the floor. I can talk my way into any woman's panties. I did it 'cause I could. You know what I'm saying? Man when they busted me for that, all hell broke loose. It was hilarious. Yeah, I lost my outside trusty job but it was worth it 'cause I embarrassed the shit out of that warden and his family. I still can't stop laughing 'bout it.*¹¹⁷

Just like in the world outside of prison, sexual expression can be an expression of freedom. This freedom of expression is closely associated with transgression—breaking the rules and going against the normative structures imposed by society, the state, and other institutions. Sexuality and gender are both normative structures imposed by society,¹¹⁸ and both are performative.¹¹⁹ Individuals adopt behaviors and practices that are consistent with their performance as males or females. Prisoners use sex to transgress these normative structures by performing in ways that defy society's constructs of gender and sexuality.

¹¹⁶ See also James E. Robertson, *The Prison Rape Elimination Act: A Primer*, 40 CRIM. L. BULL. 5 (recounting prison guards' accounts that some inmates will fight sexual advances because if they did not, they would risk being considered gay). See generally DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 124 (1980).

¹¹⁷ Worley, *supra* note 46, at 190.

¹¹⁸ See Janet Shibley Hyde & Sara R. Jaffee, *Becoming a Heterosexual Adult: The Experiences of Young Women*, 56 J. SOC. ISSUES 283 (2000) (reviewing research about girls' transition from adolescent to adult heterosexuality and emphasizing the influence of messages about sexuality from their peer group, family, and their culture more broadly). See generally JUDITH P. BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) (discussing how gender and sexuality are hegemonic).

¹¹⁹ See generally BUTLER, *supra* note 118 (originating the idea that sexuality and gender are "performative").

First, the act of having sex is against set prison policies and rules, and therefore transgressive.¹²⁰ Second, prisoners can have sex with staff, thereby jeopardizing security and putting the correctional mission at risk.¹²¹ It is the ultimate way to thwart the system, and often prisoners use this method of manipulation.¹²² There are reams of training materials written for correctional staff on avoiding prisoner manipulation,¹²³ yet to manipulate and try to change or control a situation of powerlessness is normative behavior.¹²⁴ The prisoner and the state, symbolized by correctional authorities, are constantly at odds. In the present environment, inmates will seek to gain power and control in any way they can. If sex is an advantageous tool, then prisoners will use it to their advantage to thwart, control, embarrass, and harm those who control them within the confines of prison. Therefore, prisoners use sexuality as a means of expressing their autonomy, freedom, and transgression, because having sex with staff—a symbol of the state or prison—affects the state and the prison's system of control.

E. Sex for Procreation

*Young women without children doing life sometimes wonder
if they will ever bear a child. Some truly pine for this child-bearing,
as if it proves that they are still alive. If a woman is a teenager when she
comes to prison, she may actively seek to become pregnant and have*

¹²⁰ See Worley, *supra* note 46, at 178 (“Rather, prisoners can, through staff manipulation, actively exert control over their personal situation to mediate or lessen the pains of imprisonment.”).

¹²¹ See *id.* at 190 (“[T]hese respondents admitted that they actually thrived on putting staff members into situations that compromised their jobs as well as the facility’s security.”).

¹²² See *id.* (“As one offender explained, having an inappropriate relationship with a prison staff member was the ‘ultimate way to out-con the law.’”).

¹²³ See generally James Topham, *Sting!*, CORRECTIONS TECH. MGMT. MAG. (2000) (discussing the three steps that inmates use to manipulate staff: techniques, tools, and turnouts. The first two stages are used to catch the staff member to be victimized, while the turnout is when the inmate receives the payoff for his or her ability to manipulate the victim); Gary Cornelius, THE ART OF THE CON: AVOIDING OFFENDER MANIPULATION 43-68 (2001) (describing inmate tools of manipulation with case examples); BUD ALLEN & DIANA BOSTA, GAMES CRIMINALS PLAY: HOW YOU CAN PROFIT BY KNOWING THEM 64-68 (1981) (discussing inmate manipulation of staff through sex and emotion).

¹²⁴ See Kelly D. Askin, *A Decade in Human Rights Law: A Decade of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BR. 16, 17 (2004) (chronicling findings of international tribunals on the use of rape of women in conflict to “create an atmosphere of fear and powerlessness”).

*a child—in her mind, before she can't. She may see the child as something of hers that she has created that is a good thing, a plus. She may have no concept of raising a child, or having a child with a parent in prison; she may literally not have thought that far ahead.*¹²⁵

Procreation is another aspect of sexual expression that survives imprisonment.¹²⁶ There are still clear vestiges of the early reformer and eugenic sentiment that criminals should not bear children.¹²⁷ Recently, in two different settings, professionals expressed shock that male and female prisoners might legitimately want to conceive children: the Feminism and Legal Theory Project held at American University, Washington College of Law, in March, 2004, where the audience was composed primarily of feminist scholars and students; and a training on Operational Practices in Women's Prisons held in June, 2005, where the audience was mainly correctional professionals.¹²⁸

The audience at the Feminism and Legal Theory Project wondered if this was a responsible position given that prisoners would not be able to parent the children they conceived. Correctional professionals wondered why these people should be permitted to bear children given their crimes,

¹²⁵ See Interview by Tracye Payne Wilson with Elaine Lord, Warden, Bedford Hills Correctional Facility (Oct. 2003). A transcript is available in *Our Place*, 4 *Finding Our Place* (2003) at 23, available at <http://www.ourplacedc.org/images/newslet/OurPlaceFall03.pdf>.

¹²⁶ Sentenced men and women may initially think of the separation from family and of the age they will be when they are released. However, they may not consider the impact of imprisonment on fertility. In that sense, loss of fertility becomes a collateral consequence of imprisonment. See Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT, THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 122-28 (Marc Mauer & Meda Chesney Lind eds., 2003) (discussing how the incarceration system is "intricately involved" in the dissolution of the family organization). See generally Federal Resource Center for Children of Prisoners, Child Welfare League of America, <http://www.cwla.org/programs/incarcerated/default.htm> (last visited Dec. 20, 2005); see also JOHN M. JEFFRIES ET AL., *SERVING INCARCERATED AND EX-OFFENDER FATHERS AND THEIR FAMILIES: A REVIEW OF THE FIELD*, VERA INSTITUTE OF JUSTICE 3 (2001) (surveying existing research and presenting findings from visits and from discussions with fathers who participate in programs such as the Incarcerated Fathers Initiative, and with program directors, prison administrators, and social service providers).

¹²⁷ Brenda V. Smith, Spoken Remarks at Panel on Intimacy, Sexuality and Fertility with Specific Reference to Women Prisoners: Animating the Feminist Body at the Feminism and Legal Theory Project: Celebrating 20 Years of Pedagogy, Praxis and Prisms, Mar. 19, 2004 (Washington, D.C.) (discussing intimacy, sexuality and fertility for women in custody and its challenge to feminist theory); Brenda V. Smith, Spoken Remarks at Panel on Legal Issues at the U.S. Dept. of Justice, National Institute of Corrections Training Session: Operational Practices in Women's Prisons, June 9, 2005 (Alexandria, VA) (presentation to correctional leaders on legal issues affecting women in prison including issues of fertility and procreation).

¹²⁸ *Id.*

i.e. that functional sterility was part of the penalty that prisoners should pay for their crimes. Both audiences were concerned that the state would be called upon to care for these children conceived while the parents were in custody. Neither group recognized the desire to procreate as separate from the desire to parent.

Yet both male and female prisoners desperately want to become parents—conceive, aid in conceiving, bear, and raise children. Given the construct of U.S. prisons, where prisoners have very limited contact with their children or lose custody of their children as a result of their imprisonment,¹²⁹ prisoners are left with merely conceiving or fathering children as the their primary way of sexual expression through procreation.

