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Straight to Video: America's Inmates Deprived of a Lifeline Through Video-Only Visits

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STRAIGHT TO VIDEO: AMERICA'S INMATES DEPRIVED OF A LIFELINE THROUGH VIDEO-ONLY VISITS

Abstract: The ability of inmates in the United States to visit with loved ones is often severely limited by correctional officials, and the courts have been reluctant to intervene. Recently, those officials have begun to replace in-person visitation with video visitation. This Note argues that such a transition will be harmful for inmates, correctional institutions, and the communities many of them eventually return to. It also suggests possible jurisprudential, legislative, and regulatory interventions to curtail the replacement of in-person visitation.

Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment.

—McCleskey v. Kemp, 481 U.S. 279, 343 (Brennan J., dissenting)

INTRODUCTION

Tiffany Burns looked forward to visiting Chrishon Brown, her boyfriend of two years, in jail while he was awaiting trial in the Jefferson Parish Correctional Center, near New Orleans, Louisiana.¹ Although she drove more than an hour in traffic to see him and their visits occurred through a glass partition, the visits were free, and she sometimes forgot about the glass and felt like they were “together again.”² On October 12, 2017, however, she was together with Chrishon for the last time until his release.³ As she left the visiting room she was given a pamphlet which proclaimed, “Visit an inmate from anywhere!”⁴ Despite its ebullience, the pamphlet announced the jail’s new policy prohibiting Tiffany from visiting Chrishon in person.⁵ Under the new regime, Tiffany would pay \$12.99 for a 20 minute remote video visit.⁶

¹ See Shannon Sims, *The End of American Prison Visits: Jails End Face-to-Face Contact—and Families Suffer*, THE GUARDIAN (Dec. 9, 2017), <https://www.theguardian.com/us-news/2017/dec/09/skype-for-jailed-video-calls-prisons-replace-in-person-visits> [https://perma.cc/5ADG-GWW6] (reporting that Tiffany was happy to visit Chrishon in jail). Chrishon was accused of robbing a bank. *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* The Jefferson Parish sheriff justified the new policy on the grounds that it would reduce correctional resources spent on visitation. *Id.* Under the new policy, the county offers one free

Unfortunately, Tiffany and Chrishon's story is not unique.⁷ Replacing in-person visitation with video visitation, the Jefferson Parish Correctional Center joined a growing trend among correctional facilities across the United States.⁸ Three-quarters of U.S. jails that introduce video visitation eliminate in-person visitation.⁹

The United States imprisons more individuals per capita than any other country in the world, in part because incarceration no longer serves its original purposes.¹⁰ During the colonial period prisons and jails temporarily confined witnesses and the accused who were awaiting trial, and the convicted who were awaiting imposition of a sentence.¹¹ But in the late 1700s, imprisonment replaced corporal castigation and death as the primary method of punishment.¹² Today's jails primarily serve two functions: holding inmates

video visit per week at an offsite location. *Id.* Video visits may also occur via a smartphone or computer; however, loved ones without access to such technology must visit inmates at the offsite location. *Id.*

⁷ See, e.g., Howard Hardee, *Fighting for Face Time*, NEWSREVIEW.COM (June 27, 2013), <http://www.newsreview.com/chico/fighting-for-face-time/content?oid=10378841> [<https://perma.cc/J9JR-A8GP>] (documenting the experience of an inmate's loved one cut off from seeing him in person because of a new policy replacing in-person visitation with video visitation); Jessica Robinson, *Inmates' Families Say They're the Ones Punished by Switch to Video Visits*, NW NEWS NETWORK (June 3, 2013), <http://nwnewsnetwork.org/post/inmates-families-say-theyre-ones-punished-switch-video-visits> [<https://perma.cc/YHM2-VHFV>] (noting the experience of an inmate who struggled to have a video visit with his granddaughter due to technical issues).

⁸ See BERNADETTE RABUY & PETER WAGNER, PRISON POLICY INITIATIVE, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS 11 (2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf [<https://perma.cc/U99R-CGC8>] (noting that seventy-four percent of jails that adopt video visitation then eliminate in-person visitation).

⁹ *Id.* This Note only discusses inmate visitation with family and friends, not lawyers or clergy.

¹⁰ Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST: FACT CHECKER (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.e5d86c6d6081 [<https://perma.cc/B77Y-543L>]; see Leonard G. Levenson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 HARV. C.R.-C.L. L. REV. 409, 414 (1983) (noting that incarceration in colonial America was not originally intended as punishment). The United States has less than 5% of the world's population, but around 25% of the world's incarcerated population. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/TKPY-N2J2>].

¹¹ Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450 (2005); see Levenson, *supra* note 10, at 412, 413, 414 (detailing the history of such practices in England and Colonial America). Punishment typically involved a fine, exile, bodily suffering, or death. Dolovich, *supra*, at 450. In the New York colony, for example, only nineteen individuals were sentenced to incarceration between 1691 and 1776. Levenson, *supra* note 10, at 414.

¹² Levenson, *supra* note 10, at 415. Two theories on prison operation emerged, the "silent system" and the "congregate system." *Id.* at 415, 417. The Pennsylvania legislature embraced the "silent system" in 1896, in response to calls from Quaker reformers. *Id.* at 415. The "congregate system," was adopted in 1816 in New York. *Id.* at 417. Under either, separation, silence, and re-

for short periods of time before trial or sentencing, and housing inmates serving shorter sentences, often less than a year long.¹³ Modern prisons house inmates who are given lengthier sentences, typically longer than a year.¹⁴

Although the United States moved to an incarceration-based system of punishment two centuries ago, a significant number of individuals were not incarcerated until relatively recently.¹⁵ Over the past forty years, the prison and jail population swelled by five hundred percent.¹⁶ The government responded to a crime wave that began in the 1960s by commencing the War on Drugs, which institutionalized the racist law and order rhetoric that had emerged in the 1950s in response to the Civil Rights Movement.¹⁷ This reac-

tion, not visitation, were mainstays of an inmate's life. *See id.* at 416–17 (noting that under both systems silence and separation were predominate characteristics).

¹³ *FAQ Detail: What Is the Difference Between Jails and Prisons?*, BUREAU OF JUSTICE STAT., <https://www.bjs.gov/index.cfm?ty=qa&iid=322> [<https://perma.cc/AW4C-3SGY>]. Although definitions vary by state, the crimes that land someone in jail are typically misdemeanors. *Id.* The majority of the jail population, however, is awaiting trial, and has not been adjudicated guilty of any crime. DREW KUKOROWSKI ET AL., PRISON POLICY INITIATIVE, PLEASE DEPOSIT ALL OF YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY 4 (2013), http://static.prisonpolicy.org/phones/please_deposit.pdf [<https://perma.cc/V7YQ-FCRQ>].

¹⁴ *FAQ Detail: What Is the Difference Between Jails and Prisons?*, *supra* note 13. This Note will use the term “inmates” to refer generally to those incarcerated in prisons and jails.

¹⁵ *See* PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926–86, at 4 (1991), <https://www.ncjrs.gov/pdffiles1/nij/125618.pdf> [<https://perma.cc/8C3G-5ZQD>] (documenting the rising number of individuals incarcerated in state and federal prisons from 1926 to 1986); Leverson, *supra* note 10, at 415 (noting that the United States moved to an incarceration-based system of punishment in the late 1700s). In 1926, just over forty-eight thousand individuals were admitted to federal and state prisons. LANGAN, *supra*, at 4. By 1986, the number had risen to 219,382. *Id.*

¹⁶ THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2018), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/FB65-2H9G>].

¹⁷ *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 40–58 (2d ed. 2012) (describing the connections between the political debates and decisions surrounding the War on Drugs and the following increase in law enforcement budgets and incarcerated population); Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, 33 CRIME & JUST. 1, 1 (2005) (noting that crime rates rose during the 1960s through the 1990s, and incarceration rates rose during the 1970s through the 2000s). President Nixon called for a war on drugs in the 1960s, but it was not until 1982 that President Reagan officially launched the War on Drugs. ALEXANDER, *supra*, at 48, 49. Conservatives, particularly in Southern states that were battling segregation, linked the lack of law and order to the civil disobedience encouraged by the Civil Rights Movement. *Id.* at 40–41. Both Republican and Democratic administrations, with support from some of the Black community, enacted legislation providing for more law enforcement resources to fight drug crimes and for increasingly harsher penalties for drug violations. *Id.* at 53, 56; *see* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 31 (2017) (documenting the anti-drug support in factions of the Black community). Although the language initiating and justifying the War on Drugs was couched in race-neutral terms, the effects were disproportionately borne by blacks, despite there being no difference in illegal drug use and sale between races. ALEXANDER, *supra*, at 48, 56, 99. Young whites, for example, are admitted to emergency rooms for drug-related reasons three times more often than young black Americans. *Id.* at 99. Before the 1960s, blacks were

tion is largely responsible for the drastic increase in incarcerated individuals in general, and of black Americans in particular.¹⁸ Today, the federal and state governments incarcerate more than 2.2 million individuals.¹⁹

Incarceration is often expensive for inmates and their families, and can also take a hefty psychological toll.²⁰ Americans sent to prison tend to be poor.²¹ The median income of someone who is sentenced to incarceration is nearly half that of someone who is not.²² Being behind bars then places additional financial strains on already destitute inmates and their families.²³ Federal and state governments spend around eighty billion dollars per year on incarceration, and subsidize the cost by levying fees on those who are brought into the system.²⁴ It also often leads to negative psychological impacts be-

imprisoned at a rate four times greater than whites. ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* 2–3 (2010). Today, decades after the Civil Rights Movement, blacks are incarcerated at seven times the rate of whites. *Id.* at 2–3.

¹⁸ See ALEXANDER, *supra* note 17, at 98 (finding that War on Drugs law enforcement tactics were used “almost exclusively in poor communities of color” leading to high incarceration rates for members of those communities). Before the War on Drugs in 1974, a black man had a 13.4% chance of being incarcerated. THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001*, at 8 (2003), <https://www.bjs.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/5SG9-SBRQ>]. By 2001, the number had risen to 32.2%, while a white man had a 5.9% chance. *Id.* In 2015, over 35% of the American prison population was black, while 33% was white. THE SENTENCING PROJECT, *supra* note 16, at 5. Black men, however, were in prison at a rate of 2,613 people per 100,000. *Id.* The number for white men was 457 per 100,000. *Id.* Today, one in six black men has been to prison, whereas only one in thirty-nine white men has had a similar experience. PERKINSON, *supra* note 17, at 2.

¹⁹ THE SENTENCING PROJECT, *supra* note 16, at 2. This number belies the true number—six million—of individuals under some form of government supervision, which includes incarceration, parole, or probation. *Id.*

²⁰ ELLA BAKER CTR. FOR HUMAN RIGHTS ET AL., *WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES* 11 (2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [<https://perma.cc/9Q4J-WS6F>] (concluding that incarceration adversely affects inmates’ and their families’ health, finances, and relationships); Craig Haney, *The Psychological Impact of Incarceration, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES* 33, 37–38 (Jeremy Travis & Michelle Waul, eds. 2003) (describing the long-term psychological suffering experienced by inmates).

²¹ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty*, PRISON POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/5AYC-4FZ4>]. About eighty percent of criminal defendants are deemed indigent by courts. PERKINSON, *supra* note 17, at 2.

²² Rabuy & Kopf, *supra* note 21. The median income, in 2014 dollars, for an incarcerated man was \$19,650, while the median income for a man who was not incarcerated was \$41,250. *Id.* The process of being convicted can cost a defendant, on average, \$13,607. ELLA BAKER CTR. FOR HUMAN RIGHTS, *supra* note 20, at 13. This figure includes attorney’s fees and restitution. *Id.*

²³ ELLA BAKER CTR. FOR HUMAN RIGHTS, *supra* note 20, at 11. Following a family member’s incarceration, two in three families struggle to meet their basic needs. *Id.* at 13.

²⁴ *Id.* at 12. The growth rates of state correctional budgets have outpaced those of education, transportation, and public assistance. THE PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* 11 (2009), https://www.pewtrusts.org/~media/assets/2009/03/02/pspp_lin31_report_final_web_32609.pdf [<https://perma.cc/R4P2-WBJN>]. Incarceration is also expensive for taxpayers. See TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, DEP’T

cause inmates become institutionalized, a condition characterized by hyper-vigilance and social withdrawal.²⁵

Free, in-person visitation can alleviate some of the strain created by incarceration by helping inmates remain directly connected to their loved ones, increasing their employment prospects, and decreasing recidivism.²⁶ It can also improve the internal security of correctional facilities.²⁷ But the availability of in-person visitation is jeopardized when jails and prisons implement video visitation.²⁸ Correctional officials in many jails and at least one prison are replacing in-person visitation with video visitation, whereby inmates interact with their loved ones over the Internet through video-chat.²⁹ Although in-person visitation is usually free, video visitation can be costly and plagued by technological glitches that render the service not only frustrating but ineffective.³⁰ The replacement of in-person visitation with video visitation threat-

OF JUSTICE, LOCAL GOVERNMENT CORRECTIONS EXPENDITURES, FY 2005–2011, at 3 (2013), <https://www.bjs.gov/content/pub/pdf/lgcefy0511.pdf> [<https://www.bjs.gov/content/pub/pdf/lgcefy0511.pdf>] (finding that correctional facilities cost local communities over twenty-two billion dollars in 2011).

²⁵ Haney, *supra* note 20, at 80–84 (describing possible psychological consequences of incarceration). About half of prison inmates are “functionally illiterate.” PERKINSON, *supra* note 17, at 2.

²⁶ See 42 U.S.C. § 17501(b)(7) (2012) (stating that inmates reentering the community cite family support as crucial to staying out of prison) (recodified at 34 U.S.C. § 60501); CHRISTY VISHNER ET AL., URBAN INST. JUSTICE POLICY CTR., RETURNING HOME: UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY 2 (2004), <https://www.urban.org/sites/default/files/publication/42841/410974-Returning-Home-Understanding-the-Challenges-of-Prisoner-Reentry.PDF> [<https://perma.cc/8FK7-C5Y3>] (reporting a study finding that many inmates returning home found jobs and financial support through family and friends); Mark T. Berg & Beth M. Buebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 397 (2011) (noting that employed ex-inmates are less likely to recidivate).

²⁷ See 42 U.S.C. § 17501(b)(6) (stating that inmates who remain connected to loved ones while incarcerated are less likely to have “negative incidents”) (recodified at 34 U.S.C. § 60501); Sonja E. Siennick et al., *Here and Gone: Anticipation and Separation Effects on Prison Visits on Inmate Infraction*, 50 J. RES. CRIME & DELINQ. 417, 435 (2013) (finding that in the weeks leading up to an in-person visit the probability of an inmate committing a facility infraction decreased).

