

2023

Financial Aid and Felonies: The Exclusion of Justice-Involved Individuals from Federal Student Aid

Jessamine Anderson

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Jessamine Anderson, *Financial Aid and Felonies: The Exclusion of Justice-Involved Individuals from Federal Student Aid*, 21 Seattle J. Soc. Just. 789 (2023).

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol21/iss3/16>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

Financial Aid and Felonies: The Exclusion of Justice-Involved Individuals From Federal Student Aid

Jessamine Jarris Anderson

I. INTRODUCTION

A friend of mine has been incarcerated with a life-without-parole (LWOP) sentence for the past forty years.¹ He entered prison at the age of twenty-one.² Now in his sixties, my friend has become a role model for those “behind the wall” with him.³ He has earned his GED diploma and has completed all the Department of Corrections programming available to him, even transferring prisons to have better access to educational and vocational classes.⁴ Despite my friend’s eagerness to further his education and better himself, many of these opportunities are unavailable to him because of his LWOP sentence.⁵

A large portion of the academic resources reserved for the incarcerated population are allocated solely for those serving sentences other than LWOP.⁶ This causes my client to feel as if society does not value his existence or his potential contributions to humanity.⁷ To alleviate this, my client spends his free time crocheting scarves for women and children’s shelters, as well as maintaining employment in practical skills such as textiles

¹ Interview with Anonymous, incarcerated individual, in Monroe, Wash. (Oct. 16, 2021).

² *Id.*

³ *Id.*; *Behind the wall*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=behind%20the%20wall> [<https://perma.cc/KK7U-A54G>]. The term “behind the wall” is used by those incarcerated to describe the experience of being imprisoned.

⁴ Interview with Anonymous, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

and landscaping.⁸ If my client is ever released, his numerous certificates from completing various courses and programs will not translate into any societally recognized academic achievements.⁹ This will limit his ability to obtain employment—a key stepping stone to re-entry into society—despite completing relevant coursework and having practical experience.¹⁰

In addition to the recent expansion of eligibility for the Federal Pell Grant to include people experiencing incarceration, otherwise known as justice-involved individuals, the United States Congress must also pass a law establishing a national program dedicated to increasing access to federal student loans and federal work-study for this population, especially for those serving an LWOP sentence. The United States Department of Education must implement this national program and remove financial aid eligibility restrictions for incarcerated individuals. Such legislation and subsequent policy implementations will prevent further disproportionate harm for communities of color and people suffering from mental health and substance use disorders.

II. ROADMAP

In Section III, this Comment will explore the history of the criminal legal system in the United States by providing an overview of the philosophies of punishment underlying this system as well as the effects of the prison industrial complex and those whom it burdens most. Section IV of this Comment underscores the United States federal student aid system; it discusses the history of financial aid and the barriers to accessing financial aid for students involved in the criminal legal system. Next, Section V of this Comment considers solutions to such a broken and racist system; actions include passage of Congressional legislation and implementation of new Department of Education policies. Finally, in Section VI, this Comment will

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

contemplate criticisms of federal student financial aid expansion and refute such claims.

Throughout this Comment, inclusive language will replace antiquated and demeaning terminology. For example, the descriptors “person experiencing incarceration,” “person convicted of a crime,” and “justice-involved individual” will be alternatives used for the degrading terms “criminal,” “offender,” “prisoner,” or “inmate.”¹¹ Similarly, the phrases “person with a substance use disorder” and “person experiencing the disease of addiction” will be used in lieu of the derogatory terms “drug addict” and “alcoholic.”¹² Additionally, “enslaved person” will replace the dehumanizing label “slave.”¹³ Other language may follow suit.

III. THE UNITED STATES CRIMINAL LEGAL SYSTEM

The United States imprisons more people than any other country in the world.¹⁴ Not only is the United States home to the world’s largest prison

¹¹ See Erica Bryant, *Words Matter: Don’t Call People Felons, Convicts, or Inmates*, VERA INSTITUTE (Mar. 31, 2021), <https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates> [<https://perma.cc/3HAD-CRSP>]. As one person who was formerly incarcerated described it, “Our humanity is maintained and respected by not referring to us in those impersonal and definitive terms, but by acknowledging our intrinsic value as human and not by defining us by the worst day or act in our lives.”

¹² See DELAWARE COUNTY BOARD OF DEVELOPMENTAL DISABILITIES, PEOPLE FIRST LANGUAGE STYLE GUIDE 1 (2017), <https://www.dcbdd.org/wp-content/uploads/2018/01/People-First-Language-Style-Guide.pdf> [<https://perma.cc/GL7M-WM4B>]. People-first language is a stylistic choice made by authors to refer to people with disabilities in a more human way. The words used to describe people have a significant impact on the way people are perceived and attitudes towards them. Using people-first language focuses on the person first, not their disability.

¹³ See *The Vocabulary of Freedom*, UNDERGROUND RAILROAD EDUCATION CENTER, <https://undergroundrailroadhistory.org/the-vocabulary-of-freedom/> [<https://perma.cc/Q9TC-P8MD>]. “With the word ‘slave,’ we deny the humanity of the enslaved person; with ‘enslaved person,’ we recognize their enslaved state as imposed on them and not intrinsic to their identity as a human being.”

¹⁴ *Throughline: Mass Incarceration*, NAT’L PUB. RADIO (Aug. 15, 2019, 12:01 AM), <https://www.npr.org/2019/08/14/751126384/mass-incarceration> [<https://perma.cc/T9VG-RB59>] [hereinafter *Throughline*].

population, but it also has the highest incarceration rate in the world.¹⁵ Despite its self-proclaimed status as a bastion of democracy, the United States locks up 639 people per 100,000 people in the national population.¹⁶ In comparison, China incarcerates 124 per 100,000 citizens and Iran imprisons 284 per 100,000.¹⁷ This high rate of incarceration in the U.S. is a result of decades of intentional adherence to punitive philosophies of punishment.

A. Philosophies of Punishment

Modern criminology recognizes five distinct philosophies of punishment for committing societal wrongs.¹⁸ The first philosophy is retribution, or the prevention of future crime by “removing the desire for personal avengement” by victims or society against the individual who committed the crime.¹⁹ This method can be implemented through fines, mandatory counseling, treatment center placement, house arrest, incarceration, and even execution.²⁰ Retribution aims to reassure victims and society that the individual has been adequately punished for the crime they were convicted of, which simultaneously increases feelings of trust in our criminal legal system, law enforcement, and government.²¹ The second philosophy of punishment is deterrence.²² Deterrence averts future crime by specifically frightening the defendant or generally intimidating the public with the threat of punishment

¹⁵ *Incarceration Rates in Selected Countries*, STATISTA (June 2, 2021), <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> [<https://perma.cc/MU4R-9WP8>].

¹⁶ *Id.*

¹⁷ *Incarceration Nation*, 45 AM. PSYCH. ASS'N 56 (Oct. 2014), <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/C7TM-LRJ5>].

¹⁸ CRIMINAL LAW, 16 UNIV. OF MINN. LIBR. PUBL'G 16 (2015), <https://open.lib.umn.edu/criminallaw/> [<https://perma.cc/89AK-27NZ>].

¹⁹ *Id.* at 17.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 16.

through fines and fees, incarceration, and even the death penalty.²³ The third philosophy is rehabilitation of the individual who was convicted, which impedes future crime by altering an individual's behavior with hopes of lowering recidivism, or post-release reincarceration.²⁴ Techniques for accomplishing rehabilitation include educational and vocational programs, treatment center placement, and counseling.²⁵ The fourth philosophy of punishment is the backbone of the United States prison system: incapacitation.²⁶ Incapacitation involves hampering future crime by removing the individual from society and sequestering them through incarceration, house arrest, or execution.²⁷ The fifth philosophy, a relatively new addition in Western countries, is the restorative justice philosophy of punishment.²⁸ Restorative justice "emphasizes repairing the harm caused or revealed" by crime, acknowledging that this can best be accomplished with a cooperative process involving all stakeholders, such as face-to-face meetings between victims of harm and the people who committed the harm.²⁹ This theory recognizes that people who commit crimes harm victims, but they also harm themselves and their communities.³⁰

The United States utilizes a constantly changing combination of these five philosophies of punishment: retribution, deterrence, rehabilitation, incapacitation, and restorative justice.³¹ As this Comment explores below, to appease public opinion and maintain social control, politicians and prison

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Nora V. Demleitner, *Types of Punishment*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 942, 945 (Markus D. Dubber & Tathjana Hornle eds., 2014).

