

ON INMATES AND FRIENDSHIP

Jared Deeds*

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* JD Candidate, 2024, William & Mary Law School. Thank you to my loved ones for all of their support over the years of me and my writing, and thank you to the good people of the *William & Mary Bill of Rights Journal* for making this publication possible.

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To my friends.

INTRODUCTION

Of all human relationships, friendship is perhaps the most important. Indeed, Aristotle once wrote, “friendship is a certain virtue or is accompanied by virtue; and, further, it is most necessary with a view to life: without friends, no one would choose to live, even if he possessed all other goods.”¹ If Aristotle is right in claiming that friendship is a precondition to human flourishing—that man cannot live well without friends—then the value of friendship lies far beyond mere enjoyment and reaches to the core of human nature.

Philosophers, thinkers, and writers have long observed friendship’s inherent value. According to Plato, Socrates claimed friendship to be something he valued more “than the gold of Darius.”² And as Xenophon implied, Socrates likely thought friendship was of greater value than biological brotherhood.³ Shakespeare, by

¹ ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII, at 163 (Robert C. Bartlett & Susan D. Collins trans., Univ. Chi. Press paperback ed. 2012) (c. 384 B.C.E.).

² PLATO, *Lysis*, in *PLATO’S DIALOGUE ON FRIENDSHIP* 31 (David Bolotin trans., Cornell Univ. Press 1979) (c. 380 B.C.E.).

³ See XENOPHON, *MEMORABILIA* bk. II, at 46–64 (Amy L. Bonnette trans., Cornell Univ. Press 1994) (c. 371 B.C.E.) (dedicating four chapters to the topic of friendship but only one chapter to the topic of brotherhood). According to Xenophon, Socrates also acknowledged a deep connection between friendship and the practice of philosophy. See *id.* at bk. I, 30 (“just

contrast, wrote that friendship could overcome blood and evolve into brotherhood through the shared experience of great adversity.⁴ Cicero remarked, “They might as well steal the sun from the heavens as remove friendship from life! For nothing we have from the gods is better or more enjoyable than friendship.”⁵ Montaigne wrote that “[w]ithin a fellowship the peak of perfection consists in friendship,” and he found “the perfect friendship . . . is indivisible.”⁶ Taking a page from Aristotle, C.S. Lewis similarly wrote, “Friendship is unnecessary, like philosophy, like art, like the universe itself It has no survival value; rather it is one of those things which give value to survival.”⁷ J.R.R. Tolkien also venerated friendship throughout what is quite possibly the greatest fictional exposition of friendship (or fellowship, if you will) ever written.⁸ These beliefs are even supported by observational evidence showing that friendship has a tangible, positive impact on human health and lawful behavior.⁹

That humanity both cherishes friendship and finds it to be fundamental for its own good should be reason enough to justify its legal protection. Yet, there is a serious deficiency of legal discourse on the rights and liberties of friends in America’s courts.¹⁰ In the absence of such discourse—perhaps partially because of it—friendship as a social institution experiences a lack of legal protection in the

as another is pleased by a good horse or a dog or a bird, so I myself am even more pleased by good friends And reading collectively with my friends, I go through the treasures of the wise men of old which they wrote and left behind in their books; and if we see something good, we pick it out; and we hold that it is a great gain if we become friends with one another.”)

⁴ See WILLIAM SHAKESPEARE, HENRY V act 4, sc. 3, l. 62–64 (“We few, we happy few, we band of brothers; For he today that sheds his blood with me Shall be my brother . . .”).

⁵ CICERO, *LAELIUS DE AMICITIA* [How to be a Friend] 87 (Philip Freeman trans., Princeton Univ. Press 2018) (c. 44 B.C.E.).

⁶ MICHEL DE MONTAIGNE, *On Affectionate Relationships*, in THE COMPLETE ESSAYS 207, 215 (M.A. Screech trans., 1987).

⁷ C.S. LEWIS, THE FOUR LOVES (Harcourt Brace 1960), reprinted in THE C.S. LEWIS SIGNATURE CLASSICS 739, 789 (Harper Collins Publishers 2017).

⁸ See J.R.R. TOLKIEN, THE LORD OF THE RINGS (50th Anniversary ed. 2012); see also CRISTINA CASAGRANDE, FRIENDSHIP IN THE LORD OF THE RINGS (Eduardo Boheme trans., Luna Press Publishing 2022); Kaitlyn Facista, *Five Examples of Heroic Friendship in The Lord of the Rings*, TEA WITH TOLKIEN (Jan. 22, 2019), <https://www.teawithtolkien.com/podcast/2019/1/22/episode-7-squad-goals-friendship-in-middle-earth> [<https://perma.cc/9UDC-GEGD>]; Tugba Bozkaya, *Friendship in The Lord Of The Rings Trilogy*, MOZARTCULTURES (Apr. 7, 2018), <https://mozartcultures.com/friendship-in-the-lord-of-the-rings-trilogy/> [<https://perma.cc/DY6L-YKZJ>].

⁹ See *infra* Section I.B.

¹⁰ Interestingly, there is tacit recognition of friendship in the American legal system. Courts allow non-parties to a suit to file an amicus brief, with “amicus curiae” being a Latin phrase for “friend of the court.” *Amicus Curiae*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/amicus_curiae [<https://perma.cc/R2SR-H62M>] (last visited Dec. 4, 2023). Additionally, the legal name given to a party who appears in court on behalf of another is “next friend.” *Next Friend*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/next_friend [<https://perma.cc/MC8E-NSED>] (last visited Dec. 4, 2023).

United States.¹¹ Though all friends may be exposed to abuses as a result of deficient safeguards, inmates and their unincarcerated friends suffer with particular severity.¹²

Incarceration can cut off association between inmates and their legally innocent friends, thus denying inmates many of friendship's profound benefits. While it is understandable that correctional facilities obstruct some interactions between friends and inmates due to penological interests, over-restrictive policies on visitation and contact unwisely inhibit inmates from being rehabilitated through friendship. Nevertheless, the Supreme Court has enabled prison administrators to implement excessive limitations on visitation and contact because the Court has found that "freedom of association is among the rights least compatible with incarceration."¹³ Favoring penological interests over the interests of inmates and their friends, the Court has granted deference to prison administrators, who have gone so far as to fully prohibit in-person visitation and charge burdensome fees for prison phone calls.¹⁴ As a result, both inmates and their friends lose association and activity between themselves, which diminishes their friendships.¹⁵

Though the Court has left friendships between inmates and non-inmates vulnerable to abuse, these friends may still attempt to seek legal protections for their friendships.¹⁶ To that end, it would be useful to pursue protections for friendship as a constitutional liberty. Such a liberty interest exists under the First Amendment's provision for associational liberties.¹⁷ The First Amendment protects intimate associations, a status for which friendship should most likely qualify.¹⁸ This qualification would benefit all friends seeking to protect their ability to associate with each other under any legal context, and may especially help inmates and their friends to secure more access to visitation and contact so that they may continue to engage in their friendship throughout the duration of incarceration. Therefore, for the sake of safeguarding individual friends and the positive effects of friendship, courts must legally protect friendship as a First Amendment associational liberty.

Part I of this Note will further discuss the nature of friendship for the purpose of showing its personal and legal value, with particular attention paid to Aristotle's account of friendship in *Nicomachean Ethics*. Part II will provide background on

¹¹ The damage to friendship could perhaps be attributed to presence of democratic individualism and a taste for material goods in the United States, as discussed by Alexis de Tocqueville. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 482–92 (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1835). For further discussion on this point, see *infra* Section IV.D.3.b.

¹² See *infra* Section IV.C.

¹³ *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

¹⁴ See *infra* Section IV.C.2.

¹⁵ *Id.*

¹⁶ See *infra* Section IV.A (discussing a challenge to the restrictive visitation policies enforced in prisons under the Michigan Department of Corrections).

¹⁷ See *infra* Sections II.A–B.

¹⁸ See *id.*

associational liberties pertaining to friendship protections under the Supreme Court's ruling in *Roberts v. United States Jaycees*. Part II will also discuss the divisions between courts on whether *Roberts* actually extends associational liberty protections to friends and outline a legal argument that could be used in support of friendship protections. Part III will discuss potential legal definitions courts could use in making friendship determinations, arguing that the best definition would be found under judicial determinations using the Leib test. Finally, Part IV will analyze the available visitation and contact protections for friends in the inmate context in and beyond the scope of *Overton v. Bazzetta*.

I. ON THE NATURE AND VALUE OF FRIENDSHIP

Because legal discourse has largely overlooked the importance of legally protecting friendship, it would be prudent to discuss friendship's value to human life. After all, Aristotle wrote, “[i]t seems too that friendship holds cities together and that lawgivers are more serious about [friendship] than about justice.”¹⁹ As will be shown in the following discussion, friendship is something good not only for the individual friends, but also for society itself. Therefore, it would be beneficial for modern lawmakers—judges, lawyers, and legislators—to understand why friendship deserves legal protections.

A. On the Philosophy of Friendship

1. Friendship and Justice

Although friendship is not often considered a legal topic, further examination reveals the relationship between friendship and the law. Dialogue relating friendship to the law's penultimate topic—justice—is no stranger to ancient philosophy. A well-known conflict between friendship and the law can be found in Socrates' paradox of the weapon-lending friend in *The Republic of Plato*, which states:

[A]s to this very thing, justice, shall we so simply assert that it is the truth and giving back what a man has taken from another, or is to do these very things sometimes just and sometimes unjust? Take this case as an example of what I mean: everyone would surely say that if a man takes weapons from a *friend* when the latter is of sound mind, and the *friend* demands them back when he is mad, one shouldn't give back such things, and the man who

¹⁹ ARISTOTLE, *supra* note 1, at bk. VIII, at 164.

gave them back would not be just, and moreover, one should not be willing to tell someone in this state the whole truth.²⁰

It would generally be illegal and unjust to maintain possession of another's property without permission to do so.²¹ But, as pointed out by Socrates, the far greater injustice would be to return the sword to a friend in an unsound state of mind: doing so could hurt the friend or other persons.²² Additionally, it does not seem coincidental that Socrates made the weapon-lending paradox one between friends, rather than one between strangers.²³ There are far greater moral obligations to look out for the safety of friends than there are to look out for the safety of strangers. Being a good friend may require one to be dishonest, violate the law, and forgo rigid interpretations of justice.²⁴ Therefore, when one is faced with a legal and moral dilemma, the presence of friendship does not merely pose a complication for how people believe justice and the law should be applied. Friendship fundamentally changes that analysis.

2. Aristotle's Account of Friendship

a. An Overview of Aristotle's Account of Friendship and Complete Friendship

No discussion of the nature of friendship is complete without discussing Aristotle's *Nicomachean Ethics*, his philosophic work describing how humans could obtain happiness through living well.²⁵ Aristotle's discourse on friendship in books eight and nine of *Nicomachean Ethics* has been described as, and arguably is, the most complete account of friendship ever written, and not without good reason.²⁶ Put simply, Aristotle's evaluation of friendship is comprehensive. To name just a few topics discussed, Aristotle covered what made individuals apt to be friends, the love associated with friendship, types of friendships, how a friendship is maintained or dissolved, the character of friendship between superiors and inferiors, things friends should do for each other, and even how to be a friend to oneself.²⁷

²⁰ PLATO, THE REPUBLIC OF PLATO bk. I, at 7 (Allan Bloom trans., Basic Books 2d ed. 1968) (c. 375 B.C.E.) (emphasis added).

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See generally* ARISTOTLE, *supra* note 1.

²⁶ *See Aristotle on Friendship ft. Producer Jake*, THE NEW THINKERY, at 08:30 (June 15, 2022) (downloaded using Spotify) (statement of Dr. Gregory McBrayer) (“[T]here are other famous essays on friendship, and there are other portrayals of friendship, but [books eight and nine of Aristotle’s *Nicomachean Ethics*] seem to be the most sustained treatment of it as a theme, as a question, as a topic.”).

²⁷ *See* ARISTOTLE, *supra* note 1, at bks. VIII–IX, at 163–72, 185–87, 192–97, 207–09.

As previously quoted, Aristotle said that even having all other goods, one would not choose to live without friendship; friendship is needed to achieve happiness.²⁸ Though a bold statement on its face, it is far bolder in the context of *Nicomachean Ethics*.²⁹ Before the account of friendship, the seven prior books in *Nicomachean Ethics* were almost entirely focused on the solely personal needs of an individual for achieving happiness.³⁰ To then introduce an unequivocal need for friends to be happy—to find that one could not achieve happiness in solitude—was revolutionary.

