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THE PRISONER AND THE POLITY

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All punishment comes to an end. Most periods of imprisonment are term limited, and ninety-five percent of prisoners will eventually leave prison. Though it is tempting to think of the “end” in concrete, factual terms—for example, as the moment when the prisoner is released—this concept also has normative dimensions. Core to the notion of term-limited imprisonment is the “principle of return”: the idea that, when the prisoner has completed his or her time, that person is entitled to return to society. Yet, for the principle of return to be meaningful, it must include the idea of a fair chance of reestablishing oneself in the community. The “practices of incarceration”—including the prison environment and prison programs—are thus critically important because they can either facilitate or impede a prisoner’s reentry into society. However, apart from the question of whether conditions of confinement are cruel and unusual as defined by the Eighth Amendment, these practices of incarceration have largely avoided scholarly scrutiny.

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This Article uses the case study of higher education programs in prison to expose the interdependence between the practices of incarceration and the principle of return. Drawing on original interviews with key stakeholders, it investigates how the features of higher education programs reflect and reinforce core beliefs about the goals of punishment and the state's responsibility towards those it incarcerates. The Article critically examines the dominant harm-prevention justification for prison higher education, and the desert-based objection to it, finding that both are inadequate for failing to take into account the principle of return.

This Article espouses an alternative approach that would recognize the ongoing relationship between prisoner and polity and devise incarceration practices accordingly. Building on insights from communitarian theory, this approach, which foregrounds the prisoner's status in the polity, uncovers pervasive "us-versus-them" narratives in the prison context. The first such narrative is between prisoners and those members of the polity who view prisoners, falsely, as having forfeited their claims to membership in civil society. This view of prisoners, as members of a permanent and lower caste, is in direct conflict with the principle of return, which mandates that prisoners have at least a plausible hope of basic reintegration into society and that they avoid further harm—what might be termed "punishment-plus." The Article also scrutinizes a second, more localized "us-versus-them" narrative between prisoners and correctional officers, which arises from their similar backgrounds and the common deprivation experienced by members of both groups.

Finally, the Article recommends institutional design changes to mitigate "us-versus-them" dynamics: empowering stakeholders, for example, by affording correctional officers educational opportunities that would help professionalize their role and ease their resentment towards prisoners; and increasing exposure and empathy between incarcerated and non-incarcerated populations, such as by piloting a program that would employ recent college graduates to teach in prison. These and other proposed reforms would refocus the conversation around imprisonment to account for the central role of incarceration practices in revitalizing the principle of return, as well as the inextricable connection between prisoner and polity.

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INTRODUCTION

All punishment comes to an end. In the most extreme case, the end is brutal and unambiguous, consisting of the death of the prisoner. In the more typical case, it involves release from prison and reentry into society.¹ Although seemingly straightforward, the latter case poses difficult questions about what exactly it means for punishment to end. The familiar cinematic image is of the just-released person, wearing dated clothes and awaiting a bus outside the prison gates. While evocative, this depiction of the “end” of the prisoner’s punishment ignores what comes next: the return to “ordinary” life.

¹ Ninety-five percent of prisoners eventually leave prison to reenter society. Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, BUREAU JUST. STATS., <https://www.bjs.gov/content/pub/pdf/reentry.pdf> (last updated Apr. 14, 2004). Numerically this translates into an estimated 626,000 people leaving prison each year. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

Built into the very notion of imprisonment for a term of years is the “principle of return”: the idea that, when the prisoner has done his or her time, that person is entitled to return to the fold.² This is in part what distinguishes punishment in the form of a prison term from banishment or excommunication.

The principle of return can thus be understood as a norm implicit in, and logically following from, the notion of a term-limited punishment. This entitlement to return to civil society, however, should not be confused with an entitlement to return to a particular social position, as though the conviction or period of incarceration never happened. To be sure—as raging debates about ex-felons’ voting rights demonstrate³—there are difficult questions about the precise param-

² The principle of return is related to but distinct from the extensive literature on the impediments faced by former prisoners upon release from prison, including difficulties in obtaining employment and housing, among other debilitating collateral consequences. See, e.g., Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 632–33 (2006) (urging commentators and advocates to “articulate[] collateral consequences and reentry as *interwoven* and *integrated* components along the criminal justice continuum”); Eva Coruzzi Schneider, *Disparate Impact Lacks an Impact: The Need for Pay for Success Programs to House Formerly Incarcerated People*, 44 FORDHAM URB. L.J. 529 (2017) (exploring alternatives to impact litigation to ensure formerly incarcerated people have access to safe, affordable, and stable housing); Elizabeth P. Weissert, *Get Out of Jail Free? Preventing Employment Discrimination Against People with Criminal Records Using Ban the Box Laws*, 164 U. PA. L. REV. 1529 (2016) (discussing the limitations within the existing legal framework for preventing employment discrimination against people with criminal records). Traditional accounts of reentry tend to focus on obstacles faced by former prisoners *post-release* and to stress that those reentering society should do so with a clean slate. See, e.g., Nicola Lacey & Hanna Pickard, *To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. LEGAL STUD. 665, 667 (2015) (arguing that forgiveness should replace blame as the guiding principle of criminal justice policy and penal philosophy); cf. Michael R. Brubacher, *Third-Party Support for Retribution, Rehabilitation, and Giving an Offender a Clean Slate*, 24 PSYCHOL. PUB. POL’Y & L. 503 (2018) (finding third-party support for giving prisoners a clean slate for minor crimes). By contrast, the principle of return attaches far earlier—at the point when punishment begins—and insists on conceptualizing punishment as a precursor to (for all but a small percent of those convicted to life without parole or death) return to civil society. Whereas the traditional focus on reentry may largely ignore what happens within the prison environment—instead focusing on the factors that most directly (and in real time) impede reentry—the principle of return takes a broader, more holistic perspective by highlighting the relationship between term-limited punishment, a person’s lived experience of prison, and that person’s prospect for reentry.

³ See, e.g., Letitia Stein, *Politics Cloud Felon Voting Rights Restoration in Florida*, REUTERS (Dec. 15, 2018), <https://www.reuters.com/article/us-usa-florida-felons/politics-cloud-felon-voting-rights-restoration-in-florida-idUSKBN1OE0C2> (describing political challenges in Florida to re-enfranchising people with felony records); Farah Stockman, *They Served Their Time. Now They’re Fighting for Other Ex-Felons to Vote*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/us/voting-rights-felons.html> (discussing a “growing national movement that is pushing to politically empower formerly incarcerated people by encouraging them to vote if they are eligible and pushing to restore their rights if they are not”).

ters of this return. However, for the concept of the end of punishment to be meaningful, the former prisoner's return to civil society must entail more than the mere absence of incarceration. It should at a minimum include the idea of a fair chance of reestablishing oneself in society, to live a decent, productive, self-sustaining, and sociable life.⁴

Attention to this principle of return compels us to critically examine the “practices of incarceration”—including the prison environment and programs, whether vocational, educational, religious, artistic, or recreational—that either promote or detract from a prisoner's reentry into society. These practices of incarceration are vitally important both for former prisoners and their future neighbors and communities.⁵

⁴ This Article distinguishes between a person's “term limit,” a purely quantitative measure of the period of incarceration, and the “end of punishment,” which has a qualitative dimension. The Court's Eighth Amendment jurisprudence supports an understanding that the end of punishment cannot mean merely that one is no longer incarcerated. In drawing the line between what constitutes punishment for purposes of Ex Post Facto analysis, the Court consistently has held that regulations restricting the liberties of those who were formerly incarcerated must neither be intended as punishment nor actually function as such. *See, e.g.,* *Smith v. Doe*, 538 U.S. 84, 92 (2003) (“If the intention of the legislature was to impose punishment, that ends the [Ex Post Facto Clause] inquiry. If [not], . . . we [still] must further examine whether the statutory scheme is ‘so punitive either in purpose or effect as to negate [the State's] intention’ to deem it ‘civil.’” (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980))). While collateral consequences may substantially impede a former prisoner's ability to reintegrate, thus running afoul of the principle of return, such post-conviction consequences are themselves legislated, conscious exceptions to the principle of return. They are subject to judicial review and will be found unconstitutional if determined to be punitive. Putting aside longstanding debates about how and where the Court draws this line between punitive and regulatory, the line itself has great significance, precisely because of the foundational—and conceptually logical— notion that, to be meaningful, the concept “end of punishment” must have a richer meaning than merely the end of one's period of incarceration. *Cf. id.* (acknowledging that punitive measures cannot be imposed on those who have already served their sentences).

⁵ These practices of incarceration also intersect meaningfully with legal, political, and social obstacles to reentry—a vast web of collateral consequences. *See generally* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15–17 (Marc Mauer & Meda Chesney-Lind eds., 2002). Practices of incarceration may exacerbate the effect of collateral consequences or they may work at cross-purposes with existing collateral consequences. If practices of incarceration serve to impede reentry, then they will have an exacerbating effect. Alternatively, the positive impact of practices of incarceration that are favorable to reentry may be significantly lessened by existing collateral consequences. By example, consider the person who, while incarcerated, became expert in a particular field, but upon release discovered that, due to licensing restrictions, he or she was unable to continue working in that area of expertise. This scenario has played out in such contexts as firefighting and barbering. *See* Clyde Haberman, *NYC; Ex-Inmate Denied Chair (and Clippers)*, *N.Y. TIMES* (Feb. 25, 2003), <https://www.nytimes.com/2003/02/25/nyregion/nyc-ex-inmate-denied-chair-and-clippers.html>; Mihir Zaveri, *As Inmates, They Fight California's Fires. As Ex-Convicts, Their Firefighting Prospects Wilt.*, *N.Y. TIMES* (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/california-paying-inmates-fight-fires.html>; *see also* *infa* notes 272–74 and accompanying text (discussing the

Unfortunately, these practices remain largely hidden from scholarly inquiry. Careful attention is given to whether conditions of confinement run afoul of the Eighth Amendment's ban on cruel and unusual punishment.⁶ Comparatively neglected are normative aspects of incarceration that fall outside this slice of constitutional law and beyond the purview of the Supreme Court. This Article is situated precisely in this sub-constitutional prison law space, which includes a variety of prison programs designed to be adaptive for people while they are incarcerated and once they leave prison. Assessing these practices of incarceration requires a shift in focus from theoretical conceptions of the sociology of prisons and punishment to ground-level actors and incentives.

Prison higher education presents an ideal case study to connect these ground-level programmatic details with abstract debates about the place of prisons and prisoners in society, both because of the historic link between higher education and civic membership, and because the controversy that these programs have engendered is well-documented and has been the focus of ongoing legislative debate.⁷ The example of higher education raises a broad set of questions about what resources, if any, the state must provide to prisoners as members

problem of prisoners earning criminal justice degrees in prison only to find, upon release, that they are ineligible—because of a felony conviction—for jobs in the criminal justice field).

⁶ See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009) (arguing that, because of the state's carceral burden, the Eighth Amendment's prohibition on cruel and unusual punishment applies to the administration of punishment in addition to the sanction of punishment); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 375 (1995) (critiquing the Supreme Court for "yield[ing] too much to federalism and to deference towards prison officials by placing too formidable a barrier in the path of prison reform" with regard to its Eighth Amendment jurisprudence); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817 (2016) (exploring the ramifications of slavery jurisprudence on contemporary Eighth Amendment jurisprudence with regard to sentencing and conditions within prisons); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89 (2015) (discussing the legality of supermax prisons given the Eighth Amendment's ban on cruel and unusual punishment); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018) (noting that the Supreme Court's restrictive interpretation of the Eighth Amendment's Punishments Clause has allowed prison officials to avoid constitutional accountability for dangerous prison conditions); Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013) (observing the Supreme Court's failure to articulate standards for treatment of pretrial detainees and arguing for Fourth Amendment protections of an arrestee to extend until probable cause is determined).

⁷ See *infra* Section I.A.

of the polity who are entitled to rejoin society upon their release.⁸ It brings to the forefront issues about the place of prisoners in society both while they are incarcerated and once they are released, and challenges readers to think beyond the paradigms of warehousing and second-class citizenship to imagine what it would be like if those in prison were understood primarily as fellow members of the polity who would be returning to civil society. The choice of topic is also purposefully provocative—many law-abiding citizens do not have access to a college education, so the issue of higher education programs for prisoners has elicited understandably strong reactions about the place of a “prisoner-citizen” in the polity.⁹ While other prison programs may have strong proponents and detractors, the issue of prison higher education has been uniquely polarizing, and this choice of topic thus frames the discussion of practices of incarceration and their relationship to the principle of return in helpfully stark terms for purposes of explication and analysis.¹⁰

The Article’s first contribution is sociological. Until now, existing accounts of prison higher education have focused on either a single program¹¹ or program feature,¹² thus obscuring the fact that there

⁸ The question of what duty the state incurs when it puts someone behind bars is central to prison law discourse. While a comprehensive treatment of this question is beyond the scope of this Article, the case study of higher education helps to lay the groundwork for and shape the parameters of this discussion.

⁹ See *infra* Section III.B.

¹⁰ Some readers may regard higher education—specifically in a country like the United States, where it is not universally available—as a luxury good and may therefore find the suggestion of providing higher education to prisoners to be counterintuitive. While the Article seeks to explain why this intuition does not withstand scrutiny, it also stops short of suggesting that prisoners are specifically entitled to higher education, whether by dictates of constitutional, moral, or political theory. The principle of return is not self-defining and, as Part IV will explore in greater depth, this principle sets out an abstract obligation, leaving the state to take measures—choosing from a panoply of options—to fulfill this obligation.

¹¹ See, e.g., TANYA ERZEN, *GOD IN CAPTIVITY: THE RISE OF FAITH-BASED PRISON MINISTRIES IN THE AGE OF MASS INCARCERATION* (2017) (using the New Orleans Baptist Theological Seminary as a case study to examine how faith-based higher education prison programs shape religious life in prisons); MICHAEL HALLETT ET AL., *THE ANGOLA PRISON SEMINARY: EFFECTS OF FAITH-BASED MINISTRY ON IDENTITY TRANSFORMATION, DESISTANCE, AND REHABILITATION* (2017) (exploring the history, purpose, and functioning of the Seminary program at the Louisiana State Penitentiary through inmate surveys and life-history interviews with inmates and staff); KAIA STERN, *VOICES FROM AMERICAN PRISONS: FAITH, EDUCATION, AND HEALING* (2014) (examining the ways in which the Master of Professional Studies in Ministry program at Sing Sing Prison supported and transformed its students’ lives).

¹² Many scholars have focused exclusively on the baseline question of whether prisoners should be eligible to receive government subsidies for higher education. See, e.g., Jason L. Mallory, *Denying Pell Grants to Prisoners: Race, Class, and the Philosophy of Mass Incarceration*, *INT’L SOC. SCI. REV.*, Jan. 2015, at 1 (arguing for the reinstatement of Pell Grant eligibility to incarcerated people so as to reflect the ethical values of our

exist a range of programs with different features that reflect and reinforce broader convictions about the purpose of imprisonment. Drawing on dozens of original interviews with educators, program administrators, and corrections experts who are responsible for crafting and implementing prison education policy and practice at national, state, and local levels,¹³ this Article identifies the spectrum

society); SpearIt, *Keeping it REAL: Why Congress Must Act to Restore Pell Grant Funding for Prisoners*, 11 U. MASS. L. REV. 26 (2016) (urging Congress to restore Pell Grants to prisoners who qualify under need-based criteria because of the penal and public benefits of educating prisoners, and because denying this funding does not advance any stated purpose of punishment).

¹³ Telephone Interview with Terrell Blount, Program Assoc., Ctr. on Sentencing & Corr., Vera Inst. of Justice (July 7, 2017); Interview with Burl Cain, former Warden, La. State Penitentiary at Angola, in Salt Lake City, Utah (Aug. 16, 2014); Telephone Interview with Patricia Caruso, Former Dir., Mich. Dep't of Corr. (July 15, 2014); Telephone Interview with Allison Chernow, Bd. of Dirs., Co-Chair, Rehab. Through the Arts (Dec. 12, 2018); Telephone Interview with Todd Clear, Founder, NJ-STEP (Aug. 10, 2017); Telephone Interview with Shaul Cohen, Chair, Univ. of Or. Inside-Out Prison Exch. Program (Aug. 8, 2017); Telephone Interview with Lois Davis, Senior Policy Researcher, RAND Corp. (July 6, 2017); Telephone Interview with Baz Dreisinger, Dir., Prison-to-Coll. Pipeline, John Jay Coll. of Criminal Justice (July 5, 2017); Telephone Interview with Jennifer Drew, Former Dir., Bos. Univ. Prison Educ. Program (Feb. 14, 2017); Telephone Interview with Cathy Fontenot, Warden, Lafayette Par. Sheriff's Office, Former Assistant Warden, La. State Penitentiary at Angola (Feb. 3, 2017); Telephone Interview with Ralph Fretz, Dir. of Assessment & Research, Cmty. Educ. Ctrs. (July 16, 2014); Telephone Interview with Mary Gould, Dir., St. Louis Univ. Prison Program (Feb. 3, 2017); Interview with Kurt Guner, Manager, Prison Educ. Program, Salt Lake Cmty. Coll., in Arlington, Texas (Nov. 4, 2017); Telephone Interview with Marc Howard, Dir., Prisons & Justice Initiative, Georgetown Univ. (Jan. 20, 2017); Telephone Interview with Brian Johnson, Vice President, Leadership for Educ. Equity, Former Exec. Dir., Teach for Am. L.A. (Mar. 3, 2017); Telephone Interview with Justin Jones, Former Dir., Okla. Dep't of Corr. (Aug. 11, 2014); Telephone Interview with Daniel Karpowitz, Dir. of Policy & Acads., Bard Prison Initiative (Feb. 9, 2017); Telephone Interview with Adam Key, Speech Instructor & Debate Coach, Lee Coll.-Huntsville Ctr. (July 31, 2017); Telephone Interview with Jody Lewen, Exec. Dir., Prison Univ. Project at San Quentin (June 9, 2017); Telephone Interview with Laura Liebman, Dir. of Dev., Bard Prison Initiative (Feb. 2, 2017); Telephone Interview with Lance Lowry, President of Huntsville Local Chapter, Am. Fed'n of State, Cty. & Mun. Emps. (July 15, 2014); Telephone Interview with Samuel Macomber, Instructor, Cornell Univ. Prison Educ. Program (Apr. 5, 2019); Interview with Todd Marshall, Assoc. Provost, Coll. of Online & Adult Studies, Ashland Univ., in Arlington, Texas (Nov. 2, 2017); Telephone Interview with Joshua Miller, Dir., Prison Scholars Program (Jan. 27, 2017); Telephone Interview with Tani Mills, Chief of External & Legislative Affairs, Ctr. for Emp't Opportunities (July 24, 2014); Telephone Interview with Debbie Mukamal, Exec. Dir., Stanford Criminal Justice Ctr. (July 31, 2017); Telephone Interview with Fred Patrick, Dir., Ctr. on Sentencing & Corr., Vera Inst. of Justice (July 7, 2017); Telephone Interview with LeeAnn Prince, Dir., Corr. Programs, Mgmt. & Training Corp. (Dec. 11, 2013); Interview with Annie Rody-Wright, Instructor, Siena Coll./Greene Corr. Facility (Nov. 4, 2017); Telephone Interview with Rebecca Silbert, Senior Vice President, The Opportunity Inst. (June 22, 2017); Interview with Tara Skurtu, Instructor, Bos. Univ. Prison Educ. Program (Apr. 10, 2015); Telephone Interview with Kaia Stern, Dir., Prison Studies Project (July 28, 2017); Telephone Interview with Marc Suvall, Instructor, Taconic Corr. Facility, in Bedford Hills, N.Y. (Aug. 5, 2014); Telephone

of prison higher education programs. It explores how their features—for example, as concerns eligibility, curriculum, and relationship to reentry—illustrate and further reinforce core beliefs about the goals of punishment and prison reform, as well as the prospects for prisoners to function and even thrive after they are released.¹⁴

The Article’s second contribution is normative. In this aspect, it begins by scrutinizing the arguments most commonly invoked both in favor of, and in opposition to, prison higher education programs. Proponents advocate for these programs primarily in terms of a narrow conception of harm prevention, focusing on their effectiveness in reducing recidivism¹⁵ and decreasing violence within prisons.¹⁶ Detractors, meanwhile, characterize these programs as an unjustified conferral of benefits on undeserving recipients. On the surface, critics cite budgetary constraints as the primary reason why prison higher education programs are undesirable. But beneath the focus on costs is a deeper layer of cultural resistance,¹⁷ exemplified by the politically salient “kids before cons” rhetoric used in opposition to prison higher education programs.¹⁸ This strand of resistance, which pits prisoners against non-incarcerated members of the polity, reflects a belief that prisoners are undeserving of opportunities because of the crimes they committed, and that prison is not merely a place where one loses liberty and autonomy, but also part of a justified scheme of permanent deprivation.

Each of the dominant approaches is inadequate for essentially the same reason: the failure to sufficiently take into account the principle of return—that is, the status of prisoners as members of the polity

Interview with Arthur Townes, Dir. of Alumni Servs., Cmty. Educ. Ctrs. (July 22, 2014); Telephone Interview with Peter Wagner, Exec. Dir., Prison Policy Initiative (July 16, 2014); Telephone Interview with Barbara Wall, Vice President for Mission & Ministry, Villanova Univ. (Dec. 12, 2018); Telephone Interview with Tess Wheelwright, Assoc. Dir. of Curriculum & Programming, Cornell Univ. Prison Educ. Program (May 2, 2019); Telephone Interview with Greg Woodward, Div. Chair, New Orleans Baptist Theological Seminary (Aug. 2, 2017).

¹⁴ See *infra* Section I.B.

¹⁵ See *infra* Section II.A.

¹⁶ See *infra* Section II.B.

¹⁷ In prior work, I developed a “taxonomy of resistance” that identified how and why prison industry stakeholders—including correctional officers’ unions and private prison management—resist decarceration efforts, which included both economic and cultural factors. Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 78–79 (2016). This Article’s examination of prison higher education programs and the controversy surrounding them extends my prior work on “culture as resistance” in the prison reform context. See *id.* at 114–19 (describing how the “us-versus-them” paradigm between correctional officers and prisoners manifests as a lack of support by correctional officers towards the rehabilitative goals of incarceration).

¹⁸ See *infra* Section III.B.

rather than as outlaws. Harm-prevention approaches focus on what is good for society, not on what is entailed by the idea of punishment for a term. The desert-based approach, meanwhile, while couched in retributive terms, often ignores a core principle of retributivism—proportionality, or the necessity of calibrating punishment to crime.¹⁹ Instead, it relies on a “colloquial” form of retributivism, which disregards individualized questions of desert and problematically aligns with notions of forfeiture or excommunication foreign to any plausible notion of deserved punishment.²⁰ As such, it is incompatible with constitutional dictates that forbid banishment or the revocation of citizenship for committing a crime.

In place of these unsatisfactory modes of analysis, this Article proposes an alternative “communitarian approach” to analyzing and assessing prison programs;²¹ one that accepts, rather than ignoring or running roughshod over, the connection between prisoner and polity.²² The communitarian approach looks beyond the goal of harm-prevention to consider what policies and practices are necessary such that all individuals, including former prisoners, can thrive in civil society. In doing so, it highlights the basic terms on which former prisoners are entitled to reenter society—terms that, if met, promise to benefit former prisoners as well as the broader polity.²³

The basis for the normative argument is not that the lack of enrichment programs would constitute cruel and unusual punishment, as it has been defined by the Supreme Court.²⁴ Rather, the Article’s

¹⁹ See, e.g., Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1836 (2012) (“The principle of proportionality is commonly associated with the retributivist—or just deserts—theory of punishment, or the idea that people should receive the punishment that they deserve and no more.”).

²⁰ See *infra* Section III.A.

²¹ The Article uses the term “communitarian” to acknowledge that it builds on and develops insights drawn from communitarian political theories. However, it is not wedded to all aspects of those theories and does not take a position, for example, in longstanding debates between “liberals” and “communitarians.”

²² If the prisoner’s bond with the polity is completely broken during the period of incarceration, this may yield a sense of permanent alienation, making return impossible. Accordingly, the connection between prisoner and polity post-release is inextricably linked to that between prisoner and polity throughout the period of incarceration.

²³ See *infra* Section IV.A.

