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White Paper

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**Educational Technologies for Incarcerated Students:
Challenges and Recommendations**

November 2024

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Introduction

A universe of policy decisions determines quality of life for the 1.2 million persons incarcerated in U.S. prisons, but two recent, historic developments make it crucial to zero in on how prisons integrate technology into their higher education programs.¹ First, the coronavirus pandemic caused a widespread turn to educational technology (edtech), primarily in the form of videoconferencing platforms, learning management systems (LMS), and cloud-based office software suites.² Edtech's extensive reach during lockdown laid a foundation for continued reliance on heavily tech-mediated modes of learning, even as "zoom school" revealed the limits of remote education for socioeconomically disadvantaged groups. Second, Congress restored incarcerated persons' access to Pell grant money for higher education expenses in 2021. After a long rulemaking process in which a number of stakeholders and advocates weighed in, the U.S. Department of Education set standards that prison education programs must meet in order to receive Pell money. As of July 2023, incarcerated persons were able to apply for these grants for the first time in 30 years.

It would be difficult to overstate the significance of Pell funding for incarcerated persons' access to higher ed, but changes in postsecondary prison educational offerings over the decades can give some idea. After the 1965 Higher Education Act extended Pell grants to any qualifying low-income student, prison higher education programs flourished; one 1983 survey of state correctional agencies found forty-one of forty-five states offered some post-secondary educational programming.³ The Bureau of Justice Statistics (BJS) reported more modest numbers in its 1990 census of facilities, finding that 60% of facilities offered college coursework.⁴ Postsecondary course offerings declined dramatically after the 1994 Violent Crime Control and Law Enforcement Act—better known as the "Crime Bill"—disqualified incarcerated persons from receiving Pell funds. According to one study, 82% of correctional institutions had offered postsecondary programming in 1994, only 63% the following year, and 55% two years later.⁵ The BJS 1995 census is even more stark; only one year after Pell disqualification, college course offerings dropped by half.⁶

¹ Emily D Buehler, "Correctional Populations in the United States, 2022 – Statistical Tables," *Statistical Tables*, 2022, 5.

² The terms "technology" and "edtech" used in this paper will primarily describe Information Age devices and applications capable of storing and processing high volumes of information rapidly, often with the assistance of remotely stored information (on a drive or cloud) accessed through hardware or over the internet.

³ A. Ryan and Clifton Woodard, *Correctional Education: A State of the Art Analysis* (U. S. Department of Justice National Institute of Corrections, 1987), 16. Because the authors did not survey individual facilities, this figure does not give a good idea of the distribution of such programs, but earlier studies they cite did find good distribution across facilities. In particular, a 1977 survey of 200 institutions conducted by Lehigh University found that 83% of facilities offered postsecondary education.

⁴ James Stephan, *Census of State and Federal Correctional Facilities, 1990*, (Bureau of Justice Statistics, U. S. Department of Justice, 1992), 11. This number aggregates state and federal facility offerings, but it should be noted that only about 58% of state facilities (712 of 1,207) offer college courses while an impressive ~88% of federal facilities (70 out of 80) do so.

⁵ Richard Tewksbury, David John Erickson, and Jon Marc Taylor, "Opportunities Lost," *Journal of Offender Rehabilitation* 31 nos. 1–2 (2000): 47, https://doi.org/10.1300/J076v31n01_02.

⁶ James J Stephan, *Census of State and Federal Correctional Facilities, 1995*, (Bureau of Justice Statistics, U.S. Department of Justice), 14. Again, state facilities were much worse off than federal, but the discrepancy is less pronounced than before: post-Crime Bill, only ~30% of state facilities (419 of 1,375) had postsecondary programming, while 63% of federal facilities (79 of 125) did.

We should expect similar shifts with the reinstatement of Pell eligibility for incarcerated persons. As postsecondary prison educational programming expands, new institutions, practices, and norms defining tech use in these programs will emerge. It is imperative for all stakeholders to step carefully and intentionally into Pell-funded educational endeavors now, when there is the greatest potential to set the bar for best practices. With this goal in mind, *Section I of this brief recommends two “best practices” policies for tech use in prison higher education programs.* These measures promise to improve incarcerated higher ed students' digital literacy and protect them from edtech-facilitated programming that does not truly support their interests.

Too often, sound policy guidance is implemented in half-measures or not at all, not because of the quality of the recommendations, but because the policymaking environment poses insurmountable obstacles. This dynamic has certainly plagued efforts to ensure quality in prison educational programming. The following recommendations therefore consider how entrenched practices, culture, and values in our correctional institutions get in the way of reform efforts.⁷ *Section II identifies three institutional barriers to implementing effective edtech policy in prison higher educational programming, recommending three corresponding systems-level reforms.*

At the most foundational level, policy is shaped by the way policymakers characterize society's responsibility to incarcerated persons. Reflection on the ethical frameworks that inform current policies clarifies them so that they may be intentionally embraced or rejected, while consideration of alternative frameworks opens up new directions for policymaking.⁸ *Section III discusses the utilitarian framework most commonly invoked in debates about the value of prison educational programming, recommending that human rights and communicative ethical frameworks inform policymaking.* With their more robust conception of human needs and sociality, these frameworks provide better support for policies aiming at rehabilitation.

Section One: Policy Interventions

The policy recommendations below generally aim at the state and facility levels, but it is important to acknowledge that the very nature of the U.S. prison system poses a challenge to advancing simple recommendations. That "system" is both fragmentary and dispersed: fragmentary, in the sense that the qualities of a given prison are determined at the state level by legislatures and departments of corrections (DOCs) and at the facility level by wardens and staff and dispersed, in the sense that prison operations are spread across multiple partners, including corporate and nonprofit entities who provide day-to-day goods and services. Public-private nonprofit partnership is not necessarily unusual in the provision of government services, but when coupled with inadequate public funding and minimal oversight, the beneficiaries—in this case, incarcerated persons—are at risk of exploitation by profit-seeking corporations and inadequate support from nonprofits, each of which has its own agenda and obligations to funders.

⁷ Ryan and Woodard, *Correctional Education: A State of the Art Analysis*, 27. Note that Ryan and Woodard conducted their survey in 1983 with the intent to "reveal support for and participation in adult correctional education."

⁸ The technocratic method holds out hope for a values-neutral approach to policymaking, emphasizing the analytical, problem-solving aspects of governance over conflictual aspects. Social problems are framed as puzzles; proposed solutions promise to rise above party politics. Technocracy is not without risks; by minimizing conflicts of interest and values, technocratic policymaking may land on "solutions" that miss the mark or paper over deeper rifts.

This complexity means that there is no single entry point for implementing policies that will secure tech access for incarcerated higher ed students and protect them from exploitation. Reforms are needed at national, state, local, and facility levels, and in diverse forms: as legislation, as administrative rules for government agencies, as facility culture transformation, and as directives for corporations and nonprofit organizations. While the recommendations advanced in Section Two will take the kind of systemic aim demanded by the problem, this section recommends policies that can be put into place by those positioned to immediately impact incarcerated persons' wellbeing: state executives, legislatures, DOCs, and individual facilities. As Michele Deitch observes in her comprehensive assessment of correctional oversight in the United States,

All prisons in the state answer to a single leader and operate under a single agency-wide set of policies and procedures, and thus there is more consistency in operational procedures from facility to facility. There is also a single budget for all the prison facilities, and if any operational changes are ordered, they should (at least theoretically) be put in place system-wide.⁹

State governors and legislatures have budgetary control over DOCs; they determine appropriations for prison goods, services, and programming. More obviously, powers to create laws, executive orders, committees, agencies, and commissions invest legislatures and governors with the power to require that corrections agencies enact programs and put mechanisms of accountability in place. State corrections employees on the "street level"—wardens and correctional officers—control and shape how state-level policies are put into effect.¹⁰ State and facility cooperation will go a long way towards successful implementation of Section One recommendations.

Problem One: Incarcerated students have limited access to educational tech tools and training.

Historically, prisons have significantly limited incarcerated persons' access to edtech because security supersedes all other concerns. DOCs have grown more accepting of some forms of tech over the past decade, especially when the costs of ensuring tech security are assumed by a third party like tablet vendors or higher ed providers.¹¹ A few states even provide laptops to incarcerated students on a limited basis.¹²

⁹ Michele Deitch, "But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States," *American Journal of Criminal Law* 47, no. 2 (Summer 2020): 253. In addition to the relatively centralized structure of state prison operations, state DOCs often serve as oversight agencies for county- or municipally-operated jails.

¹⁰ Michael Lipsky, *Street-Level Bureaucracy, 30th Anniversary Edition : Dilemmas of the Individual in Public Service*, vol. Updated edition, Publications of Russell Sage Foundation (New York: Russell Sage Foundation, 2010).

¹¹ Calvin University, "Apply For CPI - Prison Initiative," accessed August 19, 2023, <https://calvin.edu/prison-initiative/apply/>; Ashland University, "Ashland | Correctional Education," accessed August 19, 2023, <https://www.ashland.edu/correctional-education>.

¹² U.S. Department of Education, "Building the Technology Ecosystem for Correctional Education: Brief and Discussion Guide," (2022), 13–21, <https://lincs.ed.gov/sites/default/files/tech-ecosystem-correctional-ed.pdf>; "MI Contract Resultant," 34, accessed February 18, 2023,

Even as attitudes are beginning to liberalize, studies reveal that students' edtech access is limited by many variables.¹³ Desktop computers may be available only during class, or only in shared labs.¹⁴ Labs may be infrequently available because underfunded, shorthanded prisons can't afford the staff to monitor lab use. Access to laptops, for those students who do have access, also tends to be limited to certain hours and locations. And although tablets are widely available, they are not widely integrated in educational programming.¹⁵ Even if these technologies were available to students on a continuous basis, they would not necessarily offer the same access to information that a student on the outside would have; some devices require regular syncing using a wired connection or docking station. Access is also limited when devices are outdated, susceptible to breakdowns, or when students must pay to use shared equipment like printers.¹⁶

Qualitative studies reporting on incarcerated students' experiences show that there is little in the way of a standard use of edtech among those surveyed. In view of variance in prison operations across the U.S., it is likely that access to computer labs, printers, internet, email, and learning management systems is variable nationally. Limited access is, however, a common trend.¹⁷ Surveyed students express frustration with technological limitations and make it clear that these limitations impede their ability to succeed in their educational programs.¹⁸

<https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Procurement/Contracts/MiDEAL-Media/006/220000000203.pdf>.

¹³ Jordan Hudson, Laura Rasmussen Foster, Ess Pokornowski, Kurtis Tanaka, "Insights Aligning the Conversation on Technology Use for Education Programs in Prisons and Jails," RTI International, October 31, 2023,

<https://www.rti.org/insights/technology-use-for-education-in-prisons-jails>. As Ithaka S+R and RTI analysts point out, "access" to edtech invites binary thinking about incarcerated students' tech use. A better framework would examine "quality of access" and "quality of use" in various dimensions.

¹⁴ Ess Pokornowski, "Technology in Higher Education in Prison Programs," *Ithaka S+R* (blog), sec. Where and When Devices are Accessible, accessed September 7, 2024,

<https://sr.ithaka.org/publications/technology-in-higher-education-in-prison-programs/>.

¹⁵ "Technology in Higher Education in Prison Programs," sec. Laptop and Tablet Providers.

¹⁶ S. Gaskill, E.L. Castro, and E. Aguilar Padilla, "'It's Useless, to Put It Politely': Experiences with Technology Among Incarcerated Students Receiving Second Chance Pell at Four Institutions," *Pell Is Not Enough: Exploring the Experiences of Participants in Second Chance Brief 9* (Pell, Salt Lake City, UT: Research Collaborative on Higher Education in Prison, October 2022),

https://cherp.utah.edu/_resources/documents/publications/upep_breif9.pdf; Bryonn Bain, "Op-Ed: A Lack of Tech Access Is yet Another Injustice of Mass Incarceration," *Los Angeles Times*, April 8, 2022,

<https://www.latimes.com/opinion/story/2022-04-08/prison-technology-tablets-laptops-costs>.

¹⁷ Gaskill, Castro, and Padilla, "'It's Useless, to Put It Politely.'" Table 1 displays the patchworks of technological arrangements at each of the institutions where the authors were able to interview students. See also Delaney, Patrick, and Boldin, "Unlocking Potential: Pathways from Prison to Postsecondary Education," 30–31,

<https://www.vera.org/downloads/publications/unlocking-potential-prison-to-postsecondary-education-report.pdf>; and Royer, Castro, Lerman, Gould, "Understanding The Landscape Of Higher Education in Prison: Technology," accessed May 6, 2023,

https://assets-global.website-files.com/5e3dd3cf0b4b54470c8b1be1/6100912fa3228c7d8a593a3a_5-UnderstandingTheLandscape_Technology.pdf.

¹⁸ Gaskill, Castro, and Padilla, "'It's Useless, to Put It Politely.'" Small sample sizes in these studies means that the quantitative data—specifically, breakdowns of tech differentiation and utilization—should not be generalized.

Qualitative data provide important insights into the incarcerated student's experience and indicate issues that should be taken up by larger-scale quantitative data projects.

Solution: Every incarcerated higher ed student has easy access to reliable, up-to-date tech at no cost, with tech support and training for students whenever needed.

Technologies commonly used by college students should be distributed to each student just as any other school supplies would be. The most critical need is for laptops or comparable tech, but access to any technology appropriate to the course of study—readers; calculators; printers; and supporting hardware (mouse, headphones) and software (word processing, LMS, videoconferencing)—should also be provided.