Evidence for the necessity of friendship to human happiness manifests in Aristotle's discussion of what he considered to be the best friendship type: complete friendship.³¹ According to Aristotle, complete friendship was composed "of those who are good and alike in point of virtue" (meaning they were both virtuous individuals), and those who looked out for the good of the friend for that friend's sake rather than their own.³² Because complete friends were virtuous, looked out for each other, and enjoyed each other's companionship, these friendships were mutually beneficial to those involved.³³ Unlike other types of friendship, complete friendships were long-lasting.³⁴ Most importantly, of all the types of friendship Aristotle identified, complete friendship was the only one that could lead to happiness.³⁵

Aristotle mentioned a multitude of benefits to complete friendship,³⁶ but arguably the greatest was its ability to make the individual friends more virtuous and good,³⁷ which he claimed were prerequisites to happiness.³⁸ Additionally, Aristotle implied that becoming good could be painful and complete friends were integral for enduring this pain.³⁹ To this end, complete friends would be both useful and possibly necessary to bear the pain of becoming good.⁴⁰ Such a responsibility of complete friends is fitting. As complete friends would look out for the sake of their friend, they would undoubtedly stand by them through their pain in becoming good because this pain was for their own good.⁴¹ Lesser friends, by contrast, would likely run from the unpleasantness of sharing in this pain.⁴²

²⁸ *Id.* at bk. VIII, at 163; *see also id.* at bk. IX, at 202–05 (“[H]e who will be happy will need serious friends.”).

²⁹ *See generally id.* at bks. I–X.

³⁰ *See generally id.* at bks. I–VII.

³¹ *Id.* at bk. VIII, at 166–69.

³² *Id.* at 168–69.

³³ *Id.*

³⁴ *Id.*

³⁵ *See id.* at bk. VIII, 166–72.

³⁶ *See id.* at bks. VIII–IX.

³⁷ *Id.* at bks. VIII–IX, at 172–73, 208–09.

³⁸ *See id.* at bk. I, at 13, 23.

³⁹ *Id.* at bk. VIII, at 172–73.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See id.* bk. VIII, at 167 (describing how lesser friendships are easily dissolved when they are no longer useful or pleasant).

Turning to why friendship should be a chief concern of lawmakers, amongst the virtues previously discussed by Aristotle in *Nicomachean Ethics* was justice, which included being lawful.⁴³ Lawmakers of good societies are naturally interested in their citizens being just and law-abiding, for no lawmaker makes a law for the sake of it being disobeyed. Complete friends help each other to increase in virtue, including the virtues of justice and lawfulness.⁴⁴ If lawmakers legally encourage and foster complete friendships within their society, then society itself will grow increasingly just and lawful as a result.⁴⁵ Therefore, for the sake of building a just and lawful society, lawmakers must legally encourage the formation of complete friendships at all costs, while avoiding impediments to their growth as much as possible.

It is no wonder, then, why Aristotle found it best that complete friends “live together.”⁴⁶ To a certain extent, this was important to the friends themselves: being kept apart results in the inactivity of friendship which, if prolonged, can result in the friendship’s dissolution (an important fact to keep in mind for inmates who are over-restricted from engaging with their friends.)⁴⁷ But Aristotle argued that complete friends living together results in the exact thing good lawmakers seek: a “community” bound together in harmony by likeness in virtue, where everyone mutually looks out for one another’s well-being.⁴⁸ Thus, Aristotle found that to encourage completeness of friendship was to encourage the goodness and happiness of the regime.⁴⁹ For what regime could be better than one where citizens are complete friends?

b. Aristotle on Curative Friendship and the Rehabilitation of the Corrupt Friend

Finally, because it has direct import on inmates and their friends, Aristotle’s inquiry into corrupted friends must be addressed. Aristotle examined what a complete friend should do if a friend became corrupted by increasing in vice.⁵⁰ As lawfulness was a virtue to Aristotle, and lawlessness a vice, corruption often entail friends who acted lawlessly through criminal behavior (though corruption was certainly not limited to this scenario).⁵¹ Such situations remain prevalent today in friendships

⁴³ See *id.* at bk. V, at 90–92.

⁴⁴ See *id.* at bks. V, VIII–IX, at 90–92, 172–73, 177, 208–09.

⁴⁵ *Id.* at bk. VIII 177–78.

⁴⁶ *Id.* at bk. VIII, at 170–72.

⁴⁷ *Id.* at 170–71; see also Irene S. Levine, *Distance Matters: Surviving a Long-Distance Friendship*, PSYCH. TODAY (Aug. 17, 2010), <https://www.psychologytoday.com/us/blog/the-friendship-doctor/201008/distance-matters-surviving-long-distance-friendship> [<https://perma.cc/FU7Q-W9JS>] (“Even when two friends are tied together emotionally at the hip, it is simply less convenient to be friends from afar. Distance can compromise even the best of relationships.”).

⁴⁸ ARISTOTLE, *supra* note 1, at bk. IX, at 208–09.

⁴⁹ See *id.*

⁵⁰ *Id.* at bk. IX, at 192–93.

⁵¹ *Id.* at bk. V, at 90–91.

between innocent individuals and their inmate friends who are convicted and incarcerated for criminal activity. In these dire circumstances, Aristotle found that the virtuous friend may “cure” the corrupted one.⁵² Applying this concept to modern criminal law, the innocent friend may be able to help rehabilitate the criminal one.

As a corrupted friend was in a dangerous position to continue straying from virtue, a virtuous friend would be invaluable to that person, for friends who fall into vice could be “set aright” by a virtuous friend.⁵³ Aristotle described that, through their interactions, good friends would each grow more virtuous.⁵⁴ Increased virtue of this nature would be needed to save a corrupted friend from vice, as the virtuous nature, activity, and influence of the complete friend could potentially draw the fallen friend away from vice and back to virtue.⁵⁵ This would perhaps be when the assistance of complete friends was most needed in bearing the pain of becoming virtuous again.⁵⁶ Society, too, would benefit from this rehabilitation of lawlessness, further showing why good lawmakers are concerned with friendship.⁵⁷

On the other side of the fallen friendship, there was a serious moral dilemma for the still good friend: choosing whether to maintain or dissolve the friendship with the now corrupt friend.⁵⁸ While Aristotle stated that one must come to the aid of a corrupt friend who could still be cured,⁵⁹ Aristotle also found no wrong with dissolving the friendship when the friend became vicious.⁶⁰ Curing a corrupt friend could increase the nobility of the virtuous friend (which Aristotle found to be important),⁶¹ but nobility would not be worth foolishly risking the loss of one’s own virtue.⁶²

Aristotle did not give guidelines for determining whether a friend’s corruption could be cured or not: the only possible standard for this choice was the overtness of “excessive corruption,” but this standard was by no means clear.⁶³ Thus, the good friend was guided only by prudence, and a mistake here meant either losing what could once again be a rare and invaluable complete friendship or being personally corrupted as a result of maintaining friendship with corrupt friend.⁶⁴ Likewise, friends with inmates would be wise to take both personal lawfulness and the potential for

⁵² *Id.* at bk. IX, at 192–93.

⁵³ *Id.*

⁵⁴ *See id.* at bk. IX, at 208–09.

⁵⁵ *See id.* at 192–93.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.* at 203 (describing that a good person likely needed friends he could do good for, as this would increase the good person’s nobility).

⁶² *See id.* at 192–93.

⁶³ *See id.* Perhaps express desire and willingness to be rehabilitated can show that a friend is not excessively corrupt.

⁶⁴ *See id.*

rehabilitating the convicted friend into account.⁶⁵ Without specific guidelines, perhaps so long as there is reasonable hope in restoring the complete friendship, a virtuous friend acts wisely in attempting to rehabilitate a corrupt one friend.⁶⁶

B. The Empirical Value of Friendship

Observational studies have credited philosophical theory on friendship by showing that friendship has a tangible, quantifiable effect on human life.⁶⁷ Studies show that having good friends may improve health and increase one's lifespan.⁶⁸ Friends can also play a role in building good habits (although bad friends can lead to bad habits).⁶⁹ Reliable friends may support one another through hard times.⁷⁰ Likewise, one study has shown that individuals faced with a challenge perceive that challenge as being less difficult when their friends are present.⁷¹ Friends may even biologically influence happiness, as friendship has been theorized to release endorphins (pleasure-increasing and pain-decreasing neurotransmitters) in the brain.⁷² Friendship is thus conducive towards an individual's well-being and healthy living.

Regarding prison specifically, research also shows that visitation and contact with friends may help rehabilitate inmates:

[I]n a study of 7,000 individuals incarcerated in state prison for at least 12 months, receiving visits from a significant other, relative, or *friend* significantly reduced the odds of recidivism

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ Dawn C. Carr, *Want to Live Longer? Make Good Friends.*, PSYCH. TODAY (Mar. 15, 2015), https://www.psychologytoday.com/intl/blog/the-third-age/201503/want-live-longer-make-good-friends?gclid=CjwKCAjwo9unBhBTEiwAipC11zQSENHxOUJqQFGx8aWxxh7aZI_J4iYyEyxPOTWYWS3ejmaNVmrCBoCRTUQAvD_BwE [<https://perma.cc/DH2H-K8SC>].

⁶⁸ *See id.*

⁶⁹ *See* Wireless Philosophy, *PHILOSOPHY—Happiness 10: How Can Our Friends Help Us Build the Habits Of A Happy Life?*, YOUTUBE (Dec. 13, 2021), <https://www.youtube.com/watch?v=Eq8LTxFQZ8k&list=WL&index=114> [<https://perma.cc/993S-HDGA>].

⁷⁰ *See* Robert Puff, *The Importance of Friendship*, PSYCH. TODAY (July 26, 2021), <https://www.psychologytoday.com/us/blog/meditation-modern-life/202107/the-importance-friendship> [<https://perma.cc/B2Q5-D2VW>] (“Having solid friendships is important for two main reasons. First, they make life more enjoyable. . . . Second, our friends help us through the difficult times.”).

⁷¹ *See* Simone Schnall et al., *Social Support and the Perception of Geographical Slant*, 44 J. EXPERIMENTAL SOC. PSYCH. 1246, 1247–50 (2008). When challenging individuals to climb a steep hill with a weighted backpack, participants paired with a friend perceived the hill as less steep than participants who had to make the climb alone. *See id.*

⁷² *See* *Friends ‘Better Than Morphine,’* UNIV. OXFORD (Apr. 28, 2016), <https://www.ox.ac.uk/news/2016-04-28-friends-better-morphine> [<https://perma.cc/EN6B-KWQB>].

within the first two years of release The odds of recidivism were 30.7% lower for those visited at least once during the year before release compared with those not visited, and increased frequency of visitation reduced the odds of recidivism.⁷³

Reduced recidivism following incarceration is a positive social outcome, as society does not want inmates to reoffend after leaving prison, and the correlation between reduced recidivism and friendship shows that society too may benefit from friendship.⁷⁴ Therefore, research empirically supports the notion that friendship has a practical influence on human life, and that philosophy on friendship is not empty theory.⁷⁵

II. FRIENDSHIP AND ASSOCIATIONAL LIBERTY PROTECTIONS UNDER THE FIRST AMENDMENT

In rejection of Aristotle's recommended treatment of friendship, America's lawmakers (judges and legislators) treat friendship with indifference and contempt.⁷⁶ But disparagement need not be friendship's fate in the American legal system: the First Amendment can provide a strong basis for protecting friendship.⁷⁷ Admittedly, neither the First Amendment nor the Supreme Court confer an explicit friendship right.⁷⁸ However, the First Amendment does protect associational liberties as a constitutional right, including "intimate associations."⁷⁹ Were friendship to qualify as an intimate association under the First Amendment, it would receive constitutional protections, and policies affecting friends would be treated with heightened scrutiny.⁸⁰ As such, analyzing Supreme Court doctrine on intimate associations in

⁷³ Johanna B. Folk et al., *Behind Bars but Connected to Family: Evidence for the Benefits of Family Contact During Incarceration*, 33 J. FAM. PSYCH. 453, 454 (2019) (emphasis added); *Prisoner Rehabilitation—Maintaining and Improving Relationships with Family and Friends Through In-Cell Telephony* (Sept. 30, 2019), <https://www.unifybusiness.co.uk/2019/09/30/prisoner-rehabilitation-maintaining-and-improving-relationships-with-family-and-friends-through-in-cell-telephony/> [<https://perma.cc/NAP4-3C35>] ("Many studies have highlighted that 39% of prisoners who maintain relationships with loved ones, are less likely to return to a life of crime."); *Keeping In Touch With Imprisoned Loved Ones*, PAPPALARDO & PAPPALARDO, LLP (May 30, 2018), <https://pappalardolaw.com/2018/05/keeping-in-touch-with-imprisoned-individuals/> [<https://perma.cc/GD4X-L8PX>] (citing to several studies showing a trend between increased visitation and contact by friends and family and decreased recidivism).

⁷⁴ See *Keeping in Touch With Imprisoned Loved Ones*, *supra* note 73.

