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Beat It: A Proposal to End Bans on Masturbation While Incarcerated

There are many rights people forfeit when they are incarcerated; among these is the right to sexual expression.[1] Incarcerated people are punished inconsistently, severely, and arbitrarily for touching themselves.[2] In 2006, Terry Lee Alexander was masturbating alone in a bunk in Broward County, Florida when a female deputy monitoring his cell from a control room over one hundred feet away wrote him up.[3] Alexander was convicted of exposure and sentenced to sixty days in jail.[4] In 2000, a female guard saw Freddie Williams, a then-incarcerated person in a South Carolina prison, turned sideways in his shower towards the wall, stroking his penis.[5] He was subsequently convicted of sexual misconduct.[6] Though he appealed and insisted he had not intentionally exposed himself, he did not prevail and consequently lost 240 good time credits.[7]

In 2010, Daniel Genies was convicted of indecent exposure and sentenced to three years imprisonment with credit for time served.[8] While making rounds at 10:45 a.m., the guard saw Genies laying on his bed stroking his penis.[9] Genies was alone, was not free to leave, and the room was locked.[10] Genies expected the rounds to happen around 11:00 a.m., and stated that he was masturbating but did not want nor expect anyone to see him.[11] Nonetheless, he received a sentence of 3 years imprisonment and his appeal was denied.[12]

Whitey Bulger, a lifetime Boston mob boss who was eighty-five years old at the time, was alone in his cell at 3:00 a.m. when a male corrections officer making rounds saw him touching his exposed genitals.[13] The guard yelled, "I got you!"[14] Bulger was applying a medicated powder to treat a yeast infection.[15] "I'm eighty-five years old. My sex life is over," Bulger responded.[16] Nonetheless, he received thirty days in solitary confinement and loss of commissary and email privileges.[17] In sum, prison guards have unfettered discretion when it comes to choosing whether to enforce these prohibitions.[18]

Most states ban masturbation in prison, which negatively affects the lives of incarcerated people in numerous ways.[19] Sexual deprivation has detrimental physical and psychological effects.[20] Incarcerated persons often receive harsh punishments for these offenses, such as solitary confinement, a practice which can have disastrous mental and emotional consequences.[21] The Supreme Court's standard for assessing whether a prison regulation that burdens constitutional rights serves a legitimate penological purpose comes from the 1987 case, *Turner v. Safley*. [22] Reasonableness is assessed using four factors: whether there is a rational connection between the regulation and the governmental interest; whether incarcerated persons have alternatives; the impact the accommodation of the right will have on guards and others; and the absence of alternatives as evidence of a

regulation's reasonableness.[23] Masturbation is a form of privacy that should be protected under the Fourth Amendment of the Constitution.[24]

Masturbation bans do not pass constitutional muster under *Turner*.^[25] First, they do not effectuate the goals proponents declare; for example, that masturbation undermines incarcerated persons' ability to reflect on their crimes and complicates reintegration into society.^[26] Studies suggest that any form of consensual sexual activity, including masturbation, has beneficial psychological effects, such as stress relief.^[27] Further, the prevalence of sanctioned distractions, such as sports and movies, undermines the argument that incarcerated people must spend every waking hour reflecting on their wrongdoings.^[28] Second, all sexual activity is prohibited in prison, so there are no available alternatives.^[29] Third, exhibitionism is a form of sexual harassment that activists do not promote.^[30] Allowing incarcerated people to touch themselves in private will not significantly infringe on prison guards' abilities to do their jobs.^[31] Fourth, prisons have other ways of promoting their goals of preventing sexual abuse and fostering rehabilitation.^[32] For example, the Sexually Abusive Behavior Prevention and Intervention Program purports to prevent sexual abuse in prison.^[33] The writers of this program did not cite concerns about masturbation but did include voyeurism.^[34] This indicates that they noted a difference between masturbation and sexual harassment and factored that into the program.^[35] Therefore, under *Turner*, blanket masturbation bans are unjustifiable and therefore unconstitutional.

[1] See, e.g., Cal. Code. Regs. Tit. 15, §§ 3007, 3000 (providing that incarcerated people may not participate in illegal sexual acts, which includes sexual intercourse and masturbation).

[2] See David Merritt Johns, *Free Willy: Should prison incarcerated persons have the right to masturbate?* Slate (Jan. 10, 2012, 6:59 AM), <https://slate.com/technology/2012/01/should-prison-incarcerated-persons-have-the-right-to-masturbate.html>; See *Going Blind Justice*, *The Smoking Gun* (July 25, 2007), <https://www.thesmokinggun.com/documents/crime/going-blind-justice>; See *Genies v. State*, 196 Md.App. 590 (2010).

[3] *Going Blind Justice*, *supra* note 2.

[4] *Id.*

[5] *Johns*, *supra* note 2.

[6] *Id.*

[7] *Id.* *Frequently Asked Questions: Federal Good Time Credit*, Families Against Mandatory Minimums, <https://famm.org/wp-content/uploads/faq-federal-good-time-credit.pdf> (defining "good time credits" as credits earned for good behavior which reduces an incarcerated person's sentence).

