

## *Student Note*

### **Evaluating the Effects of Educational Attainment on Criminality and the Criminal Process, with a Focus on Federal Sentences Rendered and Recidivism Rates**

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#### **I. INTRODUCTION**

The importance of educational attainment begins at a young age, and its effects are seen throughout an individual's adult life. At the outset, education provides children with a foundation to determine right from wrong while understanding the consequences of their decisions. Importantly, continuing this educational foundation through high school, as well as the college-level, provides even adults with the tools necessary to make more reasoned decisions. And such tools in turn deter criminal participation. This trade-off occurs most often because higher levels of educational attainment strengthen an individual's understanding of the "costs" of criminal participation, facilitate stronger ties to the community, and create increasing opportunities for employment and income, among other things. And so, it follows that those individuals who have not attained higher-level education are more likely to participate in criminal activity. Moreover, following criminal participation, individuals' lack of educational attainment continues to affect their outcomes in the criminal justice process.

This Note explores the relationship between educational attainment and criminal participation, and specifically how lower levels of educational attainment create a greater risk of criminal participation, longer federal sentences, and a greater risk of recidivism. First, this Note discusses how greater educational attainment provides individuals with the tools necessary to understand why they should not commit crimes. Next, this Note explains the processes between the commission of a crime and receiving a federal criminal sentence. Federal criminal defendants are sentenced in United States district courts, and research has shown that higher sentence lengths correlate with lower levels of

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educational attainment. Last, this Note analyzes research and scholarship that show greater educational attainment and opportunities, prior to and following initial incarceration, create lower rates of recidivism. Importantly, this Note also addresses the continued inequalities seen in educational attainment and how such inequality creates a concentrated risk of criminality and recidivism for minorities.

## II. EDUCATION AND CRIME

### A. The Relationship Between Educational Attainment and Criminality<sup>1</sup>

Education is known to many as “the most powerful weapon which you can use to change the world.”<sup>2</sup> An educational foundation provides stability and financial security, is necessary for equality, permits self-dependency, and keeps our world safe.<sup>3</sup> Even globally, “increasing levels of educational attainment . . . [have been] positively associated with community engagement, advocacy and volunteering, trust and tolerance, healthy behavior[s], environmental conservation activities, [and] employment and business management.”<sup>4</sup> “These benefits [have] contributed to improved income and wealth accumulation, reduced financial stress[,] and reduced reliance on government support payments.”<sup>5</sup>

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1. AVA PAGE ET AL., EDUCATION AND PUBLIC SAFETY, JUST. POL’Y INST. 2 (2007), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/07-08\\_rep\\_educationandpublicsafety\\_ps-ac.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/07-08_rep_educationandpublicsafety_ps-ac.pdf) (“Educational attainment is a measure of the amount of education that a person has completed. . . .” Importantly and concerning, “[t]his measure may be a reflection of disparate educational opportunities available to some communities and not a description of capability.”); Definition of *Criminality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/criminality> (last visited Oct. 23, 2022) (defining criminality as “the quality or state or being criminal” or more generally, “criminal activity”).

2. *Top 10 Reasons Why is Education Important*, UNIV. PEOPLE, <https://www.uopeople.edu/blog/10-reasons-why-is-education-important/> (last visited Oct. 23, 2022) (quoting Nelson Mandela).

3. *Id.*

4. Infographic on *Benefits of Educational Attainment*, AUSTL. GOV’T DEP’T EDUC. (Sept. 5, 2019), <https://www.education.gov.au/integrated-data-research/benefits-educational-attainment>.

5. *Id.*

Although the importance of an educational foundation is most clearly seen in circumstances of adulthood, such importance actually begins at the outset of an individual's childhood. From childhood on, many face "influences coming from all directions."<sup>6</sup> In sifting through such influences, education is what assists us in deciphering fact from fiction and right from wrong.<sup>7</sup> Thus, "[e]ducational attainment, primarily high school graduation, serves as an important benchmark in the process of transitioning into adulthood."<sup>8</sup> This "[s]uccessful arrival at adulthood, . . . can be determined by a series of events such as graduation from school into the [job] market, from the [job] market into marriage, from marriage into parenthood, and so on."<sup>9</sup> Such events define a "trajectory to maturity," which "can be irreversibly altered by failure to complete . . . benchmarks[,] like high school graduation."<sup>10</sup>

Furthermore, "[a]ccording to research conducted by the American Sociological Association, these life course transitions, if completed successfully, have a key 'normalizing effect' on the individual . . . ."<sup>11</sup> Thus, "[h]igher education correlates with increased access to desirable job markets[] and . . . higher potential wage earnings, [accordingly;] heightened aversion to impulsivity due to cultivation of critical thought[;] and the added deterrent of strong social bonds with community and agency of employment."<sup>12</sup> On the same accord, educated "individuals place more weight on their potential future earnings and, thus, may be more likely to factor in the chances of getting caught and the expected prison sentence when deciding whether to commit a crime."<sup>13</sup> And "increased schooling can decrease an individual's criminal propensity by increasing his [or her] attachment to legitimate society."<sup>14</sup>

In traditional "model[s] of crime, individuals decide whether to commit crime by comparing the costs and benefits of criminal

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6. *Top 10 Reasons Why is Education Important*, *supra* note 2.

7. *Id.*

8. PAGE ET AL., *supra* note 1, at 9.

9. *Id.*

10. *Id.*

11. *Id.* at 9-10.

12. *Id.* at 10.

13. Randi Hjalmarsson et al., *The Effect of Education on Criminal Convictions and Incarceration: Causal Evidence from Micro-Data*, 125 *ECON. J.* 1290, 1291 (2015).

14. *Id.*

participation.”<sup>15</sup> And “[r]esearch has . . . shown that education increases patience and cultivates an aversion to risk-taking.”<sup>16</sup> That is, education strengthens an individual’s understanding of the costs of criminal participation due in part to “the heightened social bonds, responsibilities, or expectations that [come along with educational attainment and] could be potentially damaged by a criminal conviction.”<sup>17</sup> The working theory describing the relationship between educational attainment and criminality is known as the “‘The Human Capital’ theory.”<sup>18</sup> The Human Capital Theory is “based on the idea that if [an individual] gets an education and seizes opportunities for advancement and social reward resulting from that education, then that [individual] will be less likely to want to risk that ‘capital’ by engaging in criminal behavior.”<sup>19</sup>

Numerous studies and reports have addressed this relationship between educational attainment and criminality. For example, “individuals incarcerated in U[nited] S[tates] prisons and jails report significantly lower levels of educational attainment than do those in the general population.”<sup>20</sup> And “[s]ome [studies] have found that adolescents who are involved in paid employment or attend K–12 education are less likely to engage in criminal behavior.”<sup>21</sup> “Most studies have found that [greater high-school] graduation rates are generally associated with . . . lower crime rates for communities.”<sup>22</sup> Additionally, states with “high[] percentage[s] of [the] population who had attained a high school diploma or above were found to have lower violent crime rates than the national average, compared to . . . states with . . . lowe[r] educational attainment per population.”<sup>23</sup> And “states with the . . . highest [college] enrollment rates . . . [were seen to have] violent

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15. Rui Costa et al., *Why Education Reduces Crime*, VOX EU CEPR (Oct. 14, 2018), <https://cepr.org/voxeu/columns/why-education-reduces-crime>.