²⁴ To determine whether a person’s punishment is cruel and unusual, courts consider “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Examples of punishments that violate the Eighth Amendment include those that are grossly disproportionate to the severity of the offense, *Weems v. United States*, 217 U.S. 349, 381–82 (1910) (holding that a prison term of fifteen years for defrauding the United States through falsifying a public document was prohibited under the Eighth Amendment), and those involving the unnecessary infliction of pain. *But cf. Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (holding that double-celling prisoners was not prohibited under the Eighth Amendment’s ban on cruel and unusual punishment).

claim is that the state is failing in a political obligation it owes all members of the polity by allowing punishment to prevent the possibility of reintegration.²⁵ In short, the state should provide to term-limited prisoners at least a plausible hope of basic reintegration, and the state should avoid further debilitation that might be termed “punishment-plus.”²⁶ Punishment-plus—unjustifiably excessive punishment—is virtually guaranteed so long as an “us-versus-them” dynamic persists, with members of the polity believing that former prisoners are, and should be, a permanent underclass.²⁷

The Article recommends institutional design changes,²⁸ consistent with the preferred communitarian approach, which would help to mitigate two distinct “us-versus-them” narratives that pervade the prison context. The first such narrative is between prisoners and those members of the polity who ascribe to the view that, instead of future neighbors and community members, prisoners are members of a permanent and lower caste. Prison higher education programs may be uniquely capable of shifting such narratives. Prisoners who complete college courses and degrees while incarcerated challenge common assumptions about “criminals” and may help to expedite shifts in norms and policy. Higher education programs that increase exposure and foster empathy between incarcerated and non-incarcerated populations also have great potential to foster this shift. This Article identifies and assesses specific program design features that would support

²⁵ This Article does not mean to suggest that higher education is required to lead a successful life (whether a person was formerly incarcerated or not). Nonetheless, higher education is among a host of strategies—including job placement services, expungement of criminal records, and vocational training—that may aid in reintegration and help to counter the many obstacles that face formerly incarcerated individuals upon their release from prison.

²⁶ The Article’s conception of punishment-plus is directly connected to the principle of return, and it encapsulates anything that precludes the plausible hope of basic reintegration. While beyond the scope of this Article, any practices of incarceration could be implicated—including harsh prison conditions, which could have a debilitating effect. For a related discussion of the state’s obligation to those it incarcerates, see Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 *TEX. L. REV.* 571, 578 (2009), which describes the “two-way street” between offenders and the state insofar as “offenders’ obligations to organize their lives in a way that steers clear of criminality coexist with the state’s corollary obligation not to interfere with their return to normal lives.”

²⁷ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 93–96 (rev. ed. 2011) (describing how people who have felony convictions face legal discrimination, stigma, and exclusion, which results in their second-class status).

²⁸ While the principle of return—an abstract entitlement—is built into the legal concept of punishment for a term of years, the state has a range of options for satisfying this principle. This Article proposes a set of best practices for institutional design in the higher education context, while acknowledging that provision of higher education is one among various ways the state could fulfill its obligation.

these goals,²⁹ as well as program models that feature classes composed of both incarcerated and non-incarcerated students, and it proposes a pilot program that would train and employ recent college graduates to work as teachers in prison.³⁰

The second “us-versus-them” narrative is between prisoners and correctional officers. The pervasiveness of this narrative may be due in part to the fact that prisoners and correctional officers often share similar backgrounds, resulting in the officers’ psychological need to distance themselves from those whom they oversee.³¹ Yet, jointly situated in the prison environment, prisoners and officers also share the same harsh prison conditions—a common experience of deprivation. Adverse conditions concerning physical space and interpersonal dynamics affect both those who live and those who work in prisons, and correctional officers may even be fairly characterized as collateral victims of the “us-versus-them” dynamic between prisoner and polity. Many correctional officers have only pursued their education through the General Educational Development (GED) certification, which is the required credential for their position.³² Consequently, officers might understandably resent having the prisoners they supervise receive educational advantages to which officers have no access. Offering comparable opportunities for correctional officers to pursue higher educational opportunities would elevate their position and help to mitigate their experience of deprivation.³³ The Article’s inquiry into the role of correctional officers exposes a broader pathology behind prison walls, as well as an additional set of institutional design levers that—while routinely neglected by scholars and advocates alike—could be recalibrated to benefit both prisoner and polity.³⁴

²⁹ See *infra* Section V.A.

³⁰ See *infra* Section V.B.

³¹ See, e.g., Eisenberg, *supra* note 17, at 95–96 (noting that, because correctional officers and inmates often come from the same neighborhoods, separating them through an “us-versus-them” paradigm might serve a psychological need of the officers); Jeffrey Toobin, *This Is My Jail*, NEW YORKER (Apr. 7, 2014) <https://www.newyorker.com/magazine/2014/04/14/this-is-my-jail> (noting that female corrections officers in Baltimore come from the same neighborhoods as the inmates of the Baltimore City Detention Center).

³² *What Are the Minimum Requirements to Become a Corrections Officer?*, CORRECTIONALOFFICER.ORG, <https://www.correctionalofficer.org/faq/correctional-officer-requirements> (last visited Oct. 3, 2019).

³³ This suggested reform would facilitate the principle of return by addressing officer resistance to programs designed to help prisoners reintegrate into the polity.

³⁴ This Article’s examination of the political economy of prison reform draws inspiration from the work of William Stuntz who, in his analysis of the ever-increasing breadth of substantive criminal law, distinguished “surface politics” from a “deeper politics,” which reflects the roles and incentives of institutional stakeholders. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510–11 (2001).

The Article unfolds as follows. Part I surveys the history and controversy surrounding prison higher education programs and introduces a taxonomy of program design features. Parts II and III identify and critique the dominant harm-prevention justifications for these programs and the desert-based opposition to them. Part IV proposes the communitarian approach, which foregrounds the relationship between prisoner and polity and the impact of prison higher education programs on the prospects of prisoners to reintegrate as full citizens. This approach would consider both the rights and responsibilities of citizenship for the formerly incarcerated, as well as the utility of these programs to the polity. Part V explores design choices that would follow from this approach as well as political economy considerations that may hinder implementation.

I

PRISON HIGHER EDUCATION PROGRAMS

Part I examines the origins of prison higher education programs, the controversy they have engendered, and the range of design features that characterize them. This case study is particularly illustrative because of the historic link between higher education and civic advantage, and it raises a broad set of questions about what opportunities the state should be required to provide for prisoners, given that they are part of the polity and will be rejoining society upon their release.

Section I.A traces the three stages that characterize the modern history of prisoner higher education in the United States³⁵: from 1972 to 1994, a period of inclusion when prisoners were eligible for the same federal education grants as non-prisoners; from 1994 to 2015, a period of exclusion from public programs and the emergence of a diverse array of privately funded prison higher education programs; and from 2015 to the present day, after President Obama introduced a pilot program that restored limited government funding for prisoner higher education. Section I.B develops a taxonomy of key program

³⁵ While higher education in U.S. prisons is a relatively recent phenomenon, education in prison dates back to the earliest prison system founded in Pennsylvania in 1787, with William Rogers, a member of the clergy, serving as the “first educator.” See NEGLEY K. TEETERS, *THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA 1773–1835*, at 32 (1955); Michael Meranze, *The Penitential Ideal in Late Eighteenth-Century Philadelphia*, 108 PA. MAG. HIST. & BIOGRAPHY 419, 420 (1984). Early examples of education in prison were mostly spiritual and vocational. Jonathan E. Messemer, *The Historical Practice of Correctional Education in the United States: A Review of the Literature*, 1 INT’L J. HUMAN & SOC. SCI. (SPECIAL ISSUE) 91 (2011). It was not until 1962 that Illinois became the first state to offer live college instruction to inmates, and not until after 1970 that most states began to offer some form of post-secondary education. *Id.* at 93.

features that characterize the prison higher education landscape, and that reflect contrasting criminal justice values, educational priorities, and jurisdictional realities.³⁶

A. *Origins and Controversy*

The modern history of prisoner higher education began in 1972 when Basic Educational Opportunity Grants, called “Pell Grants” after their sponsor, Senator Claiborne Pell of Rhode Island, were established with the purpose of providing partial federal subsidies to low-income college students.³⁷ Senator Pell maintained, “the strength or richness of our country . . . is directly related to the sum total of the skills and character of its people; and these skills and character are determined by the education of its people.”³⁸ Supporters of the Pell program highlighted the importance of post-secondary educational opportunities for the social progress of a nation and for promoting the goal of civic equality. Senator Birch Bayh (D-IN), a strong proponent of the Pell program, elaborated: “By establishing a minimum level of scholarship assistance for each needy student who wishes to pursue postsecondary education, we hope to break forever the bonds that have tied generation upon generation to the ghettos and economic backwaters of America.”³⁹

Prisoners were part of the Pell program from its inception, and neither the site of prison nor the status of prisoners was considered relevant.⁴⁰ Like any other students, prisoners who met the federal student aid eligibility requirements could apply for and receive these non-repayable grants.⁴¹ The Pell program has been called “the single most important influence on the growth of prison higher education throughout the 1970s and 1980s.”⁴² Since most prisoners were from

³⁶ This Article provides a descriptive account of these programs, noting what values—criminal justice, educational, or sometimes both—are articulated by their founders and administrators.

³⁷ Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 251 (1972). Congress passed Title IV of the Higher Education Act, which instituted the grants, in 1965; however, funds for the program were not released until 1972. The grants were renamed after Senator Pell in 1980. William H. Honan, *Claiborne Pell, Patrician Senator Behind College Grant Program, Dies at 90*, N.Y. TIMES (Jan. 1, 2009), <https://www.nytimes.com/2009/01/02/us/politics/02pell.html>.

³⁸ 115 CONG. REC. 10,434 (1969) (statement of Sen. Pell).

³⁹ 117 CONG. REC. 30,155 (1971) (statement of Sen. Bayh).

⁴⁰ See Mary C. Wright, *Pell Grants, Politics and the Penitentiary: Connections Between the Development of U.S. Higher Education and Prisoner Post-Secondary Programs*, 52 J. CORRECTIONAL EDUC. 11, 13–14 (2001).

⁴¹ *Id.* at 14 (“The Pell [G]rant program enabled inmates who met certain financial criteria to get aid for their college-level courses.”).

⁴² *Id.* at 13–14.

low-income families, Pell Grants were “the primary source of funding for prison inmate college education programming.”⁴³

This period of inclusion for prisoners came to an abrupt halt in 1994, when Congress passed the Omnibus Crime Bill,⁴⁴ which amended Title IV of the Higher Education Act and included a provision expressly discontinuing Pell Grants for prisoners.⁴⁵ Despite the fact that “no eligible applicant for a Pell [G]rant ever lost out to an inmate,”⁴⁶ victors in the 1994 legislative debates emphasized “the fundamental unfairness of giving grants to prisoners when law-abiding citizens could not get them,”⁴⁷ suggesting that prisoners did not *deserve* to be included in the Pell program. U.S. Senator Kay Bailey Hutchison (R-TX), who championed efforts to exclude prisoners from Pell Grant eligibility, explained that 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.”⁴⁸ Hutchison’s claims were inaccurate; in 1993, prisoners received just 0.64% of the \$5.3 billion in Pell Grants, or approximately \$34 million in grants.⁴⁹ Nonetheless, “sentiment and public perception trumped statistical accuracy.”⁵⁰

⁴³ Charles B. A. Ubah, *Abolition of Pell Grants for Higher Education of Prisoners: Examining Antecedents and Consequences*, 39 J. OFFENDER REHABILITATION, no. 2, 2004, at 73, 74; accord John F. Littlefield & Bruce I. Wolford, *A Survey of Higher Education in U.S. Correctional Institutions*, 33 J. CORRECTIONAL EDUC. 14, 17 (1982) (discussing a national study that found Pell Grants were the most frequently named major source of funding for post-secondary correctional education programs). Nonetheless, the proportion of Pell Grants given to inmates remained miniscule, with estimates ranging from 0.82% to 1.2%. Wright, *supra* note 40, at 14.

⁴⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁴⁵ Mary Rachel Gould & SpearIt, *Twenty Years After the Education Apocalypse: The Ongoing Fall Out from the 1994 Omnibus Crime Bill*, 33 ST. LOUIS U. PUB. L. REV. 283, 288–89 (2014).

⁴⁶ Robert Worth, *A Model Prison*, ATLANTIC MONTHLY (Nov. 1995), <https://www.theatlantic.com/magazine/archive/1995/11/a-model-prison/308518>.

⁴⁷ Gregory A. Knott, *Cost and Punishment: Reassessing Incarceration Costs and the Value of College-in-Prison Programs*, 32 N. ILL. U. L. REV. 267, 282 (2012). While this rhetoric suggested that federal funds for higher education were zero-sum, in fact, this was not the case. Rather, “the grants are awarded on a merit basis, with any costs above the yearly appropriation coming out of the next year’s budget.” Worth, *supra* note 46.

⁴⁸ 139 CONG. REC. 29,449 (1993).

⁴⁹ See Gould & SpearIt, *supra* note 45, at 288 (“According to the U.S. Department of Education, in the year leading up to the passing of the Omnibus Crime Bill, ‘of the \$5.3 billion awarded in 1993, \$34 million was given to institutions serving inmates.’” (quoting DANIEL KARPOWITZ & MAX KENNER, PRISON POL’Y INITIATIVE, EDUCATION AS CRIME PREVENTION: THE CASE FOR REINSTATING PELL GRANT ELIGIBILITY FOR THE INCARCERATED 7, https://www.prisonpolicy.org/scans/crime_report.pdf (last visited Oct. 4, 2019))).

⁵⁰ Knott, *supra* note 47, at 282.

While those opposed to Pell Grants for prisoners carried the day, there were strong dissenting voices. Proponents of Pell Grants for prisoners highlighted consequentialist arguments in favor of prison higher education, specifically focusing on the recidivism-reducing effects of prison higher education and stressing the benefits of higher education as a criminal justice tool.⁵¹ Representative Albert Wynn (D-MD) observed: “[I]n these times it is easy to make statements designed to punish criminals. But I think it is very important that we make statements designed to reduce recidivism.”⁵² He continued by invoking remarks of former Chief Justice Warren Burger, who predicted that “to confine offenders behind walls without trying to change them is an expensive folly.”⁵³ Senator Claiborne Pell, the program’s champion and namesake, noted further: “It costs much less to educate a prisoner than it does to keep one behind bars.”⁵⁴ Nonetheless, in August 1994, the Omnibus Crime Bill, which included the amendment making prisoners ineligible for Pell Grants, received congressional approval.⁵⁵ President Clinton signed this new legislation a few weeks later.⁵⁶

Legislative efforts to reintroduce Pell Grants for prisoners over the following two decades proved unsuccessful, on both federal and state levels,⁵⁷ and the number of students served in prison higher education programs dropped significantly after 1994.⁵⁸ However, in the

⁵¹ 140 CONG. REC. 7948 (1994).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 140 CONG. REC. 1798 (1994).

⁵⁵ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 20,411, § 401(b)(8), 108 Stat. 1,796, 1828 (codified as amended at 20 U.S.C. § 1070a(b)(6) (2012)) (“No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.”); *Actions Overview: H.R.3355-Violent Crime Control and Law Enforcement Act of 1994*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/3355/actions> (last visited Oct. 4, 2019).

⁵⁶ *Actions Overview: H.R.3355-Violent Crime Control and Law Enforcement Act of 1994*, *supra* note 55.

⁵⁷ See, e.g., *Actions Overview: H.R.2521-REAL Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2521/all-actions> (last visited Oct. 4, 2019) (showing that Congress failed to move a bill that would reinstate Pell Grant eligibility to people incarcerated in federal and state prisons out of the House Subcommittee on Higher Education and Workforce Training). By contrast, legislation further limiting Pell Grants has met congressional approval. For example, in 2008 Congress closed a “loophole” that allowed sex offenders, once they were civilly committed, to receive Pell Grants. Ingrid Norton, *Congress Bans Pell Grants for Sex Offenders*, CHRON. HIGHER EDUC. (Aug. 15, 2008), <http://www.chronicle.com/article/Congress-Bans-Pell-Grants-for/21970>.

⁵⁸ See Richard Tewksbury & Jon Marc Taylor, *The Consequences of Eliminating Pell Grant Eligibility for Students in Post-Secondary Correctional Education Programs*, FED. PROBATION, Sept. 1996, at 61 (“In 1 year, the number of correctional systems offering

absence of government funding, various privately funded programs emerged to at least partially fill this void. These programs were supported primarily by foundation grants and individual donations.⁵⁹

The third period of prisoner higher education began in 2015 with the Obama Administration's Second Chance Pell Experimental Sites Initiative,⁶⁰ a pilot program that enabled a select number of penal institutions to provide Pell Grants to inmates enrolled in higher education programs.⁶¹ A RAND Corporation study, which was released the prior year and found a substantial reduction in recidivism risk for prisoners who participated in college programs, helped garner momentum for this program.⁶² The Second Chance Pell Pilot program—which was enabled by the Secretary's waiver authority under the Higher Education Act—provided that incarcerated adults could apply for grants of up to \$5775 for tuition and related expenses at college-level programs offered in prison facilities nationwide.⁶³

PSCE programming dropped from 82.6 percent (N = 38) in 1994-95 to 63 percent (29) in 1995-96.”).

⁵⁹ See LOIS DAVIS ET AL., RAND CORPORATION, HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE? THE RESULTS OF A COMPREHENSIVE EVALUATION 66-68 (2014) (“[T]oday postsecondary education or college courses in many states (28) are paid primarily by the individual inmate or through the use of family finances, or by private funding such as foundations or individual donations (20 states).”).

⁶⁰ See also *U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals*, U.S. DEP'T EDUC. (July 31, 2015), <https://www.ed.gov/news/press-releases/us-department-education-launches-second-chance-pell-pilot-program-incarcerated-individuals>. See generally Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiative, 80 Fed. Reg. 45964 (Aug. 3, 2015).

⁶¹ See *12,000 Incarcerated Students to Enroll in Postsecondary Educational and Training Program Through Education Department's New Second Chance Pell Pilot Program*, U.S. DEP'T EDUC. (June 24, 2016), <https://www.ed.gov/news/press-releases/12000-incarcerated-students-enroll-postsecondary-educational-and-training-programs-through-education-departments-new-second-chance-pell-pilot-program> (announcing that the Department of Education had selected sixty-seven colleges and universities to participate in the experiment).

⁶² See Doug Irving, *The Case for Correctional Education in U.S. Prisons*, RAND REVIEW, Jan.–Feb. 2016, at 6, <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html> (noting that the Secretary of Education cited RAND's research when announcing the pilot program); *U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals*, *supra* note 60 (“[I]ncarcerated individuals who participated in correctional education were 43 percent less likely to return to prison within three years than prisoners who didn't participate in any correctional education programs.”).

⁶³ See Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiative, 80 Fed. Reg. at 45965 (referring to the “waiver authority granted to the Secretary under section 487 A(b) of the HEA”); see also Michelle Chen, *Prison Education Reduces Recidivism by Over 40 Percent. Why Aren't We Funding More of It?*, NATION (Aug. 17, 2015), <https://www.thenation.com/article/prison-education-reduces-recidivism-by-over-40-percent-why-arent-we-funding-more-of-it>. Supporters of the Second Chance Act have expressed hope that, if the pilot is a success, it

The Higher Education Act, which gives the executive branch the authority to create pilot programs, allowed President Obama to circumvent a congressional vote, which would have been required to fully reinstate the Pell program for prisoners.⁶⁴ Indeed, while the Pell Pilot program bespeaks a new chapter in the history (and funding) of prison higher education programs, controversy surrounding them remains. The opposition to prisoner higher education has been so pronounced that some programs have avoided referring to their programs as “higher education,” instead characterizing them as vocational studies.⁶⁵ By contrast, vocational education and GED training have not been met with significant political resistance.⁶⁶

will galvanize broader legislative support for higher education in prisons. *See, e.g.*, Telephone Interview with Fred Patrick, *supra* note 13. Detractors insist that unilateral executive action was an inappropriate approach to resolving the debate about higher education in prisons. *See, e.g.*, Nick Anderson, *Pell Grants for Prisoners? An Experiment Will Test Reversal of a 20-Year Ban*, WASH. POST (July 30, 2015, 12:48 PM), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/30/pell-grants-for-prisoners-an-experiment-will-test-reversal-of-a-20-year-ban> (quoting John Kline (R-Minn.), chairman of the House Committee on Education and the Workforce, who accused the administration of “stifl[ing] an important debate by acting unilaterally and without regard for the law”). Regardless of one’s position on the wisdom of the Second Chance Pell Pilot, key stakeholders have expressed some concern that the fate of federal funding for prison higher education is extremely precarious. *See, e.g.*, Telephone Interview with Laura Liebman, *supra* note 13. However, in early 2018, Education Secretary Betsy DeVos described Pell Grants for prisoners as “a very good and interesting possibility,” specifically mentioning the existing prison program at Calvin College, her alma mater, which is “graduating their first class of seminary students in the prison.” Benjamin Wermund, *DeVos Strikes a Softer Tone*, POLITICO: MORNING EDUC. (Feb. 8, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-education/2018/02/08/devos-strikes-a-softer-tone-096814>. At a 2019 commencement ceremony for the Tulsa Community College prison education program, DeVos expressed support for the Second Chance Pell program, telling students, “You are why we propose the Second Chance Pell experiment or ‘pilot’ be made permanent.” Andrew Kreighbaum, *DeVos Calls for Making Second Chance Pell Permanent*, INSIDE HIGHER ED (June 26, 2019), <https://www.insidehighered.com/quicktakes/2019/06/26/devos-calls-making-second-chance-pell-permanent>.

⁶⁴ *See* Josh Mitchell & Joe Palazzolo, *Pell Grants To Be Restored for Prisoners*, WALL ST. J. (July 27, 2015), <https://www.wsj.com/articles/pell-grants-to-be-restored-for-prisoners-1438029241> (noting that, though some congressional Democrats proposed lifting the ban altogether, the administration decided instead to temporarily and experimentally waive the ban).

⁶⁵ *See* Huntsville Center, LEE COLLEGE, <http://www.lee.edu/lchc> (last visited Dec. 26, 2019); Telephone Interview with Fred Patrick, *supra* note 13 (referring, among others, to the Lee College Huntsville Center at the Texas Department of Criminal Justice, whose website highlights vocational studies, such as Automotive Mechanics, Cabinet Making, and Welding, rather than the program’s liberal arts course offerings).

⁶⁶ Many prisoners are expected to work while incarcerated, so it is no surprise that corresponding vocational training has not generated controversy. *See, e.g.*, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PS 5251.06, INMATE WORK AND PERFORMANCE PAY 1 (2008), https://www.bop.gov/policy/progstat/5251_006.pdf (“Sentenced inmates who are physically and mentally able to work are required to participate in the work program.”). GED training has been required for prisoners in the federal system since 2003. FED.

Whether by proponents or detractors, prison higher education programs tend to be grouped together as though they were essentially uniform.⁶⁷ Yet, these programs represent a diverse array and combination of features that warrant closer examination.

B. Taxonomy of Program Design Features

This Section introduces the diversity of prison higher education programs and key distinctions among them. In so doing, it sets the stage for the Article's examination of how program design choices reflect and reinforce the divergent goals of punishment and visions of reentry.

Five key variables emerge as particularly illustrative of the differences among prison higher education programs. First, is eligibility *open* or *restricted*—that is, can anyone with a GED apply, or is eligibility limited by such factors as the individual's projected release date? Second, is the curriculum best characterized as *liberal arts*, *pre-professional studies*, or *religious instruction*? Third, is the program *inside focused* or *reentry focused*? If reentry focused, what steps have been taken to ensure that credits earned while in prison are transferable and that job placement resources are available? Fourth, is funding for the program best characterized as *public*, *private*, or as a *hybrid*, and what policy or programmatic restrictions follow from each of these funding streams? Finally, is the mode of instruction *in person* (e.g., through direct interaction between teachers and students) or *remote* (e.g., through the use of pre-recorded videos or correspondence courses)?

1. Eligibility

All prison higher education programs require the same basic academic requirements: a high school diploma or GED.⁶⁸ Many programs

BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PS 5350.28, LITERACY PROGRAM (GED STANDARD) (2003), https://www.bop.gov/policy/progstat/5350_028.pdf (mandating that “an inmate confined in a federal institution who does not have a verified General Educational Development (GED) credential or high school diploma is required to attend an adult literacy program for a minimum of 240 instructional hours or until a GED is achieved, whichever occurs first”).

⁶⁷ See generally Leila Sadeghi, *An Exploratory Analysis of Public and Private Correctional Education Programs* (Jan. 2009) (unpublished Ph.D. dissertation, Rutgers University) (ProQuest) (analyzing how the variety of prison education programs is obscured by debates over private versus public management).