Male and female prisoners accomplish these goals in a variety of ways.¹³⁰ Male inmates may impregnate their partners from the community during conjugal visits or during routine prison visits.¹³¹ Female inmates often have less contact with their male partners during imprisonment and are less likely to have the opportunity for conjugal visits.¹³² The availability

¹²⁹ See DONALD BRAMAN, *Families and Incarceration*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 122-23 (Marc Mauer & Meda Chesney-Lind eds., 2003) (discussing the strain that incarceration places on the family organization). See also Beth E. Richie, *The Social Impact on Women*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 139-40 (Marc Mauer & Meda Chesney-Lind eds., 2003) (discussing the obstacles to parenting posed by confinement, such as sudden and forced separation, long distances between urban neighborhoods and correctional facilities, lack of accessible public transportation, obscure visiting hours, and long waits at visiting hours).

¹³⁰ See Interview by Tracye Payne Wilson with Elaine Lord, *supra* note 125. Some women have voluntarily engaged in sexual relations with staff in order to conceive, either because they are serving long sentences and fear they will not be able to bear children once they have finished serving their sentences, or because they are attempting to “replace” children that have been lost due to their incarceration or termination of parental rights. *Id.* at 23.

¹³¹ Turner, *supra* note 45, at 26 (“Even without conjugal visits many inmates and their spouses find ways to be sexually intimate in visitation settings. Sexual contact in visiting rooms ranging from fondling to intercourse is not uncommon.”).

¹³² See, e.g., CAL. CODE REGS. tit. 15, § 3177 (2002) (specifying California prisoners’ rights with respect to visitation of family members and setting forth several institutional guidelines to regulate the visitation process). According to these regulations, “[p]ersons with only a common-law relationship to the inmate will not be recognized as immediate family members for the purpose of family visiting. Only those immediate family members as defined in section 3000 are authorized for family visits.” *Id.* California state regulations define immediate family members as

legal spouse; natural parents; adoptive parents, if the adoption occurred and a family relationship existed prior to the inmate’s incarceration; step-parents or foster parents; grandparents; natural, step, or foster brothers or sisters; the inmate’s natural and adoptive children; grandchildren; and legal stepchildren of the inmate. Aunts, uncles and cousins are not immediate family members unless a verified foster relationship exists.

of conjugal visits is quite limited.¹³³ In fact, only a few states permit conjugal visiting for inmates¹³⁴ and even those severely limit that privilege.¹³⁵

A recent case, *Gerber v. Hickman*,¹³⁶ raised the issue of prisoners' desire to procreate. The prisoner, William Gerber, sought permission from the California Department of Corrections to provide, at his own expense, a sperm sample to his lawyer to take out to the community to impregnate his wife.¹³⁷ Mr. Gerber was serving life without parole as a result of the "three strikes" law in California,¹³⁸ and thus was ineligible for California's

¹³³ See *Hernandez v. Coughlin*, 18 F.3d 133, 138 (2d Cir. 1994) (holding that the inmate did not have a constitutionally protected interest in conjugal visitation).

¹³⁴ In 1993, seventeen states allowed sexual visits between inmates and their spouses. See *Turner*, *supra* note 45, at 25. Many foreign governments provide for conjugal visits, including Canada, Belgium, Denmark, Germany, Great Britain, Holland, Russia, Sweden, and numerous Asian and Latin American countries. *Id.* See Abu-Jamal, *supra* note 88, at 140 (explaining how Dutch prison officials have operated "sex cells" for long term convicts in order to keep inmates mentally and emotionally intact).

¹³⁵ See *Gerber v. Hickman*, 264 F. 3d 882, 891 (9th Cir. 2001) (according to California regulations, conjugal visits are prohibited for inmates sentenced to life without the possibility of parole), *reh'g en banc granted and vacated*, 273 F.3d 843 (9th Cir. 2001), *reh'g en banc granted and aff'd*, 291 F.3d 617 (9th Cir. 2002). See generally Rebecca L. Miles, *Criminal Consequences for Making Babies: Probation Conditions that Restrict Procreation*, 59 WASH. & LEE L. REV. 1545, 1546 (2002) (discussing the right to procreate for individuals under probation).

¹³⁶ 291 F.3d 617 (9th Cir. 2002).

¹³⁷ See *id.* Mr. Gerber attempted to inseminate his wife through legitimate means, though others have not. See *Gangster Sentenced in Sperm Smuggling Plot*, L.A. TIMES, Aug. 22, 2003, at 16 (reporting on New York gangster who was sentenced for an additional sixteen months for smuggling his sperm out of federal prison to his wife); Greg B. Smith, *Mobster Has On His Face in Sperm Scam*, DAILY NEWS, Dec. 15, 2000, at 7 (reporting on a New Jersey mob associate who bribed guards to smuggle sperm to his wife outside of prison); *Pregnant Pause for Sperm Smuggling Wife*, N.Y. POST, Mar. 2, 2002, at 6 (reporting that a federal judge will not allow the wife of an incarcerated New York mobster to use her husband's smuggled sperm to conceive).

¹³⁸ See Marguerite A. Driessen & W. Cole Durham, Jr., *American Law in a Time of Global Interdependence: U.S. National Reports to the XVITH International Congress of Comparative Law: Section V Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 637 (2002):

California[']s three-strikes law enhances punishment for felony offenders who have previously been convicted of felonies. Crimes that count as previous "strikes" are violent felonies or any other crimes listed in the code as serious felonies. However, the enhancement applies whenever the current conviction is for any felony-not just those listed as violent or serious.

conjugal visiting program.¹³⁹ In denying Mr. Gerber's request to send sperm out of the facility, the prison cited three justifications: (1) its policy of treating male and female prisoners the same, when possible; (2) the safety risks caused by prisoners collecting semen; and (3) concerns about litigation relating to the procedure.¹⁴⁰ The District Court found for the California Department of Corrections, but the Ninth Circuit recognized that procreation was a fundamental right that survived imprisonment and that Mr. Gerber's method of exercising that right did not unduly burden the prison.¹⁴¹ The Ninth Circuit ruled that the fear that female prisoners would exercise their right to procreate was not a legitimate penological interest that required the denial of Mr. Gerber's right to procreate.¹⁴² However, an en banc Ninth Circuit, over vigorous dissent, held 6-5 in favor of the California Department of Corrections, ruling that the right to procreate was inconsistent with imprisonment and that Mr. Gerber had no interest in inseminating his wife, as he would never be able to leave prison to assist in raising the child.¹⁴³

The Ninth Circuit's en banc decision fails to recognize that prisoners' interests are determined by their limited opportunities. Given that Mr. Gerber was not allowed conjugal visits, his only remaining interest, as well as one of his remaining ways to express his sexuality, was in providing the means for his wife to conceive a child. Certainly Mr. Gerber would have raised the child if he had the opportunity, but his current situation precluded him from doing so. Mr. Gerber's solution—which did not involve physical contact, but collection of biological material, his sperm—was an appropriate and non-intrusive way to both accommodate the exercise of his constitutional right to procreate and maintain the prison's interest in security.

Two of the arguments that the California Department of Corrections made are easily disposed of—that the right to procreate is inconsistent with imprisonment and that Mr. Gerber's actions in collecting sperm and sending it out in some way interfere with prison security.¹⁴⁴

¹³⁹ See CAL. CODE REGS. Tit. 15, § 3177 ("Family visits shall not be permitted for inmates who are in any of the following categories: sentenced to life without the possibility of parole; sentence to life, without a parole date established by the Board of Prison Terms . . .").

¹⁴⁰ See *Gerber*, 264 F. 3d at 890.

¹⁴¹ *Id.* at 892.

¹⁴² *Id.* at 891.

¹⁴³ See *id.* at 623. Here the court did not recognize the right to procreate as separate from the right to parent. See *supra* notes 126-129 and accompanying text.

¹⁴⁴ *Id.*

Skinner v. Oklahoma stands for the proposition that the state cannot take away the right to reproduce and that the right to procreate is consistent with imprisonment.¹⁴⁵ Instead, the question *Gerber* confronted was whether the state needed to facilitate that right.