16. PAGE ET AL., *supra* note 1, at 9.

17. *Id.*

18. M. Bernard, *The Clear Correlation Between Education and Crime*, ESFANDI L. GRP. (June 24, 2022) <https://esfandilawfirm.com/correlation-between-education-and-crime/> (June 24, 2022).

19. *Id.*

20. PAGE ET AL., *supra* note 1, at 1.

21. *Education and Crime*, CRIM. JUST., <https://criminal-justice.iresearchnet.com/crime/education-and-crime/4/> (last visited Oct. 25, 2022).

22. *Id.*

23. PAGE ET AL., *supra* note 1, at 1.

crime rates [well] below the national average[,]” compared to “states with the lowest college enrollment rates, [which] had violent crime rates [well] above the national average.”<sup>24</sup> For example, “California is one of the ten lowest-ranking states on the educational attainment list and has a higher rate of violent crime than states (like Minnesota) where educational attainment is higher and violent crime is lower.”<sup>25</sup>

But “[n]ot all studies find that more highly educated people are less likely to engage in criminal behavior . . . .”<sup>26</sup> For example, researchers have “found that ‘school attendance reduces contemporaneous juvenile property crime while increasing juvenile violent crime’ and that ‘the increased level of interaction among adolescents facilitated through schools may raise the likelihood of violent conflicts after school.’”<sup>27</sup> In other words, according to these findings, “while attendance in high school is apt to reduce property crimes, it actually raises the rate of violent crimes among the juveniles themselves.”<sup>28</sup> In addition, “certain white collar crimes are likely to require higher levels of education,”<sup>29</sup> such as computer fraud and pyramid schemes.<sup>30</sup> Specifically, researchers “have . . . argued that increased levels of education actually facilitate . . . criminal behavior[, like white collar crime] in some individuals because of their increased abilities and knowledge.”<sup>31</sup>

### **B. A Concentrated Risk for Low Educational Attainment and In Turn High Rates of Criminality Exists in Poor and Minority Communities**

Educational inequality has long been ingrained in the relationship between low educational attainment and in turn a greater risk of criminality. “Americans often forget that as late as the 1960s most African-American, Latino, and Native American students were educated in wholly segregated schools funded at rates many times lower than those serving whites and were excluded from many higher

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24. *Id.* at 2.

25. Bernard, *supra* note 18.

26. *Education and Crime*, *supra* note 21.

27. Bernard, *supra* note 18 (citation omitted).

28. *Id.*

29. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 158 (2004).

30. *Education and Crime*, *supra* note 21.

31. *Id.*

education institutions entirely.”<sup>32</sup> But importantly, “[t]he end of legal segregation followed by efforts to equalize spending since 1970 has made a substantial difference for student achievement.”<sup>33</sup> As evidence of this, “[o]n every major national test, including the National Assessment of Educational Progress, the gap in minority and white students’ test scores narrowed substantially between 1970 and 1990, especially for elementary school students.”<sup>34</sup> Furthermore, “[o]n the Scholastic Aptitude Test (SAT), the scores of African-American students climbed 54 points between 1976 and 1994, while those of white students remained stable.”<sup>35</sup>

But despite this (what some may consider) progress, “[o]n most major measures, educational inequality is holding steady or on the rise.”<sup>36</sup> Specifically, “educational experiences for minority students have continued to be substantially separate and unequal.”<sup>37</sup> For example, “minority students still attend schools that are predominantly minority, most of them located in central cities and funded well below those in neighboring suburban districts.”<sup>38</sup> Moreover, “[a]chievement, segregation, and funding data all indicate that poor and minority students are receiving vastly unequal educational opportunities.”<sup>39</sup> And “it is established that poverty negatively affects the development of children, contributing to poor impulse control, low self-esteem, and reduced educational achievements, all of which are conducive to harmful activity such as crime.”<sup>40</sup> Consequently, “[t]he risk of incarceration, higher violent crime rates, and low educational attainment

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32. Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>.

33. *Id.*

34. *Id.*

35. *Id.*

36. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1060 (2019).

37. Darling-Hammond, *supra* note 32.

38. *Id.*

39. Jan Resseger, *The Three Most Serious Problems for U.S. Public Education in 2023*, NAT’L EDUC. POL’Y CTR. (Jan. 17, 2023), <https://nepc.colorado.edu/blog/three-most-serious#:~:text=Achievement%2C%20segregation%2C%20and%20funding%20data,student%20than%20predominantly%20white%20schools.>

40. Mirko Bagaric, *Rich Offender, Poor Offender: Why it (Sometimes) Matters in Sentencing*, 33 MINN. J. L. & INEQ. 1, 10-11 (2015).

are concentrated among communities of color, who are more likely to suffer from barriers to educational opportunities.”<sup>41</sup>

Moreover, “[t]he underrepresentation of people of color in institutions of higher education means that those community benefits that might accrue from education involvement are less likely to be realized,”<sup>42</sup> such as lower crime rates. And by the same token, a vicious cycle is created by the underrepresentation of minorities. To begin, representation starts with school official and leaders, like teachers, professors, and deans, “reflect[ing] the demographics of the student body in the schools they serve.”<sup>43</sup> Yet, as of 2018, “only [twenty] percent of educators across the country come from minority backgrounds.”<sup>44</sup> And on the same accord, “[a] Johns Hopkins University study provides evidence for just how much representation matters in student outcomes, reporting that [B]lack students are 13[%] more likely to enter college if they had at least one [B]lack teacher by the third grade.”<sup>45</sup> According to that same study, “[t]he likelihood of college enrollment more than doubles (32[%]) for [B]lack students with at least two [B]lack teachers in elementary school.”<sup>46</sup> The issue of minority underrepresentation in educational institutions is salient in understanding education’s effect on criminal behaviors, and it begins during childhood. Mainly, “[c]hildren base their visions of their futures on what they see in their everyday environments.”<sup>47</sup> For instance, “when the people who are teaching them look like them and have a similar background,” children are able to “envision what [is] possible for the[ir futures].”<sup>48</sup> Consequently, establishing educational institutions that are representative of all demographics can “improve student outcomes” and thus reduce criminal participation.<sup>49</sup>

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41. PAGE ET AL., *supra* note 1, at 2.

42. *Id.* at 13.

