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COMMENTS

WHEN SHOULD A COURT ORDER VISITATION BETWEEN A CHILD AND AN INCARCERATED PARENT?

BENJAMIN GUTHRIE STEWART†

INTRODUCTION

One of the first cases I worked on, as a first-year summer clerk at the Cook County Office of the Public Guardian in Illinois, involved a visitation dispute between two children and their incarcerated father. The two children, aged three and four, were in foster care and had never had a relationship with their natural father. Nevertheless, the natural father's parental rights had never been terminated. After being incarcerated, the natural father, for the first time, expressed an interest in interacting with his children and filed a motion for visitation.¹

In Cook County, all abused and neglected children are appointed an attorney and guardian ad litem. The attorney and guardian ad litem for these two children determined that such visitation would not be in the children's best interest. First and foremost, the children had not had a relationship with the natural father and were trying to form a relationship with their foster parents. Second, visitation would require a three hour drive to and from the prison, a very difficult ride for young children. Acting on behalf of the minors, the public guardian filed a motion to suspend visitation.

The legal issues were straightforward and it was clear, fairly early on, that the public guardian was going to win.² Through the course of my research, however, I became concerned about several issues that arose in cases where an incarcerated parent wanted visitation with their children in prison. First, I was

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1. This fact pattern occurs more often than one might think, though it remains unclear to me why incarceration is looked upon as the first opportunity to begin raising one's children. See, for example, *Davis v Davis*, 232 AD2d 773, 648 NYS2d 742 (1996).

2. The father later withdrew his motion.

unable to determine the policy rationale behind the bi-standard test employed by Illinois courts in determining when visitation should be suspended by a court. Second, I was concerned with the lack of concrete psychological and sociological data referenced by courts in cases involving parent/child visitation in prison. Finally, I had the same concern about this issue that is present in so much of juvenile law: how to balance the wants and desires of a minor with what is in fact in a minor's best interest. In other words, how is it possible to determine what a minor (especially a minor who has been abused or neglected by his or her parents) actually wants, and how should that desire be balanced with what is actually in their best interests?

This Comment will examine the legal issues surrounding parent/child visitation in prison. Specifically, it will look at the standards that are used or should be used by courts (especially in Illinois) when there is a dispute between an incarcerated parent and another party, either another parent or the minor as represented by a Guardian *ad litem*, as to whether or not visitation is appropriate. The goal of this Comment is to formulate a standard that can rationally be employed by courts in determining when visitation between a child and a parent who resides in a prison is appropriate.

As the United States prison population increases, so does the number of children with parents in prison.³ Visitation between those children and their parents often appears to be a gut-wrenching and emotionally disturbing process to observers. A recent *Time* magazine article described the process of visitation between a child and his or her incarcerated mother:

Contacts between incarcerated mothers and their children are fraught with difficulties. Prisons are often located in remote rural locales, inaccessible to poor families without cars. In-person visits can take an emotional toll on young children. They must endure invasive body searches just like adults. Then there's the frightening clang of doors slamming shut. Once inside the noisy visiting room, kids must shout at the top of their lungs. In most state and federal prisons, children are allowed to hug and kiss their moms, but in many jails in which women are awaiting trial and sentencing, contact is forbidden. A pane of thick glass separates the mother and child, which can be yet another trauma. Gail Smith, executive director of Chicago Legal Advocacy for Incarcerated Mothers, described an infant's wrenching visit. "When he saw his mother come out, his little hand went to the glass," Smith says. "But when he realized he couldn't touch her, he just started screaming."⁴

This Comment does not make proposals for improving the success of parent/child visitation in prisons, but will rather focus on whether or not courts should allow visits as they currently exist. In addition, there is not much discussion of the potential benefit or harm of these visits to the prisoner, except to the

3. Karen Tilbor, *Prisoners as Parents: Building Parenting Skills on the Inside 3* (Edmund S. Muskie Institute for Public Affairs 1993).

4. Tamerlin Drummond, *Mothers in Prison*, *Time*, Nov 6, 2000, at 106.

extent that such benefit or harm could directly effect the child. The issue of whether or not a parent has a Constitutional right to visit with their children is a matter of some debate.⁵ In order to focus on the effect of such visits on children, this Comment assumes, *arguendo*, that an inmate does not have an absolute legal or Constitutional right to such visitation. If such rights do exist, different standards than the ones proposed would be appropriate. What these standards would be is outside the scope of this Comment.

