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CHILDREN OF INCARCERATED PARENTS: THE CHILD'S CONSTITUTIONAL RIGHT TO THE FAMILY RELATIONSHIP

CHESA BOUDIN*

I. INTRODUCTION

When judges sentence people to prison, and when prison administrators determine visitation policies, minor children are often ignored.[1] This is not an obscure issue but rather has significant, daily ramifications for a generation of American youth. As incarceration rates have spiraled by over 500% in the last thirty years,[2] so have the number of children who have lost parents to the prison system.[3] In fact, in the United States, there are more children with incarcerated parents than there are people in prison.[4] Incarcerating parents of minor children is not just an issue for those sentenced to prison; the practice also generates third party harms for the children, their caregivers, the welfare apparatus of the state,

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[1] *See generally* NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005) (detailing the plight of children with incarcerated parents); CHILDREN OF INCARCERATED PARENTS (Katherine Gabel & Denise Johnston eds., 1995) (providing guidance to social workers, caregivers, and others who work with children of incarcerated parents).

[2] The Sentencing Project News—Incarceration, THE SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=107 (last visited Oct. 29, 2010); *see also* Bureau of Justice Statistics, Dep't of Justice, Correctional Population Trends Chart, http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm (last visited Oct. 29, 2010).

[3] LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.

[4] *Id.* at 1.

the prison system, and the law.[5] Specifically, parental incarceration has implications for myriad legal issues related to custody,[6] communication,[7] visitation,[8] conditions of confinement,[9] international standards,[10] and more.[11] Studying parental incarceration through a legal frame of analysis may shed light on, or at least raise revealing questions about, the children left behind. While there is a body of literature on the social issues presented by parental incarceration[12] and an assortment of services and programs offered for children and families of prisoners,[13] there is

[5] *See generally* RENNY GOLDEN, WAR ON THE FAMILY: MOTHERS IN PRISON AND THE FAMILIES THEY LEAVE BEHIND (2005) (analyzing collateral impacts of mass incarceration); CHILDREN WITH PARENTS IN PRISON: CHILD WELFARE POLICY, PROGRAM, & PRACTICE ISSUES (Cynthia Seymour & Creasie Finney Hairston eds., 2001) (discussing permanency planning, best interests of the child, and child welfare policy); BARBARA BLOOM & DAVID STEINHART, WHY PUNISH THE CHILDREN? (1993) (considering the roles and responsibilities of child welfare agencies, corrections, caregivers, and incarcerated mothers).

[6] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (requiring a clear and convincing standard of evidence before terminating petitioners' parental rights); Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41, 45 (2000) (detailing the impact of the Adoption and Safe Families Act on termination of parental rights of the incarcerated).

[7] *See, e.g.*, Walton v. N.Y. Dep't Corr. Serv., 13 N.Y.3d 475, 494 (2009) (upholding prison phone policies).

[8] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 126–27 (2003) (upholding department of corrections policies severely limiting prison visitation by children of inmates).

[9] *See, e.g.*, Block v. Rutherford, 468 U.S. 576, 576–77 (1984) (addressing a challenge to pretrial conditions of confinement, including access to contact visits from children).

[10] *See, e.g.*, African Charter on the Rights and Welfare of the Child, art. 30, July 11, 1990, OAU Doc. CAB/LEG/24.9/49, *available at* http://www.unhcr.org/refworld/docid/3ae6b38c18.html ("States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children . . . and shall . . . ensure that a non-custodial sentence will always be first considered when sentencing such mothers [and] . . . establish and promote measures alternative to institutional confinement for the treatment of such mothers . . . .").

[11] *See generally* Tanya Krupat, *Invisibility and Children's Rights: The Consequences of Parental Incarceration*, 29 WOMEN'S RTS. L. REP. 39 (2007) (describing the challenges children with incarcerated parents face and arguing for a children's bill of rights).

[12] *See, e.g.*, BERNSTEIN, *supra* note 1; GOLDEN, *supra* note 5; GABEL & JOHNSTON, *supra* note 1; IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Pattillo et al. eds., 2004).

[13] *See* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, SERVICES FOR FAMILIES OF PRISON INMATES (2002) (surveying the programs and approaches in the various states), *available at* http://www.nicic.org/pubs/2002/017272.pdf.

surprisingly little written about the relevant legal issues.[14] This Article's research and analysis begin to fill the lacuna. Future research might productively draw on legal theory and practice in other related areas: parent–child separation in the context of divorce and immigration.[15]

This Article grapples with a series of key questions: What is the relevance, if any, of children of offenders in sentencing, prison locations, and conditions of confinement? To what extent and with what limitations or exceptions is there a societal interest in children maintaining a relationship with their convicted parents? If children have a right to be considered in sentencing and in visitation policies, what is the legal basis for that right? This Article focuses on minor children and their biological parents, legal guardians, or primary caregivers.[16] The central goal of this Article is to reframe the problem of third party harm to children from current sentencing law and prison visitation policy through the lens of children's rights, rather than the traditional frame of prisoners' rights. Drawing on international law and practice, this Article puts forward a theory for the relevance of children to the sentencing process and development of visitation policy.[17] It suggests that this relevance has a sound, if underdeveloped, legal basis grounded in children's First Amendment freedom of association and their due process liberty interests.

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[14] *But see* Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671 (2003) (discussing family separation); Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1992) (analyzing termination of parental rights process in the context of incarceration); Ellen Barry et al., *Legal Issues for Prisoners with Children*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1, at 147 (describing in brief a range of legal challenges facing families with incarcerated parents).

[15] Citizen children of immigrant parents find their family rights limited in a range of contexts. *See generally* Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751 (2009) (arguing that the rights of citizen children should be factored into their undocumented parents' removal proceedings); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV 35 (1988) (examining sanctions against citizen children for the purposes of discouraging undocumented immigration). There is a complex body of law on child custody in divorce proceedings focusing on the best interests of the child and parents' due process rights. *See generally* Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1 (1996) (applying the best interests of the child standard and constitutional analysis to custody proceedings).

[16] The argument that follows may be stretched to apply to young adult children, parents with children in prison (instead of the other way around), to extended family, or caregivers not recognized by law. However, this Article focuses on legally recognized parent–child relationships where the parent plays at least some role in caretaking the child prior to arrest.

[17] The argument does not apply to cases where maintenance of contact is not in the best interests of the child.

Today, however, minor dependent children are, as a matter of law and standard procedure, a non-factor in sentencing and statutory visitation guidelines. Even within the narrow sentencing guidelines in most jurisdictions, there is no formal mechanism for family status or dependent children to come to the attention of a judge. When individual prisons or jails offer child-friendly visiting facilities, the practice is regarded as a privilege, not a right.[18]

This Article is organized into four parts. Part II provides an overview of the group that is at the heart of this inquiry: children of prisoners. Part III draws on international law and practice to theorize the parent–child relationship in the context of the U.S. criminal justice system. Part IV considers the failure of the status quo to adequately factor children into key decisions that impact their lives in the context of parental incarceration. Specifically, Part IV reviews prison sentencing and visitation policies in two jurisdictions—the federal system and New York's state system[19]—to evaluate whether and how dependent children are taken into consideration. While sentencing and visitation are only two of the myriad areas in the criminal justice process where children's rights should be recognized, they are two of the most important and can serve as proxies for other areas, including parole, alternatives to incarceration, furloughs, phone calls, and so forth.

Finally, Part V puts forward the First Amendment freedom of association and the due process liberty interest as the legal bases for children's right to a relationship with their convicted parents. Part V also engages and rebuts possible counter-arguments. It then concludes by describing, in concrete terms, what the practical implications of the argument advanced here may be for sentencing, prison visitation, and more.

[18] There are three points that this Article does *not* argue. First, the argument here is not that children are never taken into account, or that there is no meaningful way for them to maintain a relationship with their incarcerated parents. They certainly are taken into account some of the time, and in some jurisdictions they can build meaningful relationships with their incarcerated parents, but rarely, if ever, as a matter of right. Second, this Article does not argue that children's rights should be *the* framework for approaching criminal justice. Of course, other stakeholders, including the state, the offender, and the victim have essential voices in the process. This Article modestly seeks to make room at the table for the children who are directly impacted by criminal justice outcomes in which, all too often, their rights and interests are ignored. Finally, this Article does not claim that all children benefit from a relationship with their parents all the time but rather focuses on those children whose best interests are served through maintaining active contact. *See, e.g.*, *infra* note 37.

[19] *See infra* Part IV for an explanation of why these jurisdictions were chosen.

II. The Population Impacted by Parental Incarceration and the Issues at Stake

Of the 74 million children in the United States in mid-2007, 1.7 million, or 2.3%, had a parent in prison.[20] This figure represents an 82% increase since 1991 that does not include the growing numbers of children with parents incarcerated in jails as opposed to prisons.[21] Roughly half of these children are under ten years old.[22] Due to long prison sentences, more than a third of them will reach the age of eighteen while their parents are still in prison. Thus, several hundred thousand more people, now adults, experienced parental incarceration as minors,[23] and the number would surely be far larger if parents in jail were considered as well. As in the prison population, black and Hispanic children are greatly overrepresented among those with a parent behind bars: more than 70% are children of color.[24] One out of every forty-three American children had a parent in

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[20] GLAZE & MARUSCHAK, *supra* note 3, at 1–2. Note that because these Bureau of Justice Statistics estimates are based on numbers on a given day—a snapshot—the actual numbers of children experiencing parental incarceration at some point in their childhood is much larger. For example, in 2008 alone, 735,454 inmates were released from prison and 739,132 new inmates entered. *Id.* at 3. One can easily extrapolate the numbers based on the percentages of these inmates who are parents and their average number of children. This revolving door in prison population has vast implications for a corresponding number of children. Moreover, this estimate may be significantly understating the problem on at least three counts. First, this number does not include children with a parent in jail or immigration detention—at year end 2008 over 785,000 people were held in local jails, and over 30,000 more in Immigration and Customs enforcement detention centers. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2008, at 8, 10 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf. Both jail and immigration populations have rapid turnover rates so the total number "at year end" is only a fraction of the total incarcerated at some point in a given year. For example, in over a twelve-month period between 2008–2009, local jails admitted approximately thirteen million people. TODD D. MINTON, BUREAU OF JUSTICE STATISTICS BULLETIN, JAIL INMATES AT MIDYEAR 2009, at 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf. In all, the United States incarcerates an estimated 2.4 million people on any given day. *See id.* at 8. Second, the parental status numbers here are based on self-reporting by inmates, who may be disinclined to share personal or family information with surveyors. *See* GLAZE & MARUSCHAK, *supra* note 3, at 11 (explaining methodology and survey practice). Third, the percentage of mothers in prison has elsewhere been estimated to be substantially higher than the estimate these numbers are based on. Thus, other reports have estimated that there are closer to 2.4 million children with a parent in jail or prison on any given day. *See, e.g.*, BERNSTEIN, *supra* note 1, at 2.

[21] SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 2 (2009), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

[22] *Id.* at 6.

[23] GLAZE & MARUSCHAK, *supra* note 3, at 3.

[24] SCHIRMER ET AL., *supra* note 21, at 1.

prison; for black children, the number was one out of fifteen, while for white children, the figure was one out of one hundred and eleven.[25]

Switching the focus to the prisoners rather than the children is also revealing. Most of the more than 1.5 million prisoners in the country[26] in mid-2007 were parents of children under the age of eighteen.[27] Put differently, 63% of federal inmates and 52% of state inmates reported having minor children.[28] Because women account for just 7% of inmates, or 114,852 prisoners,[29] the vast majority of parents in prison are men; in 2007, the nation's prisons held 744,200 fathers but only 65,600 mothers.[30] On average, mothers in prison each have approximately 2.4 children while fathers each have 2.0 children.[31] Prior to their arrest, 64% of incarcerated mothers and 46% of incarcerated fathers lived with their minor children.[32]

When criminal justice policy leads to the incarceration of parents with dependent children, what happens to the children left behind? When the father is incarcerated, 88% of the children live with their mother, 12% live with grandparents, and 2% are sent to a foster home or agency.[33] When the mother is incarcerated, 45% live with grandparents, 37% of children live with their father, and 11% are sent to foster homes or agencies.[34] Where, for how long, and with whom children end up living are often determining factors in child development.[35] Yet children's interests are not, as a matter of right, factored into criminal justice determinations involving their parents. The psycho-social challenges faced by children with incarcerated

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[25] *Id.* at 2.

