FAMILY SEPARATION CONDITIONS

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America's mass incarceration crisis does not end at the prison gates. While an estimated two million people are presently incarcerated, nearly twice that number of people are subject to probation, parole, and other forms of community supervision. This Article documents one particularly troubling aspect of this system of "nonincarceration mass incarceration": the widespread use of supervision conditions that separate people on parole, probation, and supervised release from their families. Courts regularly approve supervision conditions that categorically bar supervisees from contacting or interacting with their family members. Although these conditions are sometimes justified, they are used indiscriminately without individualized analysis of whether supervisees should be separated from their families. The result is a shadow system of family separation that imposes grievous infringements of familial integrity rights, perpetrates serious harms to supervisees and their family members, and undermines successful reentry for incarcerated people returning home.

After empirically documenting the prevalence of family separation conditions, this Article explains the legal doctrines that courts use to justify these conditions and advocates for reform. Courts reason that supervisees have no legal right to be with their family members because there is no such right when a person is incarcerated. But this justification ignores the reality of how the carceral state functions and distorts the legal framework that ordinarily governs deprivations of fundamental constitutional rights. Although heightened constitutional scrutiny should be applied in cases challenging family separation conditions, broader reforms are needed. Family separation conditions, this Article argues, should be subject to rigorous review at the time they are imposed, with decisionmaking taken out of the hands of probation and parole officers and directed to courts, which are better suited to address these complex and sensitive family matters.

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INTRODUCTION

In recent years, the term "family separation" has become associated with the federal government's practice of separating children and their parents when they attempt to enter the United States at its southern border. But family separation is also a common consequence of criminal conviction. As of 2016, more than 5.1 million children had a parent who was incarcerated at some point during the child's life.[1] While family separation is an expected result of incarceration, it often continues beyond the prison gates. Probation, parole, and supervised release conditions regulate—and often ban—contact between supervisees and their loved ones.

This Article is the first work of legal scholarship to systematically analyze family separation conditions in the American carceral state. This Article documents the widespread use of such conditions, explains the legal doctrines that courts and supervision authorities use to justify them, and argues for reform.

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1. See The Annie E. Casey Found., A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities 5 tbl.1 (2016), https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf [https://perma.cc/8UAM-GE4F].

Community supervision programs are a critical yet understudied part of the criminal legal system. With over two million people in jails and prisons, the United States incarcerates more people than any other country in the world.[2] Even more—approximately 4.5 million people—are supervised by probation, parole, and supervised release programs.[3] In recent years, in part because of calls to end mass incarceration, states have begun to rely heavily on community supervision programs, which allow people to live in their communities rather than behind bars.[4] Indeed, the number of probationers and parolees more than tripled between 1982 and 2007.[5] Given the extraordinary deprivations associated with prison life—lack of freedom of movement, often appalling living conditions, the threat or experience of solitary confinement, frequent outbreaks of violence, and the risk of abuse at the hands of correctional officers[6]—one might assume that life outside of prison is, by definition, better than life inside. This view does not, however, account for the stringent conditions often placed on supervisees. In fact, those conditions can be so stringent that supervisees sometimes prefer incarceration to community supervision.[7] Family separation conditions provide the paradigmatic example of stringent community supervision conditions.

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2. See Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/A7XE-2LAT] (noting that the U.S. incarceration rate, at 698 per 100,000 residents, is the highest in the world).

3. Danielle Kaeble, DOJ, Probation and Parole in the United States, 2016, at 1 fig.1 (2016), https://bjs.ojp.gov/content/pub/pdf/ppus16.pdf [https://perma.cc/PBT7-BDL8].

4. Colum. Univ. Just. Lab, Too Big to Succeed: The Impact of the Growth of Community Corrections and What Should Be Done About It 2 fig.1 (2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf [https://perma.cc/P3WU-8UHS]; Peggy McGarry, Alison Shames, Allon Yaroni, Karen Tamis, Ram Subramanian, Lauren-Brooke Eisen, Leon Digard, Ruth Delaney & Sara Sullivan, Vera Inst. of Just., The Potential of Community Corrections to Improve Safety and Reduce Incarceration 9 (2013), https://www.vera.org/downloads/Publications/the-potential-of-community-corrections-to-improve-safety-and-reduce-incarceration-configure/legacy_downloads/potential-of-community-corrections.pdf [https://perma.cc/9R8L-26L3].

5. The Pew Ctr. on the States, One in 31: The Long Reach of American Corrections 4 (2009), https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf [https://perma.cc/2K5W-KFSK].

6. See generally Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1173–85 (2015) (describing violence and dehumanization associated with incarceration); David M. Shapiro & Charles Hogle, The Horror Chamber: Unqualified Impunity in Prison, 93 Notre Dame L. Rev. 2021, 2024–36 (2018) (describing the pervasive nature of abuse of incarcerated people in American jails and prisons and providing examples).

7. See Cecilia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015, 1059 & n.188 (2013) (collecting studies "show[ing] that a significant number of individuals with experience in the criminal justice system prefer short custodial sentences to longer periods of community supervision").

This Article begins by documenting the prevalence of family separation conditions, drawing on original research to report on two common family separation conditions in the states that make heavy use of parole. As used in this Article, the term "family separation conditions" refers to those conditions that ban or severely limit contact between supervisees and their loved ones, with whom they hold constitutionally protected relationships, such as parent–child and spousal relationships.[8]

The first family separation conditions scrutinized here are those that prohibit contact with persons who have felony records or are otherwise subject to carceral control. Since carceral control in the United States is both racially and geographically concentrated, these conditions have an outsized impact on Black families and other members of marginalized communities who bear the brunt of mass incarceration.[9] A ban on contact with people who have felony records can effectively cut a supervisee off from large swaths of their community.[10]

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8. Part II extensively discusses the scope of constitutional protection for familial relationships. It is unquestionably narrow and, as numerous scholars have explained, excludes many deeply meaningful relationships. See, e.g., Katherine M. Franke, Longing for Loving, 76 Fordham L. Rev. 2685, 2703 (2008) (suggesting that the benchmark for due process protection for relationships should be close friendships); Nancy D. Polikoff, Ending Marriage as We Know It, 32 Hofstra L. Rev. 201, 202 (2003) (arguing for legal recognition of "the diversity of adult relationships characterized by emotional intimacy and economic interdependence" beyond marriage).

9. See Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse 64 (2007) ("Because housing in the United States is economically and racially segregated, incarceration that concentrates by socioeconomic status and race also concentrates by location. Some neighborhoods have dominant numbers of residents either on their way to prison, in prison, or recently released."); Deborah N. Archer, The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances, 118 Mich. L. Rev. 173, 214 (2019) ("Racially segregated housing patterns interact with socioeconomic status to produce extreme spatial concentrations of incarceration in communities of color, with Black communities feeling the brunt of this."); Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010, 54 Demography 1795, 1814 (2017) (finding that eight percent of all adults and thirty-three percent of the African American adult male population had been convicted of felonies as of 2010).

10. The zealous enforcement of such conditions sometimes leads to shocking results, such as the incarceration of a supervisee following a chance encounter. The aftermath of the shooting death of Nipsey Hussle, a well-known activist and rapper who spoke openly about his past gang affiliation, provides a good example. Hussle stopped to chat briefly in a parking lot with an acquaintance, Kerry Lathan, when they were both shot. Lathan languished in jail for approximately three weeks following the shooting because of his alleged violation of a parole condition barring contact with persons known to have gang affiliations. See Amy Russo, Man Shot Alongside Nipsey Hussle Jailed for Alleged Parole Violation, Huffington Post (Apr. 16, 2019), https://www.huffpost.com/entry/nipsey-hussle-kevin-lathan-arrest_n_5cb4c01ce4b0ffefe3b4c0a3 [https://perma.cc/VH2G-WQLJ] (last updated Apr. 17, 2019); Richard Winton, Parolee Wounded in Nipsey Hussle Shooting Is Released From Jail, L.A. Times (Apr. 18, 2019), https://www.latimes.com/local/lanow/la-me-nipsey-kerry-lathan-freed-jail-20190418-story.html (on file with the *Columbia Law Review*)

The second is a condition banning all contact with children under the age of eighteen for supervisees who have been convicted of sex offenses—without an exception for contact with one's own children. A New York case is emblematic. There, AB[11] was prosecuted at age twenty-two for kissing and fondling a fourteen-year-old girl. He was convicted of sexual abuse of a minor in the third degree—a misdemeanor.[12] New York law requires sex offenders to register for at least twenty years.[13] Eleven years after the conviction, he became homeless and did not update his address on New York's sex-offender registry—a felony.[14] He was convicted of this crime and incarcerated for over two years.[15] During that time, his two sons regularly visited him in prison, and he communicated with them by phone and letter.[16] Once released, his parole conditions prohibited any contact with his sons.[17] This ban on contact applied even though a family court had previously adjudicated a custody dispute involving one of the children and permitted AB to have regular contact with that child.[18] In AB's case, the parole condition barring contact with his son served no sincere purpose (other than cruelty). AB is one of many who have endured incarceration only to be followed by the trauma of family separation at the whim of parole authorities.

As Part II details, numerous states bar sex offenders from contact with minors, regardless of whether the underlying crime involved a minor or whether there is any reason to believe the supervisee is a threat to children.[19] When such a restriction is unjustified, it can have unfair and devastating impacts. Critically, it also violates the rights of parents to maintain contact with and direct the upbringing of their children.

After documenting the prevalence of family separation conditions, this Article offers a critical analysis of the legal doctrines that courts use when evaluating them. Given that family separation conditions are usually applied without an individualized analysis, they frequently violate familial integrity rights protected by due process.[20] In the rare cases when family separation conditions are challenged, courts often review the conditions

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(explaining that the police ultimately dropped the charges against Lathan and released him).

11. "AB" is a pseudonym for a former client of the author.

12. Declaration of AB ¶ 1 (Apr. 16, 2019) (on file with author) [hereinafter AB Declaration].

13. N.Y. Correct. Law § 168-h (McKinney 2021).

14. Id. § 168-t; Letter from AB to author (Oct. 19, 2018) (on file with author) [hereinafter AB Letter].

15. AB Letter, supra note 14.

16. AB Declaration, supra note 12, ¶¶ 12–14.

17. Id. ¶ 16.

18. Id. ¶ 4.

19. See infra notes 80–101 and accompanying text.

20. See infra section II.B.

for mere "reasonableness," offering undue deference to the supervision authorities who imposed them.[21] This approach does not accord with the constitutional demand for heightened scrutiny and is not justified by simple reference to a probationer's or parolee's supervision status. Aside from constitutional questions, family separation conditions are a legal curiosity for another reason: their complete disconnection from the family law systems designed to adjudicate disputes of this kind. As for parental access to children, family courts across the United States regularly use the "best interests of the child" standard to decide whether a parent's contact with their children would be detrimental or otherwise pose an unacceptable risk of harm.[22] But despite the fact that an entire judicial apparatus exists for the very purpose of deciding these extremely challenging questions, there is no connection between most community supervision programs and these specialized courts. Instead, it is common for individual probation or parole officers to make these sensitive and complex determinations.

While doctrinal changes are needed, broader institutional reforms are also necessary. Decisions regarding contact between supervisees and their children should rest in family courts, particularly with regard to supervisees' parental rights. There, judges and other key actors have expertise in the weighty questions that attend decisions regarding the appropriate level of contact between parents and children as well as spouses. In addition, supervision authorities should assure that administrative review is available when conditions bar contact between supervisees and other close relatives.

By documenting the prevalence of family separation conditions and explaining the pathways for reform, this Article contributes to several literatures. While criminologists, social scientists, and other researchers have analyzed the effectiveness and real-world impacts of parole and probation

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21. Infra section II.B.

22. See Douglas NeJaime, R. Richard Banks, Joanna L. Grossman & Suzanne A. Kim, Family Law in a Changing America 644 (2020) (describing use of "best interests of the child" in proceedings regarding termination of parental rights); Arnold H. Rutkin, 3 Family Law & Practice § 32.06 (2021) (explaining that all American jurisdictions utilize the "best interests of the child" standard in adjudicating custody and visitation disputes, with some state statutes requiring consideration of specific factors). Similarly, most states offer orders of protection when a spouse (or other person in an intimate relationship) endangers another. See Sally F. Goldfarb, Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?, 29 Cardozo L. Rev. 1487, 1506–09 (2008); Laurie S. Kohn, The False Promise of Custody in Domestic Violence Protection Orders, 65 DePaul L. Rev. 1001, 1002–03 & nn.1–3 (2016).

on recidivism and successful reentry,[23] legal scholars often focus on incarceration[24] and the collateral consequences of convictions[25] rather than community supervision. Notable exceptions include scholarly explorations of whether community supervision systems accord with rehabilitation

23. See, e.g., John R. Hepburn & Marie L. Griffin, The Effect of Social Bonds on Successful Adjustment to Probation: An Event History Analysis, 29 Crim. Just. Rev. 46, 46 (2004) (examining the effect of social bonds on offenders' successful adjustment to probation, such as the quality of the social relationships with family and friends); Jeffrey Lin, Ryken Grattet & Joan Petersilia, "Back-End Sentencing" and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions, 48 Criminology 759, 761 (2010) (examining how individual characteristics, organizational constraints, and the conditions of parolees' communities contribute to the likelihood that parolees will return to prison); Jeremy Travis, Back-End Sentencing: A Practice in Search of a Rationale, 74 Soc. Rsch. 631, 631 (2007) (underscoring the importance of rethinking the efficacy and purposes of parole supervision); Amy L. Solomon, Does Parole Supervision Work?: Research Findings and Policy Opportunities, Persps., Spring 2006, at 26, https://www.urban.org/sites/default/files/publication/50221/1000908-Does-Parole-Supervision-Work-.PDF [https://perma.cc/G76G-5JHN].

24. See, e.g., Sarah Abramowicz, Rethinking Parental Incarceration, 82 U. Colo. L. Rev. 793, 796–97 (2011) (proposing a model whereby children's interests can be considered in judicial decisions to incarcerate their parents); Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 885 (2009) (suggesting that the Eighth Amendment should apply to the administration of prison sentences); Jules Lobel, Prolonged Solitary Confinement and the Constitution, 11 U. Pa. J. Const. L. 115, 116–17 (2008) (examining "whether [the] increasing practice of prolonged or permanent solitary confinement constitutes cruel and unusual punishment in violation of the Constitution, and whether it violates the due process rights of the prisoners so confined"); Margo Schlanger, The Constitutional Law of Incarceration, Reconfigured, 103 Cornell L. Rev. 357, 361–62 (2018) (examining "several jail use-of-force scenarios, using them as test cases facilitating normative evaluation of various liability rules").

25. For helpful discussions of the collateral consequences surrounding convictions for sex offenses, see Allegra M. McLeod, Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform, 102 Calif. L. Rev. 1553, 1566 (2014) (contemplating "how it might be possible to regulate sexual abuse and other forms of interpersonal harm in large measure outside the criminal law administrative domain"); Bela August Walker, Locating the Criminal: Civil Sanctions, Sexual Abuse, and the American Family, 44 Sw. L. Rev. 562, 571–81 (2015) ("Based on incorrect stereotypes, current legislation regarding sex offenders is both ineffective and counter-effective. Such statutes have not demonstrated a benefit to public safety. To the contrary, by increasing alienation of sex offenders, they can also raise recidivism rates. Sex offender regulations primarily involve registration, notification and residency restrictions." (footnote omitted)).

goals[26] and works that analyze whether parole release processes accord with due process standards.[27]

By exploring the connection between community supervision and family separation, this Article makes a novel contribution to the conversation about the constitutional rights of people living under carceral control. It rejects the notions, commonly proclaimed by courts, that supervision authorities' views of family separation are entitled to deference and that the constitutional rights of parolees and probationers are circumscribed to the same extent as those of incarcerated people. It further asserts that the legal system must recognize the profound infringements of constitutional rights created by family separation conditions and ensure that adequate protections are afforded to the relationships of supervisees and their loved ones.

This Article proceeds in four parts. Part I describes the different types of community supervision programs and the procedures state and federal authorities use to impose the conditions. It also documents the widespread use of the two supervision conditions described above that often result in family separation: those that limit contact with people due to conviction records or other involvement in the criminal legal system, and those that bar people convicted of sex offenses from any contact with children. Part II explores the constitutional rights and family law concepts at issue, as well as cases in which supervisees have challenged family separation conditions. Part III critiques the predominant judicial treatment of conditions that lead to family separation, arguing that constitutional rights concerning familial integrity cannot be abrogated merely because of criminal supervision status and that heightened scrutiny is required. Part IV calls for

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26. See, e.g., Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L.J. 291, 316 (2016) [hereinafter Doherty, Obey All Laws and Be Good] (studying common probation conditions and arguing that standard probation conditions often lead to overcriminalization of probationers and do not support rehabilitation); Klingele, supra note 7, at 1020 (arguing that community supervision is imposed in too many cases and leads too often to incarceration following revocation due to overly stringent conditions); Christine S. Scott-Hayward, The Failure of Parole: Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. 421 (2011) (arguing that the primary aim of parole should be reentry and typical parole conditions do not accord with that goal); see also Andrea L. Dennis, Criminal Law as Family Law, 33 Ga. St. U. L. Rev. 285 (2017) (explai -ning that community supervision officers "closely regulate family association, cohabitation, and living spaces; restrict familial relationships; and impose obligations on families that interfere with family caretaking functions"); Tonja Jacobi, Song Richardson & Gregory Barr, The Attrition of Rights Under Parole, 87 S. Cal. L. Rev. 887, 893 (2014) (finding that the New York City Police Department conducted stops at higher rates in areas with high concentrations of parolees, undermining reentry).