⁷⁵ See *id.*

⁷⁶ See *supra* Part I.

⁷⁷ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (U.S. 1984).

⁷⁸ See U.S. CONST. amend. I; *Roberts*, 468 U.S. at 617–20.

⁷⁹ See *Roberts*, 468 U.S. at 617–18.

⁸⁰ See *id.* at 619.

relation to the First Amendment is exceedingly important to protecting friendship generally and for inmates specifically.

A. *Roberts v. United States Jaycees*

The seminal Supreme Court case determining which associations are constitutionally protected is *Roberts v. United States Jaycees*.⁸¹ In *Roberts*, the Supreme Court dealt with an internal dispute within United States Jaycees, a non-profit organization that had the goal of promoting the development of young men.⁸² Jaycees prohibited women from joining under its regular membership (though other membership positions were available to women).⁸³ In violation of this policy, the Minneapolis and St. Paul chapters of the organization began admitting women for regular membership.⁸⁴ This violation prompted the national organization to both sanction these chapters and plan to revoke their charter.⁸⁵ The chapters retaliated by filing discrimination allegations under the Minnesota Human Rights Act to the Minnesota Human Rights Department.⁸⁶ The Jaycees's national organization contended that it had a right to select its own members on the basis of freedom of association.⁸⁷ The Human Rights Department ultimately determined that the national organization was guilty of unfair discrimination.⁸⁸

When reviewing the freedom of association claim in *Roberts*, the Supreme Court divided constitutionally protected associations into two categories: "choices to enter into and maintain certain intimate human relationships," and "engaging in those activities protected by the First Amendment."⁸⁹ Regarding the latter, the Court acknowledged a need to protect activities with "expressive purposes"⁹⁰ for "preserving other individual [First Amendment] liberties."⁹¹ As for intimate associations, the Court wrote, "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."⁹² The Court chiefly recognized marriage and the family as being protected intimate relationships, but did not specify which other relationships

⁸¹ *Id.* at 612–20.

⁸² *Id.* at 612–13.

⁸³ *Id.* at 613.

⁸⁴ *Id.* at 614.

⁸⁵ *Id.*

⁸⁶ *Id.* at 614–15.

⁸⁷ *Id.* at 616–17.

⁸⁸ *Id.* at 615–16.

⁸⁹ *Id.* at 617–18.

⁹⁰ *Id.* at 623.

⁹¹ *Id.* at 617–18.

⁹² *Id.*

were protected.⁹³ The Court based this finding on several important cases in its history, including *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, *Zablocki v. Redhail*, *Moore v. East Cleveland*, and *Loving v. Virginia*.⁹⁴

B. Applying Roberts v. United States Jaycees to Friendship

Roberts created great potential for First Amendment protections to apply to friendship. Expressive purposes could potentially provide some protections for friends, as activities between friends, like socializing and meeting in public places, can be construed as exercises of free speech.⁹⁵ However, considering friendship as an intimate association provides greater potential for constitutional protections. On intimate associations, the Supreme Court wrote:

[The] broad range of human relationships . . . may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.⁹⁶

The Court described the characteristics of the relationships it intended to protect as those that “have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs”⁹⁷ Friends form a community in which they share and build values, so friendship theoretically falls under this description.⁹⁸ And, as many of the Founders were not just distant statesmen, but close friends who together cultivated the very laws and principles on which the United States Constitution was founded,⁹⁹ friendship has certainly “played a critical role in the culture and traditions of the Nation.”¹⁰⁰

⁹³ *Id.* at 619 (“The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family.”).

⁹⁴ *See id.* at 618–19.

⁹⁵ *See Waters v. Barry*, 711 F. Supp. 1125, 1127–28 (D.D.C. 1989).

⁹⁶ *Roberts*, 468 U.S. at 620.

⁹⁷ *Id.* at 619–20.

⁹⁸ *See supra* Part I.

⁹⁹ *See About the Founding Fathers*, CONST. FACTS, <https://www.constitutionfacts.com/us-founding-fathers/about-the-founding-fathers/> [<https://perma.cc/N6ML-XAES>] (last visited Dec. 4, 2023).

¹⁰⁰ *Roberts*, 468 U.S. at 618–19.

Additionally, although the Court designated marriage and family as the key relationships protected as intimate associations, the Court here mentioned a sort of intimacy “spectrum,” under which other relationships could still make some constitutional claims.¹⁰¹ Though the Court did not specify which relationships fell into this spectrum,¹⁰² friendship likely qualifies due to its similarities to the protected relationships of marriage and the family. Like marriage, friendship is an intimate relationship that individuals choose “to enter into and maintain.”¹⁰³ Moreover, this relationship can be as intimate, if not more intimate, than family,¹⁰⁴ especially when friends are the closest thing a person has to a family. There may also be intimate aspects of friendships that are not shared with marriage and the family because of differences between these types of relationships.¹⁰⁵ But at the very least, friendship is akin to spousal and familial intimacy, which should place it on the higher end of the Supreme Court’s intimacy spectrum. Therefore, the qualities of friendship would appear to qualify it as an intimate relationship protected by *Roberts*.

C. *The Aftermath of Roberts v. United States Jaycees: Circuit Courts and the Intimacy Spectrum*

Unfortunately, the Supreme Court did not clearly determine in *Roberts*—or any cases since—whether the First Amendment extends protections to friendship under either expressive liberties or intimate associations.¹⁰⁶ Regarding intimate associations, the Court did not even clarify if friendship qualified for any degree of constitutional protections, finding that there was no need to determine which relationships were protected on the intimacy spectrum “with any degree of precision.”¹⁰⁷ The absence of a definitive conclusion on friendship as an intimate association has led the federal circuit courts to split in their constitutional approaches to friendship.¹⁰⁸ The eleven federal circuits and the D.C. Circuit can be classified under following four positions: (1) protecting friendship; (2) refusing to protect friendship; (3) addressing friendship, but declining to extend protections; and (4) leaving friendship unaddressed.¹⁰⁹

¹⁰¹ See *id.* at 619–20.

¹⁰² See *id.*

¹⁰³ See *id.* at 617.

¹⁰⁴ See *Proverbs* 18:24 (NIV) (“One who has unreliable friends soon comes to ruin, but there is a friend who sticks closer than a brother.”).

¹⁰⁵ See *supra* Part I.

¹⁰⁶ See *Roberts*, 468 U.S. at 620.

¹⁰⁷ See *id.*

¹⁰⁸ See *generally* *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995); *Lord v. Erie County*, 476 F. App’x. 962 (3d Cir. 2012); *Henrise v. Horvath*, No. 01-10649, 2002 U.S. App. LEXIS 28192 (5th Cir. 2002); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013); *Moore v. Tolbert*, 490 F. App’x. 200 (11th Cir. 2012).

¹⁰⁹ See *generally* *Corrigan*, 55 F.3d 1211; *Lord*, 476 F. App’x. 962; *Henrise*, 2002 U.S. App. LEXIS 28192; *Goodpaster*, 736 F.3d 1060; *Moore*, 490 F. App’x. 200.

1. Protecting Friendship

The Sixth Circuit is the only federal circuit court that has extended intimate association protections to friendship under the *Roberts* framework.¹¹⁰ In *Corrigan v. City of Newaygo*, the Sixth Circuit wrote: “One type of freedom of association is related to privacy and is protected by the due process clause—for example the freedom of association on which we base family life and *personal friendship . . .*”¹¹¹ This statement has since been interpreted as a precedent in the Sixth Circuit that *Roberts* extends intimate association protections to friendship.¹¹² However, the Sixth Circuit has not explained why, under *Roberts*, the First Amendment protects friendship as an intimate association.¹¹³ It is almost as if the Sixth Circuit has found friendship’s intimacy to be a self-evident fact.¹¹⁴ Unfortunately, though the Sixth Circuit’s stance on friendship is undoubtedly helpful to friends seeking First Amendment protections under its jurisdiction, because the Sixth Circuit has not provided its rationale for why friendship is a protected intimate association, constitutional examination is not possible beyond this point.¹¹⁵

2. Refusing to Protect Friendship

In contrast to the neighboring Sixth Circuit, the Third Circuit outright refused to recognize friendships as protected.¹¹⁶ In *Lord v. Erie County*, a prison at which the plaintiff was employed had a policy prohibiting employees from “fraternizing” with both inmates and former inmates on probation for at least a year after their incarceration.¹¹⁷ The plaintiff’s friend was incarcerated for a misdemeanor and later let out on probation.¹¹⁸ During the friend’s probation, the plaintiff continued to “fraternize” with him in violation of the policy, leading to the plaintiff’s termination and prompting the plaintiff to file a freedom of association challenge to the policy.¹¹⁹ Despite the plaintiff being friends with the inmate prior to his criminal activity, the Third Circuit refused to extend associational liberty protections to their friendship, writing “we have declined to recognize as protected mere friendships that are not

¹¹⁰ See *Corrigan*, 55 F.3d at 1214–15.

¹¹¹ *Id.* (emphasis added).

¹¹² See *Akers v. McGinnis*, 352 F.3d 1030, 1039–40 (6th Cir. 2003) (“Personal friendship is protected as an intimate association.”).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *Lord v. Erie County*, 476 F. App’x 962, 965 (3d Cir. 2012).

¹¹⁷ *Id.* at 963.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 963–64.

based on the creation and sustenance of a family.”¹²⁰ Alongside the Third Circuit, the Fifth,¹²¹ Seventh,¹²² Tenth,¹²³ and Eleventh Circuits have similarly determined that friendship is not constitutionally protected.¹²⁴

3. Addressing Friendship, but Declining to Extend Protections

The Second and Eighth Circuits have addressed friendship but have failed to decide whether friendship is constitutionally protected under the First Amendment.¹²⁵ In *Patel v. Searles*, the Second Circuit declined to determine whether *Roberts* extended intimate association rights to friendships, writing, “we note that the district court concluded that plaintiff’s papers had made clear he was only pursuing claims based upon his familial relations. Thus, it is unnecessary to decide whether the right to intimate association extends to friendships as that question is not now before us.”¹²⁶ Although the Second Circuit merely declined to determine friendship’s intimate association status, district courts under the Second Circuit have subsequently withheld protections for friendship due to the lack of precedent from the Second Circuit, rather than on the basis of any clear doctrinal reasoning in opposition to such protections.¹²⁷ The Eighth Circuit has reached a similar conclusion on this matter.¹²⁸

¹²⁰ *Id.* at 965 (internal quotations omitted).

¹²¹ See *Henrise v. Horvath*, No. 01-10649, 2002 U.S. App. LEXIS 28192, at *18–19 (5th Cir. June 28, 2002) (“[T]he district court did not err when it refused to classify [this] close personal and professional friendship . . . as the type of highly personal relationship that earns First Amendment protection. . . . [T]hose friendships still are not the type of intimate human relationship that demand protection as a ‘fundamental element of human liberty.’”).

¹²² See *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1072 (7th Cir. 2013) (holding that “[s]ocializing with friends” was not an intimate association).

¹²³ See *Copp v. Unified School Dist.*, 882 F.2d 1547, 1551 (10th Cir. 1989) (holding that a friendship and collegueship between a teacher and a school principal was not an intimate association protected under the First Amendment).

¹²⁴ See *Moore v. Tolbert*, 490 F. App’x 200, 203–04 (11th Cir. 2012).

¹²⁵ See generally *Patel v. Searles*, 305 F.3d 130 (2d Cir. 2002); *Vieira v. Presley*, 988 F.2d 850 (8th Cir. 1993).

¹²⁶ *Patel*, 305 F.3d at 136 (internal citation and emphasis omitted).

¹²⁷ See *Silverstein v. Lawrence Union Free Sch. Dist.* No. 15, CV10-993, 2011 U.S. Dist. LEXIS 34200, at *21 (E.D.N.Y. Feb. 16, 2011) (“[C]ourts in the Second Circuit have not accepted intimate association claims based on friendships, however close.”); *Maselli v. Tuckahoe Union Free Sch. Dist.*, No. 17-CV-1913 (KMK), 2018 U.S. Dist. LEXIS 166370, at *14–16 (S.D.N.Y. Sept. 27, 2018).

¹²⁸ See *Vieira*, 988 F.2d at 852–53 (declining to extend associational liberty protections to friendship as an intimate association, the court noted that “[friendships] are the sorts of relationships which the Supreme Court did not ‘mark . . . with any precision.’ There is no clearly established law whether or not associations with friends and acquaintances are sufficiently intimate to be entitled to the constitutional protection of freedom of association.”).

