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NOTE: How the Constitution Can Preserve the Strength of Existing Familial Bonds and Foster New Relationships Between Female Inmates and Their Children

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BIO: * J.D., Rutgers School of Law-Newark, 2008. I dedicate this note to my parents, Lynne and Louis Fiorica, who first taught me the meaning of justice and encouraged me to continuously seek it. I would like also like to thank Professor Bruce Afran for his thoughtful comments and critiques.

SUMMARY:

... Included in the benefits of rehabilitation programs is the fact that, if they are successful, rehabilitation programs may be great economic alternatives to sentencing addicted mothers to federal or state prisons. ... ARBITRARY INMATE ASSIGNMENTS AND THEIR IMPACT ON FAMILIAL TIES Distance is a major constraint incarcerated mothers face in maintaining contact with their children while they are serving prison sentences. ... "By placing inmates in facilities near their families and assisting with family visitation, corrections agencies support inmates' relationship with their parents, spouses, and significant others, as well as their children." ... This concept, however, is challenged by a countervailing interest also recognized by the Court that, "when a prison regulation infringes on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." ... In addition to statutorily mandated programming, several state agencies reported in a 2001 survey that they provided additional support to inmates who have children under the age of eighteen.

TEXT:

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I. THE CHANGING FACE OF THE FEDERAL CRIMINAL JUSTICE SYSTEM AND THE GROWING NUMBER OF SEVERED TIES BETWEEN MOTHER AND CHILD

Female offenders are "the fastest growing segment of the United States criminal justice system, and this trend shows no signs of slowing." n1 Because women are traditionally viewed as the primary caretakers of children, as the number of incarcerated women rises, more and more children are becoming detached from parents due to incarceration. n2 Families who survive a mother's incarceration in the American prison system, have survived "despite it, not because of [it]." n3

"The war on drugs and shifts in both law enforcement practices and judicial decision-making, rather than any change in the nature of female criminality, are responsible for increasing female incarceration." n4 In fact, in 1997, 73.9% of federal female inmates who were also mothers were serving sentences for drug-related offenses. n5 Only 6.5% of mothers in federal prisons were incarcerated based on violent crime convictions. n6

In 2005, women represented 7% of the prison population, whereas ten years earlier, they represented about 6% of the total prison population. n7 Incarceration due to drug offenses [*50] represents the largest increase in federal prison population. n8 Of the 79% increase in the total federal prison population, 49% were serving time based on drug crimes. n9

This note discusses the impact of new federal sentencing guidelines on women inmates and their families and focuses specifically on women who are imprisoned for drug offenses. n10 This note argues that even with new sentencing

principles in place, women and their families are damaged by arbitrary prison assignments, the absence of overnight visitation facilities, and the lack of programming necessary for effective inmate rehabilitation.

The United States Supreme Court recognizes that incarceration does not in itself strip prisoners of all their constitutional rights. n11 The Court's First Amendment jurisprudence recognizes "that freedom of association [is] a peripheral First Amendment right... . In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion." n12 This note argues that this constitutional guarantee should protect the right to form and maintain familial relationships. The United States Supreme Court has stated that "the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." n13 Female inmates are effectively denied this right when they are refused regular communication and visitation with their children.

To resolve this constitutional deprivation, incarcerated mothers should be offered programming for inmate families and alternate sentencing programs tailored to address the underlying problem that drives many women to criminal behavior in the first place: substance abuse and addiction. This solution has the added benefit of potentially decreasing recidivism rates. Rehabilitation also costs less to provide. The option of providing rehabilitation instead of prison is possible. However, this shift away from incarceration would require changes in legislation and the common law, and could be further promoted with programming financed by non-profit organizations.

II. A CLOSER LOOK AT THE STATISTICS

According to a 2006 United States Department of Justice survey, 111,403 women were serving sentences in state or federal prisons, a 4.8% increase from 2005. n14 Conversely, the number of incarcerated men only rose 2.7% during that same period. n15 In a Bureau of Statistics Special Report published in 2000, the Department of Justice reported that approximately 721,500 incarcerated individuals had at least one child under the age of eighteen. n16 Approximately 46% of incarcerated parents had children living with them prior to their imprisonment. n17 This report noted that 90% of men in state prison had at least one child living with the child's mother; only 28% of women reported that one or more of their children were living with their fathers. n18 The statistics from federal prison were equally disturbing; 55% of fathers [*51] and 84% of mothers reported living with minor children before their confinement. n19

According to the report, while their mothers served their sentences, many children of female inmates did not live with their fathers and lived with one or more grandparents instead. n20 Women participating in this survey further reported that 25.7% of their children lived with another relative, 10.4% of their children lived with a friend, and 9.6% of their children were placed in a foster home or agency. n21

III. HOW NEW SENTENCING PRACTICES HAVE DISPROPORTIONATELY AFFECTED WOMEN: THE PROBLEM WITH MANDATORY MINIMUMS

Since the early 1970s, the criminal justice system in the United States has shifted from an indeterminate system of sentencing to a variety of determinate sentencing systems, which vary from state to state. n22 In the mid-1970s, California and several other states n23 passed determinant sentencing legislation to constrain the discretion of judges in sentencing. n24 For example, California created a three-tier sentencing structure that mandated judges to choose one of the three fixed sentences for a particular crime based on the existence of mitigating or aggravating factors. n25

Other states and the federal system created administrative agencies in the form of sentencing commissions to reform their sentencing structures and guidelines. n26 While in some cases, this change in sentencing structure has brought more uniform sentencing within a particular jurisdiction, the outcome is that some crimes now require non-negotiable minimum penalties. n27