Part I of this Comment summarizes some of the current legal tests and factors that courts use to determine when parent/child visitation is appropriate. Part II examines some of the surprisingly little psychological and sociological research done on the effects that prison visitation has on the children of incarcerated parents in order to determine whether or not a consensus has been reached on whether or not such visits are beneficial. The type of visitation program in place at a particular prison will inevitably have an effect on whether or not courts will allow visitation; therefore, Part II also includes research on which types of programs are most successful. Part III reanalyzes the standards from Part I in light of data from Part II and proposes a uniform standard for making determinations regarding parent/child visitation in prison and suggests areas for future research.

Finally, this Comment would not be complete without discussing, briefly, what became obvious to me after only a brief period of work in the juvenile court system: that any decision involving the welfare of juveniles made by a state agency, such as the one made by the Public Guardian above, is a risky venture. In many cases, there are no "good" choices, and a standard such as "best interest of the minor" becomes in reality an attempt to determine the course of action that is "least harmful to the minor given the government's resources." Any uniform standard, which may be necessary given the limited funding and time given to child welfare agencies, is bound to lead to wrong decisions in some cases. These type of problems will be unavoidable as long as people continue to bring children into the world that they are not financially or emotionally prepared to support. In almost every case where a court is forced to determine the fate of a child, the society and the family of that child have already failed in some way. I would be remiss if this went unmentioned because no discussion of juvenile law is complete without keeping this tragic background in mind.

PART I: ANALYSIS OF THE LAW

Courts look at many different factors in deciding whether or not to order prison visitation. Many issues surrounding parental visitation are well known to most Americans, either from their own personal experience with such a dispute

5. Contrast *Nicholson v Choctaw County*, 498 F Supp 295 (S D Ala 1980) with *Smith v McDonald*, 869 F Supp 918 (D Kan 1994).

or from the experiences of friends and relatives. These issues become even more complicated when one of the parents requesting visitation is incarcerated. Occasionally, more extreme cases invoke the interest of the public, the media, and the legislature. One such example was the case of then 3-year old Massachusetts resident Lizzie Thompson, whose father killed her mother in August of 1995.⁶ Once incarcerated, the father moved for visitation rights with the daughter. The public was outraged that such a motion would even be considered, and the Massachusetts legislature responded with the passage of “Lizzie’s Law,” which barred a judge from forcing a child to visit a parent who had been convicted of first degree murder of the other parent.⁷ Such extreme cases may be easy to decide from a moral and policy standpoint, however the issues become less clear when the crime becomes less brutal and has nothing to do with the family and when the possibility of developing a strong, post-incarceration parent/child relationship exist.

Courts are in general agreement that the mere fact of incarceration, by itself, cannot lead to either a termination of parental rights or the suspension of visitation.⁸ Courts are also in agreement that a parent who has been incarcerated does not automatically receive the right to visit with his or her children.⁹

Some courts apply the “best interest of the minor” standard in determining whether or not visitation is appropriate.¹⁰ Other courts will only deny an incarcerated parent’s motion for visitation if it can be shown that visitation in prison would be harmful to the child’s welfare.¹¹ For example, the California Family Code requires courts to grant reasonable visitation “unless it is shown that that the visitation would be detrimental to the best interests of the child.”¹²

Illinois provides an example of the interaction between the legislature and the courts in determining what type of standard to use. The Illinois legislature, through the Juvenile Court Act, has granted courts the authority to place limits on parental visitation. Courts obtain jurisdiction under the Juvenile Court Act in cases, such as the one discussed in the Introduction, where a juvenile has been

6. B.J. Roche, *Lizzie’s Legacy*, Boston Globe, Dec 14, 1997, at 16.

7. *Id.*

8. See, for example, *Wise v Del Toro*, 122 AD2d 714, 714–15, 505 NYS2d 880, 881 (1986); *Woods v Woods*, 147 Ill App 3d 772, 775, 498 NE2d 906, 909 (1986) (citing *Frail v Frail*, 54 Ill App 3d 1013, 370 NE2d 303 (1977)); *Hoversten v Superior Court*, 74 Cal App 4th 636, 641, 88 Cal Rptr 2d 197, 200–01 (1999) (citing various cases).