²⁹ *What is Restorative Justice?*, CTR. FOR JUST. & RECONCILIATION AT PRISON FELLOWSHIP INT'L 1 (2005), <https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf> [<https://perma.cc/BR3E-WYK7>].

³⁰ *Id.*

³¹ See Demleitner, *supra* note 28, at 950.

officials emphasize certain methods over others when it is most politically convenient.

B. History

One specific group's historical use of the punishment philosophy of rehabilitation reverberates in our criminal legal system today.³² The Religious Society of Friends, commonly known as the Quaker Movement (Quakers), is a religious group known for its progressive participation in both the abolitionist and women's rights movements.³³ As proponents of the idea that the presence of God exists in every human being, the Quakers opened an institution called Eastern State Penitentiary in Pennsylvania in the early 1800s with the intention of reforming those caught in the wrong place at the wrong time.³⁴ Eastern State Penitentiary's architecture and operations were based on the premise that seclusion would give individuals time to reflect on their crimes and become penitent—hence the term “penitentiary.”³⁵

This belief in rehabilitation translated into the isolation of people who were incarcerated to cultivate spiritual development, a practice that continues in Department of Corrections agencies across the country as “solitary confinement.”³⁶ Since its well-intended inception by the Quakers, solitary confinement has been used in prisons.³⁷ However, it quickly became apparent that the effect of continued segregation of people experiencing incarceration had the opposite effect as planned.³⁸ Alex de Tocqueville, a French political

³² See *Throughline*, *supra* note 14.

³³ *Quakers*, HISTORY (Sept. 6, 2019), <https://www.history.com/topics/immigration/history-of-quakerism> [<https://perma.cc/6XR5-3BLJ>].

³⁴ *Id.*

³⁵ Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INTL. J. OF OFFENDER THERAPY AND COMPAR. CRIM. 622, 623 (2008).

³⁶ *Throughline*, *supra* note 14.

³⁷ *Id.*

³⁸ *Id.*

scientist, author, and historian, visited Eastern State Penitentiary in 1831 to learn from the world leader in prison reform at the time and bring ideas back home to France.³⁹ Traveling with French prison reformer Gustave de Beaumont, de Tocqueville interviewed people incarcerated at Eastern State Penitentiary and issued a scathing report detailing his findings:

Nowhere was this system of imprisonment crowned with the hoped-for success. In general it was ruinous to the public treasury; it never effected the reformation of the prisoners. In order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.⁴⁰

Another noteworthy historical development in the United States criminal legal system was the creation of “slave patrols.”⁴¹ These groups were a “government-sponsored force [of about 10 people] that was well organized and paid to patrol specific areas to prevent crimes and insurrection by enslaved people against the white community” in states where slavery was legal.⁴² Slave patrols apprehended escaped enslaved people and returned them to their owners, unleashed terror to deter potential slave revolts, and disciplined enslaved people without a legal basis for breaking plantation rules.⁴³ Slave patrols could even enter the homes of individuals suspected of harboring enslaved people—without a warrant or consent.⁴⁴ After the Civil

³⁹ *Id.*

⁴⁰ Sarah Childress & Michelle Mizner, *Lock It Down: How Solitary Started in the U.S.*, FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/lock-it-down-how-solitary-started-in-the-u-s/> [<https://perma.cc/4CWL-RPYS>].

⁴¹ Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, A.B.A. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/ [<https://perma.cc/VBG2-QAJU>].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

War, slave patrols became institutionalized as police departments in Southern states.⁴⁵ Under a new name and with new authority, police were born of racism and continued terrorizing the lives of Black people by enforcing Black Codes and convict leasing, which will be explored in the section below.⁴⁶ Despite the abolition of slavery, slave patrols could now enforce racism with a legal mandate.

Similar to slave patrols, Reconstruction and the abolition of slavery were also significant moments in history. After the passage of the Thirteenth Amendment and Reconstruction-era reforms to incorporate Black people into American political life,⁴⁷ white people worked to regain control of Black labor by creating Black Codes and convict leasing.⁴⁸ This was possible because the Thirteenth Amendment created a loophole where slavery and involuntary servitude were still allowed: as punishment for convicted crimes.⁴⁹ Black Codes targeted Black people with petty crimes that were easy to violate, such as walking on the grass, vagrancy, unemployment, and talking too loudly in the presence of a white woman.⁵⁰

Jim Crow laws were another method of exercising social control over formerly enslaved people and Black people in general.⁵¹ These state and local statutes operated by codifying the segregation of and discrimination against Black people.⁵² This included the continual denial of the ability to vote, hold a job, receive an education, occupy certain public spaces, and live in specific

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Reconstruction*, HISTORY (Jan. 11, 2023), <https://www.history.com/topics/american-civil-war/reconstruction> [<https://perma.cc/5GU9-TT77>].

⁴⁸ See Ellen Terrell, *The Convict Leasing System: Slavery in its Worst Aspects*, LIBR. OF CONG. BLOGS (Sept. 25, 2021, 2:46 PM), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/ [<https://perma.cc/W3DB-QJF6>].

⁴⁹ *Id.*

⁵⁰ *Id.*; *Throughline*, *supra* note 14.

⁵¹ *Jim Crow Laws*, HISTORY (Feb. 28, 2018), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/BP2R-2ABA>].

⁵² *Id.*

areas, all under threat of arrest, fines, jail sentences, violence, and death.⁵³ Jim Crow laws did not just permeate the Southern states, however; as Black communities fled to Northern cities, white Northern city dwellers pushed for laws limiting the rights and opportunities of Black people out of the misguided fear that their public spaces and jobs would be overtaken.⁵⁴

By disproportionately policing Black people, prison population demographics shifted.⁵⁵ For example, in Alabama in the 1850s, 99% of people held in prisons and jails were white, but by the 1870s, 85% of those incarcerated were Black.⁵⁶ Governments began “leasing” out people they incarcerated to labor for companies and individuals in farms, mines, lumber yards, manufacturing facilities, factories, railroads, and construction.⁵⁷ Such convict leasing placed Black people right back into involuntary servitude with dangerous working conditions and frequent abuse.⁵⁸ Increasing the incarceration of newly freed Black people—combined with companies and individuals paying governments in exchange for prison labor—fixed the job supply shortage in southern states after the Civil War.⁵⁹

In recent developments in the United States, “incapacitative concepts and just deserts seem to have replaced rehabilitative philosophies.”⁶⁰ Punishment has “moved on from the crude impact on the body” alone to the heart and spirit, and now also focuses on control over movement and the mind.⁶¹ This is largely attributable to an expanded prevalence of LWOP sentences, or those where an individual is sentenced to life in prison without the possibility

⁵³ *Id.*

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Terrell, *supra* note 48.

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ Demleitner, *supra* note 28, at 951.

⁶¹ *Id.* at 946.

of early release.⁶² The European Court of Human Rights ruled that LWOP sentences violate the European Convention of Human Rights, which prohibits “inhuman or degrading treatment or punishment.”⁶³ Nevertheless, the United States continues to impose both LWOP and life-with-parole sentences at an alarming rate; both sentences have quadrupled in use since 1984.⁶⁴ Meanwhile, from 1984 to 2012, the United States general population increased by only 33%. Therefore, the expanded use of this prison sentence is not attributable to population growth.⁶⁵

The transition from rehabilitation to retribution, though, did not change all historical methods of punishment. The use of solitary confinement persists today despite an 1890 decision by the Supreme Court of the United States that observed the following:

A considerable number of prisoners fell, after even a short confinement, into a semi fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.⁶⁶

Modern research shows that segregation and isolation of individuals in jails and prisons results in negative mental health consequences for all those subjected to it, even for those with no preexisting mental health disorders.⁶⁷ Additionally, behavior and outbursts resulting from mental health disorders are often used to place incarcerated individuals in solitary confinement, which then exacerbates their symptoms.⁶⁸ People who are placed into solitary

⁶² Judith Lichtenberg, *Against Life Without Parole*, 11 WASH. U. JURIS. REV. 40, 41 (2018).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *In re Medley*, 134 U.S. 160, 168 (1890).