Gerber had not asked the state to do anything extraordinary, and in fact had proposed a scenario that would require the state's minimal involvement. As Justice Kozinski's articulated in his dissent, whether the package that Mr. Gerber sent was "used to inseminate Mrs. Gerber, to clone Gerber, or as a paperweight has no conceivable effect on the safe and efficient operation of the California prison system."¹⁴⁶ Even if the state thought that Mr. Gerber might use sperm collection as a pretext for smuggling contraband, it was free to create a process to make sure that the sperm collection took place in a controlled setting.¹⁴⁷

There is also a parallel for this process in the female reproductive sphere. The state cannot prohibit female prisoners from obtaining abortions. The state does not have to perform the abortions, but must permit prisoners to obtain abortions at their own cost.¹⁴⁸ Comparing Gerber's situation, the only difference is that he is choosing to create life rather than terminate it. Failure to support Mr. Gerber's efforts seems to suggest that the prison is willing to support prisoners' reproductive decisions as long as they comport with its notions of the value of prisoner families. Yet, in this case, the state

¹⁴⁵ See *id.* at 887. Though factually distinct, *Gerber* raises many of the same issues the court addressed in *Skinner* over sixty years ago. California's three strikes law disproportionately affects people of color and in this case has the effect of "legally sterilizing" Mr. Gerber and other three strikes inmates. See also PollyBeth Proctor, *Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case*, 31 GA. J. INT'L & COMP. L. 459 (2003) (examining the body of English law surrounding the prisoner's right to procreation before the passage of the Human Rights Act and how the prisoner's right to procreate will develop in light of the United Kingdom's passage of the Human Rights Act).

¹⁴⁶ See *Gerber*, 264 F.3d at 629 (Kozinski, J., dissenting) (arguing that "[p]roduction of the semen and delivery to a laboratory neither compromises security, nor places a strain on prison resources beyond that required to mail any other package").

¹⁴⁷ See *id.* ("Sure, the prison is entitled to make sure it doesn't contain prison escape plans, but Gerber is not claiming an exemption from routine security checks.").

¹⁴⁸ See *Gibson v. Matthews*, 926 F.2d 532, 536-37 (6th Cir. 1991) (discussing the Sixth Circuit's decision that there was no violation of the Fifth, Eighth, or Ninth Amendments when prison officials' delays resulted in the inability of a female prisoner to have an abortion); *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 354 (3d Cir. 1987) (Mansmann, J., concurring) (discussing the Third Circuit decision that there was an Eighth Amendment violation in a prison policy that required a court order before permitting elective non-therapeutic abortions); see also FED'L BUREAU OF PRISONS, P.S. 6070.05, § 551.23 (1996) ("The inmate has the responsibility to decide either to have an abortion or to bear the child.").

intervened and made a decision that this arrangement did not comport with its notions of how a family should be formed or operate.¹⁴⁹

More interesting is the state's angst about providing similar rights to female prisoners. It would be a compelling argument if, in every other context, prisons had not consistently argued that men and women were not similarly situated and therefore prisons did not have to provide them with similar opportunities.¹⁵⁰ In this circumstance, men and women are different.¹⁵¹ Biologically, it is easier for men to gather the material that they

¹⁴⁹ See generally *Overton v. Bazzetta*, 539 U.S. 126 (2003) (holding that restrictions on visits by children were properly related to maintaining prison security and protecting the children, and the prohibition of visits by former inmates bore a self-evident connection to the state's interest in maintaining prison security and preventing future crimes).

¹⁵⁰ See *Klinger v. Dep't of Corr.*, 107 F.3d 609, 613-16 (8th Cir. 1997) (determining that, because the women prisoners' comparison of the educational opportunities at the women's prison to those at the men's prison failed to provide a meaningful comparison of educational opportunities for male and female prison system as a whole, there was not a violation of Title IX of the Education Amendments); *Women Prisoners v. District of Columbia*, 93 F.3d 910, 927-28 (D.C. Cir. 1996) (noting that "an inmate has no constitutional right to work and educational opportunities" and that "idleness does not violate the Eighth Amendment protection against cruel and unusual punishment, indeed, idleness does not even constitute 'punishment.'"); Teresa A. Miller, *Sex and Surveillance: Gender, Privacy and the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. J. 291, 337 (2000) ("The problem inherent in the search for symmetry [in men and women's prisons] is that it ignores the unique problems of sex and power in men and women's prisons, which are similar to those arising in the context of equal protection for whites and blacks . . . Judicial insistence upon formal symmetry fails to recognize that men and women experience unwanted intimate physical contact and nudity before members of the opposite sex differently."); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 273-76, 275 n.336 (2003) (noting that, though judicial application of equal protection has resulted in female inmates receiving greater privacy protection than male inmates, female inmates receive less recognition of their right to educational and vocational opportunities in comparison to male inmates).

¹⁵¹ See Joseph J. Bozzuti, *Judicial Birth Control?: The Ninth Circuit's Examination of the Fundamental Right to Procreate in Gerber v. Hickman*, 77 ST. JOHN'S L. REV. 625, 637, n.72 (discussing the difference in difficulty between sperm and egg donation, declaring that "[t]hrough occasions have called for recognizing the inherent different between the sexes, and thus permitting different treatment of the sexes, if and how much such recognition would be made in this case remains unknown"); Richard Guidice, Jr., *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, 29 FORDHAM URB. L.J. 2277, 2309 (2002). Guidice comments:

For instance, female inmates cannot avail themselves of the same method of procreation that male inmates can, which is to simply provide a semen sample to their spouses so that they may be artificially inseminated. Unlike male inmates, female inmates would necessarily require outside medical attention or facilities to procreate via artificial means. Male inmates, however, could complete the semen collection procedure from inside their own prison cells. Because of their differences, male prisoners could claim that the narrow right to provide semen to artificially inseminate one's spouse does not apply to female inmates. Therefore,

contribute for procreation—sperm—than it is for women to harvest eggs, as the former is within the man's control of the man and the latter requires medical intervention. Yet technology is such that male and female prisoners can maintain and exercise their right to procreate without having sex. In the case of men, they can masturbate. In the case of women, they can harvest their eggs and use the substantial reproductive technology that exists to impregnate a surrogate mother or other means.¹⁵² The question still remains whether prisoners are worthy candidates for reproduction. Thus far, the state has ruled that they are not, and has limited their ability to reproduce through legitimate and transparent means, such as conjugal visits, artificial insemination, or surrogacy.¹⁵³ As a result, both male and female inmates have used interactions with staff and other prisoners as ways to accomplish that goal.

F. Sex for Safety ¹⁵⁴

The person told me that if I did not do what he wanted he would make life

the policy of treating male and female inmates equally, to the extent possible, is not furthered by a blanket restriction on inmate procreation.

Id.

¹⁵² See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 37 (2004) (describing the various methods of Assisted Reproduction Technology that exist, such as artificial insemination, in vitro fertilization ("IVF"), gamete intrafallopian transfer ("GIFT"), and zygote intrafallopian transfer ("ZIFT")). See generally Sarah L. Dunn, Note, *The "Art" of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate*, 70 FORDHAM L. REV. 2561, 2563 (2002) (arguing that courts should protect a male prisoner's right to procreate by donating his semen and should also protect a female prisoner's procreative rights by allowing her to harvest her eggs while incarcerated).

¹⁵³ See generally *Gerber v. Hickman*, 264 F. 3d 882, 892 (9th Cir. 2001) (declaring that the right to procreation generally survives incarceration); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (recognizing that "[i]nmates possess the right to maintain their procreative abilities for later use once released from custody," and emphasizing "later use").

¹⁵⁴ See Donaldson, *supra* note 95, at 125. The author, Stephen "Donny" Donaldson, was a former prisoner who was brutally raped while incarcerated, and coined the term "survival driven" as an intermediate category to describe a homosexual's experience of rape in prison. According to Donaldson, from

the typical punk's point of view, none of his passive sexual activities is truly voluntary, since, if he had his own way, he would not need to engage in them. Many continuing and isolated liaisons originate in the aftermath of gang rape or to counter the ever-present threat of gang rape. Prison officials and researchers label such behavior as "consensual."

Id.