Edtech contracts should provide for timely maintenance so that broken equipment can be repaired or replaced without delays that might undermine student success. Ideally, an on-site IT specialist position would be devoted solely to tech support for incarcerated students' equipment needs. Higher ed students operate on their instructor's timeline; delays in repairing or replacing broken equipment can mean that assignments are turned in late or not at all. Even these kinds of small setbacks can undermine student confidence and persistence.

Contracts must also anticipate costs that will arise from the fast pace of innovation. While email, word processing and LMS software applications have not changed much over time, any app must be compatible with particular operating systems, which are in turn limited by hardware capabilities. Realistic assessments of a technology's lifespan will ensure that procured goods are functional and that students are gaining up-to-date tech skills that can serve them after reentry. Providing students with the edtech their courses demand is essential, but it can only be fully effective if coupled with training and support. Incarcerated students may have little or no experience with the technologies put into their hands; coaching and training programs will enable them to effectively use the hardware and software they will use in their academic programs. Students' tech skills should be assessed during standard college entry evaluations. Students whose scores indicate that they need additional training should be enrolled in a preparatory course. While it is possible for a community partner to conduct the course, the best design would be a one- or two-credit college course that is integrated into the larger higher ed program; this structure offers program-targeted content and allows students to earn credit towards their degree.

Providing this kind of access would support three important goals of prison higher education: equity, academic success, and reentry support. First, it would bring “inside” college programs closer to “outside” college programs. Edtech access enjoyed by students in “outside” higher ed programs gives them a significant advantage over incarcerated students; it is labor-saving, affords an easy means of communicating with professors, and is the preferred medium for conducting research, to name just a few benefits. In fact, there is a case to be made that incarcerated students need quality edtech more than “outside” students do, as they face more significant challenges.¹⁹

¹⁹ “Lessons from San Quentin,” Vera Institute of Justice, accessed April 8, 2023, <https://www.vera.org/news/unlocking-potential/lessons-from-san-quentin>; “NCES Blog | Education and Training Opportunities in America’s Prisons,” accessed December 14, 2022, <https://nces.ed.gov/blogs/nces/post/education-and-training-opportunities-in-america-s-prisons>; Jennifer Bronson and

Second, **these technologies have become almost essential to higher educational programming, and having access to them sets students up for success.** Knowing how to email professors, type essays on a word processor, conduct research in online databases, or navigate the resources collected on a Learning Management System (LMS) won't be on any syllabus; **they are simply expected at the college level.** Regular, reliable access to digital communications apps is especially important for this student population; incarcerated students are likely to require extra academic support and may also need to get in touch with professors when learning is unexpectedly interrupted by prison operations. Unfortunately, they are rarely granted a level of access suited to the need.²⁰

Finally, **access to edtech sets up reentering students for future success.** Incarcerated persons tend to fall on the wrong side of the digital divide, which hampers reentry. Edtech access will build incarcerated students' digital literacy, a critical “soft skill” that improves employment and job retention prospects. For example, most employers expect that job applicants will already understand email etiquette, how to use cloud-based word processing, and how to participate in a videoconference. Even the job search is likely to require one or more of these. Ultimately, a prison's edtech policy should prepare those who are reentering to fully participate in a variety of social environments.

Problem Two: The key forces behind the increase in online-only prison higher education programs are not driven by incarcerated students' best interests.

Sustainable, high-quality, in-person prison higher education programs are slow to take root. Nonetheless, they far outnumber online-only programs.²¹ That balance could easily shift within a few years given the powerful incentives for edtech companies and prison higher ed providers to supply online-only instruction and for corrections facilities to adopt it.

Most obviously, if this mode of instruction trends upward, the educational technology companies providing the hardware and software will enjoy years-long contracts with state DOCs and may also profit from user fees charged to incarcerated students. This sliver of the corrections tech “market” is dominated by two massive tech services companies—Aventiv and Viapath—that contract with DOCs in every state.²² These companies have exploited incarcerated users and

Marcus Berzofsky, “Disabilities Among Prison and Jail Inmates, 2011–12,” 2015; Laura M Maruschak, BJS Statistician, and Jennifer Bronson, “Disabilities Reported by Prisoners,” 2021.

²⁰ “Technology in Higher Education in Prison Programs,” sec. Using Technological Devices to Communicate.

²¹ “National Directory of HEP—Overview,” accessed August 30, 2023, <https://www.nationaldirectoryhep.org/>. If all programs with an in-person component (face-to-face and hybrid) are compared to all non-correspondence remote programs (tablet, laptop, live and recorded broadcasts), the former outnumber the latter by about ten to one. This discrepancy reflects the novelty of online-only education as well as a longstanding resistance to putting tech in the hands of incarcerated persons.

²² “GTL/ViaPath—About Us,” November 15, 2021, <https://www.viapath.com/about/>; “Aventiv/JPay,” Aventiv Technologies, accessed February 12, 2023, <https://www.aventiv.com/>.

their families for decades, charging exorbitant rates for phone or video calls; emails; money transfers; or music, movie and book downloads. Their development and marketing of cheap, secure tablets over the past ten years has nudged U.S. correctional facilities from their former no- or low-tech policy, paving the way for edtech to capitalize on more relaxed rules.

The industry is poised to do just that, thanks to profuse investment in educational tech companies in recent years.²³ With more capital to develop "solutions" to fund online-ed friendly work by research institutes and think tanks and to lobby decision-makers, the industry is likely to have significant influence over the future of tech use in prison higher education.²⁴ Pell reinstatement promises additional profits for the industry in the form of a reliable federal funding stream, but profit magnitude depends on whether prison higher ed programs adopt tech-dependent online-only or hybrid instructional modes. The industry will surely exert its influence to make sure that happens.²⁵

Edtech has already benefited from its efforts to push correctional education toward online learning, thanks to the 2015 Second Chance Pell pilot program. The pilot allowed select colleges to provide Pell Grant funding to some incarcerated students.²⁶ Only one online-only higher ed program was chosen: Ashland University's (AU). Ashland is a private, not-for-profit, Christian college based in Ohio.²⁷ Ashland's corrections education program director had partnered with

²³ Ben Williamson and Anna Hogan, "Commercialisation and Privatisation in/of Education in the Context of Covid-19," n.d.; Reach Capital, "US Edtech's Roaring Twenties Begins With \$8.2 Billion Invested in 2021," *Reach Capital* (blog), March 8, 2022,

<https://medium.com/reach-capital/us-edtechs-roaring-twenties-begins-with-8-2-billion-invested-in-2021-99f01a662280>; Ben Williamson, "Meta-Edtech," *Learning, Media and Technology* 46, no. 1 (2021),

<https://www.tandfonline-com.proxy.lib.umich.edu/doi/full/10.1080/17439884.2021.1876089>; Michelle R. Davis, "Ed. Companies Exert Public-Policy Influence," *Education Week*, April 22, 2013, sec. School & District Management, <https://www.edweek.org/leadership/ed-companies-exert-public-policy-influence/2013/04>.

²⁴ Williamson and Hogan, "Commercialisation and Privatisation in/of Education in the Context of Covid-19," 29–32; "Think Tanks (and Ed-Tech)," The Education Technology Industry Network, accessed June 3, 2023, <http://network.hackeducation.com/thinktanks>.

²⁵ See for example "Building the Technology Ecosystem for Correctional Education: Brief and Discussion Guide"; "Realizing the Promise: How Can Education Technology Improve Learning for All?," *Brookings* (blog), September 10, 2020,

<https://www.brookings.edu/essay/realizing-the-promise-how-can-education-technology-improve-learning-for-all/>; "Teaching, Learning, and Tech: A New Name for New America's Tech-Oriented Ed Policy Program," New America, accessed June 3, 2023,

<http://newamerica.org/education-policy/edcentral/teaching-learning-and-tech-a-new-name-for-new-americas-tech-oriented-ed-policy-program/>. These edtech-specific pieces are instances of a broader pattern within the educational "market"

²⁶ "Unlocking Potential," Vera Institute of Justice, accessed April 8, 2023,

<https://www.vera.org/news/unlocking-potential>. To be specific, only those who were likely to be released within five years were eligible to receive Pell Funding.

²⁷ Amy Morona, "Ashland University's Prison Program at the Center of National Controversy," Open Campus, January 18, 2021,

<https://www.opencampusmedia.org/2021/01/18/ashland-universitys-prison-program-sits-at-the-center-of-national-controversy/>. Notably, its selection came during the Trump administration, which championed charter, religious, and for-profit schools under Education Secretary DeVos. See Cory Turner, "How Education Secretary Betsy DeVos Will Be Remembered," *NPR*, November 19, 2020, sec. Education,

<https://www.npr.org/2020/11/19/936225974/the-legacy-of-education-secretary-betsy-devos>.

Aventiv only a year earlier to develop Lantern, a tablet-based learning management system.²⁸ The plan was for Lantern to power an online-only version of AU's long-running, in-person corrections education program.²⁹ The venture was a remarkable success for Aventiv and AU; to date, facilities in 13 states and DC offer the program to enrolled incarcerated students, who now outnumber AU's non-incarcerated student population.³⁰

The program's spread demonstrates its viability as a scalable, portable, and profitable model of online-only learning, one that will certainly appeal to other financially troubled colleges.³¹ Prior to its participation in Second Chance Pell, AU was in significant debt and received a "junk" credit rating. AU's online-only program changed the school's trajectory by maximizing the returns it received from the pilot Pell funding.³² Very simply, the program costs less to run than in-person education. There are no travel expenses for instructors who serve hard-to-reach facilities, and instructor training and administrative preparation are more manageable, since the challenges that may arise for in-person programs—hostility from correctional officers, interruptions, trouble finding classroom space, access to supplies—do not arise for online program staff.³³ Now that Pell aid has been reinstated for all eligible incarcerated persons, any qualifying higher ed program that is willing to adopt AU's streamlined design can expect to benefit from the supply of already-funded incarcerated students.

On the demand side, corrections agencies and facilities are likely to welcome online-only higher ed programming. Many of the nation's DOCs have struggled in recent years to recruit and retain staff. When personnel are stretched thin, the demands of in-person higher ed programs are likely

²⁸ Madison Pauly, "It Sure Looks like a Notorious Prison Tech Giant Is Preparing to Cash in on Pell Grants for Prisoners," *Mother Jones* (blog), accessed January 13, 2023, <https://www.motherjones.com/crime-justice/2022/02/aventiv-securus-lantern-college-pell-grants-prisoners/>.

²⁹ Madison Pauly, "It Sure Looks like a Notorious Prison Tech Giant Is Preparing to Cash in on Pell Grants for Prisoners," *Mother Jones* (blog), accessed January 13, 2023, <https://www.motherjones.com/crime-justice/2022/02/aventiv-securus-lantern-college-pell-grants-prisoners/>; JPay, "Ashland University Partners with JPay to Institute Second Chance Pell Grants for More than 1,000 Inmates," accessed May 26, 2023,

<https://www.prnewswire.com/news-releases/ashland-university-partners-with-jpay-to-institute-second-chance-pell-grants-for-more-than-1000-inmates-300329765.html>. Although Second Chance Pell did not become operational until 2016, it was approved in 2015, the same year that Aventiv's LMS was developed.

³⁰ "Ashland | Correctional Education"; Morona, "Ashland University's Prison Program at the Center of National Controversy."

³¹ Anemona Hartocollis, "At Small Colleges, Harsh Lessons About Cash Flow," *The New York Times*, April 29, 2016, sec. U.S.,

<https://www.nytimes.com/2016/04/30/us/small-colleges-losing-market-share-struggle-to-keep-doors-open.html>. Some public colleges are also cutting programs: Nick Anderson, "WVU's Plan to Cut Foreign Languages, Other Programs Draws Disbelief," *Washington Post*, August 20, 2023, <https://www.washingtonpost.com/education/2023/08/18/west-virginia-university-academic-cuts/>.

³² "Ashland | Correctional Education"; Morona, "Ashland University's Prison Program at the Center of National Controversy"; "How Trump Made a Tiny Christian College the Nation's Biggest Prison Educator | The Marshall Project," accessed August 26, 2022, <https://www.themarshallproject.org/2020/12/17/this-tiny-christian-college-has-made-millions-on-prisoners-under-trump>.

³³ T. C. R. Staff, "Teaching in Prison: 'You Have to Respect the Rules,'" *The Crime Report* (blog), December 30, 2021, <https://thecrimereport.org/2021/12/30/teaching-in-prison-you-have-to-respect-the-rules/>; "The Challenges and Rewards of Teaching in Prison," Vera Institute of Justice, accessed April 1, 2023, <https://www.vera.org/news/unlocking-potential/the-challenges-and-rewards-of-teaching-in-prison>.

to be perceived as a non-essential use of resources. Instructors teaching face-to-face must regularly enter and exit the facility, requiring staff to perform security checks. Staff must escort instructors to the classroom and be available in case of threatening behavior. Administrative challenges include the need for physical space, which may be hard to come by. Facilities and ed programs must also come to an agreement about equipment and supplies. Although online-only courses may require tech support, they offer corrections personnel relief from these more complicated security and logistical demands. This array of incentives and interests may lead prisons to adopt online-only higher ed programs at a quick pace, in the same manner as their adoption of tablets.

There are good reasons to doubt that a rapid expansion of online-only prison ed programs would serve incarcerated students well. First and most foundationally, the convenience and profit of some stakeholders should not drive decision-making in matters of education. Allowing market forces and bureaucratic efficiency to shape educational programming entrenches disparities between "inside" learning and "outside" learning more firmly. This is because higher ed institutions in the free world are governed and held accountable by multiple bodies that operate more or less democratically, including trustees, faculty senates, alumni boards, and local advocacy groups. Even if these bodies aren't guaranteed to improve the quality of higher education, they provide opportunities for more voices to be heard and thus for control to be shared among a wider variety of stakeholders. Critically, those who are most impacted by school policies may also exert some influence, providing some procedural protection from exploitation of weaker parties by stronger parties.