4. Predicting the Outcome for Circuits That Have Not Directly Addressed Friendship as an Associational Liberty

The First, Fourth, Ninth, and D.C. Circuits have yet to directly address friendship in an associational liberty context.¹²⁹ Although none of these circuits have reached a direct determination, their holdings on friendship are somewhat foreseeable.¹³⁰ The First Circuit is unlikely to protect friendship. In *Correa-Martinez v. Arillaga-Belendez*, the First Circuit wrote, “it is clear that, in constitutional terms, freedom of association is not to be defined unreservedly. Entry into the constitutional orbit requires more than a mere relationship.”¹³¹ Additionally, in *Poirier v. Massachusetts Department of Corrections*, the First Circuit found that, in the context of a romantic relationship, there was not an associational liberty protecting the unmarried cohabitation of adults.¹³² Thus, the First Circuit’s refusal to extend associational liberty protections beyond marriage and family suggests that it is unlikely to extend such protections to friendship.¹³³

The Fourth Circuit is also unlikely to protect friendship. In *Schleifer v. City of Charlottesville*, the plaintiffs were friends challenging a curfew as an infringement on associational liberties.¹³⁴ Though the Fourth Circuit could have addressed the First Amendment issue at hand, it chose to dodge the issue by focusing on the fact that the plaintiffs were minors whose associational liberties were “not coextensive with those of adults.”¹³⁵ Concededly, the Fourth Circuit did not comment on whether the plaintiffs would have had a valid First Amendment claim were they adults, so it theoretically could have held for the plaintiffs under different circumstances. Nevertheless, the refusal to comment on the nature of the social activities of adults under these circumstances demonstrates the Fourth Circuit’s unwillingness to extend the First Amendment to friendly social activity,¹³⁶ making it less likely that the Fourth Circuit would protect friendship as an intimate association.

The D.C. Circuit is more likely to protect friendship than the Fourth Circuit.¹³⁷ When dealing with minors challenging a curfew in *Waters v. Barry*, the D.C. District Court, like the Fourth Circuit, did not directly comment on friendship as a

¹²⁹ See generally *Correa-Martinez v. Arillaga-Belendez*, 903 F.2d 57 (1st Cir. 1990); *Poirier v. Mass. Dep’t of Corr.*, 558 F.3d 92 (1st Cir. 2009); *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998); *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989); *Fair Hous. Council v. Roommate.com*, 666 F.3d 1216 (9th Cir. 2012).

¹³⁰ See generally *Correa-Martinez*, 903 F.2d 57; *Poirier*, 558 F.3d at 95–96; *Schleifer*, 159 F.3d 843; *Waters*, 711 F. Supp. at 1127–28; *Fair Hous. Council*, 666 F.3d at 1220–21.

¹³¹ 903 F.2d at 57.

¹³² *Poirier*, 558 F.3d at 95–96.

¹³³ *Id.*

¹³⁴ 159 F.3d at 846.

¹³⁵ *Id.* at 847.

¹³⁶ *Id.*

¹³⁷ See *Waters v. Barry*, 711 F. Supp. 1125, 1127–28 (D.D.C. 1989).

protected intimate relationship.¹³⁸ However, the District Court did strike down the curfew in question as an overbroad regulation of protected activity under the First Amendment, critically writing that “[t]he right . . . to meet publicly with one’s friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society.”¹³⁹ The willingness to partially protect friendship-related activity indicates that the D.C. Circuit could potentially protect friendship as an intimate association.

Finally, the Ninth Circuit would most likely protect friendship. In *Fair Housing Council v. Roommate.com*, the Ninth Circuit held that there was a protected associational liberty for individuals to choose their roommates, writing, “the right [to associate] isn’t restricted exclusively to family.”¹⁴⁰ Since (often unfamiliar) roommates are protected, it is hard to imagine that friends would not also be protected (especially when there is overlap between being a friend and being a roommate). Therefore, if challenged, the Ninth Circuit would likely protect friendship under the First Amendment.

D. Basic Arguments for Friendship Protections Under the Roberts Framework

Associational liberty protections for friendships between inmates and non-inmates—as well as friendships in general—would be better protected if the Supreme Court, circuit courts, district courts, and state courts were to hold that friendship is an intimate association. For that reason, inmates should understand basic arguments they can present under the *Roberts* framework when arguing that friendship is an intimate association. Of course, the success of these arguments will likely vary based on the jurisdiction in question. Nevertheless, the following arguments may prove useful to inmates and their friends in seeking legal protections.

In all arguments, individuals should liken the concept of friendship to marriage and the family because marriage and the family are universally protected as intimate associations. Pointing to similarities between these relationships and friendship credits the notion that First Amendment protections also extend to friendship.¹⁴¹ Looking to marriage, it should be pointed out that both marriage and friendship are intimate relationships founded in mutual choice. As for family, friends could point out that friendship can be just as intimate, or even more intimate, than family. For this argument, statistical and philosophic references may be useful in corroborating claims of friendship’s importance to humanity as an intimate relationship. And regardless of the jurisdiction, individuals should also bring up the Sixth Circuit’s

¹³⁸ *Id.*

¹³⁹ *Id.* at 1134.

¹⁴⁰ 666 F.3d 1216, 1220–21 (9th Cir. 2012).

¹⁴¹ See *Moore v. Tolbert*, 490 F. App’x 200, 204 (11th Cir. 2012) (crediting the shared characteristics of friendships and familial relationships).

aforementioned decisions in *Corrigan* and *Akers*.¹⁴² As those decisions extended associational liberty protections to friendship, they will serve as persuasive authority in helping friends justify that friendship, too, is a constitutionally protected intimate association.¹⁴³

After likening their friendship to other intimate association, friends should then focus on the closeness of their personal relationship with each other. *Moore v. Tolbert* shows the potential success of such an argument.¹⁴⁴ Even when rejecting friendship as being generally protected by the Constitution, the Eleventh Circuit in *Moore* wrote: “On this record, we cannot conclude that their relationship (*an apparently generic friendship*) contained qualities distinctive to family relationships. We therefore cannot conclude that their relationship . . . merits constitutional protection.”¹⁴⁵ The Eleventh Circuit left open a space for “intimate” friendships to potentially receive constitutional protections.¹⁴⁶ Thus, to show their intimacy as friends (that the friendship is not “generic”),¹⁴⁷ individuals should allege facts and file affidavits that exhibit their history and frequent activities as friends. If the friendship is the closest intimate relationship maintained by at least one of the friends—if marriage and the family are absent or characterized by neglect—that would be especially helpful in showing the deep intimacy of the friendship. Finally, when applicable, focusing on time spent living together would be especially useful.

As an argument in the alternative, it would also be worth requesting limited protections, rather than total intimate association protections. The Supreme Court mentioned in *Roberts* that there is an intimacy spectrum, upon which relationships other than family and marriage “may make greater or lesser claims to constitutional protection.”¹⁴⁸ Courts may be reluctant to place friendship on the higher end of that spectrum and to grant friendship full associational liberty protections. If individuals claim that friendship is not at the highest end of the intimacy spectrum, but is at least in the middle, they can request a more moderate degree of constitutional protections that only extends to the issue at hand. Courts, then, would have the opportunity to grant friends at least some protections without having to go so far as to call it a fully protected intimate association. And because no circuit court currently holds that friendship is somewhere in the middle of the intimacy spectrum, this argument may prove successful even in jurisdictions that currently disfavor protecting friendship.¹⁴⁹

¹⁴² See generally *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995); *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2003).

¹⁴³ See generally *Corrigan*, 55 F.3d 1211; *Akers*, 352 F.3d 1030.

¹⁴⁴ 490 F. App’x at 204.

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

¹⁴⁹ See generally *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1072 (7th Cir. 2013); *Copp v. Unified Sch. Dist.*, 882 F.2d 1547, 1551 (10th Cir. 1989); *Moore*, 490 F. App’x at

Finally, for the sake of pleading these facts in a legally appropriate manner, presenting courts with a legal definition of friendship would be particularly helpful in legitimizing these arguments.

III. LEGALLY DEFINING FRIENDSHIP

A legal definition of friendship is integral to legitimizing friendship claims for constitutional protections as intimate associations. Courts generally lack a standard for how to determine whether individuals are friends. A legal standard would allow for consistency in making friendship determinations, which would in turn assuage fears of overextending constitutional protections to too many relationships. Additionally, the existence of a legal definition would likely require the American legal system to treat friendship with more seriousness as a subject of judicial consideration and legal scholarship. Thus, it is worthwhile to review three options that could serve as a means of defining friendship: self-determined friendship, friendship registries, and judicial determinations.

Unfortunately, legally defining friendship remains an inquiry of legal theory not by convenience, but by necessity. Courts have not discussed the definition of friendship in a generally applicable manner, and even courts that have addressed friendship have not seriously attempted to define it.¹⁵⁰ Courts that have addressed a definition of friendship have either defaulted to the dictionary, which is insufficient for providing a legal definition,¹⁵¹ or have only defined friendship in a manner solely limited to the issue at hand, such as mental health assistance.¹⁵² Therefore, because courts have not actively engaged in defining friendship, this topic must be analyzed through the lens of legal theory.

A. Criticism of Friendship Definitions

Before discussing potential definitions, criticism of a legal friendship definition ought to be addressed. Legally defining friendship is a controversial subject. The subjectivity and looseness under which friendship is defined in the ordinary course of life could make legal friendship determinations imprecise and difficult. This is not an issue faced by friendship's relational counterparts: family is clearly defined by parentage or adoption, and marriage has a variety of legal mechanisms in place to provide for its own legal definition. There are also countless relationship contexts

203–04; *Henrise v. Horvath*, No. 01-10649, 2002 U.S. App. LEXIS 28192, at *18–19 (5th Cir. June 28, 2002).

¹⁵⁰ See *supra* Sections II.C.1–3.

¹⁵¹ See *People v. Thompson*, 205 Cal. App. 3d 871, 877 (1988); *Pruner's Est.*, 1934 Pa. Dist. & Cnty. Dec. LEXIS 150, at *7–8 (Centre Cnty. Ct. of C.P., Orphans' Div. Aug. 29, 1934).

¹⁵² See *In re Mental Health of D.V.*, 2007 MT 351, ¶ 36.

that further complicate friendship definitions. How should workplace friendships be treated when they do not extend beyond the workday? What of friendships involving inequality or disparities of authority (i.e., employer-employee, student-teacher, etc.)? New friends? Feuding friends? It is questionable if friendship is actually legally definable. Even if friendship could be judicially determined, litigation over whether a certain relationship is a friendship will cost courts time and resources.

Finally, some critics will justifiably fear that turning friendship into a legal matter would demean the relationship and subject it to harm.¹⁵³ As said before, the nature of friendship has deep value to human living.¹⁵⁴ If legally defining and litigating friendship inhibited, harmed, or destroyed its natural value, then by no means should friendship be defined or litigated. What good would it be to expose friendship to adjudication if doing so only caused it harm?

Such a high degree of concern is certainly justified for what is perhaps humanity's most cherished bond. But it is not entirely well-placed. Resource interests do not persuade against defining and litigating friendship. After all, judicial resources are spent on similar disputes in family law with determining marriage and paternity. Why should friendship be given any less care?

Furthermore, it is true that there are several complications faced by attempting to define friendship: there are innumerable contexts in which friendship can arise. However, as the following discussion will show, that fact does not make legally defining friendship impossible or even improbable. A good friendship definition would grant courts the flexibility to account for a wide range of contexts, allowing courts to distinguish between those who are actual friends and those who are not. Thus, the complex circumstances of an alleged friendship do not create an insurmountable obstacle to legally defining friendship.

Finally, fears that the value of friendship would be diminished through legal definition and consideration exaggerate the effect that legal terminology may have on this institution. The Supreme Court has recognized as much, finding for a "sanctity of the family"¹⁵⁵ and that marriage is "intimate to the degree of being sacred."¹⁵⁶ The American legal system extends itself to these relationships not to

¹⁵³ See Rebecca Tuhus-Dubrow, *I Now Pronounce You . . . Friend and Friend: Some Argue It's Time to Legally Recognize the Bond of Friendship*, BOSTON.COM (June 8, 2008), http://archive.boston.com/bostonglobe/ideas/articles/2008/06/08/i_now_pronounce_you_friend_and_friend/ [<https://perma.cc/EVN2-BVJ7>] ("[S]keptics hold that friendship should stay outside the law for its own sake—do we really want friends with red tape?"). But see Leah Plunkett, *Friendship Is About Loyalty, Not Laws. Should It Be Policed?*, AEON (Mar. 27, 2020), <https://aeon.co/ideas/friendship-is-about-loyalty-not-laws-should-it-be-policed> [<https://perma.cc/RN7R-2V9J>] ("We continually strive to protect our freedoms, but the lawless nature of friendship must be protected, too.").

¹⁵⁴ See *supra* Part I.

¹⁵⁵ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1997).