9. See, for example, *Davis*, 232 AD2d at 773, 648 NYS2d at 744 (citing *Paul G. v Donna G.*, 175 AD2d 236, 237, 572 N.Y.S.2d 364, 365 (1991)); *Woods*, 147 Ill App 3d at 774–75, 498 NE2d at 908 (citing *Griffiths v Griffiths*, 127 Ill App 3d 126, 129, 468 NE2d 482, 484 (1984)).

10. See, for example, *Davis*, 232 AD2d at 773–74, 648 NYS2d at 743 (denying frequent visitation in prison based on trial court’s finding that “monthly visitation requested by petitioner would not be in the child’s best interest”).

11. See *Thomas v Thomas*, 277 AD2d 935, 935, 715 NYS2d 818, 819 (2000) (the court “remitted” matter involving parent/child visits in prison because “the record [was] not sufficient to determine whether visitation would be detrimental to petitioner’s children”).

12. Cal Fam Code § 3100(a) (2001).

found to be abused or neglected. The Act defines “guardianship of the person” (in part) as “the authority and duty of reasonable visitation, *except to the extent that these have been limited in the best interests of the minor by court order.*”¹³ The Act defines “residual parental rights and responsibilities” (in part) as “those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person including . . . the right to reasonable visitation (*which may be limited by the court in the best interests of the minor as provided in subsection 8(b) of this section*) . . .”¹⁴ In order to suspend visitation under the Juvenile Court Act, a preponderance of the evidence must show that such suspension is in the minor’s best interest.¹⁵

The legislature has also granted the court the authority to suspend visitation through the Illinois Marriage and Dissolution of Marriage Act. A higher standard of proof, however, applies in cases arising under this Act. The Marriage and Dissolution of Marriage Act provides (in part):

The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child; but the court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral or emotional health.¹⁶

The legislature requires a higher burden of proof in order to suspend visitation in custody disputes between parents than it requires to suspend visitation in the cases involving abuse and neglect that arise under the Juvenile Court Act. In cases arising under the Marriage and Dissolution of Marriage Act, the court’s primary concern is still the welfare of the child.¹⁷ However, the court will only suspend visitation if visitation will seriously endanger the child. The endangerment standard described as “onerous, stringent and rigorous,”¹⁸ is a higher standard than the best interest of the minor standard.

Interestingly, even under the higher standard required by the Marriage and Dissolution of Marriage Act, Illinois courts rarely grant visitation to a parent in prison. In *In re Sims*, the court denied an incarcerated father visitation rights where the father did not prove a relationship with his children or an appropriate facility for prison visitation.¹⁹ The *Woods* court also denied visitation to a father in prison absent evidence of a past close relationship even though the prison had visiting facilities, holding that “because development of a parent-child relationship is in itself a difficult process, the child should not have to be faced with

13. 705 ILCS 405/1-3(8)(b) (emphasis added).

14. 705 ILCS 405/1-3(13) (emphasis added).

15. 705 ILCS 405/1-8(b); 705 ILCS 405/1-3(13).

16. 705 ILCS 5/607(c).

17. See *In re Blanchard*, 162 Ill App 3d 202, 206, 514 NE2d 1208, 1211 (1987).

18. *In re L.R.*, 202 Ill App 3d 69, 84, 559 NE2d 779, 789 (1990).

19. 308 Ill App 3d 311, 313-314, 719 NE2d 1166, 1168 (1999).

the additional burden of attempting this process in a prison environment.”²⁰ In *Frail v Frail*, the court did grant visitation to a mother who was in prison upon a conviction of murder after it found that such visitation was in the minor’s best interest.²¹ The *Frail* court noted that the mother had a strong relationship with the children and had been the custodial parent of the minors prior to incarceration.²² Furthermore, visitation was to take place in a non-prison environment without close scrutiny by guards.²³ However, “[t]he *Frail* case seems to be the only reported case in Illinois allowing visitation with a parent at a correctional center.”²⁴

The *Woods* court was skeptical about the father’s claim that he could convince his four-year old son that the visits were taking place at a college, noting that the guard would be present in the visiting prison room and that the child would observe the general prison environment when arriving and when leaving.²⁵ Though not explicitly stated in the opinion, the court implies that it would look more favorably on the father’s petition for visitation if such a ruse could be successfully maintained.