Second, streamlined online-only programs of the kind offered by AU are generally not a good fit for students who must overcome more learning barriers than the general population.³⁴ Incarcerated students need more academic and social supports, while online-only programs may provide fewer. Recent research comparing online-only to in-person modes of delivery in non-incarcerated classrooms suggests that face-to-face instruction works better for average and lower-performing students.³⁵ There is no question that on the population level, incarcerated students will tend to fall into these buckets; they have higher rates of learning disabilities, lower literacy levels, and lower levels of academic preparedness. Many have had negative experiences in the classroom.

From a more holistic perspective, face-to-face instruction is preferable because the classroom is a socialization space, and an in-person social environment is richer than a screen-mediated one. Incarcerated persons have few opportunities to forge meaningful relationships, much less receive

³⁴ "Lessons from San Quentin"; "NCES Blog | Education and Training Opportunities in America's Prisons"; Bronson and Berzofsky, "Disabilities Among Prison and Jail Inmates, 2011–12"; Maruschak, Statistician, and Bronson, "Disabilities Reported by Prisoners."

³⁵ T. Erzen, M.R. Gould, J. Lewen, J., *Equity and Excellence in Practice: A Guide for Higher Education in Prison*, (St. Louis, MO: Alliance for Higher Education in Prison and San Quentin, CA, Prison University Project, 2019). Retrieved from the Alliance for Higher Education in Prison website: www.higheredinprison.org; Tamara Tate and Mark Warschauer, "Equity in Online Learning," *Educational Psychologist* 57, no. 3 (July 3, 2022): 192–206, <https://doi.org/10.1080/00461520.2022.2062597>; Duha Tore Altindag, Elif Filiz, and Erdal Tekin, "Is Online Education Working?" (Cambridge, MA: National Bureau of Economic Research, July 2021), <https://doi.org/10.3386/w29113>. For an example of a deeply engaged online program, see Joe Lockard and Sherry Rankins-Robertson, "The Right to Education, Prison-University Partnerships, and Online Writing Pedagogy in the US," *Critical Survey* 23, no. 3 (January 1, 2011): 32, <https://doi.org/10.3167/cs.2011.230303>.

positive feedback from peers and authority figures. Regular, face-to-face interaction with classmates and instructors are a powerful means of addressing this deficit. Incarcerated and formerly incarcerated students have spoken to the healing and humanizing effects of these social connections. In this sense, the classroom's rehabilitative value is larger than its strictly academic qualities.

Third, there are no program-level data that suggest that students perform as well in online-only prison higher ed programs as in face-to-face programs. There are barriers to making such a determination; first of all, at the structural level—no single, centralized agency administers higher ed programs, nor does any one agency mandate or carry out data collection. Second, there is no standard terminology that would permit easy measurement of program quality. Correctional education is defined in various ways by various actors, including government agencies, advocacy groups, academic researchers, and educational providers.³⁶ Taken together, these two factors mean that existing data sets vary in what they measure and when they measure it.

Unfortunately, the Second Chance Pell pilot did not correct for these shortcomings. The program's data collection provisions included reliance on already-existing Federal Student Aid data sources and on participating schools to self-report basic student-level information and student survey results. This is a far cry from what would be needed to judge which program design best promotes incarcerated students' academic and reentry success. Valid program evaluation would require more fine-grained information, such as "how programs were implemented, their teaching formats, curricula designs, and pedagogical supports" as well as "student retention, engagement, transfer, and completion".³⁷ While some prison higher ed programs provide this kind of data of their own initiative, Ashland University has not yet done so.

A final cause for concern is the systemic impact of a sweeping turn to online-only programs of the AU variety. Ultimately, the proliferation of such programs has the potential to limit educational programming options for DOCs and students by crowding them out. With the momentum of the edtech industry behind them, other programs may replicate AU's success to the extent that streamlined online-only learning becomes the default. This would not be the first time that a rapidly changing tech sector defines a new normal, thereby eroding the viability of approaches with a successful track record.³⁸

There are student-centered reasons to permit high quality online-only programs, and they are useful to keep in mind when addressing the above concerns. The logistical flexibility that benefits prisons in the form of less demand on physical resources also means that more course options may be available to incarcerated students. Without the requirement that instructors must live close enough to physically go to the prison to teach, students may have access to more and higher quality instructors, teaching a wider range of subjects. The convenience of being able to learn on tablets enables learning to continue uninterrupted in the face of lockdowns or outbreaks.

³⁶ "Unbarring Access (Ithaka)," *Ithaka S+R* (blog), sec. "Definitions and Philosophies," accessed May 26, 2023, <https://sr.ithaka.org/publications/landscape-review-postsecondary-education-in-prison/>.

³⁷ "Unbarring Access (Ithaka)," sec. "Second Chance Pell and Program Evaluation."

³⁸ For a brief, internationally-situated summary of the interests, incentives, and concerns involved in the question of online education in prisons, see Lockard and Rankins-Robertson, "The Right to Education, Prison-University Partnerships, and Online Writing Pedagogy in the US," 30-32.

For students who wish to pursue additional education after their release, gaining experience with learning management systems, video chat software, and other tools will help prepare them to succeed in education programs on the outside.

Solution: At least one "best practices" in-person or hybrid educational program is offered OR a plan is in place to provide one.

Educational programs within prisons must be substantially similar to higher education programs on the outside to promote a more equitable and rehabilitative environment. As such, corrections decision-makers should make every effort to offer a higher ed program that is delivered in person or else has a significant in-person component.³⁹ The commitment to in-person programming should be explicitly stated at the state level, with more detailed policies spelling out the standards that hybrid programs and online-only programs, if offered, must meet. For example, online programs might be required to offer periodic in-person advising or office hours or an end-of-semester, student-led event such as a conference or debate. At minimum, to be sufficiently similar to high quality fully-online programs on the outside, online programs must include substantial synchronous instruction. Policies should also describe the conditions under which a transition to online-only instruction is acceptable—if a pandemic surges or extreme weather makes travel dangerous for instructors, say—and the process by which such decisions would be made and could be appealed or reversed.

Establishing controls on instructional delivery modes should be part of a larger process of program quality assurance, which ultimately aims to ensure that **correctional higher ed programs are on par with those enjoyed by non-incarcerated students to the greatest extent possible**. These should also be set at the state level so that program characteristics are consistent across all facilities, including, among other things:

- Robust student support from enrollment to program completion and beyond, including library services, academic advising, extracurricular and professional development opportunities, and transcript services;
- Synchronous instruction with opportunities for student discussion;
- Faculty who are available outside of class in office hours and to answer student emails;
- A program of continuous instructor training and support, including sensitivity training;
- Instructors who hold the appropriate qualifications for the courses they're teaching, typically a terminal degree in the subject matter;
- A diverse funding structure that ensures program stability, secures program autonomy, and incentivizes program quality;
- Dedicated study space where students can work with minimal distractions;

³⁹ There are a number of resources for DOCs and colleges that wish to provide incarcerated students with access to high-quality in-person programs, both in the form of model programs, such as Bard, and in the form of literature identifying the essential elements of such programs. Since the focus of this guide is on technology policy, we will not reproduce these here, but will point to some in the Appendix.

- Data collection practices that protect student privacy, support program evaluation, and make performance metrics available to stakeholders.⁴⁰

Some facilities will not be able to offer face-to-face instruction immediately. There may be logistical challenges related to space, staffing, program availability, or building infrastructure.⁴¹ Corrections decision-makers may also act slowly to adopt an in-person program so as to adequately vet for quality and stability. These are legitimate reasons to delay the establishment of in-person instruction, but delay should be accompanied by a plan of action. State executives, legislatures, or DOCs should work with facilities to identify concrete steps that will bring in-person programming to all facilities within a set time period. There should be accountability measures and incentives built into such plans. A number of arrangements are possible—special state advisory boards or working groups could be established, or legislatures could require DOCs to report on their progress and make funding contingent on progress. Legislative directives should ensure that educational programs within prisons must be substantially similar to higher education programs on the outside to promote a more equitable and rehabilitative environment.

Interim online programming must itself be appropriately vetted and quality controls installed. The unique benefits of in-person instruction should guide the selection of an online program. For example, online programs can and should include many of the features of high-quality prison higher education programs as enumerated above, including qualified and readily available instructors. Correctional ed administrators should also monitor the quality of interim online programs by setting benchmarks informed by the literature on best practices. Quantitative and qualitative data should be regularly collected to determine whether goals are being met; these should be reported to state oversight agencies.

Section Two: Changing Organizations, Institutions, and Culture

Even the most well-crafted, evidence-based policies will be susceptible to failure if they are implemented in an unsupportive setting. This section addresses three aspects of correctional codes and culture that work against incarcerated students: (1) the security culture that prevails in U.S. jails and prisons; (2) the absence of prison oversight and accountability measures; and (3) tech companies' habitual, contractual exploitation of incarcerated clients. These environmental factors will tend to shape correctional edtech policy in ways that limit access, do not allow for feedback or improvement, and extract a cost from the user.

Cultural and institutional change are needed on a grand scale if incarcerated students are to have equitable access to education and educational technologies. Turning to more humane approaches

⁴⁰ Ajinkya et al., “Equity and Excellence in Practice: A Guide to Designing Prison Ed Programs.” For an example of a short-term prison education program design that intentionally incorporated many of these recommended best practices, see Delaney, Patrick, and Boldin, “Unlocking Potential: Pathways from Prison to Postsecondary Education,” 7–10.

⁴¹ Delaney, Patrick, and Boldin, “Unlocking Potential: Pathways from Prison to Postsecondary Education,” 31. Most U.S. prisons were not built with internet access in mind.

to corrections, DOCs must begin to address the security mindset that imposes restriction after restriction on incarcerated students, to the detriment of their educational endeavors.

Problem One: Corrections' focus on security leads to prohibiting tech or to the adoption of tech that does not support rehabilitation.

DOC operations and organizational culture are powerfully shaped by an outlook that has been called the security paradigm.⁴² This perspective on safety emerged in the years following 9/11, when proponents of the "War on Terror" advocated a posture of heightened vigilance against the threat of attacks that could come at any time or place. Fear of the "imminen[t], [pervasive] and likely destructive force" of such threats had the effect of driving "an escalation of security policy" at the expense of other goods.⁴³ In the corrections context, contraband, attacks on staff, and riots are the relevant threats. Accordingly, day-to-day operations in correctional institutions are oriented towards maintaining control in order to minimize threats, even if that requires less-than-ideal trade-offs. When safety is always at stake and the stakes are always high, unlimited surveillance powers are justifiable; assuming the worst of incarcerated persons is prudent; and sacrificing rehabilitative programming may be required.

It would be logical to assume that a high concern for security would go with a restrictive attitude towards tech adoption. It is true that technologies that would facilitate communication among incarcerated persons or with the outside world or that would provide access to forbidden content, are not permitted. For example, cell phones are forbidden on grounds that they might enable illicit activities such as coordinating escape attempts or distributing drugs.⁴⁴ More pertinent for education, laptops have not been permitted due to similar concerns.

On the other hand, the rapid adoption of tablets seems to indicate a permissive attitude. In fact, both permissive and strict policies towards technology have the same source—security interests. There is currently no way to moderate cell phone use so that it serves the interests of security, and secure laptops are a recent innovation. Secure tablets have been on the market since 2015. They are wired to prevent users from accessing anything other than what corrections officials have deemed safe. This allows them to contribute to a safe environment in a second way: by

⁴² "Technology In Corrections," National Institute of Corrections, March 6, 2017, <https://nicic.gov/projects/technology-corrections>. To be clear, whenever this document references the "security paradigm" or "correctional culture," this signals a *structural* claim, not a claim about any *individual*; that is, there is no assumption that individuals working in corrections are malicious, nor even that those individuals are obsessed with power. Rather, the claim is that correctional culture recommends certain practices, norms, and values that will guide employee goals, behavior, and relationships.

⁴³ Ross W Bellaby, "Redefining the Security Paradigm to Create an Intelligence Ethic," *Intelligence and National Security*, May 15, 2022, 1–11, <https://doi.org/10.1080/02684527.2022.2076335>. See also Randall Wright's excellent summary of prison culture in Randall Wright, "Going to Teach in Prisons: Culture Shock," *Journal of Correctional Education* 56, no. 1 (March 2005): 23. Wright relies on several characterizations of correctional organizational culture, depicting it as fear-based, as operating with an "us vs. them" mentality, and as oriented towards erasing incarcerated persons' individuality in the interest of administrative efficiency.

⁴⁴ US Department of Justice, Office of the Inspector General, "Detecting and Managing Cell Phone Contraband," *Review of the Federal Bureau of Prisons' Contraband Interdiction Efforts*, June 2016.

reducing the likelihood of boredom-induced misconduct. Tablets enable incarcerated persons to entertain themselves, reducing contacts between them and staff.

The security criterion may benefit facility operations, but it has not been as beneficial for incarcerated persons and their families. The incarcerated population by and large falls on the wrong side of the digital divide. Lack of access to laptops and cell phones has only exacerbated the problem. **Those reentering after longer sentences are completely unprepared to apply for work or communicate with others on screens.** Those who have had access to tablets may be in a better position with regard to digital literacy, but worse off financially. Those who sell tablets to DOCs make much of the rehabilitative potential of their library of books and self-help and educational programs. However, their other functions have cost incarcerated persons and their families thousands in outrageously high fees.

In short, when security concerns guide tech adoption, as they do for DOCs, incarcerated persons' wellbeing is an afterthought rather than a guiding criterion. Any benefit that accrues to incarcerated users is accidental, not by design.

Solution: Institutions at all levels (federal, state, facility) should turn to person-centered, rehabilitative approaches to corrections.