⁶⁷ Arrigo & Bullock, *supra* note 35, at 632.

⁶⁸ *Id.*

confinement often exhibit psychosis, suicidal behavior, self-mutilation, clinical depression, and long-term impulse control disorder.⁶⁹

Probation and parole are further methods of exercising control over incarcerated individuals—specifically, by restricting their freedom of movement. Probation is a “court-ordered period of correctional supervision in the community, generally as an alternative to incarceration.”⁷⁰ In contrast, parole is a period of conditional, supervised release in the community following incarceration in state or federal prison.⁷¹ Probation and parole enable the state to monitor the location and activities of justice-involved individuals through electronic supervision and house arrest.⁷² Should a person on parole or probation violate the myriad rules of their community supervision or commit a new crime, they will likely be forced to serve a period of incarceration if they were on probation, or an additional period of incarceration if they were on parole.⁷³

This control over mind and movement only expanded with a nationwide increase in prosecutors as well as with the War on Drugs, both of which widened the discrepancies in imprisonment between white people and Black people.⁷⁴ Historically, victims of crime would bring their own prosecutions.⁷⁵ Over time, states began to elect public prosecutors, and these appointments eventually became full-time positions.⁷⁶ A surge in state regulation of individuals (e.g., alcohol prohibition, Jim Crow laws, etc.) created more prosecutorial roles which then generated more prosecutions and growing prison populations.⁷⁷ However, this impact was not felt equally across all

⁶⁹ *Id.* at 628.

⁷⁰ BARBARA A. OUDEKERK & DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES 2 (David Fialkoff & Edrienne Su eds., U.S. Dep’t of Just. 2021).

⁷¹ *Id.*

⁷² Demleitner, *supra* note 28, at 956.

⁷³ OUDEKERK & KAEBLE, *supra* note 70.

⁷⁴ *Throughline*, *supra* note 14.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

demographics; once Jim Crow’s pushback on newly minted rights for Black Americans had faded, the War on Drugs worked on “replicating the institutions and repressions of the plantation.”⁷⁸ Nationwide, Black men are sentenced to prison on drug charges at rates up to fifty-seven times that for white men.⁷⁹ From 1995 to 2005, Black people comprised approximately 13% of drug users but 36% of drug arrests and 46% of those convicted for drug offenses.⁸⁰ Overall, despite crime rates steadily declining since the 1980s,⁸¹ there was a 700% increase in the prison population between 1970 and 2009.⁸²

C. *What Are the Effects of Incarceration?*

The detrimental effects of imprisonment are vast.⁸³ People subject to incarceration suffer physical and mental abuse, lose relationships with friends and family who live outside prison walls, receive limited medical and mental health care, have restricted access to education (if at all), and lose relationships with friends and family that live outside prison walls.⁸⁴ For those who are released from incarceration and reenter society, many repercussions of being incarcerated follow them home. The collateral consequences can be a wide range of status-related penalties that are

⁷⁸ Graham Boyd, *The Drug War is the New Jim Crow*, ACLU (July 2001), <https://www.aclu.org/other/drug-war-new-jim-crow> [<https://perma.cc/B96A-GN3E>].

⁷⁹ Lisa D. Moore & Amy Elkavich, *Who’s Using and Who’s Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 (Supp. 1) AM. J. PUB. HEALTH 782, 784 (2008).

⁸⁰ Ashely Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT’G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/QG7Z-JWWD>].

⁸¹ CRIME AND JUSTICE ATLAS, U.S. DEP’T OF JUST. 37 (2000).

⁸² Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, THE SENT’G PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/> [<https://perma.cc/2YDM-BR5C>].

⁸³ MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE 2–3 (2021–2022).

⁸⁴ *Id.*

permitted or required by law because of a conviction, even if they are not included in the court's judgement.⁸⁵

Examples of these kinds of collateral consequences include the loss of civil and political rights; restrictions on employment and occupational licensure; limited access to public housing and rental subsidies; extra stipulations on public benefits; and even termination of parental rights.⁸⁶ Simply having a history of criminal activity reduces the likelihood of a job callback or offer by 50%.⁸⁷ Upon reentry to society, finding meaningful employment is a seemingly insurmountable challenge.⁸⁸ The lifeline that public benefits can provide is shortened as access to welfare, veterans' benefits, government pensions, and student financial aid is limited for those with a criminal record, further complicating their ability to rebuild their lives.⁸⁹

D. Who Does Incarceration Affect?

Individuals exposed to the criminal legal system are more prone to experience poverty, unemployment, and mental health substance use disorders.⁹⁰ This is due to the creation of employment barriers; a reduction in earnings and decrease in economic security through criminal debt, fees, and fines; and limited access to public benefits, among other factors.⁹¹ Incarcerated individuals are also less educated than the average American.⁹² However, interactions with the criminal legal system do not merely fuel

⁸⁵ *Id.*

⁸⁶ *Id.* at 37–38.

⁸⁷ Devah Pager et al., *Discrimination in Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIO. REV. 777, 777 (2009).

⁸⁸ LOVE ET AL., *supra* note 83, at 2.

⁸⁹ *Id.*

⁹⁰ Bradley D. Custer, *The Disenfranchisement of Justice-Involved College Students from State Financial Aid 1* (2019) (Ph.D. dissertation, Michigan State University) (ProQuest).

⁹¹ *The Relationship between Poverty & Mass Incarceration*, CTR. FOR CMTY. CHANGE, https://www.masslegalservices.org/system/files/library/The_Relationship_between_Poverty_and_Mass_Incarceration.pdf [<https://perma.cc/9S3S-U526>].

⁹² Custer, *supra*, note 90.

poverty—poverty itself leads to legal encounters.⁹³ Adults living in poverty are three times more likely to be arrested than adults whose income is above the poverty line.⁹⁴ In contrast to most other developed countries, the United States “generally fails to theorize and to consider socioeconomic status within the criminal legal system even though poor and un(der)educated” people make up the majority of those incarcerated.⁹⁵ The stark philosophical differences of America’s system of incarceration as opposed to other similarly situated countries is felt disproportionately by men, people of color, the LGBTQ+ community, individuals struggling with mental health and substance use disorders, and individuals with lower education levels and incomes.⁹⁶

With respect to race and ethnicity, incarcerated individuals are more likely to identify as members of minority groups than the general United States population.⁹⁷ For example, Black people are incarcerated at a rate of about five times that of white people.⁹⁸ Moreover, in Washington State, Black people comprise 3% of the state population, yet they make up about 18% of the prison population.⁹⁹ People who are imprisoned are also more likely to be members of the LGBTQ+ community.¹⁰⁰ The incarceration rate of self-identified lesbian, gay, or bisexual persons was 1,882 per 100,000—more

⁹³ BAILEY GRAY ET AL., TEXAS CRIM. JUST. COAL., RETURN TO NOWHERE: THE REVOLVING DOOR BETWEEN INCARCERATION AND HOMELESSNESS 2 (2019) <https://www.texascjc.org/system/files/publications/Return%20to%20Nowhere%20The%20Revolving%20Door%20Between%20Incarceration%20and%20Homelessness.pdf> [<https://perma.cc/2P8V-C3BF>].

⁹⁴ *Id.*

⁹⁵ Demleitner, *supra* note 28, at 955.

⁹⁶ *Inmate Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp [<https://perma.cc/FJQ4-Y5HL>]; see CAROLINE WOLF HARLOW, U.S. DEP’T OF JUST., EDUCATION AND CORRECTIONAL POPULATIONS 5 (2003); Custer, *supra* note 90.