27. See, e.g., Victoria J. Palacios, Go and Sin No More: Rationality and Release Decisions by Parole Boards, 45 S.C. L. Rev. 567, 568 (1994) (arguing that parole boards overseeing discretionary parole release should abide by clear guidelines); Kimberly Thomas & Paul Reingold, From Grace to Grids: Rethinking Due Process Protection for Parole, 107 J. Crim. L. & Criminology 213, 215–16 (2017) (arguing that discretionary parole release decisions should be subject to heightened scrutiny).

criminal justice policymakers to devise mechanisms by which family separation conditions are subject to review at the appropriate level of scrutiny.

I. COMMUNITY SUPERVISION SYSTEMS AND FAMILY SEPARATION

Community supervision takes many forms. Section I.A provides a basic overview of probation, parole, and supervised release systems at the state and federal levels. It describes the pathway to the imposition of conditions and the role of supervision authorities and judges in reviewing them. Section I.B reviews the existence and operation of two parole conditions that frequently result in family separation in fourteen of the fifteen states with the highest parole populations in the United States.

A. *Probation, Parole, and Supervised Release: An Overview*

The term "community supervision" embraces a range of community-based correctional institutions and programs.[28] Among them, the most prominent are probation and parole. Probation is a form of supervision typically imposed as a sentence in lieu of incarceration.[29] In state criminal systems, parole is usually the community supervision system that applies to people immediately after they are released from incarceration.[30] Historically, parole release decisions were made at the discretion of administrative boards once a person served some portion of an indeterminate sentence.[31] These systems came under attack in the 1970s and numerous states moved to significantly reduce or eliminate discretionary parole release.[32] Instead, many states now impose determinate sentences followed by mandatory supervision, sometimes referred to as post-release supervision rather than parole.[33] Many also use hybrid systems.[34] This Article refers to all forms of post-release supervision as "parole."

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28. Beyond probation and parole, examples include "fine-based programs, community service, pretrial supervision and court-based monitoring, specialized court programs, day reporting centers, half-way houses, and even local jails." Michelle S. Phelps & Caitlin Curry, Supervision in the Community: Probation and Parole, *in* Oxford Research Encyclopedia of Criminology and Criminal Justice 2 (2017).

29. See Doherty, Obey All Laws and Be Good, supra note 26, at 292 (defining probation as an independent criminal sentence that provides for a period of community supervision). It is worth noting that a sentence of probation does not always mean incarceration is excluded. Id. at 340–41 (providing examples of states where sentences are split between incarceration and probation, probation following incarceration, or incarceration as a probation condition).

30. See id. at 292.

31. Scott-Hayward, supra note 26, at 431–32.

32. Id. at 432; see also Joan Petersilia, When Prisoners Come Home 65 (2003) ("By the end of 2002, 16 states had abolished discretionary release from prison by a parole board for nearly all offenders.").

33. Scott-Hayward, supra note 26, at 433–34.

34. For example, in Wisconsin, post-incarceration supervision takes three forms: parole, mandatory release, and extended supervision. See Wis. Stat. § 973.01 (2021). New York

While probation terms are usually imposed by a judge as part of a sentence at the end of a criminal case,[35] parole conditions are almost always set by a board or administrative agency.[36] Missouri appears to be the only state in which courts routinely set and modify parole conditions.[37] In some states, the parole agencies that set release conditions are part of a department of corrections, while others are separate and independent.[38]

Whether sentenced to probation or released from prison on parole, a supervisee typically must abide by a host of conditions. Standard probation and parole conditions are similar, typically including curfews, bans on the use of illegal drugs, and a requirement that the supervisee open their home to searches.[39] As section I.B details, a ban on interactions with people convicted of felonies is also common.[40]

Some probationers and parolees may also be subject to "special conditions" that are supposed to support the supervisee's rehabilitation. Special conditions are required for certain categories of supervisees, such as sex offenders. Common special conditions for sex offenders include a ban on possessing or consuming pornography and, as discussed extensively in section I.B, a ban on contact with all minors.[41]

Officers from supervising agencies typically monitor probationers and parolees. Some officers use a more rehabilitative model, while others focus

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requires post-release supervision for all "violent felony" offenders, N.Y. Penal Law § 70.45 (McKinney 2021), and also offers discretionary parole to certain categories of incarcerated people. See N.Y. Exec. Law § 259-c (McKinney 2021) (granting the state board of parole the power to determine which incarcerated people may be released on parole).

35. Doherty, Obey All Laws and Be Good, supra note 26, at 292.

36. Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey & Kelly Lyn Mitchell, Robina Inst. of Crim. L. & Crim. Just., The Continuing Leverage of Releasing Authorities: Findings From a National Survey 35–37 (2017) (reporting that almost all of approximately forty surveyed agencies with authority to make release decisions also had authority to impose standard and special conditions on parolees), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf [https://perma.cc/RHJ3-DYV5].

37. Mo. Ann. Stat. § 559.100.2 (West 2017) ("The circuit court shall determine any conditions of probation or parole for the defendant that it deems necessary to ensure the successful completion of the probation or parole term, including the extension of any term of supervision for any person while on probation or parole.").

38. Ruhland et al., supra note 36, at 35.

39. Id. at 36 (discussing parole); Doherty, Obey All Laws and Be Good, supra note 26, at 295 (discussing probation).

40. Ruhland et al., supra note 36, at 36 (reporting that twenty-seven of forty surveyed parole authorities impose such a ban on parolees); Doherty, Obey All Laws and Be Good, supra note 26, at 295; see also infra section I.B.

41. See infra section I.B.

on surveillance and control.[42] Failure to comply with conditions often carries a heavy penalty: incarceration.[43] Administrative responses might include counseling, admonishments, or demanding more frequent meetings.[44] Parole and probation agencies, and sometimes just individual officers within such agencies, have tremendous discretion in deciding whether to seek jail time or parole revocation—resulting in reincarceration—in response to violations.[45] Recent advocacy efforts have focused on reducing the use of revocation.[46] In some jurisdictions, substantial percentages of incarcerated individuals are committed to prison because of parole revocation rather than the initial imposition of a sentence.[47]

In the federal criminal system, community supervision operates in two forms: probation and "supervised release" following incarceration.[48]

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42. Phelps & Curry, supra note 28, at 8 ("Probation is compatible with restorative justice, rehabilitation, alternatives to incarceration, retribution, and incapacitation. In some jurisdictions, it is viewed as either enforcement (monitoring conditions assigned by the court) or social work (service provisions), or something between." (internal quotation marks omitted) (quoting Faye S. Taxman & Stephanie Maass, What Are the Costs and Benefits of Probation?, *in* Probation: 12 Essential Questions 179, 179–96 (Fergus McNeill, Ioan Durnescu & René Butter eds., 2016))). See generally Richard P. Seiter & Angela D. West, Supervision Styles in Probation and Parole: An Analysis of Activities, J. Offender Rehab., 2003, at 57 (describing the casework style of supervision, focused on problem-solving and counseling, and the surveillance style of supervision, focusing on monitoring and compliance).

43. Neil P. Cohen, Law of Probation and Parole § 18:1 (2d ed. 2020).

44. See Mark Jones & John J. Kerbs, Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations, Fed. Probation, June 2007, at 9, 15 tbl.2. Some states require a graduated response depending on the seriousness of the violation. See, e.g., N.J. Admin. Code § 10A:72-2.4 (2021).

45. Jones & Kerbs, supra note 44, at 10. It is worth noting that challenging revocation decisions is difficult. The Due Process Clause does not necessarily require the assignment of counsel to probationers and parolees facing revocation. See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

46. See Ginia Bellafante, Criminal Justice Reform Empties Cells, Parole Fills Them Up Again, N.Y. Times (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/nyregion/criminal-justice-reform-empties-cells-parole-fills-them-up-again.html (on file with the *Columbia Law Review*).

47. The Council of State Gov'ts, Just. Ctr., Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets (2019), https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf [https://perma.cc/RTM6-3WWT] [hereinafter Confined and Costly] ("Technical violations, such as missing appointments with supervision officers or failing drug tests, account for nearly 1/4 of all state prison admissions."); The Pew Charitable Trusts, Probation and Parole Systems Marked by High Stakes, Missed Opportunities 9–10 (2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf [https://perma.cc/9U8S-SQYE] (reporting that around 350,000 people return to jail or prison because of supervision rule violations annually).

48. 18 U.S.C. § 3561 (2018) (identifying circumstances under which a defendant may be sentenced to probation); id. § 3583 (authorizing imposition of supervised release following incarceration). Federal parole was eliminated in 1984 when the Sentencing Reform Act was enacted. Fiona Doherty, Indeterminate Sentencing Returns: The Invention

Structurally, federal probation strongly resembles state probation systems. The term of probation is set by a judge, and federal probationers are supervised by probation officers and subject to standard conditions, as well as special conditions in some cases.[49]

Supervised release, which begins upon release from incarceration, operates similarly to federal probation in some ways but is substantially different from many state parole systems. When created, the "primary goal" of supervised release was "to ease the defendant's transition into the community" rather than to punish further.[50] Unlike most state parole systems and similar to federal probation, supervised release is overseen by judges rather than administrative agencies.[51] The term length and conditions of supervised release, for example, are set by the federal judge overseeing the criminal case during sentencing.[52] Similar to probation at both the federal and state levels, supervised release involves regular oversight by a federal probation officer who reviews compliance with conditions.[53]

Federal law requires that conditions of discretionary probation and supervised release conditions that are not required by statute be reasonable.[54] But conditions that implicate constitutional rights are subject to a more stringent standard: They must "involve[] no greater deprivation of liberty than is reasonably necessary"[55] to deter future criminal conduct, to protect the public, and to rehabilitate the defendant by "provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[56]

A significant structural difference between supervised release and most state parole systems is that lawyers are able to contest the term and conditions of supervised release for their clients in court in the federal system.[57] The right to counsel for a federal criminal defendant attaches at

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of Supervised Release, 88 N.Y.U. L. Rev. 958, 995–96 (2013) [hereinafter Doherty, Indeterminate Sentencing Returns].

49. U.S. Sent'g Guidelines Manual § 5B1.3 (U.S. Sent'g Comm'n 2021).

50. Doherty, Indeterminate Sentencing Returns, supra note 48, at 998–99 (internal quotation marks omitted) (quoting S. Rep. No. 98-225, at 124 (1983), reprinted in U.S.C.C.A.N. 3182, 3307).

51. Compare 18 U.S.C. § 3583 (authorizing federal judges to impose term of supervised release as part of criminal sentences), with Ruhland et al., supra note 36, at 35–37 (reporting that the state authorities with authority to release parolees establish parole conditions in most states).

52. 18 U.S.C. § 3583(a), (c).

53. Id. § 3601.

54. Id. § 3583(d) (supervised release); see also U.S. Sent'g Guidelines Manual §§ 5B1.3(b), 5D1.3(b) (U.S. Sent'g Comm'n 2021) (discretionary probation and supervised release conditions).

55. 18 U.S.C. § 3583(d)(2).

56. Id. § 3553(a)(2)(B)–(D).

57. Courts are not involved in setting or modifying parole conditions in the vast majority of states. See Ruhland et al., supra note 36, at 36–37.

the time of a defendant's initial appearance and applies through appeal.[58] Thus, lawyers can advocate on the defendant's behalf when the term and conditions of supervised release are established during the sentencing process. The right to counsel also applies during proceedings concerning the modification of supervised release conditions and the revocation of supervised release.[59]

B. *Family Separation Conditions: Two Case Studies*

Several different paths separate supervisees from their families. Some family separation conditions are required by statute, while others are imposed pursuant to a board or agency's discretion. Some apply to all supervisees, some apply only to people convicted of certain crimes, and others are created out of whole cloth by courts or parole officers. This section examines two common parole conditions that often lead to family separation conditions in fourteen of the fifteen states with the highest parole populations.[60] First, numerous states subject all parolees to categorical bars on contact with persons who have felony conviction records or are under correctional supervision. Second, many states aim to ban contact with children for supervisees who have been convicted of sex offenses. In an era of mass incarceration, both conditions render thousands of families subject to correctional control long after incarceration has ended.

1. *Association With People With Criminal Records.* — This review reveals that restrictions on parolees' association with people who have been or are subject to carceral control vary but are a staple of parole supervision across the United States. Most are standard conditions that apply to all parolees

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58. Fed. R. Crim. P. 44(a) (federal criminal defendants are entitled to counsel from initial appearance through appeal).

59. Id. at 32.1(b)–(c).

60. This Article focuses on parole rather than probation because parole operates at the state level, facilitating the collection of conditions that apply statewide. See Ruhland et al., supra note 36, at 35. In contrast, county governments are often responsible for imposing probation conditions. See Phelps & Curry, supra note 28, at 5. Fiona Doherty has conducted a thorough and useful analysis of standard probation conditions in roughly fifteen states, including the conditions imposed by a subset of counties in those states. See Doherty, Obey All Laws and Be Good, supra note 26, at 298–300 (describing methodology). This Article's focus on parole conditions therefore fills a gap in knowledge about the content of parole conditions.

The fourteen states studied here, with the highest parole populations, in descending order, are: Pennsylvania, Texas, California, New York, Louisiana, Illinois, Georgia, Oregon, Wisconsin, Ohio, Michigan, Missouri, Kentucky, and New Jersey. See Kaeble, supra note 3, at app. tbl.2. As of 2016, over 500,000 people were under parole supervision in those states. Id. The conditions reviewed here are either publicly available online or were provided pursuant to requests made under state freedom of information laws. (Arkansas, which had the ninth highest parole population at the time conditions were collected, is excluded here because information is available to only state residents pursuant to its freedom of information law.) Copies of all requests and responses are on file with the *Columbia Law Review*. The conditions cited herein are reproduced in the attached appendix.

under supervision. Missouri, for instance, requires advance permission for any association between parolees and anyone with a felony or misdemeanor record, as well as other parolees.[61] There is no exception for family members and, indeed, Missouri's general parole conditions make explicit that permission from a probation and parole officer is necessary in advance of contact with family members who have convictions.[62] Kentucky demands that parolees avoid association with "convicted felon[s]."[63] Louisiana, which has the highest incarceration rate in the United States,[64] bans association between parolees and "people who are known to be involved in criminal activity."[65] Texas demands that all parolees "avoid persons or places of disreputable or harmful character."[66] Illinois bars parolees from associating with other parolees without written permission from a parole officer.[67] Ohio bans contact between parolees and incarcerated people.[68] In short, this review makes clear that it is common for states to ban or limit contact between parolees and people who have records of criminal conviction or are incarcerated.

Association restrictions of these types create an astonishing level of control over parolees' lives and their interactions with others. In some cases, the conditions are so expansive as to cut off many supervisees from close family members and entire communities. These conditions have an outsized impact on Black families. As of 2010, fifteen percent of Black men had been to prison.[69] A 2004 review revealed that sixty percent of Black men who had not completed high school had been imprisoned at some point, "establishing incarceration as a normal stopping point on the route

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61. Div. of Prob. & Parole, Mo. Dep't of Corr., Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional Release 5 (2020), https://doc.mo.gov/sites/doc/files/media/pdf/2020/12/Rules%20and%20Regulations%20Governing%20the%20Conditions%20of%20Probation%20Parole%20and%20Conditional%20Release%209-29-2020.pdf [https://perma.cc/P3TF-DF36] [hereinafter Missouri Rules and Regulations].

62. Id.

63. Div. of Prob. & Parole, Commonwealth of Ky, Conditions of Supervision (2005) (on file with the *Columbia Law Review*) [hereinafter Kentucky Conditions of Supervision].

64. Emily Widra & Tiana Herring, States of Incarceration: The Global Context 2021, Prison Pol'y Initiative (Sept. 2021), https://www.prisonpolicy.org/global/2021.html/ [https://perma.cc/868S-ZH2U].

65. La. Comm. on Parole Bd. Pol'y, 09-901-POL, Statement of General Conditions Under Which Parole Is Granted ¶ 4 (2013), https://doc.louisiana.gov/wp-content/uploads/2019/08/09-901-pol.certificate.of_.parole.pdf [https://perma.cc/D29T-EF5T] [hereinafter Louisiana General Conditions for Parole].

66. Parole Div., Tex. Dep't of Crim. Just., Certificate of Parole, General Conditions of Parole Release 2 (2008) (on file with the *Columbia Law Review*) [hereinafter Texas General Conditions of Parole Release].

67. Ill. Dep't of Corr., Rules of Conduct Governing Parolees or Mandatory Supervised Releasees 1 (2013) (on file with the *Columbia Law Review*).

68. State of Ohio Dep't of Rehab. & Corr., Adult Parole Authority Conditions of Supervision (2017) (on file with the *Columbia Law Review*).

