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# Do No Harm: An Analysis of the Legal and Social Consequences of Child Visitation Determinations for Incarcerated Perpetrators of Extreme Acts of Violence Against Women

Dana Harrington Conner
Widener University School of Law

# DO NO HARM: AN ANALYSIS OF THE LEGAL AND SOCIAL CONSEQUENCES OF CHILD VISITATION DETERMINATIONS FOR INCARCERATED PERPETRATORS OF EXTREME ACTS OF VIOLENCE AGAINST WOMEN


## DANA HARRINGTON CONNER*


> *When the events are natural disasters or "acts of God," those who bear witness sympathize readily with the victim. But when the traumatic events are of human design, those who bear witness are caught in the conflict between victim and perpetrator. It is morally impossible to remain neutral in this conflict. The bystander is forced to take sides.*[1]
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> *It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear and speak no evil. The victim, on the contrary, asks the bystander to share the burden of pain. The victim demands action, engagement, and remembering.*[2]

The right of an individual in the "care, custody, and management"[3] of his or her children is one of the interests that "form the core of our

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* Associate Professor of Law and Director of the Delaware Civil Clinic, Widener University School of Law.


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[1] JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 7 (1992).

[2] *Id.* at 7-8.

[3] Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate

definition of 'liberty.'"[4] The Supreme Court of the United States has held consistently that the liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment includes an individual's right to raise his or her children.[5] Directly connected to this liberty interest in rearing one's children is a parent's freedom from government interference. Legal scholars and students of the law have expanded upon this reasoning to argue in support of incarcerated parents' interest in a continuing relationship with their children—specifically, an entitlement to prison visitation.[6] Unlike the recognized parental liberty right in rearing one's child, a parent's right to visitation remains the subject of open debate.[7]

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simply because they have not been model parents or have lost temporary custody of their child to the State.").

[4] Michael H. v. Gerald D., 491 U.S. 110, 139 (1989) (Brennan, J., dissenting); *see also Santosky*, 455 U.S. at 753.

[5] Troxel v. Granville, 530 U.S. 57, 65 (2000). The Court, in addressing the issue of grandparent visitation, described the fundamental rights of parents:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, . . . we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, . . . we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." . . . We returned to the subject in *Prince v. Massachusetts*, . . . and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ."

*Id.* at 65-66 (citations omitted). The Court referred to a number of other decisions supporting the constitutional protections afforded to parents. *Id.* at 66; *see* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J. R., 442 U.S. 584, 602 (1979); *Santosky*, 455 U.S. at 753.

[6] Although some have suggested that prison visitation is a parental right, this Article argues that a parent's desire to exercise prison visitation is one of many interests, not rights, to be considered; an interest which must yield in some cases to the protection of children and battered women. For a general consideration of the rights and interests of incarcerated parents to visit with their children see *infra* Part III.

[7] *See* David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1480 (2006) (maintaining that "[s]ome judges have recognized, at least in passing, a fundamental right of non-custodial parents to some visitation with their children—so that a court's complete denial of access would trigger constitutional scrutiny as

Courts have found that imprisonment alone is an insufficient basis upon which to deny a parent continued contact with his or her child.[8] At the same time, courts also suggest that incarceration does not create an automatic right to visitation.[9] While research suggests prison visitation can benefit parent-child bonding, which is essential to the healthy development of children,[10] it also indicates that the nature of the parent-child bond is a significant factor to be considered in determining visitation rights.[11]

Childhood trauma associated with exposure to severe acts of violence against a parent[12] and the way that exposure shapes bonding

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tantamount to a termination of parental rights"); Margaret Tortorella, *When Supervised Visitation Is in the Best Interest of the Child*, 30 FAM. L.Q. 199, 201, 210 (1996) (considering the tension between a parent's right to visitation and the obligation to protect children).

[8] *E.g.*, Trombley v. Trombley, 754 N.Y.S.2d 100 (App. Div. 2003); Beverly v. Bredice, 751 N.Y.S.2d 79, 80 (App. Div. 2002); Evelyn "ZZ" v. Randy "K", 692 N.Y.S.2d 804, 806 (App. Div. 1999); Lonobile v. Betkowski, 689 N.Y.S.2d 790, 790 (App. Div. 1999); Buffin v. Mosley, 695 N.Y.S.2d 442, 442 (App. Div. 1999); Rhynes v. Rhynes, 662 N.Y.S.2d 667, 667 (App. Div. 1997).

[9] *E.g.*, Easley v. Sims, 719 N.E.2d 1166, 1167 (Ill. App. Ct. 1999); Moore v. Moore, No. 04CAA111, 2003 WL 1924346, at *1 (Ohio Ct. App. 5 Dist. Aug. 11, 2005) (suggesting incarceration is an extraordinary circumstance which effects the visitation interests of the parent seeking contact); Winter v. Charles, 608 A.2d 731 (Del. 1992) (stating although visitation is an important right, it is not absolute); Casper v. Casper, 254 N.W.2d 407, 409 (Neb. 1977) (upholding the trial court's denial of prison visitation because ordering visitation could be detrimental to a stable home environment).

[10] *See* Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 YALE L.J. 1408, 1414, 1414 n.23 (1978) (considering Yarrow, *Separation from Parents During Early Childhood*, in 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 89 (1964)). *See generally* KATHERINE GABEL & DENISE JOHNSTON, CHILDREN OF INCARCERATED PARENTS (1995). Gabel and Johnston maintain there is "cumulative evidence" to suggest "the frequency, nature and duration of parent-child contacts following separation play a critical role in determining a child's future development." GABEL & JOHNSTON, *supra*, at 141. According to Gabel and Johnston, in no other situation is this more true than for children of incarcerated parents given the "abrupt and forced" nature of such separations. GABEL & JOHNSTON, *supra*.

[11] *See infra* notes 265-67 and accompanying text on traumatic bonding. This Article does not suggest that all incarcerated parents should be denied visitation with their children. In fact, prison visitation can be advantageous to both parents and children, depending on the parent-child relationship and the nature of the crime or crimes committed by the incarcerated parent.

[12] *See* Carmille A. v. David A., 615 N.Y.S.2d 584, 589 n.2 (Fam. Ct. 1994) (quoting the legislative authority for the Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 1994 N.Y. Laws 2704, and finding "[t]he corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly

complicates this issue further.[13] Regrettably, legal scholars have given little consideration to the nature of the crime for which a parent is incarcerated.[14] Likewise, they have failed to consider how intimate partner violence affects parent-child bonding and ultimately, prison visitation determinations.[15] In addition, a battered woman's right against state interference in the management of her children has garnered little attention in the debate over the visitation rights of incarcerated fathers.[16]

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and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves").

[13] *See infra* notes 265-67 and accompanying text.

[14] Most legal scholars would agree that a parent's act of physical violence or sexual abuse against a child clearly diminishes an incarcerated parent's justification for visitation. It is unclear, however, how acts of violence against the other parent, even those of an extreme nature which are witnessed by the child, should be perceived, as most scholarship on prison visitation is silent on the issue. *See* Note, *On Prisoners and Parenting*, *supra* note 10, at 1417-18. In addition, survivor accountability for child exposure to the violent acts committed by batterers is often misapplied in cases of intimate partner violence. *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 207-11 (E.D.N.Y. 2002) (identifying New York City's Administration for Children's Services' tendency to remove children from the abused mothers' custody on grounds that those mothers had been neglectful by exposing their children to the abusive acts of their batterers).

[15] *See* Dana Lowy & Mary Redfield, *Criminal Histories and Parental Custody and Visitation Rights*, L.A. L., Oct. 26, 2003, at 25 (addressing legislation specific to California that restricts the custody and visitation rights of individuals convicted of certain crimes); Jennifer Emily Sims, Note, *"Lizzie's Law": Must We Choose Between the Rights of the Parent and Protecting the Child?*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 245, 274 (1999) (considering laws that prohibit perpetrators of domestic homicide from visiting with their children and arguing for the right to a "fair hearing" for those individuals); Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737 (2000) (suggesting that presumptions against custody for individuals convicted of certain crimes is intended, not for the protection of children, but instead to negatively stigmatize offenders); Dance M. Kowalczyk, Note, *Lizzie's Law: Healing the Scars of Domestic Murder—An Emerging National Model*, 64 BROOK. L. REV. 1241 (1998) (considering the implications of Lizzie's Law and similar legislation on the visitation rights of perpetrators of intimate partner homicide); Hillary R. Stein, Note, *Massachusetts' "Lizzie's Law": Protection for Children or Violation of Parent's Constitutional Rights?*, 78 B.U. L. REV. 1547 (1998) (addressing the constitutional implications of Lizzie's Law and proposes termination of parent rights and parental unfitness allegations as alternative methods of preventing perpetrators of intimate partner homicide from obtaining visitation rights).

[16] Specifically, the question relates to the rights of a battered parent against state interference requiring traumatized children to visit with incarcerated perpetrators of extreme acts of violence. For a general discussion of the constitutional rights of non-custodial parents weighed against the rights of custodial parents, see Meyer, *supra* note 7, at 1475 (arguing

The presumption that parents "will make a child's interest 'their basic concern,'"[17] does not apply to batterers because they tend to manipulate both their victims and the legal system in forcing visitation contrary to the best interest of their children. If a parent's desire to visit with his or her child has little to do with the child's welfare, courts can no longer view this parent as a protector of the child vested with standard privileges.

Unlike with other incarcerated parents, in the case of the batterer father, the nature of his conviction and his distinct characteristics directly relate to his ability to spend time with his children without doing them more harm. Accordingly, courts have a unique opportunity to stop the violence in clear cases involving highly destructive and dangerous role models. In light of these concerns, this Article examines current guidelines that courts use to assess the appropriateness of prison visitation generally and suggests a specialized test for incarcerated batterers.[18]

Accepting the premise that parents have a liberty interest in the "care, custody, and control" of their children, we can move to the crucial issue: that no right is absolute.[19] As a result, this Article argues that violence

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that "the courts' reluctance to credit seriously the constitutional rights of non-custodial parents ultimately says something of broader significance about the constitutional rights of family privacy generally, including the rights of custodial parents and parents in intact or 'unitary' families").

[17] Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 109 (2002) (citing the United Nations Convention on the Rights of the Child, G.A. Res 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)).

[18] *See infra* Part V, which presents four factors for consideration when assessing prison visitation requests for perpetrators of extreme acts of violence against women: (A) nature of the crime(s); (B) parent-child relationships; (C) trauma to the child; and (D) supervision and transportation related issues. The four factor model presented herein is a modified version of the prison visitation tests provided by the Supreme Court of Oklahoma in Harmon v. Harmon, 943 P.2d 599, 605 (Okla. 1997), and the Superior Court of Pennsylvania in Etter v. Rose, 684 A.2d 1092, 1093 (Pa. Super. Ct. 1996). Although neither case involves acts of violence against women, these cases present rare judicial opinions providing sound reasoning upon which to begin the analysis of prison visitation determinations for perpetrators of extreme acts of violence to women.

[19] Despite the inherent right of parents to raise their children, the Supreme Court has found there are limits to this right. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Justice Rutledge, in his opinion, maintained that although the care, custody, and control of the child lie first with the parents, such rights are not "beyond limitation." *Id.* Accordingly, Rutledge suggests that the state has the power to limit such rights when child welfare is at issue. *Id.* at 166-67; *see also* Stanley v. Illinois, 405 U.S. 645, 652 (1972) ("We do not question the assertion that neglectful parents may be separated from their children.");

described by Bonita C. Meyersfield as "extreme acts of violence" against women has legal and social consequences beyond the criminal act.[20] The result in some cases are multiple harms that place children at risk of short-term and long-term negative effects, foreseeable to the batterer, the legal system, and society as a whole.[21] The consequences for causing foreseeable injury to secondary victims like children may include criminal charges and, when necessary, diminished privileges.[22] Some batterers are so dangerous

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Scott C. v. Marietta C., 593 N.Y.S.2d 139, 141 (Fam. Ct. 1992) (advising that although a parent's visitation "right is not forfeited by virtue of a parent's incarceration," "[t]he right of visitation . . . is not absolute"); Zakrzewski v. Fox, 87 F.3d 1011, 1014 (8th Cir. 1996); Wilkins v. Ferguson, 928 A.2d 655, 667 (D.C. 2007) (holding that a parent's right to visitation generally is not absolute). *But see* Meyer, *supra* note 7, at 1480 (suggesting that although the constitutional status of non-custodial parents is in doubt, a complete denial of access to one's children would likely trigger constitutional scrutiny).

[20] This Article will focus on "extreme acts" of intimate partner violence against women only. Extreme acts include the rape, beating, burning, stabbing, shooting, strangulation, or physical torture of one parent by the other. *See* Bonita C. Meyersfield, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 374 (2003). Meyersfield places domestic violence into two categories. The first group is defined as "domestic violence," which she explains includes "shoving, pushing or verbal denigration," and she defines the second category as "private torture," which includes "battering, breaking bones, burning, raping and torturing," what she considers to be "extreme acts of domestic violence." *Id.* Although much of the information contained in this Article can be applied to homicide cases, this Article will not focus on intimate partner homicide or the visitation rights of incarcerated parents subsequent to the killing. For a consideration of custody and visitation in the context of intimate partner homicide, see Lillian Wan, Comment, *Parents Killing Parents: Creating a Presumption of Unfitness*, 63 ALB. L. REV. 333 (1999); Holly C. Wallace, Note, *Visitation Rights of a Parent Convicted of the First-Degree Murder of the Other Parent: An Analysis of Lizzie's Law*, 37 BRANDEIS L.J. 233 (1998-99). For a discussion of the significance of employing specific terminology, or intimate partner violence and visitation determinations as gendered phenomena, see *infra* Part I.

[21] These multiple harms extend well beyond the act of endangering the welfare of a child, resulting in some cases in both short and long-term psychological damage to the child, discussed *infra* Part V.C.

[22] Some legal scholars maintain that abuse to the mother is abuse to the child. *See* Pauline Quirion et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 512 (1997) ("A court should treat a battered woman's child as if the abuser had directly battered the child . . . 'such abuse should be considered misconduct toward the child warranting restriction on visitation.'" (quoting MASS. GENDER BIAS COMM., REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 73 (1989))).

that they must forfeit visitation with their children,[23] while in other cases batterers and children may benefit from therapeutic visitation.[24]

Some may view such restrictions on a parent's interest in visitation with his child as a punishment.[25] The remedy, however, must be understood for its intended purpose—to act as a protective measure for a child who may be suffering from psychological trauma.[26] The debate should center on what is in the best interest of the child, not what is best for the incarcerated parent.[27]

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[23] Similar outcomes are found in cases of parental unfitness, where rights are terminated or diminished. Although termination of parental rights (TPR) of a perpetrator may be necessary in some cases of extreme acts of domestic violence, that discussion is beyond the scope of this Article. This Article focuses on remedies that may be used in place of TPR given the realities of our legal system, lack of statutory mandates, and courts' reluctance to utilize such measures. For a consideration of terminating the parental rights of perpetrators of domestic violence in general, see Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757 (1996).

[24] For a general discussion of therapeutic visitation, see GABEL & JOHNSTON, *supra* note 10, at 202.

[25] *See* Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 220 (2002) (considering Robert J. Levy's position, in LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 112 (1998), that "the best interest of children are not served by punishing abusive fathers"). *Contra* Pollard v. Akhdary, No. 03A01-9503-CV-00109, 1996 WL 196525, at *8 (Tenn. Ct. App. Apr. 24, 1996) (explaining that "visitation should not be made to punish or reward parents").

[26] S*ee* Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 34 (1981) (addressing the right to counsel in termination of parental rights proceedings). In a concurring opinion, Chief Justice Burger explained that the purpose of a termination of parental rights proceeding is "protective" not "punitive." As a result, the court's goal is to protect the best interest of the child, not to punish the parent. *Id.* (Burger, C.J., concurring). Similarly, in a visitation proceeding, the court's role as protector of the child should not be confused with an erroneous conclusion that the court's actions are intended to punish the parent for his or her criminal behavior. Although the parent's bad actions may be the cause of the deprivation, the court's denial of visitation is not a punitive measure; it is a protective action. Criminal proceedings are the forum for punishment when a law is violated. The visitation proceeding should act as a protective measure to ensure the safety of the child.

[27] The phrase "best interest" is often used to indicate the standard applied by courts in making custody and visitation determinations. In the context of the above assertion, the term is used in its broader sense to signify what is "best" for the child or children at issue. *See* John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's* Painter v. Bannister *Jurisprudence*, 16 NOVA L. REV. 621, 622 (1992) (maintaining that although employing a best interest analysis may require a focus on many factors, "the aspirational position of our legal system is that the child's welfare is always paramount"); Joseph McGill

The best interest of the child may be an elusive goal for a system ill-informed about intimate partner violence and childhood trauma. For many judges, the link between intimate partner violence and harm to children is not clear.[28] As a result, judicial visitation determinations made to benefit incarcerated batterers may further traumatize and impede the recovery of children exposed to extreme acts of violence against their mothers. To the extent that future injury is foreseeable, our system of justice must properly respond to the needs of children.[29] Although exposure to extreme acts of violence will not harm all children,[30] by acknowledging that

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et al., *Visitation and Domestic Violence: A Clinical Model of Family Assessment and Access Planning*, 37 FAM. & CONCILIATION CTS. REV. 315, 324 (1999) ("Moreover, 'the well-being of the children must be the primary consideration over and above the parents' right to visitation.'" (citation omitted)). See discussion of the "best interest" standard used by courts *infra* Part IV.

[28] MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 150-51 (1999). Mason explains:

> Some judges believe a parent can be kind and loving toward his child even if brutal toward his spouse . . . . Can a father be kind and loving toward his children yet violent toward their mother? This may be possible for some, but many of these fathers abuse their children as well . . . . [R]esearch conducted on a large national sample found that at least 50 percent of batterers who assault their wives frequently also physically injure their children.

*Id*. *See also* Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 253 (1999) ("Worse still, many judges simply refuse to connect violence against a parent with damage to a child; if the child hasn't been physically harmed by the batterer, judges fail to see why family violence should impact upon custody and visitation decisions."); Quirion et al., *supra* note 22, at 501.

[29] *See* Goodmark, *supra* note 28, at 274-75 (explaining that "[i]ndividual judges are the weak link in the system designed to protect children from violent homes in custody and visitation decisions"); Haddix, *supra* note 23, at 800 (maintaining that "[s]tates have an important governmental interest in protecting children from physical and emotional harm").

[30] E-mail from Leigh Goodmark, Associate Professor, University of Baltimore School of Law to Dana Harrington Conner (Aug. 14, 2007) (on file with the author) (referring to Jeff Edleson's work showing that some children are not negatively affected by exposure to domestic violence); *see also* Jeffrey L. Edleson, *Studying the Co-Occurrence of Child Maltreatment and Domestic Violence*, *in* DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN 104 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001) (referring to Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839, 839-70 (1999)). According to Edleson:

exposure places children in jeopardy,[31] our system can begin to identify those children suffering from trauma and respond to their needs.[32]

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> [R]esearch shows that some children who witness violence exhibit few, if any, developmental problems and that associated problems are frequently moderated by a variety of factors. A careful assessment of the harm that results from witnessing violence and of protective factors existing in the child's environment may reveal that witnessing, at least in some cases, does not result in maltreatment of a child.

Edleson, *supra*, at 104.

[31] Although beyond the scope of this article, our system often incorrectly holds battered women responsible for the dangerous behavior of batterers. For a consideration of this issues *see* Cindy S. Lederman et al., *The Nexis Between Child Maltreatment and Domestic Violence*, 2 J. CTR. FOR FAMS., CHILD. & CTS. 129, 133 (2000).

[32] Although not addressed herein, other acts of violence against women are relevant to visitation, as well as the broader context of violence against women generally. It is important to understand that the category of "extreme acts" of intimate partner violence should be considered only a small subset of the larger picture of what Nancy Ver Steegh describes as "intimate terrorism." Intimate terrorism cases lacking extreme acts of violence require different approaches and remedies not addressed in this Article. *See* Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005). Ver Steegh categorizes domestic violence not by the abusive act itself but rather by a batterer's use of power and control to terrorize the other partner, distinguishing "intimate terrorism" from "situational couple violence." *Id.* at 1384. According to Ver Steegh, in intimate terrorism:

> [V]iolence is one tactic in a larger pattern of power and control. Control is exerted by making threats, wielding economic control, applying privilege and punishment, manipulating and threatening children, isolating the victim, and inflicting emotional and sexual abuse. As compared with other types of violence, intimate terrorism involves more frequent per couple incidents, more severe violence, and results in more serious injury.

*Id.* at 1387-88. Situational couple violence on the other hand, "does not involve a larger pattern of power and control" and is viewed as a marital dispute that results in an isolated violent incident. *Id.* at 1394; *see also* McGill et al., *supra* note 27, at 316 (providing assessment tools to determine the type and extent of violence, as well as how intimate partner violence influences parents and their children); ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 65 (2000). According to Schneider:

> The definitions of battering that social scientists traditionally have adopted focus on physical abuse, and for strategic purposes battered women's activists have often adopted these definitions as well. A battered woman is a woman who is hit or hurt repeatedly, or against whom weapons are used; definitions of battering may involve the amount, type, frequency, or intensity of the hitting, or link hitting with rape or other forms of sexual abuse, or with other types of violence.

