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Rachel Sims

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NOTE

CAN MY DADDY HUG ME?: DECIDING WHETHER VISITING DAD IN A PRISON FACILITY IS IN THE BEST INTEREST OF THE CHILD

Deciding what is best for a child often poses a question no less ultimate than the purposes and value of life itself.¹

INTRODUCTION

Amanda Smith was thirteen years old when her father, Robert, petitioned the court to have her visit with him in prison on weekends and holidays.² Robert has been incarcerated since Amanda was three years old. He is serving a life sentence for murder, robbery, and kidnaping at the Eastern Kentucky Correctional Complex in West Liberty, Kentucky.³ In his petition, Robert alleged that Amanda's mother, Edna,⁴ had been bringing Amanda to visit with him in prison. However, after he and Edna divorced, Edna refused to continue bringing Amanda to the prison.⁵

The trial court ordered Robert to file a detailed plan of his proposed visitation, which he promptly filed.⁶ Thereafter, without conducting a hearing, the trial court denied Robert's petition, stating that "the Court has examined the record including the Petitioner's motions and heard argument of [Edna]'s Counsel [and] finds that it is inappropriate at this point to consider issues involving the parties' children because of the Petitioner's incarceration."⁷

¹ R. MNOOKIN, *IN THE INTEREST OF CHILDREN* 18 (1985).

² *Smith v. Smith*, 869 S.W.2d 55, 55 (Ky. Ct. App. 1994).

³ *Id.*

⁴ Robert and Edna were divorced in November, 1989. The divorce decree deferred the issue of visitation and support because Robert was a prisoner. *Id.*

⁵ *Id.*

⁶ *Id.* at 56.

⁷ *Smith*, 869 S.W.2d at 56.

The Court of Appeals of Kentucky reversed the trial court's denial of visitation.⁸ In its opinion, the court of appeals seemed perplexed as to how and when the trial court would have had an opportunity to hear Edna's counsel's argument in opposition to Robert's petition because the court never held a hearing.⁹ The appellate court instructed that, under Kentucky's statutory scheme, a non-custodial parent "cannot be denied visitation with his or her child unless there has been a finding that visitation will seriously endanger the child."¹⁰ The court recognized that the statute created a presumption that visitation with both parents is in a child's best interest "for the obvious reason that a child needs and deserves the affection and companionship of both its parents."¹¹ Regardless of the grievous nature of Robert's crime, "his status as an inmate in a penal institution alone does not make visitation with his child inappropriate."¹² The appellate court explained that had the trial court conducted a fact-finding hearing in which it was proven that Amanda would suffer serious harm from visiting her father in prison, then a denial of visitation would be upheld.¹³ Accordingly, the appellate court remanded the case for entry of an order establishing a visitation schedule for Amanda with her father.¹⁴

The appellate court did not promote the best interests of Amanda by reversing the lower court and ordering visitation

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Smith*, 869 S.W.2d at 57; see also *Lonobile v. Betkowski*, 261 A.D.2d 829, 829, 689 N.Y.S.2d 790, 790 (4th Dep't 1999) (finding that a parent's incarceration will not, by itself, render visitation inappropriate); *Rhynes v. Rhynes*, 242 A.D.2d 943, 943, 662 N.Y.S.2d 667, 667 (4th Dep't 1997) (finding that a parent's incarceration, standing alone, does not render visitation inappropriate); *Simpson v. Finnigan*, 202 A.D.2d 592, 592, 609 N.Y.S.2d 265, 266 (2d Dep't 1994) (explaining that a parent's incarceration alone does not make visitation with that parent's child inappropriate); *Vann v. Vann*, 187 A.D.2d 821, 821, 589 N.Y.S.2d 715, 716 (3d Dep't 1992) (stating that the father's incarceration alone does not mean that his right to visitation should automatically be forfeited); *Wise v. Del Toro*, 122 A.D.2d 714, 714-15, 505 N.Y.S.2d 880, 881 (1st Dep't 1986) (holding that a parent's incarceration alone does not make visitation with that parent's child inappropriate); *Harris v. Burns*, 904 P.2d 648, 650 (Or. Ct. App. 1995) (finding that a parent's incarceration does not invariably require that visitation be denied).

¹³ *Smith*, 869 S.W.2d at 57.

¹⁴ *Id.*

rather than remanding for a full evidentiary hearing. Moreover, the lack of an evidentiary hearing in this case is particularly worrisome because Amanda was thirteen years old, an age at which she should have had her wishes considered. Neither the trial court nor the appellate court gave Amanda an opportunity to be heard on the visitation issue, the outcome of which would have a substantial impact on the rest of her life.

As this Note will demonstrate, many trial court child visitation orders to prison facilities are reversed by appellate courts due to lack of evidentiary hearings,¹⁵ expert witnesses,¹⁶ or attorneys to represent the children.¹⁷ However, in most of the reversals, the appellate courts gave little, if any, guidance to the trial courts as to what factors the courts should examine in determining whether to allow the child to visit with her father in prison.¹⁸ Although the Kentucky Court of Appeals was correct in reversing the trial court's decision in Amanda Smith's case, it would have been much more beneficial to Amanda and other children in her situation¹⁹ if the appellate court remanded for an evidentiary hearing and provided the lower court with specific guidelines to protect the welfare of Amanda.

This Note will focus specifically on incarcerated fathers because, generally, it is the imprisoned father who is an unwed parent²⁰ and, accordingly, is not respected and protected as much in the law as are married fathers or mothers.²¹ The ma-

¹⁵ See, e.g., *Alexander v. Alexander*, 900 S.W.2d 615, 616 (Ky. Ct. App. 1995); *Sharpe v. Carpenter*, 256 A.D.2d 1231, 1231, 684 N.Y.S.2d 108, 108 (4th Dep't 1998); *Vann*, 187 A.D.2d at 821, 589 N.Y.S.2d at 715; *Sullivan v. Shaw*, 650 A.2d 882, 884 (Pa. Super. Ct. 1994); *Wolfe v. Wolfe*, 899 P.2d 46, 48 (Wyo. 1995).

¹⁶ See, e.g., *Youngblood v. Amrhein*, 216 A.D.2d 475, 475, 628 N.Y.S.2d 386, 386 (2d Dep't 1995); *Shipp v. Gaglia*, 97 A.D.2d 945, 945, 468 N.Y.S.2d 743, 743 (4th Dep't 1983).

¹⁷ See, e.g., *Folsom v. Folsom*, 262 A.D.2d 875, 876, 692 N.Y.S.2d 529, 529 (3d Dep't 1999); *Del Toro*, 122 A.D.2d at 714, 505 N.Y.S.2d at 881; *Shipp*, 97 A.D.2d at 945, 468 N.Y.S.2d at 743.

¹⁸ See, e.g., *Folsom*, 262 A.D.2d at 876, 692 N.Y.S.2d at 529; *In re Kenneth "H" v. Barbara "G."*, 256 A.D.2d 1029, 1029, 682 N.Y.S.2d 699, 700 (3d Dep't 1998); *Sullivan*, 650 A.2d at 884; *Wolfe*, 899 P.2d at 48. In all of these cases, the court held that a denial of visitation to an incarcerated parent must be based upon evidence conspicuous in the record, but the court offered no practical guidance regarding the hearing.

¹⁹ Studies estimate that 1.6 million children have a father in prison. See *infra* note 145 and accompanying text.

²⁰ And, in most cases, the non-custodial parent.

²¹ See *Lehr v. Robinson*, 463 U.S. 248, 257 (1983) (finding that the institution

jority of incarcerated fathers are not currently and have never been married to the mother of their children.²² However, most men were living in the same house with at least one of their children at the time of their arrest.²³

Most of the articles involving children visiting with an incarcerated parent focus on mothers²⁴ and tend to cast aside the importance of the father's role in his child's life. The few articles that do focus on incarcerated fathers put forth an equal protection analysis that suggests that incarcerated mothers and incarcerated fathers are similarly situated and, thus, should be treated equally.²⁵ This Note contends that an equal protection analysis would not regularly promote the best inter-

of marriage has played a critical role in defining the legal entitlements of family members and that as part of the "general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family"); see also Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 971 (1994) (noting that "historically, unwed fathers had no rights to custody, visitation or recognition of their children").

²² See Creasia Finney Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children*, 37(5) CHILD WELFARE 617, 620 (1998).

²³ *Id.*

²⁴ See generally BARBARA BLOOM & DAVID STEINHART, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, WHY PUNISH THE CHILDREN? A REAPPRAISAL OF THE CHILDREN OF INCARCERATED MOTHERS IN AMERICA (1993); SUSAN L. MILLER, CRIME CONTROL AND WOMEN, FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY (1998); *Development in Law: Alternatives to Incarceration, Alternative Sanctions for Female Offenders*, 111 HARV. L. REV. 1921 (1998); 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); Jody L. King, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273 (1996); Donna K. Metzler, *Neglected by the System: Children of Incarcerated Mothers*, 82 ILL. B.J. 428 (1994); William Wesley Patton, *Mommy's Gone, Daddy's in Prison, Now What About Me?: Family Reunification for Children of Single Custodial Fathers in Prison—Will the Sins of Incarcerated Fathers be Inherited by their Children?* 75 N.D. L. REV. 179 (1999); 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 (1993); Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM J. GENDER & L. 1 (1995); Tracy Tyson, *Downward Departures Under the Federal Sentencing Guidelines: Parenthood and Pregnancy Appropriate Sentencing Considerations?* 2 S. CAL. REV. L. & WOMEN'S STUD. 577 (1993).

²⁵ See Patton, *supra* note 24, at 180-82; Elise Zealand, Note, *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, 269-74 (1998).

est of the child because a court can find that an incarcerated father is not similarly situated to an incarcerated mother.²⁶ Hence, the court would never reach the issue of whether visitation with an incarcerated father would be beneficial for the child. Accordingly, this Note proposes that focusing on the rights and needs of the children to visit with their father²⁷ would yield more accurate and consistent results that would truly benefit the child.

This Note will explore the issue of a father's right to have visitation with his children in prison and will propose guidelines to be followed by trial courts in making this visitation determination so that the best interest of the child is paramount. Part I reviews the law regarding the rights of fathers to have visitation with their children and the impact that incarceration has on these rights. This Part also discusses the unique role that fathers play in the psychological and social development of their children and how even visits to prison might facilitate this role. Part II evaluates existing case law regarding children visiting their fathers in prison. This Part shows that most trial courts fail to have clear, concise guidelines in making this visitation decision, resulting in inconsistent and inadequate protection of the children. Furthermore, this Part demonstrates that the appellate courts, as well

²⁶ For example, in *Bills v. Dahm*, 32 F.3d 333 (8th Cir. 1994), Randall Bills brought an action against the prison officials of the Lincoln Correctional Center (the "LCC") alleging violation of his right to equal protection on the grounds that he was denied overnight visitation with his infant son while some female inmates incarcerated at the Nebraska Center for Women ("NCW") were permitted such overnight visits. *Id.* at 334. The Eighth Circuit held that since the LCC was classified as a "level 2" security institution (which is a higher level of security) and the NCW was classified as a "level 4" security institution (which is a lower level of security), it is "objectively reasonable for a prison official to believe that an inmate at the LCC is not similarly situated to an inmate at the NCW for purposes of overnight child visitation." *Id.* at 336. Thus, because a reasonable official could believe that Mr. Bills was not similarly situated to a female inmate granted overnight child visitation and that denial of such privileges to Mr. Bills could be rationally related to a legitimate penological objective, "it was not clearly established that Mr. Bills had a right to equal treatment in this case." *Id.* The court never even touched upon whether such visitation would have been beneficial for the child.