⁶⁸ See *Postsecondary Correctional Education (PSCE)*, CRIMESOLUTIONS.GOV, <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=23> (last visited Nov. 7, 2019) (“To participate in PSCE [Post-Secondary Correctional Education], inmates must have obtained a high school diploma or general equivalency degree (GED) credential.”). These requirements are typical of any undergraduate program in the United States. See *Basic*

require an essay and a personal interview,⁶⁹ and some are extremely competitive. For example, in the case of the Bard Prison Initiative, 150 men compete for twenty spots.⁷⁰

Eligibility for these programs is either *open* or *restricted*. While any inmate with a GED is eligible to apply for open programs, eligibility for restricted programs is based on the inmate's projected release date or category of offense. Open programs include the Boston University program, which is the oldest prison higher education program in the country,⁷¹ and the Prison University Project at San Quentin, which also accepts qualified students regardless of their sentence term.⁷² "We take everyone," explained Jody Lewen, Executive Director of the Prison University Project, referring to the eligibility of all inmates, even those who will be incarcerated for life, to participate if they meet the academic criteria and are chosen through the competitive application process.⁷³ Similarly, at the Bard Prison Initiative, admission is open to "anyone at the facility so long as the superintendent doesn't object."⁷⁴ The New Orleans Baptist Theological Seminary's program at Angola is open to any academically qualified inmate who submits a successful application.⁷⁵ Given the high proportion of lifers at Angola, most of the Seminary program's students will never leave prison.⁷⁶

Many prison higher education programs, however, are restricted. In Missouri, the Department of Corrections has explicitly precluded inmates who are serving life sentences without the possibility of parole (LWOP) from participating in higher education programs.⁷⁷

Eligibility Criteria, FED. STUDENT AID, <https://studentaid.ed.gov/sa/eligibility/basic-criteria> (last visited Dec. 26, 2019) ("Our basic eligibility requirements are that you must . . . show you're qualified to obtain a college or career school education by . . . having a high school diploma or a recognized equivalent such as a General Educational Development (GED) certificate . . .").

⁶⁹ This is the case for the Bard Prison Initiative and the Wesleyan Prison Program, among others. See Ted Alcorn, *In College Behind Bars, Prisoners Step into the Classroom*, VULTURE (Nov. 25, 2019), <https://www.vulture.com/2019/11/college-behind-bars-pbs-bard-prison-initiative.html>; *Center for Prison Education: About*, WESLEYAN UNIV., <https://www.wesleyan.edu/cpe/About/index.html> (last visited Dec. 26, 2019).

⁷⁰ Telephone Interview with Laura Liebman, *supra* note 13.

⁷¹ See Telephone Interview with Jennifer Drew, *supra* note 13.

⁷² See Telephone Interview with Jody Lewen, *supra* note 13.

⁷³ *Id.*

⁷⁴ See Telephone Interview with Laura Liebman, *supra* note 13.

⁷⁵ See Telephone Interview with Cathy Fontenot, *supra* note 13.

⁷⁶ See *id.*

⁷⁷ Telephone Interview with Mary Gould, *supra* note 13; see also Jesse Bogan, *St. Louis University Program in Mo. Prison Helps Set Minds Free*, ST. LOUIS POST-DISPATCH (Dec. 28, 2011), https://www.stltoday.com/news/local/metro/st-louis-university-program-in-mo-prison-helps-set-minds/article_a06b052a-064f-5ef4-bce9-d60036f1ac59.html.

Accordingly, the Prison Program at Saint Louis University is required to exclude anyone with an LWOP sentence.⁷⁸ Other programs not only bar those with an LWOP sentence but also restrict eligibility more narrowly based on “date to release.”⁷⁹ For example, the University of Baltimore, which offers for-credit classes to inmates at the Jessup Correctional Institution, accepts applications only from inmates who will be eligible for release within three to five years.⁸⁰ All institutions participating in the Second Chance Pell program are required to give priority for admission to inmates who will be eligible for release within five years.⁸¹ Some grant recipients, such as California State University, have transformed this stated preference into an admission requirement.⁸² States may also restrict certain categories of prisoners from being involved in higher education programs.⁸³ For example, in New Jersey and Pennsylvania, the Department of Corrections bars those convicted of sex offenses from participating in the Second Chance Pell Pilot program.⁸⁴

2. Curriculum

The curricular offerings of existing prison higher education programs fall into three main categories: *liberal arts*, *pre-professional*, and *religious*. The Bard Prison Initiative offers a liberal arts curriculum with a wide array of courses in many disciplines, such as history and literature.⁸⁵ Bard Prison Initiative students work towards a Bachelor of Arts or Associate of Arts degree from Bard College.⁸⁶ The Prison

⁷⁸ Telephone Interview with Mary Gould, *supra* note 13.

⁷⁹ Telephone Interview with Joshua Miller, *supra* note 13.

⁸⁰ *Id.*

⁸¹ Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiative, 80 Fed. Reg. 45966 (Aug. 3, 2015).

⁸² See Christopher Zoukis, *Cal State to Participate in Second Chance Pell Pilot Program*, HUFFPOST (Sept. 27, 2016, 11:52 AM), https://www.huffpost.com/entry/cal-state-to-participate-_b_11975502 (“For prisoners to participate, they must be eligible for release within 5 years of first enrolling in coursework.”).

⁸³ See, e.g., Adam Clark, *Second Chance Will Give Inmates Federal Aid To Take Rutgers Classes*, NJ.COM (July 3, 2016), https://www.nj.com/education/2016/07/rutgers_criminal_offenders_pell_grants.html.

⁸⁴ See *id.* (“Some inmates, including sex offenders, are not eligible for the program under state Department of Corrections rules.”); Pa. Dep’t of Corr., *Second Chance Pell Extended Through 2019-2020*, CORRECTIONAL NEWSFRONT (Mar. 12, 2019, 12:00 AM) <https://www.cor.pa.gov/CorrectionalNewsfront/Pages/Article.aspx?post=391> (“[A]pplicants cannot be . . . classified as a sex offender . . .”).

⁸⁵ See BPI Selected Course Listings 2001–2016 (on file with author). Courses offered by the Bard Prison Initiative have included “American Literature and the Visual Arts from Modernism to the Present,” “Mao’s China and Beyond,” and “Urbanization in the Nineteenth-Century Novel,” among many others.

⁸⁶ See *The College*, BARD PRISON INITIATIVE, <https://bpi.bard.edu/our-work/the-college> (last visited Nov. 5, 2019) (describing the program’s curriculum).

University Project at San Quentin also offers a liberal arts curriculum with twenty courses each semester, such as sociology, psychology, and literature.⁸⁷ Prison University Project students graduate with an Associate of Arts degree from Patten University, a for-profit institution in Oakland, California.⁸⁸

Other programs can best be described as pre-professional because they tailor their curricula with an eye towards post-release employment opportunities. For example, the Jessup program, which is housed in the University of Baltimore's College of Public Affairs, offers courses in "Human Services Administration."⁸⁹ This course of study was chosen because the "major is marketable" and "designed to place people in jobs."⁹⁰ As of now, the Jessup program is only accredited for forty-nine percent of the Bachelor's degree, so students are unable to receive their degrees until after they leave prison.⁹¹ However, since the Jessup program requires that students be within five years of release, "in practice no one will get that number of credits in prison."⁹²

Some programs were founded with a religious mission,⁹³ and this is reflected in their curricular focus. For example, the New Orleans Baptist Theological Seminary partners with Angola to offer "budget-friendly educational programs" that include Bible classes and non-religious courses,⁹⁴ enabling inmates to earn either an Associate's or a

⁸⁷ See PRISON UNIV. PROJECT, COLLEGE PROGRAM AT SAN QUENTIN GENERAL CATALOG 2019–2020, at 7–8 (2019), <https://prisonuniversityproject.org/wp-content/uploads/2019/10/CPSQ-Catalog-2019-2020-with-Appendix.pdf>.

⁸⁸ See Greta Kaul, *San Quentin's Prison University Gives Inmates Freedom to Learn*, SFGATE (Dec. 27, 2014, 10:02 AM), <http://www.sfgate.com/bayarea/article/San-Quentin-s-prison-university-gives-inmates-5980423.php>.

⁸⁹ See *Second Chance College Program*, U. BALT., <http://www.ubalt.edu/cpa/about-the-college/community-engagement/second-chance-college-program.cfm> (last visited Nov. 7, 2019).

⁹⁰ Telephone Interview with Joshua Miller, *supra* note 13.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Faith-based ministry programs are on the rise. See ERZEN, *supra* note 11, at 3 ("Today, all over the United States, with federal assistance and private volunteerist zeal, a quiet faith-based revolution is taking place in fits and starts in state and federal prisons from minimum to maximum security."). As of April 2017, "[f]orty-one percent of federal prisons [were] developing residential faith-based programs, and Florida ha[d] 16 entire prisons designated as faith-based." Derek S. Jeffreys, *The Christian Agenda Behind Inmate Education*, CHRON. HIGHER EDUC.: THE CHRON. REV. (Apr. 30, 2017), <https://www.chronicle.com/article/The-Christian-Agenda-Behind/239904>.

⁹⁴ Roy L. Bergeron, Jr., *Faith on the Farm: An Analysis of Angola Prison's Moral Rehabilitation Program Under the Establishment Clause*, 71 LA. L. REV. 1221, 1240–41 (2011).

Bachelor's degree in Christian ministry.⁹⁵ The Prison Program at Saint Louis University, a Jesuit institution, was initially housed in the Theological Studies department, but has since moved to the College of Arts and Sciences.⁹⁶ However, theology remains a required course towards the Associate of Arts degree,⁹⁷ in addition to core courses in English, fine arts, literature, math, world history, philosophy, science, and the social sciences.⁹⁸

3. *Relationship to Reentry*

Higher education programs in prison are either *inside focused* or *reentry focused*. Some programs focus exclusively on educating inmates while they are in prison, whereas other programs give priority to preparing inmates for reentry and easing their transition into educational programs outside of prison upon their release.⁹⁹ As one might expect, whether a program is inside focused or reentry focused is strongly correlated with whether inmates participating in that program are likely to be released. One extreme example is Angola, which is decidedly inside focused; since most Angola prisoners are lifers, the issue of reentry is not realistic for most students and is not much discussed.¹⁰⁰

By contrast, the Prison-to-College Pipeline, which is administered by the Prisoner Reentry Institute at John Jay College of Criminal Justice, is explicitly described by its founder as “reentry-oriented.”¹⁰¹ The program guarantees all students who receive passing grades a spot in the College of New York (CUNY) system upon release. All

⁹⁵ *Id.* at 1241. Admission to the program requires a GED, recommendation by an inmate minister or pastor, and a personal statement. In addition, before beginning the formal course, participants are required to attend a weekend course or “retreat” entitled “Experiencing God.” *See id.* at 1240; *see also* Telephone Interview with Cathy Fontenot, *supra* note 13.

⁹⁶ *See* Telephone Interview with Mary Gould, *supra* note 13; *see also* *Prison Program: Frequently Asked Questions*, St. Louis U., <https://www.slu.edu/arts-and-sciences/prison-program/faq.php> (last visited Nov. 7, 2019) (noting that the Prison Program began offering a certificate in theological studies in 2008, and then an Associate of Arts degree starting in 2011).

⁹⁷ *See* Telephone Interview with Mary Gould, *supra* note 13; *see also* *Prison Program: Curriculum*, St. Louis U., <https://www.slu.edu/arts-and-sciences/prison-program/programs/curriculum.php> (last visited Nov. 7, 2019).

⁹⁸ *Prison Program: Curriculum*, *supra* note 97.

⁹⁹ While some programs allow inmates to earn their degrees while incarcerated, others are only able to offer a particular fraction of credits towards a degree in prison, requiring students to wait until after release to complete their degrees. *See, e.g., supra* text accompanying note 91 (explaining that the Jessup program is only accredited for forty-nine percent of the Bachelor's degree); *see also* Telephone Interview with Joshua Miller, *supra* note 13.

¹⁰⁰ Telephone Interview with Cathy Fontenot, *supra* note 13.

¹⁰¹ Telephone Interview with Baz Dreisinger, *supra* note 13.

Prison-to-College Pipeline courses are CUNY general education requirements,¹⁰² and all credits earned in prison are transferable to the CUNY system.¹⁰³ Given this focus on the “pipeline” from prison to college, only prisoners within five years of release are eligible to enroll in the program.¹⁰⁴

In response to changes in legislation and parole board practices, some programs have shifted from an inside-focused approach to a reentry-focused model. For example, the Bard Prison Initiative program was initially inside focused, but “in 2008, more people were going home,” which created a demand for reentry services.¹⁰⁵ Bard originally “partnered with New York reentry groups” but many individuals who were newly released expressed concern that “it wasn’t working for them” because, despite the fact that Bard Prison Initiative graduates held undergraduate degrees from Bard College, these state-wide reentry programs “were trying to set people up in McDonald’s or offered to help them get GEDs.”¹⁰⁶ The Bard Prison Initiative leadership also found that “it was hard for alums who were with Bard for four to five years to start over with another organization.”¹⁰⁷ For this reason, Bard decided to consult with alumni and to “do reentry work [their] way,” asking alumni, “what do you wish you had gotten from us?”¹⁰⁸ The responses from alumni shaped the development of Bard’s reentry work, which now includes both “practical help,” such as resume writing and housing search assistance, and “substantive assistance,” such as expanded course offerings in public health, urban farming, and computer science.¹⁰⁹

4. Funding

Funding for existing programs is either *private*, *public*, or a *hybrid*. Many institutional recipients of the 2015 Second Chance Pell Pilot are newly developed, publicly funded programs. Recipients of the 2015 Pell Pilot that were already in existence before the Pell Pilot

¹⁰² *Id.*; see also *How P2CP Works*, JOHN JAY C. CRIM. JUST. PRISONER REENTRY INST., <http://johnjaypri.org/educational-initiatives/prison-to-college-pipeline/how-p2cp-works> (last visited Nov. 7, 2019).

¹⁰³ See Telephone Interview with Baz Dreisinger, *supra* note 13.

¹⁰⁴ See *id.* One critique of this model is that the strong orientation towards reentry has the effect of excluding academically qualified students solely because of their projected release dates.

¹⁰⁵ Telephone Interview with Laura Liebman, *supra* note 13.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

(and thus privately funded) are examples of hybrid programs.¹¹⁰ Many religious programs are privately funded,¹¹¹ as are programs that predated the Pell Pilot and were not among the sixty-seven institutions selected in 2015 for public funding.

There are many tradeoffs that program leaders may consider in determining (to the extent that a choice is available) whether to prefer public or private funding. For example, the leadership of private programs may prefer not to accept government funds in order to avoid government-imposed restrictions, such as eligibility requirements.¹¹² Indeed, even in light of the Pell Pilot initiative,¹¹³ leaders of some privately funded programs expressed concern about accepting the public money. Emphasizing the importance of keeping the program open to all qualified inmates, regardless of projected release date, Jody Lewen of the Prison University Project explained, “With public money, we don’t have that luxury.”¹¹⁴ Some representatives of privately funded programs suggested that they would never want to rely too heavily on public money because it could come and go with the fickle political winds. For example, Laura Liebman of the Bard Prison Initiative remarked that the Bard program would accept some public funding but would not want government money to account for more than ten percent of its budget.¹¹⁵

¹¹⁰ See CASSANDRA DORTCH & NATHAN JAMES, CONG. RESEARCH SERV., LIBRARY OF CONG., R45737, PRISONERS’ ELIGIBILITY FOR PELL GRANTS: ISSUES FOR CONGRESS 9 (2019) (noting that more than half of the institutional recipients are public two-year colleges and about one-third of them did not provide postsecondary correctional education prior to the Pell Pilot); see also *Institutions Selected for Participation in the Second Chance Pell Experiment in the 2016-2017 Award Year*, U.S. DEP’T EDUC., <http://www2.ed.gov/documents/press-releases/second-chance-pell-institutions.pdf> (last visited Nov. 7, 2019) (listing forty-three institutions that already had existing programs).

¹¹¹ For example, the Bible College program at Angola is funded privately by the New Orleans Baptist Theological Seminary. See ERZEN, *supra* note 11, at 62 (discussing the sources of funding for the seminary program at Angola); Erik Eckholm, *Bible College Helps Some at Louisiana Prison Find Peace*, N.Y. TIMES (Oct. 5, 2013), <https://archive.nytimes.com/www.nytimes.com/2013/10/06/us/bible-college-helps-some-at-louisiana-prison-find-peace.html> (describing how the New Orleans Baptist Theological Seminary agreed to open a seminary at Angola and would cover the costs with outside donations). In 2015, an anonymous donor provided funds for the Joan Horner Center, “an 11,000 square foot building with a computer lab, two classrooms, an auditorium and library,” which was named after a “long-time supporter[] of the Angola ministry.” Marilyn Stewart, *NOBTS Angola Prison Celebrates 20 Years of Changing Lives with New Facility*, NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY (Sept. 8, 2015), <http://www.nobts.edu/news/articles/2015/nobts-angola-prison-celebrates-20-years-of-changing-lives-with-new-facility.html>.

¹¹² See *supra* Section I.B.1.

¹¹³ See *U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals*, *supra* note 60.

¹¹⁴ Telephone Interview with Jody Lewen, *supra* note 13.

¹¹⁵ Telephone Interview with Laura Liebman, *supra* note 13.

However, while programs like the Bard Prison Initiative and the Prison University Project have managed to flourish in the absence of public money, government money may be indispensable for larger-scale projects. Debbie Mukamal, a founder of California's Renewing Communities Initiative, noted that, while "Max Kenner [at Bard Prison Initiative] sets the bar," to address the issue at scale (beyond the creation of a few "boutique" programs like the one at Bard), you "can't rely on private funding."¹¹⁶ Further, private programs are responsible for their own fundraising and subject to the priorities of their donors, which may create its own challenges.¹¹⁷

5. *Mode of Instruction*

The mode of instruction—whether a program will feature *in-person instruction* or *remote instruction*, which includes pre-recorded videos and correspondence courses—is highly contingent on resources. As might be expected, the most well-funded programs are able to offer in-person instruction, while those with less funding must opt for less resource-intensive options, such as showing pre-recorded videos in a classroom.

Leaders of some prison higher education programs insist that in-person instruction is non-negotiable because "mentoring is critical" and only possible through in-class learning.¹¹⁸ Laura Liebman of the Bard Prison Initiative explained that online college courses are barred from Bard's program because of the State of New York's internet policy but, online access aside, "we're not interested."¹¹⁹

Others have noted the benefits of online classes because they enable inmates to continue their courses with minimal disruption when transferred between prisons and upon release.¹²⁰ Various pilot

¹¹⁶ Telephone Interview with Debbie Mukamal, *supra* note 13.

¹¹⁷ Foundation support has increasingly played a greater role, with organizations such as the Ford Foundation, the Mellon Foundation, and the Gates Foundation becoming more involved in individual programs, as well as in systemic efforts to broaden access to higher education in prison. See Margaret diZerega, *College in Prison*, VERA INST. JUST., <https://www.vera.org/projects/college-in-prison/learn-more> (last visited Nov. 7, 2019).

¹¹⁸ Telephone Interview with Jody Lewen, *supra* note 13; Telephone Interview with Laura Liebman, *supra* note 13.

¹¹⁹ *Family Guide – Frequently Asked Questions*, N.Y.S. DEP'T OF CORR. & CMTY. SUPERVISION, <http://www.doccs.ny.gov/FamilyGuide/fgfaq.html#q4> (last visited Nov. 7, 2019) ("Offenders do not have access to e-mail or internet services."); Telephone Interview with Laura Liebman, *supra* note 13.

¹²⁰ See, e.g., LAUREN CAHALAN ET AL., *RECIDIVISM AND BARRIERS TO SUCCESSFUL REENTRY* 5–6 (2016), http://publicservicescholars.umbc.edu/files/2016/11/Recidivism-and-Barriers-to-Successful-Reentry_Final.pdf (asserting that technical training during imprisonment can continue after an inmate's release, thereby facilitating an inmate's reentry into society).

programs use different modes of remote instruction through online courses. In New Mexico, all educational programming is provided to prisons through a WebCT engine, which allows prisoners to enroll in courses online but restricts them from accessing email and external websites.¹²¹ A pilot program in New Jersey, Prison to Community (P2C), allows students to use streaming technology to take online courses.¹²²

Some programs illustrate a hybrid option that involves both remote and in-person components. For example, in one prison outside of Seattle, a group of students pick one correspondence course, which a single volunteer facilitates in person.¹²³ Resource constraints are central to this choice of program: “The advantage of this approach is that you need only one dedicated volunteer.”¹²⁴

II

LIMITATIONS OF THE HARM-PREVENTION APPROACH

Proponents of prison programs speak of them primarily as tools of harm prevention: These programs prevent harm within prisons by improving order maintenance, and they prevent harm outside prisons by reducing recidivism. According to this formulation, prison higher education is not an independent good, let alone a right,¹²⁵ but rather it is useful as a criminal justice tool. This Part critically examines these instrumental arguments and draws attention to the limitations

¹²¹ DIANNA M. SPYCHER ET AL., COLL. BD. ADVOCACY & POLICY CTR., *THE OTHER PIPELINE: FROM PRISON TO DIPLOMA* 12 (2012), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.269.6827&rep=rep1&type=pdf>.

¹²² CAHALAN ET AL., *supra* note 120, at 9.

¹²³ Telephone Interview with Jennifer Drew, *supra* note 13.

¹²⁴ *Id.*

¹²⁵ The United States is not a signatory to Article 13 of the International Covenant on Economic, Social and Cultural Rights, which establishes a right to higher education. International Covenant on Economic, Social and Cultural Rights art. 13(2)(c), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (“Higher education shall be made equally accessible to all . . . by every appropriate means, and in particular by the progressive introduction of free education.”). While there is no mention of prisoners in this section, nor is there any caveat that would exclude those incarcerated from the declaration that “[t]he States Parties to the Covenant recognize the right of everyone to education.” *Id.* at art. 13(1). As signatories, some countries have recognized greater access to government-provided education, as codified in their constitutions. *See, e.g.*, SUOMEN PERUSTUSLAKI [CONSTITUTION], 1 luku § 16 (Fin.), *translated in* finlex.fi/en/laki/kaannokset/1999/en19990731 (guaranteeing the right to higher education); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 43 (Russ.), *translated in* archive.government.ru/eng/gov/base/54.html (providing a right to receive free higher education); S. AFR. CONST., 1996 § 29(1)(b) (providing that the right “to further education” will be secured by the state “through reasonable measures”).

resulting from an exclusive focus on prison programs as a means of harm prevention.¹²⁶

A. Reducing Recidivism

The dominant justification for prison higher education is recidivism reduction.¹²⁷ Reducing recidivism has several public benefits,¹²⁸ and a 2014 RAND study found that individuals who participate in any educational program have forty-three percent lower odds of recidivating than those who do not participate in educational programs.¹²⁹ The results of this study have been widely touted by advocates of prison higher education programs across the political spectrum and provided significant momentum for President Obama's Second Chance Pell Pilot program.¹³⁰ Media accounts of prison higher education programs also focus on their success in reducing recidivism.¹³¹

¹²⁶ While this Article highlights the limitations of an anti-recidivism focus, it does not mean to suggest that a coalition of prison higher education advocates should shun those who support these programs because they correlate with a decrease in recidivism. Rather, the Article maintains that there are also moral arguments in favor of these programs, and that we should think of the formerly incarcerated not merely as a problem needing to be solved but rather as members of the polity.

¹²⁷ See, e.g., Chen, *supra* note 63; Eric Westervelt, *Measuring the Power of a Prison Education*, NPRED (July 31, 2015, 9:03 AM), <http://www.npr.org/sections/ed/2015/07/31/427741914/measuring-the-power-of-a-prison-education>.

¹²⁸ The advantages of recidivism reduction include reducing the aggregate crime rate and saving taxpayer money, and these goals are often considered in tandem as part of a cost-benefit analysis. See Adam Gelb & Tracy Velázquez, *The Changing State of Recidivism: Fewer People Going Back to Prison*, PEW (Aug. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison> (noting that decreasing recidivism is accompanied by reductions in both crime and spending on prisons). Similar studies have found that participation in higher education programs significantly reduced a person's risk of recidivating and that, whereas "a \$1 million investment in incarceration will prevent about 350 crimes . . . that same investment in education will prevent more than 600 crimes." AUDREY BAZOS & JESSICA HAUSMAN, UCLA SCH. OF PUB. POLICY & SOC. RESEARCH, CORRECTIONAL EDUCATION AS A CRIME CONTROL PROGRAM 10 (2004), <https://lincs.ed.gov/professional-development-resource-collections/profil-512>.