One of the most significant defects of the U.S. correctional system is a profound ambivalence about the goal of incarceration. Historically, U.S. policy has swung between rehabilitative and punitive approaches to corrections.⁴⁵ This ambivalence continues to hamper correctional rehabilitative efforts today. For example, **there are often long waits to enroll in educational, therapeutic, and vocational programs, even though some are state-mandated.** Further, there is little guarantee of the quality of these programs. DOCs have wide discretion over their choice of contractors and are not mandated to track contractors' success.

Critics of mass incarceration have also drawn attention to stubbornly high rates of recidivism; evidently, the system fails to “correct” those who are released. Attention to these failures has moved the needle towards rehabilitation. Communities that receive formerly incarcerated persons have an obvious investment in their rehabilitation; incarceration is disruptive and likely to inflict trauma on families, and the brevity of most sentences leaves little time to focus on rehabilitation. But even those who might lean towards a punitive correctional philosophy have expressed concern over recidivism in view of the high cost of corrections.

Fortunately, there are effective rehabilitation-focused alternatives to the punitive model of incarceration and model corrections systems that have implemented these. The UN's "Standard Minimum Rules for the Treatment of Prisoners", also known as the "Nelson Mandela Rules", are foundational for rehabilitative systems. The guidelines, first adopted in 1955, establish basic standards that facilities should meet in providing goods such as sanitation, nutrition, and medical

⁴⁵ Gerard Robinson et al., *Education for Liberation: The Politics of Promise and Reform Inside and Beyond America's Prisons* (Blue Ridge Summit, UNITED STATES: Rowman & Littlefield Publishers, 2019), 9–15, <http://ebookcentral.proquest.com/lib/umichigan/detail.action?docID=5646171>.

services to incarcerated persons. Importantly, the Rules articulate a humane vision of corrections that is committed to ensuring that "the reintegration of [incarcerated] persons into society upon release so that they can lead a law-abiding and self-supporting life."⁴⁶ This rehabilitative goal is achieved by committing resources to "education, vocational training and work, as well as other forms of assistance...including those of a remedial, moral, spiritual, social and heal-and sports-based nature."⁴⁷

The Mandela Rules' focus on rehabilitation and "normalization"—the notion that rehabilitation is best achieved by creating a correctional environment that is as "normal" as possible—is echoed by a second set of standards, the Council of Europe's European Prison Rules. These surpass the Mandela Rules, setting ambitiously strict limits on security and disciplinary practices, as these have the highest potential to undermine human dignity.⁴⁸ For example, the Rules recommend restorative disciplinary practices and explicitly identify corrections personnel as public servants whose role is not akin to those of police or military.⁴⁹

These Rules express a commitment to centering the humanity of incarcerated persons, an outlook that has led to positive outcomes in correctional systems that have adopted it.⁵⁰ As the Brennan Center reports, incarcerated persons in Norway are given significant control over their living conditions; they cook their own meals, decorate their living spaces, work, and may attend school.⁵¹ Prison systems in Germany and the Netherlands implement similar rehabilitative and reintegrative programs.⁵² Although it might seem impossible that such approaches could take root in the U.S., there are domestic efforts to transform corrective practices so that rehabilitative programs can have full effect. North Dakota is most notable in instituting systemic reforms such as sentence reductions, presumptive probation for some offenses, adopting "dynamic security" practices, and intensive educational and therapeutic programming.⁵³

⁴⁶ "UN Mandela Rules for the Treatment of Prisoners," 8, accessed August 26, 2022, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement>.

⁴⁷ "UN Mandela Rules for the Treatment of Prisoners," 8.

⁴⁸ Conseil de l'Europe, ed., *Règles Pénitentiaires Européennes* (Strasbourg: Editions du Conseil de l'Europe, 2006), 6.

⁴⁹ Conseil de l'Europe, 23–29.

⁵⁰ "The Benefits of Rehabilitative Incarceration," NBER, accessed February 17, 2024, <https://www.nber.org/reporter/2020number1/benefits-rehabilitative-incarceration>; Ram Subramanian and Alison Shames, "Sentencing and Prison Practices in Germany and the Netherlands," *Federal Sentencing Reporter* 27, no. 1 (October 1, 2014): 33–45, <https://doi.org/10.1525/fsr.2014.27.1.33>.

⁵¹ "How Some European Prisons Are Based on Dignity Instead of Dehumanization | Brennan Center for Justice," accessed September 13, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/how-some-european-prisons-are-based-dignity-instead-de-humanization>. See also Christin Tønseth and Ragnhild Bergsland, "Prison Education in Norway – The Importance for Work and Life after Release," ed. Sammy King Fai Hui, *Cogent Education* 6, no. 1 (January 1, 2019): 1628408, <https://doi.org/10.1080/2331186X.2019.1628408>.

⁵² "Sentencing and Prison Practices in Germany and the Netherlands," Vera Institute of Justice, July 7, 2018, <https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states>.

⁵³ "North Dakota Models Its Prison Reform Plans After Norway," US News & World Report, accessed September 13, 2022, <https://www.usnews.com/news/best-states/articles/2019-02-22/inspired-by-norways-approach-north-dakota-reforms-its-prisons>. Other states have attempted rehabilitative approaches either at the state or facility level; see also Michele Deitch, "But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States," *American Journal of Criminal Law* 47, no. 2 (Summer 2020): 214–15 and examples in the final section of Alison Shames et

The Mandela Rules and European Prison Rules do not directly address technology access, but both call for equal treatment to the greatest extent possible. The Mandela Rules direct prisons to "minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."⁵⁴ Similarly, the European Prison Rules declare that "life in prison shall approximate as closely as possible the positive aspects of life in the community" and that "all detention shall be managed so as to facilitate...reintegration into free society."⁵⁵ In the digital age, placing the well-being of incarcerated persons on the same footing with those on the outside surely obliges prisons to adopt generous policies around tech access. Similarly, equitable educational programming must allow incarcerated students access to the same digital tools that college students on the outside use. The ability to explore all the functionalities of up-to-date tech apps ensures that standards of equity and reentry preparedness are met.

Problem Two: Meager accountability and transparency means there are barriers to ensuring that tech is adopted in ways that center students' needs.

A 2018 report by the Vera Institute documents the appalling conditions that prevail in U.S. prisons: overcrowding, use of solitary confinement, insufficient food and basic hygiene products, and higher-than-normal rates of foodborne illness and sexual assault.⁵⁶ With the exception of facilities that offered federally-funded postsecondary education through the Second Chance Pell Pilot program, "opportunities for paid work, as well as rehabilitative, vocational, and postsecondary programming, have declined across the board."⁵⁷ Under these conditions, it is unsurprising that edtech has not been integrated in ways designed to promote digital literacy and educational equity.

Perhaps the principal cause of this dysfunction is that U.S. correctional facilities lack an essential feature of public institutions: publicity. **Correctional operations are hidden from the body politic in at least four senses: (1) they are virtually *invisible* due to siting policies; (2) they passively and actively restrict access to *information*; (3) they are not easily held accountable with mechanisms of *legal remediation* in civil court; and (4) they are not held accountable by *independent oversight* bodies.**

Correctional facilities, prisons in particular, are visually inaccessible to the public. Prisons are intentionally sited in "geographically remote, rural locations,...hid[den] from public view."⁵⁸ The

al., "Examining Prisons Today," Reimagining Prisons (Vera Institute, September 2018), <https://www.vera.org/reimagining-prison-web-report/examining-prisons-today>.

⁵⁴ "UN Mandela Rules for the Treatment of Prisoners," 9.

⁵⁵ Conseil de l'Europe, *Règles Pénitentiaires Européennes*, 7.

⁵⁶ Shames et al., "Examining Prisons Today."

⁵⁷ Shames et al.

⁵⁸ Melissa Benerofe, "Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation," *FORDHAM LAW REVIEW* 90 (n.d.): 145. Benerofe cites Michele Deitch, "The Need for Independent Prison Oversight in a Post-PLRA World," *Federal Sentencing Reporter* 24, no. 4 (April 1, 2012): 236-44, <https://doi.org/10.1525/fsr.2012.24.4.236>; Laura Rovner, "On Litigating Constitutional Challenges to the

literal *invisibility* of the incarcerated population makes it less likely that questions will be raised about how facilities are run, including their educational tech policies.

Access to *information* is a critical ingredient of publicity, yet decision-makers passively and actively limit the information coming out of jails and prisons. As has been commonly observed by those seeking to understand, document, or reform the U.S. prison system, correctional practices of data collection and reporting are patchy. The Bureau of Justice Statistics (BJS) collects national data describing jail and prison population numbers, the nature of offenses among the population, facility type, and demographic information.⁵⁹ States are best positioned to collect and report data on prison conditions, given the decentralized structure of U.S. corrections. However, a sample of state reports shows that if these provide additional information, it's in the form of high-level numbers on security, programming, or prison administration, not details about incarcerated persons' living conditions.

For example, the Michigan DOC's most recent statistical report primarily consists of a granular look at its population's offense types. Sections that would be devoted to information about rehabilitative programming are blank and stamped "under review." The California DOC's report counts grievances and appeals by type, programs and participants in those programs (lumping together all "leisure" programs), and number of incarcerated persons employed in the facility, but these are listed in a bare-bones spreadsheet.⁶⁰ In addition to reporting on security challenges, Arkansas' 2021 DOC report describes incarcerated persons' facility employment by sector and gives a very basic breakdown of educational achievements. While it is true that there are risks in collecting and sharing data about incarcerated persons, finding ways to minimize risk is far preferable to the current state of affairs.⁶¹

Recent scholarly work has pointed to a lack of consistent and detailed correctional data on incarcerated persons' physical and mental health.⁶² Without such data, it is difficult to know the extent to which the physical and psychological challenges of prison life, such as overcrowding, assault, and inadequate nutrition and health care, are having an impact. Most critically for the

Federal Supermax: Improving Conditions and Shining a Light," *Denver Law Review* 95, no. 2 (Spring 2018): 457, 461; David C. Fathi, "The Challenge of Prison Oversight," *American Criminal Law Review* 47, no. 4 (September 22, 2010): 1453–63; and Heather Ann Thompson, "What's Hidden behind the Walls of America's Prisons," *The Conversation*, June 5, 2017, <http://theconversation.com/whats-hidden-behind-the-walls-of-americas-prisons-77282>.

⁵⁹ E. Ann Carson, "Correctional Populations in the United States, 2021 – Statistical Tables," *Statistical Tables*, 2021.

⁶⁰ See for example "Arkansas Corrections Statistics," accessed July 29, 2023, <https://doc.arkansas.gov/wp-content/uploads/2022/05/ADC-FY2021-Annual-Report-BOC-Approved-4.29.2022-UD.pdf>; Heidi Washington, "Michigan Corrections Report," n.d., "California Corrections Statistics," California Department of Corrections and Rehabilitation, accessed July 29, 2023, <https://www.cdcr.ca.gov/reports/>; "BJS Data Collections," Bureau of Justice Statistics, accessed July 29, 2023, <https://bjs.ojp.gov/data-collections/search>. See also "Transparency in the Prison System: An Open Data Approach," accessed February 3, 2024, <https://datafordemocracy.org/projects/prison-transparency.html>. for snapshots of several states' approaches to making data available.

⁶¹ Institute of Medicine, *Ethical Considerations for Research Involving Prisoners* (National Academies Press, 2007), accessed February 17, 2024, <https://doi.org/10.17226/11692>; "Transparency in the Prison System: An Open Data Approach"; "Principles to Guide National Data Collection on the Health of Persons in the Criminal Justice System," accessed February 3, 2024, <https://doi.org/10.1177/0033354919841593>.

⁶² "Principles to Guide National Data Collection on the Health of Persons in the Criminal Justice System"; Katherine LeMasters et al., "Suicides in State Prisons in the United States: Highlighting Gaps in Data," *PLoS ONE* 18, no. 5 (May 31, 2023): e0285729–e0285729, <https://doi.org/10.1371/journal.pone.0285729>.

question of edtech use, rehabilitative programming is not tracked in any meaningful sense. Prisons partner with a variety of organizations to provide therapeutic, educational, and other programs, but there are no uniform national standards for monitoring program quality. Third parties may have their own data-collection protocols for evaluating success, but are not required to share results, with the notable and recent exception of qualified Prison Education Programs.⁶³ When the third party is a for-profit entity, as are many edtech contractors, there are even fewer guarantees that data will be shared or accurate. The data needed to give a reliable, systematic view of the industry's ability to support student learning are simply not available.

The incomplete picture most Americans have of correctional operations are due not only to less-than-ideal data collections protocols. Legal and administrative practices likewise work towards concealment. The most obvious means of shining light on correctional institutions—speaking to the media or loved ones or obtaining information under FOIA—are not so easily utilized. Facility surveillance systems pose an initial transparency barrier. COs read and censor incoming and outgoing mail, observe visits, and record visitors' identities. These measures make it "difficult to obtain an unfiltered prisoner viewpoint."⁶⁴ Media investigations may be held up by U.S. courts, which typically give corrections authorities discretion over whether to permit interviews with incarcerated persons.⁶⁵ Responses to FOIA requests encounter similar roadblocks; DOCs may be slow to provide the requested information or else "rely on statutory exemptions in public disclosure laws" that "preclude public access to information regarding law enforcement."⁶⁶

Publicity is denied in a third sense that leaves incarcerated persons particularly vulnerable: that of *legal remediation* in the civil courts. The Prison Litigation Reform Act (PLRA), enacted during the wave of tough-on-crime legislation in the mid-1990s, practically removes an incarcerated person's right to sue.⁶⁷ This is unfortunate, first, because incarcerated persons who

⁶³ "34 CFR Part 668 Subpart P—Prison Education Programs," sec. 668.239, accessed February 17, 2024, <https://www.ecfr.gov/current/title-34/part-668/subpart-P>; "Report and Suggestions from IPEDS Technical Review Panel #65: Incarcerated Students and Second Chance Pell: Data Collection Considerations," 4, accessed August 11, 2023, https://edsurveys.rti.org/IPEDS_TRP_DOCS/prod/documents/TRP65_Summary.pdf.