[26] SABOL ET AL., *supra* note 20, at 3. This is by far the highest incarceration rate in the world. ROY WALMSLEY, INT'L CTR. PRISON STUDIES, WORLD PRISON POPULATION LIST 3 tbl.2 (8th ed. 2003), *available at* http://kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

[27] GLAZE & MARUSCHAK, *supra* note 3, at 1.

[28] *Id.*

[29] SABOL ET AL., *supra* note 20, at 16.

[30] GLAZE & MARUSCHAK, *supra* note 3, at 2. This figure indicates that just 57% of women in prison are mothers, while earlier studies, also based on Bureau of Justice statistics, provided estimates that were closer to 80%. *See* Barbara Bloom, *Imprisoned Mothers*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1, at 21. Likewise, New York state reports that 74% of its female inmates are mothers. MICHELE STALEY, N.Y. DEP'T CORR. SERV., FEMALE OFFENDERS: 2005–2006, at 3 (2008), *available at* http://www.docs.state.ny.us/Research/Reports/2008/Female_Offenders_2005-2006.pdf.

[31] Denise Johnston, *Effects of Parental Incarceration*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1, at 61.

[32] GLAZE & MARUSCHAK, *supra* note 3, at 4.

[33] *Id.* at 5. Alternative outcomes include living with other relatives or with friends.

[34] *Id.*

[35] CYNTHIA BEATTY, CHILD WELFARE LEAGUE OF AMERICA, PARENTS IN PRISON: CHILDREN IN CRISIS 11 (1997); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 114 (1996).

parents and the pros and cons of prison visitation have been well-studied elsewhere.[36] The fact that parent–child visitation can help children overcome the challenges of parental separation and reduce recidivism rates is well-documented.[37] The central inquiry of this Article, however, is less well-understood: legal rights of children to a relationship with their parents.

III. THE RIGHTS OF THE CHILD: LESSONS FROM INTERNATIONAL LAW

International law offers a range of approaches to children's rights that may provide a basis for children to claim a relationship with incarcerated parents. The argument here is not concerned with the enforceability of international legal standards or foreign law in the United States,[38] but rather with the development of a practicable legal basis for children's rights to a relationship with incarcerated parents. First, a more general review of the theory of the rights of the child is in order.

A. THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (CRC)[39] has been universally ratified by every country in the world except Somalia and the United States.[40] Nonetheless, the United States played a key role in the development of the CRC,[41] and its approach to children's rights is a

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[36] *See supra* notes 12–13; *infra* notes 50–51.

[37] PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 8 (Jeremy Travis & Michelle Waul eds., 2003); William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. CRIM & DELINQ. 287, 304 (2008); Jeremy Travis, *Families and Children*, 69 FED. PROBATION 31, 31–32 (2005); *see also* Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191 (2006) (analyzing the development of parenting skills in prison).

[38] *See* John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579 (2005) (arguing that the Court repeatedly ignores international law or takes a highly constricted approach to its application).

[39] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456.

[40] *See* Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 418 n.150 (2009); *see also* 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL 389, 391 (2009), United Nations Treaty Collection, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last modified Nov. 4, 2010). Somalia has reportedly taken steps towards ratification. Press Release, UNICEF, UNICEF Welcomes Decision by the Somali Transitional Federal Government to Ratify the Convention on the Rights of the Child (Nov. 20 2009), *available at* http://www.unicef.org/infobycountry/media_51841.html.

[41] Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9, 25–26 (1998).

valuable point of reference in theorizing children's rights in the United States. The CRC does not specifically contemplate children with incarcerated parents, except to guarantee them the right to information about their parents' whereabouts.[42] Nonetheless, its provisions create a strong legal basis for a child-oriented approach to sentencing and visitation policy.

A criminal conviction of a parent or parents should in no way diminish or undermine the rights of the child. The CRC requires that parties ensure children's rights are protected "irrespective of the child's or his or her parent's or legal guardians' . . . status."[43] The CRC goes on to recognize the child's right to "know and be cared for by his or her parents."[44] This language need not be incompatible with parental incarceration, and can easily be read as having implications for when incarceration is appropriate and the kinds of visitation that should be available. This CRC language creates potential for tension between the child's right to "know and be cared for by his or her parents" and whatever societal interests may be served by incarceration.

Children must have a voice, either by themselves or through representation,[45] in proceedings that directly affect their well-being. The CRC mandates that children be given a voice in all issues of import to their lives, including "the opportunity to be heard in any judicial and administrative proceedings affecting the child."[46] Sentencing a parent to prison invariably has a profound and immediate impact on the child including the possibility for multiple changes in caregivers and addresses, the loss of parental support, and even termination of parental rights. Providing children with a voice in parental criminal justice proceedings would therefore be consistent with the CRC.

Children also have a right to contact with their incarcerated parents. Article 9 of the CRC requires that parties "respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[47] This suggests that separation due to parental incarceration[48] cannot include conditions or circumstances that preclude

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[42] Convention on the Rights of the Child, *supra* note 39, at art. 9(4).

[43] *Id.* at art. 2(2).

[44] *Id.* at art. 7(1).

[45] Such representation could be provided by a guardian *ad litem* or a court-appointed attorney.

[46] Convention on the Rights of the Child, *supra* note 39, at art. 12.

[47] *Id.* at art. 9(3).

[48] Myriad other causes beyond the scope of this Article including juvenile detention may also raise the same concerns.

regular contact, except where such contact is not in the child's best interests.[49]

Whether visitation is beneficial for children or for incarcerated parents is highly dependent on the specific dynamics in each family and the conditions of each visiting facility. The costs and benefits of facilitating visitation are more a question of policy and social science than of law. However, it is safe to assume[50] that accessible, child-friendly visiting facilities can yield significant benefits for both children and their incarcerated parents.[51] Thus, policies and practices that indiscriminately make contact visitation difficult or impossible for the majority of children with incarcerated parents are in direct tension with the approach to children's rights that led to Article 9 in the CRC and its recognition of a child's right "to maintain personal relations and direct contact with both parents on a regular basis" when in the "child's best interests."

The "best interests of the child" standard is common to both international law and United States domestic law.[52] Article 9 of the CRC relies on the "best interests of the child" standard for determining when and what contact may be appropriate. Article 3 of the CRC states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration." The "best interests" standard has been a guiding principle in U.S. law for over

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[49] The issue of whether or not visitation is in the best interests of children with incarcerated parents is beyond the scope of this Article. Here, it is enough to assume that contact visitation is in the best interests of *at least some* children. It is those children and their rights that are the central concern of the argument here. *See also infra* notes 50–51.

[50] *See generally* Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133 (2008) (reviewing literature and citing studies); Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408 (1978) (arguing that facilitating parent–child bonds in the context of incarceration is in the interests of the children).

[51] Denise Johnston, *Parent–Child Visitation in the Jail or Prison*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1, at 135; Seymour & Hairston, eds, *supra* note 5, at 13. Note also that visitation with children and family members is strongly correlated with reduced recidivism rates for inmates; however, that issue is beyond the scope of this Article. The focus here is on the children, not the inmates. *See* Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89, 100 (2003); *see also* STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 1, 13 (2009) (suggesting that visitation may be a crucial part of breaking intergenerational cycles of incarceration), *available at* http://www.cga.ct.gov/COC/PDFs/fatherhood/NCSL_ChildrenOfIncarceratedParents_0309.pdf. *See generally* sources cited *supra*, note 37.

[52] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 84 (2000) (Stevens, J., dissenting) (noting that "myriad other state statutes and court decisions at least nominally" apply the best interest of the child standard).

125 years[53] and is "universally recognized across the [United States] as the core concept of laws relating to children."[54] All fifty states and the federal government have laws that use the "best interests" standard in statutes concerning adoption, parental rights, education, child labor, and other areas of child welfare. References to the "best interests" standard frequently appear in state and federal court decisions.[55] This common standard however is vague on its face and is subject to wide-ranging interpretations and applications across jurisdictions.

B. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child ("the Charter") echoes the language of the CRC in establishing the "best interests" standard[56] and specifically addresses children with incarcerated mothers. The Charter requires parties "to provide special treatment to expectant mothers and to mothers of infants and young children" when convicted of criminal offenses and to "ensure that a non-custodial sentence will always be first considered when sentencing such mothers."[57] The same Article requires that parties "establish and promote measures alternative to institutional confinement for the treatment of such mothers," and prohibits the death penalty for mothers.[58] The focus on mothers appears to reflect the assumption in much of the world that the practice of incarcerating mothers is generally more disruptive to children's lives than the practice of incarcerating fathers. However, while there are some valid, biologically determined gender distinctions, such as with pregnant or lactating mothers, incarcerating fathers may also have significant repercussions for dependent

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[53] M.R. GARDNER & A.P. DUPRE, CHILDREN AND THE LAW: CASES AND MATERIALS 62 (2d ed. 2006).

[54] Elisabeth A. Mason, *The Best Interests of the Child*, *in* THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 121 (Jonathan Todres, Mark E. Wojcik & Cris R. Revaz eds., 2006).

[55] GARDNER & DUPRE, *supra* note 53, at 62.

[56] African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, CAB/LEG/24.9/49, *available at* http://www.unhcr.org/refworld/docid/3ae6b38c18.html. Article 4 reads:

> Best Interests of the Child, 1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. 2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

[57] *Id.* art. 30. It is troubling that the Charter exhibits this gender bias, although not entirely surprising given the international reality of child-rearing falling largely on mothers.

[58] *Id.*

children. By limiting its protection to mothers, this Article excludes the majority of prisoners and children with parents in prison. This limitation notwithstanding, the Charter provides one of the clearest recognitions of the rights and interests of children with incarcerated parents in international law.[59]

The CRC and the Charter are more than just idealistic, aspirational documents; their language protecting children with incarcerated parents has been incorporated into national jurisprudence in South Africa. In the landmark Constitutional Court case, *S v. M*, the central question was: What are the duties of a sentencing court when sentencing a primary caregiver of minor children, bearing in mind the constitutional protection of the best interests of the child?[60] Justice Sachs, writing for the Court, relied heavily not only on Section 28(2) of the South African Constitution[61] but also cited the CRC[62] and the Charter.[63] Justice Sachs considered the "best interests of the child" standard, concluding that when it comes to sentencing, "[t]o apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."[64] In exploring the reach of these provisions in sentencing proceedings, Justice Sachs held that the "objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved including those of the children."[65] The opinion clearly states that the purpose "is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children."[66] Ultimately, Justice Sachs established a multipart test for sentencing parents that clearly, but not necessarily decisively, incorporates children's rights. This Constitutional Court decision is a valuable example of how the

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[59] *Cf.* Resolution on a European Charter of Rights of the Child 1992, at art. 8.15, *reprinted in* GERALDINE VAN BUEREN, INTERNATIONAL DOCUMENTS ON CHILDREN 53 (2d ed. 1998) ("Any child who has one or both parents in prison must be allowed to maintain contact with them. Young children living with their mothers in prisons must have the benefit of suitable facilities and care. The Member State shall guarantee that such children attend school outside the prison.").

[60] *S v. M* 2008 (3) SA 232 (CC) (S. Afr.).

[61] "A child's best interests are of paramount importance in every matter concerning the child." S. AFR. CONST., 1996 § 28(2).

[62] *S v. M* 2008 (3) SA 232 (CC) at 245 para. 16.