43. *Why Teachers Teach at Low-Performing Schools: Representation Matters*, AU SCH. EDUC. ONLINE PROGRAMS (Apr. 10, 2020), <https://soeonline.american.edu/blog/why-representation-matters-in-low-performing-schools/>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* Despite research exhibiting the importance of equal representation in educational institutions, a recent “analysis suggests that historically marginalized racial and ethnic populations—Black, Hispanic and Latino, and Native American and Pacific Islander—are still

### III. EDUCATIONAL ATTAINMENT AND THE FEDERAL CRIMINAL PROCESS

#### A. Background on the Post-Criminal-Participation Process and Proceedings

When “a crime is brought to the attention of federal authorities, whether by a victim of the crime or a witness to it . . . , a federal law enforcement agency[,]” such as the Federal Bureau of Investigation (FBI), “will undertake an investigation to determine whether a federal offense was committed and, if so, who committed it.”<sup>50</sup> But “[n]ot every crime is a federal offense.”<sup>51</sup> To illustrate, “murder is a crime in all [fifty] states, but it is not a federal offense unless, for example, a federal official is murdered while performing official functions.”<sup>52</sup> Additionally, “[n]ot every federal law enforcement agency has the responsibility to investigate every crime.”<sup>53</sup> For instance, “the Secret Service is responsible for investigating counterfeiting of currency, and the FBI is the lead federal agency for terrorism cases.”<sup>54</sup> So, an important distinction between federal law enforcement agencies and local law enforcement forces is that federal agencies have particular areas of expertise and, thus, do not handle any and every federal crime that arises.<sup>55</sup>

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underrepresented in higher education among undergraduates and faculty and in leadership.” Diana Ellsworth et al., *Racial and Ethnic Equity in US Higher Education*, MCKINSEY & CO. (July 18, 2022), <https://www.mckinsey.com/industries/education/our-insights/racial-and-ethnic-equity-in-us-higher-education>.

50. *A Brief Description of the Federal Criminal Justice Process*, FBI, <https://www.fbi.gov/how-we-can-help-you/victim-services/a-brief-description-of-the-federal-criminal-justice-process> (last visited Dec. 30, 2022).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*



Following the responsible agency's investigation, so long as it "concludes that a crime was committed and identifies a suspect," the next step typically involves "federal law enforcement officers (known as special agents)" making an arrest.<sup>56</sup> Additionally, federal prosecutors, known as Assistant United States Attorneys (AUSAs) must review the information from the investigating agency and "decide whether to present the case to a grand jury."<sup>57</sup> A grand jury consists of "an impartial group of citizens," who first hear[] witness testimony and review[] other evidence."<sup>58</sup> Next, the "grand jury deliberates and votes in secret on whether they believe there is enough evidence to charge, [or indict,] the person with a crime."<sup>59</sup>

On "[e]ither the same day or after a defendant is indicted and arrested, they are brought before a magistrate judge for an initial hearing," where "the defendant learns more about their rights and the charges, arrangements are made for legal representation, and the judge decides if the defendant will be held in jail or released on bond until the trial."<sup>60</sup> During an arraignment, the defendant "enters a plea responding to those charges, which generally is not guilty or guilty."<sup>61</sup> The AUSA on the case "may offer the defendant a plea agreement to avoid trial and perhaps avoid a longer sentence."<sup>62</sup> "Through a guilty plea [agreement], a defendant admits guilt and consents to be sentenced by the judge presiding over the case without a trial."<sup>63</sup> Absent a plea agreement, a case will proceed to trial.<sup>64</sup> In the case of "federal criminal trials, the jury must reach a unanimous decision in order to convict the defendant."<sup>65</sup> Once the jury reaches an "agreement on a verdict, the jury

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56. *Id.*

57. *Criminal Justice Process*, ENV'T & NAT. RES. DIV. U.S. DEP'T JUST., <https://www.justice.gov/enrd/criminal-justice-process#:~:text=In%20federal%20criminal%20trials%2C%20the,the%20reading%20of%20the%20verdict> (last visited Dec. 30, 2022).

58. *Id.*

59. *Id.* ("An indictment is formal notice to a defendant that they have been charged with a crime. It contains the basic information that informs the person of the nature of the charge(s) against them.")

60. *Id.*

61. *A Brief Description of the Federal Criminal Justice Process*, *supra* note 50.

62. *Criminal Justice Process*, *supra* note 57.

63. *Id.*

64. *Will my Sentence be Harsher if I Decline a Plea Offer?*, BURNHAM L. (Feb. 2, 2022), <https://burnhamlaw.com/help-center-articles/will-my-sentence-be-harsher-if-i-decline-a-plea-offer/#:~:text=It%20is%20possible%20for%20the,is%20up%20to%20the%20judge>.

65. *Criminal Justice Process*, *supra* note 57.

informs the judge, the lawyers, and the defendant in open court.”<sup>66</sup> Where a jury trial does not take place, “the judge will deliberate and return a verdict.”<sup>67</sup> The result of either a guilty plea or verdict is a conviction.<sup>68</sup> And following a conviction, “the court will impose some *sentence* on the offender.”<sup>69</sup>

## B. Background on Federal Criminal Sentencing

### 1. *The United States Sentencing Commission and Mandatory Sentencing Guidelines*

Prior to 1984, the Supreme Court acknowledged the existence of broad discretionary powers in sentencing courts, which “led to significant sentencing disparities among similarly situated offenders.”<sup>70</sup> Specifically, “federal judges [were] impos[ing] ‘indeterminate’ sentences with virtually unlimited discretion within broad statutory ranges of punishment.”<sup>71</sup> In addition, members of Congress found that “[e]ach judge [was] left to apply his [or her] own notions of the purposes of sentencing. . . . As a result, every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”<sup>72</sup>

To address these issues, the United States Sentencing Commission (Commission)—“a bipartisan expert agency located in the judicial

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66. *Id.*

67. *A Brief Description of the Federal Criminal Justice Process*, *supra* note 50.

68. *A Federal Criminal Case Timeline*, FED. PUB. DEFENDER: N. DIST. W. VA. 4 <https://wvn.fd.org/sites/wvn.fd.org/files/pdfs/FedCrimTimeline.pdf> (last visited Dec. 30, 2022); *The Relationship Between Incarceration and Low Literacy*, LITERACY MID - S. (Mar. 2016), <https://www.literacymidsouth.org/news/the-relationship-between-incarceration-and-low-literacy> (noting that although “[a] low level of literacy is not a direct determinant of a person’s probability to be convicted on criminal charges, . . . correctional and judicial professionals have long recognized a connection between poor literacy, dropout rates, and crime.”)

69. *A Brief Description of the Federal Criminal Justice Process*, *supra* note 50 (emphasis added). The steps in the federal justice process described above are not exhaustive. See *Criminal Justice Process*, *supra* note 57 (“Some cases are simple and may not involve every step. Others may be more complex and may involve most or all of the steps in the process.”).

70. U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 2 (2020) (footnote omitted) [hereinafter 2020 THE BASICS].

71. *Id.*

72. *Id.*

branch”<sup>73</sup>—was created by Congress under the Sentencing Reform Act of 1984 “to reduce sentencing disparities and promote transparency and proportionality in sentencing.”<sup>74</sup> The 1984 Sentencing Reform Act charged the Commission with constructing a set of guidelines that would “provide certainty and fairness” in conformance with the purposes of sentencing, while circumventing “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”<sup>75</sup> In 1987, the Commission completed the Federal Sentencing Guidelines (Guidelines), and Congress adopted the Guidelines into law that same year.<sup>76</sup> At that time, the sentencing courts were bound by the Guidelines, which “provided the sentencing judge with a narrow range ([for example], [six]-[twelve] months) within which he or she was *required* to sentence the defendant.”<sup>77</sup>

Defense lawyers, judges, academics, and the like greatly criticized the mandatory guidelines.<sup>78</sup> Critics believed the Guidelines were “unduly complicated and inflexible.”<sup>79</sup> And further, that the Guidelines “reduc[ed] sentencing to mathematical formulas,” removing the discretion of human actors.<sup>80</sup> In response, supporters asserted that the Guidelines “had created a reasonably administrable system that promoted sentencing uniformity and proportionality better than any alternative . . . .”<sup>81</sup> Despite this controversy, the importance of the Guidelines was universally acknowledged.<sup>82</sup> Specifically, all came to understand that a defendant’s potential sentence under the Guidelines was a critical consideration in numerous decisions, “including whether they would be released on bail, with what they would be charged, the

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73. *Id.*

74. *About the Commission*, U.S. SENT’G COMM’N, <https://www.uscc.gov> (last visited Mar. 12, 2022). 2020 THE BASICS, *supra* note 70, at 2 (“The Commission is composed of up to seven voting members, including a chair, who are nominated by the President and must be confirmed by the Senate. No more than four Commissioners can be from the same political party, and at least three Commissioners must be federal judges.”) (footnote omitted).