69. Shannon et al., supra note 9, at 1814.

to midlife."[70] Incarceration also disproportionately affects Black women.[71] Looking beyond incarceration, thirty-three percent of Black men have been convicted of felonies.[72]

In addition, carceral control in the United States is geographically concentrated, leaving people in particular neighborhoods more likely to experience criminal conviction and incarceration.[73] This phenomenon is vividly illustrated by the widespread existence of "Million Dollar Blocks," where "more than $1 million is being spent annually to incarcerate the residents of a single census block."[74] In Chicago alone, there were 851 such blocks between 2005 and 2009.[75] Unsurprisingly, the geographic concentration of arrests and criminal convictions also correlates with race, leaving Black people in certain neighborhoods more likely to be subject to carceral control.[76] One criminologist has termed these neighborhoods "prison places."[77] The results of a study in Tallahassee aptly illustrate the connections among race, place, and involvement in the criminal legal system. In two Tallahassee neighborhoods, more than 1.5% of residents entered prison during the study year, while most of the city's eighty-six other neighborhoods only had a person or two sent to prison during the study year.[78]

Due to the vague language used in some conditions in this category, supervisees who want to work hard to avoid parole revocation and reincarceration will find themselves uncertain of whom the ban applies to and will therefore isolate themselves to ensure compliance. For example, a ban on interacting with people "known to be involved in criminal activity" leaves parolees unsure of what type of association might trigger a parole

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70. Becky Pettit & Bruce Western, Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration, 69 Am. Soc. Rev. 151, 164 (2004).

71. See, e.g., E. Ann Carson, DOJ, Bureau of Just. Stat., Prisoners in 2014, at 15 tbl.10 (2015), https://bjs.ojp.gov/content/pub/pdf/p14.pdf [https://perma.cc/JGB8-STFV] (showing that the incarceration rate for Black women was more than twice that of white women).

72. Shannon et al., supra note 9, at 1814.

73. Id.; Clear, supra note 9, at 64 ("Some neighborhoods have dominant numbers of residents either on their way to prison, in prison, or recently released.").

74. 'Million-Dollar Blocks' Map Incarceration's Costs, NPR (Oct. 2, 2012), https://www.npr.org/2012/10/02/162149431/million-dollar-blocks-map-incarcerations-costs [https://perma.cc/48DU-65BS].

75. Emily Badger, How Mass Incarceration Creates 'Million Dollar Blocks' in Poor Neighborhoods, Wash. Post (July 30, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/30/how-mass-incarceration-creates-million-dollar-blocks-in-poor-neighborhoods/ (on file with the *Columbia Law Review*).

76. Archer, supra note 9, at 214; David S. Kirk, The Neighborhood Context of Racial and Ethnic Disparities in Arrest, 45 Demography 55, 73 (2008).

77. Clear, supra note 9, at 67 ("Those who . . . go to prison are overrepresented by young men of color; these young black males tend to come, in concentrated ways, from certain disadvantaged neighborhoods. In short, these neighborhoods are 'prison places.'").

78. Id. at 66.

violation and thereby renders the freedom of Louisiana parolees extremely precarious.[79] But even where the language is crystal clear, supervision conditions in this category that do not make exceptions for close family members adversely affect the ability of supervisees to maintain important and constitutionally protected relationships.

In sum, a supervision condition that bans contact with people who have felony records or other involvement in the criminal legal system can cut off supervisees, especially Black supervisees, from family members and large swaths of their communities. These conditions take numerous forms and encompass slightly different categories of people, but the results are consistent: mandated isolation and social control that are not tailored to the particular needs of supervisees or the public interest.

2. *Contact with Children.* — This review reveals that states frequently impose categorical bans on contact with children for parolees convicted of sex offenses without any cognizance that such a restriction might implicate the parent–child relationship, which is typically subject to extraordinary protection. Some states limit these restrictions to supervisees whose underlying crimes involved children, but many do not. Some states make explicit exceptions for the supervisee's own children, but most examined here do not. Even states discussed in this Article that expressly account for the possibility of a ban on contacts with minors implicating the parent–child relationship offer limited, if any, procedural protections for parolees.[80]

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79. New York's former standard parole condition barring "fraternizing with known felons" is another good example of a supervision condition that left supervisees with little clarity about what kind of association would result in a parole violation. See Di Gioia v. Travis, 745 N.Y.S.2d 117, 119 (N.Y. App. Div. 2002) (overturning revocation of parole due to alleged fraternization).

80. It is also noteworthy that regardless of the type of underlying offense, numerous states bar parolees who have been convicted of sex offenses from establishing romantic or sexual relationships without permission from their parole officers. This associational limitation effectively thwarts the ability of people convicted of sex offenses to even enter certain constitutionally protected relationships. See, e.g., Div. of Prob. & Parole, Ky. Dep't of Corr., Specialized Conditions of Supervision for Sex Offenders and Computer User Agreement 2 (on file with the *Columbia Law Review*) [hereinafter Kentucky Specialized Conditions]; Pa. Bd. of Prob. & Parole, Supplemental Special Conditions for Sex Offenders 2 (2019) (on file with the *Columbia Law Review*) [hereinafter Pennsylvania Supplemental Special Conditions]; Div. of Cmty. Corr., Wis. Dep't of Corr., Wisconsin Special Sex Offender Rules 1 (on file with the *Columbia Law Review*) [hereinafter Wisconsin Special Sex Offender Rules]. Pennsylvania further requires a parolee to inform a potential intimate partner of their status on probation or parole supervision, classification as a sex offender, and criminal record. Pa. Bd. of Prob. & Parole, Pennsylvania Supplemental Special Conditions, supra, at 2. Some states bar people who have been convicted of sex offenses from having relationships with people who have children. See Cal. Dep't of Corr. & Rehab., Special Conditions 2 (2019) (on file with the *Columbia Law Review)* [hereinafter California Special Conditions]; Tex. Bd. of Pardons & Paroles, Board Policy 145.263(D)(5) (2019) (on file with the *Columbia Law Review*) [hereinafter Texas Special Condition "X"]. California bars association among people convicted of sex offenses without approval by a parole officer. California Special Conditions, supra, at 2. It is worth noting that the California

A common formulation of special conditions concerning children is a categorical ban on contact with minors, with no mention of the supervisee's own children.[81] Illinois takes this approach, although the condition mentions the possibility of approval for contact with a minor, with "prior identification and approval."[82] Presumably, a parolee in Illinois could seek permission for contact with his own children but approval is not presumed or guaranteed by the policy. Pennsylvania, which has the highest population of parolees in the United States,[83] employs a similar special condition,[84] as do Georgia,[85] Kentucky,[86] Oregon,[87] and Wisconsin.[88]

Some states condition a parolee's contact with their child on permission, explicitly or implicitly, from the child's other parent. Georgia's standard condition for parolees convicted of sex offenses regarding contact with minors is illustrative. It bans all contact with minors, including through a

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Department of Corrections and Rehabilitation indicates that it only imposes this condition and all other special conditions if there's an appropriate "nexus," and therefore may not apply the condition to all parolees convicted of sex offenses. See E-mail from Bryan Nakayama, Parole Agent, Cal. Dep't of Corr. & Rehab., to author (Aug. 6, 2019) (on file with the *Columbia Law Review*).

81. This is also common among probation conditions. For example, Maricopa County's guidance for probation officers on appropriate conditions for sex offenders indicates that a prohibition on sex offenders' contact with children is "typical[]." See Maricopa Cnty., Ariz., Sex Offender Caseload Management Standards 8 (2014) (on file with the *Columbia Law Review*).

82. Prisoner Rev. Bd., Ill. Dep't of Corr., Parole or Mandatory Supervised Release Agreement 2 (2013) (on file with the *Columbia Law Review*) [hereinafter Illinois Supervised Release Agreement].

83. Kaeble, supra note 3, at app. tbl.5.

84. Pa. Bd. of Parole & Prob., Optional Special Conditions for Sex Offenders 1 (2019) (on file with the *Columbia Law Review*) [hereinafter Pennsylvania Optional Special Conditions for Sex Offenders]. Pennsylvania further bans some parolees convicted of sex offenses from living in a home where a minor resides, having a minor visit their residence, and maintaining an intimate relationship with a parent who has full or partial custody of their children. Id.

85. Ga. State Bd. of Pardons & Paroles, Special Conditions of Supervision 1 (2017) (on file with the *Columbia Law Review*) [hereinafter Georgia Special Conditions].

86. Ky. Dep't of Corr., Kentucky Specialized Conditions, supra note 80, at 2. Kentucky requires covered parolees to report "normal legal contact" with minors to their parole officer within twenty-four hours. Id. at 4.

87. See Or. Admin. R. 255-070-0001 Ex. J, at 3 (2019), https://secure.sos.state.or.us/oard/viewAttachment.action?ruleVrsnRsn=257916 [https://perma.cc/BVN4-GYLV] (prohibiting contact with a person eighteen years old or younger without prior approval).

88. Wisconsin applies such conditions to sex offenders in the following categories: anyone whose offense involved child pornography; anyone who committed a "[h]ands-on" offense involving a child under eighteen years old, or a "[h]ands-off" offense involving a child under eighteen years old ("facilitation") or including a "co-offender"; or anyone who is a "[s]exual [r]ecidivist." Wisconsin Special Sex Offender Rules, supra note 80, at 4–5, 7.

third party, unless "an adult is present who has knowledge of [the parolee's] history of criminal sexual behavior."[89] That adult must be approved by the parole officer, and the contact with the minor must be approved in advance in writing.[90] The condition does not identify the standard of approval for either decision.[91] Michigan and Ohio utilize similar conditions.[92] New Jersey demands a written statement from the parent or legal guardian of the child when a supervisee requests unsupervised visitation with their child, as well as a written assessment from a "sex offender treatment provider."[93] A parole supervisor ultimately determines whether to permit visitation.[94]

California, New York, and Texas are the only states examined here whose policies expressly acknowledge the possibility that a parole condition limiting contact with minors could impact a parolee's relationship with their own children. But, remarkably, they take very different approaches to deciding whether a parolee should have the ability to contact their children and rely primarily on parole officials to determine whether such contact should be allowed.

California and Texas appear to be the most protective of the parent–child relationship. In both states, the standard parole condition for people convicted of sex offenses that bars contact with minors expressly excludes the parolee's children.[95] Texas only limits contact between a parolee convicted of a sex offense[96] and their child in two circumstances: (1) when

89. Ga. Dep't of Cmty. Supervision, Sex Offender Special Conditions of Supervision, https://dcs.georgia.gov/offender-supervision-0/parole-supervision/sex-offender-special-conditions-supervision-0 [https://perma.cc/J9PR-7RTV] (last visited Nov. 5, 2021).

90. Id.

91. Id.

92. Mich. Dep't of Corr., 06.04.130G, Attachment A, Standard Special Conditions of Parole 1 (2013) (on file with the *Columbia Law Review*) [hereinafter Michigan Standard Special Conditions]; E-mail from Brigid Slaton, Chief Hearing Officer, Ohio Parole Bd., to author (Sept. 19, 2019) (on file with the *Columbia Law Review*). The Ohio Parole Board imposes this condition only when there is a nexus between the condition and the parolee's offense.

93. New Jersey's restriction applies only to people subject to community supervision for life or parole supervision for life, which are triggered by convictions for certain offenses. See N.J. Admin. Code § 10A:71-6.11(a) (2021) (community supervision for life); id. § 10A:71-6.12(a) (parole supervision for life). The restrictions on access to one's own child appear to apply only to people on community supervision for life or parole for life whose underlying convictions involved a minor. See id. § 10A:72-2.6(a).

94. Id. § 10A:72-2.6(a).

95. California Special Conditions, supra note 80, at 2; Texas Special Condition "X", supra note 80.

96. While California requires a "nexus" between the condition and the parolee, Texas applies its condition to all parolees convicted of sex offenses whose underlying crimes involved minors. See Texas Special Condition "X", supra note 80, at 3–4.

there is an outstanding court order requiring such limitations, or (2) when the parolee's child was the victim of their crime.[97]

New York, the only other state examined here that acknowledges the possibility of separating parolees from their children, takes a very different and much more restrictive approach. It is unique in that it imposes a categorical ban on contact with minors for most sex offenders on parole but permits exceptions following a formal appeal process initiated by the parolee. The state requires: (1) documentary evidence of the parolees' relationship with their child, (2) a signed statement from the child's other parent stating that they approve of the proposed contact, and (3) a statement made under penalty of perjury that no existing order of protection or court order would be violated if the parolee were to have contact with their child.[98]

The parole officer then completes an investigation to confirm the information provided by the parolee and to "determin[e] the least restrictive conditions necessary and appropriate for a releasee to properly exercise his or her parental rights, while protecting his or her [children] and others from harm or danger."[99] In the course of the investigation, the parole officer must contact the child's other parent, visit their home, and consider a host of factors in reaching their decision on whether the parolee may have contact with their child.[100] Up to fifty-five days may pass between a parolee's initial request for contact with their child and the Department of Corrections and Community Supervision's (DOCCS) decision on the request.[101] In New York, parole officers are thus the arbiters of whether a parolee will be allowed to maintain any contact with children.

People convicted of sex offenses are among the most reviled people in American society, and it is easy to assume that any condition imposed on them with the intent to reduce the likelihood of recidivism is worthwhile. Such an assumption is wrong. The term "sex offender" is usually interpreted to apply to a person who has committed a heinous sex crime. In fact, people are sometimes labeled sex offenders following convictions for relatively minor misconduct, including misdemeanors, low-level offenses like public urination, and other conduct that does not hew to the

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97. See id. at 7.

98. N.Y. Dep't of Corr. & Cmty. Supervision, Directive 9601: Parental Contact Protocol 2, 6 (2016), http://www.doccs.ny.gov/Directives/9601.pdf [https://perma.cc/4R2G-N86D] [hereinafter New York Parental Contact Protocol].

99. Id. at 3.

100. See id. at 3–4.

101. Within forty-five days of the parolee's request for contact with his children, the investigating parole officer and a senior parole officer must hold a conference concerning the parolee's request. Their recommendation is forwarded to a parole bureau chief, who decides within ten days whether the parolee will be allowed to contact his children. Id. at 5–6.

popular understanding of the term "sex offense."[102] A young person in a relationship with another young person close in age could face conviction for statutory rape, which requires registration as a sex offender in many states.[103] Consequently, the widespread use of the conditions that ban sex offenders from any contact with children leads to the separation of parents and children, regardless of whether a parolee poses an actual threat to child safety. And, as was true for AB described above, this condition sometimes ends contact that parolees maintained with their children while incarcerated.[104]

Although the conditions banning contact between people convicted of sex offenses and children do not apply to all parolees, they provide a useful lens into understanding the enormous power that supervision authorities claim in order to regulate the lives, including the intimate family lives, of supervisees. These conditions are applied routinely without oversight and often without any clear mechanism to challenge them.[105] This claimed authority to regulate contact with children is echoed in efforts to regulate other close relationships.[106]

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102. See Ofer Raban, Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders, 16 Wm. & Mary Bill Rts. J. 497, 499 (2007) (arguing that requiring nonsexual offenders to register as sex offenders violates the Due Process Clauses of the Fifth and Fourteenth Amendments); Walker, supra note 25, at 573–74 (providing examples of low-level offenses that require registration as a sex offender).

103. The infamous case of Genarlow Wilson, a seventeen-year-old who was convicted of "aggravated child molestation" for having consensual oral sex with a fifteen-year-old girl, is a good example. He served two years in prison and faced mandatory registration as a sex offender. See Joanna S. Markman, Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families, 32 Seton Hall Legis. J. 261, 265–68 (2008) (describing the *Wilson* case and providing other examples of juveniles convicted of sex offenses). For other examples, see Walker, supra note 25, at 574 & nn.70–71 (citing Human Rts. Watch, No Easy Answers: Sex Offender Laws in the US 73 (2007)).

104. See supra notes 11–18 and accompanying text.

105. For example, it is common for supervisory authorities to impose a condition banning contact between a supervisee and their crime victim. Although the justification for such a ban is obvious, when a supervisee perpetrated a crime against a family member, the condition may be unwelcome by both parties and implicate a constitutionally protected relationship. Sometimes the "victim" does not wish to be separated from their spouse at all. See Williams v. N.Y. State Div. of Parole, 899 N.Y.S.2d 146, 147–49 (N.Y. App. Div. 2010) (declining a joint request by the parolee and his spouse to remove a parole condition banning the parolee from contacting his spouse, which was imposed due to unproven allegations concerning intimate partner violence); Leigh Goodmark, A Troubled Marriage 96–101 (2012) (collecting research that documents the desire of many domestic violence survivors to remain in troubled relationships).

106. It is worth noting that California and New York impose special conditions in cases involving intimate partner violence. In California, a special condition in a category titled "Family Violence" bans a parolee from "com[ing] within 100 yards of the victim, the victim's residence, or the victim's workplace." California Special Conditions, supra note 80, at 3. New York utilizes an expansive policy regarding parolees accused of acts of domestic violence. It bars parolees from having any contact with the person who is alleged to have

II. LEGAL TREATMENT OF FAMILY SEPARATION

Andrea Dennis has observed that the role of community supervision authorities in supervisees' family matters stands in stark contrast to the expectation, undergirded by "family law rules and norms," that government intervention in family life is supposed to be rare absent exceptional circumstances.[107] As explained in this Part, the claimed authority of community supervision authorities to separate families also conflicts with constitutional standards regarding family life. This Part first provides a brief overview of the constitutional and family law principles that generally govern family separation. It then catalogues judicial treatment of cases in which supervisees assert that they have been unjustifiably separated from their children or spouses.

A. *Legal Standards Regarding Maintenance of Family Ties*

Courts utilize strict standards to analyze restrictions on fundamental rights, including the right to parent children, the right to marry, and the right to intimate association. Those analyses typically require inquiry into whether the government has a compelling interest in the restriction and, if so, whether the restriction is narrowly tailored to the state's articulated interest.[108] In addition, family law standards regarding a parent's custody and visitation rights involve sensitive inquiries into a child's best interests. Each is described briefly below.