²⁸ See RABUY & WAGNER, *supra* note 8, at 11 (noting that seventy-four percent of jails that institute video visitation subsequently eliminate in-person visitation).

²⁹ See *id.* at 11 & n.31 (reporting that one prison and seventy-four percent of jails that have adopted video visitation have eliminated in-person visitation); Patrice A. Fulcher, *The Double-Edged Sword of Prison Video Visitation: Claiming to Keep Families Together While Furthering the Aims of the Prison Industrial Complex*, 9 FLA. A & M U. L. REV. 83, 94–96 (2013) (documenting the replacement of in-person visitation with video visitation at two separate county jail facilities).

³⁰ See RABUY & WAGNER, *supra* note 8, at 10 (noting that in-person visitation is traditionally free). *But see, e.g.*, Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES (Sept. 4, 2011), <http://www.nytimes.com/2011/09/05/us/05prison.html> [<https://perma.cc/FX7P-RKF7>] (reporting that the Arizona Department of Corrections charges visitors a one-time twenty-five dollar fee for a background check).

ens the benefits of in-person visits, and resembles slavery-era practices.³¹ If used at all, video visitation should be offered in addition to, not instead of, in-person visitation.³²

Part I of this Note details the history of visitation in U.S. correctional facilities, the psychological, safety, and recidivism implications of inmate visitation, the involvement of private companies in public corrections, and the recent development of video visitation technology.³³ Part II examines the history of inmates' constitutional claims before the U.S. Supreme Court, as well as legislative and regulatory efforts to moderate inmate video visitation.³⁴ Part III argues that in-person visitation should not be replaced with video visitation and considers judicial, legislative, and regulatory approaches to address such detrimental change.³⁵

I. INMATE VISITATION HISTORICALLY, PSYCHOLOGICAL IMPLICATIONS OF IN-PERSON VISITATION, AND PRIVATIZED VIDEO VISITATION

Section A of this Part describes the historical development of inmate visitation.³⁶ Section B details research regarding the benefits of in-person visitation.³⁷ Section C explains the privatization of the prison phone industry.³⁸ Section D concludes by portraying the current video visitation landscape in correctional facilities.³⁹

A. *The Historical Context of Inmate Visitation*

In the colonial period, jails and prisons were open to the public and later to inspectors because judges, prison founders, reformers, and administrators believed that transparency would prevent inmate abuse.⁴⁰ Such public visits

³¹ See, e.g., BRENDA E. STEVENSON, *LIFE IN BLACK AND WHITE: FAMILY AND COMMUNITY IN THE SLAVE SOUTH* 206, 221 (1996) (detailing how slave owners could control minute aspects of slaves' intimate lives); Siennick, *supra* note 27, at 429 (finding that the anticipation of an in-person visit can decrease the probability that an inmate violates correctional facility rules).

³² See Fulcher, *supra* note 29, at 112 (advocating for video visitation to be offered in addition to in-person visitation).

³³ See *infra* notes 36–113 and accompanying text.

³⁴ See *infra* notes 114–190 and accompanying text.

³⁵ See *infra* notes 191–255 and accompanying text.

³⁶ See *infra* notes 40–49 and accompanying text.

³⁷ See *infra* notes 50–65 and accompanying text.

³⁸ See *infra* notes 66–83 and accompanying text.

³⁹ See *infra* notes 84–113 and accompanying text.

⁴⁰ Levenson, *supra* note 10, at 409, 416, 420, 422–23. In 1770, one New York inmate had so many visitors that the prison established visiting hours for the influx of friends wishing to see him. *Id.* at 414 n.23. United States Attorney General William Bradford, who previously served as a justice on the Pennsylvania Supreme Court, noted the importance of jails and prisons being “easily accessible” to inspection. *Id.* at 416. A New York prison warden, and former state judge, wrote to the New York Legislature in 1828 commenting that public exposure of prisons had a positive

were accepted by prison officials despite the burden they placed on correctional staff.⁴¹ As the purpose of incarceration shifted from confinement to punishment, open public scrutiny was replaced by a procedure of official inspection.⁴² Nevertheless, although the U.S. Supreme Court has never held that inmates have a right to such visitation, prisons and jails today generally allow family and friends to visit inmates.⁴³

In the view of some, incarceration has historically been—among other things—a tool of racial control and suppression rooted in slavery.⁴⁴ Restricting or eliminating in-person visitation echoes practices employed by slave owners, who not only separated slaves from their family members but controlled their intimate lives.⁴⁵ Although slave owners claimed that their goal was to keep families together, when profit was at issue they did not hesitate to

effect on convicts and prison officers, ensuring that both performed their respective duties. *Id.* at 422–23. In 1980, Chief Justice Burger, in a case holding that criminal trials must be open to the public, wrote for a plurality of the Supreme Court that the “appearance of justice” is served by allowing the public to observe the criminal process. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571–72 (1980) (quoting *Offutt v. United States*, 384 U.S. 11, 14 (1954)).

⁴¹ See *Leverson*, *supra* note 10, at 415, 421 (documenting the experience of New York prison administrators who were unwilling to risk a lawsuit by preventing a visitor from entering a facility, and noting that “[t]ens of thousands of citizens, and many foreigners as well” thronged to visit houses of confinement).

⁴² *Id.* at 415–17. Public inspection turned out to be a better bulwark against abuses of prisoners than official oversight. *Id.* at 421. In certain Southern prisons, for example, where public access was completely forbidden, prisoners were electrocuted for infractions or placed in solitary confinement without access to running water and fed one meal per day. *Id.* at 427–28.

⁴³ See *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (refusing to hold that any right to intimate contact is terminated by imprisonment); *Leverson*, *supra* note 10, at 429 (noting that the Supreme Court has never decided whether there is a public right to access prisons because litigants have never presented it). See generally Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 *YALE L. & POL’Y REV.* 149 (2013) (describing various visitation policies in United States correctional facilities).

⁴⁴ See Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 *HARV. L. & POL’Y REV.* 237, 255 (2009) [hereinafter Dolovich, *Incarceration American-Style*] (noting that “morality has replaced slavery’s use of biology” as the factor legitimizing social control of blacks, that the category of “inmate” in the United States is racialized, and that it is difficult not to notice the nexus between the emergence of the modern prison and the “political imperative of controlling newly freed Blacks”); Giovanna Shay, *Ad Law Incarcerated*, 14 *BERKELEY J. CRIM. L.* 329, 330 (2010) (noting that commentators suggest that the “prison-industrial complex” helps maintain racial subordination, and commenting that prison and jail regulation amounts to a regressive policy that significantly affects poor and minority communities). See generally Coates, *supra* note 10 (detailing the connections between slavery, the incarceration of black men, and social control). The Supreme Court of Virginia exposed the true nature of incarceration, noting, six years after the conclusion of the Civil War, that a prisoner is a “slave of the State.” *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

⁴⁵ See STEVENSON, *supra* note 31, at 206 (documenting the sales practices of slave owners in Loudoun County, Virginia that destroyed slave family networks, and slave owners’ ability to control their slaves’ intimate associations). George Washington, for example, had a practice of dispersing slave families far away from each other. *Id.* at 211. Slave owners controlled various aspects of slaves’ sexual and familial lives through lawmaking powers. *Id.* at 221.

break them apart.⁴⁶ Slave owners did not view slaves as capable of forming real familial bonds.⁴⁷ In language that mirrors the Supreme Court standard for assessing constitutional claims made by inmates, Thomas Jefferson wrote that he only respected “connections seriously formed by those people” if he could do so “reasonably.”⁴⁸ When prison officials restrict or eliminate the ability of inmates to see their loved ones in person, they act in the long shadow of slavery.⁴⁹

B. Research on the Benefits of In-Person Visitation

Correctional facilities essentially store people.⁵⁰ They are inherently stressful and contentious environments from which in-person visitation can provide relief.⁵¹ A breadth of psychological research supports the notion that seeing loved ones face to face is beneficial for psychological health.⁵² Having strong relationships can help an individual bear the burdens of, and improve through, experiences of stress.⁵³

Research has documented the benefits that direct contact with family and friends has on inmates.⁵⁴ Inmates who receive more monthly visits tend

⁴⁶ See WILMA A. DUNAWAY, *THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION* 51 (2003) (finding that in many cases masters would only keep families together if there were no economic implications).

⁴⁷ *Id.* at 53.

⁴⁸ *Id.* at 52; see *Overton*, 539 U.S. at 133 (upholding prison policies curtailing inmate visitation in part because the restrictions were “reasonable”).

⁴⁹ See DUNAWAY, *supra* note 46, at 63 (describing the practice of “abroad spouses,” who belonged to different owners and could only meet at predetermined times); STEVENSON, *supra* note 31, at 221 (noting that slave owners controlled numerous aspects of a slave’s “sexual behavior and family life”).

⁵⁰ Robert Johnson & Hans Toch, *Introduction to THE PAINS OF IMPRISONMENT* 13, 13, 15 (Robert Johnson & Hans Toch, eds., 1982) (commenting that the two main goals of prisons are punishment and deterrence, and that the “bottom line” of incarceration is storage); see Dolovich, *Incarceration American-Style*, *supra* note 44, at 253 (noting that the penal system long ago abandoned rehabilitation).

⁵¹ See Johnson & Toch, *supra* note 50, at 19 (describing prison environments as hostile and indifferent); John D. Wooldredge, *Inmate Experiences and Psychological Well-Being*, 26 CRIM. JUST. & BEHAV. 235, 244 (1999) (finding that visitation can help inmates feel less depressed, anxious, and stressed).

⁵² See, e.g., SUSAN PINKER, *THE VILLAGE EFFECT: HOW FACE-TO-FACE CONTACT CAN MAKE US HEALTHIER, HAPPIER, AND SMARTER* 9 (2014) (noting the critical importance in-person communication and that it affects thought and trust processes).

⁵³ Brooke C. Feeney & Nancy L. Collins, *A Theoretical Perspective on the Importance of Social Connections for Thriving*, in *MECHANISMS OF SOCIAL CONNECTION* 291, 297 (Mario Mikulincer & Philip R. Shaver eds., 2014).

⁵⁴ See Wooldredge, *supra* note 51, at 244 (finding that inmates tend to have worse psychological outcomes when they are visited less); see also *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000) (noting that visits are of great value to inmates and those who visit them). Inmates are more likely to become agitated when they experience less social stimulation. Wooldredge, *supra* note 51, at 235–36. Indeed, many criminological theories rely on an individual’s social bonds and sup-

to be less depressed, anxious, and stressed.⁵⁵ By providing them an opportunity to connect with loved ones, visitation can also increase inmates' likelihood to follow facility rules.⁵⁶ One study found that in the weeks leading up to a visit the probability of an inmate breaking one of those rules decreased.⁵⁷ This occurred regardless of the type of visitor the inmate received, for example a relative as opposed to a friend.⁵⁸ Inmates who received frequent visits were generally less likely to break a rule than those who were visited less frequently.⁵⁹ In-person visitation, then, can bolster correctional facility safety.⁶⁰

Research also links in-person visitation with positive outcomes for inmates once they return to their communities.⁶¹ Recidivism is a problem for the correctional system; approximately two-thirds of inmates are rearrested within three years of their release.⁶² Research suggests that inmates who are visited frequently and experience higher levels of social support have a decreased risk of recidivism than those visited less.⁶³ One study found that inmates who were visited had an approximately thirty percent lower chance of

ports to explain criminal behavior. Grant Duwe & Valerie Clark, *Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. JUST. POL'Y REV. 271, 274–75 (2013) (describing theories that involve social supports).

⁵⁵ Wooldredge, *supra* note 51, at 244. This study examined self-reported data from inmates in three Ohio prisons. *Id.* at 240.

⁵⁶ Siennick, *supra* note 27, at 419, 435; see JORGE ANTONIO RENAUD, GRASSROOTS LEADERSHIP, VIDEO VISITATION: HOW PRIVATE COMPANIES PUSH FOR VISITS BY VIDEO AND FAMILIES PAY THE PRICE 4 (2014) (noting that disciplinary infractions at the Travis County, Texas jail increased when in-person visitation was replaced with video visitation). Prison rule-breaking poses a significant problem for prisons. See Siennick, *supra* note 27, at 429 (noting that in 2000, inmates committed over 1.7 million infractions).

⁵⁷ Siennick, *supra* note 27, at 435. This study analyzed the number of weekly infractions and visits for 7,787 inmates incarcerated in Florida between 2000 and 2002. *Id.* at 424–25. Although visit-anticipation is related to a lower probability of an inmate committing an infraction, after the visit occurs the likelihood of an inmate committing an infraction increases before returning to baseline. *Id.* at 435. Perhaps this is because, although feelings of agitation are assuaged in anticipation of social connection, they return with force following separation from loved ones. *Id.* at 437.

⁵⁸ *Id.* at 433–34.

⁵⁹ *Id.* at 434. This may be due to inmates' hesitation to imperil their visitation privileges by committing an infraction close to a visit. *Id.* at 437.

⁶⁰ *Id.* at 435.

⁶¹ See William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. CRIME & DELINQ. 287, 304 (2008) (finding that visitation reduces the chances of recidivism by up to thirty percent); Duwe & Clark, *supra* note 54, at 289 (concluding that visitation decreases the risk of recidivism for felony offense and technical violations).

⁶² Duwe & Clark, *supra* note 54, at 272. One issue driving the large rates of recidivism is that former inmates, while on supervised release, can be rearrested and incarcerated for behavior that is not criminal, like consuming alcohol. *Id.* at 278.

⁶³ *Id.* at 289. This study examined 16,410 inmates released from Minnesota prisons between 2003 and 2007. *Id.* at 272. On average the researchers followed offenders for almost five years to examine recidivism rates. *Id.*

recidivism than those who were not visited, with a per-visit reduction in the probability of recidivism of almost four percent.⁶⁴ In-person visitation thus increases an inmate's prospect of leading a crime-free life upon release.⁶⁵

C. Correctional Privatization and the Correctional Phone Industry

Private companies have often been involved with corrections in the United States.⁶⁶ After the Civil War ended, states provided inmates as unpaid laborers to private contractors in a practice known as convict leasing.⁶⁷ Later, to manage the influx of inmates following the War on Drugs, correctional officials again turned to the private sector.⁶⁸ States initially attempted to house growing numbers of inmates in existing facilities.⁶⁹ But overcrowding led to court orders requiring states to rapidly increase the number of correctional facilities; to help meet the demand, private companies entered the fray, building and running entire prisons.⁷⁰ In the 1980s, there were approximately

⁶⁴ Bales & Mears, *supra* note 61, at 304–05. This study examined seven thousand inmates in Florida, released between 2001 and 2002, who served at least twelve-month sentences. *Id.* They were followed after release for two years. *Id.* Thirty-one percent of inmates reoffended within two years of being released. *Id.* It is possible that visits reduce the chances of recidivism by keeping inmates connected to community members who can soothe inmates' transition back to society and help them find, among other things, employment and housing. *See* Duwe & Clark, *supra* note 54, at 275 (noting that family and friends help inmates returning to society overcome unemployment and homelessness). Receiving visitors may also help inmates maintain their familial and community roles, and generally allow inmates to be more optimistic about their return to society. *See* Joshua C. Cochran, *The Ties That Bind or the Ties That Break: Examining the Relationship Between Visitation and Prisoner Misconduct*, 40 J. CRIM. JUST. 433, 438 (2012) (suggesting that visitation may allow inmates to maintain their community roles and remain optimistic about their return to society).

