

# KEEP THE FAMILY CLOSE: ANALYZING THE IMPACT OF FAMILY VISITATION ON OUTCOMES FOR YOUNG ADULT OFFENDERS

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Introduction .....	127
I.The Young Adult Classification .....	131
A. Neuroscience of the Young Adult.....	132
B. The Supreme Court’s Recognition of the Reduced Culpability of Youthfulness .....	134
II.Impacts of Visitation On Incarcerated People .....	139
III.Notice-and-Comment Rulemaking.....	143
A. Why the BOP Should Use Informal Notice-and-Comment Rulemaking.....	146
B. A Rule Addressing Family Visitation For Young Adults.....	149
C. Strategies for Increasing Family Visitation.....	153
Conclusion .....	154

## INTRODUCTION

More than 80% of individuals incarcerated in federal prisons are in facilities located farther than one hundred miles from their homes and

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families.<sup>1</sup> While physical distance between correctional institutions and families is frequently the primary impediment for family visitation, families face a myriad of additional obstacles to visitation, including prison policies and rules.<sup>2</sup> The difficulties associated with the distance required for travel are often exacerbated by the necessity of overnight accommodations, childcare costs, and lost wages for missed work.<sup>3</sup> Due to these complexities, those who are incarcerated receive visitors at vastly different rates.<sup>4</sup> However, the impact of these visits on incarcerated people are profound.<sup>5</sup> Offenders who maintain contact with family and friends show improved mental health functioning and reduced misconduct while incarcerated.<sup>6</sup> Additionally, people who received visitors while incarcerated were nearly 30% less likely to recidivate<sup>7</sup> than those who did not receive visitors.<sup>8</sup> Importantly, greater reductions in the rate of recidivism are associated with each additional visit.<sup>9</sup> In fact, federal prison officials acknowledge the importance of family visitation on successful reentry into society.<sup>10</sup>

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1. SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS & THEIR CHILDREN: TRENDS 1991–2007 8 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf> (describing findings from 2004 and finding that a measly 5% of parents incarcerated in a federal facility were housed fewer than fifty miles from their homes).

2. See Neil L. Sobol, *Connecting the Disconnected: Communication Technologies for the Incarcerated*, 53 WAKE FOREST L. REV. 559, 562 (2018) (adding that policies and rules designed to allegedly promote prison security and environments that are unsuitable for children create significant barriers for communication between incarcerated people and their families).

3. Brae Campion Young & Carter Hay, *All in the Family: An Examination of the Predictors of Visitation Among Committed Juvenile Offenders*, 24 YOUTH VIOLENCE & JUV. JUST. at 5 (2019).

4. See *id.* at 4–5 (elaborating upon variations in visitation among incarcerated people based on race, sex, age, number of siblings, family’s structural and background characteristics, family’s history of incarceration, and various other factors).

<sup>5</sup> See *infra* Part II (discussing the positive effects of visitation on those who are incarcerated)

6. See Young & Hay, *supra* note 3, at 1–2 (describing the benefits of allowing visitation).

7. See *Recidivate*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“To return to a habit of criminal behavior; to relapse into crime.”).

8. Young & Hay, *supra* note 3, at 3.

9. See Young & Hay, *supra* note 3, at 3 (suggesting that the more contact inmates have with their families, the less likely they are to commit more crimes).

10. See FED. CORR. COMPLEX BEAUMONT, TEX., U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, NO. BMX 5267.08A, COMPLEX SUPPLEMENT: VISITING REGULATIONS (2008) (stating that “[v]isiting helps maintain the morale of [incarcerated persons], while strengthening relationships between inmates and family members and others in the community”).

Despite the established benefits, incarcerated people are not constitutionally entitled to any visitation.<sup>11</sup> In *Newman v. Alabama*,<sup>12</sup> the Fifth Circuit held that visitation regulations should be left to prison authorities and include general rules which allow for “reasonable” visitation.<sup>13</sup> However, the Fifth Circuit also noted that prison officials should adapt the visitation policies to individual circumstances “if their sound discretion should so dictate.”<sup>14</sup> Therefore, prison authorities may use their discretion to either allow or exclude visitors to ensure the facility’s security and orderly operation.<sup>15</sup> The Supreme Court addressed this issue in *Kentucky Department of Corrections v. Thompson*,<sup>16</sup> holding that incarcerated people are not entitled to visitation under the Fourteenth Amendment.<sup>17</sup> The majority elaborated that prison officials may exclude a visitor when the officials believe that the visitor would interfere with the institution’s functioning or security.<sup>18</sup> In his dissent, Justice Marshall argued that the majority’s ruling in this case allows correction authorities to deny incarcerated people visits from parents and close friends “for any reason whatsoever, or for no reason at all.”<sup>19</sup> The prior holding in *Turner v. Safley*<sup>20</sup> addressed Justice Marshall’s concerns, establishing that a ban on visitors is unconstitutional if it does not serve any legitimate goal of the correctional institution.<sup>21</sup> While holding unfounded prison

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11. See *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (explaining that every incident of visitor harassment cited by the petitioner stemmed from a legitimate penological objective); see also *McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975) (finding that “visitation privileges are a matter subject to the discretion of prison officials”).

12. 559 F.2d 283 (5th Cir. 1977).

13. See *id.* at 291 (explaining that “visitation regulations should be left to the prison authorities, wisely adapted to individual circumstances if their sound discretion should so dictate, or included in general rules which will allow prisoners reasonable visitation”).

14. *Id.*

15. See *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) (describing state procedures providing that “a visitor ‘may be excluded’ when . . . officials find reasonable grounds to believe that the ‘visitor’s presence in the institution would constitute a clear and probable danger to the institution’s security or interfere with [its] orderly operation.”).

16. *Id.*

17. See *id.* at 465 (deciding that due process does not include the right to visitations).

18. See *id.* at 463 (enabling a discretionary system of visitation).

19. *Id.* at 465–66 (Marshall, J., dissenting) (arguing that the majority’s declaration that visitors need not fall into one of the prison’s established categories of impermissible visitors to be excluded from the facility is unnecessarily broad).

20. 482 U.S. 78, 89 (1987).

21. See *id.* (finding that a prison regulation is valid if it is reasonably related to legitimate penological goals); see also *Jones v. Diamond*, 594 F.2d 997, 1013–14 (5th Cir. 1979) (holding “arbitrary or capricious limitations” on visitation privileges unconstitutional); *Valentine v.*

visitation regulations unconstitutional sends a message to prison officials, it does not provide a remedy guaranteeing that families of incarcerated people have access to reasonable visitation throughout the prison system.<sup>22</sup>

The criminal justice system has long acknowledged the difference between adult and juvenile offenders.<sup>23</sup> For example, juvenile centers emphasize rehabilitation and treatment more often than adult facilities.<sup>24</sup> This greater emphasis recognizes that while juveniles and young adults should not be released from responsibility for their criminal actions, “youthfulness justifies some level of reduced culpability.”<sup>25</sup> Advances in neuroscience show that the prefrontal cortex—the area of the brain associated with impulse control and analyzing the consequences of particular courses of action—is one of the last regions of the brain to develop, and may not be fully formed until the mid-twenties.<sup>26</sup> This means that legally relevant emotional and social development continues past age eighteen.<sup>27</sup> Influenced by this developmental science, some lower courts have restructured their criminal justice systems to include a young adult category.<sup>28</sup>

The Bureau of Prisons (BOP) should address the needs of this emerging category of young adult offenders, especially in light of the high rates of criminality and recidivism among this age group, by formally acknowledging the positive impacts of family visitation. To do so, the BOP, acting pursuant to its rulemaking power as part of the Department of Justice (DOJ), should

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Englehardt, 474 F. Supp. 294, 301 (D.N.J. 1979) (holding a county jail’s ban on visitation by children unconstitutional).

22. See *Valentine v. Englehardt*, 492 F. Supp. 1039, 1042–43 (D.N.J. 1980) (explaining that regardless of the constitutional right to visitation, the manner in which the visits occur is at the sound discretion of the executive branch).

23. See Elijah D. Jenkins, Comment, *Adjudicating the Young Adult: Could Specialized Courts Provide Superior Treatment to this Emerging Classification?*, 61 HOW. L.J. 455, 456 (2018) (noting that the legal distinction between adults and juveniles goes back to the 1800s).

24. See Young, *supra* note 3, at 6.

25. See Jenkins, *supra* note 23, at 470.

26. See Nathan Hughes & Grace Strong, *Implementing the Evidence on Young Adult Neuromaturation: The Development of a Specialist Approach in Probation Services*, 63 PROB.J. 452, 453 (2016).

27. See Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 643 (2016).

28. See Kevin Lapp, *Young Adults & Criminal Jurisdiction*, 56 AM. CRIM. L. REV. 357, 374–75 (2019) (noting that many juvenile courts retain jurisdiction of adolescent offenders into their adulthood). The Supreme Court has accepted this neuroscience. See Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1796, 1801 (2016) (recognizing that the Court in *Roper* drew upon science when discussing the “inchoate nature of the adolescent brain” and the Court in *Miller* noted that “brain science suggests that children should be treated differently than adults in the criminal justice process”).

engage in notice-and-comment rulemaking and propose a rule regulating visitation for young adult offenders in federal prisons nationwide. The rule should ensure that young adults have reasonable access to family visitation and that the BOP policies specifically encourage family engagement.