Women are disproportionately affected by mandatory minimum sentencing structures, particularly in the federal system; n28 the majority of females in federal prisons are serving time for drug-related sentences, which are affected by this mandatory structure. n29 The explanation offered by scholars for the high percentage of women being incarcerated for drug offenses is that "many sentenced women, particularly in drug conspiracies, are the wives or girlfriends of male defendants, and may find themselves involved in criminal activity because of social and cultural pressures or occasionally as a result of more obvious means of coercion, such as battery." n30

Still, there is a perception that women have traditionally received lighter sentencing than men. n31 Regardless of whether this perception is unfounded, n32 there are many reasons why women may flourish in special rehabilitation programs within their communities, rather than just surviving long mandatory prison sentences. n33 [*52] First, a lar-

ger number of women than men, serving time for drug-related crimes in state prison, committed the offense in order to satisfy a drug addiction. n34 In fact, nearly one in every three incarcerated women in state prisons reported committing the crime for which they were serving time in order to feed an addiction to drugs. n35 Furthermore, "women who are not treated for their underlying problems are likely to recommit crimes and reenter the criminal justice system." n36 The Substance Abuse and Mental Health Services Administration ("SAMHSA") Administrator Charles Curie noted:

Treatment is a bargain compared to expenditures for jails, foster care for children, and health complications that often accompany addiction. Rarely do we have public initiatives that can save society as much as substance abuse treatment and recovery support services. Treatment provides an opportunity for recovery for the individual, better homes for children, and improved safety for our communities. n37

Included in the benefits of rehabilitation programs is the fact that, if they are successful, rehabilitation programs may be great economic alternatives to sentencing addicted mothers to federal or state prisons. n38

In addition, "women are less likely [than men] to be disruptive inmates," and they are less likely than men to relapse in criminal behavior. n39 Likewise, "most observers do not see female offenders ... as being as dangerous to society" and there "is [a] perception among sentencing judges that women are better candidates" than men for rehabilitation. n40 Despite these positive societal perceptions of female offenders, courts have given surprisingly little consideration to female offenders' "reduced danger to public safety," and to their roles as caretakers, when deciding sentencing schemes. n41

In general, men and women differ in their tendency to commit violent crimes. n42 Because women are often taught to fear victimization and frequently feel physically powerless against male predators, women are less likely than men to react to threatening situations in a violent criminal manner. n43 In addition, women generally tend to disfavor violence, whereas men have a higher threshold for the acceptance of violent behavior. n44

The limited research that has compared violent male and female career criminals has found substantial differences: (1) although violent offenses comprise only a small percentage of all the offenses committed by offenders in [*53] any population, females participate in substantially less violent crime than males during the course of their criminal careers; (2) the careers of violent females both begin and peak earlier than those of males; (3) females are far less likely than males to repeat their violent offenses; and (4) females are far more likely to desist from further violence. n45

For these reasons, some female offenders whose criminal tendencies have been sparked due to addiction or histories of physical and mental abuse might fare better in rehabilitation programs, rather than in prisons. Unfortunately, certain drug crimes fall within mandatory sentencing structures that do not allow for judicial discretion in determining the length of the prison sentence or placement. n46 Thus, many addicted women are forced to wait out their long sentences even though, unlike their male counterparts, women are less prone to violent crime and tend to have a more significant role in child-rearing duties.

IV. ARBITRARY INMATE ASSIGNMENTS AND THEIR IMPACT ON FAMILIAL TIES

Distance is a major constraint incarcerated mothers face in maintaining contact with their children while they are serving prison sentences. This problem is especially evident among women serving time in federal prison. n47 In 1997, 84% of inmate parents in federal prisons were located more than one hundred miles from their last household. n48 Of that 84%, more than half of the inmates were located more than five hundred miles from their last household. n49 Among state prison systems, twenty-four state departments of corrections indicated that their states' departments of corrections do not assign inmates to facilities based on the facility's proximity to the inmate's family. n50

"By placing inmates in facilities near their families and assisting with family visitation, corrections agencies support inmates' relationship with their parents, spouses, and significant others, as well as their children." n51 However, only twenty state corrections departments surveyed in 2001 reported that assistance in familial visitation "is available

for the families of inmates" in one or more of the states' prisons. n52 Those state corrections departments offer free transportation or lodging for families of inmates. n53 For example, in New York, the Family Visiting Program "provides free bus service from New York City and Buffalo to facilities across the state, with stops at some on-route locations whenever possible." n54 Delaware, New York, and South Dakota Departments of Correction offer overnight visiting space in one or more of their states' facilities. n55 New York's "Family Reunion Program" provides private, two-to-three bedroom mobile homes on the grounds of eleven of its state facilities for the overnight use of inmate mothers and their children. n56 Similarly, "South Dakota's PACT House (Parents and Children Together) provides mothers space for extended visits up to two weekends per month with their daughters up to age [twelve] and their sons up to age [eleven]." n57

In some state statutory schemes, the legislature empowers corrections officers to implement programming that will aid in familial relationship [*54] building. n58 Also, many states that have implemented overnight stay programs, also have policies that attempt to place inmates in institutions located nearest to their prior address or located close to family members. n59 However, despite strides being made in this area, even some of the most liberal states have failed to pass legislation, n60 or provide programming which would help to facilitate family visitation. Thus, a similar type of program could be instituted at the federal level. It could be enacted to protect federal prisoners who are serving sentences for non-violent drug offenses, especially since most federal inmates serve their sentences in prisons or other institutions that are located up to 500 miles away from their last address. n61

V. THE JUDICIAL SHAPING OF AMERICAN MORALITY: LESSON LEARNED FROM GRISWOLD V. CONNECTICUT

With the number of incarcerated mothers continually rising and no legislative solution in sight, the use of the courts as a vehicle for social change is particularly important to ensure that a mother's incarceration will not destroy the maternal bond she shares with her children. Through its substantive due process jurisprudence and notions of the right to privacy based in the First Amendment's free association clause, the Supreme Court has laid the foundation for lower federal and state courts to require stronger protections for incarcerated mothers and their children. More specifically, the penumbral privacy rights recognized in the Court's First Amendment jurisprudence as addressed in *Griswold v. Connecticut* n62 should be used to compel alternative sentencing options for mothers and family visitation programs.