²⁷ See Patton, *supra* note 24, at 196 ("Rather than pitting female and male prison parents against each other in what appears to be a zero-sum game, perhaps a better approach is to focus on children's rights and needs, not those of parents.").

as the trial courts, fail to adequately protect the children. Although many appellate courts reverse trial court visitation orders due to a lack of proper evidentiary hearings, they fail to provide meaningful guidance to the trial courts. Therefore, Part III proposes guidelines for trial courts to follow when faced with an incarcerated father's petition requesting that his child visit with him in prison. These proposals will ensure that, in most cases, the courts reach a decision that is most beneficial for the child.

I. OVERVIEW OF FATHERS' RIGHTS AND THE NEED TO PROTECT CHILDREN

A. *Constitutional Protection of the Parent-Child Relationship*

In 1923, the Supreme Court first articulated its broad statement that parents have a fundamental right in the care, control, and custody of their children.²⁸ This parental right is inherently embodied in the liberty interest of the Fourteenth Amendment to the Constitution.²⁹ Two years later, the Supreme Court reaffirmed this parental right when it struck down a statute requiring parents to send their minor children to public school.³⁰

Nearly twenty years later, the Court narrowed its broad statement of parental autonomy when it held that the rights of parenthood are not beyond state regulation when such regulation is consistent with society's interests.³¹ Later, the Court reaffirmed the principles of parental autonomy by stating that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."³²

²⁸ *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (invalidating a statute prohibiting the teaching of children in a foreign language).

²⁹ *Id.*

³⁰ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

³¹ *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (allowing the state to limit parental freedom where parent allowed a minor child to work in violation of a state statute).

³² *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). In *Yoder*, the Supreme Court

While the rights of parents to raise their children without state interference seem well protected, the rights of fathers, particularly unwed fathers, to establish and maintain a relationship with their biological children remain somewhat uncertain and less protected.

B. *Defining Fatherhood and its Rights*

The process of defining fatherhood and the rights associated therewith has been contested in the courts for decades. Initially, the recognition of fatherhood depended almost entirely upon marriage.³³ However, beginning with *Stanley v. Illinois*,³⁴ the legal meaning of fatherhood was dramatically changed when the Supreme Court clearly recognized that a father's connection to his children no longer depended solely upon his relationship to the children's mother.³⁵ Yet *Stanley* was an easy case for the Court to decide because, although he never married the children's mother, Peter Stanley lived with his children and their mother and actively participated in raising his children.³⁶

The rights of unwed fathers were truly fleshed out in a trio of cases that arose in the context of adoption, in each of which an unwed father challenged a mother's choice to have her child adopted by her current husband. First, in *Quilloin v. Walcott*,³⁷ an unwed father challenged a Georgia statute allowing adoption of a child without consent of the biological father.³⁸ Mr. Quilloin did not prevail because the court found that he had neither supported nor spent substantial time with his son and that he had taken no action indicative of paternity before challenging the adoption petition when his son was more than eleven years old.³⁹

affirmed a judgment of the Wisconsin Supreme Court that invalidated the conviction of parents who were members of the Older Order Amish religion.

³³ See *supra* note 21.

³⁴ 405 U.S. 645 (1972).

³⁵ *Id.*

³⁶ *Id.* at 666 (Burger, C.J., concurring).

³⁷ 434 U.S. 246 (1978).

³⁸ *Id.* at 247.

³⁹ *Id.* at 256.

Second, *Caban v. Mohammed*⁴⁰ involved the attempt by an unwed father to block an adoption by a stepfather. The father, Mr. Caban, however, had lived with the mother and their two children for several years and continued to see his children after their mother left him and married Mr. Mohammed.⁴¹ Under New York law, when a mother married another man, her husband was allowed to adopt her children without the consent of the children's biological father.⁴² The Supreme Court invalidated the New York statute on the basis of equal protection, finding that the "gender based distinction" was not "required by any universal difference between maternal and paternal relations."⁴³ The Court acknowledged that where a father had actively participated in raising and supporting his children, he had the same rights as the mother to withhold his consent to adoption.⁴⁴

The clearest understanding of fatherhood was expressed in the third case, *Lehr v. Robertson*,⁴⁵ where the Court addressed whether an unwed father's due process rights afforded him a liberty interest strong enough to defeat the adoption of his children. Like Mr. Quilloin, Jonathan Lehr had not assumed any responsibilities as a father in the two years between his child's birth and the child's subsequent adoption by the stepfather.⁴⁶ Although Mr. Lehr claimed that his efforts to maintain contact with his child were thwarted by his child's mother, the Court found that, because Mr. Lehr had not followed the New York procedure that would have established him as the father, he was not denied due process when his parental rights were terminated over his objection.⁴⁷ In rejecting Mr. Lehr's due process claims, the Court set forth its clearest explanation of when an unwed father acquires the rights of fatherhood:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in

⁴⁰ 441 U.S. 380 (1979).

⁴¹ *Id.* at 382.

⁴² *Id.* at 385 (citing N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

⁴³ *Id.* at 394.

⁴⁴ *Id.* at 392-93.

⁴⁵ 463 U.S. 248 (1983).

⁴⁶ *Id.* at 249-50.

⁴⁷ *Id.* at 265.

the rearing of his child" . . . his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection.⁴⁸

The Court then explained that the importance of the biological connection "is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."⁴⁹ This unique opportunity becomes a constitutionally protected interest only if the father "grasps that opportunity and accepts some measure of responsibility for the child's future."⁵⁰ Thus, the biological connection between a father and his child, while important, is not enough to sustain a protected liberty interest in a father's parental rights. An unwed father must affirmatively demonstrate his commitment to being a father by taking some responsibility for the child's upbringing and future.

Notwithstanding the Supreme Court's explanation of when an unwed father acquires the rights of fatherhood, even where a father demonstrates his commitment to being a father, traditional social values of family integrity may defeat his claim. In *Michael H. v. Gerald D.*,⁵¹ a plurality of the Court expressed that the Fourteenth Amendment only afforded protection to those interests "so rooted in the traditions and conscience of our people as to be ranked fundamental."⁵² Thus, four justices⁵³ concluded that because history and tradition did not protect a relationship between a father and his child born of an adulterous affair, the father, who satisfied the *Lehr* definition of fatherhood, would not be recognized as the child's father.⁵⁴

Although the definition of fatherhood still remains somewhat unclear, what emerges is a recognition that, to qualify as a father, a man must have a biological connection with his child and must also establish a committed relationship with

⁴⁸ *Id.* at 261 (citations omitted).

⁴⁹ *Id.* at 262.

⁵⁰ *Lehr*, 463 U.S. at 262.

⁵¹ 491 U.S. 110 (1989).

⁵² *Id.* at 122 (citation omitted).

⁵³ Justice Scalia announced the judgment of the court and delivered the opinion in which Justice Rehnquist joined and, in all but footnote 6, of which Justice O'Connor and Justice Kennedy joined.

⁵⁴ 491 U.S. 110.

his child. However, even when a man has done so, his claim may be defeated if it upsets traditional social values of family integrity.⁵⁵

C. *Understanding a Father's Rights to Visitation*

A non-custodial parent's⁵⁶ right to visit with a child is strongly favored in the law, and it is generally presumed to be in the best interest of a child to visit with a non-custodial parent unless the court finds that such visitation would endanger the child's physical or emotional health.⁵⁷ This right of visitation is derived from the general right of parents to the care, custody, and control of their children.⁵⁸ Moreover, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of the child to the State."⁵⁹ Thus, many state courts have held that a parent's incarceration, in and of itself, is not grounds to deny visitation.⁶⁰

If anything, an incarcerated father has a critical need for due process protection⁶¹ because if a father cannot maintain contact with his children, he might face a more serious harm—the termination of his parental rights.⁶² Because the

⁵⁵ For an in depth discussion and analysis of the rights of unwed fathers, see generally Forman, *supra* note 21.

⁵⁶ A majority of non-custodial parents are fathers.

⁵⁷ See, e.g., ARIZ. REV. STAT. ANN. § 25-408 (West 2000); IND. CODE ANN. § 31-17-4-1 (West 1999); KAN. STAT. ANN. § 60-1616 (1998); KY. REV. STAT. ANN. § 403.320 (Banks-Baldwin 1999); MINN. STAT. ANN. § 518.175 (West 1999); MO. ANN. STAT. § 452.400 (West 1999); N.D. CENT. CODE § 14-05-22 (1999); TENN. CODE ANN. § 36-6-301 (1999).

⁵⁸ See *supra* notes 28 & 32 and accompanying text.

⁵⁹ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁶⁰ See, e.g., *Alexander v. Alexander*, 900 S.W.2d 615, 616 (Ky. Ct. App. 1995); *Smith v. Smith*, 869 S.W.2d 55, 57 (Ky. Ct. App. 1994); *Casper v. Casper*, 254 N.W.2d 407, 409 (Neb. 1977); *Rhynes v. Rhynes*, 242 A.D.2d 943, 943, 662 N.Y.S.2d 667, 668 (4th Dep't 1997); *Davis v. Davis*, 232 A.D.2d 773, 773, 648 N.Y.S.2d 742, 743 (3d Dep't 1996); *Simpson v. Finnigan*, 202 A.D.2d 592, 593, 609 N.Y.S.2d 265, 266 (2d Dep't 1994); *Matter of Wise v. Del Torro*, 122 A.D.2d 714, 714, 505 N.Y.S.2d 880, 881 (1st Dep't 1986); *Harris v. Burns*, 904 P.2d 648, 650 (Or. Ct. App. 1995).

⁶¹ *Santosky*, 455 U.S. at 753.

