

# Cost and Punishment: Reassessing Incarceration Costs and the Value of College- in-Prison Programs

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I.	INTRODUCTION.....	268
II.	THE UNTENABLE SITUATION .....	269
	A. SOLVING THE BUDGET CRISIS THROUGH EARLY RELEASES: CALIFORNIA AND ILLINOIS .....	269
	B. OTHER COSTS .....	271
	C. PRISONS AND THE JUDICIARY .....	272
III.	OVERVIEW OF PRISON POPULATION .....	273
	A. PRISONERS.....	274
	1. <i>Growth in the Number of Prisoners</i> .....	274
	2. <i>Types of Prisoners</i> .....	275
	B. PRISON BUILDING.....	278
	1. <i>Public Prisons</i> .....	278
	2. <i>Private Industry</i> .....	278
IV.	APPROACHES TO PENOLOGY .....	279
	A. OVERVIEW OF THEORIES – GENERAL.....	279
	B. RECENT APPLICATION OF “TOUGH ON CRIME” .....	279
	C. RISK MANAGEMENT .....	281
V.	COLLEGE-IN-PRISON PROGRAMS .....	281
	A. HISTORY OF COLLEGE-IN-PRISON PROGRAMS .....	281
	B. OVERVIEW OF PRESENT PROGRAMS .....	282
	1. <i>Boston University</i> .....	282
	2. <i>Bard College</i> .....	284
	3. <i>Saint Louis University</i> .....	285
	C. THEORY AND PRACTICE OF COLLEGE IN PRISON .....	286
	D. DESIRED OUTCOMES .....	288
VI.	COLLEGE-IN-PRISON AS PART OF THE RISK MANAGEMENT LANDSCAPE .....	288
	A. LIMITS OF COLLEGE-IN-PRISON .....	289
	B. POTENTIAL GAINS FROM SUCH PROGRAMS .....	290

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C. CONSIDERATIONS FOR DEVELOPING COLLEGE-IN-PRISON PROGRAMS .....	291
1. <i>Political Constraints</i> .....	291
2. <i>Practical Constraints</i> .....	292
VII. CONCLUSION .....	293

## I. INTRODUCTION

“The United States currently incarcerates its residents at a rate that is greater than any other country in the world.”<sup>1</sup> This statement places the magnitude of the U.S. prison system in context. Yet, even this incredible fact fails to describe the situation adequately because it addresses neither the exponential growth of our prison systems in recent years,<sup>2</sup> nor the overwhelming cost burden that has accompanied that growth. Those two factors have forced governments to reallocate funds in order to build and house more prisoners, diverting those monies away from education, healthcare, and other priorities.<sup>3</sup> In the recent economic crisis, the effects of this burden have become even clearer, with states releasing offenders for financial reasons unrelated to notions of punishment or justice.<sup>4</sup>

This article argues that college-in-prison programs are an effective response to prison population growth and costs explosions—admittedly on a limited scale. The programs reduce long-term costs through investments in education. Such offerings are not suitable for every prisoner, but can be highly effective for those individuals in a position to benefit from devoting time in prison to learning. The article begins with an overview of the untenable situation in U.S. prisons, including the burden of the population and cost boom. Second, the article examines the prison population to determine which individuals there might benefit from education. Third, the article considers theories of penology and the place an education program might occupy in the respective theories. Fourth, the article describes college-in-prison programs and their efforts to address the needs of both prisoners and the populace paying for the prison system. Finally, the article considers the role of college-in-prison programs as part of the risk management paradigm

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1. Steven Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?*, in *DO PRISONS MAKE US SAFER? THE COSTS AND BENEFITS OF THE PRISON BOOM* 27, 27 (Steven Raphael & Michael A. Stoll eds., 2008).

2. *See generally id.*

3. *See generally* John W. Ellwood & Joshua Guetzkow, *Footing the Bill: Causes and Budgetary Consequences of State Spending on Corrections*, in *DO PRISONS MAKE US SAFER? THE COSTS AND BENEFITS OF THE PRISON BOOM*, *supra* note 1, at 207.

4. *See, e.g.*, Michael Rothfeld, *Some Inmates Are Set Free Early*, L.A. TIMES, July 9, 2009, at A1; Press Release, Ill. Dep’t. of Corr., D.R. Michael P. Randle, (Dec. 30, 2009).

currently predominant in criminal justice systems.

## II. THE UNTENABLE SITUATION

It has become clear in recent years that the cost of the U.S. prison system is untenable. State expenditures on corrections rose 349 percent from 1987 to 2008, reaching at least 47.73 billion dollars for the 2008 budget year.<sup>5</sup> This rate of spending equates to one out of every fifteen state discretionary dollars going to corrections.<sup>6</sup> “Between 1984 and 2000, across all states and the District of Columbia, [increased] state spending on prisons was six times the increase of spending on higher education.”<sup>7</sup> With these drastic figures in mind, states facing budget crises are reconsidering their capacity to fund prisons.<sup>8</sup> This subsection considers state budgets and then turns to associated costs of incarceration to provide a complete picture of incarceration costs.

### A. SOLVING THE BUDGET CRISIS THROUGH EARLY RELEASES: CALIFORNIA AND ILLINOIS

Recent budget problems in states like California and Illinois have led to early release programs as part of cost-cutting measures needed to balance state budgets. In Illinois, “[b]etween 1985 and 2000 the State’s budget for higher education increased by 30 percent, while the State’s budget for corrections increased more than 100 percent.”<sup>9</sup> Illinois spends over one billion dollars annually on its prison system and the over 45,000 inmates housed in it.<sup>10</sup> In light of the Illinois budget crisis in 2009, the state decided to release nonviolent offenders early to a sort of parole/compromise situation.<sup>11</sup> The move was estimated to save the state “millions” and to “usher in other al-

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5. *Right-Sizing Prisons: Business Leaders Make the Case for Corrections Reform, Report*, PEW CTR. ON THE STATES 3 (Jan. 7, 2010), [http://www.pewcenteronthestates.org/uploadedFiles/Business%20Leaders\\_QA\\_Brief\\_web.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Business%20Leaders_QA_Brief_web.pdf) [hereinafter *Right-Sizing Prisons*]. Some studies estimate the cost of prison systems on the state level to be even higher, with one estimate by the Bureau of Justice Statistics indicating that the states spent a collective \$65 million in 2005, roughly the equivalent of \$220 per state resident. See Steven Raphael & Michael A. Stoll, *Introduction*, in DO PRISONS MAKE US SAFER? THE COSTS AND BENEFITS OF THE PRISON BOOM, *supra* note 1, at 1, 2.

6. *Right-Sizing Prisons*, *supra* note 5, at 1.

7. Erica R. Meiners, *Resisting Civil Death: Organizing for Access to Education in Our Prison Nation*, 3 DEPAUL J. SOC. JUST. 79, 85 (2009).

8. See, e.g., *Too Many Laws, Too Many Prisoners*, THE ECONOMIST, July 22, 2010, available at <http://www.economist.com/node/16636027>.