⁹⁷ Custer, *supra* note 90.

⁹⁸ Nellis, *supra* note 80.

⁹⁹ *Id.*

¹⁰⁰ Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey*, 107(2) AM. J. PUB. HEALTH 267, 267 (2017).

than three times that of the general American adult population.¹⁰¹ Compared with incarcerated people who self-identified as straight, those who self-identified as members of the LGBTQ+ community were more likely to be sexually victimized while incarcerated, to be subjected to solitary confinement and other sanctions, and to report current psychological distress.¹⁰²

Rates of confinement also differ depending upon gender identity.¹⁰³ In federal prisons, 93% of people who are incarcerated identify as men while only 7% identify as women.¹⁰⁴ Additionally, nearly one in six people who identify as transgender have been incarcerated at some point in their lives, a rate much higher than that for the general population.¹⁰⁵ This increased likelihood of incarceration for people who identify as transgender is even higher for those who are also Black: nearly half have been incarcerated at some point in their lives.¹⁰⁶

Unsurprisingly, education level is also unequally represented among incarcerated people.¹⁰⁷ While only 18% of the general American population has not obtained a high school diploma or equivalent, 41% of people who are incarcerated in state and federal prison and local jails nationally have not received a high school diploma.¹⁰⁸ Among state prison and local jail populations nationally, the number of individuals with college degrees is only

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *Inmate Gender*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp [<https://perma.cc/5K92-VCSR>].

¹⁰⁴ *Id.*

¹⁰⁵ JAIME M. GRANT, ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011).

¹⁰⁶ *Id.*

¹⁰⁷ See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., EDUC. AND CORR. POPULATIONS 5 (2003).

¹⁰⁸ *Id.* at 1.

12% of that in the general population.¹⁰⁹ This discrepancy in education level is only perpetuated when it intersects with race. While 61% of white men aged twenty through thirty-nine who are incarcerated in state prisons have received a high school diploma, only about 48% of Black men and about 42% of Hispanic men of the same demographic have received a high school diploma.¹¹⁰ Overall, the disproportionately high representation of racial and gender minorities among incarcerated populations results in unduly burdening these groups with the negative effects of institutionalized confinement. These effects are only compounded when identities intersect with lower education levels, lower incomes, and higher rates of mental health and substance use disorders.

IV. FEDERAL STUDENT AID

Federal student aid is money allocated by the federal government to help fund college or other higher education for individuals.¹¹¹ Funds are either given to recipients to pay for tuition and other costs of education, or they can be dispersed directly to the educational institution.¹¹² There are four main types of student financial aid on which this Comment focuses on: federal student loans, Federal Pell Grants, the Federal Work-Study Program, and Federal Supplemental Educational Opportunity Grants.¹¹³

First, federal student loans are funds borrowed from the federal government to attend undergraduate, graduate, or professional school.¹¹⁴ The full loan and any accrued interest must be repaid.¹¹⁵ Second, Federal Pell Grants are sums of money awarded by the federal government to students

¹⁰⁹ *Id.* at 5.

¹¹⁰ *Id.* at 6.

¹¹¹ *Types of Financial Aid: Loans, Grants, and Work-Study Programs*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types> [<https://perma.cc/S4JK-4QLM>].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

that do not have to be repaid.¹¹⁶ These grants are given to undergraduate students who display exceptional financial need and have not yet earned a bachelor's, graduate, or professional degree.¹¹⁷ Next, Federal Work-Study (FWS) is the provision of part-time employment at educational institutions to enrolled students with financial need with the goal of helping students pay their education expenses.¹¹⁸ The program encourages civic education work related to the student's course of study.¹¹⁹ Finally, the Federal Supplemental Educational Opportunity Grant (FSEOG) is a sum of money administered by individual school financial aid offices to students that does not have to be repaid.¹²⁰ Similar to Federal Pell Grants, FSEOGs are only given to undergraduate students who display exceptional financial need, but rather than providing funds to each eligible student as occurs with Pell Grants, each institution receives a limited amount and funds are awarded on a first-come, first-served basis.¹²¹ Access to these types of financial aid for people experiencing incarceration is severely limited depending upon the type of conviction and place of incarceration.¹²² For example, the U.S. Department of Education website states that "if you are in a federal or state institution, you can't get a Federal Pell Grant or federal student loans, [and] you can get

¹¹⁶ *Federal Pell Grants are usually awarded only to undergraduate students*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/grants/pell> [<https://perma.cc/KFT3-MCCK>].

¹¹⁷ *Id.*

¹¹⁸ *Federal Work-Study jobs help students earn money to pay for college or career school*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/work-study> [<https://perma.cc/G5K3-JKNH>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *A Federal Supplemental Educational Opportunity Grant (FSEOG) is a grant for undergraduate students with exceptional financial need*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/grants/fseog> [<https://perma.cc/J2FA-RMWF>] [hereinafter FSEOG].

¹²² *Eligibility for Students With Criminal Convictions*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> [<https://perma.cc/98EN-2DWA>].

a Federal Supplemental Educational Opportunity Grant and Federal Work-Study, but you probably won't.”¹²³

A. History

Time has shown that public support for student financial aid ebbs and flows as “tough on crime” moral panics spike and fall. Since justice-involved individuals are limited in their educational opportunities to what is offered at their place of confinement, their ability to pursue an education hinges on the amount of taxpayer money allocated that fiscal year. The Higher Education Act of 1965, a law designed to increase financial support for post-secondary education, permitted incarcerated citizens to receive Pell Grants for higher education while they were serving a prison sentence.¹²⁴ As a result, by the early 1990s, there were an estimated 772 prison college programs in more than 1,000 correctional facilities nationwide.¹²⁵ Unfortunately, after three decades of prioritizing education for those behind bars and embracing rehabilitative methods of punishment, the 1992 Amendment to the Higher Education Act of 1965 prohibited incarcerated people serving a LWOP prison sentence and those on death row from accessing Pell Grants.¹²⁶ Those serving a life-with-parole prison sentence were still eligible.¹²⁷ Two years later, public sentiment again shifted and politicians feared that “voters would punish them for appearing to give criminals a benefit that many law-abiding citizens never receive.”¹²⁸ Politicians acted on this fear by passing the Violent

¹²³ *Id.*

¹²⁴ Higher Education Act of 1965, 20 U.S.C. § 1091 (1965).

¹²⁵ Gerard Robinson & Elizabeth English, *The Second Chance Pell Pilot Program: A Historical Overview*, AM. ENTER. INST. (Sept. 2017), <https://www.aei.org/wp-content/uploads/2017/09/The-Second-Chance-Pell-Pilot-Program.pdf> [<https://perma.cc/U3NE-W9K2>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Blog Admin, *Americans' support for college financial aid for prisoners depends on how the benefits are described*, AM. POL. & POL'Y BLOG (Apr. 20, 2021), <https://bit.ly/2Q8XWK1> [<https://perma.cc/9F9P-LTMJ>].

Crime Control and Law Enforcement Act of 1994.¹²⁹ This Act went to the extreme, revoking *all* Pell Grant funding “to any individual who is incarcerated in any federal or state penal institution.”¹³⁰ As a result, the number of postsecondary programs in prison dropped to less than ten nationwide, with all ten funded with private money.¹³¹

However, the federal government was not done moving away from rehabilitation and towards retribution.¹³² Passage of the 1998 Amendment to the Higher Education Act of 1965 disqualified any individual from obtaining further federal student aid if they were subject to a drug conviction while receiving it.¹³³ In addition, repayment of financial aid already given was mandatory upon receipt of a drug conviction.¹³⁴ For the next two decades, this federal policy wreaked havoc on the lives of those suffering from substance use disorders and limited the resources available to those involved in the criminal legal system.¹³⁵ Through these policies, the United States embraced the exclusion from financial aid of those who need the upward mobility associated with education the most: those with drug convictions, those serving a LWOP prison sentence, and those on death row.¹³⁶

As the ramifications of these policies took effect, public opinion once again crawled back to espousing ideals of prison reform.¹³⁷ Decades of advocacy produced stopgap measures such as professors and students who live outside of the jails and prisons teaching classes behind the wall on their own time, nonprofits operating book clubs to get literature into the hands of people who are incarcerated, and private organizations fundraising to finance

¹²⁹ Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (1994).