¹²⁹ DAVIS ET AL., *supra* note 59, at 14.

¹³⁰ See, e.g., Press Release, U.S. Dep't of Educ., Citing Prison Inmate Literacy Study, King Calls for More High-Quality Education Programs in Correctional Facilities (Nov. 17, 2016), <https://www.ed.gov/news/press-releases/citing-prison-inmate-literacy-study-king-calls-more-high-quality-education-programs-correctional-facilities>; Editorial, *Let Prisoners Learn While They Serve*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/opinion/prison-education-programs-html>; Christine Smith, *Prison Programming with Education Focus Reduces Recidivism*, AM. LEGISLATIVE EXCH. COUNCIL (Mar. 4, 2016), <https://www.alec.org/article/prison-programming-with-education-focus-reduces-recidivism>.

¹³¹ See, e.g., Editorial, *A College Education for Prisoners*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/16/opinion/a-college-education-for-prisoners.html> (referring to the Bard Prison Initiative's "remarkable recidivism rate of 4 percent for inmates who merely participated in the program and 2.5 percent for those who earned

Yet an exclusive focus on recidivism reduction is susceptible to criticism on at least five grounds. First, there is no consensus about how to define recidivism.¹³² Definitions of recidivism range from “reconviction, re-incarceration (in a jail or prison), imprisonment, re-arrest, and re-arraignment.”¹³³ Some of these definitions are inherently problematic: For example, using *re-arrest* data is overinclusive, and it offends the principle that a person is considered innocent until proven guilty.¹³⁴ Using *reconviction* data, on the other hand, may be underinclusive, since not everyone will be convicted for each crime committed.¹³⁵

Second, a sole focus on recidivism reduction would make the availability of prison programs contingent on a cost-effectiveness analysis. There would be no reason to conclude that any particular prison program—for example, higher education—should even be afforded as an option for those incarcerated, unless data indicate that it fares well in comparison to the recidivism-reducing results of other prison programs. Moreover, even if exposure to higher education did meet that recidivism-reducing threshold, outperforming other programs, there would be no inherent advantage to an inmate *completing* a college degree, unless the cost-effectiveness calculus showed that the extra resources sufficiently corresponded to a further reduction in recidivism. Such an approach might thus result in policies that disfavored degree completion. As one prison education expert explained, when

degrees in prison”); News Release, Chaffey Coll., Chaffey College Receives \$140,000 Grant to Expand Program for Incarcerated Individuals (Mar. 31, 2015), <https://www.chaffey.edu/releases/CIM%20opportunity%20grant.shtml> (describing Chaffey College’s program for women incarcerated at Chino Institution for Women, and highlighting that, ten years since the program’s inception, “only one student has been re-incarcerated (a .04% compared to the statewide 48.9% rate)”); Telephone Interview with Daniel Karpowitz, *supra* note 13 (emphasizing that the goals of the Bard Prison Initiative are educational and not criminal-justice-related while acknowledging that the program has received significant media attention precisely because of the program’s demonstrated success in reducing recidivism).

¹³² Tayler Ruggero et al., *Measuring Recidivism: Definitions, Errors, and Data Sources* 1 (Ctr. for Pub. Safety Initiatives, Working Paper No. 2015-03, 2015) (“[T]here is no consistent definition of recidivism.”).

¹³³ *Id.* at 2–3.

¹³⁴ See, e.g., *Wilkerson v. Commonwealth*, 76 S.W. 359, 361 (Ky. 1903) (emphasizing that the presumption of innocence, a presumption of both fact and of law, is a fundamental foundation of the criminal justice system); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 728 (2011) (noting that the presumption of innocence forbids judges from detaining defendants solely out of a concern that they may commit a crime upon release).

¹³⁵ See, e.g., Alan M. Dershowitz, *Foreword* to HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT*, at xix (2009) (arguing that, due to an ever-expanding body of criminal law, the average American unwittingly commits three felonies each day).

the goal of recidivism reduction is primary, “you try to figure out [the] lowest dosage to get [the] desired outcome.”¹³⁶

Third, a myopic focus on recidivism reduction may alienate prison higher education leaders, whose priority is to broaden access to college degrees. One practitioner, particularly concerned that data about the favorable effects of higher education could be used to support a “limited dosage,” asked rhetorically: “Are you sure you *want* that data?”¹³⁷ The concern here is that, due to “psycho-social effects, . . . a single class could be transformative,”¹³⁸ and thus, efforts by higher education leaders to broaden access to college degrees might be thwarted. If policymakers relied on data suggesting that participation in even one college course reduced the likelihood that a person would recidivate, such data could be used as a justification to deemphasize college degrees and instead focus on providing broader access to a single college course. Ultimately, while someone whose priority is recidivism reduction would consider these data crucial to program design and resource allocation, whatever the result, this approach could backfire if it led concerned program directors to refuse either to participate in data collection or to report their findings. This point of tension is not merely theoretical; rather, it represents a fundamental disagreement in approach and priorities among those who are otherwise united—at a higher level of generality—in favor of higher education in prison.¹³⁹

Fourth, focusing on recidivism metrics risks instrumentalizing education and abstracting the humans involved in the educational enterprise,¹⁴⁰ rendering the incarcerated person a mere “passive object of the program.”¹⁴¹ One prison higher education advocate analogized the narrative of recidivism reduction to “a car wash.”¹⁴² She suggested that, according to this account, “[you] build a program, you shove prisoners through the program, and if successful, you let them out . . . and they won’t steal [from you].”¹⁴³

¹³⁶ Telephone Interview with Jody Lewen, *supra* note 13.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ For example, some prison education experts who are particularly concerned with educational rather than criminal justice goals expressed concern (either theirs or what they learned from others) about the Vera Institute’s role—as a criminal justice institute rather than an educational institution—as technical assistance provider to the Department of Education for the Second Chance Pell Pilot. *See, e.g., id.*; Telephone Interview with Debbie Mukamal, *supra* note 13.

¹⁴⁰ The “maintaining prison order” rationale is also susceptible to this critique. *See infra* Section II.B.

¹⁴¹ Telephone Interview with Jody Lewen, *supra* note 13.

¹⁴² *Id.*

¹⁴³ *Id.*

Fifth, studies demonstrating that prison education programs reduce recidivism may be susceptible to significant methodological challenges, specifically with respect to demonstrating causation. For example, if subjects of a study who participate in prison higher education programs are also “more motivated to make positive changes in their lives than those who do not participate in such programs and therefore, may be less likely to reengage in criminal activity,” a failure to account for selection bias would threaten the internal validity of the study.¹⁴⁴

B. Maintaining Prison Order

Prison higher education programs also have been celebrated for their role in maintaining order, thus preventing harm *within* prisons. Corrections leaders “look favorably on structure,” and they view programs, including higher education, as a “vital way to manage populations.”¹⁴⁵ Central to a risk management inquiry is “whether a particular practice will ‘translate into anything that can provide a viable handle on [an] agency’s tasks in law enforcement.’”¹⁴⁶ Evidence that educational programs improve prison order and reduce violent incidents directed at both staff and other inmates provides support for maintaining and expanding the reach of these programs.¹⁴⁷

This approach, with its focus on risk management inside prisons, is susceptible to many of the same criticisms as the recidivism-reduction approach, which gives priority to harm prevention outside prisons. It fails to individualize participants by putting its “emphasis on systemic goals, rather than individualized or external social ideals” and by viewing participants “as an aggregate, rather than individuals.”¹⁴⁸ Further, like the recidivism-reduction approach, this narrow

¹⁴⁴ Ryang Hui Kim & David Clark, *The Effect of Prison-Based College Education Programs on Recidivism: Propensity Score Matching Approach*, 41 J. CRIM. JUST. 196, 196–98 (2013) (“[I]nflated estimates of the treatment effect may result when research does not take self-selection bias into account.”). Further, it is difficult to know whether a person would have committed more crimes but for education. In other words, education could *reduce* but not *eliminate* reoffending, and we would never know without a means of predicting how many more (or what type of) crimes a person was going to commit after release.

¹⁴⁵ Telephone Interview with Fred Patrick, *supra* note 13.

¹⁴⁶ Knott, *supra* note 47, at 281 (quoting Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992)).

¹⁴⁷ See, e.g., VERA INST. OF JUSTICE, EXPANDING ACCESS TO POSTSECONDARY EDUCATION IN PRISON (2017) (“Prisons with college programs have fewer violent incidents, creating safer working conditions for staff and safer living environments for incarcerated people.”).

¹⁴⁸ Knott, *supra* note 47, at 281.

order-maintenance approach obscures larger policy questions about sentencing excesses, reentry challenges, and best practices for transitioning individuals from prison to mainstream society. Moreover, in some respects, the order-maintenance approach is even more myopic than the recidivism-reduction approach. If maintaining prison order is one's highest priority, it is questionable whether prison higher education programs would ever survive a cost-effectiveness analysis. There are many other programmatic options that require less human capital and might comparably distract (or placate) inmates while in prison—for example, access to televisions or other electronic media. However, such distractions, while perhaps successful in maintaining order within the prison context, would not necessarily play any role in harm prevention outside prison, i.e., by enabling a person to function productively in society upon release.

C. Rehabilitation

Prison programs, including higher education, also have been justified as a means of rehabilitation. While there is no consensus about the meaning of rehabilitation, the two dominant constructions of rehabilitation in this context are, first, as a means of harm prevention and, second, as a means of religious redemption.

Rehabilitation has been cast as a means of harm prevention by reference both to order-maintenance goals and to the goal of recidivism reduction.¹⁴⁹ Towards the aims of order maintenance, rehabilitation has been described as “essentially a technical device to mold the personality of offenders and obtain their compliance with a predesigned pattern of thought and behavior . . . [An] instrument of institutional discipline.”¹⁵⁰ Mission statements of departments of correction explicitly tie the goal of rehabilitation to crime reduction.¹⁵¹

¹⁴⁹ In theory, a rehabilitative framework could look beyond narrow questions of how a program serves criminal justice purposes and could avoid instrumentalizing participants. See Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1025–26 (1986) (favoring a “humanistic” or “liberty-centered” ideal of rehabilitation, as contrasted with the disfavored “authoritarian” or “paternalistic” version of rehabilitation). In practice, however, rehabilitative benefits tend to be framed in harm-prevention terms. See, e.g., *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, U.S. DEP'T JUST., <https://www.justice.gov/archives/prison-reform> (last updated Mar. 6, 2017) (describing a focus on “evidence-based rehabilitation strategies . . . with the goal of reducing the likelihood that inmates re-offend either while incarcerated or after their release”).

¹⁵⁰ Rotman, *supra* note 149, at 1026.

¹⁵¹ See, e.g., *Mission Statement*, R.I. DEP'T CORR., <http://www.doc.ri.gov/director/mission.php> (last visited Oct. 6, 2019) (“Efforts to rehabilitate and reintegrate criminal

Some supporters of prisoner higher education also have attempted to tie rehabilitation to recidivism metrics.¹⁵²

Rehabilitative benefits have also been framed in highly individualized, sectarian terms. Here, the focus is on the personal transformation of the individual and takes on a religious quality akin to the Christian notion of redemption.¹⁵³ Indeed, the justification for prison higher education as rehabilitative—and especially the notion that one can be “saved” or “redeemed” through such programs—has been favored by prison leadership whose Christian beliefs are central to their understanding of their professional roles.¹⁵⁴

Notably, the notions of rehabilitation as an order-maintenance strategy and as a means of redemption are not mutually exclusive. For example, at Angola, higher education, and specifically religious ministry,¹⁵⁵ is an integral part of the institution’s mission of “moral reha-

offenders as law-abiding and productive members of society are essential to the reduction of crime.”).

¹⁵² See, e.g., Mike Savino, *Inmates in Cheshire Say College Level Classes Offer Hope, Improve Prison Behavior*, RECORD-JOURNAL (Aug. 6, 2017), <http://www.myrecordjournal.com/Archive/2017/08/regPrisonClass-RJ-080617> (quoting the Undersecretary for Criminal Justice Policy and Planning at the Connecticut Office of Policy and Management).

¹⁵³ See, e.g., *Our Mission Is to Restore Those Affected by Crime and Incarceration*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/about/beliefs> (last visited Oct. 6, 2019) (“As Christians, we believe that Jesus . . . offers hope, healing, and a new purpose for each life. . . . Through an amazing awakening . . . those who once broke the law are transformed and mobilized to serve their neighbors, replacing the cycle of crime with a cycle of renewal.”); *Seeking Restoration and Rehabilitation in our Corrections System*, DAMASCUS WAY REENTRY CTR. (Mar. 28, 2016), <https://damascusway.com/seeking-restoration-and-rehabilitation-in-our-corrections-system> (“Human beings are capable of change. No one knows that better than Christians, who have received God’s transformational grace through Jesus Christ. Because of the personal power of repentance, we are committed to rehabilitation for ex-offenders, and enacting corrections policies that are committed to rehabilitation.”).

¹⁵⁴ See generally DENNIS SHERE, *CAIN’S REDEMPTION: A STORY OF HOPE AND TRANSFORMATION IN AMERICA’S BLOODIEST PRISON* (2005) (describing the interconnectedness of former warden Burl Cain’s belief in the redemptive power of the Christian gospel to “save sinners” and his rehabilitative vision for prisoners at Angola).

¹⁵⁵ While one must be Christian to be ordained as a minister, the Seminary courses are open to all, and the leadership at Angola insists that “it doesn’t matter which religion,” clarifying that “we find morality quickest through religion.” Pam LeBlanc, *One Day of ‘Freedom,’* MYSTATESMAN (Nov. 13, 2015), <http://specials.mystatesman.com/angola-prison-rodeo>. However, the message of Seminary leadership is decidedly sectarian. In the words of Seminary President, Chuck Kelley, “Jesus Christ can make anybody new.” *Kelley Credits Jesus for the Transformation of Angola, Prisoners*, THE MESSAGE (June 6, 2017), <http://baptistmessage.com/kelley-credits-jesus-transformation-angola-prisoners>. Once they have been ordained as ministers, Angola prisoners may volunteer to transfer to other Louisiana prisons to serve as missionaries. Telephone Interview with Greg Woodward, *supra* note 13. While beyond the scope of this Article, this practice raises the possibility of First Amendment, Establishment Clause concerns based on sending prisoners in public prisons, using public funding, to other public prisons as missionaries.

bilitation,”¹⁵⁶ which has been lauded for radically transforming the culture at the notoriously violent Louisiana State Penitentiary.¹⁵⁷ Supporters celebrate order-maintenance metrics; whereas in 1991, prior to the moral rehabilitation program, there were about 500 inmate-on-inmate assaults, that number dropped to 60 in 2006, a decrease of 88%.¹⁵⁸ Supporters also highlight religious or redemptive benchmarks; since Angola partnered with the New Orleans Baptist Seminary, “at least 100 inmates are baptized inside the prison every year.”¹⁵⁹

Both strands of the rehabilitation rationale for prison higher education—and their respective metrics—are subject to criticism.¹⁶⁰ The “order maintenance” strand that would use reduction in prison violence as a metric is subject to the criticisms discussed above in the context of the use of prison education as a risk-management tool.¹⁶¹ The “redemption” strand that would use metrics that are religious in nature, such as the number of inmates baptized per year, may be fairly criticized as providing no reliable information about future behavior. Further, to the extent that rehabilitation is used as a proxy for redemption, there will be concerns about the religious overtones of this framework and especially about the substantial involvement of religious institutions whose mission involves converting nonbelievers

¹⁵⁶ To avoid running afoul of First Amendment separation of church and state doctrine, the leadership at Angola adopted a “moral rehabilitation” paradigm, which is essentially a secularized approach to salvation. Telephone Interview with Cathy Fontenot, *supra* note 13. This terminology was strategically chosen to avoid controversy after the leadership at Angola met with the American Civil Liberties Union. *Id.* Quite simply, Fontenot explained, “we didn’t want lawsuits.” *Id.*

¹⁵⁷ See Bergeron, *supra* note 94, at 1237–38 (“Angola was historically known as one of the most dangerous prisons in the country.”). Inspired by this approach, leaders of other states’ Departments of Corrections—for example, in Illinois and New Mexico—have visited Angola and subsequently set up Bible colleges in their state prisons. Telephone Interview with Cathy Fontenot, *supra* note 13.

¹⁵⁸ *Id.* at 1238 n.129.

¹⁵⁹ THE MESSAGE, *supra* note 155. For a general discussion of religion at Angola, see Bergeron, *supra* note 94, at 1239–43.

¹⁶⁰ Beyond the specific objections that follow, any state efforts to “transform” adult individuals may be criticized as paternalistic. See, e.g., David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 522–23 (1988) (defining paternalism as an action taken to benefit others independent of their consent). See generally JOEL FEINBERG, *Legal Paternalism*, in 3 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986) (describing legal paternalism as an action that involuntarily interferes with another’s will). While this critique may have salience as a philosophical matter, in practice, prison policy in the United States is unabashedly paternalistic. See, e.g., James Q. Whitman, *The Case for Penal Modernism: Beyond Utility and Desert*, 1 CRITICAL ANALYSIS L. 143, 158–59, 180 (2014).

¹⁶¹ See *supra* Section II.B.

to their faith.¹⁶² Moreover, where benefits (e.g., opportunities for early release) accrue to inmates who avail themselves of higher education classes, and these classes are expressly religious, there are genuine concerns about coercion.¹⁶³

D. Program Design Implications

These various harm-prevention approaches are subject to different criticisms, and they also give rise to distinct program design preferences. If one gives priority to the goal of recidivism reduction, it follows that programs should be restricted based on date to release. Higher educational opportunities should be offered only to those incarcerated individuals who eventually will be released, and the highest priority should be given to those individuals who will be released within a few years. The preferred curriculum will be whatever best serves recidivism-reduction goals, with no preference as between a liberal arts, pre-professional, or religious studies curriculum. Reentry focused programs would be preferred, and resources should be provided to make the transition to mainstream society upon release as smooth as possible. Rigorous testing and assessment mechanisms—including a longitudinal study of participants—should be funded and implemented,¹⁶⁴ and resulting data should guide future program design.¹⁶⁵

One whose priority is maintaining prison order will prefer open eligibility and not favor a particular mode of instruction, since “keeping inmates out of trouble” does not depend on in-person interaction with an instructor. Curricular details are unimportant, and there is no concern about reentry prospects or the ability for a student to continue a course of study upon release.

Where rehabilitation goals are essentially synonymous with order maintenance, the same design choices should follow. For example, one would strongly prefer open eligibility over restricted eligibility. Where the goals of rehabilitation more closely resemble redemption, the cur-

¹⁶² At Angola, the Seminary teaches “the exclusivity of Christ” and inmate ministers receive the highest hourly rates among prison inmates, providing an incentive for inmates to study at the Seminary. *See* Bergeron, *supra* note 94, at 1241–42, 1241 n.160.

¹⁶³ *See, e.g.,* Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (finding improper government coercion where failure to attend a religious program could have implications for security classification and parole).

¹⁶⁴ Notably, no funds were allocated for the evaluation or assessment of the Second Chance Pell Pilot program. Telephone Interview with Jody Lewen, *supra* note 13. Without the relevant data, it is impossible to assess the “success” of programs with respect to recidivism reduction or any other metrics.

¹⁶⁵ If the goal is recidivism reduction, one is likely to prefer randomized control trials in order to control for self-selection.

riculum would be centered around morality and religious teachings—likely to the exclusion of secular studies.

III

DEBUNKING THE DESERT-BASED OBJECTION

Part III identifies and critically examines the dominant, desert-based opposition to prison programs.¹⁶⁶ It highlights the cultural resistance that undergirds this opposition: an “us-versus-them” dynamic that pits prisoners against non-incarcerated members of the polity and reflects a belief that prisoners—even after completing their prison terms—are second-class citizens. It also identifies an “us-versus-them” dynamic between prisoners and correctional officers, revealing that this dynamic may best be characterized as an argument about distributive fairness. Understanding the root of these “us-versus-them” dynamics is crucial to any reformist efforts to mitigate them.

A. *The Problem of Colloquial Retributivism*

The leading objection to prison higher education programs is grounded in the claim that prisoners do not *deserve* opportunities for higher education.¹⁶⁷ Since “just deserts” is the purview of retributivism, assessing this argument demands that one turn to retributive theory. The two primary retributive goals of punishment, what this Article refers to as “retributive philosophy,” include (1) imposing

¹⁶⁶ While the dominant objections to prisoner higher education are deontological, it bears mention that there is also a possible (albeit largely theoretical) objection framed in consequentialist terms. This objection is grounded in concerns about general deterrence: The prospect of prison will be a deterrent only if prisons are understood to be sites of deprivation that one would take pains to avoid, and the provision of higher educational opportunities would subvert this understanding. According to this argument, the possibility of completing college courses, or even a college degree, while in prison undermines the message that prison is a site of deprivation, taking away some of the sharp bite, and with it, some of the deterrent effect. This argument is extremely weak, however. First, an extensive literature has cast doubt on whether deterrence theory actually plays out in practice. See, e.g., Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766, 818 (2010) (discussing the generally weak empirical support for criminal deterrence). Second, this objection would overlook the many aspects of prison that restrict an inmate’s freedom and make prison decidedly not like life outside prison walls; indeed, the restriction of liberty and autonomy inherent in the experience of incarceration is independent of prison conditions or programmatic features. See generally DOMINIQUE MORAN, *CARCERAL GEOGRAPHY: SPACES AND PRACTICES OF INCARCERATION* 78 (2015) (describing prisoners’ lack of autonomy and extremely limited mobility).

¹⁶⁷ This claim, rooted in desert, does not depend on what educational opportunities are available to non-prisoners.

punishment that causes pain or unpleasantness;¹⁶⁸ and (2) proportionality, i.e., calibrating this punishment to the individual's crime.¹⁶⁹

A categorical ban on prison higher education would run counter to retributive principles. First, education does not constitute punishment under the legal definition laid out in *Kennedy v. Mendoza-Martinez*,¹⁷⁰ which requires courts to consider whether the sanction at issue “has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”¹⁷¹ Education has never been characterized as punishment and, historically, withholding educational access has not been used as a form of punishment.¹⁷² Thus, in the retributivist's search for proportionate punishment, education would not be an integral part of the equation.

Second, even if the state *were* to consider deprivation of educational resources as punishment—imposed as part of the crime-punishment calibration—the retributivist would only favor individual, *ex ante* denial of education rather than a categorical rule against education. The priority of the retributivist is to calibrate the harshness of punishment to the particular individual, and such deprivation would affect different individuals very differently.¹⁷³

Unless imposed *ex ante*, and purposefully as part of the person's punishment, such deprivation would render an otherwise proportionate punishment disproportionate inasmuch as it would constitute an *extension* of that person's punishment post-release, or punishment-plus.¹⁷⁴ Since education is orthogonal to punishment, the categorical

¹⁶⁸ See, e.g., Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1284 (Joshua Dressler et al. eds., 2d ed. 2002); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009) (“When the state punishes a criminal, it inflicts suffering.”).

¹⁶⁹ See, e.g., Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 56 (1992); Lee, *supra* note 19.

¹⁷⁰ 372 U.S. 144, 168–70 (1963) (outlining the multi-factor test used by courts to determine what constitutes punishment).

¹⁷¹ *Smith v. Doe*, 538 U.S. 84, 97 (2003).

¹⁷² While, historically, education—or withholding of education—has not been regarded as punishment, it has, however, been imposed for rehabilitative purposes. See *supra* Section II.C.

¹⁷³ See, e.g., Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 189 (2009) (“[P]unishments vary in their severity based on the subjective experience.”). While courts have not been willing to consider how restrictions on liberty and autonomy affect prisoners differently, those restrictions are considered fundamental to incarceration, while the deprivation of education is not.

¹⁷⁴ According to core principles of retributive justice, it would be unjust to punish a wrongdoer more than she deserves; what she deserves must be in some way proportional to the gravity of her crime. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 436 (1979)

denial of education would extend beyond the punishment authorized by the criminal code and imposed by the state.