75. 28 U.S.C. § 991(b)(1)(B).

76. Eleanor L.P. Spottswood, *Reviewing Federal Sentencing Policy, One Guideline at a Time*, 89 N.Y.U. L. REV. 769, 770 (2014) (footnotes omitted).

77. JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME CASES AND MATERIALS* 107 (West Academic Publishing, 7th ed. 2018) (emphasis in original).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

types of counts to which they might plead guilty, [the plea negotiations process,] the conduct of any trial, and strategies to be employed at sentencing.”<sup>83</sup>

## 2. **United States v. Booker: Taking the Federal Sentencing Guidelines from Mandatory to Advisory**

Ultimately, the Guidelines’ critics were heard by the Supreme Court in 2005. In *U.S. v. Booker*, the Supreme Court found “the existing [Guidelines] violated the Constitution by permitting judges to find facts that raised the guideline range by a preponderance of the evidence (as opposed to juries making such findings beyond a reasonable doubt).”<sup>84</sup> In short, the Court held that the mandatory nature of the Guidelines violated the Sixth Amendment,<sup>85</sup> and accordingly, the Court eliminated all mandatory provisions from the statute.<sup>86</sup> Specifically, the Court held:

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (2000 ed. and Supp. IV), which depends upon the Guidelines' mandatory nature. So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 (Sentencing Act), as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a).<sup>87</sup>

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83. *Id.*

84. 2020 THE BASICS, *supra* note 70, at 6.

85. *United States v. Booker*, 543 U.S. 220, 222 (2005).

86. *Id.* at 225.

87. *Id.* at 245.

The provisions eliminated by *Booker* included 18 U.S.C. § 3553(b)(1), which required sentencing courts to impose a sentence within the guidelines range absent grounds for departure, as well as 18 U.S.C. § 3742(e), that set forth the applicable standards for appellate review including a de novo review standard for departures.<sup>88</sup> Nevertheless, the Court held that the sentencing courts were still bound to consider the Guidelines, but only in an *advisory* context.<sup>89</sup>

Following *Booker*, sentencing courts must consider the Guidelines in conjunction with the factors laid out in 18 U.S.C. § 3553(a).<sup>90</sup> So, “a sentencing court must correctly calculate a defendant’s guideline range and then consider whether there is any basis set forth in the *Guidelines Manual* to ‘depart’ from the range.”<sup>91</sup> Mainly, “the practical effect of *Booker* was to add a third step in the sentencing process—namely, the court’s decision whether, after considering *all* of the factors in 18 U.S.C. § 3553(a), a sentence outside of the applicable guideline range should be imposed as a ‘variance.’”<sup>92</sup> To be specific, section 3553(a) provides seven factors for a sentencing court’s consideration:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to reflect the four primary purposes of sentencing, i.e., retribution, deterrence, incapacitation, and rehabilitation;
- (3) the kinds of sentences available (e.g., whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute);
- (4) the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines;

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88. O’SULLIVAN, *supra* note 77, at 108.

89. Spottswood, *supra* note 76, at 778 (citing *Booker*, 543 U.S. at 245). Importantly, the Commission may make suggestions to the Guidelines each year by submitting a revised version to Congress. *See id.* at 773. If approved, the revisions become law that same year. *See id.*

90. *Id.* at 778.

91. 2020 THE BASICS, *supra* note 70, at 17.

92. *Id.*

- (5) any relevant “policy statements” promulgated by the Commission;
- (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.<sup>93</sup>

In effect, the addition of this third step regarding variances created the “*Booker* three-step process,” which requires “respectful consideration of the *Guidelines Manual* in all three steps.”<sup>94</sup> The steps being:

- (1) [] initially calculating the sentencing range;
- (2) [] considering policy statements or commentary in the *Guidelines* [] about departures from the guideline range; and
- (3) [] considering all of the § 3553(a) factors (which include the guidelines, commentary, and any relevant policy statements in the *Guidelines Manual*) in deciding what sentence to impose, whether within the applicable range, or whether as a departure or as a variance (or as both).<sup>95</sup>

Indeed, this process reflects both promulgated roles of the Commission and the federal sentencing courts.<sup>96</sup> The Supreme Court has observed that “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic [section]

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93. *Id.* at 4 (citing 18 U.S.C. § 3553(a)).

94. *Id.* at 17.

95. *Id.* at 18.

96. *Id.*

3553(a) objectives, the one, at retail, the other at wholesale.”<sup>97</sup> Since the 2005 *Booker* decision,

[s]entencing data . . . show[s] that, although the “within-range” rate of sentences has decreased, it has remained steady, at around 50 percent of cases, in recent years [, and] . . . of those cases in which below-range sentences are imposed, around 40 percent of them are the result of grounds for downward departure specifically recognized by the *Guidelines Manual*, including for defendants’ “substantial assistance to the authorities.”<sup>98</sup>

### 3. The Advisory Ranges

Today, the Guidelines provide advisory sentencing ranges determined by the “Sentencing Table,” which interrelates offense conduct and history.<sup>99</sup> A base “offense level” is established by the crime of conviction.<sup>100</sup> Accordingly, “[e]ach offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward.”<sup>101</sup> A “criminal history category” is determined by adding criminal history points based on prior offenses committed, and the greater criminal history category a defendant has, the more severe the recommended sentence will be.<sup>102</sup> Generally, “criminal history points are based on the length of a sentence imposed for a prior conviction in a local, state, or federal court and whether the defendant committed the instant federal offense while still serving a sentence in another case ([for example], the defendant was on probation or parole).”<sup>103</sup> To illustrate, per the Guidelines, “a defendant with a record of prior criminal behavior is more culpable than a first

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97. *Id.* at 5 (footnote omitted).

98. U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 4-5 (2018) (footnotes omitted) [hereinafter 2018 THE BASICS].

99. U.S. SENTENCING COMM’N, U.S. SENT’G GUIDELINES MANUAL 2021 1-16 (2021) [hereinafter 2021 GUIDELINES MANUAL].

100. Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 718-719 (2008) (footnote omitted).

101. 2021 GUIDELINES MANUAL, *supra* note 99, at 50.

102. *See* Schanzenbach & Tiller, *supra* note 100, at 718-19 (footnote omitted).