⁶⁴ Benerofe, "Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation." Benerofe here cites Demetria D. Frank, "Prisoner-to-Public Communication," *Brooklyn Law Review* 84, no. 1 (Fall 2018): 115–64.

⁶⁵ Deitch, "But Who Oversees the Overseers?," 222–23.

⁶⁶ Benerofe, "Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation." Benerofe cites two analyses of how DOCs manage to evade FOIA requests: Sarah Geraghty and Melanie Velez, "Bringing Transparency and Accountability to Criminal Justice Institutions in the South," *Stanford Law & Policy Review* 22, no. 2 (March 22, 2011): 461–62; and Christina Koningisor, "Transparency Deserts," *Northwestern University Law Review* 114, no. 6 (March 2020): 1506. Unsurprisingly, corrections authorities cite security concerns in refusing to provide information about prison conditions. See Deitch, "But Who Oversees the Overseers?," 222–23.

⁶⁷ *Jailhouse Lawyers Handbook*, 6th ed. (Center for Constitutional Rights, Lawyer's Guild, 2021), accessed December 5, 2022, https://www.jailhouselaw.org/sites/all/themes/rktp_jailhouselaw/assets/pdf/Jailhouse%20Lawyers%20Handbook%202021.pdf. As the *Handbook* discusses, the 1996 Prison Litigation Reform Act established punishing hurdles for those seeking relief from maltreatment in prisons: the requirement to exhaust all administrative remedies before bringing suit; the requirement to prove physical or sexual damage before seeking remedy for emotional damage; the low bar for dismissal of a case; and the low likelihood that lawyers' fees will be paid by a losing corrections defendant. State versions of the law were also enacted. See "Laws on Frivolous Inmate Litigation in Connecticut and Other States," accessed April 15, 2023, <https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-0822.htm>; "Federal and State PLRA," Department of Corrections, accessed April 15, 2023,

pursue internal remedies as required by the PLRA may continue to suffer abuse and will be vulnerable to retaliation. For example, incarcerated students who are being denied equal access to educational resources would have to submit as many complaints to the facility as its internal policies demand prior to filing suit. In the meantime, they will continue to be denied equal access to educational resources. Second, PLRA undermines the power of the civil courts to further social justice; historically, the lawsuit has historically been a means of enforcing the rights of the most vulnerable members of society and of exposing otherwise hidden abuses of power.⁶⁸

Of course, the lawsuit is an imperfect way of being "made whole" again. It is far better to prevent harms from arising in the first place. In other social arenas, this is accomplished through regulation and oversight. Ideally, the degree of scrutiny is indexed to the potential for harm, taking also into account whether there are other factors in place that prevent harm. For example, college accreditation processes are typically on a five- to ten-year cycle.⁶⁹ This generous time span does not mean that ensuring that schools are up to par is unimportant. Rather, it takes into account the supporting interests and institutions that hold schools accountable. These include: the U.S. Department of Education, which makes federal student aid contingent on accreditation; elected or appointed trustee boards, to whom university decision-makers must report; and faculty and staff associations, whose activities contribute to a culture of investment in educational and administrative quality.⁷⁰

The significant power corrections agencies wield over every aspect of incarcerated persons' bodies and day-to-day existence calls for *independent oversight*. Oversight should be preventative and corrective. Preventative oversight may consist in rules or monitoring (or both) designed to avoid harms that might occur. Corrective oversight is exercised by a body that receives and addresses grievances. Sadly, the state of correctional oversight in the U.S. reflects the fragmentary nature of the correctional system itself; a smattering of diverse types of oversight bodies exist at the state and local level, but these do not necessarily possess the power to ensure safe and humane conditions. It cannot be overemphasized that "correctional oversight bodies...are still relatively rare in the United States."⁷¹ This is true even after a decade of advocacy by the American Bar Association and other civil society groups prompted states to

<https://www.cor.pa.gov:443/Inmates/InmateStrikeIndex/Pages/Federal-And-State-PLRA.aspx>. The federal PLRA emerged from the same "tough-on-crime" team—a Newt Gingrich-led Republican Congress and Bill Clinton—who revoked Pell Grants for incarcerated persons, thereby decimating prison education programs. For a summary of the court's treatment of incarcerated persons' rights, see also Thompson, "What's Hidden behind the Walls of America's Prisons." See also Michele Deitch, "The Need for Independent Prison Oversight in a Post-PLRA World," *Federal Sentencing Reporter* 24, no. 4 (April 1, 2012): 236–44, <https://doi.org/10.1525/fsr.2012.24.4.236>; and Deitch, "But Who Oversees the Overseers?," 227–30.

⁶⁸ Lawrence M. Friedman, "Torts," in *A History of American Law*, ed. Lawrence M. Friedman (Oxford University Press, 2019), 0, <https://doi.org/10.1093/oso/9780190070885.003.0015>. See also David Kairys and Rene Cramer, *The Politics Of Law: A Progressive Critique, Third Edition* (New York, UNITED STATES: Basic Books, 1998), 445–70, <http://ebookcentral.proquest.com/lib/umichigan/detail.action?docID=625119>.

⁶⁹ Education Next, "College Accreditation, Explained," *Education Next* (blog), June 13, 2018, <https://www.educationnext.org/college-accreditation-explained-ednext-guide-how-it-works-whos-responsible/>.

⁷⁰ It is also important to note that the capacity of an institution to inflict bodily harm has important bearing on the appropriate level of oversight that an institution should be subject to. To continue with the example above—students' bodily integrity is not under the power of school authorities in the same way that incarcerated persons' bodies are under the power of correctional facilities.

⁷¹ Deitch, "But Who Oversees the Overseers?," 257.

strengthen oversight.⁷² Even where oversight bodies exist, they do not typically have comprehensive (preventive *and* corrective) powers and are likely to lack staffing and funding, be vulnerable to political pressure, and have only limited access to correctional facilities.⁷³

Solution: Establish or restore accountability and transparency mechanisms for correctional institutions.

As the preceding analysis indicates, well-functioning mechanisms of accountability and transparency depend on the cooperation of multiple systems: courts, legislatures, DOCs, statistical agencies, and others. Although there are measures that could be taken to improve transparency and accountability in each of the aspects discussed above, establishing *independent oversight* has the greatest potential for system-wide impact.

The United States is unique among Western nations in lacking national correctional oversight standards and national or state oversight bodies. As elaborated by Deitch, an effective oversight body is

- Independent from the correctional agency it oversees;
- Primarily concerned with monitoring confinement conditions, preventing ill treatment, or investigating grievances of incarcerated people;
- Granted formal or informal access to correctional facilities in order to carry out its core functions; and
- Actively engaged in its work.⁷⁴

Such bodies exist across Europe and in a number of nations in Africa, Asia, and Latin America, where signatories to the Optional Protocol to the Convention Against Torture (OPCAT) agree to establish preventative and corrective oversight of detention facilities.⁷⁵ Signatory nations grant inspection rights to a UN subcommittee devoted to the prevention of torture and inhumane treatment, the Subcommittee on the Prevention of Torture (SPT). In addition, nations must have at least one National Preventive Mechanism (NPM), a body with "authority to conduct unannounced visits, to interview people in custody away from facility staff and administrators, and to access data and other relevant information it needs to assess facility conditions and the treatment of people in custody."⁷⁶

For example, Norway's parliament elects the Parliamentary Ombudsman to serve as the nation's NPM. The Ombuds visits prisons and other places "where someone is, or could be, deprived of

⁷² Deitch, 230–40. In addition to the ABA and the National Association for Civilian Oversight of Law Enforcement, scrutiny from Black Lives Matter, The Vera Institute for Justice, and The Marshall Project have put pressure on corrections to operate with greater accountability and transparency. For comparison, see Deitch's 2010 catalogue of correctional oversight bodies in Michele Deitch, "Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory," *Pace Law Review* 30, no. 5 (September 2010): 1754–1930.

⁷³ Deitch, "But Who Oversees the Overseers?," 268.

⁷⁴ Deitch, 243.

⁷⁵ "International Oversight," NRCCO, sec. Optional Protocol to the Convention Against Torture (OPCAT), accessed February 17, 2024, <https://prisonoversight.org/oversight-resources/international-oversight/>; Deitch, "But Who Oversees the Overseers?," 224; "OPCAT Signatories," accessed February 17, 2024, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT-OP.

⁷⁶ "International Oversight," sec. National Preventive Mechanism (NPM).

their liberty" and receives complaints from those who are detained.⁷⁷ Denmark's Parliamentary Ombudsman is elected in the same manner but works with two nonprofit organizations to conduct visits, process complaints, and issue reports.⁷⁸ England's system of oversight is regarded by many as a model of excellence. Three oversight bodies work together to ensure safe detention conditions: Her Majesty's Inspectorate of Prisons (HMIP) provides prevents harm through regular inspections; the Prisons and Probation Ombudsman (PPO) handles complaints, investigates custodial deaths, and makes reform recommendations; and Independent Monitoring Boards (IMBs) are unique bodies intended to function as the "eyes and ears of the public" by securing rights of entry into community prisons for local volunteers.⁷⁹

The United States has been notoriously reluctant to cede authority to supranational bodies such as the UN, but progress is possible notwithstanding the refusal to commit to OPCAT. The oversight institutions the Protocol has given rise to can serve as models for the development of federal, state, and local oversight bodies. Establishing these would go a long way towards addressing the accountability and transparency deficits identified above.

For example, in order to address the *invisibility* of our correctional institutions, local oversight bodies similar to IMBs would have the right to enter jails and detention centers, interview detained persons and staff, and observe living conditions. Allowing trained volunteers to perform oversight duties would open up our institutions to the view of ordinary citizens.⁸⁰ These local bodies should report to state or federal legislatures, as in the UK, or be accredited at the national level. Accountability at a higher level would provide an extra layer of protection appropriate for the sensitive nature of the work. In addition, it would impose a measure of coherence on a fragmentary system by allowing the legislative or accrediting agency to establish a common set of evaluative standards.

NPM-type oversight at the state level would have great potential to improve access to *information*. Like IMBs, NPMs have preventative monitoring responsibilities with unrestricted rights of entry, but at the state level, those rights would apply to prison facilities. They typically also receive and arbitrate grievances.⁸¹ There are at least three ways that this kind of oversight would lay the groundwork for better data collection and, ultimately, increased transparency. First, resistance to disclosing facility conditions will be difficult to maintain under a regime of regular visits, particularly when they may be unannounced. Such access to facilities is the most fundamental condition for data collection. Second, regular preventative monitoring requires some standardization of quality measurements; common markers of correctional facility quality must be identified so that these may be checked and reported on. Similarly, corrective oversight requires identification of legitimate grounds for complaint. Finally, regular engagement with incarcerated persons and corrections staff has potential to improve the relevance, veracity, and

⁷⁷ "Norwegian Parliamentary Ombudsman," *Sivilombudet* (blog), accessed February 17, 2024, <https://www.sivilombudet.no/en/visit-reports/>.

⁷⁸ "Danish Parliamentary Ombudsman," October 23, 2017, https://en.ombudsmanden.dk/international/fields_of_work/.

⁷⁹ Deitch, "But Who Oversees the Overseers?," 224; "International Oversight," sec. England and Wales: Independent Monitoring Boards (IMBs).

⁸⁰ Neil Barsky, "Opinion | How to Fix Our Prisons? Let the Public Inside," *The New York Times*, December 17, 2019, sec. Opinion, <https://www.nytimes.com/2019/12/17/opinion/prison-reform.html>.

⁸¹ As noted above, preventative and corrective oversight functions are performed by different bodies in the UK.

effectiveness of quality measurements. Oversight bodies may employ formalized feedback procedures that make space for those “on the ground” to weigh in on the metrics used to evaluate prisons.⁸² Robust oversight would not obviate the need for investigative journalism and citizens' rights to obtain information under FOIA, but it would alleviate the burden on these and other watchdog organizations.

Repealing the PLRA would be the surest way to restore judicial oversight over corrections institutions. However, NPM-type oversight would arguably be a more effective measure; it addresses the root causes of the demand for *legal remediation*, potentially reducing litigation by preventing injury and providing means of redressing injuries that do occur. It is possible that independent corrective oversight bodies would have nonpartisan political appeal, even for PLRA supporters who believe the Act reduces "frivolous lawsuits"; after all, one of the PLRA's most stringent requirements forces incarcerated persons to exhaust their prison's grievance procedures before filing suit.⁸³

Problem Three: Companies that provide correctional technology services have been allowed to profit at incarcerated persons' expense.

A review of existing correctional tech use reveals two dominant trends in tech adoption: **first, tech must enhance safety, or at the very least, its potential threats to safety must be neutralized; and second, tech is profitable, often at incarcerated persons' expense.** These trends by themselves provide strong reason for concern about the ways that edtech may be integrated into prison higher ed programming in coming years. But **there are additional forces that threaten to steer edtech adoption in directions harmful to incarcerated students, including edtech industry power, thorny data privacy issues, and, in the wake of Pell restoration, the likelihood that edtech will rapidly expand into the correctional “market.”**

Correctional tech: current usage patterns

Tech is put to many uses in U.S. correctional facilities, in large part because tech products are marketed as solutions to security problems. In this way, **tech companies are able to style themselves as allies to security-minded decision-makers, administrators, and staff.** The relationship between the correctional tech industry and public sector corrections agencies is a friendly one, evident in various spaces:

⁸² This structure might take inspiration from community-based participatory research methods. See Barbara A. Israel et al., *Methods for Community-Based Participatory Research for Health* (Somerset, UNITED STATES: John Wiley & Sons, Incorporated, 2012), <http://ebookcentral.proquest.com/lib/umichigan/detail.action?docID=918182>; Barbara A. Israel et al., “Community-Based Participatory Research: A Capacity-Building Approach for Policy Advocacy Aimed at Eliminating Health Disparities,” *American Journal of Public Health* 100, no. 11 (November 2010): 2094–2102, <https://doi.org/10.2105/AJPH.2009.170506>.