9. Meiners, *supra* note 7, at 85.

10. Megan Twohey, *State Gears for Early Prisoner Releases*, CHI. TRIB., Oct. 30, 2009, at C1.

11. See, e.g., *id.*

ternatives to incarceration.”<sup>12</sup> The savings were to come from reduced prisoner housing costs and staff layoffs, which together were to total twenty-three million dollars annually.<sup>13</sup> The state also sought to release 1,000 inmates under a separate accelerated good-time credit program; however, that program turned into a political debacle when released inmates were arrested for new crimes, and the initiative was cancelled.<sup>14</sup> The state’s budget has only worsened in the interim.<sup>15</sup>

California has also attempted to solve its budget crisis in part through a resizing of its prison system. In 2009 the state sought to close a \$26.3 billion budget gap with the help of a \$1.2 billion reduction in prison costs.<sup>16</sup> The plan called for reducing the number of inmates in the system from 167,000 to 140,000.<sup>17</sup> These reductions were to result from several new strategies: sending old and sick inmates to hospitals; allowing nonviolent inmates to serve their last year in house arrest; allowing some nonviolent offenders to earn credit for time in GED or vocational training; turning over illegal immigrant inmates to federal authorities for deportation; and creating a commission to overhaul the state’s sentencing laws.<sup>18</sup> The actual reductions in state prisons are closer to 6,500 inmates, but county jails have also taken up the practice of early release to solve their budget problems, thus increasing the numbers significantly.<sup>19</sup>

Illinois and California are extreme examples in that their budgets exhibit extraordinary large deficits; however, other states have followed this same pattern of releasing inmates to balance the budget. Kentucky, for example, released state prisoners to balance the state budget at the expense of the counties, which depended on state revenue for their jails.<sup>20</sup> Excess capacity in prisoner housing facilities in the state exacerbated the budget problems at the county level.<sup>21</sup> The population reduction strategy exists in

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12. *Id.*

13. Monique Garcia & Ray Long, *Quinn Studying Inmate Releases*, CHI. TRIB., July 10, 2009, at C12.

14. Monique Garcia, *Quinn Admits Prison Error*, CHI. TRIB., Dec. 31, 2009, at C5.

15. *See, e.g., Illinois Stuck in a ‘Historic, Epic’ Budget Crisis*, CHI. TRIB., Feb. 23, 2010; Monica Davey, *In Illinois, a Giant Deficit Leads to Talk of a Giant Tax Increase*, N.Y. TIMES, Jan. 9, 2011.

16. Matthew Yi, *Budget Pact in Jeopardy*, S.F. CHRON., July 22, 2009, at A1.

17. *Id.*

18. *Id.*

19. Andrew Blankstein, *Brown Tackles Early-Release Law*, L.A. TIMES, Feb. 17, 2010, at AA5.

20. James Mayse, *Early Release Program Hits Jails’ Budgets*, MESSENGER-INQUIRER, June 25, 2009.

21. *Id.*; *see also* THE ECONOMIST, *supra* note 8.

other states and contexts as well.<sup>22</sup>

#### B. OTHER COSTS

Associated social costs prove perhaps even more significant than direct imprisonment costs.<sup>23</sup> These costs lie primarily in family and social services contexts. For example, in recent years, “higher male imprisonment appears to have lowered the likelihood that women marry.”<sup>24</sup> This lower rate of marriage has made individuals and groups—African Americans in particular—“poorer and lonelier” than their peers.<sup>25</sup> In addition, children of inmates suffer disproportionately. They live in poverty at much higher rates than other children (5% versus 19%)<sup>26</sup> and engage in “deviant behavior” at much higher rates too.<sup>27</sup> Further, inmates contract diseases such as AIDS at higher rates, increasing healthcare costs, and they engage in criminal behavior at higher rates as a result of their stay in prison, increasing social costs again.<sup>28</sup> The total collateral costs for one prisoner for one year of incarceration may be reasonably estimated at approaching \$25,000.<sup>29</sup>

It is also clear that formerly incarcerated individuals have lower earnings following reentry into society.<sup>30</sup> Seen in a larger context, a one percentage point increase in incarceration among young black men translates into a 1.0 to 1.5% increase in unemployment among young black men.<sup>31</sup> Reincarceration increases this effect, such that employment activity among young black males is four to nine percent lower than it would be without the increase in incarceration rates.<sup>32</sup> Wages among young black males drop

22. See, e.g., Rebecca Vesely, *Another Aging Population: More States Considering Early-Release Programs for Older, Infirm Inmates*, MODERN HEALTHCARE, Mar. 29, 2010, at 32; *Prisons Full, Coffers Empty*, THE ECONOMIST 28 (July 24, 2010).

23. See generally TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

24. Kerwin Kofi Charles & Ming Ching Luoh, *Male Incarceration, the Marriage, Market, and Female Outcomes*, 92 REV. OF ECON. & STAT. 614, 614 (2010).

25. *Id.*

26. Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in *DO PRISONS MAKE US SAFER? THE COSTS AND BENEFITS OF THE PRISON BOOM*, *supra* note 1, at 177, 193.

27. See generally *id.*

28. *Id.* at 304.

29. John J. Donohue, III, *Assessing the Relative Benefits: Overall Changes and the Benefits on the Margin*, in *DO PRISONS MAKE US SAFER?*, *supra* note 1, at 301.

30. Harry J. Holzer, *Collateral Costs: Effects of Incarceration on Employment and Earnings Among Young Workers*, in *DO PRISONS MAKE US SAFER? THE COSTS AND BENEFITS OF THE PRISON BOOM*, *supra* note 1, at 239. See also SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* xix (2007).

31. Holzer, *supra* note 30, at 255.

32. *Id.* at 255-56.

from three to sixteen percent on average as a result.<sup>33</sup> Studies on white or latino men are inconclusive, but suggest a similar effect in those demographics.<sup>34</sup>

### C. PRISONS AND THE JUDICIARY

Growth in the prison system has not only created an untenable financial burden for state budgets, it has also created an impossible situation for the judiciary, which is charged with handling ever-increasing numbers of cases.<sup>35</sup> In one recent example, Chief Justice William Ray Price of the Supreme Court of Missouri detailed the need to rethink the priorities of the justice system in light of current financial and social realities.<sup>36</sup> In the annual “State of the Judiciary address,” Price examined current statistics from the perspective of the judiciary. He concluded that “[w]e may have been tough on crime, but we have not been smart on crime.”<sup>37</sup> He noted further,

For years we have waged a “war on drugs,” enacted “three strikes and you’re out” sentencing laws, and “thrown away the key” to be tough on crime. What we did not do was check to see how much it costs, or whether we were winning or losing. In fact, it has cost us billions of dollars and we have just as much crime now as we did when we started.<sup>38</sup>

Price suggests drug courts, revamped sentencing guidelines, and addiction treatment as strategies.<sup>39</sup> The speech does not mention education as an op-

33. *Id.* at 256.

34. *Id.*

35. *See, e.g.*, COAL. OF NY STATE JUDICIAL ASSOC., PRESENTATION TO THE NEW YORK STATE JUDICIAL COMPENSATION COMMISSION 16 (2011), <http://www.judicialcompensation.ny.gov/assets/D%20-%20Coalition%20of%20New%20York%20State%20Judicial%20Associations%20-%20Full.pdf>; COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 6 (2009), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf> (“Since 2000, incoming cases per judicial officer have increased for both general and limited jurisdiction courts.”). Since 2000, incoming cases per judicial officer have increased for both general and limited jurisdiction courts. *See* U.S. SUP. CRT., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9, <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> (noting increase in all types of cases in federal district courts).

36. William Ray Price, Jr., 2010 State of the Judiciary Address, Feb. 3, 2010, <http://www.courts.mo.gov/page.jsp?id=36875>.

37. *Id.*

38. *Id.*

39. *Id.*

tion,<sup>40</sup> but appears to be open to many solutions. As an underlying principle, Price argues for a transition from “anger-based sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results -- sentencing that assesses each offender’s risk and then fits that offender with the cheapest and most effective rehabilitation that he or she needs.”<sup>41</sup>

It is unclear at this point exactly what, if anything, will develop out of the discussion Price has initiated. In any case, legislators appear willing to consider options. The Missouri Senate has already begun analyzing a plan to reduce the state prison population by 2,000 inmates by shifting non-violent offenders to county facilities.<sup>42</sup> Such moves would not solve the problem, but they would at least reduce costs in this case by an estimated \$20 million annually.<sup>43</sup>

There are many other ideas to reduce incarceration rates. For example, a “justice corps” could employ crews of people returning from prison to renovate buildings for use by the needy.<sup>44</sup> Alternatively, public-private programs to build or maintain facilities below market cost could provide employment for returnees.<sup>45</sup> Yet another strategy is investing funds used for prisons into early childhood education programs.<sup>46</sup> Political will and financial obstacles often stand in the way of such programs, but financial necessity has changed the approach to them and will likely continue to do so in the coming years.<sup>47</sup>

### III. OVERVIEW OF PRISON POPULATION

College-in-prison programs may provide significant benefits to prison-

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40. Price implies that education is an option in his 2010 speech, and more explicitly addresses the need for it in his 2011 speech. There he notes,

I want to be absolutely clear. I am not advocating that we reduce prison populations just to save money. Nonviolent offenders are still law breakers, and they will break laws until they learn their lesson. What I am saying is that we need to do a better job teaching nonviolent offenders the right lessons. That takes more than prison; . . . discipline and job skills must be learned.