*bad here for me. He made me suck on his penis and after doing this for about a week, he wanted more. He and his friends made me bend over the desk and they took turns going in me from the back. I wish something could be done. This has happened more than once for me.*¹⁵⁵

Imprisonment evokes our deepest fear—the fear of losing control over one’s personhood. Upon imprisonment, men and women lose the control over functions that are core to survival—eating, drinking, elimination, sleep, communication, self-care. All of these functions are either controlled or limited by external authority. Often, concern for physical safety and well-being is a key motivator for sex between inmates and between inmates and correctional staff. Social scientists have identified the concept of “protective pairing,” where inmates have sex or become involved with someone in order to protect themselves from a greater harm from other inmates or staff.¹⁵⁶ Legal and other narratives are replete with stories of prisoners having sex with other prisoners or with correctional staff in order to ensure their safety.¹⁵⁷

In large part, statutory law has developed to address the problem of sex for safety—at least between correctional staff and inmates. Currently, every state except Vermont has a criminal statute which prohibits the abuse of persons in custody.¹⁵⁸ Each state law’s coverage varies based upon the respective state’s legislative perception of who is a threat. In particular, some statutes only cover conduct that occurs in prisons or involves

¹⁵⁵ See Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 74 (1996) (discussing the lack of studies on prison sexual coercion by social scientists and providing a research study to determine the occurrence of sexual coercion in prison).

¹⁵⁶ See Barbara Owen, *The Mix: The Culture of Imprisoned Women*, in *THE INMATE PRISON EXPERIENCE* 157-58 (2004) (discussing how some inmates new to the system find a “mentor” in an effort to adjust, and that those women who are “[l]eft to their own devices are women who do not possess the skills for negotiating a bureaucracy, the prison smarts to work the system, nor a ‘protector’ who watches out for them”). See generally Struckman-Johnson, *Sexual Coercion Reported by Men and Women in Prison*, *supra* note 153; Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217 (2002) (reporting on a study of an anonymous self-report survey of coercive sexual experiences of women incarcerated in three Midwestern prisons).

¹⁵⁷ See *Richardson v. Penfold*, 839 F.2d 392, 394 (7th Cir. 1988) (describing an incident in which a victim of prison rape was informed that his assailant “had ‘sold’ him” to another inmate who subsequently raped him); NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 13, at 87-89 (discussing various types of coerced sexual abuse within the prison system).

¹⁵⁸ See generally BRENDA V. SMITH, 50 STATE SURVEY 2005 (on file with author) (providing a detailed analysis of each state’s sexual misconduct in prisons laws, as well as those codified at the federal level).

correctional staff, specifically exempting probation and parole settings.¹⁵⁹ Other states recognize that sex with a person in custody is an abuse of authority and use language to cover "abuse of supervisory authority."¹⁶⁰ One of the sharpest divisions between states is the acknowledgment of prisoner's ability to consent to sex and the consequences of that consent. The majority view is that inmates cannot consent to sex with staff.¹⁶¹

However, three states—Arizona, Nevada and Delaware—have enacted laws that penalize not only staff but also inmates who "consent" to sex with staff.¹⁶² The result, at least in Delaware, has been that staff who violate these laws are reassigned while inmates receive both disciplinary and criminal penalties.¹⁶³ Unsurprisingly, this has created a situation where inmates are reluctant to report for fear of not being believed and for fear of receiving additional criminal and administrative sanctions.

Notwithstanding the passage of these laws, prisoners still receive little protection from forced and coerced sex. While the full scope of sexual violence in prison is not known,¹⁶⁴ even what correctional officials do report¹⁶⁵ should cause concern. The recent BJS study found that inmate

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 9-10. For example, Colorado law states that

[a]ny actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if: . . . (f) the victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit.

Id.

¹⁶¹ *See* SMITH, *supra* note 158 (indicating that twenty-two states declare that staff and inmates cannot consent to sex). *See, e.g.*, ALA. CODE § 14-11-31(e) (1975) (prohibiting the use of consent as a defense in cases where custodial officers are accused of rape); CAL. PENAL CODE § 289(e) (2005) (banning the consent defense for officials accused of rape in custodial settings); 11 DEL. CODE ANN. § 1259 (2005) (disallowing consent as a defense to accusations of staff raping individuals in custody).

¹⁶² SMITH, *supra* note 158, at 5, 12, 38.

¹⁶³ Telephone Interview with Lee Williams, Investigative Reporter, The News Journal of Wilmington, Delaware, in Wilmington, Del. (Nov. 1, 2005).

¹⁶⁴ *See generally* BECK, *supra* note 24, at 2 (noting that there are no truly reliable figures on the prevalence of prison rape); Struckman-Johnson, *Sexual Coercion Reported by Men and Women in Prison*, *supra* note 155, at 67-68 (noting a conspicuous silence on the subject of sex in prison and sexual coercion in prison from social scientists); Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, *supra* note 155, at 379 (commenting on the lack of reliable numbers on prevalence of prison rape).

¹⁶⁵ *See* BECK, *supra* note 24, at 1 (indicating that forty-two percent of the allegations of sexual violence reported nationwide in 2004, involved staff sexual misconduct; thirty-seven percent, inmate-on-inmate nonconsensual sexual acts; eleven percent, staff sexual harassment; and ten percent, abusive sexual contact, but that numbers are suspect due

perpetrators of sexual abuse were more likely to be sanctioned and prosecuted than staff perpetrators.¹⁶⁶ Even when prosecuted, the sanctions that staff offenders receive is minimal.¹⁶⁷ The most common sanction for staff perpetrators were discipline, discharge, or referral for prosecution.¹⁶⁸ Given this environment, sex for safety with staff and other inmates is a reasonable response to the prospects, of receiving protection from either the corrections agency or the state through either investigation, discipline, or prosecution.

The federal courts have been another venue to seek vindication of the constitutional right to be free from rape—if not protection from rape itself.¹⁶⁹ The courts' protection of prisoners from rape has been inconsistent at best. The Supreme Court laid out its standard for cruel and unusual punishment in a case involving rape of a transsexual prisoner by other prisoners.¹⁷⁰ The prisoner, Dee Farmer, had been placed in a general population prison even though she presented as a woman and was in the preoperative stages of her sex change. The Supreme Court ruled that placing Ms. Farmer in this setting showed deliberate indifference to her

to varying definitions, poor recordkeeping, poor investigations, and compromised grievance process); *see also* U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent). U.S. GEN'L ACCOUNTING OFFICE: WOMEN IN PRISON, SEXUAL MISCONDUCT BY CORRECTIONAL STAFF: REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REPRESENTATIVES 7-8 (1999) (reporting that the full extent of staff sexual misconduct is unknown and underreported nationally due to the fear of retaliation and vulnerability felt by female inmates, and that jurisdictions do not have readily available, comprehensive data on the number, nature, and outcome of sexual misconduct allegations).

¹⁶⁶ *See* BECK, *supra* note 24, at 9 (reporting that a variety of legal sanctions, including arrest, referral for prosecution, or a new sentence, were imposed on perpetrators of inmate-on-inmate sexual violence in eighty-six percent of the thirty-six prison systems, seventy-six percent of the forty-two jail facilities, seventy percent of the twenty-seven State-operated juvenile systems and fifty percent of the forty local, private juvenile facilities whereas ninety percent of staff perpetrators of sexual misconduct were discharged or referred for prosecution).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 10 (Table 10) (reporting that of the 508 substantiated incidents of staff sexual misconduct and staff sexual harassment, only a 193 were referred for prosecution).

¹⁶⁹ *See, e.g.,* Calderon-Ortiz v. Laboy-Alvaro, 300 F.3d 60, 64 (1st Cir. 2002) (holding that a prison official's failure to prevent rape of a pre-trial detainee in a state prison constituted deliberate indifference to his safety); Ware v. Jackson County, Missouri, 150 F.3d 873, 883 (8th Cir. 1998) (holding that an inmate's Eighth Amendment rights had not been violated when officials were deliberately indifferent to risks of harm eventually resulting in a prison guard raping the inmate).