⁸³ “Know Your Rights: The Prison Litigation Reform Act” (American Civil Liberties Union, November 2002), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf.

- The Corrections Technology Association's annual industry summit is sponsored by both quasi-public entities and for-profit companies like Microsoft, Amazon, IBM, and Blackboard, to name a few.⁸⁴
- The National Institute of Corrections, a federal agency supporting effective corrections operations, features links to promotional industry pages alongside news articles, agency research pieces, and peer-reviewed journal articles on its website.⁸⁵
- The Integrated Justice Information Systems Institute, a nonprofit recipient of public grant money, claims to offer a "neutral venue" where government agencies can find information about tech "solutions" to corrections problems even as their publications very intentionally give weight to industry voices.⁸⁶

National prison staffing shortages have only increased corrections clients' tendency to treat tech as a partner.⁸⁷ Technological approaches to labor problems tend to enhance surveillance powers while keeping constant, decreasing, or even substituting for staff labor. For example:

- Managed access systems interrupt cell phone signals, making physical searches for contraband cell phones unnecessary.⁸⁸
- Wearable RFID tag systems track incarcerated persons with radio signals and alert staff whenever an unusual number of persons are gathered in any one area, reducing the need for staff to monitor in person, or even remotely via live feed.⁸⁹
- Video communications apps like Zoom mean fewer security checks and fewer incarcerated persons moving within or outside the facility.⁹⁰

⁸⁴ Non-corporate sponsors include the American Correctional Association and Integrated Justice Information Systems (IJIS), whose members are public-sector corrections employees and public corrections agencies. "CTA Sponsors," Corrections Technology Association, accessed January 30, 2023, <https://www.correctionstech.org/sponsors-partners>.

⁸⁵ "Technology in Corrections". The NIC is a branch of the US Department of Justice.

⁸⁶ "Corrections_Tech_2020_FINAL_20170331.Pdf," accessed January 12, 2023, https://static1.squarespace.com/static/5c9bddf0797f7463f03a7bff/t/5ce224e0dc364f0001fe51e7/1558324453314/Corrections_Tech_2020_FINAL_20170331.pdf; "Our Focus - IJIS Institute," December 14, 2021, <https://ijis.org/our-focus/>.

⁸⁷ "Prison Staff Shortages Take Toll on Guards, Incarcerated People," accessed January 12, 2023, <https://pew.org/3S5a5KS>. Understaffing means that the prison environment is less safe, but also inhumane; prisoners may lack access to yard time or even showers. Michael Wyke/Associated Press, "As Corrections Officers Quit in Drove, Prisons Get Even More Dangerous," The Marshall Project, accessed February 5, 2023, <https://www.themarshallproject.org/2021/11/01/as-corrections-officers-quit-in-drove-prisons-get-even-more-dangerous>.

⁸⁸ US Department of Justice, Office of the Inspector General, "Detecting and Managing Cell Phone Contraband."

⁸⁹ Philip Bulman, "Using Technology to Make Prisons and Jails Safer: (534662009-011)" (American Psychological Association, 2009), <https://doi.org/10.1037/e534662009-011>.

⁹⁰ Video apps have led to increased reliance on remote visits with friends and family, remote educational and recreational programming, remote hearings, and telehealth. "Role and Use of Technologies," Penal Reform International, accessed October 24, 2022, <https://www.penalreform.org/global-prison-trends-2021/role-and-use-of-technologies/>. These apps intensify surveillance by allowing prisons to record, analyze, and store calls, which creates privacy risks for incarcerated persons and their virtual visitors. Kentrell Owens, Camille Cobb, and Lorrie Cranor, "'You Gotta Watch What You Say': Surveillance of Communication with Incarcerated People," in *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems* (CHI '21: CHI Conference on Human Factors in Computing Systems, Yokohama Japan: ACM, 2021), 1–18, <https://doi.org/10.1145/3411764.3445055>.

These technologies are designed and marketed to appeal to the security-first mindset that dominates corrections culture. From that perspective, less contact with individuals perceived to be dangerous is preferred, no matter the implications for incarcerated persons' well-being.⁹¹

Treating the tech industry as a security partner may reduce costs for DOCs, but incarcerated users enjoy no such benefit. Perverse financial incentives often structure contracts with tech companies, inviting DOCs to pass the costs of communications and recreational tech onto incarcerated users and their families. There are several prominent examples of the ways that tech companies have exploited these users, beginning with telecom. Prison telecom has long been the chief means for incarcerated persons to communicate with loved ones.⁹² The industry's duopoly over the corrections market raises the first and most glaring red flag. Most states contract with one of two massive providers on terms that can be incredibly unfavorable to incarcerated persons. The average price of a 15-minute phone call costs about \$3, far above market rate, especially in the days of cell phones.⁹³ Incarcerated persons who are poor or low on funds no longer have the option to call collect; prepaid accounts are required, allowing telecoms to squeeze users with a wide variety of processing or service fees, including charges to:

- open or close an account;
- deposit funds into an account;⁹⁴
- receive a refund for unused funds;
- keep an account open; and
- administer or connect a call (surcharges).⁹⁵

When prepaid account funds go unused they may be seized by telecom companies. In some cases, released persons have six months to a year to retrieve deposited funds. Worst-actor telecoms seize unused funds upon release or after only 3 months of inactivity. The Federal Communications Commission (FCC) has recently taken action to cap rates and set limits on ancillary charges, but telecoms continue to find ways to skirt the rules.⁹⁶

The state's failure to protect incarcerated persons from contractual exploitation is not a case of benign neglect; most DOCs profit from price gouging in the form of "site commissions," or as they are more plainly known, kickbacks.⁹⁷ On the high end, some corrections clients (states or counties) receive upwards of 75 cents on the dollar for each call. This arrangement motivates telecoms to increase their prices while DOCs cheer them on. The kickback norm has a more

⁹¹ A few prisons across the world are turning to very high tech solutions that dramatically reduce contact between incarcerated persons and COs and thus the need for COs. The broader implications of removing person-to-person interaction tends to be pushed to the side. See "Role and Use of Technologies."

⁹² It is generally accepted that incarcerated persons have a Constitutional right to communicate with the outside world; jails and prisons provide for the exercise of this right with community phones. *Jailhouse Lawyers Handbook*, chap. 3; "Prisoners' Right to Communicate with the Outside World," accessed February 12, 2023, <https://jlm.law.columbia.edu/files/2021/02/26.-Chapter-19.pdf>.

⁹³ Prison Policy Initiative, "State of Phone Justice 2022: The Problem, the Progress, and What's Next," accessed March 2, 2024, https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html.

⁹⁴ Deposit fees are often maximized by capping the maximum amount that may be deposited and charging per deposit. Prison Policy Initiative, "Please Deposit All of Your Money - Report," accessed March 2, 2024, <https://www.prisonpolicy.org/phones/pleasedeposit.html>.

⁹⁵ Surcharges may include those disguised as taxes or regulatory fees. See Initiative.

⁹⁶ "FCC Rule Capping Prison Phone Rates," 6, 50–53, accessed February 11, 2023, <https://docs.fcc.gov/public/attachments/FCC-13-113A1.pdf>; Initiative, "State of Phone Justice 2022."

⁹⁷ Initiative, "State of Phone Justice 2022."

sinister systemic impact, though; it breeds resistance to prison telecom reform among corrections decision-makers.⁹⁸

Another, more recent use of tech—video visits—offers another illustration of the harm that can come to incarcerated users when a myopic focus on security intersects with tech industry profit interests. During these visits, incarcerated persons and their visitors sit in separate, monitored rooms within the facility, their conversation mediated by a webcam-equipped console.⁹⁹ Video tech also allows loved ones to connect from any off-site location, even from home, using a software similar to Skype.¹⁰⁰ Remote visits benefit families for whom in-person visitation would be prohibitively expensive, but it's unlikely that this is what DOCs had in mind. Video visits, whether remote or in-person, are a boon for security. They require less intensive monitoring since visitors are not in the same physical space as incarcerated persons, and the option to record means they are more susceptible to surveillance. In addition, remote visits limit on-site security processes to those involved in moving the incarcerated person to the video console.¹⁰¹

The same vendors that dominate the telecom market have imposed account and usage fees for video visits like those for phone calls. More troublingly, they have pressured facilities to offer video visits exclusively.¹⁰² A number of facilities capitulated, replacing face-to-face visits with virtual ones as soon as they became widely marketed in the early 2010s.¹⁰³ Their rapid spread was certainly driven by profit interests; while on-site video visits are free, off-site visits cost as much as a dollar a minute. Under the monopolistic conditions of the prison telecom market, the line between offering tech to and forcing it upon incarcerated persons is meaningless. Telecom profit interests are given weight even when they threaten to erode incarcerated persons' rights to connect with friends and family.

⁹⁸ For instance, PPI reports that the National Sheriff's association actively lobbies against prison phone industry regulation. Initiative.

⁹⁹ On paper, these visits resemble traditional visits in every way except that the incarcerated person and their visitor are not in the same room together. In reality, there are technological glitches that can impede conversation. See Prison Policy Initiative, "When Jails Replace In-Person Visits with Video, What Happens When the Technology Fails?," accessed January 23, 2023, <https://www.prisonpolicy.org/blog/2019/06/18/video-failure/>. Further, the research that demonstrates the social, psychological, and behavioral benefits of visitations presumes a face-to-face modality. See Murphy.

¹⁰⁰ Prison Policy Initiative, "When Jails Replace In-Person Visits with Video, What Happens When the Technology Fails?"

¹⁰¹ Depending on what kind of contact visitors are able to have with incarcerated persons, in-person visitations may provide the opportunity for contraband to come into the facility. These kinds of visits will therefore require much more labor on the part of prison staff, not only at security checkpoints, but in the room during visitation.

¹⁰² Tim Murphy, "Prison Phone Companies Have Found yet Another Way to Squeeze Families for Cash," *Mother Jones* (blog), accessed January 23, 2023, <https://www.motherjones.com/politics/2015/02/jail-prison-video-visitation/>; Tim Murphy, "Video Visitation Giant Promises to Stop Eliminating In-Person Visits," *Mother Jones* (blog), accessed January 23, 2023, <https://www.motherjones.com/crime-justice/2015/05/securus-prison-phones-video-visitation/>. Since the initial rush to adopt video-only visitation, several states have passed legislation to prohibit and/or overturn the practice, and Securus ended their practice of contractually requiring jails and prisons they contract with to adopt video-only visitation. See "Prison and Jail Visitation | Prison Policy Initiative," accessed January 23, 2023, <https://www.prisonpolicy.org/visitation/>.

¹⁰³ This controversial policy is by no means implemented everywhere, but as many as 95 jurisdictions adopted video-only visits. Hanna Kozłowska, "Are Video Visits a Smart Innovation for Jails—or yet Another Way to Exploit Families?," *Quartz*, April 30, 2015, <https://qz.com/386789/are-video-visits-in-jails-a-smart-innovation-or-yet-another-way-to-exploit-families/>.

A third case of tech adoption—tablets—appears to diverge from the patterns described above, at least at first. Jails and prisons around the country began to make tablets available to incarcerated persons in 2017.¹⁰⁴ In the initial rollout, those who wanted a tablet had to buy one, though some facilities distributed them for free as part of a "pilot program."¹⁰⁵ Free distribution has increasingly become standard procedure.¹⁰⁶ In addition to being widely available for free, tablets are personal devices whose use is far less restricted. Further, they serve multiple functions; in addition to communications applications, they can be used to manage commissary accounts or to entertain.

These departures from the status quo are only skin deep. First, decision-makers have surely embraced tablets because they promise to make facilities safer. Tablets present incarcerated persons with a menu of options for passing the time, reducing the likelihood of boredom-induced misconduct. Tablet use also reduces contact between staff and incarcerated persons because the latter are more willing to be sedentary. Perhaps most importantly, **tablets are wired to prevent users from accessing anything other than what corrections officials have deemed safe. Internet browsing is blocked, and books, music, and any other resources available on tablets must be approved by corrections staff. Communications like email are monitored, just as conventional mail would be. These out-of-the-box security features are a key reason for corrections agencies to contract with the companies providing the tablets.**

Tablets likewise adhere to the correctional tech status quo in that they generate huge profits at incarcerated persons' expense. Tablet giveaways are a smokescreen, providing cover for companies like Aventiv and Viapath to charge far above-market rates for music, books, news, podcasts, movies, and games.¹⁰⁷ Rates vary by state, but a recent investigative piece reported that incarcerated persons in New York may pay up to \$2.50 for a single song and up to \$46 for an album.¹⁰⁸ As of 2019, incarcerated persons in Colorado were paying \$19.99 per month for a digital music subscription, while those in South Dakota paid \$14.99 for a 14-day subscription, including a \$9 "infrastructure charge."¹⁰⁹ In some states, JPay, an Aventive subsidiary, charged customers for books that were available for free on Project Gutenberg until complaints forced them to abandon the practice.