*Id.*

41. Price, *supra* note 36.

42. Tony Messenger, *Matt Bartle’s Plan Would Divert Some Convicts Away from State Prison*, ST. LOUIS POST-DISPATCH, Apr. 15, 2010, [http://www.stltoday.com/news/local/govt-and-politics/matt-bartle-s-plan-would-divert-some-convicts-away-from/article\\_0fb5f187-6bd1-5e33-bb58-4946e95e0139.html](http://www.stltoday.com/news/local/govt-and-politics/matt-bartle-s-plan-would-divert-some-convicts-away-from/article_0fb5f187-6bd1-5e33-bb58-4946e95e0139.html).

43. *Id.*

44. CLEAR, *supra* note 23, at 222.

45. *Id.* at 223-24.

46. Donohue, *supra* note 29, at 308.

47. Steven Greenhouse, *States Help Ex-Inmates Find Jobs*, N.Y. TIMES, Jan. 24, 2011, available at <http://www.nytimes.com/2011/01/25/business/25offender.html>.

ers. This effect is limited, however, to those prisoners with the educational background and social skills to translate the coursework into a better life in prison and after incarceration.<sup>48</sup> This section provides an overview of the prison population in the United States in order to highlight some of the restrictions and opportunities among the incarcerated. This section begins with incarceration rates, including historical trends. The second portion then considers the increase in the number of prisons needed to house the growing population.

#### A. PRISONERS

##### 1. *Growth in the Number of Prisoners*

The prison population in the United States has grown significantly in recent years. Incarceration rates held steady for much of the last century at around 110 inmates per 100,000 residents.<sup>49</sup> In recent years, that figure has more than quadrupled to around 488 inmates per 100,000 residents.<sup>50</sup> More specifically, the rapid increase in the rate of incarceration occurred in the last 30 years, with growth from the long-time rate of 110 beginning around 1975.<sup>51</sup> These rates of incarceration have led to a prison population of around 1.4 million adults in the United States<sup>52</sup>—a figure that does not even include those individuals in local jails.<sup>53</sup>

A comparison with other industrialized countries puts the numbers in context. The United States incarcerates its citizens at a rate several times higher than comparable nations.<sup>54</sup> The world average is around 166 inmates per 100,000 residents, and the European Union average is around 135.<sup>55</sup> Another study notes that no other country in Europe or Asia imprisons its citizens at even half the rate of the U.S. except Russia, which has only somewhat lower incarceration rates than the U.S.<sup>56</sup> Closer to home, Canada and Mexico imprison their citizens at rates of 116 and 207 inmates per 100,000 residents, respectively.<sup>57</sup>

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48. See *infra* Part III.A.2.

49. Raphael & Stoll, *supra* note 1, at 3.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 4.

54. DAVID GARLAND, *THE CULTURE OF CONTROL* ix (2001).

55. Raphael & Stoll, *supra* note 1, at 27.

56. John J. Donohue, III, *Assessing the Relative Benefits: Overall Changes and the Benefits on the Margin*, in *DO PRISONS MAKE US SAFER?*, *supra* note 1, at 269, 269.

57. DONNA SELMAN & PAUL LEIGHTON, *PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE* 19 (2010).

## 2. *Types of Prisoners*

The population of U.S. prisons has grown at a phenomenal rate in recent years. Several types of prisoners that have moved into prison facilities at a higher rate than others over that time.<sup>58</sup> This subsection examines the overall demographics and relative growth rates in turn, with an eye toward the benefit the respective categories might gain from additional education at the college level. Factors considered are the type of crime, educational levels attained, mental health status, substance abuse, and incidence of recidivism within those groups.

Prisoners land in jail for many different reasons, but the raw numbers and trends suggest that drug and parole violations are by far the most numerous.<sup>59</sup> Robberies and other property theft, in part related to drug use, are the other major categories of violations.<sup>60</sup> The crimes most prominent in media coverage—rape, murder, arson, kidnapping, and so forth—are far less common: rape and murder together occurred at a rate of 38.74 per 100,000 crimes reported to police in 2002, when burglary, robbery, and larceny hit over 3,500 per 100,000.<sup>61</sup> In other words, violent crime is far less prevalent than public perception would suggest—the numbers emphasize property crime. Drug crimes are only moderately frequent at a rate of 469.68 per 100,000 crimes reported to police, but still more frequent than the crimes against the body (rape, murder, etc.).<sup>62</sup> Among these categories, those incarcerated for more severe violent crimes are less likely to benefit from education aimed at reentry into society because they serve much longer sentences, if they are eligible for release at all.<sup>63</sup> Those individuals who commit drug or property crimes may be better candidates for educational programs.

A second important factor in recidivism and education programs is educational attainment among inmates. Education among inmates is a very effective predictor of recidivism (and eligibility for education programs that lower recidivism).<sup>64</sup> Most prisoners are, not surprisingly, not particularly well educated. The great majority of prisoners holds a high school diploma,

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58. Raphael & Stoll, *supra* note 1, at 34-35, tbl. 2.1

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Raphael & Stoll, *supra* note 1, at 34-35, tbl. 2.1.

64. See, e.g., STEPHEN J. STEURER & LINDA J. SMITH, CORRECTIONAL EDU. ASSOC. & MANAGEMENT & TRAINING CORP., EDUCATION REDUCES CRIME: THREE STATES RECIDIVISM STUDY—EXECUTIVE SUMMARY (2006). See also CAROLINE WOLF HARLOW, EDUCATION & CORRECTIONAL POPULATIONS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 10, tbl. 15 (2003).

a GED, or less.<sup>65</sup> Those students not yet prepared for college-level work are ineligible for college-in-prison programs, at least as an initial matter, because of their inadequate education. This inability to participate in educational programs matters for post-prison success. High school dropouts were incarcerated at rates double their diploma-bearing peers.<sup>66</sup> For these less-educated inmates, the labor market has worsened significantly since the 1970s, perhaps explaining in part the increased crime levels.<sup>67</sup>

Mental health also plays a role in prisoners' education options. Mental health affects a greater percentage of prisoners than members of the general population, and mental health issues are undoubtedly related to incarceration rates.<sup>68</sup> It has been argued that the failure of the mental health system has "bloated" the prison system by "channel[ing] hundreds of thousands of mentally ill people into jails and prisons."<sup>69</sup> In the general population, around 10.6% of Americans 18 years or older have a mental health disorder of some kind.<sup>70</sup> In contrast, a 2005 Bureau of Justice Statistics report analyzing the prevalence of mental health conditions and their correlation to crime in state and federal prisons found that over half of inmates had mental health problems.<sup>71</sup> These statistics do not include those inmates judged "*mentally incompetent to stand trial or not guilty by reason of insanity.*"<sup>72</sup> Therefore, the rates are somewhat higher even than the figures reported here.<sup>73</sup>

The rates of mental health issues varied by level of incarceration: in local jails 64% of inmates faced mental health issues; in state prisons 56% were affected, and federal prisons saw a 45% rate of mental health problems.<sup>74</sup> The most common mental health issues were related to manic-depressive disorders, with around 32% of state inmates and 25% of federal inmates suffering from these conditions.<sup>75</sup> Psychotic disorders represented

65. Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283, 289 (noting that 68% of people in state prisons did not hold a high school diploma and as many as 70% of all people in state and federal prisons are functionally illiterate or read below the eighth-grade level).

66. Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 860 (2009).

67. *Id.* at 865.

68. Raphael & Stoll, *supra* note 1, at 45-46; Doris J. James & Lauren E. Glaze, U.S. Dep't. of Justice Bureau of Justice Statistics, *Mental Health Problems of Prison and Jail Inmates 3* (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

69. ABRAMSKY, *supra* note 30, at xiv.

70. James & Glaze, *supra* note 68, at 3, n.1.

71. *Id.* at 1.