## I. DEFINING THE ISSUES

> *Various forms of legal process define the harm of battering differently and convey particular messages about its social impact.*[33]

According to the Bureau of Justice Statistics, in 1999, state and federal prisons housed an estimated 721,500 parents.[34] Fathers were more likely than mothers to be violent offenders.[35] In state prisons, forty-five percent of fathers were incarcerated as a result of a violent offense, whereas only twenty-six percent of mothers were incarcerated as a result of committing a violent crime. [36] "Almost half—forty-six percent—of parents in state prison were violent recidivists (repeat offenders with either a current or past violent offense)."[37] The Bureau reports that incarcerated parents in state prisons engaged in other dangerous behavior associated with alcohol use, namely arguments with family members and physical violence.[38] In local jails the situation is worse. The Bureau of Justice Statistics estimates that approximately "1 in 4 convicted violent offenders confined in local jails had committed their crime against an intimate [partner]."[39] One study in particular indicated that "[w]omen in the United States are more likely to be victimized, through assault, battery, rape, or homicide, by a current or former male partner than by all other assailants

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SCHNEIDER, *supra*, at 65. Recognizing Schneider's posture, one must balance the necessity to focus on a narrow issue, protect the interests of incarcerated survivors, and ensure all women who have suffered violence in their lives, whatever the form, are treated justly.

[33] SCHNEIDER, *supra* note 32, at 46.

[34] BUREAU OF JUSTICE STATISTICS, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000).

[35] *Id.* at 6.

[36] *Id.*

[37] *Id.* at 7.

[38] *Id.* at 8 ("[P]arents in State prison reported engaging in troubled behaviors associated with prior alcohol abuse. About 48% of parents said that they had driven drunk in the past, 42% reported arguments with family members and friends while drinking, and 39% had alcohol-related physical fights.").

[39] BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, INTIMATE VICTIMIZERS, *available at* http://www.ojp.usdoj.gov/bjs/crimoff.htm (last visited Aug. 8, 2007).

combined."[40] Additionally, experts estimate that approximately ten million children each year witness serious acts of violence committed predominantly against their mothers.[41]

To discuss intelligently an incarcerated male batterer's legal interests in contact with his children,[42] one must clearly define the individuals in need of protection and the acts at issue.[43] With regard to what has traditionally been called "domestic violence," Elizabeth M. Schneider suggests, at a most basic level of discussion, that how we define the terms and the values we attach to names are particularly important.[44] Many feminists and legal scholars have moved away from the term "domestic violence" to describe the acts of abuse that occur within the context of an intimate relationship and use "intimate partner violence" (IPV) as an alternative term to describe the abuse perpetrated by one adult against another within an intimate relationship. For some, the term "IPV" may also fail to capture the intent and meaning of the violence as it occurs in the family unit. By its characterization, IPV focuses on the violence in the adult relationship, possibly to the exclusion of the children involved. However,

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[40] Quirion et al., *supra* note 22, at 504-05 (citing Council on Ethics and Judicial Affairs, *Physicians and Domestic Violence: Ethical Considerations*, 267 JAMA 3190 (1992)).

[41] Dorothy Lemmey et al., *Severity of Violence Against Women Correlates with Behavioral Problems in Their Children*, 27 PEDIATRIC NURSING 265 (2001) (explaining it is estimated "10 million children witness the punching, kicking, stabbing, strangling, or shooting of the child's parent, most commonly their mother"). *But cf.* Ernest N. Jouriles et al., *Issues and Controversies in Documenting the Prevalence of Children's Exposure to Domestic Violence*, *in* DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN 22 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001). Although experts agree that many children are exposed to domestic violence, there has been some debate about how to quantify that number. Jouriles et al., *supra*. Moreover, experts do not necessarily agree that the problem "is truly at epidemic proportions, as might be suggested from the rough estimates" available. Jouriles et al., *supra*, at 26.

[42] The male pronoun will be used to describe the incarcerated perpetrator of extreme acts of violence, given overwhelming evidence that the vast majority of extreme acts of intimate partner violence are committed by men against women. *See, e.g.*, Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191, 192 n.3 (2006) ("Ninety-three percent of incarcerated parents are male."); BUREAU OF JUSTICE STATISTICS, NCJ 149259, VIOLENCE BETWEEN INTIMATES 2 (1994) (providing that ninety to ninety-five percent of all victims of domestic violence are women).

[43] SCHNEIDER, *supra* note 32, at 46 (maintaining that "naming is a form of claiming—claiming identity, claiming experience, claiming rights").

[44] *Id.*

when intimate partner violence occurs in the context of the family unit, it is violence to the family as a whole.[45]

Nevertheless, there are valid reasons why feminists may want to discard the terms "domestic" or "family violence."[46] As Schneider suggests, these long-standing terms devalue the many surrounding issues.[47] Historically, American society has treated domestic and family violence as private matters.[48] The answer, however, may be a simple one. Call it what it

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[45] When referring to the family unit, this Article defines "the family" as either a heterosexual or homosexual couple residing with a child of one or both parties through birth, adoption or other legal guardianship.

[46] SCHNEIDER, *supra* note 32, at 20 (quoting ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO PRESENT 182 (1987)). Schneider reasons that the term "domestic disturbance," which police used until the mid-1970s, carried a depoliticized anti-feminist meaning. *Id.*

[47] *Id.* at 48. According to Schneider:

> This use of deliberate statist imagery highlights the degree to which intimate violence is understood within a broader public-private dichotomy, and challenges this dichotomy to describe the "personal" and "domestic" problem of intimate violence as a problem of public dimension—a harm that we recognize as a serious public, national, and indeed international problem. The seriousness of the loss of freedom, liberty, basic human rights, privacy, and autonomy that results from woman abuse may seem invisible in the case of an individual family and relationship.

*Id.*

[48] *Id.* at 13 (explaining that although nineteenth century English and U.S. authorities rejected a husband's right at common law to corporally punish his wife, the American legal system still treated violence that occurred in the home differently from other cases involving physical violence); *see also* Michelle Madden Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 312 (2006); Molly Butler Bailey, *Improving the Sentencing of Domestic Violence Offenders in Maine: A Proposal to Prohibit Anger Management Therapy*, 21 ME. B.J. 140, 145 (2006); Caroline Dettmer, Comment, *Increased Sentencing for Repeat Offenders of Domestic Violence in Ohio: Will This End the Suffering?*, 73 U. CIN. L. REV. 705, 712 (2004) (citing Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 268 (1987)). Even today, the term domestic violence may covey a new and different message for some individuals. Advocates' hard work to educate the legal system that the focus should be on the battered woman may be to her detriment, as well as the detriment of her children. In 2005, the American Bar Association published a judicial checklist tear-out sheet as a guide "to help judges protect children in cases with domestic violence." Margaret Drew, *Judicial Checklist*, 39 FAM. L.Q. 1, 5 (2005). The tear-out includes a definition of domestic violence that suggests that it "does not typically include child abuse, child-to-parent violence, or sibling violence, which are

is: violence to women and children. As a result, this Article will use the terms "domestic violence," "family violence," and "intimate partner violence" in moderation; the term "violence to women" will serve to signify abuse to women in intimate partner relationships involving children.[49]

This discussion examines what Bonita C. Meyersfield describes as "extreme violence" including, but not limited to, rape, attempted rape, sexual assault, burning, stabbing, shooting, strangulation, physical torture, intentionally causing "substantial bodily" injury,[50] or threat of serious physical harm perpetrated by one parent against the other parent or household member.[51]

The intent and focus of this analysis is on individuals who commit intentional acts of violence to harm another—not acts of self-protection.[52] The crimes considered are narrowly defined, focusing on perpetrators to the exclusion of incarcerated survivors who seek access to their children. This Article proposes solutions to respond to the trauma that mothers and

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forms of 'family violence.'" *Id.* Maintaining domestic violence does not include abuse to the children may confuse and mislead some individuals.

[49] Another term which gives justice to the issue is "woman abuse," which Schneider uses throughout *Battered Women & Feminist Lawmaking*. *See generally* SCHNEIDER, *supra* note 32.

[50] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2003). The term "substantial bodily harm" is borrowed from the Model Rules because it best describes violence of an extreme nature intended to harm and not committed in an effort to defend.

[51] Meyersfield, *supra* note 20, at 374.

[52] The traditional term "self-defense" is not used in the context of extreme acts of violence given its failure to recognize the unique aspects of self-protection as they relate to victims of intimate partner violence. *See generally* Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome (Part II)*, 1995 WIS. L. REV. 1003, 1068-78; *cf.* BLACK'S LAW DICTIONARY 1390 (8th ed. 2004) (defining self-defense as "[t]he use of force to protect oneself, one's family, or one's property from a real or threatened attack. Generally, a person is justified in using a reasonable amount of force in self-defense if he or she believes that the danger of bodily harm is imminent and the force is necessary to avoid this danger"). Schneider explains the relationship between gender and understandings of self defense:

> Many courts have now accepted the view that there is gender bias in the law of self-defense. Yet ongoing legal work in this area teaches us new lessons. Judges have considerable difficulty in genuinely "hearing" and taking in women's experiences, and consequently in modifying the law to take them into account.

SCHNEIDER, *supra* note 32, at 33.

children suffer as a result of violence committed by batterers.[53] Initiating the discussion, however, presents particularized difficulties for battered women. Inevitably, solutions restricting batterers' privileges may target the precise class of individuals that need protection.[54] The application of relief against the intended beneficiary in this context exposes our society's predisposition to blame mothers while failing to hold men accountable for their actions.[55]

In the context of this Article, "harm to the child or children" refers to the effects that are caused by violence perpetrated by one parent upon the other adult parent or household member.[56] This Article views exposure in its broadest context, and not solely in terms of witnessing violent acts.[57] Merely living in a violent home is harmful to children in many ways.[58] Children do not have to witness intimate partner violence with their eyes to be injured. Children hear the violence with their ears, they feel it in their hearts, they touch it, they taste it, and they live it day after day, even if they

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[53] *See infra* Part VI.

[54] Based on a conversation with Professor Marina Angel, Temple Law School, at the Fourteenth Annual CLE Conference, Update for Feminist Law Professors (Feb. 3, 2007). Angel expresses valid concern that prison visitation restrictions could be used against incarcerated, abused mothers. This certainly is one of many difficulties of proposing draft legislation or model tests to solve a gendered problem.

[55] *Cf.* Rebecca Ann Schernitzki, *What Kind of Mother Are You? The Relationship Between Motherhood, Battered Women Syndrome and Missouri Law*, 56 J. MO. B. 50, 51 (2000) (suggesting a double standard for mothers and fathers); Lynn Hacht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397, 401 (1993) (identifying the male experience as a contributing factor for gender bias in the law).

[56] Direct physical abuse to children is beyond the scope of this Article.

[57] The term "exposure" to violence will be used in place of "witnessing" violence to capture the scope of the problem and true influence intimate partner violence has on children. *See* Peter G. Jaffe et al., *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, Sept. 7, 2005, at 14, http://www.hspc.org/policy_forums/pdf/JaffePaper_JusticeReport_Sept05.pdf (defining exposure to violence).

[58] *See* Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 221, 225-35 (1994) (explaining that "[c]hildren suffer emotional and psychological harm not only when they are victims of abuse, but also when they witness the abuse of one parent by another and when they live in a violent home without witnessing abuse").

never see one act of physical violence.[59] According to Leigh Goodmark, the aftermath of the violence may be just as damaging for many children because they see the injuries and destruction, they attempt to console their traumatized mothers, and they either continue to live in an atmosphere of terror and dysfunction, or with fear of the unknown.[60] In addition, Lundy Bancroft and Jay G. Silverman suggest that the child's exposure to the batterer himself, notwithstanding the violence, is the critical factor in the trauma the child experiences.[61]

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[59] *See* Goodmark, *supra* note 28, at 244 (defining "witnessing violence" in the broadest of terms). Goodmark suggests that children witness intimate partner violence not only with their eyes:

> Witnessing includes not only what a child sees during an actual violent event, but also what the child hears during the event, what the child experiences as part of the event, and what the child sees during the aftermath of the event . . . . They hear their mothers screaming or crying or begging . . . . [They] see[] a parent's battered and bloodied face, watch[] as a parent is interviewed or apprehended by the police, mov[e] with a parent to a shelter to escape further violence. All of these forms of witnessing can have the same detrimental impact on children as actually watching an event take place. In some cases, the impact may be more damaging; . . . they may imagine scenarios that are scarier and more violent than the events that actually occur.

*Id.*; *see also* Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: the Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 82 (2001) (explaining that children are "closer" to the violence than we understand).

[60] Goodmark, *supra* note 28, at 244.

[61] *See generally* LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT (2002). Bancroft and Silverman base their observations and theories about domestic violence on over twenty years of clinical experience working with batterers. *Id.* at 2-3. They explain the problem of childhood exposure to intimate partner violence as follows:

> We believe therefore that the psychological distress observed in children exposed to domestic violence results not only from their witnessing of periodic acts of violence but also from exposure to a batterer, and to his parenting style, in everyday life; in fact, we believe that the phrase "children exposed to batterers" is often more accurate than the current phrase "children exposed to domestic violence," for reasons that will become clear in the pages ahead. For closely related reasons, we find that a batterer's parenting cannot be assessed separately from his entire pattern of abusive behaviors, all of which have implications for his children.

*Id.* at 2.

Whether by direct observation of the acts of extreme violence or as a result of the after-effects of the violence on the victim-parent, some children undergo trauma themselves.[62] Unfortunately, it is often difficult to determine whether a child is suffering, as well as the extent of his or her trauma.[63] According to Marjory D. Fields, children do not suffer exclusively from exposure to acts of violence;[64] continued contact with the batterer may also impede their recovery resulting in long-term negative consequences for society as a whole.[65]

## II. THE PROBLEM OF PRISON VISITATION DETERMINATIONS

> *[The] process of subversion happens in many ways . . . lawyers who handle these claims, and the judges who rule on them, must be genuinely able to hear them . . . . [T]he process of hearing experiences that may be threatening or unfamiliar, of really listening to those experiences and "taking them in" in order to reshape factual examination or theory of the case, is complex and difficult.*[66]

Children represent an unshakable connection between the abuser and the survivor after the violent relationship ends.[67] According to Bancroft and Silverman, the end of the abusive relationship marks the beginning of new and different issues for the adult survivor of violence.[68] If asked to

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[62] *See* McGill et al., *supra* note 27, at 315 (establishing that "witnessing violence was one of three predictors of post-traumatic stress disorder in children").

[63] *See infra* Part IV.

[64] *See* Fields, *supra* note 58, at 230.

[65] *See infra* Part V.C.

[66] SCHNEIDER, *supra* note 32, at 229.

[67] Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101,106-07 (2004); Patricia K. Susi, *The Forgotten Victims of Domestic Violence*, 54 J. MO. B. 231, 232 (1998).

[68] *See* BANCROFT & SILVERMAN, *supra* note 61, at 44. Bancroft and Silverman "observe that many batterers' motivation to intimidate their victims through the children *increases* when the couple separates, because of the loss of other ways to exert control." *Id.*; *see also* HERMAN, *supra* note 1, at 77 (maintaining that "[t]hreats against others are often as effective as direct threats against the victim").

name one of her greatest concerns, a survivor of extreme acts of violence will likely respond that continued contact between the perpetrator and their children is her chief concern.[69] Yet by ending her relationship with the perpetrator, the survivor is no longer in a position to act as the protector of her children.[70]

Members of the bench and bar commonly misperceive that perpetrators of intimate partner violence do not pose a risk to their children.[71] Studies show, however, that batterers are seven times more likely to harm their children physically than parents who do not engage in battering.[72] Physical abuse statistics reflect only one of the many risks facing children of batterers. Bancroft and Silverman maintain that such statistics do not account for the psychological harm children exposed to abusive fathers experience.[73] Ironically, risk of harm or trauma to the child may increase when the abusive relationship ends because the perpetrator's only means of power and control over the battered woman is through the child.[74]

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[69] Based on the author's experience representing survivors of intimate partner violence since 1994. *See also* Quirion et al., *supra* note 22, at 514-15 (explaining the abuser's post separation efforts to continue to control the battered woman through her children).

[70] If visitation is ordered after the abusive relationship ends, the battered woman in no longer physically present to protect her children from the perpetrator's acts of violence or emotionally damaging behavior. BANCROFT & SILVERMAN, *supra* note 61, at 44.

[71] Based on the author's experience representing survivors seeking protection from their abusers and custody of their children since 1994. *See also* MASON, *supra* note 28; Goodmark, *supra* note 28.

[72] *See* BANCROFT & SILVERMAN, *supra* note 61, at 64.

[73] Witnessing domestic violence is not the only risk to children of abusive fathers. According to Bancroft and Silverman, the mere presence of the batterer in the home has negative implications on the family. *Id*. at 2-3.

[74] *See id.* at 75-76. Bancroft and Silverman explain:

> Batterers can use the children as vehicles for communicating with their former partners, a tactic that becomes particularly important if the woman has obtained a restraining order or has taken other steps to indicate that she wishes that the batterer not contact her. One client of ours had said to his wife prior to separation, "I love you, and that's for life. If I can't have you, no one else will, and we're going to die together." After separation, he said to the children, "Tell your mother I will always love her." The children had no awareness of the implications of this message.

Although states have taken steps to protect survivors by enacting legislative presumptions against custody determinations in favor of perpetrators, many fail to provide sufficient protections when the issue is visitation. Such an outcome results in the ultimate legal loophole.[75] By denying joint custody to a perpetrator, our legal system sends a strong message: we as a society find the abuser to be an inappropriate decision maker, a poor role model, and a potential danger to the child's welfare. Nevertheless, when a perpetrator is given access to the child through a visitation order, prison visitation in particular, the risk of long-term negative consequences to children receives little consideration.

The very fact that prison visits take place in a controlled setting may also work against the survivor and her children. Hearing officers may mistakenly believe that prison visitation provides added protections against physical harm to a child because they occur in a supervised setting. Although rare, physical harm to children does occur during prison visitation.[76] Unfortunately, the more pervasive, yet less easily detected harm

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*Id.* at 76.

[75] *See* N.M. M v. J.W. M., No. CN00-07147, 2002 WL 32101256 (Del. Fam. Ct. Dec. 18, 2002). The court in *N.M. M. v. J.W. M.* granted the mother sole custody of the children based on several factors including evidence of serious acts of domestic violence. Nonetheless, prison visits were ordered between the father and his two daughters despite evidence that the father had strangled and threatened the mother, as well as "doused Mother's car with gasoline and blew it up in her driveway." *Id.* at *2. In addition, despite the fact that the mother was the victim of these serious acts of intimate partner violence she was ordered to deliver the children to the prison to facilitate visitation between the father and the children. *Id.* at *3. The order failed to provide a detailed analysis as to the appropriateness of prison visitation given the father's propensity to commit serious acts of violence against a family member, the nature of the violence, the effect such violence had on the children, and the children's desire not to see their father. *Id.* at *1. Another such case was *Juli B. F. v. Clarence S. M. Jr.*, Nos. CN95-08172, 96-20683, 1997 WL 905956 (Del. Fam. Ct. Nov. 10, 1997). The father's conviction for assaulting the mother classified him as a perpetrator of domestic violence, triggering a presumption against awarding him joint or sole custody. *Juli B. F.*, 1997 WL 905956, at *2. Despite granting the mother sole custody pursuant to the presumption, the court explained that it must determine visitation for the incarcerated father pursuant to the best interest standard. *Juli B. F.*, 1997 WL 905956. Ultimately, the court determined that "meaningful contact" between the father and his daughter was not possible because of the father's incarceration and the child's young age. *Juli B. F.*, 1997 WL 905956, at *3. It is likely, however, that the court based its decision in part on the father's sexual abuse of a four-year-old boy and the fact that while the parents lived together, the "[f]ather walked around the residence nude, and left Dominique home alone while he went to buy beer." *Juli B. F.*, 1997 WL 905956. The result may have been different had sexual abuse of a third party not been an issue and the case had solely involved intimate partner violence.

[76] *See* Bougor v. Murry, 283 A.D.2d 695, 695-96 (N.Y. App. Div. 2001) (explaining that although incarceration alone is not a valid basis upon which to deny

to children comes from the psychological trauma they suffer as a result of continued contact with the battering parent no matter where the visits occur.[77]

*Rahn v. Norris* may best represent the complex and sometimes arbitrary nature of family court proceedings regarding visitation decisions for incarcerated perpetrators of extreme acts of violence and how visitation can place children at risk of psychological trauma.[78] Anthony Norris was incarcerated for charges relating to his abuse of Tara Rahn, the mother of his son David Norris.[79] In July of 1999, Anthony dragged Tara from a vehicle, physically assaulted and attempted to rape her in the presence of three-year-old David.[80] As a result of these as well as other criminal acts, Anthony was sentenced to five years imprisonment.[81] In March of 2001, the family court considered the custody and visitation rights of Anthony, incarcerated at the time of the trial. Evidence presented at trial showed that young David was extremely aggressive, had difficulty forming relationships with his peers, and often hit, spit on and bit other children.[82] David also acted out sexually toward other young children by pulling down his pants and touching his genitals.[83] Despite evidence of serious acts of violence perpetrated by the father in the presence of the child and what appears to be the child's clear modeling of that behavior,[84] the court ordered prison visits between the child and father.[85]

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visitation, a denial is appropriate if it can be shown that visitation is not in the best interest of the child). According to the Appellate Court, the "[t]estimony at trial established that petitioner perpetrated domestic violence against respondent while she was pregnant with the child and that, during one of the three prison visitations, he struck the child in the face." *Id.* at 695.

[77] *See infra* Part V.B.

[78] Rahn v. Norris, 820 A.2d 1183 (Del. Fam. Ct. 2001).

[79] *Id.* at 1184-85. To avoid confusion with his father, Anthony Norris, young Anthony James David Norris is referred to as David Norris throughout this Article.

[80] *Id.* at 1185.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* (according to David's counselor, "children often model adult behavior").

