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Of Sexual Bondage: The 'Legitimate Penological Interest' in Restricting Sexual Expression in Women's Prisons

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OF SEXUAL BONDAGE: THE 'LEGITIMATE
PENOLOGICAL INTEREST' IN RESTRICTING
SEXUAL EXPRESSION IN WOMEN'S PRISONS

*Joanna E. Saul**

I.	INTRODUCTION	• 350
II.	CAUSES OF SAME-SEX SEXUAL BEHAVIOR IN FEMALE PRISONS	• 354
III.	LEGAL FRAMEWORK: <i>TURNER V. SAFLEY</i>	• 358
IV.	BENEFITS OF RELATIONSHIPS BETWEEN FEMALE INMATES	• 360
	A. <i>Protection</i>	• 361
	B. <i>Emotional Support</i>	• 362
	C. <i>Stability of Relationships</i>	• 364
V.	THE PROBLEMS OF PRISON SEXUAL EXPRESSION	• 367
	A. <i>Public Health Concerns</i>	• 367
	B. <i>Security</i>	• 369
	C. <i>Reinforced Patterns of Poor Relationships</i>	• 371
	D. <i>Burden on Prison Resources</i>	• 373
	E. <i>Forced Coercion and Rape</i>	• 374
VI.	THE QUESTION OF CONSENT	• 378
	A. <i>The Prison Environment</i>	• 379
	1. <i>Overcrowding Exacerbates Coercion</i>	• 380
	2. <i>The Social Hierarchy</i>	• 381
	3. <i>Prison Rules</i>	• 382
	B. <i>Mental Health</i>	• 382
VII.	ADDITIONAL ANALYSIS: THE RIGHT TO PRIVACY	• 385
VIII.	CONCLUSION	• 387

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I. INTRODUCTION

Human sexuality transcends prison bars. In both men's and women's prisons, same-sex sexual expression,¹ like the drug trade,² is officially prohibited yet flourishes.³ Most of the research, media attention, and legislation has been directed toward male inmates⁴ or staff abuse of inmates.⁵ However, same-sex activity is actually more prevalent in female prisons than in male facilities.⁶ Recent research supports the inference that up to 60% of women in prison are involved in a same-sex relationship.⁷ Anecdotally, one former inmate estimated that "7 out of 10 new admissions have a homosexual encounter within their first six months of incarceration."⁸ The lack of focus on female same-sex behavior is likely due to the characterization of most homosexual behavior between male inmates as forced or coerced and of most homosexual behavior between

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1. For the purposes of this Article, the terms "sexual expression" or "sexuality" are inclusive of any physical expression of affection—such as hugging or holding hands—that would not be considered sexual in the traditional sense of involving genitals, due to the fact that women in prison are often prohibited from any form of physical contact.
 2. See, e.g., Lou Michel & Susan Schulman, *Drugs in Prison Now An Issue; Gubernatorial Candidates Address How to Stem Flow of Drugs to Incarcerated Addicts*, BUFFALO NEWS, Oct. 1, 2006, at B1; Patricia MacPherson, *Use of Random Urinalysis to Deter Drug Use in Prison: A Review of the Issues*, ADDICTIONS RESEARCH BRANCH, CORR. SERV. OF CAN. 5–6 (2004), http://www.csc-scc.gc.ca/text/rsrch/reports/r149/r149_e.pdf (reporting on the prevalence of drug use in Canadian prisons); CORR. INST. INSPECTION COMM., INVESTIGATOR DATA REVIEW 15–17, 52–59 (2006), <http://www.ciic.state.oh.us/reports/idr.pdf> (reporting on drug use and trafficking in Ohio prisons).
 3. See ANNE APPLEBAUM, GULAG 315 (2003); RAYMOND G. WOJDA & JUDY ROWSE, WOMEN BEHIND BARS 34 (1997) ("The 'no touching' rule helps to keep physical abuse and homosexual activity from flourishing. Much forbidden conduct occurs anyway . . ."); Craig J. Forsyth, et al., *An Analysis of Inmate Explanations for Lesbian Relationships in Prison*, 30 INT'L J. SOC. & FAM. 66, 67 (2002).
 4. For example, the Prison Rape Elimination Act of 2003 defines "carnal knowledge" as "contact between the penis and the vulva or the penis and the anus, including penetration of any sort, however slight." 42 U.S.C. § 15609 (2003). See also Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 3 J. SEX RES. 217, 217 (2002).
 5. See, e.g., Stop Prisoner Rape, a nonprofit human rights organization that seeks to end the sexual assault of prisoners, "whether perpetrated by corrections officials or by inmates with the acquiescence of corrections staff." Stop Prisoner Rape: About, <http://www.justdetention.org/en/about.asp>.
 6. Peter Monaghan, *Sex and the Cellblock*, 50 CHRON. OF HIGHER EDUC. 15 (2004) (book review).
 7. Forsyth, *supra* note 3, at 67.
 8. Dominik Morgan, *Restricted Love*, in BREAKING THE RULES: WOMEN IN PRISON AND FEMINIST THEORY 75, 79 (Judy Harden & Marcia Hill eds., 1998).

females as consensual.⁹ And yet, sexual expression is equally prohibited in both men's and women's prisons by prison rules, a fact which prompts several questions: What are the causes of same-sex sexual behavior in women's prisons? What are the effects of these relationships on the inmates? And, given the constraints of the institutional setting, does the correctional system have a legitimate interest in prohibiting these relationships?

Despite its prevalence, sexual expression among inmates is currently prohibited in United States prisons. Primarily, this is achieved through institutional administrative rules and regulations.¹⁰ Under these rules, prohibited sexuality encompasses a variety of sexual expression, from consensual sexual acts to even simply soliciting a sexual act.¹¹ No definition of soliciting is included in the rules, leaving room for inmates' confusion and inconsistent application of sanctions by officials. The use of administrative rules and regulations to dispute disciplinary violations further complicates the issue; decisions are made by prison employees

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9. Estelle B. Freedman, *The Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual, 1915–1965*, 22 FEMINIST STUD. 397, 404 (1996) (“Women tend toward ‘more or less permanent relationship[s] in which one person looks after the welfare of the other, makes them silk underwear, etc. The male homosexuality, on the other hand, is exploitative and promiscuous—it is not a paired sexuality.’” (quoting Margaret Mead)).
10. A non-exhaustive list of states that prohibit consensual sexual conduct between inmates: ALA. ADMIN. CODE r. 403 (2003), available at <http://www.doc.alabama.gov/docs/AdminRegs/AR403.pdf>; ALASKA ADMIN. CODE tit. 22, § 05.400(c)(3) (1999), available at <http://www.touchngo.com/lglcntr/akstats/aac/title22/chapter005/section400.htm>; ARIZ. INTERNAL MGMT. POL'Y § 103.3.1 (Attachment C) (1994), available at http://www.azcorrections.gov/adc/policy_inclusion.asp?menuName=all_includes/custommenus/di.htm&fileName=/Policies/DI006.htm; CAL. CODE REGS. tit. 15, § 3323(g)(3) (2007), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2007.pdf; CONN. ADMIN. DIRECTIVE § 9.5(12)(Z) (2008), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0905.pdf>; 03-201 ME. CODE R. § 20.1 (Weil 2005), available at <http://www.maine.gov/sos/cec/rules/03/chaps03.htm>; 103 MASS. CODE REGS. 430.24 (3-2) (2006), available at <http://www.mass.gov/Ecops/docs/doc/policies/430.pdf>; 68 NEB. ADMIN. CODE § 5-005(II)(C) (2007), available at http://www.sos.state.ne.us/rules-and-regs/regsearch/Rules/Correctional_Services_Dept_of/Title-68/Chapter-5.pdf; OHIO ADMIN. CODE 5120:9-06(C)(13) (2007), available at <http://codes.ohio.gov/oac/5120-9-06>; PA. DEP'T. OF CORR. POL'Y DC-ADM 801 (2006), available at http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_801_Inmate_Discipline.pdf; VT. DEP'T. OF CORR. ADMIN. DIRECTIVE 410.01 (Rule B17) (2006), available at <http://doc.vermont.gov/about/policies/rpd/410.01>; WIS. ADMIN. CODE [DOC] § 303.15 (2007). The Louisiana Correctional Institution for Women imposes a penalty of 90 days in the maximum security cellblock for “being caught in a ‘lesbian moment.’” Forsyth, *supra* note 3, at 71.
11. See, e.g., ALA. ADMIN. CODE r. 403(37) & (94).

rather than by courts, and there is no precedent to consult for consistency in application.

In addition to administrative regulations, President George W. Bush signed into law the Prison Rape Elimination Act, which created a zero-tolerance standard for the incidence of prison rape in all prisons.¹² While prison regulations prohibiting sex preceded the Act, the regulations depended upon prison employees for enforcement. The Act increased liability for employees who ignored the occurrence of rape. Despite these measures, prison sex continues, often due to the prison guards turning a blind eye when it occurs¹³ or enforcing prohibitions in a selective pattern, targeting specific inmates for discipline.¹⁴

Recent scholarship, however, has advocated allowing certain types of sexual expression in women's prisons.¹⁵ The advocates of such a position differentiate between different types of sex within the correctional system: sexual expression that the system has no interest in prohibiting and should not bar, and sex acts that the system does have an interest in prohibiting and should continue to regulate.¹⁶ This position is based on the dual assumptions that, first, women in prison as a collective unit would benefit from some types of sexual expression, and second, that the government has a legitimate interest in prohibiting others. This paper will examine both assumptions with the intent to determine what intersection exists between these interests. Recognizing that much of the research in this area has focused on male prisoners, rape, and/or staff abuse, this paper will primarily examine *women* prisoners engaged in *consensual* sex with other female *inmates*. Overall, it will reject the argument that any type of sex should be officially permitted within prison, due to the destructive nature of both prison relationships and the prison itself and to the impossibility of consent to any prison relationship.

Part II will introduce the issue of prison sex, providing a brief overview of the common reasons given for same-sex sexual expression among women in prison. Same-sex behavior is not due simply to a lack of men,

12. 42 U.S.C. § 15602. One of the purposes of the Prison Rape Elimination Act is to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States." Individual sanctions for violation of this standard are left to the states.

13. ANDI RIERDEN, *THE FARM: LIFE INSIDE A WOMEN'S PRISON* 115 (1997) ("The [corrections officers] know what's goin' on inside, but never say anything.").

14. Nancy Kurshan, *Behind the Walls: The History and Current Reality of Women's Imprisonment*, in *CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS* 157 (Elihu Rosenblatt ed., 1996).

15. See, e.g., Brenda Smith, *Rethinking Prison Sex: Self-expression and Safety*, 15 COLUM. J. GENDER & L. 185 (2006).

16. *Id.*

as has been previously posited.¹⁷ Nor is it due to a Victorian-era perception that criminal women are by their very nature “fallen women,” unable to restrain sexual impulses. Rather, as evidenced by the prevalence of same-sex sexual expression in women’s prisons across time and national boundaries, the expression is primarily a reaction to the prison environment rather than a reflection of a woman’s individual characteristics.