Part I of this Comment discusses the neuroscience of young adults and the similarities between young adult and juvenile offenders. Part I also argues that court systems should identify a young adult category as a transitional classification between juveniles and fully mature adults. Part II discusses the myriad of barriers families face when visiting their incarcerated loved ones, statistics on visitation of incarcerated people, and the ways in which visitation impacts outcomes for those who are incarcerated, including improved behavior and decreased recidivism. Finally, Part III proposes an administrative recommendation to address prison visitation for incarcerated young adults, suggesting the BOP should engage in notice-and-comment rulemaking and promulgate a rule streamlining federal prison visitation policies and ensuring reasonable access to visitation nationwide.

## I. THE YOUNG ADULT CLASSIFICATION

The criminal justice system has finally started to formally recognize that “kids are different.”<sup>29</sup> Research demonstrates that the brain development process impacts the way adolescents think and behave.<sup>30</sup> Young adults, however, are frequently being left out of the discussion.<sup>31</sup> While research shows that young adults’ brains are still forming and are in some ways more like adolescent brains than those of fully mature adults,<sup>32</sup> the criminal justice system does little to accommodate the needs of this group.<sup>33</sup> The high rates of arrests and recidivism of young adults, along with their susceptibility to

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29. Andrew Cohen, *Kids are Different*, THE MARSHALL PROJECT (Dec. 13, 2014, 11:37 AM) <https://www.themarshallproject.org/2014/12/12/kids-are-different> (highlighting recent movements in the criminal justice system based on the understanding that kids and adults are different).

30. See Eric Fowler & Megan C. Kurlycheck, *Drawing the Line: Empirical Recidivism Results From a Natural Experiment Raising the Age of Criminal Responsibility*, 16 YOUTH VIOLENCE & JUV. JUST., 2017, at 263, 265 (explaining that “there are clear biological reasons youths may not be as responsible or culpable for their actions as adults”).

31. See Scott, *supra* note 27, at 641 (noting that most public policy and criminal justice reform has focused on juveniles).

32. See Hughes & Strong, *supra* note 26, at 453 (noting the similarities between the neuroscience of adolescents and young adults); see also Alex A. Stamm, Note, *Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 75 (2017) (noting that the brain is not fully mature until closer to age twenty-five).

33. See Stamm, *supra* note 32, at 73 (determining that young adults receive vastly different treatment than juveniles in the criminal justice system).

rehabilitation,<sup>34</sup> make this age group especially in need of intervention.<sup>35</sup>

### A. *Neuroscience of the Young Adult*

Young adults account for the highest rate of arrests in the United States.<sup>36</sup> These offenders comprise approximately one third of people who start a community or suspended sentence order, are found guilty of offenses, or are sentenced to custody each year.<sup>37</sup> Young adults<sup>38</sup> engage in noncriminal risky behaviors like binge drinking, substance abuse, and unprotected sex more frequently than older adults.<sup>39</sup> Additionally, a young adult's inhibitory control and rational decisionmaking appears to be prone to becoming overwhelmed during emotional circumstances.<sup>40</sup> Psychologists have thus argued that adolescents do not have the same level of cognitive reasoning as adults and are therefore less culpable for their acts.<sup>41</sup> Research shows that key regions of the brain may not fully develop until young adults reach their mid-twenties.<sup>42</sup> The prefrontal cortex is among the last regions of the brain to develop, and that important region of the brain is associated with impulse control and the analysis of consequences of specific courses of action.<sup>43</sup> Robust connections between the prefrontal cortex and the limbic regions, where emotional processing occurs, are associated with consistent regulation of emotions.<sup>44</sup> Current research indicates that this connectivity may not

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34. See Patrick A. Langan & David J. Levin, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 (2002), <http://bjs.gov/content/pub/pdf/rpr94.pdf> (finding that of all adults who had been in state prison, those in the eighteen to twenty-four year old age bracket had the highest rates of re-arrest (75.4%), reconviction (52%) and return to prison with a new sentence (30.2%) within three years of release).

35. See Stamm, *supra* note 32, at 75–76 (explaining that even though young adults frequently break the law, they are also especially susceptible to efforts toward rehabilitation).

36. See Lapp *supra* note 28, at 376–77 n.141 (explaining that eighteen to twenty-four-year-olds account for approximately 10% of the U.S. population but 26.8% of criminal arrests). For the purpose of this Comment, young adults are classified as adults between the ages of eighteen and twenty-five years old.

37. See Hughes, *supra* note 26, at 453.

38. See *supra* note 36 (classifying young adults between eighteen and twenty-five years old).

39. See Lapp, *supra* note 28, at 376.

40. See Hughes, *supra* note 26, at 453.

41. See Fowler & Kurlycheck, *supra* note 30, at 265.

42. See Hughes, *supra* note 26, at 453.

43. See Hughes, *supra* note 26, at 453.

44. See Hughes, *supra* note 26, at 453.

occur until the mid-twenties.<sup>45</sup>

Due to these processes of neuromaturation,<sup>46</sup> “young adults may differ from older adults in key aspects of emotional functioning” and thus in their maturity and behavior in certain contexts and situations.<sup>47</sup> Similarly, when compared to their older counterparts, young adults exhibit differences in the ability to evaluate consequences before acting, including limitations in the ability to control impulses and aggressive responses.<sup>48</sup> Young adults are also more likely to prioritize short-term rewards over long-term outcomes.<sup>49</sup> Along with the profound changes in brain development, studies show that young adulthood is also “the key period . . . for personality trait development.”<sup>50</sup> Furthermore, recent developments in economic and social research have lengthened the period of financial dependency later into adulthood mainly due to increasingly difficult and prolonged struggles for

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45. See Hughes, *supra* note 26, at 453 (elaborating that recent research has also indicated that the brain develops later than previously thought, determining that key regions of the brain may not be fully developed until the mid-thirties).

46. See Christine E. Fitch, Note, *Emerging Adulthood and the Criminal Justice System: #Brainnotfullycooked #Can'tadulyet #Yolo*, 58 SANTA CLARA L. REV. 326, 333 (2018) (defining “neuromaturation” as the pruning and myelination process that occur as the brain matures, refining and improving the brain’s communication network and allowing for information to be transferred more efficiently).

47. Hughes *supra* note 26, at 453; see also Fitch, *supra* note 46, at 332–33 (explaining that the region of the brain in control of emotions develops prior to the region of the brain in charge of impulse control, and, therefore, emotions outweigh rationality until age twenty-four).

48. See Hughes, *supra* note 26, at 453; see also Vincent Schiraldi & Bruce Western, *Why 21 Year-Old Offenders Should be Tried in Family Court*, WASH. POST (Oct. 2, 2015), [www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac\\_story.html](http://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html) (reflecting that young adults “are more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings”).

49. See Hughes, *supra* note 26, at 453.

50. Brent W. Roberts & Jordan P. Davis, *Young Adulthood is the Crucible of Personality Development*, 4 EMERGING ADULTHOOD 318, 324 (2016) (finding in a self-reported survey of eighteen and twenty-nine-year-olds that they “tended to be higher on being other focused but lower on all other dimensions, like identity exploration, experimentation, and feeling in-between.”); see also Wiebke Bleidorn, *Hitting the Road to Adulthood: Short-Term Personality Development During a Major Life Transition*, 38 PERSONALITY & SOC. PSYCHOL. BULL. June 1594, 1594 (2012) (noting that young adults are more mature and less neurotic than adolescents); Wiebke Bleidorn, *What Accounts for Personality Maturation in Early Adulthood?*, 24 CURRENT DIRECTIONS IN PSYCHOL. SCI., 245, 245 (2015) (stating that early adulthood is a time of personality trait change and young adults become more emotionally stable, conscientious, and agreeable during this time period).

financial independence and less frequent or later entrances into marriage.<sup>51</sup> Essentially, young adults are more comparable to adolescents than to fully mature adults in critical and legally relevant ways, especially in the context of the criminal justice system.<sup>52</sup>

*B. The Supreme Court's Recognition of the Reduced Culpability of Youthfulness*

The Supreme Court recognizes that there are fundamental differences between adults and juveniles regarding their responsibility for criminal behavior.<sup>53</sup> Although the Court does not support the belief that juveniles should be completely absolved from blame,<sup>54</sup> there is a recognition that their young age warrants some level of reduced culpability.<sup>55</sup> The Court has noted that juveniles are more susceptible to negative influences and external pressures such as peer pressure and often “lack the freedom that adults have to extricate themselves from a criminogenic setting.”<sup>56</sup> In *Thompson v. Oklahoma*,<sup>57</sup> the Supreme Court emphasized juvenile defendant’s immaturity, stating that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”<sup>58</sup>

Endorsing the idea that juveniles and adults should be treated differently

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51. See Scott, *supra* note 27, at 654–55, 657 (recognizing that young adults without a college degree face greater financial challenges as adults than those faced by earlier generations and young adults are marrying later in life or are less likely than their parents to marry at all).