72. *Id.* at 3 (emphasis in original).

73. *Id.*

74. *Id.* at 1.

75. James & Glaze, *supra* note 68, at 2.

the other major category of symptoms, with over 19% of state inmates and over 12% of federal inmates suffering from delusions or hallucinations.<sup>76</sup> Inmates suffering from mental health disorders were only somewhat more likely to commit violent crimes than their counterparts,<sup>77</sup> but they were much more likely to report substance abuse problems,<sup>78</sup> repeat convictions,<sup>79</sup> and unemployment.<sup>80</sup>

A history of substance abuse can be an additional barrier to education programs. Substance abuse levels among prisoners are high, regardless of the type of crime. In general, as many as 35.6% of convicted jail inmates were under the influence of some substance when they committed the crime that landed them in jail.<sup>81</sup> Over 2/3 of jail inmates fell under the definition of substance abuse or substance dependence in the year before their arrest.<sup>82</sup> Researchers have devoted much attention to alternative sentencing regimes and incarceration and justice strategies in an effort to address the underlying substance abuse problems, most recently in the form of drug courts.<sup>83</sup> Inmates with substance abuse problems tend to recidivate at high rates,<sup>84</sup> and they are accordingly pessimistic of their chances of avoiding crime following release.<sup>85</sup> Substance abusers are in many cases not likely to benefit from education unless it is coupled with substance abuse programs, and sometimes not even in those cases.<sup>86</sup>

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76. *Id.*

77. *Id.* at 7.

78. *Id.* at 6.

79. *Id.* at 1.

80. James & Glaze, *supra* note 68, at 5.

81. David M. Eagleman et al., *Why Neuroscience Matters for Rational Drug Policy*, 11 MINN. J. L. SCI. & TECH. 7, 7 (2010).

82. *Id.*

83. For an overview of drug courts and their strategies, see Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 417-18 (2009).

84. Mandeep K. Dhami et al., *Prisoners' Positive Illusions of Their Post-Release Success*, 30 LAW & HUM. BEHAV. 631, 633 (2006).

85. *Id.*

86. James & Glaze, *supra* note 68, at tbls. 5 & 10 (showing higher rates in mental health and substance abuse issues among incarcerated and lower employment prospects for those with mental health and substance abuse issues). See also Gerald G. Gaes, *The Effectiveness of Prison Education Programs on Post-Release Outcomes*, Reentry Roundtable on Education, at 12 (2008), <http://www.urban.org/projects/reentry-roundtable/upload/Gaes.pdf>; Diana Brazzell, et. al., *From the Classroom to the Community: Exploring the Role of Education during Incarceration and Reentry* 20 (2009), [http://www.jjay.cuny.edu/centers/prisoner\\_reentry\\_institute/2706.htm](http://www.jjay.cuny.edu/centers/prisoner_reentry_institute/2706.htm).

## B. PRISON BUILDING

The increase in incarceration in the United States has led to a building boom in the prison system. This construction has involved both public and private actors. Public facilities have increased in number in politically interesting ways. Private facilities represent a new development in the political and fiscal approach to the prison system. This subsection describes these two elements in turn.

### 1. *Public Prisons*

Public prisons have experienced tremendous growth in recent years and enjoyed particular favor as an economic development tool.<sup>87</sup> The most common pattern of development has been growth in prisons in depressed rural areas, where locals lobby for jobs and state governments award prisons to those areas.<sup>88</sup> The prisons have in many cases not delivered on their promises to improve the local economy significantly.<sup>89</sup> Of course, some of the dissatisfaction may result from unrealistic expectations in the rural communities, in part fueled by politicians' rhetoric.

This growth in the prison system came at a great cost. Average costs to residents of a given state increased from \$60 per capita in 1980 to \$164 per capita in 2000 on an annualized, inflation-adjusted basis.<sup>90</sup> This cost varied greatly by state, with the highest-incarceration states (Florida, Arizona, etc.) spending 2.6 times per capita more than the lowest-incarceration states (North Dakota, Minnesota, etc.).<sup>91</sup> For those states with the highest costs, if not also for states with smaller prison system budgets, the long-term burden is too much to maintain.<sup>92</sup>

### 2. *Private Industry*

Private industry has entered the prison industry in a major way in the last twenty years. Much of this growth has centered on a few corporations that engage in both the construction and the operation of corrections facilities: Corrections Corporation of America (CCA) and the GEO Group are the biggest players.<sup>93</sup> CCA was the first operator and began its work in the

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87. SELMAN & LEIGHTON, *supra* note 57, at 45.

88. *Id.*

89. *Id.*

90. Ellwood & Gutzkow, *supra* note 3, at 208.

91. *Id.* at 209.

92. SELMAN & LEIGHTON, *supra* note 57, at 42-43.

93. SELMAN & LEIGHTON, *supra* note 57, at 1.

1980s in Tennessee.<sup>94</sup> Since then, “for-profit” contractors [have been] allowed to pursue their commercial interests so long as they remain within the constraints” of their contract and monitoring.<sup>95</sup>

Those commercial interests have included profit through purported cost-savings<sup>96</sup> and a drive to increase the number of facilities operated by a company—thus increasing profit potential.<sup>97</sup> It is difficult to assess the success of any individual operation compared with the government’s operation of similar facilities, but it appears likely that the private prisons are no more able to contain costs than the public institutions they replaced.<sup>98</sup>

#### IV. APPROACHES TO PENOLOGY

##### A. OVERVIEW OF THEORIES – GENERAL

Traditional models of penology centered on the individual and considered strategies for responding to an individual’s criminal behavior. The most common responses were punishment and rehabilitation.<sup>99</sup> Both approaches reflected Enlightenment ideals of rational behavior by recognizing the “mismatch among individual motivation, normative orientation, and social opportunity structures.”<sup>100</sup> More recent approaches focus less on individuals and rational behavior. This section describes contemporary views on penology and their role in increasing the number of prisoners in the United States.

##### B. RECENT APPLICATION OF “TOUGH ON CRIME”

“Tough on crime” positions are a fairly recent phenomenon that developed out of the interaction of high modernism with a postmodern social pastiche. Following the arguments of David Garland, recent efforts on crime are “a series of policies that appear deeply conflicted, even schizoid, in their relation to one another.”<sup>101</sup> Government authorities recognize that they need to pull back from the government’s traditional role of “provider

94. *Id.* at 54-55.

95. GARLAND, *supra* note 54, at 116.

96. SELMAN & LEIGHTON, *supra* note 57, at 63-64.

97. *Id.* at 44, 79.

98. *Id.* at 129-158 (demonstrating that cost estimates used to sell the public on the idea of privatizing prisons were based on incorrect assumptions of institutional cost and insufficient accounting for the public cost that would remain for selecting and overseeing the new private prison operators).

99. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 466 (1992).

100. *Id.*

101. GARLAND, *supra* note 54, at 110.

of security and crime control.”<sup>102</sup> At the same time, however, they also realize that “the political costs of such a withdrawal are liable to be disastrous.”<sup>103</sup> The political viability of “tough on crime” strategies is exemplified by Sheriff Joe Arpaio of Arizona, who describes his view as follows: “I’m doing what I was *elected* to do—get tough on crime. I want inmates to hate jail so much they never come back.”<sup>104</sup> Sheriff Arpaio has reaped the political fruits of this strategy as “the most popular elected official in Arizona” throughout his career.<sup>105</sup>

These contradictory policies of strict enforcement and the admission of the state’s limits are represented in the “War on Drugs” and the community and public-private partnership solutions engaged in at the same time. The “War on Drugs” purports to eradicate an evil by imprisoning drug users and dealers.<sup>106</sup> Garland reads this strategy as a combination of six strategies for maintaining the image of the state as the embodiment of civil order, including redefining deviance and success to suit the current political mood.<sup>107</sup> The community partnerships of the same era—block watch programs and the like—were in effect an admission that the state cannot effectively function as the sole arbiter of justice and guarantor of order.<sup>108</sup> Community policing sought assistance from businesses, volunteers, non-profits, and others in an effort to maintain adequate levels of safety.<sup>109</sup>

The combination of apparently contradictory initiatives from “tough on crime” movements and community partnerships developed parallel to the penal-welfare model in the 1980s. The penal-welfare approach is not “an independent form of criminal justice legal process” in the strict sense, but rather an approach to crime in a broad social context.<sup>110</sup> Penal welfarism focuses on “the delinquent,” an essentialized, flawed individual in need of

102. *Id.*

103. *Id.*

104. Lisa Kelly, *Chain Gangs, Boogeymen and Other Real Prisons of the Imagination*, 5 RACE & ETHNIC ANC. L.J. 1, 6 n.20 (1999) (emphasis added) (internal citation omitted).

105. Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 606 n.245 (2006). Arpaio explains his views on crime in general in his most recent book: “Crime does not cure itself. Crime does not go away of its own accord. Crime is an insatiable parasite, feeding off its host—society—until there is nothing left to take, corrupt, or destroy.” JOE ARPAIO, *JOE’S LAW: AMERICA’S TOUGHEST SHERIFF TAKES ON ILLEGAL IMMIGRATION, DRUGS, AND EVERYTHING ELSE THAT THREATENS AMERICA* 255 (2008).

106. Lester Grinspoon & James B. Bakalar, *The War on Drugs—A Peace Proposal*, 330 NEW ENGL. J. MED. 357 (1994).

107. GARLAND, *supra* note 54, at 113-27.

108. *Id.* at 124-27.

109. *Id.* at 123-24.

110. Miller, *supra* note 83, at 1509.

rehabilitation.<sup>111</sup> Scientific experts played a critical role in giving the approach the appearance of validity by providing the discretion and expertise required to render decisions in individual cases.<sup>112</sup> Politics left little room for rehabilitation in the 1980s, but more recently the ideals of penal welfarism have been revived.<sup>113</sup> College-in-prison programs with their reliance on experts, hope for reentry, and reduced recidivism are more likely to take hold in the current environment, which is more receptive to rehabilitation and also forced to address the consequences of “tough on crime” incarceration strategies because of budget constraints.

### C. RISK MANAGEMENT

In recent years, risk management has come to the forefront of criminal justice systems, and college-in-prisons can serve the goals of that perspective well. Risk management is characterized by three elements: 1) a rhetoric of probability and risk, 2) an emphasis on systemic goals, rather than individualized or external social ideals, and 3) the view of offenders as an aggregate, rather than individuals.<sup>114</sup> This new approach resulted from increased awareness that the rapid rise in incarceration under “tough on crime” regimes was presenting an unbearable economic burden.<sup>115</sup> The all-important question under risk management systems is whether a particular practice will “translate into anything that can provide a viable handle on [an] agency’s tasks” in law enforcement.<sup>116</sup> College-in-prison programs seek to fit these needs by removing a portion of the population from prison and reducing the cost of the system.

## V. COLLEGE-IN-PRISON PROGRAMS

This section provides an overview of College-in-Prison Programs at American correctional facilities. The section begins with a historical overview. Then it turns to descriptions of three significant programs currently in operation. Finally, the section considers the theory and practice of such programs in light of desired outcomes.

### A. HISTORY OF COLLEGE-IN-PRISON PROGRAMS

At one time, there were 350 College-in-Prison Programs operating in

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111. *Id.* at 1510.

112. *Id.*

113. *Id.* at 1511.

114. Feeley & Simon, *supra* note 99, at 450.

115. *Id.*

116. *Id.*

the United States.<sup>117</sup> The enactment of the Violent Crime Control and Law Enforcement Act in 1994<sup>118</sup> reduced that number to three by eliminating federal support for such programs.<sup>119</sup> Research has demonstrated that the elimination of Pell Grants for inmates suggests that voters and legislators are choosing inmate recidivism over inmate rehabilitation and reintegration.<sup>120</sup> Legislative histories exhibit a less cost-benefit-based rational, emphasizing instead the fundamental unfairness of giving grants to prisoners when law-abiding citizens could not get them. As U.S. Senator Kay Bailey Hutchison (R-TX) explained in 1994, it was “not right” that prisoners doing time “for offenses like carjacking, armed robbery, rape, and arson received as much as \$200 million in Pell . . . funds, courtesy of the American taxpayer.”<sup>121</sup> In fact, prisoners received 0.6% of the six billion dollars in Pell Grants in 1993, or approximately thirty-six million dollars in grants,<sup>122</sup> but the sentiment and public perception trumped statistical accuracy.

Interest in College-in-Prison Programs has risen in recent years as schools have sought to address various social issues through prisoner education.<sup>123</sup> Now that financial concerns are also driving a reevaluation of the prison system, additional programs are developing in several states.<sup>124</sup>

## B. OVERVIEW OF PRESENT PROGRAMS

### 1. *Boston University*

Boston University offers perhaps the oldest and largest of the College-in-Prison programs currently in operation. The Prison Education Program

117. Nazneen Malik, *The Bard College Prison Initiative*, 10 EDUC. UPDATE 19 (2005).

118. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

119. *Id.*

120. See, e.g., Charles A. Ubah, *Abolition of Pell Grants for Higher Education of Prisoners: Examining Antecedents and Consequences*, 39 J. OFFENDER REHABILITATION 73 (2004).

121. J.M. Taylor, *Pell Grants for Prisoners Part Deux: It's Déjà vu All Over Again* 8 J. PRISONERS ON PRISONS 1 (1997) (internal citations omitted).

122. Meiners, *supra* note 7, at 87.

123. See *What We Do*, EDUCATION JUSTICE PROJECT, <http://www.educationjustice.net/> (last updated Aug. 1, 2011) (contains related information and references).

124. See Alison Leigh Cowan, *Shoots of College Ivy Sprout at a Prison*, N.Y. TIMES, Nov. 17, 2009, at A24; Lauren Sieben, *Liberal-Arts Colleges Reach Minds Behind Bars*, CHRON. HIGHER ED., Feb. 6, 2011, at A22; *infra* Part IV.B.3 (including: Saint Louis University (St. Louis, MO) (working in Missouri state prison system); Greenville College (Greenville, IL) (working in Illinois federal prison); Wesleyan University (Middletown, CT) (working in Connecticut state facility)).

(PEP) began in 1972 with an initiative by now-deceased former BU professor Elizabeth “Ma” Barker.<sup>125</sup> PEP operates in three separate prisons: Massachusetts Correctional Institution (MCI)-Norfolk, a medium-security facility for men; MCI-Bay State, a medium-security facility that houses men; and MCI-Framingham, a women’s prison housing inmates at different security levels.<sup>126</sup> PEP currently offers only bachelor’s degrees, although it was able to offer master’s degrees prior to funding limitations imposed by changes in federal law in 1994.<sup>127</sup> The program educates around 180 prisoners at any given time, and over 180 individuals have completed bachelor’s degrees since the program’s inception.<sup>128</sup> A major stumbling block over the years has been PEP’s requirement that incoming students already have some first-year college level work completed for admission to the program.<sup>129</sup> In recent years, grant funds and other organizations have provided potentially suitable candidates with the necessary background for admission to the degree program.<sup>130</sup>

Boston’s program grew out of Parker’s observation that the prisoners were knowledgeable and very interested in learning.<sup>131</sup> Inmates rarely discuss their crimes in PEP, instead focusing on life events and interpretation of poetry or history.<sup>132</sup> This study allows prisoners to “figure out [their] own experience[s]” by “see[ing themselves] in those problems,” which “will help when [they] are released back into society.”<sup>133</sup> That is, the act of reflection makes for an effective self-transformation strategy. PEP seeks to counter the hardening of criminals in prison through this education in order to allow them to succeed after their release. “A lot of times prisoners do their time and they don’t think about bettering themselves . . . . They come to prison and become better criminals instead of better human beings.”<sup>134</sup>

Boston University’s program believes it can help direct the students’ lives in a better direction, but does not link the program to one particular

125. Brent Staples, *What Ma Barker Knew and Congress Didn’t*, N.Y. TIMES, Nov. 25, 2002, available at <http://www.nytimes.com/2002/11/25/opinion/editorial-observer-prison-class-what-ma-barker-knew-and-congress-didn-t.html>.