[63] *Id.* at 250 para. 31.

[64] *Id.* at 248 para. 24.

[65] *Id.* at 251 para. 33.

[66] *Id.* at 252 para. 35. Justice Sachs went on to explain that a parent who would otherwise necessarily be sentenced to prison will still have to be incarcerated. *Id.* at 252 para. 39.

children's right to family integrity is cognizable in the context of parental incarceration.[67]

C. EUROPEAN LAW

European law and policy also recognize, though less explicitly than the CRC or the Charter, the rights of children with incarcerated parents.[68] The Charter of Fundamental Rights of the European Union establishes that "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."[69] The standard was further articulated in 2006 when the Council of Europe, Committee of Ministers, promulgated model European Prison Rules ("the Rules").[70] Article 24.4 of the Rules recommends that "arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible." Specifically, inmates are "allowed to communicate as often as possible by letter, telephone or other forms of communication with their families . . . and to receive visits."[71] The Rules also indicate that "[p]risoners shall be allocated, as far as possible, to prisons close to their homes."[72] While these rules and recommendations are framed in terms of the prisoners' rights, there are direct and reciprocal implications for the rights of prisoners' children.

European law enshrines children's right to a family. Article 8 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms establishes a right to respect for private and family life, including "no interference by a public authority with the exercise of this right."[73] The right, however, is subject to exceptions for national security, public safety, crime prevention, and more. The language of the Article appears verbatim in national legislation as well, such as England's Human Rights Act of 1998.[74] The language of Article 8 suggests that any

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[67] *Id.* at 252 para. 36.

[68] *See generally* D. KING, DUBLIN INST. OF TECHNOLOGY, PARENTS, CHILDREN AND PRISONS: EFFECTS OF PARENTAL IMPRISONMENT ON CHILDREN (2002) (reviewing literature, international law, and international models of best practice), *available at* http://arrow.dit.ie/cgi/viewcontent.cgi?article=1011&context=cserrep.

[69] Charter of Fundamental Rights of the European Union art. 24, Dec. 7, 2000, 2000 O.J. (C 364) 13.

[70] Council of Europe, Committee of Ministers, Recommendation on European Prison Rules (Jan. 11, 2006), *available at* https://wcd.coe.int/ViewDoc.jsp?id=955747.

[71] *Id.* at art. 24.1.

[72] *Id.* at art. 17.1.

[73] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

[74] Human Rights Act, 1998, c. 42 (Eng.).

interference—presumably including incarceration in general, and lengthy sentences or restrictive visiting conditions in particular—must serve a legitimate purpose and be proportionate to that aim. Disproportionate restrictions on visiting or overly harsh sentences would prima facie be unjustified. While extremely limited by and balanced against other societal interests, this recognition of children's rights goes considerably further than the status quo approach in the United States.[75] However, the exceptions written into the Article may be determinative for most children: imprisonment is clearly a gross interference with family life, though it is virtually self-justifying under the crime and public safety exceptions.

Courts interpreting Article 8 not only are deferential to prison authorities, but also factor in the interests and rights of the child. For example, in *R v. Secretary of State* the Supreme Court of Judicature Court of Appeal Civil Division in England considered the validity of forced separation of infant children from their incarcerated mothers. The court recognized that in the context of parental incarceration "[c]ompulsory separation is, on the face of it, a serious interference by the state in the children's right to respect for that family life."[76] Like Justice Sachs in South Africa, the court in England emphasized the need for balancing: "[t]he more serious the intervention in any given case (and interventions cannot come very much more serious than the act of separating a mother from a very young child), the more compelling must be the justification."[77] Wherever possible courts must "ensure that the mother can be punished adequately for her offence without the necessity of taking her into custody away from her children."[78] Although *R v. Secretary of State* was brought by incarcerated mothers, the court found it necessary to consider the interests of the children as well:

> Were this an ordinary dispute about the enforced separation of parent and child by the state, [the children] would have been separately represented by an expert guardian *ad litem* and their own lawyers. We cannot know whether or not those representatives would have supported these applications, but we cannot avoid giving separate consideration to the position of the children.[79]

The European Court of Human Rights has often recognized "that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life" protected by Article 8.[80] Yet, despite all that may be at stake and children's legal right to noninterference in

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[75] *See infra* Parts III & IV.
[76] R v. Secretary of State [2001] EWCA (Civ) 1151, [83] (Eng.).
[77] *Id.* at [78]; *see also id.* at [65] for details of the balancing test.
[78] *Id.* at [79].
[79] *Id.* at [82].
[80] *Id.* at [83] (citing cases).

family life, children facing parental separation due to incarceration are not appointed guardians *ad litem* or their own lawyers. Thus, there is an explicit, but underdeveloped, judicial recognition of children's rights and family interests as a factor in the criminal justice processing of their parents.

D. OTHER INTERNATIONAL LAW

Around the world, there are countries that have recognized children's rights in the context of parental incarceration. The Supreme Court of South Australia found that the welfare of young, dependent children justified conditional release of one of a married couple convicted of social security fraud.[81] New Zealand's Sentencing Act of 2002 requires that judges "take into account the offender's personal, family . . . background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose."[82] In Italy, criminal law provides for house arrest for pregnant women or women with very young children.[83] In Fiji, courts have expressly considered the best interests of the child in bail hearings for parents.[84] A U.N. General Assembly Resolution on the Rights of the Child provides that when sentencing or deciding on pretrial measures for a child's sole or primary caregiver member states should prioritize non-custodial measures while considering both the gravity of the offense and the need to protect the public and the child.[85] Thus, there is a wide range of examples of international and foreign jurisdictions factoring the interests of the child into the criminal justice processing of parents and suggesting possibilities for change within the United States. Before analyzing U.S. constitutional law, with this international and foreign law in mind, an overview of the status quo for U.S. sentencing and visitation standards is in order.

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[81] *Walsh v. Dep't of Soc. Sec.* [1996] 67 SASR 143 (Austl.).

[82] Sentencing Act 2002 (N.Z.).

[83] Finocchiaro Act, Act No. 40/01, Alternative Measures to detention with the aim of protecting the relationship between mother detainees and their children. Article 146 of the penal code provides that "the execution of the detention penalty can be postponed inter alia in relation to mothers of children under the age of one." Article 4 of Act No. 165/98 extended the house detention measure to mother detainees of children under the age of ten. *See* JEAN TOMKIN, ORPHANS OF JUSTICE, QUAKER UNITED NATIONS OFFICE 28 n.114 (2009), *available at* http://www.quno.org/geneva/pdf/humanrights/women-in-prison/Orphans-of-Justice200908-English.pdf.

[84] Yuen Yei Ha v. The State, [2004] FJHC 228, *available at* http://www.paclii.org/fj/cases/FJHC/2004/228.html; Devi v The State [2003] FJHC 47, *available at* http://www.paclii.org/fj/cases/FJHC/2003/47.html.

[85] G.A. Res 63/241, ¶47(a), U.N. Doc. A/RES/63/241 (Mar. 13, 2009).

IV. SENTENCING AND VISITING: IS THERE A ROLE FOR THE CHILD?

There are two key areas where the rights and interests of children might come into play during parental incarceration. The first is in the context of a specific, one-off moment of judicially determined sentencing.[86] The second is in the broader, temporally expansive, and more complex context of visitation. This Part considers current law and practice in both sentencing law and visitation policy, with comparative analysis of the federal and New York state systems in order to illuminate the problem at the heart of this inquiry: the denial of children's rights to a relationship with their incarcerated parents.

Rather than attempting a fifty state survey, the following discussion focuses on the federal and New York systems so as to benefit from in-depth comparative analysis. The federal system is an obvious point of reference because of its size[87] and national reach across all of the United States. New York is an especially useful state to analyze because it is one of just six states in the country that have specific statutory or administrative law language regarding families of inmates,[88] and it is the leader of some twenty states that have begun to reduce their prison populations.[89] Additionally, though New York, like almost all other states,[90] does not provide any

[86] This Part of the Article serves as a preliminary response to Judge Nancy Gertner, of the U.S. District Court for the District of Massachusetts, who insisted that "the impact on families of the imprisonment of the defendant . . . needs to be carefully reexamined by all the participants in the federal sentencing system." Nancy Gertner, *Women, Justice, and Authority: How Justice Affects Women: Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 300 (2002).

[87] The federal prison system holds over 200,000 inmates, more than any single state. SABOL ET AL., *supra* note 20, at 17.

[88] Jade S. Laughlin et al., *Incarcerated Mothers and Child Visitation: A Law, Social Science, and Policy Perspective*, 19 CRIM. JUST. POL'Y REV. 215, 226 (2008). This figure is based on a 2002 fifty state survey. The other five states included: Alaska, California, Connecticut, Florida, and Massachusetts.

[89] From 2007 to 2008, New York's prison population decreased by 3.6%, more than any of the other state's reporting a decline in the number of inmates. SABOL ET AL., *supra* note 20, at 2, 17.

[90] Laughlin, *supra* note 88, at 226.

specific legal right for children to visit, it is one of the national leaders in family visitation opportunities and services.[91]

A. SENTENCING PROCEDURES FAIL TO RECOGNIZE CHILDREN'S RIGHTS

New York's sentencing guidelines provide precisely defined sentencing ranges that limit judicial discretion.[92] While judges still do have some discretion, the law stipulates precise ranges for each category of offense.[93] Once a prosecutor brings a particular charge and the jury convicts, the sentencing judge is confined to a statutory range of sentencing options. The limits on judicial discretion in sentencing present a range of issues that have been well documented elsewhere.[94] Of particular interest

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[91] Bedford Hills Correctional Facility, for example, has long been recognized as a leading example of child-focused programming. MERRY MORASH ET AL., NAT'L INST. OF JUSTICE WOMEN OFFENDERS, PROGRAMMING NEEDS AND PROMISING APPROACHES 8 (1998); Katherine Gabel & Kathryn Girard, *Long-Term Care Nurseries in Prisons: A Descriptive Study*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1, at 238–40; Noelle E. Fearn & Kelly Parker, *Washington State's Residential Parenting Program: An Integrated Public Health, Education, and Social Service Resource for Pregnant Inmates and Prison Mothers*, 2 CAL. J. HEALTH PROMOTION 34, 39 (2004); Denise Johnston, *Intervention*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1, at 207; Mark S. Kaplan & Jennifer E. Sasser, *Women Behind Bars: Trends and Policy Issues*, 23 J. SOC. & SOC. WELFARE 43, 51 (1996); Nicole S. Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 101 (1998). New York is one of just six states to offer at least some of its prisoners extended "family reunion" overnight visits. Kacy E. Wiggum, *Defining Family in American Prisons*, 30 WOMEN'S RTS. L. REP. 357, 357 (2009).

[92] N.Y. PENAL LAW at §§ 70.00–70.08 (McKinney 2009).

[93] *Id.* Indeed sentencing reforms and guidelines across the country were implemented in order to curb judicial discretion. Pauline K. Brennan & Cassia Spohn, *Empirical Research on the Impact of Sentencing Reforms: Recent Studies of State and Federal Sentencing Innovations*, 24 J. CONTEMP. CRIM. JUST. 340, 340 (2008); *see also* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990 (1993) (describing the history of efforts to curb discretion in sentencing); Sandra Shane-Dubow, *Introduction to Models of Sentencing Reform in the United States*, 20 LAW & POL'Y 231 (1998) (explaining the trend away from judicial discretion in sentencing).

[94] *See, e.g.*, Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109 (2008) (questioning the focus on prior bad acts at sentencing); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003) (considering when departure from federal sentencing guidelines may be appropriate); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003) (examining the ways in which mandatory minimum sentences undermine just sentencing); Shimica Gaskins, Note, *"Women of Circumstance"—The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533 (2004) (discussing mandatory minimums specifically in the context of federal sentencing and female drug offenders).

here is that circumscribed judicial discretion in sentencing means that even when judges would otherwise be inclined to investigate and factor in a convict's family obligations, it is difficult to do so. Children of the convicted are essentially considered irrelevant third parties to sentencing.