52. See *People v. House*, 72 N.E.3d 357, 387 (Ill. App. Ct. 2015) (illustrating that several European countries have extended juvenile court jurisdiction to young adult offenders).

53. See, e.g., Jenkins, *supra* note 23, at 458 (indicating the ways in which recent Supreme Court decisions could shift how young adults are sentenced).

54. See *Thompson v. Oklahoma*, 487 U.S. 815, 823, 834 (1988) (noting that while punishment should be directly proportional to the crime committed, the court should take into consideration factors such as the age of the offender).

55. See *id.* at 823, 835 (holding that the Constitution prohibits the execution of a person who was under the age of sixteen at the time of the committed offense because “such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty”).

56. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

57. 487 U.S. 815 (1988).

58. *Thompson*, 487 U.S. at 835 (elaborating that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult”).



under the law, a series of Supreme Court decisions determined that some criminal sentences are constitutionally impermissible for juveniles.<sup>59</sup> The Supreme Court in *Roper v. Simmons*<sup>60</sup> held that both the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under eighteen years old at the time of the commission of the crime.<sup>61</sup> Next, the holding in *Graham v. Florida*<sup>62</sup> prohibited the imposition of a life without parole sentence for juvenile nonhomicide offenders.<sup>63</sup> Lastly, *Miller v. Alabama*<sup>64</sup> held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment.<sup>65</sup> These decisions accept the idea that juveniles should legally be treated differently from adults, and that juveniles have some level of reduced culpability solely because of their age.

Federal legislation and state courts have also accepted the idea that juveniles are still neurologically developing and therefore require different treatment than adult offenders by legally separating juveniles and adults in their criminal justice systems.<sup>66</sup> Placing adolescents who display early signs of criminality in juvenile facilities, rather than adult jails and prisons where their criminal instincts could be enhanced,<sup>67</sup> could help those adolescents

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59. See *Roper*, 543 U.S. at 569–70 (declaring three key differences between adults and juveniles resulting in reduced culpability for juveniles: first, juveniles lack maturity and a fully developed sense of responsibility that frequently results in imprudent or impulsive decisions; second, juveniles have less control over their environments, resulting in more susceptibility to outside pressures, including peer pressures; and, third, juveniles' personality traits are more transitory and their characters less fixed than adults).

60. *Roper*, 543 U.S. 551 (2005).

61. See *id.* at 578 (discussing that states are bound to the Eighth Amendment's cruel and unusual punishment provision through the Fourteenth Amendment).

62. 560 U.S. 48 (2010).

63. See *id.* at 74 (noting that juvenile nonhomicide offenders have less culpability).

64. *Miller*, 567 U.S. 460 (2012).

65. See *id.* at 465 (concluding that juveniles facing the most serious penalties deserve individual sentencing).

66. See Fowler, *supra* note 41, at 265 (pointing to the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974, requiring that juveniles be kept out of contact with adult offenders and not incarcerated in adult facilities); Megan C. Kurlychek, *Pathways to Adult Court: Does the Road Traveled Impact the Final Destination?*, 12 JUST. RES. & POL'Y, 2010, at 1, 3 (commenting that since the first juvenile court was founded in Cook County, Illinois in 1899, every state in the country has adopted an entirely separate judicial system for juveniles).

67. See THOMAS J. BERNARD & MEGAN C. KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* 170–71 (2d ed. 2010) (finding that juveniles housed in adult facilities are more likely to be physically or sexually assaulted and, instead of being reformed, are more likely to gain increased criminogenic attitudes).

instead develop into law abiding and productive adults.<sup>68</sup> Research supports this proposition, determining the odds that an adolescent processed as a juvenile will be rearrested are about half those of an adolescent processed as an adult.<sup>69</sup> This disparity may be attributable to the differing penological goals of juvenile detention centers and adult prisons.<sup>70</sup> While adult prisons and jails focus on deterrence, retribution, and incapacitation, juvenile centers focus on rehabilitation.<sup>71</sup>

Despite recognition that age is important, particularly for young offenders, the criminal justice system currently offers little accommodation for young adult offenders.<sup>72</sup> Critics of the criminal justice system's current separation of adults from juveniles at age eighteen argue that the "stark, scientifically indefensible line" of eighteen years old has "disastrous public safety outcomes."<sup>73</sup> The Court itself recognized in *Roper* that drawing the line at age eighteen is somewhat arbitrary, explaining that the qualities differentiating juveniles and adults do not disappear when a person turns eighteen.<sup>74</sup> The Supreme Court has noted that drawing the criminal line of

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68. See Fowler, *supra* note 41, at 264 (reasoning that adolescents are highly susceptible to both positive and negative influences).

69. See Fowler, *supra* note 41, at 271–72 (finding lower rates of rearrest among adolescents processed as juveniles); see also David L. Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court: A Consideration of Selection Bias*, 1 YOUTH VIOLENCE & JUV. JUST. 79, 80 (2003) (finding that youths transferred to adult courts had a higher rate of recidivism than the youths who remained in juvenile court); Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128, 134–37 (2003) (discussing many studies showing the increase in recidivism for youths tried in adult court as opposed to juvenile court, such as a Minnesota study that found a 58% adjudication or conviction rate for new offenses for transferred juveniles versus 42% for non-transferred juveniles).

70. See Fowler, *supra* note 41, at 264–65 (explaining that the idea behind keeping youths out of adult prisons was to provide the youths with age-appropriate treatment and services to foster positive development).

71. See Fowler, *supra* note 41, at 265 (emphasizing rehabilitation over punishment for young offenders).

72. See Lapp, *supra* note 28, at 376–77 n.141, 376 (expounding that all young adult offenders are processed in adult criminal courts and either incarcerated or surveilled in ways that not only fail to rehabilitate them but may increase their chances of reoffending and affect their futures through the shackle of a criminal record).

73. Schiraldi, *supra* note 48 (pointing to the extremely high recidivism rate for young adults).

74. 543 U.S. 551, 574 (2005); see also Scott, *supra* note 27, at 658 (observing that the legal line between childhood and adulthood is sometimes drawn before or after age eighteen, such as when young adults are classified as legal children who may be entitled to financial support from noncustodial parents while they attend college and cannot obtain or drink alcohol);

adulthood at age eighteen is rooted in the historical and social significance of age, rather than in developmental psychology.<sup>75</sup> Thus, courts have acknowledged that age may be a mitigating factor even when the defendant is over eighteen years old.<sup>76</sup> The high rate of offending among young adults suggests the need for a different approach to young adult offenders.<sup>77</sup> Young adulthood is the most critical period in terms of criminal behavior in that it is the stage in which criminal behavior is most common as well as the stage during which most offenders also stop engaging in criminal behavior.<sup>78</sup> In this regard, “young adulthood is arguably the most significant transitional period in the development of criminal behavior.”<sup>79</sup>

Some state legislatures have formally accepted the neuroscience behind the reduced culpability of the young adult category and incorporated this emerging classification into their sentencing structure.<sup>80</sup> At least twelve states allow for special sentencing of young adults convicted in criminal court, thereby adopting the mentality that young adults have diminished responsibility.<sup>81</sup> Additionally, the majority of states allow juvenile courts to

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Schiraldi, *supra* note 48 (noting that states prohibit young adults from smoking cigarettes, gambling, and adopting children).

75. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (determining that “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood” and therefore is “the age at which the line for death eligibility ought to rest”); see also Josh Gupta-Kagan, Article, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669, 671 (2018).

76. *State v. O’Dell*, 358 P.3d 359, 366 (Wash. 2015) (holding the youthfulness of a defendant over eighteen years old can be a mitigating factor justifying a reduced sentence if there is evidence that such youthfulness impaired the offender’s ability to appreciate the wrongfulness of the act).

77. See Hughes, *supra* note 26, at 453 (arguing that the high rate of reoffending among young adults “calls into question the effectiveness of criminal justice interventions intended to prevent future offending amongst this population, and suggests an alternative approach is needed”).

78. See Scott, *supra* note 27, at 645 (acknowledging that in the “age-crime curve,” rates of criminal behavior increase during adolescence, peak around age eighteen, and decline during the early twenties).

79. Scott, *supra* note 27, at 645.

80. See Stamm, *supra* note 32, at 80–87 (noting that at least twelve states have set up special sentencing for young adults because their brains are not fully formed).