⁶⁵ *See* FLA. STAT. ANN. § 944.8031(1) (West 2010) (stating that visitation can “improve an inmate’s behavior in the correctional facility and . . . help to reduce recidivism”); Bales & Mears, *supra* note 61, at 304 (concluding that increased visitation can reduce recidivism).

⁶⁶ *See* Dolovich, *supra* note 11, at 451 (describing the postbellum involvement of companies with corrections); Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 597 (2012) [hereinafter Fulcher, *Hustle and Flow*] (describing the involvement of private companies to help address rising numbers of inmates).

⁶⁷ Dolovich, *supra* note 11, at 451. Convict leasing was prevalent in the South to mitigate the negative economic effects caused by the dearth of free labor following the end of slavery. *Id.* at 451. States entered into contracts with private parties, who treated individual inmates as disposable, because if one died another would be brought to replace him. *Id.* at 451–52.

⁶⁸ *See id.* at 439 (noting that governments turned to the private sector when inmate populations “soared” during the 1980s and 1990s); Fulcher, *Hustle and Flow*, *supra* note 66, at 597 (noting that governments turned to private companies after prison populations “exploded” from drug law modifications). Relying on the private sector for incarceration services was not an innovation; federal immigration services had been relying on private contractors to run detention facilities since the 1970s. Dolovich, *supra* note 11, at 457.

⁶⁹ Dolovich, *supra* note 11, at 455.

⁷⁰ *See id.* at 455–57 (describing how overcrowding led to court orders mandating that states increase their correctional capacities, which lead to private companies managing new facilities). The first private prison company to enter the market was Corrections Corporation of America in

three thousand inmates in private prisons worldwide.⁷¹ By 2015, the number had increased to one hundred twenty-six thousand inmates in the United States alone, representing approximately eight percent of the total number of U.S. inmates.⁷² The private sector has also extended its reach into publicly run correctional facilities through various methods, one of which is by contracting with them to operate their telephone systems.⁷³

The correctional phone industry provides revenue for companies and correctional facilities while imposing high costs on inmates and their families.⁷⁴ It is worth \$1.2 billion per year with two companies, Securus and Global Tel*Link, controlling 80% of the market.⁷⁵ Correctional institutions enter into exclusive contracts with prison operations companies to provide inmate calling services, and the companies transfer a portion of the revenue to the correctional facilities in the form of commissions.⁷⁶ The companies then have a captive market; the inmates and their loved ones have no ability to

1983. *Id.* at 459. Since then, it has brought in billions of dollars in annual revenue. Fulcher, *Hustle and Flow*, *supra* note 66, at 602. The typical prison contract pays the company a per diem rate for every inmate held. *Id.* at 599. Although no longer called convict leasing, private prison companies continue to employ the labor of inmates for profit. Fulcher, *supra* note 29, at 107.

⁷¹ Fulcher, *Hustle and Flow*, *supra* note 66, at 598.

⁷² E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015, at 16 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/PT7L-FC9Q>]. With economic motivation to increase the correctional population, these private companies donate money to politicians and campaigns aimed at passing "tough on crime" laws. See Fulcher, *supra* note 29, at 107 (noting that harsh laws lead to larger inmate populations, causing correctional institutions to enter contracts with private companies to store inmates).

⁷³ See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/57DS-R7RK>] (noting that private companies provide inmates with goods through commissaries and provide telephone services).

⁷⁴ See KUKOROWSKI ET AL., *supra* note 13, at 2 (reporting the high price of correctional phone calls and facilities' commissions systems).

⁷⁵ See Fulcher, *supra* note 29, at 108–09 (reporting that Securus and Global Tel*Link control eighty percent of the market); Sims, *supra* note 1 (reporting that the industry is worth \$1.2 billion annually). In February 2017, Securus was bought by Platinum Equity LLC for \$1.6 billion, twice the amount of the company's 2012 valuation. Victoria Law, *Prison Video Visits Are No Substitute for Face-to-Face, Especially at These Prices*, BLOOMBERG BUS. WK. (Oct. 2, 2017), <https://www.bloomberg.com/news/articles/2017-10-02/prison-video-visits-are-no-substitute-for-face-to-face-especially-at-these-prices> [<https://perma.cc/WQ87-SEAC>]. Global Tel*Link, after being outbid for the contract to service the Los Angeles County Jail phone system, bought the company that won the bid. David Lazarus, *Gouging L.A. County Inmates with High Phone Fees*, L.A. TIMES (Sept. 8, 2014), <http://www.latimes.com/business/la-fi-lazarus-20140909-column.html> [<https://perma.cc/T8ED-9RST>].

⁷⁶ See KUKOROWSKI ET AL., *supra* note 13, at 2 (describing the contractual process). In 2012, Pennsylvania, for example, received \$6.9 million in revenue from inmate phone calls. Andrew McGill, *Talk Is Anything but Cheap from Jail*, PITTSBURGH POST-GAZETTE (July 21, 2013), <http://www.post-gazette.com/region/2013/07/21/Talk-is-anything-but-cheap-from-jail/stories/201307210268> [<https://perma.cc/9C9Q-4W2P>]. Calls related to prison operations, like booking, are provided for "free," however that cost is passed onto the consumers: inmates and their families. KUKOROWSKI ET AL., *supra* note 13, at 6.

engage with competition.⁷⁷ Also, the interests of prison officials choosing a contract and pricing scheme are at odds with those who pay for the phone calls.⁷⁸ The former seeks a high commission, the latter an inexpensive method to contact a family member or friend.⁷⁹ Furthermore, in order to remain profitable, correctional phone companies charge a litany of ancillary fees to place calls.⁸⁰ This results in astronomical prices: a fifteen minute call can cost over seventeen dollars.⁸¹ Such high prices can deter family communication.⁸² The prison phone industry has laid the foundation for video visitation, which private companies are beginning to offer inmates at similarly exorbitant prices.⁸³

D. Video Visitation in Correctional Facilities

Video chat and conference technology has begun to pervade the American legal system, including the nation's correctional facilities.⁸⁴ Although no

⁷⁷ See *Global Tel*Link v. Fed. Comm'n's Comm'n*, 866 F.3d 397, 404 (D.C. Cir. 2017) (explaining that once a company is awarded a contract competition ceases and it has a "local monopol[y]").

⁷⁸ See *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd. 16,629, 16,662 (2012) (statement of Pai, Comm'r) (commenting that correctional officials who select a contract have different incentives than inmates). Correctional officials are incentivized to choose the contract with the highest commission to maximize the facility's financial yield. KUKOROWSKI ET AL., *supra* note 13, at 3. These fees are passed onto the inmates and their families. *Id.*

⁷⁹ See *Global Tel*Link*, 866 F.3d at 404 (noting that correctional institutions "give considerable weight" to which company will provide the largest commission); KUKOROWSKI ET AL., *supra* note 13, at 3 (noting that inmates may not select a carrier with the lowest rate). In 2007, Dane County, Wisconsin passed an ordinance requiring that jail phone contracts not generate revenue for the county in the form of a commission, and be awarded to the lowest bidder. *Wisconsin County Bans Profiteering in Jail Phone Contracts*, PRISON LEGAL NEWS (July 15, 2008), <https://www.prisonlegalnews.org/news/2008/jul/15/wisconsin-county-bans-profiteering-in-jail-phone-contracts/> [<https://perma.cc/SXB7-CQG4>]. Before the ordinance was passed, a fifteen-minute call cost an inmate \$11.75. *Id.* The county brought in nearly one million dollars of revenue under the discontinued commission system. *Id.*

⁸⁰ KUKOROWSKI ET AL., *supra* note 13, at 7–9 (listing and describing various fees callers are charged). There are fees to open an account with the company, fees for holding money in the account, fees to return deposited money that will not be used, and fees for paying through a money service like Western Union. *Id.* Experts estimate that families spend a combined \$386 million annually on fees alone. *Id.* at 10.

⁸¹ *Id.* at 2. One company offers an unlimited long-distance calling plan for \$52.99 a month. *Id.*

⁸² See Letter from Anthony J. Annucci, Acting Comm'r, State of N.Y. Dep't of Corr. and Cmty. Supervision, to Gregory V. Haledjian, Attorney-Advisor, Pricing Policy Div.—Wireless Competition Bureau, Fed. Comm'n's Comm'n 1, 2 (July 8, 2013), <https://ecfsapi.fcc.gov/file/7520931060.pdf> [<https://perma.cc/ST4N-JJ8T>] [hereinafter Annucci Letter] (noting that when commissions were banned in New York and prison phone call prices decreased, inmate phone calls increased).

⁸³ See RABUY & WAGNER, *supra* note 8, at 11 (opining that charging for video visits is a regressive tax similar to the correctional telephone market).

⁸⁴ See, e.g., Christopher Danzig, *Video Arraignments Save Money and Make Judges Feel Safer*, ABOVE THE LAW (June 27, 2011), <https://abovethelaw.com/2011/06/video-arraignments->

definitive database exists, tallies estimate that more than six hundred jails and prisons currently offer video visitation to inmates and their loved ones.⁸⁵ These services allow an inmate to see visitors via video broadcast over the Internet instead of in-person.⁸⁶ At first blush, this appears to be a promising alternative that provides inmates a method of instant, face-to-face communication with visitors who are spared what can be a lengthy and costly trip to the facility.⁸⁷ A large swath of inmates receive no in-person visits and many are housed far from their homes and families; this service could provide them with a means of communication more intimate than a phone call.⁸⁸ In practice, however, video visitation is most often employed in jails, where inmates are typically closer to their loved ones than are inmates in prisons.⁸⁹ Additionally, the services have severe limitations, can be even more expensive than phone calls, and often completely replace in-person visitation.⁹⁰

A private correctional operations company called VUGate was the first, in 1995, to institute a video visitation system at a correctional facility.⁹¹ Since

save-money-and-make-judges-feel-safer/ [https://perma.cc/D3P7-B4K9] (noting that state courts have used video conferencing for arraignments, witness testimony, and sentencing hearings); Sims, *supra* note 1 (noting the rise of video visitation in American correctional facilities).

⁸⁵ See Fulcher, *supra* note 29, at 93 (noting that it is unclear how many correctional institutions are using this technology); Law, *supra* note 75 (reporting that six hundred fifty correctional facilities offered video visitation in 2017). In 2016, researchers found that fifteen state prison systems were currently using the technology in some capacity, nine were in the process of implementing it, seven intended to implement it, and fourteen did not plan to implement it. LÉON DIGARD ET AL., VERA INST. OF JUSTICE, A NEW ROLE FOR TECHNOLOGY?: IMPLEMENTING VIDEO VISITATION IN PRISON 6 (2016), <https://www.prisonpolicy.org/scans/vera/video-visitation-in-prison.pdf> [https://perma.cc/27SM-423G]. In states that allow video visitation, a majority restrict access to the service for inmates who are housed in segregated units, such as solitary confinement. *Id.*

⁸⁶ Fulcher, *supra* note 29, at 92.

⁸⁷ See RABUY & WAGNER, *supra* note 8, at 2 (noting the potentially positive aspects of video visitation for inmates and their families).

⁸⁸ Fulcher, *supra* note 29, at 100, 102; see Bales & Mears, *supra* note 61, at 304 (documenting that fifty-eight percent of inmates in a study were not visited during the year prior to their release). There are several obstacles to visitation, including distance, access to public or private transportation, and age or health. DIGARD ET AL., *supra* note 85, at 10.

⁸⁹ See RABUY & WAGNER, *supra* note 8, at 4–5 (reporting that video visitation is most often used in jails and that inmates held in prisons are often farther from home than those in jails).

⁹⁰ See NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, VIDEO VISITING IN CORRECTIONS: BENEFITS, LIMITATIONS, AND IMPLEMENTATION CONSIDERATIONS 16 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/029609.pdf> [https://perma.cc/FMQ3-HR5C] (noting the limitations of video visitation, including, but not limited to, family dissatisfaction at the poor quality and camera angles, and illiteracy posing a potential barrier to setting up a video visitation account, and unaffordable fees); RABUY & WAGNER, *supra* note 8, at 10–11 (quoting a local county representative and reporting that one dollar per minute is a fair price to pay for video visitation and noting that most county jails ban in-person visitation after instituting video visitation). In 2012, for example, the jail administrators in Washington D.C. completely replaced in-person visitation with video visitation. Fulcher, *supra* note 29, at 94.

⁹¹ *Video Visitation*, VUGATE, <http://vugate.com/videovisitation.html> [https://perma.cc/QSR3-23MT]. VUGate notes on its website that it developed the technology using the input from prison

then other companies have entered the market, including Securus and Global Tel*Link, which also operate phone lines in facilities and bundle video visitation with existing phone service contracts.⁹² This market is lucrative for such companies; Securus gave one county a \$100,000 signing bonus for agreeing to a video visitation contract and it installed a \$133,415 system in another county for free.⁹³ Video visits, like phone calls, provide correctional facilities a source of income because the companies pay the facilities a commission from revenue derived from the visits.⁹⁴ Video visitation companies and correctional facilities are thus incentivized to eliminate free in-person visitation to increase video visitation revenue.⁹⁵ Indeed, until 2015, when it changed the language in its contracts, Securus required that correctional facilities implementing its video visitation service eliminate in-person visitation.⁹⁶ Both Securus and Telmate, another video visitation provider, have admitted that banning in-person visitation is the only manner by which the companies can recuperate the costs of installing and operating the systems.⁹⁷

administrators, not the end users of the product, the inmates and their families. *See id.* (“Designed by Corrections Officers for Corrections officers”).

⁹² RABUY & WAGNER, *supra* note 8, at 4 (finding that correctional phone companies have begun bundling video visitation services with phone services); Fulcher, *supra* note 29, at 93, 97 (explaining how Securus and Global Tel*Link entered the video visitation market). Securus controls approximately one-third of the video visitation market. Law, *supra* note 75.

⁹³ RABUY & WAGNER, *supra* note 8, at 12 (reporting how Securus installed a video visitation system for free in one county); Fulcher, *supra* note 29, at 97 (describing Securus’s signing bonus with another county). Another company, Jpay, paid the costs to install the video visitation system in Washington state prisons. DIGARD ET AL., *supra* note 85, at 11.