¹³⁰ *Id.*

¹³¹ Robinson & English, *supra* note 125, at 2.

¹³² Higher Education Act of 1965, 20 U.S.C. § 1091 (1965).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Robinson & English, *supra* note 125, at 1–3.

¹³⁶ See *id.*

¹³⁷ See *id.*

programming.¹³⁸ The efforts of prison reform activists paid off with the recent Free Application for Federal Student Aid (FAFSA) Simplification Act.¹³⁹ This Act, passed in December 2020, addresses some of the issues arising from withholding financial aid from those with drug convictions and those incarcerated.¹⁴⁰ Starting in 2021, the legislation ended the practice of suspending eligibility for and mandating repayment of federal student aid for drug-related convictions that occurred while receiving aid.¹⁴¹ In addition, low-income incarcerated students will once again be able to apply for Federal Pell Grants starting in the 2023–2024 award year.¹⁴²

The time for further promoting education as a form of rehabilitation is now. While new legislation reduces the harmful impact of segregating justice-involved individuals from other people in terms of receiving financial aid going forward, the consequences of punitive policies of years past cannot be erased by these measures alone.

B. Barriers to Access

The trend away from rehabilitation in the past thirty years means that fewer people can attain high school or college degrees or gain transferable job skills while in prison.¹⁴³ This vicious cycle further impedes rehabilitation.¹⁴⁴ Already, three-quarters of people incarcerated in state prisons lack a high school diploma, and incarcerated people with lower education levels are

¹³⁸ See *id.* at 2–3; *Prison Chapters*, NONAME BOOK CLUB, <https://nonamebooks.com/Prison-Chapters> [<https://perma.cc/8N7S-8RNG>].

¹³⁹ Early Implementation of the FAFSA Simplification Act’s Removal of Selective Service and Drug Conviction Requirements for Title IV Eligibility, 86 Fed. Reg. 32252 (June 17, 2021).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *What is the FAFSA Simplification Act?*, FED. STUDENT AID, <https://studentaid.gov/help-center/answers/article/fafsa-simplification-act> [<https://perma.cc/5QGV-E844>].

¹⁴³ See Moore & Elkavich, *supra* note 79, at 784.

¹⁴⁴ See *id.*

more likely than their peers with higher education levels to commit another crime after being released from prison.¹⁴⁵

Currently, if an individual is incarcerated in a federal or state institution, they automatically do not qualify for a Federal Pell Grant or federal student loans.¹⁴⁶ The FAFSA Simplification Act of 2020 will expand Federal Pell Grant eligibility to low-income incarcerated students during the 2023–2024 award year, but this change has not gone into effect at the time of this Comment.¹⁴⁷ Those incarcerated in a federal or state institution can receive an FSEOG or FWS, but the federal government provides two reasons why applications will likely not be approved: first, priority for FSEOGs must be given to those students who will also receive a Federal Pell Grant, which those incarcerated in a federal and state institution currently cannot receive; and second, the logistical difficulties of performing a FWS job while incarcerated would likely be too great for the government to award FWS funds.¹⁴⁸

If an individual is incarcerated in an institution other than a federal or state institution, they are automatically disqualified from receiving federal student loans.¹⁴⁹ Although people within non-federal or non-state facilities such as private prisons can qualify for a Federal Pell Grant, less than 8% of people locked up in the United States in 2022 were held in private prisons.¹⁵⁰ These individuals can receive FSEOG and FWS but, similar to those imprisoned in a federal or state institution, they likely will not be approved.¹⁵¹ The federal

¹⁴⁵ *Id.* at 785.

¹⁴⁶ FSEOG, *supra* note 121; *What is the FAFSA Simplification Act?*, *supra* note 142.

¹⁴⁷ Early Implementation of the FAFSA Simplification Act’s Removal of Selective Service and Drug Conviction Requirements for Title IV Eligibility, 86 Fed. Reg. 32252 (June 17, 2021).

¹⁴⁸ FSEOG, *supra* note 121.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/3B7R-BB45>].

¹⁵¹ FSEOG, *supra* note 121.

government explains this broad decision with the same rationales used for those in federal or state institutions: schools are limited in the amount of FSEOG funds available and the logistics of performing a FWS job while incarcerated are difficult.

Once an individual is released from prison, most of their eligibility limitations for federal student aid will be removed.¹⁵² This is especially true for those with drug convictions, as this type of record no longer affects federal student aid eligibility.¹⁵³ Additionally, people still incarcerated can apply for aid before they are released so that their application is processed in time for them to begin school upon release.¹⁵⁴ Even if an individual is on probation or parole post-release, they may still be eligible for federal student aid.¹⁵⁵ However, if a person is subject to an involuntary civil commitment for a forcible or nonforcible sexual offense, they are ineligible to receive a Federal Pell Grant.¹⁵⁶ This could be a result of continuing public sentiment that certain individuals (in this case, those convicted of committing sexual offenses and those placed under involuntary civil commitment) are undeserving of an education and the opportunities it provides.

V. MOVING FROM EXCLUSION TO INCLUSION

Although Congress recently expanded eligibility for the Federal Pell Grant to people experiencing incarceration, more must be done. The United States Congress must pass a law ending the disqualification of people with criminal records from federal financial aid and establishing a national program to increase access to federal student loans and FWS for justice-involved individuals. Additionally, the United States Department of Education must implement this national program while removing from their agency rules any

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

financial aid eligibility restrictions imposed on people experiencing incarceration. This section elaborates on these two solutions and how such solutions will prevent further disproportionate harm for communities of color and people suffering from mental health and substance use disorders.

A. Congressional Action

Congressional action is a necessary component of expanding access to federal student aid. Restrictions on federal student aid for incarcerated individuals produce disproportionate effects on minority communities and people facing poverty. To eliminate such discrimination, Congress must remove all barriers to access to federal student aid for those with a criminal conviction of any kind. Congress can accomplish this by passing legislation during the current Congressional session.

Congress has made some steps in the right direction. The FAFSA Simplification Act of 2020 stopped the suspension of eligibility for federal student aid for drug-related convictions that occurred while receiving aid.¹⁵⁷ In addition, the Act will expand Federal Pell Grant eligibility to low-income incarcerated students by the 2023–2024 award year.¹⁵⁸ However, Congress must act with a greater scope and influence. Simply removing the barrier to access previously enacted by the 1992 Amendment is not enough to reverse the decades of damage perpetrated by this legislation.

Regardless of whether an individual is incarcerated in a federal or state institution, any Congressional solution must allow eligibility for Federal Pell Grants, federal student loans, FWS, and FSEOGs for all incarcerated individuals. To achieve this, Congress must legislatively address some structural issues surrounding the programs. For example, individuals incarcerated in federal or state institutions currently can theoretically receive

¹⁵⁷ Early Implementation of the FAFSA Simplification Act’s Removal of Selective Service and Drug Conviction Requirements for Title IV Eligibility, 86 Fed. Reg. 32252 (June 17, 2021).

¹⁵⁸ *Id.*

FWS and FSEOGs, but the Department of Education warns that they likely will not be approved.¹⁵⁹ The federal government cites several reasons for this blanket eligibility determination: schools are limited in the amount of funds available; priority for grants must be given to those students who will also receive a Federal Pell Grant, for which those incarcerated in a federal or state institution cannot receive until the 2023–2024 award year; and the logistical difficulties of performing a FWS job while incarcerated would likely be too great for the government to award funds.¹⁶⁰

To address these purported reasons for barring those with an incarcerated status from receiving government assistance, this legislation must meet the underlying needs of the program. To put it simply, Congress must award schools more funding and must designate prison employment programs as FWS positions. For example, remote schools or remote work policies at educational institutions and FWS job sites could allow more flexibility to the education and employment of those incarcerated. Although access to computers for incarcerated individuals is extremely limited,¹⁶¹ more funding could provide the technology to allow remote work while still meeting the security needs of correctional facilities. Furthermore, Congress should authorize current employment opportunities within correctional facilities as FWS-eligible positions, which would allow incarcerated individuals to pay their education expenses through stable employment already secured with the facility at which they are held.