81. Stamm, *supra* note 32, at 80–87 (explaining “Youthful Offender” statutes in states like Alabama, Colorado, Florida, South Carolina, and Virginia which allow judges to suspend the young adult’s sentence and place him or her either on probation or in a rehabilitation-oriented program at a Department of Corrections (DOC) facility separated from older adults and then, after successful completion of the program, reduce, dismiss, or expunge the young adult’s sentence).

retain jurisdiction over individuals until they reach twenty years old.<sup>82</sup> Juvenile courts retaining jurisdiction over young adults can also present issues because young adult offenders and juveniles have different needs.<sup>83</sup> Therefore, housing large numbers of young adults in juvenile facilities may negatively impact the juvenile facility's "ability to serve the needs of the youths who are its primary concern."<sup>84</sup>

Juvenile detention differs from adult incarceration in many ways.<sup>85</sup> Juvenile confinements are typically much shorter in duration, usually lasting less than one year.<sup>86</sup> Juvenile detention centers tend to emphasize rehabilitation more than adult jails and prisons.<sup>87</sup> Furthermore, juvenile detention centers frequently integrate family members into the experience of the offender's confinement in a way that is not seen in adult facilities through "family engagement" initiatives that seek to involve parents in the incarcerated juvenile's treatment.<sup>88</sup> These "family engagement" initiatives specifically encourage visitation as one of the elements of their involvement.<sup>89</sup> Even though neuroscience has shown that young adults do not have fully matured brains and are more similar to juveniles than older adults, young adults incarcerated in the adult prison system do not receive the same type of support found in juvenile detention centers such as the initiatives emphasizing family participation and visitation.<sup>90</sup>

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82. See Lapp, *supra* note 28, at 375. Juvenile courts in California, Montana, Oregon, and Wisconsin can retain jurisdiction until age twenty-five, and courts in Hawaii, Colorado, and New Mexico may retain jurisdiction even longer. See Lapp, *supra* (noting the minority of states retain jurisdiction beyond that age).

83. See Scott, *supra* note 27, at 665 (noting that integrating a substantial amount of young adults into the juvenile system could negatively affect the needs of the youth).

84. Scott, *supra* note 27, at 665.

85. See Young, *supra* note 3, at 6 (noting that courts and residential programs seek to better involve parents in the treatment of juveniles).

86. See Young, *supra* note 3, at 6; see also Chad R. Trulson et al., *In Between Adolescence and Adulthood: Recidivism Outcomes of a Cohort of State Delinquents*, 3 YOUTH VIOLENCE & JUV. JUST. 355, 356, 378 (2005) (stating that rehabilitation and reformation are guiding principles of juvenile courts and, elaborating that, unlike the adult prison system, the juvenile system is concerned with the individual and solving individual problems).

87. See Trulson, *supra* note 86, at 356.

88. See Young, *supra* note 3, at 6; see also Trulson, *supra* note 86, at 356.

89. See Young, *supra* note 3, at 6.

90. See Irene Y. H. Ng et al., *Comparison of Correctional Services for Youth Incarcerated in Adult and Juvenile Facilities in Michigan*, 92 PRISON J. 460, 477 (2012) (finding that juveniles sent to adult prison experienced fewer resources and lower staff quality than juveniles incarcerated in juvenile detention facilities).

## II. IMPACTS OF VISITATION ON INCARCERATED PEOPLE

Prevalence and frequency of visitation of incarcerated people varies significantly.<sup>91</sup> Many incarcerated people will never receive a single visit.<sup>92</sup> If an incarcerated person does receive a visit, the visitor is most often a family member.<sup>93</sup> Key indicators of the probability of visitation include an incarcerated person's age, race, sex, and distance from home.<sup>94</sup> Those who are young, white, female, and housed closer to home receive the most visitors.<sup>95</sup> Extensive criminal histories may reflect and fortify "social isolation from conventional sources of support," leading to those with more extensive criminal histories being less likely to receive visits.<sup>96</sup>

An additional barrier to visitation is the location of the prison facility. Incarcerated people are often housed in facilities that are 100 miles or more from their homes and families.<sup>97</sup> While a majority of incarcerated people are

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91. See Young, *supra* note 3, at 2 (pointing to research identifying significant variation in frequency of visitation received by incarcerated people).

92. See William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society*, 45 J. RES. CRIME & DELINQ. 287, 304 (2008) (finding that 58% of those incarcerated in Florida prisons did not receive a single visitor in the year prior to their release); see also Brae Campion Young et al., *Far From Home: An Examination of the Juvenile Visitation Experience and the Barriers to Getting There*, 63 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1409, 1416 (2019) (determining that one in four juveniles was not visited during their confinement).

93. See Young, *supra* note 3, at 5.

94. See Young, *supra* note 3, at 4–5; see also Joshua C. Cochran et al., *Spatial Distance, Community Disadvantage, and Racial and Ethnic Variation in Prison Inmate Access to Social Ties*, 53 J. RES. CRIME & DELINQ. 220, 243–44 (2016) (concluding that Blacks and Latinos are often incarcerated farther away than Whites from their homes).

95. See Young, *supra* note 3, at 5. While white people were most likely to receive visitors overall, part of the disparity is due to distance from home. When Latinos were housed close to home, they were the most likely group to be visited, while blacks were the least likely group to be visited regardless of distance from home. Cochran, *supra* note 94, at 244 (elaborating that distance impacts racial and ethnic groups differently).

96. Young, *supra* note 3, at 5; see also Cochran, *supra* note 94, at 244–45 (hypothesizing that incarcerated black people may not receive visitors because the visitors are actively trying to avoid detection by police); cf. Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 165 (2013) (stating that unlike many state prisons, the Bureau of Prisons (BOP) specifically allows former felons to visit incarcerated people).

97. See Young, *supra* note 3, at 5; see also FED. BUREAU OF PRISONS, DEP'T OF JUSTICE, P5100.08, PROGRAM STATEMENT INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION 5100.8 (2006) (stating that prison practice is to incarcerate people within 500 miles of their anticipated release area and finding that within 500 miles shall be considered reasonably close even if there is a facility closer to the incarcerated person's anticipated release residence).

from urban areas, most prisons are in rural areas far from cities.<sup>98</sup> The long distances required for families to visit incarcerated loved ones increases transportation costs and can sometimes require overnight accommodations, extended childcare, and unpaid time off from work.<sup>99</sup> Therefore, balancing visitation with work and childcare can limit the ability of families to visit.<sup>100</sup> Incarcerated people who come from lower income households and whose families live a great distance away from where they are incarcerated are less likely to have their families visit.<sup>101</sup> Furthermore, racial and ethnic minorities may be less likely to receive visitors due to their visitors having less of the social and economic resources needed to overcome barriers to visitation such as high transportation costs.<sup>102</sup>

In reality, even when families are able to visit, the process of visiting an incarcerated loved one is “grueling and frustrating.”<sup>103</sup> BOP facilities require pre-approval before visiting, which can entail a background check, fees, and a waiting period.<sup>104</sup> Once approved, the security staff’s searches of visitors can be very invasive and may “deter well-intentioned visitors from coming at all.”<sup>105</sup> Additionally, prisons can regulate the physical aspects of the visit, such as what the visitor wears or physical contact between the visitors and their incarcerated loved ones.<sup>106</sup> Prisons can also end visits due to overcrowding or

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98. See Grant Duwe & Valerie Clark, *Blessed Be the Social Tie that Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. JUST. POL’Y REV. 271, 273 (2013) (elaborating that while 30% of those incarcerated in Florida state prisons are from the Miami-Dade County area, only 5% of those incarcerated in Florida are housed in Dade County).

99. See Young, *supra* note 3, at 5.

100. See Young, *supra* note 3, at 5 (adding that the farther away the incarcerated person is housed, the more time that is needed to visit); see also Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POLICY INITIATIVE (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html> (noting that the proportion of incarcerated people receiving visits decreases as the distance from home increases).

101. See Young, *supra* note 3, at 5.

102. See Young, *supra* note 3, at 5.

103. Rabuy, *supra* note 100 at 1.

104. See Boudin, *supra* note 96, at 163, 165–66 (elaborating that while many states prohibit visits from former felons, BOP facilities specifically allow former felons to visit incarcerated people but limit visitors to those people the incarcerated person knew prior to his or her incarceration).

105. Boudin, *supra* note 96, at 166–67; see Paul Wright, *The Rights of Visiting and Visitors*, PRISON LEGAL NEWS (Mar. 15, 1994), <https://www.prisonlegalnews.org/news/1994/mar/15/the-rights-of-visiting-and-visitors/> (alleging that visitors are treated as poorly or worse than incarcerated people which discourages them from visiting, as well as degrades and humiliates them).

106. See FEDERAL BUREAU OF PRISONS, GENERAL VISITING INFORMATION, <https://www.bop.gov/inmates/visiting.jsp> (last visited Jan. 20, 2020).

behavior that they deem inappropriate during the visit.<sup>107</sup>

Although visiting incarcerated people is difficult and time consuming for the visitors, the positive impacts of prison visitation on the incarcerated person are profound.<sup>108</sup> The BOP's policy statement on visitation acknowledges that family visitation helps to maintain morale and specifically encourages visitation by friends, families, and community groups.<sup>109</sup> However, the BOP has interpreted what constitutes reasonable visitation inconsistently.<sup>110</sup> While recidivism is a critical issue in the criminal justice system generally,<sup>111</sup> recidivism rates are especially high for young adults.<sup>112</sup> Some may say that this high rate of recidivism is due to offenders' young age and increased time they have to commit criminal offenses. However, when the timeframe after release is kept consistent, recidivism still drops dramatically after age twenty-five.<sup>113</sup> Offenders under the age of twenty-one have the highest rates of

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107. *See id.*

108. *See* Nancy G. La Vigne et al., *Chicago Prisoners' Experiences Returning Home*, URBAN INST. 1, 1 (Dec. 8, 2004), [https://www.urban.org/research/publication/chicago-prisoners-experiences-returning-home/view/full\\_report](https://www.urban.org/research/publication/chicago-prisoners-experiences-returning-home/view/full_report) (finding that people who were formerly incarcerated cited family as "the most important factor in helping them stay out of prison" when interviewed four to eight months after release).