¹⁵⁶ *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

demean, but to protect their inherent value. Likewise, legally defining and protecting friendship would not be inherently demeaning to friendship, so this concern does not justify withholding a legal definition from friendship. These fears only advise that we proceed with prudence and care to craft a legal definition of friendship that honors its inherent value.

B. Friendship Self-Determination

The simplest, and perhaps most obvious, option for defining friendship is by self-determination, where individuals would notify the court that they are friends. This method would most closely reflect the mutual choice involved in individuals representing themselves as friends.¹⁵⁷ Likewise, this option favors the stance that the law should remain largely uninvolved in defining friendships.¹⁵⁸ But the most persuasive aspect is this method's efficiency. As soon as individuals represented themselves to the court as friends, protections would attach without costly and lengthy legal disputes, thus saving valuable court resources. The friends say they are friends, and that is that.

Despite the simplicity of self-determined friendship, several complications discourage its use as a legal definition. For one, analyzing feuding friends would be particularly difficult. During a friendship, conflict may arise, and one friend may claim that the friendship terminated, while the other claims that friendship still exists. Although conflict destroys many friendships, the best survive it,¹⁵⁹ so it would be wrong to deny these individuals protections on the basis of a singular misrepresentation of friendship.

The problem of feuding friends could be remedied by allowing individuals to freely change their friendship status throughout the course of prosecution, but this would expend a court's time and resources, thus negating the simplicity of self-determinations. Nor would it be prudent to follow the opinion of one friend alone, for this would force courts to choose which friend to believe. Granting the authority

¹⁵⁷ See Allan Silver, *Friendship and Trust as Moral Ideals: An Historical Approach*, 30 EURO. J. SOC. 274 (1989) (arguing that a defining trait of friendships is that they are voluntary).

¹⁵⁸ For commentary on friendship registries, see Richard Stith, *Keep Friendship Unregulated*, 18 NOTRE DAME J.L. ETHICS & PUB POL'Y 263, 271 (2004):

Do we really want a State Friendship Registry? Even if the government used mainly positive incentives, rather than penalties, to support its scheme, would there not be too great an intrusion into private life? Would we not have lost too much freedom and flexibility in our personal relationships? Would we not have created an excessive bureaucracy?

¹⁵⁹ See Rachel Sokol, *11 Ways to Move Past a Friendship Fight*, READER'S DIGEST, <https://www.rd.com/list/friendship-fight/> [<https://perma.cc/7MUD-SPZR>] (Dec. 20, 2020).

to one friend may even encourage dishonesty in connection to the conflict itself. At any rate, such a formulation would no longer represent the mutuality of the individuals' choice to be friends and represent themselves as such.

Dishonesty poses another risk that leaves self-determinations further untenable. In a self-determinate system where courts have no analytical role in finding for friendships, nonfriends could receive protections between themselves by falsely claiming themselves to be friends. This result is undesirable: it could extend friendship protections to a category of individuals not meant to receive them (nonfriends), and the ease of dishonesty could become a hinderance to prosecutions. The worst case would arise when criminals lie about being friends to protect their group's nefarious activities. Therefore, although friendship self-determination may best represent the mutual choice involved in friendship, the likelihood of complications and abuses dissuades its use.

C. Friendship Registries

Related to self-determinations, government friendship registries provide another potential definition.¹⁶⁰ One form these registries could take would be that suggested by Professor David L. Chambers.¹⁶¹ Under his system, individuals with close ties outside of a familial or marital relationship would register as "designated friends" with their state governments.¹⁶² This formal registration would then come with certain legal rights, privileges, and mutual responsibilities.¹⁶³ The main benefit to friendship registries would be the ease with which they could be applied for registered friends. Friends would only need to present proof of their designated friendship registration to receive protections. Friendship registries also provide a greater degree of credibility to individuals claiming to be friends and eliminate the problem of feuding friends, for a feud would not negate a registration.

However, adopting friendship registries would result in a legal definition that is both over- and under-expansive. On the over-expansive side, there is no apparent mechanism to prevent nonfriends from registering as friends.¹⁶⁴ As a result, friendship registries, like self-determinations, run the risk of needlessly protecting

¹⁶⁰ See generally David L. Chambers, *Unmarried Partners and the Legacy of Marvin v. Marvin: For the Best of Friends and for Lovers of All Sorts, a Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347 (2001).

¹⁶¹ See *id.* But see Stith, *supra* note 158, at 271 ("What would happen if we took Professor Chambers' advice and offered generous public benefits to every emotionally satisfying, long-term relationship? . . . Do we really want a State Friendship Registry?").

¹⁶² See Chambers, *supra* note 160, at 1348.

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 1347. Mechanisms to prevent nonfriends from registering to a friendship registry could be implemented by federal and state governments through reasonable vetting procedures, and they could refuse registration to individuals with criminal records. But Chambers did not describe such mechanisms.

nonfriends, including ill-motivated criminals. Courts have no business in overexpanding associational protections to relationships that are not friendships, least of all to those with criminal motives.

On the under-expansive side, requiring friendship registration would fail to protect actual friends who did not register. Even individuals who embodied complete friendship could be denied access to friendship protections because they did not sign up for a government program. Furthermore, there is no assurance that state governments would sufficiently promote or advertise friendship registries, making their common use and legal viability unlikely. Solely defining friendship through friendship registries, then, would often deny protections to actual friends, which would defeat the purpose of legally defining friendship. In fairness to Chambers, his goal was for friendship registration to protect certain caregiving rights for unmarried partners under civil law, rather than generally in all legal matters.¹⁶⁵ Nevertheless, because friendship registries would be inaccurate and inconsistent in protecting the liberties of friends, they should not be used for a legal definition of friendship (though friendship registration could be a positive factor for judicial consideration).

D. Judicial Determinations Under the Leib Test

After analyzing the deficiencies of self-determinations and registries, it is apparent that judicial analysis will likely be necessary in legally defining friendship, thus making judicial determination the final option for defining friendship. For judicial determinations, either legislatures or the judges themselves would legally adopt a test for friendship to judge if individuals are actually friends. To this end, Ethan J. Leib has provided the most appropriate and practical test (hereinafter “Leib test”).¹⁶⁶ Although Leib formed this test for use in civil law, because his designated factors are universally indicative of friendship, there is no reason why the Leib test cannot be used beyond the civil sphere in all other legal contexts—including for inmates and their friends.¹⁶⁷

Rather than a bright line rule for determining the legal existence of a friendship, the Leib test contains a non-exhaustive list of ten factors for courts to assess when determining whether or not individuals are friends.¹⁶⁸ Those factors are (1) voluntariness, (2) intimacy, (3) trust, (4) solidarity and exclusivity, (5) reciprocity, (6) warmth, (7) mutual assistance, (8) equality, (9) duration over time, and (10) conflict

¹⁶⁵ See *id.*

¹⁶⁶ Ethan J. Leib, *Friendship & the Law*, 54 UCLAL. REV. 631, 642–47 (2007). Fittingly, Leib uses Aristotle’s principles on friendship as the foundation for much of his legal scholarship on the subject. *Id.* at 647–53. For more of Leib’s work on the application of friendship in civil law, see also ETHAN J. LEIB, *FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT* (1st ed. Oxford Univ. Press 2011).

¹⁶⁷ See Leib, *supra* note 166, at 642–47.

¹⁶⁸ *Id.*

and modalities of conflict resolution.¹⁶⁹ While these factors all appear to be characteristic of friendship on their face, analyzing some of them further reveals the usefulness of the Leib test. Voluntariness respects the autonomy and choice involved in being friends.¹⁷⁰ Trust shows the tightknit loyalties that close friends have.¹⁷¹ Duration rewards individuals who have been friends for a long time.¹⁷² Conflict resolution accounts for the fact that friends may fight, placing significance on friends who overcome their feuds.¹⁷³ Because these factors so appropriately balance the traits that compose a friendship, the Leib test should allow courts to make accurate friendship determinations.

Judicial friendship determinations, like the other options, warrants its share of criticism. The Leib test will by no means lead to perfect determinations in every case, as a discretionary, factor-based approach is bound to lead to some mistakes and inconsistencies. The far greater criticism, however, would be that judicial determinations take choice away from the friends themselves, and instead place it in the hands of disinterested judges. This is a serious ideological dilemma. Allowing courts to determine whether individuals are friends necessarily and unavoidably reduces the autonomy of individuals to personally define their friendships before a court, which could be demeaning to the friendship itself.

Powerful though those criticisms may be, the benefits of judicial friendship determinations under the Leib test outweigh the costs and justify judicial determinations as the best means of legally defining friendship. It is true that courts could make errors when using the Leib test, granting friendship protections to some who do not deserve it and failing to grant protections to those who do. Yet, in comparison to self-determinations and registries, the Leib test would effectively mitigate the effects of dishonesty by allowing judges to weigh various attributes of the relationship in reaching a conclusion on whether a friendship actually exists. As a result, it

¹⁶⁹ *Id.*

¹⁷⁰ See generally Susan Degges-White, *Friendology: The Science of Friendship*, PSYCH. TODAY (May 29, 2019), <https://www.psychologytoday.com/us/blog/lifetime-connections/201805/friendology-the-science-friendship> [<https://perma.cc/R6YF-SFDJ>] (“[M]ost researchers agree that friendship exists within the socio-emotional realm and that it is hallmarked by interdependence and the voluntary nature of interactions.”).

¹⁷¹ See generally Danny Newman, *A Comprehensive Guide to Loyalty in a Friendship*, WHAT’S DANNY DOING? (Sept. 4, 2022), <https://www.whatsdannydoing.com/blog/loyalty-in-a-friendship> [<https://perma.cc/ZXC3-L8DV>].

¹⁷² See generally Lauren Berger et al., *Phases of Friendship: Formation, Maintenance, and Dissolution*, BRITANNICA, <https://www.britannica.com/topic/friendship/Phases-of-friendship-formation-maintenance-and-dissolution> [<https://perma.cc/22L5-DL36>] (last visited Dec. 4, 2023) (“The length and duration of the various phases of a friendship vary across individuals and circumstances.”).

¹⁷³ See generally Sokol, *supra* note 159 (“[C]onflict doesn’t have to lead to a ‘friendship breakup.’ Here’s how to move past it, forgive each other, and make your relationship stronger than ever.”).

would be far more difficult to abuse this legal definition of friendship. Applying the Leib test may be a little messy, but hey, so is friendship.

As for the ideological concerns, although personal choice is undeniably diminished through judicial determinations, it would be wrong to conclude that judicial determinations will not respect autonomy, as the onus in friendship determinations still lies in the choices of the friends themselves. After all, when evaluating friendships under the Leib test, a judge's decision will largely be guided by the choices friends have made over the course of their friendship.¹⁷⁴ The Leib test has already acknowledged the aforementioned voluntariness factor, and perhaps Leib listed it first in honor of its higher importance.¹⁷⁵ Further, the rest of the factors of the Leib test would be able to take into consideration all other choices that the individuals made in pursuit of friendship.¹⁷⁶ Thus, judicial determinations do not destroy the role of autonomy between friends. Rather, the way in which friends have chosen to live and engage in certain activities and habits together, past and present, would guide judicial determinations. Therefore, because they minimize the role of feuds and dishonesty while still giving a great deal of deference to the personal choices of friends over the course of their friendship, judicial determinations under the Leib test present the most viable option for a legal definition of friendship, and should be used when seeking intimate association protections.

IV. ON VISITATION AND CONTACT PROTECTIONS BETWEEN INMATES AND FRIENDS

As friendship can have a rehabilitative effect that benefits both the individuals involved and society as a whole,¹⁷⁷ legally preserving friendship in the criminal sphere is advantageous. There are several avenues through which friendship could be better preserved, such as courts granting friends testimonial privileges during criminal prosecutions.¹⁷⁸ However, visitation and contact rights seem to be the most effective means to preserve friendships between the incarcerated and the unincarcerated. These are perhaps necessary to preserve such friendships at all, as incarceration would otherwise cause the inactivity and possibly the dissolution of the friendship.¹⁷⁹

Admittedly, the Supreme Court has expressed that it will not protect visitation as a right itself. In *Block v. Rutherford*, a case decided the same day as *Roberts*, the

¹⁷⁴ See Leib, *supra* note 166, at 642–47.

¹⁷⁵ See *id.* at 642.

¹⁷⁶ See *id.* at 642–47.

¹⁷⁷ See *supra* Part I.

¹⁷⁸ See Michael D. Moberly, *Must a Friend Indeed Reveal a Friend's Misdeed? Exploring the Merits of a Friendship Privilege*, 51 ST. MARY'S L.J. 903 (2020). *But see* Bryant v. Livigni, 619 N.E.2d 550, 555 (Ill. App. 1993) (“The law does not recognize a ‘friendship privilege.’”).

¹⁷⁹ See ARISTOTLE, *supra* note 1, at bk. VIII, at 170–72.