[85] *Id.* at 1198-99.

The court in *Rahn v. Norris* relied, in part, on the testimony of David's counselor, who began working with him six months after his father assaulted his mother. Although the counselor explained "children often model adult behavior,"[86] the court inferred from her testimony that the sexual issues were no longer a concern.[87] Ironically, the court did not find David's sexually inappropriate behavior relevant to the issue of visitation, despite the fact that David was unable to attend a conventional school

[86] *Id.* at 1185. The court's opinion provides the following account of David's behavior:

> Ms. Meek [David's counselor] went on to state that records reflected David [from three and a half to four years of age] . . . demonstrated difficulty with peer relationships, and he was extremely aggressive and angry, often hitting and spitting on other children, and biting other children so they were injured. At that time, David also demonstrated sexually inappropriate behavior which involved pulling his pants down, pulling on his penis, and making sexual advances towards other children. It should be noted that Ms. Meek began working with David in late December of 1999, which came six (6) months after the July 19, 1999, incident in which father assaulted mother in David's presence, and for which father was later incarcerated. Ms. Meek noted that children often model adult behavior. In December of 1999, Ms. Meek observed in David severe cussing, hitting, kicking, biting of other children, and hostility against teachers and counselors.

*Id.*

[87] *Id.* at 1186. Although the written opinion suggests a bleak picture for young David's future, it appears that the court relies upon some of the counselor's testimony to support its holding:

> Eventually, the sexual concerns about David resolved, and this was no longer a concern of Ms. Meek [the counselor] at the time of the trial. David is taking Atarol, a psychiatric stimulant which helps the ADHD. He also takes Risperdol, an anti-psychotic medication which helps manage anger. Ms. Meek testified that David will require intense one-on-one instruction in the future, and that it may not be possible for David to attend regular schools. He continues to be extremely impulsive, and poses a risk for injury to others as well as himself. Presently, David's play is . . . "traumatic" . . . with a "heavy incarceration component." David's play often involves placing the other person in jail for doing something bad. Ms. Meek believes that David is reflecting his memory of his father's arrest.

*Id.*

because he was unable to control his actions and posed a danger to himself and others.[88]

The court heard the custody and visitation matters approximately one year and nine months after the altercation the minor child witnessed and fifteen months after David began to receive counseling. In the year prior to the trial, David was diagnosed with several disorders, including Post-Traumatic Stress Disorder (PTSD), which a doctor attributed to his observation of the domestic violence incident in July 1999.[89] During the custody trial, David's mother also testified to prior acts of violence that David witnessed, one in particular where his father slapped her, resulting in a bloody nose.[90]

It is hard to imagine why a court would order prison visits in a case like *Rahn v. Norris.* It is likely that the court was influenced by the mother's testimony about David's extremely close relationship with his father and what the court viewed as her acceptance of some of the blame for David's behavior, because she did not leave the relationship sooner.[91] In this case, it is clear the legal system failed to appreciate the father's sole responsibility for his criminal acts against David's mother, which occurred in the presence of young David, the reasons that prevent battered women from breaking free from abusive relationships,[92] the probability of traumatic bonding,[93] and the detrimental effect exposure to violence has on children.[94]

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[88] *Id.* For a look at PTSD and domestic violence, see Weithorn, *supra* note 59, at 87 (maintaining that PTSD has been diagnosed in thirteen to fifty-one percent of children exposed to acts of intimate partner violence).

[89] *Id.* at 1185-86.

[90] *Id.* at 1187.

[91] *Id.*

[92] The court deflects blame for David's behavior on his mother's decision to remain in an abusive relationship. *Id.* at 1187. It also notes, "[A]lthough nothing that the mother did justified the father's outrageous conduct, the Court is concerned that mother previously exhibited towards father and in the presence of David a lesser form of domestic violence." *Id.* at 1197; *see also* Christina L. v. Harry J., No. CN93-9894, 1995 WL 788196, at *21 (Del. Fam. Ct. June 5, 1995) (explaining that "[w]hile it appears unfathomable that a woman would remain in any relationship where she is victimized to such a degree, psychologists specialized in the field of domestic violence recognize that the reasons a battered wife stays in a violent relationship are both complex and numerous"); Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19 (citing Barbara Hart, *National Estimates and Facts About Domestic Violence*, NCADV VOICE, Winter 1989, at 12). *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6-7 (1991); Videotape: Defending Our Lives (Cambridge Documentary Films, Inc.1993).

One would like to think that the outcome in *Rahn v. Norris* is atypical of cases involving requests for prison visitation in the face of extreme acts of violence against women. There is, however, little consensus among the jurisdictions and even within state trial courts regarding this issue. Some courts grant visitation in cases of extreme acts of domestic violence, viewing visitation as a right of non-residential parents.[95] Conversely, other courts deciding visitation cases involving extreme acts of violence find that prison visitation is not in the best interest of the child.[96]

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[93] *See infra* notes 265-67 and accompanying text for a consideration of trauma bonding.

[94] *See infra* Part V.C.

[95] For a consideration of cases that award prison visitation in the face of extreme acts of violence, see N.M.M. v. J.W.M., No. CN00-07147, 2002 WL 32101256, at *2 (Del. Fam. Ct. Dec. 18, 2002) (ordering prison visits to a batterer despite evidence that he strangled and threatened the other parent, as well as doused her car with gasoline and blew it up in her driveway); McNeeley v. McNeeley, 45 S.W.3d 876, 878 (Ky. Ct. App. 2001) (vacating and remanding the trial court's order granting visitation to an imprisoned father who had "brutally killed" the son of his girlfriend by "beating and stomping him" to death, given evidence from the father's conviction showed that the father was also abusive to the children at issue, and noting that the trial court's record was devoid of the facts of father's incarceration or abuse to his children); Charles G. v. Deborah G., No. CN93-08910, 1999 WL 486584 (Del. Fam. Ct. Mar. 30, 1999) (ordering prison visitation for the two youngest children but not the oldest daughter as a result of the oldest daughter's testimony that she recalled media coverage of her father's rape of her mother and that "there were allegations that he had tried to kill Mother," instead, giving the oldest daughter the choice to visit with her father in prison and ordering that, upon his release from incarceration, the father be permitted supervised visitation); *In re* Taylor, No. CK-91-4685, 1994 WL 811731 (Del. Fam. Ct. Feb. 15, 1994).

[96] For a look at cases that deny prison visitation in light of domestic violence, see Trombley v. Trombley, 301 A.D.2d 890 (N.Y. App. Div. 2003) (denying prison visitation request by a father who had a history of abusing the mother of his child, as well as his recent live-in girlfriend); S.R. v. C.B., No. CN97-06515, 2002 WL 32101266 (Del. Fam. Ct. Dec. 27, 2002) (denying a perpetrator's request for prison visitation). According to the facts of *S.R.*, the father was convicted of "assault third" for acts of abuse against mother. *S.R.*, 2002 WL 32101266, at *2. Additionally, there was evidence that the child had visited with father at the prison prior to the court's order and as a result the child's behavior was negatively affected by those visits. *S.R.*, 2002 WL 32101266, at *1. It is unclear from the court's decision, however, which factor was the basis of the court's denial of visitation. *S.R.*, 2002 WL 32101266; *see also* Beverly v. Bredice, 299 A.D.2d 747 (N.Y. App. Div. 2002) (affirming denial of visitation where the father broke into the mother's apartment in violation of a protection order, threatened her, and subsequently called threatening to shoot her); Bougor v. Murry, 283 A.D.2d 695 (N.Y. App. Div. 2001) (denying prison visitation given evidence of abuse to the mother while she was pregnant, as well as recent physical abuse to the child during a scheduled prison visit); Hadsell v. Hadsell, 249 A.D.2d 853, 854 (N.Y. App. Div. 1998) (denying visitation based on the father's attempt to kill the mother and

Some have argued that there is evidence to suggest that prison visitation has a positive correlation with a prisoner's success upon release from incarceration.[97] This Article supports the view that many incarcerated parents should be granted access to their children. The desire to rehabilitate prisoners, however, should not outweigh the need for child protection. In no other circumstance would the legal system require a victim to visit the perpetrator in prison, but that is in essence what happens in some cases when courts require a child to visit an incarcerated batterer. Even scholars who support the visitation rights of prisoners recognize that when the cause of the incarceration is the result of crimes against the family, family visits should not always take place.[98] Moreover, researchers who study the effects

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disregard for the child's safety); Mara C. D. v. Paul C., No. CN96-7446, 1997 WL 878688 (Del. Fam. Ct. July 25, 1997) (denying prison visitation given the incarcerated father's repeated threats to kill mother and what the court found to be serious assaults on mother and the children); Hughes v. Hughes, 463 A.2d 478 (Pa. Super. Ct. 1983) (affirming the trial court's denial of incarcerated father's visitation request). The conclusion of what the *Hughes* court described as a long history of abuse occurred when father broke into the mother's residence and shot her with a hunting rifle while she held the child. In addition to his reckless disregard for the safety of his child, the court pointed out that the father's record of abuse to "the child's mother confirms his moral deficiency," which constituted a threat to the child's welfare, justifying a denial of visitation. *Hughes*, 463 A.2d at 479.

[97] Legal scholars have argued that prison visits have a positive correlation with a "crime-free return to society." *See* Maldonado, *supra* note 42, at 196 ("The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return."); Marsha M. Yasuda, Note, *Taking a Step Back: The United States Supreme Court's Ruling in Overton v. Bazzetta*, 37 LOY. L.A. L. REV. 1831, 1848 (2004) (quoting Michael B. Mushlin, Rights of Prisoners § 12:1 (3d ed. 2002) (citing Kozlowski v. Coughlin, 871 F.2d 241, 242-43 (2d Cir. 1989))); Justin Brooks & Kimberly Bahna, "*It's a Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 277 (1994).

[98] *See* Maldonado, *supra* note 42, at 197. Although Maldonado argues in support of visitation for incarcerated fathers, the following excerpt from his article suggests prison visitation is not always beneficial to children:

> The child's best interest is always paramount. Thus, contact with an incarcerated parent is not warranted if such contact would be detrimental to the child, regardless of the benefit to society of lower recidivism rate . . . . Researchers have found that, unless the incarcerated father has a history of violence against the child or other close family, the child most often benefits from maintaining contact.

*Id.*; *See also* Tiffany Jones, Comment, *Neglected by the System: A Call for Equal Treatment for Incarcerated Fathers and Their Children—Will Father Absenteeism Perpetuate the Cycle of Criminality?*, 39 CAL. W. L. REV. 87, 89 (2002).

of parental incarceration on children and the benefits of prison visits for both parent and child acknowledge that there are instances in which the removal of a parent from the child's life through incarceration is beneficial[99]—specifically, when the parent engages in violent and abusive behavior.[100] Removing an abusive parent reduces the risk of both physical and psychological harm to the child.[101] Accordingly, if parental incarceration diminishes risk to children exposed to intimate partner violence, what happens when courts order prison visitation for batterers? Unfortunately, some courts never explore the threshold question of the crime for which the parent is incarcerated, thereby dangerously ignoring the issue of child safety.[102]

## III. RIGHTS VS. INTERESTS

> *Violation of the laws with its resulting confinement subsumes very serious restrictions on the freedom to do many things and to exercise many rights, the least of which is to have a normal relationship with one's family.*[103]

Although many legal scholars champion the rights of incarcerated parents[104] not all legal scholars agree that incarcerated parents have a right to visitation. In particular, Professor David Meyer argues that in the case of

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[99] Karen Laing & Peter McCarthy, *Risk, Protection and Resilience in the Family Life of Children and Young People with a Parent in Prison: A Literature Review* 24 (Econ. & Soc. Research Council, Working Paper, undated), http://www.pcrrd.group.shef.ac.uk/working_papers/newcastle_working_paper.pdf.

[100] *Id.*

[101] *Id.*

[102] See *infra* Part V.A.

[103] Sullivan v. Shaw, 650 A.2d 882, 886 (Pa. Super. Ct. 1994) (Tamilia, J., dissenting).

[104] S*ee* Maldonado, *supra* note 42; Brooks & Bahna, *supra* note 97; Pamela Lewis, Comment, *Behind the Glass Wall: Barriers that Incarcerated Parents Face Regarding the Care, Custody and Control of Their Children*, 19 J. AM. ACAD. MATRIMONIAL LAW. 97 (2004); Yasuda, *supra* note 97, at 1831; Jones, *supra* note 98; Benjamin Guthrie Stewart, Comment, *When Should a Court Order Visitation Between a Child and an Incarcerated Parent?*, 9 U. CHI. L. SCH. ROUNDTABLE 165 (2002); Rachel Sims, Note, *Can My Daddy Hug Me?: Deciding Whether Visiting Dad in a Prison Facility is in the Best Interest of the Child*, 66 BROOK. L. REV. 933 (2001). *See generally* GABEL & JOHNSTON, *supra* note 10.

prison visitation, judges "[h]av[e] taken too seriously the Supreme Court's fundamental rights rhetoric."[105] Moreover, a court's decision to grant or deny visitation to an incarcerated perpetrator of domestic violence also affects the rights of the custodial parent[106] and the child.[107]

Generally, our courts seem divided on the issue of a parental right to visitation. Some courts view visitation as a liberty interest protected by the Constitution[108] while others see visitation as a less compelling interest than custody itself.[109] In the case of incarcerated parents in particular, some courts have gone as far as finding that the commission of a crime resulting in incarceration "subsumes very serious restrictions on the freedom to do many things and to exercise many rights, the least of which is to have a normal relationship with one's family."[110] In contrast, other courts have held that a parent's right to visit with his or her child is a "natural right"[111] that "incarceration, standing alone, does not render . . . inappropriate."[112]

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[105] David Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 529-30 (2000).

[106] Although beyond the scope of this Article, one must conclude the residential parent has or will receive sole custody of the child or children at issue in the visitation matter. Most states provide that courts take acts of domestic violence into consideration when making custody determinations. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Parentage and Assisted Reproduction Problems Take Center Stage*, 39 FAM. L.Q. 879, 918 (2006) (providing a chart of the custody criteria in the fifty states).

[107] *See infra* note 315 (discussing the role of the child).

[108] *Sullivan*, 650 A.2d at 884 (citing Santosky v. Kramer, 455 U.S. 745 (1982)). Relying on the United States Supreme Court's decision in *Santosky v. Kramer*, the court in *Sullivan* held that visitation is a liberty interest protected by the Constitution. In *Santosky*, however, the Supreme Court considered a fundamentally different issue altogether. The Court was faced with the termination of a parent's rights, a final and everlasting end to the parent-child relationship. *Santosky*, 455 U.S. at 753-54 (explaining that "persons faced with forced dissolution of their parental rights have more critical need for procedural protections than do those resisting state intervention into ongoing family affairs"). To extend *Santosky* to a limitation on one's interest in visitation with a child misconstrues the intent and meaning of the Court's reasoning. The Court spoke of a parent's fundamental liberty interest in the "care, custody, and management" of his or her child, not in a parent's entitlement to visitation. *Santosky*, 455 U.S. at 753-54.

[109] Brittain v. Hansen, 451 F.3d 982, 992 (9th Cir. 2006) (considering whether a parent has a liberty interest in court-ordered visitation).

[110] *Sullivan*, 650 A.2d at 886 (Tamilia, J., dissenting); *see also In re* Brewer, 760 P.2d 1225 (Kan. Ct. App. 1988).

[111] Harmon v. Harmon, 943 P.2d 599, 604 (Okla. 1997). The *Harmon* court stated:

The distinction between the State's attempt to end the parent-child relationship permanently and its attempt to halt contact between parent and child provisionally is crucial to a constitutional analysis of incarcerated parents' liberty interest in visitation rights. Assertions of constitutional protections favoring a parent's right to visitation appear to stem primarily from Supreme Court precedent regarding the termination of the parent-child relationship,[113] not the ability of a parent to visit with his child.[114] In fact, there is support to suggest that, as yet, no visitation deprivation has risen to the level of a constitutional violation.[115]

In *Brittain v. Hansen*, the United States Court of Appeals for the Ninth Circuit considered whether a parent has a liberty interest in court-ordered visitation.[116] The court explained that it is "long-settled that custodial parents have a liberty interest in the 'companionship, care, custody, and management' of their children."[117] What was less clear to the court was whether a non-custodial parent has a similar liberty interest in his

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> [T]his Court has ruled that the natural right of a divorced parent to visit his/her minor child should not be taken away unless evidence shows the parent has forfeited this right or the exercise of it would be detrimental to the child's welfare . . . . Although, in our view, a parent has no absolute right to visitation with a minor child in a correctional facility, each case involving visitation issue(s) must be made on the factual situation involved on a case-by-case basis, always keeping in mind the paramount importance of what is in the best interest of the child.

*Id.*

[112] Rhynes v. Rhynes, 242 A.D.2d 943 (N.Y. App. Div. 1997).

[113] *See generally* Meyer, *supra* note 7.

[114] *Sullivan*, 650 A.2d at 884 (citing Santosky v. Kramer, 455 U.S. 745 (1982)).

[115] Zakrzewski v. Fox, 87 F.3d 1011, 1014 (8th Cir. 1996). According to the Eighth Circuit, although there is a possibility that intrusion upon a parent's visitation interest may be subject to due process scrutiny where there is an intrusion upon a parent's interest in "the 'care, custody, and management of their child,' . . . . we have not yet found a case where the right to visitation was infringed in a manner that rose to the level of a constitutional violation." *Id. Zakrzewski* suggested that to rise to the level of a substantive due process violation of one's "parenting liberty interest," the violation must occur "in a manner that shocks the conscience." *Id.*

[116] Brittain v. Hansen, 451 F.3d 982, 992 (9th Cir. 2006).

[117] *Id.*

or her right to visitation.[118] Referring to *Zakrzewski*, as well as other decisions, the court in *Brittain* noted that most federal circuits that have previously addressed a parent's right to visitation found that "some liberty interest exists."[119] Of particular significance, however, was the court's recognition of "the obvious reality that visitation is a lesser interest than legal custody."[120] *Brittain* suggests that a parent's liberty interest in visitation should not be considered in a vacuum; it must be balanced with the liberty interests of others, namely the custodial parent and the children.

It is important to point out that the issue in *Brittain* did not relate to an inmate's request for prison visitation with his or her child. Moreover, unlike the dilemma presented in this Article, *Brittain* involved a parent who had already been granted visitation by court order after a trial court determined visitation was appropriate. The question before the court was "whether Brittain had a liberty interest in her court-ordered visitation rights,"[121] not whether a parent has a liberty interest in visitation in the first instance.[122] The court acknowledged that the fact that a parent's liberty interest in visitation had not been previously addressed made the issue presented more difficult.[123] The court, however, chose not to address the broader issue of whether state "interference that affects the existence of visitation rights altogether, rather than discrete instances of visitation, might

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[118] *Id.* ("We have not had occasion to decide whether parents who have visitation rights, but lack legal custody, have a similar liberty interest.").

[119] *Id.* (citing *Zakrzewski*, 87 F.3d at 1013-14; Franz v. United States, 707 F.2d 582, 594-602 (D.C. Cir. 1982); Wise v. Bravo, 666 F.2d 1328, 1331-33 (10th Cir. 1981)).

[120] *Brittain*, 451 F.3d at 992. Although the custodian of the children in cases of parental incarceration is not always the other parent, for the purposes of this Article the custodian is presumed be the battered parent.

[121] *Id.*

[122] The case involved a dispute between Hansen (the father) and Brittain (the mother) over a particular visit the mother wished to exercise with the child. *Id*. at 985. Prior to the dispute at issue, the father was granted sole custody and the mother was awarded court-ordered visitation with her son. *Id.* The parties had a dispute over the mother's right to a week-long visit with the child. *Id*. at 986. As a result of the dispute, a police officer was called to the scene. *Id.* The officer ordered the mother to turn over the child after a great deal of discussion, attempts to interpret the court order, and contact with the officer's commander. *Id.* at 986-87. Subsequently, the mother filed suit claiming the father and the police conspired to violate her due process rights relating to her interest in visitation with her child. *Id.*

[123] *Id.* at 992 n.2.

give rise to a viable claim."[124] The court viewed the issue at bar as a narrow one: a brief deprivation.[125] One week of lost visitation in the court's eyes was not significant, or in the court's words, failed to rise to the level of "conscience shocking."[126] Had there been actions that shocked the conscience, a parent still would have to show that some liberty interest existed upon which the state intruded.[127]

The *Brittain* court explained that in resolving the case it followed the Supreme Court's mandate "to 'avoid constitutional issues when resolution of such issues is not necessary for disposition of a case.'"[128] The court acknowledged that in doing so it left open the issue of whether child custody disputes, unlike the permanent termination of a parent's rights, may give rise to substantive due process claims.[129] Therefore, whether visitation is an inherent right to which a non-custodial parent is entitled or whether it is simply an interest to be considered remains unresolved.

Notwithstanding the constitutional debate, few would dispute that a parent generally has an interest in visitation with his or her child. The extent of that interest, however, depends on the facts and circumstances of the particular case.[130] This Article addresses a specific group of parents seeking contact with children: parents incarcerated as a result of horrific acts of violence against another parent or household member. Admittedly, not all children are negatively affected by exposure to domestic violence.[131] Cases that involve "extreme acts" of violence, however, call for special attention from our justice system. Courts must acknowledge that children exposed to

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[124] *Id.* at 995-96.

[125] *Id.* at 996.

[126] *Id.* The court explained that in order to find that the government deprived an individual of his or her liberty interest, the acts must rise to a level "which shocks the conscience." *Id.* at 991 (citing Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

[127] *Id.* (citing Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 948 (9th Cir. 2004)).