103. 2020 THE BASICS, *supra* note 70, at 26.

offender and thus deserving of greater punishment.”<sup>104</sup> In effect, the offense level and criminal history categories produce a sentencing range indicated in months.<sup>105</sup> Below is the current Sentencing Table, which is provided by the Guidelines.<sup>106</sup>

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

In practice, the United States Probation and Pretrial Services Office produces an initial sentencing calculation based on the Guidelines and subsequently presents it in a pre-sentence report (PSR).<sup>107</sup> The PSR has

104. 2021 GUIDELINES MANUAL, *supra* note 99, at 379.

105. Schanzenbach & Tiller, *supra* note 100, at 719 (footnote omitted).

106. 2021 GUIDELINES MANUAL, *supra* note 99, at 407.

107. *How Does a Judge Decide What Sentence to Impose on a Defendant?*, MOLOLAMKEN LLP, <https://www.mololamken.com/knowledge-How-Does-a-Judge-Decide-What-Sentence-To-Impose-on-a->



been referred to as the “most important document in the Federal criminal process,” as it is the “most comprehensive collection of information concerning an inmate and the offense available to the Bureau of Prisons and the parole commission.”<sup>108</sup> Both the prosecution and defense can object to the PSR, if necessary to advocate for the sentence they deem adequate.<sup>109</sup> However, the sentencing judge makes the determinative Guidelines calculation and renders the sentence she or he believes appropriate.<sup>110</sup>

### a. Aggravating and Mitigating Factors

In addition to the Guidelines and section 3553(a), section 3553(b) allows “a court to depart from a guideline-specified sentence only when it finds an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the . . . Commission in formulating the [G]uidelines that should result in a sentence different from that described.”<sup>111</sup> Specifically, aggravating factors work against a defendant, increasing their culpability and potentially creating the basis for an enhanced or maximum sentence.<sup>112</sup> Some common and known aggravating factors include prior record of similar convictions, vulnerability of victim, leadership role, hate crimes, and mandatory minimum sentencing.<sup>113</sup> In addition, “the use of a gun, the use of sophisticated means in a fraud, whether the crime affected a financial institution, whether the offender played a major [ ] role in the crime, and [lack of] acceptance of responsibility” all may be seen as aggravating

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Defendant#:~:text=A%20judge%20must%20impose%20a,and%20provide%20the%20defendant%20with (last visited Dec. 30, 2022).

108. *Importance of the Presentence Investigation Report After Sentencing*, U.S. DEP’T JUST., <https://www.ojp.gov/ncjrs/virtual-library/abstracts/importance-presentence-investigation-report-after-sentencing> (last visited Dec. 30, 2022).

109. *How Does a Judge Decide What Sentence to Impose on a Defendant?*, *supra* note 107.

110. *Id.*

111. 2021 GUIDELINES MANUAL, *supra* note 99, at 7 (citing 18 U.S.C. § 3553(b)) (internal quotations omitted).

112. *What is the Difference Between Aggravating and Mitigating Factors?*, DICINDIO L. LLC (Dec. 18, 2019), <https://www.dicindiolaw.com/blog/what-is-the-difference-between-aggravating-and-mitigating-factors/#:~:text=Mitigating%20factors%20are%20extenuating%20circumstances,and%20enhanced%20or%20maximum%20sentence>.

113. *Aggravating and Mitigating Factors in Criminal Sentencing Law*, JUSTIA: CRIM. L. CTR., <https://www.justia.com/criminal/aggravating-mitigating-factors/> (Nov. 2022).

circumstances.<sup>114</sup> As an illustration, if an offense resulted in a substantial monetary loss, injured a substantial number of victims, or exploited a position of trust the defendant was in, “the Guidelines will recommend a more severe sentence.”<sup>115</sup> But importantly, a sentencing court “may not use aggravating factors to impose a harsher sentence than usual unless the jury found those factors to be true beyond a reasonable doubt,” the defendant stipulated to those factors, or the defendant admitted to those factors in testimony, except in the case of prior convictions.<sup>116</sup>

On the other hand, mitigating factors are defined as “*extenuating circumstances* that might lead to a reduced sentence.”<sup>117</sup> Mitigating factors typically include an individual’s lack of a prior criminal record or minor role in the offense, the culpability of the victim, past circumstances (for example, “abuse that resulted in criminal activity”), circumstances at the time of the offense (for example, “provocation, stress, or emotional problems that might not excuse the crime but might offer an explanation”), mental or physical illness, genuine remorse, cooperation with the government, and pleading guilty (or accepting responsibility).<sup>118</sup> Typically, these factors are introduced by the defense in support of leniency in sentencing.<sup>119</sup> But both “[a]ggravating and mitigating factors in a criminal case may be raised in the probation officer’s PSR, prosecution and defense arguments, witness testimony, the defendant’s direct address to the judge, and crime victim statements.”<sup>120</sup>

#### 4. The Impact of Offenders’ Education Levels on Sentencing Courts

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114. Schanzenbach & Tiller, *supra* note 100, at 718 (footnote omitted).

115. *How Does a Judge Decide What Sentence to Impose on a Defendant?*, *supra* note 107.

116. *Aggravating and Mitigating Factors in Criminal Sentencing Law*, *supra* note 113 (citing *Cunningham v. California*, 549 U.S. 270 (2007)).

117. *What is the Difference Between Aggravating and Mitigating Factors?*, *supra* note 112 (emphasis added).

118. *Aggravating and Mitigating Factors in Criminal Sentencing Law*, *supra* note 113; *How Does a Judge Decide What Sentence to Impose on a Defendant?*, *supra* note 107.

119. *Aggravating and Mitigating Factors in Criminal Sentencing Law*, *supra* note 113.

120. *Id.*

Several studies have argued that sentencing courts not only rely on legal factors, for example, offense level and criminal history, but also extralegal offender characteristics when assessing offenders' culpability and their potential for recidivism.<sup>121</sup> Numerous studies have reported on the influences of extralegal characteristics, including race, gender, age, ethnicity, and sex.<sup>122</sup>

And while these frequently studied factors “represent important areas of study given their social importance . . . , their dominance in the literature appears to have overshadowed the study of other offender characteristics worthy of attention.”<sup>123</sup> For instance, up until recently, researchers had not begun to look at the impact individuals' citizenship statuses have on their sentencing outcomes.<sup>124</sup> There is an even greater lack of attention toward the impact educational achievement has on sentencing.<sup>125</sup> However, this lack of attention does not mean educational achievement has no influence on sentencing outcomes. In fact, the below findings (although limited) prove quite the opposite. Former Attorney General, Eric Holder, once stated: “By basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level . . . —[sentencing courts] may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”<sup>126</sup>

An additional analysis reported that “[o]ffenders with [any] college education [(attended college for any amount of time)] received shorter sentences than offenders with no college education.”<sup>127</sup> Stipulating two separate models, the analysis went further. Under the “Booker report model,” an association was seen between education and sentence

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121. Travis W. Franklin, *Sentencing Outcomes in U.S. District Courts: Can Offenders' Educational Attainment Guard Against Prevalent Criminal Stereotypes?*, 63(2) CRIME & DELINQ. 137, 138-39 (2017) [hereinafter *Educational Attainment*].

122. *Id.* at 137.