⁶² See Genty, *supra* note 24, at 761 (noting that approximately twenty-five states have termination of parental rights statutes that specifically pertain to

parent-child relationship is a protected liberty interest, an incarcerated parent is entitled to procedural due process, which includes an opportunity to be heard at a meaningful time and in a meaningful manner.⁶³ Thus, a father must be afforded a hearing to decide whether to allow visitation with his child at the prison facility.⁶⁴

A father's right to visitation is also supported by societal interests that point in favor of a father maintaining physical contact with his children.⁶⁵ Studies indicate that maintaining close family ties during incarceration results in decreased recidivism rates, increased likelihood of family reunification, and greater potential for success for the parolee.⁶⁶ In addition,

incarcerated parents); *see also* Copeland v. Copeland, No. E1999-01514-COA-R3-CV, 2000 WL 336665 (Tenn. Ct. App. 2000) (terminating a father's rights under T.C.A. § 36-1-113(g)(6) where a "parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten or more years and the child is under eight years of age at the time the sentence is entered by the court") (citations omitted).

⁶³ Matthews v. Eldridge, 424 U.S. 319, 332 (1976).

⁶⁴ *See infra* Part III.A & III.C.

⁶⁵ *See, e.g.*, Vice President Al Gore, Address at the Second National Summit on Fatherhood in Washington, D.C. (June 15, 1998), available at <http://www.geocities.com/nafcj/GoreFRmole.htm> (last visited Mar. 30, 2001) ("[R]e-connecting fathers with their children is a large motivator for the fathers to stay off drugs, stay away from crime and keep a job."); *see also* Peter A. Breen, *Families in Peril: Bridging the Barriers*, CORRECTIONS TODAY, Dec. 1995, at 99 ("[M]ore research comes out every year showing that prison visits are a positive, supportive activity that help the incarcerated parent, the family, the institution and, ultimately, society as a whole.").

⁶⁶ *See* Diane F. Reed & Edward L. Reed, *Children of Incarcerated Parents*, 24(3) SOC. JUSTICE 152, 168-69 (1997); *see also* Creasie Finney Hairston, *Men in Prison: Family Characteristics and Parenting Views*, 13(1) J. OFFENDER COUNSELING, SERVICES & REHABILITATION 24, 24 (1988) (finding that studies consistently show that men who maintain strong family ties while incarcerated and assume responsible husband and father roles upon release have lower recidivism rates than those who function without family ties); Kim Harrison, *Parental Training for Incarcerated Fathers: Effects on Attitudes, Self-Esteem and Children's Self-Perceptions*, 137(5) J. SOC. PSYCH. 588, 589 (1997) (finding that thirty-three inmates who participated in a Family Reunion Program addressing the needs of incarcerated fathers reported an improved quality of their relationship with their children and felt more successful in parenting); Margaret Humadi, *Breaking Barriers with Books: A Father's Book-sharing Program from Prison*, 40(2) J. ADOLESCENT & ADULT LITERACY 92, 92 (1996) ("Common threads of daily life that bind parent and child may slowly loosen during a long separation."); Fox Butterfield, *Children Bear Burden of Jailed Parents*, N.Y. TIMES NEWS SERVICE, Apr. 18, 1999, available at LEXIS NewsGroup File, All ("There is a growing body of research that shows maintaining family ties while in prison leads to lower rates of re-arrest for the fathers and makes a difference in the lives of their kids") (quoting Creasie Finney

inmates who participate in special father programs⁶⁷ are usually better behaved in the prison because they are afraid of losing their visitation privilege.⁶⁸

Although an incarcerated father has a liberty interest in maintaining visitation with his children and such visitation may have a positive effect on him, this right is not absolute.⁶⁹ Indeed, careful attention must be given to the rights or interests of the children who are at the very heart of this visitation dispute.

D. *Protecting the Child of an Incarcerated Father*

Although emotional attachments and other forms of nurturing are not substitutes for the financial support and security that fathers provide when they live with their children, they

Hairston, Dean of the Jane Addams College of Social Work).

⁶⁷ Some examples of programs designed for incarcerated fathers include: (1) a program designed to help a child experience memorable, positive experiences with a father and help the father maintain an active relationship with his child, see Humadi, *supra* note 66, at 92; (2) a program that provides a pleasant child-oriented area where young children can visit with their jailed parent and that offers parenting classes and family counseling for all interested inmates who are parents of young children, see Charlotte H. Rudel & Margaret L. Hayes, *Behind No Bars*, CHILDREN TODAY, May-June 1990, at 20; and (3) a program that provides incarcerated fathers with parenting skills training and the opportunity to have weekly visits with their children (inmates must earn the privilege of the weekly visit by attending five hours of education sessions and maintaining good behavior in the classroom and the prison unit); see also Christina Ramirez, *PATCHing Torn Families, Dads Behind Bars Stay in Touch with Their Kids*, SAN ANTONIO EXPRESS-NEWS, June 13, 1997, at G1.

⁶⁸ See Joe Hallinan, *Family Visits Bring Inmate Closer to Home. Lifer Finds Special Times Mean A Lot*, THE STAR-LEDGER, NEWARK, Feb. 11, 1996, at B1 (reporting that wardens believe that visits help manage the behavior of inmates and increase the odds of rehabilitation); Ramirez, *supra* note 67, at G1 (reporting that inmates behave well when visitation privileges must be earned through good behavior); Rudel & Hayes, *supra* note 67, at 22 ("Because a visit involving physical contact with family members is the highest prison privilege, inmates are careful not to jeopardize their advantage, and thus they present fewer disciplinary problems.")

⁶⁹ See, e.g., *M.L.B. v. W.R.B.*, 457 S.W.2d 465, 467 (Mo. Ct. App. 1970) (holding that parental right of access is not an absolute one); *Harmon v. Harmon*, 943 P.2d 599, 603 (Okla. 1997) (stating that a parent has no absolute right to visitation with a minor child in a prison facility); *Harris v. Burns*, 904 P.2d 648, 652 (Or. Ct. App. 1995) (finding that a non-custodial parent's right to visitation is not absolute; a primary concern is the best interests of the child); *Wolfe v. Wolfe*, 899 P.2d 46, 48 (Wyo. 1995) (stating that there is no absolute right to visitation in a correctional facility).

are, nonetheless, vital to children and fathers and cannot be easily disregarded.⁷⁰ "How valuable the mature guiding hand and love of a second parent may be to a child is taught by life itself. This is surely so when the parent-child relationship is carefully nurtured by regular, frequent and welcomed visitation."⁷¹

Fathers play a unique and important role in the development of their children.⁷² A father's absence from his child's life for any reason can negatively impact the child's psychological and social development,⁷³ and "a father's imprisonment has been linked to social, emotional and cognitive delays in children."⁷⁴ In particular, the impact of fathers on their children has been especially great in the areas of social competence and social responsibility.⁷⁵ Fathers also seem to foster sex role development in their children.⁷⁶ Furthermore, "the quality of fathering that [a] boy receives is generally the most crucial factor in the positive development of his view of himself as a male."⁷⁷ For daughters, positive and frequent nurturing by their fathers has had a positive impact on their cognitive development.⁷⁸

A father's positive impact on a child, however, is seriously diminished when that father is incarcerated. In general, children of incarcerated parents experience a multitude of negative

⁷⁰ See Hairston, *supra* note 22, at 621.

⁷¹ Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981).

⁷² See Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determinations*, 30 J. FAM. L. 847, 860 (1991/1992).

⁷³ BONNIE E. CARLSON & NEIL CERVERA, INMATES AND THEIR WIVES: INCARCERATION AND FAMILY LIFE 31 (1992); see also Vice President Al Gore, *supra* note 65 (stating that the Report of the Federal Interagency Forum for Child and Family Statistics "confirms earlier findings that children growing up without a father are more likely to do poorly in school, get pregnant, do drugs and have a hard time finding and keeping a job").

⁷⁴ See Andersen, *supra* note 72, at 860.

⁷⁵ Ross D. Parke, *Perspectives on Father-Infant Interaction*, in HANDBOOK OF INFANT DEVELOPMENT 549 (J.D. Osofsky ed., 1979).

⁷⁶ Michael E. Lamb, *Fathers and Child Development: An Integrative Overview*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 17 (Michael E. Lamb ed., 2d ed. 1981).

⁷⁷ Cooper v. Cooper, 491 A.2d 606, 621 (N.J. 1984) (Schreiber, J., concurring) (quoting Henry B. Biller, *The Father and the Sex Role*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 323 (Michael E. Lamb ed., 2d ed. 1981).

⁷⁸ See Lamb, *supra* note 76, at 21 (finding that highly involved fathers have an especially marked impact on the cognitive development of their daughters).

emotional and psychological behaviors including fear, anxiety, sadness, anger, loneliness, guilt, low self-esteem, depression, and emotional withdrawal from friends and family.⁷⁹ These children may also become disruptive in the classroom, and often their academic performance deteriorates.⁸⁰ The extent to which a child will be affected by the incarceration of a parent depends upon a number of variables, including the child's age when the parent was incarcerated, the length of the separation, the nature of the parent's crime, the length of the parent's sentence, and the disruptiveness of the incarceration.⁸¹ One study found that children who had contact with their incarcerated parent once a month or less developed significant emotional needs.⁸²

According to another study, children whose fathers are imprisoned for a long period of time often experience confusion and worry as to whether being sent to prison can happen to them.⁸³ Furthermore, children who are separated from an incarcerated father "have a greater likelihood of becoming criminals themselves."⁸⁴ Researchers also found that girls may

⁷⁹ See, e.g., Denise Johnston, *Parent-Child Visitation in the Jail or Prison*, in CHILDREN OF INCARCERATED PARENTS 136-37 (Katherine Gabel & Denise Johnston eds., 1995); Garry L. Landreth & Alan F. Lobaugh, *Filial Therapy with Incarcerated Fathers: Effects on Parental Acceptance of Child, Parental Stress, and Child Adjustment*, 76(2) J. COUNSELING & DEVELOPMENT 157, 157 (1998) (citation omitted); Cynthia Seymour, *Children With Parents in Prison: Child Welfare Policy, Program and Practice Issues*, 77(5) CHILD WELFARE 469, 472 (1998) (citation omitted); Breen, *supra* note 65, at 99 (stating that children of incarcerated parents "are at great risk in all areas of their lives, from basic health needs to completion of their education"); Daphne Muse, *Parenting From Prison*, MOTHERING, Sept. 22, 1994, at 13 (stating that ten year old Johnette sometimes feels scared that her father is in prison: "Sometimes I feel ashamed and I also wonder what he doesn't tell me about being in prison").

⁸⁰ Justice Brooks & Kimberly Bahna, "It's a Family Affair"—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 280 (1994); Travis A. Fritsch & John D. Burkhead, *Behavioral Reactions of Children to Parental Absence Due to Imprisonment*, 30 FAM. RELATIONS 83, 85 (1981); Stewart Gabel, *Behavioral Problems in Sons of Incarcerated or Otherwise Absent Fathers: The Issue of Separation*, 31 FAMILY PROCESS 303, 306-07 (1992).

⁸¹ See Seymour, *supra* note 79, at 472.

⁸² See Landreth & Lobaugh, *supra* note 79, at 163 (citing Rob McPeck and Peter Tse, Fed. Office of Research and Evaluation, *Bureau of Prisons Parenting Programs: Use, Costs, and Benefits* (1988)).