However, other third parties are directly included in the process: victims.[95] Of course the sentencing guidelines limit a judge's ability to consider victims of offenses too—a judge can consider victims or children of a convicted person, but only within the sentencing guideline range. Nevertheless, state law requires that the prosecutor consult with and obtain the views of the victim or the victim's family in an array of circumstances throughout the criminal justice process,[96] thus giving the victims a say in what charges are brought and ultimately what sentencing range in the guidelines a judge will have to apply. Moreover, the sentencing guidelines themselves were developed with explicit deference to victims' rights. An executive order[97] directs the New York State Commission on Sentencing Reform to:

> ensure that appropriate consideration be given to the impact of New York's sentencing laws on crime victims, their families and the community. It is indisputable that with the possible exception of the defendant, no one has a more direct stake in the just outcome of a criminal case—and the propriety of any sentence imposed—than the crime victim.[98]

Thus, victims and their families are rightly recognized as having a stake in the process, but children of offenders are unfairly ignored.[99]

Virtually the only procedure that could possibly alert a judge to the family circumstances of an offender would be the presentence report.[100] Specifically, the presentence investigation "consists of the gathering of

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[95] While victims might not be considered third parties, technically they are not party to criminal proceedings. Moreover, the term "victim" is generally construed broadly enough to encompass the family members of murder victims who, like children of criminals, are certainly third parties who are directly impacted. One could argue that both families of victims and families of offenders are directly impacted and therefore not actually "third parties," however, for the purposes of this Article, the term simply refers to anyone not party in the criminal proceedings.

[96] N.Y. Exec Law §§ 642, 647 (McKinney 2005).

[97] 29 N.Y. Reg. 103–04 (Mar. 28, 2007).

[98] *Id.* at 104; *see also* N.Y. STATE COMM'N ON SENTENCING REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: RECOMMENDATIONS FOR REFORM 170 (2009), *available at* http://www.criminaljustice.state.ny.us/pio/csr_report2-2009.pdf ("New York has established a solid statutory foundation in the area of victim rights, a foundation that recognizes the critical role played by victims in the criminal justice process and, in particular, sentencing-related matters.").

[99] Note that other third parties are not similarly included: victims are uniquely invited to participate in proceedings.

[100] N.Y. CRIM. PROC. LAW §§ 390.20–390.50 (McKinney 2009).

information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits."[101] This provision provides the only textual opening for inclusion of minor dependent children in a presentencing report. The phrase "family situation" is buried in a laundry list of other potentially relevant circumstances, is not invested with any noticeable grammatical or linguistic significance, and does not even specifically mention children. In contrast, the same provision of the code has an entire subsection dedicated to the inclusion of a victim impact statement in the report. Victim impact statements are, as a general rule, to be included in all reports.[102]

As in New York State, federal judges' discretion has been defined and circumscribed by legislation and guidelines. In 2005, however, when the Supreme Court handed down its decision in *United States v. Booker*,[103] the rules of federal sentencing dramatically changed. Although in the post-*Booker* world federal judges have substantially increased discretion, there is still no legal recognition of children's rights in sentencing.

Congress mandates that federal judges weigh a number of factors at sentencing.[104] Specifically, judges are to consider: "the nature and circumstances of the offense and the history and characteristics of the defendant;"[105] the seriousness of the offense, deterrence of future criminal conduct, and public safety;[106] and "the kinds of sentences available."[107] The statute also refers judges to the Guidelines developed by the United States Sentencing Commission (USSC).[108]

The Guidelines include a sentencing table that was designed to be so detailed that, once a judge identified the category of criminal history and

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[101] *Id.* at § 390.30(1).

[102] *Id.* at § 390.30(3)(b). Here, I am not arguing that victim impact statements should be excluded. That issue is beyond the scope of this Article. Rather, the explicit inclusion of victims in the report is noteworthy because it provides a concrete example of the ways in which third parties—persons other than the state and the convicted person—are brought to the sentencing judges' attention.

[103] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that sentencing courts must consider sentencing guidelines, but the guidelines are not mandatory).

[104] 18 U.S.C. § 3553(a) (2003).

[105] *Id.* at § 3553(a)(1).

[106] *Id.* at § 3553(a)(2).

[107] *Id.* at § 3553(a)(3).

[108] *Id.* at § 3553(a)(4)(A)(i), (a)(5)(A), (b)(1).

the offense level, there would be extremely limited discretion.[109] The statute limited the authority of sentencing judges to impose a sentence below a statutory minimum to circumstances in which mitigating circumstances were "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines."[110] However, in establishing categories for the Guidelines the USSC was supposed to take matters including "family ties and responsibilities" into consideration, "to the extent that they do have relevance."[111] The USSC took children of offenders into consideration—it instructs that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."[112] Accordingly, even if a judge was aware of and sympathetic to minor dependent children of a convicted person facing sentencing, under the Guidelines she may have been unable to alter the sentence accordingly. Judges seeking to depart downward because of family circumstances risked reversal on appeal.[113]

Even as the children and families of offenders were largely excluded from consideration in the sentencing process, another third party group was included. In a statutory provision titled "Crime Victims' Rights," Congress provided a wide range of rights to crime victims.[114] These rights include

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[109] U.S. SENTENCING GUIDELINES MANUAL § 5A (2009), *available at* http://www.ussc.gov/2009guid/GL2009.pdf. [hereinafter USSC MANUAL]. The range between the minimum and the maximum sentence within a given box on the table ranges from as little as six months up to five years for sentences upwards of thirty years. *Id.* Note that before the Guidelines were in effect, federal courts had much greater latitude in determining sentences. Bruce M. Selya and Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 1 (1991). While some lower courts found the Sentencing Reform Act unconstitutional on separation of powers grounds, the Supreme Court upheld its validity in *Mistretta v. United States*, 488 U.S. 361 (1989).

[110] 18 U.S.C. § 3553(b) (2006).

[111] 28 U.S.C. § 994(d) (2006), *as amended by* Secure and Responsible Drug Disposal Act of 2010, Pub. L. 111-273, 124 Stat 2858.

[112] USSC MANUAL, *supra* note 109, at §5H1.6; *see* United States v. Dyce, 91 F.3d 1462, 1466 (D.C. Cir. 1996) (noting that departures on the basis of family ties and responsibilities should be rare since the USSC considered family circumstances in formulating the guidelines), *cert. denied* 519 U.S. 1018 (1996). Nonetheless, "[t]here is absolutely no indication that the Commission ever considered pregnancy and single parenting, let alone the lopsided gender effect that imprisoning single mothers has on their children." Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 949 (1993). In light of this oversight, Judge Gertner has suggested that downward "departures should be considered on the general grounds under 18 U.S.C. § 3553(b), a mitigating circumstance not adequately considered by the Commission." Gertner, *supra* note 86, at 300 n.48.

[113] *See infra* note 119.

[114] 18 U.S.C. § 3771 (2006).

notice of developments involving the offender and being "heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[115] In addition, the statute gives the victim the "right to confer with the attorney for the Government in the case."[116] The point here is not to suggest that these rights are wrongly accorded to victims but simply to highlight the fact that federal law, like New York state law, explicitly brings third parties into the criminal justice process. Victims are guaranteed a voice and consideration in ways that could easily impact the specific charges brought and the sentence handed down. Yet when it comes to children of offenders, "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."[117] Thus the USSC makes clear that minor dependent children, present in the lives of the majority of prisoners, are not to be taken into consideration in sentencing.

Until 2005, judges generally did not have the authority to depart from the Guidelines because of children or family circumstances except in "extraordinary" circumstances, a standard that has been subject to grossly inconsistent interpretation.[118] Judges who departed from the Guidelines

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[115] *Id.* at § 3771(a)(2), (a)(4).

[116] *Id.* at § 3771(a)(5).

[117] USSC MANUAL, *supra* note 109, §5H1.6; *see* United States v. Dyce, 91 F.3d 1462, 1466 (D.C. Cir. 1996) (noting that departures on the basis of family ties and responsibilities should be rare since the USSC considered family circumstances in formulating the Guidelines), *cert. denied* 519 U.S. 1018 (1996).

[118] *See* United States v. Chestna, 962 F.2d 103, 107 (1st Cir. 1992) ("[S]tatus as a single mother of three, (now four), young children simply is not, as [defendant] contends, an unusual family circumstance."); United States v. Cacho, 951 F.2d 308, 311 (11th Cir. 1992) ("[T]he Fourth, Sixth and Eighth Circuits have held that, unless there are unique or extraordinary circumstances, a downward departure from the Guidelines, based on the defendant's parental responsibilities, is improper."). *But see* United States v. Galante, 111 F.3d 1029, 1035 (2d Cir. 1997) (comparing defendant's circumstances to those in *Alba*); United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991) (finding extraordinary family circumstances justifying downward departure where defendant lived with and supported his wife, two daughters, disabled father, and grandmother). These cases are exceptional and judges tended to enforce the Guidelines in their sentencing procedures. However, when surveyed, numerous judges expressed discontent with the Guidelines' failure to give weight to family ties and responsibilities. LINDA D. MAXFIELD, U.S. SENTENCING COMM'N, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES ES-6 (2003), *available at* http://www.ussc.gov/judsurv/jsfull.pdf.

were often overruled on appeal[119]—the law sent a clear message to sentencing judges and defense lawyers alike: dependent minor children do not matter. Then, in 2005, *United States v. Booker* significantly changed criminal sentencing procedures.[120] The Court held that the Federal Sentencing Act provisions that made the Guidelines mandatory[121] and set forth a standard of review on appeal[122] were inconsistent with the Sixth Amendment jury trial requirements and thus invalid.[123] The Court further held that the proper standard of review on appeal was unreasonableness.[124] The result of the decision was that the Guidelines went from being mandatory to advisory. Post-*Booker* sentencing judges are allowed to tailor a sentence in light of a range of statutory concerns as long as they consider

[119] *See generally* United States v. Rybicki, 96 F.3d 754, 759 (4th Cir. 1996) (overruling a downward departure based, in part, on convict's nine-year-old son with neurological problems and mentally ill wife); United States v. Calhoun, 49 F.3d 231, 237 (6th Cir. 1995) (finding downward departure inappropriate in case of mother with fourteen-month-old infant); United States v. Brown, 29 F.3d 953, 961 (5th Cir. 1994) (overruling a downward departure based on convict's two children under the age of five who were being placed with their impoverished great-grandmother); United States v. Miller, 991 F.2d 552, 553 (9th Cir. 1993) (finding convict's two minor children who "would be placed at potential risk" insufficient grounds for downward departure); United States v. Harrison, 970 F.2d 444, 448 (8th Cir. 1992) (applying Guidelines to sentencing of a single mother of a child who, in defendant's absence, would be cared for by an alleged alcohol and drug abuser); United States v. Mogel, 956 F.2d 1555, 1565 (11th Cir. 1992) (supporting two minor children and a dependent mother was not so unusual as to justify downward departure); United States v. Thomas, 930 F.2d 526, 531 (7th Cir. 1991) (rejecting the possibility of downward departure for a single mother with three mentally disabled children and one grandchild); United States v. Headley, 923 F.2d 1079, 1083 (3d Cir. 1991) (upholding a denial of a request for downward departure in the case of a single mother with five young children); United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990) ("A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children."). *But see* United States v. Sclamo, 997 F.2d 970, 972, 974 (1st Cir. 1993) (allowing downward departure where defendant had developed a "critical and unique" relationship with his partner's twelve-year-old son); United States v. Johnson, 964 F.2d 124, 129–31 (2d Cir. 1992) (finding extraordinary circumstances sufficient to justify downward departure where defendant mother was the sole support for an infant, two other young children, and one grandchild).