126. *About the Prison Education Program*, BOS. U., [http://www.bu.edu/pep/about\\_us/](http://www.bu.edu/pep/about_us/) (last visited Jan. 22, 2012).

127. *Id.*

128. *Id.*

129. Dick Taffe, *Prison Education Program Expands With New Grant*, B.U. TODAY, Nov. 10, 2005, <http://www.bu.edu/today/node/743>.

130. *See, e.g., id.*

131. Midge Raymond, *Inside the Walls*, BOS. U. (Summer 2003), <http://www.bu.edu/bostonia/summer03/walls/> (noting prisoner interest in quiz bowl program in which inmates handily defeated BU students).

132. *Id.*

133. *Id.*

134. *Id.*

benefit. Instead, PEP offers a very open description of its goals:

The Boston University Prison Education Program is not a jobs program, though success in gaining employment is surely eased by college credit on a job application. It is not a program expressly designed to reduce recidivism, though ample research suggests that it does. Finally, it is not designed to contribute to the ease with which the Department of Correction manages its population, though there are studies that suggest education does that as well.<sup>135</sup>

Instead, PEP seeks to create “informed, successful, and contributing citizens” through their education.<sup>136</sup>

## 2. *Bard College*

The Bard Prison Initiative was founded in 1999 by Bard College alumnus Max Kenner at the Eastern New York Correctional Facility in Naponoch, New York.<sup>137</sup> The program first offered college courses in 2001 and now leads to either an associate’s or a bachelor’s degree.<sup>138</sup> Currently there are around 200 men and women pursuing degrees in three maximum-security and two medium-security prisons in the New York State system.<sup>139</sup> Student volunteers also travel to the prisons to provide pre-college tutoring, arts workshops, and more.<sup>140</sup> The Bard Initiative purports to create “within the space of the prison another space dedicated to the goals and practices of a liberal education.”<sup>141</sup> That is, the subject matter and the educational theory are intended to push students to become more reflective citizens through an open process of interacting with historical shifts in power and meaning. As Director Daniel Karpowitz explains: “[r]ather than defining and then prescribing a doctrinal mode of citizenship, or a fundamental definition of freedom, students are introduced to the situated histories and contested visions of the good that underlie our constitutional framework.”<sup>142</sup>

135. *Students*, BOS. U., <http://www.bu.edu/pep/students/> (last visited Jan. 22, 2012).

136. *Id.*

137. Ian Buruma, *Uncaptive Minds*, N.Y. TIMES MAG., Jan. 20, 2005, available at [http://www.nytimes.com/2005/02/20/magazine/20PRISON.html?\\_r=1&ex=1266642000&en=5a3010d4cf012a46&ei=5090&p](http://www.nytimes.com/2005/02/20/magazine/20PRISON.html?_r=1&ex=1266642000&en=5a3010d4cf012a46&ei=5090&p).

138. *BPI: Bard Prison Initiative*, BARD PRISON INITIATIVE, <http://www.bard.edu/bpi/> (last visited April 14, 2010).

139. *Id.*

140. *Id.*

141. Daniel Karpowitz, *Prison, College, and the Paradox of Punishment*, in 37 CRIME & PUNISHMENT: PERSPECTIVES FROM THE HUMANITIES 305, 307 (Austin Sarat ed., 2005).

142. *Id.* at 322.

Bard seeks to prepare inmates for life after prison by providing them the ability “to function as social beings.”<sup>143</sup> Perhaps ironically, Bard attempts to affect change in the individuals by *avoiding* reference to the self and therapy.<sup>144</sup> Bard recognizes the power structures inherent in the right/wrong dichotomies present in therapy, and the Initiative seeks to work around them. This power structure of punisher and punished “impl[ies] a social critique,” and fails to consider how the individual and society have both played a role in the crime committed.<sup>145</sup> Bard argues that the Initiative functions on the basis of three principles. First, it engages the moral agency of the student “in non-punitive ways.”<sup>146</sup> Second, it respects and amplifies “their dignity as human agents.”<sup>147</sup> Third, it encourages students to become critical readers of social structures and contexts “within which individuality and moral agency are themselves constructed.”<sup>148</sup>

### 3. *Saint Louis University*

The Saint Louis University (SLU) program combines elements of the Bard and Boston approaches and builds on them by addressing prison staff needs, as well. Founded in 2007, SLU’s program is in its early stages, with a pilot program nearing completion and a permanent program approved by University administration and funded in part by the Hearst Foundation.<sup>149</sup> SLU works with the Eastern Reception, Diagnostic and Correction Center (ERDCC), a medium-security facility in Bonne Terre, Missouri, about 40 miles south of St. Louis.<sup>150</sup> The program began as a series of courses on theology and has now expanded into an associate’s degree, with plans to offer bachelor’s degrees once the initial associate’s degrees are complete.<sup>151</sup> The students pursue general studies along tracks designed to prepare them for work after they complete their sentences (to the extent that they will ever be released).<sup>152</sup>

SLU’s program consciously positions itself as a part of the Univer-

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143. Nazneen Malik, *The Bard College Prison Initiative*, EDUC. UPDATE, May 2005, <http://www.educationupdate.com/archives/2005/May/html/FEAT-Bard.html>.

144. Karpowitz, *supra* note 141, at 321.

145. *Id.* at 317 (quoting DAVID GARLAND, *CULTURE OF CONTROL* 200 (2001)).

146. *Id.* at 308.

147. *Id.* at 308-09.

148. *Id.* at 310.

149. Nick Sargent, *Professors Bring Theology Education to Prisoners*, ST. LOUIS U. (Jan. 29, 2010), <http://www.slu.edu/x34624.xml>; *SLU Gets \$150,000 for In-Prison Classes*, ST. LOUIS BUSINESS J. (Aug. 16, 2010), <http://www.bizjournals.com/stlouis/stories/2010/08/16/daily17.html>.

150. Sargent, *supra* note 149.

151. *Id.*

152. *Id.*

sity's Jesuit mission of service,<sup>153</sup> noting that the Bible tells believers that if they serve the least in society they have served God.<sup>154</sup> The program also hopes to serve as a bridge to rehabilitation and reduced recidivism:

For the prisoners that will someday be paroled, the hope is that the education will help them transition back into the world and aid them in finding employment. For prisoners serving life sentences, the hope is that they will mentor younger prisoners at the ERDCC, encouraging them to turn their lives around rather than continuing their lives of crime.<sup>155</sup>

The SLU program builds on earlier models by adding degree programs for staff. In St. Francois County, where the prison is located, only around ten percent of adults have college degrees,<sup>156</sup> and there is no institution awarding four-year degrees in the area. Poverty levels<sup>157</sup> and unemployment are high.<sup>158</sup> SLU proposes to increase staff education levels to improve prison conditions and to increase employment prospects for the staff. Greater access to education for staff will also hopefully translate into educational achievement by the children of prison staff.

### C. THEORY AND PRACTICE OF COLLEGE IN PRISON

One recurring question is: why should we educate prisoners while they are in prison—where they are presumably supposed to be punished for their past transgressions? The answer is quite simple when considered in terms of recidivism. People who are better educated are better able to find work and, therefore, more likely to lead productive lives and avoid returning to prison.<sup>159</sup> A degree can provide additional opportunities for former inmates

153. *Id.*

154. *Matthew* 25:40.

155. Sargent, *supra* note 149.

156. *St. Francois County Quickfacts from the U.S. Census Bureau*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29187.html> (last visited Feb. 5, 2012).

157. The U.S. Census estimated in 2008 that 16.8% of county residents were below the poverty line, and median per capita income was over \$4,000 below the state average. *Id.*

158. *ERS/USDA Data – MO Unemployment and Median Household Income*, USDA ECON. & RES. SERV., <http://www.ers.usda.gov/data/unemployment/RDLlist2.asp?ST=MO> (last visited Feb. 16, 2012) (stating that in 2008, St. Francois county unemployment was 7.0%, about 0.9% above the state average); *Unemployment Rates – February 2010*, MO. ECON. RES. & INFO. CENTER, (Feb. 2010), [http://www.missourieconomy.org/images/indicators/unemp/unemp\\_map\\_0210.jpg](http://www.missourieconomy.org/images/indicators/unemp/unemp_map_0210.jpg) (noting that currently the county has unemployment around 12.0%, compared to the state average of 10.1%).