Charges for tablet-based financial and communications functions are similarly outrageous. Families in Michigan and Colorado pay nearly \$4.00 to deposit any funds less than \$200 into commissary accounts, and higher fees attach to larger deposits.¹¹⁰ Tablets' email and

¹⁰⁴ "How Corporations Turned Prison Tablets Into a Predatory Scheme," *Dissent Magazine* (blog), accessed January 13, 2023, https://www.dissentmagazine.org/online_articles/corporations-prison-tablets-predatory-scheme.

¹⁰⁵ Bob Gross, "Jails Had Different Experiences with Inmate Tablets," *Times Herald*, accessed January 16, 2023, <https://www.thetimesherald.com/story/news/local/2017/07/13/jails-had-different-experiences-inmate-tablets/467657001/>.

¹⁰⁶ Mack Finkel and Wanda Bertram, "More States Are Signing Harmful 'Free Prison Tablet' Contracts," accessed January 16, 2023, <https://www.prisonpolicy.org/blog/2019/03/07/free-tablets/>.

¹⁰⁷ Finkel and Bertram.

¹⁰⁸ "How Corporations Turned Prison Tablets Into a Predatory Scheme."

¹⁰⁹ Finkel and Bertram, "More States Are Signing Harmful 'Free Prison Tablet' Contracts."

¹¹⁰ "Sending a Prisoner Funds With GTL Financial Services," accessed January 22, 2023, <https://www.michigan.gov/corrections/services/family-information/sending-a-prisoner-funds-with-gtl-financial-servi>

"video-gram" functions allow incarcerated persons to stay in touch with loved ones outside of the community phones. Costs vary by contract; in some states, the cost of sending an email is \$0.30, while others charge by the minute. In others, costs may rise up to \$1.25 per message, and monthly caps mean higher prices beyond an arbitrarily-set limit.¹¹¹ There are additional costs to attach photos or videos.¹¹²

Correctional edtech in the making: industry power, privacy issues, Pell eligibility

It is unclear whether incarcerated students' access to educational technologies will be patterned after telecom and tablet use, but these precedents suggest the need for vigilance. Prison edtech policy is as likely to bend to the same security myopia and profit-seeking as telecom policy. As described in Section One, the scant data that exist bear this out—the prioritization of security has meant that the technologies available to students are insufficient to support the development of digital literacy skills; they are outdated, prone to breakdown, available on a limited basis, or have built-in limitations (often security-based) that constrain the development of digital literacy skills.¹¹³ **But there are three further reasons to pay close attention to the ways that DOCs procure and utilize edtech: the edtech industry's power, concerns about incarcerated students' privacy, and the restoration of Pell eligibility for incarcerated persons.**

The edtech industry has an outsized footprint in education, evidenced by the fact that it is viewed as a necessity, almost without question. The industry's marketization of public education dates back to schools' rapid integration of PCs into the classroom in the 1980s. This was followed by an explosion of educational software programs, then the introduction of online software and online education in subsequent decades.¹¹⁴ The current market has mutated to cover territory beyond hardware and software, including online schooling options, learning management systems, AI-based tutoring, surveillance technologies, and textbooks.¹¹⁵ These

ces; "Send Money to an Inmate | Department of Corrections," accessed January 22, 2023, <https://cdoc.colorado.gov/resources/inmate-money-banking/send-money-to-an-inmate>.

¹¹¹ Finkel and Bertram, "More States Are Signing Harmful 'Free Prison Tablet' Contracts"; Prison Policy Initiative, "SMH: The Rapid and Unregulated Growth of e-Messaging in Prisons," accessed March 16, 2024, <https://www.prisonpolicy.org/reports/emessaging.html>.

¹¹² Stephen Raheer, "The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails," n.d., 26.

¹¹³ Gaskill, Castro, and Aguilar Padilla, "It's Useless, to Put It Politely': Experiences with Technology Among Incarcerated Students Receiving Second Chance Pell at Four Institutions"; Bain, "Op-Ed"; C.E. Royer et al., "Understanding The Landscape Of Higher Education in Prison 2018-2019: Technology in Prison Programs" (Alliance for Higher Education in Prison, 2021).

¹¹⁴ Victoria Cain, *Schools and Screens: A Watchful History* (MIT Press, 2021), 148-173, <https://ieeexplore.ieee.org/document/9611059>. The incursion of the market into education is one facet of a larger philosophical shift that began in the 1970s, namely, the view that the public sector functions better when it imitates or assigns key functions to the private sector. Diverse groups have championed this view, including NGOs, commercial enterprises, policy reformers, philanthropists, and both political parties. Indeed, Obama successively appointed two champions of charter schools to be Secretary of Education, and enrollment in charter schools doubled during his presidency. See Dana Goldstein, "The Education of Barack Obama," December 12, 2016, <https://www.thenation.com/article/archive/the-education-of-barack-obama/>.

¹¹⁵ Williamson and Hogan, "Commercialisation and Privatisation in/of Education in the Context of Covid-19," 49–54; Monica Chin, "Google Launches New Website for Kids Learning to Read," *The Verge*, August 9, 2022, <https://www.theverge.com/2022/8/9/23297565/google-read-along-diya-pc-beta-release>; Gaggly Net Inc, "Student Safety Monitoring Software for K-12 | Gaggly Safety Management," accessed March 18, 2023,

products are designed to appeal to students understood as consumers, promising personalized learning, resources, and responsive monitoring.

Edtech has shown itself to be as shrewd as telecom in profiting from relationships with government clients. The industry's lobbying power has expanded alongside its menu of products and access to capital. U.S. edtech companies raised \$5.2 billion in venture capital in 2022, down from a peak of \$8.2 billion in 2021.¹¹⁶ This growth was accompanied by intensive marketing and lobbying; in addition to webinars, free trials, and curriculum-linked lessons aimed at clients, edtech companies have poured money into influencing federal and state policy.¹¹⁷ Maintaining relationships with legislators has in some cases enabled edtech companies to participate indirectly in lawmaking, as when the Foundation for Excellence in Education helped to write legislation that would lead to a contract for Pearson, one of the Foundation's biggest funders.¹¹⁸ Indeed, foundations, perhaps most famously the Gates Foundation, have been enormously successful in the mission to marketize education under the guise of philanthropy.¹¹⁹ In addition to the dollar value of contracts with DOCs, **edtech companies stand to gain by 'mining' incarcerated students' personal information.** The practice of data mining is not unique to edtech, of course. In general, monetizing users' personal information is integral to big tech's profit model. Such data has value as a free input in research efforts that aim to better target advertisements, increase usage, set pricing, and to guide myriad other aspects of customer-firm

<https://www.gaggle.net/safety-management>; Faiza Patel, Rachel Levinson-Waldman, and Jun Lei Lee, "School Surveillance Zone | Brennan Center for Justice," accessed March 18, 2023,

<https://www.brennancenter.org/our-work/research-reports/school-surveillance-zone>.

¹¹⁶ Capital, "US Edtech's Roaring Twenties Begins With \$8.2 Billion Invested in 2021." Edtech is by no means confined to national boundaries; worldwide investment capital raised in 2021 topped \$20 billion. See Saurabh Sanghvi, "Five Trends to Watch in the Edtech Industry," [mckinsey.com](https://www.mckinsey.com), November 14, 2022,

<https://www.mckinsey.com/industries/education/our-insights/five-trends-to-watch-in-the-edtech-industry#/>.

¹¹⁷ K12 Inc., a company that provides a variety of virtual learning products, spent \$1.5 million on lobbying last year, up from a mere \$20,000 in 2015. "K12 Inc Lobbying Profile," OpenSecrets, accessed March 25, 2023,

<https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2015&id=D000044946>; "Stride Learning Solutions - The Future of Education," Stride Learning Solutions, accessed March 25, 2023, <https://stridels.com/>.

¹¹⁸ Davis, "Ed. Companies Exert Public-Policy Influence."

¹¹⁹ "Got Dough? How Billionaires Rule Our Schools," *Dissent Magazine* (blog), accessed April 1, 2023,

<https://www.dissentmagazine.org/article/got-dough-how-billionaires-rule-our-schools>; "AP Analysis Shows How Bill Gates Influences Education Policy," AP NEWS, April 21, 2021,

<https://apnews.com/article/politics-education-bill-gates-seattle-education-policy-a4042e82ffaa4a34b50ceac464761957>.

The Gates and Broad Foundations poured \$60 million into pushing educational reforms such as charter schools and performance pay for teachers. These types of reforms evince a move away from the notion of education as a public good towards that of education as a "consumer-driven commodity." See "School Choice and Privatization in Education," 247, accessed April 1, 2023, <http://www.jceps.com/wp-content/uploads/PDFs/04-01-10.pdf>.

Gates money is also generously spread around think tanks that parrot the industry message that Edtech is essential to education. See "Think Tanks (and Ed-Tech)." The industry's influence on think tanks is indirect, but shows up in a project's funders, contributors, and the base assumptions of a report or project. For examples of edtech-friendly publications by Gates-funded organizations like Brookings, New America, and Aspen (respectively), see "Realizing the Promise"; "Teaching, Learning, and Tech"; "EdTech Equity Team," accessed June 3, 2023,

<https://www.edtechequity.org/team>. The influence is particularly apparent when these types of pieces are contrasted with think tank literature that is funded by educational or governmental institutions; for example, see "Building the Technology Ecosystem for Correctional Education: Brief and Discussion Guide"; "Advancing Technological Equity for Incarcerated College Students," *Ithaka S+R* (blog), accessed September 5, 2022,

<https://sr.ithaka.org/publications/advancing-technological-equity-incarcerated-college-students/>.

<https://sr.ithaka.org/publications/advancing-technological-equity-incarcerated-college-students/>.

<https://sr.ithaka.org/publications/advancing-technological-equity-incarcerated-college-students/>.

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interactions.¹²⁰ Data may also be sold to "partners," such as advertisers, data brokers, client-seeking businesses, or data analytics companies.¹²¹

Edtech companies harvest student data under the guise of monitoring students' online activity or personalizing learning.¹²² Children as young as four are exposed to the same industry predation as adults; their data is collected, stored, analyzed, and utilized to enrich the company. Sadly, it is far from clear that the privacy-product exchange is worthwhile. There is no clear evidence demonstrating that, in general, edtech lives up to its claims to enhance student learning and safety.¹²³ There is little or no acknowledgement that some programs impose risks, much less careful consideration of whether the benefits outweigh risks. In particular, monitoring software is marketed as the way to keep deeply online youth safe. However, it puts a regime of surveillance into place that has a disproportionate negative impact on students of color.¹²⁴ While some legal protections of student data are in place, those relevant to edtech are aimed at ensuring that parents are informed about data uses.¹²⁵ Compliance with these laws has taken the form of a voluntary "Student Privacy Pledge"; the scale of enforcement is almost nonexistent in view of edtech's prevalence.¹²⁶

Incarcerated students are no less vulnerable to edtech's predations; their data can be put to the same purposes as any user data. Indeed, the special characteristics of the prison population may excite edtech developers' interest even more than "outside" student populations.¹²⁷ Correctional

¹²⁰ "What Big Tech Does With Your Data," accessed March 23, 2024, <https://blog.mojeek.com/2024/03/what-big-tech-does-with-your-data.html>.

¹²¹ Johana Bhuiyan, "Where Does Your Info Go? US Lawsuit Gives Peek into Shadowy World of Data Brokers," *The Guardian*, March 23, 2022, sec. Technology, <https://www.theguardian.com/technology/2022/mar/23/data-brokers-lawsuit-security-transparency>.

¹²² The Regulatory Review, "Protecting Student Data Privacy in the Digital Age | The Regulatory Review," September 18, 2021,

<https://www.theregview.org/2021/09/18/saturday-seminar-protecting-student-data-privacy-in-digital-age/>;

"Protecting Student Data in a Digital World | McKinsey," accessed April 6, 2024,

<https://www.mckinsey.com/industries/education/our-insights/protecting-student-data-in-a-digital-world>; "Student Data Is the New Oil: MOOCs, Metaphor, and Money," Hack Education, October 17, 2013,

<http://hackeducation.com/2013/10/17/student-data-is-the-new-oil>; Pia Ceres, "Kids Are Back in Classrooms and Laptops Are Still Spying on Them," *Wired*, accessed April 6, 2024,

<https://www.wired.com/story/student-monitoring-software-privacy-in-schools/>.

¹²³ Even an apparently pro-edtech piece is diffident about edtech's value-add for student learning. See "Protecting Student Data in a Digital World | McKinsey." Most tellingly, these studies do not show that it's the technology rather than a tutor, teacher, or even a book that improves test scores. Some studies show edtech to be a detriment to student learning.

¹²⁴ "Digital Redlining, Access, and Privacy | Common Sense Education," accessed June 3, 2023,

<https://www.commonsense.org/education/articles/digital-redlining-access-and-privacy>; 9211 and 255, "School Surveillance Zone | Brennan Center for Justice"; Ceres, "Kids Are Back in Classrooms and Laptops Are Still Spying on Them."

¹²⁵ "D.C. Law 21-218. Protecting Students Digital Privacy Act of 2016. | D.C. Law Library," accessed April 6, 2024, <https://code.dccouncil.us/us/dc/council/laws/21-218>; "Protection of Pupil Rights Amendment (PPRA)" (United States Department of Education, 2021),

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/20-0379.PPRA_508.pdf; "U.S. Dept of Ed | Protecting Student Privacy," accessed April 6, 2024, <https://studentprivacy.ed.gov/>.

¹²⁶ Review, "Protecting Student Data Privacy in the Digital Age | The Regulatory Review."