In *Griswold*, the Court emphasized that free association with one's spouse is so fundamental that to interfere with this association would violate a "sacred" privacy interest long understood across time and culture alike. n63 The Court's opinion relied, in part, on the notion that the First Amendment grants a peripheral right to privacy in the associations a person forms. n64 The Court has subsequently upheld the idea that the sanctity of the family, although not immune from regulation, must be protected from regulation that does not sustain a strong governmental interest. n65

Despite these forceful declarations, the Court has long recognized that it is ill-equipped to deal with "problems of prison administration and reform." n66 However, regulations must undergo judicial scrutiny when they unnecessarily violate the rights of prisoners, and their children. The right to associate with one's family is so fundamental that it must necessarily undergo scrutiny if it is violated. Although deference must be given to prison officials, that deference cannot be construed as free reign to arbitrarily deny female prisoners their right to associate with their children.

VI. INMATE CASE LAW

Although the Court has routinely afforded deference to the criminal justice system with regard [*55] to certain regulations that infringe on the rights of inmates, the Court has held that prison walls do not in themselves bar constitutional protections. n67 Furthermore, the Court has always held the right to make child-rearing decisions as one of the most fundamental rights afforded by the Constitution. n68 This concept, however, is challenged by a countervailing interest also recognized by the Court that, "when a prison regulation infringes on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." n69 The use of a reasonableness inquiry instead of a heightened form of scrutiny reflects the Court's longstanding recognition that problems facing prisons "are complex and intractable, and... they are not readily susceptible [to] resolution by decree." n70

The recent Supreme Court decision in *Overton v. Bazzetta* emphasizes this point. n71 In *Overton*, n72 the Supreme Court established that two-year visitation restrictions for inmates suffering from substance abuse did not violate the Eighth Amendment standard for cruel and unusual punishment because the restriction reasonably addressed both the penological concern of preventing substance abuse and disciplinary problems within the prison. n73

However, in a decision three years prior to *Overton*, the Court upheld a mother's "fundamental right to make decisions concerning the care, custody and control of [her] children." n74 In *Troxel v. Granville*, petitioners sought to gain visitation rights to their two granddaughters pursuant to a Washington statute that stated "any person may petition [a superior court] for visitation rights at any time." n75 The respondent, a mother of two children, claimed that the Washington statute infringed on her rights as a parent to make decisions regarding the upbringing of her children. n76 The Court agreed with the respondent and held that the visitation order was "an unconstitutional infringement on [respondent]'s fundamental rights." n77 Admittedly, the respondent in this case was not an inmate in a state or federal facility at the time of this suit. n78 However, using the *Turner* test, the Court has found that an inmate's rights cannot be infringed if there is no reasonably related goal that is achieved by the infringement. n79

In *Turner*, the Court set out guidelines for determining whether or not a regulation is reasonable in light of penological concerns. n80 First, the Court stated that a prison regulation impeding speech should be neutrally applied to speech without consideration as to the speech's substance. n81 Second, the Court stated that where there are "other avenues'... of the asserted right... [the] court[] should be particularly conscious of the 'measures of judicial deference owed to corrections officials...in gauging the validity of the regulation.'" n82 The third factor courts should consider is the impact that an accommodation will have on other inmates, guards and prison resources. n83 Finally, courts should consider evidence of whether there is an "absence of ready alternatives" to a given prison regulation, and if there is evidence that the regulation is an "exaggerated response" to prison concerns, then this should be weighed in the prisoner's favor. n84

It should be noted that even though the Court has never applied a strict scrutiny standard to an incarcerated parent's right to make child-rearing decisions, that right is not foreclosed given the Supreme Court's prior decisions. In addition, because inmates serving shorter sentences will soon return to their families [*56] as custodial guardians, it is important to make sure that these parents are fit to take on that role. Denying visitation to incarcerated mothers and failing to provide special programming will not achieve this goal.

In *Turner*, the Court clarified the standard of review for cases where prison regulations infringe on the rights of inmates. "Because prisoners retain these [fundamental] rights, 'when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'" n85 In a prior case, *Procnier v. Martinez*, the Court had held that there must be a reasonable basis for a regulation that infringes upon the rights of individuals other than the prisoners themselves:

In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners. n86

In *Martinez*, the holding turned on the fact that the challenged regulation caused a "consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." n87

As in *Martinez*, if the Court is willing to give deference to the rights of non-inmates whose First Amendment free speech rights are being infringed, the Court should extend those rights to inmates' children who wish to exercise their right to associate with their inmate parents, absent an important state interest that would be compromised by the extension of those rights. Currently, these rights are ignored by arbitrary prison assignments, n88 which effectively bar families from meaningful communication while mothers are in prisons. Additionally, arbitrary regulations in prisons that do not reasonably relate to a more important disciplinary purpose have always been held invalid based on a reasonableness standard. Therefore, these assignments may be unconstitutional, notwithstanding implications on the rights of children of female inmates. n89

VII. PRISON ASSIGNMENTS AND THE REASONABLENESS STANDARD: DO THEY PASS THE TEST?

When an offender is convicted of a federal crime, he or she is referred to the Federal Bureau of Prisons for sentencing and prison assignments. n90 Facilities are then chosen based on factors such as "security level, public safety factors, and management variables." n91 The "Security Designation System" n92 gives a number value to an inmate's security risk, and is designed to place inmates in the lowest possible security facility; the system's goal is to

maintain a population balance in the Bureau of Prisons, and at the same time attempt to keep offenders within five hundred miles of the prisoner's home. n93