[120] United States v. Booker, 543 U.S. 220 (2005). The case made such a splash that in the less than five years since it was published, its name has appeared in the title of 135 separate law review or journal articles, notes, and comments. This figure was obtained in the LEXIS "US Law Reviews and Journals, Combined" database with a search protocol "TITLE(booker) and date(geq (01/01/2005) and leq(11/19/2010)."

[121] 18 U.S.C. § 3553(b)(1) (2002).

[122] *Id.* at § 3742(e).

[123] *Booker*, 543 U.S. at 250.

[124] *Id.* at 261.

the Guidelines.[125] *Booker* has largely liberated federal judges from the rigid Guidelines so that they can exercise discretion.[126]

Yet in cases that cited *Booker*, family ties and responsibilities account for just 2.2% of the sentences below the Guideline range.[127] Even that diminutive percentage of departures is probably concentrated in a relatively small number of judges.[128] Judge Gertner explains that she "now feel[s] that [she] ha[s] considerable discretion under *United States v. Booker*."[129] Even before *Booker*, she "was a critic of the 'extraordinary family circumstances' guidelines."[130] Post-*Booker*, she frequently departs from the Guidelines and can do so with confidence that she will not be appealed or reversed.[131] However, as her decisions indicate even pre-*Booker*,[132] she is clearly exceptional in her willingness to consider family circumstances at sentencing. If judges are not required to consider children with a clear interest in an ongoing relationship with their parents, and if children do not have an explicit legal right to be factored into the process, then some judges will ignore them. Once parents are sentenced to prison, visitation policies determine the quantity and quality of parent–child interaction.

B. VISITATION POLICIES AND CHILDREN WITH INCARCERATED PARENTS

Most prisons make some provision for visitation.[133] There is, however, tremendous variation in prison visiting conditions between

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[125] "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* at 233.

[126] In fact, a subsequent Supreme Court decision held that appeals courts may not presume that a sentence outside the Guideline range is unreasonable on that basis alone. Gall v. United States, 552 U.S. 38, 51 (2007) ("But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness.").

[127] U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 82 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf.

[128] Myrna Raeder, *Gender-Related Issues in a Post-*Booker *Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 716 (2006).

[129] E-mail from Nancy Gertner, Judge, United States District Court for the District of Massachusetts, to the author (Mar. 21, 2010, 9:48 EST) (on file with the author).

[130] *Id.*

[131] *Id.*

[132] *See, e.g.*, United States v. Jurado-Lopez, 338 F. Supp. 2d 246, 254 n.17 (D. Mass. 2004); United States v. Thompson, 190 F. Supp. 2d 138, 141 (D. Mass. 2002); United States v. LaCarubba, 184 F. Supp. 2d 89, 98 (D. Mass. 2002).

[133] DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 17 (2009).

jurisdictions and even within them.[134] While some individual prisons are exemplary in their efforts to foster child-friendly visiting conditions and programming, children and their parents have little if any legal basis for demanding particular visiting conditions or access. Some prisons offer special visiting opportunities for families of inmates, but even then they tend to "narrowly define the family members who are granted visiting privileges."[135] Children are not always favored when it comes to visiting policies, and in some cases they are targeted for exclusion.[136] This subpart first reviews New York state's administrative law governing prison visitation with attention to some of the disparities in implementation and then examines the state's family reunion program and the visiting program at Bedford Hills Correctional Facility (Bedford Hills) as models of child-friendly approaches. The second part focuses on the Federal Bureau of Prisons, in which geography and policy conspire to make visitation an intimidating proposition for many children.

New York state has a uniform, standard policy for its Inmate Visitor Program (Visitor Program), which encourages visitation in maximum security prisons.[137] The Visitor Program does not cater to or make special dispensation for children of inmates but does refer to issues of family visitation.[138] Consistent with the Visitor Program directives, each prison can develop unique visiting conditions and practices that result in substantial variation within the state.[139] In addition, New York is one of

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[134] For example, New York's maximum security prisons have all day visiting hours every day of the year while medium security prisons only allow weekend and holiday visits. N.Y. DEP'T OF CORR. SERV., DIRECTIVE NO. 4403, INMATE VISITOR PROGRAM 1 (NOV. 10, 1993), *available at* http://www.docs.state.ny.us/Directives/4403.pdf.

[135] Travis, *supra* note 37, at 37.

[136] *See* Overton v. Bazetta, 539 U.S. 126, 133 (2003) (finding a legitimate penological interest in excluding certain children from visitation facilities).

[137] N.Y. Dep't of Corr. Serv., Directive No. 4403, *supra* note 134; *see also* 7 N.Y. COMP. CODES R. & REGS. tit. 7, § 200.2(a)(4), (b)(2) (2010) (encouraging visits with immediate family members). Note that this New York state statute provides for contact visits while many states do not allow them. § 200.2(b)(2).

[138] Only six states have statutes or administrative law guidelines regarding families of inmates. Laughlin, *supra* note 88, at 226.

[139] N.Y. DEP'T OF CORR. SERV., HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCS INMATES 9 (2007) ("Depending on the correctional facility, activities for children vary. Most facilities have a specialized area where children can watch videos and play games. Normally, you can not take toys or stuffed animals into the visiting room."), *available at* http://www.docs.state.ny.us/FamilyGuide/FamilyHandbook.pdf. Some variation between prisons is inevitable, especially when dealing with a wide range of offenders and security classifications. In New York state, the maximum security prisons have significantly improved access to and quality of visitation as compared to lower security classifications. The real question is, what should be the minimum standard required?

just six states in the country to offer some of its inmates a "family reunion program" for extended overnight visitation.[140]

Children are mentioned in New York's prison visiting regulations but with few special visiting privileges. The Visitor Program provides for groups of children to enter a prison with an approved adult for special programs like that at Bedford Hills.[141] While the Visitor Program contemplates the need for special visiting conditions for professional meetings with attorneys and clergy, no similar consideration is made for children.[142] Children are only referenced for narrow, bureaucratic, and security-related reasons, and no specific provisions are made for child-friendly visiting conditions, unless at the discretion of an individual superintendent. Children are considered as an inevitable part of the Visiting Program, but nowhere does the state recognize anything close to a right to visitation with incarcerated parents, nor establish a standard for child-friendly facilities.[143]

In some of its prisons, New York offers a child-friendly visiting program called the Family Reunion Program.[144] The stated goal of the program is to "preserve, enhance, and strengthen family ties that have been disrupted as a result of incarceration."[145] Of course, the state may have its own unstated, but equally valid, reasons for permitting the program that have nothing to do with the interests or rights of the children.[146] Whatever the goals, it allows minor children of inmates to spend up to two full days inside the prison in specially-equipped housing units.[147] A wide range of law and policy implications of this program have been studied elsewhere—

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[140] *See supra* note 91.

[141] N.Y. DEP'T OF CORR. SERV., DIRECTIVE NO. 4403, *supra* note 134, at 3.

[142] *Id.* at 2.

[143] This is the norm—nationwide, only two states (California and Florida) have statutory language that promotes parent–child visitation, and just four others (Alaska, Connecticut, Massachusetts, and New York) have administrative law guidelines that specifically contemplate children of inmates. Laughlin, *supra* note 88, at 226. New York does statutorily require visitation support for those children who are in state custody. N.Y. CORRECT. LAW § 619 (McKinney 2003).

[144] N.Y. Dep't of Corr. Serv., Directive No. 4500, Family Reunion Program, Jan 28, 2009, *available at* http://www.docs.state.ny.us/Directives/4500.pdf.

[145] *Id.* at 1.

[146] For example, as early as 1980 the New York Department of Correctional Services published findings suggesting that the program decreased recidivism rates as much as sixty-seven percent. D. G. MACDONALD & D. KELLY, NAT'L INST. OF JUSTICE, FOLLOW-UP SURVEY OF POST-RELEASE CRIMINAL BEHAVIOR OF PARTICIPANTS IN FAMILY REUNION PROGRAM 1 (1980). The program also incentivizes good behavior, as inmates with disciplinary problems are denied access. N.Y. Dep't of Corr. Serv., Directive No. 4500, *supra* note 144, at 1.

[147] *Id.* at 3.

the results overwhelmingly illustrate the benefits for children, inmates, and the state interests at play.[148] However, the program is a privilege, not a right. It is available to a small proportion of children with incarcerated parents—even within New York state, only eleven of the more than sixty correctional facilities offer the Family Reunion Program.[149]

New York state's Bedford Hills, the only maximum security prison for women in the state, is a model of what a children's rights approach to visitation might look like.[150] To start, Bedford Hills is located just forty miles from New York City and is accessible by public transportation. Geography is significant because over sixty percent of inmates in New York state prisons come from the New York City metropolitan area, but most of the state prisons, including the largest prison holding women, are located much further away.[151] The state makes no provision for placing parents in facilities close to their home at the time of arrest. However, at least one prison in New York state serves as a counterpoint.

Bedford Hills became a national leader in incarcerated parent–child relationships when it created a prison nursery program for women who are pregnant when they enter prison.[152] And Bedford Hills' visitation program has long been recognized as one of the country's most progressive.[153]

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[148] *See, e.g.*, Jennifer L. Fiorica, Note, *How the Constitution Can Preserve the Strength of Existing Familial Bonds and Foster New Relationships Between Female Inmates and Their Children*, 29 WOMEN'S RTS. L. REP. 49 (2007) (describing the range of visiting programs and their impact on familial bonds); Rachel Wyatt, Note, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J. INT'L L. 579, 597 (2006) (considering the relationship between conjugal visits and sexual violence in prisons); *see also supra* notes 12–13.

[149] Laughlin, *supra* note 88, at 223; NAT'L INST. OF CORR., *supra* note 13, at 8; N.Y. Dep't of Corr. Serv., *Facility Listing*, http://www.docs.state.ny.us/faclist.html (last visited Oct. 22, 2010).

[150] Across the country, most parenting programs and child-friendly visitation programs that do exist are in women's prisons. Elise Zealand, *Protecting the Ties that Bind from Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children to Maintain the Parent-Child Relationship*, 31 COLUM. J.L. & SOC. PROBS. 247, 256 (1998).

[151] N.Y. DEP'T OF CORR. SERV., UNDER CUSTODY REPORT: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2009, at 4 (2009), *available at* http://www.docs.state.ny.us/Research/Reports/2009/UnderCustody_Report_2009.pdf. New York state does provide a free bus service that provides families of inmates with limited access to prisons that are otherwise inaccessible via public transportation, however in practice the service is infrequent and inaccessible. NAT'L INST. OF CORR., *supra* note 13, at 4.

[152] Nicole S. Mauskopf, Note, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 107–10 (1998); *see also* Note, *Development in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1921–44 (1998) (discussing the ambivalence amongst policy makers towards prison nursery programs).

[153] BLOOM & STEINHART, *supra* note 5, at 52.

Bedford Hills also operates a Parenting Center that helps mothers maintain contact and arrange visits with their children. The facility has a large visiting room, part of which is dedicated to a Children's Center, a visiting area designated exclusively for mothers and children.[154] The Children's Center staff also organizes a "summer program" where children from New York City visit every day for a week and engage in a range of group activities.[155] However, these visiting opportunities are not available in most of New York's other prisons, and many states have nothing comparable.[156] Thus, while the staff, volunteers, and inmates at Bedford Hills have done much to improve the quality of access children have to their incarcerated mothers, the prison and its program's *sui generis* nature highlights the fact that most children in New York state and across the country are denied meaningful access to their incarcerated parents.

Parental incarceration in the federal system presents a bleaker reality for the children left behind. Though as a matter of policy "[t]he Bureau of Prisons encourages visiting by family . . . to maintain the morale of the inmate and to develop closer relationships between the inmate and family members,"[157] in practice promoting visitation is not a priority. The Bureau of Prisons maintains 115 facilities spread across the United States.[158] Even if a sentencing judge requests that an inmate be sent to a prison near her or his family, the Bureau of Prisons need not comply with that request once the inmate is in its custody.[159]

In practice, most children of federal inmates do not maintain active contact with their incarcerated parents. In 2004, 59% of parents in state

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[154] *Id.*; Heidi Rosenberg, Comment, *California's Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 GOLDEN GATE U. L. REV. 285, 313–14 (2000).

