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YALE LAW & POLICY REVIEW

An Endangered Necessity: A Response to *Prison Visitation Policies: A Fifty-State Survey*

David Fathi*

Humans are social animals. Our very sense of our own existence depends on interaction with others who respond and react to us in myriad ways. Beyond that, some of our most important roles—as a brother, a mother, a husband, a friend—are inherently relational; these terms make sense only in relation to other persons.

This is true for all of us, but particularly true for prisoners. Prison is a total institution that, partly by design and partly as an unavoidable result of incarceration, strips its residents of much of their personal and professional identity. No longer are you a doctor or a teacher or a plumber, a volunteer firefighter or a PTA member. No longer may you express yourself through the clothes or hairstyle you wear. Even your ability to read and write, and by extension to think, may be significantly curtailed.¹

In this starkly deprived environment, personal relationships take on increased importance. Unfortunately, such relationships within the prison are usually unsatisfactory at best. Friendships with other prisoners are subject to interruption at any time due to frequent transfers over which prisoners have no control. And while many prisoners have positive interactions with corrections officers and other staff, these relationships are inherently limited, both by prisoner transfers and staff turnover and by the unavoidably coercive and adversarial nature of incarceration. Your captors are never really going to be your friends.

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1. See, e.g., *Beard v. Banks*, 548 U.S. 521 (2006) (holding that ban on all newspapers, magazines, and photographs in “Long-Term Segregation Unit” did not violate the First Amendment). Justice Stevens protested that “the prison regulation at issue in this case . . . comes perilously close to a state-sponsored effort at mind control.” *Id.* at 552 (Stevens, J., dissenting). *But see* *Jordan v. Pugh*, 504 F. Supp. 2d 1109 (D. Colo. 2007) (invalidating a Bureau of Prisons regulation that prohibited prisoners from publishing under a byline).

And tens of thousands of U.S. prisoners are held in solitary confinement, deprived of all but the most fleeting and perfunctory interaction with staff and other prisoners.

For all of these reasons, many prisoners characterize their relationships with friends and family on the outside as a vital lifeline that helps them maintain their sense of self, their emotional equilibrium, and in some cases their will to go on living in a harsh and punitive environment. These relationships can be maintained through letters and telephone calls, but each has important limitations. Telephone calls from prison are often extraordinarily expensive, due to monopoly arrangements in which the prison system awards an exclusive contract to a single provider in exchange for “commissions.”² Mail is unsatisfactory as a means of communicating with young children and others with limited literacy, and may be subject to a host of restrictions.³

No one who has ever spent an hour in a prison visiting room can doubt the paramount importance of visiting to both prisoners and their loved ones. Even non-contact visiting, though far from ideal, is a deeply emotional experience for many, with tears welling up and hands pressed wistfully against the Plexiglas when visiting time is over.

Unfortunately, visiting exists at the sufferance of prison officials. Both before and after the Supreme Court’s decision in *Overton v. Bazzetta*,⁴ courts have been extraordinarily willing to uphold severe limitations on visiting,⁵ although some

2. On August 9, 2013, the Federal Communications Commission issued an order significantly limiting interstate calling rates from prisons and jails. See Press Release, Fed. Comm’n’s Comm., FCC Bars High Rates for Long Distance Phone Calls in Jails and Prisons Nationwide (Aug. 9, 2013), <http://www.fcc.gov/document/fcc-reduces-high-long-distance-calling-rates-paid-inmates>. Rates for intrastate calls are regulated by state public utility commissions and remain high in many states.

3. In recent years, some jails have adopted “postcard-only” policies, under which incoming and/or outgoing mail is limited to postcards. The impossibility of discussing complex or sensitive subjects with a spouse or other family member on a four-by-six inch postcard is obvious. These policies have been successfully challenged by the ACLU and others in a number of jails, but remain in effect in others. See, e.g., *Prison Legal News v. Columbia County*, No. 3:12-cv-00071, 2013 WL 1767847 (D. Or. Apr. 24, 2013) (invalidating jail postcard-only policy); *Martinez v. Maketa*, No. 10-CV-02242, 2011 WL 2222129 (D. Colo. June 7, 2011) (entering consent injunction against jail postcard-only policy).

4. 539 U.S. 126 (2003).