The standards by themselves are quite fact dependent and hard to understand without examining their application in particular cases. Factors considered by Illinois courts (when applying the “serious endangerment” standard) include the presence of a close relationship between the parent and child and the existence of appropriate visiting facilities where the visits can take place. These two factors have been considered by other courts as well.²⁶

Travel time is another factor that courts consider. In *Ellett v Ellett*, the court denied visitation in part because “it was not in the . . . child’s best interest to be transported to the correctional facility . . . as it required a round trip of at least 10 hours.”²⁷ Furthermore, the petitioner was allowed to re-petition for a modification of visitation if he was transferred to a prison that would not require such a long drive.²⁸ In *Davis v Davis* a seven hour round trip was enough to deny visitation. The court also considered the fact that the minor would have to be driven to the correctional facility by two grandparents with whom he was not well acquainted.²⁹ In *McRone v Parker*, the court assuaged concerns about the time needed to travel to the prison by limiting visits to three times a year.³⁰

The length of the sentence is another factor that courts consider in deter-

20. *Woods*, 147 Ill App 3d at 775, 498 NE2d at 909.

21. 54 Ill App 3d 1013, 1015–16, 370 NE2d 303, 305 (1977).

22. *Id.* at 306.

23. *Id.*

24. *Sims*, 308 Ill App 3d at 313, 719 NE2d at 1168.

25. 147 Ill App 3d at 775–76, 498 NE2d at 909.

26. See, for example, *Ellett v Ellett*, 265 AD2d 747, 748, 698 NYS2d 740, 741–42 (1999).

27. *Id.* at 747–48.

28. *Id.* at 748.

29. *Davis*, 232 AD2d at 774, 648 NYS2d at 743.

30. 265 AD2d 757, 758, 697 NYS2d 379, 381 (1999)

mining whether or not to allow visitation. In granting visitation in *McRone*, the court distinguished the case from *Ellet* in part because the incarcerated parent was serving a much shorter sentence.³¹ In contrast, the *Woods* court noted in dicta that, because the incarcerated father's sentence would expire in such a short amount of time, the harm caused by denying visitation would be lessened.³² It seems the length of an incarcerated parent's sentence can result in different outcomes for different cases.

In some states, courts leave the matter of visitation in prison entirely up to the Department of Corrections. Courts in Florida, for example, have held that they lack the authority to order visitation in prison.³³

In summary, the courts that have considered whether or not to allow visitation have used several differently worded standards, all of which focus on the welfare of the minor. The following factors are those a court would likely use to decide whether visitation would be beneficial or detrimental to a minor.

- 1) Whether the minor and the incarcerated parent have a long-lasting relationship.
- 2) Whether the incarcerated parent was the custodial parent of the minor.
- 3) Whether the prison has appropriate visitation facilities where the visit could take place.
- 4) Whether the minor (due to age or to the actual environment of the prison) will realize that the visits are, in fact, taking place in a prison.
- 5) The distance and the nature of the travel required by the minor to reach the incarcerated parent.
- 6) The length of the incarcerated parent's sentence: in some cases looking favorably on a petition for visitation from a parent with a shorter sentence and in other cases reasoning that the harm caused by prison visitation outweighs the harm caused by depriving visitation during a short sentence.

PART II: ARE PARENT/CHILD VISITS IN PRISON BENEFICIAL?

Much has been written about the negative effects of incarceration on children. For example, studies have shown that the children of an incarcerated mother or father will suffer emotional, physical and mental problems.³⁴ Many

31. Id.

32. 147 Ill App 3d at 776, 498 NE2d at 909.