1. *The Right to Parent Children.* — The right to parent children was first developed in the context of cases concerning education and statutory infringements on a parent's right to direct their children's education.[109] In more recent years, the Supreme Court has conceptualized this right more broadly as a parent's right to direct their child's upbringing, most

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previously been victimized by the parolee. Thus, New York bans contact, including between spouses, on the basis of mere allegations—even when the spouses desire contact with each other. See *Williams*, 899 N.Y.S.2d at 147–49.

107. Dennis, supra note 26, at 336.

108. See Reno v. Flores, 507 U.S. 292, 301–02 (1993) (explaining that substantive due process claims rely on cases that interpret the "guarantee of 'due process of law' to include a substantive component" that "forbids the government to infringe certain 'fundamental' liberty interests . . . no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (noting that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation").

109. See Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (finding that an Oregon law requiring public school attendance "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (reviewing a Nebraska law prohibiting any language other than English from being taught to children and observing a German language teacher's "right . . . to teach and the right of parents to engage him . . . to instruct their children").

commonly in cases concerning custody disputes and the termination of parental rights.[110] It is one of few interests deemed of such great importance that it is substantively, not just procedurally, protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

Indeed, "[t]he rights to conceive and to raise one's children have been deemed 'essential.'"[111] The right to parent one's children is "of basic importance in our society"[112] and encompasses the "companionship, care, custody, and management of [one's] children."[113] Part of a "private realm of family life which the state cannot enter,"[114] the right "undeniably warrants deference and, absent a powerful countervailing interest, protection."[115] These rights extend unquestionably to biological parents, and some states extend similar protections to nonbiological parents as well.[116]

The right to parent remains intact even when one is not a model parent. Thus, a state may not terminate someone's right to parent their child unless the state can show that the parent has neglected the child by clear and convincing evidence.[117] As the Court has explained:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood

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110. See, e.g., Troxel v. Granville, 530 U.S. 57, 60 (2000) (reviewing a Washington statute that provided for a grandparent's visitation rights despite parental objection); M.L.B. v. S.L.J., 519 U.S. 102, 106–07 (1996) (determining whether a Mississippi law could disallow appeal of decision to terminate parental rights because of inability to pay filing costs); Stanley v. Illinois, 405 U.S. 645, 646 (1972) (reviewing an Illinois law that deemed a child a ward of the state upon the death of their unwed mother).

111. *Stanley*, 405 U.S. at 651 (quoting *Meyer*, 262 U.S. at 399).

112. *M.L.B.*, 519 U.S. at 116 (internal quotation marks omitted) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

113. *Stanley*, 405 U.S. at 651; see also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (referencing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . . ."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

114. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

115. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) (internal quotation marks omitted) (quoting *Stanley*, 405 U.S. at 651).

116. At least one scholar has argued that these constitutional protections extend to nonbiological parents who have not adopted as well. See Douglas NeJaime, The Constitution of Parenthood, 72 Stan. L. Rev. 261, 265, 269 (2020).

117. *Santosky*, 455 U.S. at 747–48.

> relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.[118]

In general, to justify the termination of parental rights, a state must demonstrate that a parent has either harmed a child through abuse, neglect, or abandonment, or cannot care for the child due to disability, including mental illness, or substance abuse.[119]

Procedural due process protection also applies to the right to parent children. In *Mathews v. Eldridge*, the Supreme Court identified three factors that must be balanced to determine what procedures are required when the government infringes a protected interest:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[120]

All point to the need for strong procedural safeguards when the government attempts to separate parents from their children: (1) The interest at stake is one of the few fundamental rights protected by the Due Process Clause, (2) the risk of an unjustified separation is high without a rigorous

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118. Id. at 753. It is worth noting, however, that the level of protection accorded to the right for fathers has sometimes depended on whether the father was married to the child's mother or whether the father played an active role in his child's life. See, e.g., Lehr v. Robertson, 463 U.S. 248, 266 (1983) ("[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."); Caban v. Mohammed, 441 U.S. 380, 394 (1979) ("The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."); Quilloin v. Walcott, 434 U.S. 246, 256 (1978) ("Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.").

119. Gargi Sen & Tiffanie Tam, Child Custody, Visitation, & Termination of Parental Rights, 16 Geo. J. Gender & L. 41, 74 & nn.201–06 (2015). In addition, it is worth noting that as a condition of receiving federal funding, the Adoption and Safe Families Act requires states to seek to terminate parental rights under several circumstances. Id. at 71 (noting that all fifty states have adopted the guidelines required by the Adoption and Safe Families Act, 42 U.S.C. § 675(5)(E) (2018)). The one with the greatest impact is the mandate that a state initiate termination of parental rights proceedings once a child has been in foster care for fifteen of the preceding twenty-two months, unless an exception applies. 42 U.S.C. § 675(5)(E). This requirement has an obviously severe impact on children whose parents are incarcerated and unable to ensure their children are cared for by family members in their absence. See Deseriee A. Kennedy, Children, Parents & the State: The Construction of a New Family Ideology, 26 Berkeley J. Gender L. & Just. 78, 110 (2011) (observing, in the context of proceedings concerning termination of parental rights, that a parent's incarceration can be used to find a parent unfit without adequate examination of a child's actual needs and interests).

120. 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

process,[121] and (3) the burden on the government in providing a rigorous process is low.[122] Thus, when a state seeks to sever ties between a parent and child, the state typically must provide the parent with notice and an opportunity to be heard in court before a separation.[123] In emergencies, prompt judicial review that occurs after the separation will also pass muster.[124] These standards apply even if a state seeks to separate parents from their children only temporarily.[125]

In sum, substantive and procedural due process protections for the right to parent children are robust and well established. Although outside of the traditional family law realm, family separation conditions that implicate parent–child relationships are deserving of the rigorous scrutiny demanded by the Constitution.

2. *The Right to Marry.* — Another example of a constitutional right implicated by family separation conditions is the right to marry. The right to marry has been recognized as a core liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[126] As the

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121. See Duchesne v. Sugarman, 566 F.2d 817, 828 n.26 (2d Cir. 1977) ("[T]he 'fact specific' nature of the determination of the fitness of a parent presents a grave risk of erroneous deprivation when the action of the state is not promptly reviewed.").

122. As the Second Circuit noted in *Duchesne*, in the context of an established system for judicial review for the removal decision at issue, providing a formal opportunity to be heard adds little cost. See id. ("[T]he administrative and fiscal burden to the state can be of no moment when state law itself apparently requires a court order and prompt judicial review of emergency action.").

123. Although the Supreme Court has never directly addressed this question, federal circuit courts have agreed on this standard for decades. See, e.g., Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997) ("Removal of children from the custody of their parents requires predeprivation notice and a hearing 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" (quoting Spielman v. Hildebrand, 873 F.2d 1377, 1385 (10th Cir. 1989))); Hooks v. Hooks, 771 F.2d 935, 941 (6th Cir. 1985) ("It is well-settled that parents have a liberty interest in the custody of their children. . . . Hence, any deprivation of that interest by the state must be accomplished by procedures meeting the requirements of due process." (citations omitted)).

124. See *Duchesne*, 566 F.2d at 826 (explaining that removal of children without court order is permissible in emergency situations, but "in those 'extraordinary situations' where deprivation of a protected interest is permitted without prior process, the constitutional requirements of notice and an opportunity to be heard are not eliminated, but merely postponed" (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971))); see also Weller v. Dep't of Soc. Servs., 901 F.2d 387, 396 (4th Cir. 1990) (holding that a father whose son was allegedly removed from his custody suffered a due process violation if he was not afforded a prompt post-deprivation hearing).

125. See *Weller*, 901 F.2d at 396 ("We agree that, even if it is constitutionally permissible to temporarily deprive a parent of the custody of a child in an emergency, the state has the burden to initiate prompt judicial proceedings to ratify its emergency action.").

126. See Obergefell v. Hodges, 576 U.S. 644, 664–65 (2015) ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause." (citing M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Griswold v. Connecticut, 381 U.S. 479, 486 (1965);

Court declared in *Loving v. Virginia*, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[127] The Court has further described marriage in lofty terms, opining that marriage "is an association for as noble a purpose as any involved in [the Court's] prior decisions"[128] and one that "dignifies couples who 'wish to define themselves by their commitment to each other.'"[129]

Constitutional and family law scholars debate whether the right is positive or negative or both. For example, Kenji Yoshino has argued that it is both "a positive right in that it requires the state to grant the parties recognition and benefits,"[130] and "a negative right in that it creates a zone of privacy into which the state cannot intrude, as . . . see[n] in privacy cases such as *Griswold*, which spoke of the 'sacred precincts of the marital bedroom,' or in the testimonial privileges that permit spouses to refuse to testify against each other."[131] In contrast, other scholars argue that it is only a positive right.[132] However it is characterized, the right to marry unques-

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

127. 388 U.S. 1, 12 (1967).

128. *Griswold*, 381 U.S. at 486.

129. *Obergefell*, 576 U.S. at 667 (quoting United States v. Windsor, 570 U.S. 744, 763 (2013)).

130. Kenji Yoshino, A New Birth of Freedom?: *Obergefell v. Hodges*, 129 Harv. L. Rev. 147, 168 (2015).

131. Id. (footnote omitted) (quoting *Griswold*, 381 U.S. at 485).

132. See, e.g., Susan Frelich Appleton, *Obergefell*'s Liberties: All in the Family, 77 Ohio St. L.J. 919, 941–42 & n.143 (2016) (arguing that marriage is a positive right because the state actively administers and attaches benefits to it); Gregg Strauss, The Positive Right to Marry, 102 Va. L. Rev. 1691, 1732–41 (2016) (arguing that marriage's negative liberty and immunity rights derive from its positive power right); see also Carlos A. Ball, The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of *Lawrence v. Texas*, 88 Minn. L. Rev. 1184, 1187 (2004) (arguing, before *Obergefell*, that the right to marry includes a positive component).

tionably protects multiple interests, including material benefits, that accrue after solemnization.[133] Among those interests are recognition of intimate association and emotional attachment.[134]

The Court has typically cast a critical eye on restrictions limiting eligibility to marry, striking down bans on interracial marriage and marriage by same-sex couples.[135] Even in the prison context, corrections officials are not entitled to deny incarcerated people the right to marry absent legitimate penological goals.[136] Inmate marriages, the Court declared, are not so different from other marriages in that they "are expressions of emotional support and public commitment."[137] Reasoning along similar lines in a case decided on Equal Protection grounds, the Court held that a state could not bar a man from marrying until he had met his child support obligations.[138]

The Court has not directly answered the question of whether burdens on marital relationships demand heightened scrutiny.[139] But, as noted

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133. As explained in *Obergefell*, the benefits provided by states on the basis of marriage are substantial, including:

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

576 U.S. at 670. The Court also recognized the benefits that marriage provides to some children. Id. at 668 (observing that marriage "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives,'" "afford[ing] the permanency and stability that is important to children's best interests" (quoting *Windsor*, 570 U.S. at 772)).

134. See Cass Sunstein, The Right to Marry, 26 Cardozo L. Rev. 2081, 2096 (2004).

135. See, e.g., *Obergefell*, 576 U.S. at 665 (same-sex couples); Loving v. Virginia, 388 U.S. 1, 12 (1967) (mixed-race couples).

136. See Turner v. Safley, 482 U.S. 78, 95–99 (1987).

137. Id. at 95.

138. Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (striking down a law because the state was unable to establish "sufficiently important state interests" that were "closely tailored to effectuate only those interests").

139. One notable exception is the right to marital privacy, as described by the Court in *Griswold v. Connecticut*. See 381 U.S. 479, 485–86 (1965) (striking down a ban on contraceptives because its invasion of marital privacy had "a maximum destructive impact upon that relationship"). The Court also touched on the government burdening a marriage in *Kerry v. Din*, where it upheld the U.S. State Department's decision to deny a visa to the spouse of an American citizen with the bare explanation that the spouse had engaged in terrorist activities. 576 U.S. 86, 88 (2015). The visa denial meant the couple could not live together in the United States, and the American citizen argued that the government had violated her due process rights by denying her the right to associate with her spouse without adequate explanation. Id. at 93. The Court fractured badly in determining whether a protected liberty interest was at issue: Three Justices in the plurality opinion found there was none, id. at 95 (plurality opinion); four dissenters disagreed, id. at 107 (Breyer, J.,

above, strict scrutiny would require courts to examine whether the government has a compelling interest in a regulation that infringes on fundamental liberty interests and whether the regulation is narrowly tailored to that interest.[140] As explained in Part III, this heightened scrutiny should apply to supervision conditions that separate spouses as well.

3. *The Right to Intimate Association.* — Courts have also routinely recognized a right to intimate association that protects additional familial relationships, although its contours are less well defined than those of the right to parent children or the right to marry. In his seminal article, Kenneth Karst argued that the Supreme Court's decision in *Griswold v. Connecticut* suggested that the First and Fourteenth Amendments protect intimate relationships beyond marriage.[141] Although the Court did not adopt Karst's precise articulation of the factors that should be used to identify protected relationships, it accepted the concept of intimate association in *Roberts v. United States Jaycees*, where a private club that excluded women asserted associational rights in response to allegations of discrimination.[142] Without specifically naming the relationships entitled to protection, the Court underscored the importance of various familial connections:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.[143]

The Court also held that the level of protection for familial relationships would vary.[144]

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dissenting); and two Justices declined to decide the question. Id. at 102 (Kennedy, J., concurring in the judgment).

140. See Reno v. Flores, 507 U.S. 292, 301–02 (1993) (discussing the respondents' substantive due process claim).

141. See Kenneth Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 626 (1980) (describing *Griswold* as part of "the revival of substantive due process as a guarantee of individual freedoms"). Karst "enumerated four values at issue in intimate association: society, caring and commitment, intimacy, and self-identification." Collin O'Connor Udell, Intimate Association: Resurrecting a Hybrid Right, 7 Tex. J. Women & L. 231, 234 (1998) (citing Karst, supra, at 629–37).

142. 468 U.S. 609, 618 (1984) (noting the importance of protecting intimate association).

143. Id. at 619–20.

144. Id. at 620. It further stated that courts should look to "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." Id.

As numerous commentators have observed, *Roberts* has been followed by inconsistency and confusion, leaving the scope of the right unclear.[145] While the Ninth Circuit has concluded that the right to intimate association protects the roommate relationship,[146] the Third Circuit has rejected a similar claim made by fraternity members.[147] In a case involving the criminal legal system, the Sixth Circuit held that an ordinance barring people with conviction records involving drug crimes from "drug exclusion zones" was unconstitutional because it infringed on a grandmother's "fundamental associational right to participate in the education and rearing of her grandchild."[148] Similarly, in a case involving a police detective's alleged smearing of a criminal suspect, the Second Circuit recognized that relationships with parents, spouses, children, and siblings are protected by the right to intimate association.[149]

The Supreme Court has made clear, however, that the right to intimate association remains intact for people subject to carceral control. In *Overton v. Bazzetta*, prisoners and their family members and friends challenged a prison system's rules severely limiting visitation rights.[150] There, the Court ratified that incarcerated people retain the right to intimate association, despite rejecting the challenge.[151] As discussed in Part III, there is no compelling justification for supervisees' constitutional rights to be narrower than those of incarcerated people.[152] Accordingly, although the precise contours of the right to intimate association are unclear, its clear extension to incarcerated people means it should extend to supervisees as well.[153]

4. *Family Law Standards Regarding Child Custody.* — In the realm of child custody and visitation disputes, states utilize the "best interests"

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145. See, e.g., Nancy Catherine Marcus, The Freedom of Intimate Association in the Twenty First Century, 16 Geo. Mason U. C.R.L.J. 269, 287–98 (2006) (describing various interpretations adopted by the circuit courts); Udell, supra note 141, at 243–60 (same).

146. See Fair Housing Council of San Fernando Valley v. Roommate.com, 666 F.3d 1216, 1220–21 (9th Cir. 2012).

147. See Pi Lambda Phi Fraternity v. Univ. of Pitt., 229 F.3d 435, 438 (3d Cir. 2000) ("The Chapter's size, membership criteria, and openness to the public all militate against its claim that it engages in intimate association.").

148. Johnson v. City of Cincinnati, 310 F.3d 484, 501 (6th Cir. 2002).

149. Patel v. Searles, 305 F.3d 130, 136 (2d Cir. 2002).

150. 539 U.S. 126, 129–30 (2003) (describing limitations on visitation by children and former prisoners, and a policy banning visits for incarcerated people who had committed multiple substance abuse violations).

151. Id. at 131 ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.").

152. See infra Part III.

153. It is also worth noting that the Supreme Court arguably bolstered the right in Lawrence v. Texas, 539 U.S. 558 (2003), through its recognition that the freedom to enter intimate relationships is protected by the Constitution. See Marcus, supra note 145, at 302–06.

standard to determine whether a parent should have access to their children.[154] Historically, state statutes presumed that mothers should have custody pursuant to the "tender years" doctrine, but that presumption has given way to a gender-neutral "best interests" standard.[155] The underlying goal of the best interests standard is to "ensure that each child becomes a happy, well-adjusted adult."[156] To that end, family courts focus their inquiry on a child's "psychological well-being, a catch-all goal that entails, among other things, that children grow up to form healthy relationships with their spouses and their own children; that they learn to regulate their emotions; and that they develop a positive sense of identity and self-worth."[157] Some states specify by statute numerous factors that family court judges must consider when analyzing the best interests, while in other states case law provides greater guidance.[158] Whether a state statute identifies particular factors or not, the best interests standard is unquestionably malleable.[159]

In applying the best interests standard, courts have recognized that separation from a parent—even a parent who is not the primary caregiver—can cause significant harm to a child.[160] As Sarah Abramowicz has observed, "Courts assessing children's interests have begun to attend to the ways in which loss of regular contact with the noncustodial parent, typically the child's father, might harm a child's development."[161] Accordingly, family law standards generally presume a noncustodial parent has a right to visitation, although "judges maintain broad discretion to determine whether such visitation is in the best interests of the child."[162] The

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154. Rutkin, supra note 22, § 32.06; Sen & Tam, supra note 119, at 51–55 (collecting state standards on child custody and visitation).