Court held that visitation was not a protected constitutional right, writing: “[W]e do not in any sense denigrate the importance of visits from family or friends to the detainee We hold only that the Constitution does not require that detainees be allowed contact visits.”¹⁸⁰ Although they were denied strict classification as a right, visitation and contact maintain constitutional connections to intimate association rights, and the Court refuses to hold that “any right to intimate association is altogether terminated by incarceration.”¹⁸¹ Therefore, because there are lingering constitutional protections for visitation and contact, it is necessary to understand the modern framework so that inmates and their unincarcerated friends can effectively seek these protections.

A. Overton v. Bazzetta: The Modern Framework for Visitation and Contact Restrictions

The current standard for evaluating restrictions on visitation and contact rights is primarily found in the Supreme Court’s decision in *Overton v. Bazzetta*.¹⁸² In *Overton*, prisoners and their friends and families challenged the constitutionality of the restrictive visitation policies enforced in prisons under the Michigan Department of Corrections.¹⁸³ Such policies included: requiring visitors be placed on a pre-approved list, limits on the number of unrelated individuals permitted to visit, special restrictions for child visitors, and required non-contact visitation for inmates classified “as the highest security risks.”¹⁸⁴ The challengers claimed that these policies violated their First Amendment associational liberties.¹⁸⁵

Although the District Court and Court of Appeals held that the policies violated First Amendment associational liberties of inmates and visitors (specifically the non-contact policy), the Supreme Court found that both lower courts erred in their conclusion.¹⁸⁶ The Court did recognize the intimate association issue posed by this case, even referencing *Roberts*, but the Court found that “[t]his is not an appropriate case for further elaboration of those matters.”¹⁸⁷ Critically, the Court wrote:

Many of the liberties and privileges enjoyed by other citizens
must be surrendered by the prisoner. An inmate does not retain

¹⁸⁰ *Block v. Rutherford*, 468 U.S. 576, 589 (1984).

¹⁸¹ *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

¹⁸² *Id.* at 131–32. For more background information on fundamental rights and prisons, see generally *Turner v. Safley*, 482 U.S. 78 (1987).

¹⁸³ *Overton*, 539 U.S. at 129–30.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 131.

¹⁸⁷ *Id.* Note that the Court again refused to clarify which relationships were protected as intimate associations under *Roberts*. *Id.*

rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.¹⁸⁸

The Court found that incarceration and associational liberties were inherently incompatible,¹⁸⁹ but the Court did not find that incarceration automatically defeated all existing liberty interests held by inmates: “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.”¹⁹⁰ Nevertheless, the Court refused to “determine the extent to which [freedom of association] survives incarceration,”¹⁹¹ meaning that, based on *Overton*, there were no specific means of knowing when and how visitation could be protected under the First Amendment.

The Court in *Overton* held that restrictions on prison visitation were subject to rational basis review, meaning that a challenged regulation would be found valid so long as it bore a “rational relation to legitimate penological interests.”¹⁹² Given that a fundamental right was at stake, this holding was counterintuitive. Whereas heightened scrutiny typically applies when a fundamental right is at stake, the Court held for rational basis—the lowest form of scrutiny.¹⁹³ Because it only applied rational basis, the Court promoted a framework where there was “substantial deference to the professional judgment of prison administrators” because of their “responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.”¹⁹⁴ As rational basis review is especially difficult for challengers to overcome, inmates and their friends face a sizeable burden when attempting to show that visitation and contact policies are not rationally related to a legitimate penological interest.¹⁹⁵ Finally, citing to *Turner v. Safley*, the Court recognized the four standards by which it would assess visitation restrictions: (1) the aforementioned rational basis review; (2) whether there were alternative means available to exercise visitation; (3) visitation’s impact on guards, inmates, and prison resources; and (4) whether there were ready alternatives to the regulation.¹⁹⁶

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 132.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (“The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.”).

¹⁹⁶ *Id.*

B. The Merits of “Legitimate Penological Interests” as a Reason to Restrict a Friend’s Visitation

Although *Overton* may be criticized for devaluing a fundamental right to rational basis review, it is not as though penological interests are unimportant. As the Court pointed out, the nature of incarceration unavoidably inhibits visitation, making it infeasible for prisons to allow perfectly free visitation and contact.¹⁹⁷ Indeed, *Overton* listed many valid and persuasive penological interests.¹⁹⁸ Prisons need to maintain safety for the well-being of their staff, inmates, and visitors, which may require limited visitation.¹⁹⁹ Restrictions are also justified so that prisons can properly monitor visitation to prevent contraband from being smuggled in.²⁰⁰ Additionally, visitation supervision expends facility resources and funds that could be better allocated elsewhere, making financial concerns appropriate.²⁰¹

There remained, however, a more powerful reason for restricting and denying visitation: punishment.²⁰² Justice Stevens’s concurring opinion in *Overton* expanded upon association restrictions as a punishment, writing, “the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association.”²⁰³ The concurrence found that terminating associational liberties is a reasonable penalty, as criminals deserve to lose free association with friends and other close relationships for committing crimes.²⁰⁴ Potential criminals could be plausibly deterred from crime by the risk of losing these associations, validating this stance.²⁰⁵ And, under a Kantian, retributionist perspective, those guilty of crimes deserve to suffer the loss of their friends.²⁰⁶ For why should criminals continue to enjoy friendship to the same extent as law-abiding citizens?

To argue between restricting and permitting friend visitation and contact is to argue between opposing legal philosophies. Society has punitive and security interests that would compel greater restrictions on visitation, but social interests in the rehabilitation of inmates and reduction of recidivism are roughly equivalent. Ultimately, this dilemma is without a clear answer,²⁰⁷ and therein lies the true flaw

¹⁹⁷ *Id.* at 131.

¹⁹⁸ *Id.* at 133–35.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 134.

²⁰¹ *Id.* at 135.

²⁰² *See id.* at 142 (Stevens, J., concurring).

²⁰³ *Id.*

²⁰⁴ *See id.* at 141–42.

²⁰⁵ *Five Things About Deterrence*, U.S. DEP’T OF JUST. (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/Q65T-QKWJ>].

²⁰⁶ *See* Frederick Rauscher, *Kant’s Social and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (July 24, 2007), <https://plato.stanford.edu/entries/kant-social-political/> [<https://perma.cc/M35Q-TRXW>].

²⁰⁷ Unclear though this answer may be, this rhetorical question posed by Socrates is worth

with the Court's holding in *Overton*: the Court gave substantial deference to prison administrators for the sake of penological interests where it was unclear that penological interests should control instead of rehabilitation and constitutional liberties. Indeed, it is not even clear that penological interests needed to be placed above rehabilitative interests by default, as the Court could have supplied a balancing test to weigh these interests against each other. Instead, the Court one-sidedly continues to allow correctional administrators to shape policies with near complete disregard for rehabilitation and constitutional liberties, meaning the *Overton* framework places inmates and their friends at the mercy of the prisons that bind them.²⁰⁸

C. Restrictions on Visitation and Contact Between Friends and Inmates Under the Overton Framework

Under the *Overton* framework, courts have overwhelmingly deferred to prison administrators when challenges to visitation and contact restrictions arise. Even the Sixth Circuit, which accepted friendship as a constitutionally protected intimate association, has used *Overton* to justify intense friendship restrictions in the correctional context.²⁰⁹ As a result, many restrictive policies have disallowed visitation and contact between inmates and their friends, affirming the validity of these policies over constitutional challenges.

1. Prohibitions on Friendly Visitation and Association

Because *Overton* defers to prison administrators, prisons have imposed—and courts have affirmed—total bans on friend visitation.²¹⁰ In *Baltas v. Maiga*, for example, an inmate who was transferred from Connecticut to a Virginia correctional facility alleged that the Virginia facility denied him visitation with friends and family.²¹¹ The inmate challenged this policy on First Amendment associational liberty grounds.²¹² Though the inmate claimed that he was totally denied visitation, the court found that he failed to state a claim.²¹³ The court wrote, “the Virginia

remembering: “Should we not assert the same of human beings, my comrade—that when they are harmed, they become worse with respect to human virtue?” PLATO, *supra* note 20, at bk. I, at XII.

²⁰⁸ For more on how *Overton v. Bazzetta* needlessly curtails rehabilitation for the sake of penological interests, see generally Kyrsten Sinema, Note, *Overton v. Bazzetta: How the Supreme Court Used Turner to Sound the Death Knell for Prisoner Rehabilitation*, 36 ARIZ. ST. L.J. 471 (2004).

²⁰⁹ See *Akers v. McGinnis*, 352 F.3d 1030, 1039–43 (6th Cir. 2003).

²¹⁰ See *Baltas v. Maiga*, No. 3:20cv1177(MPS), 2020 U.S. Dist. LEXIS 198290, at *31–34 (D. Conn. Oct. 26, 2020).

²¹¹ *Id.* at *31–32.

²¹² *Id.* at *31.

²¹³ *Id.* at *32–34.

facility is not required to provide treatment for an inmate confined under the Compact that it does not provide for similar inmates not confined under the Compact.”²¹⁴ Therefore, because the facility similarly disallowed visitation for its own inmates not under a compact, it could completely deny visitation to the inmate in this case.²¹⁵ Other courts have likewise denied in-person visitation in the face of associational liberty challenges and other constitutional claims.²¹⁶ And the advent of video calls has made matters worse, as prisons have argued that this technology qualifies as a valid alternative to in-person visitation to help justify in-person bans.²¹⁷

An additional prohibition has been directed at friendships between correctional employees and inmates during and after incarceration, with violations of these policies often resulting in employment termination. As discussed in Part II, *Lord v. Erie County* demonstrated this policy, showing that correctional employees who were friends with inmates prior to incarceration could be fired for trying to maintain the friendship after incarceration had ended.²¹⁸ Other courts have affirmed similar prohibitions against friendships between correctional employees and inmates during and after incarceration.²¹⁹ While some monitoring of friendships between inmates

²¹⁴ *Id.* at *33.

²¹⁵ *Id.*

²¹⁶ See *Ritter v. Alexander*, 460 F. App’x 629, 630 (9th Cir. 2011) (“The district court properly granted summary judgment as to Ritter’s denial of visitation claim because he had no protected right to visits from friends or family”); *Steinbach v. Branson*, No. 1:05-cv-101, 2007 U.S. Dist. LEXIS 75156, at *17 (D.N.D. Oct. 9, 2007) (finding that there was no protected visitation rights after analyzing *Overton*, and reluctantly writing, “in the Eighth Circuit, it appears that prison officials are free to arbitrarily deny visitation, even indefinitely, with a prisoner’s mother, wife, child, or *close friend* without being subject to federal court scrutiny—at least absent a total denial of visitation with all persons.”) (emphasis added); *Falls v. Alton City Jail*, No. 06-294-DRG, 2007 U.S. Dist. LEXIS 2659, at *6–7 (S.D. Ill. Jan. 17, 2007) (dismissing an inmate’s challenge to a visitation policy that allowed visitation from family, but not friends or children); *Tarvin v. Tex. Dep’t of Crim. Just.*, No. 03-11-00491-CV, 2013 Tex. App. LEXIS 7751, at *4 (June 26, 2013) (“The Department’s policy to restrict visitation when an ex-offender, whether friend or family, lacks permission from his or her probation officer does not place a severe or insurmountable restriction on the rights of either the inmate or the would-be visitor”).

²¹⁷ See Patrice A. Fulcher, *The Double Edged Sword of Prison Video Visitation: Claiming to Keep Families Together While Furthering the Aims of the Prison Industrial Complex*, 9 FLA. A&M U. L. REV. 83, 106 (2013) (“Yet, why would jail and prison administrators adopt prison video visitation to the exclusion of these types of visits? The answer appears to lie in money”); J. Tanner Lusk, Note, *Isolation for Profit: How Privately Provided Video Visitation Services Incentivize Bans on In-Person Visitation Within American Correctional Facilities*, 26 WASH. & LEE J. C.R. & SOC. JUST. 339, 365–66 (2019).

²¹⁸ See *supra* Section II.C.2.

²¹⁹ *Akers v. McGinnis*, 352 F.3d 1030, 1039–40 (6th Cir. 2003); see *Lee v. Crossroads Corr. Ctr.*, No. 01-143, 2002 LEXIS 317, at *2–8 (Mont. July 12, 2002); *Ebli v. State*, 451 P.3d 382, 387–90 (Alaska 2019); *Nigl v. Jess*, No. 18-cv-882-bbc, 2020 U.S. Dist. LEXIS 179075, at *41–55 (W.D. Wis. Sept. 29, 2020).

and correctional employees is likely necessary to prevent prison corruption, the current judicial doctrine under cases like *Lord* prohibits even harmless friendships.