Female inmates, like their male counterparts, are designated by security level assignments based on classification score and public safety factors. n94 For example, a woman who has a classification score between zero and ten is considered not to pose more than a minimum level of threat to public safety in most cases. n95 [*57] However, if a woman with a classification score from zero to ten is (1) a deportable alien, guilty of juvenile violence, (2) a sex offender, (3) a serious telephone abuser, n96 or (4) a threat to government officials, she is subject to a higher level of inmate security. n97 These are only a few of the factors taken into account for prison assignments. An inmate can receive points for his/her family ties. n98 However, the difference between having no ties whatsoever and strong ties is only one point, whereas many other factors are given more weight. n99

It is also possible, in certain limited circumstances that some federal inmates will be assigned to state prison facilities. This occurs when placement in a Federal Bureau Prison has been exhausted; officials can redirect federal prisoners who qualify to state facilities. n100 If officials cannot locate "an appropriate facility within [their] own region," they then begin to investigate placement in another region. n101

Special considerations for religious beliefs have been put in place to account for the long-recognized freedom of religious expression afforded by the First Amendment. n102 This consideration is factored in when considering whether or not to designate a non-federal facility for federal inmates. n103 For example, a federal inmate whose religious beliefs will be infringed by a certain facility's restrictions will not be placed in such a facility. n104 However, it cannot be overlooked that the First Amendment also guarantees a right to associate, which has been interpreted to encompass family privacy. n105 Nonetheless, special consideration is not given to federal inmates who have special familial needs; and therefore, without reservation, women are placed in federal facilities that are over 500 miles away from their children. Women are also placed in federal facilities that put harsh restrictions on inmate-family contact, communication and association.

To ignore an incarcerated woman's right to associate with her children, yet accommodate her equally weighty constitutional right to practice a religion of her choosing is, at best, an arbitrary decision. Therefore, either the courts or the legislature must address this imbalance in the protections afforded certain First Amendment rights. The Federal Bureau of Prison should be required to amend its practices to include special considerations for familial association.

VIII. WHY KEEPING FAMILIAL BONDS INTACT CAN BE IMPORTANT FOR SOCIETY

"Increased contact between inmates and their families can contribute to an inmate's successful reintegration into the community after release," which "is an indicator of [a] reduced risk of re-offense." n106 In addition, children of inmate parents are more likely to exhibit criminal behavior, especially when coupled with instances of poverty, parental substance abuse, physical and mental abuse, neglect, and being moved around to different caregivers during the course of their parent(s)' incarceration. n107

Even though many state department of correction agencies reported having programming for families of incarcerated parents, only half reported that the initiatives were available in all of their institutions. n108 Thirty-five percent of these agencies reported that their programming was primarily focused on aiding the children of incarcerated parents. n109 Of the agencies [*58] that reported in the 2002 Department of Justice survey, seven agencies developed family-oriented initiatives to satisfy state statutory requirements. n110

Inmates who maintain strong familial ties are less likely to "accept norms and behavior patterns of hardened criminals." n111 However, there are barriers to programming that strengthen these ties. For example, inmates have the right to refuse services. n112 In addition, service providers are sometimes self-helping, putting profit margins ahead of the best interests of inmate parents and their children. n113 Furthermore, some programs do not take into account different cultural views of the family and other differing cultural nuances that are evident in a prison setting. n114

Other practical problems exist in providing special programming for inmate mothers and their children. Special groups that provide assistance to inmate families have to work within the rules and parameters of the specific prisons and institutions they are seeking to assist. n115 Additionally, "some resentment may also occur when inmates receive services that are not available to ... the general public." n116

Despite the problems with providing special programming, it remains important to help female inmates become rehabilitated and reenter society in the smoothest possible way. Local facilities are likely to keep existing support systems intact, which in turn, is more likely to help incarcerated women overcome addiction and other mental and physical

health issues. n117 Strong family ties can help with rehabilitation if those bonds remain intact. n118 If emphasis on prison sentencing is punishment and confinement rather than rehabilitation, inmates are much more likely to relapse to a life of crime and delinquency when they are released from incarceration. n119 Finally, a decrease in incarceration and an increase in rehabilitation programs will help break the cycle of generational crime patterns because "children of inmates are five to six times more likely to end up" in jail. n120

IX. EXAMPLES IN STATUTORY INITIATIVES DESIGNED TO PROVIDE PROGRAMMING FOR STRENGTHENING FAMILIAL BONDS: TAKING A CUE FROM THE STATES

In 1994, California passed the Pregnant and Parenting Women's Alternative Sentencing Program Act. n121 The act provided funds to the Department of Corrections in order to develop and build facilities designed to accommodate the unique needs of pregnant women and incarcerated mothers with substance abuse problems. n122 The statute required each State Department of Justice agency to propose a plan that would create a "[twelve]-month residential program, plus a [twelve]-month outpatient transitional services program to be completed by participating women and children." n123

The program is designed to help women smoothly transition back into society as well as protect the children of inmates. The statute provides that participation and eligibility n124 will be granted based on whether it is "in the best interest of the [defendant's] children." n125 Women who have been implicated in dangerous crimes n126 or who have been sentenced to a prison term greater than thirty-six months will not be eligible for the program. n127

[*59] Other states have also taken steps to supplement incarceration with inmate programming. The Tennessee legislature passed a statute in 2006 that grants furloughs to inmates who meet certain qualifications. n128 The statute empowers the department of corrections to grant "furloughs to female inmates" in the adult corrections institution for "up to [six] months to permit" a mother to give birth and bond with her child. n129 In addition, the Maryland legislature granted leave to female inmates for the purpose of "participating in educational programs" and for "making personal or family visits." n130 The state of Maryland also passed a statute that requires the commissioner to "provide inmates with the opportunity to strengthen family and community relationships through extended family leave." n131