⁸³ See Landreth & Lobaugh, *supra* note 79, at 163 (citing E. Herrman-Keeling, *When Dad Goes to Prison*, 11 NURTURING TODAY 10, 14-16 (1988)).

⁸⁴ See Brooks & Bahna, *supra* note 80, at 272; see also William H. Sack et al., *Children of Imprisoned Fathers*, 40 PSYCHIATRY 163, 165 (1977) (describing results

suffer more severe problems related to school performance as a result of their father's imprisonment than boys.⁸⁵

Visiting with a father in prison can lessen the stress of separation between a father and child.⁸⁶ Furthermore, visitation can enable the child to maintain a healthy relationship with her father and increase the likelihood of a successful reunification.⁸⁷ Visiting fathers in prison can also alleviate the fear that children have regarding their father's safety in prison and correct misconceptions of prison life.⁸⁸ Visiting serves to strengthen the family bond, and maintaining family ties is "the best hope that the cycle of intergenerational incarceration will be broken."⁸⁹

On the other hand, visitation in prison can be both psychologically and physically demanding on a child because the visiting environment in most prisons is unpleasant, depressing, and sometimes frightening.⁹⁰ "Visitors are treated, at best, as

of a study which found that sons of incarcerated fathers displayed aggressive, delinquent, and criminal behavior).

⁸⁵ James D. Jorgensen et al., *Addressing the Social Needs of Families of Prisoners: A Tool for Inmate Rehabilitation*, 50 FED. PROBATION 47, 48 (1986).

⁸⁶ Susan Hoffman Fishman, *The Impact of Incarceration on Children of Offenders*, in SERVICES FOR FAMILIES OF OFFENDERS: AN OVERVIEW 94 (1983) ("[V]isiting is especially helpful for children because it calms their fears about their father's health and welfare as well as their concerns about his feelings for them."); Seymour, *supra* note 79, at 481.

⁸⁷ Seymour, *supra* note 79, at 481.

⁸⁸ See Fishman, *supra* note 86, at 94 (stating that visits can reduce the fears children have when their parent is sent to prison); Breen, *supra* note 65, at 99 (stating that children "wonder if their parent will ever return, if their parent is being hurt in prison or even if their parent will die"); Rudel & Hayes, *supra* note 67, at 23 (stating that children worry about their parents being mistreated, being denied medical attention, or not being allowed to move about).

⁸⁹ Breen, *supra* note 65, at 99.

⁹⁰ Fishman, *supra* note 86, at 94 ("Prison visiting rooms are usually drab and colorless."); Hairston, *supra* note 22, at 625 ("[T]he visiting environment in most prisons is poor."); Tracy Tyson, *Downward Departures Under the Federal Sentencing Guidelines: Are Parenthood and Pregnancy Appropriate Sentencing Considerations?* 2 S. CAL. REV. L. & WOMEN'S STUD. 577, 605 n.19 (1993) (same); Rudel & Hayes, *supra* note 67, at 20 ("A visit behind bars is really indescribable . . . Your kids see you like you would see an animal in a zoo. There is no way you can explain to them why you're not allowed to hold them or give them a kiss."); see also Scott C. v. Marrietta C., 156 Misc.2d 336, 340, 593 N.Y.S.2d 139, 141 (Fam. Ct. Ulster Co. 1992) (finding that because there were no special provisions for child visitation at the prison facility and because of the uncontradicted testimony that there was fondling and sexual contact between inmates and visitors, the facility's visiting room was inadequate to accommodate children).

unwelcome guests to be barely tolerated and, more often, as intruders to be kept in line through humiliation and intimidation.⁹¹ Most visitors, including children, must wait in line for hours to be cleared for a visit and are subjected to pat and frisk searches and rude treatment.⁹² Moreover, the visiting rooms are usually crowded, noisy and dirty and, in most instances, the parent and child are separated by a glass barrier.⁹³ In addition, exposing a young child to the truth about her father might cause irreparable psychological and emotional harm and impair the child's adjustment to her father's absence.⁹⁴ These factors point to the conclusion that visitation at a prison facility can be traumatic and detrimental to a child, and therefore, careful consideration must be given to the welfare of the child before visitation is ordered.

II. THE CURRENT APPROACH OF STATE COURTS

A. *The "Best Interest of the Child" Standard*

The issue of custody and visitation is almost exclusively in the hands of state and family court trial judges. A judge's primary consideration in fashioning custody and visitation deci-

⁹¹ Hairston, *supra* note 22, at 625 (citations omitted).

⁹² See BLOOM & STEINHART, *supra* note 24, at 51 (recounting a New York social worker's description of the day-long ordeal of traveling with foster children to a local jail using transportation provided by the New York City Department of Corrections: "After a long wait for the bus, the social worker and the children often wait additional hours at the jail while the prisoner is found and taken to the visiting area"); Hairston, *supra* note 22, at 625 (stating that children stand "in line for hours to be cleared for a visit that lasts less than half the time spent waiting"); Michelle Locke, *The Children of Inmates Face Prison of Shame and Silence*, THE LAS VEGAS REVIEW-JOURNAL, (June 28, 1992) ("Tracy visits her father about twice a week at Mule Creek State Prison in Ione, about 40 miles from her home near Sacramento California. She has to start out before dawn to get a good place in line that is out of the sun.").

⁹³ Hairston, *supra* note 22, at 625; see also BLOOM & STEINHART, *supra* note 24, at 51 (stating that plastic or glass partitions can intensify feelings of separation for both the mother and child); Fishman, *supra* note 86, at 94 (stating that inmates and their visitors are generally separated by barriers, that in most institutions the barriers prohibit any touching whatsoever, and that "[u]sually a father is not permitted to hold his child").

⁹⁴ See *Fusco v. Fusco*, 452 A.2d 681, 682 (N.J. Super. Ct. App. Div. 1982) (noting that mother was concerned about taking her four-and-a-half year old daughter to see her father in prison because exposing her young daughter to the truth about her father might cause irreparable psychological and emotional harm).

sions is the best interest of the child, which is the standard for determining custody and visitation in most American jurisdictions.⁹⁵ This standard, however, has been subjected to considerable attack because it is vague⁹⁶ and gives precious little guidance to judicial decision makers.⁹⁷ Consequently, it invites judges to engage in virtually unfettered exercises of discretion in deciding issues of child custody and visitation.⁹⁸

⁹⁵ See, e.g., Unif. Marriage and Divorce Act § 407, 9A U.L.A. 612 (1987) ("The general rule implies a 'best interest of the child' standard" for visitation rights, and that "[v]isitation rights should be arranged to an extent and in a fashion which suits the child's interest rather than the interest of either the custodial or noncustodial parent."); *McAlister v. Shaver*, 633 So. 2d 494, 496 (Fla. Dist. Ct. App. 1994) (finding that the best interest of the child controls over parental rights); *Brewer v. Brewer*, 760 P.2d 1225, 1227 (Kan. Ct. App. 1988) (stating that under state statute, the court must consider the best interests of the children when considering modification of a visitation order); *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. Ct. App. 1994) (stating that the state statute created the presumption that visitation is in the child's best interest); *Rogowski v. Rogowski*, 251 A.D.2d 827, 827, 674 N.Y.S.2d 480, 480 (3d Dep't 1998) (stating that the primary consideration in deciding the issue of visitation is the best interests of the child); *Harris v. Burns*, 904 P.2d 648, 649 (Or. Ct. App. 1995) (stating that a noncustodial parent's right to visitation is not absolute; a primary concern is the best interest of the child); *Sullivan v. Shaw*, 650 A.2d 882, 883 (Pa. Super. Ct. 1994) (finding that in custody and visitation cases, the paramount concern is the best interests of the child).

⁹⁶ For a comprehensive and detailed summary of the criticisms of the best interests of the child standard, see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219-25 (1991); see also Annette R. Appell & Bruce A. Boyer, *Parental Rights v. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POLY 63, 66 (1995) (arguing that the standard is vague and subject to arbitrary application); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11-16 (1987) (arguing that the best interest standard is indeterminate); N. Dickon Reppucci & Catherine A. Crosby, *Law, Psychology, and Children: Overarching Issues*, 17 LAW & HUM. BEHAV. 1, 4-5 (1993) (arguing that regardless of how it is measured, the best interests of children are generally indeterminate).

⁹⁷ See, e.g., Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, in CHILD, PARENT AND STATE 3, 5-6 (S. Randall Humm et al. eds., 1994) (stating that the "best interests of the child" is not a standard, but "a euphemism for unbridled judicial discretion"); Catherine A. Crosby-Currie, *Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals*, 20 LAW & HUM. BEHAV. 289, 295 (1996) (stating that the indeterminacy of the standard vests judges with a great deal of discretion and very little guidance).

⁹⁸ See JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 42 (1990) ("[L]eaving judges with an ultimate standard but with no real guidance on how to satisfy it puts them in a position of having only two ways to do their job: either they follow their own instincts or they rely on the expertise of others."); Janet L.

When deciding the question of whether a child should be able to visit with her father in prison, the best interest of the child standard is more a rubric than a useful tool for deciding this issue. The lack of practical guidance in the standard leads to arbitrary and inconsistent decision-making and leaves our vulnerable children unprotected. An exploration of some cases in which judges decided whether to send children to prison facilities to visit with their fathers reveals the inconsistencies, biases, and arbitrariness in deciding this visitation issue.

B. *Judicial Decision-Making in the Context of Children Visiting Their Fathers in Prison*

A review of the cases clearly indicates that, in deciding the question of visitation when the parent is incarcerated, a majority of the courts have failed to set out concise factors to be considered under a "best interest" standard. This lack of guidance leaves judges to rely on their own instincts, morals, and values and leads to arbitrary and inconsistent decision-making that serves no useful purpose in protecting the children.

A paradigmatic illustration of the unfettered application of the best interest standard in deciding whether to allow a child to visit her father in prison is illuminated in *In re Marriage of Brewer and Brewer*.⁹⁹ Terry Brewer, an incarcerated felon, and his wife Sandra were divorced in April, 1986.¹⁰⁰ The divorce decree awarded Sandra sole custody of their two minor children, ages two and four, and denied Terry joint custody and visitation due to his incarceration in a state penitentiary.¹⁰¹ Terry moved for a modification of the divorce decree,

Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L. J. 473, 495 (1996) (arguing that application of the standard cannot serve the best interests of children in custody cases because "the best-interest standard depend[s] on the insight and wisdom and thus the world-view[] of individual judges"); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) (observing that "the 'best interests' standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge or other third party").