33. See *Singeltary v Carpenter*, 705 S2d 110, 111 (Fla Dist Ct App 1998).

34. "In terms of the number of problems per child, male and female inmates report almost exactly the same number." Elise Zealand, *Protecting the Ties that Bind from Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children to Maintain the Parent-Child Relationship*, 31 Colum J L & Soc Probs 247, 277 (Winter 1998) (quoting Travis A. Fritsch & John D. Burkhead, *Behavioral Reactions of Children to Parental Absence due to Imprisonment*, 30 Fam

studies have indicated that these effects may be more profound on the children of incarcerated mothers than incarcerated fathers. This is because women tend to be the primary caregivers to their children and women's prisons (since they are fewer in number) tend to be further away from the mother's urban residence.

Given the well-documented, negative effect that incarceration of a parent has on a child in general, it is surprising that little has been written on whether or not prison visitation, a common feature in such situations, exacerbates or relieves the burden placed on children by parental incarceration.

Visiting a parent in prison can undoubtedly be an unpleasant experience at times. "Standing in line for hours to be cleared for a visit that lasts less than half the time spent waiting, being subjected to pat and frisk searches and rude treatment, and visiting in crowded, noisy, dirty, overheated facilities, or with parents and children separated by a glass barrier, are hardly conducive to promoting family bonds."³⁵

Prison rules against touching, time limits on visitation, plastic barriers and requirements that communication be conducted over a telephone can increase feelings of separation for both the prisoner and the child and limit any opportunity for meaningful exchange.³⁶ A study in the United Kingdom found that "[l]ocked doors along the route to the visits room, mothers being searched, and the endless waiting, often after a long and tiring journey on public transport, all add to the sense of bewilderment that many children feel about the visit."³⁷

Despite the problems inherent with the parent/child visit in prisons, most experts still agree that such visits do have their benefits. In a handbook for creating an effective visiting program for incarcerated parents, Karen Tilbor states:

While no research has yet examined the impact on children on visiting their incarcerated mothers and fathers and participating in prison-based programs designed to enhance family relationships, our experience in Project H.I.P. [Helping Incarcerated Parents] (based on staff observation and numerous reports from inmates, family members and children themselves) confirms that the experience has helped children reduce their sense of loss and enhance their relationship with their incarcerated parents. In some families, the child's participation in the program has also served as a catalyst for improving

Relations 83, 85 (1981)).

35. Creasia Finney Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children*, in Cynthia Seymour & Creasia Finney Hairston, eds, *Children with Parents in Prison: Child Welfare, Policy, Program & Practice Issues* 149, 157-58 (Transaction 2001).

36. Barbara Bloom & Dave Steinhart, *Why Punish the Children?* 51 (National Council on Crime and Delinquency 1993).

37. Fiona Clarke et al, *Prisoner's Children: The role and responsibility of the prison service in England and Wales*, in Roger Shaw, ed, *Prisoner's Children: What are the issues?* 114, 119 (Routledge 1992) ("*Prisoner's Children*").

communication between the incarcerated parents and the child's caregiver.³⁸

A large study from the 1960s about the nature of the family relationship in the prison setting found that, despite the hardships involved with traveling and with the prison visit itself, most mothers felt that the maintenance of contact between an imprisoned father and his children outweighed the drawbacks.³⁹

A 1978 study interviewed 22 children about their visitation with incarcerated parents. The study discovered that most of the children did not have normal peer relationships, and theorized that maintaining family ties through prison visits may have been doubly important.⁴⁰ The study's major conclusion was that the issue of prison visitation required a great deal more empirical study.⁴¹ One important result was derived from the small study. Even though the children questioned had widely different answers to many questions asked (for example, some of them identified strongly with their father and idolized him while others expressed a very strong interest in being different from their father), all of the children "claimed they looked forward to the visits and talked of their sad feelings at the time of departure."⁴² Furthermore, the parents of several children reported that their children "seemed less disruptive and 'relieved' after making the first visit."⁴³

In 1992, a survey was conducted of 240 children between the ages of 3 months and 17 years who were regularly visiting their parents in prison.⁴⁴ About half of the children had a behavioral reaction, usually excitability or hyperactivity, in response to the visit.⁴⁵ In most cases, the reaction lasted less than a week.⁴⁶ None of the children had a sustained reaction to visitation.⁴⁷ None of the reactions involved a serious emotional disturbance.⁴⁸ A correlation was discovered between the length of the reaction and the length of time that the parent and the child had lived together.⁴⁹ Importantly, the study only surveyed children who regularly visited their parents in prison, hence the outcome is not nec-