[128] *Id.* at 996 (quoting *In re* Snyder, 472 U.S. 634, 642 (1985)).

[129] *Id.*

[130] Zakrzewski v. Fox, 87 F.3d 1011, 1014 (8th Cir. 1996) (explaining that no right is absolute).

[131] Based on comments to this article by Leigh Goodmark, Professor, University of Baltimore School of Law (Aug. 14, 2007) (referring generally to Jeff Edleson's research on children exposed to domestic violence). *See generally* Edleson, *supra* note 30, at 104.

extreme acts of violence may be at increased risk of trauma. Moreover, these at-risk children must be properly assessed and protected when necessary.

Although incarceration alone may not justify a denial of visitation, some cases of parental incarceration warrant a closer look. *In re Taylor* is one case that involves both extreme violence and parental incarceration.[132] At the time of the visitation hearing the father in this case was serving a two-year prison sentence for raping his child's natural mother.[133] During the trial, the mother testified "although Mr. F. [the child's father] raped her, she did not believe that any emotional trauma she may suffer as a result of the minor children visiting with Mr. F would emotionally harm the children or be transferred unto the children" and she would not object to contact if the father were not incarcerated.[134] Relying on the mother's testimony, the court granted the father's request for visitation at the correctional facility every other week.[135] There is, however, no indication that any expert testimony was taken or that the children underwent evaluation for possible psychological trauma prior to the court's entry of the visitation order. In fact, as a result of the mother's testimony, the court maintained it had "no choice but to grant the natural father's Petition for Visitation."[136] The

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[132] *In re* Taylor, No. CK-91-4685, 1994 WL 811731, at *1 (Del. Fam. Ct. Feb. 15, 1994) (citing Elizabeth A.S. v. Anthony M.S., 435 A.2d 721 (Del. 1981). The opinion stated:

> The Court notes that 13 Del. C. 728(a) creates a presumption in favor of visitation for any non-custodial parent. Further, 728(a) shifts the burden of proof from the non-custodial parent to the custodial parent to prove that unrestricted visitation "would endanger the child's physical health or significantly impair his or her emotional development."

*Id.*

[133] *Id.* The court noted father's testimony:

> [The father] is currently in prison, serving a two-year sentence for rape of the natural mother . . . . [H]e would like to have visitation with his three minor children, twice a month, at the prison . . . . [H]e wants visitation with the three children so that they can build a relationship and the children will know who he is upon his release.

*Id.*

[134] *Id.* at *2.

[135] *Id.*

[136] *Id.*

court's view that the statements of a potentially traumatized victim tied its hands is remiss. Basing a judicial determination regarding childhood trauma primarily on the testimony of a parent (possibly traumatized herself), ignores both the mother's tragedy and the court's ability to seek guidance from a vast array of experts, *sua sponte*.[137] In addition, the opinion fails to consider the rights and interests of the children at issue completely.[138]

Two years prior to the trial court's decision in *Taylor*, Delaware's highest court held that although "a non-custodial parent's right to visitation is an important, natural and legal right . . . it is not an absolute right but 'one which must yield to the good of the child.'"[139] In *Winter v. Charles*, the Supreme Court of Delaware affirmed the trial court's denial of an incarcerated father's visitation request, establishing that the child's interests are paramount. In its decision, the court explained that the child's best interest should be "the ultimate test for visitation" determinations.[140]

Justice Stevens, in his dissenting opinion in *Troxel*, suggests that courts should not be quick to afford protection to parents when doing so would allow parents to exercise those rights contrary to the child's best interest.[141] To address both Stevens' concern and the challenges raised

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[137] Although beyond the scope of this Article, the ability of a victim of marital rape or intimate partner violence to communicate statements directly adverse to the father of her children safely in court is an issue of concern. *See generally* Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 FLA. B.J. 24, 24 (1994) (explaining that a special relationship exists between abusers and survivors of intimate partner violence because the victim learns to read the abuser's actions, the meaning of which "extends far beyond what is being said or done in the moment"). *See also* Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection and Domestic Violence*, 79 TEMP. L. REV. 877 (2006) (expanding on Dutton's theory about the unique relationship between batterers and their victims); Harrington Conner, *supra*, at 879 n.6 (noting that according to Dutton, "[t]he victim learns that a certain look from the perpetrator may mean that she is in significant danger if she does not conform to his wishes, for the battered woman it is this simple act that alters her behavior in such significant ways" (citing Dutton, *supra*, at 24)).

[138] *See infra* note 315 for a discussion of the role of the child.

[139] Winter v. Charles, No. 237,1991, 1992 WL 53404 (Del. Feb. 3, 1992).

[140] *Id.* at *1 (citing Rogers v. Trent, 594 A.2d 32, 33 (Del. 1991) (quoting Elizabeth A.S. v. Anthony M.S., 435 A.2d 721, 725 (Del. 1981))).

[141] Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Justice Stevens suggests that children also have constitutionally protected rights:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and

herein we must determine whether the exercise of one's parental rights, which results in prison visitation between a perpetrator of extreme acts of violence and a minor child, is "motivated by an interest in the welfare of the child"[142] or by selfish desire.[143]

According to Bancroft and Silverman, "[t]he overarching *attitudinal* characteristic of batterers is entitlement."[144] Bancroft and Silverman base their conclusions on over twenty years of research and clinical experience working with perpetrators of intimate partner violence.[145] They find that batterers tend to place themselves first and all other family members last[146] and that batterers often seek visitation as a way of either gaining access to the victim or exerting control over her.[147] In accordance with Bancroft and Silverman's conclusions, an incarcerated batterer may seek visitation primarily out of self-interest and not because it is best for his children.

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> families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

*Id.*

[142] *Id.* at 89.

[143] Some parents may be conflicted between doing what is best for the child and desiring continued contact. When a parent requests visitation contrary to the best interest of the child, it is difficult to view that decision as primarily motivated by anything other than self-interest.

[144] BANCROFT & SILVERMAN, *supra* note 61, at 7. They explain entitlement in batterers in the following way:

> Entitlement is the belief that one has special rights and privileges without accompanying reciprocal responsibilities. Batterers tend to have this orientation in specific relationship to their partners and children and do not necessarily carry it over into other contexts . . . . A primary manifestation of entitlement is that batterers expect family life to center on the meeting of their needs . . . . They may believe that they are owed services and deference without regard to their own level of contribution or sacrifice.

*Id.*

[145] *Id.* at 2-3.

[146] *Id.* at 9 (noting that "our clients perceive their needs as being of paramount importance in the family").

[147] *Id.* at 110-15.

Putting aside the likelihood that the perpetrator of extreme acts of violence selfishly seeks visitation to contact or control the other parent, visitation still may not be warranted in such cases. The perpetrator's motivation is just one aspect to consider in prison visitation determinations. Notwithstanding the interests of the incarcerated parent, a child's interests must also have a place in the framework of this legal analysis. Not all courts view visitation as an exclusive right held solely by the nonresidential parent. According to the New York Family Court in *John R. v. Marlene C.*, "visitation is a right jointly shared by parent and child, intended to benefit both."[148] If true, then children have an inherent right not to visit with a harmful parent if they derive no benefit and, in fact, would be injured by further contact.[149]

Even those who maintain that children have few rights when it comes to the issue of visitation cannot so easily deny that children have an interest in the court's ultimate visitation determination. Courts must, however, approach the declaration of a child very carefully, given the possibility that the batterer may attempt to influence the child's expressed wishes.[150] As a result, courts should carefully weigh the wishes of the parents and children in light of the nature of the crime for which the parent is incarcerated.[151] Regrettably, trial courts often fail to consider the type of crime for which a parent is imprisoned and how such crimes shape the child's emotional and physical welfare.[152]

Finally, the right of a survivor of extreme acts of violence to object to forced prison visitation has received little legal scholarly attention.[153] Balancing the interests of parents in prison visitation cases presents a

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[148] John R. v. Marlene C., 683 N.Y.S.2d 724, 728 (Fam. Ct. 1998); *see also* Valenza v. Valenza, 143 A.D.2d 860, 862 (N.Y. 1988) (explaining that visitation is a "natural right" that is "jointly enjoyed" by both the parent and the child).

[149] The Tennessee Court of Appeals in *Arnold v. Arnold* maintained that although nonresidential parents are usually granted visitation, visitation is a privilege, not a right. Arnold v. Arnold, 774 S.W.2d 613, 618 (Tenn. Ct. App. 1989). The Court explained that the privilege to visit with one's child depends on a showing that it is beneficial to the child and that the "enforcement of 'visitation' is not justified where it results in injury to rather than enforcement of the best interests of the child or children." *Id.*

[150] *See infra* Part V.B.

[151] *See infra* Part V.A.

[152] *See infra* Part V.C.

[153] Although beyond the scope of this Article, custodial survivors have a significant liberty interest in the care and control of their children.

distinct dilemma in the area of individual rights against state intervention.[154] If we follow the court's logic in *Brittain*, that the right to "visitation is a lesser interest than legal custody,"[155] a survivor, as the custodial parent, should be vested with the authority to determine what is best for her child in the case of a prison visitation request. State interference in the form of court-ordered prison visitation over the objection of a survivor-parent can be considered a violation of the survivor's liberty interest in the care of her child.[156] As such, custodial parents should be able to prevent visitation in favor of incarcerated batterers when such orders are contrary to the wellbeing of the child.

If we concede that incarceration alone may not justify a denial of an individual's interest in a continuing relationship with his or her children, we can move to the fundamental issues in our analysis. First, no right is absolute.[157] Second, there are multiple interests and rights to be balanced. Third, incarcerated perpetrators of extreme acts of violence and their children are special and demand individualized attention.

## IV. IN SEARCH OF A STANDARD

> *[W]hen the child's welfare seems to conflict with the claims of one or both parents, the child's welfare must prevail . . . . But having made the statement, few if any experienced judges or lawyers think that goes very far toward deciding cases. That can only be done by considering the facts of the individual case against the background of factors held to be relevant in earlier cases, and most importantly, with the awareness of the biases which the judge brings to his deliberations . . . . The best interest ideal is not to be taken too literally for another reason. The child's interests are not the only consideration to be taken into account in every circumstance, even though some non-legal writers think that they are.*[158]

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[154] Meyer, *supra* note 7, at 1475.

[155] Brittain v. Hansen, 451 F.3d 982, 992 (9th Cir. 2006). The court in *Brittain* held that "non-custodial parents with court-ordered visitation rights have a liberty interest in the companionship, care, custody, and management of their children. Such an interest is unambiguously lesser in magnitude than that of a parent with full legal custody." *Id.*

[156] Meyer, *supra* note 105, at 555.

[157] Zakrzewski v. Fox, 87 F.3d 1011, 1014 (8th Cir. 1996).

[158] *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 788-89 (2d ed. 2000). Clark's quote speaks specifically to custody determinations, although it readily applies to visitation determinations as well.

The question of what legal standard to use in cases involving visitation between incarcerated perpetrators of extreme acts of violence is not clear cut. Some courts hold that the best interest of the child is paramount,[159] while others find visitation is an automatic right that can not be denied short of a showing of harm to the child.[160]

### A. The Court's Choice: Balancing the Interests of Parents and Children

The proper standard for visitation determinations is not clear. Although the best interest standard often establishes the nature and extent of visitation,[161] some courts maintain that it is not the proper standard for a denial of visitation.[162] These decisions suggest that visitation between parent and child is presumed to be best for children absent an extraordinary showing that contact is harmful to the child.[163] The *Moore v. Moore* court in particular made clear that "imprisonment of a parent for a term of years

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[159] Hadsell v. Hadsell, 249 A.D.2d 853 (N.Y. App. Div. 1998).

[160] John R. v. Marlene C., 683 N.Y.S.2d 724, 727 (Fam. Ct. 1998) (involving intimate partner homicide).

[161] *Id.* at 75 (suggesting the best interest standard is appropriately used to determine the nature and extent of visitation).

[162] *Id.* According to the court in *John R.*, visitation is a parental right absent a showing of "extraordinary circumstances." *Id.* Furthermore, a complete denial of visitation is rare. *Id.*

[163] *See* Meece v. Meade, No. 2005-CA-001510-ME, 2006 WL 1195929 (Ky. Ct. App. May 5, 2006). In *Meece*, the court maintained that it was error for the trial court to use a best interest standard in making visitation determinations, when the proper standard is a "'non-custodial parent cannot be denied reasonable visitation with his or her child unless there is a finding that visitation will seriously endanger the child.'" *Id.* at *4 (citing Smith v. Smith, 869 S.W.2d 55, 56 (Ky. Ct. App. 1994)); *see also* KC v. MC, No. CN99-10809, 2005 WL 4024848 (Del. Fam. Ct. July 20, 2005). In *KC v. MC*, the court presumed visitation was in the best interest of the child absent a showing of harm. *KC*, 2005 WL 4024848. The court explained, however, that case law suggests the best interest of the child is an additional consideration beyond a showing that visitation would not be harmful to the child. *KC*, 2005 WL 4024848 at *11 (citing Capri M.P. v. Ronald O., 480 A.2d 669 (Del. Fam. Ct. 1984)). In *KC v. MC*, the father was charged with unlawful sexual intercourse and unlawful sexual contact related to acts against his stepdaughter. The father was incarcerated and later placed on probation for unlawful sexual contact in the second degree. *KC*, 2005 WL 4024848, at *1; *see also* Moore v. Moore, No. 04CA111, 2005 WL 1924346, at *1 (Ohio Ct. App. Aug. 11, 2005).

constitutes 'extraordinary circumstances,'" and once established, visitation depends on the best interest of the child.[164]

Judges wrestle with visitation requests given the competing interests of children and their parents. One decision in particular, *John R. v. Marlene C.*, suggests that visitation is not just a parent's right, but a right which is shared by the child—a child whose interests are paramount.[165] Judges making visitation determinations often overlook the importance of the emotional wellbeing of the primary custodian and the overall stability of child's home environment in evaluating the child's best interests. In *Casper v. Casper*, the Supreme Court of Nebraska upheld a trial court's finding that the best interest of a child in part "lay in the establishment of a stable home environment."[166] The Nebraska high court refused to overturn the trial court's denial of prison visitation given the lower court's findings that such visits were of little benefit to anyone other than the inmate and caused turmoil in the home following visitation.[167]

The Nebraska court is not alone in viewing a stable home environment as paramount to the child. According to *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*, court orders for both custody and visitation should reflect the safety of the child and abused spouse, as well as "create a stable environment for the children."[168] The handbook suggests that judges should initially consider whether visitation should be ordered at all, and only after a determination of the appropriateness of visitation should a hearing officer make a determination of whether visitation may occur safely.[169]

### B. Application of the Best Interest Standard

If we presume that the principal goal of all judicial determinations regarding a child should be what is best for that child, our next step is to

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[164] *Moore*, 2005 WL 1924346, at *1 (citing Pettry v. Pettry, 486 N.E.2d 213 (Ohio Ct. App. 1984)).

[165] *John R.*, 683 N.Y.S.2d at 728.

[166] Casper v. Casper, 254 N.W.2d 407, 409 (Neb. 1977).

[167] *Id.*

[168] NAT'L CTR. FOR STATE COURTS, DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 47 (1997).

[169] *Id.*

begin the delicate process of applying a standard.[170] According to Black's Law Dictionary, the best interest of the child is:

> A standard by which a court determines what arrangements would be to a child's greatest benefit, often used in deciding child-custody and visitation matters . . . . A court may use many factors, including the emotional tie between the child and the parent or guardian, the ability of a parent or guardian to give the child love and guidance, the ability of a parent or guardian to provide necessaries, the established living arrangement between a parent or guardian and the child, the child's preference if the child is old enough that the court will consider that preference in making a custody award, and a parent's ability to foster a healthy relationship between the child and the other parent.[171]

Many of the "best interest" standards that states utilize are the same for both custody and visitation, despite the different questions these distinct legal issues present.[172] According to Nancy K.D. Lemon, "custody and visitation greatly overlap; often there is no clear dividing line between them."[173] The Uniform Marriage and Divorce Act § 402, designed to codify the best interest standard in most jurisdictions, provides that the court shall consider all relevant factors in making custody determinations, including the following factors:

> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

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[170] Although there will be other goals and interests for the court to consider when making visitation determinations, the paramount goal must be what is best for the child.

[171] BLACK'S LAW DICTIONARY 170 (8th ed. 2004) (defining "best interests of the child").

[172] Custody relates to decision-making powers whereas visitation provides for access to and time spent with the child.

[173] NANCY K.D. LEMON, DOMESTIC VIOLENCE & CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES 57 (1995).

> (4) the child's adjustment to his home, school and community; and
>
> (5) the mental and physical health of all individuals involved.[174]

### C. Domestic Violence as a Best Interest Factor

Although not expressly listed in § 402, most states also require courts to consider evidence of domestic violence when making determinations in the best interest of the child.[175] Some states codify particular factors for courts to consider, while other states rely on case law to guide judges in the interpretation of what to consider in making best interest determinations. For example, Connecticut lists sixteen factors for courts to consider in making best interest determinations regarding the custody, care, education, visitation, and, support of children.[176] The list

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[174] The Uniform Marriage and Divorce Act § 402, 9A UNIF. L. ANN. (Part 2) 282 (1998).

[175] *See* Elrod & Spector, *supra* note 106.

[176] *See* CONN. GEN. STAT. ANN. § 46b-56(c) (West 2004). According to Connecticut law the court may consider, in assessing the best interest of the child, the following factors:

> (1) The temperament and developmental needs of the child;
>
> (2) the capacity and disposition of the parents to understand and meet the needs of the child;
>
> (3) any relevant and material information obtained from the child, including the informed preferences of the child;
>
> (4) the wishes of the child's parents as to custody;
>
> (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interest of the child;
>
> (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate . . .
>
> (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute;
>
> (8) the ability of each parent to be actively involved in the life of the child;

specifically enumerates domestic violence; however, the statute explicitly states that "[t]he court is not required to assign any weight to any of the factors that it considers."[177] On the other hand, Pennsylvania's statute provides for general considerations, including domestic violence, but does not list all factors to be addressed.[178] Lawyers in Pennsylvania must look to case law for guidance regarding the factors courts will consider.[179]

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> (9) the child's adjustment to his or her home, school and community environments;
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> (10) the length of time that the child has lived in a stable and satisfactory environment . . .
>
> (11) the stability of the child's existing or proposed residences, or both;
>
> (12) the mental and physical health of all individuals involved . . .
>
> (13) the child's cultural background;
>
> (14) the effect on the child of the actions of an abuser, if domestic violence has occurred between the parents or between a parent and another individual or the child;
>
> (15) whether the child or a sibling of the child has been abused or neglected . . . ; and
>
> (16) whether the party satisfactorily completed participation in a parenting education program . . . .

*Id.*

[177] *Id.*

[178] 23 PA. CONS. STAT. ANN. § 5303 (West 2003). Award of custody, partial custody or visitation

> (a) General rule.—
>
> (1) In making an order for custody or partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual and emotional well-being.
>
> (2) In making an order for custody, partial custody or visitation to either parent, the court shall consider, among other factors, which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child.
>
> (3) The court shall consider each parent and adult household member's present and past violent or abusive conduct which may include, but is not

Despite the fact that many jurisdictions consider evidence of domestic violence as a factor in judicial determinations affecting children,[180] employing the best interest standard as states presently define it may pose problems in domestic violence visitation cases in general, and prison visitation in particular. The problem with the best interest standard may be in both its structure and its application. In applying the best interest standard, some believe that our legal system is making determinations that balance the interests of the parents with those of the child,[181] resulting in an outcome that is not always best for the child. Such criteria may be acceptable in cases in which parents seek what is best for their children; however, this is not so in cases in which parents are motivated by other interests.[182]

When the needs of a child conflict with the wishes of a parent, what is best for the child may not always be the guiding principle in the court's resolution of the matter. According to Martha Albertson Fineman, the Deskbook—, which provides direction to judges in family law matters—, offers surprising guidance to our judicial officers.[183] The Deskbook suggests that visitation in the face of domestic violence may in fact be acceptable.[184]

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> limited to, abusive conduct as defined under the act of October 7, 1976 (P.L. 1090, No. 218), known as the Protection From Abuse Act.

*Id.*

[179] *See* EMANUEL A. BERTIN, PENNSYLVANIA CHILD CUSTODY LAW, PRACTICE, AND PROCEDURE § 1.1.1 (1983) (citing Gerald G. v. Theresa G., 426 A.2d 157 (Pa. Super. Ct. 1981)). Bertin explains that although the best interest standard is a "nebular term," in Pennsylvania the factors "most frequently presented for analysis include the character and fitness of the parties seeking custody, the nature of the proposed custodial homes, the child's preference, the parenting abilities and inclinations of the contestants, and the ability of each party to provide financially for the child." *Id.*

[180] *See Charts*, 40 FAM. L.Q. 591, 593 chart 2 (2007) ("Custody Criteria").

[181] *See* CLARK, *supra* note 158, at 788-89.

[182] *See* Donna J. Jitchens & Patricia Van Horn, *The Court's Role in Supporting and Protecting Children Exposed to Domestic Violence*, 6 J. CTR. FOR FAMS., CHILD. & CTS. 31, 39-40 (2005) (explaining that it is a fallacy to assume that parents, in the context of domestic violence, act in the best interest of their children).

[183] Fineman, *supra* note 25, at 221.

[184] ROBERT J. LEVY, NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVE ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 112-13 (1998). Levy states:

Such guidance is likely to result in judicial determinations based on the wishes of the parent rather than the needs of the child.