Part III will establish the legal framework in which the rest of the discussion of women inmates’ sexual expression is grounded. Under the standard established in *Turner v. Safley*,¹⁸ restrictive prison regulations are permissible if they are reasonably related to legitimate penological interests and are not exaggerated responses to such objectives.¹⁹ The *Turner* Court, in its evaluation of inmate marriages, examined both the positive aspects of inmate marriages and the legitimate penological interests in regulating such behavior (comparatively, the “negative” aspects of inmate marriages).²⁰ Following this analysis, Part IV will discuss the positive aspects of female sexual expression in prison, including everything from sex to hugging, touching, and other expressions of emotional favor—all of which are currently prohibited.²¹ In particular, “prison families” serve as an important source of emotional support and may defuse tension. For the purposes of this analysis, the emotional support provided by prison families, which may also involve nonsexual relationships, will be regarded as similar to that provided by a sexual relationship.

In contrast, Part V will examine the negative consequences of female sexual expression in prison, including continued patterns of abusive and exploitative relationships and disruption to the prison community. In addition, administrative efficiency in a prison allowing consensual sex would decrease, as correctional officers would be forced to delineate “acceptable” and “unacceptable” types of sexual expression. This would not only take time away from correctional officers’ usual

17. Margaret Mead, an early influential commentator on homosexual behavior in institutions on a national level, declared same-sex sexual behavior in women’s prisons to be a temporary substitute for heterosexual relationships. See Freedman, *supra* note 9, at 404.

18. *Turner*, 482 U.S. 78, 89 (1987).

19. *Turner*, 482 U.S. at 89, 91.

20. *Turner*, 482 U.S. at 91–99.

21. See, e.g., Forsyth, *supra* note 3, at 71; WOJDA & ROWSE, *supra* note 3, at 33–34 (“To the extent possible, relations between the inmates are governed by facility rules. Inmates are not allowed to borrow from each other or sell items to each other. Fingernails must not extend beyond the end of the finger to prevent scratching. Inmates are not allowed to touch each other The ‘no touching’ rule helps to keep physical abuse and homosexual activity from flourishing.”).

duties but would be an inappropriate use of staff who are not trained in relationship counseling.

As the argument for allowing any sexual relationship is based on the underlying assumption that full consent is possible, Part VI will examine the question of consent in the prison environment. Fully consensual relationships may not exist in the inherently coercive environment of the prison, especially in light of the high rates of mental health disorder symptoms among women in state prisons. Part VII will examine women prisoners' possible constitutional claims to sexual freedom under their right to privacy. Part VIII will provide recommendations for the future, focusing on the need for greater research into the emotional effects of prison sexuality upon women and whether it ultimately has a positive or negative effect on women inmates and the prison as an institution.

II. CAUSES OF SAME-SEX SEXUAL BEHAVIOR IN FEMALE PRISONS

Counter to what many may believe, in a prison for women homosexuality isn't always the release of sexual energy or the manipulation of the weak. It can be true love, or a substitute for the love a woman may be seeking but unable to find. It can be a social activity, an excuse simply to touch, or a venue for social acceptance within prison cliques.²²

Few rigorous academic studies exist that quantify either the number of same-sex relationships in prison or the number of same-sex-oriented women in prison, perhaps for the obvious reason that for an inmate to admit to such a relationship is to admit to a rule violation. Any numbers proffered tend to be anecdotal.²³ Of note, however, is a 2002 study of women in three Midwestern prisons that reported that out of the 263 inmates who returned a usable survey, 28 (10.6%) reported that they were homosexual.²⁴ Another 44 (16.7%) reported that they were bisexual.²⁵ The numbers are high and may logically correlate to a high number of sexual relationships in prison. However, even these numbers may be ambiguous for the purposes of the present examination, as the study did not report whether the women's self-perceived sexual orientation had changed since admission. Thus, the high numbers could be a

22. Morgan, *supra* note 8, at 76.

23. *See id.* at 79; RIERDEN, *supra* note 13, at 26.

24. *See* Struckman-Johnson & Struckman-Johnson, *supra* note 4, at 220–21.

25. *Id.*

result of the prevalence of sexual activity within the prison; for example, a woman who previously considered herself heterosexual engaged in sexual activity with a female inmate within the prison and so considered herself to be bisexual. Conversely, the numbers may have nothing to do with the prevalence of sexual activity, as a woman may engage in same-sex sexual activity while still considering herself heterosexual, and a woman could be homosexual and choose not to engage in sex in prison. Consequently, the true statistical presence of homosexual relationships in women's prisons remains unknown.

However, plenty of anecdotal evidence relays the existence of these relationships and indicates their presence in the prison community. Female same-sex sexual relationships have existed in American adult prisons,²⁶ juvenile facilities,²⁷ Russian Stalinist-era labor camps,²⁸ and nineteenth century Australian prisons,²⁹ to name just some examples. Researchers have posited several explanations for the high rate of homosexuality among females within the prison system.³⁰ First, it is generally acknowledged that the same-sex sexual behavior of female inmates has little, if anything, to do with their sexual orientation prior to prison admission.³¹ Only a small percentage of women entering prison have engaged in same-sex sexual behavior prior to incarceration,³² and many will return to a male significant other after release.³³

Second, same-sex relationships in prison are thought by some to be related to a woman's negative sexual history with men. The woman may have been dissatisfied with her past heterosexual relationships,³⁴ or she may have been the victim of abuse.³⁵ Turning to same-sex behavior may

26. See, e.g., Morgan, *supra* note 8.

27. See, e.g., THE AGGRESSIVES (Logo, MTV Networks Image Entertainment 2005).

28. APPLEBAUM, *supra* note 3, at 313.

29. Eleanor Conlin Casella, 'Doing Trade': A Sexual Economy of Nineteenth-Century Australian Female Convict Prisons, 32 WORLD ARCHAEOLOGY 209, 216-17 (2000).

30. See Forsyth, *supra* note 3, at 67-70.

31. See, e.g., Morgan, *supra* note 8, at 76.

32. RIERDEN, *supra* note 13, at 26.

33. *Id.* at 18; Forsyth, *supra* note 3, at 72; WOJDA & ROWSE, *supra* note 3, at 47 ("I'm doing [homosexual activity] in here, but I'll go back to men when I get out.").

34. Tina A. Brown & Elizabeth Hamilton, *From Pain, Family—Special Report: Seeking Stability Amid the Chaos, More Poor Women of Color are Turning to Each Other*, HARTFORD COURANT, Apr. 30, 2006, at A1 ("Lauray had grown bitter about relationships with men. So when women flirted with her in prison, she flirted back.").

35. Turner v. Safley, 482 U.S. 78, 82 (1987) (citing Safley v. Turner, 586 F.Supp. 589, 592 (W.D. Mo. 1984) ("Women who are consistently in abusive relationships, at some point they may make a conscious decision to explore non-abusive relationships beyond the heterosexual relationship . . . They say men are dangerous. What about being with a woman?") (quoting Gloria Gonzalez-Lopez, a sociologist at the University of

be a reaction to her experiences as a prostitute³⁶ or may come out of a desire to experiment outside community pressures.³⁷ Alternatively, same-sex sexual behavior may be the result of lack of confidence in attracting a man,³⁸ feelings of inadequacy resulting from decreased sexual attention,³⁹ or a fear of commitment to a heterosexual relationship.⁴⁰ Same-sex sexual relations may also be an act of rebellion against a woman's family⁴¹ or even an attempt to build her own family unit.⁴²

However, the prevalence of female same-sex sexuality in prisons across time,⁴³ national boundaries, race,⁴⁴ and age⁴⁵ undermines any argument that same-sex sexual behavior has anything to do with a woman's individual characteristics. As stated, female prisoners in Russian gulags during the Stalinist era also engaged in same-sex relationships. Not only did they engage in the relationships, but the relationships themselves were similar to those documented in the contemporary prison context: the Russian women divided themselves into the two gender roles⁴⁶ often demonstrated by their clothes,⁴⁷ and engaged in

Texas at Austin))). *See also* Morgan, *supra* note 8, at 76; Forsyth, *supra* note 3, at 72–73.

36. DAVID A. WARD & GENE G. KASSEBAUM, *WOMEN'S PRISON: SEX AND SOCIAL STRUCTURE* 129 (1965).
37. Brown & Hamilton, *supra* note 34 (“Most women are likely to be electing to be lesbians in college For the poor, it is prison.” (quoting Lisa Bowleg, Assistant Professor of Psychology at the University of Rhode Island)).
38. WARD & KASSEBAUM, *supra* note 36, at 115.
39. Morgan, *supra* note 8, at 77; WOJDA & ROWSE, *supra* note 3, at 47 (“The younger inmates are taken advantage of a lot. They tend to get involved in that kind of activity with their eyes wide open. I think it's because they think they have to have someone to have any self-worth.”).
40. WARD & KASSEBAUM, *supra* note 36, at 115.
41. *Id.* at 115–16.
42. *Id.* at 138. *See infra* Part IV for discussion of prison families.
43. For an excellent discussion of same-sex sexual relationships among women in prison during the early to mid 20th century, *see generally* Freedman, *supra* note 9.
44. *Id.*
45. NANCY LEIGH TIERNEY, *ROBBED OF HUMANITY: LIVES OF GUATEMALAN STREET CHILDREN* 28 (1997) (“Girls, too, often enter homosexual relationships, especially while in juvenile jails.”); RENE DENFELD, *ALL GOD'S CHILDREN: INSIDE THE DARK AND VIOLENT WORLD OF STREET FAMILIES* 274 (2007) (“[Cassandra] had made a new family in jail and talked about her jail sisters and her jail wife like they had been her family for her entire life. She now identifies herself as lesbian and complains that the jail guards discriminate against her for being homosexual.”).
46. APPLEBAUM, *supra* note 3, at 313; WARD & KASSEBAUM, *supra* note 36, at 102.
47. APPLEBAUM, *supra* note 3, at 313; WARD & KASSEBAUM, *supra* note 36, at 105–106; WOJDA & ROWSE, *supra* note 3, at 42 (“People perceive me as being a homosexual because I wear pants all the time. Or my hair is short.”).

public displays of affection or sexuality.⁴⁸ Although the Russian ex-inmates' stories recount a rape of a female inmate by other female prisoners,⁴⁹ the sexual relationships between the women primarily served to help some inmates survive the harsh prison environment.⁵⁰ The high rate of sexual expression among female prisoners regardless of culture or temporal constraints indicates that the expression likely has little to do with the individual women and everything to do with adaptation to the prison.

This role of same-sex sexual behavior as a means of social adaptation to prison implies coercion, in that the prison environment acts as an outside force dictating a woman's choice to engage in sex. For example, prison, as a restrictive environment in which there are few means of lawfully gaining sizable amounts of money, engenders black market economic bartering, including exchanging sexual favors for "gifts" from a lover, such as commissary items, cigarettes, and favors.⁵¹ In fact, one survey of twenty-four women who had been at the Louisiana Correctional Institution for Women for at least twenty years found that economic support was the most frequently stated reason by the inmates for same-sex relationships in the prison.⁵² Women may also be elevated in the social hierarchy by being in a relationship with a particular inmate or because they are known for having multiple sexual partners. Most literature also portrays same-sex sexual relations as a reaction to the loneliness and isolation of prison.⁵³ If it is true that the sexual activity is born out of adaptation to prison rather than out of an un-coerced sexual desire, women inmates may have less of a legitimate interest in achieving sexual

48. APPELBAUM, *supra* note 3, at 313 ("When such a pair are suddenly seized by a wave of passion, they jump up from their seats, leave their sewing machines, and chase after each another, then amid frantic kisses they fall to the ground.").