⁹⁹ *Brewer*, 760 P.2d at 1225.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

seeking visitation with his children.¹⁰² Following a hearing, the trial court denied Terry's motion, stating:

And, I realize . . . there is a provision [K.A.R. 44-7-104] for the visitation of children out there . . . [A]nd my personal opinion is, I think it would be better . . . for the children, both socially, psychologically, and otherwise, for those children not to be taken to such a setting and visit with their father. . . . I think there's going to be a whole lot of problems . . . I can't see that . . . it's to the benefit of the children to visit their father while he is in prison in that setting . . . [S]ince I have seen this motion, I have tried to . . . think . . . and I have not been able to come up with anything that would merit it. . . .¹⁰³

Although the trial judge purported to rest his decision on the best interests of the children, he based this vital decision simply on his "personal opinion."¹⁰⁴ Furthermore, there is no indication that an attorney had been appointed to represent the children's interests. While the judge's conclusion to deny visitation may ultimately have been correct, a decision in this visitation context based on a judge's personal opinion, without an evaluation of the salient factors, is untenable.

To exacerbate the personal approach of the trial court, the Kansas Court of Appeals in *Brewer* affirmed the trial court's decision, stating that "the trial court is in the most advantageous position to judge how the interests of the children may best be served."¹⁰⁵ By affirming a decision based on a judge's personal opinion,¹⁰⁶ the appellate court, too, failed to further the children's best interests.

Unlike the Kansas Court of Appeals, some appellate courts have recognized that when deciding whether to allow a child to visit an incarcerated father, a full evidentiary hearing must be held. However, these courts still failed to protect the best interest of the child because they did not provide guidance to the lower courts by articulating a set of factors to be examined. For example, in *In re Kenneth "H" v. Barbara "G,"*¹⁰⁷ a New York case, the family court judge determined that the father

¹⁰² *Id.*

¹⁰³ *Id.* at 1126.

¹⁰⁴ *Brewer*, 760 P.2d at 1126.

¹⁰⁵ *Id.* at 1227.

¹⁰⁶ *Id.*

¹⁰⁷ 256 A.D.2d 1029, 682 N.Y.S.2d 699 (3d Dep't 1998).

had abused his children, and the judge prohibited the father from having any contact with his children until he proved that he had successfully completed therapy for sexual offenders.¹⁰⁸ Thereafter, the father, who was incarcerated, filed a petition alleging that he had successfully completed the required therapeutic program, and he requested that he be allowed visitation with his children in the form of written and telephone contact.¹⁰⁹

The family court judge conducted an informal discussion with the children's law guardian, the county attorney, and the children's mother.¹¹⁰ Then, without conducting a formal hearing, the judge dismissed the father's petition for modified visitation with his children.¹¹¹ The appellate division reversed the family court's denial of visitation and explained that the paramount consideration in determining whether visitation should be permitted is the best interests of the children.¹¹² The court stated, "A determination of the children's best interests should only be made after a full evidentiary hearing unless there is sufficient information before the [trial] court to enable it to undertake an independent comprehensive review of the children's best interests."¹¹³ Because there was no comprehensive evidentiary hearing, the appellate division reversed the family court's order and remanded for an evidentiary hearing.¹¹⁴ Notably, the court did not offer much guidance to the lower court.¹¹⁵

¹⁰⁸ 256 A.D.2d at 1029, 682 N.Y.S.2d at 700.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 256 A.D.2d at 1029, 682 N.Y.S.2d at 700.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; see also *Alexander v. Alexander*, 900 S.W.2d 615, 616 (Ky. Ct. App. 1995) (reversing a trial court's order denying incarcerated father visitation with his child because "a parent's incarceration does not suspend, nor deprive him of, his right to a hearing before he is denied visitation with his child"); *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. Ct. App. 1994) (reversing and remanding a trial court's order denying incarcerated father visitation with his child because "there ha[d] never been an evidentiary hearing, much less a finding, that [the child] would be endangered in any manner by visiting her father in prison"); *Sullivan v. Shaw*, 650 A.2d 882, 885 (Pa. Super. Ct. 1994) (reversing and remanding the lower court's denial of visitation and holding that "as long as prisoners seeking visitation have the opportunity to tell the court how they would marshal their resources to enable visitation, then they have a meaningful opportunity to be heard"); *Wolfe v. Wolfe*,

Similarly, the appellate court in *Folsom v. Folsom*,¹¹⁶ another New York case, failed to provide sufficient guidance to the trial court. While the appellate division recognized that deciding the question of whether a child should visit with her father in prison required an evidentiary hearing,¹¹⁷ the court failed to delineate the factors to be examined. John Folsom, an incarcerated father, moved the family court for visitation after the children's mother stopped bringing the children to the prison.¹¹⁸ The trial court dismissed the father's motion based on the mother's unsworn allegations that she had encountered problems with the father during the course of prior visits.¹¹⁹ The appellate division reversed the lower court's denial of visitation, stating that the record in the case was insufficient to make a visitation determination.¹²⁰ The court noted that the record contained "no sworn testimony or documentary evidence, and [the father] was not given an opportunity to present evidence, participate by phone or otherwise respond to [the mother's] allegations."¹²¹ Furthermore, the court opined that this was "an appropriate case for the appointment of a Law Guardian to protect the rights of the children."¹²²

Fortunately, a few courts have recognized that trial courts need concise guidelines when faced with the question of wheth-

899 P.2d 46, 48 (Wyo. 1995) (holding that denial of visitation to an inmate must be based upon evidence conspicuous in the record). In all of these cases, the appellate courts failed to articulate a set of factors to examine at each hearing and thus, did not provide practical guidance to the trial courts.

¹¹⁶ 262 A.D.2d 875, 692 N.Y.S.2d 529 (3d Dep't 1999).

¹¹⁷ 262 A.D.2d at 875, 692 N.Y.S.2d at 530; see also *Lonobile v. Betkowski*, 261 A.D.2d 829, 829, 689 N.Y.S.2d 790, 790 (4th Dep't 1999) (reversing the denial of visitation and remitting for a new hearing at which the court shall consider the full range of factors pertinent to that determination. The court, however, did not delineate the factors to be examined); *Wise v. Del Toro*, 122 A.D.2d 714, 714, 505 N.Y.S.2d 880, 881 (1st Dep't 1986) (noting that no Law Guardian was appointed to represent the child while reversing the lower court's denial of visitation and holding that there should be a full inquiry before visitation is denied to a parent); *Shipp v. Gaglia*, 97 A.D.2d 945, 945, 468 N.Y.S.2d 743, 743 (4th Dep't 1983) (reversing lower court's denial of visitation because the record did not include any expert testimony as to the effect visitation would have on the child, any psychological examination of the father, any Law Guardian appointed to represent the child, or any in camera interview of the child).

¹¹⁸ *Folsom*, 262 A.D.2d at 875, 692 N.Y.S.2d at 530.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

er sending a child to visit with her father in prison would be beneficial for the child. The decision by the Superior Court of New Jersey in *Fusco v. Fusco*¹²³ illustrates how a court can provide guidance to the lower courts when deciding this issue. Tiffany Fusco was born to Lawrence and Denise Fusco in May, 1976.¹²⁴ The Fuscos divorced in May, 1979, and custody of Tiffany was granted to Denise subject to visitation rights given to Lawrence.¹²⁵ In the summer of 1979, Lawrence Fusco was arrested and charged with committing a brutal murder in which he ambushed his victim on an interstate highway and bludgeoned him to death.¹²⁶ Following a jury trial, Lawrence was convicted and sentenced to a twenty-three year prison term for first degree murder that he was to serve at the New Jersey State Prison at Rahway.¹²⁷

In December, 1980, Lawrence petitioned the Chancery Division of the Bergen County Superior Court for bi-weekly visits with his daughter, Tiffany.¹²⁸ Lawrence's petition was supported by his own affidavit declaring his love for his child and by additional supporting declarations by his parents and local political figures all in favor of having Tiffany brought to prison twice a week to visit with her father.¹²⁹ Denise Fusco filed an opposing affidavit in which she expressed her reluctance to take her then four-and-a-half year-old daughter to see her father in prison. Ms. Fusco feared that subjecting Tiffany to the prison environment and exposing her at such a tender age to the truth about her father "would cause irreparable psychological and emotional harm and would impair the good adjustment she had made to the father's absence in the interim."¹³⁰ Denise submitted supporting letters from various friends and acquaintances and the director of Tiffany's nursery school, all of which stated that Tiffany should not be taken to see her father in prison.¹³¹

¹²³ 452 A.2d 681 (N.J. Super. Ct. App. Div. 1982).

¹²⁴ *Id.*

¹²⁵ *Id.* at 682.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Fusco*, 452 A.2d at 682.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

The trial court ordered psychiatric examinations of Lawrence, Denise, and Tiffany.¹³² Thereafter, based solely on equivocal and conflicting documentary submissions by two psychologists, self-serving certifications by the parties, and without hearing oral argument, taking any testimony, or making any findings of fact, the trial court awarded Lawrence bi-weekly visits with his daughter at the prison.¹³³

The New Jersey Appellate Division reversed the trial court's order, and, pointing to the serious nature of the trial court's error, the court stated that the visitation decision that was made "without an evidential basis, without examination and cross-examination of lay and expert witnesses, and without a statement of reasons is untenable in the extreme."¹³⁴ In its reversal, the New Jersey Appellate Division framed the issue as follows:

[W]hether the welfare of this child will be promoted or disserved by visitation with her father under all of these circumstances Although the father may not have forfeited his parental rights as a result of his heinous crime, nevertheless *the answer to the visitation question must be dictated exclusively by concern for the child's best interests and not by the conflicting desires, wishes or sensibilities of the parents and grandparents.*¹³⁵

The court emphasized that decision-making in this visitation context "requires the highest degree of care, factual exploration, deliberation and sensitivity to personal and family dynamics and motivations."¹³⁶ Moreover, the court explained that there are a number of factors to be considered at an evidentiary hearing, such as the general desirability of maintaining a paternal relationship between father and child and countervailing factors, such as the risk of the child's premature knowledge of her father's crime, the problems inherent in the environmental constraints of prison visits, the probable effect

¹³² *Id.*

¹³³ *Fusco*, 452 A.2d at 684.

¹³⁴ *Id.*

¹³⁵ *Id.* (emphasis added); see also *Mohammed v. Cortland County Dep't of Social Serv.*, 186 A.D.2d 908, 908, 589 N.Y.S.2d 112, 113 (3d Dep't 1992) (affirming the trial court's denial of visitation since the evidence included the testimony of psychologists, counselors, and the Law Guardian's recommendation and since the Family Court "was correct in confining its consideration to what is best for the child and not simply to what might be best for the parent").