⁹⁴ *See* KUKOROWSKI ET AL., *supra* note 13, at 2 (noting that correctional phone companies often pay commissions to correctional facilities); RABUY & WAGNER, *supra* note 8, at 13 (describing how commissions work in the video visitation industry); Fulcher, *supra* note 29, at 98–99 (describing how video visitation systems generate revenue for correctional facilities). With video visitation, there is the potential for companies to derive money from advertisements that show on the screens. Fulcher, *supra* note 29, at 99. Some companies use the commissions to pay for initiatives that benefit inmates. *See, e.g.*, DIGARD ET AL., *supra* note 85, at 12 (noting that revenue from video visitation in Washington state goes to the “Offender Betterment Fund,” which is used, among other things, for prison libraries and televisions).

⁹⁵ *See* Fulcher, *supra* note 29, at 98–99 (noting that video visitation companies and correctional facilities benefit financially from the use of video visitation).

⁹⁶ RABUY & WAGNER, *supra* note 8, at 20–21 (noting that a Securus contract included the language: “Customer will eliminate all face to face visitation through glass or otherwise at the Facility and will utilize video visitation for all non-professional on-site visitors”); Bernadette Rabuy, *Securus Ends Its Ban on In-Person Visits, Shifts Responsibility to Sheriffs*, PRISON POL’Y INITIATIVE (May 6, 2015), <https://www.prisonpolicy.org/blog/2015/05/06/securus-ends-ban/> [<https://perma.cc/R5YW-KEWD>] (describing Securus’s change in contractual language to no longer require facilities to eliminate in-person visitation).

⁹⁷ RABUY & WAGNER, *supra* note 8, at 24–25. But Turnkey, another video visitation company, found that retaining in-person visitation resulted in more video visitation usage than when in-person visitation was eliminated. *Id.* at 25.

In contrast to free in-person visits, video visits can range from \$5 to \$12 for a twenty minute conversation, and up to \$40 for forty minutes.⁹⁸ Often facilities also provide free video visits, but impose restrictions on them.⁹⁹ Washington County, Idaho, for example, offers inmates two free video visits per week, but they must occur between the hours of six and eight in the morning.¹⁰⁰ Unsurprisingly, inmates use video visitation services more frequently when the cost decreases.¹⁰¹

A typical video visitation set-up includes two kiosks, one outside and one inside the facility, where the inmate and visitor sit facing a screen displaying the other's face.¹⁰² One mother drove an hour and a half to the jail where her son was held to visit him not in person, but via video.¹⁰³ Some companies place the visitor's kiosk at the facility itself, while others place them in the community.¹⁰⁴ Some also allow for video visitation via mobile device.¹⁰⁵ The visits are recorded, and correctional staff can either review a visit later or observe it in real time and terminate it in the event of inappropriate behavior.¹⁰⁶

Video visits are plagued by technological problems, making it more difficult for inmates and loved ones to share meaningful interactions.¹⁰⁷ In the

⁹⁸ *Id.* at 10 (noting that in-person visitation is traditionally free); Law, *supra* note 75 (reporting the price range for video visits). In 2016, five state prison systems offered video visitation at no cost to inmates or their families. DIGARD ET AL., *supra* note 85, at 13.

⁹⁹ See RABUY & WAGNER, *supra* note 8, at 22 (noting that many facilities provide at least some free video visits, but often with cumbersome restrictions).

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 27 (illustrating that as price-per-minute of a video visit decreased in Travis County, Texas jails, the average minutes used per inmate per month increased).

¹⁰² Fulcher, *supra* note 29, at 92.

¹⁰³ Law, *supra* note 75. This mother had the option of visiting from home via her mobile device, at the price of almost seven dollars for a twenty-minute visit. *Id.*

¹⁰⁴ See LÉON DIGARD ET AL., VERA INST. OF JUSTICE, CLOSING THE DISTANCE: THE IMPACT OF VIDEO VISITS IN WASHINGTON STATE 5 (2017) [hereinafter DIGARD ET AL., CLOSING THE DISTANCE], https://storage.googleapis.com/vera-web-assets/downloads/Publications/closing-the-distance/legacy_downloads/The-Impact-of-Video-Visits-on-Washington-State-Prisons.pdf [https://perma.cc/8QRF-E9H8] (describing how in Washington State, inmates' family members may call from portals in the community); Fulcher, *supra* note 29, at 92 (noting that some inmates may use kiosks in their facilities).

¹⁰⁵ Sims, *supra* note 1.

¹⁰⁶ See DIGARD ET AL., CLOSING THE DISTANCE, *supra* note 104, at 8 (describing how in Washington State, correctional officials may supervise video visits in real time or watch them later).

¹⁰⁷ See, e.g., Jones'El v. Berge, 164 F. Supp. 2d 1096, 1101 (W.D. Wis. 2001) (noting the "poor audio quality" for video visits at a prison and commenting that the similarly poor quality of the video feed caused "some mentally ill inmates to believe that the images on the video screens are manipulated and to refuse visitors"); Jack Smith IV, *Video Visitation' Is Ending In-Person Prison Visits—and Prisons Are Going to Make a Ton of Money*, BUS. INSIDER: MIC (May 5, 2016), <http://www.businessinsider.com/video-visitation-is-ending-in-person-prison-visits-2016-5> [https://perma.cc/8DUG-ZH2E] (documenting the travails of a woman who attempted to video visit with an inmate using two computers to no avail so she switched to her phone, but saw what

Clark County, Nevada jail, for example, over half of the video visits each month were cancelled due to system glitches.¹⁰⁸ Because companies consider their customers to be correctional officials, not the inmates and their families, they have no financial incentive to improve the design and efficiency of the systems.¹⁰⁹ In fact, it may be in the companies' financial interest to provide a malfunctioning service because when a video visit is interrupted or lost the user may pay for another visit.¹¹⁰ Additionally, families that use the system note its lack of privacy and the potential for callers' increased exposure to inmate violence.¹¹¹ Furthermore, because the camera is located above the screen, video visits prevent families from maintaining eye contact, which is important for interpersonal communication.¹¹² Video visits, in sum, have inherent disadvantages for the people who use them, are prone to technological issues, and are more expensive as well as substantially less personal than in-person visits.¹¹³

appeared like a "tangle of blinds" on the screen instead of her loved one's face, and was subsequently charged \$10 for the visit, despite ending it several minutes early).

¹⁰⁸ Annalise Little, *Home Video Chats, Other Upgrades Coming to CCDC*, LAS VEGAS REV.-J. (Oct. 13, 2014), <https://www.reviewjournal.com/local/local-las-vegas/home-video-chats-other-upgrades-coming-to-ccdc/> [<https://perma.cc/WL9R-N8ZJ>]. In Louisiana, one woman paid \$12.99 for a call on which her incarcerated boyfriend could not hear her. Sims, *supra* note 1. The boyfriend noted that the system did not work for either of the two other inmates he knew of who had tried it. *Id.*

¹⁰⁹ See RABUY & WAGNER, *supra* note 8, at 3, 7 (noting that video visitation industry leaders consider jails and prisons their customers, and have not responded to "consistent complaints" about technological glitches and issues with the systems).

¹¹⁰ See KUKOROWSKI ET AL., *supra* note 13, at 13 (noting that, in the context of inmate telephone calls, companies have been accused of dropping calls to increase revenue); Little, *supra* note 108 (noting that half of the video visits per month at a facility were canceled because of technological problems). In Florida, for example, inmate phone companies refused to cooperate in an investigation into alleged improper dropping of inmates' phone calls, and, facing \$6 million in demanded refunds, settled for \$1.25 million. KUKOROWSKI ET AL., *supra* note 13, at 13.

¹¹¹ See RABUY & WAGNER, *supra* note 8, at 16 (noting that facility tension can increase due to the lack of visitation privacy); Peter Hermann, *Visiting a Detainee in the D.C. Jail Now Done by Video*, WASH. POST (July 28, 2012), https://www.washingtonpost.com/local/crime/visiting-a-detainee-in-the-dc-jail-now-done-by-video/2012/07/28/gJQAcf1TGX_story.html?utm_term=.480b0e8c3572 [<https://perma.cc/37L5-PYQF>] (quoting a woman who, during a visit with her incarcerated boyfriend, to which she brought their daughter, saw a fight break out in the background, ending her visit, which she already derided as lacking privacy).

¹¹² See RABUY & WAGNER, *supra* note 8, at 8 (noting that video visitation set ups create interpersonal communication that is different from in-person communication, and that families complain about the "impersonal" feeling from the dearth of eye contact); H. Mge Satar, *Multi-modal Language Learner Interactions Via Desktop Videoconferencing Within a Framework of Social Presence: Gaze*, 25 RECALL 122, 123 (2013) (noting that video conferencing in general does not provide the same level of eye-contact, important to human communication, that occurs in person).

¹¹³ See RABUY & WAGNER, *supra* note 8, at 8, 10 (noting impersonal aspects of video visitation and the technological issues); Law, *supra* note 75 (describing the high price range of video visitation).

II. INMATES' RIGHTS IN FRONT OF THE SUPREME COURT, AND LEGISLATIVE AND REGULATORY APPROACHES TO VIDEO VISITATION

Section A of this Part details the history of inmate challenges to correctional policies on constitutional grounds.¹¹⁴ Section B illustrates how various legislatures have handled video visitation.¹¹⁵ Section C concludes by describing challenges and successes in regulating video visitation.¹¹⁶

A. The History of Constitutional Challenges to Correctional Policies Before the Supreme Court

The Supreme Court has not addressed the issue of video visitation, but in recent decisions has often held that correctional policies restricting inmates' rights are constitutional.¹¹⁷ Once an individual has been lawfully incarcerated, many of that person's rights and privileges are curtailed.¹¹⁸ Beginning at least in the 1930s, federal courts took a hands-off approach to many inmates' constitutional challenges to conditions of incarceration because of federalism concerns.¹¹⁹ During the 1960s and early 1970s, however, the federal judiciary brought the rights of the Constitution to bear on the experiences of inmates.¹²⁰ Some district courts went so far as to take control of entire state prison systems.¹²¹ The crackdown was brief, and in the late 1970s the Supreme Court issued a series of decisions limiting the role that federal courts

¹¹⁴ See *infra* notes 117–153 and accompanying text.

¹¹⁵ See *infra* notes 154–165 and accompanying text.

¹¹⁶ See *infra* notes 166–190 and accompanying text.

¹¹⁷ See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 131, 132 (2003) (sustaining a prison regulation prohibiting contact visits). This Note does not specifically address the Eighth Amendment, which prohibits cruel and unusual punishment, because social isolation is not typically considered to violate it. U.S. CONST. amend. VIII; Gertrude Strassburger, Comment, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199, 206 (2001). In the most recent challenge to visitation restrictions, inmates asserted First Amendment freedom of association, Eighth Amendment cruel and unusual punishment, and Fourteenth Amendment substantive due process claims. *Overton*, 539 U.S. at 128, 131, 136.

¹¹⁸ *Overton*, 539 U.S. at 131 (noting that a host of liberties enjoyed by free individuals “must be surrendered by the prisoner” once incarcerated); *Price v. Johnston*, 334 U.S. 266, 285 (1948) (commenting that incarceration leads to “the necessary withdrawal or limitation of many privileges and rights” because of penal considerations).

¹¹⁹ James E. Robertson, *The Rehnquist Court and the Turnerization of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 99 (2006).

¹²⁰ *Id.* at 100.

¹²¹ See *id.* at 100–01 (noting that courts did this through “all-encompassing structural injunctions”).

play in assessing inmates' constitutional claims, instructing courts to provide nearly unbridled deference to the decisions of correctional officials.¹²²

The trend toward deferring to correctional officials began in 1974 when the Court noted in *Procunier v. Martinez* that there are "Herculean obstacles" to effective correctional management and that federal courts are "ill equipped" to deal with them.¹²³ When presented with a constitutional challenge to a correctional policy, courts should defer to correctional officials decisionmaking.¹²⁴ The Court in *Martinez* declared a two-part standard courts should apply when deciding whether to uphold a rights-restrictive policy.¹²⁵ It must both advance a substantial correctional interest and be specifically tailored to protect that interest.¹²⁶ The decisions following *Martinez* narrowed this standard and allowed for increasingly restrictive correctional policies to withstand judicial scrutiny.¹²⁷

In *Pell v. Procunier*, decided in the same term as *Martinez*, the Court concluded that inmate freedom of speech claims must be analyzed in the context of the correctional system's objectives; inmates retain only First Amendment rights that do not conflict with them.¹²⁸ The Court cited the objective of internal prison security in upholding correctional officials' decision to block certain media visitors from seeing inmates.¹²⁹

¹²² *Id.* at 101–02; see Simeon Goldstein, Note, *Prisoners with AIDS: Constitutional and Statutory Rights Implicated in Family Visitation Programs*, 31 B.C. L. REV. 967, 969 (1990) (commenting that courts give deference to prison administrators).

¹²³ 416 U.S. 396, 404–05 (1974).

¹²⁴ *Id.* (commenting that correctional management is within the domain of the executive and legislative, and that where state prison systems are involved, there is an added reason to defer to correctional authorities). *But see* *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (noting that "there is no iron curtain" between prisons and the Constitution).

¹²⁵ *Martinez*, 416 U.S. at 406, 413. For the first time the Court addressed how inmates' First Amendment freedom of speech rights should be balanced against a correctional policy restricting those rights. *Id.* at 406.

¹²⁶ *Id.* at 413. The Court was reacting to a variety of approaches to such questions in the lower courts. *Id.* at 406–07. Applying the new standard, the Court found that California's regulations allowing for the censoring of inmates' mail for content that was inflammatory or overstated grievances was unconstitutional because prison officials could censor mail that was simply critical, and that no government interest was advanced besides suppression of expression. *Id.* at 415.

¹²⁷ See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989) (limiting the applicability of the *Martinez* test to situations involving outgoing inmate correspondence).

¹²⁸ *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The Court listed the following among goals of the penal system: deterrence, because prison is an undesirable place; societal protection, because inmates cannot harm society from within prison; and rehabilitation, because most inmates will return to society and hopefully not recidivate. *Id.* at 822–23.

¹²⁹ *Id.* at 826, 827–28. The Court also found that alternative means of communication remained open to the inmates and the media. *Id.* at 823–24. The Court noted that, following its holding in *Martinez*, prisoners would be especially free and able to communicate with the media by mail. *Id.* at 824. Also, because prisoners are allowed to visit with family, friends, the clergy, and attorneys, they could use these visitors as intermediaries to communicate with the media. *Id.* at 824–25.