In addition to statutorily mandated programming, several state agencies reported in a 2001 survey that they provided additional support to inmates who have children under the age of eighteen. n132 Fourteen of the responding agencies reported that their department of corrections offered parenting programs for women and their children. n133 A few state agencies including "Illinois, Iowa, Mississippi, New Hampshire, and Oregon provide literacy programs designed to strengthen contact between parents and their young children." n134 Storybook Projects make audio recordings of an incarcerated mother reading a book for her child. n135 The tape is then sent to the child to give the child a feeling of connectedness with his or her absent mother. Anecdotes from participants and volunteers indicate that these programs have proven to be comforting to children, but also help parents by supplementing literacy and parenting classes. n136

X. RECOMMENDATIONS FOR FEDERAL STATUTORY REMEDIES AND POSSIBLE LITIGATION

There are few federal programs geared towards 1) helping mothers and their children maintain existing bonds, or 2) assisting inmate mothers in their development as responsible adults and good mothers for their children. One program that is offered through the Federal Bureau of Prisons, is "a community residential program called Mothers and Infants Nurturing Together (MINT) for women who are pregnant at the time of commitment [the program intends to] ... promote[] bonding and parenting skills for low-risk female inmates." n137 There are also inmate transitional programs through the Bureau of prisons that provide in-depth job training for inmates who will be released. n138 Some of the services provided are resume building help, mock job fairs and interviews and, when applicable, placement in halfway houses. n139 Legislation should be used to further institutionalize these types of programs, as well as require the Federal Bureau of Prisons to develop additional programming to assist mothers maintain ties with their children of all ages. In drafting this legislation, Congress should provide some discretion to prison officials to ensure that these programs can be tailored to meet the needs of inmates without interfering with the operation of the facility. For example, the legislation could include broad requirements such as a requirement to implement programming that will aid in familial relationship building, which would then [*60] allow prison officials to structure the details of the programs intended to comply with this requirement.

Litigation is another possible avenue for reform that may pave the way for more progressive treatment of incarcerated parents. This has been an affective approach in some respects. For example, California's Appellate Division determined that it was arbitrary to deny an incarcerated father the opportunity to visit with his children because he was incarcerated in a facility outside the fifty-mile geographical limitation imposed by court order. n140 The issue, whether visi-

tation services should be provided, was resolved based on whether providing the service would be detrimental to the child. n141 More specifically, the court held that geography alone cannot be the basis for a finding that visitation with the incarcerated parent would be detrimental to the child. n142

As with legislative remedies, judicial remedies must be balanced against the well-established rule that prisoners relinquish some rights when they are incarcerated. n143 Discretion is given to correctional agencies in order to account for disciplinary concerns unique to the prison setting. Consequently, successful federal litigation would most likely take the form of small steps. For example the first step might establish that whenever possible, a federal inmate must be placed in an institution closest to his last address. It is more plausible that a court would establish this precedent and would not initially find that inmates have a fundamental right to rear their children from a federal corrections institutions. This would be consistent with the Court's general view that courts are ill-equipped to fully account for and appropriately balance the various considerations that go into the operation of a correctional facility.

XI. CONCLUSION

There are many critics who are understandably hesitant to fight for the rights of female inmates' as mothers; these critics pose interesting questions. For example, should all inmates have the same access to their families? Applying the reasonableness standard currently employed by the Court, the answer would be no, and reasonably so. For obvious reasons, dangerous criminals serving time for lewd acts to their children, for example, should not have the right to maintain contact with their victims. More importantly, however, this standard could not be reasonably applied to deny this programming to prisoners who are good candidates for rehabilitation.

The family unit has been one of the most guarded entities in our society. The reach of these protections should not end simply because a mother and her children are separated by a prison gate. To avoid the costliness and piece-meal nature of litigation reform, Congress should pass legislation mandating the creation of programs to strengthen the bonds of female inmates and their children and should draw from the state statutes discussed above. Furthermore, Congress should consider alternatives to sentencing for women who are addicted to drugs and alcohol, which can help to ensure that incarcerated mothers will be better equipped to maintain these familial bonds upon her release.

At the same time, this is a problem of constitutional magnitude and is therefore within the court's power to address. Using the privacy rights imbedded in the First Amendment, courts should strike down policies that result in women serving sentences in prisons located hundreds of miles away from their homes. Doing so would force prison officials to protect an incarcerated mother's right to associate with her family as strongly as they protect her right to freely practice her religion.

Whatever your stance on this issue, one thing remains evident: we will never see a decrease in intergenerational crime if we do not strengthen the bonds between mothers and children. [*61] When mothers are sent back into society, and given custody of their children, we trust them with the skills and responsibility to make decisions regarding the care and wellbeing of other human beings. If we are willing to do so after a woman has completed a five-year sentence, why make it almost impossible for some of these families to maintain any level of substantial connection during the sentence? In addition, is it not in our best interest as a society to ensure that mothers receive the best rehabilitation possible, so that they are well equipped to handle the task? Activism breeds social change, and to deal with this problem, we must stop villainizing offenders and grouping them together no matter what their crime. We must accept a shift in our notions of crime and punishment to save familial bonds.