The facial objection to prison higher education that claims retributivism as its foundation and would deny educational resources categorically to all incarcerated individuals thus fundamentally misconstrues retributive principles. It is instead a manifestation of what this Article terms “colloquial retributivism.” The priority of colloquial retributivism is deprivation, or vengeance,¹⁷⁵ and the proportionality inquiry—which is the cornerstone of retributive philosophy—is entirely absent.¹⁷⁶

The colloquial-retributivist approach, with its focus on deprivation, not only goes beyond retributive philosophy,¹⁷⁷ it is also consistent with extreme notions of forfeiture, excommunication, and dehumanization—the de facto removal of citizenship.¹⁷⁸ This

(explaining further that “[a]s a principle of [retributive justice] it is hardly less familiar or less important than the principle that only the guilty ought to be punished”). By contrast, the possibility of punishing someone less than she deserves, has normative significance but provides a much weaker constraint on retributive justice. Göran Duus-Otterström, *Why Retributivists Should Endorse Leniency in Punishment*, 32 *LAW & PHIL.* 459, 460–61 (2013).

¹⁷⁵ What this Article refers to as colloquial retributivism is thus distinct from *lex talionis* (i.e., the principle that a punishment should correspond both in degree as well as in kind to the wrongdoer’s offense), which is also what Paul Robinson has referred to as “vengeful desert.” Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 147 (2008).

¹⁷⁶ While this approach mischaracterizes retributive principles, it looms large in the public psyche and is also manifested by many who work in prisons. *See, e.g.*, Telephone Interview with Lance Lowry, *supra* note 13.

¹⁷⁷ Many scholars have distinguished retributivism from vengeance or revenge. *See, e.g.*, GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 416–17 (2000) (famously reflecting that retributivism is “not to be identified with vengeance or revenge, any more than love is to be identified with lust”); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 367 (1981) (“Revenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done.”).

¹⁷⁸ This approach has also been described as “the exile function of punishment” that “cuts [the convicted person] off sharply at that point from the total community.” *See, e.g.*, John Griffiths, *Ideology in Criminal Procedure or a Third “Model” of the Criminal Process*, 79 *YALE L.J.* 359, 378–79 (1970). By contrast, given the core retributive concern that a person not be subject to excessive punishment, the retributivist should care deeply that there be no punishment beyond the term of incarceration. While maintaining that colloquial retributivism is incompatible with the preferred communitarian approach, *see infra* Part IV, this Article does not mean to suggest that a desert-based philosophy, which takes seriously the issues of proportionality and of avoiding excessive punishment, could not also be consistent with the communitarian approach. However, in practice, and given the existing reality of mass incarceration in the United States, the very premise of an “objective measure of ‘just deserts’ that allows us to match the punishment perfectly to the crime” may be untenable. Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 *MARQ. L. REV.* 1203, 1229 (2012) (citing David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1635–36 (1992)).

approach is thus incompatible with constitutional dictates that forbid banishment or the revocation of citizenship for committing a crime.

B. Distributional Fairness Arguments as Moral Claims

Another objection to prison higher education is expressed in distributive fairness terms though, at its root, it is a moral claim about desert. This objection assumes scarce resources and questions why prisoners should receive educational opportunities over other individuals or groups. Despite the descriptive inaccuracy of a zero-sum framing of this issue,¹⁷⁹ distributive fairness rhetoric was particularly effective in the 1994 debates and in subsequent efforts to block government funding for prison higher education.

Rep. Holden's (D-PA) closing remarks in the 1994 congressional debates are indicative of the rhetorical strength of this fairness-based objection to prison higher education, which pits incarcerated and non-incarcerated populations against each other:

I could argue for hours against why prisoners should not be allowed to have Pell grants, but, instead, I would like to read a letter I received in my district from Tamaqua. The woman states: Where is an average, hard-working student who wants to make something of herself and get somewhere in life supposed to turn for help? Over the years we have told our daughter, 'Keep your nose clean, stay out of trouble. If you have a police record, you will never get into college.' My daughter has listened, but where has it gotten her? She reads about prisoners getting Pell grants and free college educations. What does this tell her? It tells her: If she was sitting in jail she would get a free education. Just where does a hard-working normal honor student involved in many extra-curricular activities not only in school but also in the community go for help? The prisoner is rewarded with a free education. The average honor student is penalized because she tried to save money for college and she is penalized because she stayed out of trouble. Who can justify all of this? The woman concludes: Do I tell her to put on a ski mask, go to the local bank, rob it, get a criminal record and then receive a free education?¹⁸⁰

One finds similar rhetoric—with similar success—on the state level. For example, in February 2014, New York Governor Andrew Cuomo unveiled a proposal that would provide funding for college classes in New York prisons.¹⁸¹ Citing studies that show a correlation

¹⁷⁹ See *supra* Section I.A.

¹⁸⁰ 140 CONG. REC. H7911, 7949 (daily ed. Apr. 20, 1994) (statement of Rep. Holden).

¹⁸¹ Press Release, Governor's Press Office, Governor Cuomo Launches Initiative to Provide College Classes in New York Prison (Feb. 16, 2014), <https://www.governor.ny.gov/news/governor-cuomo-launches-initiative-provide-college-classes-new-york-prison>.

between college education and a reduction in recidivism rates, Governor Cuomo explained:

Giving men and women in prison the opportunity to earn a college degree costs our state less and benefits our society more. New York State currently spends \$60,000 per year on every prisoner in our system, and those who leave have a 40 percent chance of ending up back behind bars. Existing programs show that providing a college education in our prisons is much cheaper for the state and delivers far better results.¹⁸²

Governor Cuomo highlighted the significant cost savings associated with this plan, contrasting the \$60,000 spent per inmate per year for incarceration with approximately \$5000 to provide one year of college education for one inmate.¹⁸³

State Senator Greg Ball, who opposed the proposal, relied on a fairness objection, describing college education for prisoners as “a slap in the face to hard working New Yorkers that work multiple jobs and take out exorbitant student loans to pay for the cost of higher education.”¹⁸⁴ Senator Ball highlighted finite resources that would be spent either to fund the higher education of prisoners or to fund the educational needs of hard-working Americans and their children. Without engaging the arguments that Governor Cuomo’s plan would result in significant cost savings, Senator Ball focused exclusively on provoking the ire of taxpayers who could be made to feel slighted because money that would otherwise be going to “hard-working Americans” would instead be spent on “undeserving inmates”:

In a world of finite resources, where we are struggling to find funding for education for our kids, the last thing New York State should be funding is college tuition for convicts. As some are unveiling ‘Attica University,’ millions of New Yorkers right now are wondering how the heck they are going to pay student loans and help their kids go to college.¹⁸⁵

State Senator George Maziarz furthered:

¹⁸² *Id.*

¹⁸³ *Id.* A 2015 report found that eleven states spent more money on prisons and jails than on higher education in 2013. See AM. ACAD. OF ARTS & SCIS., PUBLIC RESEARCH UNIVERSITIES: CHANGES IN STATE FUNDING 9 (2015), https://www.amacad.org/sites/default/files/academy/multimedia/pdfs/publications/researchpapersmonographs/PublicResearchUniv_ChangesInStateFunding.pdf.

¹⁸⁴ Jessica Bakeman, *Republicans Rally Against Cuomo’s Prison-College Plan*, POLITICO N.Y. (Feb. 18, 2014), <http://www.politico.com/states/new-york/albany/story/2014/02/republicans-rally-against-cuomos-prison-college-plan-011039>.

¹⁸⁵ Joseph Spector, *Senator Ball Launches Petition Against Cuomo’s Plan to Pay for Prisoners’ College*, LOHUD (Feb. 18, 2014, 12:25 PM), <https://www.lohud.com/story/polhudson/2014/02/18/senator-ball-launches-petition-cuomos-plan-pay-prisoners-college/5580049>.

The whole notion of rewarding bad behavior is completely backwards. It should be ‘do the crime, do the time,’ not ‘do the crime, earn a degree.’ It is simply beyond belief to give criminals a competitive edge in the job market over law-abiding New Yorkers who forgo college because of the high cost.¹⁸⁶

Opposition to Governor Cuomo’s proposal rallied around the slogan “kids before cons,”¹⁸⁷ and this opposition movement gained enough support that Governor Cuomo was forced to withdraw his plan.¹⁸⁸

This pitting of “undeserving inmates” against “hard-working Americans” exposes the extent to which this conception of fairness—a “less eligibility” argument¹⁸⁹—is actually rooted in desert. It is also the main argument articulated in political debates by opponents of prison higher education. Yet, at issue is not actually whether to allot one dollar, or one million dollars, to “kids” or to “cons.” Rather, what masquerades as a fairness argument is actually a moral claim about what prisoners deserve. For example, as above, a parent’s claim that it would be a slap in the face for a prisoner to receive a benefit that her law-abiding child does not.¹⁹⁰

¹⁸⁶ Press Release, State Sen. George Maziarz, N.Y. State Senate, Senator Maziarz Criticizes Prison-to-College Scheme (Feb. 18, 2014), <https://www.nysenate.gov/newsroom/press-releases/george-d-maziarz/senator-maziarz-criticizes-prison-college-scheme>.

¹⁸⁷ See, e.g., Casey Bortnick, *Three New York Congressmen Introduce Kids Before Cons Act*, ST. POL. (Feb. 25, 2014, 11:30 PM), <http://www.nystateofpolitics.com/2014/02/three-new-york-congressmen-introduce-kids-before-cons-act> (detailing proposed legislation that would “prohibit the use of federal taxpayer dollars to provide a college education to convicted criminals”); see also Kids Before Cons Act, H.R. 3327, 114th Cong. (2015) (proposing an amendment that would prohibit the Education Department from “awarding . . . Federal Pell Grants to incarcerated individuals”).

¹⁸⁸ Thomas Kaplan, *Cuomo Drops Plan to Use State Money to Pay for College Classes for Inmates*, N.Y. TIMES (Apr. 2, 2014), <https://www.nytimes.com/2014/04/03/nyregion/cuomo-drops-plan-to-use-state-money-to-pay-for-college-classes-for-inmates.html>. Cuomo recently unveiled a new plan to provide \$7 million for college courses in prison; however, unlike the state-funded proposal that garnered so much resistance, this grant program would be “financed with money from large bank settlements . . . rather than general state funds.” Jesse McKinley, *Cuomo to Give Colleges \$7 Million for Courses in Prison*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/nyregion/cuomo-to-give-colleges-7-million-for-courses-in-prisons.html>.

¹⁸⁹ This argument maintains that, for imprisonment to have a deterrent effect, a prisoner’s treatment should not be better than that provided to a member of the lowest social class. Edward W. Sieh, *Less Eligibility: The Upper Limits of Penal Policy*, 3 CRIM. JUST. POL’Y REV. 159, 160 (1989). For a critique of this approach, see ANDREW RUTHERFORD, PRISONS AND THE PROCESS OF JUSTICE: THE REDUCTIONIST CHALLENGE 94 (1984), which describes the less-eligibility principle as “intellectually and morally bankrupt.”

¹⁹⁰ The question of whether persons who have *not* committed crimes are entitled to have the government provide them with higher education is, in a sense, beside the point. The provision of higher education to prisoners for a term of years is grounded in the special duties the state owes such persons by virtue of exercising the power to punish them

Even taking the distributive fairness objection at face value, however, a zero-sum analysis is misleading. It is simply not the case that each dollar spent on prison higher education programs is one fewer dollar spent on youth education. To the contrary, if prison education programs are cost-effective and have the potential to reduce prison budgets, as recent research suggests,¹⁹¹ they could potentially free up more funds for youth education.¹⁹²

Further, even if these prison programs did cost money on balance, there is no direct tradeoff between these particular priorities. For example, resources for funding college for students not in prison are no more threatened by prison education programs than by a wide range of other government-funded programs, such as fixing potholes, developing bombers, maintaining national parks, or providing ethanol subsidies. One state budget expense that is significant enough to potentially trade off noticeably with spending on higher education is incarceration itself. Many states spend more money on prisons than on higher education,¹⁹³ and this

for crimes that are not so grave as to warrant death or permanent exclusion from civil society. A non-prisoner's claim to the provision of higher education would need to be grounded in some other principle or norm, and there may well be such a norm as a matter of political morality even if not positive constitutional law, but such discussion is beyond the scope of this Article. Here, the salient point is that prisoners who are provided with higher education are not getting preferential treatment in relation to non-prisoners. Rather, they are getting something to which they are entitled (assuming no substitute is provided) if the state's exercise of the unique and extraordinary power to punish is to be legitimate (for all punishment short of the death penalty or life in prison without parole).

¹⁹¹ Ayodele Fajonyomi, *Strategic Learning Ideologies in Prison Education Programs*, 38 INT'L J. LIFELONG EDUC. 124, 124 (2018) (citing U.S. DEP'T OF JUST., FEDERAL BUREAU OF PRISONS EDUCATION PROGRAM ASSESSMENT: FINAL REPORT, at iii–iv (2016)) (“[T]he cost of education and training provided in prison could be as much as 20 times less than the cost of incarceration with the estimated cost of imprisonment not including prosecution costs, or cost to the economy in lost productivity and the cost to governments at all levels.”); James Fogarty & Margaret Giles, *Recidivism and Education Revisited: Evidence for the USA* 17 (Univ. of W. Austl. Agric. & Res. Econ., Working Paper No. 1806, 2018) (“Overall we conclude that for basic education programs and post-secondary education programs there is strong, clear evidence that the programs reduce recidivism rates, and the reduction is large enough to have confidence that these program[s] are cost-effective.”).

¹⁹² While this Article maintains that arguments premised on cost-effectiveness are incomplete, they are still worth engaging. Indeed, without suggesting that cost-effectiveness or recidivism reduction are the most important metrics, there are compelling reasons to favor prison education programs on these grounds.

¹⁹³ AM. ACAD. OF ARTS & SCI., *supra* note 183, at 11 (reporting that eleven states—including Michigan, Colorado, and Massachusetts—spend more money on prisons and jails than on public research universities). A 2016 study found that “since 1990, state and local spending on higher education has been largely flat while spending on corrections has increased 89 percent.” Press Release, U.S. Dep’t of Educ., Report: Increases in Spending on Corrections Far Outpace Education (July 7, 2016), <https://www.ed.gov/news/press-releases/report-increases-spending-corrections-far-outpace-education> (finding further, as per P-12 spending, that “even when population changes are factored in, 23 states increased

fact has become a rallying cry for some bipartisan prison reform efforts.¹⁹⁴

The educational opportunities for students not in prison, even poor students, will always be vastly greater than the opportunities for those in prison. Non-incarcerated people have various choices available, including affordable community colleges and numerous scholarship programs. Thus, even ignoring all of the other reasons that it is preferable not to be in prison, no hypothetical teen would ever be better off committing a crime in order to get an education. Moreover, the limitation of educational opportunities outside prison bespeaks a much broader policy issue—such as the political viability of a free-college plan—and does not uniquely concern the prison population.

Ultimately these distributive justice concerns lose their persuasive impact if small investments in prison higher education programs pay large dividends in reducing the systemic costs of incarceration.¹⁹⁵ Nonetheless, refuting this objection through logical argument or by providing empirical data has generally been unsuccessful,¹⁹⁶ which further suggests the dominance of a moral claim, grounded in desert, that is thinly disguised as a concern about fairness.

per capita spending on corrections at more than double the rate of increases in per-pupil P-12 spending”).

¹⁹⁴ See, e.g., Ted Roelofs, *After Spending More Money on Prisons than Higher Education, Michigan Gets Serious About High Cost of Corrections*, BRIDGE MAG. (Apr. 15, 2014) (noting that, in Michigan, which “devotes a bigger share of its general fund budget to prisons than any other state,” there is a renewed and bipartisan “push for reforms that include reducing sentencing guidelines for many non-violent crimes [and] changes in parole procedures”).

¹⁹⁵ This broad distributive justice argument also ignores other factors—for example, that helping people with criminal records also helps their kids, and that they tend to come from environments where they were deprived or distributively disadvantaged. See David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 55, 74 (2008) (demonstrating a significant association between socioeconomic status and arrest rates). In the educational context, “African American males are at increased risk for experiencing disciplinary practices that exclude them from the school environment.” Jamilia J. Blake, Alicia Darenbourg & Erica Perez, *Overrepresentation of African American Males in Exclusionary Discipline: The Role of School-Based Mental Health Professionals in Dismantling the School to Prison Pipeline*, 1 J. AFR. AM. MALES EDUC. 196, 196 (2010). This “exclusionary discipline” both restricts their access to higher education and correlates with higher incarceration rates.

¹⁹⁶ See, e.g., Kaplan, *supra* note 188. This phenomenon also suggests the operation of motivated reasoning, or “the tendency of people to conform assessments of information to some goal or end extrinsic to accuracy.” Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection* 407, 408 (Yale Law Sch. Cultural Cognition Project, Working Paper No. 107, 2013).

C. *Resistance from Correctional Officers*

Educators who teach in prison programs have reported that they experience significant resistance from correctional officers, and specifically from line officers, who vocally oppose these programs.¹⁹⁷ One explanation for such opposition is that this is yet another example of correctional officers resisting anything that could be construed as an indulgence to inmates—colloquially, “hug a thug.”¹⁹⁸ In fact, officers have resisted improvements to prison conditions even if such “indulgences” were in their best interest.¹⁹⁹ For example, correctional officers in Texas and Louisiana spoke out against installing air conditioning in prisons, despite excruciating summer heat that affected them as well as the inmates under their watch.²⁰⁰ This resistance is widely understood to be rooted in strong retributive tendencies that undergird the political economy of criminal law and are further heightened by experiencing firsthand, through their day-to-day work in prison, the abstracted category of “undeserving prisoners.”²⁰¹

In the context of higher education, some line officers may also have more personal reasons to object to resources provided to inmates under their supervision, and their opposition may be characterized more accurately in terms of a concern about distributive fairness.²⁰² Many correctional officers have only pursued their education through a GED, which is the required credential to become a correc-

¹⁹⁷ See, e.g., Telephone Interview with Jody Lewen, *supra* note 13 (noting how correctional officers “try to cling to [the] idea that [the current] system is humane [and] rational”); Telephone Interview with Joshua Miller, *supra* note 13 (explaining how line officers are less supportive than other administrative staff); Telephone Interview with Fred Patrick, *supra* note 13 (describing the concerns of some line officers that inmates get free college while they do not).

¹⁹⁸ Telephone Interview with Lance Lowry, *supra* note 13.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Some officers, however, may prefer an orderly prison, regardless of what opportunities are provided to inmates. Further, while line officers have been resistant to higher education programs in prison, corrections administrators may have a different perspective. See, e.g., Telephone Interview with Adam Key, *supra* note 13; Telephone Interview with Jody Lewen, *supra* note 13; Telephone Interview with Joshua Miller, *supra* note 13. Many corrections leaders have spoken out in favor of higher education programs in prison and, even in the 1994 legislative debates, the American Correctional Association—as well as the Association of State Correctional Administrators and the North American Association of Wardens and Superintendents—sided with those who wanted to retain Pell Grants for prisoners. 140 CONG. REC. 7949 (1994) (statement of Rep. Clyburn).

²⁰² See, e.g., Telephone Interview with Marc Howard, *supra* note 13. Howard described his rapport with inmates as “beyond cordial”—often involving a warm embrace—explaining, “[c]orrectional officers don’t like that.” *Id.*

tional officer.²⁰³ So it may seem like an affront to correctional officers if the prisoners they supervise are receiving educational advantages that they themselves are lacking.

In a formal sense, objections by correctional officers to prisoner higher education are no more rational than those voiced by opponents who do not interact daily with prisoners. Whatever the programmatic opportunities that are provided to prisoners, officers would not choose to swap places with those under their watch. Nonetheless, given the proximity and daily interaction between prisoners and correctional officers, it is perhaps unrealistic to expect officers not to feel such resentment. Precisely because of this high level of interaction, objections by correctional officers may be both uniquely sympathetic, as well as disruptive, and should be taken seriously.²⁰⁴

D. The “Othering” of Prisoners and Prison

This Article’s examination of objections to prison higher education programs exposes multiple distinct “us-versus-them” dynamics in prisons that are relevant far beyond the higher education context. First, it reveals the “us-versus-them” dynamic between incarcerated and non-incarcerated individuals. Many members of the polity view prisoners as distant, foreign, and even subhuman, second-class citizens,²⁰⁵ undeserving of enrichment *even* if such enrichment would reduce crime or maximize public welfare. “Othered” as such, prisoners are not imagined as people with whom one is connected through a common humanity.²⁰⁶ They are not envisioned as potential family members or friends, nor as future neighbors and community members.

The second “us-versus-them” narrative is that between prisoners and correctional officers. Indeed, by many accounts, the interpersonal dynamic in prisons may appear “designed to be us versus them.”²⁰⁷

²⁰³ U.S. Dep’t of Labor, *Correctional Officers and Bailiffs*, BUREAU LAB. STAT. (last updated Sept. 4, 2019, 5:11 PM), <https://www.bls.gov/ooh/protective-service/print/correctional-officers.htm>.

²⁰⁴ Objections by correctional officers may also be particularly amenable to institutional design changes. See *infra* Section V.C.2.

²⁰⁵ See, e.g., Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 96, 121 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (“[T]he assumption currently driving the American carceral system [is] that individuals subject to criminal punishment have thereby forfeited their status as political citizens and moral equals.”).

²⁰⁶ *Id.* at 97, 125; see also Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *BERKELEY J. CRIM. L.* 259, 261 (2011) (“[E]xclusion and control has emerged over the past several decades as the animating mission of the carceral project.”).

²⁰⁷ Eisenberg, *supra* note 17, at 95 n.137 (quoting Telephone Interview with Donald Cohen, Exec. Dir., In the Public Interest (Apr. 8, 2014)); see also Kathleen O’Toole, *The Stanford Prison Experiment: Still Powerful After All These Years*, *STAN. UNIV. NEWS*

Correctional officers refer to prisoners as “bad guys” or “thugs,” defining their professional roles in direct opposition, as “the toughest beat” or as “patrolling the toughest precincts.”²⁰⁸ This rhetoric is used by officers to separate themselves from the inmates under their watch, and as some have observed, to fill a psychological need.²⁰⁹ Officers often come from the same neighborhoods as prisoners, and they may be “linked by common interests, cultural and social values and experiences,” as well as by “common deprivations,”²¹⁰ stemming from shared exposure to harsh prison conditions. Indeed, the “othering” in this context may be more of an artifice, imposed by the distinct roles officers and prisoners play within the criminal justice context and a desire of officers to “distance themselves from the prisoners under their watch” despite the “narrow gap” between them.²¹¹

Correctional officers may even be fairly characterized as collateral victims of the “us-versus-them” dynamic between prisoner and polity. One 2010 study ranked the job of correctional officer as having among the worst working environments and the highest work-related stress.²¹² Vacancies abound, PTSD rates are higher than for combat veterans,²¹³ and suicide rates are extremely high.²¹⁴ Poor conditions—

SERVICE (Jan. 8, 1997), <https://news.stanford.edu/pr/97/970108prisonexp.html> (describing Philip Zimbardo’s famous experiment that randomly assigned college students to roles as prisoners and correctional officers, resulting in a prisoner rebellion on day two, after which the officers “steadily increased their coercive aggressive tactics, humiliation and dehumanization of the prisoners” (quoting Philip Zimbardo)).

²⁰⁸ Eisenberg, *supra* note 17, at 95 (first quoting Telephone Interview with Les Cantrell, Statewide Coordinator, Fla. Teamsters Local 2011 (Aug. 4, 2014); then quoting Telephone Interview with Lance Lowry, *supra* note 13; then quoting *About Us*, CAL. CORRECTIONAL PEACE OFFICERS ASS’N, <http://cpcoa.org/about-us> (last visited Oct. 17, 2019) (describing the work correctional officers do as “the toughest beat”); R.I. BROTHERHOOD OF CORRECTIONAL OFFICERS, <http://www.ri-brotherhood.com> (last visited Oct. 17, 2019) (same); and then quoting CORRECTION OFFICERS’ BENEVOLENT ASS’N, INC., <http://www.cobanyc.org> (last visited Oct. 17, 2019)).

²⁰⁹ *Id.* at 96.

²¹⁰ Alison Liebling, *Prison Officers, Policing and the Use of Discretion*, 4 THEORETICAL CRIMINOLOGY 333, 338 (2000) (citing Rina Shapira & David Navon, *Staff-Inmates Cooperation in Israeli Prisons: Toward a Non-Functionalistic Theory of Total Institutions*, 15 INT’L REV. MOD. SOC. 131, 141 (1985)).

²¹¹ Eisenberg, *supra* note 17, at 96.

²¹² *Jobs Rated 2010: A Ranking of 200 Jobs from Best to Worst*, CAREERCAST, <https://www.careercast.com/jobs-rated/jobs-rated-2010-ranking-200-jobs-best-worst?page=7> (last visited Sept. 28, 2019).