49. *Id.*

50. *Id.* at 313, 315 ("Lesbian relationships helped some people to survive Camp relationships humanized our lives.").

51. Christina Wilson, *Loving in the War Years: Support for Black Women in Detention*, WOMEN IN ACTION, Mar. 3, 2003, available at http://www.isiswomen.org/index.php?option=com_content&task=view&id=727&Itemid=200 ("Lots of women are with women 'cause they buy them stuff, [they are] not serious about the [homosexual] lifestyle."); WOJDA & ROWSE, *supra* note 3, at 52 ("It's all about commissary. Whoever can buy me the most commissary can be my boyfriend.").

52. Forsyth, *supra* note 3, at 73–74. Economic trade is also the basis for the sexual activity in the Australian prison discussed in Casella, *supra* note 29, at 215.

53. RIERDEN, *supra* note 13, at 127 ("It's hard in prison because some women are serving a lot of time and want companionship."); WOJDA & ROWSE, *supra* note 3, at 35 ("Even homosexuality largely is based on exploitation of the need to be comforted and loved rather than physical aggression.").

expression, and the prison may have a more substantial penological interest in suppressing it.

III. LEGAL FRAMEWORK: *TURNER V. SAFLEY*

Inmates' sexual autonomy ends upon entrance to a correctional institution. Cases regarding an inmate's right to consensual sexual expression with other inmates are nonexistent, but sexual expression is analogous to an inmate's right to marriage, at issue in *Turner v. Safley*. In *Turner*, the Supreme Court reviewed Missouri prison regulations that limited inmate correspondence between inmates at different institutions and almost completely banned inmate heterosexual marriages.⁵⁴ Specifically, the regulation on inmate marriage permitted "an inmate to marry only with the permission of the superintendent of the prison, and provide[d] that such approval should be given only when there are compelling reasons to do so."⁵⁵ Prison officials testified at trial that "generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason."⁵⁶ The Court held that restrictive prison regulations implicating inmates' constitutional rights are permissible only if they are "reasonably related to legitimate penological interests" and are not exaggerated responses to such objectives.⁵⁷

In its opinion, the Supreme Court identified four factors relevant to determining whether a prison restriction is reasonably related to a legitimate penological interest: (1) the existence of "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact 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 . . . [or] existence of obvious, easy alternatives."⁵⁸ Thus, the prohibition of inmate correspondence was upheld, because it was deemed to be legitimately related to

54. *Turner*, 482 U.S. 78, 82 (1987). In addition to the formal regulation, the District Court found that inmates were threatened with loss of writing and visitation privileges, parole, and custody of their children if they pursued their marital rights, and that they were harassed and threatened if they pursued grievances in an attempt to exercise marital rights. *Safley v. Turner*, 586 F.Supp. 589, 593 (W.D. Mo. 1984).

55. *Turner*, 482 U.S. at 82.

56. *Turner*, 482 U.S. at 82.

57. *Turner*, 482 U.S. at 89, 91.

58. *Turner*, 482 U.S. at 89-90.

security concerns, such as facilitating restriction of gang activity.⁵⁹ Conversely, the prohibition on inmate marriages was struck down, because it was an “exaggerated response” to security concerns, as there were less restrictive alternatives that would achieve the same objectives.⁶⁰

The Supreme Court reviewed the *Turner* factors again in *Beard v. Banks*,⁶¹ which involved a prohibition of inmates’ access to all newspapers, magazines, and photographs. The Secretary of the Pennsylvania Department of Corrections asserted several justifications for the policy, including incentivizing better inmate behavior, the need for less property in an inmate’s cell, and security interests such as reducing flammable material.⁶² The Court said that the Secretary needed only the first—to incentivize good behavior—to justify the prohibition and granted summary judgment in his favor.⁶³ Although denying access to printed material is not as central to a human’s being as denying sexual expression, the fact that the prison did not even have to assert a security concern to override an inmate’s right to access to printed material is remarkable. In contrast, sexual expression does invoke security interests, as sexual relationships involve two inmates in close contact and may cause disruptions in the prison. Thus, a prison can assert an even stronger interest in suppressing it.

To determine whether sufficient justification exists to overcome an inmate’s constitutional right,⁶⁴ the court must weigh the benefits of inmate sexuality against the prison’s interest in prohibiting sexual activity. In coming to its decision, the *Turner* Court identified several benefits of inmate marriages:

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally,

59. *Turner*, 482 U.S. at 91–92.

60. *Turner*, 482 U.S. at 97–98.

61. *Beard*, 548 U.S. 521, 525–29 (2006).

62. *Beard*, 548 U.S. at 530.

63. *Beard*, 548 U.S. at 530–32.

64. Part VII *infra* will examine the women prisoners’ constitutional right to privacy.

marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimization of children born out of wedlock).⁶⁵

Similarly, although sexual relationships do not result in the receipt of government benefits, inmates could argue that their consensual relationships are, like marriages, an expression of emotional support, public commitment, and personal dedication. However, it remains to be seen whether there is empirical support for an assertion that consensual inmate relationships do result in such benefits. Next, I will examine both the positive aspects and the negative consequences of sexual relations among female inmates, in order to engage in the same balancing analysis as the *Turner* Court and determine whether, in this case, there is sufficient counterweight to any positive benefits such that prison regulation of inmate sex could satisfy the *Turner* test.

IV. BENEFITS OF RELATIONSHIPS BETWEEN FEMALE INMATES

We have little families, you know. I have about six prison kids and I look out for them and they look out for me. I love them like I do my kids. They call me their dad.⁶⁶

Similar to intimate relationships on the outside, sexual expression between female inmates provides emotional and physical support. Only in prison the stakes are higher: women are isolated from their friends, family, and work, and their relationships in prison may be their only support.

Compensating for the isolation of prison, inmates often form “families”—they adopt children, they have spouses, parents, and grandparents.⁶⁷ These families “integrate the inmates into a meaningful social system and represent an attempt to create a substitute universe within the prison.”⁶⁸ Within these families, the women separate themselves into

65. *Turner*, 482 U.S. at 95–96.

66. *Lockdown: Women Behind Bars* (National Geographic Channel television broadcast Feb. 17, 2007).

67. See, e.g., RIERDEN, *supra* note 13, at 21; WOJDA & ROWSE, *supra* note 3, at 47 (“The homosexuals will form family units. They have mothers, sisters, brothers. Whole family. It happens a lot.”).

68. Rose Giallombardo, *Social Roles in a Prison for Women*, 13 SOC. PROBS. 268, 270 (1966).

the traditional gender roles of a masculine spouse and a feminine spouse. Sexual activity, in the traditional sense of involving genitals, is not always involved in a prison family,⁶⁹ but simple physical expressions of affection also violate many prisons' rules, as women are often not allowed to touch or hug⁷⁰ due to security concerns.⁷¹

The relationship between prison families and sexual expression between women in prison is complex. In mercurial prison societies, prison families and girlfriends may be mutually exclusive or they may be inter-related. For the purposes of this paper, these emotional relationships are discussed together because they are both have beneficial aspects for the women involved and they are both prohibited by prison authorities. Sexual partners and prison families often are multicultural,⁷² unlike prison gangs, which tend to divide along racial and ethnic lines.⁷³ In addition to protection (a primary reason for prison alliances),⁷⁴ families also provide emotional support and promote internal discipline that may well further stability in the institution as a whole.

A. Protection

Female inmates may seek protection by developing intimate relationships, particularly prison families, instead of joining prison gangs.⁷⁵ Within the often violent and shifting social structure of the prison, many young offenders anchor themselves by allying with a lover or a gang.⁷⁶ Similar to a gang, if one member of the family is attacked, the

69. Morgan, *supra* note 8, at 79 ("In some instances, a prison lesbian may not engage in sexual activity with her woman at all. She may find one person to be her friend and that person becomes her companion for emotional support and simple touching.").

70. *Id.* at 78.

71. For other possible reasons, see *id.* (implying that the restrictions on touching are due simply to homophobia); Freedman, *supra* note 9 (arguing that the oppression of lesbian relationships in prison was in part or wholly due to the interracial aspect of many of the female couples).

72. *The O'Reilly Factor: California Women's Prison Notorious for Violence* (Fox television broadcast Feb. 9, 2007). See also *Lockdown*, *supra* note 66.

73. See, e.g., Southern Poverty Law Center, *Behind the Walls*, INTELLIGENCE REP., Winter 2002, <http://www.splcenter.org/intel/intelreport/article.jsp?sid=55>.

74. See *id.*

75. See *The O'Reilly Factor: California Women's Prison Notorious for Violence*, *supra* note 72.

76. See, e.g., RIERDEN, *supra* note 13, at 32 (noting that, in the wing where young offenders at the Niantic Correctional Institution are housed, the "culture demands sharp survival skills and a quick eye for the ever-shifting hierarchy. Most of these young offenders anchor themselves by finding a lover or joining a gang.").

other members will come to her aid.⁷⁷ Contrary to stereotypical assumptions about the “fairer sex,” women’s prisons suffer their share of violence,⁷⁸ perhaps because most states have only a handful of female facilities,⁷⁹ and therefore women of all security levels may be housed together. Faced with physical threats, women likely do not want to face those threats alone. Thus, the prison environment may lead women to band together, whether in a sexual partnership or a prison family, to protect one another.

B. Emotional Support

I’ve been sleeping above the same person for two years. So what kind of relationship do you think I have with that person? I’m with them. Ride or die. They become like a part of your family. I’m closer in here with people than with people in my own family.⁸⁰

Similar to the inmate marriages discussed in *Turner*, sexual relationships among women, in their most positive incarnation, promote emotional support and may be a public declaration of commitment.⁸¹ Prison families mirror traditional families in that sexual relationships are expressed in horizontal relationships of a “husband” and a “wife.” In contrast, a woman “adopting” a daughter seldom has anything to do

77. *Lockdown*, *supra* note 66.

78. For example, the Ohio Reformatory for Women, Ohio’s main female-only facility, had the second-highest number of inmate-on-staff assaults from November 2004 through October 2005, and was eighth overall in the system for inmate-on-inmate assaults during the same time period. During that period, there were twenty-two inmate-on-inmate assaults, or 1.83 per month. CORR. INST. INSPECTION COMM., REVIEW OF ASSAULT DATA FROM THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION REGARDING OHIO PRISONS 10, 23 (2006), <http://www.ciic.state.oh.us/publications/assaultdata06.pdf>. See also *Lockdown*, *supra* note 66.

79. For example, New York, one of our most populous states, has only seven facilities that house women inmates; Georgia has three, and Pennsylvania only two. N.Y. State Dep’t of Corr. Servs., Facility Listing, <http://www.docs.state.ny.us/faclist.html> (last visited Sept. 20, 2008); Ga. Dep’t of Corr., State Prisons, <http://www.dcor.state.ga.us/Divisions/Corrections/StatePrisons.html> (last visited Sept. 20, 2008); Pa. Dep’t of Corr., Institutions, <http://www.cor.state.pa.us/> (follow “Institutions” hyperlink) (last visited Sept. 20, 2008).