109. *See* 28 C.F.R. § 540.40 (1996) (mandating that the Warden develop procedures allowing visitation due to the positive impacts on incarcerated people).

110. *Compare* Boudin v. Thomas, 533 F. Supp. 786, 791–92 (S.D.N.Y. 1982) (citing the BOP's encouragement of family visits and holding that the court's intervention was necessary to ensure the incarcerated person was being treated in accordance with the prison regulations), *with* King v. Frank, 371 F. Supp. 2d 977, 981 (W.D. Wis. 2005) (acknowledging that while the technology for televised visits did not always work properly for those incarcerated in segregation, prison staff tried to repair the technology as quickly as possible and holding that these technological issues did not constitute a constitutional deprivation).

111. *See* KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (2016), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) (acknowledging that over 52% of those incarcerated in federal prisons were re-arrested within the first two years after direct release).

112. *See id.*

113. *See* KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENTENCING COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS, A-47 (Dec. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf) (finding that five years post-release the recidivism for those twenty-four years or younger is around 35% while the recidivism for those between twenty-five and twenty-nine is only around 28%); *see also id.* at 30 (determining recidivism by any measure declined as age increased and that recidivism for older offenders is usually longer after release, less frequent, and for less serious offenses).

recidivism with almost 68% reoffending.<sup>114</sup> Nevertheless, offenders who maintain contact with family and friends have better outcomes both during confinement and after release.<sup>115</sup> Visitation provides offenders with the opportunity to maintain contact with loved ones and is associated with improved mental health, reduced misconduct, and lower recidivism.<sup>116</sup> Visits also provide incarcerated people with emotional, and potentially financial support, as well as access to re-entry resources including career advice,<sup>117</sup> which may ease concerns they feel during their incarceration and aid in successful re-entry into society after their release.<sup>118</sup> Incarcerated people who received visits were nearly 30% less likely to recidivate than those who did not receive visits.<sup>119</sup> Furthermore, each additional visit an incarcerated person receives is correlated with a greater reduction in recidivism.<sup>120</sup> Early and consistent visitation is also associated with the greatest reductions in reoffending, an obvious benefit to society at large.<sup>121</sup>

Among the most effective techniques at reducing reoffending are programs promoting positive relations between young adult offenders and their families in areas like substance use, counseling, and re-entry.<sup>122</sup> Traditional service methods for juveniles, such as substance abuse education and anger management classes, have proven to be inefficient ways to

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114. See Hunt & Dumville, *supra* note 111, at 23.

115. See Young, *supra* note 3, at 1–2 (noting that family visitation is linked to improved mental health, functioning, reduced misconduct, and lower recidivism); see also Sandra Villalobos Agudelo, VERA INST. OF JUST., THE IMPACT OF FAMILY VISITATION ON INCARCERATED YOUTH'S BEHAVIOR AND SCHOOL PERFORMANCE: FINDINGS FROM THE FAMILIES AS PARTNERS PROJECT 4 (2013), available at [https://jije.org/wp-content/uploads/2018/09/impact-of-family-visitation-on-incarcerated-youth-brief\\_VERA\\_April-2013.pdf](https://jije.org/wp-content/uploads/2018/09/impact-of-family-visitation-on-incarcerated-youth-brief_VERA_April-2013.pdf) (adding that more frequent visitation is associated with higher GPAs for incarcerated juveniles).

116. See Young, *supra* note 3, at 1–2; see also Agudelo, *supra* note 115, at 3; Young, *supra* note 3, at 4 (demonstrating that juveniles who received visits from parents had a reduced likelihood of depressive symptoms over the course of their confinement).

117. See Young, *supra* note 3, at 3; see also Duwe, *supra* note 98, at 275 (observing that seven months out of prison, 84% of former incarcerated people were living with family and 92% received cash assistance from their families).

118. See Young, *supra* note 3, at 3 (articulating that family visits can alleviate concerns of prison monotony and the “labeling effects associated with confinement”).

119. Young, *supra* note 3, at 3.

120. See Young, *supra* note 3, at 3.

121. See Young, *supra* note 3, at 4.

122. See JOSH WEBER ET AL., GEO. U. CTR. JUV. JUST. REFORM, TRANSFORMING JUVENILE JUSTICE SYSTEMS TO IMPROVE PUBLIC SAFETY AND YOUTH OUTCOMES 20 (2018), <https://cjjr.georgetown.edu/wp-content/uploads/2018/05/Transforming-Juvenile-Justice-Systems-to-Improve-Public-Safety-and-Youth-Outcomes.pdf> (describing program ideas for reducing young adult recidivism).



improve public safety or youth outcomes unless the programs partner with the juvenile's family and community support systems.<sup>123</sup> Although visitation is important for all incarcerated people, the impact on young adults may be especially valuable since younger offenders are likely to be more reliant on their family social networks than older offenders.<sup>124</sup> Unfortunately, criminal justice professionals often do not recognize the positive effects of healthy and consistent family visitation—sometimes viewing families negatively and even blaming them for the young adult's delinquency.<sup>125</sup> Prison administrators, subsequently, fail to implement the vital family-centered community-based service approaches proven to aid in reduced recidivism.<sup>126</sup>

Family visitation often leads to positive outcomes for offenders and the community at large.<sup>127</sup> Since young adult offenders are arguably the most vulnerable age group, their high rates of criminality and recidivism, as well as their immature brain development, make family visitation critical for them.<sup>128</sup> Therefore, family visitation for young adult offenders should be broadly encouraged and facilitated through prison policies and regulations.<sup>129</sup>

### III. NOTICE-AND-COMMENT RULEMAKING

Section 4042 of the U.S. Code delegates to the BOP, under the direction of the Attorney General, “the management and regulation of all Federal penal and correctional institutions.”<sup>130</sup> Management and regulation may also include recidivism reduction programs. The First Step Act of 2018 seeks to reduce recidivism through programs and activities that specifically address the recidivism risk and criminogenic needs of people incarcerated in federal

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123. See *id.* (listing “focus [on] case planning and service delivery on strengthening youth’s connections to positive adults, peers, and community supports” as one of the strategies for improving public safety and youth outcomes).

124. See Young, *supra* note 3, at 4 (pointing out that young adults’ reliance on their families makes “visitation a more central and beneficial feature of their incarceration experience”).

125. See Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 632 (2014) (“There is a widespread belief, reflected both in the studies of family engagement and operation of the justice system overall, that families are the cause of their children’s problems . . . [.]”).

126. See Weber, *supra* note 122, at 20 (arguing that many agencies discount the strengths and abilities of family and therefore do not fully integrate families into service programs for young adults); cf. Young, *supra* note 3, at 4 (adding that visits may not always be a positive experience, especially if the visitor and the offender have a tumultuous relationship).

127. See *supra* Part II (commenting on the positive effects of family visitation).

128. See *supra* Part I (detailing the developmental immaturity and its impacts on the high rates of recidivism and criminal offending of young adults).

129. See *infra* Part III (suggesting policies and regulations that the BOP can implement through notice-and-comment rulemaking).

130. 18 U.S.C. § 4042 (2018).

prisons.<sup>131</sup> Thus, enactments that will reduce recidivism and improve outcomes for those incarcerated in federal prisons are under the direct purview of the BOP.<sup>132</sup>

The BOP is subject to the rulemaking requirements of the Administrative Procedure Act (APA).<sup>133</sup> Under the APA, notice-and-comment rulemaking requires federal agencies to provide notice of a proposed rule, a comment period, and, if a final rule is promulgated, an explanation of the statement and purpose of the rule.<sup>134</sup> When reviewing the BOP regulations, federal courts can strike down prison rules if they are “arbitrary and capricious,”<sup>135</sup> or remand for an additional statement of reasoning if the prison authority fails to provide sufficient rationale.<sup>136</sup> The BOP, like other administrative agencies, does not need to comply with the APA when issuing interpretive rules or policy statements like those contained in its Program Statements and Institutional Supplements.<sup>137</sup> These Program Statements and Institutional Supplements are not

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131. See First Step Act of 2018, Pub. L. No. 115–391, § 101, 132 Stat. 5194, 5195–5208 (to be codified at 18 U.S.C. §§ 1361–1363) (detailing new federal prison programs and activities); see also FEDERAL BUREAU OF PRISONS, AN OVERVIEW OF THE FIRST STEP ACT, <https://www.bop.gov/inmates/fsa/overview.jsp> (last visited Jan. 20, 2020) (“Under the act, the system is required to provide guidance on the type, amount, and intensity of recidivism reduction programming and productive activities to which each prisoner is assigned, including information on which programs prisoners should participate in based on their criminogenic needs.”).