[155] Rachel D. Costa, Comment, *Now I Lay Me Down to Sleep: A Look at Overnight Visitation Rights Available to Incarcerated Mothers*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 94 (2003).

[156] *See* BLOOM & STEINHART, *supra* note 5, at 53 ("Few state correctional systems can boast of mother–child programming that is as comprehensive and nurturing as the Bedford Hills program.").

[157] 28 C.F.R. § 540.40 (2010).

[158] Bureau of Prisons, *About the Bureau of Prisons*, http://www.bop.gov/about/index.jsp (last visited Oct. 22, 2010).

[159] Interview with Nancy Gertner, Judge, U.S. District Court for the District of Massachusetts, in New Haven, Conn. (Mar. 26, 2010). Even if and when the Bureau of Prisons wants to determine an inmate's location based on children or family considerations, it is much easier to do so for men than for women because of the greater number of male facilities. Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4, 18 (2005); *see also* Froehlich v. State Dep't of Corr., 196 F.3d 800, 802 (1999) ("[W]e do not think that accommodation of family needs is a duty that the U.S. Constitution imposes on state prison officials . . . ."). The key question here is why is the Bureau of Prisons not required to consider children and family location regardless of whether or not the judge requests special placement.

correctional facilities and 45% of parents in federal correctional facilities reported never having had a personal visit from their children, and less than 15% received visits at least once a month.[160] While numerous personal factors might help explain this lack of contact after parental incarceration,[161] there are simple structural and policy explanations as well. For example, 62% of parents in state correctional facilities and 84% of parents in federal facilities were incarcerated more than 100 miles from their place of residence at arrest; only 15% of parents in state facilities and about 5% of parents in the federal system were within fifty miles of their place of residence at arrest.[162] Moreover, prison administrative guidelines may actively deter visitation,[163] and often prisons do not have visiting facilities that are child-friendly.[164] Clearly, children's rights and access to their incarcerated parents are not a significant factor in choosing where to build prisons or where to house individual inmates.

Even if and when children are able to make the long trip to their parents' prison, the visiting conditions they find are highly variable. For example, in the federal Bureau of Prisons each warden may establish a unique visiting schedule at his or her institution,[165] provided each inmate is allowed "a minimum of four hours visiting time per month."[166] Prison wardens are required to dedicate a portion of the visiting room "to provide facilities for the children of visitors"[167] but only "[i]f space is available."[168] "Despite the negative impact of maternal separation on young children,

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[160] SCHIRMER ET AL., *supra* note 21, at 7 tbl.6. In addition, 21% of state inmates and 9% of federal inmates reported never having visits, phone calls, or mails from their children. *Id.*

[161] Some parents do not want to receive visits, some caregivers do not want or cannot arrange for visits, some children resist efforts to arrange visits or misbehave after them, some parents may be transferred to out of state facilities, some prisons may be inaccessible with public transportation, and so on. Barbara J. Myers et al., *Children of Incarcerated Mothers*, 8 J. CHILD & FAM. STUD. 11, 16 (1999).

[162] SCHIRMER ET AL., *supra* note 21, at 8.

[163] *See, e.g.*, MICH. DEP'T OF CORR., POLICY DIRECTIVE 05.03.140, PRISONER VISITING (2007), *available at* http://www.michigan.gov/documents/corrections/05_03_140_210434_7.pdf (providing a ten-page list of caveats and limitations on visits from family members, including children). Note that there is tremendous variation in visiting policies and conditions between the states and federal system, between the various state systems, and even within individual state systems. To date, there is no comprehensive jurisdiction-by-jurisdiction comparative analysis of visiting policies and conditions across the country.

[164] *See, e.g.*, Myers et al., *supra* note 163, at 16 (reporting that some inmates do not want their children to visit because of poor visiting conditions).

[165] 28 C.F.R. § 540.42 (2010).

[166] *Id.* at § 540.43.

[167] It is unclear why the C.F.R. language focuses on children of visitors rather than children of inmates themselves.

[168] 28 C.F.R. § 540.41 (2010).

relatively few programs foster the mother–child bond."[169] Thus, the recognition of children and family visitation as positive[170] does not derive from, or lead to, any particular rights on behalf of children to access their incarcerated parents.

V. CONSTITUTIONAL RIGHTS OF CHILDREN WITH INCARCERATED PARENTS

While international law and principles may not be binding within the United States,[171] they are nonetheless relevant to domestic constitutional law. Notwithstanding the efforts of a movement called "exclusive sovereigntism" to "buffer the United States from foreign influences,"[172] the jurisdictional interaction of international law with national and local law has produced significant changes in U.S. constitutional interpretation.[173] Indeed there are numerous examples of how international legal documents, foreign law, and transnational experiences have influenced U.S. law.[174] The process and possibilities for constitutional "cross-fertilization" have been well-documented elsewhere[175] and are beyond the scope of this Article. The point here is simply that international law, norms, and practice, including those detailed *supra*, can be of use in reframing or reinterpreting constitutional rights in the United States.

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[169] Raeder, *supra* note 160, at 17.

[170] *See also* AM. PRISON ASS'N, A MANUAL OF CORRECTIONAL STANDARDS 342 (1954); COMM'N ON ACCREDITATION FOR CORRECTIONS, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 88 (1981); DANIEL GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 366 (1964).

[171] *See* Setear, *supra* note 38.

[172] Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism,* 57 EMORY L.J. 31, 33 (2007).

[173] Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1594–95 (2006) ("[W]hile aspects of the concept of dignity are implicit in the U.S. Constitution's commitment to liberty, equality, and other personal rights, the Constitution does not use the term. Given the era in which the Constitution was written, that absence is not surprising. During the sixteenth and seventeenth centuries, dignity was not considered to be an attribute of all persons but was, in Western nations, reserved for nobility. However, as is detailed elsewhere, three hundred years of revolutionary ideology about the rights of individuals, the role of governments, and popular sovereignty succeeded in expanding the categories of persons understood as having dignity.") (internal citations omitted).

[174] Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926 (2003).

[175] Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (setting forth five categories of transnational judicial interaction); *see also* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 Stan. L. Rev. 1863 (2003) (examining and categorizing factors influencing legal interactions across national and international levels).

This Article has shown that current law and practice in the United States fail to take into account the interests or rights of children in sentencing and incarcerating their parents. Children are rarely a factor in sentencing or visitation policy even if and when the best interests of the children require ongoing contact and support from their parents. Select international and foreign law demonstrates that the international community has made greater strides in factoring the best interests of the child and children's rights into decisions regarding incarcerated parents than the United States has done thus far.

This Part presents the central argument of this Article as a solution to the legal exclusion problems that children with incarcerated parents face: it puts forward First Amendment associational rights and a due process liberty interest in familial integrity as domestic constitutional bases for factoring children of the incarcerated into sentencing and visitation policy. Next, it engages weaknesses and counter-arguments. Finally, it sketches the practicalities and policy implications of the argument. Some of the constitutional arguments put forward here have been rejected or ignored by the Supreme Court. Nonetheless, especially informed by the international and foreign law outlined in Part III, they are valuable aspirational approaches rooted in U.S. constitutional law.

A. FIRST AMENDMENT

Lawyers, judges, and lawmakers should recognize children's First Amendment right to freedom of association with their incarcerated parents. Framing the issue of associational rights as a prisoners' rights issue—as has been the norm in much previous litigation—instead of a children's rights issue may have a significant impact on the outcome of a given case. Indeed, the Supreme Court's recent decision on prison visitation, *Overton v. Bazetta*, has been widely cited for the proposition that "freedom of association is among the rights least compatible with incarceration,"[176] while the decision is silent on children's First Amendment rights to a relationship with their parents. The unanimous ruling in *Overton* upheld Michigan Department of Corrections' policies severely restricting visitation, including visitation by children, and even the elimination of non-

[176] Overton v. Bazetta, 539 U.S. 126, 131 (2003); *see, e.g.*, Warren v. Pennsylvania, 316 Fed. Appx. 109, 113 (3d. Cir. 2008); Jones v. Brown, 461 F.3d 353, 360 (3d Cir. 2006); Torres Garcia v. Puerto Rico, 402 F. Supp. 2d 373, 381 (D.P.R. 2005).

contact visits.[177] The Sixth Circuit had upheld Michigan's efforts to eliminate contact visits,[178] but found that the restrictions on non-contact visits went too far and were unrelated to legitimate penological goals.[179] The Supreme Court's reversal, refusing to uphold even the limited grounds on which the Sixth Circuit had based its opinion, was a definitive affirmation of a long line of jurisprudence upholding limitations on visitation and prisoners' rights.[180]

In *Overton*, as in most cases,[181] the key issues were framed as prisoners' rights rather than children's rights, despite the fact that the original suit was filed on behalf of inmates *and* their prospective visitors.[182] This Article calls for an inversion of the traditional framework: challenges

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[177] *Overton*, 539 U.S. at 132. In reaching this conclusion the Court relied heavily on the four-factor *Turner* test. *See* Turner v. Safley, 482 U.S. 78 (1987). *But see, e.g.*, Marsha M. Yasuda, Note, *Taking a Step Back: The United States Supreme Court's Ruling in* Overton v. Bazetta, 37 LOY. L.A. L. REV. 1831 (2004) (criticizing *Overton*'s application of the *Turner* test).

[178] Bazzetta v. McGinnis, 124 F.3d 774 (6th Cir. 1997).

[179] Bazzetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002).

[180] *See, e.g.*, Ky. Dep't of Corr. v. Thompson, 490 U.S. 454 (1989) (holding that inmates do not have a liberty interest in receiving visitors that is entitled to the protections of the Due Process Clause); Block v. Rutherford, 468 U.S. 576 (1984) (finding a jail's blanket prohibition on contact visits to be constitutionally valid); Macedon v. Cal. Dep't of Corr., 67 Fed. App'x 407 (9th Cir. 2003) (affirming summary judgment against an inmate's challenge of denial of family visits); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1997) (leaving visitation regulations to prison administrators); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984) ("Prison inmates have no absolute constitutional right to visitation."); Ford v. Beister, 657 F. Supp. 607, 611 (M.D. Pa. 1986) (quoting *Block*, 468 U.S. at 589); Laaman v. Helgemoe, 437 F. Supp. 269, 322 (D.N.H. 1977) (allowing curtailment of visitation as punishment but recognizing First Amendment limits); Craig v. Hocker, 405 F. Supp. 656, 674 (D. Nev. 1975) ("So long as there are reasonable alternative means of communication, a prisoner has no First Amendment right to associate with whomever he sees fit."). *But see* Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985) (finding jail's policy of forbidding weekend visitation and preventing visits by minors to be unlawful); McMurry v. Phelps, 533 F. Supp. 742, 764 (W.D. La. 1982) (rejecting a policy that prevented children under the age of fourteen from visiting their jailed parents); Valentine v. Englehardt, 474 F. Supp. 294 (D.N.J. 1979) (holding that county jail procedures totally barring visitation by inmates' children are unconstitutional).

[181] *But see* King v. Caruso, 542 F. Supp. 2d 703 (E.D. Mich. 2008) (holding that termination of spouse's rights to visit her incarcerated husband did not violate her First Amendment right to freedom of association); Hernandez v. McGinnis, 272 F. Supp. 2d 223 (W.D.N.Y. 2003) (holding that a three-year suspension of inmate's visitation rights did not violate inmate or his family's right to freedom of association, due process, or constitute cruel and unusual punishment).