80. *Lockdown*, *supra* note 66.

81. See *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

with sex. Instead, it is something of a mentorship role,⁸² a relationship born of mutual regard rather than exploitation. These relationships can be as important as outside families in that the “elder” family members—those who have been in prison longer—can give instruction to the “younger” family members about how to live in prison.

Women often form families out of friendship and mutual support,⁸³ a natural result of the long length of time they live together. Mandatory minimums, drug sentencing, and federal conspiracy charges have resulted in a rapid increase in the number of women in prison.⁸⁴ From 2000 to 2006, the number of women incarcerated under state or federal jurisdiction increased from 93,234 to 112,498.⁸⁵ Many women may be in prison for years. In 2004, 42% of the women convicted in state court were convicted for a property offense⁸⁶ carrying an average maximum prison sentence of 45 months and a median maximum prison sentence of 31 months.⁸⁷ In comparison, in 1992, a property felony offense carried an average maximum sentence length of 67 months, but the estimated time to serve in prison was only 23 months.⁸⁸

Living day in and day out together within a repressive environment, it is natural that the women grow close together, providing mutual support and companionship—even growing so close as to consider one another family.⁸⁹ Many women prisoners who are used to being supported by a chain of people, from parents to lovers to husbands, may find familiar comfort in the support of a same-sex relationship.⁹⁰

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82. Examples of mentorship roles include Starr giving life instructions to her “daughter,” Spooky, *Lockdown*, *supra* note 66, and “Ma” Delia doling out advice to her “daughters” and other inmates, RIERDEN, *supra* note 13, at 21–24, 77, 154, 162.
 83. Wilson, *supra* note 51 (“Women loving women inside prison are creating opportunities for self-growth, mutual support, intimacy, and trust with incredible hope and intention.”); WOJDA & ROWSE, *supra* note 3, at 47 (“The homosexuals will form family units . . . They just want to belong, I guess.”).
 84. Wilson, *supra* note 51. *See also* RIERDEN, *supra* note 13, at 3.
 85. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, PRISONERS IN 2006, at 3 (2007), *available at* <http://www.ojp.gov/bjs/pub/pdf/p06.pdf>.
 86. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS 2004: PROFILE OF FELONS CONVICTED IN STATE COURTS tbl.2.2 (2007), *available at* <http://www.ojp.gov/bjs/pub/html/scscf04/tables/scs04202tab.htm>.
 87. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS 2004: FELONY SENTENCES IN STATE COURT tbl.1.3 (2007), *available at* <http://www.ojp.gov/bjs/pub/html/scscf04/tables/scs04103tab.htm>.
 88. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS 7 (1992), *available at* <http://www.ojp.gov/bjs/pub/pdf/njrp921.pdf>.
 89. RIERDEN, *supra* note 13, at 24.
 90. WARD & KASSEBAUM, *supra* note 36, at 74 (“Many women who have been supported and protected by parents, husbands and lovers in the free world find in the

Prison relationships promote criminal justice objectives both in providing for a woman's social rehabilitation and in promoting rehabilitation program success. Stress and loss of support have been linked to drug-use continuation and relapse;⁹¹ alleviating both would seem intuitively to lead to a higher likelihood of treatment success. Social support furthers substance abuse treatment, so long as the social support is itself anti-drug.⁹² In general, feelings of comfort and support have a greater chance of allowing an inmate to focus on treatment than stress, agitation, and fear. Thus, the social and emotional support that prison relationships provide can be an important factor in furthering criminal justice goals.

C. Stability of Relationships

Folks are looking for love. The sexual orientation of their new partners is less significant if they are receiving love, safety and support That speaks to their brokenness, [which] comes with poverty, oppression and trauma.⁹³

The *Turner* Court identified one element in favor of inmate marriage as the expectation that it would ultimately be consummated upon the inmate's release. Although the court did not elaborate further, the presumption is that the court favored relationships that would be stable, that the alliances formed would eventually have a more lasting incarnation, that the marriages were not frivolous wastes of prison employees' time. While allowing female sexual expression is not the same as allowing marital union—in fact, the inmates are technically asking for consummation without the union—the likelihood of a stable relationship upon release may be a factor that weighs in favor of allowing it in prison. Just as inmate marriages provide legitimacy to a relationship,

homosexual affair the answer to the problem of adjusting to the lonely and frightening atmosphere of the prison.”).

91. See, e.g., NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS 18–19 (2006), http://www.drugabuse.gov/PDF/PODAT_CJ/PODAT_CJ.pdf; NAT'L INST. ON DRUG ABUSE, NIDA COMMUNITY ALERT BULLETIN: STRESS AND SUBSTANCE ABUSE (2006), <http://www.drugabuse.gov/StressAlert/StressAlert.html>.
92. Mark D. Litt & Sharon D. Mallon, *The Design of Social Support Networks for Offenders in Outpatient Drug Treatment*, 67 FED. PROBATION 15, 17 (2003). See also RIERDEN, *supra* note 13, at 125–26 (providing an example of where social pressure can be exerted to assist an inmate in overcoming addiction).
93. Brown & Hamilton, *supra* note 34.

physical involvement of female inmates can signify long-term commitment rather than simple sexual gratification.

The greater community has become more accepting of the lesbian lifestyle in a way that has increased the likelihood of success for relationships that develop in women's prisons. In 1965, prison relationships did not have a high success rate in the outside world.⁹⁴ A survey conducted in 1965 found that 90% of the inmates and 86% of the staff agreed with the following statement: "Most homosexuality in this prison is really bisexuality because the women go back to men when they get out of prison."⁹⁵ Thus, relationships in prison were generally short-lived affairs, representing more the need of the moment rather than commitment that would continue in the community.

However, the twenty-first century has seen an increase in the number of women living openly as lesbians after being in prison, drug treatment, and psychiatric hospitals.⁹⁶ The greatest increase has been seen in poor, urban, minority women looking for intimate relationships they could not find with men.⁹⁷ Neighborhoods with the highest percentage of same-sex female households also are neighborhoods with significantly high poverty rates.⁹⁸ In these impoverished urban communities, where many men may themselves be in prison or are otherwise unsuitable as mates, the women are together forming the traditional two-parent household in which to raise their children.⁹⁹ Greater population density in urban areas may also result in a larger community of lesbian, gay, bisexual, and transsexual individuals who could provide support, including GED programs, life skills programs, and outreach.¹⁰⁰ If the stability and legitimacy of a relationship post-release is a factor that weighs in favor of inmate marriage, then the increasing likelihood that same-sex partnerships formed in prison will survive release may equally weigh in favor of permitting inmate sexual relationships within prison.

94. WARD & KASSEBAUM, *supra* note 36, at 177.

95. *Id.* at 97.

96. Brown & Hamilton, *supra* note 34 ("Deborah Rogala, director of the prison resettlement program run by Community Partners in Action in Hartford, said there's been a noticeable change over the last decade. 'We're definitely seeing more women staying in their relationships with women than we used to.'").

97. *Id.* ("They are poor, urban African American and Hispanic women in search of intimacy, love, safety and stability. And they are increasingly finding those things with each other.")

98. *Id.*

99. *Id.*

100. THE AGGRESSIVES, *supra* note 27.

The inmates may still encounter lack of acceptance, however, which may cause emotional and psychological harm. Gangs, having developed social codes prohibiting homosexuality, may order retribution against a woman who engages in same-sex sexual behavior within prison.¹⁰¹ Families may also be unwilling to accept the change. In a documentary about the poor, urban lesbian community, both of the mothers interviewed said that they opposed their daughter's homosexuality and attempted to pass it off as a "phase."¹⁰² Women who are returning home may feel shame about their behavior in prison or confused about their sexuality once they are released. The *Turner Court's* opinion leaves unclear whether the Court would have still permitted inmate marriages if it were known that social pressures would result in the immediate dissolution of those marriages upon release.

A gap in the literature exists as to whether women suffer such a disconnect upon release. One former inmate observed that some inmates who engage in same-sex relationships in prison may deny it upon release due to feelings of shame. Such shame could inhibit a woman's readjustment to the community, if she could not deal with negative feelings attached to actions socially permissible in prison but socially subversive in the community.¹⁰³ Greater study is needed to determine the full emotional impact of same-sex sexual activity among women in prison and of any disjunction it may cause upon release.

Overall, there are many positive benefits prison families provide to the entire prison system. Prison families provide protection, emotional support, and stability. As these same benefits could also be attributed to consensual sexual relationships among prisoners,¹⁰⁴ the question is whether the detrimental effects of prison relationships, discussed in the following section, outweigh these substantial benefits.

101. See RIERDEN, *supra* note 13, at 67 ("[The Kings] did order us to beat up one woman who was going with a King, because she slept with a woman in prison.").

102. THE AGGRESSIVES, *supra* note 27.

103. Morgan, *supra* note 8, at 81.

104. See Forsyth, *supra* note 3, at 73 ("It's more like, you know, having a best friend too. . . . You genuinely care for someone. And you're giving to them material things and emotional support."); Gina R. Autrey, *Life in Prison – Relationships*, AUTHORS-DEN, July 9, 2007, <http://www.authorsden.com/visit/viewshortstory.asp?id=28196&AuthorID=62563> ("Her name was Nikki. She made me laugh. She was so funny. She listened to me. She was there for me as I went through the most horrible time and she truly seemed to care for me."); Wilson, *supra* note 51 ("Women loving women inside prison are creating opportunities for self-growth, mutual support, intimacy and trust with incredible hope and intention.").

V. THE PROBLEMS OF PRISON SEXUAL EXPRESSION

Having examined the positive effects of permitting positive physical expression and relationships among inmates, a restriction on female sexuality must be reasonably related to legitimate penological interests sufficient to outweigh the benefits. There would be concrete detriments to both the inmates and to the prison system if sexual activity were openly allowed,¹⁰⁵ including public health concerns, increased fights, reinforced patterns of poor relationships, burdens on prison resources, and rape. Underlying the evaluation of these detriments is a consideration of *Turner's* reasonableness factors as applied to assess the impact of a prison policy allowing inmate sexuality on other inmates, the guards, and the allocation of prison resources, generally.

A. Public Health Concerns

Health may be the best argument that the prison has to restrict sexual expression in women's prisons. Restricting sex is reasonably related to the legitimate penological interest of providing for the health and safety of its inmates. HIV and AIDS are major public health problems within America's correctional facilities.¹⁰⁶ Many women enter prison with a multiplicity of health problems that may be communicable to other inmates.¹⁰⁷ As of December 31, 2005, 20,888 state inmates were infected with HIV, composing 1.8% of the prison population.¹⁰⁸ A higher percentage of female and male inmates have HIV.¹⁰⁹ Overall,

105. While more theoretical arguments exist (e.g., criminals should not enjoy themselves in prison, denial of sex is part of the deterrence, etc.), they seem to be largely born of judgment and without evidentiary support.

106. See, *HIV Transmission Among Male Inmates in a State Prison System—Georgia, 1992–2005*, MORBIDITY & MORTALITY WKLY. REP. (Ctrs. for Disease Control & Prevention, Atlanta, Ga.), Apr. 21, 2006, at 1, <http://www.cdc.gov/mmwr/PDF/wk/mm5515.pdf>; Michael F. Haggerty, *Incarcerated Populations & HIV*, THE BODY, Summer 2000, <http://www.thebody.com/content/art14343.html>.