38. Tilbor, *Prisoners as Parents* at 3 (cited in note 3).

39. Pauline Morris, *Prisoners and Their Families* 156 (Hart 1965). A study of prisoners and their wives discovered that "virtually all prisoners and their wives considered it valuable that their children were included in visits, despite the social stigma and possible emotional upheaval the children may have experienced." Jules Quentin Burstein, *Conjugal Visits in Prison* 75 (Lexington 1977).

40. William H. Sack & Jack Seidler, *Should Children Visit Their Parents in Prison?* 2 *Law & Human Beh* 261, 265 (1978).

41. *Id.* at 265.

42. *Id.* at 264.

43. *Id.*

44. Denise Johnston, *Parent-Child Visitation*, in Katherin Gabel & Denise Johnston, eds, *Children of Incarcerated Parents* 135 (Lexington 1995) ("*Children of Incarcerated Parents*").

45. *Id.* at 139.

46. *Id.*

47. *Id.*

48. *Id.* at 140.

49. *Id.*

essarily useful for a court trying to determine what to do with a child who has yet to visit a parent in jail.⁵⁰ The study found no reason to believe that any of the well-documented benefits of parent/child visitation would not be present in visits between a parent and a child in prison.⁵¹ In fact, the author could find “no evidence in literature, either from empirical studies or statements of expert opinion, that parent-child visitation in the jail or prison setting has any significant or long-term consequences for children.”⁵²

Many fathers in prison express a desire for more frequent visitation in order to maintain family ties.⁵³ However, visits with children are sometimes suspended if children appear to be upset before or during a visit.⁵⁴ These two studies demonstrate the problem with suspending visitation based solely on a child’s initial reaction to visitation. Children who visit their parents in prison regularly look forward to such visits and do not appear to have any long-term negative reactions to such visits, regardless of what their initial reaction to the unfamiliar and uncomfortable prison visitation situation.

There is evidence to indicate that particular types of contact besides the traditional prison visit may be more beneficial. A 1977 study contrasted a group of men who had regular, conjugal visits with their wives with a group of men who saw their wives only on ordinary visits.⁵⁵ The researchers were able to compare and contrast the reactions of the children brought along on these visits.⁵⁶ Children in the group which engaged in regular visitation were frequently described as depressed and bitter, but those who were given the more unrestricted access to their fathers were not described in this way.⁵⁷ Furthermore, when questioned about their father’s situation, 50 percent of children in the group which engaged in conjugal visits did not mention their father’s imprisonment, as opposed to 9 percent of children in the group that engaged in normal visits who did not mention their father’s imprisonment.⁵⁸ The authors hypothesize that this marked difference is at least partially explained by the fact that children with more extensive interaction with their father “had better opportunity to see their father’s situation as one of relative normality.”⁵⁹ A study in the United Kingdom found that the creation of a creche, or a separate room for children so that mothers can bring the children to a visit with the children’s father yet still have some

50. *Id.*

51. *Id.* at 138–41.

52. *Id.* at 141.

53. Creasie Finney Hairston, *Fathers in Prison*, in *Children of Incarcerated Parents* 31 (volume cited in note 44).

54. Christina Jose Kampfner, Post-Traumatic Stress Reactions in Children of Imprisoned Mothers, in *Children of Incarcerated Parents* 89, 91 (volume cited in note 44).

55. Burstein, *Conjugal Visits in Prison* at 46–47 (cited in note 39).

56. *Id.* at 75.

57. *Id.* at 77.

58. *Id.* at 76.

59. *Id.*

time for private discussions with the father, greatly increased the productivity of prison visitation.⁶⁰

The Project H.I.P. program discussed above involved regular parenting education courses,⁶¹ “Play and structured activities in an atmosphere conducive to interacting with children”⁶² and occasional special family events.⁶³ Furthermore, the project coordinated with the child’s caregiver and with state agencies serving children and families (including assisting in transportation).⁶⁴ This service created the anecdotal evidence of benefit to children discussed above.

