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Legal Issues Pertaining to Visitation – Part One

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Introduction.

This article, the first of a two-part series, reviews a variety of issues concerning visitation of prisoners in correctional facilities. Prisoners, while incarcerated, seek continued contact with family members, friends, neighbors, clergy, business associates, and other people in the community. (Some of course, also seek continued contact with fellow criminals, gang-members, or co-conspirators in the conduct that resulted in their incarceration in the first place).

In a number of decisions, the U.S. Supreme Court and other courts have addressed issues that arise out of visitation and restrictions on visitations. Challenges on such restrictions have been based on freedom of association, family integrity, due process, Eighth Amendment, and other legal and practical concerns.

This article examines how courts have responded to some of these challenges, and what factors they have looked at to decide whether restrictions on visitation are appropriate. Who can visit, what conditions can be placed on visits, and can visitation rights be restricted on the basis of the prisoner's own misconduct? At the conclusion of the article, a number of useful on-line resources are listed.

The article that follows does not address, in any detail, issues concerning in-person meetings between incarcerated clients and their attorneys, which will be the subject of a later article.

The second article in the series will discuss other topics, including the duty to protect visitors on prison premises, searches and detention of visitors, contact visits and “family reunion” or conjugal visitation programs, and the barring of particular categories of persons, such as minors, former prisoners, or former correctional personnel from visitation.

U.S. Supreme Court Decision

The U.S. Supreme Court, in [Overton v. Bazzetta](#), #02-94, 539 U.S. 126 (2003), upheld a set of Michigan prison rules limiting visits by children, non-family members, former prisoners, or for prisoners who commit two violations of substance abuse rules.

The Michigan Department of Corrections issued new regulations limiting prison visitation because of concerns about prison security problems caused by the increasing number of visitors to the state's prisons and by substance abuse among inmates.

A federal appeals court, in [Bazzetta v. McGinnis](#), #01-1635, 286 F.3d 311 (6th Cir. 2002) found that the regulations, at least as applied to non-contact visits, violated the prisoners' rights. The court held that the regulations violated the prisoners' [First Amendment](#) right of association as applied to non-contact visits from prisoners' minor siblings, nieces, and nephews, children of prisoners whose parental rights have been terminated, and former prisoners who are not members of prisoner's family. Also, regulations that ban visitors, aside from attorneys and clergy, for prisoners who have twice violated the department's drug abuse policies violate both the right of association and the [Eighth Amendment's](#) prohibition of cruel and unusual punishment.

Under the rules, an inmate may be visited by qualified clergy and attorneys on business and by persons placed on an approved list, which may include an unlimited number of immediate family members and ten others; minor children are not permitted to visit unless they are the children, stepchildren, grandchildren, or siblings of the inmate; if the inmate's parental rights are terminated, the child may not visit; a child visitor must be accompanied by a family member of the child or inmate or the child's legal guardian; former prisoners are not permitted to visit except that a former prisoner who is an immediate family member of an inmate may visit if the warden approves. Prisoners who commit two substance-abuse violations may receive only clergy and attorneys, but may apply for reinstatement of visitation privileges after two years.

The U.S. Supreme Court disagreed with the appeals court decision, upholding the Michigan prison rules.

The Court found that the regulations had a rational relation to legitimate penological interests, and that this "suffices to sustain them," regardless of whether or not the prisoners have a constitutional right of association that has survived incarceration. The Court noted that it accords substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining a correctional system's legitimate goals and determining the most appropriate means to accomplish them.

The Court found that the regulations in question satisfy each of four factors used to decide whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge as set forth in [Turner v. Safley](#), 482 U. S. 78 (1987).