The Court then held in *Meachum v. Fano* that inmates are not entitled to hearings when correctional officials adversely alter the conditions of their confinement.¹³⁰ Invoking deference to correctional officials' decisions, the Court refused to hold that "any substantial deprivation" of a right requires the protection of the Due Process Clause of the Fourteenth Amendment.¹³¹

Next, in *Jones v. North Carolina*, the Court acknowledged that correctional officials have the latitude to institute a proactive policy mitigating a threat that they cannot show exists.¹³² Because officials are accorded deference in their decisions regarding facility policy, the Court concluded that those challenging such a policy bear the burden of showing that it is unreasonable.¹³³ Once a correctional official decides that a certain activity *could* negatively affect facility security, a policy may stand so long as the officials' decision is not "conclusively shown to be wrong."¹³⁴

In *Block v. Rutherford*, the Court directly addressed inmate visitation, considering whether inmates have any constitutional right to contact visits with family and friends.¹³⁵ Deferring to the judgment of correctional officials, the Court concluded that the correctional interests of keeping contraband out of facilities and keeping visitors safe from hostage or escape predicaments justified a policy banning contact visitation.¹³⁶ Having found some justification supporting the policy, the Court ended the constitutional inquiry.¹³⁷

¹³⁰ 427 U.S. 215, 216 (1976); see *Olim v. Wakinekona*, 461 U.S. 238, 248 (1983) (noting that the Constitution permitted transferring an inmate from Hawaii to the mainland, where he was separated from his loved ones). In *Meachum* several Massachusetts inmates challenged prison officials' decisions to send them to different prisons, where the living conditions were worse than their previous placements. 427 U.S. at 218.

¹³¹ *Meachum*, 427 U.S. at 225. The Court noted that a prisoner's expectation of remaining at a prison is not substantial enough to require due process protections. *Id.* at 228. Prison officials may be free from due process constraints to move prisoners for "whatever reason or for no reason at all." *Id.*

¹³² 433 U.S. 119, 132–33 (1977).

¹³³ *Id.* at 127–28. This deference arises out of the complicated realities of running a penitentiary. *Id.* at 126.

¹³⁴ *Id.* at 132. State prison officials testified that an inmate union was "fraught with potential dangers." *Id.* at 126. The Court concluded that, given the potential threat the union organizing presented to internal prison order, the regulation banning them survived First and Fourteenth Amendment challenges. *Id.* at 133, 136.

¹³⁵ 468 U.S. 576, 577, 578 (1984). Several pretrial detainees challenged the Los Angeles County Jail policy of prohibiting inmates from contract visits. *Id.* In *Bell v. Wolfish*, the Court held that correctional facility policies that are reasonably related to penal objectives are not punishment, and so may be applied to pretrial detainees. 441 U.S. 520, 539 (1979).

¹³⁶ *Rutherford*, 468 U.S. at 586–87. The Court provided no factual support for the contention that those who visit inmates may "be taken as hostages or become innocent pawns in escape attempts." See *id.* at 587 (providing no citation to factual evidence).

¹³⁷ *Id.* at 589.

In *Turner v. Safley*, the Court established the modern test applied to inmates' constitutional challenges to correctional policies.¹³⁸ It held that a policy affecting inmates' constitutional rights is valid if it is "reasonably related to legitimate penological interests."¹³⁹ The Court described four factors that should guide this assessment.¹⁴⁰ First, there must be a rational nexus between the policy and the "legitimate governmental interest" advanced to justify it.¹⁴¹ Second, courts should consider whether there are alternative means of expressing the restricted right.¹⁴² Third, the impact of any accommodation on guards, other inmates, and prison resources should be accounted for.¹⁴³ Fourth, courts should consider whether there are ready alternatives to the challenged regulation.¹⁴⁴

Shortly thereafter, in *Thornburgh v. Abbott*, the Court explicitly narrowed the *Martinez* standard, nearly overruling it outright.¹⁴⁵ It noted its trend towards creating a standard of constitutional review that defers to correctional officials when assessing policies concerned with the preservation of order and security within a facility.¹⁴⁶ Bowing to officials' invocation of the broad interest in facility security, the Court commented that a policy could be rational if it bans something that, although not "likely" to cause violence, an official determines creates an unacceptable risk of "disorder."¹⁴⁷

¹³⁸ 482 U.S. 78, 89 (1987). The *Turner* test, however, is not applicable to every inmate's constitutional claim. *Johnson v. California*, 543 U.S. 499, 510 (2005). Only rights that are "inconsistent with proper incarceration," or those that must be compromised for correctional administration, like freedom of association and access to courts, are governed by the *Turner* test. *Id.* (quoting *Overton*, 539 U.S. at 131). Claims of racial discrimination made under the Fourteenth Amendment, on the other hand, are not governed by the *Turner* test because such discrimination hinders the "legitimacy of the entire criminal justice system." *Id.* at 510–11.

¹³⁹ *Turner*, 482 U.S. at 89. The court rejected a stricter level of scrutiny because operating a correctional institution is a difficult task. *Id.* The court noted that separation of power principles caution against the judiciary inserting itself into the day-to-day decisions of correctional officials. *Id.* at 85.

¹⁴⁰ *Id.* at 89–91.

¹⁴¹ *Id.* at 89 (quoting *Rutherford*, 468 U.S. at 586).

¹⁴² *Id.* at 90.

¹⁴³ *Id.* The Court acknowledged that prisons are closed systems, and so any accommodation would impact others within the system. *Id.*

¹⁴⁴ *Id.* The court expressly rejected a "least restrictive" test, so that prison officials do not have to show that they have attempted to accommodate inmates' rights. *Id.* at 90–91. Prisoners may, however, suggest alternatives that can aid a court in determining whether the regulation is valid if the alternatives do not impose significant cost. *Id.* at 91.

¹⁴⁵ *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). With regard to First Amendment claims concerning mail coming into prisons, the Court adopted the reasonableness standard articulated in *Turner*. *Id.* at 414. The Court held that the *Martinez* standard only applies to correctional regulations governing outgoing mail. *Id.* at 413. Outgoing mail, according to the Court, poses a lesser security risk than material coming into a prison because it can then be disseminated among prisoners, potentially wreaking havoc. *Id.* at 412.

¹⁴⁶ *Id.* at 409–10.

¹⁴⁷ *Id.* at 415, 417.

More recently, in *Overton v. Bazzetta*, the Court again directly confronted a challenge to a visitation policy.¹⁴⁸ Correctional officials in Michigan established regulations limiting the number and type of visitors an inmate could receive, claiming that visitors posed the threat of smuggling drugs into prison.¹⁴⁹ Sounding a familiar refrain, the Court noted that the judgment of correctional officials, who both define legitimate penal goals and determine the appropriate means to achieve them, must be given “substantial deference.”¹⁵⁰ Finding that the restrictive visitation regulations were rationally related to the penal interest of security and deterring drug use and thus passed constitutional muster, the Court skirted broader consideration of the limits that incarceration places on inmates’ “right to intimate association” with those outside of the facility.¹⁵¹

Clearly, the Supreme Court gives great weight to correctional officials’ decisions when considering inmates’ constitutional claims challenging correctional policies and regulations.¹⁵² Furthermore, the Court places the burden on inmates to show that a policy is unreasonable, and does not require evidence to support the reasoning behind a challenged policy.¹⁵³

B. Legislative Involvement with Video Visitation

Congress and state legislatures have not provided many protections for inmates; what protections exist have come from the courts.¹⁵⁴ Inaction is likely due, at least in part, to the fact that many citizens who are convicted of felonies are disenfranchised both while they are incarcerated and following their

¹⁴⁸ 539 U.S. 126, 128 (2003).

¹⁴⁹ *Id.* at 129. The regulations required that inmates maintain a visitor list, and stated that they could only visit with those approved and on the list. *Id.* The list could include an unlimited number of family members and up to ten non-family members. *Id.* Only children with a direct relation to inmates could be placed on the list, unless parental rights were terminated. *Id.* at 129–30. Inmates who committed multiple substance-abuse infractions were not permitted any visitors for at least two years. *Id.* at 130.

¹⁵⁰ *Id.* at 132.

¹⁵¹ *Id.* at 131–32, 133, 134.

¹⁵² *See, e.g., id.* at 132 (noting that correctional officials are owed deference in setting policy and regulations); *see also* Shay, *supra* note 44, at 339 (commenting that Supreme Court precedent treats corrections regulations “as an undifferentiated monolith” with no regard for how they are created).

¹⁵³ *See Thornburgh*, 490 U.S. at 417 (concluding that it is rational for a regulation to ban something unlikely to cause violence); *Jones*, 433 U.S. at 127–28, 132–33 (holding that the burden of demonstrating a regulation is unreasonable falls upon the inmate, and noting that a prison regulation may respond to a threat that has not yet been shown to exist).

¹⁵⁴ *See* James F. Smith, *Prison Reform Through the Legislature*, in *THE POLITICS OF PUNISHMENT* 262, 262 (Erik Olin Wright ed., 1973) (noting that almost all accused criminals have come through the courts). *But see, e.g.,* FLA. STAT. ANN. § 944.8031 (West 2010) (concluding that maintaining inmates’ ties to the community through increasing the “frequency and quality of the visits” is an “underutilized correctional resource”).

release.¹⁵⁵ Deprived of their voting rights, they have no political “bargaining chip” with which to affect the legislative agenda.¹⁵⁶ Inaction also occurs because a state’s primary correctional policymaker, the head of its department of corrections, is tasked with setting prison visitation policy, while a state’s sheriffs may set county jail visitation policy.¹⁵⁷ The leaders of individual facilities also have considerable latitude in setting facility-specific policies.¹⁵⁸

Recently, however, Congress and state legislatures have intervened in correctional visitation policy, requiring facilities to maintain in-person visitation schemes even if they implement video visitation.¹⁵⁹ In 2017, as part of a budget deal, California passed a law prohibiting correctional facilities that offered in-person visitation from converting to video-only visitation.¹⁶⁰ The law additionally requires facilities offering on-site video visitation to provide the service for free.¹⁶¹ The Texas legislature also passed a law requiring jails to provide in-person visitation, although it does not require facilities that already switched to video-only visitation to return to in-person visitation.¹⁶² Massachusetts recently passed a law requiring that correctional facilities provide in-person visitation, and that those electing to incorporate video visitation also offer in-person visitation.¹⁶³ In Congress, a representative proposed

¹⁵⁵ See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that the Due Process Clause of the Fourteenth Amendment allows felons to be disenfranchised even after they have completed their sentence and parole); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1999) (listing inmates among insular minorities, and noting the fact that prisoners are often disenfranchised).

¹⁵⁶ Chemerinsky, *supra* note 155, at 460.

¹⁵⁷ See Boudin et al., *supra* note 43, at 159–60 (noting that statewide prison visitation policy is set by the state’s department of corrections head); Walt Bogdanich & Grace Ashford, *An Alabama Sheriff, a Mystery Check and a Blogger Who Cried Foul*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/us/ana-franklin-alabama-sheriff.html> [<https://perma.cc/KY54-9PYG>] (noting that county Sheriffs often have “unfettered dominion” over jail policy).

¹⁵⁸ See Boudin et al., *supra* note 43, at 159 (finding that the directors of individual facilities often retain “some” discretion over visitation policy).

¹⁵⁹ See, e.g., CAL. PENAL CODE § 4032(b) (West Supp. 2019) (prohibiting “local detention centers” from adopting video visitation in lieu of in-person visitation if they offered in-person visitation as of January 1, 2017); TEX. GOV’T CODE ANN. § 511.009(a)(20) (West Supp. 2018) (requiring county jails to offer a minimum of two in-person visits per week); Video Visitation in Prisons Act of 2016, H.R. 6441, 114th Cong. § 2 (2016) (prohibiting video visitation from replacing in-person visitation in federal facilities); H.R. Paper 572, 129th Leg., 1st Reg. Sess. (Me. 2019) (requiring sheriffs to provide for in-person visitation at county jails, unless a determination is made that a particular inmate requires video visits for security reasons).

¹⁶⁰ CAL. PENAL CODE § 4032(b); Jazmin Ulloa, *California Jails Won’t Be Able to Restrict Face-to-Face Family Visits for Inmates Under State Budget Deal*, L.A. TIMES: ESSENTIAL POLITICS (June 15, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-jails-will-have-to-provide-1497578912.htmlstory.html> [<https://perma.cc/N4HT-XXVS>].

¹⁶¹ CAL. PENAL CODE § 4032(d).

¹⁶² TEX. GOV’T CODE ANN. § 511.009(a)(20), (a-1) (requiring that the corrections committee provide “each prisoner at a county jail with a minimum of two in-person, noncontact visitation periods per week,” but allowing noncompliance by certain facilities built before September 2015).

¹⁶³ MASS. GEN. LAWS ANN. Ch. 127, § 36C (West Supp. 2019).

the Video Visitation in Prisons Act of 2016, which would allow the Federal Communications Commission (FCC) to regulate video visitation and require that federal prisons not replace in-person visitation with video services.¹⁶⁴ Although correctional policies are not typically the province of the legislature, it is not impossible that legislators will act to address the replacement of in-person visitation with video visitation.¹⁶⁵

C. Regulatory Agency Involvement with Video Visitation

Regulatory agencies at both the federal and state level have attempted, with little success, to address the exorbitant prices of prison phone calls.¹⁶⁶ These fruitless efforts could set the mold for similar attempts to regulate the video visitation industry.¹⁶⁷

In 2000, a group known as the Wright Plaintiffs sued various private correctional and correctional phone companies alleging violations of antitrust laws.¹⁶⁸ The U.S. District Court for the District of Columbia, finding that regulatory, not judicial, intervention was warranted, stayed the matter so the FCC could act.¹⁶⁹ In 2015, the FCC set rate and fee caps for inmate phone calls and

¹⁶⁴ H.R. 6441. The bill did not pass during the 2016 session of Congress. Peter Rugg, *Prisons Are Replacing In-Person Visits with Video Visitation—and Putting Families in Debt*, THE DAILY DOT: LAYER 8 (Mar. 13, 2017), <https://www.dailydot.com/layer8/video-visitation-prison-problems/> [<https://perma.cc/R2LZ-G9XJ>].

¹⁶⁵ See, e.g., CAL. PENAL CODE § 4032(b) (requiring correctional facilities to continue offering in-person visitation if they had not yet switched to video-only by January 1, 2017); TEX. GOV'T CODE ANN. § 511.009(a)(20) (requiring county jails to offer a minimum of two in-person visits per week); see also Boudin et al., *supra* note 43, at 159 (finding that state DOCs often determine correctional policies).

¹⁶⁶ See *Global Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 402 (D.C. Cir. 2017) (finding that the Federal Communications Commission did not have the regulatory authority to regulate the state prison phone industry); *Dep't of Corr. v. Pub. Utils. Comm'n*, 968 A.2d 1047, 1048–49 (Me. 2009) (holding that the Maine Public Utilities Commission lacked the statutory authority to regulate the state's prison telephone scheme); see also *Bowers v. T-Netix*, 837 A.2d 608, 610, 613, 614 (Pa. Commw. Ct. 2003) (concluding that, among other things, a pro se state prison inmate, who alleged that the state prison's exclusive phone contract with a private company violated the Telecommunications Act of 1996 and the Pennsylvania Unfair Trade Practices and Consumer Protection Law because he was unable to use a third party to call, the company failed to reimburse him for dropped calls, and he was charged long-distance rates for local calls, failed to state a claim under federal law and lacked standing under state law).