Ultimately, the most definitive answer to the question: “Is visitation with a parent in prison beneficial to a child?” is that the evidence is inconclusive. Furthermore, the number of factual variables means that an individual determination must be made in each case. How close is the child with the parent? What type of visiting facilities does the prison have? These are standards very similar to the ones employed by the courts.

Perhaps the question should be rephrased: “Is parental incarceration itself detrimental to the success of visitation or can the same factors which apply to all parental visitation be applied?” No studies have shown that visitation in prison destroys the benefits caused by other parent/child visitation.

In summary, the research on parent/child visitation in prison has come to the following, tentative conclusions:

- 1) There is no reason to believe that visitation in prison is more harmful to children than other types of visitation with a non-custodial parent.
- 2) There is no evidence that mere exposure to the prison environment leads to long term harm in children.
- 3) Several factors, however, including long waits, exposure to the prison environment and confusion as to the situation they are in can make a visit to a prison an unpleasant experience for children.
- 4) Different types of visitation programs other than traditional prison visitation can make interaction and visits between an incarcerated parent and his or her children more beneficial.

PART III: REANALYSIS

The research data that is available on the impact of parent/child visitation in prison suggests that much of courts’ analysis of the situation is correct. Part III discusses the five factors used by courts and reanalyze them in light of the above

60. Clarke, *Prisoner’s Children*, at 120 (article cited in note 37).

61. Tilbor, *Prisoners as Parents* at 16 (cited in note 3).

62. *Id.* at 18.

63. *Id.* at 20.

64. *Id.* at 22–24.

research.

The first factor is whether or not the minor and the incarcerated parent have a long-lasting relationship. The research is unclear as to whether a long lasting relationship should be an important factor in determining whether prison visitation is appropriate. The research does indicate that prison visitation can be useful in *maintaining* a parent/child relationship. However, there is no research to indicate whether or not the *development* of a parent/child relationship is possible through prison visitation.

There is some evidence to support the notion that a close relationship between a natural parent and child can be maintained through prison visitation in addition to the child's relationship with the custodial parent. Neither the Johnston nor the Sack and Seidler studies indicate a differing opinion.⁶⁵ Hence, if the court finds that a relationship between a minor and a non-custodial parent was valuable before incarceration, there is no reason to believe that such benefit will not continue after incarceration.

The second factor involves whether or not the prison has appropriate visitation facilities where the visit could take place. Research indicates that appropriate visitation facilities and, ideally, an organized family program greatly increase the benefits of parent/child visits. Therefore, it may be appropriate for a court to consider the existence of such facilities in a borderline case, such as a case where the closeness of the parent/child relationship is unclear or where travel time is exceptionally long. However, the research also indicates that in most cases parent/child visitation is valuable regardless of the existence of such facilities. There is no evidence that such visitation leads to long-term negative effects, and some evidence that it is in fact beneficial to a child's development.

Courts generally operate on either a "best interest of the minor" standard or a standard that denies visitation only when it is detrimental to the minor's interest. Even though there may be short-term negative effects from visiting in a normal prison visiting facility, there is not enough evidence that it is not ultimately in the best interest of the minor; assuming that the continuance of the parent/child relationship is also in the best interest of the minor.

Again, this Comment does not address whether such visitation programs and facilities should be required. A juvenile court trying to determine whether or not visitation is appropriate is not in a position to order a prison to provide comfortable visitation facilities. A court should, in borderline cases, consider whether or not such a visitation program already exists before making a determination as to whether or not to allow prison visits.

The third factor examined is whether or not the minor will realize that the visits are, in fact, taking place in a prison. Some experts have offered the opinion

65. See generally Denise Johnston, *Parent-Child Visitation*, in *Children of Incarcerated Parents* 31 (volume cited in note 44); Sack & Seidler, 2 *Law & Human Beh* at 265 (cited in note 40).

that children should, in fact, not be lied to about their parents' incarceration.⁶⁶ If the goal of parent/child visitation in prison is to *maintain* a close relationship between a parent and a child, then this reasoning seems sound. However, none of the research indicates whether or not hiding the fact that parent is in prison increases or decreases the benefits of prison visitation to for the minor. Given the apparent benefits of visitation, this should not be an important factor in a court's decision unless future research indicates that confirmed knowledge of a parent's imprisonment (confirmed by seeing the parent in an obviously prison-like environment) is in some way detrimental to the minor.