107. *Prevention and Control of Infections with Hepatitis Viruses in Correctional Settings*, MORBIDITY & MORTALITY WKLY. REP. (Ctrs. for Disease Control & Prevention, Atlanta, Ga.), Jan. 24, 2003, at 3, <http://www.cdc.gov/mmwr/PDF/rr/r5201.pdf> [hereinafter *Hepatitis Viruses*] (“Infectious diseases—including acquired immune deficiency syndrome (AIDS), STDs, TB, and viral hepatitis—are more prevalent among correctional inmates than the general population.”); Nawal H. Ammar & Edna Erez, *Health Delivery Systems in Women's Prisons: The Case of Ohio*, 64 FED. PROBATION 19, 20 (2000).

108. LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, HIV IN PRISONS, 2005, at 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp05.pdf>.

109. *Id.*

5,620 state prisoners had confirmed AIDS at year-end 2005.¹¹⁰ Although the number of inmates with HIV has fallen since 1999, almost all of the decrease in AIDS-related deaths in prison is attributable only to the male inmate population.¹¹¹

Unfortunately, HIV and AIDS are not the only diseases in correctional populations. In addition, many female prisoners are infected with Hepatitis B and/or C.¹¹² Hepatitis C has reportedly reached “epidemic levels in California prisons,” with an estimated 60% of inmates in women’s prisons infected.¹¹³ In a study of inmates in Texas prisons, 37% of female prisoners were diagnosed with an infectious or parasitic disease.¹¹⁴ Of the total population of female inmates in the Texas prisons, 16.2% were diagnosed with tuberculosis.¹¹⁵ According to the Centers for Disease Control and Prevention, “[o]utbreaks of syphilis and hepatitis B among inmates reflect sexual activity in correctional facilities.”¹¹⁶ Further, inmates may be afraid to share with a physician that they have engaged in sexual activity in prison out of fear that the physician will report them.¹¹⁷ Thus, in a sexually active population, it is much more likely that disease will go undetected and will spread.

Using the *Turner* reasonableness factors, which require examination of the burdens imposed upon others and upon prison resources, a prison policy that allowed women to exercise their right to sexual expression could heavily burden other inmates and guards, who could be infected through involuntary or nonsexual means, such as assisting an inmate in a medical emergency. Second, higher disease rates caused by sexual activity also impose a burden on the prison’s already limited medical services. Third, higher disease rates also impose a burden on the greater community. The women who cycle through the prison hotbed of disease will return to the community and to their loved ones and may continue to pass diseases on to others.

Turner also requires examination of less burdensome alternatives to restricting the sexual activity of women prisoners. Instructing women on

110. *Id.*

111. *See id.* at 3, 5.

112. *See* CALIFORNIANS UNITED FOR A RESPONSIBLE BUDGET, SPECIAL REPORT ON REDUCING THE NUMBER OF PEOPLE IN CALIFORNIA’S WOMEN’S PRISONS 7 (2007).

113. *Id.*

114. *Id.*

115. *Id.* at 22. *See also* *Prevention and Control of Tuberculosis in Correctional and Detention Facilities: Recommendations from CDC*, MORBIDITY & MORTALITY WKLY. REP. (Ctrs. for Disease Control & Prevention, Atlanta, Ga.), July 7, 2007, at 2, <http://www.cdc.gov/mmwr/PDF/rr/rr5509.pdf> (“[A] disproportionately high percentage of TB cases occur among persons incarcerated in U.S. correctional facilities.”).

116. *Hepatitis Viruses*, *supra* note 107, at 4.

117. *See* Ammar & Erez, *supra* note 107, at 23.

safe sex is a possible alternative; however, it would not insure against the spread of disease.¹¹⁸ Again, the prison would be balancing “safe” sex with the potential risks to its correctional guards and to the community. Thus, not only do public health concerns advocate against allowing women full sexual expression in prison, but they limit possible alternatives to complete denial of sexual activity.

B. Security

I look out for them and they look out for me If they're not [in the wrong], I'm going to get involved. I'm going to fight for them. It's how we do it here.¹¹⁹

Restricting prison sex is also reasonably related to the legitimate penological interest of promoting a secure and stable environment. By one count, four times as many inmates who engaged in homosexual relationships as those who did not had three or more disciplinary reports.¹²⁰ Inmates may purposefully violate the institutional rules to impress prospective partners or as a reaction to interventions by staff into their relationships.¹²¹ Some officers reported that sexuality, relationships, and jealousy are leading causes of violence in the women's prisons.¹²² Competitors for an inmate's affection can also provoke emotional outbursts, escape attempts, occasional fights, and attempted suicides.¹²³ A riot in a mid-nineteenth century women's prison in Australia was ascribed to the enragement of one woman over the prolonged solitary confinement of her lover.¹²⁴ Nor are the combatants themselves the only ones affected by the spats. The fights can be loud, involving

118. A similar argument has also been made in regard to men's prisons, that if consensual sex were permitted, condoms could be openly distributed to the inmates and encouraged in their use. Letter from Peter Wagner, Assistant Dir., Prison Pol'y Initiative, to James Guy, Staff, Ohio Dep't of Rehabilitation & Corr. (Nov. 24, 2003), <http://www.prisonpolicy.org/articles/inmaterules112403.html>.

119. *Lockdown*, *supra* note 66.

120. WARD & KASSEBAUM, *supra* note 36, at 110.

121. *Id.* at 77.

122. WOJDA & ROWSE, *supra* note 3, at 47 (“During my first trip, I used to get into a lot of fights. That happens a lot when you engage in homosexual activity Most of the fights in here are over women. You see, a woman to woman relationship is more dangerous, because a woman knows what pleases another woman. A woman gets turned out, and then she will kill for it.”); *The O'Reilly Factor: California Women's Prison Notorious for Violence*, *supra* note 72.

123. WARD & KASSEBAUM, *supra* note 36, at 109.

124. Casella, *supra* note 29, at 219.

slamming doors and screaming obscenities.¹²⁵ In overcrowded prisons, space is limited and extraneous noise can grate on nerves already rubbed raw by the prison environment.¹²⁶

Increased fights implicate both security and rehabilitation interests. Not only do the fights destabilize the prison environment, they require reallocation of correctional resources, necessarily decreasing supervision in other areas. Further, the rehabilitation interests of the inmate may be affected if she is more focused on her relationship than on her programs and job skills training. The fights also impose a burden on the other inmates, who will also be subject to greater stress and disruption.

Even nonsexual relationships in prison families can implicate security concerns. Prison families exert an internal discipline within their social system by way of an "inmate code,"¹²⁷ a set of norms by which inmate social groups regulate their members' conduct. Past research indicates that certain demographics of female inmates, particularly younger inmates, married inmates, and inmates with previous imprisonment experience, may be more supportive of an inmate code.¹²⁸ In a positive light, prison families can maintain order through their own regulations.¹²⁹ However, order is often maintained through violence:

I got kids that get into trouble sometimes. Sometimes they're disrespectful. They do things that aren't acceptable here in prison. They get checked. I might grab them by their neck and rough them up a little.¹³⁰

Ultimately, while the internal regulation of prison families may have a beneficial aspect in promoting some form of order, it presents a security threat because it establishes an authority other than the prison officials. Just as greater society prefers an established police force to vigilantes, prisons cannot allow individual groups to establish their own rules and punishments.

Overall, relationships in prison present a strong likelihood of causing greater disruption to the security of the prison due to the high emotions inherent in sexual relationships. Disruption in prison forces reallocation of resources and guards that might further jeopardize the security of other areas of persons and prison. The relationships also dis-

125. RIERDEN, *supra* note 13, at 158.

126. *Id.*

127. *Id.* at 30–55, 158.

128. Timothy F. Hartnagel & Mary Ellen Gillan, *Female Prisoners and the Inmate Code*, 23 PAC. SOC. REV. 85, 98 (1980).

129. WARD & KASSEBAUM, *supra* note 36, at 77.

130. *Lockdown*, *supra* note 66.

tract women from their programs and training, and the subsequent fights may distract other inmates from theirs.

C. Reinforced Patterns of Poor Relationships

The poor relationship structures of the women in prison also weigh against the women's interest in sexual expression and in favor of the prison limiting it. One could argue that one of the benefits of prison is to remove a woman from her community and whatever poor environmental influences led her to criminal behavior in the first place—including abusive relationships. One could assume that the women, coming from similarly broken backgrounds, would treat one another with kindness and sympathy, that if they were running from bad heterosexual relationships, they would be running toward something better.

But rather than a sisterhood of women involved sexually, many of the women divide themselves into two gender roles and perpetuate masculine abuse of the feminine partner. The “butch” women, rather than adopting a chivalrous and romantic role that women might be thought to prefer, engage in the same physically abusive behavior that many of the women experienced in the outside world.¹³¹ In one girls' juvenile facility, for example, the masculine partner “protects” her feminine partners but also has the “right to beat” her partners, and “they cannot fight back.”¹³² Even more disturbing, more than one source explicitly states that the abused partner finds in her abuse a sense of status or pride, perhaps with the additional belief that abuse equals real affection. In one juvenile facility, the incarcerated girls were said to have “proudly showed their black-and-blue marks” to the research interviewer.¹³³ As another inmate reported,

The Aggressive [lesbian] girls is in control in here. They are in control. The feminine female is just the one that . . . just wash the clothes, cook, and stuff like that; other than that, the aggressive girls is in control. Tell the girl what to do, how to do it. Most girls in here want you to beat them up and stuff. I don't know why. You can't be nice to them in here, you can't

131. Fifty-seven percent of women in state prison reported having been abused prior to admission to prison, and half of those reported that it was at the hands of their spouse or boyfriend. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.gov/bjs/pub/pdf/parip.pdf>.

132. WARD & KASSEBAUM, *supra* note 36, at 137.

133. *Id.*

respect them . . . You got to call them bitches, hos, come here, ho, grab them up. Because they like that.¹³⁴

Even where women have been mistreated and have formed a hatred of men, they may still adopt a masculine role, which may cause a great deal of inner gender and identity confusion.¹³⁵ In this way, the woman perpetuates gendered abuse on herself, and her male stereotypes and experiences continue to exploit her. When the women leave prison, they are not stronger; rather, they have additional proof that in all relationships, heterosexual or otherwise, a person demonstrates his or her love through violence. As discussed later, one possible mitigation strategy would be to introduce women's empowerment sessions and inmate discussion groups on how to develop healthy relationships. But the reality of prison relationships casts a long shadow over the positive benefit of emotional support.

A second unfortunate aspect to same-sex prison relationships is exploitation.¹³⁶ Some women have a method of grooming their future partners:

Let's say you've four children, you're not a criminal, but passed some bad checks and you come in with everyone that matters so far away . . . Once the stud broad knows you don't play, then I begin to build a friendship, knowing all the while what's going on, although you do not. Maybe we like the same music, poetry or other things of common interest. We spend lots of time together and then, I leave you alone for a week, maybe playing with someone else. You'll miss me. You'll want to know if I'm mad at you. You'll miss me—after all, we've filled up a lot of time together. By this time, you like me and you're

134. THE AGGRESSIVES, *supra* note 27. See also TIERNEY, *supra* note 45, at 85 (“[They treated me] bad. Because in the jails there’s almost always lesbianism. Almost everyone is a lesbian. Lesbianism, they treated you like an animal.”).