First, they "bear a rational relationship to a legitimate penological interest." The restrictions on children's visitation are related, the Court found, to a valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. They promote internal security, perhaps the most legitimate penological goal, by reducing the total number of visitors and by limiting disruption caused by children. It is also reasonable to ensure that the visiting child is accompanied and supervised by adults charged with protecting the child's best interests. Prohibiting visitation by former inmates bears a "self-evident connection" to the State's interest in maintaining prison security and preventing future crime. Restricting visitation for inmates with two substance-abuse violations serves the legitimate goal of deterring drug and alcohol use within prison.

Second, the plaintiffs have "alternative means of exercising their asserted right of association" with those prohibited from visiting, the Court noted. They can send messages through those who are permitted to visit, and can communicate by letter and telephone. Visitation alternatives "need not be ideal; they need only be available."

Third, accommodating the associational right by allowing unrestricted visitation would have a considerable impact on guards, other inmates, the allocation of prison resources, and the safety of visitors by causing a significant reallocation of the prison system's financial resources and by impairing corrections officers' ability to protect all those inside a prison's walls, according to the Court.

And finally, the plaintiffs had suggested no alternatives that fully accommodate the asserted right "while not imposing more than a de minimus (minimal or incidental) cost to the valid penological goals."

The U.S. Supreme Court also rejected the argument that the visitation restriction for inmates with two substance-abuse violations was cruel and unusual confinement condition violating the Eighth Amendment.

Withdrawing visitation privileges for a limited period in order to effect prison discipline, the Court ruled, is not a dramatic departure from accepted standards for confinement conditions. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety, or involve the infliction of pain or injury or deliberate indifference to their risk.

The Court's ruling provided considerable guidance for correctional officials as to what kinds of restrictions on visitation are permissible, and the perspective that the courts will apply in looking at such restrictions.

An earlier U.S. Supreme Court decision on visitation, also of interest, is [Kentucky Dept. of Corrections v. Thompson](#), #87-1815, 490 U.S. 454 (1989), ruling that prison visitation regulations do not give inmate a due process liberty interest unless they utilize "explicitly mandatory" language.

Aftermath of the Supreme Court's Ruling

The U.S. Supreme Court's ruling examined above was not the end of the litigation over the Michigan prison visitation regulations. A later decision in the same case is [Bazzetta v. McGinnis](#), #04-1823, 423 F.3d 557 (6th Cir. 2005). After the original appeals court decision, the trial court had issued an injunction barring the Department from implementing the regulation.

The U.S. Supreme Court, as examined in detail above, granted review, and overturned the appeals court ruling on the First, Eighth and Fourteenth Amendment substantive due process claims in [Overton v. Bazzetta](#), 539 U.S. 126 (2003), but did not review the Fourteenth Amendment procedural due process claim. On remand to the trial court, the judge declined to dissolve the injunction against the rules, finding that its procedural due process holding was not disturbed by the Supreme Court's decision.

The Michigan Department of Corrections appealed from this refusal to dissolve the injunction, arguing that the Supreme Court's decision implicitly foreclosed any procedural due process challenges. The federal appeals court ruled that trial judge abused its discretion in failing to dissolve the injunction in light of the Supreme Court's reasoning. It held that summary judgment should be entered for the defendant on facial challenge to the visitation regulation, while not foreclosing the possibility that individual inmates might have valid claims as to the application of the regulations to them.

The Supreme Court, in [Overton](#), held that the substance abuse regulation adopted by the MDOC was a "regular means of effecting prison discipline" which did not constitute a "dramatic departure from accepted standards for conditions of confinement." This statement, the appeals court reasoned, was contradictory to the

trial court's finding of a liberty interest in prison visitation because the regulation supposedly imposes on prisoners an "atypical" hardship in comparison to the ordinary incidents of prison life. The appeals court therefore found that there was no basis to find a liberty interest on the face of the substance abuse visitation regulation.

The appeals court reasoned that this foreclosed a facial procedural due process challenge, which could be used to strike down the application of the regulation to all prisoners, while not precluding individual prisoners from challenging a particular application of the substance abuse regulation to them.