FOOTNOTES:

n1. Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 *Stan. L. & Pol'y Rev.* 133, 134 (1999) (footnotes omitted).

n2. *Id.* at 135-36.

n3. Philip Genty, *Dir. of Prisoners and Families Clinic, Columbia Univ. Sch. of Law, Keynote Address at the Women's Rights Law Reporter Symposium: Behind Bars: The Impact of Incarceration on Women and their Families* (Mar. 7, 2007).

n4. Acoca & Raeder, *supra* note 1, at 134 (citing Meda Chesney-Lind, *The Female Offender: Girls, Women and Crime* 149 (1997)).

n5. Christopher J. Mumola, U.S. Dep't of Justice, *Incarcerated Parents and Their Children* 6 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

n6. *Id.*

n7. Allen J. Beck & Paige M. Harrison, U.S. Dep't of Justice, *Prisoners in 2005*, at 1 (2006).

n8. *Id.* at 10.

n9. *Id.* This statistic is gender neutral, and has been rounded to whole numbers.

n10. Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in *Sentencing and Sanctions in Western Countries*, 222, 226-27 (Michael Tonry & Richard S. Frase eds., 2001). Beginning in the 1970s several states, and then federal courts in 1987, began enacting presumptive guidelines for certain types of felonies or misdemeanors. *Id.*

n11. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

n12. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). While this note will focus on the First Amendment, *Griswold* found privacy rights in many other provisions of the Constitution. See *id.* at 381. In *Griswold*, the Court noted that the Third Amendment protects privacy in the home "in its prohibition against the quartering of soldiers... without the consent of the owner." *Id.* Additionally, the Fourth Amendment protects individuals from unreasonable searches and seizures. *Id.* The Fifth Amendment protects individuals from self-incrimination. *Id.* Finally, the Ninth Amendment ensures that individuals have alternative rights, which are not explicitly named in the Constitution. *Id.*

n13. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O'Connor, J., plurality opinion). See also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents have the right to direct the upbringing and education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children") (citations omitted). More recently, the Court has upheld this idea. See e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

n14. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Statistics*, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Mar. 24, 2007).

n15. *Id.*

N16. Mumola, *supra* note 5, at 1.

n17. *Id.*

n18. *Id.*

n19. *Id.* at 4.

n20. *Id.* Approximately 52.9% of the children of incarcerated mothers lived with grandparents, whereas only 13.3% of children with incarcerated fathers lived with grandparents. *Id.*

n21. *Id.*

n22. Reitz, *supra* note 10, at 223. See also Marvin Frankel, *Lawlessness in Sentencing*, 41 *U. Cin. L. Rev.* 1, 4-6 (1972) (noting that at the time, sentencing judges had a wide range of discretion in sentencing, and therefore, there was no rule of law).

n23. Reitz, *supra* note 10, at 223. States that "modified their former indeterminate sentencing schemes to provide for greater specificity in authorized punishments" in the mid-1970s were Arizona, California, Colorado, Illinois, Indiana, and North Carolina. As of 1999, seventeen more states, as well as the federal courts, modified their sentencing structures. At that time, there were seven more states whose new schemes were pending and/or were under study. *Id.* at 224-27.

n24. *Id.* at 224.

n25. *Id.* In *Cunningham v. California*, the Supreme Court held that California's determinate sentencing law, which gave a trial judge the "authority to find the facts that expose a defendant to an elevated 'upper term' sentence," impermissibly violated the Federal Constitution's jury-trial guarantee. 127 *S. Ct.* 856, 860 (2007).

n26. Reitz, *supra* note 10, at 225. The creation of permanent sentencing commissions was the most widely used mode of sentencing reform in the 1990s, and as of 2001, about twenty jurisdictions, including the federal system, had created an administrative agency for the purpose of creating new sentencing policy. *Id.* The idea of creating sentencing commissions was the brain-child of Judge Marvin Frankel, who utilized legal principles to create a uniform sentencing structure. *Id.*

n27. *Id.* at 228.

n28. Acoca & Raeder, *supra* note 1, at 135.

n29. *Id.* Acoca and Raeder also point out that the majority of women serving time in federal prisons are non-violent criminals. *Id.* at 138.

n30. *Id.* at 135.

n31. *Id.*

n32. See *id.* at 141-43 (arguing that this perception is inaccurate).

n33. Acoca and Raeder point out that "mandatory minimums, state Truth-in-Sentencing provisions, and federal guideline sentences" have adversely affected female offenders. *Id.* Because women are normally non-violent criminals, it was traditionally considered unnecessary to use harsh sentences for their punishment. *Id.* at 134. Since new guidelines have been set using the combined statistics of violence in both male and female offenders, women's sentences have grown disproportionately in harshness when compared to their male counterparts. *Id.*

n34. Barry A. Krisberg & Carolyn Engel Temin, Nat'l Council on Crime and Delinquency, *The Plight of Children Whose Parents Are in Prison 3* (2001) (citing Leslie Acocha & James Austin, Nat'l Council on Crime and Delinquency, *The Crisis - The Women Offender Sentencing Study and Alternative Sentencing Recommendations Project: Women in Prison* (1996)), available at http://www.nccd-crc.org/nccd/pubs/children_of_incarcerated_parents_focus_10-01.pdf.

n35. Office of Nat'l Drug Control Policy, *Drug Facts*, <http://www.whitehousedrugpolicy.gov/drugfact/women/index.html> (last visited Mar. 16, 2007) (citing Lawrence A. Greenfeld & Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Women Offenders 9* (1999)).

n36. Dana Yates, *Summit Explores Women's Jail Reform*, *San Mateo Daily J.*, http://www.smdailyjournal.com/article_preview.php?id=71287 (last visited Mar 21, 2007).

n37. Press Release, Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health and Human Servs., *SAMHSA Releases Data on Costs of Treatment for Alcohol and Drug Abuse* (May 25, 2004), available at http://www.samhsa.gov/news/newsreleases/040525nr_adss.htm.

