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## Visiting Room: A Response to Prison Visitation Policies: A Fifty-State Survey

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## YALE LAW & POLICY REVIEW

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### Visiting Room: A Response to *Prison Visitation Policies: A Fifty-State Survey*

Giovanna Shay\*

In 2013, Sesame Street introduced its first Muppet with an incarcerated parent, Alex.<sup>1</sup> Also this year, U.S. Attorney General Eric Holder acknowledged that “too many Americans go to too many prisons for far too long and for no good law enforcement reason.”<sup>2</sup> With this Feature in the *Yale Law & Policy Review*,<sup>3</sup> Chesa Boudin, Trevor Stutz, and Aaron Littman bring long-overdue attention to prison visitation, which affects so many American families, and especially the children of the incarcerated.<sup>4</sup> The authors’ important effort could help to undermine the radically isolating style of imprisonment<sup>5</sup> that has developed in the U.S. during an era of mass incarceration,<sup>6</sup> in which visitation is markedly restricted compared to other advanced democracies.

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\* Professor of Law, Western New England University School of Law. Thanks to James Forman, Jr. for comments; to Hadar Aviram and Rasmus H. Wandall for information about Scandinavian policies; and to Neal Smith for helpful research assistance.

1. Erik Ortiz, ‘Sesame Street’ Introduces First-Ever Muppet With a Parent in Prison, N.Y. DAILY NEWS, June 19, 2013, <http://www.nydailynews.com/entertainment/tv-movies/sesame-street-introduces-muppet-dad-jail-article-1.1376845>.
2. Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, <http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html>.
3. Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL’Y REV. 149 (2013).
4. See Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J.L. & FEMINISM (forthcoming 2014) (describing negative effects of parental incarceration); Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671 (2002).
5. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237 (2009).
6. See generally MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001) (discussing mass incarceration).

This nationwide survey of prison visitation policies is a tremendous contribution to the study of corrections regulation. The project makes available information that previously was difficult to obtain, and provides a much fuller picture of visitation in jurisdictions across the country. The scrutiny of prison policies is all the more important, as the authors explain, because courts accord tremendous deference to prison officials' judgment, even when their policies impinge on prisoners' federal constitutional rights. As I argued in my 2010 Article, *Ad Law Incarcerated*, this judicial deference is particularly troubling because prison regulations are frequently promulgated without the kind of procedural protections and public scrutiny mandated in other areas of administrative law.<sup>7</sup> Because courts defer to prison officials, whose rules are often exempt from notice-and-comment rule-making, the type of project undertaken here is one of the few ways to shine a light on corrections regulations.

We stand at a critical moment in which to confront these issues. Beginning in 1970, America saw four decades of prison expansion, which by 2008 had resulted in the incarceration of one in one hundred Americans and one in fifteen African-American men.<sup>8</sup> In 2010, prison populations finally began to decline.<sup>9</sup> In the wake of the economic crisis of 2008, several states, including some with tough-on-crime reputations, adopted reforms designed to reduce prison populations, such as alternatives to incarceration for non-violent offenders and reduced penalties for drug and property crimes.<sup>10</sup> This year, Attorney General Holder announced changes in federal prosecution policies to avoid harsh mandatory minimum sentences for low-level, non-violent drug offenses.<sup>11</sup> Some observers believe that these changes are not merely a response to the Great Recession, but a policy pivot with staying power.<sup>12</sup> At the same time, mass incarceration appears to be crumbling under its own weight. Recently, litigation forced the Cal-

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7. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329 (2010).

8. Michael C. Campbell & Heather Schoenfeld, *The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOC. 1375, 1376 (2013).

9. Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, <http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html>.

10. Neil King Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL ST. J., June 21, 2013, <http://online.wsj.com/news/articles/SB10001424127887323836504578551902602217018>.

11. Savage, *supra* note 2.

12. Goode, *supra* note 9.

## VISITING ROOM

ifornia Department of Corrections, once the nation's largest state corrections system,<sup>13</sup> to reduce its prison population.<sup>14</sup> Liberalizing visitation would be consistent with these trends. Citing a Minnesota study,<sup>15</sup> the authors argue that prisoners who receive visits are less likely to be reincarcerated, thus potentially lowering prison populations.