Precise guidance in assessing what is in the best interest of children of incarcerated batterers could resolve some concerns. The answer may be found in the weight given to certain factors, as well as some fine-tuning of those factors. According to the Model Code on Domestic and Family Violence, the safety and welfare of the child—as well as of the battered parent—must have the greatest weight, "above all other 'best interest factors'" the court considers.[185] The Model Code's requirement that the "domestic violence factor" possess the greatest weight fails to answer what in particular the judge should weigh. The Model Code speaks of the act of violence itself, as well as fear that the violence will likely cause,[186] but does not speak of psychological damage beyond fear that may result from exposure to extreme acts of violence against women.

Consider Montana's best interest standard, which requires courts to consider physical abuse or a threat of physical abuse by one parent against the other parent or child as a factor to determine a parenting plan which is

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> Nonetheless, children of even the unhealthiest marital relationship need both parents and the quality of parent-child affiliations is not always determined by the quality of the interaction between the marital partners. Denying an abusing spouse's visitation with his children, under many circumstances even restricting visitation substantially, might serve to punish the children rather than protect them.

*Id.*

[185] NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 and Commentary (1994). § 402.1 of the Model Code provides:

> 1. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic violence:
>
> > (a) The court shall consider as primary the safety and well-being of the child and the parent who is the victim of domestic or family violence.
> >
> > (b) The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person.

*Id.*

[186] *Id.*

in the best interest of the child.[187] The statute is silent as to how a judge is to use evidence of domestic violence to determine its relevance to and influence on the best interest of the child. Montana's law provides little direction as to whether the judge should weigh the violent act or the effect the act has on the child. The statute neither considers the need to protect the child from further psychological damage, nor the short- and long-term implications of acts of violence on a child's emotional well-being.[188]

Similarly, Pennsylvania's statute requires courts to consider acts of domestic violence, but does not provide guidance as to how judges should weigh such acts or how domestic violence should alter visitation determinations.[189] When an abuser is convicted of an enumerated crime, Pennsylvania law requires that the court determine that the parent does not pose a "threat of harm" to the child before entering a visitation order.[190] Threat of harm, however, is not defined.

Some states specifically provide that even if a court finds domestic violence has occurred, the court may still determine that visitation with the abusive parent is in the best interest of the child. One such state, Missouri, fails to provide information to suggest which domestic violence acts are contrary to the best interest of the child and which are not detrimental.[191]

These and similar laws focus primarily on the physical safety of the victim or the child and provide little guidance to courts on the use of domestic violence beyond the act itself. These laws do not consider the influence the act has on the emotional development of the child and the implications of ordering continued contact between a child and a perpetrator of extreme acts of violence.[192] In addition, these statutes fail to address the special circumstances of prison visitation, the particular factors to consider,

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[187] MONT. CODE. ANN. § 40-4-212 (2006).

[188] *See* discussion of trauma and children *infra* Part V.C.

[189] 23 PA. STAT. ANN. § 5303(a)(3) (West 2005).

[190] *Id.* § 5303(b).

[191] 30 MO. REV. STAT. § 452.400.1(1) (West 2003).

[192] In the alternative, a Maine statute requires that courts consider not only the safety of the child but also how the existence of domestic abuse affects the child emotionally. ME. REV. STAT. ANN. tit. 19-A, § 1653.3(L) (1998). The law does not, however, suggest how the domestic violence factor should be weighed relative to the other eighteen factors in determining what is in the best interest of the child. *Id.*

and how courts should weigh those factors in assessing prison visitation requests.[193]

### D. A Legal Presumption

Potentially, a legal presumption against prison visitation in cases of extreme acts of violence would solve the problem.[194] The Model Code on Domestic and Family Violence provides that in domestic violence cases, there shall be a rebuttable presumption against an award of sole or joint custody to the perpetrator.[195] The Model Code does not provide a similar presumption against visitation and is notably silent on the issue of prison visitation.[196]

In a minority of states, evidence of certain acts of domestic violence triggers a rebuttable presumption that visitation between the abusive parent and the child should be supervised.[197] Other states suggest that courts must consider evidence of domestic violence when parents request supervised visitation between an abusive parent and a child.[198] Although a step in the right direction, these laws fail to address factual situations involving extreme acts of violence, which may require staying any and all contact between the abuser and child.[199]

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[193] Recently, Delaware enacted a law addressing prison visitation separately. It requires consideration of special factors before granting visitation to an incarcerated parent. *See* DEL. CODE ANN. tit. 13, § 728(e) (1999).

[194] Although rebuttable, the presumption would bar any visitation unless rebutted and not simply provide for supervised visitation as some states mandate. *See, e.g.*, IND. CODE ANN. § 31-17-2-8.3 (LexisNexis 2003) (providing that if a parent is convicted of an act of domestic violence witnessed or heard by the child at issue, "there is created a rebuttable presumption that the court shall order that the noncustodial parent's parenting time with the child must be supervised").

[195] NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 185, at 33.

[196] *Id.* § 402.

[197] *See* IND. CODE ANN. § 31-17-2-8.3.

[198] *See* MINN. STAT. ANN. § 518.17 (West 2006) (mandating courts must consider the entry of a protective order when a parent requests an order for supervised visitation); LA. REV. STAT. ANN. § 9:364 (1997) (providing for supervised visitation in cases of family violence). *But see* Slayton v. Slayton, 929 So. 2d 865, 871 (La. Ct. App. 2006) (citing Michelli v. Michelli, 655 So. 2d 1342, 1346 (La. Ct. App. 1995)) (clarifying that the court must find family violence has occurred and that there is a history of such violence for the Act to apply).

[199] *See infra* Part V.D.

## V. FACTORS FOR CONSIDERATION IN PRISON VISITATION CASES

> *[F]ostering children's long-term recovery and well-being involves both assisting them to heal from the emotionally traumatic effects of the incidents that they have witnessed and intervening to help them to repair and strengthen their bonds with their mothers . . . .*[200]

Current standards fail to provide the specialized attention necessary for cases involving prison visitation requests by perpetrators of extreme acts of violence.[201] The Supreme Court of Oklahoma in *Harmon v. Harmon* explained that although an incarcerated parent does not have an absolute right to visit with a minor child while in prison, cases must be decided on the facts presented in each case.[202] The *Harmon* court followed the Superior Court of Pennsylvania's model in *Etter v. Rose*, which provided the following factors to be considered when making prison visitation determinations: (1) age of the child; (2) distance and hardship to the child in traveling to the visitation; (3) type of supervision provided during the prison visit; (4) individual providing transportation and type of transportation provided; (5) emotional and physical effect on the child; (6) the incarcerated parent's past and present interest in the child; and (7) whether the incarcerated parent maintained reasonable contacts with the child in the past and any other relevant matters impinging on the child's best interest.[203] In lieu of the final catchall factor in *Etter*,[204] the *Harmon* court added its own eighth factor to the *Etter* test: the "nature of the criminal conduct" that caused the parent's incarceration.[205] Indeed, this is not a condition *Etter* contemplates as there is no factual consideration of the underlying offenses whatsoever in the *Etter* decision.

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[200] BANCROFT & SILVERMAN, *supra* note 61, at 82-83.

[201] The factors addressed *infra* are suggested as an alternative to the best interest factors currently utilized by many courts throughout the country.

[202] Harmon v. Harmon, 943 P.2d 599, 604 (Okla. 1997).

[203] Etter v. Rose, 684 A.2d 1092, 1093 (Pa. Super. Ct. 1996).

[204] *Id*.

[205] *Harmon*, 943 P.2d at 605.

*Harmon*, on the other hand, reasoned that crimes related to incarceration bear upon the court's decision-making process.[206] *Harmon*, however, failed to provide a detailed analysis of how to weigh the "criminal conduct" factor. Which crimes justify a denial of visitation, and why, remains unclear. Still, courts that consider prison visitation regularly fail to consider some or all of the *Etter* and *Harmon* factors. Instead, courts will simply find that either visitation is not in the best interest of the child, or that parents, including incarcerated parents, have a right to visitation unless harm to the child, beyond the act that resulted in the incarceration of the parent, can be clearly established.

To properly assess prison visitation requests for perpetrators of extreme acts of violence against women, courts must consider the following factors: [207] (A) nature of the crime;[208] (B) parent-child relationships;[209] (C)

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[206] *Id.* (considering the factors to be taken into account in making a prison visitation determination); *see also id.* at 602 n.2 ("We are not certain for what crime(s) husband is currently serving a term of imprisonment."). The court goes on to explain that there is some indication the father is incarcerated for offenses related to auto theft resulting in two fifteen year sentences.

[207] The test also contemplates a new and unique law recently enacted in the State of Delaware, DEL. CODE ANN. tit. 13, § 728(e) (2006), which requires a judge to consider the following factors before ordering visitation at a correctional facility:

> (1) The parent seeking visitation in a correctional facility had a substantial and positive relationship with the child prior to incarceration;
>
> (2) The nature of the offense for which the parent seeking visitation is incarcerated;
>
> (3) Whether the victim of the offense is the child, a sibling of the child, stepsibling, half sibling, parent, stepparent, grandparent, guardian, or custodian of the child; and,
>
> (4) Whether the child seeks a relationship with the incarcerated parent.

*Id.* Regrettably, the statute fails to consider the relationship between the child and the abused parent, the risk of emotional harm resulting from exposure and the possibility of traumatic bonding. Although lacking is some areas, the new law takes a bold step toward considering the underlying crime for which a parent is incarcerated.

[208] The eighth factor in *Harmon*. 943 P.2d at 602.

[209] In *Etter*, the court focused on the incarcerated parent's past and present interest in the child and whether reasonable contacts took place in the past. *Etter*, 684 A.2d at 1093; *see also* DEL. CODE ANN. tit. 13, § 728(e)(1) (considering whether the parent and child have a "substantial and positive relationship").

trauma to the child;[210] and (D) supervision and transportation issues.[211] A court should consider these four factors in determining what is best for children of incarcerated perpetrators of violence towards women. Furthermore, incarcerated batterers should bear the burden of proving that prison visitation is in the best interest of the child, in light of the aforesaid factors.[212]

### A. Nature of the Crime

The court in *Harmon v. Harmon* suggests that the "nature of the crime" for which an individual is incarcerated is relevant to the issue of

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[210] The fifth factor in *Etter*. 684 A.2d at 1093. The court considered the factor as it relates to the child's emotional reaction to prison visitation. Instead, this Article will measure the emotional effects as they relate to the underlying act and how that alters the child's emotional and physical reaction to prison visitation itself. In addition, the age of the child referenced in *Etter* and *Harmon* will be considered in the context of how children of particular ages react to traumatic events.

[211] Modified factor four, supervision and transportation issues, is a combination of factors three and four from the *Etter* test.

[212] Who should bear the burden in a particular visitation case is an important consideration to the litigant, lawyer, and judge involved. *See* Wilkins v. Ferguson, 928 A.2d 655, 669 n.11 (D.C. 2007) (providing that D.C. law places the burden on the perpetrator of family violence to show that visitation will not harm the child emotionally or physically). Courts seem to be split on the issue, some holding that the incarcerated parent must assume the burden of proving that visitation would not be detrimental to the child. *See, e.g.*, Moore v. Moore, No. 04CAA111, 2003 WL 1924346, at *2 (Ohio Ct. App. Aug. 11, 2005). Other courts hold that the burden rests with the residential parent or guardian to prove that visitation would be harmful to the child or children at issue. *See, e.g.*, Meece v. Meade, No. 2005-CA-001510-ME, 2006 WL 1195929, at *1 (Ky. Ct. App. May 5, 2006). (applying this standard where Meece, the father of the children, was convicted of complicity to commit the murder of an unrelated individual and was serving a twelve-year prison term); KC v. MC, No. CN99-10809, 2005 WL 4024848, at *11 (Del. Fam. Ct. July 20, 2005). In *Moore v. Moore*, the court maintained that it is the incarcerated parent who bears the burden of establishing that visitation is in the best interest of the child. *Moore*, 2003 WL 1924346, at *2. Whereas, *Meece v. Meade* suggests that the "one who" denies visitation bears the burden of proving that visitation would harm the child. *Meece*, 2006 WL 1195929, at *4 (in determining that the burden was on the mother to prove that visitation would be harmful to the child, the court relied on Smith v. Smith, 869 S.W.2d 55, 56 (Ky. Ct. App. 1994), which held that "[t]he burden of proving that visitation would harm the child is on the one who would deny visitation"). For the purposes of this Article, given the abuser's extreme acts of violence and present incarceration, the perpetrator parent should bear the burden of proving that visitation is in the best interest of the child. This Article recommends that states enact laws that mandate an incarcerated perpetrator of extreme acts of violence bears the burden of proving that prison visitation will be in the best interest of the children.

prison visitation.[213] The decision, however, provides little guidance as to the how trial judges should apply the crime factor. Specifically, which crimes will trigger a denial of a prisoner's request for visitation and which are immaterial to the issue of prison visitation? Although select courts do consider the nature of the crime for which an individual is incarcerated,[214] many judges do not recognize the connection between the acts of violence and the damage continued contact can have on a child.

When the ultimate act of violence results in murder of the other parent, courts are more likely to find that visitation is not in the best interest of the child. [215] Could it be courts find the act of murdering the other parent so horrifying that the only reasonable outcome is to presume contact between the killer and the children is harmful?[216] Some states have enacted

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[213] *Harmon*, 943 P.2d at 602.

[214] A few courts have considered the "nature of the crime" in making prison visitation determinations. *See* Gutkaiss v. Leahy, 285 A.D.2d 752, 752-53 (N.Y. App. Div. 2001) (holding that the trial court's denial of visitation was appropriate given the father's sixty-four year imprisonment and the "nature of the underlying offense" where the offenses at issue, unrelated to his child, involved "three counts of sexual abuse in the first degree and two counts of sodomy in the first degree"); McNeeley v. McNeeley, 45 S.W.3d 876 (Ky. Ct. App. 2001); Rogowski v. Rogowski, 251 A.D.2d 827 (N.Y. App. Div. 1998); Suttles v. Suttles, 748 S.W.2d 427, 428 (Tenn. 1988) (reversing both the trial and appellate courts, which had granted visitation to incarcerated father); Koop v. Koop, 378 N.W.2d 121, 123-24 (Minn. Ct. App. 1985).

[215] Although beyond the scope of this Article, the issues discussed and solutions provided herein may be applied to some intimate partner homicide cases. Many of those cases, however, warrant specialized attention that is not essential in all cases of extreme acts of intimate partner violence. The issue of intimate partner homicide has been the focus of a vast body of research and scholarship. *See* NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE (1999); JEAN HARRIS-HENDRIKS ET AL., WHEN FATHER KILLS MOTHER: GUIDING CHILDREN THROUGH TRAUMA AND GRIEF (2000); Wan, *supra* note 20; Wallace, *supra* note 20; Frankie Chamberlain et al., *Coping When Mother Kills Father*, PSYCHIATRIC TIMES, Sept. 2001, *available at* http://psychiatrictimes.com/showArticle.jhtml?articleID=185300969; Ahrens, *supra* note 15; Kowalczyk, *supra* note 15; Stein, *supra* note 15.

[216] *See* Ceasar A. R. v. Raquel D., 179 A.D.2d 574 (N.Y. 1992) (denying visitation request by incarcerated father who killed the children's mother and raped their stepsister); John R. v. Marlene C., 683 N.Y.S.2d 724 (Fam. Ct. 1998) (denying prison visitation). *Contra* State *ex rel.* Juvenile Dep't of Multnomah County v. Clampitt, 523 P.2d 594 (Or. Ct. App. 1974) (rejecting the trial court's stated policy of denying prison visitation, in particular, to a parent who has killed the other parent). The Oregon Court of Appeals explained that "[e]ach case must be decided on its own merits and not on the basis of a policy not to allow children to visits their parents at the penitentiary." *Clampitt*, 523 P.2d at 595. *See supra* notes 54-55 and accompanying text for a consideration of the issue as it relates to incarcerated battered mothers.

laws that specifically address situations in which a parent has committed an act of domestic homicide and seeks custody and visitation of the children at issue.[217] Anything short of a parent's death, however, seems to pose great difficulty for some courts.[218]

In *Rogowski v. Rogowski*, the appellate court affirmed the trial court's denial of prison visitation, in part, because of the nature of the crime for which the father was incarcerated.[219] The court noted that the father's crime was significant.[220] Notably, the father's crime—unlawful sexual contact—was perpetrated upon a niece and not the child at issue. Despite that fact, the court found that the trial court did not abuse its discretion given the daughter's young age, the father's failure to participate in sexual abuse counseling while incarcerated, supervision concerns, and the length of time it would take to travel to the prison.[221] The court in *Rogowski* made the connection between the nature of acts of child sexual abuse upon third parties and the relevance of those acts to visitation between a parent and child. It is difficult to project when courts will make a connection between

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[217] *See* CAL FAM. CODE § 3030(c) (West 2004) (barring only unsupervised visitation); CONN. GEN. STAT. § 46b-59b (West 2004) (barring visitation to a parent convicted of murdering the other parent unless the child is of sufficient age and assents to visitation); DEL. CODE ANN. TIT. 13 § 728(g) (1999); IOWA CODE ANN. § 598.41B (West 2001); KY. REV. STAT. Ann. § 403.325 (LexisNexis 2007); MD. CODE ANN., FAM. LAW § 9-101.1 (LexisNexis 2007) (providing for supervised visitation); MASS. GEN. LAWS ANN. ch. 208, § 31A (LexisNexis 2003); NEV. REV. STAT. ANN. § 125C.220(2) (LexisNexis 2004) (creating a rebuttable presumption that visitation with a parent convicted of domestic murder in the first degree is not in the best interest of the child).

[218] *See* N.M.M. v. J.W.M, No. CN00-07147, 2002 WL 32101256, at *2 (Del. Fam. Ct. Dec. 18, 2002) (ordering prison visits to a batterer despite evidence that he strangled and threatened the other parent, as well as doused her car with gasoline and blew it up in her driveway); McNeeley v. McNeeley, 45 S.W.3d 876, 878 (Ky. Ct. App. 2001) (vacating and remanding the trial court's order granting visitation to a imprisoned father who had "brutally killed" the son of his girlfriend by "beating and stomping him" to death); Charles G. v. Deborah G., No. CN93-08910, 1999 WL 486584 (Del. Fam. Ct. Mar. 30, 1999). For additional cases that grant prison visitation in cases of extreme acts of violence, see *supra* note 95.

[219] *See* Rogowski v. Rogowski, 251 A.D.2d 827 (N.Y. App. Div. 1998) ("It is significant that the crimes for which petitioner is currently incarcerated arise from his inappropriate sexual conduct toward his niece and that petitioner has not received any sexual abuse counseling while in prison."). Although beyond the scope of this Article, even the issue of prison visitation between a perpetrator of child abuse and the child at issue is not always clear to trial courts.

[220] *Id.*

[221] *Id.*at 828-29.

acts of violence and risk to the child at issue when the crime occurs within the child's household, but is not perpetrated on the child.

In *Suttles v. Suttles*, the Supreme Court of Tennessee emphasized the inappropriateness of visitation given the crimes for which the father in this case was imprisoned.[222] The court reversed a trial court's order granting visitation to the incarcerated father.[223] The Supreme Court of Tennessee found that visitation between the father and the child was inappropriate given the father's assault on the child and his violence toward the mother.[224] The father shot the maternal grandfather, abducted the mother and child, shot the mother, crashed a vehicle while the mother and child were in the automobile against their will, and attempted to choke the child.[225] The child was three years old at the time.[226] The child's father was sentenced to thirty-five years in prison for his crimes.[227] When the child was five years old, the trial court granted the father's request for prison visits and the appeals court affirmed the decision.[228] On appeal, the Supreme Court of Tennessee

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[222] Suttles v. Suttles, 748 S.W.2d 427, 429 (Tenn. 1988). ("While the mere fact that Defendant is presently incarcerated does not of itself preclude visitation, the combination of Defendant's incarceration, the crimes for which he is imprisoned, the age of the child, his history of violence . . . [and] his violent temper make visitation inappropriate at this time").

[223] *Id.* at 427.

[224] *Id.* at 429.

[225] *Id.* at 428. The record reflects the following extreme acts of violence by the perpetrator:

> Defendant came to see Plaintiff where she was staying at a campground . . . when Plaintiff's father intervened in an argument between the parties, Defendant drew a pistol and shot the father in the chest. He then abducted Plaintiff and their son in his car and led the police on a high speed chase. During the course of the chase, Defendant threatened his son with the pistol and shot Plaintiff when she tried to protect the child. As a result of the chase, the Defendant wrecked his car, injuring both Plaintiff and their son. At some point during this incident, Defendant choked his son but was restrained by Plaintiff and the police before the child was seriously injured.

*Id.*

[226] *Id.* at 428 n.1.

[227] *Id.* at 428. The opinion indicates that father's sentence was later reduced to thirty years. *Id.* at 428 n.2.

[228] *Id.* at 429.

explained that although a noncustodial parent's right to visitation is favored, it "'. . . may be limited or eliminated, if there is definite evidence that to permit . . . the right would jeopardize the child, in either a physical or moral sense.'"[229]

In *Koop v. Koop*, although the Minnesota Court of Appeals upheld the trial court's decision to deny prison visitation, the high court took issue with the lower court's reasoning with regard to the oldest son.[230] The facts indicate that the father crashed his vehicle into the mother's car, beat her with a tire iron, and assaulted an individual who attempted to intervene.[231] Here, the mother sustained severe injuries as a result of the father's extreme acts of violence.[232] Ultimately, the father was convicted of attempted second-degree murder and several counts of aggravated assault, and was sentenced to serve eighty-one months in prison.[233] Despite these excessive acts of violence, the appeals court was of the opinion that a teenager's desire to see his incarcerated father should be given "due consideration" and indicated that the father was free to file a request for visitation at anytime.[234] Although the appellate court found that the trial court did not abuse its discretion in denying prison visits to the father, its dicta calls into question the lower court's reasoning that the father's crimes against the mother are harmful to the child as well. Perhaps the appellate court struggled with the weight the trial court afforded to the wishes of the teenager in this case. The message from this decision, however, may suggest that a court vested with the power of judicial review does not necessarily regard harm to a mother—no matter how severe, horrific, and shocking—as harmful to the child.