¹⁶⁷ See *Global Tel*Link*, 866 F.3d at 402 (finding that the Federal Communications Commission did not have the regulatory authority to regulate the state prison phone industry); *Dep't of Corr. v. Pub. Utils. Comm'n*, 968 A.2d at 1048–49 (holding that the Maine Public Utilities Commission lacked the statutory authority to regulate the state's prison telephone scheme).

¹⁶⁸ *Global Tel*Link*, 866 F.3d at 404; see KUKOROWSKI ET AL., *supra* note 13, at 3 (describing the “Wright Plaintiffs” and the eponymous original plaintiff Martha Wright).

¹⁶⁹ *Global Tel*Link*, 866 F.3d at 404. The Communications Act of 1934 provides the FCC with authority to regulate interstate phone rates, leaving intrastate rate regulation to the states. *Id.* at 401. Attempting to curb local phone company monopolies, Congress amended the Communications Act in 1996, providing the FCC with more authority over intrastate calls. *Id.* The amended

issued regulations for video visitation services.¹⁷⁰ Various correctional phone companies challenged the order in district court.¹⁷¹ The U.S. Court of Appeals for the District of Columbia concluded that the FCC, which abandoned defending aspects of the order following a political change in power at the agency, had exceeded its statutory authority in attempting to regulate intrastate inmate phone call rates, and vacated that part of the order.¹⁷² Judge Pillard, dissenting in part, noted that the FCC's mandate to ensure phone companies be fairly compensated does not prevent it from reducing unfairly high calling rates.¹⁷³ Because over eighty percent of phone calls from inmates occur intrastate, the court's ruling prevents the FCC's regulatory power from reaching the vast majority of prison phone calls.¹⁷⁴ The court also concluded that the FCC could not require correctional companies to file reports on the use of video visitation services because the matter was too attenuated to the FCC's authority.¹⁷⁵

The Maine Supreme Judicial Court, in what could be used as persuasive authority by other state courts, has considered a similar issue.¹⁷⁶ The court vacated a finding by the state's Public Utilities Commission ("Commission") that it had jurisdiction over the Department of Corrections ("DOC") to regu-

Act requires that payphone providers be "fairly compensated for each and every" inter- and intrastate call. 47 U.S.C. § 276(b)(1)(A) (2012); *Global Tel*Link*, 866 F.3d at 401.

¹⁷⁰ *Global Tel*Link*, 866 F.3d at 401.

¹⁷¹ *Id.* at 405. The rate caps issued in 2015 initially restricted per-minute calling rates to between \$0.14 to \$0.49, which were set to decrease to between \$0.11 to \$0.22 in 2018. *Id.* The regulation also attempted to address ancillary fee schemes and regulate video visitation services. *Id.* at 401. The FCC does not generally have authority over intrastate communication services, although it has the limited authority to ensure that phone service providers are "fairly compensated" for intrastate phone calls. 47 U.S.C. § 276(b)(1)(A). The FCC has broader power, under 47 U.S.C. § 201(b), to enact regulations to ensure that interstate calling rates are "just and reasonable." *Global Tel*Link*, 866 F.3d at 409. The FCC, confusingly, conflated the two standards in its regulation, calling for a rate standard that was "just, reasonable and fair." *Id.*

¹⁷² *Global Tel*Link*, 866 F.3d at 402. The FCC initially defended the regulation in court. *See id.* (noting that counsel for the FCC advised the court that it would no longer defend certain aspects of its order). Because the FCC did not rescind the regulation, however, the court found that the issue was not moot. *Id.* at 407. The new commissioner of the FCC, Ajit Pai, had previously represented Securus, a titan in the prison phone industry, while working as a partner at Jenner & Block. Law, *supra* note 75. Despite this previous conflict of interest, Pai was cleared by the FCC's ethics office to continue to work on the matter. *Id.*

¹⁷³ *Global Tel*Link*, 866 F.3d at 420, 421 (Pillard, J., dissenting in part and concurring in part). Judge Pillard, dissenting in part, noted that the record was replete with "compelling evidence of dysfunction in the inmate-calling marketplace, with harsh consequences" for the users. *Id.* at 419.

¹⁷⁴ *See Rates for Interstate Inmate Calling Service, Second Report and Order and Third Further Notice of Proposed Rulemaking*, 30 FCC Rcd. 12,763, 12,768 (2015) (noting that over eighty percent of correctional facility calls are intrastate).

¹⁷⁵ *Global Tel*Link*, 866 F.3d at 415. The court found that the FCC must explain how its statutory authority includes video visitation before it may regulate such services. *Id.*

¹⁷⁶ *See Dep't of Corr. v. Pub. Utils. Comm'n*, 968 A.2d at 1048-49 (finding that the state Public Utilities Commission cannot regulate the state Department of Corrections calling scheme).

late the DOC's phone system.¹⁷⁷ Framing the issue as one of statutory interpretation, the court considered the interaction between the Commission, which has "broad authority" over telephones in Maine, and the DOC, which has "broad authority" over inmates.¹⁷⁸ Because Maine case law supports the contention that the DOC is not controlled by another state agency without express statutory authority and no statute gave the Commission such authority, it could not regulate the DOC.¹⁷⁹ Relinquishing control over prison operations would interfere with the DOC's ability to ensure a secure and stable prison environment.¹⁸⁰ The court buffered its holding by noting that the DOC's mandate from the legislature to have expansive authority over prison policy did not suggest that the DOC could not regulate prison phone services.¹⁸¹

Yet where communications regulators have fallen short, correctional officials have succeeded.¹⁸² Because correctional officials have broad and often unchecked authority in setting policy, they have been able to address the correctional phone industry.¹⁸³ In 2007, for example, the New York State Department of Corrections and Community Supervision, facing criticism from inmate advocacy groups and a class action lawsuit challenging its phone call commission scheme, worked closely with the state legislature to prohibit itself from receiving any commission on inmate phone calls.¹⁸⁴ The results

¹⁷⁷ *Id.* at 1049. Loved ones of prisoners filed a complaint with the Public Utilities Commission claiming that the rates charged for prison phone calls were unreasonable and unjustly discriminatory. *Id.*

¹⁷⁸ *Id.* at 1050.

¹⁷⁹ *Id.* at 1051. The statute authorizing the Commission to regulate "telephone utilities" provides it authority over a "legal entity." *Id.* at 1050. Relying on *Black's Law Dictionary*, the Commission concluded that the DOC fell within that definition. *Id.* The DOC argued, however, that the Commission required express statutory authority in order to regulate it. *Id.* The court agreed with the DOC, finding it unreasonable to rely on *Black's Law Dictionary* instead of settled Maine case law, which found that the State was not included in statutory definitions of "person," but had not yet considered whether the State was a "legal entity." *Id.* at 1051.

¹⁸⁰ *Id.* at 1052.

¹⁸¹ *Id.* at 1051–52. The court noted that maintaining control over the telecommunications within the prison was "essential" to facility security. *Id.* at 1052.

¹⁸² See, e.g., Annucci Letter, *supra* note 82, at 1 (noting that the New York State Department of Corrections and Community Supervision removed commissions on inmate telephone calls).

¹⁸³ See Shay, *supra* note 44, at 333 (noting that courts defer to correctional officials' decisions, and that these decisions can take the form of official regulations or unofficial memoranda); Annucci Letter, *supra* note 82, at 1 (describing how the New York State Department of Corrections and Community Supervision eliminated commissions on inmate telephone calls). Prison regulations range from state-wide rules that are subject to a public comment period, to "informal memoranda" written by sheriffs. Shay, *supra* note 44, at 333.

¹⁸⁴ N.Y. CORRECT. LAW § 623 (McKinney 2014) (requiring the "lowest possible cost to the telephone user" to be of central importance in entering into inmate telephone contracts); see Annucci Letter, *supra* note 82, at 1 (detailing the collaboration between the state legislature, the DOC, and inmate advocacy groups in writing the law).

were dramatic: the average cost of a phone call decreased from over \$4 to less than \$1, and the number of annual phone calls increased by over 8 million.¹⁸⁵

Correctional officials can similarly act to curtail the replacement of in-person visitation with video visitation.¹⁸⁶ In Adams County, Mississippi, for example, a newly elected sheriff scrapped the video-only visitation scheme maintained by his predecessor and resumed offering in-person visitation.¹⁸⁷ The Illinois Department of Corrections plans to introduce video visitation as an option while maintaining in-person visitation.¹⁸⁸ And in Maryland, video visitation is available only at prisons that cannot be accessed by public transportation.¹⁸⁹ Correctional officials have the power to decide what type of visitation scheme is employed at their facilities, and they are crucial to maintaining in-person visitation.¹⁹⁰

¹⁸⁵ Annucci Letter, *supra* note 82, at 1–2. But correctional officials do not always take such a considerate tack; following the FCC’s attempts to regulate inmate phone calls, the executive director of the National Sheriffs’ Association stated that sheriffs could eliminate inmate phone calls because they are not required to provide such services. Eric Markowitz, *Why American Jails May Drastically Curtail Inmate Phone Calls*, INT’L BUS. TIMES (May 5, 2015), <http://www.ibtimes.com/why-american-jails-may-drastically-curtail-inmate-phone-calls-1904855> [<https://perma.cc/5NTG-KJW7>]. Another sheriff sent a letter to the FCC echoing this sentiment, writing that “we may be forced to significantly limit or eliminate altogether access to inmate phones in our jail.” *Id.*

¹⁸⁶ See, e.g., Paul Hampel, *Video Visits at St. Clair County Jail Get Mixed Reviews*, ST. LOUIS POST-DISPATCH (Feb. 20, 2014), http://www.stltoday.com/news/local/crime-and-courts/video-visits-at-st-clair-county-jail-get-mixed-reviews/article_b46594b0-9f01-5987-abf0-83152f76c9dd.html [<https://perma.cc/8ZT9-ECVN>] (reporting that the Illinois Department of Corrections plans to introduce video visitation, while maintaining in-person visitation as an option at its facilities); Vershal Hogan, *Sheriff to Discontinue Video Visitation at Jail*, NATCHEZ DEMOCRAT (Apr. 22, 2016), <https://www.natchezdemocrat.com/2016/04/22/sheriff-to-discontinue-video-visitation-at-jail/> [<https://perma.cc/2M88-KH33>] (documenting a sheriff who replaced video visitation with in-person visitation at his facility).

¹⁸⁷ Hogan, *supra* note 186. The sheriff stated, “[a] lot of people couldn’t afford those calls. . . . I think everybody should have the right to check in on their child (in jail) and make sure they’re OK.” *Id.*

¹⁸⁸ Hampel, *supra* note 186. The Department of Corrections spokesperson stated, “I can’t imagine the scenario in which someone would travel to a prison and then wish to communicate through a video screen rather than see a prisoner face-to-face.” *Id.*

¹⁸⁹ DIGARD ET AL., *supra* note 85, at 8. Pennsylvania only allows video visitation for prisoners who have not received an in-person visit for over a year. *Id.*

¹⁹⁰ See Shay, *supra* note 44, at 333 (describing how correctional officials have broad authority over institutional regulations and policy); Jennifer Sullivan, *King County to Install Video System in Jails for Virtual Inmate Visits*, SEATTLE TIMES (June 18, 2014), <https://www.seattletimes.com/seattle-news/king-county-to-install-video-system-in-jails-for-virtual-inmate-visits/> [<https://perma.cc/SWB8-PT84>] (reporting that King County, Washington planned to install a video visitation system while still allowing for in-person visits, but quoting the interim jail director saying that in-person visits may eventually be terminated).

III. WHY VIDEO VISITATION SHOULD NOT REPLACE IN-PERSON VISITATION, AND POSSIBLE REMEDIES TO EXISTING VIDEO VISITATION POLICIES

Section A of this Part argues that in-person visitation should be preserved at correctional facilities.¹⁹¹ Section B then describes how a constitutional challenge to a video visitation scheme that replaces in-person visitation might fare.¹⁹² Section C examines whether legislation could preserve in-person visitation.¹⁹³ Section D concludes by discussing whether a viable regulatory solution exists to maintain in-person visitation.¹⁹⁴

A. The Case for Maintaining In-Person Visitation

Humans crave the ability to connect with others, and certain aspects of in-person interactions are crucial in satisfying this desire.¹⁹⁵ Evolutionarily, humans developed an emphasis for the visual in social interactions.¹⁹⁶ All of our other senses are integrated with our vision.¹⁹⁷ So although spoken words may carry “instrumental” content, we make meaning of that content based on what we see.¹⁹⁸ Video visitation severely limits this crucial element of human communication.¹⁹⁹ Users complain of technological failures and poor quality, which prevent loved ones from seeing each other clearly.²⁰⁰ Also, as mentioned above, video visits prevent loved ones from making eye-contact, compromising a critical feature of the exchange.²⁰¹ Additionally, when physically

¹⁹¹ See *infra* notes 195–219 and accompanying text.

¹⁹² See *infra* notes 220–243 and accompanying text.

¹⁹³ See *infra* notes 244–248 and accompanying text.

¹⁹⁴ See *infra* notes 249–255 and accompanying text.

¹⁹⁵ See PINKER, *supra* note 52, at 62 (describing how reading emotions from someone’s face and building trust through touch are desired by humans).

¹⁹⁶ JONATHAN H. TURNER, FACE TO FACE: TOWARD A SOCIOLOGICAL THEORY OF INTERPERSONAL BEHAVIOR 50–51 (2002). When early primates began climbing trees millions of years ago, their most important sense shifted from smell to vision, so they could better see where they were stepping in the forest. *Id.* at 50. Humans have more exposed facial skin than other animals, which allows us to gauge the blood flow and small muscles in each other’s faces, enhancing our ability to center interactions around facial expressions. *Id.* at 64. We are also able to communicate our emotions through body language. *Id.*

¹⁹⁷ *Id.* at 51.

¹⁹⁸ *Id.* at 64. Auditory channels can also convey emotional messages, but visual channels do the heavy lifting. *Id.* When we communicate, we find it difficult to constrain our facial expressions and bodily movements, because they are the primary method of communicating emotion. *Id.* Thus, using subtle cues like signs and gestures play a critical role in emotional communication. *Id.*

¹⁹⁹ See RABUY & WAGNER, *supra* note 8, at 7–9 (describing issues in video feeds with regard to prison video visitation); TURNER, *supra* note 196, at 65 (noting that seeing someone’s face is important for human communication).

²⁰⁰ RABUY & WAGNER, *supra* note 8, at 7.