[182] Bazetta v. McGinnis, 148 F. Supp. 2d 813, 815 (E.D. Mich. 2001). When the case reached the Supreme Court, there was an amicus brief filed on behalf of the sons and daughters of the incarcerated. Brief of the Sons and Daughters of the Incarcerated as Amicus Curiae in Support of Appellees Seeking Affirmance of the District Court Ruling, Overton v. Bazetta, 539 U.S. 126 (2003) (No. 01-01635), 2001 WL 34787107.

should be brought in the name of children left behind, children who have not been convicted of a crime and therefore cannot be similarly deprived of the full protection of the Bill of Rights.[183] Freedom of association is, by definition, a two-way street involving more than one party; freedom to associate requires associating with someone else.

The Court has considered the bi-directional nature of First Amendment rights in the prison context. In *Procunier v. Martinez*, the Court found

> no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.[184]

The reasoning of the Court in *Martinez* clearly illustrates the disadvantages to approaching First Amendment rights based claims from the perspective of the prisoner. However, in subsequent cases the Court has been hesitant to "forge a separate standard for cases implicating the rights of outsiders," essentially overruling the *Martinez* approach.[185] Thus, since *Martinez*, even when litigators frame their challenges in the name of non-inmates whose rights are implicated by prison policy, courts tend to focus on the prisoner's rights only. However, no case mandates that courts ignore the rights of non-prisoners implicated by prison policy and indeed ignoring these rights seems a strained approach to the First Amendment that raises the question of how far could prison policies go in restricting non-prisoners' rights.

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[183] The argument might similarly be made on behalf of spouses or other family members of inmates. However minor, dependent children are likely particularly vulnerable and in need of protection given the negative outcomes associated with parental incarceration. *See* Denise Johnston, *Effects of Parental Incarceration*, *in* CHILDREN OF INCARCERATED PARENTS, *supra* note 1.

[184] 416 U.S. 396, 408 (1974).

[185] Thornburgh v. Abbott, 490 U.S. 401, 411 n.9 (1989) (citing Pell v. Procunier, 417 U.S. 817 (1974)); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Bell v. Wolfish, 441 U.S. 520 (1979).

A long line of Supreme Court doctrine extends the First Amendment to family relationships.[186] When *Martinez* and its progeny are read together with *Overton*'s declaration that "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner,"[187] it should be apparent that there is a need for a new framework. The argument here is that children of prisoners, whose constitutional rights are necessarily implicated in sentencing, placement, and visiting opportunities of their incarcerated parents, have a stronger basis for bringing suit than the prisoners themselves.

Martinez defined a two-part test in cases in which prison regulations may justifiably implicate the free speech rights of non-prisoner citizens: "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." The Court subsequently decided to avoid clarifying the *Martinez* test in the context of a prisoner marriage prohibition,[188] and since then it has preferred to employ a lower reasonableness standard from *Turner v. Safley*.[189] However, the *Turner* reasonableness test is generally applied to prisoners themselves, and the goal here is to move toward a stricter standard of review through a children's rights approach.[190]

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[186] *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) ("The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."); Roberts v. United States, 468 U.S. 609, 618 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary . . . ."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (extending constitutional protections to begetting and bearing of children); Prince v. Massachusetts, 321 U.S. 158 (1944) (recognizing fundamental constitutional rights to family relationships); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (finding that education and child-rearing are protected by the Constitution).

[187] *Overton*, 539 U.S. at 131.

[188] Turner v. Safley, 482 U.S. 78, 97 (1987); *see also Overton*, 539 U.S. at 136 (applying the *Turner* reasonableness test).

[189] *Turner*, 482 U.S. at 89; *Thornburgh*, 490 U.S. at 413–14.

[190] Presumably, any non-convict third party would have a stronger First Amendment basis for a challenge but the focus here is on children whose unique and dependent relationship with their parents might justify application of a particularly strict standard of review.

B. DUE PROCESS

Children with incarcerated parents also have a due process liberty interest in the maintenance of their family integrity.[191] Since the New Deal Era, courts have referred to "substantive due process" as the basis for extending unenumerated fundamental rights through the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment.[192] Substantive due process has been the basis for establishing a wide range of fundamental rights including reproductive rights,[193] the right to marry a person of a different race,[194] a right to engage in sexual relations with partners of the same sex,[195] the right to travel,[196] and more. Even if there is no substantive due process liberty interest for family to visit a prison or for prisoners to receive visits,[197] children's interest in a relationship with their parents should survive.[198] According to the Court, the primary relationship between parent and child "is now established beyond debate as an enduring American tradition."[199] Four key cases develop a constitutional right to family integrity: *Moore v. City of East Cleveland*;[200] *Smith v. OFFER*;[201] *Santosky v. Kramer*;[202] and *Troxel v. Granville*.[203]

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[191] *See generally* Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301–02, 310 (2007) (outlining a doctrinal due process right to family integrity).

[192] *See, e.g.*, A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 502 (1935) (using the phrase "substantive due process" for the first time in Supreme Court history).

[193] Griswold v. Connecticut, 381 U.S. 479 (1965).

[194] Loving v. Virginia, 388 U.S. 1 (1967).

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

[196] Kent v. Dulles, 357 U.S. 116 (1958).

[197] Mayo v. Lane, 867 F.2d 374, 375-76 (7th Cir. 1989); Southerland v. Thigpen, 784 F.2d 713 (5th Cir. 1986); White v. Keller, 438 F. Supp. 110, 115–16 (D. Md. 1977), *aff'd*, 588 F.2d 913 (4th Cir. 1978) (per curiam).

[198] Santosky v. Kramer, 455 U.S. 745, 753 (1982); Griffin v. Strong, 983 F.2d 1544, 1547 (10th Cir. 1993); Niehus v. Liberio, 973 F.2d 526, 532–33 (7th Cir. 1992); *Mayo*, 867 F.2d at 375. *Contra* Froehlich v. Wis. Dep't of Corr., 196 F.3d 800, 802 (7th Cir. 1999) ("The separation of family members that ensues upon the lawful incarceration of one of them is not the destruction of the family, but merely an inevitable incident of incarceration; and no one yet has had the audacity to argue that imprisoning a person who has children or parents violates the Constitution—that only orphans and recluses can be imprisoned for committing crimes.").

[199] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[200] Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

[201] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977).

[202] *Santosky*, 455 U.S. at 745.

[203] Troxel v. Granville, 530 U.S. 57, 57 (2000).

First, in *Moore v. City of East Cleveland*, the Court affirmed a long line of cases that goes back to at least the 1920s[204] and recognizes the special common law rights of parents and children. The decision invalidated a zoning ordinance preventing extended relatives from living in the same home.[205] In a concurring opinion, Justices Brennan and Marshall wrote that "if any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family."[206] The decision further entrenched the legal protection of family and even expanded it to include extended family.

That same year, in *Smith v. OFFER,* the Court considered the state's ability to remove children from a foster home where they had been living for more than a year.[207] Although the Court found that the existing procedures for removal did not violate the due process rights of the foster families or the foster children, Justice Brennan reasoned that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association."[208] Courts should not permit prisons incarcerating parents to deprive needlessly children of "the intimacy of daily association." Lower courts have also recognized a First Amendment right of association, as incorporated through the Fourteenth Amendment,[209] in the context of children visiting incarcerated parents;[210] yet children whose parents are sent to prison are not provided with any process, much less a process that could survive constitutional scrutiny.[211] The right to association and the liberty interest in the maintenance of a family together form a legal basis for demanding an expanded recognition of children's interests in sentencing, visitation, and beyond.

Santosky v. Kramer built on *Moore* and *Smith* and further extended the right to family integrity. *Santosky* was a custody case concerning the standard of proof required to demonstrate parental unfitness such as to legitimize placing children in foster care. The Court found two state

[204] Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing a parent's due process liberty interest in establishing a home and bringing up children).

[205] *Moore*, 431 U.S. at 499.

[206] *Id.* at 511 (Brennan, J., concurring).

[207] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977)

[208] *Id*.

[209] *See generally* AKHIL REED AMAR, THE BILL OF Rights 183–86 (1998).

[210] Nicholson v. Choctaw Cnty., Ala., 498 F. Supp. 295, 310 (S.D. Ala. 1980); O'Bryan v. Cnty. of Saginaw, 437 F. Supp. 582, 598–99 (E.D. Mich. 1977).

[211] *See also* Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (holding that children have a constitutional due process right to representation in abuse and neglect proceedings to protect their fundamental liberty interest in the integrity of their family relationship).

interests at stake: "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings" and a powerful parental interest in the maintenance of family integrity.[212] *Santosky* is significant in the context of a right to family integrity because it expanded the traditional family right beyond just parents to parents and children.

As described above, children's rights—both in the United States and internationally—are generally considered through a "best interests of the child" analysis. In *Troxel v. Granville*, the Supreme Court held unconstitutional a statute that allowed courts to grant a third party visitation rights against the parent's wishes if doing so was in the best interests of the child.[213] According to the Court, "so long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family."[214] In his dissent in *Troxel*, Justice Scalia squarely teed up and then chose not to suggest a definitive resolution on the issue at the heart of the argument here: he noted that the respondent asserted "only, *on her own behalf,* a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children,* their First Amendment rights of association or free exercise."[215] Although the Court did not further develop the issue Justice Scalia flagged, it did acknowledge that the liberty interest of the parent–child relationship "is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court."[216] In other cases, the Court has had the "unanimous view that 'few consequences of judicial action are so grave as the severance of natural family ties.'"[217] Taken together, these cases demonstrate the progression of the Court's recognition of a constitutional due process liberty interest in family integrity. That right, at least as it pertains to children, should not stop at the prison gate.

Where it has been established that maintenance of a relationship with the parent is in a child's best interests, the state should assume a *parens patriae* obligation to intervene in criminal justice proceedings of the parent on behalf of the child. Thus, as in the international law outlined in Part III,

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[212] Santosky v. Kramer, 455 U.S. 745, 758–59 (1982); *see also* John C. Duncan Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1257–58 n.99 (2005).

[213] Troxel v. Granville, 530 U.S. 57, 71 (2000).

[214] *Id*. at 68.

[215] *Id.* at 93 n.2 (Scalia, J., dissenting).

[216] *Id.* at 65; *see also*, Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994) (reviewing Supreme Court First Amendment family doctrine).

[217] M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (quoting *Santosky*, 455 U.S. at 787).

the state would approach criminal processing of parents with a balancing test to resolve competing interests: the interests of society to punish crime and increase public safety; the best interests of the child of the offender; and the interests of the victim in seeing the perpetrator punished. This approach ensures that all parties whose rights and interests are directly implicated will be factored into the outcome.

C. ENGAGING COUNTER-ARGUMENTS

As with any innovative approach, there are weaknesses and counter-arguments to the children's rights approach to parental incarceration advocated here. A child's First Amendment right to familial association and due process liberty interest in family integrity are not absolute. Clearly, these rights are regularly limited in the context of incarceration.[218] This section engages three related counter-arguments to expanding the role and rights of children in the context of parental incarceration.

First, some might argue that family ties *already* have been amply factored into various stages of the criminal justice process. Professor Dan Markel, a leader in the field of criminal law, sentencing, and retribution, contends that "[m]embers of state-recognized families fare better throughout the system, which is designed quite self-consciously to make sure defendants with families will get benefits that others will not."[219] He argues elsewhere that a variety of laws form a string of "family ties benefits" which pervade the criminal justice system.[220] According to this perspective, any further incorporation of children's rights, as advocated here, would at best be redundant and at worst actually incentivize crime.[221] However, the idea that some discount in sentencing or access to a child-friendly visiting room would incentivize crime should be absurd on its face. It is elementary logic that criminals do not expect to be caught; otherwise, they would not commit crimes.[222] Although Markel's publications are chock full of concrete examples of ways in which family can influence criminal justice outcomes, they are not persuasive here.[223] The fact that the

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[218] *See supra* Part IV.

[219] MARKEL, *supra* note 133, at 19.