In *N.M.M. v. J.W.M.*, a Delaware trial court ordered prison visits to a batterer father despite evidence that he strangled and threatened the child's mother, doused her car with gasoline, and blew it up in her

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[229] *Id.* (quoting Weaver v. Weaver, 261 S.W.2d 145, 148 (Tenn. Ct. App.1953)). The high court, however, suggested that given the need to maintain a bond between the child and his father, the defendant was free to communicate with the child by mail and telephone. *Id.*

[230] Koop v. Koop, 378 N.W.2d 121, 123-24 (Minn. Ct. App. 1985).

[231] *Id.* at 122.

[232] *Id.*

[233] *Id.* It is remarkable that father's prison sentence was less than seven years, given the severity of his crimes against mother.

[234] *Id.* at 124.

driveway.[235] In its decision, the court indicated that the father seriously endangered the life of the mother and showed little regard for the well-being of his children when he sent a frightening letter from prison.[236] The trial judge explained that when making custody and visitation determinations, the court must consider the best interests of the child pursuant to statute.[237] Although the court maintained that evidence of domestic violence favored the mother,[238] the decision failed to consider in detail the nature of the crimes for which the father was incarcerated, how such crimes should weigh against the other factors, and their relationship to the father's prison visitation request. In fact, the court provided no analysis on the impact that the father's crimes—blowing up the car on Christmas morning or strangling and threatening the mother—had on the children.[239]

In *McNeeley v. McNeeley*, a Kentucky Court of Appeals vacated and remanded a trial court's order granting visitation to an imprisoned father who had "brutally killed" the son of his girlfriend by "beating and

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[235] *See* N.M.M. v. J.W.M., No. CN00-07147, 2002 WL 32101256, at *2 (Del. Fam. Ct. Dec. 18, 2002). The decision provides the following facts detailing the violence father committed against his family:

> Later in October [2001], Father was charged with offensive touching and terroristic threatening for strangling and threatening Mother . . . . On December 25, 2001, Father called Mother repeatedly to talk to the children even though he was supposed to call only through a third party, pursuant to a Protection from Abuse (PFA) Order. Father continued to call past midnight and, on the following morning at 6:30 a.m., Father doused Mother's car with gasoline and blew it up in her driveway. He was charged with possession of heroin, arson, and violation of a PFA Order.

*Id.*

[236] *Id.* at *3.

[237] *Id.* at *1. By law, at the time of the trial, the court was required to consider seven factors in determining the best interest of the child. *Id.* at *1 n.1. Delaware's best interest statute has since changed, adding an additional factor. *See* DEL. CODE ANN. tit. 13, § 722 (1989). In addition, prison visitation requests are now addressed by the new law. DEL. CODE ANN. tit. 13, § 728(e) (1989).

[238] *N.M.M.*, 2002 WL 32101256, at *2.

[239] The court granted father a monthly visit with his daughters at the prison. *Id.* In addition, mother was required to transport the children to the correctional facility "to facilitate the visits." *Id.* Although beyond the scope of this Article, a mandate that a victim of a horrific act of violence must travel to a correctional facility where her abuser is housed, for any purpose, shocks the conscience and suggests the need for further consideration.

stomping him" to death.[240] The trial court entered an order granting prison visitation to the father without holding a hearing on the matter.[241] The Kentucky Court of Appeals observed that the record established the trial court's failure to consider the crimes for which the father was incarcerated.[242] As such, the Kentucky Court of Appeals maintained, "[t]he documents appellant provided to this Court from appellee's criminal conviction are deeply troubling. They reflect that appellee was abusive to all the children in his household, which includes the minor children concerned in the case at issue."[243] The court referred specifically to the fact that the children at issue lived with the father, his girlfriend, and the murdered child.[244] The documents appellant provided showed that he "brutally killed his girlfriend's son . . . by beating or stomping him, lacerating his liver and mesentery, on the day before his second birthday."[245] The appeals court held that by ordering visitation without a hearing and failing to consider appellant's evidence the trial court had erred.[246] The case was remanded for a hearing on the matter.[247]

In *Gregory C. v. Nyree S.*, the Supreme Court of New York, Appellate Division held that although the denial of visitation to a parent is a "drastic result," it is appropriate "where compelling reasons and substantial evidence show that visitation would be detrimental to the child."[248] The family court in *Gregory C. v. Nyree S.* denied the father's request for prison visitation and the father appealed. The New York Court of Appeals

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[240] McNeeley v. McNeeley, 45 S.W.3d 876 (Ky. Ct. App. 2001).

[241] *Id.* at 878. The decision was based on a motion to modify a prior visitation order, to which mother failed to respond. *Id.* The appeals court indicated that it was reasonable to conclude that mother expected she would be afforded an opportunity to respond at a hearing. *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.* Regrettably, the appeals court found that it was not vested with the authority to make the ultimate determination whether visitation should be granted or denied; that decision was for the trial court to make. *Id.* at 879.

[247] *Id.*

[248] Gregory C. v. Nyree S., 790 N.Y.S.2d 130, 131 (App. Div. 2005).

explained that compelling reasons existed in the case at bar to deny visitation.[249] In this case, the father was serving a twenty-five year prison term for the murder for hire of an unrelated individual.[250] In addition, there was evidence that acts of domestic violence had taken place in the past. Specifically, he abused the mother while she was pregnant and sent her threatening mail from prison.[251] The appeals court explained that the record supported the lower court finding that the father failed to understand the harm visitation would cause to the children.[252]

Similarly, in *Trombley v. Trombley*, the father appealed the trial court's denial of his request for visitation.[253] The evidence showed that he was convicted of sexual assault and criminal possession of a weapon as a result of acts of violence against the mother.[254] In addition, he committed extreme acts of violence against a recent girlfriend resulting in a ten-year prison term. Specifically, his girlfriend testified that at times while the child was in the household, he beat her with his fists, a sledge hammer, steel-toed boots, and a frying pan.[255] The New York Supreme Court, Appellate Division noted that although visitation is not inappropriate simply because a parent is incarcerated, visitation should be denied upon a showing of harm to the child.[256] Accordingly, the court held that there was a "sound and substantial basis" for the trial court's decision to deny the father's request for prison visitation given the facts of the case.[257]

The foregoing decisions illustrate that it is difficult to predict in cases of extreme acts of violence under what circumstances a court will grant or deny prison visitation to the batterer. As a result, courts must come to understand cases involving extreme acts of violence against family members command specialized attention.

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[249] *Id*.

[250] *Id.*

[251] *Id.* at 143.

[252] *Id.* at 143.

[253] Trombley v. Trombley, 754 N.Y.S.2d 100 (App. Div. 2003).

[254] *Id.*

[255] *Id.*

[256] *Id.* at 891.

[257] *Id.*

## B. Parent and Child Relationships

In *Etter v. Rose*, the court proposed considering the incarcerated parent's past and present interest in the child, as well as whether reasonable prior contacts took place, as factors six and seven of its factors for adjudicating visitation determinations.[258] This Article suggests modifying factors six and seven of the *Etter* test to consider (1) the relationships between all parties involved, (2) how prison visits will influence those associations, and (3) how the dynamics of the current bonds relate to the appropriateness of prison visitation between perpetrator and child.

### *1. The Perpetrator-Parent and Child Bond*

Experts acknowledge that although parental incarceration itself may lead to trauma in some children,[259] the outcome may depend upon the relationship between the child and the perpetrator-parent prior to incarceration.[260] If a healthy bond has not formed prior to detention, it is unlikely that forced visitation during the parent's incarceration will fix longstanding problems the batterer's behavior as a parent created.

In the words of the Tennessee Court of Appeals, "the affection of a child must be earned. It cannot be commanded."[261] Neither the court, nor the perpetrator can force a child to form a healthy bond with a parent who has acted in a harmful manner. The court explained that although a judge can provide the parent with an opportunity to form a relationship with one's child, in the end the court "cannot compel or create such a relationship."[262] There comes a point when a parent is so dangerous, either emotionally or physically, that he must forego the opportunity to develop a relationship with his child.

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[258] Etter v. Rose, 684 A.2d 1092, 1093 (Pa. Super. Ct. 1996).

[259] Karin D. Young, Children of Incarcerated Fathers: An Exploration of the Psychological and Social Tasks of the Child 8 (May 2000) (unpublished clinical dissertation, California School of Professional Psychology) (on file with the California School of Professional Psychology).

[260] *Id.* at 9.

[261] Arnold v. Arnold, 774 S.W.2d 613, 619 (Tenn. Ct. App. 1989).

[262] *Id.* at 621.

Although the absence of a father may result in negative effects on the child in some cases,[263] the context in which it arises is key. Just as it is unsound to claim that all incarcerated fathers present a danger to their children, so too is it inaccurate to suggest that all parental involvement is beneficial to children. In fact, the negative effects of an absent father may be inconsequential when compared with the trauma experienced by children exposed to perpetrators of extreme acts of intimate partner violence.[264] As a result, the incarcerated parent's past and present relationship with the child and whether reasonable contacts took place in the past must be considered in the context of parent-child bonding. Evidence of what appears to be a strong bond between the incarcerated parent and the child may result in an inaccurate legal conclusion that promoting the parent-child relationship is justified and possibly even essential to the child's emotional development.

Lundy Bancroft and Jay G. Silverman suggest that bonding between perpetrators of domestic violence and their children may be misleading.[265] They maintain that "abuse of any kind, including direct child abuse, does not necessarily lead to distant, superficial, or overly fearful relationships."[266] They suggest that victims can form strong bonds with their abusers, known as traumatic bonds.[267] Bancroft and Silverman have

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[263] GABEL & JOHNSTON, *supra* note 10, at 141; *see also* Yarrow, *supra* note 10, at 89.

[264] Even those who believe a child's attachment to both mother and father is critical to the healthy development of the child acknowledge that, in some cases, contact must be restricted. *See* Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 302 (2000) (suggesting that intimate partner violence, among other harmful exposures, negatively influences the "security and stability of attachments"). Kelly and Lamb offer that once there is a reduction in exposure to the harm, children can become securely attached over time. *Id.*

[265] BANCROFT & SILVERMAN, *supra* note 61, at 39-41 (providing a detailed explanation of the occurrence of trauma bonding).

[266] *Id.* at 39. Although traumatic bonding can result in a strong connection between the child and the perpetrator, these bonds are unhealthy according to Bancroft and Silverman. *Id.* at 40.

[267] *See Id.* at 40. The authors explain:

> In traumatic bonding, the person who brings the soothing relief is the same one who perpetrated the abuse. Following an incident of abuse, for example, an abuser may apologize for what happened, express concern for how the victim is feeling, and speak in a calm and warm tone. The typical response in victims of abuse is to feel thankful for the kindness, to be eager to forgive, and to form a belief that the abuser actually cares

found that even those who witness violence can develop traumatic bonds with the perpetrator once the observer learns "that one path to relative safety is to maintain a close bond with the abuser."[268] Consequently, although it may appear to outsiders that the child and the incarcerated parent have a close connection, instead a very harmful and emotionally damaging relationship may exist[269]—a harmful bond that is not easily detected. The court's continuation of that unhealthy relationship may in fact cause unintended, additional harm to the child both emotionally and physically. As we saw earlier in *Rahn*, the court based its decision to grant prison visitation in part on evidence of what it believed to be a strong relationship between the child and father.[270] Hearing officers must look deeper to make accurate assessments about the type of bond that exists between parent and child.[271]

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> deeply for him or her. Once this cycle has been repeated a number of times, the victim may come to feel grateful to the abuser for stopping the abuse each time, even if no real kindness or attentiveness follows.

*Id.*; *see also* Janet R. Johnston & Robert B. Straus, *Traumatized Children in Supervised Visitation: What Do They Need?*, 37 FAM. & CONCILIATION CTS. REV. 135, 136 (1999) (suggesting that children form unhealthy attachments with abusive parents out of fear "in a defensive attempt to master their fears, the children may have developed pathological attachments to that parent and may have aligned with him or her").

[268] BANCROFT & SILVERMAN, *supra* note 61, at 41.

[269] *Id.* (citing M.R. Whitten, *Assessment of Attachment in Traumatized Children*, *in* B. JAMES, HANDBOOK FOR TREATMENT OF ATTACHMENT-TRAUMA PROBLEMS IN CHILDREN 35 (1994)).

> Traumatic bonding leads the child to become increasingly focused "on the needs, wants, and emotional state of the abusive adult[, which] is her best shot at maintaining safety for herself," while simultaneously causing the child to lose focus on developing his or her abilities or engaging with the world . . . .

*Id.*

[270] Rahn v. Norris, 820 A.2d 1183, 1187-88 (Del. Fam. Ct. 2001) (explaining that "[a]s bad as the relationship was between mother and father, it is clear from mother's testimony that David was very close to his father").

[271] DEL. CODE ANN. tit. 13, § 728(e)(1) (1989). The statute requires consideration of several factors, one of which is the "parent seeking visitation in a correctional facility had a substantial and positive relationship with the child prior to incarceration." *Id.* Although this law is a good start, what appears "substantial and positive" to the objective observer may be misleading without expert assessment.

The behavior of the perpetrator is also relevant to the equation given his distinctive characteristics as a parent.[272] According to Karin D. Young, children of incarcerated parents may be the object of harsh or violent treatment, given the nature of domestic violence; research indicates that inmates tend to exhibit "coercive and authoritarian patterns in managing their children's behavior."[273] The parenting behaviors of confined batterers may, in fact, be more dangerous than many experts on incarcerated parents understand, due to the batterer's unpredictability. According to Bancroft and Silverman, batterers tend to swing from authoritarian to permissive, or even indifferent, without warning when parenting.[274] These poor parenting styles may be more damaging to children exposed to domestic violence because of the trauma they may experience as a result of the violence.[275] Bancroft and Silverman suggest that batterers are more often angry at their children and more likely to use physical discipline than non-batterers.[276]

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[272] BANCROFT & SILVERMAN, *supra* note 61, at 6-7. According to Bancroft and Silverman:

> [B]atterers tend to be controlling and coercive in their direct interactions with children, often replicating much of the interactional style that they use with the mother . . . . Their coercive parenting has multiple consequences for families . . . . In particular, the batterer's tendency to be retaliatory has important implications for children who disclose abuse to outsiders or who call for police assistance during an assault. Professionals intervening in families affected by domestic violence need to remain aware at all times of the high potential for punishment or intimidation of the children by the batterer for discussing events in the home.

*Id.*

[273] Young, *supra* note 259, at 12.

[274] BANCROFT & SILVERMAN, *supra* note 61, at 30; *see also* Johnston & Straus, *supra* note 267, at 140 (noting "unpredictable shifts in the moods and availability of parents, and especially, climactic incidents of violence from fathers who could, at other times, be loving caretakers or doting suitors, left some children with a 'double image' of their fathers").

[275] BANCROFT & SILVERMAN, *supra* note 61, at 30 ("Children exposed to domestic violence are very often at emotional risk because of the traumatic effects of the violence itself, and thus poor parenting by a batterer can be felt more deeply than might be the case in other circumstances.").

[276] *Id.*

In addition, experts suggest that "mutual influence" may explain why criminal behavior repeats itself generation after generation in some families.[277] Through mutual influence one family member has a negative influence on the behavior of his or her children by providing destructive role models for the child to emulate.[278] Instead of seizing the opportunity to break the cycle of violence, court-ordered prison visitation between batterers and their children supports and encourages extreme acts of violence against women. As a consequence, the cycle of violence continues.

### *2. The Abused-Parent and Child Relationship*

Experts in the field support the notion that the well-being of children exposed to violence against women is directly linked to the well-being of the abused parent.[279] According to Dr. Lois A. Weithorn, research supports the view that a positive relationship between the non-abusive parent and the child is critical to the child's healing process.[280] In prison visitation cases in particular, the stability of the abused parent is critical because the abused parent may be the sole provider of care for the child.

By his intentional illegal acts, the abuser has not only removed himself from the role of parent, provider, and caretaker, he has also intentionally injured and traumatized the child's only available caretaker. By demanding visitation, the incarcerated batterer adds to the problem by causing additional emotional trauma to the child and the abused parent. Requiring visitation may allow the batterer to continue to harass and intimidate the mother through her children. Visitation allows the abuser to maintain control over the battered spouse through the legal process, places additional financial burdens upon her in transporting the children to the prison, and constrains her time, depending on the frequency of the visitation schedule. Most importantly, the survivor must handle the daily stress that results from continued contact, in any form, with someone who has committed horrific acts of violence against her.

In contrast, a child's positive bonds may counteract the negative effects of traumatic bonding, as well as other traumatic events. Based on the

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[277] Laing & McCarthy, *supra* note 99, at 23.

[278] *Id.*

[279] Weithorn, *supra* note 59, at 135-36 (citing OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, SAFE FROM THE START: TAKING ACTION ON CHILDREN EXPOSED TO VIOLENCE (2000)).

[280] *Id.* at 136.

work of G. Margolin, Bancroft and Silverman suggest that a child's ability to recover from trauma is associated with a positive relationship with a loving parent or other caretaker.[281] Unfortunately, to exert power over the other parent, many abusers intentionally damage the relationship between the child and the battered parent.[282] Allowing the child to strengthen ties with the non-abusive parent or caretaker safely may offset the negative effects of traumatic bonding. Preventing perpetrators from continuing to traumatize their children during prison visits may aid in the healing process for children exposed to extreme acts of violence to women.[283]

*RJ v. DJ* provides an example of the positive correlation between removal of a negative parental figure and the healthy development of children.[284] The court in *RJ* denied the incarcerated father's visitation request based in part on the effect such visitation would have on the mother's emotional stability.[285] According to the family court: "[The m]other is in effect the only parent the child has at this time and the child's well-being is entirely dependent on his mother's stability."[286] *RJ* did not involve intimate partner violence, and yet the court was inclined to find that if frequent prison visitation would at all negatively impact the mother's ability to "function effectively as a sole custodial parent," visitation should

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[281] BANCROFT & SILVERMAN, *supra* note 61, at 42 (citing Gayla Margolin, *Effects of Domestic Violence on Children*, *in* PENELOPE K. TRICKETT & CYNTHIA J. SCHELLENBACH, VIOLENCE AGAINST CHILDREN IN THE FAMILY AND COMMUNITY 57 (1998)). Bancroft and Silverman suggest "children's resilience to any type of traumatic event has been linked to the presence of a good parent or parentlike figure in their lives, which for children exposed to domestic violence points to the importance in most cases of their relationship with their mother." *Id.*; *see also* Weithorn, *supra* note 59, at 88-89 (maintaining that research supports the notion that the "presence of 'protective' factors that promote the child's 'resilience,'" such as a "strong and capable parent," are important to consider when assessing how children experience domestic violence); HARRIS-HENDRICKS, *supra* note 215, at 13 (explaining that securely attached children are better able to manage stress).

[282] BANCROFT & SILVERMAN, *supra* note 61, at 57-64 (maintaining that battering undermines the other parent's authority thus damaging the relationship between the child and the battered spouse).

[283] *See id.* at 82-83.

[284] RJ v. DJ, 508 N.Y.S.2d 838 (Fam. Ct. 1986).

[285] *Id.*

[286] *Id.* at 840.

be limited.[287] The court suggested that the mother's ability to function was paramount to the healthy development of her child.[288]

Similarly, the Nebraska Supreme Court in *Casper v. Casper* affirmed a trial court's limitations on incarcerated father's visitation on the basis that the "best interest of the children lay in the establishment of a stable home environment."[289] Because prison visits were disruptive to the children, the mother, and her new husband, the court found contact to be of little benefit to anyone other than incarcerated father.[290]

Extending the analysis of *Casper* and *RJ* to cases involving extreme acts of violence to mothers, ordering visitation between the abuser and the child may result in additional stress to the battered mother. Courts are faced with a difficult task when asked to protect the health and emotional stability of the parent with physical custody, assess future risk to children, and weigh the interests of incarcerated batterers seeking contact with their children. There are, however, important reasons why courts should consider the interests of all individuals whom these unique visitation determinations affect.

Experts suggest that an abused mother may suffer from depression, which could disrupt her ability to adequately respond to the needs of her children.[291] Moreover, "[a]dequate parenting capacities are important mediators of developmental risk to children who have been exposed to ongoing violence."[292] Removing the abuser from the situation, thus affording a safe environment for both mother and child, allows the abused parent the opportunity to heal and thus provide for her children.[293] Our legal system's utmost concern should be the physical and emotional well-being of the parent solely responsible for the care and nurturing of the child.[294]

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[287] *Id.* at 841.

[288] *Id.* ("It is clear to this Court that mother must have control over the time and frequency of visitation. Her ability to function effectively as a sole custodial parent is of utmost importance to her son. The Court finds that it would not be in the best interests of the child to impose upon mother a recurrent frequent visitation schedule. She already finds the situation she is presented with as stressful and difficult.").

[289] Casper v. Casper, 254 N.W.2d 407 (Neb. 1977).

[290] *Id.* at 409.

[291] McGill et al., *supra* note 27, at 320-21.

[292] *Id.* at 321.

[293] *Id.*

[294] RJ v. DJ, 508 N.Y.S.2d 838, 841 (Fam. Ct. 1986).