135. WARD & KASSEBAUM, *supra* note 36, at 113 (“The girl was a prostitute, she had been married three or four times, she’d had a considerable amount of men. She—maybe it’s because she had so many she’d grown to hate them—I don’t know. To her, when she spit out the word ‘man’ it was with all the filth and foulness you could find in the world. Her actions, everything she said—that a man was the worst thing that ever crawled, he never walked, he only crawled. Yet, she was playing the character of a man. The haircut, the actions, the mannerisms, everything, and I could not understand. I don’t even think today anyone will ever know why it is that if they hate men so they are copying them or mocking them. But they’ll say, ‘I took this girl away from a man, and I took that girl away from a man.’”).

136. See, e.g., DENFELD, *supra* note 45, at 280 (“[Danielle] said she had ‘three bitches’ under her in the prison, meaning prison sex slaves.”).

wondering: What's it like? What would my people think? What would I have to do? Is it really so sick? By then I'm half being your friend again. The pressure's on, I'm really applying it, but you think the pressure's on yourself. Then one day the time is right, the scene is right, I'm full of emotion (as all women are), and you say to yourself, "She really loves me. I care for her, surely it's not a wrong thing."¹³⁷

To sexually predatory inmates, it can be like a game. Predatory inmates will pick the women that they see are lonely and have isolated themselves.¹³⁸ This is not to say that all prison relationships are based on manipulation or exploitation,¹³⁹ but it does counteract the image of a female commune where all live and love on equal ground.

D. Burden on Prison Resources

As previously stated, recent scholarship has differentiated between types of sex that should be permitted in prison systems and those that should be prohibited.¹⁴⁰ However, while perhaps laudable as an ideal, it overlooks the practical burden on the prison system. By December 2005, twenty-three states and the Federal system reported operating at 100% or over their reported highest capacities.¹⁴¹ Within overcrowded prisons, resources are stretched thin. Not only do resource constraints decrease the ability of staff to identify problems such as determining whether sex is consensual or not, but it also results in greater victimization, as predatory inmates capitalize on the decreased supervision.¹⁴² Requiring correctional officers to closely monitor inmates' sexual relationships would add strain to an already strained system, possibly

137. WARD & KASSEBAUM, *supra* note 36, at 152.

138. *Id.* at 151.

139. For a discussion of positive, loving relationships between women in prison, see Wilson, *supra* note 51.

140. According to Brenda Smith, the prison has no legitimate interest in regulating four types of sex—sex for pleasure, freedom, procreation, and love—but it does have a legitimate interest in regulating sex for trade, transgression, and safety. See Smith, *supra* note 15.

141. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISONERS IN 2005, at 7 (2006) (revised Jan. 18, 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

142. Craig Haney, Testimony to the Comm'n on Safety and Abuse in America's Prisons, Prison Overcrowding: Harmful Consequences and Dysfunctional Reactions 6 (July 19, 2005), http://www.prisoncommission.org/statements/haney_craig.pdf.

subjecting other inmates to greater threats of victimization and thereby infringing upon their rights of security.

Further, staff may encounter other problems associated with prison relationships, such as frequent requests from inmates for job and housing changes and the need to control inappropriate displays of affection.¹⁴³ Staff may also be called in to referee disputes and to provide therapy for women distressed about their affairs,¹⁴⁴ requiring prison guards to provide services beyond their job description or their training. Overall, allowing sexual relationships in prison would necessarily involve the correctional officers in inappropriate uses of their time.

In addition, inmates generally are not appreciative of staff interventions into their relationships. Verbal abuse of staff members and destruction of prison property are not uncommon protests against unwanted staff advances.¹⁴⁵ The same level of staff involvement that would be required to ensure protection against victimization would likely result in greater inmate outbursts. Not only would monitoring such sexual relationships require the intervention of prison staff, but the intervention itself may cause additional security concerns.

E. Forced Coercion and Rape

I ask Harris about a gang rape I heard she was involved in, in which someone reportedly shoved her fist up an inmate's vagina. She rolls her eyes and shakes her head. Finally she gives me a cool grin. "Look, we were all playing strip poker and that girl lost. We all knew what was goin' down."¹⁴⁶

Finally, in evaluating the costs and benefits of officially permitting female sexuality, the greater possibility that rape will go unnoticed or unreported argues against official sanction. Rape exists in women's prisons.¹⁴⁷ In 2006, there were an estimated 6,528 allegations of sexual

143. WARD & KASSEBAUM, *supra* note 36, at 91.

144. *Id.*

145. WARD & KASSEBAUM, *supra* note 36, at 109.

146. RIERDEN, *supra* note 13, at 60.

147. Morgan, *supra* note 8, at 77 ("Although very few women are gang raped by other women inmates, it has been known to happen in isolated instances."); Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 73 (1996) (reporting a forced sexual touch of a female inmate by several other inmates).

violence across the nation's prisons.¹⁴⁸ Women comprised 15% of the perpetrators of reported inmate-on-inmate sexual violence.¹⁴⁹ However, these statistics likely do not cover the full number of incidents of sexual violence that occur in prison. Sexual violence is likely underreported, as women may fear retaliation from the staff or the other inmates.¹⁵⁰ Despite the supposedly controlled environment, sexual relationships can occur in the bathroom,¹⁵¹ showers, closets, chapel, or even the freezer.¹⁵²

As discussed in relation to prior arguments, the primary concern is that the persons who see the inmates most often—the prison guards—are not qualified to evaluate relationships and the extent of consent in a given situation. If inmate relationships were officially sanctioned, greater leeway likely would be provided to inmates to spend time alone with one another. Rape is not always violent, nor does it always leave a physical mark, and a prison guard cannot often be certain that sexual activity is consensual.¹⁵³

Second, allowing sexual expression would increase the burden of proof for a female victim, because she would have to prove non-consent rather than simply providing evidence of sexual contact. As consent or lack thereof is difficult to prove due to its mental rather than physical nature, the higher bar may result in more reluctance on the part of the woman to report sexual coercion if she does not feel that reporting will provide any remedy. In fact, the New York prison system reportedly required a woman to produce physical proof or DNA evidence before taking action on her allegation of sexual abuse by a prison guard, due to a reluctance to take an inmate's word over that of the guard's in a s/he-said-she-said situation.¹⁵⁴ This corroboration requirement arguably stifles a woman's willingness to report sexual assault, because if she fails to

148. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 2 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf>.

149. *Id.* at 4.

150. Kevin Corlew, *Congress Attempts to Shine a Light at a Dark Problem: An In-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. L. 157, 179 (2006).

151. RIERDEN, *supra* note 13, at 57 ("Sex can also be arranged if two women are in the bathroom at the same time . . .").

152. Frank Green, *Intimate Acts with Inmates Alleged; Studies Help Explain What Brings Staff, Prisoners Together*, RICHMOND TIMES DISPATCH (Va.), Nov. 19, 2006, at B1.

153. See Corlew, *supra* note 150, at 161 ("Another factor contributing to the problem of prison rape is that prison officials may find it hard to distinguish consensual relationships from coercive ones.").

154. Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 65 (2007).

prove her allegation, she could then be subject to retaliation from the rapist.¹⁵⁵

Conversely, under the current system where all sex is prohibited, women's reports are also stifled because just admitting being party to sex may result in administrative penalties.¹⁵⁶ However, a woman will not go to the authorities to discuss her sexual activity unless coercion or force was involved, and the threat of potential penalty may lend greater credence to her claim in the eyes of the prison administration. It is likely that prison systems would grant immunity to such a victim. In all, one would think that a system in which retribution for the offender is assured, even at the risk of punishment to the victim, would be more likely utilized by inmate victims than a system in which the victim may receive no justice at all without hard evidence.

One area that is particularly in need of study is whether higher rates of self-perceived homosexuality result in higher rates of sexual coercion by physical force. In the study of women in Midwestern prisons, the facility with the highest rates of self-perceived bisexuality and homosexuality (20% and 15%, respectively) also had the highest number of physical acts of sexual coercion.¹⁵⁷ In that facility, 27% of the respondents reported that they had been sexually coerced while incarcerated in their state prison system, 19% in that facility.¹⁵⁸ In comparison, of the women in the facilities that reported lower rates of bisexuality (13% and 11%) and homosexuality (5% and 6%) only 9% and 8%, respectively, reported sexual coercion.¹⁵⁹ This, of course, is just one study. Its authors admitted the study's weaknesses, disclosing that only 50% of the women in the facilities returned the surveys, potentially skewing the results, and conceding that, as the numbers were based on self-report, the study could not control for women who may not have been truthful.¹⁶⁰ At the very least, however, the numbers prompt the question whether greater rates of self-perceived homosexuality and bisexuality regularly correlate with higher rates of sexual coercion. Potentially, a correlation could bolster the argument against permitting sexual activity, if women who are sexually interested in women suffer higher rates of victimization, or if a more sexually-charged environment results in higher rates of coercion.

155. *Id.* at 65–67.

156. Interview with Ann Cammett, Staff Attorney, Georgetown Univ. Law Ctr. Domestic Violence Clinic, in Wash., D.C. (Dec. 3, 2007).

157. Struckman-Johnson & Struckman-Johnson, *supra* note 4.

158. *Id.*

159. *Id.*

160. *Id.*

In the context of female inmates, the stereotypical idea of rape by physical force may be less prevalent than nonconsensual sex due to environmental or emotional coercion.¹⁶¹ In a recent survey of three Midwestern women's prisons, 27% of the respondents in one facility reported that they had been sexually coerced.¹⁶² Further, the inmates generally disagreed with the statement that their prison system protected them from sexual coercion.¹⁶³ A woman may be hard-pressed to prove that she was coerced into sex because another inmate was threatening to take her commissary. Additionally, a system that punishes only nonconsensual sex may not even recognize an exchange of sex for a better job as coercion. After all, the line between consensual and coerced can be very thin; sex for trade might be considered a win-win for the inmates by the prison staff, as the inmate gets both intercourse and a better job.¹⁶⁴

Yet the profound physical, social, and psychological effects¹⁶⁵ of coerced sex may last a lifetime and can be magnified in confinement.¹⁶⁶ Unlike victims in society, who may be able to avoid their attacker in the future, an inmate victim often has nowhere else to go due to the limited number of female facilities in many states. In prison, once the rapist is released from segregation, the victim will have to meet her on the yard, in the chow hall, in programs, in chapel—everywhere. And many female inmates do not ever report their abuse. In the Midwestern women's prison study, only 59% of the victims in the facility with the highest number of reported incidents of sexual coercion reported the incident.¹⁶⁷

Whether there is a correlation between sexual relationships and sexual coercion, or whether permitting consensual relationships simply allows for the possibility of greater incidents of sexual coercion, the legitimate penological interests are clear: in terms of security, the prison is under an obligation to protect those who are in its custody from physical victimization. In terms of rehabilitation, a woman's focus on

161. RIERDEN, *supra* note 13, at 111 ("The [corrections officers] will tell you that a lot of women in here get pressured into having sex with the more experienced and manipulative inmates . . .").