123. *Educational Attainment*, *supra* note 121, at 138.

124. *Id.* (citations omitted).

125. *Id.* at 138-39.

126. Anna Maria Barry-Jester et al., *The New Science of Sentencing: Should Prison Sentences be Based on Crimes that Haven't Been Committed Yet?*, MARSHALL PROJECT (Aug. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing>.

127. U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 2 (2010) [hereinafter *BOOKER REPORT UPDATE*].

length.<sup>128</sup> Specifically, following *Booker*, “offenders with any college education received sentences that were 9.3[%] shorter than those without any college education[.]”<sup>129</sup> Following a subsequent Supreme Court case regarding federal sentencing, *Gall v. United States*,<sup>130</sup> the same category of offenders “received sentences that were 9.6[%] shorter than sentences imposed on offenders without that education.”<sup>131</sup> Under the “refined model,” sentence outcomes for offenders with some college education differed significantly from the outcomes for offenders with zero college education.<sup>132</sup> Post-*Booker*, “offenders having at least some college education received sentences that were 5.4[%] shorter than sentences of those with no college experience.”<sup>133</sup> Post-*Gall*, “offenders having some college education received sentences 3.9[%] shorter than sentences of those with no college experience.”<sup>134</sup>

#### a. The Result: Incarcerated Persons’ Education Levels

As a result, it has been reported that incarcerated persons have lower educational achievement than the general population and are also “more likely to have GEDs, which prior research finds do not reap the same rewards as a high school diploma.”<sup>135</sup> In one analysis, these differences were “greatest for the younger age groups considered . . . , and were greater for young [B]lack and Hispanic men than for young white men.”<sup>136</sup> Additionally, reports showed “young [B]lack and Hispanic men in the general population have lower levels of educational attainment than young white men[;]”<sup>137</sup> however, “the racial and ethnic differences in high school dropout levels were even greater among the adult correctional population.”<sup>138</sup>

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128. *Id.* at 16-17.

129. *Id.* at 17.

130. *Gall v. United States*, 552 U.S. 38, 39 (2007) (holding that federal appellate courts may not presume a sentence falling outside of the Guidelines’ range is per se unreasonable).

131. *BOOKER REPORT UPDATE*, *supra* note 127, at 17.

132. *Id.* at 24.

133. *Id.*

134. *Id.*

135. Stephanie Ewert & Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS 18* (SEHSD Working Paper No. 8, 2011).

136. *Id.*

137. *Id.* at 15.

138. *Id.*

Moreover, “[f]ederal prisoners in 2016 averaged 10.6 years of education prior to [incarceration], and more than half (57%) had not completed high school.”<sup>139</sup> And among all incarcerated individuals in the United States in 2016, over six out of ten had achieved “less than a high school degree prior to their [incarceration].”<sup>140</sup> As found by “the National Adult Literacy Survey, 70% of all incarcerated adults cannot read at a fourth-grade level, ‘meaning they lack the reading skills to navigate many everyday tasks or hold down anything but lower (paying) jobs.’”<sup>141</sup> Additionally, federal incarcerated individuals in 2016 were “more likely to report completing eleventh grade or less than to report completing high school or any college.”<sup>142</sup> The vast majority of federal incarcerated individuals 57% reported they had not obtained a high school degree, while 14% had achieved some level of college with 8% achieving at least a college degree.<sup>143</sup> In terms of capital sentences, “[a]s of 2020, around 9.2[%] of all prisoners on death row in the United States had at least some college education[, while] [t]he majority of death row prisoners, at 44.4[%], were high school graduates or had their GED.”<sup>144</sup>

#### IV. EDUCATIONAL ATTAINMENT AND RECIDIVISM

##### A. The Relationship Between Greater Educational Opportunities and Lower Rates of Recidivism

139. LAUREN G. BEATTY & TRACY L. SNELL, PROFILE OF PRISON INMATES, 2016, U.S. DEP’T JUST. 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppi16.pdf>.

140. *Id.* at 6 (“Similarly, state prisoners in 2016 were more likely to report completing eleventh grade or less than to report completing high school or some college. More than [six] in [ten] state prisoners had not completed high school (62%), and less than [one] in [four] had obtained a high school degree (23%). Less than [one] in [six] either completed some college (11%) or earned a college degree or more (4%). The education of state prisoners increased between 2004 and 2016. While the majority of state prisoners in 2016 (62%) did not have a high school degree, this represented a decline from 67% in 2004. The percentage of state prisoners who had completed some college or attained a college degree or more increased from 12% in 2004 to 15% in 2016.”).

141. *The Relationship Between Incarceration and Low Literacy*, *supra* note 68 (citation omitted).

142. BEATTY & SNELL, *supra* note 139 at 6.

143. *Id.*

144. *Share of Prisoners under Sentence of Death in the United States in 2020, by Educational Attainment*, STATISTA (Dec. 2021), <https://www.statista.com/statistics/199020/prisoners-under-sentence-of-death-in-the-us-by-educational-attainment/>.

Not even “[five] percent of the world’s population” resides in the United States, “yet nearly [sixteen] percent of all incarcerated people—roughly two million people—are held in our jails and prisons.”<sup>145</sup> The United States has the highest prison population rate in the world, “716 per 100,000 of the national population . . . .”<sup>146</sup> And “[t]he majority of . . . [currently-incarcerated] individuals will be released into communities unskilled, undereducated, and highly likely to become reinvolved in criminal activity.”<sup>147</sup> Accordingly, “[r]ates of recidivism in the United States are extraordinarily high.”<sup>148</sup> Despite the fact that most researchers have found “social, psychological, and demographic factors correlate strongly with recidivism,” as previously stated, most individuals “are released from prison into communities unskilled, undereducated, and highly likely to become reinvolved in crime.”<sup>149</sup>

As an alternative to the “punitive, incarceration-based approach to crime prevention,” “[e]ducation, particularly at the college level, can afford individuals with the opportunities to achieve and maintain productive and crime-free lives and help to create safer communities for all.”<sup>150</sup> This is particularly because “increased levels of education generally lead to many other characteristics that are viewed as positive correlates of lessening one’s criminal or antisocial behavior.”<sup>151</sup> For example, “education may change individuals’ preferences (and, in turn, their breadth of choices).”<sup>152</sup> Additionally, “education contributes to a lower time preference ([that is], learning the consequences of one’s actions often make that individual postpone the direct satisfaction of needs).”<sup>153</sup> Several “researchers also argue that the more education an individual has, the more heavily he or she will weigh the future

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145. *Ending Mass Incarceration*, VERA, [https://www.vera.org/ending-mass-incarceration?ms=awar\\_comm\\_all\\_grant\\_BS22\\_ctr\\_AP2&utm\\_source=grant&utm\\_medium=awar&utm\\_campaign=all\\_AP2&gclid=CjwKCAjwqJSaBhBUEiwAg5W9pxlK5A5fxsqWuhcSxmYMQT9sHosHWD7UDz7j1Y9WTD3-yHwC5d0ITRoC\\_9oQAvD\\_BwE](https://www.vera.org/ending-mass-incarceration?ms=awar_comm_all_grant_BS22_ctr_AP2&utm_source=grant&utm_medium=awar&utm_campaign=all_AP2&gclid=CjwKCAjwqJSaBhBUEiwAg5W9pxlK5A5fxsqWuhcSxmYMQT9sHosHWD7UDz7j1Y9WTD3-yHwC5d0ITRoC_9oQAvD_BwE) (last visited Oct. 30, 2022).