159. *See infra* Part III.A.2.

because of their increased skills, but it can also be an incentive to offer employment to someone whose convict status potentially subjects the employer to tort liability.<sup>160</sup>

In addition, the ability of prisoners to pursue higher education following their imprisonment is severely limited. Former prisoners rarely have the financial means to go to college, because most of them come from lower-class backgrounds and do not have access to private funding sources.<sup>161</sup> Further, former prisoners are also excluded from federal grant funding programs by the Violent Crime Control and Law Enforcement Act of 1994, as described above.<sup>162</sup>

Prisoners who are better educated have drastically lower rates of recidivism, but this benefit usually occurs if the prisoners complete their education *before* leaving prison, for both financial and social reasons.<sup>163</sup> In addition to financial concerns, questions of social stigmatization and risk management on college campuses may also limit opportunities for former inmates seeking education *after* their prison terms have ended. Former inmates suffer from stigmatization on campus with negative effects for their schooling and limiting effects on their subsequent career options.<sup>164</sup>

Former prisoners are an undesirable demographic for many higher education institutions, which are wary of the liability that may ensue for an institution admitting a known former prisoner following *Tarasoff v. Board of Regents of the University of California*.<sup>165</sup> *Tarasoff* held that “a relationship to a dangerous person . . . can be a predicate for responsibility under some circumstances.”<sup>166</sup> An analysis of the likelihood of incurring liability when a college admits a former prisoner would be very fact-specific and go beyond the scope of this article,<sup>167</sup> but some past crimes would likely put a

160. Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183 (2008).

161. See, e.g., Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 259 (2009).

162. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

163. Brazzell, *supra* note 86.

164. Anna Copenhaver, et al., *Journeys in Social Stigma: The Lives of Formerly Incarcerated Felons in Higher Education*, 58 J. CORRECTIONAL EDUC. (2007).

165. *Tarasoff v. Bd. of Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (*en banc*).

166. ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 125 (1999).

167. See, e.g., Joel Smith, Annotation, *Liability of University, College, or Other School for Failure to Protect Student from Crime*, 1 A.L.R. 4th 1099 (1980). See also RESTATEMENT (SECOND) OF TORTS § 448 (1965) (noting that an actor may incur liability for a third party’s action if the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime).

university on notice of potential danger, thus increasing the likelihood that an institution would refuse to admit past prisoners. As a non-protected group under civil rights law, prisoners do not enjoy broad legal protection in pursuing educational opportunities, and universities could exclude them with impunity on that basis.<sup>168</sup> Even if there were potential civil rights remedies, on the basis of race, for example, the reality is that it would be unlikely that former prisoners would be in a position to pursue those remedies, because the financial issues and the erosion of civil rights suits in recent years make such litigation unattractive in many cases.<sup>169</sup>

#### D. DESIRED OUTCOMES

The desired outcomes for college-in-prison programs vary somewhat in that they emphasize different, albeit related, points in their stated goals. Boston University, for example, speaks of bettering individuals, even if the self-improvement does not translate into a tangible result.<sup>170</sup> Bard College, on the other hand, attempts to right larger discrepancies in social opportunity through education.<sup>171</sup> Saint Louis University believes that it is fulfilling its mission of service to God by returning inmates to productive lives and by aiding corrections staff in building better lives for themselves and their families.<sup>172</sup> The improvement of individuals is a common thread in all of these cases. The potential systemic gains from these programs will be discussed below.

### VI. COLLEGE-IN-PRISON AS PART OF THE RISK MANAGEMENT LANDSCAPE

The risk management model operates on the basis of carefully considering factors in crime and the possibilities of avoiding future crime.<sup>173</sup> College-in-prison programs must evaluate prisoners on this basis, as well. In practice this evaluation translates into considering which types of prisoners are suited for the educational programs and who can make productive use of the education either in prison or following release. This section considers

168. See, e.g., ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW* 667-789 (3d ed., 2006).

169. See, e.g., Harold S. Lewis, Jr., *Teaching Civil Rights with an Eye on Practice: The Problem of Maintaining Morale*, 54 ST. LOUIS U. L.J. 769 (2010) (arguing that contemporary civil rights practice offers few options for plaintiffs, who increasingly find higher legal hurdles and lower damage awards in civil rights cases).

170. *Students: Boston University Prison Education Program*, BOS. U., <http://www.bu.edu/pep/students/> (last visited Feb. 21, 2012).

171. BARD PRISON INITIATIVE, <http://www.bard.edu/bpi/> (last visited Feb. 16, 2012).

172. Sargent, *supra* note 149.

173. Molly J. Walker Wilson, *Cultural Understandings of Risk and the Tyranny of the Experts*, 90 OREGON L. REV. 113, 119 (2011).

some of the factors in selecting suitable prisoners. It then examines the potential benefits from college-in-prison programs before concluding with a discussion of the practical and political limits on such programs.

#### A. LIMITS OF COLLEGE-IN-PRISON

Even the most optimistic or naïve proponent of college-in-prison programs must concede that some prisoners will not benefit from educational opportunities. Inmates with certain mental health problems, certain violent propensities (likely a form of mental health problem), certain criminal records, or extreme substance abuse problems are but a few examples. In addition, certain characteristics may make success less likely for apparently suitable candidates, details which in many cases surface in the initial application process.

Programs attempt to screen out undesirable candidates through a variety of selection processes. Those processes include not only a review of academic credentials, but also essays, interviews, behavioral records in prison, and more.<sup>174</sup> Administrators seek individuals who are in a position to benefit from the program on some level. This desire to improve an individual's lot does not preclude inmates serving life sentences from participating in the programs, because those individuals can prove beneficial within the prison system and can become more productive while there. Boston University, for example, employs former students as on-site administrators.<sup>175</sup> Those employees earn more than most prison employees, but their wages are still far lower than the salary any non-inmate would draw.<sup>176</sup> In other words, both sides win when the pay is higher for the recipient and lower for the employer. The prison system also benefits from ease of administration and the additional employment opportunity for its inmates.<sup>177</sup>

Even the most careful screening processes will not catch all determined recidivists. For example, Boston University's PEP alumni include a prison escapee listed on the DOC's Most Wanted List.<sup>178</sup> He is described as an "accomplished prison poet and author" and "extremely dangerous and

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174. The web sites for the programs at Boston University and Bard College give some insights into the selection process in at several points. See BARD PRISON INITIATIVE, *supra* note 171; *Boston University Prison Education Program*, *supra* note 170.

175. Telephone conversation with Robert Cadigan, then-Director, Boston University Prisoner Education program, June 2009.

176. *Id.*

177. Telephone conversation with Robert Cadigan, then-Director, Boston University Prisoner Education program, June 2009 (explaining that BU employs students to assume some administrative duties for the program and noting that discipline problems are almost nonexistent among students).

178. Midge Raymond, *Inside the Walls*, Bos. U. (Summer 2003), <http://www.bu.edu/bostonia/summer03/walls/>.

manipulative.”<sup>179</sup> Even conceding that a few unsuited inmates may get through the screening process, it is unlikely that education makes them into worse individuals—in any case, schooling will be less dangerous education than lessons from the prison yard.<sup>180</sup>

#### B. POTENTIAL GAINS FROM SUCH PROGRAMS

The gains from education programs in prison are potentially enormous. College-in-Prison Programs strive for both prison-internal and prison-external benefits in personal and cost terms. In the prison, inmates are generally found to behave better when they have educational opportunities.<sup>181</sup> On the one hand, “[d]isciplinary incidents are less likely to occur” in general.<sup>182</sup> On the other hand, inmates for whom participation in educational programs may be at risk are more likely to walk away from confrontations.<sup>183</sup> In a prison system fundamentally structured by violence, the importance of this reduction in violence cannot be underestimated.<sup>184</sup> In addition, these reductions in discipline problems lead directly to lower personnel costs for the facility.<sup>185</sup>

Prison-external benefits include reduced recidivism,<sup>186</sup> lowered costs in the corrections system, and higher tax revenues from the reintegration of prisoners into the workforce. One study showed that continuing higher education programs in Illinois would have saved from \$11.8 to \$47.3 million in 2002 alone, to name but one example.<sup>187</sup> In addition, those same Illinois prisoners, if working, would have contributed \$10.5 million per year to the state’s economy.<sup>188</sup> In other words, there are fewer expenses, and the state

179. *Id.*

180. Several studies have demonstrated that there is “a strong and consistent correlation between individual criminal behavior and peer delinquency.” Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, in DO PRISONS MAKE US SAFER? THE COSTS AND BENEFITS OF THE PRISON BOOM, *supra* note 1, at 151, 154.