162. Struckman-Johnson & Struckman-Johnson, *supra* note 4.

163. *Id.*

164. *Cf.* Corlew, *supra* note 150, at 173–74 (discussing correctional officers' general apathy toward and acceptance of prison rape).

165. Struckman-Johnson et al., *supra* note 147, at 75 (reporting predominately men's reactions to coerced sex, including depression, thoughts of suicide, hatred, prejudice, and a desire for revenge); Janine M. Zweig et al., *A Longitudinal Examination of the Consequences of Sexual Victimization for Rural Young White Women*, 36 J. SEX RES. 396, 397 (1999) (reporting depression, anger, self-esteem, body image, and social adjustment problems for female victims).

166. Corlew, *supra* note 150, at 160.

167. Struckman-Johnson & Struckman-Johnson, *supra* note 4.

developing positive behaviors is impaired when she is re-victimized daily by having to continually face her attacker and fear potential reprisal. Instead of focusing on peacefulness, she will focus on how to defend herself against future attacks. Instead of focusing on drug rehabilitation, she may focus on finding substances that will help her endure the time. She will leave prison more fearful, less trusting of others, and more likely to be involved in self-harming behavior, including crime.¹⁶⁸

VI. THE QUESTION OF CONSENT

[W]hen you study sex in prison, “you begin to realize the definition of consensual is very complicated.”¹⁶⁹

The examination of the benefits and detriments of consensual sexual expression in prison is based on the assumption that it is possible for any kind of relationship in prison to be consensual. However, the question of consent in prison is much more murky than a woman’s simple yes or no. Ultimately, no sexual act in prison may be free of coercion.¹⁷⁰ This is so for two reasons. First, the prison environment imposes such substantial coercion on inmate decisions that there may be no such animal as truly free consent. And second, the overwhelming prevalence of mental health issues within the female inmate population may reduce the level of possible consent. If sexual consent is not possible, then a woman’s right to sexual expression in prison is outweighed by the state’s security concerns, tipping the balance in favor of prohibiting sexual behavior in prison.

Several counterarguments are made contesting the assertion that inmates lack the ability to consent while in prison. First, it is argued that

168. Prison Rape Elimination Act, 42 U.S.C. § 15601(14)(E) (West 2008) (finding that a high incidence of prison rape “increases the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape”); *Hearing on Prison Rape Elimination Act Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 108th Cong. 66 (2003) (statement of Frank A. Hall, Director of The Eagle Group) (“Victims [of prison rape] suffer severe physical and psychological effects that hinder their ability to re-integrate into the community and maintain stable employment after release. The result is higher recidivism...”); Capt. Frank Leonbruno, *How to Reduce Inmate Sexual Assault and Coercion*, 14 CORRECTIONS PROF’L 5, pt.3 (2008) (“Sexual misconduct contributes to recidivism.”).

169. Green, *supra* note 152 (“We went from thinking that we were studying prison rape to studying sexual coercion and then . . . we realized we were also studying bartered sexuality [and] we’re certainly studying consensual sexuality,” she said.”).

170. Alice Ristroph, *Prison and Punishment: Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006) (arguing that sexual coercion is inherent in incarceration).

power differentials due to social hierarchy and mental health concerns such as depression are common to the general population. Followed to its conclusion, this argument would imply that very few—if any—sexual relationships in America are truly consensual. However, by virtue of the women's involuntary imprisonment, the correctional system has a greater duty to its inmate population to protect it from sexual pressure. Although there are surely similarities between the sexual decisions of women within and without prison, there is an inherent difference between women who have the freedom to choose with whom they associate and women who are placed in a confined environment with a limited population.

The second response to the non-consent argument is that it is based on a narrow-minded assumption that a majority of women could not come to prison and consensually decide to engage in sex. This counterargument relates back to the claim that same-sex sexual activity is a product of the prison environment rather than any individual characteristic of sexually active women. The high percentage of women who engage in the same-sex sexual behavior who had not engaged in it previously implies that free consent is impaired by some third factor that is tilting the balance. As discussed above, sexual activity among inmates is due not to lack of men or boredom, but generally to economic deprivation and other more coercive pressures. But all of these reasons are tied to incarceration. The following sections discuss the coercive pressure that prison itself exerts on inmate relationships and the inherent issue of consent in a population with mental health problems.

A. The Prison Environment

Prison is an environment that is so controlling of an inmate's body that all acts within it are ultimately coerced.¹⁷¹ Women feel violated from the moment they enter the system:

When you come in, you're stripped. You're no longer your name. They give you a number. You're lumped in with women that you don't know and you're all the way stripped down

171. *Id.*

from head to toe. You go through a whole process of where they have to look you over.¹⁷²

Within prison, a woman has no choice of what she will wear, what she will eat, when she will get up, and when she will go to bed. In such an environment, no choice is truly free of coercion. If a woman makes a choice that fits within the prison structure, it is directly due to the control. And when she makes a choice to rebel, it is still a response to the same control.

Most prison sex, especially with women, comes not from physical force or the threat of physical force, but from a bargain—a bargain made purely in the context of prison conditions.¹⁷³ These conditions include overcrowding, the social hierarchy within the prison, and the institutional rules themselves.

1. Overcrowding Exacerbates Coercion

As tough-on-crime sentencing becomes more popular and inmates receive longer sentences, the number of prisoners in our country has dramatically increased. But prison space has not kept pace. By December 2005, twenty-three states and the Federal system reported operating at 100% or over their reported highest capacities.¹⁷⁴ Overall, state prisons operated between 99% of their highest capacity and 114% of their lowest capacity.¹⁷⁵ Overcrowding not only presents serious public health and security concerns, but it also has a direct correlation to sexual activity in prison. First, overcrowding causes the ratio of officers to inmates to be dramatically lowered. Fewer officers results in less supervision, creating greater opportunity for inmates to engage in illicit acts outside the eye of the authorities.¹⁷⁶

172. Interview by Bill O'Reilly with Donna Ann Smith Marshall, *The O'Reilly Factor* (Fox television broadcast Mar. 28, 2007). See also Alan Erwin, *Minor Female Offenders 'Degraded in Prison,'* PRESS ASS'N NEWSFILE, July 5, 2007.

173. Ristroph, *supra* note 170, at 141.

174. HARRISON & BECK, *supra* note 141.

175. *Id.* at 8.

176. RIERDEN, *supra* note 13, at 57 ("Sex can also be arranged if two women are in the bathroom at the same time. Though it is risky and can result in further disciplines, inmates say that once they are inside the bathroom, [corrections officers] often become so preoccupied with other matters that intimacy becomes easy. It is one of the perks of overcrowding . . .").

Second, overcrowding decreases privacy. Prison, from the moment of entrance into the system, already engenders a lack of privacy.¹⁷⁷ But overcrowded prisons mean more bodies in the showers, more eyes of the guards and other inmates, more inmates being strip-searched together after visitation, and greater need to place more inmates together in sleeping arrangements that may increase an inmate's vulnerability.¹⁷⁸ Modesty is not an option. At what point does one lose the sense that one's body—who sees it, who touches it, what one does with it—is no longer under one's own control, but is something to be manipulated by others? The concept of being able to say “yes” to one person and “no” to another—the very essence of consent—does not exist in the prison context where inmates are told what to do. Inmates may disassociate from the physical experience and may be more likely to engage in sexual relationships for the purpose of profit, whether economically or socially. Within the pressure of the prison environment, inmates may feel that trading sex for gain is a good bargain.

2. The Social Hierarchy

In terms of abuse of the power differential in prison sex, most of the discussion revolves around inmates and prison guards. In fact, advocates of allowing prison sex must believe that sex between two inmates does not inherently incur the problem of coercion.¹⁷⁹ Any power differential, however, has a coercive element that may impair consent. A social hierarchy exists among the inmates, dependent upon factors such as length of time in prison and number of crimes committed.¹⁸⁰ Within this structure, partners of the most powerful inmates rise in social stature. Thus, not only might there be pressure from a more powerful

177. See *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (“[P]rivacy is the thing most surely extinguished by a judgment committing someone to prison. Guards take control of where and how prisoners live; they do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life.”)

178. Freedman, *supra* note 9, at 403 (suggesting that overcrowding and the “doubling up of women in cells may have intensified lesbian activity”).

179. Interview with Ann Cammett, *supra* note 156.

180. See, e.g., RIERDEN, *supra* note 13, at 59 (“[I]n the lesbian culture there is a loosely defined hierarchy, typically headed by a black woman who thinks of herself as a stud. To become one usually requires returning to the prison several times to establish yourself.”); WOJDA & ROWSE, *supra* note 3, at 39 (“There’s kind of a pecking order in here. The inmates are especially hard on people who committed crimes involving children.”).

inmate to engage in sex, but there might also be pressure to accede in exchange for the social lift.¹⁸¹

A hierarchy also exists in a family, from “grandparents” to “parents” to “children.” Many women in prison come from backgrounds of both physical and sexual abuse by parents and significant others. Of female inmates in state prisons, 57.2% reported being abused prior to admission; 46.5% reported physical abuse, and 39% reported sexual abuse.¹⁸² Of those who reported abuse, 40.1% experienced abuse at the hands of a family member, and 60.1%, by an “intimate.”¹⁸³ It is possible that these women may transpose their expectations and experiences from their real family onto their prison family and be accepting of abuse as part of the family dynamic.

3. Prison Rules

Prison rules may actually backfire in their deterrence effect, in that some women may feel more attracted to sexual activity because it is taboo.¹⁸⁴ Or they may feel that within the restricted confines of the prison, with all of its rules and regulations and in which they have so little choice, they are empowered by making an affirmative choice in favor of sexual expression. Further, a former inmate has argued that the prison’s restriction of any physical interaction whatsoever may drive the women to respond to each other simply out of a craving for physical touch.¹⁸⁵ Regardless of the actual rationale behind the choice, the institutional rules that are a part of every prison facility may exert a pressure on women to engage in sexual activity.

B. Mental Health

Mental health implications are often overlooked by advocates of openly condoning sexual activity by female inmates. Congress found that “inmates with mental illness are at an increased risk of sexual vic-

181. See WOJDA & ROWSE, *supra* note 3, at 42 (“You come in here as a woman, one hundred percent. But the minute you step in here, you get into these games because people want to belong rather than be individuals . . . If you’re not homosexual, don’t play the game.”).

182. HARLOW, *supra* note 131, at 1.

183. *Id.*

184. Morgan, *supra* note 8, at 78–79.

185. See *id.* at 79.

timization.”¹⁸⁶ The Department of Justice Bureau of Justice Statistics recently reported that 73% of women in state prisons exhibited some mental health problem.¹⁸⁷ These women are more likely to have a history of physical or sexual abuse: 68% reported past physical or sexual abuse, compared to 44% of female inmates without a mental health problem.¹⁸⁸ Thus, the chances are high that any two inmates do not operate on the same level of mental health and awareness.