Adopting more humane visitation policies also could change the qualitative nature of what Sharon Dolovich has termed "incarceration American-style."<sup>16</sup> She describes this as "a distinct cultural practice with its own aesthetic . . . orange jumpsuits, cell blocks, bars, barbed wire"<sup>17</sup>—a world evoked by the title of the hit 2013 web series, *Orange is the New Black*.<sup>18</sup> In real life, Dolovich writes, the "American-style of incarceration" includes several harsh components curtailing visitation, including:

greatly restricted movement; limited media access to the facility; strict limits on visits and communication with family and friends on the outside; minimal access to or control over personal effects; a lack of privacy vis-à-vis staff or other prisoners; limited access to meaningful work, education, or other programming; little if any concern for the self-respect of the incarcerated; an "us" versus "them" dynamic between the incarcerated and custodial staff; and increased reliance on solitary confinement for the purpose of punishment or control.<sup>19</sup>

Dolovich argues that "degrading" people this way creates a "permanently marginal" class of inmates.<sup>20</sup>

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13. Don Thompson, *California's Prison Population Eclipsed by Texas*, HUFFINGTON POST (June 13, 2012), [http://www.huffingtonpost.com/2012/06/13/california-prison-population\\_n\\_1594926.html](http://www.huffingtonpost.com/2012/06/13/california-prison-population_n_1594926.html).
  14. Jennifer Medina, *Justices Rule California Must Free Some Inmates*, N.Y. TIMES, Aug. 2, 2013, <http://www.nytimes.com/2013/08/03/us/justices-rule-california-must-free-some-inmates.html>; see *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Brown v. Plata*, 134 S. Ct. 1, 1 (2013) (Scalia, J., dissenting from an order denying a request for a stay).
  15. Grant Duwe & Valerie Clark, *Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism*, 39 CRIM. JUST. POL'Y REV. 271 (2012).
  16. Dolovich, *supra* note 5, at 237-38.
  17. *Id.* at 237.
  18. ORANGE IS THE NEW BLACK (Netflix 2013). The series is based on PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN'S PRISON* (2010).
  19. Dolovich, *supra* note 5, at 237-38.
  20. *Id.* at 254-55 (citing Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on an Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 467 (1992)).

The miserly “American-style” of prison visitation is unique among advanced democracies, a facet of what James Q. Whitman has described as America’s exceptional harshness compared to Western Europe.<sup>21</sup> A 2013 Vera Institute report described how Dutch and German corrections authorities strive for “normalization,” or making prisoners’ lives as much like the free world as possible.<sup>22</sup>

In her book on women’s incarceration, Silja Talvi noted the relatively family-friendly atmosphere for visitors at Holloway Prison in the United Kingdom and the presence of mother/baby units in correctional facilities in the U.K., Finland, and Canada.<sup>23</sup> Holloway Prison has a Visitors Center run by a children’s charity, which states that its “aim is to provide a supportive, friendly and welcoming environment for everybody.”<sup>24</sup> HMP Askham Grange, an “open” prison for women in the U.K., hosts Acorn House, where imprisoned mothers care for their children unsupervised for up to 48 hours.<sup>25</sup>

In the U.K., opportunities for high-quality family visitation are not limited to women’s prisons. A 2012 article in the *Prison Service Journal* reports that “most prisons in England and Wales” have prison visitors’ centers<sup>26</sup>—areas outside of the main prison where family can prepare for their visit, sometimes staffed by guards and in other instances run by charitable organizations.<sup>27</sup> HMP Grendon, a “small, therapeutic” prison where all of the male prisoners are “serious offenders on long sentences,” hosts “family days on wings [and] children’s days.”<sup>28</sup> Relatives and partners of U.K. prisoners can receive financial assistance to defray the cost of visitation.<sup>29</sup>