181. Michelle Fine et al., *Changing Minds: The Impact of College in a Maximum Security Prison*, THE GRADUATE CENTER OF CITY U. OF N.Y., at 21 (Sept. 2001), <http://web.gc.cuny.edu/che/changingminds.html>.

182. *Id.*

183. *Id.*

184. See generally Ahmed A. White, *The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737 (2008).

185. Fine, *supra* note 181, at 21.

186. Daniel Karpowitz & Max Kenner, *Education as Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated* 3, <http://www.stcloudstate.edu/continuingstudies/distance/documents/EducationasCrimePreventionTheCaseForReinstatingthePellGrantforOffendersKarpowitzandKenner.pdf>.

187. Kathleen Kane-Willis et al., *Intersecting Voices: Impacts of Illinois’ Drug Policies*, THE ILLINOIS CONSORTIUM ON DRUG POLICY, ROOSEVELT U. INST. FOR METROPOLITAN AFF., at 13 (2006), <http://www.roosevelt.edu/ima/pdfs/intersectingvoices.pdf>.

188. *Id.*

also takes in more revenue when citizens are returned to productive lives.

In addition to the quantifiable cost savings, education programs in prisons may lead to more enlightened prison administration and improved perception of the justice system as a means for rehabilitating, rather than merely a place to house criminals.

### C. CONSIDERATIONS FOR DEVELOPING COLLEGE-IN-PRISON PROGRAMS

#### 1. *Political Constraints*

The political limits on college-in-prison programs generally come back to the question of why prisoners—*criminals*—should receive opportunities that law-abiding citizens do not.<sup>189</sup> Even individuals who agree that education can help keep inmates from returning to prison may not agree that it is appropriate to use taxpayer money to fund opportunities not available to others.<sup>190</sup> There are two responses to this line of thought. First, operating the programs in partnerships with private universities eliminates the public funding questions for the most part. The question is then one of selling potential donors on the program. Critics may also argue that the state is aiding the prisoners by simply allowing the program to operate in state facilities and using state personnel hours to transport students in the facility and to schedule the classes. This argument is difficult to counter without forcing the educating institutions to pay for their use of the facilities and for the personnel hours involved in coordinating prisoner participation. A possible response to the organizational costs is found in the Boston University program, where a prisoner who has graduated works for the University to coordinate the logistics within the prison.<sup>191</sup> The state then reaps the benefit of assistance and a funded, secure job for an inmate.<sup>192</sup> The second response to critics of conferring a benefit on prisoners is that the prisoners reap only one portion of the benefit. Taxpayers win through reduced incarceration costs and gains in the tax base when inmates return to society.<sup>193</sup>

Critics could also argue that programs that educate mostly white staff at prisons located in rural areas—also largely white, as a general rule—confer a benefit on white citizens that minority citizens do not receive.<sup>194</sup> More specifically, the rural white citizens receive both the employment

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189. LAURA E. GORGOL & BRIAN A. SPONSLER, INST. FOR HIGHER EDU. POLICY, UNLOCKING POTENTIAL: RESULTS OF A NATIONAL SURVEY OF POSTSECONDARY EDUCATION IN STATE PRISONS 6 (2011).

190. Fine, *supra* note 181, at 21.

191. Telephone conversation with Robert Cadigan, then-Director, Boston University Prisoner Education program, June 2009.

192. *Id.*

193. Kane-Willis, *supra* note 187.

194. See SELMAN & LEIGHTON, *supra* note 57, at 45.

opportunity at the prison and the educational opportunity provided by the sponsoring college. Furthermore, the educational bonus would come in addition to the statistical distortion and corresponding increase in federal funding that result from including the prison population in statistical analyses of the town.<sup>195</sup> Critics of the bonus to whites could also allege that this new opportunity will merely increase whites' income and career opportunities without alleviating any of the race-based discrimination felt in such prison facilities.<sup>196</sup> There is no clear answer here, but the political reality may be that gaining education for some minority prisoners is a reasonable trade-off even for those individuals who would prefer to limit the benefits received by white prison staff.

## 2. *Practical Constraints*

Practical constraints are related to the political concerns, but they also include the strategies for financing the education. The debate centers around the perceived privileging of prisoners, who receive a benefit for free that is only available to non-inmates for a (large and rapidly increasing) cost.<sup>197</sup> The financial obstacles in setting up and paying for such a program are significant. It is certainly no coincidence that only private institutions are offering college-in-prison programs at the present because of the problem of separating state funding out from donations—or at least the public's perception of such problems.<sup>198</sup> Private schools receive no direct subsidy from their respective state governments and the federal government for these programs,<sup>199</sup> and they are also forced to raise any funds to operate the program privately.<sup>200</sup>

Inmate transfers also tend to limit the effect of the program. As a New York study explained, “[c]ourses are growth producing; graduation is transformative.”<sup>201</sup> That is, it makes a difference if students are able to take some courses, but the *completion* of the degree is of even greater importance. This aspect matters for psychological reasons, but it is also crucial for em-

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195. See, e.g., Taren Stinebricker-Kauffman, *Counting Inmates: Prison Inmates, Population Bases, and “One Person, One Vote”*, 11 VA. J. SOC. POL’Y & L. 229, 257 (2004) (detailing the effect of counting prison inmates in the population figures for rural towns hosting a prison).

196. Spearlt, *Manufacturing Social Violence: The Prison Paradox and Future Escapes*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 84, 116 (2009) (arguing that overcriminalization leads to increased violence both within and outside of the prison system).

197. GORGOL & SPONSLER, *supra* note 189.

198. *Id.*

199. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

200. *Id.* See also Malik, *supra* note 117 (“The only stipulation was that [program founder Max] Kenner would have to find a way to raise money to support the program”).

201. Fine, *supra* note 181, at 36.

ployment prospects—a key indicator of the likelihood of recidivism.<sup>202</sup> Prisoners who serve longer sentences are often transferred for a variety of reasons,<sup>203</sup> and this change could prevent students from completing their studies. Prisoners have no right to prevent such transfers and are completely at the mercy of the prison system in this respect.<sup>204</sup> Here the cooperation of the prison system and local administrators is crucial.

## VII. CONCLUSION

The American prison system has become an unbearable burden in recent years because of tremendous growth in incarceration rates.<sup>205</sup> We can no longer afford the monetary cost of maintaining the current situation—even without considering the human cost. Judges, legislators, and business interests are all recognizing the need to reconsider tough-on-crime policies that have increased the size of our prisons system without making us safer. Education offers one effective strategy to reintegrate some prisoners back into society, thus turning a cost to government into a more productive citizenry. Some hope for new options exists in recent legislation,<sup>206</sup> but political obstacles remain, particularly in the large numbers of voters who oppose giving “criminals” something that law-abiding citizens have to pay for—education.<sup>207</sup> In this case, however, the benefits clearly outweigh the costs for all involved.

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202. *Id.*

203. For a number of noteworthy examples of prisoner transfers from case law, see *Substantive Rights Retained by Prisoners*, 38 GEO. L. J. ANN. REV. CRIM. PRO. 967, 977 n.2918 (2009).

204. *Id.*

205. THE ECONOMIST, *supra* note 8.

206. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

207. GORGOL & SPONSLER, *supra* note 189.