2. The High Costs of Contact

Aside from visitation, other forms of contact have also become heavily regulated by correctional facilities and lawmakers. Most commonly, friends and families of inmates are charged a high fee for phone calls. On average, a fifteen-minute phone call costs \$5.74, but calls of the same length have reached as high as \$24.82 in some facilities.²²⁰ High prices such as these have contributed to prison phone calls generating approximately \$1.4 billion in revenue annually.²²¹ Unsurprisingly, these high costs can lead dedicated friends into “staggering debt.”²²² Courts have been dismissive of First Amendment challenges to these fees and have held they are valid.²²³ As a result, some unincarcerated friends may be discouraged from calling their inmate friend; if they are not discouraged, they risk going into debt from high-cost collect calls.²²⁴

3. Restrictions During and Following the Coronavirus Pandemic

The Coronavirus Pandemic saw the universal cancellation of in-person visitation in order to prevent the spread of disease.²²⁵ When challenged, courts have generally affirmed Coronavirus non-visitation policies as valid, finding they were rationally related to penological goals in protecting health and safety during the pandemic.²²⁶

²²⁰ Tyler Kendall, *Why Are Jail Phone Calls So Expensive?*, CBS NEWS (Oct. 13, 2020, 7:07 P.M.), <https://www.cbsnews.com/news/why-are-jail-phone-calls-so-expensive/> [<https://perma.cc/A6SD-CZUS>].

²²¹ Rosalie Chan & Belle Lin, *The High Cost of Phone Calls in Prisons Generates \$1.4 Billion a Year, Disproportionately Driving Women and People of Color into Debt*, INSIDER (June 30, 2021, 9:30 A.M.), <https://www.businessinsider.com/high-cost-prison-communications-driving-debt-racial-wealth-gap-2021-6> [<https://perma.cc/2UT5-DXX8>].

²²² Katrina Vanden Heuvel, *The Staggeringly High Price of a Prison Phone Call*, WASH. POST (Nov. 30, 2021, 8:04 A.M.), <https://www.washingtonpost.com/opinions/2021/11/30/staggeringly-high-price-prison-phone-call/> [<https://perma.cc/E6JA-3DD3>].

²²³ See *Arsberry v. Illinois*, 244 F.3d 558, 564–66 (7th Cir. 2001); *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000); *Walton v. N.Y. State Dept. of Corr. Servs.*, 921 N.E. 145, 155–56 (N.Y. 2009); *Byrd v. Goord*, No. 00 Civ. 2135 (GBD), 2005 U.S. Dist. LEXIS 18544, at *18–21 (S.D.N.Y. Aug. 26, 2005).

²²⁴ See Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL’Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ [<https://perma.cc/77BM-NLE5>]. For more on fees faced by inmates’ friends and other loved ones, see also Fern L. Kletter, *Fees Charged to Inmate or Inmate’s Family for Services or Purchases as Giving Rise to Liability or Violating State or Federal Law*, 37 A.L.R.7th 2, 74–109.

²²⁵ Heuvel, *supra* note 222.

²²⁶ *Thaddeus v. Sec’y of the Exec. Off. of Health and Hum. Serv.*, 193 N.E.3d 472, 422–23

Though justified during the pandemic, these prohibitions have remained in place despite the waning need for health and safety concerns.²²⁷ The continuation of these prohibitions are likely part of an effort to eliminate in-person visitation entirely, which began well before the Coronavirus Pandemic.²²⁸ Reinstatement of visitation has otherwise been slow.²²⁹ In facilities where in-person visitation has yet to return, inmates and their friends continue to seek legal remedies by challenging anti-visitiation policies, though to little success.²³⁰

Despite the lack of success of challenges to Coronavirus visitation restrictions, these policies have partially benefitted inmates and their friends. Chiefly, the costs of contacting inmates through phone calls have been dramatically reduced in some facilities and outright eliminated in others.²³¹ Federal detention facilities have seen the greatest change, as the Bureau of Prisons completely suspended the cost of phone and video calls during the pandemic.²³² Some states have also made an increased effort to reduce or eliminate the costs of non-physical contact.²³³ Thus, although COVID policies brought in a slew of prohibitions against in-person visitation, these policies at least improved remote contact conditions for friends by reducing costs.²³⁴

D. Protecting Friendship Visitation and Contact Under the Current Framework

Due to the substantial deference granted to prison administrators: the high burden of showing that a policy does not meet a legitimate penological interest, and the general lack of friendship protections as an associational liberty, inmates and their friends may believe that seeking protections for visitation is a useless endeavor. However, the situation is not without hope. Despite the low chances of legal success,

(Mass. App. 2022); *MacDonald v. Harold*, No. 6:20-cv-00931-AA, 2022 U.S. Dist. LEXIS 12635, at *13–15 (D. Or. Jan. 24, 2022) (citing *Overton*); *Schweder v. Beshear*, 570 F. Supp. 3d 443, 453–54 (E.D. Ky. 2021) (citing *Overton*); see *Santana v. Quiros*, No. 3:21cv376(KAD), 2021 U.S. Dist. LEXIS 99492, at *13–15 (D. Conn. May 26, 2021) (citing *Overton*).

²²⁷ Heuvel, *supra* note 222.

²²⁸ Shannon Sims, *The End of American Prison Visits: Jails End Face-to-Face Contact—and Families Suffer*, THE GUARDIAN (Dec. 9, 2017), <https://www.theguardian.com/us-news/2017/dec/09/skype-for-jailed-video-calls-prisons-replace-in-person-visits> [<https://perma.cc/QH7V-ZTNK>].

²²⁹ *Id.*

²³⁰ See, e.g., Beenish Ahmed, *One Man's Fight to Bring Back Visits in the Wayne County Jail*, MICH. RADIO (Jan. 30, 2023), <https://www.michiganradio.org/criminal-justice-legal-system/2023-01-30/jail-visitiation> [<https://perma.cc/A6KQ-GSQG>].

²³¹ Heuvel, *supra* note 222.

²³² Luke Barr, *Bureau of Prisons Allowing Inmates to Make Free Phone Calls Amid COVID-19 Pandemic*, ABC NEWS (Apr. 15, 2020), <https://abcnews.go.com/US/bureau-prisons-allowing-inmates-make-free-phone-calls/story?id=70161178> [<https://perma.cc/MMB9-JHYQ>].

²³³ Heuvel, *supra* note 222.

²³⁴ See *id.*

there is still a chance that friends will receive protections when pursuing them through judicial and extrajudicial means.

1. *Overton*'s Lingering Friendship Protections for Visitation and Contact

Though *Overton* mostly hinders friendships for inmates, it does offer a small degree of protection. As the Court stated, alternative means to exercise a right must be maintained to justify visitation restrictions.²³⁵ The Court wrote, “[w]ere it shown that no alternative means of communication existed . . . it would be some evidence that the regulations were unreasonable.”²³⁶ It reasonably follows that, even in situations where in-person visitation has been terminated, inmates cannot be completely prohibited from remaining in contact with friends without a satisfactory reason.²³⁷

As at least some avenues of contacting friends must normally be left open, inmates and their friends may be able to successfully challenge overburdensome restrictions on contact between each other. An example of such a challenge appeared in *Pape v. Cook*.²³⁸ Having been denied visitation, an inmate alleged that the prison failed to keep open alternative means of communication because the prison would not allow him to make calls for social purposes and refused to send out his mail.²³⁹ The court refused to dismiss this First Amendment claim, finding that inmate contact assurances posed an important constitutional issue worthy of more discourse.²⁴⁰ Therefore, by claiming that prisons have not left open alternative means of communication, inmates and their friends may use *Overton* to successfully challenge prison policies and secure a greater degree of contact.

2. Arguing for the Associational Rights of the Unincarcerated Friend

Another potential course friends may take is to claim the associational liberties of the unincarcerated friend. While the Court wrote in *Overton* that liberties were “surrendered by the *prisoner*,” the Court did not state that these liberties were to be surrendered by non-prisoners.²⁴¹ Despite having violated no law, the innocent friend of an inmate is also punished when that friend is incarcerated: they lose that friend’s physical presence and companionship. Losing association in this manner may be partially justifiable for criminals, but it is fundamentally unfair for their innocent friends, making it difficult for prison administrators to justify restrictions against

²³⁵ *Overton v. Bazzeta*, 539 U.S. 126, 135 (2003).

²³⁶ *Id.*

²³⁷ *See id.*

²³⁸ No. 3:20-cv-1324(VAB), 2021 U.S. Dist. LEXIS 101942, at *16–18 (D. Conn. May 28, 2021).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 131–32 (emphasis added).

them. This loss of association can raise an associational liberty claim for unincarcerated friends: despite having committed no crimes themselves, they have been deprived of free association with their incarcerated friends.

The plaintiffs used this argument in *Hamilton v. Saxbe* by challenging visitation policies under the First Amendment, claiming “that the right of a prisoner to be visited by family and friends involves fundamental constitutional rights of association, privacy, and liberty of the prisoners *and of those who seek to visit with them.*”²⁴² Unfortunately, the court still overruled this argumentative approach in *Hamilton*,²⁴³ as the Supreme Court would similarly go on to do in *Overton*,²⁴⁴ so advancing the liberties of innocent friends alone will not likely win inmates and their friends associational liberty protections. Nevertheless, adding more injured parties to a freedom of association claim is still more persuasive than it would be for an inmate to proceed as the sole party to a First Amendment claim. Therefore, both the incarcerated and unincarcerated friends should claim that their associational liberties have been violated by over-restrictive prison policies.

3. Seeking Legal Policy Reform

Finally, because the law provides them with only weak remedies in the prison context, inmates and their friends could attempt to change the law so that it better supports and protects the institution of friendship. Friends may seek these reforms through lobbying to federal and state legislatures to enact their desired protections, and there are two key areas where legal policy reform would be the most helpful: prisons and education. Changing the law to be more supportive of friendship in these areas will be difficult, no doubt. But because the current framework provides so little protection and so few feasible legal arguments, legal policy reform is the most direct route to effecting change for inmates and their friends, making it worthy of pursuit and consideration.

a. Prisons

Regarding prison reform, inmates and their friends should lobby for a reduction in prison restrictions on visitation and contact. They may try to gain the support of Congress or their state legislatures in an attempt to achieve their desired reforms on their own, or they can enlist the help of existing prison reform groups.²⁴⁵ Inmates

²⁴² 428 F. Supp. 1101, 1109 (N.D. Ga. 1976) (emphasis added).

²⁴³ *Id.* at 1112–14.

²⁴⁴ 539 U.S. 126, 131–36 (2003).

²⁴⁵ *Prison and Jail Visitation*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/visitation/> [<https://perma.cc/7G4C-MF38>] (last visited Dec. 4, 2023); *About*, PRISON PHONE JUST., <https://www.prisonphonejustice.org/about/> [<https://perma.cc/4X93-QRVH>] (last visited Dec. 4, 2023).

and their friends will likely find mixed results in pursuing legislative change for visitation and contact. However, some states have taken measures to expand visitation, as have some localities, so friends may see some success through seeking prison reform.²⁴⁶ At the very least, inmates and their friends may raise awareness for visitation and contact issues, which will hopefully lay the groundwork for future change.

b. Education

To reform the American public conscience on friendship through education is the more effective, albeit less direct, remedy. As shown by the lack of its discussion in law school, litigation, judicial opinions, and legal scholarship, friendship is not treated seriously in the legal sphere. However, this lack of seriousness in the legal sphere is caused by the lack of seriousness friendship receives in the public sphere. Without being respected as a legal issue, it is difficult for arguments concerning friendship to gain traction both in and beyond the corrections system.²⁴⁷

To show that reform to education policy is necessary, it must be first shown that the public does not take friendship seriously and that this has caused social problems. Because friendship is often characterized by light-heartedness and joy, rather than solemnity, it is understandable why individuals do not generally think of friendship as something serious. However, though good friendship is often a light-hearted and joyful thing, joyfulness and seriousness are not mutually exclusive. It is as C.S. Lewis described: “Not that we must always partake of [friendship] solemnly It is one of the difficult and delightful subtleties of life that we must deeply acknowledge certain things to be serious and yet retain the power and will to treat them often as lightly as a game.”²⁴⁸ An individual friendship is something that is to be both enjoyed and pondered; to do one without the other likely risks the preservation of a friendship. Therefore, to properly preserve the institution of friendship, we must consider the place of friendship in the public conscience.

First, there are long-standing difficulties for friendship in American society due to the democratic nature of the American people.²⁴⁹ Alexis de Tocqueville implicated

²⁴⁶ On statewide reform, see *Prison and Jail Visitation*, *supra* note 245 (“In April 2018, Massachusetts Governor Charlie Baker signed S.2371 into law, which requires Massachusetts jails to provide people in jails with at least two in-person visits per week and prohibits jails from replacing in-person visits with video calls.”). On local reform to visitation, see *id.* (“Travis County, TX legislators voted to bring back in-person visits in September 2015.”).