²¹³ Natasha Lennard, *31 Percent of Correctional Officers Have PTSD*, SALON (Dec. 5, 2012, 2:37 AM), https://www.salon.com/2012/12/04/31_percent_of_correctional_officers_have_ptsd (comparing a U.S. Department of Veterans Affairs estimate of the prevalence of PTSD among Iraq War veterans (20%) with a Desert Waters Correctional Outreach study on the prevalence of PTSD among correctional officers (27%)) (citing MICHAEL D. DENHOF & CATERINA G. SPINARIS, DESERT WATERS CORR. OUTREACH, DEPRESSION, PTSD, AND COMORBIDITY IN UNITED STATES CORRECTIONS PROFESSIONALS: PREVALENCE AND IMPACT ON HEALTH AND FUNCTIONING 14–15 (2013); *PTSD—A*

including violence, lack of sanitation, vermin, and extreme temperatures—affect not only the people who *live* in prisons, but also those who *work* in them.²¹⁵ Further, when prisoners are not valued by the broader polity as future community members—as demonstrated by a comfort with prisons functioning as “warehouses”²¹⁶—this alienation of prisoners may also signify the polity’s devaluation of the correctional officers who supervise them.

IV

A COMMUNITARIAN APPROACH

Having exposed the substantial shortcomings of both harm-based justifications for, and desert-based objections to, prison programs, Part IV proposes the communitarian approach,²¹⁷ which foregrounds the connection between prisoner and polity. With its focus on relationships and social context, the communitarian approach provides a rich terrain for exploring the responsibility of the state towards those it incarcerates, as well as the “us versus them” dynamics that threaten to further alienate the prisoner from the polity. This Part argues that the state is required to provide to term-limited prisoners at least a plausible hope of basic reintegration and the avoidance of further debilitation. It highlights the basic terms on which formerly incarcer-

Growing Epidemic, NIH MEDLINEPLUS, Winter 2009, at 10, 14, https://magazine.medlineplus.gov/pdf/MLP_Winter_09.pdf.

²¹⁴ Steven J. Stack & Olga Tsoudis, *Suicide Risk Among Correctional Officers: A Logistic Regression Analysis*, 3 ARCHIVES SUICIDE RES. 183, 185 (1997) (finding that correctional officers are thirty-nine percent more likely to die by suicide).

²¹⁵ See, e.g., David N. Pellow, Commentary, *Environmental Inequalities and the U.S. Prison System: An Urgent Research Agenda*, INT’L J. EARTH & ENVTL. SCI., Oct. 27, 2017, at 1, <https://www.graphyonline.com/archives/IJEES/2017/IJEES-140> (“It is now clear that . . . prison[s] can [feature] internal threats to the bodies of prisoners and corrections officers who work and live on site. . . . [For example] extreme weather combined with a lack of air conditioning and deficient medical care.”).

²¹⁶ Jonathan Simon, *From the Big House to the Warehouse*, 2 PUNISHMENT & SOC’Y 213, 228 (2000) (highlighting the nexus between the growth of California’s prison population and a warehousing paradigm, and observing that the state has made “its capacity to simply hold a large population, or warehouse them, the crucial test of its competence”).

²¹⁷ This Article builds on theoretical work by Anthony Duff and others about the relationship between the state and the political community it governs. See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY (2001) (arguing for a communicative theory of justice and noting that this theory depends on Duff’s normative conception of political community). While there is no single definition of communitarianism, the primacy of relationships and of social context is core to communitarian theory. See generally COMMUNITARIANISM AND INDIVIDUALISM 2 (Schlomo Avineri & Avner de-Shalit eds., 1992) (“[A] general theory of communitarianism [has] gradually emerged. . . . [T]he only way to understand human behavior is to refer to individuals in their social, cultural, and historical contexts. That is to say, to discuss individuals one must look first at their communities and their communal relationships.”).

ated individuals are entitled to reenter society—terms that, if met, promise to benefit both former prisoners and the polity.

A. *The Principle of Return*

The implication of punishment for a limited term is that it literally ends after that period of time. Embedded in this promise of a limited term is the principle of return: After completing his or her punishment, a person is entitled to return as a free citizen. There is no allowance for continued punishment after a person has served his or her time,²¹⁸ nor for second-class citizenship.²¹⁹ Rather, for the concept of term-limited punishment to have meaning, the former prisoner must have, upon release from prison, a plausible chance at reintegrating into civil society.

Yet there is much in the way criminal punishment currently is practiced in the United States that is inconsistent with the principle of return. Numerous policies and practices enshrine a distinction between those who have and have not been convicted of a crime.²²⁰ These outlast the convicted person's sentence and have dire ramifications, especially for communities of color.²²¹ This phenomenon has

²¹⁸ The extensive debate about what constitutes punishment versus regulation illustrates the importance of this distinction—if something is deemed punishment, it cannot constitutionally be applied retroactively. *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (citing Thomas M. Cooley & Alexis C. Angell, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 319 (Boston, Little, Brown, & Co. 1890); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); Walter Malins Rose & Chas L. Thompson, 1 *ROSE'S NOTES ON THE UNITED STATES SUPREME COURT REPORTS* 49 (rev. ed., The Lawyer's Coop. Publ'g Co., 1917)) (“[The] *ex post facto* . . . prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description.”); see also Avlana Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 160–68 (2017) (discussing the implications of the Court's distinction between punishment and regulation in the context of retroactive imposition of electronic monitoring). See generally *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (describing the factors to be considered when congressional intent regarding the penal nature of a statute is inconclusive).

²¹⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that it is unconstitutional to revoke a person's citizenship because they committed a crime).

²²⁰ Michelle Alexander documents the pervasiveness of this phenomenon and its dire ramifications, especially for African American men, for whom the criminal justice system functions as “The New Jim Crow.” See ALEXANDER, *supra* note 27, at 141 (“Today [the formerly incarcerated] ha[ve] scarcely more rights, and arguably less respect, than . . . freed slave[s] or . . . black [people] . . . at the height of Jim Crow. . . . [C]riminal record[s] . . . authorize[] precisely the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, . . . jury service[, and] even . . . voting.”).

²²¹ For example, people convicted of drug felonies, who are disproportionately likely to be African American, *id.* at 98, will be “barred from public housing by law, discriminated against by private landlords, ineligible for food stamps, forced to ‘check the box’ indicating

created an “undercaste,” which renders prisoners and those formerly incarcerated as “permanent second-class citizen[s].”²²² The existence of a two-tiered citizenry ensures that the formerly incarcerated are forever associated with criminality.²²³

The reconceptualization of the prisoner as prisoner-citizen is crucial to the principle of return.²²⁴ Prison programs—such as higher education—can lessen the negative effects of the current regime of criminal punishment by helping the formerly incarcerated reintegrate into civil society and equipping them to participate in the democratic process.²²⁵ Education scholars have written extensively about the “civic mission” of higher education and its key role in cultivating “public participation in democracy and civic life.”²²⁶ In the specific context of prison, this notion of enhanced participation in civic life is

a felony conviction on employment applications for nearly every job, and denied licenses for a wide range of professions.” *Id.* at 94. Further, once convicted of a crime and labeled “offender,” a person may be subject to significant social stigma in addition to the legal and professional restrictions discussed above. *See, e.g.*, Lynn S. Branham, *Eradicating the Label “Offender” from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53 (2019) (describing the term “offender” as “the verbal equivalent of a scarlet letter”); Harold D. Trulear, *Welcome Home!: Returning Citizens. . . Not Ex-Cons, Ex-Offenders, or Ex-Felons*, DONDIVAGLOBAL (Mar. 15, 2016), <https://dondivamag.com/welcome-home-returning-citizens-not-ex-cons-ex-offenders-or-ex-felons> (“No one should have to wear a label describing their past as they move to the future.”).

²²² *Id.* at 12–13.

²²³ *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) (analyzing the system of collateral consequences as a “civil death”); Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871 (2015) (delineating how collateral consequences interfere with rehabilitation).

²²⁴ This notion of reconceptualizing prisoners goes beyond semantics, though it is compatible with reform efforts such as the movement to cease referring to those we incarcerate as “offenders.” This movement has highlighted the “vicious cycle” resulting from the use of labels such as “offender” and related neuroscientific findings that “the words we use to describe what we see . . . [actually] determine what we see.” Branham, *supra* note 221, at 56, 59 (quoting Adam Alter, *Why It’s Dangerous to Label People*, PSYCHOL. TODAY (May 17, 2010), <https://www.psychologytoday.com/us/blog/alternative-truths/201005/why-its-dangerous-label-people>).

²²⁵ This Article does not suggest, however, that prison higher education is qualitatively more of a priority than other reforms that would improve prison conditions, address inequities in prosecution and sentencing, or enhance the ability of the formerly incarcerated to live productive lives after their release.

²²⁶ *See* Nancy Thomas & Jodi Benenson, *The Evolving Role of Higher Education in U.S. Democracy*, 5 EJOURNAL PUB. AFF., no. 2, 2016, at 1–2, <http://www.ejournalofpublicaffairs.org/wp-content/uploads/2017/09/The-Evolving-Role-of-Higher-Education-in-U.S.-Democracy.pdf> (detailing how, in the aftermath of World War II, President Truman established the Commission of Higher Education in 1947, “which identified education as a ‘necessity’ critical to ‘the foundation of democratic liberties’”). *See generally* CIVIC RESPONSIBILITY AND HIGHER EDUCATION (Thomas Ehrlich ed., 2000) (examining higher education and its role in civics).

particularly germane. Formerly incarcerated individuals are in an ideal position to address the social problems associated with mass incarceration, cycles of crime and poverty, and obstacles to reentry,²²⁷ which are among the most salient social problems in the United States and are associated with severe humanitarian and fiscal costs.²²⁸ Those with higher education credentials are in a far better position to engage in civic discourse.²²⁹

Prison higher education promotes civic equality in the face of debilitating collateral consequences.²³⁰ Civic equality requires that “individuals should be treated and treat one another as equal citizens.”²³¹ Collateral consequences, “[b]y intruding into post-punishment life, . . . reinforce the idea that a person who has committed a criminal offense is a fundamentally different kind of person from their fellows, one who simply *deserves* unequal treatment, regardless of how weak the justification for a particular restriction

²²⁷ Kelsey Kauffman, *Academia in Prison: The Role of the University in an Era of Mass Incarceration*, PERSPS. ON HIST. (Feb. 1, 2015), <https://www.historians.org/publications-and-directories/perspectives-on-history/february-2015/academia-in-prison> (describing the research of Michelle Jones, among other incarcerated women, into the history of the Indiana Women’s Prison, and the role of these women in raising questions, “often-cynical, penetrating, exacting ones that not only have exposed new information about the founders of this prison, but have challenged prevailing ideas about where, when, and by whom prisons for women were started and, most importantly, why”).

²²⁸ Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1620 (2019) (describing how “the indisputable and enormous human and economic costs imposed on prisoners, their families, and society by large prison populations” have prompted many states to pursue criminal justice reform); A. Elizabeth Stearns, Rick Swanson & Stephanie Etie, *The Walking Dead? Assessing Social Death Among Long-Term Prisoners*, 4 CORRECTIONS 153, 153–54 (2019) (“In addition to humanitarian concerns, social death experienced by prison inmates contributes to high rates of prison violence and low morale. These in turn contribute to the substantially rising financial costs of the criminal justice system.”).

²²⁹ See, e.g., WALTER W. McMAHON, HIGHER LEARNING, GREATER GOOD: THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION 206–07 (2009) (noting that higher education can “lead to lifelong learning about public affairs that are the foundation of good citizenship and related social benefits”). This Article does not intend to suggest, however, that higher education is in any way a cure-all, either for all prisoners, or even for all prisoners who are in a position to avail themselves of higher education programs.

²³⁰ This assertion should not be read as suggesting that legal and policy reforms designed to directly address the problem of collateral consequences are not worthwhile or are in some way incompatible with the approach advanced by this Article. Further, given the strong connection between prison higher education and democratic participation, even in a hypothetical world without collateral consequences, prison higher education would still be favored as consistent with the principle of return.

²³¹ Amy Gutmann, *Unity and Diversity in Democratic Multicultural Education: Creative and Destructive Tensions*, in DIVERSITY AND CITIZENSHIP EDUCATION: GLOBAL PERSPECTIVES 71 (James A. Banks ed., 2004).

may be.”²³² Collateral consequences confer a *civic disability* on millions of individuals; they are “no longer formally punished by the state, [yet] they nonetheless retain a form of outlaw status.”²³³ Higher education has the opportunity to invert this paradigm by providing a *civic advantage* to those who are otherwise disadvantaged.²³⁴ Expanding higher educational resources to prisoners is thus a particularly potent way for the state to manifest its commitment to the principle of return.

B. State Responsibility

The state is legally responsible for providing material benefits to prisoners beyond those to which non-incarcerated persons are entitled because of the relationship between the state and the incarcerated person. For example, once the state takes over a person’s liberty by incarcerating them, it is responsible for providing health care and shelter, though these entitlements are not universally available.²³⁵ The provision of these basic needs is required to prevent physical debilitation while in prison. By logical extension, the state also should bear responsibility for providing programmatic opportunities for incarcerated individuals that are required to prevent mental and psychological deterioration. Indeed, the *lack* of such opportunities provided by the state could constitute additional punishment of the incarcerated person—punishment-plus,²³⁶ which would

²³² Briana L. McGinnis, *Beyond Disenfranchisement: Collateral Consequences and Equal Citizenship*, 6 POL. GROUPS & IDENTITIES 59, 61 (2017).

²³³ *Id.* at 63.

²³⁴ While one might argue that eliminating collateral consequences would be a more efficient approach, such an approach may be less politically feasible than expanding higher educational opportunities for the incarcerated population. Among other reasons, prison higher education programs can be privately funded, whereas removal of collateral consequences would require either legislative action or executive clemency. See U.S. COMM’N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 30–31 (2019).

²³⁵ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103–06 (1976) (“These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.”); Joseph E. Paris, *Why Prisoners Deserve Health Care*, 10 VIRTUAL MENTOR 113 (2008). In the context of food and shelter, the state does not ask who among the prison population deserves these provisions. Rather it concludes that prisoners, as wards of the state, need food and shelter and, accordingly, the state provides them to a minimal standard.

²³⁶ Unless a component of punishment is considered by a judge as retributively appropriate, by definition, it is excessive. To be justified, therefore, the absence of programmatic opportunities would need to have been part of the sentencing decision. For a related argument about proportionality and collateral consequences, see Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 160 (1999), which argues that, in the interest of proportionality, collateral consequences “should be clearly designated as part of the

offend foundational legal principles of proportionality and fairness.²³⁷

The state also has political obligations to the prisoner-citizen, even if such obligations are not legally enforceable. These include the provision of a plausible hope of reintegration.²³⁸ The communitarian approach is concerned not only with preventing the debilitation of prisoners but also with enabling former prisoners to successfully rejoin the polity upon release. Accordingly, the state is falling short if punishment means further encumbering prisoners such that they cannot reintegrate.²³⁹ Such shortcomings adversely affect the legitimacy (and perceptions of legitimacy) of the state's role in criminal punishment.²⁴⁰

sentence at the time punishment is imposed and explicitly considered part of the penalty.” In practice, however, judges rarely provide detailed reasons for the sentences they impose, and they seek to accomplish various ends consistent with a panoply of punishment theories (including though not limited to retributivism). *See generally* Kimberly Kaiser & Cassia Spohn, *Why Do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, 19(2) *CRIMINOLOGY, CRIM. JUST., L. & SOC'Y* 44, 46 (2018) (describing how leading theories posit that a mixture of culpability of the offender, perceived need for incapacitation, practical consequences, and social costs factor into judicial decisionmaking); *see also* Amy L. Anderson & Cassia Spohn, *Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes*, 27 *JUST. Q.* 362, 364 (2010).

²³⁷ *See* Robert F. Vodde, *Proportionality*, in 2 *ENCYCLOPEDIA OF CRIMINAL JUSTICE ETHICS* 736, 736–37 (Bruce A. Arrigo ed., 2014) (noting that “[t]he principle of proportionality is based on the [law’s] foundation of balance and fairness” and that sanctions imposed on individuals convicted of equal offenses should be “of equal severity”).

²³⁸ This concept is core to the principle of return. *See supra* Section IV.A. To hold otherwise would be antithetical to the very notion of a limited term of punishment. Notably, the communitarian approach is not inconsistent with rehabilitative goals; however, it goes beyond a concern for the individual, instead focusing on the relationship between the individual and civil society. Post-conviction consequences such as voting bans, licensing restrictions, and the loss of parental rights demonstrate contrary effects, serving to sever ties between former prisoners and the polity.

²³⁹ For a related argument about the state's obligation to those it incarcerates, which would include the obligation to prevent them from debilitating further, see Rotman, *supra* note 149, at 1028–29, which explains that “[t]o avoid the harmful effects of incarceration on the mental and social health of the inmate, some positive action towards rehabilitation is essential.” *See also* Lee, *supra* note 26, at 618 (describing the state's “heightened responsibility towards the offender . . . to help him get back to a life of normalcy or at least to not interfere with an offender's effort to become a law-abiding citizen”).

²⁴⁰ *See* DUFF, *supra* note 217, at 181 (arguing that the question whether a person “is responsible as a citizen of the polity . . . depends on the extent to which she is included as a member of that political community”); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307, 314 (2004) (“If the exercise of state power in a liberal democracy is to be legitimate, . . . it must be justifiable in terms that all members of society subject to that power would accept as just and fair.”); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 *J. CRIM. L. & CRIMINOLOGY* 397, 402–03 (2012) (“Social psychologists have shown that people are more

Shifting norms over time may lead to shifting duties on the part of the state to provide such hope of reintegration. In the education context, a college degree is an increasingly important (and standard) credential in the American economy. Thus, preventing prisoners from obtaining or working towards college degrees today may be analogous to preventing prisoners from obtaining high-school degrees fifty years ago. The concern here is not that the lack of education makes the experience of prison worse, an argument that also could apply to such restrictions as limited television or internet access, but instead that the state, by withholding opportunities (such as education), would be impeding a person's reentry prospects, thus running afoul of the promise of a term-limited punishment.²⁴¹

C. *Exposure and Empathy*

Mitigating any “us-versus-them” dynamic requires bringing two groups into a relationship or exposing some commonality between them. Inasmuch as the “othering” at the root of the “us-versus-them” dynamic is often founded not on significant exposure but instead on stereotype or prejudice,²⁴² one crucial first step in mitigating this dynamic is to challenge these assumptions by exposing each group to experiences that complicate or disrupt stereotypes. In the prison context, narratives of courage, transformation, and achievement—especially those that feature individuals who were formerly incarcerated and have distinguished themselves as productive citizens—challenge those who maintain that there is a sharp divide between former felon and full citizen.²⁴³ Prisoner higher education can play a role in chal-

likely to view authorities and the decision that these authorities make as legitimate, and thus worthy of deference, when authorities treat people with dignity and fairness, i.e., when authorities are procedurally fair.”).

²⁴¹ According to this argument, which stresses the state-prisoner relationship as providing a justification for higher education, the educational opportunities a person is given should be minimally acceptable. Much like food and shelter are expected to be serviceable but not luxurious, so too with educational opportunities.

²⁴² See Nguyen Toan Tran et al., *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, BMC INT'L HEALTH & HUM. RTS. 1–2 (Nov. 16, 2018), <https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-018-0180-4> (explaining that referring to incarcerated persons using stereotyping and dehumanizing language drives discrimination against them and undermines their treatment as individuals).

²⁴³ Several profiles of such individuals have been highly publicized. These individuals are depicted both as role models for those still inside prison walls and, more broadly, as individuals who have overcome adversity to become productive citizens. See, e.g., Eli Hager, *From Prison to Ph.D.: The Redemption and Rejection of Michelle Jones*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/us/harvard-nyu-prison-michelle-jones.html>; Adam Liptak, *A Mediocre Criminal, but an Unmatched Jailhouse Lawyer*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/us/09bar.html>; Bari

lenging common assumptions by the broader citizenry about “criminals” and criminality as a permanent condition or status.²⁴⁴

Such exposure may expedite shifts in norms and policy. For example, consider a narrative featuring a formerly incarcerated individual who has demonstrated clear and substantial evidence of commitment and capacity to participate as a lawful and productive citizen, yet is barred from participating in a profession for which he or she is academically qualified. This situation presents a unique opportunity for disrupting established precedents that would categorically bar the formerly incarcerated from entire professions.²⁴⁵ Exposure—and resulting empathy—in this context may be a powerful resource in the effort to mitigate “us-versus-them” dynamics and foster policy changes.²⁴⁶

Weiss, Opinion, *Admit This Ex-Con to the Connecticut Bar*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/opinion/admit-this-ex-con-to-the-connecticut-bar.html>.

²⁴⁴ Personal narratives may be more effective at changing perspectives than statistical data. See, e.g., Dennis Nishi, *To Persuade People, Tell Them a Story*, WALL ST. J. (Nov. 9, 2013), <https://www.wsj.com/articles/to-persuade-people-tell-them-a-story-1384047871> (arguing that statistics tend to be less memorable than narratives).

²⁴⁵ Reform efforts designed to relax restrictions for the formerly incarcerated (by “banning the box” or loosening licensing restrictions, for example) are frequently catalyzed by narratives of particular individuals who have succeeded against all odds in bettering themselves—often through education—and have demonstrated both commitment and capacity to lead productive lives post-release. See, e.g., Joshua J. Florence & Mia C. Karr, *Professors Condemn Rejection of Michelle Jones*, HARV. CRIMSON (Sept. 21, 2017), <https://www.thecrimson.com/article/2017/9/21/professors-petition-criminal-history> (reporting efforts by 150 Harvard University professors who signed a letter “calling for the University to include ‘criminal history’ in its non-discrimination policy, condemning Harvard’s decision to deny Ph.D. program admission to ex-inmate Michelle Jones”); Vinny Vella, *State Bar Committee Approves Jail-to-Yale Lawyer*, HARTFORD COURANT (Sept. 29, 2017), <http://www.courant.com/news/connecticut/hc-news-dwayne-betts-approved-20170929-story.html> (chronicling the experience of Reginald Betts, whose admission to the Connecticut Bar was paused because of a prior felony conviction, but who ultimately was admitted to the state’s bar). In 2017, Louisiana became the first state to “ban the box” for applicants to the state’s higher-education institutions. Nick Roll, *Louisiana Becomes First State to Ban the Box*, INSIDE HIGHER ED (June 19, 2017, 3:00 AM), <https://www.insidehighered.com/quicktakes/2017/06/19/louisiana-becomes-first-state-ban-box>; see also Carmen Russo, *NYU Welcomes New Grad Student After 20 Years in Prison*, NYU LOCAL (Sept. 26, 2017), <https://nyulocal.com/nyu-welcomes-new-grad-student-after-20-years-in-prison-f271a1df7ab1> (describing the NYU student movement to “Unbox NYU” by eliminating questions about an applicant’s criminal record).

²⁴⁶ See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 363–64 (2012) (arguing that, fundamentally, people are intuitive and that the way to influence people is to appeal to their moral intuitions). See generally Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 373 (1996) (citing Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987)) (characterizing empathy as a means of understanding and internalizing the emotions of others, allowing one to overcome feelings of otherness and focus on a common humanity).

D. *The Prison Environment*

The communitarian approach thus far has focused on the relationship between prisoners and members of the polity *outside* prison walls. However, this approach also has purchase for understanding relationships *inside* prison, where prisoners and staff are situated.²⁴⁷ Indeed, the “us-versus-them” dynamics within prison may be profoundly disruptive and demoralizing for those who live and who work in prison.

Understanding prisoners and staff as situated in the shared social environment of prison would humanize the living and working experience in prison. Central to the communitarian approach is the importance of cultivating positive relationships among members of the community that are rooted in “social trust.”²⁴⁸ To develop such a pro-social environment would require giving priority to the needs of prisoners and officers, understanding these groups to be inextricably linked in a shared space. This approach could radically change the interpersonal dynamics in prison, and it would pay dividends for those prisoners who leave prison, as they would have experienced being part of a pro-social environment in advance of their release into the broader polity.

Various international examples demonstrate this pro-social approach. In many European nations, the human connection between officers and prisoners is considered integral to the principle of “normalization,” which aims to make life in prison “as similar as possible to life in the community.”²⁴⁹ Prisons are “run under a system of

²⁴⁷ This claim is consonant with Duff’s assertion that every person belongs to a variety of communities. See DUFF, *supra* note 217, at 44–46 (discussing the “academic community” as a separate community for purposes of analysis and illustration). Even within prison, a person may be part of various sub-communities. For example, one might be a member of a religious organization or an affinity group within the prison. See, e.g., Telephone Interview with Cathy Fontenot, *supra* note 13 (discussing the Drama Club at Angola). One notable exception is the practice of solitary confinement. While beyond the scope of this Article, the practice of housing prisoners in solitary confinement is anathema to the proposed communitarian approach as it deprives a person of human contact, and thus effectively from any meaningful social connection.