Additionally, this legislation must incentivize parallel action by the states. States also can eliminate impediments to financial aid access for individuals experiencing incarceration. While the anti-commandeering principle prohibits the federal government from compelling states to use their

¹⁵⁹ *Eligibility for Students With Criminal Convictions*, *supra* note 122.

¹⁶⁰ *Id.*

¹⁶¹ Interview with Anonymous, *supra* note 1.

sovereign powers in particular ways,¹⁶² Congress may offer incentives to states using the spending power found in Article 1, Section 8 of the United States Constitution.¹⁶³

Congress ought to galvanize state governments by reimbursing them for any increased costs of giving financial aid to those in prison. The receipt of federal funds may be conditional in this way if the exercise of the spending power is for the general welfare and the conditions are unambiguous, related to a federal interest in a particular national project or program, and do not violate any other constitutional provisions such as the Tenth Amendment.¹⁶⁴ Here, Congress' exercise of the spending power is for the general welfare as participation in education programs while incarcerated has resulted in a 43% lower recidivism rate,¹⁶⁵ increasing community safety. The conditions proposed are unambiguous as they "enabl[e] the States to exercise their choice knowingly, cognizant of the consequences of their participation."¹⁶⁶ Further, the conditions clearly relate to a federal interest in the particular national program that Congress is creating with the same bill: the increase in financial aid funding to be allocated for schools to distribute; the bar on automatic disqualification of incarcerated students from Federal Pell Grants; and the classification of prison employment programs as FWS positions. Finally, the conditions do not violate any other constitutional provisions.

Congress must underpin its inclusion of more individuals in federal student aid with two measures: (1) the creation of a national program implementing the financial aid changes and developing funding to increase the total amount

¹⁶² See, e.g., *New York v. U.S.*, 505 U.S. 144, 145 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287 (1981).

¹⁶³ See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

¹⁶⁴ *Id.*

¹⁶⁵ Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education*, RAND CORP. (2013), https://www.rand.org/pubs/research_reports/RR266.html [<https://perma.cc/7JT9-N3KS>].

¹⁶⁶ *Dole*, 483 U.S. at 207.

of recipients; and (2) the building of a support network around those recipients.

First, the establishment of a national program must work to assist justice-involved students in their pursuit of an education. To ensure the effectiveness of the program, Congress will direct the United States Department of Education, an institution charged with implementing educational policies, to execute the new law and its accompanying program. Congress must also require the Federal Bureau of Prisons to work with the Department of Education and educational institutions to grant transferrable educational credit for general programming. This will enable incarcerated individuals to receive recognition where it is due for their efforts at bettering themselves behind bars. Having universally accepted academic credits will also improve employment outcomes after reentry, allowing formerly incarcerated individuals to build careers and reduce their chances of recidivism.

Second, budget increases must work to sustain the rehabilitative efforts of the national program. Congress must allocate a portion of the money to the United States Department of Education to fund the national program. Other money will be funneled into federal student financial aid disbursement as well as given to schools for their own distribution. Congress needs to give priority to educational institutions that host academic programs for people who are incarcerated. Yet, Congress must apportion even more money to incentivizing companies that participate in the program by hiring individuals who have had contact with the criminal legal system.

The money to subsidize these solutions will require Congressional prioritization of education in government funding bills. For the 2022 fiscal year, Congress earmarked \$76.4 billion for the Department of Education, with \$26.5 billion dedicated to federal student aid.¹⁶⁷ Meanwhile, Congress

¹⁶⁷ H. APPROPRIATIONS COMM., 117TH CONG., REP. ON FISCAL YEAR 2022 LAB., HEALTH AND HUM. SERV., EDUC., AND RELATED AGENCIES FUNDING B. (Comm. Print 2022), <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Labor%2>

allocated \$728.5 billion for defense and national security funding, a \$32 billion increase over 2021 spending.¹⁶⁸ A shift in budget priorities would fully fund the proposed national financial aid program, which is crucial to the longevity of such reform.

In its legislation, Congress must additionally remove all financial aid eligibility requirements based on incarceration status and criminal record. Congress must also direct the United States Department of Education to implement a departmental policy reflecting this new law, which would ensure continued compliance with the eligibility changes by codifying them for future use. In other words, the Department of Education must allow all students currently incarcerated or with a prior conviction to be eligible for all four types of financial aid: federal student loans, Federal Pell Grants, FWS, and FSEOG. The Department of Education policy must reflect that of Congress.

The success of the expansive program proposed in this Comment does not rest solely on the academic careers of incarcerated students—efficacy also depends upon the reception incarcerated students receive into the workplace upon reentry into society. Justice-involved individuals face a myriad of difficulties once they complete their prison sentence and re-enter society.¹⁶⁹ Lower employment rates for people with felony convictions decreases the overall employment rate for men in the United States by an estimated 1.7% based on employment penalties for having a criminal record.¹⁷⁰ For Black

C%20Health%20and%20Human%20Services%2C%20Education%2C%20and%20Relat ed%20Agencies.pdf [https://perma.cc/LES7-784C].

¹⁶⁸ H. APPROPRIATIONS COMM., 117TH CONG., REP. ON FISCAL YEAR 2022 DEF. FUNDING B. (Comm. Print 2022), <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Defense.pdf> [https://perma.cc/285L-JF6S].

¹⁶⁹ See ROBERT JOHNSON & HANS TOCH, CRIME AND PUNISHMENT: INSIDE VIEWS 135 (1st ed. 2000).

¹⁷⁰ *Study Shows Ex-offenders Have Greatly Reduced Employment Rates*, PRISON LEGAL NEWS (Dec. 15, 2011), <https://www.prisonlegalnews.org/news/2011/dec/15/study-shows-ex-offenders-have-greatly-reduced-employment-rates/> [https://perma.cc/2SYN-EA3Q].

people with felony convictions, the employment rate decreased 5%.¹⁷¹ These lower employment rates for people with felony convictions represent a loss in goods and services that reduced the United States' gross domestic product by an estimated \$57–\$65 billion in 2008.¹⁷²

Companies such as American Airlines, Apple, MOD Pizza, Microsoft, Starbucks, Trader Joes, and Uber have all publicly adopted hiring policies that welcome applicants with criminal records.¹⁷³ To incentivize more companies to hire those with criminal records, Congress has an obligation to boost existing benefits already in place for entities that give justice-involved individuals a second chance. These benefits include tax credits and free fidelity bonds.¹⁷⁴ The Work Opportunity Tax Credit can be claimed by employers for hiring individuals from “certain targeted groups who have consistently faced significant barriers to employment.”¹⁷⁵ This tax credit reimburses eligible employers up to \$2,400 per employee for hiring and paying these individuals who are certified by a state workforce agency as being a member of ten targeted groups.¹⁷⁶ One “targeted group” is people who have been released from prison within the past year for a felony conviction.¹⁷⁷

Another benefit to employers is fidelity bonds, which cover the first six months of employment of a formerly incarcerated individual at no cost to the job applicant or employer.¹⁷⁸ These bonds are funded by the federal

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Jobs for Felons*, RELAUNCH PAD, <https://therelaunchpad.com/category/jobs-for-felons/> [<https://perma.cc/YV7E-VG8H>].

¹⁷⁴ Mike Green, *Five Bottom Line Reasons Why Employers Should Hire Ex-Felons*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/five-bottom-line-reasons-b_8021476 [<https://perma.cc/SYE4-K9NZ>].

¹⁷⁵ *Work Opportunity Tax Credit*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> [<https://perma.cc/FJC2-PSX7>].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

government and protect companies against employee dishonesty or theft.¹⁷⁹ Expanding funding for these programs would give incarcerated individuals a better chance at securing a stable job post-release and allow them to provide for themselves while pursuing an education.