¹³⁶ *Fusco*, 452 A.2d at 684.

of these visits on the maternal relationship, and the emotional and psychological burden that this five-year old child will have to bear in maintaining a relationship with her father by prison visitation.¹³⁷

A similar conclusion was reached by the Superior Court of Pennsylvania in *Etter v. Rose*,¹³⁸ in which the court opined:

When considering a request for visitation, *the primary concern of the court is what is in the best interest and permanent welfare of the child . . .* This determination will be made on a case-by-case basis and premised on *a weighing of all factors which legitimately affect the child's physical, intellectual, moral and spiritual well-being.*¹³⁹

In this case, the trial court denied Michael Etter's petition for visitation with his minor son at the prison facility, stating that a "prison is not conducive to establishment of a positive parent/child relationship."¹⁴⁰ In reversing that denial and remanding for a full hearing, the Superior Court detailed the factors to be examined at such a hearing:

All relevant factors must be considered, including age of the child, distance and hardship to the child in traveling to the visitation site, the kind of supervision at the visit, the identification of the person(s) transporting him and by what means, the effect on the child physically and emotionally, whether the father has and does exhibit a genuine interest in the child, whether he maintained reasonable contacts in the past and any other relevant matters impinging on the child's best interest.¹⁴¹

As this Note will demonstrate later, the guidance provided by the Appellate Division in *Fusco*¹⁴² and the superior court in *Etter*,¹⁴³ should be adopted by all courts deciding whether

¹³⁷ *Id.*

¹³⁸ 684 A.2d 1092 (Pa. Super Ct. 1996).

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also *Jonathan M. v. Superior Court of Orange County*, 62 Cal. Rptr. 2d (Cal. Ct. App. 4th 1997) (holding that in determining detriment the court should consider the age of the minor, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, etc.); *Harmon v. Harmon*, 943 P.2d 599, 605 (Okla. 1997) (reversing the lower court's denial of father's petition for visitation with his son at the prison and remanding for a hearing. This court, too, gave guidance to the lower court by incorporating the factors set forth in *Etter v. Rose*).

¹⁴² 452 A.2d 681 (N.J. Super. Ct. App. Div. 1982).

¹⁴³ 684 A.2d 1092 (Pa. Super Ct. 1996).

a child should visit with her father in prison.¹⁴⁴ This will ensure harmonious decision-making across all jurisdictions and secure better protection of the children who are at the core of the visitation dispute.

III. RECOMMENDATION

With the nation's incarceration rate growing each year, studies estimate that 1.6 million children have a father in prison¹⁴⁵ and that this figure is likely to increase.¹⁴⁶ Accordingly, as incarcerated fathers exercise their right to have visitation with their children by filing motions or petitions with the court, courts need clear guidelines to deal with this issue so that the best interest of the child is always paramount.

To protect the physical, emotional, and psychological welfare of children, the court must fulfill its role as *parens patriae*¹⁴⁷ and "must put itself in the position of a wise, affectionate and careful parent, placing the welfare of the child above the rights of the parents."¹⁴⁸ Thus, when faced with the peti-

¹⁴⁴ See *infra* Part III.

¹⁴⁵ Christopher J. Mumola, *Bureau of Justice Statistics, Special Report, Incarcerated Parents and Their Children*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited Mar. 30, 2001) (estimating from 1999 prison survey: number of fathers in prison, 593,800 (state) and 74,100 (federal); number of children with fathers in prison, 1.2 million (state) and 163,000 (federal); results indicate that 45% of male state prisoners and 37% of male federal prisoners were fathers); see also Susan Phillips & Barbara Bloom, *In Whose Best Interest? The Impact of Changing Public Policy on Relatives Caring for Children With Incarcerated Parents*, 77(5) CHILD WELFARE 531, 531-32 (stating that more than 75% of women in prison are mothers and approximately 65% of male prisoners are fathers); Seymour, *supra* note 79, at 470 (finding approximately 200,000 children in America have a mother in prison and more than 1.6 million have an imprisoned father).

¹⁴⁶ Seymour, *supra* note 79, at 489 n.1. Seymour noted that the Center for Children of Incarcerated Parents developed a formula for calculating these numbers:

To estimate the number of children with incarcerated fathers, multiply the number of currently incarcerated men by .56 (the average percentage of incarcerated men with children) and then multiply that number by 2.0 (the average number of children per incarcerated father. Using this formula with 1995 data, 1.4 million incarcerated men [U.S. Department of Justice 1997] have 1.6 million incarcerated children.

Id.

¹⁴⁷ In child custody determinations, *parens patriae* refers to the principle that "the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 769 (Abridged 6th ed. 1993).

¹⁴⁸ *Finlay v. Finlay*, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925); see also Mo-

tion of an incarcerated father requesting visitation with his children in a prison facility, this Note proposes that (1) if a father is incarcerated for committing a violent crime against any child, a limited hearing should be held before granting a hearing on the merits of the visitation issue; in the limited hearing, the father would be required to show, by a preponderance of the evidence, that he has successfully¹⁴⁹ completed a therapy program dealing with his particular crime; (2) if a father is incarcerated for the first-degree murder of his child's mother,¹⁵⁰ no visitation should be ordered unless the child is old enough to consent;¹⁵¹ (3) for fathers who are convicted of other crimes and for those fathers who meet the preponderance of the evidence standard, the court should evaluate certain factors to ensure that the best interest of the child is served by having that child visit her father in prison; and (4) the child should be represented by an attorney at both the limited hearing and the visitation hearing,¹⁵² and a forensic psychologist¹⁵³ should be appointed by the court at the visitation

hammed v. Cortland County Dep't of Soc. Servs., 186 A.D.2d 908, 908, 589 N.Y.S.2d 112, 113 (3d Dep't 1992) (holding that the Family Court was "correct in confining its consideration to what is best for the child and not simply what might be best for the parent").

¹⁴⁹ See discussion *infra* Part III.A.

¹⁵⁰ Likewise, if a mother is incarcerated for the murder of her child's father, no visitation should be ordered.

¹⁵¹ There is a rebuttable presumption that children age twelve and above are competent to make decisions regarding their own welfare. See *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1, 5-6 (1995); see also *Lozada v. Lozada*, 270 A.D.2d 422, 422, 704 N.Y.S.2d 313, 314 (2d Dep't 2000) (affirming the Family Court's visitation order where court gave proper weight to the children's wishes where they were of a "sufficient age to articulate their needs and preferences to the court"); *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113, 117, 558 N.Y.S.2d 596, 599 (2d Dep't 1990) (finding that at the trial regarding visitation, the trial court should have ascertained the wishes of the children who were fourteen and twelve years old, an age where their input would be particularly meaningful).

¹⁵² See *infra* Part III.A.

¹⁵³

The forensic psychologist is a psychologist whose professional activities are defined by the American Psychological Association or by regulation of title by state registration or licensure. The forensic psychologist conducts practice with definable foreknowledge, as a psychological expert on explicitly psycho-legal issues, in direct assistance to courts, parties to legal proceeding, correctional and forensic mental health facilities, and administrative, judicial, and legislative agencies acting in an adjudicative capaci-

hearing to evaluate the child's situation and make a recommendation to the court. This Note maintains that following these guidelines will promote more consistent decision-making across the states and will ensure that the best interest of the child will be served in every U.S. jurisdiction.

A. *Violent Crimes Committed Against Children*

Generally, it is presumed that visitation with both parents is in the best interest of a child, unless it can be demonstrated to a court that visitation would be detrimental to a child.¹⁵⁴ This Note contends, however, that when a father is convicted of a crime of violence committed against any child,¹⁵⁵ the presumption should be that visitation with that father is not in the best interest of his child. It can be assumed that an adult who is capable of committing a violent crime against a child does not respect the humanity and personhood of a child. Furthermore, by committing such an act, the adult has taken advantage of his power and superiority over the child and has used that power to commit the crime.¹⁵⁶ Children are not physically or emotionally safe with adults who have hurt other children. Thus, before sending a child to a prison facility¹⁵⁷ to

ty.

Marc J. Ackerman, *Specialty Guidelines for Forensic Psychologists, Committee on Ethical Guidelines for Forensic Psychologists*, in *CLINICIANS GUIDE TO CHILD CUSTODY EVALUATIONS* 255 (1995).

¹⁵⁴ See, e.g., *Alexander v. Alexander*, 900 S.W.2d 615, 616 (Ky. Ct. App. 1995); *Folsom v. Folsom*, 262 A.D.2d 875, 875, 692 N.Y.S.2d 529, 530 (3d Dep't 1999); *Lonobile v. Betkowski*, 261 A.D.2d 829, 829, 689 N.Y.S.2d 790, 790 (4th Dep't 1999); *Rhynes v. Rhynes*, 242 A.D.2d 943, 943, 662 N.Y.S.2d 667, 667 (4th Dep't 1997); *Vann v. Vann*, 187 A.D.2d 821, 821, 589 N.Y.S.2d 715, 716 (3d Dep't 1992); see also *supra* note 57.

¹⁵⁵ For example, crimes such as rape of a minor, sexual or physical abuse of a minor, and pedophilia. See, e.g., *Sullivan v. Shaw*, 650 A.2d 882, 886 (Pa. Super. Ct. 1994) (Tamilia, J., dissenting). Judge Tamilia noted that the Custody Act, 23 Pa. C.S. § 5301, provides distinct "directions to consider criminal conduct in determining custody or visitation awards." *Id.* Among the crimes to be considered are endangering the welfare of children and prostitution and sexual abuse of children. *Id.*

¹⁵⁶ See, e.g., *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992) (upholding the admission of a prior conviction of sexual abuse of a minor in a prosecution for rape and sexual abuse of a minor because the admission showed the intent of the defendant "to take advantage of one incapable of resisting or unable to appreciate the act, as well as his knowledge that young children are easily victimized").

¹⁵⁷ As discussed in Part I.D, *supra*, prisons present inherent dangers.

visit with a father convicted of a crime of violence against any child, the physical and emotional safety of his child must be assured.¹⁵⁸

To adequately protect a child, this Note proposes that a limited hearing should be granted to a father who seeks visitation with his child but has been convicted of a crime of violence against any child. At this hearing, the father should be required to show, by a preponderance of the evidence, that he successfully completed a treatment program designed to heal the underlying problem that caused him to commit the crime. The preponderance showing, however, would not be satisfied by a letter saying that the father attended all of the required therapy sessions. Rather, the father would have to submit proof from a licensed professional running the program that he has made significant progress in treatment and would not pose a danger to his child.

To further protect the child who is the subject of this visitation issue, an attorney for the child should be appointed¹⁵⁹ and present at this hearing to examine and cross-examine witnesses. Only after a father successfully meets the preponderance standard at the limited hearing should a full evidentiary hearing be granted¹⁶⁰ to determine whether visitation in the prison would be in the best interest of his child. If, after a full evidentiary hearing has been conducted, a judge concludes that visitation would be beneficial for the child, this Note advocates that such visitation should be supervised at the prison by a licensed professional¹⁶¹ trained to work with and sensitive to the needs of children.

The following case exemplifies how the process outlined above would operate in practice. Raymond La Rue is serving a

¹⁵⁸ See, e.g., *Inmate Charged with Raping Girl*, ASSOCIATED PRESS, Mar. 31, 1999. A nine-year old girl was sexually assaulted during most of her sixteen visits to the Schuylkill County Prison since April, 1998. The inmate, John Mims, knew when the visiting room guard was occupied and used that opportunity to rape the girl. *Id.*

¹⁵⁹ See *infra* Part III.D.