155. J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law & Policy, 52 Fam. Ct. Rev. 213, 214–15 (2014); Sen & Tam, supra note 119, at 44.

156. Abramowicz, supra note 24, at 805; see also Sen & Tam, supra note 119, at 47 ("[A] judge 'is not adjudicating a controversy between adversary parties . . . . He is not determining rights 'as between a parent and a child' or between one parent and another . . . . Equity does not concern itself with such disputes . . . . Its concern is for the child.'" (second and third alterations in original) (quoting Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.))).

157. Abramowicz, supra note 24, at 805.

158. Sen & Tam, supra note 119, at 47–50.

159. See Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226, 226 (1975) (critiquing malleability of best interests standard); Carl E. Schneider, Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard, 89 Mich. L. Rev. 2215, 2219–25 (1991) (collecting criticisms of the best interests standard); Elizabeth S. Scott & Robert E. Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 Law & Contemp. Probs. 69, 72–76 (2014) (critiquing the malleability of best interests standard).

160. Abramowicz, supra note 24, at 807–08 & nn.50–52.

161. Id. at 808.

162. Sen & Tam, supra note 119, at 52–53.

Uniform Marriage and Divorce Act (UMDA) reflects this presumption, instructing that a court may limit visitation only if it determines, following a hearing, that "visitation would endanger seriously the child's physical, mental, moral, or emotional health."[163] The UMDA's drafters purposely devised this standard to be more stringent than the best interests standard.[164]

If necessary to protect a child's best interests, family courts have authority to impose limitations on visitation, such as a requirement for supervision.[165] Supervised visitation can involve oversight of a visit by a family member or the use of supervised visitation centers where the staff monitor visits and ensure children's safety.[166]

Family law does not invite decisions on sensitive questions regarding contact among family members on the basis of categorical labels. While a parent's conviction may be relevant to a best interests analysis regarding custody or visitation rights, it is generally not determinative.[167] Numerous states call for family courts to evaluate custodial arrangements following certain convictions but categorically bar access to children in only the most extreme cases.[168]

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163. Unif. Marriage & Divorce Act § 407(a), 9A U.L.A. 61 (1974).

164. Id. § 407 cmt. ("The special standard was chosen to prevent the denial of visitation to the noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child.").

165. See Leigh Goodmark, From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases, 102 W. Va. L. Rev. 237, 275 (1999) [hereinafter Goodmark, From Property to Personhood] (describing supervised visitation options).

166. Id. at 276.

167. See Jesse Krohn & Jamie Gullen, Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color, 46 U. Balt. L. Rev. 237, 265–67 (2017) (noting that numerous states have statutes that trigger a mandatory evaluation of parents with criminal convictions); Deborah Ahrens, Note, Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity, 75 N.Y.U. L. Rev. 737, 752–53 (2000) (arguing that despite the presumption that a convicted parent is unfit, "[n]o child custody statutes explicitly enumerate the violent crimes of murder or assault as per se barriers to childrearing").

168. See, e.g., Colo. Rev. Stat. § 14-10-129(3) (2021) (allowing a parent or guardian to contest the custody or parenting time of the other parent following conviction for certain violent crimes and sex crimes); Minn. Stat. § 631.52 (2021) (requiring the defendant to show that continued custody or parenting time is in the best interest of the child following convictions for certain violent crimes and sex crimes); N.J. Stat. Ann. § 9:2-4.1 (West 2021) (requiring the defendant to show with "clear and convincing evidence" that continued custody or parenting time is in the best interest of the child following convictions for certain sex crimes); N.Y. Dom. Rel. Law § 2401-c(b)(A) (McKinney 2021) (establishing a rebuttable presumption against a parent convicted of certain sex crimes in custody and visitation cases); Ohio Rev. Code Ann. § 3109.051(D) (2021) (requiring consideration of whether a parent has a conviction for "any criminal offense involving any act that resulted in a child being an abused child or a neglected child" for custody and visitation determinations); Va.

B. *Judicial Analyses of Family Separation Conditions for Supervisees*

Despite the lofty language cited above and the heightened scrutiny that typically applies to claims asserting the fundamental rights to parent and to marry, state courts have largely departed from strict scrutiny when considering challenges to supervision conditions that infringe on the right to parent. Indeed, courts have approved probation and parole conditions that bar parents who have been convicted of drug and weapons offenses from any contact with their children or with their partners.[169] In general, federal courts have analyzed supervision conditions implicating these rights with more care.

Allen v. State,[170] recently decided by Maryland's highest court, is emblematic. There, a criminal defendant was convicted of the sexual abuse of his girlfriend's minor daughter.[171] He was sentenced to two consecutive sentences of forty-six years' imprisonment, with all but five years suspended, and five years of supervised probation.[172] One of the probation conditions prohibited "unsupervised contact with minors."[173] The defendant objected to the condition because it would infringe on his constitutional right to parent his son, who had not been an abuse victim.[174] The Maryland Court of Appeals acknowledged that the probation condition infringed on the fundamental right to parent but nevertheless held that heightened scrutiny was unnecessary. Instead, the probation condition "was only required to be reasonable and rationally connected to the offense of conviction."[175] The appellate court relied on two key concepts in determining that heightened scrutiny should not apply: (1) the notion that "probationers do not enjoy the breadth of constitutional rights that are enjoyed by law abiding citizens,"[176] and (2) that "probation is considered to be a matter of grace and an act of clemency,"[177] which means "a

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Code Ann. § 16.1-283 (2021) (requiring consideration of previous conviction(s) in determining the best interests of the child for custody and visitation determinations).

169. See, e.g., United States v. Worley, 685 F.3d 404, 408–09 (4th Cir. 2012) (reversing the district court's conditions of supervised release barring the defendant's contact with his children following a drug conviction); State v. Tanner, 727 S.E.2d 814, 822 (W. Va. 2012) (affirming a parole condition barring the defendant from contact with her husband following her conviction for a drug crime); see also In re Dunn, 488 P.2d 902, 902–03 (Mont. 1971) (upholding a condition banning the defendant's contact with minors following his conviction for a drug sale).

170. 141 A.3d 194 (Md. 2016).

171. Id. at 196.

172. Id.

173. Id. at 199.

174. Id.

175. Id. at 201.

176. Id. at 206 (citing United States v. Knights, 534 U.S. 112, 119, 122 (2001); Corbin v. State, 52 A.3d 946, 955 (Md. 2012)).

177. Id. at 207 (quoting Meyer v. State, 128 A.3d 147, 166 (Md. 2015)).

sentencing judge in Maryland, by imposing probation, is allowing the defendant substantially more liberties than he or she would otherwise enjoy while incarcerated."[178] Thus, although the defendant had previously victimized only girls and psychological assessments did not indicate that he was likely to reoffend with boys, the Maryland Court of Appeals approved the five-year condition limiting the defendant's contact with his son.[179] The appellate courts of Maine, Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, and Wyoming have all taken similar approaches when reviewing community supervision conditions that infringe on the right to parent.[180]

In notable contrast, federal courts reviewing supervised release conditions have been more protective of the right to parent.[181] As indicated above, the federal supervised release statute allows courts to impose only those special conditions that "involve[] no greater deprivation of liberty than is reasonably necessary" for rehabilitative purposes.[182] Because the right to parent one's children is recognized as a fundamental liberty interest, federal courts routinely recognize that the supervised release statute cabins their discretion to impose conditions infringing that right. For example, in *United States v. Wolf Child*, the Ninth Circuit described the stringent review necessary when a court imposes conditions that infringe on the parent–child relationship.[183] In its view, a district court must "undertake an *individualized* review of that person and the relationship at issue"[184] when a condition infringes on a constitutionally protected relationship. In other words, "it must consider 'the history and characteristics of the defendant' and the history of his relationship with the affected intimate family members as well as the need for deterrence, protection of the public,

178. Id.

179. Id.

180. See State v. Coreau, 651 A.2d 319, 320–22 (Me.1994); Commonwealth v. LaPointe, 759 N.E.2d 294, 298–300 (Mass. 2001); State v. Fylstra, No. A07-0706, 2008 WL 2246053, at *2–3 (Minn. Ct. App. June 3, 2008) (citing State v. Friberg, 435 N.W.2d 509, 515 (Minn. 1989)); J.C. v. N.J. State Parole Bd., No. A-3174-16T1, 2018 WL 1415605, at *3, *5–6 (N.J. Super. Ct. App. Div. Mar. 22, 2018); State v. Strickland, 609 S.E.2d 253, 254–56 (N.C. 2005); State v. Jones, 550 N.E.2d 469, 470–72 (Ohio 1990); Perkins v. State, 317 P.3d 584, 587–90 (Wyo. 2014).

181. As indicated above, it is more common for federal courts to confront claims that supervised release conditions infringe the right to parent than for challenges to be instituted at the state level. Federal judges thus play a critical role in approving supervised release conditions around the time of sentencing, reflecting an uncommon mandate for judicial review of supervisee conditions.

182. 18 U.S.C. § 3583(d)(2) (2018).

183. 699 F.3d 1082, 1089 (9th Cir. 2012) (citing United States v. Soltero, 510 F.3d 858, 866 (9th Cir. 2007)).

184. Id. at 1093 (quoting United States v. Napulou, 593 F.3d 1041, 1047 (9th Cir. 2010)).

and rehabilitation."[185] Similarly, the Eighth and Tenth Circuits have demanded a close nexus between a criminal defendant's underlying crime and a supervised release condition limiting contact between the defendant and their child.[186]

Some state courts have followed the federal example. For example, the Washington courts have required that supervision conditions infringing on fundamental rights be imposed "sensitively."[187] Thus, in a case where a mother had sexually abused a boy who was not her son, an appellate court determined that "[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention."[188] Alaska takes a similar approach.[189]

When faced with challenges to probation and parole conditions that limit contact between spouses, thereby infringing on the right to marry, state courts are split as to whether they should apply a heightened level of scrutiny. Although challenges to these conditions typically arise when there is a history of intimate partner violence between the supervisee and their spouse, some supervision authorities ban contact between spouses with no such history.

Some, like West Virginia's highest court, have been extraordinarily deferential to supervision authorities that have separated spouses. Demanding only that the parole board "act in a way which is not unreasonable, capricious, or arbitrary," the court upheld a parole condition that banned contact between a parolee and her husband because her husband had a felony record.[190] Rejecting the parolee's constitutional arguments, the court relied on the Supreme Court's pronouncements regarding the limited Fourth Amendment rights of parolees to conclude that a parole board needs only to articulate interests in protecting the public and reducing recidivism to justify a condition banning contact between spouses.[191]

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185. Id. at 1094 (citing 18 U.S.C. § 3583(d)(1)).

186. See, e.g., United States v. Bear, 769 F.3d 1221, 1229 (10th Cir. 2014); United States v. Lonjose, 663 F.3d 1292, 1302–03 (10th Cir. 2011); United States v. Davis, 452 F.3d 991, 994–96 (8th Cir. 2006).

187. State v. Riley, 846 P.2d 1365, 1374 (Wash. 1993) (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975)).

188. State v. Letourneau, 997 P.2d 436, 446 (Wash. Ct. App. 2000).

189. See Simants v. State, 329 P.3d 1033, 1039 (Ala. Ct. App. 2014) (applying a "heightened level of scrutiny" in reviewing a probation condition that barred a woman convicted of having a sexual relationship with a seventeen-year-old boy from residing with minors, without an exception for her own children).

190. State v. Tanner, 727 S.E.2d 814, 819 (W. Va. 2012) (internal quotation marks omitted) (quoting State ex rel. Gardner v. W. Va. Div. of Corr., 559 S.E.2d 929, 930 (2002)).

191. Id. at 821. Remarkably, the court concluded that the parole board was justified in banning the parolee's contact with her spouse in part because the parolee's "insecurities about her husband's perceptions of her weight contributed to her use of methamphetamine." Id. at 822.

Also noteworthy is the deference to parole authorities expressed by New York courts,[192] which have imported the standard announced by the Supreme Court in *Turner v. Safley* regarding treatment of prisoners' constitutional rights, including marriage rights, that a restriction merely be "reasonably related to legitimate penological interests."[193]

Appellate courts in Alaska, California, Maryland, Nebraska, Oregon, and Washington have recognized that probation and parole conditions limiting contact between spouses implicate a fundamental interest but, with one exception, ultimately have not applied a formally distinct standard of heightened scrutiny.[194]

In sum, deference to supervision authorities is a common thread in constitutional challenges to supervision conditions. For reasons described in the next Part, courts should instead evaluate familial integrity rights pursuant to the ordinary heightened scrutiny standards.

III. RETHINKING SUPERVISEES' FAMILIAL INTEGRITY RIGHTS

Courts often severely discount the constitutional rights of supervisees regarding familial integrity. This disfavored treatment fits a longstanding but misguided pattern. When confronted with questions about the constitutional rights of people on parole, probation, and other forms of community supervision, courts often abridge the rights of such persons. To take one prominent example, the Supreme Court's interpretation of the Fourth Amendment right to be free from unreasonable searches reflects this approach. Although a government agent must obtain a warrant before searching a person, unless an exception applies,[195] the Court has given states great leeway to conduct warrantless searches of parolees and proba-

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192. See, e.g., George v. N.Y. State Dep't of Corr. & Cmty. Supervision, 968 N.Y.S.2d 670, 672 (App. Div. 2013) (upholding a restriction barring a parolee from contacting his wife); Boehm v. Evans, 914 N.Y.S.2d 318, 320–21 (App. Div. 2010) (same); Williams v. N.Y. State Div. of Parole, 899 N.Y.S.2d 146, 149 (App. Div. 2010) (same).

193. *George*, 968 N.Y.S.2d at 672 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

194. See Dawson v. State, 894 P.2d 672, 680–81 (Alaska 1995) (acknowledging the "special scrutiny" restrictions on marital relations are subject to but also stating "that a narrower, better tailored, and more fully explained restriction" may be acceptable); People v. Jungers, 25 Cal. Rptr. 3d 873, 879 (Ct. App. 2005) (evaluating a restriction for reasonableness); Lambert v. State, 61 A.3d 87, 90 (Md. Ct. Spec. App. 2013) (same); State v. Gilkey, 826 P.2d 69, 71 (Or. 1992) (same); State v. Warren, 195 P.3d 940, 947 (Wash. 2008) (same). But see State v. Rieger, 839 N.W.2d 282 (Neb. 2013) (applying heightened scrutiny).

195. See U.S. Const. amend. IV. For example, the "search incident to arrest" exception applies to all arrests and allows a law enforcement officer to search an arrestee for the purposes of securing evidence and protecting officers from any weapons. Knowles v. Iowa, 525 U.S. 113, 119 (1996) (reaffirming the Court's holding in United States v. Robinson, 414 U.S. 218, 234 (1973), that "the authority to conduct a full field search as incident to an arrest was a 'bright-line rule,' which was based on the concern for officer safety and destruction or loss of evidence").

tioners. It had no constitutional quarrel with a state regulation that allowed a probation officer to conduct a warrantless search of any probationer's home with only reasonable suspicion of contraband.[196] In an even more far-reaching decision, the Court upheld another state's statute that allows the search of parolees by any law enforcement officer without cause.[197] Consequently, a supervisee's right to privacy largely turns on state policy without any discernible stopping point required by the Fourth Amendment.

The primary justification for this incredibly anemic view of parolees' and probationers' Fourth Amendment rights is that parolees and probationers are on a "'continuum' of state-imposed punishments,"[198] and their rights are therefore rightfully curtailed as part of that punishment.[199] The Seventh Circuit has gone so far as to claim that "[f]or parolees . . . the 'conditions' of parole *are* the confinement,"[200] likening a constitutional challenge to parole conditions as an attempt to remove bars from a cell.[201] The court suggests that supervisees should be considered inmates who are simply in a nonprison locale and the control that community supervision authorities have over them is functionally identical to the authority of correctional officers inside prisons.[202] Unfortunately, many state courts have adopted this perspective as well. As described above, it is common for state courts to offer extraordinary deference to supervision officials when evaluating challenges to supervision conditions. They often implicitly, and sometimes explicitly, follow the mode of analysis employed by the Supreme Court in *Turner* in which the Court offered extreme deference to prison authorities when incarcerated people asserted their constitutional rights.[203] This Part explains why *Turner* deference is inappropriate and makes an affirmative case for heightened scrutiny when evaluating supervisees' familial integrity rights.

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196. Griffin v. Wisconsin, 483 U.S. 868, 872–73 (1987).

197. See Samson v. California, 547 U.S. 843, 846 (2006) (citing Cal. Penal Code § 3067(a) (2000)).

198. Id. at 850 (quoting United States v. Knights, 534 U.S. 112, 119 (2001)).

199. Id. ("The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)); see also *Knights*, 534 U.S. at 119 ("Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.").

200. Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003).