146. Ron Walmsley, *World Prison Population List*, INT’L CTR. FOR PRISON STUD. (2013) [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_10.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_10.pdf).

147. *Education and Crime*, *supra* note 21.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

consequences ([that is], punishment) of his or her current criminal or antisocial actions.”<sup>154</sup> Thus, “quality education is one of the most effective forms of crime prevention and . . . educational skills can help deter” previously-incarcerated individuals from reoffending.<sup>155</sup>

Specifically, “prison-based education has been found to be the single most effective tool for lowering recidivism.”<sup>156</sup> Many researchers “argue that prison education is far more effective at reducing recidivism than are boot camps, shock incarceration, or vocational training.”<sup>157</sup> In fact, a 2016 report by the RAND Corporation found that “[i]nmates who participate in any kind of educational program behind bars—from remedial math to vocational auto shop to college-level courses—are up to 43[%] less likely to reoffend and return to prison.”<sup>158</sup> And “[i]n addition to reducing recidivism, education can improve outcomes from one generation to the next.”<sup>159</sup> For example, “[r]esearch shows that children with parents with college degrees are more likely to complete college, which can create social mobility for families.”<sup>160</sup> Moreover, “[t]he significant personal benefits of prison education include increased personal income, lower unemployment, greater political engagement and volunteerism, and improved health outcomes.”<sup>161</sup>

There is also an economic benefit to be seen from these programs: “Expanding access to postsecondary education in prison is likely to reduce recidivism rates, resulting in a decrease in incarceration costs across states of \$365.8 million per year.”<sup>162</sup> Admittedly, “investing in

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154. *Id.*

155. *Id.* (“[T]here is an overwhelming consensus among public officials, academics, teachers, and parents that postsecondary education is one of the most successful and cost-effective methods of preventing crime.”).

156. *Id.*

157. *Id.*

158. Doug Irving, *The Case for Correctional Education in U.S. Prisons*, RAND CORP.: RAND REV. (Jan. 3, 2016), <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html>.

159. Kathleen Bender, *Education Opportunities in Prison are Key to Reducing Crime*, CAP (Mar. 2, 2018), <https://www.americanprogress.org/article/education-opportunities-prison-key-reducing-crime/#:~:text=Prisons%20with%20college%20programs%20have,incarcerated%20individuals%20and%20prison%20staff>.

160. *Id.*

161. *Id.*

162. Fact Sheet for *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison*, VERA INST. JUST. 2 (Jan. 2019), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/investing-in-futures-education-in-prison/legacy\\_downloads/investing-in-futures-factsheet.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/investing-in-futures-education-in-prison/legacy_downloads/investing-in-futures-factsheet.pdf).

prison education programs . . . require[s] upfront funding,” but “the long-term economic benefits for states and localities are [nonetheless] considerable.”<sup>163</sup> The Center for American Progress (the Center) found that “[f]or every dollar spent on prison education, taxpayers are estimated to save four to five dollars that would have been spent on incarceration.”<sup>164</sup> Moreover, the Center suspects that “[p]utting more money back into consumers’ pockets and providing previously incarcerated individuals the necessary tools to be competitive in the job market will spur economic activity and productivity.”<sup>165</sup> Specifically, doing so gives incarcerated individuals an opportunity to become “stronger players in the market—through taxes and purchasing power—and more self-sufficient citizens less reliant on government programs.”<sup>166</sup> As an example, the Center points to Missouri, which “saved an average of \$25,000 per year for every incarcerated individual who left prison and did not return.”<sup>167</sup> The Center also found, nationally, “the U.S. economy is estimated to lose around \$60 billion per year from loss of labor from the high numbers of incarcerated individuals.”<sup>168</sup>

Despite the above-mentioned findings and statistics, “[r]eceiving a quality education continues to be out of reach for much of the prison population due to a lack of funding for, and access to, the materials needed for the success of these programs.”<sup>169</sup> Moreover, “in response to the American public’s growing fear of crime and the call for more punitive measures to combat such fear, many legislators and policymakers have promoted . . . eliminating various [educational] programs inside prisons and jails.”<sup>170</sup> But “[w]ith rearrest rates increasing almost daily, it is clear that incarceration alone is not working in the United States.”<sup>171</sup> This is especially true where “research has consistently shown . . . that educational skills . . . greatly decrease the likelihood that people will return to crime after release from prison.”<sup>172</sup>

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163. Bender, *supra* note 159.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Education and Crime, supra* note 21.

171. *Id.*

172. *Id.*



In the words of Lois Davis, a senior policy researcher at RAND: “Regardless of what you think about inmates, what do you want for your community? . . . You have to understand that they all come back eventually. If you don’t rehabilitate them, how are they going to successfully rejoin society?”<sup>173</sup>

One example of a prison-education program that does exist is the Inside-Out Exchange Program which is offered by universities across the nation, including the University of Pittsburgh.<sup>174</sup> The program states: “The Inside-Out praxis stems from the belief that our society is strengthened when higher education/learning is made widely accessible and, at the same time, when it allows participants to encounter each other as equals, often across profound social barriers.”<sup>175</sup> Accordingly, the program “bring[s] together campus-based college students with incarcerated students for a semester-long course held in a prison, jail or other correctional setting.”<sup>176</sup> “Th[is] practice of bringing incarcerated (inside) and non-incarcerated (outside) people together for engaged and informed dialogue allows for transformative learning experiences that invite participants to take leadership in addressing crime, justice, and other issues of social concern.”<sup>177</sup>

Importantly, the inside-outside “terminology designates everyone as people, people coming from different places and perspectives, certainly, but people nonetheless.”<sup>178</sup> Thus, “[n]o one is labeled as a college kid, a criminal, or anything else.”<sup>179</sup> In describing the inside-out program, an outside student stated:

This is also an exchange that takes place in a prison. But what is being exchanged? Roles, kind of. For a few hours every (week), the outside students had to sit in a prison, being watched by guards and cameras. The inside students had the opportunity to do something that frighteningly few people that are incarcerated in our

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179. Irving, *supra* note 158 (internal quotations omitted).

174. *Inside-Out Program*, UNIV. PITTSBURGH: PITT PRISON EDUC. PROJECT, <https://www.ppep.pitt.edu/about-mission/inside-out> (last visited Oct. 30, 2022).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Scholarship on Inside-Out*, INSIDE-OUT CTR., <https://www.insideoutcenter.org/scholarship-inside-out.html> (last visited Dec. 30, 2022).