[8] *Genies*, 196 Md.App. at 590.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Regina F. Graham, *'My sex life is over': Whitey Bulger, 85, put in solitary confinement for a month after being caught masturbating in his cell with the lights on*, Daily Mail (Feb. 25, 2016, 18:44 EDT) <https://www.dailymail.co.uk/news/article-3464799/My-sex-life-Whitey-Bulger-85-solitary-confinement-month-caught-masturbating-cell-lights-on.html>.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] See *Johns*, *supra* note 2; *Graham*, *supra* note 13; *Genies*, 196 Md.App. at 590.

[19] Sam D. Hughes, *Release Within Confinement: An Alternative Proposal for Managing the Masturbation of Incarcerated Men in U.S. Prisons*, J. Positive Sexuality (2020), https://journalofpositivesexuality.org/wp-content/uploads/2020/04/Release-within-Confinement_Managing-the-Masturbation-of-Incarcerated-Men-Hughes.pdf (Providing the types of masturbation banned in each state. For example, in fourteen states, including Florida, Washington, and Tennessee, all masturbation is banned. In seven states, including Texas and Georgia, public masturbation is banned. In seven other states, including Maryland and New Jersey, public masturbation is banned regardless of intent. In nine states and Washington, D.C., only intentional public masturbation is banned.)

[20] Anna Mascherek, Mirjam Christina Reidick, Jürgen Gallinat & Simone Kühn, *Is Ejaculation Frequency in Men Related to General and Mental Health? Looking Back and Looking Forward*, *Frontiers in Psych.* (Aug. 9, 2021) <https://www.frontiersin.org/articles/10.3389/fpsyg.2021.693121/full>.

[21] Laura M. Salerno & Kristen M. Zgoba, *Disciplinary Segregation and Its Effects on In-Prison Outcomes*, 100 *The Prison J.* 74 (2020), <https://journals.sagepub.com/doi/10.1177/0032885519882326>; Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, U.S. Dep't Health & Hum. Servs. (Dec. 2001), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//42351/Haney.pdf.

(discussing the increased psychological difficulty incarcerated persons in solitary confinement have transitioning from prison to home); Leah Wang & Wendy Sawyer, *New data: State prisons are increasingly deadly places*, Prison Pol'y Initiative (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ (discussing the rising suicide rate in prisons and citing decreasing harsh solitary confinement practices as a possible solution).

[22] *Turner v. Safley*, 482 U.S. 78 (1987).

[23] *Id.*

[24] See U.S. Const. amend. XIV.

[25] *Turner* at 78.

[26] Carmen M. Cusack, *No Stroking in the Pokey: Promulgating Penological Policies Prohibiting Masturbation Among incarcerated person Populations*, 7 *J. L. & Soc. Deviance* 80 (2014), <https://deliverypdf.ssrn.com/delivery.php?ID=704004065004023008087004079005080101050000093043060085030075099000065084030099089022028107099061116032008084120071087085028082102052030015033016103023071012066115022053051047016101086015124107025001083089069028093085110006085117092026096127125126094101&EXT=pdf&IND EX=TRUE>.

[27] Rodrigo J. Carcedo, Daniel Perlman, Noelia Fernández-Rouco, Fernando Pérez, & Diego Hervalejo, *Sexual Satisfaction and Mental Health in Prison incarcerated persons*, *J. Clinical Medicine* (2019), <https://www.mdpi.com/2077-0383/8/5/705/html>.

[28] *Common incarcerated person Recreational Activities*, Hcsdmass.org <https://hcsdmass.org/common-incarcerated-person-recreational-activities/>.

[29] George Lavender, *California Prisons Aim to Keep Sex Between incarcerated persons Safe, If Illegal*, NPR (Jan. 21, 2015), <https://www.npr.org/2015/01/21/378678167/california-prisons-aim-to-keep-sex-between-incarcerated-persons-safe-if-illegal>.

[30] Yaniv Kot, *The Fundamental Right to Sexual Autonomy in Prison*, *Am. Crim. L. Rev.* (2019) [https://www.westlaw.com/Document/Ief4cf3815c0511e9adfea82903531a62/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Ief4cf3815c0511e9adfea82903531a62/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

[31] *Exhibitionism*, PSYCH. TODAY, <https://www.psychologytoday.com/us/conditions/exhibitionism> (last visited Dec. 26, 2022) (stating how exhibitionist disorder is not, like solitary masturbation, prevalent; it affects only about two to four percent of the male population).

[32] *PREA / Offender Sexual Abuse*, NAT'L INST. CORR., <https://nicic.gov/projects/prea-offender-sexual-abuse> (describing the Prison Rape Elimination Act of 2003, which was enacted by Congress to combat the problem of sexual abuse of persons in state and federal custody. PREA addresses both inmate-on-inmate sexual violence and staff sexual abuse).

[33] *Sexually Abusive Behavior Prevention and Intervention Program*, U.S. Dep't of Just. Fed. Bureau of prisons (June 4, 2015) https://www.bop.gov/policy/progstat/5324_012.pdf.

[34] *Id.*

[35] *Id.*