²⁴⁸ See, e.g., Toby Lowe, *Communitarianism as a Blind Alley? A Reply to Lacey and Frazer*, 16 *POLITICS* 103, 104–06 (1996) (noting that the key to developing social trust is “generating a social situation where people feel they *can* trust one another”).

²⁴⁹ RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 7–12 (2013), https://www.vera.org/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy_downloads/european-american-prison-report-v3.pdf (describing German and Dutch prison systems). This model stands in sharp contrast to the American system, which features “rules forbidding people who work in prisons from getting to know those who are forced to live there.” Jack W. Duran, *What German Prisons Do Differently*, VERA INST.

‘dynamic security,’ in which interpersonal relationships between prison staff and inmates are seen as the primary factor in preserving safety.”²⁵⁰ Correctional officers are encouraged to socialize with prisoners “over meals or card games,” and this system of dynamic security is intended to foster trust.²⁵¹ By contrast, static security, the dominant system in the United States, “assumes antagonism.”²⁵² Notably, dynamic security is the dominant Norwegian system across prison security levels, including where a substantial percentage of prisoners are serving sentences for violent crimes such as assault, rape, and murder.²⁵³

V

DESIGN CHOICES AND IMPLEMENTATION CHALLENGES

Part V identifies and assesses specific design features and program models that would support the aims and values of the communitarian approach. These include prison higher education programs that are mindful of, and consonant with, the principle of return. Notwithstanding resource constraints and political economy considerations that may hinder implementation, an incremental approach that disrupts dominant “us-versus-them” narratives about prison and prisoners by challenging assumptions and cultivating empathy between affected groups has great potential to reform the practices of incarceration in the higher education context and beyond.

A. Features

1. Broad Eligibility

The primary goal of the communitarian approach is to prepare incarcerated individuals for the rights and responsibilities of citizenship; this goal may favor giving priority for enrollment in prison programs to those inmates who eventually will be released. However,

JUST.: THINK JUST. BLOG (Aug. 23, 2018), <https://www.vera.org/blog/dispatches-from-germany/what-german-prisons-do-differently>.

²⁵⁰ Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 EMORY INT’L L. REV. 329, 345–46 (describing the “principle of normality” that is encouraged between staff and prisoners in Norway); see also Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>.

²⁵¹ Labutta, *supra* note 250, at 346; see also Kindred Motes, *Reimagining American Prisons Isn’t a Pipedream*, VERA INST. JUST.: THINK JUST. BLOG (Oct. 14, 2018), <https://www.vera.org/blog/reimagining-american-prisons-isnt-a-pipedream-after-the-holocaust-germany-reimagined-theirs>.

²⁵² Labutta, *supra* note 250, at 346.

²⁵³ *Id.*

many factors point to a communitarian preference for broad eligibility and the further principle that no prisoners should be categorically excluded from participation.

In the higher education context, regulations that limit enrollment to prisoners within three to five years of release are misguided for several reasons.²⁵⁴ First, it is not always evident who will be released, and at what time.²⁵⁵ Second, one's pursuit of an education may lead to a more favorable parole decision.²⁵⁶ Excluding from prison programs those who are incarcerated for long-term sentences needlessly diminishes their chances for release.

Third, this requirement does not take into account the debilitating environment of prison and its cumulative effect. Assuming a long sentence, say twenty years, this would mean a person would be incarcerated for fifteen years *before* that individual was able to participate in the program. The longer one is exposed to the prison environment, the more desensitized or 'hardened' one may become. A requirement that prisoners must wait for a substantial period of time before they are allowed to begin a program of study for which they would otherwise be eligible is thus short-sighted and counter-productive.²⁵⁷

Fourth, while some may argue that a shorter sentence signifies lower moral culpability and thus should trigger increased access to prison programs, there is no reason to suspect any correlation between suitability for higher education programs and the degree of moral culpability associated with a past crime. Further, as discussed above, prison programs are not a component of punishment; the quality or content of the program should not change based on a person's crime. Rather, programs should reflect the commitment of the polity to provide a meaningful opportunity for prisoners to reintegrate into society upon release.

²⁵⁴ This restriction is mandated by some programs, and Pell Pilot recipients are required to give preference to prisoners within three to five years of release. *See supra* Section I.B.1.

²⁵⁵ *See, e.g.*, Joseph O'Sullivan, *How Long You in for? Courts Leave Sentences Unclear for Hundreds of State Prisoners*, SEATTLE TIMES (Dec. 23, 2016), <https://www.seattletimes.com/seattle-news/politics/when-counties-dont-respond-department-of-corrections-staffers-sometimes-make-sentencing-decisions> (describing how confusing or illegible sentencing orders, mathematical errors, and the implementation of enhanced sentencing rules have led to uncertain sentences for hundreds of Washington prisoners).

²⁵⁶ *See* Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 17, 19 (2007).

²⁵⁷ This observation is consistent with the general proposition that reentry efforts should be initiated "at the earliest possible opportunity." Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. SOC. JUST. 293, 308 (2006).

While at first glance one might be inclined to exclude those with a sentence of life without the possibility of parole, this also would be short-sighted. Even a person serving a life sentence eventually may be resentenced or released.²⁵⁸ Further, older, more mature inmates may create a positive effect on younger inmates by serving as role models,²⁵⁹ and the communitarian approach would acknowledge that cultivating positive relationships within the prison environment is of value. In some instances, this intergenerational mixing also may help to create quasi-parental and mentoring relationships with positive, pro-social effects, especially where an incarcerated person grew up without a strong support network or, as is common in many communities with high incarceration rates, without the presence of a father figure.²⁶⁰ Further, if those with longer sentences—even LWOP—are eligible for higher educational opportunities, they may be able to tutor younger inmates or even participate in teaching courses, drawing on their expertise and helping to address the severe understaffing problem in prison GED and basic literacy programs. Students in these courses also would benefit from having teachers who could empathize with their situations and understand the challenges of pursuing an education while in prison.

While the communitarian approach would support broad eligibility, it is evident that, given space and resource constraints, not all qualified individuals may be able to participate in the prison programs for which they are eligible. But the question of *eligibility* is distinct from that of who is *selected* from among those eligible, and this distinction has both theoretical and practical significance.²⁶¹

²⁵⁸ See, e.g., Matt Sledge, *Angola Inmate Released in Plea Deal After Serving Nearly 42 Years for Racially Charged Killing*, NOLA.COM (May 1, 2016, 4:27 PM), https://www.nola.com/news/article_034aa0e5-0fc3-529e-b584-13b558d1261c.html (discussing release of inmate after serving nearly forty-two years of a life sentence).

²⁵⁹ See, e.g., Darnell Epps, Opinion, *The Prison ‘Old-Timers’ Who Gave Me Life*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/opinion/sunday/aging-inmates-prisons-mandatory-sentencing.html> (describing the “guidance and wisdom of several ‘old-timers’ . . . some serving life sentences, who committed themselves to keeping us out of trouble”).

²⁶⁰ See *The Proof Is In: Father Absence Harms Children*, NAT’L FATHERHOOD INST., <https://www.fatherhood.org/father-absence-statistic> (last visited Oct. 6, 2019) (detailing social and economic harms of growing up in a father-absent home).

²⁶¹ A program’s eligibility requirements signal the priorities of that program, as well as judgments about who “belongs” in the higher educational context. By categorically excluding those convicted of particular crimes or with certain release dates, a two-tiered system is reinforced within the carceral setting. Practically, if the eligibility parameters are drawn narrowly, there may not be enough individuals who fit the eligibility requirements, and therefore classes may be below capacity while prisoners who are academically qualified are excluded. Further, if those serving longer sentences are barred from participation, the possible benefits of an intergenerational educational setting will be lost.

2. *Curricular Emphasis on Critical Thinking Skills*

Critical thinking skills are crucial to civic engagement and thus central to the curricular choices of the communitarian approach.²⁶² While this may suggest a preference for a liberal arts education, which is considered by many as the gold standard for cultivating values of citizenship,²⁶³ the resources required for programs like those at Bard and San Quentin are vast, and scaling such programs would present a formidable challenge.²⁶⁴

Far more important than the primacy of a liberal arts curriculum, however, is the mandate that prison higher education not be viewed exclusively as a harm-prevention tool. Rather, education should provide returning citizens with the opportunity and intellectual resources to “think like citizens.”²⁶⁵ An education that focuses on developing the critical thinking skills that underlie civic participation allows for many different curricular options. The broader question of liberal arts versus pre-professional training—which also is central to debates in education policy circles outside the prison context—cannot easily be resolved.²⁶⁶ However, so long as critical thinking skills are an integral part of the program (which presumably is already one of the aspects separating higher education programs from purely vocational or skills-

²⁶² See Geert ten Dam & Monique Volman, *Critical Thinking as a Citizenship Competence: Teaching Strategies*, 14 *LEARNING & INSTRUCTION* 359, 375 (2004) (arguing that critical thinking is essential to full participation in democratic society).

²⁶³ See, e.g., *What Is Liberal Education?*, ASS’N AM. COLLS. & UNIVS., <https://www.aacu.org/leap/what-is-a-liberal-education> (last visited Oct. 6, 2019) (explaining that a liberal education “helps students develop a sense of social responsibility”).

²⁶⁴ See, e.g., Telephone Interview with Debbie Mukamal, *supra* note 13 (explaining the difficulty of scaling prison higher education programs); Telephone Interview with Rebecca Silbert, *supra* note 13 (highlighting the difficulty of scaling prisoner higher education in the era of mass incarceration).

²⁶⁵ Jeffrey D. Hilmer, *The Irony of Civic Education in the United States*, in *CIVIC EDUCATION IN THE TWENTY-FIRST CENTURY: A MULTIDIMENSIONAL INQUIRY* 61, 66 (Michael T. Rogers & Donald M. Gooch eds., 2015) (arguing that a radical reconceptualization of civic education would promote a more democratic form of politics).

²⁶⁶ Given that issues surrounding curricula are hotly debated in mainstream education policy circles, it should come as no surprise that there is no one-size-fits-all curriculum in the prison context. Nonetheless, the value of exposure to the liberal arts should not be underestimated, both because such exposure may open up job prospects and because of the independent value it provides as a means of demonstrating respect for the dignity and intellectual capabilities of prisoners. See, e.g., Jerry Adler, *The Amazing Results When You Give a Prison Inmate a Liberal Arts Education*, *SMITHSONIAN MAG.* (Nov. 2014), <https://www.smithsonianmag.com/innovation/amazing-results-when-you-give-prison-inmate-liberal-arts-education-180953041> (discussing the success of providing prisoners with a liberal arts education).

based training),²⁶⁷ a panoply of curricular options could meet the aims of the communitarian approach.

Religiously oriented programs are not inherently objectionable, so long as they teach critical thinking skills and not solely religious dogma. However, the centrality of religion or theology in an education program may be problematic where this is the only educational option at a given institution or if the participant is only able to pursue higher educational opportunities if he or she submits to religious instruction.²⁶⁸

3. *Reentry Focused*

Where there is a choice between program models that are inside focused or reentry focused, reentry focused models should be preferred. This choice is consistent with the goals of cultivating a seamless transition from prison to free society and providing opportunities so that formerly incarcerated individuals have a realistic chance of thriving after they leave prison. Such models should focus on the student as a returning citizen, envisioning that person—and that person’s needs—beyond the prison walls.

In concrete terms, higher education programs should coordinate with outside institutions to ensure that credits earned in prison are transferable. Creating a “pipeline” through transferability of credits is crucial to operationalizing prison higher education programs towards broader civic aims. Also crucial to this approach is the design of networks,²⁶⁹ safe spaces,²⁷⁰ and supports for formerly incarcerated students on campuses. This would increase their opportunity to succeed academically and integrate into campus life once they are enrolled in courses at outside institutions.²⁷¹

²⁶⁷ Critical thinking skills are linked to “meaning-making.” See Sarah E. Schoper & Craig E. Wagner, *Developing Meaning-Making to Promote Critical Thinking*, in HANDBOOK OF RESEARCH ON ADVANCING CRITICAL THINKING IN HIGHER EDUCATION 195, 195 (Sherrie Wisdom & Lynda Leavitt eds., 2015) (arguing that critical thinking depends on meaning-making). Critical thinking and meaning-making are both associated with study of the humanities. See, e.g., Daniela Dumitru, *Creating Meaning: The Importance of Arts, Humanities, and Culture for Critical Thinking Development*, 10 STUD. HIGHER EDUC. 1, 1 (2019) (arguing that the development of critical thinking depends, in part, on exposure to the humanities).

²⁶⁸ See generally ERZEN, *supra* note 11 (detailing the rise of religious higher education programs in the prison system).

²⁶⁹ These networks could be modeled on those for other student groups, such as first-generation students and veterans.

²⁷⁰ Professors could be encouraged to specify on their syllabi that a course is a “safe space” for formerly incarcerated students.

²⁷¹ According to one expert, “in a way, it’s structurally easier to get colleges into prisons than to change the landscape on campuses.” Telephone Interview with Rebecca Silbert, *supra* note 13 (explaining that this is, in part, because such networks and support may look

It is critical to select program design features carefully in order to create a pipeline that supports returning citizens who wish to continue their studies after release. It is equally important to avoid design choices that would predictably result in reentry-related obstacles. Prison programs should be wary of offering courses of study that would prepare students for jobs for which prisoners would be ineligible because of their status (e.g., convicted felon).²⁷² For example, in the 1980s and early 1990s, many prisoners were working towards and receiving criminal justice degrees.²⁷³ Yet upon their release, these individuals were ineligible for many jobs in the criminal justice field, despite their training, because these jobs, such as correctional officer and FBI agent, were not open to anyone with a felony conviction.²⁷⁴

4. Government Funding

A program's funding source should be selected carefully, as it may directly affect many other design choices, including eligibility.²⁷⁵ At a minimum, incarcerated students who meet low-income requirements should be eligible for federal higher education subsidies—a policy change that would represent a return to the early days of Pell Grants.²⁷⁶ This policy shift would acknowledge that access to higher education is inextricably tied to civic equality and that prisoners, as equal members of the polity, should not lose this civic advantage. The government also should provide community college access and pathway programs to state university systems, so students can continue their courses of study without disruption upon release.

State legislative changes also could have a dramatic effect on the viability and scope of higher education programs in prison. For example, California's SB 1391, which was passed in 2014,²⁷⁷ allows community colleges to be reimbursed for courses taught by their instructors inside prisons.²⁷⁸ As a direct consequence of this legislative change, in 2015, 5000 students, housed in 32 of the 35 prisons in California, were able to enroll in community college courses.²⁷⁹

very different depending on the defining features of a campus and the demographics of the student body).

²⁷² See Telephone Interview with Joshua Miller, *supra* note 13.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See *supra* Section I.B.4.

²⁷⁶ See Wright, *supra* note 40.

²⁷⁷ See Act of Sept. 27, 2014, ch. 695, 2014 Cal. Legis. Serv. (West).

²⁷⁸ See *id.*

²⁷⁹ See Telephone Interview with Rebecca Silbert, *supra* note 13.

Securing government funding for these programs, however, does not require forgoing supplemental funding from the private sector.²⁸⁰ Existing funding streams for public reform projects have tended to involve partnerships with the private sector or allocation of funds that do not require legislative approval.²⁸¹ Further, when the public sector has been unable to garner support for prison reform initiatives, and elected officials have been unwilling to champion prison reform due to fear of electoral consequences, the philanthropic sector has emerged as a dominant force.²⁸² Since foundations function outside of the political system, they are capable of coming to the aid of an unpopular demographic or cause—in this case, prisoners and those formerly incarcerated—in a way that may be challenging for elected officials.²⁸³ This countermajoritarian role,²⁸⁴ when assumed by the philanthropic sector, may be uniquely powerful. Foundations in this space play a quasi-legislative role,²⁸⁵ but unlike democratically elected policymakers, they can avoid the problem of unfunded mandates, since funding allotments are inextricably tied to the programs or policies they choose to support.

²⁸⁰ For example, social impact bonds, which feature a partnership between private investors and the government for public reform projects, could be further explored in this context. *See generally* ANNIE DEAR ET AL., SOC. FIN., SOCIAL IMPACT BONDS: THE EARLY YEARS 12 (2016), https://www.socialfinance.org.uk/sites/default/files/publications/sibs-early-years_social_finance_2016_final.pdf.

²⁸¹ *See supra* Section I.A.

²⁸² *See, e.g.*, Alex Daniels, *MacArthur, Seeing Success in Reducing Jail Time, Boosts Funding for Criminal Justice Overhaul*, CHRON. PHILANTHROPY (Oct. 24, 2018), <https://www.philanthropy.com/article/MacArthur-Seeing-Success-in/244888> (describing the MacArthur Foundation's addition of \$22 million to its Safety and Justice Challenge, a five-year, \$100 million push to reform criminal justice in localities).

²⁸³ For an example of this phenomenon outside the criminal justice realm, consider the roles that the Rosenwald Fund and other philanthropic organizations played in creating opportunities for public education for African Americans in the late nineteenth and early twentieth century South. *See* David Strong et al., *Leveraging the State: Private Money and the Development of Public Education for Blacks*, 65 AM. SOC. REV. 658, 660 (2000) (explaining the ways in which the Rosenwald Fund “wielded a strong influence on educational policy development”).

²⁸⁴ An extensive literature has explored the countermajoritarian function, traditionally attributed to the Court and understood as “protecting minority rights against majoritarian excesses,” though many have raised the question whether the Court is actually capable of serving this function given that its decisions tend to track public opinion. *See* Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 285 (2010).

²⁸⁵ *See, e.g.*, Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1156 (2018) (“[C]ontemporary philanthropy tends more toward top-down policy-making . . .”).

5. *In-Person Instruction*

In-person instruction should be preferred as it represents an opportunity for pro-social interactions between teachers and students. However, given resource and geographical constraints, it is not realistic to expect that all higher education programs can feature in-person instruction at all times. For example, whereas the Prison University Project at San Quentin has the ability, because of its location, to draw on volunteer teachers who are professors and graduate students at Stanford, UC Berkeley, and other local universities, many prisons are located in remote areas and are not close to any universities.²⁸⁶

When such constraints make in-person instruction either unavailable or only intermittently available, it will be important to consider second-best options. For example, one model could have most coursework completed online, with an instructor checking in occasionally to oversee the program. In some circumstances, a prisoner who already completed a course could serve as a mentor for that course. This model would promote pro-social interaction among prisoners,²⁸⁷ as would a model that allows students to interact—either within the prison, or even virtually through video conferencing.²⁸⁸ Finally, as a last resort, correspondence courses with no interactive component would still be preferable to no such courses, since they could promote critical thinking skills and serve reintegrative goals. However, to the extent possible, interactive opportunities—even if occasional—should be favored.

B. *Relationships*

The communitarian approach is relational and values increasing exposure and fostering empathy. It is thus particularly concerned with countering the “us-versus-them” dynamics between incarcerated and

²⁸⁶ See Telephone Interview with Jody Lewen, *supra* note 13; see also Ryan Scott King et al., *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 *CRIMINOLOGY & PUB. POL’Y* 453, 455 (2004) (describing the rise in rural prison construction since 1980); Hannah L. Walker et al., *The Hidden Subsidies of Rural Prisons: Race, Space and the Politics of Cumulative Disadvantage*, 19 *PUNISHMENT & SOC’Y* 393, 410 (2017) (“[P]risons are typically located in the most economically depleted, rural communities that subsequently depend on prison-related jobs and revenue as well as outsized state subsidies in order to stave off economic collapse.”).

²⁸⁷ See Lila Kazemian & Jeremy Travis, *Imperative for Inclusion of Long Termers and Lifers in Research and Policy*, 14 *CRIMINOLOGY & PUB. POL’Y* 355, 362–63 (2015) (discussing the positive effects of having inmates become instructors to other prisoners).

²⁸⁸ See generally *National Directory of Higher Education Programs in Prison*, *PRISON STUDIES PROGRAM*, prisonstudiesproject.org (last visited Oct. 22, 2019) (providing a directory of the prison higher education programs in every state).

non-incarcerated populations by challenging stereotypes and prejudices. To some, once a person is convicted of a crime that person is forever a criminal. Yet, if an incarcerated person is recast as a “student” (or even “college student”), this characterization may complicate an otherwise static designation as “criminal,” thus humanizing the incarcerated person.²⁸⁹ This Section explores possibilities for fostering such interaction and building relationships between incarcerated and non-incarcerated populations through strategic program design choices.

1. Teacher-Student

One such program design choice would widen the net of opportunities for non-incarcerated individuals to participate in prison higher education programs as teachers. I propose a pilot program, modeled on Teach for America (TFA),²⁹⁰ called “Teach for Freedom.”²⁹¹ Like TFA,²⁹² Teach for Freedom would hire recent college graduates as instructors for two-year opportunities in prison education programs.²⁹³ The program would serve three goals: to increase educa-

²⁸⁹ See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241, 1279 (2002) (“By simply drawing attention to another category, we implicitly suggest something like ‘she may be an X and therefore have quality A—an assumption I do not at this moment contest—but she is also a Y, and for that reason more likely to have quality B.’”); Elayne E. Greenberg, *Bridging Our Justice Gap with Empathic Processes That Change Hearts, Expand Minds About Implicit Discrimination*, 32 *OHIO ST. J. ON DISP. RESOL.* 441, 480 (2017) (describing the humanizing effects that can result from dropping “stigmatizing” labels like “offender”).

²⁹⁰ A companion piece will outline this proposed program in greater detail. This piece will discuss the organizational structure of Teach for Freedom, funding sources, and teacher-recruitment strategies, and it will identify and address likely sources of resistance to the proposed program, including those based on operational, public safety, and financial concerns. It will also highlight the economic, professional, and personal benefits to college graduates from participation in this program and further explore leading research on the role of empathy, as well as best practices for trauma-informed communication across different cultures and backgrounds.

²⁹¹ Thanks to James Forman Jr. for suggesting this name. While it may at first seem incongruous since the program’s site is prison, more than ninety-five percent of those incarcerated are eventually released, and preparing them for their eventual freedom is a crucial component of higher education in prison. Second, freedom of thought is an essential part of being human. The metaphor of “freeing one’s mind” through education is a common trope, including in the prison context. See, e.g., Susannah Bannon, *Why Do They Do It?: Motivations of Educators in Correctional Facilities*, 33 *ST. LOUIS U. PUB. L. REV.* 301, 312–13 (2014) (discussing “the transformative nature” of the relationship between incarcerated students and their teachers).

²⁹² The Teach for America program (TFA) includes educators, advocates, entrepreneurs, community members, and policymakers. TEACH FOR AMERICA, <https://www.teachforamerica.org> (last visited Sept. 29, 2019). TFA educators teach for a minimum of two years, reaching millions of students. *Id.*

²⁹³ In basing “Teach for Freedom” on Teach for America, I am mindful that Teach for America has been subject to significant controversy, with opponents raising concerns that

tional opportunities for inmates; to provide employment prospects for recent college graduates; and to increase exposure between incarcerated and non-incarcerated populations.²⁹⁴ Like Teach for America, Teach for Freedom would be structured as a non-profit organization and would recruit teachers from among recent graduating classes of four-year colleges and universities.²⁹⁵ This program would supplement

the amount of training provided to teachers is insufficient and that the organization's "elite recruits often displace veteran black and Latino teachers." Kristina Rizga, *Is America's Most Controversial Education Group Changing Its Ways?*, MOTHER JONES (Feb. 11, 2016), <https://www.motherjones.com/politics/2016/02/teach-america-most-divisive-education-reform-group>; see also M.S.L.J., *Why Is Teach for America Controversial?*, ECONOMIST: ECONOMIST EXPLAINS (Sept. 19, 2013), <https://www.economist.com/the-economist-explains/2013/09/19/why-is-teach-for-america-controversial> (outlining TFA critics' concerns including the "provision of only five weeks' training before placing recruits in front of students" and allegations that Teach for America, by "placing inexperienced young people in front of 'marginalised students' only serves 'to perpetuate the status quo of inequity'"); see also Katie Osgood, *An Open Letter to New Teach for America Recruits*, RETHINKING SCHS., Spring 2014, at 38, 38, <https://www.rethinkingschools.org/articles/an-open-letter-to-new-teach-for-america-recruits> ("TFA claims to fight to end educational inequality, and yet exacerbates one of the greatest inequalities in education today: Low-income children of color are much more likely to be given inexperienced, uncertified teachers."). Given the shortage of teachers (and educational programs) in prison, analogous concerns about replacing well qualified local teachers or increasing educational inequality are less applicable to Teach for Freedom, at least not initially given the almost complete absence of higher education in many prisons. However, ensuring that Teach for Freedom recruits receive sufficient (and appropriate) training is of utmost concern, and Teach for Freedom's training protocol will benefit from a careful scrutiny of the challenges and successes both of Teach for America and of existing prison education programs.