n38. See Office of Applied Studies, Substance Abuse and Mental Health Servs. Admin., *Alcohol and Drug Servs. Study Cost Study* (2004) available at <http://www.oas.samhsa.gov/2k4/costs/costs.htm>. In a recent survey, the Alcohol and Drug Services Information System reported that the average cost for admission to an outpatient methadone treatment program (the most expensive drug treatment program surveyed) was \$ 7,415; that amounts to \$ 12.65 per day. *Id.* at tbls.1 & 2.

n39. Krisberg & Temin, *supra* note 34, at 3 (citing Leslie Acocha & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, *11 Stan. L. & Pol'y Rev.* 133 (1999)).

n40. Victor L. Streib, *Death Penalty for Female Offenders*, *58 U. Cin. L. Rev.* 845, 875 (1990).

n41. Krisberg & Temin, *supra* note 34, at 3.

n42. Deborah W. Denno, *Gender, Crime and the Criminal Law Defenses*, *85 J. Crim. L. & Criminology* 80, 80-81 (1994).

n43. Jon Hurwitz & Shannon Smithy, *Gender Differences on Crime and Punishment*, *51 Pol. Res. Q.* 89, 90-92 (1998).

n44. See *id.* at 92-93. "Women are less accepting [than men] of violence on television, corporal punishment in schools, and casualties in wartime." *Id.* at 92. In addition, men are more likely to support war in general, including its funding, and the use of police brutality in controlling suspects. *Id.* at 92-93.

n45. Denno, *supra* note 42, at 94; see also Neil Alan Weiner, *Violent Criminal Careers and "Violent Career Criminals,"* in *Violent Crime, Violent Criminals* 35, 49, 56, 121 (Neil Alan Weiner & Marvin E. Wolfgang eds., 1989).

n46. Several states, including Connecticut, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, South Dakota, Texas, Vermont, West Virginia, and Wyoming, continue to use indeterminate sentencing structures. Some historians and legal theorists posit that the continued reliance on indeterminate sentencing structures in some states, despite their shortcomings and lack of regularity, is based in part on the idea that "if one is uncertain about the

best course to follow among contending theories of desert, incapacitation, deterrence, and, once in a while, rehabilitation, it may seem wise to keep all options open in every case." Reitz, *supra* note 10, at 231-33 (citations omitted).

n47. Mumola, *supra* note 5, at 5.

n48. *Id.*

n49. *Id.*

n50. Nat'l Inst. of Corr., U.S. Dep't of Justice, Services for Families of Prison Inmates 4 (2002), available at <http://www.nicic.org/pubs/2002/017272.pdf>.

n51. *Id.*

n52. *Id.* at 5.

n53. *Id.*

n54. *Id.*

n55. Nat'l Inst. of Corr., *supra* note 51, at 5.

n56. *Id.* at 10.

n57. *Id.*

n58. See *Md. Code Ann., Corr. Servs. § 3-305(a)*(LexisNexis 2007).

n59. Nat'l Inst. of Corr., *supra* note 51, at 5.

n60. California Senate Bill 1362 (introduced in 2002) called for overnight visits on prison grounds for the children of women prisoners serving life sentences, subject to the same rules that govern overnight visits by the children of other women prisoners. S.B. 1362, 2001-2002 Sess. (Cal. 2002). The bill passed both houses, but was then vetoed by the governor in November of 2002. Official California Legislative Information, http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1351-1400/sb_1362_bill_20021130_history.html (last visited Feb. 8, 2008).

n61. Mumola, *supra* note 5, at 5.

n62. *381 U.S. 479 (1965)*.

n63. See *Griswold*, *381 U.S. at 485-86*. In *Griswold* the Court stated that, "we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an associa-

tion that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Id.* at 486.

n64. *Id.* at 483. See also *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

n65. E.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

n66. See *Turner v. Safley*, 482 U.S. 78, 84 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

n67. *Id.*

n68. *Troxel v. Granville*, 530 U.S. 57, 65-67, 72 (2000) (citing numerous cases where the Court upheld the right of parents to rear their children and reaching the same conclusion in the case before the Court). While none of these cases dealt with incarcerated parents, there is nothing in these opinions to suggest that a parent's incarcerated status would warrant the creation of an exception to this fundamental right.

n69. *Turner*, 482 U.S. at 89.

n70. *Id.* at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)).

n71. 539 U.S. 126 (2003).

n72. *Id.*

n73. *Id.* at 134-35.

n74. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

n75. 530 U.S. at 67 (quoting *Wash. Rev. Code* § 26.10.160(3) (1996)) (emphasis omitted).

n76. *Id.* at 65.

n77. *Id.* at 72-73.

n78. In *Troxel*, the petitioners sought increased visitation rights with their granddaughters after their son passed away and the mother of the children informed the petitioners' that their visitation time would be reduced. *Id.* at 60-61.

n79. See generally *Turner v. Safley*, 482 U.S. 78, 89 (1987).

n80. Id.

n81. Id.

n82. Id. (citing *Pell v. Procunier*, 417 U.S. 817, 872 (1974)).

n83. Id. at 90.

n84. Id.

n85. Id. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)). See also *Johnson v. Avery*, 393 U.S. 483, 486 (1969) (noting that when a prison regulation or practice offends a fundamental constitutional guarantee, "the regulations may be invalidated").

n86. *Martinez*, 416 U.S. at 408.

n87. *Id.* at 409.

n88. See *supra* Part IV.

n89. See *Turner*, 482 U.S. at 87 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)) (weighed under a reasonableness standard, a rule "restricting inmates' receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores" passed constitutional muster); *Jones v. N.C. Prisoners' Union*, 433 U.S. 119 (1977) (holding that a regulation barring mass mailings from labor unions was "reasonable under the circumstances" and rationally related to the objectives of prison administration).