The fourth factor is the distance that must be traveled by the child and the nature of the travel involved. Perhaps no factor is more widely considered by courts to be important in determining whether or not to grant a petition for visitation inside a prison. Nevertheless, no studies have indicated that there is any long term detriment to minors caused by traveling long distances to visit their parents. Furthermore, the majority of mothers of children whose father is incarcerated would probably indicate that the hassles and expense of traveling are worth the benefits of a close relationship between the child and the incarcerated father.

Undoubtedly, there are some inconveniences, such as missing school, and perhaps even temporary physical discomfort associated with traveling long distances. A court must weigh these inconveniences against the potential benefit which could come from the maintenance or formation, or even from the chance of the maintenance or formation, of a relationship between a parent and a child. The benefits of parent visitation are well documented. Unless research indicates that there is potential long term harm caused by frequently traveling great distances, courts should only deny visitation due to long travel time if there seems extraordinarily little chance that the child will derive any benefit from visits with their parent such as the formation or maintenance of a beneficial long-term relationship.

The final factor courts also consider is the length of the incarcerated parent's sentence, in some cases looking favorably on a petition for visitation from a parent with a shorter sentence, in other cases reasoning that the harm caused depriving visitation during a short sentence does not balance out the harm caused by the visit.

A reasonable consideration of the length of a parent's sentence may be appropriate in some circumstances. The benefits of parent visitation are clear, but the issue of visitation in prison has not been studied widely enough to say with certainty whether or not any harm comes from exposure to the prison environ-

66. "First and foremost, children need to be told the truth about where their father is in order to cope with his absence and minimize adjustment difficulties such as the depression, anxiety, acting out, and school difficulties that are so often associated with a father's imprisonment." Bonnie E. Carlson & Neil Cervera, *Inmates and Their Wives* 105 (Greenwood 1992).

ment. In many cases, it may be a worthwhile risk. In a case, however, where the parent is only in jail for a matter of months, courts may wish to acknowledge the uncertainty and paucity of research in this area by refusing to allow visitation. Furthermore, the issue of whether or not maintenance of the parental bond is positive becomes more muddled when the parent is in jail for many, many years or is serving a life sentence.

The research on the effects of prison visitation indicates, more than anything, that much more research should be done in this area. However, studies do seem to indicate that children look forward to the visits, enjoy the visits, are sad when the visits are over and suffer no long-term negative consequences due to the visitation. For this reason, courts should be wary of accepting the word of an overworked welfare agency or a struggling parent when they say that the inconvenience of visitation is not worth it. Furthermore, the research indicates that children on a regular visiting pattern seem to benefit more from visitation, even though children may have behavioral reactions at first. Therefore, courts may need to require visitation over a long period of time before its benefits are realized.

Given the growing number of children with a parent in prison, this issue needs much more empirical study. Even though the subjective view of a child as to whether or not he or she enjoys visiting with the incarcerated parent is hardly dispositive in determining whether or not such visits are in the child's best interest, it is disturbing how few researchers have bothered to simply survey children and ask them. What is needed is a long-term study which will give courts a tool in determining whether or not prison visitation as a whole is beneficial.

CONCLUSION

Ultimately it is currently unclear whether or not prison visitation as a whole is beneficial to children. Even if several large and long-term studies on the subject were done, the multitude of factors at work in an individual case would make it very difficult to use a study to determine whether or not such visits would be beneficial to an individual child. However, the studies that have been done already indicate that courts' approach to the situation may be misguided in some ways. Courts need to first analyze whether or not visitation would be appropriate between a given child and a parent under normal circumstances. Courts should then look at the potential drawbacks caused specifically by a visit to prison only to see if these drawbacks outweigh the already considered benefits. Courts currently are very likely to consider factors such as travel time and the existence of visiting facilities which, while they do increase the pleasantness or unpleasantness of a prison visit, may not be strong enough factors to outweigh the benefits that can be drawn from maintaining a close relationship between a parent and their child.