¹⁷⁰ Farmer v. Brennan, 511 U.S. 825, 832-51 (1994).

safety, and found that the prison had violated her Eighth Amendment right to be free from cruel and unusual punishment.¹⁷¹

However, the jurisprudence on prison rape has developed so that states, municipalities, and public officials are rarely held liable for the rape of prisoners—even juveniles—by staff or other youth.¹⁷² Rather, states, municipalities, and officials have been granted immunity because they enacted policies and procedures, conducted staff training, and took disciplinary action after the fact against staff or inmate perpetrators.¹⁷³ In this environment, more often than not only the perpetrator is held liable.¹⁷⁴ The courts have not held states, municipalities, and public officials accountable for preventing inmate rape. Hopefully, the Prison Rape Elimination Act, with its requirement for data collection and accountability, will begin to do so.

G. Sex for Love

We met through the "word of God". Every day, we would share

¹⁷¹ See *id.* (holding that a prison official may be held liable under the Eighth Amendment for acting with deliberate indifference to inmate health or safety only if he knows that inmates face a substantial risk or serious harm and disregards that risk by failing to take reasonable measures to abate it).

¹⁷² See *Ice v. Dixon*, No. 4:03CV2281, 2005 U.S. Dist. LEXIS 13429 (N.D. Ohio July 6, 2005) (finding the county immune in its official capacity, the sheriff immune in both his official and individual capacity, the perpetrator immune in his official capacity, but not immune in his individual capacity, on claims of sexual assault and battery against Ice, the plaintiff inmate incarcerated at Mahoning County Jail). *But see generally* *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978) (finding that, when a government's policy or custom is the source of the injury, a municipality or government can be held liable).

¹⁷³ See *Ice*, 2005 U.S. Dist. LEXIS 14329 (concluding that the county's specific policy—including the training it had given to staff within forty-eight hours of the incident, videotaping the plaintiff in an interview, taking the plaintiff to the hospital for a rape kit, calling the Ohio Bureau of Criminal Investigation, suspending Dixon, getting the Internal Affairs involved and sending the incident to the Mahoning County Prosecutor's Office—were sufficient to find immunity).

¹⁷⁴ *But see generally* *Riley v. Olk-Long*, 282 F.3d 592, 597 (8th Cir. 2002) (holding prison officials personally liable for rape of female prisoner by male corrections officer); *Morris v. Eversley*, 282 F. Supp. 2d 196, 208-09 (S.D.N.Y. 2003) (discussing the elements of claim for personal involvement where the guard who committed the assault on the inmate was found personally liable, but granting immunity to the two female supervisors).

*scriptures with one another and we bonded as Christians. It took six to eight months before things became romantic and then sexual, if ya know what I'm talking 'bout. We kept things very quiet from everyone.*¹⁷⁵

Often prisoners engage in sex for love or desire. Even in the prison setting, where individuals are legally stripped of their autonomy and dignity and face violence from other prisoners and staff, prisoners manage to establish meaningful and sometimes loving relationships.¹⁷⁶ There is a great deal of literature on how women create families while imprisoned.¹⁷⁷ These prison families include children, husband, wives, even grandparents. The process that male inmates use to establish bonds is commonly perceived as violent and hierarchical,¹⁷⁸ though that characterization may not encompass all male prison relationships. The literature suggests that in male settings, certain men are feminized in order to fulfill the role of women.¹⁷⁹ This feminization often includes sex, cooking, and cleaning for the male partner.¹⁸⁰ Yet there is little written about whether these relationships are all governed by force or if there is love or emotional attachment.

At the same time that these relationships develop among inmates, often complicated relationships develop among prisoners and staff.¹⁸¹ In any number of oppressive settings, there have been accounts of the powerless forming emotional bonds with those in power.¹⁸² During the period of U.S.

¹⁷⁵ See Worley, *supra* note 46, at 183.

¹⁷⁶ See *id.* at 185 (describing "heart-breakers" as inmates who insisted that they were truly in love and never intended to take advantage of their relationships with correctional staff).

¹⁷⁷ See MERRY MORASH & PAMELA J. SCHRAM, *THE PRISON EXPERIENCE: SPECIAL ISSUES OF WOMEN IN PRISON* 196 (2002) (describing the network of relationships at the Central California Women's Facility that provided prisoners with support and help in avoiding negative prison influences).

¹⁷⁸ See Donaldson, *supra* note 95, at 118-26 (discussing the male prison classification system which includes "men," "queens," "jockers," and "punks").

¹⁷⁹ See Peek, *supra* note 33, at 1226-30 (discussing masculinity and where it places an individual on the prison hierarchy).

¹⁸⁰ See *id.* (describing stereotypically feminine tasks undertaken by "queens" and other submissive inmates, like doing laundry, cleaning the cell, straightening bunks, and making coffee).

¹⁸¹ See Worley, *supra* note 46, at 182 (describing "heart-breakers" as inmates who initiate relationships with security officers, forming strong emotional bonds, preceded by lengthy courtships).

¹⁸² See generally Chunghee Sarah Soh, Lecture at the Institute for Korean-American Studies (May 1, 2000), available at <http://www.icasinc.org/2000/2000s/2000scss.html> (discussing the complex, "masculinist sexual culture," and both the men and women who ascribe to its tenets, including the idea that men have superior sexual needs to those of

slavery, there were many accounts of male and female slaves bearing children and having long-term relationships with their owners.¹⁸³ The same is true for women and men in custody.¹⁸⁴ In spite of modern feminist notions of equality of relationships as the basis for love,¹⁸⁵ few relationships are equal. For prisoners, they may not see the inequality of their relationships in prison as qualitatively different from relationships they may have had in the community.

However, prison authorities cannot be in the position of legitimizing relationships between staff and inmates, in the same way that a school system would be hard-pressed to legitimate relationships between students and teachers. There is an inherent imbalance of power that the institution relies upon for its legitimacy. Prisons depend on the fact that correctional staff's interactions with inmates are based on achieving correctional goals—safety, security, discipline, and rehabilitation—rather than on furthering an intimate or personal relationship. As a matter of meeting its mission of safety and security, prisons must prohibit relationships between staff and inmates. That does not stop inmates from seeking out these relationships, whether for pleasure, freedom, transgression, procreation, or love.

The role of the state in limiting sexual relationships based on love between inmates is less clear. Since most state correctional policies prohibit any sex between inmates, they end up also limiting romantic or intimate

women, and therefore, deserve to be "comforted" both in premarital and extramarital sexual situations).

¹⁸³ See *Compton v. Prescott*, 12 Rob. 56 (La. 1845), in *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 47-48 (Katherine T. Bartlett & Angela P. Harris eds., 1998) (detailing a relationship between a white man and his freed slave partner, whom he never married, but with whom he lived and fathered two children that he acknowledged as his and to whom he bequeathed the majority of his estate upon death).

¹⁸⁴ See Worley, *supra* note 46, at 182-85 (discussing the romantic relationships that inmates form with correctional staff).

¹⁸⁵ Frances E. Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1573-74 (1983) (analyzing the feminist theories of Shulamith Firestone and Elizabeth Rapaport, which discuss sexual equality as the means to achieve meaningful and healthy love). For an alternative commentary on the power relations at stake in such relationships, see generally CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (proposing an alternative interpretation of gender difference—or sameness—by suggesting that equality between men and women be analyzed in terms of how power is distributed between them). MacKinnon calls this the "dominance approach," and uses it to study not only sex discrimination in employment, but also trends of rape, sexual abuse, and domestic violence. *Id.* at 493. In suggesting that there is an imbalance of power in male/female relationships, there is the implication that there is some give and take of power between the two sexes. In reality, MacKinnon seems to assert that women are always on the giving end; i.e., they are the ones who either voluntary or involuntary relinquish some or all of their power in their interactions with men. *Id.*

relationships between inmates. Certainly there are instances where relationships between inmates may threaten the correctional missions of safety, security, rehabilitation, or discipline, either through inmate violence or inmate noncompliance with institutional rules. The prison should be free to limit or regulate those relationships in the interest of providing a safe and secure environment for staff and inmates.