n90. U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement 5100.07, Change Notice 2, ch. 3, at 3 (1999), http://www.bop.gov/policy/progstat/5100_007.pdf [hereinafter Program Statement 5100.07].

n91. Id.

n92. The Security Designation System takes into account a variety of factors that appears on the Security Designation Form. There are separate forms for male and female prisoners, yet both forms are almost identical in factors they take into account. See *id.* ch. 5, at 1-17 and ch. 6, at 1-18.

n93. *Id.* ch. 3, at 3.

n94. See *id.* ch. 7, at 8.

n95. *Id.*

n96. This refers to inmates who have been convicted of or have a history of threatening behavior using the telephone, such as threats and/or stalking. PS 5100.07, *supra* note 90, ch. 7, at 5.

n97. *Id.* at 8.

n98. See Program Statement 5100.07, *supra* note 90, ch. 8, at 16.

n99. *Id.* See also, ch. 8, at 11-16 (discussing factors other than familial ties which affect female prison assignments).

n100. *Id.* ch. 10, at 20.

n101. *Id.*

n102. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1513 (1990).

n103. *Id.*

n104. *Id.*

n105. See *Griswold*, 381 *U.S.* at 484-85 (discussing the right to privacy inherent in the First Amendment's protection of association and finding "the present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

n106. H.R. 624, 2007 Leg., 24th Leg. (Haw. 2007), [http://www.capitol.hawaii.gov/sessioncurrent/Bills/HB624 HD2 .htm](http://www.capitol.hawaii.gov/sessioncurrent/Bills/HB624%20HD2.htm).

n107. J. Mark Eddy and John B. Reid, Ore. Social Learning Ctr., *The Antisocial Behavior of the Adolescent Children of Incarcerated Parents: A Developmental Perspective* (2006), available at <http://aspe.hhs.gov/hsp/prison2home02/eddy.htm#Linking>.

n108. Nat'l Inst. of Corr., *supra* note 51, at 2.

n109. *Id.*

n110. *Id.* at 4.

n111. Shirley R. Klein et al., *Inmate Family Functioning*, 46 *Int'l J. of Offender Therapy and Comp. Criminology* 95, 99 (2002).

n112. *Id.* at 100.

n113. *Id.*

n114. Acoca & Raeder, *supra* note 1, at 138.

n115. Klein et al., *supra* note 111, at 100.

n116. Id.

n117. See Angela Wolf, Nat'l Council on Crime and Delinquency, *Reducing the Incarceration of Women: Community-Based Alternatives 5* (2006), available at http://realcostofprisons.org/materials/WIP_Special_Report_Final.pdf

n118. Id.

n119. See *id.* at 1, 5.

n120. See *id.* at 4 (citing Barbara Bloom, *Incarcerated Mothers and Their Children: Maintaining Family Ties*, in *Female offenders: Meeting Needs of a Neglected Population 60* (Am. Corr. Ass'n ed., 1993)).

n121. *Cal. Penal Code § 1174* (West 2007).

n122. Acoca & Raeder, *supra* note 1, at 141-42.

n123. *Cal. Penal Code § 1174.2(b)(8)* (West 2007).

n124. According to the statute, eligible participants of the program include pregnant or parenting women with a history of substance abuse "who have one or more children under six years old." *Id.* § 1174.4(a)(1).

n125. *Id.* § 1174.4(b)(2).

n126. For a list of specific crimes, see *id.* § 1174.4(a)(2)(A)-(V).

n127. *Id.* § 1174.4(a)(3).

n128. See *Tenn. Code Ann. § 41-21-227* (2006).

n129. *Id.* § 41-21-227(h)(1).

n130. *Md. Code Ann., Corr. Servs. § 3-305(a)* (LexisNexis 2007).

n131. *Id.* § 3-303(b)(2).

n132. Nat'l Inst. of Corr., *supra* note 51, at 7.

n133. *Id.*

n134. *Id.*

n135. Lutheran Soc. Serv. of Ill., *How to (and Why) Do a Storybook Project 1-2*, available at <http://www.fcnetwork.org/storybook.pdf>.

n136. See *id.*

n137. Fed. Bureau of Prisons, *Inmate Matters: Female Offenders*, http://www.bop.gov/inmate_programs/female.jsp (last visited Feb. 9, 2008). "Women are eligible to enter the program if they are in their last three months of pregnancy, have less than five years remaining to serve on their sentence, and are eligible for furlough." *Id.* Furloughs are granted in marginal circumstances such as "to be present for a crisis in the immediate family," "to reestablish family and community ties," to be transferred to another prison, to receive medical treatment, etc. *Id.* Furloughs are granted when the inmate has demonstrated that he or she is not a flight risk, nor too dangerous to leave prison walls. U.S. Dep't of Justice, Fed. Bureau of prisons, Program Statement 5280.08, change *Notice 5280.08* (1998), http://www.bop.gov/policy/progstat/5280_008.pdf.

n138. Fed. Bureau of Prisons, *Inmate Matters: Release Preparation*, http://www.bop.gov/inmate_programs/release_emp.jsp (last visited Feb. 9, 2008).

n139. *Id.*

n140. *In re Jonathan M.*, 62 Cal. Rptr. 2d 208, 209 (Ct. App. 1997).

n141. *Id.*

n142. *Id.* at 209-10. Cf. *In re CJ*, 729 A.2d 89, 96-97 (Pa. Super. Ct. 1999) (finding that requiring the incarcerated parents children to be transported to the correctional facility would be a "grave threat" to the children based on the distance the children would have to travel).

n143. See *Turner*, 482 U.S. at 89 (holding that when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests). But see *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (holding that when balancing the hardships to a Native American inmate's religious practices with penological interests, the penological interests did not outweigh the Native American's right to practice his religion).

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