201. Id. at 580 (citing Drollinger v. Milligan, 552 F.2d 1220, 1223–24 (7th Cir. 1977)).

202. Id. at 579 (likening the parole experience to "remain[ing] 'in custody'").

203. Turner v. Safley, 482 U.S. 78, 89–90 (1987).

A. Turner *Deference Does Not Apply to Community Supervision*

In *Turner*, the Court held that when assessing the constitutionality of prison policies or practices, courts should look to the reasonableness of prison administrators' justifications for them.[204] Specifically, a challenged policy or practice need only be "reasonably related to legitimate penological interests."[205] As Sharon Dolovich has pointedly explained, the factors used to make this assessment[206] result in not just deference but extreme deference: A challenged policy or practice should be upheld "unless [it] is found to be an 'arbitrary or irrational' method for the state to achieve its stated goals . . . *and* claimants can identify an alternative means to 'fully accommodate' their rights without any appreciable cost to the prison."[207] In the context of evaluating supervisees' constitutional familial integrity rights, this approach is misguided and a poor fit. Instead, the usual heightened standards of review should apply.

Turner deference rests on an interest that simply does not exist in the community supervision context: the unique security needs of prisons and jails. It is essential for prison and jail operators to adopt regulations that prevent escapes, keep contraband and weapons out, and maintain order. Virtually every facet of prison life is governed by regulations addressing all manner of minutiae, such as the timing of movement of people around the prison, the length of phone calls, and the weight of books.[208] Deference to prison officials is arguably important in this context given institutional security needs that may not be well understood outside of prisons.[209]

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204. Id. at 97–98 (finding a Missouri prison regulation's limitation on an inmate's right to marry to not be reasonably related to its security objectives).

205. Id. at 89.

206. The Court requires assessment of four factors: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it," id. at 89; (2) "whether there are alternative means of exercising the right that remain open to prison inmates," id. at 90; (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," id.; and (4) whether there are "ready alternatives" that allow prisoners to exercise their rights without undermining "valid penological interests." Id. at 90–91.

207. Sharon Dolovich, Forms of Deference in Prison Law, 24 Fed. Sent'g Rep. 245, 246 (2012) [hereinafter Dolovich, Forms of Deference].

208. Giovanna Shay, Ad Law Incarcerated, 14 Berkeley J. Crim. L. 329, 331 (2009) (noting that corrections policies govern "medical and mental health care, visitation, telephone usage, mail, access to lawyers, sexual abuse policies, and programming such as vocational and educational courses").

209. See, e.g., Overton v. Bazzeta, 539 U.S. 126, 133–34 (2003) (upholding a restriction on prison visitors as justified because the rules at issue "promote[d] internal security," minimized disruption within prisons, and "induce[d] compliance with the rules of inmate behavior"); *Turner*, 482 U.S. at 89 (noting the need for prison officials to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"); Block v. Rutherford, 468 U.S. 576, 586 (1984) (upholding a ban on contact visits in part because of potential "security problems"). But see Johnson v.

As one commentator put it, "The courts defer to prison administrators because the prison, by definition, operates in an entirely different sphere than the free world that the rest of us inhabit."[210] It is fair to question whether the extreme deference announced in *Turner* is necessary to account for prisons' unique safety and security needs.[211] Whether it is necessary or not, the Court has consistently rested its justification for *Turner* on these institutional needs that simply do not apply in the community supervision context.

The Court's most recent exploration of *Turner* emphasizes the connection between deference to prison authorities and the unique experience of incarceration. In *Johnson v. California*, the Court considered an equal protection challenge to California's routine racial segregation of incarcerated people.[212] Strict scrutiny ordinarily applies in cases involving racial classifications.[213] But California prison officials argued that *Turner* deference was appropriate instead.[214] The Court rejected this position, noting that it had previously applied *Turner* deference "*only* to rights that are 'inconsistent with proper incarceration,'"[215] and emphasized that *Turner* deference rested on the need to limit "certain privileges and rights . . . in the prison context."[216]

Following *Turner*, deference in the prison context has stymied jurisprudential development and consequently resulted in questions about the scope of incarcerated persons' constitutional rights being answered en-

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California, 543 U.S. 499, 510 (2005) (rejecting a call to apply *Turner* deference in a race discrimination case because the Court had applied such deference "*only* to rights that are 'inconsistent with proper incarceration'" (quoting *Overton*, 539 U.S. at 131)).

210. Raja Raghunath, A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?, 18 Wm. & Mary Bill Rts. J. 395, 400 (2009).

211. Unsurprisingly, numerous scholars have offered stringent critiques of the deference to prison officials offered in *Turner*, despite the security issues. See, e.g., Eric Berger, Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making, 91 B.U. L. Rev. 2029, 2045–47 (2011) (arguing that deference to prison authorities is not always justified); Dolovich, Forms of Deference, supra note 207, at 249 (arguing that the Supreme Court has been excessively deferential to defendants in prisoners' rights cases); James E. Robertson, The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules, 53 Okla. L. Rev. 161, 182–87 (2000) (critiquing the Supreme Court's deference to prison authorities due to supposed greater expertise); David M. Shapiro, Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny, 84 Geo. Wash. L. Rev. 972, 989–94 (2016) (providing examples of dubious justifications for prison rules resting on institutional security and critiquing *Turner*); Shay, supra note 208, at 341 (noting that *Turner* demands deference regardless of the formality of the policy or practice at issue).

212. 543 U.S. 499, 502–03 (2005).

213. Id. at 505.

214. Id. at 509.

215. Id. at 510 (quoting Overton v. Bazetta, 539 U.S. 126, 131 (2003)).

216. Id.

tirely in relation to rationales for restrictions offered by supervision authorities.[217] There is no good reason to follow the same path with regard to the constitutional rights of supervisees. Community supervision officials do not secure buildings, need to prevent escapes, or regulate contraband. Supervisees live in society with few restrictions on their movement and are members of free communities. Accordingly, the core justification for *Turner* deference does not exist and it should therefore not apply when supervisees challenge conditions that infringe on their familial integrity rights.

B. *The Need for Heightened Scrutiny*

Given that the primary rationale underlying *Turner* deference is inapposite, the question remains of whether the ordinary heightened scrutiny standards ought to apply to cases involving familial integrity rights in the community supervision context. They should for two reasons. First, the flexible nature of heightened scrutiny allows courts to account for all relevant interests, including public safety, and promotes coherent doctrinal development. Second, without heightened scrutiny, deference to community supervision authorities encourages the imposition of unjustified restrictions, perpetrating significant harm on supervisees and their loved ones and undermining community supervision's core rehabilitative purpose. Each reason is addressed below.

As Part II explains, familial integrity rights are among the few rights that implicate fundamental liberty interests protected by substantive due process. As such, deviation from the standard of heightened scrutiny should be reserved for unique cases in which important interests will not receive sufficient protection. There are no such concerns in the community supervision context.

Heightened scrutiny is flexible by nature and requires balancing individual and state interests.[218] Accordingly, if a supervisee challenges a family separation condition, heightened scrutiny allows supervision authorities to assert any and all justifications for the separation. If a court finds such a proffered justification compelling, it may sustain the condition if it is appropriately tailored to the justification. Alternatively, it could find that a variation on the restriction is appropriate. For example, if a supervisee convicted of a sex offense challenges an attempt to ban contact with all children because they want a relationship with their own child, a supervision agency would remain free to offer justifications concerning any topic,

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217. Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1301–02 (2006) (making this argument with regard to deference to prison officials); see also Dolovich, Forms of Deference, supra note 207, at 246 (noting that the holding in *Turner* "is itself deferential, creating a space in which prison officials can violate constitutional rights if they can show that doing so facilitates the running of a prison").

218. See supra section II.A.

including child safety, in support of such a ban. Narrow tailoring would demand, however, a close nexus between the proffered justification and the restriction. Courts typically examine the necessity of the infringement and whether the infringement is overinclusive or underinclusive.[219] In this hypothetical, a court could inquire into whether a supervisee poses a threat to their own child and whether restrictions on contact short of a total ban would be sufficient to protect the supervision agency's interest in child safety. Thus, heightened scrutiny does not undermine public safety and also recognizes the fundamental nature of familial integrity rights.

In this way, familial integrity rights stand in stark contrast to Fourth Amendment jurisprudence, which often utilizes bright-line rules.[220] For example, a warrant requirement is usually inflexible. Once applied, the administrative burden on the government to institute searches is high, as is the cost of violating the warrant requirement—the suppression at trial of evidence obtained without a warrant.[221] The rigidity of the warrant requirement arguably undermines public safety by hindering the prosecution of crimes that could be proven with suppressed evidence. Heightened scrutiny of familial integrity rights does not impose similar costs on the government.

One could argue that heightened scrutiny inappropriately removes decisionmaking around familial integrity questions from the appropriate entity—supervision authorities—and instead gives it to the courts. But this contention presumes that supervision authorities have greater expertise in assessing the impact of contact with close family members than courts and therefore deserve deference. This is not the case. While prison authorities arguably have expertise in prison security needs, probation and parole officers are not uniquely able to assess whether restricting or banning a supervisee's contact with a child, spouse, or other close family member is necessary to promote public safety and rehabilitation.

Courts are fully capable of weighing evidence and evaluating familial integrity interests. The federal criminal legal system provides an excellent example of judges applying heightened scrutiny to supervision conditions without sacrificing public safety. As Part I indicates, federal judges assess whether supervised release conditions "involve[] no greater deprivation

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219. See Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1326–32 (2007) (describing judicial treatment of narrow tailoring and its "significant, unresolved ambiguities").

220. See Donald A. Dripps, The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules, 74 Miss. L.J. 341, 352 (2004) (describing development of bright-line Fourth Amendment rules).

221. See Wayne R. LaFave, 2 Search and Seizure: A Treatise on the Fourth Amendment § 4.1(b) (6th ed. 2020) ("[I]t may well be that, as a practical matter, the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to prevent those police practices that would be most destructive of Fourth Amendment values.").

of liberty than is reasonably necessary" before they are imposed.[222] This standard strongly resembles the heightened scrutiny demanded by the Constitution in considering familial integrity rights.[223] Federal criminal defendants have the opportunity to contest proposed supervised release conditions during the sentencing process and even upon release from prison.[224] Federal judges regularly adjudicate disputes about supervised release conditions. Thus, the government is able to offer evidence in support of proposed family separation conditions and courts evaluate it. The federal experience suggests that supervision authorities are not the only entities that can claim competence to address familial integrity questions.

Given its flexible nature, heightened scrutiny costs supervision authorities little to nothing. It also has the significant benefit of mitigating the risk that supervisees, a politically unpopular group, will be subject to unjustified family separation conditions. Supervision authorities often suffer from tunnel vision that makes them lean toward more restrictions, despite the constitutional interests at stake, making deference especially dangerous.[225] This risk is exacerbated by the authoritarian nature of supervision agencies that are unaccustomed to any scrutiny, whether judicial or political.[226] Heightened scrutiny does not allow the invocation of vague rehabilitation goals or risks that are not grounded in reality, thus according familial integrity rights the protection their fundamental nature demands.

In addition, offering deference to supervision authorities with regard to familial integrity rights in place of heightened scrutiny perpetrates significant harm on people who are not subject to control of the criminal legal system. These harms may be especially significant for children separated from their parents. The harms of family separation resulting from incarceration are well documented and apply with equal measure to separation resulting from supervision conditions.[227] Children separated from

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222. 18 U.S.C. § 3583(d)(2) (2018).

223. See supra section II.A.

224. See supra notes 57–59 and accompanying text.

225. See Berger, supra note 211, at 2093 ("Agencies sometimes become tunnel-visioned, focusing so much on policy goals that they ignore other important values, including constitutional ones.").

226. See Erwin Chemerinsky, The Constitution in Authoritarian Institutions, 32 Suffolk U. L. Rev. 441, 458 (1999) (arguing that judicial deference to authoritarian institutions can be dangerous because "first, the authoritarian nature of these institutions makes them places where serious abuses of power and violations of rights are likely to occur; and second, the political process is extremely unlikely to provide any protections in these arenas").

227. See Philip M. Genty, Damage to Family Relationships as a Collateral Consequence of Parental Incarceration, 30 Fordham Urb. L.J. 1671, 1674 & n.23 (2003) (collecting studies on the harms of children's limited contact with their incarcerated parents); Ross D. Parke & K. Alison Clarke-Stewart, The Effects of Parental Incarceration on Children: Perspectives, Promises, and Policies, *in* Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities 189, 192 (Jeremy Travis & Michelle Waul eds., 2003) (examining factors that influence how parental incarceration impacts children,

their parents due to incarceration "always experience the loss of a parent as a traumatic event," which hinders their development and may lead to maladaptive responses.[228] The same harms unfold when children are separated from their parents in the child-welfare context.[229] There is no reason to believe the separation of children from their parents due to supervision conditions is less traumatizing. Indeed, trauma may be intensified when family separation conditions bar all contact, including phone calls and text messages, as well as in-person visits.[230]

Adults suffer from family separation as well. As a result of family separation conditions, spouses may be banned from contacting each other—and may become effectively divorced. Couples subject to family separation conditions effectively have second-class status and do not enjoy the benefits of marriage extolled by, among others, the Supreme Court in *Obergefell v. Hodges*.[231]

Family separation conditions may also extend to adults who play important supportive roles in supervisees' lives. For example, there are certainly many young adults with parents who have decades-old conviction records. Given the widespread use of conditions that ban contact with people who have criminal records or are under supervision, when such a

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including prior living arrangements and who cares for them while their parents are incarcerated).

228. Jeremy Travis & Michelle Waul, Prisoners Once Removed: The Children and Families of Prisoners, *in* Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities, supra note 227, at 1, 16–17.

229. See Shanta Trivedi, The Harm of Child Removal, 43 N.Y.U. Rev. L. & Soc. Change 523, 527–40 (2019) (summarizing research on the emotional and psychological harm created by separating a child from their parent).

230. Of course, family separation conditions that result in severed ties between parents and children will not be harmful in every case. In some cases, it may be beneficial. But even children who do not have strong and uniformly positive relationships with their parents may suffer from the total loss of their parent, as family separation conditions sometimes demand. See Sara Wakefield & Christopher Wildeman, Children of the Prison Boom: Mass Incarceration and the Future of American Inequality 46 (2013) (explaining that "[t]he pool of incarcerated parents is . . . complex . . . and includes involved parents, abusive parents, and many that fall somewhere in between," and noting that even contact with "parents who are inconsistently involved with their children may still represent a net gain for them").

231. The Supreme Court was unequivocal about the benefits of the marital relationship in *Obergefell*:

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

576 U.S. 644, 656–57 (2015).

young person leaves prison they may find themselves cut off from the family members who are well poised to support their reentry to the community.[232] Furthermore, the concentration of these harms, both racially and geographically, should not be ignored.[233] In line with the criminal legal system's well-documented patterns of enveloping certain communities, family separation conditions are highly likely to disproportionately impact Black supervisees and their families.[234] For all familial relationships close enough to enjoy constitutional protection, the harms created by supervision authorities demanding zero or limited contact are substantial. To borrow an insight asserted about the family separation caused by U.S. immigration laws, they constitute "slow death" or "slow violence," causing damage that is not spectacular but real nonetheless.[235]

At bottom, the chief aim of community supervision is reentry and support for supervisees to live productive lives, not punishment. Parole's primary purpose is to facilitate reentry to society—where a former parolee will not be subject to supervision at all.[236] Probation is supposed to provide an opportunity to avoid both prison and, by definition, restrictions on the freedoms inherent in normal life. Overly restrictive supervision conditions, such as family separation conditions, ultimately interfere with bringing supervision to its expected conclusion: rehabilitation.[237] Extreme deference to supervision authorities that results in the expansive use of family separation conditions does not accord with these rehabilitative goals.

C. *The Counterargument*

The main counterargument to these points is that community supervision is simply a manifestation of criminal punishment, a context in which

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232. Bruce Western, Homeward: Life in the Year After Prison 101–20 (2018) (describing the value of supportive relationships upon release from prison and associated challenges); Stephen J. Bahr, Lish Harris, James K. Fisher & Anita Harker Armstrong, Successful Reentry: What Differentiates Successful and Unsuccessful Parolees?, 54 Int'l J. Offender Therapy & Compar. Criminology 667, 686 (2010) (finding, in a study of parolees over three years following release from prison, that parolees who avoided recidivism cited supportive family relationships as an important resource); Elizabeth Marlow, Adeline Nyamathi, Alejandra Bautista & William Grajeda, "But, Now, You're Trying to Have a Life": Family Members' Experience of Reentry and Reintegration, *in* And Justice for All: Families & the Criminal Justice System (Joyce A. Arditti & Tessa le Roux eds., 2015) (same); Dina R. Rose & Todd R. Clear, Incarceration, Reentry, and Social Capital: Social Networks in the Balance, *in* Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities, supra note 227, at 313, 331–35 (same).

233. See supra section I.B.

234. See supra note 9 and accompanying text.

235. Stephen Lee, Family Separation as Slow Death, 119 Colum. L. Rev. 2319, 2322–24 (2019).

236. Scott-Hayward, supra note 26, at 432 (citing Morrissey v. Brewer, 408 U.S. 471, 477 (1972)).

237. Klingele, supra note 7, at 1061.

narrow constructions of constitutional rights, even fundamental ones, are routine and justified by our criminal legal system's retributive purpose. If community supervision is a privilege whereby someone is not incarcerated due to the state's exercise of grace, the rights restrictions associated with incarceration can and should be extended to community supervision. Accordingly, *Turner*'s demand for mere reasonableness review applies to restrictions on supervisees' constitutional rights just as it does to those of incarcerated people. But the privilege theory is dubious at best.