B. Suggested Response by the Department of Education

After first initiating policy changes to reflect the new law expanding eligibility for federal student aid to justice-involved individuals, the Department of Education must administer the national program funded by Congress. This includes extending financial aid offers to all incarcerated individuals who apply and are financially eligible. While Congress will incentivize the support of state governments and leverage the cooperation of state and federal prisons, the Department of Education must encourage the engagement of educational institutions and private companies. This will be accomplished through the federal government's offering of financial incentives such as tax credits and fellowship grants.

Congress's passage of the Education Act of 1965 led prison college programs to skyrocket.¹⁸⁰ After less than three decades, the passage of the Violent Crime Control and Law Enforcement Act of 1994 shrunk available programs by 77.2%.¹⁸¹ Since then, ad hoc groups of organizations and universities have provided programming to the prisons located in proximity to them.¹⁸² Examples of such projects include the Bard Prison Initiative and the Georgetown Prison Scholars Program.¹⁸³ The New York-based Bard Prison Initiative enrolls over 300 incarcerated students in full-time college

¹⁷⁹ *Id.*

¹⁸⁰ Robinson & English, *supra* note 125, at 2.

¹⁸¹ *Id.*

¹⁸² Emma Kerr, *Financial Aid Options for Incarcerated Individuals*, U.S. NEWS & WORLD REPORT (Mar. 1, 2021), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/financial-aid-options-for-incarcerated-individuals-and-their-children> [<https://perma.cc/79WU-UXBC>].

¹⁸³ *Id.*

programs.¹⁸⁴ About 80% of their students are Black, Indigenous, and people of color and over 600 degrees have been conferred to date.¹⁸⁵ The Georgetown Prison Scholars Program has an even smaller number of open spots but waives tuition for students and offers courses in English, music, philosophy, and government.¹⁸⁶ In Washington State, University Beyond Bars is a non-profit that coordinates and pays for people experiencing incarceration to complete an Associate of Arts degree.¹⁸⁷ The organization partners with a local community college that allows students to continue their studies upon release into a Bachelor of Arts degree and beyond.¹⁸⁸ This program is focused on “replacing incarceration with education” by stopping the revolving door of imprisonment with academic scholarship and personal growth.¹⁸⁹ As one University Beyond Bars student aptly put it, “when you learn, you don’t return.”¹⁹⁰

Meanwhile, the United States Department of Education has similarly experimented with offering higher education for justice-involved individuals.¹⁹¹ Starting in 2015, the Department gave eligible incarcerated individuals access to the Pell Grant to pursue higher education while in prison through an initiative called the Second Chance Pell program.¹⁹² The experiment was renewed for the 2022–2023 school year, allowing up to 200 colleges and universities to offer their prison education programs with

¹⁸⁴ *Our Work*, BARD PRISON INITIATIVE, <https://bpi.bard.edu/our-work/the-college/> [<https://perma.cc/QZT4-UAZH>].

¹⁸⁵ *Id.*

¹⁸⁶ Kerr, *supra* note 182.

¹⁸⁷ *Academics*, UNIV. BEYOND BARS, <http://www.universitybeyondbars.org/programs> [<https://perma.cc/Y9TG-7N5P>].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ U.S. DEP’T OF EDUC., U.S. DEPARTMENT OF EDUCATION ANNOUNCES IT WILL EXPAND THE SECOND CHANCE PELL EXPERIMENT FOR THE 2022–2023 AWARD YEAR (2021), <https://www.ed.gov/news/press-releases/us-department-education-announces-it-will-expand-second-chance-pell-experiment-2022-2023-award-year> [<https://perma.cc/K58N-R957>].

¹⁹² *Id.*

support from the Pell Grant.¹⁹³ This is an increase from the 131 colleges and universities currently participating.¹⁹⁴ Since its inception in 2015, the Second Chance Pell program has enrolled over 22,000 participants across thirty states and the Federal Bureau of Prisons.¹⁹⁵

The Department of Education must expand upon the Second Chance Pell program to further establish a national program that supports incarcerated students in their pursuit of an education. By allowing people in prison access to federal funds that will cover their education expenses, the Department will create a need for educational programs that accommodates the unconventional classroom setting of prisons. As exemplified by the Bard Prison Initiative and the Georgetown Prison Scholars program, an interest in meeting these needs exists.¹⁹⁶ To motivate schools to promote and support these programs, the Department of Education must offer fully funded fellowship positions to professors that teach in prison programs on their behalf and work with other federal government agencies to establish financial incentives for participating academic institutions.

In addition to college courses operated by outside institutions, prisons must be allowed to grant credit for the general programming that they offer. In Washington State, the Department of Corrections offers classes such as “Emotion Coaching,” “Partners in Parenting,” “Preparing for Release,” “Bike Refurbishing,” “Sustainability and Environmental Performance,” and “Alcoholics Anonymous.”¹⁹⁷ This programming is offered “to constructively occupy” the time that people who are incarcerated spend behind bars and “to provide opportunities for positive personal growth.”¹⁹⁸ As of today,

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Kerr, *supra* note 182.

¹⁹⁷ WASH. STATE DEP’T OF CORR., CURRENT PROGRAMMING (2016), <https://doc.wa.gov/corrections/programs/descriptions.htm> [https://perma.cc/B5VF-PPLS].

¹⁹⁸ *Id.*

Washington State grants certificates of completion for this programming, but the certificates are not transferrable to a degree-granting institution or otherwise counted as education credit.¹⁹⁹ The Department of Education could give incarcerated students the ability to utilize the skills they learn behind bars in a concrete way by allowing two-year, four-year, and technical colleges to act as granting institutions for prisons across the country, both by creating their own prison programs and by permitting in-house prison programming to count as transfer credit.

To encourage educational institutions to participate in creating programs and allow transfer credits, Congress should direct the U.S. Internal Revenue Service to give these institutions tax credits per participating student. This financial incentive could mirror the one given to businesses that hire previously incarcerated individuals, with the tax credit increasing per credit up to a maximum annual amount per student.²⁰⁰ Congress could additionally redirect money from other parts of the budget towards fellowship positions for professors to teach in prisons. This would take the financial burden off individual schools while still giving their faculty the ability to participate in such a meaningful program.

The current approach of ad hoc organizations and universities providing programming leaves little resources for prisons located in rural areas away from cities and universities.²⁰¹ A disproportionate share of prisons are located in rural areas, while a disproportionate share of people who are incarcerated live in urban areas.²⁰² The Department of Education must ensure the equity of resources directed to both urban and rural areas. For rural prisons that do not have nearby organizations or universities to offer programming, the Department must subsidize groups that employ individuals to travel to such

¹⁹⁹ See Interview with Anonymous, *supra* note 1.

²⁰⁰ *Work Opportunity Tax Credit*, *supra* note 175.

²⁰¹ Kerr, *supra* note 182.

²⁰² SONYA R. PORTER ET AL., CORRECTIONAL FACILITY AND INMATE LOCATIONS: URBAN AND RURAL STATUS PATTERNS 11 (2017). In fact, the majority of state prisons, which incarcerate the largest percent of the prison population, are located in rural areas.

locations and set up satellite offices in these areas as needed. The Department must allocate part of its budget or request further Congressional funding to pay for these positions within organizations and universities. Alternatively, the Department could create Departmental jobs and contract employees out to those organizations and universities. Additionally, classes could be offered remotely to lower cost, with instructors teaching virtually, removing the need for the instructors to spend time and money commuting to prisons.