179. *Id.*

country ever do, participate in a university level course. The most important exchange, however, in my opinion, is the exchange of ideas that takes place. The sustained dialogue in our prison classroom is what taught me so much this semester, and it is that that I will carry with me beyond my academic life.<sup>180</sup>

Regarding the inside-out experience, another outside student stated:

I didn't expect to learn so much. I didn't expect to grow and change as a result of the process. . . . As I reflect on the power of this course, I am awestruck and humbled . . . and certain that I do not want it to end here.<sup>181</sup>

An additional outside student, reflecting on the inside-out program, stated: "What we got from [the program] was academically good, but our gains from this class went so far beyond that[.] I listened with moist eyes as my fellow classmates told how this class had changed their lives in very significant ways."<sup>182</sup> Inside students have expressed similar views:

We started this class to broaden people's perceptions and in turn we had our own perceptions broadened, and our lives changed for the better. The ripple effect works; with the passion that we felt instilled in us, we put ourselves out there in positive ways. We have gained patience and understanding towards those who do not know what it is like going through what we have been through.<sup>183</sup>

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180. *Id.*

181. *About*, TEMP. UNIV.: INSIDE-OUT CTR., <https://liberalarts.temple.edu/research/labs-centers-and-institutes/inside-out-center/about> (last visited Oct. 30, 2022).

182. Sarah L. Allred, *The Inside-Out Prison Exchange Program: The Impact of Structure, Content, and Readings*, 60 J. CORR. EDUC. 240, 254 (2009).

183. Laura Mishne et al., *Breaking Down Barriers: Student Experiences of the Inside-Out Prison Exchange Program*, 1 UNDERGRADUATE J. SERV. LEARNING & CMTY. BASED RSCH. 1, 11 (2012), <https://ujslcbr.org/index.php/ujslcbr/article/view/87>.

In evaluating correctional education programs, one study “found that, on average, inmates who participated in [such programs] had 43[%] lower odds of recidivating than inmates who did not[,]” which “translate[d] into a reduction in the risk of recidivating of 13 percentage points” for those who participate in correctional education programs versus those who do not.<sup>184</sup> And, “[i]n general, studies that included adult basic education (ABE), high school/GED, postsecondary education, and/or vocational training programs showed a reduction in recidivism.”<sup>185</sup> Another study found “offenders who had a lower level of education not only had a higher recidivism rate, but also such uneducated (or under-educated) offenders were likely to be reincarcerated earlier than those offenders who had a higher level of education.”<sup>186</sup>

### **B. A Concentrated Risk for Higher Recidivism Rates Exists in Poor and Minority Communities**

“Exacerbating the problem [of high recidivism rates] is the continued increases in the incarceration rates of African Americans and Latinos,”<sup>187</sup> as “[p]rison[s] and jail[s] have been found to interrupt education and employment, further disenfranchising people of color from their communities—something that also”<sup>188</sup> affects recidivism rates. To evidence this, “a 2017 report by the . . . Commission” found “[w]hite offenders had the lowest rearrest rate overall, starting with 59.1[%] for the youngest age group . . . Black offenders had the highest rearrest rate overall, starting with 72.7[%] in the youngest age cohort,

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184. LOIS M. DAVIS ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS 57 (2013), [https://www.rand.org/pubs/research\\_reports/RR266.html](https://www.rand.org/pubs/research_reports/RR266.html).

185. *Id.* at 57-58.

186. John M. Nally et al., *The Post-Release Employment and Recidivism Among Different Types of Offenders with a Different Level of Education: A 5-Year Follow-Up Study in Indiana*, 9 JUST. POL'Y J. 1, 25 (2012), [http://www.cjcj.org/uploads/cjcj/documents/The\\_Post-Release.pdf](http://www.cjcj.org/uploads/cjcj/documents/The_Post-Release.pdf).

187. PAGE ET AL., *supra* note 1, at 13 (footnote omitted).

188. *Id.* (footnote omitted).

which is the highest recidivism rate among all age categories.”<sup>189</sup> Additionally, the report found “[t]he other racial category, which includes American Indians, Alaskan Natives and Asians, had the second highest overall rearrest rate, starting with a 65.1[%] rearrest rate in the youngest age cohort before declining.”<sup>190</sup> And “[t]hough recidivism rates declined across the board for each successive age group, Black [offenders] had the highest rates for all ages.”<sup>191</sup> Furthermore, “[a] 2018 study by the Bureau of Justice Statistics found a similar trend in a year-by-year review: ‘During the [nine]-year follow-up period, 87% of [B]lack prisoners and 81% of white and Hispanic prisoners were arrested.’”<sup>192</sup>

“Reverend Dr. Kelly Brown Douglas, the Canon Theologian at the Washington National Cathedral and the Dean of Episcopal Divinity School at Union Theological Seminary, believes addressing racial disparity in recidivism requires a broader approach than just acknowledging bias.”<sup>193</sup> Specifically, Dr. Douglas postulated: “The system must focus not on retributive justice but restorative justice. It must work to restore persons to the fullness of their humanity. This means instead of seeing itself as a mediator of punishment, it needs to see itself as a mediator of opportunity.”<sup>194</sup> And to achieve this, Dr. Douglas suggested “making jails and prisons centers of opportunities for rehabilitative counseling, educational opportunities, life and employment skill development, etc.”<sup>195</sup> As previously stated, educational opportunities are heavily supported as ways to reduce recidivism rates.

## V. CONCLUSION

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189. Joseph Lyttleton, *Recidivism Rates for Black Men in the US Prison System are Higher than all Other Groups*, TMS: GEOPOLITICS (Feb. 23, 2021), <https://themilsources.com/2021/02/22/recidivism-rates-for-black-men-in-us-prison-system-are-higher-than-all-other-groups/>.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

Over “1.5 million individuals are housed in adult correctional facilities in the United States.”<sup>196</sup> Even the “U.S. Department of Justice generally portrays offenders as impoverished and uneducated prior to incarceration.”<sup>197</sup> Within U.S. correctional facilities, “many adult inmates are illiterate, and many more are functionally illiterate.”<sup>198</sup> Therefore, the influence of a criminal offender’s educational attainment on the criminal justice process (starting with criminal participation itself), while arguably understudied, is important to understand. And though understudied, statistics still show that greater educational attainment reduces an individual’s risk of criminal participation, his or her federal criminal sentence rendered, as well as his or her likelihood of reoffending. And because the lack of educational opportunities is predominantly seen in poor and minority communities, such individuals also represent a greater number of incarcerated people. Furthermore, although educational attainment has a lowering impact on recidivism, correctional education programs are scarce (or virtually nonexistent in some cases) for incarcerated individuals, thus creating a vicious cycle of reoffending and reincarceration.

Many argue that “[s]tates and communities should . . . consider education a long-term investment that may not necessarily bring about immediate changes, but would create lasting changes for communities in terms of economic development, civic involvement[,] and crime.”<sup>199</sup> Specifically, in terms of crime, providing greater support for educational opportunities will make communities and the individuals therein safer. Studies further establish the idea of “[s]hifting money away from law enforcement and corrections and into building educational opportunities” to lower rates of criminality in our communities.<sup>200</sup> Scholars also argue greater attention to educational spending “should be particularly focused in communities of color and high school aged youth.”<sup>201</sup> As evidenced by the findings and ideas set forth in this Note, “the higher the level of educational attainment, the greater the benefits to the community,” and our nation at large.<sup>202</sup>

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203. *Education and Crime*, *supra* note 21.

197. *Id.*

198. *Id.*

199. PAGE ET AL., *supra* note 1, at 14.

200. *Id.*

201. *Id.*

202. *Id.*

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