Yet it is questionable that the prison has an interest in regulating those relationships that do not infringe upon correctional goals. A logical response to this challenge might be, so what? Sexual conduct is prohibited anyway, so why do we need to reach this? Isn't the absence of sex one of the penalties that you pay for committing a crime? Why should we be concerned about prison sex when we don't even want to talk about sex in the free world?¹⁸⁶ The simple response to these questions is that sexuality is a core feature of any social environment. Sex is a basic drive that does not dissipate in prison. And finally, accounts of prison officials at all levels indicate that they are aware that sexual relationships between inmates occur and are part of the fabric of the correctional experience for both staff and inmates.¹⁸⁷

Correctional staff accounts indicate that they have already developed tools to address these relationships—identifying, intervening, and disciplining where appropriate.¹⁸⁸ A clear recognition, expressed either in written policies or in the procedures followed by prison officials, that intimate relationships between inmates occur would not only provide opportunities for inmates to express those relationships, but also would offer opportunities for corrections' officials to explicitly address them in a manner congruent with their correctional mission.

IV. IMPLICATIONS FOR STATE REGULATION OF PRISON SEX

Having outlined a continuum of sexual expression in correctional environments, the basic legal inquiry concerns the state's ability to regulate that expression. Taking as a given that sexual expression is a fundamental

¹⁸⁶ See Press Release, Kaiser Family Foundation, Number of Sexual Scenes on TV Nearly Double Since 1998 (Nov. 9, 2005), available at <http://www.kff.org/entmedia/entmedia110905nr.cfm>. A study by the Foundation found that the number of sexual scenes on television has nearly doubled since 1998, that seventy percent of all shows include some sexual content, and that primetime television content is seventy-seven percent sexual. *Id.* While Americans may not want to talk about sex or teach about sex, they seem to want to watch programs with high sexual content.

¹⁸⁷ See OWEN, *supra* note 39, at 15 (noting that many correctional officials believe that encounters of sexual violence between staff and inmates begin as consensual relationships that become coercive over time).

¹⁸⁸ *Id.* at 28-29.

right,¹⁸⁹ should this fundamental right survive imprisonment? Unfortunately, the legal response is not promising. Court decisions seem to set parameters for sexual expression that are marked by sterilization and abortion—the State cannot sterilize an inmate,¹⁹⁰ and the State must allow an inmate to obtain an abortion to the same extent that the privilege is granted by the holding state.¹⁹¹ The terrain in between remains uncharted but seems terribly forbidding.

The courts have embraced small but important limitations on constitutional protections related to procreation,¹⁹² visitation,¹⁹³ and the right to define one's family¹⁹⁴ as they relate to prisoners. As a result, notwithstanding my view that states should recognize that these rights survive imprisonment, I am not hopeful that courts would decide to recognize these rights to self-expression in prison, even if they have done so in contexts outside of prison.¹⁹⁵

¹⁸⁹ See *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (noting that “[a]fter *Griswold*, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (recognizing the right to “bear or beget a child” as fundamental).

¹⁹⁰ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that the right to procreate is a fundamental right guaranteed by the constitution).

¹⁹¹ See *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 330 (3d Cir. 1987) (holding that prisoners have a right to get needed medical treatment, including abortions).

¹⁹² See *Gerber v. Hickman*, 291 F.3d 617, 622 (9th Cir. 2002) (contrasting the general right to “procreate while incarcerated” with “the right to be free from surgical sterilization by prison officials”); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994), (recognizing that the right to maintain procreative ability survives imprisonment, but can only be exercised upon release from custody) *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990) (holding “that the Bureau’s restriction on inmate procreation is reasonably related to furthering the legitimate penological interest of treating all inmates equally, to the extent possible”).

¹⁹³ See *Overton v. Bazzetta*, 539 U.S. 126, 130 (2003) (discussing Michigan’s policy for contact visits where inmates are allowed limited physical contact with their visitors in a large visitation room and non-contact visits where inmates must communicate with their visitors through a glass panel).

¹⁹⁴ See *id.* at 169 (“[O]utside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents.”). The court made it clear that it did not intend to “imply that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.” *Id.* at 170.

¹⁹⁵ See, e.g., *Overton*, 539 U.S. at 136 (holding that visitation regulations limiting prisoners’ contact with their visitors were rationally related to a penological objective and therefore valid); *Gerber*, 291 F.3d at 623 (holding that prisoner had no constitutional right to artificially inseminate his wife); *Goodwin*, 908 F.2d at 1400-01 (holding that a regulation

The Supreme Court has made clear that any analysis of a regulation that infringes on the fundamental rights of prisoners must undergo a four-part analysis, outlined in *Turner v. Safley*.¹⁹⁶ In *Turner*, a class of inmates challenged state prison regulations that restricted correspondence between inmates at different penal institutions, with exceptions for correspondence between immediate family members and correspondence by inmates on “legal matters.”¹⁹⁷ The challenged regulations also prohibited inmate marriage unless the prison superintendent determined that there were “compelling reasons” for the marriage.¹⁹⁸ While “compelling” was not defined in the regulations, prison officials testified in the lower court proceedings that “only a pregnancy or the birth of an illegitimate child would be considered a compelling reason.”¹⁹⁹ Ultimately, the correspondence regulations were upheld, but the marriage restrictions were declared unconstitutional.²⁰⁰

In reviewing the constitutionality of the prison regulations, the Court outlined a four-part test: 1) the existence of “a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it”; 2) the existence of “alternative means of exercising the right that remain open to prison inmates”; 3) the “impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”; and 4) “the absence of ready alternatives as evidence of the reasonableness” of the regulation.²⁰¹

Turner has become the predominant standard for analyzing attempts to regulate conduct in prisons and has been used by prison officials to limit inmate visitation,²⁰² justify cross-gender supervision of male

disallowing prisoners to artificially inseminate their non-incarcerated wives is valid, even assuming that the right to procreate survives imprisonment); *Hernandez*, 18 F.3d at 138 (holding that an inmate does not have a constitutionally protected right to conjugal visits). *But see* *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding unconstitutional the criminalization of private consensual sodomy).

¹⁹⁶ See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (applying a four-part reasonableness test to prison regulations that infringed on inmates’ rights to send mail amongst themselves—a First Amendment right—and to marry without the prison superintendent’s permission—a fundamental privacy right).

¹⁹⁷ *Id.* at 81.

¹⁹⁸ *Id.* at 82.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 81.

²⁰¹ *Id.* at 89-90 (internal quotations removed).

²⁰² See *Overton v. Bazzetta*, 539 U.S. 126 (2003) (holding that restrictions on visits by children were rationally related to maintaining prison security and protecting the children,

inmates,²⁰³ and limit reading material that prisoners can receive.²⁰⁴ At the same time, prison officials have used *Turner* to enact policies they deemed beneficial, such as same-sex supervision for female inmates,²⁰⁵ rehabilitative programs for particular categories of prisoners,²⁰⁶ and enhanced opportunities for female staff.²⁰⁷

Under *Turner*, states could enact policies that permitted a greater range of sexual expression for prisoners. I have identified at least six legitimate penological interests that would be served by enhanced prisoner self-expression.

First, the Prison Rape Elimination Act requires correctional agencies to report all incidents of prison rape.²⁰⁸ However, appropriately identifying acts that are consensual as opposed to coerced would permit corrections official to more accurately report information to the Bureau of Justice Statistics and meet the data collection requirements of the Act. This would in turn enhance national, state, and local interests in assessing prevalence and risk, with the goal of more effectively deploying resources to eradicate rape in prisons altogether.

Second, making this appropriate distinction would assure that corrections officials effectively use scarce investigative, medical, and

and the prohibition of visits by former inmates bore a self-evident connection to the state's interest in maintaining prison security and preventing future crimes).

²⁰³ See generally *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1999) (finding that cross-sex surveillance of male inmates is "not unreasonable" under the *Turner* test); *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002) (finding that cross-sex surveillance was not a violation of male prisoner's equal protection rights, according to the *Turner* test).