²⁹⁴ While no such program currently exists in the United States, a government report in the United Kingdom, spearheaded by former headteacher Dame Sally Coates, recommended the creation of a program that would place top university graduates in prisons as officers for two-year periods. DAME SALLY COATES, MINISTRY OF JUSTICE, UNLOCKING POTENTIAL: A REVIEW OF EDUCATION IN PRISON 25 (2016) (noting that while the placed prison officers would be responsible for traditional officer functions like "security, supervision and support," they would also be responsible for a range of educational programs within the prison). The resulting program, "Unlocked Graduates," was launched in 2016 and is modeled on Teach First, which is the UK's version of Teach for America. See *About Us*, UNLOCKED GRADUATES, <https://unlockedgrads.org.uk/about> (last visited Sept. 29, 2019). While this program may be the closest existing analogue to Teach for Freedom, there are significant differences; for example, the "Unlocked Graduates" program emphasizes "reducing rates of reoffending" as its primary goal, whereas Teach for Freedom is motivated by broader communitarian goals. See *id.*; see also *supra* Section II.A.

²⁹⁵ This model has already been tested in programs such as the Prison University Project at San Quentin where graduate students (i.e., recent college graduates) serve as teachers. Telephone Interview with Jody Lewen, *supra* note 13. Based on the success of that program, there is good reason to believe that a qualified pool of recent college graduates would be well-suited to teach in a prison higher education program. Notably, in at least one prison education program, the instructors are themselves college students. Telephone Interview with Barbara Wall, *supra* note 13 (explaining the structure of Villanova's program, which includes GED-preparation and higher education courses). One could also imagine a system where new teachers are paired with more experienced teachers and share a classroom, or where Teach for Freedom teachers could also teach understaffed GED

the opportunities provided by existing prison programs, many of which rely on master's degree students—who may themselves be in their first year out of college—to teach college courses.²⁹⁶

Exposure breeds empathy.²⁹⁷ For many college graduates, teaching prisoners might be their first exposure to a population that had previously seemed entirely foreign—an undifferentiated category of people that bore no resemblance to them. Many college graduates may never have encountered an incarcerated person, let alone forged a meaningful professional relationship with one. To form a relationship with someone—even if solely in the teacher-student context—is to humanize that person.²⁹⁸

Over time, exposure and interaction between incarcerated and non-incarcerated populations might radically alter conversations about the goals of punishment and possibilities for successful reintegration. The program's impact would extend far beyond those people who actually participated in Teach for Freedom, including family and friends of Teach for Freedom alumni who would vicariously learn more about the prison context from someone with direct personal experience. Further, to the extent that Teach for Freedom alumni become members of the elite or have influence on elite circles, they may have a particularly strong influence in reshaping attitudes about criminal justice and prison reform.²⁹⁹

classes for those who eventually could qualify for higher education programs (as well as pre-college transitional courses).

²⁹⁶ The Prison University Project, for example, draws on graduate students from Stanford and UC Berkeley. Telephone Interview with Jody Lewen, *supra* note 13.

²⁹⁷ While some may posit that exposure could also breed contempt, experiences of teachers in prison higher education programs have been overwhelmingly positive. *See, e.g.*, Bannon, *supra* note 291, at 305–06 (citing other work on high levels of job satisfaction among teachers in correctional education). The experiences of students in Inside-Out Prison Exchange programs are also highly relevant. At the University of Oregon, for example, competition is fierce among outside students for spots in the program's courses, which are known widely as an “intense, unique experience.” Telephone Interview with Shaul Cohen, *supra* note 13. This is despite the seventy-five-minute commute and additional time required to get in and out of the prison facility. *Id.* Course evaluations are significantly better than average, with students remarking that the Inside-Out course was “enriching, affirming” and in many cases, the “most meaningful, powerful course” in their entire university experience. *Id.*

²⁹⁸ *See generally* MICHELLE BROWN, *THE CULTURE OF PUNISHMENT: PRISON, SOCIETY, AND SPECTACLE* (2009) (exploring how the cultural distance between people and the reality of prisons contributes to peoples' perceptions of incarceration and the incarcerated).

²⁹⁹ Research suggests that popular attitudes about crime are “largely unrelated to the reported incidence of crime and drug use but are strongly associated with the extent to which elites highlight these issues in political discourse.” KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 15 (1997).

2. *Student-Student*

Another approach to exposing incarcerated and non-incarcerated populations to one another is by holding “mixed courses” that include both incarcerated and non-incarcerated students. As with Teach for Freedom, this approach would help to dispel a one-dimensional conception of “criminal” by introducing the characterization “student.”³⁰⁰ Here, in addition to valuable exposure and interaction between teacher and students, there is the added dimension of interaction *among* students, which would include both incarcerated and non-incarcerated individuals.

A limited version of this design choice is the Inside-Out Prison Exchange Program, which was pioneered by Temple University in 1997 and trains instructors to take on-campus students into prison for mixed classes of inside and outside students.³⁰¹ Central to the mission of this program is the opportunity for inside and outside students to learn from one another,³⁰² rather than just providing a “research opportunity.”³⁰³ While this program began as a “criminal justice approach to education” featuring such courses as “Crime and Punishment in America,” in recent years the course offerings have expanded; the core faculty now teaches courses in a broad range of humanities and social science subjects.³⁰⁴ The personal interaction among students participating in the Inside-Out Prison Exchange Program is a core aspect of the program’s mission.³⁰⁵

This example is limited, however, because inside students in the Inside-Out Prison Exchange Program may not receive credit for these courses.³⁰⁶ While these courses may provide valuable, even trans-

³⁰⁰ See *supra* note 289 and accompanying text.

³⁰¹ Telephone Interview with Shaul Cohen, *supra* note 13. More than 800 instructors have been trained, and more than 30,000 students have participated in Inside-Out Prison Exchange Program classes. *The Inside-Out Prison Exchange Program: Social Change Through Transformative Education*, THE INSIDE-OUT CENTER, <http://www.insideoutcenter.org> (last visited Dec. 26, 2019).

³⁰² This program “pushes back on [the] notion of prison as containment” and aims to “break down [the] barrier” between outside and inside the prison walls. Telephone Interview with Shaul Cohen, *supra* note 13.

³⁰³ *Id.*

³⁰⁴ *Id.*; see also *Students*, THE INSIDE-OUT CTR., <http://www.insideoutcenter.org/students.html> (last visited Dec. 26, 2019) (listing courses offered through the exchange program).

³⁰⁵ Telephone Interview with Shaul Cohen, *supra* note 13.

³⁰⁶ See Tanja C. Link, *Breaking Down Barriers: Review of the Implementation of an Inside/Out Prison Exchange Program in a Jail Setting*, 3 J. PRISON EDUC. & REENTRY 50, 53 (2016) (“The inside students were not offered college credits for the course.”); *Frequently Asked Questions*, THE INSIDE-OUT CTR., <https://www.insideoutcenter.org/FAQs.html#questionnin> (last visited Nov. 4, 2019) (“The Inside-Out Center does not require that inside students receive credit.”).

formational, experiences for all participating students, they are also ripe for criticism as voyeuristic, or as examples of “prison tourism.”³⁰⁷ A preferred program model would offer college credits to all participants and ensure that these credits are transferable to a community college or state-wide system, thus facilitating a prison-to-college pipeline.

C. Narratives

A further way to disrupt prevalent “us-versus-them” dynamics is to challenge dominant narratives about prison and prisoners, both relating to and extending beyond the context of higher education.³⁰⁸ Specifically, this would require a reframing of prison in the public imagination as a place where members of the polity live and work. A first step would be to humanize prisoners by exposing non-incarcerated individuals to the multifaceted people we incarcerate—for example, those with latent talents as poets, artists, and orators—thus challenging the notion that prisoners can be defined solely in terms of criminality. Where the “us-versus-them” dynamic involves correctional officers, strategies should empower officers by providing them with more enrichment opportunities and by reframing their roles as more akin to social workers invested in improving the lives of others, rather than as employees tasked with maintaining order within a warehousing paradigm. These strategies would enhance the officers’ self-perceptions as respected members of society who provide a valued service to the polity.

1. Humanizing Prisoners

Exposing non-incarcerated individuals to the creative output of prisoners, either in prison or as part of an exhibit outside prison walls, may help to shift dominant narratives about prisoners and to humanize them in the public imagination.³⁰⁹ Various arts and theater

³⁰⁷ Cf. BROWN, *supra* note 298, at 97–98 (discussing the adverse effects of the “voyeuristic gaze” to which prisoners are subject during organized prison tours).

³⁰⁸ Challenging these “us-versus-them” dynamics is crucial to facilitating the principle of return, which requires that prisoners be envisioned as members of the polity. The “us-versus-them” dynamic also reveals a reciprocity inherent in the principle of return: On the one hand, prisoners need assistance to successfully reintegrate into the broader polity, while on the other hand, the broader polity needs assistance—for example, through shifting norms and narratives—to be prepared to welcome reentering members of the polity.

³⁰⁹ See generally *supra* notes 297–99 and accompanying text.

organizations—often associated with universities—have created immersive experiences that foster such exposure.³¹⁰

For example, the Prison Creative Arts Project (PCAP) connects the University of Michigan community with incarcerated individuals through an annual art exhibition and auction of works created by prisoners.³¹¹ The Curtis Institute’s Community Artist Program (CAP) has facilitated songwriting workshops at a maximum-security prison outside Philadelphia and has plans to record an album of participants’ compositions.³¹²

There have also been notable theatrical collaborations in prison where works selected for performance feature themes with relevance to the prison context, such as transformation and social isolation.³¹³ For example, “Shakespeare Behind Bars” offers “theatrical encounters” to incarcerated individuals and is the oldest organization of its kind in North America.³¹⁴ A 2005 documentary follows a troupe of inmates through their nine-month process of producing *The Tempest* and interviews participants about their experiences, offering them an opportunity to reflect on how themes of Shakespeare’s play relate to the prison context.³¹⁵

Such productions can be powerful reflection pieces for the performers, as well as for audiences, who are invited to view the participants not only as prisoners but also as creators and interpreters, and

³¹⁰ The “Prison Performance Network,” an online resource for educators who “facilitate performance work with prison inmates,” consolidates information about a range of artistic programs in prisons across the United States. THE PRISON PERFORMANCE NETWORK, <http://prisontheatreconsortium.blogspot.com> (last visited Sept. 28, 2019).

³¹¹ *Prison Creative Arts Project*, UNIV. MICH., <https://lsa.umich.edu/pcap> (last visited Sept. 28, 2019).

³¹² CAP’s programming goes beyond the prison context and also includes other underserved communities in the Philadelphia area. See *Curtis Graduates Bring Arts Access and Education to Philadelphia*, CURTIS INST. MUSIC (Dec. 18, 2017), <https://www.curtis.edu/news-folder/Fall-2017/curtis-graduates-bring-arts-access-and-education-to-philadelphia-communities-through-community-artist-fellowships>.

³¹³ See, e.g., Elizabeth Charlebois, “*Their Minds Transfigured So Together*: Imaginative Transformation and Transcendence in *A Midsummer Night’s Dream*, in *PERFORMING NEW LIVES: PRISON THEATRE* 256, 256–57 (Jonathan Shailor ed., 2011) (noting the connection between the metamorphoses in Shakespeare’s *A Midsummer Night’s Dream* and those of the prisoners performing the play); Baz Kershaw, *Pathologies of Hope in Drama and Theatre*, in *THEATRE IN PRISON: THEORY AND PRACTICE* 35, 46 (Michael Balfour ed., 2004) (describing one such work about prison that “root[s] out the drama buried deeply and discretely at the heart of its panoptic system”).

³¹⁴ SHAKESPEARE BEHIND BARS, <https://www.shakespearebehindbars.org> (last visited Dec. 26, 2019).

³¹⁵ *SBB Documentary*, SHAKESPEARE BEHIND BARS, <https://www.shakespearebehindbars.org/documentary> (last visited Dec. 26, 2019). For a fictional account of a production of *The Tempest* in prison, see MARGARET ATWOOD, *HAG-SEED* (2016).

to consider familiar themes and narratives through the lens of the prison context. For example, in 2012, the Angola Drama Club, in conjunction with a Louisiana women's prison, produced a full-length public performance of the three-hour play *The Life of Jesus Christ*, which was performed in an outdoor arena and open to family members and the broader public.³¹⁶ Reflecting on the experience, Assistant Warden Cathy Fontenot explained that the professional-level production (including costumes, sets, and staging) “allow[ed] the public to see [prisoners] in a different way, and to see how prison changed them.”³¹⁷ This play, and the opportunity for the public to witness the inmates performing it, crystallized the message of transformation, deliberately, self-consciously, and, apparently, to great effect.³¹⁸ Such exposure—even without any in-person interaction—has great promise to shift the “us-versus-them” narratives that pit incarcerated and non-incarcerated populations against each other, cultivating a sense of shared humanity and common membership in the polity.

2. *Empowering Officers*

When officers object to prison reforms that would improve conditions or increase access to enrichment programs for prisoners, this opposition may be emblematic of their conception of the “undeserving prisoner.” It also may reveal a “resistance born of envy.”³¹⁹ Scrutinizing the role of the correctional officer, especially in the context of prison higher education programs, provides insights into the disadvantages faced by those who labor behind prison walls and who may themselves feel “imprisoned.” To shift this narrative would require offering enrichment opportunities to correctional officers, and ultimately reimagining their professional roles.³²⁰

In the higher education context, offering opportunities for officers to pursue higher education—same as or similar to those pro-

³¹⁶ Telephone Interview with Cathy Fontenot, *supra* note 13; *see also* C.D., *A Passion Play in Prison: Enacting Forgiveness and Redemption*, *ECONOMIST: PROSPERO* (May 15, 2012), <https://www.economist.com/prospero/2012/05/15/enacting-forgiveness-and-redemption> (describing “a uniquely powerful staging of ‘The Life of Jesus Christ’ at Louisiana State Penitentiary”).

³¹⁷ Telephone Interview with Cathy Fontenot, *supra* note 13.

³¹⁸ Importantly, this took buy-in from not only the inmates themselves but also from administrators and staff, beginning with Warden Cain who “didn’t say ‘no’ because of security concerns. He said ‘yes’ to reengage the public. Even if inmates were in for life, there could still be an impact on people—on staff, family, and other inmates.” Telephone Interview with Cathy Fontenot, *supra* note 13; *see also* Campbell Robertson, *In Prison, Play with Trial at Its Heart Resonates*, *N.Y. TIMES* (May 5, 2012), <http://www.nytimes.com/2012/05/06/us/in-prison-play-with-trial-at-its-heart-resonates.html>.

³¹⁹ Telephone Interview with Jody Lewen, *supra* note 13.

³²⁰ Eisenberg, *supra* note 17, at 137.

vided to the inmates they supervise—would be a first step in this direction. This approach could include parallel academic tracks for staff and inmates, shared classrooms, and specialized programs for staff geared towards professional advancement in the corrections landscape. According to one prison education expert, “If people looked at line officers as people, if we recognized them as students and crafted programs at a time of day that works for them, it would change the culture of prison and change the field in a positive way.”³²¹

No prison currently offers joint higher education classes for staff and inmates,³²² and none provides a specialized curriculum geared towards the professional advancement of line officers. Only one program, run by Saint Louis University in conjunction with the Missouri Department of Corrections, offers parallel curricula to inmates and staff.³²³ The Saint Louis University program began in 2007 as a non-degree-granting course of study in theological studies for “inside students” only.³²⁴ When the program was exploring a switch to a degree-granting model, one faculty member in sociology with experience working as a correctional officer made a push to include staff as well as inmates.³²⁵ The philosophy central to this dual-track program is that “prisons are not only places where people are incarcerated, but also where people work.”³²⁶

The “dual emphasis” of Saint Louis University’s program helped to “garner enthusiastic support” from George Lombardi, the director of Missouri’s Department of Corrections (DOC).³²⁷ Saint Louis University’s pilot Associate of Arts degree ran “on a dual track, with a cohort of incarcerated students who would take courses during the morning inside of the prison fences, and a cohort of staff who would take classes in the evening at the training center just outside the prison perimeter.”³²⁸ Mary Gould, the Saint Louis University Program Coordinator, observed that, precisely because of the dual

³²¹ Telephone Interview with Jody Lewen, *supra* note 13.

³²² In 1972, when Villanova University’s prison program began, prisoners and staff were enrolled in the same classes. Telephone Interview with Barbara Wall, *supra* note 13. However, “soon after, the guards dropped out,” and thereafter the program was open only to prisoners. *Id.*

³²³ See *Saint Louis University Prison Program*, ST. LOUIS U., <https://www.slu.edu/arts-and-sciences/prison-program/index.php> (last visited Dec. 26, 2019).

³²⁴ Telephone Interview with Mary Gould, *supra* note 13.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Kenneth L. Parker, *The Saint Louis University Prison Program: An Ancient Mission, A New Beginning*, 33 ST. LOUIS U. PUB. L. REV. 377, 394 (2014).

³²⁸ *Id.*

track, which remains a defining feature of the program, “we have more staff who love us than most prisons.”³²⁹

While there are no Saint Louis University classes that include both prison staff and inmates—the DOC places a high premium on avoiding any formal disruption of the strict hierarchy of the prison environment³³⁰—these two cohorts take classes with identical syllabi,³³¹ which may result in ad hoc interaction between staff and inmates about their respective experiences. Gould recounted an interaction she observed between the member of the prison staff who runs the laundry and the inmates who work there.³³² Since the staff member and inmates were reading the same book in their respective college courses, they were able to have a spontaneous, substantive conversation about the text.³³³ The success of Saint Louis University’s “dual-track” program, and the reported interest and enthusiasm of corrections leaders elsewhere, suggest that this model could be implemented more widely, so long as increased resources were provided.³³⁴

Providing educational opportunities to correctional officers on par with those of inmates may not only mitigate resistance; it also may fundamentally shift the officers’ self-perception of their roles in the criminal justice system, and of the purpose of prison more broadly. According to Gould, after completing the Saint Louis University program, correctional officers confided that “they don’t want to do their job; they want to be social workers or do something more therapeutic.”³³⁵ Optimally, instead of warehousing, the officer’s job eventually would be more akin to social work, as in Germany, the Netherlands, and other European nations.³³⁶

³²⁹ Telephone Interview with Mary Gould, *supra* note 13.

³³⁰ Missouri DOC leaders voiced displeasure when staff attended an inmate graduation, preferring to keep these cohorts entirely separate. Telephone Interview with Mary Gould, *supra* note 13 (explaining that “the Department of Corrections doesn’t love the interaction” between these populations). Crucial to this anecdote is the distinction between the motivations of line officers and the priorities of the Department of Corrections administration. This demonstrates that overcoming an “us-versus-them” mentality between inmates and correctional officers may require addressing other “us-versus-them” dynamics in the prison hierarchy.

³³¹ Saint Louis University Prison Program, *Frequently Asked Questions*, ST. LOUIS U., <https://www.slu.edu/arts-and-sciences/prison-program/faq.php> (last visited Dec. 26, 2019).

³³² Telephone Interview with Mary Gould, *supra* note 13.

³³³ *Id.*

³³⁴ *See, e.g.*, Telephone Interview with Rebecca Silbert, *supra* note 13 (explaining that in California, while there is definite interest in expanding course offerings to include correctional officers, a lack of resources is a significant barrier).

³³⁵ Telephone Interview with Mary Gould, *supra* note 13.

³³⁶ For example, in Germany, “training spans two years with 12 months of theoretical education followed by 12 months of practical training,” and prospective officers are required to take courses in such subjects as constitutional law, psychology, and educational

D. *The Political Economy of Prison Reform*

While programs that provide higher educational opportunities to correctional staff, as well as inmates, have the potential to mitigate opposition and empower line officers to reimagine their own roles within the prison walls, there are significant obstacles to broader implementation of such programs. Corrections leaders and prison reform advocates have stressed a shortage of resources. In the words of one advocate, “It’s about money.”³³⁷

Yet resistance to reform involves both economic and cultural factors. Beyond financial constraints, there is a general resistance to change in the prison context,³³⁸ and a concern among corrections leaders for disrupting hierarchies.³³⁹ Some prison industry stakeholders may prefer to keep correctional officer jobs as low-paid and essentially unskilled labor.³⁴⁰ If so, investing in the welfare of correctional officers would be considered an extremely low priority, and even pose a potential threat if likely to inspire them to challenge the warehousing model in which they play a part.

There are also choices to be made among reformers with respect to what kinds of programs—or even what kinds of reforms—should receive priority. Some will prefer reforms that have the greatest likelihood to shift dominant narratives about prisoners and that presage structural change. Others will favor reforms that impact the greatest number of prisoners. While conceptually these categories of reforms are not mutually exclusive, given limited resources, it may be necessary to choose. Those who would favor the most broad-reaching reforms with immediate impact would favor expanding and improving literacy training programs, since more than sixty percent of prisoners are illiterate.³⁴¹ Similarly, as many GED programs in prison have huge waiting lists,³⁴² programs that help to expand GED course offerings

theory. SUBRAMANIAN & SHAMES, *supra* note 249, at 12 (describing correctional officers in these European countries as “professionals who undergo extensive training that is more akin to that of social workers and behavior specialists in the U.S.”); *see also* Benko, *supra* note 250.

³³⁷ Telephone Interview with Jody Lewen, *supra* note 13.

³³⁸ Eisenberg, *supra* note 17, at 101.

³³⁹ Telephone Interview with Mary Gould, *supra* note 13.

³⁴⁰ *See, e.g.*, Tracy F. H. Chang & Douglas E. Thompkins, *Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry*, 27 *LAB. STUD. J.* 45, 52 (2002) (explaining that, in the private prison context, “[t]o be profitable, the companies must first reduce labor costs by paying employees lower wages and benefits”).

³⁴¹ Christopher Zoukis, *Basic Literacy a Crucial Tool to Stem School to Prison Pipeline*, *HUFFPOST* (May 12, 2017), https://www.huffingtonpost.com/entry/basic-literacy-a-crucial-tool-to-stem-school-to-prison_us_59149393e4b01ad573dac1dd.

³⁴² *FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS EDUCATION PROGRAM ASSESSMENT FINAL REPORT 4*, app. 6 (2016) (“The waiting list for

also could serve a large number of prisoners. Nonetheless, as this Article illustrates, it would be unwise to neglect prison higher education programs merely because their immediate reach would be narrow. Indeed, the case study of prison higher education exemplifies a possible tradeoff between programs that involve a high impact (measured by prisoners served) and those that may gradually lead to more widespread, systemic reforms.

While any structural change—especially involving entrenched institutions with a host of incentives that cut against such reform—is challenging, incremental change may still be possible. One could imagine, for example, an incrementalism that eventually moves those who oppose enrichment opportunities for prisoners towards accepting these programs because they satisfy harm-prevention goals, and that moves those who already accept these programs on harm-prevention terms towards considering the value to the polity when its members, including the formerly incarcerated, thrive as citizens.

CONCLUSION

The details of prison programming have been largely ignored by criminal law scholarship. Yet they reflect and reinforce punishment theory goals and are critical to any meaningful discussion of prisoners' reentry into society. This Article's examination of prison higher education programs, and the controversy surrounding them, exposes widespread theoretical and cultural resistance to prison reform. But this study also reveals institutional design choices that could mitigate this resistance, interventions that would benefit both incarcerated and non-incarcerated populations. The Article's recommendations would disrupt the "us-versus-them" dynamics that alienate those who live in and who work in prison, ultimately shifting the national discourse about the role of prisons, the function of punishment, and the interconnectedness of prisoner and polity.

a GED program has been estimated at some 15,629 inmates, with 19,725 inmates enrolled in the programs."); Emily Sweeney, *Enrolled in a School of Hard Time*, BOSTON GLOBE (May 22, 2008), archive.boston.com/news/local/articles/2008/05/22/enrolled_in_a_school_of_hard_time ("There are waiting lists for every class . . . [T]he GED class usually has at least 100 people or more on it.").