132. 18 U.S.C. § 3621(h)(1)–(6) (stating how BOP is to enact recidivism reduction programs); see also Second Chance Reauthorization Act of 2017, H.R. 2899, 115th Cong. § 4(g)(3) (2017) (referred to H. Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations, Sept. 13, 2018) (calling on the BOP to engage in recidivism reduction efforts).

133. See Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2018); see also Giovanna Shay, Article, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 344–45 n.125 (2009) (expanding on how certain BOP determinations for incarcerated individuals are exempt from the APA’s requirements). APA exemptions do not extend to BOP’s rulemaking activities. See *id.* (noting how § 553 of the APA, which establishes rulemaking requirements, does not apply).

134. See 5 U.S.C. § 553 (2018) (describing the notice-and-comment rulemaking process).

135. See *Alnoubani v. Fed. Bureau of Prisons*, 306 F. App’x 309 (7th Cir. 2009) (finding that a prison regulation was “arbitrary and capricious because the BOP did not offer any rationale for categorically excluding from the early-release program inmates with convictions involving firearms”).

136. Shay, *supra* note 133, at 345.

137. See Shay, *supra* note 133, at 345 (noting that BOP’s interpretive rules take the form of Program Statements and Institutional Supplements); see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that courts should defer to agencies when the agencies interpret their own previously-issued rule, as long as the interpretation is not plainly erroneous or inconsistent with the rule).

compulsory because they are not binding or designed to affect incarcerated peoples' substantive rights.<sup>138</sup> Due to the disparate effects of policy statements and rules, those incarcerated in federal prisons frequently seek litigation to determine whether the BOP regulations are merely noncompulsory internal clarifications or legally binding guidelines.<sup>139</sup>

To address excessive and frivolous prison litigation, Congress enacted the Prison Litigation Reform Act (PLRA) in 1996.<sup>140</sup> The PLRA requires that all administrative remedies are exhausted before an incarcerated person may file suit in court.<sup>141</sup> Thus, while courts previously adopted a "hands-off" policy towards prisons, they now defer to the expertise of corrections authorities.<sup>142</sup> The Supreme Court defers to corrections officials and their policies, even when their decisions implicate the constitutional rights of incarcerated persons.<sup>143</sup> The Court has acknowledged that although incarcerated people are protected under the Constitution, there are great difficulties associated with prison management that require increased judicial deference.<sup>144</sup> Therefore, prison grievance policies are accorded even greater deference than other rules.<sup>145</sup> The Supreme Court recognizes the difficulties associated with running a prison, as well as the intentional separation of the judicial branch

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138. Shay, *supra* note 133, at 345.

139. See Shay, *supra* note 133, at 346 (stating how litigation centers on a regulation being substantive or interpretive); see also Morrison v. Woodring, 191 F. App'x 606, 606–07 (9th Cir. 2006) (holding that BOP security classifications are not subject to APA rulemaking procedures); Williams v. Van Buren, 117 F. App'x 985, 987 (5th Cir. 2004) (determining the BOP's policy restricting compassionate release is interpretive and thus not subject to the APA's notice-and-comment requirement).

140. See Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (2018); see also Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 981 (1999) (adding that prison litigation has the lowest success rate of any type of civil litigation in federal courts); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003) (highlighting that in 1995, the year prior to the PLRA's enactment, incarcerated persons filed nearly 40,000 new federal civil lawsuits).

141. See Hobart, *supra* note 140, at 994 n.72 (considering administrative remedies as a way to review a case); see also PLRA, 42 U.S.C. § 1997e.

142. See Shay, *supra* note 133, at 333 (discussing the great amount of judicial deference given to prison officials).

143. Shay, *supra* note 133, at 340 (surveying when prison regulations infringe on constitutional rights).

144. See Shay, *supra* note 133, at 340; see also Turner v. Safley, 482 U.S. 78, 84–85 (1987) (noting that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.").

145. Shay, *supra* note 133, at 342.

from the legislative and executive branches, and is therefore reluctant to intervene in the regulation of prison policies.<sup>146</sup>

Although prison policies are created through a variety of methods, courts often treat prison regulations as an “undifferentiated monolith, according them deference without asking how they are formulated.”<sup>147</sup> The Court explained in *Procunier v. Martinez*<sup>148</sup> that prisons are “complex and intractable” requiring “expertise, comprehensive planning, and the commitment of resources” and courts are thus “ill equipped to deal with the increasingly urgent problems of prison administration and reform.”<sup>149</sup> In reality, “corrections rules originate from a wide range of administrative and legal processes representing varying degrees of transparency and accountability.”<sup>150</sup> Prison regulations are given great deference regardless of the administrative procedure used.<sup>151</sup>

#### A. *Why the BOP Should Use Informal Notice-and-Comment Rulemaking*

Notice-and-comment rulemaking offers many benefits, including an increase in transparency, accountability, information-gathering, and democratic participation.<sup>152</sup> Transparency and democratic participation enhance the ability of regulators to achieve the desired result of “high-quality and legitimate rules.”<sup>153</sup> Through notice-and-comment rulemaking, agencies solicit information and technical expertise from those outside of the agency, such as corrections professionals, corrections officers’ unions, community leaders, social scientists, nonprofit social service agencies, faith-

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146. See Shay, *supra* note 133, at 333, 340 (describing the “hands-off” approach federal courts apply in prison and jail litigation).

147. Shay, *supra* note 133, at 339; see also *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (holding that “[p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”); *Lopez v. Davis*, 531 U.S. 230, 237 (2001) (holding that to the extent Congress left a gap in the statute entitling some incarcerated persons to early release after successful completion of a substance abuse program, the BOP’s interpretation is entitled to deference “so long as the interpretation is a permissible construction of the statute”).

148. 416 U.S. 396 (1974).

149. *Id.* at 405.

150. Shay, *supra* note 133, at 344.

151. *Cf.* Shay, *supra* note 133, at 343–44 (explaining that most Supreme Court case law does not distinguish among different types of prison policies and regulations).

152. See, e.g., Shay, *supra* note 133, 361–62 (discussing the myriad positives of notice-and-comment rulemaking).

153. See Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 *GEORGE WASH. L. REV.* 924, 927 (2009).

based organizations, and medical or mental health care providers.<sup>154</sup> This public input leads to “better, more informed policy decisions” that help policymakers better predict the outcomes and potential impacts of proposed rules.<sup>155</sup> Furthermore, “affected groups are more likely to comply . . . with a rule if they are allowed the opportunity to provide meaningful input during the formation of the rule and to understand better the rationale underlying it.”<sup>156</sup> Notice-and-comment rulemaking may have an even more significant impact on incarcerated people since they are unlikely to have much influence through traditional political arenas.<sup>157</sup> Thus, incarcerated persons “have particular needs for transparency and participation in the processes that affect them directly.”<sup>158</sup> Notice-and-comment rulemaking can provide those advocating on behalf of incarcerated people, such as their families, nonprofit organizations, religious officials, and community groups, with an organizational tool and an opportunity to be heard.<sup>159</sup> Notice-and-comment rulemaking gives those advocates a venue to educate corrections authorities and try to effectuate policy.<sup>160</sup>

Notice-and-comment rulemaking has many benefits but is certainly not without its drawbacks,<sup>161</sup> most notably that it is time consuming and requires increased agency resources.<sup>162</sup> A large agency like the BOP, with facilities in

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154. See Shay, *supra* note 133, at 362–63; see generally NAT’L INST. OF JUSTICE, STAKEHOLDER STATEMENTS SUBMITTED IN RESPONSE TO NIJ’S *FIRST STEP ACT* LISTENING SESSIONS (2019), <https://www.ncjrs.gov/pdffiles1/nij/253115.pdf> (including statements from professors, a rabbi, the NAACP, the ACLU, the National Association of Assistant United States Attorneys, and the Sentencing Project, among others).

155. See Coglianese, *supra* note 153, at 927 (arguing that “[i]ncreased participation allows agencies to obtain information that may help them better understand how current policies could be improved and also how the public or regulated parties would respond to a change in policy.”).

156. Coglianese, *supra* note 153, at 927.

157. See Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 *IND. J. OF GLOBAL LEGAL STUD.* 125, 126 (2003); see also Shay, *supra* note 133, at 362–63 (2009) (discussing the ways in which disenfranchisement laws strip incarcerated people of their right to vote and reduce the political power of poor communities).

158. Shay, *supra* note 133, at 362 n.238.

159. See Shay, *supra* note 133, at 363 (discussing the importance of participation in notice-and-comment rulemaking due to the disenfranchisement of incarcerated people).

160. See Shay, *supra* note 133, at 363 (stressing the need for interested parties to participate in notice-and-comment periods to affect policy changes).

161. See, e.g., Coglianese, *supra* note 153, at 928–30 (articulating positive and negative aspects of participation and transparency in rulemaking). Many resources are spent reading through many duplicative comments. See *id.* at 928.