As Fiona Doherty has explained with regard to probation, the notion that all probationers would be incarcerated if they were not on probation both undermines the fundamental rationale for probation and does not reflect the realities of our correctional systems.[238] "The original idea of probation, as explained by the Supreme Court in 1928, was the avoidance of prison"[239] and its related hardships. Thus, restricting rights on the theory that the probationer's rights would be similarly narrow if they were incarcerated turns the logic of probation on its head. Furthermore, probation is in such widespread use that it is not a true alternative to prison.[240] There are roughly two million people incarcerated in the United States,[241] but close to four million on probation.[242] It is simply impossible to send every probationer to prison.

A similar argument applies to parole and other forms of post-release supervision. Although some parole authorities exercise discretion in making parole decisions,[243] many states impose fixed sentences of incarceration followed by periods of mandatory post-release supervision.[244] In those cases, post-release supervision is not a privilege at all; it is mandated by statute for all people convicted of certain offenses. States are not acting benevolently toward people in this category and extending grace by generously letting them spend time outside of prison that courts sentenced them to spend inside prison. Rather, they are subjecting them to additional scrutiny and surveillance without an individualized demonstration of need for such scrutiny and surveillance. There is no privilege in play.

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238. Doherty, Obey All Laws and Be Good, supra note 26, at 334–42.

239. Id. at 341 (citing Cook v. United States, 275 U.S. 347, 357 (1928) ("What was lacking in [executive clemency and parole] provisions was an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance granted before actual imprisonment should stain the life of the convict.")).

240. Id. at 337–42 (providing data on the high number of people on probation throughout the United States and explaining that many probation terms are served "either in addition to prison, or in situations where prison would not have been imposed").

241. See supra note 3 and accompanying text.

242. Kaeble, supra note 3, at 1.

243. See Scott-Hayward, supra note 26, at 433–44 & nn.85–92.

244. Ruhland et al., supra note 36, at 37–38 ("Of 37 respondents, 16 states (43%) indicated there is a minimum period of time that released individuals must serve on parole before acquiring eligibility for final discharge.").

And for those who have been granted discretionary parole, it has been awarded on the basis of a conclusion that the parolee has been rehabilitated enough to enjoy life in free society.[245] In both cases, the circumstances surrounding release do not suggest that the right to associate with close family members should be narrowed on the basis of the parolee's status. Similar to probation, a grant of discretionary parole is effectively a recognition of a low risk of recidivism. After such a determination, allowing the severe circumscription of parolees' rights by offering *Turner*-like deference to supervision authorities defies logic.

While the retributive purpose of criminal punishment theoretically justifies limited protection for supervisees' rights, it stands in serious tension with the rehabilitative purpose of criminal punishment, particularly in the supervision context. The ultimate goal of rehabilitation is to ensure that people who have committed crimes live freely without running afoul of criminal laws. Moving toward freedom requires trust that a supervisee is able to live outside an institution without strict regulation of either their movement or interactions with other people. As we all do, supervisees make countless choices about the people with whom they associate and pass time. Gaining the opportunity to make those choices without restriction is an essential component of rehabilitation, especially since, for most, supervision is time limited. While supervision authorities should retain some ability to regulate supervisees' relationships, extreme deference to them undermines efforts to vest supervisees with the autonomy that is inherent in rehabilitation.

Moreover, deference to supervision authorities in this context can result in serious harm to supervisees' families. One family member being subjected to supervision does not change the importance of the relationship. The bonds among supervisees and their children, spouses, parents, siblings, and extended family members are as strong as those of others. As the Supreme Court declared in *Turner*, the value and benefits of marriage are "unaffected by the fact of confinement or the pursuit of legitimate corrections goals."[246] The same is true of other close familial relationships protected by the Constitution, including, among others, parent–child relationships.

In sum, courts should not give the familial integrity rights of supervisees short shrift. They can account for the significant interests underlying those rights *and* public safety by utilizing heightened scrutiny. Utilizing a deferential standard of review in the supervision context, as the Supreme Court has required in constitutional challenges brought by incarcerated people, is unjustified and unnecessary. Rather than excessive deference, robust judicial oversight supports supervision's rehabilitative purpose and

245. Cohen, supra note 43, § 4:30.

246. Turner v. Safley, 482 U.S. 78, 96 (1987).

protects the fundamental constitutional rights of supervisees and their loved ones.

IV. RECOMMENDATIONS

Family separation as a result of community supervision conditions implicates fundamental constitutional rights, but both the courts and the authorities that impose them frequently fail to recognize as much. Often with judicial approval, probation and parole agencies invoke a mantle of "reasonableness" to impose such conditions, despite the sometimes devastating consequences for both supervisees and their loved ones. They should instead recognize that the conditions they devise trod on highly protected ground and that they are ill-equipped to make the sensitive decisions that determine whether families remain intact. Courts should apply heightened scrutiny when supervisees challenge family separation conditions for the reasons explained above. But simply turning to that standard in the rare case when a supervisee mounts a court challenge to family separation conditions is insufficient to offer adequate protection. Criminal justice policymakers, including state legislatures and supervision authorities, must recognize the constitutional values at stake and offer protections that accord with procedural due process standards.

When family separation conditions are at issue, due process demands procedures that are "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case."[247] In accordance with the three-factor test announced in *Mathews*,[248] procedural safeguards far stronger than the unreviewable whims of probation and parole officers are necessary.

The private interests implicated by family separation conditions—belonging to both supervisees and their family members—are often of paramount importance. As described above, the constitutional protection accorded to familial relationships exists on a sliding scale. At the zenith are relationships between parents and children, as well as spouses, which enjoy substantive due process protection.[249] Other relationships, such as

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247. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (internal citation omitted) (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970)).

248. The three factors are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." See supra text accompanying note 120 (providing the three factors of the *Mathews* test).

249. See supra sections II.A.1–.2 (describing due process protections for parent–child and spousal relationships).

those between siblings, grandparents and grandchildren, and extended family, are entitled to less but likely still some protection.[250]

Accordingly, when supervision authorities propose to separate a supervisee from their child or spouse, a hearing convened after notice and before a neutral arbiter that allows the supervisee an opportunity to contest a proposed separation is essential.[251] For other constitutionally protected familial relationships, states should ensure that administrative mechanisms are available to ensure that family separation conditions are, at the very least, reviewable and that a supervisee has the opportunity to be heard. These procedural protections are critical given that supervisees outside of the federal criminal legal system do not usually have a right to counsel and judicial review of conditions is not available as a practical matter.[252]

States can take numerous steps to ensure that their community supervision systems comply with these standards. Experiences in other contexts, as well as due process jurisprudence, make clear that states have flexibility in devising procedures that accord with procedural due process standards.[253]

This Article proposes first that states utilize existing family court systems to address the sensitive questions that arise when supervision conditions would separate supervisees from their children or spouses. As indicated above, certain convictions trigger the initiation of family court proceedings regarding a defendant's custody and visitation arrangements with his children in numerous states.[254] States can create a similar trigger for family separation conditions.

Making family courts the primary forum where questions regarding custody and visitation are adjudicated would both recognize the gravity of the constitutional rights surrounding familial integrity and bring coherence to a byzantine system in which probation and parole officers are sometimes making decisions around family ties that have profound consequences. This shift would also offer practical benefits.

As described in Part II, family law provides the legal standards that govern decisions regarding separation between parents and children in

250. See supra section II.A.3 (describing the right to intimate association).

251. See Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279–1305 (1975) (describing elements to be evaluated in determining what due process protections are required).

252. See supra section I.A.

253. Jason Parkin, Dialogic Due Process, 167 U. Pa. L. Rev. 1115, 1134–47 (2019) (providing examples of "bottom-up procedural innovation" in which policymakers have implemented procedural innovations without courts ordering them).

254. See supra note 168 and accompanying text.

the context of proceedings concerning child custody, visitation, and termination of parental rights.[255] States can and should explicitly adopt these standards for consideration of family separation conditions. Family courts' extensive experience in applying these standards would inure to the benefit of supervisees and their families.

Further, family courts offer relatively robust procedural protections that would aid supervisees and their families. Attorneys often play important roles in proceedings concerning child custody, visitation, and termination of parental rights, whether as counsel for parents or children. Although the Supreme Court has held that the appointment of counsel is not necessarily constitutionally required when a state initiates proceedings to terminate parental rights,[256] the majority of states provide counsel as a matter of right in such cases.[257] New York provides a right to counsel for parents in all child custody cases.[258] Some states provide a right to counsel for children in custody or visitation proceedings.[259] Attorneys could offer significant assistance to supervisees who wish to assert their rights to maintain contact with their children. States can and should choose to provide counsel in the context of proceedings involving the separation of parents and children.[260]

In addition, family courts commonly appoint a guardian ad litem to ensure consideration of the child's perspective.[261] A guardian ad litem functions as an independent advocate who asserts a child's best interests

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255. Similarly, operating parallel to criminal law, family law governs the regulation of certain aspects of spousal relationships.

256. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–34 (1981) (explaining that no routine right to counsel exists for parents seeking to defend against termination of their parental rights, but instead that such a right depends on the circumstances of the case).

257. See Laura K. Abel & Max Rettig, State Statutes Providing for a Right to Counsel in Civil Cases, 2006 Clearinghouse Rev. 245, 252–62 (2006) (providing a list of state right-to-counsel statutes); Bruce A. Boyer, Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of *Lassiter v. Department of Social Services of Durham*, 36 Loy. U. Chi. L.J. 363, 367–68 (2005) (pointing out how most states provide counsel in termination cases even post-*Lassiter*). Some states also guarantee counsel in such cases initiated by private parties rather than the state. See Clare Pastore, A Civil Right to Counsel: Closer to Reality?, 42 Loy. L.A. L. Rev. 1065, 1069 & n.17 (2009).

258. Laura K. Abel, Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws, 42 Loy. L.A. L. Rev. 1087, 1089 & nn.8–10 (2009).

259. Abel & Rettig, supra note 257, at 245–46 & nn.10 & 13.

260. As indicated in Part I, many supervisees facing conditions imposed by state criminal justice systems do not have access to attorneys in challenging their conditions. While attorneys often play a role in proceedings where probation conditions are set, the same is not true in parole and other post-release supervision systems.

261. Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, Legal and Ethical Issues Confronting Guardian Ad Litem Practice, 13 J.L. & Fam. Stud. 43, 44 (2011) (discussing how guardians ad litem play a central role in state family and juvenile courts).

but is not necessarily an attorney.[262] Judges often appoint a guardian ad litem in custody proceedings and other proceedings in which a judge determines that such an appointment will be useful to identifying the child's best interests.[263] Although there are numerous models for a guardian ad litem's role, the most common is that of an investigator who reviews relevant records, meets with the child, and interviews parents and other persons knowledgeable about the issues related to the proceeding, such as therapists and healthcare providers.[264] When a proposed family separation condition limits a parent's access to their child, a guardian ad litem could play a valuable role in identifying a child's interests and perspective.

Family courts are accustomed to addressing the challenging questions that sometimes arise with respect to parent–child contact when a parent has a history of criminal activity.[265] They are able to draw upon a variety of tools that permit continued contact when appropriate and accord with constitutional standards.[266] When contact is not advisable, orders of protection are usually available.[267] This approach stands in stark contrast to family separation conditions imposed by supervision authorities that often eliminate all contact.

Family courts can also play a valuable role in addressing family separation conditions that concern relationships between adults, such as a supervisee and their spouse. A post-deprivation remedy may be appropriate in such cases. For example, states can create mechanisms by which the spouse of a supervisee can pursue judicial intervention in family court if they wish to restore contact with the supervisee. Such a review could function similarly to those used in proceedings regarding civil orders of protection.[268]

Despite these arguable benefits of the family court system, it is important to recognize that family courts and the standards utilized therein are worthy of criticism. For example, the "best interests of the child" standard is extraordinarily malleable.[269] And bias in family courts is a pressing

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262. Id. at 43–44, 46 (observing that "[t]he investigator role is by far the most common role for the [guardian ad litem]").

263. See id. at 45 (pointing out how, among other things, a judge appoints a guardian ad litem when determining that it would be in the ward's best interest); Rutkin, supra note 22, § 32.06.

264. Boumil et al., supra note 261, at 46 & nn.22–23.

265. See Ahrens, supra note 167, at 737 (describing states and courts taking into account criminal conduct in custody proceedings).

266. See Goodmark, From Property to Personhood, supra note 165, at 275 (describing visitation options).

267. Id.

268. See Goldfarb, supra note 22, at 1528 (describing the process of modifying ongoing contact orders to add stay away provisions).

269. See Schneider, supra note 159, at 2219–25 (collecting criticisms of the best interests standard); Scott & Emery, supra note 159, at 69 (critiquing the malleability of the best interests standard); Mnookin, supra note 159, at 229 (same).

concern.[270] But the offices of probation and parole authorities do not fare better in comparison. Although imperfect, family courts are the logical location for the careful judicial review that due process standards demand of family separation conditions. They are specifically designed to adjudicate some of the hardest decisions our legal system makes—when to break up families and the especially thorny question of when children's ties to their parents should be severed.

Alternatively, states can ensure judicial review of family separation conditions in the criminal courts with appropriate standards. As described in section I.A, it is typical for courts to review probation conditions but not parole conditions in state criminal legal systems.[271] The federal criminal legal system requires judicial review of both probation and supervised release conditions, requiring that release conditions implicating fundamental rights must "involve no greater deprivation of liberty than is reasonably necessary."[272] The federal approach offers the significant benefit of ensuring review by a neutral arbiter at a hearing and demands a standard comparable to heightened scrutiny, as constitutional doctrine requires. States could adopt an approach similar to the federal system and routinely allow criminal courts to evaluate supervision conditions.

It is worth noting that supervision authorities themselves could also offer internal review of family separation conditions, providing greater procedural protections than existing safeguards in many jurisdictions. For example, New York offers parolees the option to appeal conditions that separate them from their children to parole bureau chiefs and then regional directors within the Department of Corrections and Community Supervision.[273] The downsides of this internal administrative review are significant in comparison to the use of a judicial apparatus, as suggested above. This approach does not offer a truly neutral arbiter of these difficult questions, and there is no reason to believe internal parole bureaucrats have expertise in the sensitive questions surrounding potential family separation. But even internal administrative review would offer an avenue of relief to supervisees whose access to close family members is often dictated by the whims of probation and parole officers. This approach may be ap-

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270. See Tonya L. Brito, David Pate, Jr. & Jia-Hui Stefanie Wong, "I Do for My Kids": Negotiating Race and Racial Inequality in Family Court, 83 Fordham L. Rev. 3027, 3029–30 (2015) (describing the harm arising from a race-neutral approach); Solangel Maldonado, Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes, 55 Fam. Ct. Rev. 213, 214 (2017) (discussing the influence that racial, ethnic, and cultural factors have on evaluating parents' behaviors and testimony).

271. See supra notes 35–38 and accompanying text.

272. 18 U.S.C. § 3583(d)(2) (2018) (requiring that release conditions implicating fundamental rights must "involve[] no greater deprivation of liberty than is reasonably necessary").

273. See supra notes 98–101 and accompanying text.

propriate for addressing family separation conditions that regulate relationships entitled to some, but not the greatest, constitutional protection.

In sum, states must recognize the fundamental constitutional interests at stake when it comes to family separation conditions. They should ensure that appropriate procedural protections are available in such cases. Routing the disputes around the most highly protected relationships—between parents and their children, as well as spouses—to family courts would bring much-needed expertise and experience to bear on these sensitive questions that need to be addressed appropriately. Mirroring the federal system, routine oversight by criminal court judges utilizing sufficiently stringent standards would also be a marked improvement from the practices of many community supervision programs.

CONCLUSION

As the role of community supervision programs in the American criminal legal system continues to grow, legal scholars must grapple with questions surrounding the rights of the millions who live in its grips. Family separation conditions are just one manifestation of the many restrictions that make community supervision closely resemble incarceration, in contravention of the central rationale for its use.

This Article does not advocate that supervisees should have unfettered access to any and all relatives, particularly children, merely because of familial connection. Instead, it suggests that the constitutional rights of supervisees remain intact despite involvement in the criminal legal system. The basic fact that a person is under supervision of the criminal legal system does not compel abrogation of the fundamental rights to parent children, marry, and maintain intimate association, nor traditional family law concepts and norms more broadly. Applying heightened scrutiny to family separation conditions strikes the appropriate balance by allowing the government to assert public safety rationales but not relegating supervisees' familial bonds to second-class status. To support rehabilitation and reentry, family separation conditions should be imposed only with the appropriate procedural protections that fundamental rights require.

A diverse set of voices, including prominent think tanks and rapper and entrepreneur Shawn "Jay-Z" Carter, are calling to reduce the use of incarceration *and* community supervision.[274] They are gaining traction. But because most states require some form of community supervision following incarceration and the use of probation is growing, states and the federal government will continue to subject millions to intense scrutiny

274. See, e.g., Confined and Costly, supra note 47; The Pew Charitable Trusts, supra note 47; Jay-Z, Opinion, The Criminal Justice System Stalks Black People Like Meek Mill, N.Y. Times (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/opinion/jay-z-meek-mill-probation.html (on file with the *Columbia Law Review*).

when they are living in communities. Respecting supervisees' constitutional rights not only ensures justice but also promotes rehabilitation and reentry goals.

APPENDIX

Relevant quotations of cited parole conditions are reproduced below. Unless an online source is provided, all material was provided to the author in response to requests made pursuant to freedom of information laws.