5. See, e.g., *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (holding that denial of visits from anyone other than immediate family did not violate the Constitution), *amended*, 135 F.3d 1318 (9th Cir. 1998); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1233-39 (M.D. Ala. 1998) (upholding denial of all visiting during ninety-day “shock” program during which prisoners worked on a chain gang).

of the most draconian and nonsensical restrictions have attracted judicial scrutiny.⁶

* * *

Incarceration, like any other industry, is affected by technological change. One such development has been the growth of video visiting, in which the prisoner interacts with his or her “visitor” on a video monitor. It should be obvious that video visiting is a poor substitute for face-to-face-interaction, even if the latter is non-contact. One federal judge described video visiting at a Wisconsin supermax prison this way:

Inmates are not allowed face-to-face visits, other than with their lawyers. The institution provides only video visitation. Inmates remain in their cell block and visitors at the front of the institution. Inmates and their visitors see each other on small video screens that are located across the room from the inmate. The audio quality is poor The poor quality of the visits has led some mentally ill inmates to believe that the images on the video screens are manipulated and to refuse visitors. During the video visits, inmates remain handcuffed, shackled and belly chained.⁷

Courts have confronted the issue of video visiting in the context of child custody, and a number of decisions recognize its significant limitations.⁸ These concerns are consistent with findings from the social science and communications literature that video communication entails significant loss of meaning.⁹

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6. See, e.g., *Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir. 2002) (reversing dismissal of complaint regarding a rule forbidding same-sex “kissing, embracing (with the exception of relatives or immediate family) or petting”); *Morrow v. Harwell*, 768 F.2d 619, 626-27 (5th Cir. 1985) (holding a ban on visiting by minors unconstitutional).
 7. *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1101 (W.D. Wis. 2001). The court cited the example of a mentally ill prisoner who “explained that he does not participate in visits with his family via video monitors because ‘they could be faking the images.’” *Id.* at 1113.
 8. See, e.g., *Gilbert v. Gilbert*, 730 N.W.2d 833, 840 (N.D. 2007) (“Virtual visitation is not a substitute for personal contact.”); *Marshall v. Marshall*, 814 A.2d 1226, 1233 (Pa. Super. Ct. 2002) (“[S]uch technology cannot realistically be equated with day-to-day contact between parents and young children. Such arrangements do not comport with realistic, substitute visitation.”); *Graham v. Graham*, 794 A.2d 912, 915 (Pa. Super. Ct. 2002) (“[W]e disagree with the [trial] court’s inference that staying connected via the Internet could ever be a substitute for face-to-face contact.”).
 9. See *Video Visit Modification Act of 2013: Hearing on Bill 20-122 Before the Comm. on the Judiciary of the Council of the District of Columbia*, 2013 Council (D.C. 2013) (statement of the Am. Civil Liberties Union of the Nation’s Capital) (on file with author) (citing Aaron Hass, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 70 (2006); Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*,

Despite these limitations, video visiting could be a positive addition to in-person visiting. It could make some form of interaction easier for visitors who live far from the prison, or have mobility or other limitations that make in-person visiting difficult or impossible. Unfortunately, it appears that many jurisdictions have instituted video visiting as a replacement for, rather than a supplement to, in-person visiting.

Perhaps the most malignant trend in prisoner visiting is the move to charge prisoners and their families for visiting. As the Feature notes, many video visiting programs are operated by private corporations that rely on fees for their profits. And in what may be a first, the Arizona Department of Corrections has begun charging to visit prisoners, imposing a one-time \$25 “background check fee” on visitors eighteen and older.¹⁰ The chief of staff for the Arizona Senate “confirmed that the fees were intended to help make up the \$1.6 billion deficit the state faced at the beginning of the year.”¹¹ The fee has been upheld by the Arizona Court of Appeals against various challenges.¹²

Prisoners are drawn overwhelmingly from the poorest strata of U.S. society. Their already struggling families are often further stressed by the loss of the prisoner’s income and the legal and other costs attending his or her prosecution. Charging for prison visiting is surely the ultimate example of attempting to squeeze blood from a turnip. It is also extraordinarily short-sighted public policy, especially given the robust literature on the positive rehabilitative effects of visiting.

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One of the Feature’s most significant contributions is to show the extraordinary range and diversity of prison visiting practices.¹³ Its central finding that “some jurisdictions generally restrict visitation, while other states specifically encourage and promote visitation as a core part of the rehabilitation process,”¹⁴ shows that there is nothing inevitable about harsh and restrictive visiting policies. Clearly, some states are able to maintain prison safety and security while facilitating and encouraging visiting. As the Feature’s authors tactfully put it, “we do

22 LAW & HUM. BEHAV. 165, 173-81 (1998); Michael J. Mallen et al., *Online Versus Face-to-Face Conversations: An Examination of Relational and Discourse Variables*, 40 PSYCHOTHERAPY THEORY, RES., PRAC., TRAINING 155 (2003)).

10. Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES, Sept. 4, 2011, <http://www.nytimes.com/2011/09/05/us/05prison.html>.

11. *Id.*

12. *Hamm v. Ryan*, No. 1 CA-CV 12-0130, 2013 WL 2325546 (Ariz. Ct. App. May 28, 2013).

13. Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL’Y REV. 149 (2013).

14. *Id.* at 154.

not know why similar security concerns yield widely variant statewide policies.”¹⁵ As the United States clings to its dubious distinction as the world’s leading incarcerator, the Feature’s findings will be a powerful tool for those advocating more humane and progressive prison visiting policies.

15. *Id.* at 172.