Mental health status affects a woman's ability to give full consent to sex. Courts, however, have established a high bar so that only the seriously mentally ill will be deemed unable to consent. States differ in how they determine mental incapacity, but most states interpret “mental incapacity” for the purposes of consent to sexual activity to mean a lack of understanding of the physical aspect of sex or of the potential consequences, such as pregnancy or sexually-transmitted disease.¹⁸⁹ On one side of the spectrum, according to the New York Court of Appeals, “[a]n understanding of coitus encompasses more than a knowledge of its physiological nature . . . [but also] how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed.”¹⁹⁰ Thus, a woman must understand both the physical and the moral components of sexual activity in order to give full legal consent to sex. On the other side, the New Jersey Supreme Court specifically rejected the New York standard and held that a woman is incapable of consent “if, at the time of the sexual activity, the mental defect rendered [her] unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another.”¹⁹¹ Thus, New Jersey only considers the physical aspect of sex. Under both of these definitions, however, only the seriously mentally ill would qualify as legally unable to give consent.

Still, the fact that a woman is legally able to consent does not mean that her consent is unimpaired. Mental health occurs on a spectrum—there is no dividing line between the mentally healthy and the mentally

186. 42 U.S.C.A. § 15601 (West Supp. 2005).

187. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES tbl.3 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf> (defining “mental health problem” as having a recent history or exhibiting symptoms of a mental health problem).

188. *Id.* at 10.

189. Stephen G. Noffsinger, *Sex and Mental Illness: Legal Considerations*, in *SEXUALITY AND SERIOUS MENTAL ILLNESS* 35, 38 (Peter Buckley ed., 1999).

190. *People v. Easley*, 364 N.E.2d 1328, 1332 (N.Y. 1977).

191. *State v. Olivio*, 589 A.2d 597, 605 (N.J. 1991).

ill. A woman who is severely depressed due to the isolation of the prison environment may be able to legally consent, but is there truly full consent if another inmate takes advantage of her desire for companionship? Further, as discussed earlier, the majority of women with a mental health problem come from difficult backgrounds, many involving abuse. A relationship exists between child sexual abuse and adult female sexual behavior—including higher frequency of intercourse and masturbation, a greater range of sexual experience and fantasies, and a greater likelihood of engaging in unrestricted sexual behavior.¹⁹² A woman with a history of sexual abuse may therefore be particularly vulnerable to sexual pressures in prison.

Women with mental health problems are also more likely to have problems with substance abuse.¹⁹³ Over 74% of women with mental health problems met criteria for substance dependence or abuse, compared to 54% of the female inmate population without mental health problems.¹⁹⁴ In an article on lesbian prison relationships that continued in the outside community after release, drug addiction and mental illness were “common threads” in the women’s lives.¹⁹⁵ Women in prison may not be of sound mind either due to being under the influence of drugs obtained through the prison black market or because they are in recovery. They may also be more likely to trade the commodity that they have, their body, in exchange for contraband such as drugs.

Returning to *Turner’s* emphasis on the burden on prison resources, prison officials would be hard pressed to determine who was mentally healthy and therefore able to give full consent, and who was mentally compromised to the point that consent would be impaired. Considering that 73% of the women in state prison have been determined to have some sort of mental health problem, prison officials would have the burden of evaluating a large number of women. Further, in terms of the burden on the guards, relationship therapy is not part of their training; requiring them to evaluate relationships would therefore be inappropriate.¹⁹⁶

192. Cindy M. Meston et al., *The Relation Between Early Abuse and Adult Sexuality*, 36 J. SEX RES. 385, 391 (1999).

193. JAMES & GLAZE, *supra* note 187, at 1.

194. *Id.* at 10.

195. Brown & Hamilton, *supra* note 34.

196. The same argument was made regarding a prison guard’s lack of training or qualification to discern consent in an inmate’s relationship.

VII. ADDITIONAL ANALYSIS: THE RIGHT TO PRIVACY

[P]rivacy is the thing most surely extinguished by a judgment committing someone to prison.¹⁹⁷

Implicit in a *Turner* analysis is not only that the prison does not have the right to infringe on an inmate's sexual autonomy, but that the inmate has a constitutional right to such autonomy. Rights to bodily integrity in the prison context are generally grounded in the Fourth and Eighth Amendments. Unfortunately for the inmates, rights to privacy and one's own body become substantially abridged once they enter the prison walls. Specifically, the Supreme Court in *Hudson v. Palmer* rejected the Fourth Amendment's application within prisons:

[P]roscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.¹⁹⁸

An inmate wishing for freedom of sexual expression likely would desire privacy within her cell in order to engage in physical exercise of that freedom. However, under the Supreme Court's holding, and given the strong security concerns implicated by allowing two inmates to be unmonitored within a cell, it is unlikely that any such privacy right would be protected.

Despite holding that an inmate does not have any right of privacy under the Fourth Amendment, the *Hudson* court remarked that an inmate still has recourse under the Eighth Amendment against cruel and unusual punishments.¹⁹⁹ This Eighth Amendment protection may even go so far as to protect against "calculated harassment unrelated to prison needs."²⁰⁰ However, to establish a claim under the Eighth Amendment, an inmate would have to demonstrate the "unnecessary and wanton infliction of pain."²⁰¹ Pain can be psychological, physical, or both. As just one example, in *Jordan v. Gardner*, the Ninth Circuit found that cross-gender bodily searches in a women's facility violated the Eighth

197. *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (citing *Hudson v. Palmer*, 468 U.S. 517, 526–30 (1984)).

198. *Hudson*, 468 U.S. at 526.

199. *Hudson*, 468 U.S. at 530.

200. *Hudson*, 468 U.S. at 530.

201. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Amendment, given extensive personal testimony of the physical, sexual, and emotional abuse that the women had endured during their lives, as well as expert testimony as to the detrimental psychological effects that the cross-gender searches would therefore have on the women.²⁰² Here, it is possible that female inmates could testify to the vast amount of psychological pain that they suffer when denied sexual expression. This argument might work especially well for those serving life sentences who are facing complete denial of sex for the rest of their lives. However, an Eighth Amendment violation has a high bar to meet, and without more evidence of injury, is unlikely to succeed. In addition, at least one court has declared that any practice allowed under a *Turner* analysis is acceptable under the Eighth Amendment,²⁰³ which returns the argument to the previous sections of this paper.

Even in light of the Supreme Court's holding regarding the reduced privacy interests of prison inmates, courts have held that inmates retain a right to privacy as an individual liberty guaranteed by the Constitution.²⁰⁴ The most common case in which the right to privacy is raised is in regard to bodily searches, especially cross-gender bodily searches. In *Canedy v. Boardman*, for example, the plaintiff asked for shower curtains to be installed and for prison officials to allow an inmate to cover his cell window when undressing or using the toilet.²⁰⁵ This argument is similar to an inmate's desire to have certain actions involving undress—such as sexual intercourse—to be outside the prying eyes of guards. The Seventh Circuit in *Canedy*, although without further analysis of the merits of his complaint, reversed the dismissal of his suit.²⁰⁶ The court emphasized that even in the current legal world of *Turner* and *Hudson*,

where it *is* reasonable [for prison officials to adopt measures to afford privacy to inmates]—taking account of a state's interests in prison security and in providing equal employment opportunity for female guards—to respect an inmate's constitutional privacy interests, doing so is not just a palliative to be doled out at the state's indulgence. It is a constitutional mandate.²⁰⁷

Still, these appear to be strong words that are all bark and no bite. With the federal courts' repeated insistence on the reduced privacy

202. *Jordan v. Gardner*, 986 F.2d 1521, 1525–26 (9th Cir. 1993).

203. *Johnson v. Phelan*, 69 F.3d 144, 149 (7th Cir. 1995).

204. *See, e.g., Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

205. *Canedy*, 16 F.3d at 188.

206. *Canedy*, 16 F.3d at 183.

207. *Canedy*, 16 F.3d at 183.

rights of inmates, in addition to the incredible deference granted to the prison authorities by the courts, prison inmates stand little chance of winning a right to sexual expression under their right to privacy.

VIII. CONCLUSION

A balance exists between the interest and right of a woman to sexual expression and the need of the correctional system to provide security and protection for all inmates. It is important to start with the understanding that same-sex sexual behavior among women is not a question of sexual orientation, but is endemic to the prison system. If sexual relationships are a result of a coercive prison environment, and the inmates could not have given full consent, then the relationships cannot be viewed as a public good. Greater research needs to be performed as to evaluate the long-term effects of same-sex sexual relationships in prison to determine whether the theoretical positive and negative effects on a woman are real.

Prisons need to take the initiative to discuss inmate relationships openly with their populations and obtain the women's opinions. Perhaps the burden on the other inmates is greater than thought because they fear sexual victimization—or perhaps the burden is less. The inmates may be able to suggest workable alternatives that promote both prison and inmate interests. Prisons also need to mitigate the burden on health and healthcare resources by discussing safe-sex measures with inmates to lessen the spread of disease. To reduce rates of victimization and to improve inmate reports, prisons need to have frank discussions on healthy relationships and ensure that a woman can discuss her relationship with staff without fearing administrative penalties. They may also want to segregate vulnerable inmates from known sexual predators, teach inmates how to avoid assaults, and engage in self-esteem building to lessen emotional vulnerability.²⁰⁸ Finally, prisons should seriously consider allowing inmates nonsexual hugging and touching in order to reduce the feelings of isolation that women experience in prison that may push them into sexual relationships.

In a study of men's and women's American prisons, the inmates and staff proposed a number of measures that would potentially limit sexual assault and same-sex sexual activity. These measures included segregating vulnerable inmates from sexual predators, allowing conjugal visits, teaching inmates how to avoid sexual assault, and increasing staff and

208. *Caney*, 16 F.3d at 183.

supervision.²⁰⁹ Increasing staff and supervision and housing inmates in single cells would decrease sexual assault and activity, as more eyes means greater chances to get caught. However, such measures would be extremely cost-prohibitive—particularly so for a society in which prison sexuality ranks low in terms of public expenditure priorities. Not only that, but while greater supervision would likely result in fewer incidents of sexual coercion through physical force, it may not affect sex coerced through other means,²¹⁰ such as sex for economic gain, which tends to be the greatest inducement of sexual activity in prison.

Thus, if the problem of sexual coercion is a result of the prison environment, then the solution must come from changing the prison rather than changing the women. As such, one of the best measures could be to remove the prison from the equation altogether by favoring community-based alternatives for women, where they could better remain within their family structures. Another would be to encourage more visitation, so that the loneliness and isolation of prison would not result in emotional vulnerability. In the end, changing punishment from an isolated, restrictive environment with limited sexual outlets and its own twisted social code, to a system that is integrated within the community will better mitigate the pressures of sexual coercion in our incarcerated populations.

This paper argues in favor of the prohibition of consensual sex-in women's prisons, given the current realities of the prison system. Although many positive benefits accompany these relationships (such as protection, emotional support, and internal discipline), the costs of sexual relationships on both the inmates and the community (in terms of public health, prison fights, reinforced patterns of poor relationships, the burden on prison resources, and the greater likelihood that rape and coerced sex would go undetected and unpunished) outweigh the benefits. Furthermore, the coercive nature of the prison environment imposes an outside pressure on prison relationships that reduces the ability of a woman to fully consent to sex, which is doubly impaired by the mental health issues commonly experienced by female inmates. In the future the balance may shift, as treatments for disease develop and community views of same-sex sexual behavior evolve. But today's prison system does not allow for the nurturing relationships that we would wish for America's imprisoned women. ❀

209. Struckman-Johnson et al., *supra* note 147, at 74.

210. Ristroph, *supra* note 170, at 177.