¹⁶⁰ At this hearing, a judge should examine the factors as set forth, *infra*, in Part III.C.

¹⁶¹ The fact that the visitation site is supervised by a prison official is not enough. A licensed professional must supervise the interaction between the father and child to ensure that no inappropriate behavior or conversation takes place and to ensure that the interaction between the father and child is a meaningful one.

combined prison term of four to twelve years for the rape and sodomy of his girlfriend's thirteen-year old daughter.¹⁶² Raymond petitioned the court for visitation with his children, Bruce, age twelve, and Danielle, age eight.¹⁶³ Following a full evidentiary hearing in which the children were represented by independent counsel, the family court dismissed Raymond's petition.¹⁶⁴

Although the court did conduct a full evidentiary hearing and the children were represented by independent counsel, additional protection should have been provided for Bruce and Danielle. As recommended in this Note, when Raymond petitioned the court for visitation with his children, the court should have first granted a limited hearing in which Raymond would have been required to show, by a preponderance of the evidence, that he had already completed a treatment program designed for sexual abusers of children.¹⁶⁵ This showing would require, at a minimum, written proof from a licensed professional running the program that Raymond had made significant progress in treatment and would no longer pose a danger to a child. Only after such a showing had been made should a full evidentiary hearing on the visitation issue take place.¹⁶⁶ This approach would place the children's well-being before the interest of a father by not subjecting the children to the physical and emotional rigors of a courtroom proceeding until necessary.

¹⁶² La Rue v. Crandall, 254 A.D.2d 633, 634, 679 N.Y.S.2d 204, 205 (3d Dep't 1998).

¹⁶³ *Id.*

¹⁶⁴ There was substantial proof that visitation would be harmful to the children. *Crandall*, 254 A.D.2d at 634, 679 N.Y.S.2d at 206.

¹⁶⁵ See, e.g., Rogowski v. Rogowski, 251 A.D.2d 827, 828, 674 N.Y.S.2d 480, 481 (3d Dep't 1998). Thomas Rogowski is serving a sentence of 8 1/3 to 25 years upon his conviction of two counts of rape in the first degree and one count of endangering the welfare of a child. The court denied Thomas' petition for visitation with his six year old daughter because his incarceration arose out of his inappropriate sexual conduct toward his niece and Thomas had not received any sexual abuse counseling while in prison. *Id.*

¹⁶⁶ As will be discussed in Part III.D, *infra*, a child should be represented by independent counsel at both hearings. Furthermore, at the full evidentiary hearing, a forensic psychologist should be appointed to evaluate the parties and the factors delineated in Part III.C, *infra*, should be examined.

The crime of pedophilia, however, presents a more problematic dilemma than do other kinds of criminal child abuse because pedophilia is difficult to treat¹⁶⁷ and because the recidivism rate is very high.¹⁶⁸ Indeed, the psychiatric profession describes pedophilia as a disorder characterized by "at least six months [of] recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally age thirteen years or younger)."¹⁶⁹ Generally, for the pedophile who sexually abuses male children, the drive to molest is usually more chronic than the pedophile who sexually abuses female children.¹⁷⁰ In fact, the recidivism rates for men who prefer male children is almost double the rates of those who molest female children.¹⁷¹ Thus, because the crime of pedophilia is so problematic, it is particularly important that family court judges adhere to the two-step hearing requirement.

The concern is that while in prison, pedophiles are not around children, so their urge to re-offend tends to subside. Consequently, there is a danger that when a child is sent to visit with her father who has been convicted of pedophilia, the father's urge to molest a child may re-emerge. Accordingly, a convicted pedophile must show, by a preponderance of the evidence, that he has successfully learned to control his sexual urges.¹⁷² Subsequently, should a court find after a full evidentiary hearing that visitation would benefit the child, strict supervision at the visitation site by a licensed psychologist who

¹⁶⁷ See Katie Isaac, Note, *Kansas v. Hendricks: A Perilous Step Forward in the Fight Against Child Molestation*, 35 HOUS. L. REV. 1295, 1327 (1998) (explaining that while several studies indicate that comprehensive treatment of pedophilia has a ninety percent or better success rate, other experts caution that while pedophiles may learn how to control their behavior, they can never be cured).

¹⁶⁸ See *Palmer v. Dep't of Health and Rehabilitative Servs.*, 547 So.2d 981, 984 (Fla. Dist. Ct. App. 5th Dist. 1989) (noting that studies show that the rate of recidivism from the medical standpoint is extremely high).

¹⁶⁹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 528 (4th ed. 1994).

¹⁷⁰ See Melissa R. Saad, Note, *Civil Commitment and the Sexually Violent Predator*, 75 DENV. U. L. REV. 595, 604 (1998).

¹⁷¹ *Id.*; see also *Palmer*, 547 So. 2d at 984 (noting that "studies show and experts agree . . . that there is no easy 'cure' for this disorder and the rate of recidivism from the medical standpoint is extremely high").

¹⁷² A father would have to prove this by submitting written documentation by a licensed professional that he has successfully completed treatment and would not pose a danger to his child.

has been trained to work with pedophiles and sexually abused children must be mandated to ensure the safety of the visiting child.

Thus, the question that arises is whether restricting a convicted father's right to a hearing on the visitation issue until he meets the standard proposed by this Note would infringe upon the father's procedural due process rights. This determination is governed by the three-factor test espoused by the Supreme Court in *Mathews v. Eldridge*,¹⁷³ which involves the evaluation of three distinct factors:

- (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁷⁴

The private interest that would be affected by implementing this Note's proposal is a father's right to associate with his child—a protected liberty interest.¹⁷⁵ While the father might be deprived of his visitation right, this deprivation is only temporary; when the father makes the showing necessary under the limited hearing, he would then be allowed to proceed to a visitation hearing. In addition, any risk of erroneous deprivation of the father's right to associate with his child is lessened because a father is given a hearing, albeit a limited one. If, in fact, there is a risk of error at all, that risk should fall on the side of protecting the child.

The government's interest in the visitation issue may be deemed compelling—protecting the physical and emotional well-being of a minor child. The need to protect the child from possible deleterious effects of visiting with a father convicted of crimes against a child, coupled with the dangers inherent in visiting a prison facility, should supercede the limited loss of rights that the father will experience by having to satisfy the preponderance of the evidence standard in the initial limited

¹⁷³ 424 U.S. 319 (1976).

¹⁷⁴ *Id.* at 335.

¹⁷⁵ Parents' right to associate with their children is a protected liberty interest under the Fourteenth Amendment. *See supra* Part I.A.

hearing. Thus, when balancing the factors set forth in *Matthews*, it is unlikely that imposing the requirements set forth in this Note would infringe upon the due process right of the incarcerated father.

B. Incarceration for First-Degree Murder

Another special consideration arises when a father has been convicted of the first-degree murder of his child's mother.¹⁷⁶ It is simply not in the best interest of a child to visit with such a father. The Superior Court of Pennsylvania said it best when it explained that "[b]arring criminal acts committed upon the child, we can think of no action in which a parent could engage posing a graver threat to a child's welfare than killing the other parent. In one grim swoop, the father has deprived his child of both parents' guidance and support."¹⁷⁷ This child has to deal with the loss of her mother, knowing it was her father that caused that loss. It is difficult to believe that a father who callously took his child's mother away is really interested in the welfare of his child.¹⁷⁸

Recognizing the need to protect children from further emotional harm after the brutal loss of a parent, some states have passed statutes that deny visitation to the parent convicted of first-degree murder of that child's other parent. For example, in 1997, the Massachusetts legislature enacted "Lizzie's Law," which prohibits any court in the State of Massachusetts from fashioning an order which would allow for visitation with the child by a parent convicted of first-degree murder of the other parent.¹⁷⁹ New York enacted a similar law known as the "Lee-Anne Cruz Memorial Act."¹⁸⁰ However, New York went further than Massachusetts and mandated that no court shall make an order providing for visitation to a person who is con-

¹⁷⁶ See, e.g., *Edgar O. v. Superior Court*, 100 Cal. Rptr. 2d 540, 544 (Cal. Ct. App. 2d Dist. 2000); *Albright v. Peterson*, 539 S.E.2d 919, 920-21 (Ga. Ct. App. 2000).

¹⁷⁷ *Green v. Sneeringer*, 635 A.2d 1074, 1077 (Pa. Super. Ct. 1993).

¹⁷⁸ *Id.*

¹⁷⁹ MASS. GEN. LAWS ANN. ch. 119, ch. 208 § 28, ch. 209 § 37, ch. 209C § 3(a) (West 1999).

¹⁸⁰ See N.Y. DOM. REL. LAW § 240 (McKinney 1996) (amended in 1997 to include the Lee-Ann Cruz Memorial Act).

victed of murder in the first or second degree of a "legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding."¹⁸¹

Although these statutes have not yet been challenged as a possible violation of the Due Process Clause, they would probably withstand such a constitutional challenge¹⁸² because the parental right of a father to visit with his child is not terminated forever. Rather, it is suspended temporarily until such time as the child is old enough to decide whether she wishes to visit with her father in prison.¹⁸³ Under these extenuating circumstances, the interests of the child must be paramount and must supercede the rights of the father.¹⁸⁴ In addition, the child is already emotionally traumatized by the loss of her parent. Forcing that child to visit with the parent who brutally took away the other parent would only serve to perpetuate the emotional harm.

¹⁸¹ See N.Y. DOM. REL. LAW § 240(1)(h)(1-c)(a). When New York first enacted the Lee-Ann Cruz Memorial Act in 1997, the Act provided only that no visitation be ordered to a parent convicted of the first or second degree murder of a child's other parent. See Kowalczyk, *infra* note 182, at 1268 n.149. In 1999, New York amended § 240 of the Domestic Relations Law to prohibit visitation to a parent convicted of the first or second degree murder of a legal custodian, legal guardian, sibling, half sibling, or step sibling. The judicial memorandum that accompanied the amendment explained that there was "no reason to distinguish between murder of a parent and murder of a sibling . . . when determining whether custody or visitation furthers the 'best interests of the child.'" See McKinney's 1999 Session Law News of New York, Judicial Memorandum relating to ch. 378, Memorandum of Office of Court Administration (NY Legis. J. Memo 378 (1999)).

¹⁸² For a concise argument as to why these statutes would not violate the Due Process Clause, see generally Danice M. Kowalczyk, Note, *Lizzie's Law: Healing the Scars of Domestic Murder—An Emerging National Model*, 64 BROOK. L. REV. 1241 (1998). But cf. Hillary R. Stein, Note, *Massachusetts' "Lizzie's Law": Protection for Children or Violation of Parents' Constitutional Rights?* 78 B.U. L. REV. 1547 (1998) (arguing that Lizzie's Law is an unconstitutional means to achieve a desired end).