²⁰¹ See *id.* at 8 (noting that video visitation portals are built with the camera several inches above the screen); Satar, *supra* note 112, at 123 (noting that video conferencing in general does

close to someone we are communicating with we are better able to empathize with that person and be more engaged in the conversation.²⁰² Because prison visits occur within an institutionalized framework, they are already different than normal in-person contact with loved ones.²⁰³

If the connectivity that inmates and their loved ones experience through in-person visitation is eliminated or dampened through video visitation, then the institutional security, recidivism benefits, and integrity of the penal system could suffer.²⁰⁴ Research suggests that increased in-person visitation boosts facility security.²⁰⁵ In-person visitation has also been linked to a decrease in recidivism.²⁰⁶ Furthermore, correctional officials originally welcomed visitors because they could help monitor facilities.²⁰⁷ But eliminating in-person visitation prevents loved ones from effectually assessing an inmate's physical condition and advocating for improvements, threatening the transparency and integrity of the penal system.²⁰⁸

not provide the same level of eye-contact, important to human communication, that occurs face-to-face); *see also* Matthew 6:22 (The Voice) (“The eye is the lamp of the body. . . . [L]ight shines out to the world through your eyes.”).

²⁰² *See* TURNER, *supra* note 196, at 4 (describing how humans can better take the measure of another when they can depend on verbal and nonverbal cues). Even when speaking with someone who is not present, we imagine what the other person would look like in-person as they speak. *Id.* at 51.

²⁰³ *See id.* at 34–35 (noting that the institutional environment affect interpersonal interactions).

²⁰⁴ *See* FLA. STAT. ANN. § 944.8031 (West 2010) (finding that visitation improves inmates' comportment while incarcerated and helps reduce recidivism); Duwe & Clark, *supra* note 54, at 289 (documenting the recidivism lowering benefits of inmates receiving visitors); Siennick, *supra* note 27, at 435 (finding that the risk an inmate commits a disciplinary infraction declines in the weeks preceding a visit); Chase Hoffberger, *Through a Glass, Darkly: County Jail Visitation Now Video-Only*, AUSTIN CHRON. (Nov. 7, 2014), <https://www.austinchronicle.com/news/2014-11-07/through-a-glass-darkly/> [<https://perma.cc/VC3R-9R59>] (quoting an inmate advocate who stated that in-person visitation provides loved ones a means to assess an inmates condition).

²⁰⁵ *See* Siennick, *supra* note 27, at 435 (reporting the results of a study suggesting that inmates commit fewer infractions after receiving visits).

²⁰⁶ *See* Duwe & Clark, *supra* note 54, at 289 (reporting the results of a study suggesting that inmates who are visited are at a lower risk of recidivism).

²⁰⁷ *See* Levenson, *supra* note 10, at 409, 416, 420, 422–23 (noting that historically judges, and prison founders, reformers, and administrators supported public visitation of correctional institutions because it could prevent abuse of inmates).

²⁰⁸ *See* Hampel, *supra* note 186 (quoting a mother concerned that video visitation prevents her from seeing if her son is getting enough to eat or has been injured); Hoffberger, *supra* note 204 (quoting an inmate advocate who stated that in-person visitation provides visitors a manner to assess the physical condition of an inmate so they may take action to address concerns). This is not to advocate for the position that prisons should be completely open to the public as they were in colonial times. *See* Levenson, *supra* note 10, at 415 (noting that prisons in colonial times were open to public inspection).

Policies eliminating in-person visitation can also perpetuate economic inequalities embedded in the correctional system.²⁰⁹ Video visitation can be expensive, while in-person visitation is typically free.²¹⁰ Although some facilities provide free video visits, often with restrictions, in others such visits can cost twenty dollars for a twenty minute conversation.²¹¹ Americans who are incarcerated are often already poor; their plight should not be aggravated for the benefit of private corporations by their attempts to connect with loved ones.²¹² Profiting from inmate contact with loved ones is “offensive to basic concepts of morality.”²¹³ Furthermore, policies eliminating in-person visitation resemble practices employed by slave owners, who viewed slaves as incapable of forming interpersonal connections.²¹⁴ Such policies similarly send an implicit message that inmates’ relationships with family and friends are not valuable.²¹⁵

If video visitation is used at all, correctional officials should offer it in addition to, not instead of, in-person visitation.²¹⁶ Supporters of in-person visitation include the U.S. Congress, the Council of Europe, the United Nations, the American Bar Association, and the American Correctional Association.²¹⁷ Various newspapers’ editorial boards have directly condemned the

²⁰⁹ See RABUY & WAGNER, *supra* note 8, at 10 (commenting that families typically charged for video visitation are already poor); Fulcher, *supra* note 29, at 111 (noting that eliminating in-person visitation leads to economic “subjugation” of inmates and their families).

²¹⁰ See RABUY & WAGNER, *supra* note 8, at 10 (noting that in-person visitation is traditionally free and quoting a county administrator stating that one dollar per minute for a video visit was an appropriate price); Fulcher, *supra* note 29, at 97 (documenting facilities that charge \$15 for a thirty minute conversation and \$20 for a twenty minute conversation).

²¹¹ RABUY & WAGNER, *supra* note 8, at 22–23; Fulcher, *supra* note 29, at 97.

²¹² Fulcher, *supra* note 29, at 111; see Rabuy & Kopf, *supra* note 21 (noting that the median income for an incarcerated man is almost twenty thousand dollars less than one who is not incarcerated).

²¹³ Editorial, *Idea Blackout: Paid Video Visits? Just a Bad Idea.*, HOUS. CHRON. (Sept. 12, 2014) [hereinafter Editorial, *Idea Blackout*], <https://www.chron.com/opinion/editorials/article/Idea-blackout-5752156.php> [<https://perma.cc/RAR6-2ETB>].

²¹⁴ See *infra* notes 44–49 and accompanying text.

²¹⁵ See Bruce G. Link & Jo Phelan, *Stigma Power*, 103 SOC. SCI. & MED. 24, 25 (2014) (citing Pierre Bourdieu, *What Makes a Social Class? On the Theoretical and Practical Existence of Groups*, 32 BERKELEY J. SOC. 1 (1987)) (exploring how power allows those with it to impose upon others their view of the social world and standing within that world, and noting that institutional practices can contribute to keeping individuals down).

²¹⁶ See Fulcher, *supra* note 29, at 103 (noting agreement among prisoner rights groups that video visitation should “supplement, not eliminate” in-person visitation).

²¹⁷ See 42 U.S.C. § 17501(b)(6) (2012) (stating that inmates who remain connected to loved ones while incarcerated are more likely to stay out of trouble while incarcerated and have shorter sentences) (recodified at 34 U.S.C. § 60501); ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-8.5(e) (3d ed. 2011) (suggesting that inmates incarcerated for over thirty days be allowed in-person, preferably contact, visits); G.A. Res. 70/175 at 20 (Dec. 17, 2015) (requiring that prisoners have regular visits with family and friends); Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 on the European Prison Rules, app. at rule 24.1, 24.2 (Jan. 11, 2006), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805

complete replacement of in-person visitation with video visitation.²¹⁸ The question, then, is how to translate this broad consensus into correctional policy.²¹⁹

B. Judicial Remedy

A constitutional challenge to a policy eliminating in-person visitation in favor of video visitation would be unlikely to succeed.²²⁰ The Supreme Court has never held that inmates have a right to remain in contact with, much less visit, loved ones.²²¹ Several federal courts have alluded to such a visitation

d8d25 [https://perma.cc/PU97-U7GG] (recommending that prisoners be allowed to visits from outside persons and that restrictions should allow for an acceptable minimum level of contact); Am. Corr. Ass'n, Resolution: Supporting Family-Friendly Communication and Visitation Policies (Jan. 24, 2012), http://www.aca.org/ACA_Prod_IMIS/aca_member/ACA_Member/Govt_Public_Affairs/PandR_FullText.aspx?PRCode=R0015 [https://perma.cc/HX58-8MB3] (resolving to commit the American Correctional Association to visitation "without added associated expenses or fees").

²¹⁸ Editorial, *A Bad Idea to Cut Prison Visitations*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/opinion/a-bad-idea-to-cut-prison-visitations.html> [https://perma.cc/DDT4-P57T]; Editorial, *Banning In-Person Jail Visits Is Foolish and Needlessly Cruel*, L.A. TIMES (May 30, 2017), <http://www.latimes.com/opinion/editorials/la-ed-video-jail-visits-20170530-story.html> [https://perma.cc/6JMU-CCCC]; Editorial, *Idea Blackout*, *supra* note 213; Editorial, *Virtual Visits for Inmates?*, WASH. POST (July 26, 2012), https://www.washingtonpost.com/opinions/virtual-visits-for-inmates/2012/07/26/gJQAultJCX_story.html?utm_term=.6e26ae24f228 [https://perma.cc/BL65-JDHP].

²¹⁹ See generally, *supra* notes 195–218 and accompanying text.

²²⁰ See *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003) (upholding prison regulation barring certain inmates from receiving non-contact visits because it furthered the legitimate penal objective of removing drugs from the institution); *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002) (noting that it is "well-settled" that inmates do not have a constitutional right to contact visits). Courts have, however, struck down restrictions on in-person visitation for inmates with mental health problems. See, e.g., *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1101, 1125 (W.D. Wis. 2001) (granting preliminary injunction prohibiting mentally ill inmates from being housed at a facility where, among other things, visitation was restricted to video visitation and inmates were shackled during such visits); *Eckerhart v. Hensley*, 475 F. Supp. 908, 925 (W.D. Mo. 1979) (finding that mental health prison unit's visitation restrictions, including limiting visits to a half hour when the visiting room was crowded, to be "so extreme as to be not reasonably related to legitimate interests in . . . security" and thus in violation of the inmates' Fourteenth Amendment due process rights); *Davis v. Watkins*, 384 F. Supp. 1196, 1208 (N.D. Ohio 1974) (ordering prison mental health hospital inmates to have "unrestricted right to visitation, at all reasonable times"). Courts have tepidly considered the use of video visitation in other contexts, for example to resolve child custody disputes. See, e.g., *Gilbert v. Gilbert*, 730 N.W.2d 833, 840 (N.D. 2007) (instructing the district court to consider virtual visitation, including the use of a web-cam, to ensure important contact with the noncustodial parent, but noting that virtual visitation cannot substitute in-person visitation); *Marshall v. Marshall*, 814 A.2d 1226, 1233 (Pa. Super. Ct. 2002) (noting that although video visitation allows for some contact, "such technology cannot realistically be equated" with in-person contact between parents and young children).

²²¹ See *Overton*, 539 U.S. at 131–32 (refusing to decide the extent to which incarceration affects inmates rights to visit with loved ones); *Dunn v. Castro*, 621 F.3d 1196, 1202 (9th Cir. 2010) (commenting that the Supreme Court has not recognized an inmates' right to visitation); see also *Leverson*, *supra* note 10, at 429 (noting that litigants have never presented the issue of whether there is a right of public access to prisons). *But see*, e.g., *Arsberry v. Illinois*, 244 F.3d

right on First Amendment grounds, but have stopped short of declaring its existence.²²²

If an inmate launched a constitutional challenge to a policy replacing in-person with video visitation, the inmate would bear the burden of disproving the validity of the policy.²²³ When analyzing a challenge to a visitation policy, federal courts first ask whether the policy is rationally related to a legitimate penal objective.²²⁴ Supreme Court precedent instructs courts to provide much credence to correctional officials' policy determinations.²²⁵ In two cases dealing with inmates' challenges to visitation restrictions, the Court cited the goals of protecting visitors and curbing contraband as legitimate penological interests justifying the restrictions.²²⁶

The concerns the Supreme Court expressed in *Block v. Rutherford*, that visitors may "be taken as hostages or become innocent pawns in escape attempts," are spurious.²²⁷ Escape attempts have declined despite growing in-

558, 565 (7th Cir. 2001) (commenting that "[i]t is conceivable . . . that the constitutional concept of liberty" encompasses a "limited right" to have prison visits, but noting that an "electronic visit" may be the only form feasible for certain inmates); *Halvorsen v. Baird*, 146 F.3d 680, 688, 689 (9th Cir. 1998) (stating that there is "a well established tradition against holding prisoners incommunicado in the United States" but finding the case law supporting this tradition "surprisingly scanty"). The Court has found that the Constitution protects, in some regards, "undue intrusion by the State" upon the "freedom of association," which includes the ability to enter into and maintain some loving relationships. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

²²² See, e.g., *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (stating that, in a case challenging telephone use restrictions, the contested right "may be defined expansively as the First Amendment right to communicate with family and friends"); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (stating that inmates have a First Amendment right to use the telephone, subject to security restrictions).

²²³ See *Overton*, 539 U.S. at 132 (affirming that the burden is on the inmate to disprove the validity of a regulation).

²²⁴ See *id.* (noting that whether a correctional regulation bears a rational relationship to a legitimate government interest is the first *Turner* factor). The existence of one is enough to sustain a challenged regulation. *Id.* at 131–32.

²²⁵ See *supra* notes 117–148 and accompanying text.

²²⁶ See *Overton*, 539 U.S. at 134 (citing the goal of decreasing drug use in prison); *Block v. Rutherford*, 468 U.S. 576, 586–87 (1984) (citing the goal of decreasing contraband and increasing facility security).

²²⁷ *Rutherford*, 468 U.S. at 587; see *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir. 1993) (noting that the Arizona Department of Corrections had failed to cite a specific incident where a contact visit "resulted in assault, escape, or hostage-taking," but concluding that, even so, banning contact visits was not irrational); Joseph Bernstein, *Why Are Prison Riots Declining While Prison Populations Explode?*, THE ATLANTIC (Dec. 2013), <https://www.theatlantic.com/magazine/archive/2013/12/have-a-safe-riot/354671/> [<https://perma.cc/T8QJ-DF2T>] (noting that long prison riots are a rarity and that prison violence generally has decreased); Justin Wm. Moyer, *New York Prison Break Just One of 2,000 Per Year*, WASH. POST (June 8, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/08/new-york-prison-escape-just-one-of-2000-per-year/?utm_term=.4fc5a33b2f5a [<https://perma.cc/3EY5-FJDR>] (noting that the number of inmate escapes has diminished over the past two decades). Inmate visitors require protection from a more certain danger, the intrusive and humiliating searches conducted by corrections staff. See, e.g., Raven Rakia, "A Living Nightmare": Women Visiting Loved Ones Jailed at Rikers Describe a Pattern of Invasive Searches

mate populations, and correctional officials have had difficulty demonstrating how visitors are implicated in escape attempts that do occur.²²⁸ The concern about contraband entering prisons through visitors, however, rests on less fickle ground.²²⁹ Visitors smuggle in contraband, but so do correctional employees, who are underpaid and can earn supplemental income by flouting facility rules and conspiring with inmates.²³⁰ There is, then, a legitimate concern that visitors are one of several avenues through which contraband may enter correctional facilities.²³¹ But prohibiting in-person visitation may para-

by *Guards*, THE INTERCEPT (Jan. 10, 2017), <https://theintercept.com/2017/01/10/rikers-island-strip-search-new-york-city-jails-visitors/> [<https://perma.cc/QPB7-T5L9>] (documenting invasive searches—including strip searches—of female visitors at New York correctional facilities).