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21. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).
  22. RAM SUBRAMANIAN & ALISON SHAMES, *VERA INST. OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES* 7, 19 (2013).
  23. SILJA J.A. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* 242-43, 249, 254, 260 (2007); see SUBRAMANIAN & SHAMES, *supra* note 22 at 12, 16 (discussing a mother/baby unit in the German system).
  24. *Visiting Holloway Prison*, SPURGEONS, <http://www.spurgeons.org/hmp-holloway> (last visited Nov. 2, 2013).
  25. See Ben Raikes & Kelly Lockwood, “*Mothering From the Inside*”—A Small Scale Evaluation of Acorn House, an Overnight Child Contact Facility at HMP Askham Grange, 194 *PRISON SERVICE J.* 19 (2011).
  26. Nancy Louks, *Prisons: Where DOESN'T the Community Come In?*, 204 *PRISON SERVICE J.* 42, 43 (2012).
  27. Families Outside, *Prison Visitors' Centres: An Ongoing Debate*, 5 *IN BRIEF* 3 (2010).
  28. HM CHIEF INSPECTOR OF PRISONS, *REPORT ON A FULL ANNOUNCED INSPECTION OF HM PRISON GRENDON* 3, 16 (2004).
  29. *Prison Service Order Number 4405: Assisted Prison Visits Scheme*, HM PRISON SERVICE (1999), [http://www.insidetime.org/resources/ps0/ps0\\_4405\\_assisted\\_prison\\_visits.pdf](http://www.insidetime.org/resources/ps0/ps0_4405_assisted_prison_visits.pdf).

## VISITING ROOM

Other advanced democracies have similar policies. Canada provides eligible prisoners with “private family visits” for up to seventy-two hours every two months, occurring in separate quarters with kitchens and living areas.<sup>30</sup> Finnish women are permitted monthly overnight visits with their partners and even “vacations” from prison.<sup>31</sup> In Denmark, residents of “open” state prisons are permitted leave from prison every third weekend,<sup>32</sup> and, in Norway, prisoners can be granted a “leave-of-absence.”<sup>33</sup>

Of course, liberalizing visitation policies alone cannot increase visitation. The Ohio study cited by the authors concluded that poor families and working families with children, along with those who must use public transportation, face significant visitation challenges.<sup>34</sup> “Friendly” visitation policies cannot undo the structural effects of locating facilities in remote rural areas without easy access to trains and airports. Disturbingly, as this Response was being written, the United States’ Federal Bureau of Prisons (BOP) announced plans to close the only federal facility designated for women on the Eastern seaboard and relocate the 1,100 women housed there (many of them from the cities of the Northeastern corridor) to rural Alabama.<sup>35</sup> After eleven U.S. senators called for the BOP to provide more information about the move, the BOP temporarily suspended the plan,<sup>36</sup> then

30. *Private Family Visiting*, CORRECTIONAL SERVICE CANADA, <http://www.csc-scc.gc.ca/family/003004-1000-eng.shtml> (last visited Nov. 2, 2013).

31. TALVI, *supra* note 23, at 256.

32. KRIMINAL FORSORGEN, INFORMATION ON SERVING A PRISON SENTENCE 10 (2009) (“Most inmates of open state prisons have regular leave every third weekend.”); see Doran Larson, *Why Scandinavian Prisons Are Superior*, ATLANTIC (Sept. 24, 2013), <http://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949> (describing “open” prisons in Scandinavia).

33. Regulations to the Execution of Sentences Act § 3-30 (2002) (Nor.) (“Convicted persons may in addition to short-term leave of absence be granted an ordinary total period of leave of absence annually (leave-of-absence quota) not exceeding 18 twenty-four hour periods with extra time for necessary travelling.”).

34. GARY C. MOHR, OHIO DEP’T OF REHAB. & CORR., AN OVERVIEW OF RESEARCH FINDINGS IN THE VISITATION, OFFENDER BEHAVIOR CONNECTION 2 (2012), <http://www.asca.net/system/assets/attachments/4991/OH%20DRC%20Visitation%20Research%20Summary.pdf>.

35. See Letter from Am. Bar Ass’n Gov’t Affairs Office to Charles E. Samuels, Dir., Fed. Bureau of Prisons (Aug. 6, 2013), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013aug6\\_alicevilletransfer\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013aug6_alicevilletransfer_1.authcheckdam.pdf).