The appeals court also rejected an argument that the due process clause itself provided a right to prison visitation in order to protect an interest in intimate or family association. It stated that it knew of no appeals court that has found an "implicit due process right to prison visitation. While the substance abuse visitation regulation was "severe," the appeals court declined to find that the regulation, on its face, "rises to the level of egregious conduct necessary to implicate the implicit guarantees of the due process clause."

Misconduct by Visitors

Visitation rights may be revoked or restricted on the basis of misconduct of various sorts by visitors, who must obey rules and procedures designed to preserve order in the facility, prevent the introduction of contraband, and otherwise serve security concerns. In Steinbach v. Branson, Case No. 1:05-cv-101, 2007 U.S. Dist. Lexis 75156 (N.D.), a court found that a warden was entitled to summary judgment on a prisoner's claim that his rights under the First, Eighth and Fourteenth Amendments were violated by denying him visitation with persons whose mailings had generated positive alerts from a drug screening device. The prisoner had no constitutionally protected right to visitation from any particular person, the court stated, and a total denial of all visitation for an extended time period was required before such a denial could be considered "cruel and unusual" under the Eighth Amendment.

In the Matter of Sylvester v. Goord, #500653, 838 N.Y.S.2d 229 (A.D. 3rd Dept. 2007), similarly, the court upheld the revocation of visitation privileges for wife of inmate who allegedly hid cell telephones inside a typewriter and sent them to the correctional facility for the use of her husband and two other prisoners. Evidence that the phones were planned to be used in connection with an escape attempt showed that she posed a threat to safety and security. The court rejected the argument that it was improper to revoke her visitation privileges because the misconduct at issue did not occur during one of her visits.

Placing a visitor on a permanent visitor restriction list when a prisoner was found in possession of cocaine after his visit did not violate either the prisoner's or the visitor's constitutional rights. Percy v. Jabe, 823 F.Supp. 445 (E.D. Mich. 1993).

Also see Qasim v. Scully, 708 F.Supp. 90 (S.D.N.Y. 1989), in which a visitor arrested and barred from visiting after marijuana was found on her during routine search was held to have brought a meritless suit in which the defendant officers were entitled to an award of attorneys' fees.

Misconduct or Classification of Prisoners

Visitation rights may be, in some instances, revoked or restricted on the basis of either prisoner misconduct, their classification, or the particulars of the crime for which they are incarcerated.

That does not mean, however, that baseless or unproven allegations of misconduct will suffice for such sanctions. In Puckett v. Stuckey, 633 So.2d 978 (Miss. 1993), the Mississippi Supreme Court upheld a determination that prison officials arbitrarily suspended an inmate's visitation privileges with his wife, based on allegations of misconduct that had already been investigated and for which no charges had been brought.

Visitation rights may not be restricted in retaliation for a prisoner engaging in protected conduct. In Larson v. Cooper, No. S-10708, 113 P.3d 1196 (Alaska 2005), however, the court ruled that prison officials did not act with improper retaliation by continuing a restriction on visitation of a maximum security prisoner after he was acquitted of disciplinary charges of disobeying a direct order to stop holding hands with his wife while praying during a contact visit. The restriction was legitimate on the basis that the prisoner disobeyed a direct order, and the prisoner failed to show that the defendants would not have continued the restrictions on his visitations in the absence of his filing of grievances and acquittal of the disciplinary charges.

Security concerns, particularly around issues of escape, may justify restrictions on visitation. See Parker v. Snyder, No. 4-03-0745, 2004 Ill. App. Lexis 1206 (4th Dist. 2004), in which a prison rule restricting visitation for prisoners found to present a high risk of escape was upheld as reasonably related to legitimate safety and security interests.

Other cases of interest in this area include:

* [Childers v. Maloney](#), 247 F. Supp. 2d 32 (D. Mass. 2003), ruling that a Massachusetts prisoner did not have constitutionally protected liberty interests which were infringed by his loss of visitation for six weeks as a punishment for allegedly violating prison disciplinary rules.