State	Conditions/Limitations
CA	**Contact With Minors/Sex Offenders** "You shall not have contact with any minor male/female you know or reasonably should know is under the age of 18. 'No contact' means no contact in any form, whether direct or indirect, personally, by telephone, by writing, electronic media, computer, or through another person, etc., excluding biological or adopted children."[275] "You shall not have any contact with any minor male/female you know or reasonably should know is between the ages of 13 and 18. 'No contact' means no contact in any form, whether direct or indirect, personally, by telephone, by writing, electronic media, computer, or through another person, etc., excluding biological or adopted children."[276] "You shall not have contact with your biological or adopted children. 'No contact' means no contact in any form, whether direct or indirect, personally, by telephone, in writing, through electronic media, email, computer, or through another person, etc."[277] **Association Limits** "You shall not associate with any known sex offenders except as previously approved or instructed by your parole agent."[278] "You shall not have contact with co-defendants or other arrestees of your offense. 'No contact' means no contact in any form, whether direct or indirect, personally, by telephone, by writing, electronic media, computer, or through another person, etc."[279]

275. California Special Conditions, supra note 80, § 014.

276. Id. § 015.

277. Id. § 016.

278. Id. § 028.

279. Id. § 029.

	Special Conditions (Sex Offenders): "You shall not date, socialize or form a romantic interest or sexual relationship with any person who has physical custody of a minor."[280] "You shall inform all persons with whom you have a significant relationship; e.g., employer, dating, or roommate, about your criminal history, and you will inform your parole agent about the relationship."[281]
GA	**Contact With Minors/Sex Offenders** "I will not be with any child under 18 years of age unless an adult is present who has knowledge of my history of criminal sexual behavior and/or abusive behavior and who has been approved in writing as a chaperon by my Parole Officer."[282] "I will not reside in any residence, either permanently or temporarily, with persons under 18 years of age unless the child is my biological or adopted child and I have lawful custody or court approved visitation rights for said child. I will not work and/or volunteer for any business, organization or activity which provides services or care to children under 18 years of age or to persons over 18 years of age who are unable to give consent due to mental or emotional limitations."[283] "I will not have any contact with anyone under 18 years of age whether in person or through any means of communication; nor will I attend any place of business, amusement, social event, or gathering of any type for the purpose of coming in contact with minors. Except as authorized by the Parole Board or my Parole Officer, I will not create, possess, access or control any type of photograph, video, rendering or digital imagery of any person under 18 years of age."[284] **Association Limits** No relevant standard parole conditions.[285]

280. Id. § 021.

281. Id. § 022.

282. Georgia Special Conditions, supra note 85, § N.

283. Id. at 1–2.

284. Id. at 2.

285. See id. at 1–2.

IL	**Contact With Minors/Sex Offenders** "You shall refrain from all contact, directly or indirectly, personally, by telephone, letter, or through a third party, with minor children without prior identification and approval of an agent of the Department of Corrections."[286] **Association Limits** *Rules of Conduct Governing Parolees or Mandatory Supervised Releasees:* "You shall secure permission before visiting or writing a committed person in an Illinois Department of Corrections facility."[287] "You shall not knowingly associate with other persons on parole or mandatory supervised release without the prior written permission of your parole agent and shall not knowingly associate with persons who are members of an organized gang as that term is identified in the Illinois Street Gang Terrorism Omnibus Prevention Act."[288]
KY	**Contact With Minors/Sex Offenders** "I shall have no contact with anyone under the age of eighteen (18), unless it is specifically authorized by my Probation and Parole Officer and treatment provider, if I am in Sex Offender Treatment. 'Contact' means face-to-face, telephonic, any correspondence including electronic, written, and visual, or any indirect contact via third parties. 'Supervised contact' means that any contact with juveniles is to be physically monitored by a designated adult at all times. 'Physically Monitored' means being present to visually observe all contact. 'Designated Adult' means a responsible adult who has prior approval from my Officer and treatment provider, if applicable. There will be no overnight visits or lodging without prior approval."[289] "If incidental contact, which is defined as normal legal contact, with anyone under the age of eighteen (18) occurs I will report this contact to my Officer within twenty-four (24) hours."[290]

286. Illinois Supervised Release Agreement, supra note 82, § 26.

287. Id. § 6.

288. Id. § 13.

289. Kentucky Specialized Conditions, supra note 80, § 2.

290. Id.

	Association Limits "I understand that I shall avoid associating with any convicted felon and shall not visit residents of jails or prisons unless permission is obtained from my officer and institutional or jail authority."[291] "I shall not establish, pursue, nor maintain any dating and/or romantic and/or sexual relationship without prior approval of my Probation and Parole Officer and treatment clinician. I further understand that any relationship with another person who has minor children, whether in the home or not, shall be reported to my Officer and treatment clinician immediately."[292]
LA	**Contact With Minors/Sex Offenders** No relevant parole conditions.[293] **Association Limits** *Louisiana Committee on Parole Board Policy, 09-901-POL, dated October 26, 2020:* "I will not engage in criminal activity, nor will I associate with people who are known to be involved in criminal activity. I will avoid bars and casinos. I will refrain from the illegal use of drugs or alcohol."[294]
MI	**Contact With Minors/Sex Offenders** *Michigan Department of Corrections, Standard Special Conditions of Parole:* "You must not have any verbal, written, electronic, or physical contact with any individual age 17 or under, or attempt to do so, either directly or through another person."[295] "You must not live in a residence where any individual age 17 or under stays or is cared for. You must not provide care for any individual age 17 or under."[296] "You must not marry, date, or have any romantic involvement with anyone who resides with or has physical

291. Kentucky Conditions of Supervision, supra note 63, § 3.

292. Kentucky Specialized Conditions, supra note 80, § 6.

293. See Louisiana General Conditions for Parole, supra note 65, ¶¶ 1–12.

294. Id. § 4.

295. Michigan Standard Special Conditions, supra note 92, § 1.0.

296. Id. § 1.1.

	custody of any individual age 17 or under, without getting written permission from the field agent."[297] **Association Limits** *Michigan Department of Corrections, Standard Special Conditions of Parole:* Special Condition 4.8: "You must not provide care for any adults, age 62 or older, or for any disabled adults."[298]
MO	**Contact With Minors/Sex Offenders** *Missouri Department of Corrections, Division of Probation and Parole, Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional Release for Sex Offenders:* No relevant conditions.[299] **Association Limits** *Missouri Department of Corrections, Division of Probation and Parole, Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional Release for Sex Offenders:* "I will obtain advance permission from my Probation and Parole Officer before I associate with any person convicted of a felony or misdemeanor, or with anyone currently under the supervision of the Division of Probation and Parole. It is my responsibility to know with whom I am associating."[300] "Additionally, if you have family members who have been convicted of a felony or a misdemeanor, or are currently under the supervision of the Division of Probation and Parole, you need advance permission from your Probation and Parole Officer before associating with these individuals."[301]
NJ	**Contact With Minors/Sex Offenders** *New Jersey Administrative Code:* People on either community supervision for life (offense committed before January 14, 2004) or parole supervision for life (offense committed before January 14, 2004) due to

297. Id. § 1.3.

298. Id. § 4.8.

299. See Missouri Rules and Regulations, supra note 61, at 1–18.

300. Id. at 5.

301. Id.

	conviction for a variety of offenses are subject to restrictions:[302] *If victim was a minor* the offender shall "1. Refrain from initiating, establishing, or maintaining contact with any minor; 2. Refrain from attempting to initiate, establish, or maintain contact with any minor; and 3. Refrain from residing with any minor without the prior approval of the District Parole Supervisor or designated representative. Staying overnight at a location where a minor is present shall constitute residing with any minor for the purpose of this condition."[303] **Association Limits** *New Jersey Administrative Code:* No relevant parole conditions.[304]
NY	**Contact With Minors/Sex Offenders** B. "[I]n determining whether the releasee's child(ren) require protection from harm or danger presented by PC, the investigating Parole Officer will consider the following factors: . . . 5. For individuals with histories of one or more sex offense and/or histories of sexually inappropriate behavior(s): a. Persistence of sexually inappropriate behavior; b. Predatory and/or sadistic nature of the sexually inappropriate behavior; c. Proximity in time of prior sexually inappropriate behavior to the date of the PC request; d. Any current sex offender polygraph information on file; e. Any current sex offender treatment program evaluations or records that evaluate the releasee's current risk of sexually reoffending; and

302. N.J. Admin. Code § 10A:71-6.11(a) (2021) (community supervision for life); N.J. Admin. Code § 10A:71-6.12 (parole supervision for life).

303. Id. § 10A:71-6.11(c) (community supervision for life); id. § 10A:71-6.12(e) (parole supervision for life).

304. See id. § 10A:71-6.11(a) (community supervision for life); id. § 10A:71-6.12 (parole supervision for life).

	f. The age and nature of any case records that reveal specific prior behaviors of the releasee that indicate he/she has sexually abused or mistreated other minor children."[305] **Association Limits** No relevant parole conditions (standard conditions available at N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2 (2021)).[306]
OH	**Contact With Minors/Sex Offenders** "No contact with minors via the internet." "No unsupervised contact with minors (supervising adult must be approved by the APA)." "Offenders will not receive all of the below as special conditions; only those that are appropriate and have a nexus to that particular offender's current offense and prior criminal and supervision histories."[307] **Association Limits** "I will not enter the grounds of any correctional facility nor attempt to visit any prisoner without the prior written permission of my supervising officer. I will not communicate with any prisoner in any manner without first obtaining written permission from my supervising officer."[308] "No contact with any known STG member" (STG = security threat group).[309]
OR	**Contact With Minors/Sex Offenders** *"Sex Offender Package," Exhibit J to Oregon Administrative Rule 255-005:* "(b) A prohibition against contacting a person under 18 years of age without the prior written approval of the board, supervisory authority or supervising officer."[310]

305. New York Parental Contact Protocol, supra note 98, at 4.

306. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2 (2021).

307. E-mail from Brigid A. Slaton, Chief Hearing Officer, Ohio Parole Bd., to author (Sept. 9, 2019) (on file with the *Columbia Law Review*).

308. Adult Parole Auth., Ohio Dep't of Rehab. & Corr., DRC 3019, Conditions of Supervision § 5 (2017) (on file with the *Columbia Law Review*).

309. Ohio Corr. Inst. Inspection Comm., DRC Security Threat Groups 1 (2014) (on file with the *Columbia Law Review*); E-mail from Brigid A. Slaton, Chief Hearing Officer, Ohio Parole Bd., to author (Sept. 19, 2019) (on file with the *Columbia Law Review*).

310. Or. Admin. R. 255-080-0001 Ex. J, at 3 (2019), https://secure.sos.state.or.us/oard/viewAttachment.action?ruleVrsnRsn=257916 [https://perma.cc/BVN4-GYLV].

	Association Limits No relevant parole conditions.[311]
PA	**Contact With Minors/Sex Offenders** *Optional Special Conditions for Sex Offenders:* 1. "You must not have any contact with anyone under the age of 18 years old without the prior written approval of probation/parole supervision staff and if applicable, in agreement with your treatment provider. You must immediately report any of these contacts to your parole agent. Contact is defined as follows: (1) actual physical touching; (2) writing letters, sending messages, buying presents, sending email, sending instant messages, sending text messages, calling on a telephone/cell phone/blackberry; (3) and verbal communication, such as talking, as well as nonverbal communication, such as body language (waving, gesturing, winking), sign language and facial expressions; (4) direct or indirect contact through a third party."[312] 2. "You must not reside in any residence where a person under the age of 18 years old resides. Persons under the age of 18 years old must not visit or be present in the residence in which you reside or on the property without the prior written approval of probation/parole supervision staff and if applicable, in agreement with your treatment provider."[313] 3. "You must not loiter, attend, visit, or participate in events where the primary activity at such locations involve persons under the age of 18 years without the prior written approval of probation/parole supervision staff and if applicable, in agreement with your treatment provider. These areas include but are not limited to the following places: playgrounds, youth recreation centers, youth clubs, arcades, amusement parks, child daycare centers, elementary schools, high schools, elementary/high school bus stops, Special Olympic events, Boy Scout/Girl Scout meetings or events, county or community fairs and carnivals, or any similar areas where persons under the age of 18 years old commonly congregate."[314] 4. "You must not form an intimate or romantic/sexual relationship with any person who has full or partial physical custody, including visitation rights, of anyone under the age

311. See id. at 1–4.

312. Pennsylvania Optional Special Conditions for Sex Offenders, supra note 84, ¶ 1.

313. Id. ¶ 2.

314. Id. ¶ 3.

	of 18 years old without the prior written approval of probation/parole supervision staff and if applicable, in agreement with your treatment provider."[315] 5. "You must not participate, directly or indirectly, in any child sponsorship-type organizations or activities without the prior written approval of probation/parole supervision staff. These activities include but are not limited to the following: Big Brother/Big Sister, Boy Scout/Girl Scouts, foster child programs, fundraiser events conducted for or by persons under the age of 18 years, sponsoring/providing financial support to needy children overseas, sponsoring a child in a walkathon or marathon event, etc."[316] **Association Limits** *Supplemental Special Conditions for Sex Offenders:* "You must wear appropriate clothing when you are in public areas, social gatherings or in any areas where another person may be expected to view you. This excludes an appropriate, consensual intimate partner with whom probation/parole supervision staff has previously approved your relationship. Appropriate clothing does include undergarments. At all times, your breasts, nipples, genitalia, buttocks, midriff and pubic area must be covered and clothed."[317] "You must not form an intimate, romantic or sexual relationship with anyone unless you first inform the **person** that you are on probation/parole, that you are classified as a sex offender and of your complete criminal history. Within 72 hours of establishing this type of relationship, you must inform your parole agent of the relationship and provide your parole agent with the name, age, address and telephone number of the **person** you are involved with."[318] "You must not form an intimate, romantic or sexual relationship with anyone without the prior written permission of probation/parole supervision staff. You must provide your parole agent with the name, age, address and telephone number of the **person** you wish to form a relationship with. Prior to engaging in an intimate, romantic or sexual relationship with the **person**, you must inform the **person** that you are on probation/parole, that you are

315. Id. ¶ 4.

316. Id. ¶ 5.

317. Pennsylvania Supplemental Special Conditions, supra note 80, ¶ 8.

318. Id. ¶ 13.

	classified as a sex offender and of your complete criminal history."[319]
TX	**Contact With Minors/Sex Offenders** "D. Child Victim-Offenders shall: . . . . 3. Not reside with, have unsupervised contact with, or cause to be contacted, any child 17 years of age or younger, in person, by telephone, correspondence, video or audio device, third person, media, or any electronic means, unless the offender is the legally recognized parent of the child . . . . 4. Not have any unsupervised contact with any person 17 years of age or younger when the offender is not the legally recognized parent of a child 17 years of age or younger. The supervising Parole Officer also must approve in writing requests for residence and the chaperone for any authorized contact. 5. Not become involved in dating, marriage, or a platonic relationship with any person who has children 17 years of age or younger unless approved in writing by the offender's supervising Parole Officer."[320] *Procedure:* "III. Legally Recognized Parent A. In order to request that the parole panel impose restrictions on contact with a child 17 years or [sic] age or younger, when the offender is the legally recognized parent of that child, the supervising Parole Officer shall submit a transmittal along with a copy of the court's order which specially prohibits the legally recognized parent from having contact with their child(ren). B. The parole panel may impose the no contact conditions based upon the court's order. The no contact condition shall remain in effect for the duration of the court's order. If the court enters an order authorizing the legally recognized parent to have access to their child(ren), the supervising Parole Officer shall submit a transmittal along with the court's order requesting the parole panel withdraw the no contact condition. C. If the offender is the legally recognized parent of the victim of the offense, the panel shall impose Special Condition 'V', which requires that the offender not intentionally or knowingly communicate by any means

319. Id. ¶ 14.

320. Texas Special Condition "X", supra note 80, at 3.

	directly or indirectly with the victim of the offense or intentionally or knowingly go near a residence, school, place of employment, or business of a victim."[321] **Association Limits** "I shall avoid persons or places of disreputable or harmful character."[322]
WI	**Contact With Minors/Sex Offenders** *Special Sex-Offender Rules:* SSO-001: "You shall not have contact or attempt contact with anyone under the age of 18 without prior agent approval and unless accompanied by an adult sober chaperone approved by your agent. Contact includes face-to-face contact, contacts facilitated by third parties and any other forms of communication including but not limited to telephone, computer, mail or any other electronic or scientific means."[323] SSO-002: "You shall not be present in a location frequented by minor children without prior agent approval and unless accompanied by an adult sober chaperone approved by your agent." *When Are Special Rules Imposed?* "Impose other special rules as appropriate based on crime/victim dynamics"[324] • Offense involves child pornography • Hands-on offense involves children under age 18 (all male sex offenders + female sex offenders if victim under 13, but not if victim ages 13–18) • Hands-off offense involves children under 18 (facilitation) or includes co-offender (all sex offenders) • Sexual recidivist (new crime following punishment for prior crime) • Offender with both adult and child victims • Static-99R Score in Moderate or Higher Range (males only).[325]

321. Id. at 7.

322. Texas General Conditions of Parole Release, supra note 66, ¶ 5.

323. Wisconsin Special Sex Offender Rules, supra note 80, at 1.

324. Id. at 2.

325. Id. at 3–5, 7–8, 10.

	Association Limits *Special Sex-Offender Rules:* SSO-007: "You shall not establish, pursue, nor maintain any dating, romantic, or sexual relationship without prior agent approval."[326] *When Are Special Rules Imposed?* • Crime with adult victim • Sexual recidivist • Violence in commission of assault • Offender with both adult and child victims[327]

326. Id. at 1.

327. Id. at 4–8, 10.