36. Press Release, Sen. Chris Murphy, Murphy Applauds Bureau of Prisons Decision to Temporarily Suspend Transfer of Female Inmates From FCI Danbury (Aug. 14, 2013), <http://www.murphy.senate.gov/newsroom/press-releases/murphy-applauds-bureau-of-prisons-decision-to-temporarily-suspend-transfer-of-female-inmates-from-fci-danbury>.

resumed it,<sup>37</sup> then halted it during the government shutdown of 2013.<sup>38</sup> As of this writing, it appears that the BOP has agreed to construct a new facility for women in the Northeast.<sup>39</sup>

Some visitation practices pose a risk of reinforcing the “prison industrial complex.”<sup>40</sup> The Feature describes one form of visitation—video visitation—that could boomerang when it involves private vendors. Phone companies have charged notoriously high rates for prison phone service,<sup>41</sup> which the Federal Communications Commission (FCC) recently voted to limit for interstate calls.<sup>42</sup> More troubling, as the authors acknowledge, is the possibility that private vendors will benefit from growing their market. This can result from expanded visitation or (worse) from growing numbers of prisoners. Even as the media heralds declining incarceration rates, the Corrections Corporation of America reportedly forecasts prison growth as the economy rebounds.<sup>43</sup>

When Sesame Street introduced Alex, observers worried that it signaled a “normalization” of parental incarceration.<sup>44</sup> Indeed, some argue that bringing children to prison regularly (and especially housing them there on mother-baby

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37. Judith Resnik, *The Return of the Terrible Plan to Ship Female Inmates from the Northeast to Alabama*, SLATE (Oct. 4, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/10/04/female\\_inmates\\_in\\_federal\\_prison\\_must\\_give\\_up\\_their\\_beds\\_to\\_men\\_and\\_move.html](http://www.slate.com/blogs/xx_factor/2013/10/04/female_inmates_in_federal_prison_must_give_up_their_beds_to_men_and_move.html).
38. Irin Carmon, *Shutdown Keeps Women Prisoners Closer to Home—For Now*, MSNBC (Oct. 9, 2013), <http://www.msnbc.com/msnbc/danbury-prison>.
39. Press Release, Sen. Chris Murphy, *Senators Announce Changes to FCI Danbury Transfer* (Nov. 4, 2013), <http://www.murphy.senate.gov/newsroom/press-releases/senators-announce-changes-to-fci-danbury-transfer>.
40. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 84-104 (2003).
41. John E. Dannenberg, *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, PRISON LEGAL NEWS, Oct. 23, 2012, [https://www.prisonlegalnews.org/23083\\_displayArticle.aspx](https://www.prisonlegalnews.org/23083_displayArticle.aspx).
42. Jenna Greene, *FCC Tackles Cost of Prison Phone Calls*, BLT: BLOG OF THE LEGAL TIMES (July 10, 2013, 3:35 PM), <http://legaltimes.typepad.com/blt/2013/07/fcc-tackles-cost-of-prison-phone-calls.html>; Ian Simpson, *FCC Votes to Lower Costly Prison Telephone Rates—Effective Immediately*, RAW STORY (Aug. 9, 2013, 1:37 PM), <http://www.rawstory.com/rs/2013/08/09/fcc-votes-to-lower-costly-prison-telephone-rates-effective-immediately/>.
43. Walter Hickey, *Prison Populations Are Expected to Boom Now That the Economy is Recovering*, BUS. INSIDER (July 17, 2013), <http://www.businessinsider.com/prison-populations-climb-with-economic-recovery-2013-7> (reporting that the Corrections Corporation of America “released a slide deck in June” that stated in part “inmate populations are expected to increase as tax collections continue to recover from their bottom in 2009/2010”).
44. Ortiz, *supra* note 1.

**VISITING ROOM**

units) will do more harm than good.<sup>45</sup> Others might fear—for different reasons—that expanding family visitation might cause us to accept over-incarceration as the new normal.<sup>46</sup>

However, comparing our visitation policies to other advanced democracies suggests that American mass incarceration is about more than the numbers. Imprisonment in the U.S. is qualitatively different.<sup>47</sup> Implementing high-quality visitation programs could help to end this destructive “cultural practice,”<sup>48</sup> which may finally have run its terrible course. If we are going to bring Alex’s dad home to stay, progressive visitation policy is a good place to start.

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45. See James G. Dwyer, *Jailing Black Babies*, 2013 UTAH L. REV. (forthcoming 2014).

46. Cf. Lynne Haney, *Motherhood as Punishment: The Case of Parenting in Prison*, 39 SIGNS 105 (2013) (describing life in a “community” facility in the California Community Prisoner Mother Program and arguing that a mother/child community corrections facility can become just another form of punishment).

47. Dolovich, *supra* note 5, at 237.

48. *Id.*