The child's well-being depends on the primary caregiver's physical and emotional stability.[295]

### C. Trauma to Children

To determine the appropriateness of prison visitation in cases of extreme acts of violence, courts must understand how children experience trauma.[296] Moreover, judges must consider how visits with a batterer will affect a child coping with the trauma associated with exposure to extreme violence. Only then can the court focus on the narrow issue of determining what impact ordering visits in a prison setting will have on the child.

By understanding how extreme acts of violence against women in particular, and prison visitation in general, affect children, we can begin to answer the question of whether the exercise of prison visitation rights by perpetrators is in the best interest of children.

Exposure to acts of violence that are greater in severity will likely cause greater trauma to a child than acts that are less severe.[297] Moreover, Spencer Eth and Robert Pynoos suggest that the closer the personal relationship between the child and the victim, the more likely that grave trauma will result.[298] In addition, Janet R. Johnston and Robert B. Straus

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[295] *Id.*

[296] *See* Marty Beyer, *Developmentally-Sound Practice in Family and Juvenile Court*, 6 NEV. L.J. 1215, 1215-16 (2006) ("Developmentally-sound practice in Family and Juvenile Court means seeing the complex and unique combination of trauma, disabilities and childish thinking behind the behavior of each child or adolescent . . . . Too often, trauma is viewed as the therapist's domain . . . .").

[297] *See* HARRIS-HENDRIKS ET AL., *supra* note 215, at 143 (explaining "the more serious the situation the children have suffered, the higher the rate of problems"); Lemmey et al., *supra* note 41, at 268 (explaining that exposure to increased physical violence also results in increased behavioral problems in children); SPENCER ETH & ROBERT PYNOOS, POST-TRAUMATIC STRESS DISORDER IN CHILDREN 19 (1985) ("Children who witness extreme acts of violence represent a population at significant risk of developing anxiety, depressive, phobic, conduct, and post-traumatic stress disorders, and are in need of both clinical and research attention.").

[298] ETH & PYNOOS, *supra* note 297, at 24 ("The greater the personal impact on the child, the greater the likelihood a traumatic state will occur. Therefore, it is not surprising that child witnesses to parental homicide, rape, or suicidal behavior all report feeling emotionally overwhelmed by the danger to their parent."); *see also* Beyer, *supra* note 296, at 1217 (explaining that exposure to trauma that directly impacts the family in particular is harmful to a child's normal development); HERMAN, *supra* note 1, at 7 (explaining the difference between those who witness natural catastrophic events and those who observe horrific acts by "human design" and arguing that when the act is by human design the witness is forced to take sides).

maintain that many of these children appear, to the objective observer, no different than any other child.[299] They may seem happy and yet, "their underlying vulnerability becomes quite evident through careful clinical observations and personality testing, especially when indirect projective measures are used."[300] Judges may be predisposed to follow their personal observations, which may contradict the opinions of experts. In the face of conflict, judges must acknowledge their limitations in assessing human emotion and make use of the knowledge and expertise of others.

Complicating this issue further, according to Marty Beyer, is the fact that children react to trauma in such varied ways.[301] This fact alone may cause some judges to mistakenly conclude that many children do not suffer. Unfortunately, when trauma goes untreated, the survival skills these children learn come at what some describe as a "high cost," resulting in dysfunction later in life.[302]

The Supreme Court of North Dakota in *Kraft v. Kraft* provided an enlightened view of the effects of intimate partner violence on children.[303] According to the court, intimate partner violence, regardless of whether the child has experienced the violence first hand, has long-term negative effects on children.[304] The court affirmed that children do not need to witness abuse to be affected by intimate partner violence.[305] Although experts in the field

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[299] *See* Johnston & Straus, *supra* note 267, at 137.

[300] *Id.* at 137-38.

[301] *See* Beyer, *supra* note 296, at 1217.

[302] Johnston & Straus, *supra* note 267, at 138.

[303] Kraft v. Kraft, 554 N.W.2d 657 (N.D. 1996). Although *Kraft v. Kraft* does not involve prison visitation, the court's analysis of the effects of domestic violence on children provides persuasive authority to be considered in cases involving intimate partner violence.

[304] *Kraft*, 554 N.W.2d at 661.

[305] *Id.*; *see also* Weithorn, *supra* note 59, at 4. Weithorn explains:

> The data clearly demonstrates that growing up in violent homes is detrimental to children, even when children are not direct victims of physical or sexual abuse. Researchers have observed, in fact, that samples of children exposed to domestic violence display symptoms and difficulties quite similar to children who have been direct victims of physical abuse.

Weithorn, *supra* note 59.

support this view,[306] those entrusted with the power to make legal determinations about the safety of our nation's children infrequently recognize it.

To address how children experience trauma, we must also consider the first factor enumerated in both *Etter* and *Harmon*: the age of the child.[307] Neither court, however, provides sufficient guidance as to how age should be weighed in the decision-making process.

### *1. Age-Related Considerations*

In *Juli B. F. v. Clarence S. M. Jr.*, the court denied prison visits between the father and the child based in part on the child's young age.[308] The facts of the case reveal that the father's conviction for assaulting the mother classified him as a perpetrator of domestic violence, thus triggering a presumption against awarding him joint or sole custody.[309] Despite granting the mother sole custody pursuant to the presumption, the court explained that it must determine visitation for the incarcerated father pursuant to the best interest standard.[310] Ultimately, the court determined that "meaningful contact" between the father and his daughter was not possible because of the father's incarceration and the child's young age.[311] The court, however, failed to provide any analysis as to why the age of the child required a finding that prison visitation was inappropriate.[312]

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[306] BANCROFT & SILVERMAN, *supra* note 61, at 3.

[307] Harmon v. Harmon, 943 P.2d 599, 604 (Okla. 1997); Etter v. Rose, 684 A.2d 1092, 1093 (Pa. Super. Ct. 1996).

[308] Juli B. F, v. Clarence S. M Jr., Nos. CN95-08172, 96-20683, 1997 WL 905956 (Del. Fam. Ct. Nov. 10, 1997).

[309] *Id.* at *2.

[310] *Id.*

[311] *Id.* at *3.

[312] *Id.* In this case the child was three years old. It is possible that the court based its decision primarily on the father's sexual abuse of a four-year-old boy and the fact that while the parents lived together the "[f]ather walked around the residence nude, called the toddler "sexy," and left Dominique [the child at issue] home alone while he went to buy beer." *Id.* Although the father's deviant acts resulted in a finding by the court that he should not be around small children, the court failed to provide any guidance as to why a small child would be more vulnerable than older children in this situation. *Id.*

Furthermore, basing a denial of visitation on the age of a child is a temporary solution that fails to resolve the underlying issue. Children grow up. If the problems associated with domestic violence remain unresolved, not only will courts fail to order necessary treatment, but critical evidence related to domestic violence and the resulting trauma to the child will be lost.[313]

In a standard prison visitation case, the age of the child may, in fact, tell us very little about when a child should visit in a penal setting. According to the experts, "age may be arbitrary, [and] 'developmental psychology does not offer what lawyers would most like: definitive, fixed information upon which to ground simple, age-based rules.'"[314] If the age of a child does not provide precise answers to the issues of when visitation is appropriate given the maturity and stage of a child's development, we may well question the utility of considering age as a part of the decision making process.

Although age does not provide clear-cut answers, it can provide some guidance about how children at various stages of development experience trauma and consequently, how a child of a certain age will react to continued contact with the battering parent.[315] A particular child's coping

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[313] Based on the author's experience representing survivors of intimate partner violence since 1994. Unlike stranger violence, domestic violence acts often go unreported and evidence may be lost. When law enforcement, other members of the legal profession, or medical personnel are absent from the case, photographs, medical reports, witnesses and related evidence are lost forever. If domestic violence is addressed at the initial custody trial some evidence of the violence can be procured by the court or counsel at the time of trial thus making a record of the acts of abuse for the future.

[314] *See* Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian* Ad Litem *Model*, 6 NEV. L.J. 1284, 1288 (2006) (quoting Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After* Troxel, 2003 WIS. L. REV. 115, 134 (quoting Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 919 (1999))); *see also* Beyer, *supra* note 296, at 1215 (noting that "[c]hildren and adolescents cannot be understood simplistically by their age").

[315] Although beyond the scope of this Article, a child's age may also establish whether she or he should have a role in the legal dialogue and the decision-making process. Questions could be asked, such as: Has the child reached sufficient age to add to the discussion? If so, what weight should be given to the child's wishes? Although judges, lawyers and legal scholars continue to debate the issue of the child's rights and the extent to which his or her wishes should be considered in custody and visitation decisions, there is no question that there is a place for the child's voice in the discussion. *See generally* Woodhouse, *supra* note 17. In addition, if the child has not reached a suitable age someone must speak for him or her. According to Professor Barbara Bennett Woodhouse, "treating children with the dignity owed to individual persons requires an assessment of their needs

skills are fundamental to any judicial determination that the child is able to manage the trauma associated with extreme acts of violence, and thus handle further contact with the perpetrator.

Jean Harris-Hendriks, Dora Black, and Tony Kaplan, in their study of children and trauma, find that age contributes to how the child handles stress.[316] In particular, they maintain that because of their vulnerability and dependence, younger children fare the worst from exposure to inter-parental violence.[317] Among the harms, exposure to the noises and tension related to battering can result in irritability and sleep disturbances in infants.[318] Adding to the problem, parents are often completely unaware of the extent to which young children experience violence in the home.[319]

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even if they have no autonomous views to articulate." *Id.* at 118. The desire to assess and ultimately express the needs of children is easily stated but not so easily accomplished. Determining who should speak on the child's behalf can be as complicated as assessing the extent to which the child's wishes should be taken into consideration. Some courts favor a law guardian or guardian *ad litem* (GAL), while others prefer appointing an attorney for the child. *Id.* at 130 (considering the role of the attorney for the child). *See generally* American Bar Ass'n, *American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 132 (2003) (explaining that a lawyer should act as either a attorney for the child or as a "Best Interest Attorney" and not a "Guardian Ad Litem" because the term is ill defined). The knowledge and training of the appointed attorney in the area of domestic violence may be crucial to his or her ability to speak on behalf of a child raised in a home where extreme acts of domestic violence have taken place. *See generally* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7 (2005). Sadly, this issue may have little influence on the court when faced with a decision to appoint an attorney for the child in cases involving violence to women. Assuming an attorney well versed in the area of intimate partner violence is appointed to represent the child, how does that individual determine the needs or wishes of the child? Cases involving a criminal conviction or other evidence of extreme acts of intimate partner violence may benefit from the assistance of a mental health professional to aid the court and counsel in making assessments about risk to children.

[316] HARRIS-HENDRIKS, *supra* note 215, at 27.

[317] *Id.* (explaining that young children have a "high degree of minor health problems and somatic complaints, sleep problems and negative mood, are fearful and act younger than their age and respond poorly to children and adults").

[318] *Id.*

[319] *Id.* ("[C]hildren see much more of the fighting than their parents realize or wish to admit. Children old enough to talk can describe violence which neither father nor mother knows that they have seen. This theme, that children will tell only when asked (and not always then), occurs throughout all violence and trauma research.").

Karin D. Young, in her look at children of incarcerated parents,[320] finds that "a child's perceptions of and reactions to stress and trauma are reflected by his or her psychological age and location along the developmental continuum."[321] Consistent with Harris-Hendrik's findings, Young maintains that although children between the ages of two and six are able to remember traumatic events, they are unable to "process or adjust to trauma without assistance"[322] and lack the ability to express their emotions.[323] As a result, children exposed to early childhood trauma "are more susceptible to negative outcomes" because they are more fearful and lack the skills older children possess to cope with their negative experiences.[324]

In addition, Young maintains that children in their early years view themselves as an extension of their parents and when a parent is harmed, they experience that harm as if it is happening to them.[325] If this is true, how do children of intimate partner violence process the violent acts inflicted by one parent against another? Do they view themselves as the abused parent or the batterer?[326]

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[320] Young, *supra* note 259, at 107. Although Young focuses on the potential detrimental effects of the separation caused by parental incarceration, she acknowledges that her study provides little attention to the issue as it related to family violence. *Id.* In such cases, Young recognizes that separation caused by incarceration may in fact be beneficial to the child. *Id.* Young suggests further research in several areas; in particular, the extent to which children already emotionally damaged prior to parental incarceration and not as a result of the incarceration, manage stress. *Id.* Despite the primary focus of Young's dissertation, much of the information she provides on child development is applicable to the issues presented herein.

[321] *Id.* at 3-4.

[322] *Id.* at 6.

[323] *Id.* at 5.

[324] *Id.* at 5. ("Unlike older children and adults, they [young children] cannot mentally create alternative scenarios or verbally express their emotional reactions to trauma."); *see also* McGill et al., *supra* note 27, at 315 (explaining that exposure to intimate partner violence at an early age can result in negative social behaviors including, but not limited to, the use of violence as a form of conflict resolution).

[325] Young, *supra* note 259, at 5. ("Young children are relatively unable to distinguish themselves as separate from their parents. Children, therefore, tend to experience injuries or threats to their parents as injuries or threats to themselves.").

[326] Experts in the field have established children's modeling of negative behavior. *See supra* notes 277-78 and accompanying text explaining mutual influence.

Experts suggest that the picture is mixed for school-age children.[327] Some school-age children exposed to violence may become violent, while others withdraw.[328] Young contends that children between the ages of seven and ten have an increased ability to reason.[329] As a result, they likely have a greater understanding of acts of violence they witness against a loved one, complicated by the fact that they also have a greater understanding of the battering parent's role in causing injury to an intimate. Because parents serve as important role models for school-age children,[330] a batterer's abusive behavior may be highly destructive to the healthy development of the school-age child. In general, researchers suggest that children exposed to violence in the home may have varied emotional responses including, but not limited to, depression, agitation, or even aggression.[331]

Harris-Hendriks asserts that older children suffer more guilt from traumatic events in their lives.[332] They feel guilty that they did not, or were unable to, protect their abused parent.[333] John Batt suggests that adolescents are vulnerable to negative identity outcomes.[334] Batt recommends that during this stage of identity development, parents should not act in an "authoritarian, negative or highly punitive" manner.[335] Unfortunately, a batterer's parenting style is frequently controlling, negative, and harmful.[336]

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[327] McGill et al., *supra* note 27, at 322.

[328] *Id.* ("For school-age children, the symptom picture is mixed. Living with high conflict may result in aggressive, oppositional, controlling, and anxious behaviors, or both undercontrolled and withdrawn constricted behaviors.").

[329] Young, *supra* note 259, at 7.

[330] *Id.* at 7.

[331] McGill et al., *supra* note 27, at 320. School-age children experience the trauma differently because of their ability to reason. Young, *supra* note 259, at 7. The positive aspect of this ability to reason could be that school-age children may respond well to intervention.

[332] HARRIS-HENDRIKS, *supra* note 215, at 20.

[333] *Id*.

[334] Batt, *supra* note 27, at 681-82.

[335] *Id.*

[336] *See supra* Part V.B; *supra* notes 272-76 and accompanying text; Young, *supra* note 259, at 12.

Unless and until children receive age-appropriate trauma assessment and treatment from highly trained mental health professionals, prison visitation orders will not reflect the needs of children exposed to violence.

### *2. Public Health Concerns*

Childhood exposure to violence against women is an important public health concern. As discussed above, children of all ages are at risk of experiencing negative outcomes as a result of exposure to violence. Surprisingly, experts maintain that children who witness violence experience more severe and long-term trauma than children who suffer injuries because those who suffer injuries tend to focus on their pain, and not the act of violence.[337] Conversely, children who observe acts of violence tend to focus on the actors and the actions.[338]

The medical community is leading the charge in providing outstanding research and data regarding the influence of childhood exposure to household dysfunction and health risks to those children.[339] Vincent J. Felitti and a number of colleagues conducted a study to consider the relationship between exposure of children to household dysfunction and abuse[340] and health risk behavior and disease in adults.[341] Felitti noted what

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[337] HARRIS-HENDRIKS, *supra* note 215, at 26.

[338] *Id.*

[339] Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREV. MED. 245 (1998); *see also* Shanta R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span*, 286 J. AM. MED. ASS'N 3089, 3095 (2001). Dube suggests:

> Children who experience traumatic events are more likely to have problems with emotional and behavioral self-regulation later in life and more likely to mutilate themselves and attempt to commit or commit suicide. Furthermore, the biological processes that occur when children are exposed to stressful events such as recurrent abuse or witnessing domestic violence can disrupt early development of the central nervous system, which may adversely affect brain functioning later in life.

Dube et al., *supra*. *See also* Weithorn, *supra* note 59, at 85-91 (explaining that exposure to violence in the home may affect both the health and emotional development of children in various ways).

[340] The term "abuse" is used in broad terms; including emotional, physical, and sexual abuse to the child. Felitti, *supra* note 339, at 248. Household dysfunction includes

the medical community has known for some time: high levels of exposure to adverse experiences "produce anxiety, anger and depression in children."[342] As a result of the study, Felitti discovered a strong correlation between high levels of exposure to negative childhood experiences and diminished adult health status.[343] The higher the level of exposure to negative childhood experiences, the more likely the possibility of health risk factors, such as increased smoking, obesity, depressed mood, suicide attempts, alcoholism, drug use, and history of sexually transmitted disease.[344] Similarly, Barbara Forsstrum-Cohen and Alan Rosenbaum, in their study of college students, found that the negative effects of childhood exposure to violence in the home continue into young adulthood.[345] In particular, they found that exposure to parental violence in childhood was associated with increased levels of anxiety in young adults.[346]

### *3. Buffers to Stress*

Experts suggest that the incarceration of a parent may in fact be a positive change for a family suffering at the hands of a batterer,[347] because incarceration will "act as a buffer to stress, thereby offsetting the negative consequences that may otherwise follow" from parental incarceration.[348]

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exposure to household members who engaged in domestic violence, criminal behavior, and substance abuse, as well as exposure to household members with mental illness. *Id.*

[341] *Id.* at 245.

[342] *Id.* at 253.

[343] *Id.* at 251.

[344] *Id.* at 249-50.

[345] Fields, *supra* note 58, at 233 (quoting Barbara Forsstrom-Cohen & Alan Rosenbaum, *The Effects of Parental Marital Violence on Young Adults: An Exploratory Investigation*, 47 J. MARRIAGE & FAM. 467, 468 (1985)).

[346] *Id.*

[347] Young, *supra* note 259, at 41; *see also* Laing & McCarthy, *supra* note 99, at 24 ("In some circumstances, the imprisonment of a parent may actually serve to reduce risk. For instance, imprisonment of negligent, violent and abusive parents can clearly benefit children by removing serious risks of current and future harm.").

[348] Young, *supra* note 259, at 41. Although looking at the stress seen generally from parental incarceration, Young acknowledges that "positive change can act as a buffer to stress, thereby offsetting negative consequences that might otherwise follow from negative change." Young agrees that there were limitations to her study because less attention was

The case of *Mara C. D. v. Paul C.* may best illustrate the positive correlation between the absence of the perpetrator from the lives of his children and a dramatic improvement in those children.[349] In *Mara C. D.*, the father was incarcerated at the time of his visitation request because he had violated his probation by threatening to blow up a family court.[350] The facts of the case reveal acts of violence so extreme that it is astonishing they were not the basis for father's incarceration. On one occasion, the father "picked up a six-inch butcher knife and slashed it in front of [the mother's] stomach to intimidate her."[351] Other acts of violence included attempting to choke the mother, threatening to kill her and their children, stating that the only way the mother would leave him would be in a pine box, brutally beating her, striking the children, and routinely acting out angrily toward both her and their children.[352] The father was arrested on one occasion for striking the mother repeatedly, pushing her, punching her mouth and ribs, kicking her arm, throwing rocks and roller skates at her, and threatening to kill her.[353]

As a result of his threat to blow up the courthouse, the father was incarcerated, which brought about his request for prison visitation.[354] The court ultimately denied the father's request for visitation based, in part, on what the court described as a "dramatic and hopeful improvement in the children's behavior since the father has been absent from their lives."[355] Evidence at trial showed that the children were "thriving in their new environment" and that the older child had "greatly improved behaviorally, emotionally and academically" during the period in which the child had no

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paid to situations where parent-child separation as a result of incarceration due to domestic violence may in fact benefit the child. *Id.* at 107.

[349] Mara C. D. v. Paul C., No. CN96-7446, 1997 WL 878688 (Del. Fam. Ct. July 25, 1997).

[350] *Id.* at *4.

[351] *Id.* at *2.

[352] *Id.* at *2-3.

[353] *Id.* at *3-4.

[354] *Id.*

[355] *Id.* at *8.

contact with his father.[356] *Mara C. D.* illustrates that, given the opportunity, children can thrive in the absence of an abusive parent.

### D. Supervision and Transportation

In *Etter*, the type of supervision provided during a supervised visit, the distance and hardship to the children traveling to the prison for visitation, and the individual providing the transportation comprised the second, third, and fourth factors of its seven prong test. Yet, the court provided little guidance as to how other courts should weigh these factors.[357] Although these factors may appear to be straightforward, they require some consideration given the distinctive nature of both the perpetrator and prison visitation.

It is with an undercurrent of trauma to the child, along with the unpredictability of the perpetrator and his poor parenting skills that this Article considers the broader picture of prison visitation. The prison setting itself can be traumatic to many children. The setting by nature will be unfamiliar, strange, and in some cases unsettling. The atmosphere of prison visitation has been described as "crowded and noisy, and the setting is generally not conducive to communication . . . . [It is] 'unnatural,' 'uncomfortable,' 'restrictive,' and 'stress-creating' for both [fathers] and their children."[358] These stressful conditions likely have an amplified harmful effect on children who already suffer from trauma directly related to the actions of their incarcerated parent.