²⁰⁴ See *Rice v. State*, 95 P.3d 994, 997 (Kan. 2004) (holding regulations that limited inmates' subscriptions to periodicals were reasonably related to penological interests and were therefore valid).

²⁰⁵ See *Torres v. Wisconsin*, 859 F.2d 1523, 1529 (7th Cir. 1986) (holding that defendants were required to meet an unrealistic, and therefore unfair, burden in displaying the validity of their bona fide occupational qualification theory, and that, under *Turner*, "prison administrators have always been expected to innovate and experiment"); see also *Everson v. Michigan*, 391 F.3d 737, 747-48 (6th Cir. 2004) (holding that female gender was a bona fide job qualification for the positions in housing units at female prisons because the plan would enhance security and protect privacy for female inmates).

²⁰⁶ See *Smith v. Bingham*, 914 F.2d 740, 742 (5th Cir. 1990) (denying sex discrimination claims by male inmates challenging their exclusion from vocational programs open only to female prisoners).

²⁰⁷ See BLOOM, *supra* note 40, at 114 ("Although courts have given deference to decisions of prison administrators in a Title VII context, they balance the rights of employees. Therefore, the *Turner* standard appears to play a role in the analysis of whether sex discrimination is a BFOQ, even though it is not directly determinative.").

²⁰⁸ Prison Rape Elimination Act of 2003, 42 U.S.C.S. § 15603 (2005).

administrative resources to address cases of forced or coerced sex between inmates and between inmates and staff. Policies that recognize and allow greater sexual expression would provide a broader range of categories in which correctional officials could situate sexual behavior, resulting in a significant improvement over current policies which simply provide that all sexual conduct is prohibited.²⁰⁹ Another outcome of this policy change would be enhancing the credibility of the agency with staff and inmates. Currently, correctional staff ignores or selectively enforces prison policies that prohibit sexual conduct.²¹⁰ Having policies that are honored more in the breach than in the observance fosters a culture of disrespect by both staff and inmates and calls into question the necessity for following other rules.

Third, sex in prison, whether consensual or non-consensual, poses serious health risks to the community, which the Prison Rape Elimination Act recognizes in its findings and purposes.²¹¹ For example, recent studies estimate that the rate of infection for hepatitis and HIV—both sexually transmitted diseases—among the prison population is three times that of the general population, and affects female inmates at a higher rate than males.²¹² It goes without saying that treating these diseases exacts

²⁰⁹ OWEN, *supra* note 39, at 8, 10. See generally SMITH, *supra* note 155.

²¹⁰ OWEN, *supra* note 39, at 9.

²¹¹ PREA is replete with references to the public health impacts of prison rape. See, e.g., § 15601(7):

HIV and AIDS are major public health problems within America's correctional facilities. In 2000, 25,088 inmates in federal and state prisons were known to be infected with HIV/AIDS. In 2000, HIV/AIDS accounted for more than 6 percent of all deaths in federal and state prisons. Infection rates for other sexually transmitted diseases like tuberculosis and hepatitis B and C are also far greater than for the American population as a whole. Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims.

See also § 15601(14)(C) (discussing how the high incidence of prison rape "increases health care expenditures, both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases"); § 15601(15)(B) (prison rape also affects interstate commerce because of "the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases, contributing to increased health and medical expenditures throughout the nation").

²¹² See LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HIV IN PRISONS, 2003 BULLETIN 1 (2005) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp03.pdf> (stating that "[t]he overall rate of confirmed AIDS among the prison population (0.51%) was more than 3 times the rate in the U.S. general population (0.15%)" and "[a]t yearend [sic] 2003, 2.8% of all female State prison inmates were HIV positive, compared to 1.9% of males."). See generally NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, 2 THE HEALTH STATUS OF SOON-TO-BE RELEASED INMATES, A REPORT TO CONGRESS (2002). The report notes that some of the serious diseases affecting inmates, including STDs, HIV/AIDS, hepatitis B and C, and

significant costs from state, local, and federal government. Acknowledging that a broad range of sex occurs in correctional settings for a variety of reasons would enable prison officials to take appropriate health measures such as condom distribution,²¹³ HIV/AIDS education programs,²¹⁴ clinical trials, and specific interventions that target risk behavior in prison settings. The refusal to acknowledge sexual activity, both consensual and non-consensual, means that correctional agencies have not initiated programs, services, and resources that could protect the health of staff, inmates, and the communities to which they will return.²¹⁵

The fourth legitimate penological interest for recognizing and allowing for a broader range of sexual expression is the impact on reentry

tuberculosis can be transmitted to other inmates, correctional employees, daily visitors, and to the community once inmates are released. Inmates who are released with untreated conditions can become a financial burden on community health care systems. *Id.* at vii.

²¹³ See Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, 904 (1998) (discussing how the Supreme Court did not address the prevalence and modes of transmission of HIV/AIDS in prison); Brent Staples, *Fighting the AIDS Epidemic by Issuing Condoms in the Prisons*, N.Y. TIMES, Sept. 7, 2004, at A1 (noting that “[c]ondoms are banned or simply unavailable in more than 95 percent of the nation’s prisons”); *Fighting AIDS Behind Bars*, N.Y. TIMES, June 10, 2005, at A1 (noting that “[t]he United States will never contain deadly diseases like AIDS and hepatitis C until it prevents them from spreading behind bars, where infection levels are many times as high as in the world outside and the diseases spread easily, thanks in part to unprotected sex among inmates”).

²¹⁴ One model for such programs is Our Place DC, which has implemented a program to educate women while they are incarcerated and upon their release about HIV/AIDS, including methods of transmission, prevention, and care. See Our Programs and Services, Our Place DC Website, <http://www.ourplacedc.org/pages/abprog.html> (last visited Dec. 3, 2005). Another model is The Women’s Collective, which runs “Sisters Helping Sisters to Survive,” a peer education program that seeks to educate women about safer sex and empowerment, provide safer sex tools, encourage HIV testing among women, and help HIV positive women receive care. See Prevention Programs, Women’s Collective Website, <http://www.womenscollective.org/prevention.html> (last visited Dec. 3, 2005).

²¹⁵ Indeed, studies are being conducted to determine if the alarming rise of HIV among heterosexual African American women is linked to the large number of African American men who are imprisoned and return to the community. See HIV/AIDS AMONG AFRICAN AMERICANS, CDC FACT SHEET, available at www.cdc.gov/hiv/pubs/Facts/afam.htm (last visited Dec. 3, 2005) (“African American women are most likely to be infected with HIV as a result of sex with men. They may not be aware of their male partners’ possible risks for HIV infection such as unprotected sex with multiple partners, bisexuality, or injection drug use.”); Jonathan E. Briggs, *New Law to Focus on HIV in Blacks; Infection Rate Tied to Prison Population*, CHICAGO TRIBUNE, Aug. 19, 2005, at C4. See also *Illinois Governor Signs Law Focusing on HIV Prevention Among African-Americans*, THE ADVOCATE, Aug. 23, 2005, available at www.advocate.com/news_detail_ektid19909.asp (stating that “[t]he legislation, called the African-American HIV/AIDS Response Act, requires the state Department of Corrections and all county jails in the state to offer free HIV antibody tests to all inmates when they arrive at prison, during their imprisonment, and before they complete their sentences and are released”).

or reintegration into the community. The Bureau of Justice Statistics estimates that over 600,000 inmates return to the community each year.²¹⁶ Research also indicates that the strongest indicator for success upon reentry to the community is family support.²¹⁷ Strengthening and preserving family bonds, rather than enhanced sexual expression, are the goals for most conjugal and family visiting programs.²¹⁸ These family visiting programs result in enhanced family support for inmates while they are serving their sentences, and sustain important connections and support which they can mine once they have served their sentences. Inmates who have family support are less likely to re-offend and return to prison, straining limited correctional resources.