¹⁸³ Both Massachusetts and New York law provide that a court may order visitation where the child is of suitable age to signify assent and where such child assents to the visit. See *supra* notes 179-181.

¹⁸⁴ See Mara Youdelman, *The Post-Separation Family Violence Relief Act: Its Impact on Custody and Visitation Cases Involving Domestic Violence*, 13 PROB. L.J. 189, 191 (1996); Kowalczyk, *supra* note 182, at 1285.

C. Factors to be Examined at Visitation Hearing

As an additional measure of protection for children, this Note proposes that certain factors should be examined at the hearing of any incarcerated father¹⁸⁵ requesting visitation with his child in prison. Before looking to these factors, however, a threshold determination should be made to ascertain whether the incarcerated father has established a parental and emotional bond with the child with whom he wishes to have visitation.¹⁸⁶ This Note does not suggest that the relationship between the father and child must have been a custodial one. Rather, the issue to be determined is whether the father established a substantial nurturing relationship with his child such that the child has a present positive memory of her father.

An incarcerated father has a continuing obligation to communicate with and maintain an interest in his child to the best of his ability. Thus, an important indicator of parental involvement would be the extent to which an incarcerated father has, through his actions while incarcerated, manifested a continuing interest in being a parent to his child.¹⁸⁷ For the father who has been incarcerated for most of his child's life, proof of an attempt to establish a relationship would include whether the father maintained contact with his child by telephone and/or correspondence.¹⁸⁸ If the evidence presented at the hearing proves that there is no substantial parental relationship between an incarcerated father and the child with whom

¹⁸⁵ This would include those fathers convicted of violent crimes against children who have met the preponderance of the evidence standard in the limited hearing as proposed in Part III.A, *supra*. This, of course, does not include those fathers convicted of the first degree murder of the mother of a child with whom the father wishes to visit or those fathers convicted of violent crimes against children who have not met the preponderance of the evidence standard.

¹⁸⁶ See *supra* notes 49-50 and accompanying text.

¹⁸⁷ The Supreme Court of Minnesota offered a concrete explanation:

If a parental relationship existed prior to a [parent's] imprisonment and he continued this relationship to the best of his ability during incarceration through letters, cards and visits where possible, and through inquiry as to [the] children's welfare, his parental rights would be preserved, both because of his actions and for the benefit of [the] children.

Staat v. Hennepin County Welfare Bd., 178 N.W.2d 709, 713 (Minn. 1970).

¹⁸⁸ If attempts by the father to maintain contact with his child were thwarted by the child's mother, that fact should be elicited during the hearing and, if proven, should not be held against the father.

he seeks visitation, such visitation would not be in the best interest of the child. Thus, visitation at the prison facility should not be ordered.

The denial of visitation, however, should not be a permanent one. A father who truly wants to establish a relationship with his child should be allowed to correspond with and telephone his child, and the custodial parent should not be permitted to interfere with this contact. A father can renew his visitation request when he believes that a positive relationship has been developed.

After establishing that a substantial parental bond exists between an incarcerated father and his child, the following factors,¹⁸⁹ as suggested by the courts in *Fusco*¹⁹⁰ and *Etter*,¹⁹¹ should be analyzed: age of the child; distance and hardship to the child in traveling to the prison; the visitation area at the prison, including the type of supervision at the visitation site; the effect of the visit on the child physically, emotionally, and psychologically; and the nature of the crime. An assessment of these factors will facilitate a court's determination as to whether visitation would be beneficial for the child. It is important that courts faced with this visitation dilemma evaluate the same factors to ensure adequate protection for all children involved in this type of visitation dispute. To assist the court in assessing these factors, a child should have independent counsel and the court should appoint a forensic psychologist.¹⁹²

D. *An Attorney for the Child and a Forensic Psychologist Should be Appointed*

Generally, the voice of a child goes unheard during a proceeding to decide whether the child should visit with her father in prison.¹⁹³ Unfortunately, judges and attorneys tend to cam-

¹⁸⁹ This is not an exhaustive list of factors, but this Note contends that these are the important factors to be considered uniformly at every hearing to determine whether a child should visit with her father in prison.

¹⁹⁰ 452 A.2d 681 (N.J. Super. Ct. App. Div. 1982).

¹⁹¹ 684 A.2d 1092 (Pa. Super Ct. 1996).

¹⁹² See *supra* note 153.

¹⁹³ See generally *Brewer v. Brewer*, 760 P.2d 1225 (Kan. Ct. App. 1988); *Alexander v. Alexander*, 900 S.W.2d 615 (Ky. Ct. App. 1995); *Smith v. Smith*, 869 S.W.2d

ouflagé the issues of concern about the child by focusing their attention on the rights of the father.¹⁹⁴ This is of great concern because the outcome of these proceedings will have a substantial impact on the child for the rest of his or her life. Moreover, the adversarial nature of the proceeding hinders the parents from focusing on the best interest of their child.

A child involved in a court proceeding to determine whether she visits with her father in prison will be better served by having her own attorney.¹⁹⁵ This visitation decision involves the balancing of several important factors, including the dangers inherent at the prison, the nature of the father's crime and how that will impact the child, and the age and vulnerability of the child. With such pressing issues present, a child should have her own attorney to ensure that her best interests are sufficiently considered through comprehensive, factual development.

Some of the objectives that have been articulated by advocates for the appointment of counsel for a child in a custody proceeding¹⁹⁶ are even more pronounced in a proceeding to

55 (Ky. Ct. App. 1994); *Folsom v. Folsom*, 262 A.D.2d 875, 692 N.Y.S.2d 529 (3d Dep't 1999); *Shipp v. Gaglia*, 97 A.D.2d 945, 468 N.Y.S.2d 743 (4th Dep't 1983); *Harris v. Burns*, 904 P.2d 648 (Or. Ct. App. 1995); *Wolfe v. Wolfe*, 899 P.2d 46 (Wyo. 1995). In all of these cases, no law guardian was appointed.

¹⁹⁴ See *supra* Part I.C (discussing the rights of fathers); see also *Alexander*, 900 S.W.2d at 616 (finding that a father, even though incarcerated, is entitled to a hearing on the visitation issue); *Sullivan v. Shaw*, 650 A.2d 882, 884 (Pa. Super. Ct. 1994) (stating that incarcerated parents who petition courts for visitation are entitled to a hearing); *Wolfe*, 899 P.2d at 47 (explaining that while there is no absolute right to visitation in a prison facility, an inmate must be afforded an opportunity to be heard).

¹⁹⁵ For a poignant and in depth look at the importance of recognizing children's rights and giving them a voice in our legal system, see generally Suellyn Scarnecchia, *Imagining Children's Rights*, 12 T.M. COOLEY L. REV. 1 (1995); see also Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L.Q. 417, 417-18 (1993) (advocating that when children have a significant interest in a legal proceeding, they should have effective and independent representation to address their legal and non-legal needs).

¹⁹⁶ For a concise and thoughtful understanding of the need for effective representation of children, see generally Edwards, *supra* note 195; Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 BOSTON BAR J. 6 (1991); Robert E. Shepherd & Sharon S. England, *I Know the Child is My Client, But Who Am I?*, 64 FORDHAM L. REV. 1917 (1996); Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, J. AM. ACAD. MATRIM. L. (Summer 1995).

determine whether a child visits with a father in prison. The adversarial and emotionally charged nature of this visitation dispute would, undoubtedly, prohibit parents from focusing on the best interest of their child. For example, many times a father must petition the court for visitation because his child's mother refuses to bring the child to the prison.¹⁹⁷ The mother may have several reasons why she may not want to bring the child to the prison that have nothing to do with whether the visit would be good for the child.¹⁹⁸ Thus, a mother may not be concerned with what is best for her child but rather what she can do to prevent the visitation. In such a situation, if the only parties that are represented are the parents, the interests presented to the court will be those of the parents, not the child. Consequently, the evidence presented at the hearing may fail to accurately portray the existing father-child relationship or the child's attitudes and feelings toward her father. Therefore, to ensure a fair process and to ensure that the proceedings are, indeed, directed towards the best interests of the child, children of incarcerated parents must be represented by independent counsel. The child's attorney would provide an independent view of the circumstances and would encourage a more complete record, ensuring the court's ability to determine the best interests of the child.¹⁹⁹

To further protect the best interests of the child, the court should require the assistance of a forensic psychologist²⁰⁰ who is trained in child development. Children's needs vary depend-

¹⁹⁷ See, e.g., *Smith*, 869 S.W.2d at 55; *Folsom*, 262 A.D.2d at 875, 692 N.Y.S.2d at 530; see also *Fishman*, *supra* note 86, at 94 (stating that many mothers with young children do not want to "undertake what will amount to an exhausting and expensive effort on a regular basis for a very limited amount of visiting").

¹⁹⁸ For instance, a mother may have other young children at home, she may have a job which prevents her from bringing the child for a visit, or she may be angry at the father for putting her in this position.

¹⁹⁹ It is unclear whether the role of the child's attorney should be that of an advocate, in which the attorney decides what is in the best interest of the child and promotes that interest, or whether the attorney should be guided by the child's expressed views. See, e.g., Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 306-07 (1998); Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 940 (1995); Marvin R. Ventrell, *Essay, Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 260 (1995).

²⁰⁰ See *supra* note 153 and accompanying text.

ing upon their age, stage of development, personal coping capabilities, and other pertinent factors. An understanding of these factors for each particular child in the context of the child visiting with her father in prison is essential to serving the best interests of the child. A forensic psychologist provides the necessary nexus between psychology and the law by using analytical skills and sorting out psycho-legal issues so that they are both cogent and understandable to the court.²⁰¹

Accordingly, a licensed forensic psychologist who has experience with issues relating to parent-child relationships and who understands the impact of a prison environment upon children of different ages will assist the judge in reaching a decision that is truly in the best interest of the child. The expert's assistance will help compensate for the lack of special training of judges and attorneys to deal with the unique psycho-legal issues that arise when an incarcerated father petitions the court for visitation with his child in prison.

CONCLUSION

Society can no longer ignore the 1.6 million children who have a father in prison. Fathers play too important a role in a child's life, even when the father is incarcerated. Accordingly, as more incarcerated fathers petition the courts for visitation with their children in prison, courts should have concise guidelines to ensure the adequate protection of the child. Adopting the proposals outlined in this Note would lead to more predictable results and is a necessary step toward tipping the scale in favor of protecting a child.

*Rachel Sims**

²⁰¹ Jack S. Annon, *Psychologists Who Make Unqualified Public Statements About Litigants Whom They Have Not Examined*, 8 INST. FOR PSYCH. THERAPIES (1996), available at http://www.iptforensics.com/journal/volume8j8_3_5.htm (last visited Mar. 30, 2001).

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