Supervision provided during the visit may at first glance seem a non-issue because visits will take place at a highly secure location. However, those who are responsible for the supervised visits at a correctional facility may be incapable of providing appropriate safeguards. Although trained to guard inmates, prison staff may have little knowledge

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[356] *Id.* at *7. Regrettably, the court ordered that mother, a survivor of extreme acts of violence, write to her incarcerated perpetrator three times a year to supply information concerning the children's education, extracurricular activities, and health. *Id*. at *9. Suggested alternatives to court orders requiring survivors to have contact with their abusers could include third-party contact for the purpose of supplying information regarding the children or requiring the batterer obtain the information on his own. Contact alternatives and access to information must be balanced with the protection of victims against harassment or intimidation by third parties.

[357] Etter v. Rose, 684 A.2d 1092, 1093 (Pa. Super. Ct. 1996).

[358] *See* Elizabeth Dunn & J. Gordon Arbuckle, *Children of Incarcerated Parents and Enhanced Visitation Programs: Impacts of the Living Interactive Family Education (LIFE) Program* (2002), http://extension.missouri.edu/fcrp/lifeevaluation/LIFEreport.doc.

and no training concerning the dynamics of intimate partner violence.[359] Visitation centers, on the other hand, are expressly designed with built-in safeguards.[360] Staff may be specially trained in the area of intimate partner violence and well suited to observe and detect the subtle acts many perpetrators exhibit, such as a look or a hand gesture that the untrained eye may never detect.[361] According to Leigh Goodmark, specialized training in the area of domestic violence not only allows staff to recognize danger, it also equips them with the skills to appropriately intervene when necessary.[362] In addition, in some cases visitation center staff and volunteers have social work or psychology backgrounds.[363] Goodmark maintains that unlike prisons, visitation centers, as a policy, may require that their staff

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[359] BANCROFT & SILVERMAN, *supra* note 61, at 112. Bancroft and Silverman discuss the unique aspects of supervised visitation and batterers:

> In our experience, because of the manipulative style of many batterers, supervised visitation does not guarantee children's emotional safety and well-being unless the supervision is vigilant and is performed by a professional trained in the parenting of batterers and the dynamics of domestic violence . . . . In less structured forms of supervision, the risks of manipulation are even greater.

*Id.* In addition, Bancroft and Silverman explain, "the professional assessment of batterers' parenting is made more complicated by their typical ability to perform well under observation." *Id.* at 36; *see also* HERMAN, *supra* note 1, at 75 (explaining that the batterer's "*most consistent feature, in both the testimony of victims and the observations of psychologists, is his apparent normality*" (emphasis added)).

[360] *See generally Standards and Guidelines for Supervised Visitation Network Practice*, 36 FAM. & CONCILIATION CTS. REV. 108 (1998) (providing detailed standards and guidelines to be followed by those providing the delivery of supervised visitation services).

[361] Harrington Conner, *supra* note 137 (citing Dutton, *supra* note 137, at 24) (explaining that domestic violence is a pattern of behavior that over time changes the nature of the relationship causing both individuals to understand the "meaning of specific actions and words"). According to Dutton, the victim learns to read the abuser's actions, the meaning of which "extends far beyond what is being said or done in the moment." Dutton, *supra* note 137, at 24. Children, not unlike their abused mothers, learn to read the abuser's behavior, subtleties the untrained individual is unprepared to uncover or address. Dutton, *supra* note 137.

[362] Goodmark, *supra* note 28, at 280. Goodmark acknowledges, however, that even today many visitation centers are not set up this way. Comments to this article by Leigh Goodmark, Professor, Associate Professor, University of Baltimore School of Law (Aug. 14, 2007) (on file with the author).

[363] Goodmark, *supra* note 28, at 280.

record their observations during the visitation, providing critical evidence of an abusive parent's behavior.[364]

In those few cases where an incarcerated parent commits extreme acts of domestic violence and a court properly grants visitation, visitation should be accomplished through therapeutic supervision by a mental health professional.[365] Prior to any contact between the parent and the child, the mental health professional should conduct an assessment of both the incarcerated parent and the children involved.[366] The mental health professional must also consider any and all information relating to the extreme acts of violence in order to properly assess potential childhood trauma. Only upon an initial finding that limited contact would not be detrimental to the child's emotional well-being should preliminary therapeutic visits occur. After a series of contacts the mental health professional could make a determination for further contact based upon evaluations during therapeutic prison-visit sessions between the parent and the child, as well as upon separate evaluations of both the child and the incarcerated parent. All professionals working with children exposed to extreme acts of violence should also undergo training in the area of intimate partner violence and trauma bonding.

Transportation factors also remain crucial to determining whether visitation is appropriate. The New York Supreme Court Appellate Division affirmed the trial court's partial denial of prison visitation in *Ellett v. Ellett*.[367] The trial court based its denial of the father's visitation with his younger child on several factors, including the time it would take by automobile to transport the child to the correctional facility.[368] Given the child's young age, the ten-hour round-trip drive, the fact that the child would be transported by a grandparent, and the lack of a prior relationship,

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[364] *Id.*

[365] *Standards and Guidelines for Supervised Visitation Network Practice*, *supra* note 360, at 111 (describing therapeutic supervision as contact between parent and child facilitated by a certified or licensed mental health professional who is able to provide evaluation and recommendations for continued contact).

[366] Some will argue that the expense of professional assessment and supervision outweigh the benefits. A price, however, cannot reasonably be placed on the safety of children.

[367] Ellett v. Ellett, 698 N.Y.S.2d 740 (App. Div. 1999). Intimate partner violence was not a factor in *Ellett*. The father's lengthy incarceration was based on first degree robbery and assault convictions.

[368] *Id.* at 748.

the court denied the incarcerated father's request to visit with the younger child.[369] The trial court granted visitation between the father and the older child given their prior relationship and the older child's ability to manage the long trip to the prison.[370] Yet, the older child was only two years older than her three year-old-sister, with whom the court denied prison visitation.[371] *Ellett* suggests that there is a fine distinction between children of suitable ages when distance and hardship are at issue in a particular case.

The individual transporting the child to visitation must also be considered in all cases where prison visits are at issue. In no case should the court order or ask the battered parent to transport the child to the prison for a visit. The perpetrator must also arrange for a suitable individual who will safely transport the child to and from the visit at no cost to the battered parent. This requirement may present serious challenges given the potential for abuse. The perpetrator may use this opportunity to have family or friends terrorize, harass, intimidate, or negatively influence the child during the trip to and from the correctional facility. As a result, the battered spouse must retain the authority to reject individuals the batterer suggests as transporters.

## VI. THE RESPONSE

> *The response of the community has a powerful influence on the ultimate resolution of the trauma. Restoration of the breach between the traumatized person and the community depends, first, upon public acknowledgement of the traumatic event and, second, upon some form of community action. Once it is publicly recognized that a person has been harmed, the community must take action to assign responsibility for the harm and to repair the injury. These two responses—recognition and restitution—are necessary to rebuild the survivor's sense of order and justice.*[372]

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[369] *Id.* At the time of the family court's decision in 1997, the younger child was three years old.

[370] *Id.*

[371] *Id.* at 747 ("Petitioner and respondent are the parents of two daughters, born in 1992 and 1994.").

[372] HERMAN, *supra* note 1, at 70.

## A. Solutions

Our courts could simply do nothing, and it would be far better than the harm some visitation determinations cause battered women and their children. To argue that it is the legal system's duty to intervene in a visitation disagreement may be valid when both parents are similarly situated. This is not the case when one parent is unable to exercise free contact with a child due to confinement resulting from a predilection to act violently toward the other parent. Awarding prison visitation to a perpetrator of extreme acts of violence places a child at risk of psychological trauma.[373] A true system of justice must acknowledge that an injury has occurred, that individuals are suffering as a result of that harm, and that it should inflict no additional damage through legal intervention.

In cases of parental incarcerations as a result of extreme acts of violence to the other parent, there exists clear evidence to suggest that the inmate has acted in a manner that is in direct conflict with what is best for the child. By committing an act of extreme violence the abusive parent causes harm to the child, as well as the other parent. Research suggests that children raised in violent homes suffer in varied ways. As a result, the perpetrator and the child require specific responses not necessary in other cases of parental incarceration.

### *1. Expert Assessment of Children*

Children exposed to batterers who commit extreme acts of violence against women should receive expert assessment prior to visitation and treatment, if necessary, from a professional specifically trained in the areas of IPV and childhood trauma. According to Joseph C. McGill, Robin M. Deutsch, and Robert A. Zibbell, a child's coping abilities must be assessed.[374] McGill and his colleagues categorize children either as having adequate or inadequate coping capabilities.[375] McGill concludes that children with inadequate coping abilities are most in need of immediate

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[373] Although beyond the scope of this Article, caregivers have few options available when visitation is ordered in a case of extreme acts of violence. Appeal is the obvious choice in some cases, but as we have seen, not all appellate courts are willing to find that the trial court has abused its discretion. Some appellate courts even fail to recognize the significance of the nature of the crime as it relates to prison visitation determinations altogether.

[374] McGill et al., *supra* note 27, at 326.

[375] *Id.*

therapy services, and possibly require restricted contact with the abusive parent.[376] All at-risk children require assessment so professionals can determine both the extent of their trauma and their coping ability. Our courts are certainly in the best position to order therapy services and to monitor treatment with six-month or yearly reviews depending on the treatment services needed.[377]

### *2. Certification of Medical Professionals*

As a public policy matter, courts should mandate experts to assess the appropriateness of continued contact and provide treatment to children in need of supportive services. The medical profession should properly train and certify those working with children experiencing trauma associated with intimate partner violence. Children should have the opportunity to work though their trauma and break the cycle of violence. According to Carla Garrity and Mitchell A. Baris, before visitation occurs, courts should consider, with the assistance of an expert evaluation of the child, the intensity of the trauma and level of fear the child is experiencing.[378] Children experiencing a high level of trauma or fear should not visit with their parent, even after the batterer is released from incarceration.[379] As

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[376] *Id.* at 327.

[377] Some officials may view court monitoring as a drain on an overly burdened system that lacks sufficient resources to meet even current demands. Failure to respond to the needs of children, however, reinforces the cycle of violence that continually places additional burdens on our legal system in the form of criminal prosecution, probation, and various forms of civil relief in response to the acts of future batterers. Our reactive legal system is insufficient. We require a new approach, a proactive approach responsive to those individuals we are in the best position to help: the children.

[378] Carla Garrity & Mitchell A. Baris, *Custody & Visitation: Is it Safe*, FAM. ADVOC., Winter 1995, at 40, 44.

[379] Although beyond the scope of this Article, the issue of extreme acts of violence to women extends well beyond the prison walls. Many of the individuals who commit serious acts of domestic violence receive either a brief prison term or in some cases a suspended sentence. And unlike the prison visitation cases, post-incarceration cases have garnered little public attention. Courts lack guidance as to how to handle these specialized cases involving extreme acts of violence. Moreover, unlike prison visitation situations that provide, although flawed, a minimally controlled environment in which visitation shall occur, the circumstances are drastically altered when the perpetrator is no longer incarcerated. According to the National Court Appointed Special Advocate (CASA) Association, "[t]he coexistence of domestic violence and child maltreatment is well established. Judges should be knowledgeable of the safeguards which need to be in place when determining appropriate visitation which will ensure the child's safety." CHRIS BAILEY, NAT'L COURT APPOINTED SPECIAL ADVOCATE (CASA) ASS'N, DOMESTIC VIOLENCE AND

Garrity and Baris suggest "a supportive parent/child relationship will not thrive in an atmosphere of fear."[380]

### *3. Representation for Children*

A guardian *ad litem* (GAL), trained in the area of childhood trauma and IPV, may be necessary in some cases of childhood exposure to extreme acts of intimate partner violence. If the individual appointed lacks training and experience in the area of domestic violence, however, the introduction of a GAL can, in some instances, be problematic.[381] If a GAL is involved in the case, he or she should be charged with ensuring the provision of specialized services and treatment for children experiencing the trauma associated with exposure to extreme acts of intimate partner violence.

### *4. Reunification Efforts*

When released from incarceration, former inmates often try to reunite with their children. As a result, perpetrators should receive batterer's treatment and appropriate parenting skills training while in prison to ensure the safety of children upon release. Unfortunately, in some cases treatment will do little to change the batterer's abusive behavior or poor parenting skills.[382] According to experts, to protect children, judges must understand

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CHILD VISITATION: FOCUSING ON THE BEST INTEREST OF THE CHILD 25 (2006), http://www.nationalcasa.org/download/Judges_Page/0606_family_visitation_issue_0036.pdf. Added to the short and longer term emotional harms that may be caused by exposure to extreme acts of violence is the real possibility of physical danger to children.

[380] Garrity & Baris, *supra* note 378, at 45.

[381] Based on comments to this article by Leigh Goodmark, Professor, University of Baltimore School of Law (Aug. 14, 2007) (on file with the author). See *supra* note 315 and accompanying text for a discussion of court appointments of law guardian, guardian ad litem (GAL), or an attorney for the child.

[382] *See* Garrity & Baris, *supra* note 378, at 43 (explaining that some batterers commit acts of violence as a result of an impulse control problem, which is "usually not a treatable condition"). Evaluating the effectiveness of treatment programs for batterers has also proved difficult. *See* BRIAN K. PAYNE & RANDY R. GAINEY, FAMILY VIOLENCE & CRIMINAL JUSTICE: A LIFE-COURSE APPROACH 296 (2005). According to Payne and Gainey:

> Literally hundreds of studies have been done on the effectiveness of different batterer treatment programs. The results of this research show mixed support for the programs. Some programs are quite successful, while others are seen as dismal failures. One of the major obstacles that permeates all of the treatment programs for offenders concerns the negative attitudes that society has toward child abusers, spouse abusers,

the prognosis for recovery, as well as the length of time it may take for such recovery to occur.[383]

The Living Interactive Family Education (LIFE) Program provides an example of one prison program available for modeling. LIFE is an extension of the University of Missouri and serves to enhance and encourage visitation between incarcerated fathers and their children.[384] The program employs unique visitation settings, 4-H activities, and intensive parenting skills training to enhance the father's communication skills, manage his anger, promote nurturing, and encourage positive role modeling.[385] In a limited number of cases in which the child has received trauma therapy and the incarcerated father has successfully completed intensive batterer's treatment, participation in a program similar to LIFE may be beneficial to both child and parent. Prior to entry in such a program the child and parent should participate in therapeutic visitation sessions addressed herein.[386]

### *5. Judicial Education*

Finally, the judiciary must receive specialized training on IPV and childhood trauma. Although judges must employ and rely on the expertise of medical professionals, they must also possess certain knowledge about the dynamics of abusive relationships and the risks to children exposed to extreme acts of violence. In addition, judges should be required to make written finding when ordering visitation between children and the battering parent. Written findings will provide an opportunity for judges to reflect on

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> and elder abusers. Given that the abusers often already have low self-esteem, negative reactions from society may slow down the treatment process.

PAYNE & GAINEY, *supra.*

[383] PAYNE & GAINEY, *supra* note 382, at 296.

[384] L.I.F.E. home page, http://muextension.missouri.edu/fcrp/lifeevaluation/lifeprogram.htm (last visited Feb. 26, 2008).

[385] *Id.* According to one parent: "It's given us a unique opportunity to be better parents. You know, you take a lot of us: we've never had a chance to be parents . . . . Through this program we learn to become better parents by interacting along with each other and with our children." Dunn & Arbuckle, *supra* note 358, at 9.

[386] For a general discussion of therapeutic visitation, see GABEL & JOHNSTON, *supra* note 10, at 202.

their decision-making and establish a clear record for review when necessary.

### B. Model Test

The following proposed model may be adopted as a test or statute to be followed by courts in making visitation determinations for incarcerated batterers.

> **Section 101. Definitions**
>
> (1) *Extreme Acts of Intimate Partner Violence*: An extreme act of intimate partner violence (IPV) shall include, but is not limited to, rape, attempted rape, sexual assault, burning, stabbing, shooting, strangulation, physical torture, intentionally causing substantial bodily injury, or threat of serious physical harm by one parent against the other parent or household member.
>
> (2) *Exposure to Extreme Acts of Intimate Partner Violence*: A parent's act of violence against another parent or household member shall be evidence of harm to the child. Childhood exposure should be viewed in its broadest context and not solely in terms of witnessing violent acts. Exposure will include witnessing acts of violence, observing the aftermath of said violence or simply living (permanently, or on a limited or temporary basis) in a home where extreme acts of violence occur, even if the child is not present during the abusive incident.
>
> **Section 102. Presumption Against Visitation for Incarcerated Batterers**
>
> In every case in which an incarcerated perpetrator of an extreme act of intimate partner violence requests visitation with a child exposed to said acts, it is presumed that the inmate has acted in a manner which is in direct conflict with the well-being of the child and raises a rebuttable presumption that visitation or other contact between the perpetrator and the child is not in the best interest of the child.
>
> **Section 103. Factors in Determining Visitation in Cases of Extreme Acts of Intimate Partner Violence for Incarcerated Batterers**
>
> (1) In every case in which a child has been exposed to extreme acts of violence the court shall order expert assessment and

treatment of the child from a professional specifically trained in the areas of intimate partner violence, family violence, and childhood trauma.

(2) In addition to any other factors that a court must consider in determining an incarcerated parent's request for visitation and in which evidence of extreme acts of violence exist, the court must consider as paramount the emotional and physical well-being of the child; the safety of the child and the abused parent or household member; and the establishment of a stable home. In making determinations as to the best interest of the child, the court shall consider as paramount, above all other factors provided elsewhere, the following:

> (a) The nature of any acts of intimate partner violence committed by the incarcerated parent;
>
> (b) The emotional and physical effect exposure to the acts of violence has on the child, age-related factors, and any additional trauma which will result to the child from continued contact between the perpetrator and the child;
>
> (c) The nature of the incarcerated parent's past and present relationship with the child;
>
> (d) The impact prison visitation or continued contact with the batterer will have on the relationship between the abused parent and the child, as well as the effect such contact will have on the child's home environment;
>
> (e) The quality and extent of the supervision to be provided should visitation occur;
>
> (f) The distance and hardship to the child traveling to and from visitation.[387]

[387] The "distance and hardship to the child traveling to and from visitation" language taken from Etter v. Rose, 684 A.2d 1092 (Pa. Super. Ct. 1996).

**Section 104. Rebutting the Presumption**

At the expense and responsibility of the incarcerated parent, the presumption may be overcome by clear and convincing evidence of the following:

(a) A psychological or psychiatric evaluation of the child by a mental health professional specifically trained in the area of intimate partner violence who confirms in writing that visitation between the child and incarcerated parent will not further traumatize the child or impair the child's emotional or physical development or well-being; and

(b) A psychological or psychiatric evaluation of the incarcerated perpetrator by a mental health professional specifically trained in the area of intimate partner violence who confirms in writing that visitation between the child and incarcerated parent will not further traumatize the child or impair the child's emotional or physical development or well-being; and

(c) The perpetrator successfully completes an intensive batterer's intervention program and provides documentation to the court of successful completion; and

(d) The perpetrator successfully completes a parenting education course and provides documentation of successful completion; and

(e) Upon weighing all Section 103 factors, in light of the treatment of the batterer, the court finds by clear and convincing evidence that continued contact between the perpetrator parent and the child will not further traumatize the child or impair the child's emotional or physical development, or wellbeing.

## VII. CONCLUSION

*If we do not care about the functioning of the custodial parent, we neglect the child as well.*

There is little question that the mere suggestion that restrictions be placed upon the parent-child relationship invokes fierce emotional reactions. Most parents and children have a legal right to their continued relationship. In addition, there are many public policy reasons why the legal community should fight to maintain the sanctity of the family unit on behalf of parents and children. But we cannot ignore the broader picture; our society will only function if the individuals who make up our community

are mentally and physically healthy. Thus, an individual's rights and interests must be balanced with the interests of others and society as a whole.

When courts begin to examine and weigh the nature of the crime for which an individual is incarcerated and the risk to children exposed to those acts as important factors, our system will come to understand that extreme acts of violence against women are extraordinarily relevant to the decision of whether a particular incarcerated parent should visit with his or her child.[388] Judges who believe that their decisions regarding visitation are "not about" the parents are missing the point.[389] Our legal system must take a holistic approach to visitation matters and come to understand that visitation relates not just to the child but to the parents as well.[390]

If it is true that the imprisonment of a batterer acts as a buffer to the stress typically seen in cases of parental incarceration,[391] court-ordered visitation may in fact offset the positive effects of parental incarceration. Given the legal system's paramount objective to make decisions in the best interest of the child, we must not ignore the importance of the long-term negative effects of adverse childhood experiences on the health of children now, as well as into adulthood. As a result, carefully devised restrictions on prison visitation in cases of extreme acts of violence may provide hope of recovery to children in distress and a healthier future for all.

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[388] Although beyond the scope of this Article, many of the factors considered herein may be applied to cases that extend beyond the prison walls.

[389] Information based on the author's representation of hundreds of battered women seeking civil protective orders and custody of their children. Most recently, in the fall of 2006, the Delaware Civil Clinic appeared on behalf of a survivor at the call of a calendar to schedule the custody and visitation matters in the pending case. Intimate partner violence issues were raised and the judge turned to the client and began lecturing her, telling her that "this is not about you."

[390] McGill et al., *supra* note 27, at 316 (explaining that custody evaluators must not only assess the effects violence has on children, but its effects on the parents as well).

[391] Young, *supra* note 259, at 41. *See supra* notes 347-48 for a consideration of how prison acts as a buffer to stress.