Many correctional agencies explicitly use family and conjugal visiting as an inmate management tool.²¹⁹ Inmates who exhibit positive institutional behavior are rewarded with enhanced opportunities for intimate contact.²²⁰ In the case of conjugal or family visits, this can often implicitly mean greater opportunities for sexual expression. In addition, correctional staff implicitly reward or punish prisoners by allowing or restricting their intimate contact with other prisoners. By explicitly regulating this conduct, prison officials could control and implement it strategically, in furtherance of correctional goals of safety, security, and rehabilitation.

²¹⁶ See Reentry Trends in the US: Releases From Prison, <http://www.ojp.usdoj.gov/bjs/reentry/releases.htm> (last visited Dec. 3, 2005) (noting that, in 2001, 592,000 state prison inmates were released from prison).

²¹⁷ See NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, SERVICES FOR FAMILIES OF PRISON INMATES, SPECIAL ISSUES IN CORRECTIONS 1 (2002), available at <http://www.nicic.org/pubs/2002/017272.pdf> (noting that studies have supported the idea that increased contact between inmates and their families contribute to an inmate's re-integration into the community).

²¹⁸ *Id.* at 6 (indicating that policies and programs focus "on supportive family relationships or benefiting the children of inmates").

²¹⁹ See generally *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (noting that conjugal visits may alleviate sexual tension, reduce homosexuality, and serve as an incentive for good behavior).

²²⁰ See MISS. DEP'T OF CORR., CONJUGAL VISITS, available at http://www.mdoc.state.ms.us/conjugal_visits.htm (last visited Dec. 8, 2005).

Inmates that qualify for conjugal visits are those that are 'A' or 'B' custody (minimum custody levels) and maintain an acceptable level of good behavior. In addition, eligible inmates cannot have a rule violation report (a report that is written after a rule is broken such as fighting, swearing, etc.) in the last 6 months.

Fifth, recognizing and granting inmates a degree of sexual expression may enhance inmate safety by decreasing prison rape.²²¹ By explicitly recognizing and regulating the conduct, the state can further its interests in preventing violence and disease associated with prison rape, and help prisoners learn healthy and responsible sexual behavior prior to re-entering the community.²²² Examples of this kind of intervention have already been used in situations involving illegal sex, namely prostitution²²³ and prohibited sex in other institutional settings, such as nursing homes,²²⁴ homes for the mentally retarded,²²⁵ and psychiatric settings.²²⁶

Finally, permitting a greater degree of sexual expression recognizes the inherent dignity of human beings, which survives imprisonment.²²⁷ Increasingly, the courts have turned to international human rights law, which recognizes the dignity of each and every person, to enrich our impoverished constitutional rights jurisprudence.²²⁸ Both prevention from

²²¹ BONICE E. CARLSON, *ENCYCLOPEDIA OF AMERICAN PRISONS* 105, 106 (Marilyn D. McShane & Frank P. Williams, III eds., 1996) (noting that conjugal visits may alleviate sexual tension, reduce homosexuality, and serve as an incentive for good behavior).

²²² Prison Rape Elimination Act of 2003, 42 U.S.C.S. § 15601(14)(A)-(F) (2005).

²²³ See Thompson, *supra* note 106, at 227 (noting that one benefit of legalized prostitution is the corresponding health regulations designed to prevent disease outbreak); Ashley Bollinger, *Regulating the World's Oldest Profession: Criminalization, Decriminalization or Legalization – What is Best for Working Women vs. What Will Work in the United States?* 34 (2005) (unpublished student paper) (discussing how legalization of prostitution in Nevada has created an environment where the “incidence of disease among licensed prostitutes is virtually zero”) (on file with author); Jenna Casper, *Prostitution: A Celebration or Degradation of Women* 10, 11 (2005) (unpublished student paper) (discussing legalization of prostitution and the argument of liberal feminists that prostitution should be treated as an occupation that women should have the right to pursue) (on file with author).

²²⁴ Feldkamp, *supra* note 46.

²²⁵ THE ARC, *POSITION STATEMENT*, *supra* note 46.

²²⁶ Mayers, *supra* note 46.

²²⁷ See International Covenant on Civil and Political Rights art. 10 § 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”). See generally The Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 23, delivered to the members of the General Assembly, U.N. Doc. A/56/156 (July 3, 2001), available at <http://www.un.org/documents/ga/docs/56/a56156.pdf> (expressing concern about reports of sexual abuse of sexual minorities in detention); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 276-88 (2003) (lauding the use of human rights norms and instruments as way of analyzing prisoners’ claims for vindication of rights insufficiently protected by U.S. Constitution).

²²⁸ See, e.g., *Roper v. Simmons*, 541 U.S. 1040, 1198 (2004) (citing international law standards in finding that execution of individuals under eighteen years of age violates the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (using

sexual abuse and permitting greater sexual self-expression are congruent with international human rights instruments and norms.²²⁹ Many other countries recognize this and permit sexual expression in institutional settings.²³⁰ They permit sexual contact not only because they recognize that sexual identity and expression is core to personhood, but also that permitting sexual expression accomplishes legitimate correctional goals. Corrections agencies in the United States would enhance the safety of prisons and inmates by doing the same.

V. CONCLUSION

The desire for sexual intimacy and sexual expression is a powerful force that survives imprisonment.²³¹ Indeed, it is a powerful human desire. Individuals in custody, despite society's view, maintain their humanity and personhood. As Judge Posner has written, "[w]e must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration."²³² Inmates can and will find ways to express their desires for freedom, pleasure, and love.²³³ This expression can take the form of transgressive sex which, at base, is a desire to gain control of their environment and those who control them and their environment.²³⁴ Inmates have even found ways to conceive

international law in holding that a Texas statute making it a crime for two persons of the same sex to engage in consensual sodomy in privacy was unconstitutional).

²²⁹ See Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex I (adopted Aug. 30, 1955); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), (entered into force June 26, 1987) [Part I Only]; *Hearing on the Prison Rape Reduction Act of 2002 Before the Senate Committee on the Judiciary*, 107th Cong. (2002) (statement of Dr. Scott Long), available at http://www.nprec.us/docs/sf_atrisk4_slongstatement.pdf (discussing the international laws against discrimination for sexual orientation and commenting that "every day the lives and the physical integrity of lesbian, gay, bisexual and transgender people are at stake within our prison systems, and what they face is torture, and our government is complicit in it and in many cases responsible for it").

²³⁰ See Abu-Jamal, *supra* note 88, at 140 (explaining that Dutch prison officials facilitate sex for prisoners in an effort to improve mental health).

²³¹ See *supra* note 37 and discussion Part III.

²³² *Johnson v. Phelan*, 69 F.3d 144, 152 (1995) (Posner, J., dissenting) (dissenting from the majority decision upholding cross-gender viewing of nude male inmates by female correctional staff).

²³³ See *supra* Part III.A, C, G.

²³⁴ See *supra* Part III.D.

or impregnate their partners in the community.²³⁵ While correctional authorities have legitimate penological interests in prohibiting the sexual interactions inmates engage in for safety, trade, and transgression,²³⁶ they also have compelling and legitimate penological interests in enhancing opportunities for sexual expression for inmates.²³⁷ There is great benefit to acknowledging that inmates do not lose their sexuality once they enter prison, and that managing these interactions is part of the work required of corrections agencies. Moreover, appropriate intervention in these interactions can enhance the safety of inmates, staff and the community, help agencies realize their correctional goals of providing safe and secure correctional environments, and encourage rehabilitation of inmates.²³⁸ This approach also preserves scarce correctional resources for serious incidents of sexual violence that occur in institutional settings. While there is still much work to be done in outlining the parameters of a workable and humane approach to enhancing opportunities for inmate sexual expression, this Article will hopefully serve as an initial step in that direction.

²³⁵ See *supra* Part III.E.

²³⁶ See *supra* Part III.B, D, F.

²³⁷ See *supra* Part IV (outlining six legitimate interests that prison officials have in expanding sexual expression of inmates).

²³⁸ See *supra* Part III.G, notes 186-188 and accompanying text, and Part IV, notes 208-229 and accompanying text.

SEXUALITY AND MARRIAGE