162. See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *ADMIN. L. REV.* 59, 65 (1995) (describing notice-and-comment rulemaking as an “extraordinarily lengthy, complicated, and expensive process”).

almost every state and 36,378 employees,<sup>163</sup> would be required to consider input from various stakeholders such as government contractors, nonprofit organizations, and community members, which would require a great deal of time and money.<sup>164</sup> Furthermore, the BOP may not be willing to disclose unfavorable information during the process, and regulatory officials may feel inhibited in their discussion of the proposed rule by fear of criticism.<sup>165</sup> Moreover, once finalized, the BOP may be reluctant to promulgate revised standards, thus hindering or ultimately defeating the original progressive policy initiatives.<sup>166</sup>

Despite the shortcomings of notice-and-comment rulemaking, formal rulemaking is prohibitively impractical and rarely required by Congress.<sup>167</sup> Formal rulemaking requires the agency to provide an oral hearing at which potentially affected parties can present their own witnesses and cross examine opposing witnesses.<sup>168</sup> For a large agency such as the BOP, “the direct, cross, redirect, and recross examinations of hundreds of witnesses by dozens of parties on dozens of issues” could produce endless delay.<sup>169</sup> Due to its burdensome nature, agencies only use formal rulemaking when

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163. See FED. BUREAU OF PRISONS, ABOUT OUR AGENCY, <https://www.bop.gov/about/agency/> (last visited Jan. 20, 2020).

164. See, e.g., Coglianese, *supra* note 153, at 930 (noting that transparency and opportunities to participate in the rulemaking process could require agencies to use more time and resources to reach decisions and issue rules).

165. See Coglianese, *supra* note 153, at 929 (identifying potential downsides to greater transparency in rulemaking).

166. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1388, 1390 (1992) (“Important rulemaking initiatives grind along at such a deliberate pace that they are often consigned to regulatory purgatory, never to be resurrected again.”). The BOP may be especially reluctant to promulgate revised standards because prison reform is extremely difficult and costly. See Matthew Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part*, N.Y. TIMES (Oct. 17, 2019), <https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html> (elaborating on some of the difficulties associated with closing down Rikers Island, including an \$8 billion price tag).

167. See Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106–07 (2003) (“[B]ecause the impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so.”).

168. See 5 U.S.C. § 556(d) (2018) (describing the evidence that a party is permitted to submit during rulemaking).

169. See Rubin, *supra* note 167, at 107 (highlighting the notorious hearing on peanut butter under the Federal Food, Drug, and Cosmetic Act which spanned nine years and produced an almost eight-thousand-page transcript).

required by statute.<sup>170</sup>

### B. *A Rule Addressing Family Visitation For Young Adults*

Prison officials almost exclusively determine the intricacies of prison visitation, with the sole exception of marginal judicial oversight.<sup>171</sup> This administrative discretion means that correctional officers are among the primary determinants of whether and how incarcerated people are able to maintain family relationships.<sup>172</sup> Since activists seeking to change prison visitation policies rarely succeed in judicial review<sup>173</sup> and courts grant prison administrators “wide latitude generally and in the realm of visitation regulations specifically,”<sup>174</sup> the BOP is in a position to enact nationwide change ensuring reasonable visitation for incarcerated young adults. While state prisons are far more numerous than federal prisons,<sup>175</sup> a federal policy would enact change throughout the country rather than on a state-by-state basis.<sup>176</sup> Furthermore, it is likely that if the BOP enacts a rule, state prisons

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170. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 110–11 (1998) (detailing the numerous requirements and restrictions parties must comply with when undertaking formal rulemaking process).

171. See Boudin, *supra* note 96, at 152–53 (“Comparative analysis of visitation policies is particularly important given that administrative discretion almost exclusively determines the contours of prison visitation, unconstrained except at the margins by judicial oversight.”).

172. See Boudin, *supra* note 96, at 154 (explaining that the substantial discretion afforded to corrections officers means that decisions made by officers are determinative of whether inmates maintain relationships).

173. See Boudin, *supra* note 96, at 154 (noting that it is rare for advocates and activists attempting to change prison visitation policies to find support in the courts).

174. Boudin, *supra* note 96, at 153; see also *Overton v. Bazzetta*, 539 U.S. 126, 133–35 (2003) (holding unanimously that a ban on visitation by minors and a restriction on visitation for incarcerated persons with substance abuse violations did not violate their Constitutional rights on the grounds that the regulations had “a rational relationship to a legitimate penological interest” under the four-part test outlined in *Turner*).

175. See JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 252156, PRISONERS IN 2017 3 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> (finding that at year-end 2017 there were 183,100 people incarcerated in federal prisons and 1,306,300 people incarcerated in state prisons).

176. See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 704 (2016) (explaining that federalism allows states to “design, implement, and interpret their respective state laws as they see fit”); see also FED. BUREAU OF PRISONS, OUR LOCATIONS, <https://www.bop.gov/locations/map.jsp> (last visited Nov. 22, 2019) (showing the numerous locations of federal prisons throughout the United States).

will follow the federal government's lead.<sup>177</sup>

Confusing and inconsistent BOP visitation policies are partially to blame for dissuading family visitation.<sup>178</sup> Promulgating a consistent and clear BOP regulation through notice-and-comment rulemaking would guarantee adherence and enforcement across correctional facilities nationwide.<sup>179</sup> Consistent and clear visitation policies would ensure that potential visitors are able to more easily follow the rules and, therefore, would likely increase visitation generally.<sup>180</sup>

Since family visitation is especially important for young adult offenders due to their high rates of criminality and recidivism,<sup>181</sup> a BOP initiative directed toward that specific age group is likely to have far-reaching and positive implications.<sup>182</sup> Not only could a rule regulating prison visitation significantly benefit incarcerated persons and their families, society at large benefits greatly from a reduction in recidivism.<sup>183</sup>

The notice-and-comment aspect of informal rulemaking will allow those advocating on behalf of incarcerated people, including their families, to directly communicate the particular obstacles to visitation they face.<sup>184</sup> Because prison visitation varies greatly according to factors such as race,

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177. See Dodson, *supra* note 96, at 705 (determining that states often look to and then follow federal laws even when adherence is not required thus establishing that “federal law exerts a kind of gravitational pull on states”).

178. Cf. Duwe, *supra* note 98, at 273 (examining the impediments families face to visitation such as uncomfortable visitation settings and policies that are subordinate to prison safety and security); Shay, *supra* note 133, at 357 (“Such restrictive regulations can frighten children and inhibit visitation.”). See generally Boudin, *supra* note 96 (discussing the myriad ways prison visitation policies differ across the United States).

179. See 5 U.S.C. § 553 (2018) (detailing the rulemaking procedures, including requirements for the publication of finalized rules, that the suggested BOP regulation would need to undergo for promulgation).

180. Cf. Boudin, *supra* note 96, at 160 (noting that prison visitors can more easily follow the rules when prison visitation policies are clear and readily accessible).

181. See *supra* Part I (discussing high rates of criminality and recidivism in young adults).

182. See *supra* Part II (articulating the positive impacts of visitation).

183. See Shay, *supra* note 133, at 359 (quoting ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA'S PRISONS 15 (2004)) (explaining how “[s]ociety is profoundly influenced by the abuses [incarcerated people] suffer or perpetrate” in that “we cannot separate ourselves from those who are behind bars,” because most incarcerated people eventually return to the community and thus, “the skills they pick up—whether legitimate or criminal—the diseases they contract and the treatment they receive” all affect the society to which incarcerated people return).

184. See Rabuy, *supra* note 100, at 3–4 (arguing that prison administrators should listen to incarcerated people and their families as they are in the best position to identify barriers to visitation).



socioeconomic status, and length of sentence,<sup>185</sup> the BOP should take these dynamics into consideration and promulgate a rule that addresses visitation in ways that account for the needs of a variety of different populations. Allowing participation by those directly affected by the rule will enable the BOP to see potential areas for improvement and to identify best practices within the federal prison visitation policies. Because most visitation policies are formulated with safety and security as the foremost concern,<sup>186</sup> the input of corrections officers and prison administrators is also vital to a successful BOP rule.

The rule should guarantee that young adults incarcerated in federal prisons nationwide have sufficient access to reasonable family visitation by ensuring that prison policies are not overly restrictive. Additionally, the rule should establish adequate visiting hours to allow those with children, those who have difficult work schedules, and those who do not live close to the facility to have opportunities to visit their incarcerated loved ones. Furthermore, because distance is one of the greatest barriers to family visitation,<sup>187</sup> the rule should establish a maximum distance that young adults can be incarcerated from their homes, affording their family members greater opportunity to take advantage of the streamlined prison visitation policies.<sup>188</sup>

The BOP should also be mindful of the potential obstacles to a rule regulating family visitation for young adults. Nationwide prison change is very difficult to implement and regulate.<sup>189</sup> Additionally, housing incarcerated people is a widespread issue<sup>190</sup> and many prisons are already overcrowded.<sup>191</sup> Often when prisons are overcrowded, incarcerated persons

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185. See Young, *supra* note 3, at 16–19 (evaluating certain demographic variables as predictors of visitation). See generally Cochran, *supra* note 94 (finding that distance and community disadvantage adversely affect likelihood of visitation).

186. See Duwe, *supra* note 98, at 273.

187. See *supra* Part I; see also Rabuy, *supra* note 100, at 2 (discussing studies that found “distance is a top barrier preventing [incarcerated people] from in-person contact with their families”).

188. See Boudin, *supra* note 94, at 160 (providing state-by-state comparisons of prison visitation policies across common visitation-related categories).