These policy changes and creations must be tailored to and focused on people of color and other minority demographics. Statistics point strongly to the existence of workplace discrimination against disadvantaged groups.²⁰³ On average, Black job applicants are half as likely as equally qualified white job applicants to receive a callback or job offer.²⁰⁴ Further, Black and Latinx job applicants with no criminal record fared no better than white applicants just released from prison.²⁰⁵ Additionally, while only 4% of the world's population of women lives in the United States, the country imprisons over 30% of the world's incarcerated women.²⁰⁶ While women in state prisons are more likely than men to have received a high school diploma or have attended an institution of higher learning, women are also the fastest-growing group of incarcerated individuals.²⁰⁷ Learning differences must also be recognized when expanding federal financial aid. While 39.7% of the general state prison population did not complete high school, that figure is 66% for members of the state prison population with learning challenges.²⁰⁸

Policies that make pursuing an education while incarcerated financially feasible will help these disadvantaged groups by increasing their education

²⁰³ Pager et al., *supra* note 87, at 777.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Aleks Kajstura, *States of Women's Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (2018), <https://www.prisonpolicy.org/global/women/2018.html> [<https://perma.cc/8P9K-ST5K>].

²⁰⁷ HARLOW, *supra* note 107, at 5.

²⁰⁸ *Id.* at 9.

level and thus widening their job prospects upon release. Because people of color, those experiencing poverty, and those who identify with the LGBTQ+ community are overrepresented within the prison population, the proposals assisting incarcerated people as suggested in this Comment will equitably benefit them.²⁰⁹ New policy measures must urgently account for these stark discrepancies and create equitable remedies to the greatest extent possible.

VI. DEFENSES TO THE CRITICISMS OF EXPANDED FEDERAL STUDENT AID

As with any policy proposal, critiques will arise. These critiques should be addressed to iron out any potential issues and improve the overall effectiveness of the proposal. This section will contemplate criticisms of federal student financial aid expansion and refute such claims.

Some may not agree with the “commandeering” of states by Congress in expanding access to financial aid. However, it is unlikely that a court challenge would overturn this legislation, as courts defer substantially to the judgment of Congress in considering whether a particular expenditure is intended to serve general public purposes.²¹⁰

Another argument against the proposals outlined in this Comment may postulate that expansion of federal financial aid should apply only to those justice-involved individuals who are below certain income requirements. This view could stem from the belief that those who have committed crimes and caused harm to our society do not deserve the benefits of living in such a society. However, if our society truly wants to move away from punitive measures of punishment and embrace the inherent dignity in every human being, we must allow access to aid for all interested in higher education.

Others may disagree with the expanded role of the federal government created by increasing access to federal student aid for incarcerated

²⁰⁹ Custer, *supra* note 90; GRAY ET AL., *supra* note 93; Meyer et al., *supra* note 100.

²¹⁰ South Dakota v. Dole, 483 U.S. 203, 206 (1987).

individuals. However, over time, the use of government resources would narrow as participation in education programs for those incarcerated lowers recidivism rates by 43%.²¹¹ Lower recidivism rates will reduce the need for spending on further incarceration, which costs an average of \$36,299.25 per person incarcerated federally in 2017.²¹² This reduction takes place across almost all categories of justice-involved individuals.²¹³ Among incarcerated individuals under age thirty at the time of release, college graduates had a substantially lower rearrest rate (27%) than incarcerated individuals who did not complete high school (74.4%).²¹⁴ Similarly, among incarcerated individuals aged sixty or older at the time of release, college graduates had a somewhat lower rearrest rate (11.6%) than those who did not complete high school (17.2%).²¹⁵ A temporary increase in government purview that pursues initiatives aimed at incarcerated individuals can reduce the need for government involvement, through incarceration, further down the line.

Fiscal conservatives, as supporters of small government, will likely oppose this legislation for its increase in government spending; however, the proposed congressional and executive changes are more fiscally responsible in the long run than current policies.²¹⁶ Financial aid for justice-involved individuals will actually have a net positive economic impact. In fact, for every dollar invested in correctional education programs, five dollars are saved on three-year reincarceration costs.²¹⁷ Additionally, a 1% increase in the high school completion rate of all men ages twenty to sixty would save the United States as much as \$1.4 billion per year in reduced costs from crime

²¹¹ Davis et al., *supra* note 165.

²¹² Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18863 (Apr. 30, 2018).

²¹³ U.S. SENTENCING COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Davis et al., *supra* note 165.

²¹⁷ *Id.*

incurred by victims and society at large.²¹⁸ Adopting restorative justice and rehabilitative principles will significantly benefit the individual, society as a whole, and even the economic health of the nation. In 2014, employment barriers faced by people with felony convictions—including occupational licensing and other challenges, such as lower levels of education and job skills—were associated with a reduction in the overall employment rate, amounting to a loss of at least 1.7 million workers from the workforce and a cost of at least \$78 billion to the economy.²¹⁹ Instead of this harm to the economy, smart policies that reduce employment barriers could expand the workforce and increase productivity.

An additional argument against providing federal student aid to incarcerated individuals is that law-abiding citizens are more deserving of receiving this aid than those who have been convicted of crimes.²²⁰ Some may say that granting money to those who are incarcerated takes funds away from the pockets of law-abiding citizens. However, this proposal does not take money away from those not involved with the criminal legal system. By increasing the overall amount of financial aid available, this legislation simply makes more space for those incarcerated who also pursue an education. Further, the notion that those with a criminal record are somehow less deserving of an education than those who have never been punished by the law is inherently racist and classist when those with a criminal record are disproportionately people of color and those experiencing poverty.²²¹

²¹⁸ Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94(1) AM. ECON. REV. 155, 183–84 (2004).

²¹⁹ NAT'L. CONF. ON STATE LEG., BARRIERS TO WORK: PEOPLE WITH CRIMINAL RECORDS (2018).

²²⁰ See Edward W. Sieh, *Less Eligibility: The Upper Limits of Penal Policy*, 3 CRIM. JUST. POL'Y REV. 159 (1989),

<https://heinonline.org/HOL/P?h=hein.journals/cjpr3&i=159> [<https://perma.cc/SL6X-M3FB>]. Prevalent in the criminal legal system is the concept that “if imprisonment is to act as a deterrent the treatment given a prisoner should not be superior to that provided a member of the lowest significant social class in free society.” Financial aid can be seen as undermining the deterrent purposes of imprisonment.

²²¹ See Nellis, *supra* note 80.

Most abhorrently, those in opposition to this Comment's proposal may perpetuate stereotypes against Black people by arguing that Black people face higher rates of incarceration because they are more prone to commit crimes.²²² To limit the credence given to this repugnant idea, suffice it to say that the United States' entire criminal legal system was created purposefully to target Black people, resulting in disproportionate incarceration rates.²²³

VII. CONCLUSION

Restrictions on federal student aid for incarcerated individuals produce disproportionate effects on minority communities and people facing poverty.²²⁴ Such impacts only further harm communities that disproportionately experience poverty, low education rates, high unemployment rates, and a higher prevalence of disabilities, neurodivergence, and substance use disorders.²²⁵ This Comment attempts to resolve these inequity issues through government action. The suggested policy approach treats individuals more humanely in a way that is consistent with the rehabilitation philosophy of punishment.²²⁶ The proposals within create safer communities as a strong correlation exists between higher education levels and lower recidivism rates.²²⁷ Furthermore, the solutions enclosed are more fiscally responsible than our current policies for financial aid for justice-involved individuals²²⁸ and will have a positive economic impact.

Increasing access to educational programs in prison is neither a novel idea nor a perfect solution. It is, however, unique to propose a network of educational support for incarcerated people at the depth and breadth that is

²²² *Throughline*, *supra* note 14.

²²³ *Id.*

²²⁴ *See Custer*, *supra* note 90.

²²⁵ *Id.*

²²⁶ CRIMINAL LAW, *supra* note 18.

²²⁷ *See Davis et al.*, *supra* note 165.

²²⁸ *Id.*

argued for in this Comment. By eliminating statutory barriers to federal financial aid and by creating a support system for justice-involved individuals to attain and maintain this aid, the United States will begin dismantling structural barriers to education and impediments to a good quality of life. To prevent further human rights abuses and the squandering of human potential, the United States Congress, the Federal Bureau of Prisons, and the Department of Education must act, and must act quickly.²²⁹

²²⁹ JOHNSON & TOCH, *supra* note 169, at 159.