²⁴⁷ Friendship may even border being a frivolous argument in some cases. See *Davis v. Tobacco Co. of Prods.*, No. SA-96-CA-782, 1997 U.S. Dist. LEXIS 7474 (W.D. Tex. May 21, 1997) (holding that a claim of damages against a tobacco company was frivolous because the friend had no blood relation to the decedent).

²⁴⁸ LEWIS, *supra* note 7, at 802; see also *supra* Part I.

²⁴⁹ See generally TOCQUEVILLE, *supra* note 11. “Democratic” here refers to the values and

these difficulties in his examination of the United States and its people in *Democracy in America*. According to Tocqueville, Americans are more naturally disposed to friendliness than the peoples of other nations.²⁵⁰ However, the democratic nature of Americans leads to individualism and a taste for material goods.²⁵¹ Both of these come with disadvantages that tend to obstruct friendship.²⁵² Individualism leads to weakened bonds of human affection and eventually causes the complete isolation of Americans from even their closest relations.²⁵³ Meanwhile, a taste for material goods causes Americans to live in a constant state of hurry driven by a desire to be materially well-off, which detracts and distracts from spending quality time with friends.²⁵⁴ As modern Americans continue to remain individualistic and prioritize work and consumerism over their friendships, Tocqueville's claims are no less true now than they were two centuries ago.²⁵⁵

Furthermore, modern living conventions and technologies (smart phones and social media) create new problems for friendship. Currently, people are prone to move away from their friends with a much greater frequency, especially young adults, and this often leads to weakened and broken friendships.²⁵⁶ Though technology and social media have granted individuals the ability to maintain their friendships over great distances, individuals find themselves spread thin over having all

lifestyles of a people self-governed under a democracy, rather than a particular political party or set of political beliefs. *Id.*

²⁵⁰ *See id.* at 541 (“In a foreign country, two Americans are friends right away for the sole reason that they are Americans.”).

²⁵¹ *Id.* at 482–84, 511–14.

²⁵² *See id.*

²⁵³ *See id.* at 482–84 (“Thus not only does democracy make each man forget his ancestors, but it hides his descendants from him and separates him from his contemporaries; it constantly leads him back toward himself alone and threatens finally to confine him wholly in the solitude of his own heart.”).

²⁵⁴ *Id.* at 511–14 (“He who has confined his heart solely to the search for the goods of this world is always in a hurry, for he has only a limited time to find them, take hold of them, and enjoy them.”).

²⁵⁵ *See* Jefferson M. Fish, *Are American Friendships Superficial?*, PSYCH. TODAY (Sept. 7, 2010), <https://www.psychologytoday.com/us/blog/looking-in-the-cultural-mirror/201009/are-american-friendships-superficial> [<https://perma.cc/HKN7-Z3RA>]; *Friendship and Friendliness: Easy Ways to Make Friends*, PARTNERS HEALTHCARE, <https://pips.partners.org/life-in-the-united-states/american-culture/friendship-and-friendliness.aspx> [<https://perma.cc/DYF3-55G6>] (last visited Dec. 4, 2023).

²⁵⁶ Melissa Dahl, *Friendships Start to Seem Disposable When You Move a Lot*, THE CUT (Feb. 26, 2016), <https://www.thecut.com/2016/02/friendships-start-to-seem-disposable-when-you-move-a-lot.html> [<https://perma.cc/KZQ3-MDN2>]; Julie Beck, *Disposable Friendships in a Mobile World*, THE ATLANTIC (Feb. 24, 2016), <https://www.theatlantic.com/health/archive/2016/02/disposable-friendships-in-a-mobile-world/470718/> [<https://perma.cc/76X4-5WTJ>]. *But see* Sabrina Tavernise, *Frozen in Place: Americans Are Moving at the Lowest Rate on Record*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/us/american-workers-moving-states-.html> [<https://perma.cc/VRY7-V293>].

of their friends available at once, hindering the development of more meaningful and complete friendships.²⁵⁷ Over-reliance on technology has replaced in-person interaction, leading to a deficit of genuine human connection.²⁵⁸ And the Coronavirus Pandemic has had several drawbacks on friendships for individuals and in aggregate.²⁵⁹ It is no wonder that the United States currently experiences a severe decline in friendship!²⁶⁰ Therefore, because the long-standing characteristics and new lifestyles of the American people do not leave room for friendship to flourish in the public conscience, it is evident that the public does not currently take friendship seriously. As a result, the institution of friendship suffers.

To heal the public and change its conscience on friendship, our public education *must* teach lessons on friendship. As of now, rather than being directly taught the nature of good friendship and how to live as a good friend, most people generally learn about friendship through observation, following the example of others, and trial and error.²⁶¹ While some may argue that this alone is a sufficient education, the aforementioned decline in good friendship indicates otherwise. Thus, policy reform to curricula is evidently needed so that individuals are taught friendship under the public education. Crafting a well-thought-out curriculum of friendship will require deeper consideration than what is given here.²⁶² However, many essential pillars of

²⁵⁷ Douglas Heingartner, *How Many Friends Is Too Many? This New Study Shows the Problem of Having Too Many Friends*, PSYCH NEWS DAILY (Feb. 20, 2023), https://www.psychnewsdaily.com/why-having-too-many-friends-makes-people-less-likely-to-friend-you/#google_vignette [<https://perma.cc/M4RW-TJT3>].

²⁵⁸ Emma Seppala, *What is Your Phone Doing to Your Relationships?*, GREATER GOOD MAG. (Oct. 10, 2017), https://greatergood.berkeley.edu/article/item/what_is_your_phone_doing_to_your_relationships [<https://perma.cc/DJ6G-UCG6>].

²⁵⁹ Claire Cohen, *The Pandemic Has Taken Its Toll on Our Friendships. How Do We Fix Them?*, THE GUARDIAN (June 18, 2022), <https://www.theguardian.com/commentisfree/2022/jun/18/pandemic-friendships-relationships> [<https://perma.cc/KX8Y-274D>].

²⁶⁰ Daniel A. Cox, *The State of American Friendship: Change, Challenges, and Loss*, SURV. CTR. AM. LIFE (June 8, 2021), <https://www.americansurveycenter.org/research/the-state-of-american-friendship-change-challenges-and-loss/> [<https://perma.cc/4MWW-9D93>] (reporting several survey statistics on the decline of friendship, including that in 2021, twelve percent of Americans surveyed reported having no close friends, whereas in 1990, only three percent of Americans reported having no close friends).

²⁶¹ See *How Children Make Friends*, PREGNANCY, BIRTH & BABY, <https://www.pregnancybirthbaby.org.au/how-children-make-friends> [<https://perma.cc/WRA9-SFRD>] (last visited Dec. 4, 2023).

²⁶² See generally Janet R. Reohr, *Friendship: An Important Part of Education*, 57 THE CLEARING HOUSE 209 (1984); Caron Carter & Cathy Nutbrown, *A Pedagogy of Friendship: Young Children's Friendships and How Schools Can Support Them*, 24 INT'L J. EARLY YEARS EDUC. 395 (2016). These authors each present thoughtful consideration on how to increase the presence of friendship as a part of elementary school education. Because young adults particularly struggle with prioritizing and maintaining their friendships, I would argue for extending consideration for teaching friendship to secondary and post-secondary

such a curriculum have already been referenced thus far in the discussion of complete friendship.²⁶³ To look out for the good of a friend for that friend's sake, to live together, to help friends grow in virtue, as well as why each of these things are intrinsically valuable, are just a few lessons conducive to teaching friendship and reforming the public conscience.

The change will likely be slow, but if a public education on friendship is implemented, then a greater respect for friendship will steadily foster in the consciences of the American people.²⁶⁴ In turn, friendship will increasingly grow as an object of legal contemplation, and many legal reforms will naturally come to pass.²⁶⁵ Increased allowances for prison visitation and contact between friends may be part of these natural reforms. Roundabout though it may be, if inmates and their friends and all other advocates of friendship wish to see it better protected, they would be wise to seek reform friendship is taught in the United States. For the best hope for legally protecting friendship lies in education.

As a final word on policy reform, success will not be easily won. Lawyers, legislators, judges, and the public do not currently give friendship serious legal or social consideration, and they will not likely be receptive to reforming prisons and education to better protect and support the institution of friendship. But despite these difficulties, there remains something altogether fitting about friends working together for these reforms. These friends seek great change for each other's sake and the sake of the friendship itself. This can be fittingly described as an act of complete friendship.

CONCLUSION

American courts and American law offer little protection to friendship. Despite the deep meaning of this relationship to those who hold it, the Supreme Court has not expressly recognized friendship as a constitutionally protected intimate association under the First Amendment in the time span following its decision in *Roberts v. United States Jaycees*. Subsequent decisions in lower courts have refused to extend this constitutional protection to friendship, making it difficult for friends to challenge policies restricting their friendship in many legal circumstances.²⁶⁶

education. Nevertheless, these studies remain valuable as discussions on the practical inclusion of friendship in curricula and are therefore deserving of reference here.

²⁶³ See *supra* Section I.A.2.

²⁶⁴ See generally *Respect*, STAN. ENCYCLOPEDIA PHIL. (July 2, 2022), <https://plato.stanford.edu/entries/respect/> [<https://perma.cc/N2BF-BER9>], and the sources listed therein.

²⁶⁵ See Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 79–80 (2011); Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RSCH. Q. 29, 36 (2003).

²⁶⁶ See *supra* Section II.C.

The difficulty faced by friends in receiving constitutional protections has especially arisen in the prison context for inmates and their unincarcerated friends who struggle to receive protections for visitation and other forms of contact.²⁶⁷ Under the Supreme Court's framework articulated in *Overton v. Bazzetta*, there is virtually no constitutional protections for visitation and contact in general, let alone between friends, and prison administrators are given substantial deference in restricting visitation and contact.²⁶⁸ As a result, prison administrators can eliminate visitation between inmates and their friends, and they have eliminated it in many instances.²⁶⁹ While other routes of contact have been left open, even these have high costs for those who use them.²⁷⁰ Thus, inmates and their friends are often left without options to continue engaging in their friendship.²⁷¹

In its opposition and indifference to friendship, the American legal system has reduced friendship to a legal interest of little worth. Consequentially, penological interests easily defeat interests in friendship.²⁷² Empirical evidence of friendship's value has been cast aside in reaching this result.²⁷³ Philosophically, the legal system has chosen not to protect the inherent value of friendship in rehabilitation and in making life altogether worth living. We have exiled Aristotle from our courts.

Though the situation for friends appears bleak, for those who see virtue in friendship, seeking protections remains worthwhile. Though modest, legal protections and remedies are not useless. Making associational liberties challenges from different angles could allow friends to gain ground in achieving First Amendment protections for friendship as an intimate association.²⁷⁴ Similarly, though it will be difficult to obtain visitation protections from courts, inmates and their friends can still obtain judicial protection for other forms of communications under *Overton*.²⁷⁵ Friends can always lobby for legal policy reform to visitation and education. And each of these litigatory paths will likely become more viable and successful when armed with a workable legal definition of friendship that uses the Leib test.²⁷⁶

Friendship is both personally and politically important. Good friends make life worth living; good friendships play a vital role in maintaining social order through

²⁶⁷ See *supra* Section IV.C.

²⁶⁸ See 539 U.S. 126, 131–32 (2003).

²⁶⁹ See *id.* at 131; *Lord v. Erie County*, 476 F. App'x 962, 965 (3d Cir. 2012); *Akers v. McGinnis*, 352 F.3d 1030, 1039–43 (6th Cir. 2003); *Baltas v. Maiga*, No. 3:20cv1177 (MPS), 2020 U.S. Dist. LEXIS 198290, at *31–34 (D. Conn. Oct. 26, 2020); see also cases listed at note 216.

²⁷⁰ Heuvel, *supra* note 222.

²⁷¹ *Supra* Section IV.C.

²⁷² *Supra* Part IV.

²⁷³ *Supra* Section I.B.

²⁷⁴ See *supra* Section II.D.

²⁷⁵ See *supra* Section IV.D.1.

²⁷⁶ Leib, *supra* note 166, at 642–47.

forming virtuous citizens and reforming criminals to live accordingly with the law. To reap these benefits from this ancient institution, the modern legal system would do well to treat friendship with the seriousness of legal analysis and discourse that it deserves. For as the complete friend seeks the good of his friend for that friend's sake, so too must the lawmaker be like a complete friend to his citizens and seek their good for the sake through the rule of law.²⁷⁷

²⁷⁷ See generally ARISTOTLE, *POLITICS* (2d ed. Carnes Lord trans., Univ. Chi. Press 2013) (c. 350 B.C.E.).