[220] Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1199 (2007).

[221] *Id.*

[222] *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11 (1999) (concluding that harsh mandatory sentences have little effect on crime).

[223] In fact, Markel does not argue against recognizing children's rights. Rather, he is concerned primarily with challenging the narrow definitions of "family" that harm non-traditional care-giving units.

concept of family is already incorporated into the criminal justice system in various places—either through statutory rights and procedures, or through voluntary services provided haphazardly and unevenly—in no way justifies the criminal justice system's failure to consider the rights of children in sentencing and visitation. In fact, the recognition of family ties elsewhere highlights its crucial importance in the context of dependent minor children who risk losing their parents through no fault of their own.

Second, a related counter-argument is simply that criminal justice proceedings should not be driven or influenced by third parties. As Markel puts it, a "person who commits a crime can reasonably foresee that, if prosecuted and punished, his punishment will affect not only himself but also his family."[224] This argument might continue: criminal proceedings are between the state and the offender and allowing other parties to join the table is a slippery slope with no clear cut-off point. This logic also fails. Victims or their families are already guaranteed a voice at various stages of the criminal justice process,[225] and more than thirty states have a victim's rights amendment in their state constitutions.[226] Moreover, just as it is wrong for a crime to harm the victims, it is wrong that the punishment for that crime should harm innocent children. While advocates of the counter-argument may suggest that the harm to the children of a person convicted of a crime serves as a deterrent, it also feeds into a broader cycle of intergenerational incarceration[227] that may ultimately increase crime rather than deterring it. Finally, as a matter of policy it would be irrational to approach criminal justice issues in a vacuum when it is possible to consider and account for all the key stakeholders in the process: victims, children, families, and communities. Surely, this country's legal system is sophisticated enough to approach criminal justice law and policy with a holistic perspective that both provides an appropriate, if limited, role to those most directly impacted and takes a broad, long-term view of societal interest, by, among other things, reducing future criminal behavior.

Third, some may argue that incorporating children's rights into sentencing or visitation policies will introduce unjust discrepancies in outcomes for otherwise similarly situated offenders. Significant discrepancies have in fact been the result in widely cited cases such as

[224] MARKEL, *supra* note 133, at 49.

[225] *See supra* text accompanying notes 95–98, 102, 105.

[226] Rachel King, *Why a Victim's Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 359 (2000).

[227] *See infra* note 243.

United States v. Johnson,[228] where two defendants were convicted of the same crime but received disparate sentences because one of them was the mother of four dependent children. Factoring children into the process "facilitate[s] ad hoc disparities between offenders who are otherwise similarly situated across cases, it also creates inequalities between persons involved in the very same cases."[229] Indeed the Sentencing Reform Act of 1984[230] created the USSC to, among other things, examine and eliminate "unwarranted disparity in federal sentencing policy."[231] But having minor dependent children is a real factor that has implications not only for the children themselves and the offender, but also for society as a whole.[232] The simple reality, as the Second Circuit recognized in *Johnson*, is that sentencing a non-parent to prison generally has few grave social implications, while sentencing a mother and active caretaker for four young children to prison does. In fact, no one would seriously suggest that sentencing and prison conditions should be determined solely on the basis of the facts of the crime committed. Even the Guidelines require incorporation of prior criminal record and other relevant factors. Why should innocent children who face losing their primary caregiver and potentially being transferred to state custody not be a relevant factor as well? Children have a First Amendment right to association; they also have a due process liberty interest in maintaining family integrity. These rights should apply with equal vigor in the context of parental incarceration.

D. PRUDENTIAL CONSIDERATIONS

The argument here is not for a particular sentencing statute or visitation standard. Rather, it is for the progressive, incremental realization of children's rights in the context of parental incarceration. Nonetheless a few policy specifics may help to illustrate the legal argument. Whether

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[228] United States v. Johnson, 964 F.2d 124 (2d Cir. 1992). The case is cited in forty-six law review articles. This number was obtained by using the LEXIS online Shepardization function.

[229] MARKEL, *supra* note 133, at 49.

[230] Comprehensive Crime Control Act, Pub. L. 98-473, 98 Stat. 1976, ch. II (1984).

[231] LISA M. SEGHETTI & ALISON M. SMITH, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 13 (2007).

[232] *See supra* Part II.

through incremental impact litigation[233] and the courts, or through legislative initiative, eventually, if the theory put forward here is successful, the outcome might look something like the following: Lawmakers would fund a wide range of non-carceral punishments tailored to specific classes of crime: treatment for addicts; intensive community service for vandals; reparations for thieves; Global Positioning Satellite monitoring of gang members, and so forth. These programs tend to be significantly cheaper than incarceration and cause fewer third-party harms to children and families.[234] These alternatives to incarceration would be available sentences at judicial discretion and not limited only to parents. Where public safety requires incarceration, the best interests of the child[235] might suggest shorter sentences than under the current regime, and prison facilities located in areas easily accessible from urban centers. Public transportation[236] would facilitate access to existing remotely located facilities. Visitation facilities and prison programming would be improved to facilitate the best interests of the child. The prison nursery and children's center in Bedford Hills might become a statutory norm rather than a discretionary exception. Incarcerated parents might be required to enroll in continuing education courses and parenting classes. Overnight visiting and furlough programs could be considerably expanded to allow for the maintenance of family bonds and ease the transition to freedom at the end of prison terms. Some judges may already implement some of these recommendations unilaterally,[237] but the argument here is for a systematic approach through statute or USSC Guidelines to establish a balancing test like that set out by Justice Sachs in South Africa. All of these changes

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[233] Impact litigation involves bringing cases designed to affect large numbers of people and impact social policy rather than simply settling the disputes of individual litigants. An incremental approach to impact litigation was, perhaps, most famously and successfully employed in the line of cases that led to *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (describing the long-term litigation strategy that made *Brown* possible).

[234] *See generally* Nora v. Demleitner, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENT'G REP. 1 (2009) (advocating alternatives to incarceration).

[235] This standard is already well-established in the United States. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 84 (2000) (noting that "myriad other state statute's and court decisions at least nominally" apply the best interest of the child standard) (Stevens, J., dissenting).

[236] For example, special buses set up and subsidized by the department of corrections to provide families of prisoners with access.

[237] *See* Gertner, *supra* note 129.

could save untold millions of tax dollars, ease prison crowding, and fulfill children's rights.[238]

Sentencing judges would engage in balancing designed to "promote uniformity of principle, consistency of treatment, and individualisation of outcome."[239] First, all sentencing judges would determine whether a given convicted person is a primary caregiver. Next, if the person is a primary caregiver and is facing incarceration under the existing guidelines, the judge would evaluate the likely impact on the child or children, and consider what steps might be necessary to ensure the children's best interests are adequately protected during incarceration. Where appropriate, advocates could be appointed to represent children's interests in legal proceedings. Finally, in deciding what specific sentence to order, the judge would consider not only the guidelines, the victim impact statement, the prior criminal history, and the details of the offense, but also the best interests of the child.[240] The proposed process is multifaceted, but it is one that judges, who engage in complex balancing and multifaceted analysis regularly, are well-suited to handle.[241]

When and if primary caregiver parents are sentenced to prison and it is in the best interests of the child to maintain or develop a relationship with them, the law should require certain minimum standards. Bedford Hills serves as a model, though certainly not all prisons would be required to meet that high standard. The Bureau of Prisons or state department of corrections should simply facilitate phone calls, written communication, and visitation. Visiting facilities should provide contact and interactive, child-appropriate spaces. Children should not be forced to travel hundreds of miles to see their parents. To the extent possible, in light of the individual offender's security status and other relevant factors, overnight visitation, furloughs, and simulations of real-life family interactions should be promoted. Child-friendly visitation policies would help reduce recidivism rates[242] and break the cycle of intergenerational incarceration

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[238] *See, e.g.*, THE RISING COSTS OF INCARCERATION: CRIMINAL INVESTMENT DECISIONS, URBAN STRATEGIES COUNCIL (2007) (detailing the costs of incarceration per inmate and its impact on state budgets) *available at* http://www.urbanstrategies.org/programs/csj/documents/CostsofIncarcerationFlyer_08.06.07_BH.pdf.

[239] *S v. M* 2008 (3) SA 232 (CC) (S. Afr.).

[240] The specific outcome of this approach would vary. A clearer, simpler test focused more narrowly on children's rights to the exclusion of other factors would simply require that a primary caregiver of a dependent children not be sentenced to prison unless required by public safety considerations and then only for the minimum appropriate time.

[241] If, in this context, judges fail to factor children into the sentencing determination, that failure should be grounds for appeal.

[242] *See* MACDONALD & KELLY s*upra* note 146.

potentially impacting millions of American youth.[243] These visiting programs should not be a rare privilege doled out selectively as is current practice. Rather, child-friendly visitation opportunities should be based on Constitutional rights of children to intimate association and family integrity with their incarcerated parent.[244]

VI. CONCLUSION

The recognition of children's rights in the context of parental incarceration may be a long way from realization. Nonetheless, there are concrete proposals and promising developments that warrant brief mention here. Advocacy groups in the United States have promoted an aspirational document called a "bill of rights" for children with incarcerated parents.[245] While the proposal is far from being binding law, this Article has argued that many of the principles in the bill of rights for children with incarcerated parents may have legal basis in the Constitution. Over time, perhaps, impact litigation and judicial interpretation could expand and entrench the legal basis theorized here.

Legislative action is another approach to the realization of children's rights to a relationship with their incarcerated parents. In January 2010, with broad bipartisan support, the New Jersey Legislature passed a historic package of bills seeking to reduce recidivism rates, protect children of prisoners, and break the cycles of recidivism and intergenerational incarceration.[246] For example, the Women and Families Strengthening Act establishes a commission to strengthen bonds between incarcerated parents and their children and encourages incarcerated individuals to be placed in facilities as close as possible to family.[247] The Act also lifts the ban on food stamps and Temporary Assistance for Needy Families benefits for

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[243] JEREMY TRAVIS ET AL., URBAN INSTITUTE, FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 2 (2005); Johnston, *supra* note 51, at 138; Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 478 (2006); Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283, 289 (2009).

[244] The right could be further developed through a statute with a built-in cause of action to more readily allow for judicial enforcement.

[245] SAN FRANCISCO PARTNERSHIP FOR INCARCERATED PARENTS, CHILDREN OF INCARCERATED PARENTS: A BILL OF RIGHTS (2003), *available at* http://www.fcnetwork.org/Bill of Rights/billofrights.pdf; *see also* Tanya Krupat, *Invisibility and Children's Rights: The Consequences of Parental Incarceration*, 29 WOMEN'S RTS. L. REP. 39 (2007) (describing the "Bill of Rights" initiative).

[246] Chris Megerian, *N.J. Assembly Passes Bills Aimed at Curbing Recidivism*, NJ.COM, Jan. 11, 2010, *available at* http://www.nj.com/news/index.ssf/2010/01/nj_assembly_approves_bills_aim.html.

[247] Women and Families Strengthening Act, A.B. 4197, 2nd Sess. (N.J. 2009).

individuals who have felony drug convictions and dependent children.[248] While these steps by the New Jersey legislature do not address the specific problems or legal issues raised in this Article, they represent a major advance for children of prisoners and suggest the possibility of legislating an expanded role for children in the criminal justice proceedings of their parents.

This Article has argued for the recognition of children's right to a relationship with their parents in the context of criminal justice. A comparative analysis of the New York state and federal sentencing and visitation policies demonstrated that the status quo criminal justice system is largely sanitized of the needs and interests of children. When and where children are taken into consideration, it is discretionary, as a matter of privilege rather than of right. The approach mapped out here has vast implications for sentencing guidelines, prison visiting conditions, the outcome of cases such as *Overton*, the political geography of prison construction, and more. What is called for is nothing less than adding a new dimension to the way law and policy approach the administration of criminal justice.

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[248] *Id.*