189. Cf. *Turner v. Safley*, 482 U.S. 78, 84–85, 89–91, 93 (1987) (discussing the difficulties associated with prison regulation generally).

190. See Steven Arrigg Koh, *Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment*, 46 VAND. J. TRANSNAT’L L. 1267, 1281–82 (2013) (arguing that while BOP has wide discretion regarding housing of incarcerated persons, there are additional factors, such as the characteristics of the prisoner, the nature of the offense, and the resources at the facility).

191. See Jeff Bleich, Comment, *The Politics of Prison Crowding*, 77 CALIF. L. REV. 1125, 1125–26 (1989) (highlighting that in 1987 forty-six states and the BOP reported significant

are sent out-of-state where they will be even farther from their families.<sup>192</sup> Commenters will likely argue that ensuring young adults are incarcerated close to home is expensive and impractical given the “structural and financial barriers to re-conceiving prisons.”<sup>193</sup> Keeping track of data could itself be cost prohibitive, especially given that many prisons are underfunded.<sup>194</sup>

Additionally, individual facilities have specific needs and requirements based on geographic location and community population and should therefore take the demographics of their communities into account.<sup>195</sup> Restricting all federal prisons to a one size fits all model may therefore be a hinderance to the goals of improved outcomes for young adult offenders. Consequently, the final rule should allow for some flexibility for prison administrators to consider the specific needs of their facility, with nationwide standards that still ensure compliance with reasonable family visitation for juveniles. With that flexibility, individual prisons will be able to adapt the regulation to the specific regional needs<sup>196</sup> of their location, such as rural or urban geography, public transportation availability, and the demographics of the area’s population, including race and socioeconomic status.<sup>197</sup>

If the BOP promulgates a final rule regulating access to visitation for

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overcrowding problems and each year “prison populations continue to outstrip the addition of new prison beds”).

192. See Demetria D. Frank, *Prisoner-to-Public Communication*, 84 BROOKLYN L. REV. 115, 124 n.49 (2018) (explaining that one method of dealing with overcrowding has been for prisons to transfer incarcerated people to less crowded but far away prisons, thus limiting their access to family visitation). See generally Rabuy, *supra* note 100, at 2 (finding that 63% of people in state prisons are over 100 miles from their families).

193. Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 129 (2011).

194. See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 28 (2010) (observing that many prisons are underfunded and understaffed).

195. Cf. Boudin, *supra* note 96, at 172 (noting that there are no clear geographical trends to explain the variation in policies).

196. See Walter Campbell et al., *Neighborhood Prison Admission Rates and the Sunbelt: Variation in Imprisonment, Concentrated Disadvantage, and Their Relationship Across the United States*, CRIME & DELINQ., May 2019 at 1, 8, 23 (discussing that the “general demographic patterns and structure of cities differ across the United States, with Southwestern cities in many ways bearing little resemblance to their Northeastern or Midwestern counterparts” and suggesting the importance of understanding the impacts of region on imprisonment and criminal justice systems generally).

197. See *supra* Part III (explaining deference to agencies regardless of process, while recognizing the benefits and drawbacks of informal notice-and-comment rulemaking). In the meantime, the BOP should consider using agency guidelines and interpretive rules to quickly enact change while working through the time-consuming notice-and-comment process.

incarcerated young adults, it must ensure that prisons throughout the country abide by the regulations to increase family visitation. First, the BOP should issue warnings to individual prisons for noncompliance. If the prisons do not improve compliance, the BOP should withhold the prison's vital federal funding.<sup>198</sup> Having a system in place with consequences for noncompliance will hopefully ensure that all federal prisons abide by the regulation, and consequently that family visitation increases in federal prisons throughout the country.

In order to establish a maximum distance, the BOP must recognize the unique needs of young adults by paying specific attention to their hometown locations and ensuring they are not incarcerated outside of the maximum distance.<sup>199</sup> While this will likely be costly and difficult to facilitate,<sup>200</sup> the benefits of improving behavior while incarcerated, easing transition back into communities, and reducing recidivism will be substantial.<sup>201</sup>

### C. *Strategies for Increasing Family Visitation*

If the BOP is unable or unwilling to promulgate a rule regarding visitation for young adult offenders, there are other ways to improve outcomes for young adults and increase access to visitation for incarcerated persons' families. Since moving incarcerated people closer to their homes could be impractical in many instances, a less drastic option could be to subsidize or even provide transportation to prison facilities from city centers.<sup>202</sup> Similarly,

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198. *See* *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (determining that Congress may withhold federal funding in order to encourage states to adopt a national minimum drinking age); *see also* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L.J.* 248, 252–56 (2014) (defending the use of the funding cut-off and noting that the use or threat of funding cut-offs played a substantial role in the desegregation of southern schools in the late 1960s).

199. *See supra* Parts II and II (discussing the importance of the young adult category and the need for a rule establishing a maximum distance of incarceration).

200. *See supra* text accompanying notes 185–96 (noting the difficulties of prison reform). This will be particularly difficult for some states because not all states have BOP facilities. *See* FED. BUREAU OF PRISONS, OUR LOCATIONS, <https://www.bop.gov/locations/map.jsp> (last visited Jan. 31, 2020) (demonstrating that states like Idaho, Utah, Montana, and Wyoming, among others, do not have federal prisons).

201. *See supra* Part II (discussing the many benefits of family visitation on incarcerated people).

202. *See* Kennedy, *supra* note 193, at 129 (citing Pennsylvania's Program for Women and Girls which sponsors bus trips twice a month from Philadelphia to the correctional facility in Muncy, Pennsylvania); *see also* Alon Levy, *New York City Bus Operating Costs: An Analysis*, CURBED NEW YORK (Jan. 30, 2018, 4:30 PM), <https://ny.curbed.com/2018/1/30/16946476/mta-new-york-city-bus-operating-costs-analysis> (finding that city buses cost between \$7.40 and \$30.40 to operate per mile).

prisons could provide transportation vouchers to families who qualify for assistance to help defray the costs of transportation to visit their incarcerated loved one.<sup>203</sup> Nontraditional methods of communication, such as virtual visits, could enable incarcerated people and their families to maintain contact when physical visitation is unfeasible.<sup>204</sup> Even increasing family use of traditional methods of communication, like letters and phone calls, through policies that encourage family participation in the experience of incarcerated young adults, would help create or maintain critical family bonds.<sup>205</sup> Finally, and perhaps most importantly, restriction of visitation must not be used against young adult offenders as a punishment or sanction.<sup>206</sup> The times when young adults are acting out are the times during which they need support and encouragement the most. Withholding visitation as a punishment for bad behavior certainly does more harm than good.<sup>207</sup>

### CONCLUSION

Prison administrators and the BOP must recognize the importance of visitation for young adult offenders and prioritize access to visitation for this particularly vulnerable age group.<sup>208</sup> While the BOP's policy statement admits the importance of family visitation,<sup>209</sup> the agency can do much more to ensure

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203. See Kennedy, *supra* note 193, at 130.

204. See Boudin, *supra* note 96, at 171; see also Rabuy, *supra* note 100, at 4 (discussing the video visitation program of the Mike Durfee State Prison in South Dakota where incarcerated people, for twelve hours a week, have access to free video visits though Skype).

205. See Duwe, *supra* note 98, at 273 (exposing that even though phone calls are less costly than visits, the cost can still be prohibitive for some families); see also Rabuy, *supra* note 100, at 74 n.25 (citing a report finding that 34% of families studied went into debt trying to pay for prison visitations and phone calls).

206. See Boudin, *supra* note 96, at 161 (noting that because prisons consider visitation to be a "privilege," the facilities will limit access to visitation as punishment for infractions or bad behavior).

207. See Christie Thompson, *When Prisons Cut Off Visits—Indefinitely*, Marshall Project (Apr. 9, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/09/when-prisons-cut-off-visits-indefinitely> (interviewing the families of incarcerated people whose visitation was revoked as punishment and hypothesizing that the trouble the incarcerated loved one got into after the revocation was a direct result of them being prohibited from seeing their family).

208. See Gaby Galvin, *Underfunded, Overcrowded State Prisons Struggle with Reform*, U.S. NEWS & WORLD REP. (July 26, 2017, 1:30 PM), <https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership> (observing "[r]ecreation, family visits and training programs are often the first to go when staffing levels dip").

209. See Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L.

that all incarcerated persons have access to reasonable visitation. The high criminality and recidivism of young adult offenders, coupled with their still-developing brains, makes this age group especially vulnerable and in need of regular visits from their families. The BOP, through notice-and-comment rulemaking, can significantly impact outcomes for young adult offenders by minimizing the complicated prison visitation policies and potentially shortening the great distances many families travel for visitation. Streamlining prison visitation policies throughout the nation and ensuring that incarcerated young adults are in facilities closer to their homes could improve the behavior and mental health of incarcerated young offenders, as well as reduce their chances of reoffending once they are released into the community.

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REV. 1147, 1178 (2007) (first and second alteration in original) (citation omitted) (“visits [by family] are an important factor in maintaining the morale of the individual offender and motivating [him or her] toward positive goals.”).