²²⁸ See *Casey*, 4 F.3d at 1521 (describing how the Arizona Department of Corrections failed to cite a specific incident where a contact visit led to hostage-taking or an escape attempt); Moyer, *supra* note 227 (documenting that the number of state prison escapes has declined despite an increase in state prison populations). In 1993, over fourteen thousand prisoners escaped. *Id.* In 2013, 2,001 prisoners serving a sentence of one year or more escaped. Moyer, *supra* note 227.

²²⁹ See Matt Clarke, *Contraband Smuggling a Problem at Prisons and Jails Nationwide*, PRISON LEGAL NEWS (Jan. 15, 2013), <https://www.prisonlegalnews.org/news/2013/jan/15/contraband-smuggling-a-problem-at-prisons-and-jails-nationwide/> [<https://perma.cc/96GJ-5A2E>] (noting that prison employees and visitors are sources of contraband entering prisons). One manner visitors bring contraband into prison is by leaving it in the visiting areas, which are cleaned by inmates who retrieve the contraband and bring it into the facility. *DeSoto County Jail Will Soon Only Allow Video Visitation*, WMC5 (June 20, 2012), <http://www.wmcactionnews5.com/story/18840159/desoto-county-jail-will-soon-only-allow-video-visitation/> [<https://perma.cc/PZ9V-WEDC>]. New Hampshire prison officials justified policies limiting the amount of time a prisoner can hug a visitor to three seconds and removing board games and vending machines from visiting rooms on the grounds that they created the risk of drugs entering the facility and causing overdoses. Rebecca Beitsch, *Prisons Put New Limits on Inmate Visits to Stamp Out Drugs*, PEW: STATELINE (May 30, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/30/prisons-put-new-limits-on-inmate-visits-to-stamp-out-drugs> [<https://perma.cc/GFQ7-XBXW>]. Inmates responded by going on a hunger strike and starting a fire. *Id.* In 2015, a New Hampshire prison employee was caught sneaking sixty-seven thousand dollars' worth of narcotics into a facility. *Id.* Approximately one percent of inmate deaths are caused by drugs and alcohol. *Id.*

²³⁰ See CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, PRISON CORRUPTION: THE PROBLEM AND SOME POTENTIAL SOLUTIONS 1 (2016), https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/prison_corruption_-_capi_community_contribution_-_september_2016.pdf [<https://perma.cc/7TU2-F6WG>] (noting that corrupt prison guards are a source of illicit contraband and weapons entering prisons); Clarke, *supra* note 229 (listing inmates and correctional staff as potential drug couriers into facilities). It is difficult to eliminate contraband in prisons. See Beitsch, *supra* note 229 (citing a study in California that found that using scanners like those used at airports and drug-detection dogs did not significantly reduce the level of drugs in prisons).

²³¹ Clarke, *supra* note 229. Inmates have proven to be resourceful in getting contraband into facilities. See, e.g., Tracy Samilton, *Prisons Work to Keep Out Drug-Smuggling Drones*, NPR (Nov. 15, 2015), <https://www.npr.org/2017/11/15/564272346/prisons-work-to-keep-out-drug-smuggling-drones> [<https://perma.cc/9RGM-W9EJ>] (reporting on the use of drones to drop cigarettes, cell phones, marijuana, and razor blades into prison yards in at least twelve states, and correctional officials' efforts to stymie the drops).

doxically increase the availability of contraband.²³² In Travis County, Texas, the number of disciplinary infractions for contraband rose by fifty-four percent after prison officials replaced in-person visitation with video visitation.²³³

In-person visitation advances other penological objectives.²³⁴ Correctional officials often justify policies restricting inmates' rights on the grounds that they further the objectives of facility security and rehabilitation.²³⁵ Officials have also cited these goals in replacing in-person visitation with video visitation.²³⁶ As the discussion above illustrates, however, available research suggests that in-person visitation is beneficial for both.²³⁷ But in analyzing whether a policy bears a rational relationship to a correctional objective, courts do not balance competing objectives.²³⁸ Once a prison official invokes the objective of restricting contraband, a court could disregard the research supporting the benefits of in-person visitation, concluding that eliminating

²³² See RENAUD, *supra* note 56, at 4 (documenting that facility infractions for possession of contraband at one jail increased when in-person visitation was replaced with video visitation). If correctional officials were serious about addressing the contraband problem, at least as it applies to drugs, they would consider providing inmates with proven treatments, such as methadone and buprenorphine, which are used to treat opioid addiction and, for example, have been found to decrease drug addiction and recidivism rates at Rikers Island. Christine Vestal, *At Rikers Island, a Legacy of Medication-Assisted Opioid Treatment*, PEW: STATELINE (May 23, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/23/at-rikers-island-a-legacy-of-medication-assisted-opioid-treatment> [<https://perma.cc/C8T6-5FCQ>]. This, however, is not the favored approach in most American correctional facilities. See Dolovich, *Incarceration American-Style*, *supra* note 44, at 245 (noting the dearth of efficient drug treatment in American prisons, despite the fact that a large number of inmates suffer from substance-use disorders).

²³³ RENAUD, *supra* note 56, at 4.

²³⁴ See, e.g., *id.* (noting that facility infractions for contraband increased when in-person visitation was eliminated); Siennick, *supra* note 27, at 435 (finding that inmates have a lower likelihood of committing a facility infraction during the weeks leading up to an in-person visit).

²³⁵ See, e.g., *Overton*, 539 U.S. at 129 (including rehabilitation as a legitimate penal interest threatened by drug and alcohol use by inmates in discussing why correctional officials decided to limit inmate visitation); *Jones v. North Carolina*, 433 U.S. 119, 132–33 (1977) (holding that a prison regulation banning unions was reasonable because correctional officials perceived it could threaten facility security).

²³⁶ See, e.g., *Travis County Jail Visitation Is Now Video Visitation*, TRAVIS COUNTY SHERIFF'S OFFICE (May 1, 2013), <https://www.tcsheriff.org/about/press-releases/2013/118-travis-county-jail-visitiation-is-now-video-visitiation> [<https://perma.cc/Y8AV-6F6X>] (citing the "safety and security of the inmates and staff" as the primary reason for replacing in-person visitation with video visitation).

²³⁷ See *supra* notes 54–60 and accompanying text.

²³⁸ See *Overton*, 539 U.S. at 131–32 (refusing to consider the extent that inmates have a right to association because the challenged regulation was rationally related to a legitimate penological interest); *Hightower*, 101 F.3d at 1384–85 (stating that once a rational relationship between a prison regulation and a legitimate penal interest is established the analysis ends).

such visits is rationally related to a correctional goal.²³⁹ Additionally, because the Supreme Court has commented that correctional officials need not support their policies with evidence, an official may justify banning in-person visitation by simply alleging that it presents a “risk” to facility security.²⁴⁰

Having found a rational relationship between a correctional policy and a correctional objective, courts then ask whether there are alternative means for inmates to express a right, whether the accommodation would impact other prison resources, and whether there are “ready alternatives” to the regulation.²⁴¹ A court could conclude that an alternative to in-person visitation is video visitation, which would still provide inmates with a means to connect with loved ones while potentially conserving correctional resources.²⁴²

In sum, primarily because courts provide great deference to correctional authorities in establishing penal regulations, it is unlikely that a judicial remedy is a viable path to relief.²⁴³

C. Legislative Remedy

Federal legislation mandating that federal facilities provide in-person visitation is necessary, but such legislation will be most impactful at the state level because that is where most inmates are held.²⁴⁴ A bill proposed in the

²³⁹ *Overton*, 539 U.S. at 134 (upholding a regulation barring visitation for inmates with two substance-abuse demerits in part because it was rationally related to the legitimate penological goal of decreasing narcotic contraband in prison).

²⁴⁰ *See Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989) (commenting that although something is not “likely” to cause prison disorder, a prison official need only perceive a “risk” that it will justify a regulation banning it); *Jones*, 433 U.S. at 132–33 (noting that prison officials must be given latitude to anticipate threats before “they can compile a dossier on the eve of a riot”); *see also Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) (concluding that a showing by a prison official that regulated material “could lead to violence” was sufficient to establish a threat to prison security).

²⁴¹ *Overton*, 539 U.S. at 132.

²⁴² *See id.* at 135 (finding that inmates barred from having in-person visits had alternative means of association with those they could not visit with, like communicating through those they were allowed to visit with). Additionally, if an inmate challenged being relocated from a facility offering in-person visitation to one offering only video visitation, that inmate would be unlikely to succeed because unfavorable conditions of confinement are not protected by the Fourteenth Amendment’s Due Process Clause. *See Meachum v. Fano*, 427 U.S. 215, 216, 225 (1976) (concluding that the Due Process Clause of the Fourteenth Amendment does not necessarily protect inmates who are moved to a facility with worse conditions than their previous location); *see also Olim v. Wakinekona*, 461 U.S. 238, 248 (1983) (holding that transferring an inmate from Hawaii to the mainland, where he was separated from his loved ones, was constitutionally permissible); *Froehlich v. Wis. Dep’t of Corr.*, 196 F.3d 800, 802 (7th Cir. 1999) (concluding that there is not a constitutional right to “insist” that a loved one not be confined far away).

²⁴³ *See Overton*, 539 U.S. at 132 (noting that the Court defers to correctional officials’ decisions).

²⁴⁴ *See Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973) (noting that “[i]t is difficult to imagine an activity . . . more intricately bound up with state laws” than regulating correctional

2016 session of the U.S. House of Representatives serves as a useful model for state-level efforts because its plain language prohibits video visitation from replacing in-person visitation.²⁴⁵ The precedent-setting approaches of the California and Texas legislatures should not be imitated because, although beneficial, they allow facilities that have already eliminated in-person visitation to maintain video-only visitation schemes.²⁴⁶ States seeking to follow in their wake should require all penal institutions, regardless of whether they have already eliminated in-person visitation, to allow for such visits.²⁴⁷ States should also adopt a provision noting the benefits of inmate visitation, as Florida has, so that the purpose of statutes requiring in-person visitation is clear.²⁴⁸

D. Regulatory Remedy

Regulatory agencies such as the Federal Communications Commission (FCC) and its state equivalents will likely need express statutory authority to limit video visitation and regulate the industry.²⁴⁹ Efforts to regulate the prison phone industry without such authority have floundered.²⁵⁰ The proposed legislation in the U.S. House of Representatives also provides the FCC with regulatory authority over the video visitation industry.²⁵¹ States should simi-

institutions); CARSON & ANDERSON, *supra* note 72, at 1 (reporting that in 2015 there were over 1.5 million prisoners in the United States, fewer than 200,000 of whom were in federal custody).

²⁴⁵ Video Visitation in Prisons Act of 2016, H.R. 6441, 114th Congress (2016) (“Video visitation may be used only to supplement, not supplant, in-person visitation.”). A recently passed law in Massachusetts has similarly clear language, and could also provide an example for other states to follow. MASS. GEN. LAWS ANN. ch. 127, § 36C (West Supp. 2019) (“A correctional institution . . . may use video . . . for inmate communication with visitors; provided, that such communications shall be in additions to and shall not replace in-person visitation . . .”).

²⁴⁶ CAL. PENAL CODE § 4032(b), (d) (West Supp. 2019); TEX. GOV’T CODE ANN. § 511.009(a)(20), (a-1) (West Supp. 2018).

²⁴⁷ See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, *supra* note 217, at 23-8.5(e) (recommending that prisoners confined for over thirty days be allowed to receive visits, preferably contact visits); Editorial, *A Bad Idea to Cut Prison Visitations*, *supra* note 218.

²⁴⁸ See FLA. STAT. ANN. § 944.8031(1) (West 2010) (finding that visitation can “improve an inmate’s behavior in the correctional facility and . . . help reduce recidivism”). The Florida statute should be amended to explicitly note the benefits of in-person visits, not simply “visits,” which could be construed to be satisfied by video visitation. See *id.* (using the term “visits,” not “in-person visits”).

²⁴⁹ See *Global Tel*Link v. Fed. Comm’n Comm’n*, 866 F.3d 397, 402 (D.C. Cir. 2017) (finding that the Federal Communications Commission did not have authority under the Telecommunications Act of 1996 to regulate the state prison phone industry); *Dep’t of Corr. v. Pub. Utils. Comm’n*, 968 A.2d 1047, 1049 (Me. 2009) (holding that the Maine Public Utilities Commission lacked the express statutory authority to regulate the state’s prison telephone scheme).

²⁵⁰ See *supra* notes 166–181 and accompanying text.

²⁵¹ H.R. 6441 (“[T]he Federal Communications Commission shall promulgate regulations with respect to video visitation services . . .”).

larly provide state communications regulatory agencies with the power to regulate video visitation in prisons because it is unwise to allow correctional authorities to oversee themselves when they may have a financial interest in eliminating in-person visitation.²⁵²

If Supreme Court precedent makes one thing clear, it is that correctional officials have nearly unbridled discretion in setting prison policies.²⁵³ The best path for preservation of in-person visitation, then, likely lies with them.²⁵⁴ Correctional officials should follow the lead of their colleagues who continue to offer in-person visitation, if anything along with low-cost, if not free, video visitation.²⁵⁵

CONCLUSION

Houses of correction in the United States are beginning to completely replace in-person visitation with video visitation. Such policies prevent effective communication between inmates and their loved ones, and could detract from the psychological, facility security, and recidivism benefits derived from in-person visitation. Federal judicial relief from such policies is unlikely, but legislators and correctional officials can influence policy at the state- and facility-level to maintain in-person visitation and preserve its benefits.

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²⁵² See *Dep't of Corr. v. Pub. Utils. Comm'n*, 968 A.2d at 1050, 1051 (finding that the Maine Public Utilities Commission could not impose regulations upon the Department of Corrections, which has "broad authority" over prison regulations, without express statutory authority); Hampel, *supra* note 186 (quoting a county administrator who said a dollar a minute seemed like a "fair price" for a video visit because inmates are a captive audience).

²⁵³ See, e.g., *Overton*, 539 U.S. at 132 (noting that courts must provide great deference to correctional officials' determinations).

²⁵⁴ See, e.g., Hogan, *supra* note 186 (documenting a Mississippi sheriff who, following his election, re-instituted in-person visitation at the county jail after his predecessor had replaced it with video visitation).

²⁵⁵ See, e.g., *id.* (noting that the Illinois Department of Corrections plans to introduce video visitation, while maintaining in-person visitation as an option at its facilities); Sullivan, *supra* note 190 (noting that King County, Washington recently installed a video visitation system while still allowing for in-person visits).