* [Encarnacion v. Goord](#), 778 N.Y.S.2d 562 (A.D. 3d Dept. 2004). In this case, the court found that a prisoner was properly denied further visitation of inmate's fiancée to prison based on evidence that he sent money to her in exchange for heroin she allegedly conspired to bring into the facility. Correctional officials had reasonable grounds to believe that continued visits would have caused a serious threat to prison security. Substantial evidence also supported a determination that the prisoner was guilty of violating disciplinary rules against possession of money, promoting prison contraband, and smuggling.

* [Wirsching v. State of Colorado](#), #00-1437, 360 F.3d 1191 (10th Cir. 2004) in which a federal appeals court rejected a prisoner's claim that his constitutional rights were violated by requiring him to participate in a sexual offender treatment program requiring him to admit to his offense, under penalty of a loss of privileges, including denial of visitation with his minor child, if he failed to participate.

* [Hernandez v. McGinnis](#), 272 F. Supp. 2d 223 (W.D.N.Y. 2003). In this case, a three-year suspension of a prisoner's visitation rights as punishment for attempting to introduce a weapon into the visitation room was found not to violate due process rights, his right to free association, or the Eighth Amendment prohibition on cruel and unusual punishment.

* [Dawes v. State of New York](#), Claim No. 102133, 755 N.Y.S.2d 221 (Ct. Cl. 2003). This case concerned a prior consent decree about New York prisoners and correctional rules established to implement the decree, specifically 7 NYCRR Sec. 200.1-200-5, under which misconduct that is unrelated to visitation cannot be used as the basis for a denial of visitation rights. Accordingly, an inmate's right to contact visitation could not be denied based on his alleged violent behavior against prison staff members, when it had not occurred during a visitation period, and prisoner was entitled to \$100 in damages for the denial.

* [Cassady v. Moore](#), 737 So. 2d 1174 (Fla. App. 1999), upholding a Florida statute denying a prisoner visitation with his children when he was convicted of child sexual offenses as constitutional. The statute also allows for prison superintendent to exercise discretion to allow visitation if it is in the interest of the children.

* Cooper v. Garcia, 55 F. Supp. 2d 1090 (S.D. Cal. 1999), ruling that a California prisoner had no protected liberty interest in "family visitation." A prison official who classified him as a "sex offender" based on his prior arrest, but not conviction, of a sex offense, and used this as a basis to bar family visitation did not violate his rights.

* Czajka v. Moore, 708 F. Supp. 253 (E.D. Mo. 1989), in which a prisoner and wife accused of misconduct involving sexual activity in visiting room were found to be entitled to injunction against prevention of further visits because official who reported misconduct was on the disciplinary board making the decision.

Accommodations for visitors

Once visitation is allowed, correctional facilities must anticipate and make some accommodations for foreseeable unavoidable human needs. This is illustrated by Glaspay v. Malicoat, 134 F. Supp. 2d 890 (W.D. Mich. 2001), in which a visitor denied the use of a restroom to urinate was awarded \$5,000 in compensatory and \$5,000 in punitive damages against a correctional officer. The refusal to allow the visitor to urinate, the court found, violated his substantive due process rights.

Resources

The Federal Bureau of Prisons Program Statement on Visiting Regulations, 5267.08, issued 5/11/2006, can be found online at:
http://www.bop.gov/policy/progstat/5267_008.pdf

Also of interest are the federal regulations concerning the BOP and visitation, found at 28 C.F.R. Secs. 540.40-540.64. They address such varied topics as visiting facilities, visiting times, frequency of visits, number of visitors, regular visitors, qualification as special visitor, attorney visits, media visits, transportation assistance, visitors to inmates not in regular population status, procedures, penalty for violation of visiting regulations, etc.

[Inmate Visiting Guidelines](#) of the California Department of Corrections.

[Visitation regulations](#) of the Illinois Department of Corrections.

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