¹²⁷ "The NCES Fast Facts Tool Provides Quick Answers to Many Education Questions (National Center for Education Statistics)" (National Center for Education Statistics), accessed December 28, 2022, <https://nces.ed.gov/fastfacts/display.asp?id=80>.

security culture is likely to compound these data security risks for incarcerated students. After all, the belief that incarcerated persons' privacy is unimportant is the condition for surveillance. This mindset **has led to lax or nonexistent protection of incarcerated persons' telecom-related data, and there is no reason to think that edtech data will be more stringently protected.**¹²⁸ Indeed, a technology's ability to uncover suspicious activity, even if privacy is compromised, can be a selling point. Marketing for a Securus data aggregation product promises security-minded corrections administrators that "digital evidence is everywhere."¹²⁹ Perverse incentives also heighten data security risks. DOCs may stand to benefit if edtech companies can profit by mining incarcerated students' data; as described above, correctional institutions receiving site commissions (kickbacks) profit when their tech partners profit.

For a population already entangled in the criminal legal system, lax privacy protections have potentially grave consequences. **Data that is wrongly collected or incorrectly interpreted may result in new legal actions or may bar reintegration,** as when a formerly incarcerated job applicant was denied employment because of inaccurate information shared about supposed charges against her.¹³⁰ Security breaches may likewise impede release or reentry. For example, when Securus's call data was breached in 2014, hackers accessed over 70 privileged client-attorney calls. Finally, data sharing may inflict hardship on formerly incarcerated people as they seek employment or housing. As one legal analysis observes, **state-level "ban the box" initiatives that prevent employers from inquiring into criminal history too early in the hiring process "are rendered ineffective where a simple Google search can reveal such information, or where private databases that cater to employers use such information" in rating job applicants.**¹³¹

The restoration of Pell grant eligibility for incarcerated students presents a third reason to scrutinize correctional edtech. The FAFSA Simplification Act of 2020 (FSA), which went into effect in July of 2023, reinstated Pell eligibility for incarcerated students. As the largest federal college aid program for low-income students, Pell has historically been the chief vehicle for incarcerated persons to pay for college.¹³² Prison higher ed enrollment is likely to increase dramatically, and with it, the demand for educational technology. It is likely that the edtech industry will see correctional education as a growing market and, even better, one that is less risky to enter thanks to government support.

Aventiv's trajectory under Second Chance Pell may offer a preview of edtech's coming expansion and the risks of such expansion for incarcerated students. The promise of Pell money prompted

¹²⁸ Raher, "The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails," 40–46.

¹²⁹ Raher, 42. Securus is Aventiv's parent company. The product, Threads, is meant to be used in conjunction with the company's video visitation app.

¹³⁰ Chad Squitieri, "Data Privacy and Inmate Recidivism," *Virginia Law Review*, 102, September 11, 2016, <https://virginialawreview.org/articles/data-privacy-and-inmate-recidivism/>.

¹³¹ Squitieri, "Data Privacy and Inmate Recidivism."

¹³² Prior to imprisonment, incarcerated persons' income is on average 41% lower than that of the rest of the population. Prison Policy Initiative, "Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned," accessed April 13, 2024, <https://www.prisonpolicy.org/reports/income.html>; Madison Pauly, "Biden Won't Say If He Still Stands by the 1994 Crime Bill's Ban on Pell Grants for Prisoners," *Mother Jones* (blog), accessed April 13, 2024, <https://www.motherjones.com/criminal-justice/2019/06/biden-wont-say-if-he-still-stands-by-his-crime-bills-ban-on-pell-grants-for-prisoners/>; GAO, "HEHS-94-224R Pell Grants for Prison Inmates," August 5, 1994.

Aventiv to partner with AU and invest in Lantern's development. The investment more than paid off when the platform, together with AU's program, spread to 13 states in just a few years. Although Aventiv's conduct as a Second Chance Pell partner was prudently generous in providing students free use of Lantern's functions, the company has resorted to familiar profit-seeking tactics from other educational partners using Lantern.¹³³ In at least two instances, Aventiv initially provided the LMS free to these prison higher ed programs, then later attempted to charge a per-student fee.¹³⁴ In spite of the company's loudly professed commitment to support incarcerated students, there is no guarantee that Aventiv will refrain from monetizing Lantern's use in the same ways it monetizes music, email, or other tablet apps.¹³⁵

There is no question that correctional tech contractors prey on incarcerated users, and the edtech industry may well follow the pattern of exploitation set by other correctional tech contractors as its footprint increases. In fact, there are stronger-than-usual incentives to do so with Pell money in the offing. For example, companies selling tablets, laptops, and software may find ever more ways to charge incarcerated students for using school-related products. Or, colleges seeking to boost their enrollment numbers may peddle online-only programs that don't offer incarcerated students the support they need to graduate.

The FSA offers some hope that incarcerated students will be protected from these kinds of scenarios. The Department of Education's (ED) guidance for implementing the FSA includes the following guardrails:

- Private for-profit higher ed institutions cannot qualify as prison education programs (PEPs) eligible to receive students' Pell funds.
- DOCs must evaluate whether a PEP is operating in the best interest of students using ED's criteria, and must document how these criteria play into the decision. After a PEP has been in operation for two years, the DOC must review the PEP's performance, again with reference to ED's criteria.
- A PEP's accrediting body must evaluate and approve the school's first two prison locations prior to the school's application to ED for approval as a PEP.
- After a PEP has been in operation for two years, the accrediting body must approve of the school's method for ensuring that the PEP is substantially similar to the school's non-carceral educational programming.
- In the process of approving and operating PEPs, DOCs must seek feedback from "representatives of confined or incarcerated individuals, organizations representing confined or incarcerated individuals, State higher education executive offices, and accrediting agencies."¹³⁶

¹³³ "Ashland | Correctional Education."

¹³⁴ Pauly, "It Sure Looks like a Notorious Prison Tech Giant Is Preparing to Cash in on Pell Grants for Prisoners."

¹³⁵ "Securus Lantern - Correctional Education," Securus Lantern - Correctional Education, accessed May 26, 2023, <https://securustechnologies.tech/corrections/inmate-self-service/education/>; Aventiv Technologies, "Digital Education Creates Hope and Opens Doors to Second Chance Opportunities for Thousands of Incarcerated Students," *Aventiv Technologies* (blog), April 25, 2023, <https://www.aventiv.com/digital-education-creates-hope-and-opens-doors-to-second-chance-opportunities-for-thousands-of-incarcerated-students/>; "New Transformation Commitments," *Aventiv Technologies* (blog), accessed March 23, 2024, <https://www.aventiv.com/new-transformation-commitments/>. See especially "Intensifying Focus on Reentry".

¹³⁶ "Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10); Change in Ownership and Change in Control," Federal Register, October 28, 2022, sec. 668.235,

These and other protective measures may steer edtech use in the right direction, but are not likely to fully counterbalance industry power.

Solution: Tech contracts should adhere to standards set by oversight bodies, with input from all stakeholders.

As correctional institutions settle into procuring edtech on a larger scale, it will be critical to install robust protections that are informed by the above-described trends in tech and correctional culture and practices. Such protections have potential for downstream effects, both for other correctional educational programming, such as tutoring and secondary education, and even for non-educational tech procurement.

Create oversight bodies

As the experience with the FCC shows, tech companies are adept at finding ways to skirt rules and tech is a moving target. **Oversight bodies should be created, ideally at the state level, to verify that incarcerated individuals are protected from financial exploitation, that their privacy is protected, and that the quality of the education is on par with students on the outside.** Relevant stakeholders, particularly incarcerated individuals and their representatives, should be included in developing fair and well-rounded guidelines, and in ongoing oversight.

Set regulations/requirements for contracts

Incarcerated individuals should be protected from predatory practices. These protections should be implemented on a facility-by-facility and state-by-state basis, informed by the evolving trends in technology and the unique culture within correctional settings. New contracts as well as those being renewed should include

- Clear and fair pricing structures to mitigate financial burdens that disproportionately affect this vulnerable population
- Protections from data extraction/collection that impact formerly incarcerated individuals in employment, housing, education, and more when they leave prison. The contract protections should at minimum comply with the Family Educational Rights and Privacy Act (FERPA) and should include:
 - Ownership of the data by the customer (in this case the prison or department of corrections, with students able to access it on request) rather than the tech company.
 - A data retention plan, with clear timelines and steps for deletion after a set period of time or a milestone such as a user's release from prison.
 - Limits on third party access to data/programs, with decisions about third party access in the hands of the prison/DOC.
 - Prohibitions on selling data or using it for marketing purposes.
 - Requirements for consent from individual users before collecting/using data.

"Definitions,"<https://www.federalregister.gov/documents/2022/10/28/2022-23078/pell-grants-for-prison-education-programs-determining-the-amount-of-federal-education-assistance>.

- Limits on using data in any way that is not explicitly mentioned.

Protections must continuously be reevaluated given the historical context of financial exploitation by tech companies in the corrections market to ensure fairness and equity. As new technologies and startups emerge they may create new opportunities but they can pose new risks for incarcerated students.

Section Three: Ethical Perspectives: Changing How We Talk About the Value of Prison Education

Correctional edtech policy is inextricably tied up with contentious debates about the value of prison higher education. Over the past four decades, the search for common ground has led punitive- and rehabilitative-minded parties to adopt utilitarian terms. It has left prison higher education vulnerable to political trends, and in the long view, limited the range of live options for reform. It may likewise hinder the formulation of an edtech policy that truly serves incarcerated students' needs. The framework's focus on average outcomes, its silence on minority rights, and its pretensions to objectivity lend weak support for incarcerated students' equitable access to education.

Utilitarianism is not the only ethical perspective that can inform correctional ed and edtech policy. This final section describes two alternatives: human rights and discourse ethics. Correctional ed and edtech policy reforms would find more firm footing within the human rights ethical framework, which insists on the right to an education as a matter of principle even as it allows for variety in implementation. Discourse ethics offers another key contribution to the conversation: by grounding ethical principles in dialogue amongst all stakeholders, it sets a place at the table for incarcerated persons and their advocates.

Problem: Correctional ed and edtech are evaluated almost exclusively in utilitarian terms.

Utilitarian thinking about the value of prison higher education

Like other Enlightenment-era moral frameworks, utilitarianism focuses on individual morality; the individual should choose actions that have good consequences for all impacted parties, or, more precisely, actions that have better consequences than alternative actions—such actions are "moral" and the alternative actions "immoral". The expected consequences of an action are measured quantitatively by summing benefits and harms for all members of the relevant group. For example, a person who is wrestling with whether to tell a white lie to spare a friend's feelings would assign a number to the amount of happiness and pain they and the friend would experience if the lie were told and then sum these up. The procedure would be repeated for the

consequences (in terms of happiness and pain) for all concerned if the truth were told. The moral action is the one with the higher sum.

This evaluation process translates easily to policy: the "good" policy is the one that produces higher utility—the sum of benefits and harms—than alternative policies. Although policy analyses do not explicitly refer to utilitarian moral theory, they often reflect utilitarian values. In particular, the common practice of evaluating a policy's average impact on some group follows the utilitarian example.¹³⁷ In this kind of calculation, no individual's or subgroup's outcome is more important than any other. Utilitarian-informed policymaking leans on the analysis of these averages or other statistical quantities to provide an overall, objective view of the consequences of a program or policy.

Utilitarian-inspired policy analysis is deeply embedded in government regulatory processes in the form of a policy decision-making tool known as cost-benefit analysis (CBA). CBA is mandated in rule-making for many federal agencies, in large part because it appears to offer objective means of selecting from among policy alternatives or determining program effectiveness.¹³⁸ Its kinship with utilitarianism is evident, first, in its focus on outcomes, or the "overall social benefit" of a policy approach or program. Second, CBA measures social benefits in quantitative terms that sum up overall costs and benefits, allowing calculation of a policy's return on investment.¹³⁹

It is important to note that cost-benefit analyses center on *monetary* quantities in particular. This decision is premised on the view that the dollar is the most appropriate unit for assessing a policy's social welfare value. Economics supplies an additional premise that is famously definitive of the discipline: we are always in a situation of resource scarcity. This framework—dollar-centric utilitarianism and a scarcity mindset—exerts a significant influence over U.S. policy arenas, including correctional ed policy.¹⁴⁰

Over the past decade, defenses of prison higher education have largely employed this framework, investing importance in the overall social benefit that correctional higher ed programming confers. **Post-release employment is indisputably more beneficial than unemployment, both**

¹³⁷ To be clear, the claim is *not* that policy program evaluation is intentionally patterned after utilitarian moral theory. Rather, the common approach to evaluating policy exhibits utilitarianism's assumptions and values, thereby reinforcing their presence in policy arenas.

¹³⁸ Maeve P. Carey, "Cost-Benefit Analysis in Federal Agency Rulemaking" (Congressional Research Service, March 2022); Christian Henrichson, "Using Cost-Benefit Analysis for Justice Policymaking" (Vera Institute of Justice, April 2014); "GAO-21-404SP, Program Evaluation: Key Terms and Concepts" (Government Accountability Office, March 2021).

¹³⁹ The reduction of all social benefits to quantities allows for precision in calculating return on investment, even if it ultimately rests on the metaphysical belief that there is nothing important lost in translation when qualities are changed into quantities. A second metaphysical belief supports the value placed on cost-benefit analysis: quantitative analysis yields objective truth, or at least gets us closer to objective truth.

¹⁴⁰ The fairly stable consensus that economics possesses the best methods and resources for addressing social problems was forged over several decades and has received its own attention. See Alice O'Connor, "Poverty Knowledge: Social Science, Social Policy, and the Poor in Twentieth-Century U.S. History," in *Poverty Knowledge* (Princeton University Press, 2009), 173–81, <https://www.degruyter.com/document/doi/10.1515/9781400824748/html>. In these pages, O'Connor traces the beginnings of the turn to econometric methods in American policymaking institutions, starting at the highest levels of the federal government.

for the formerly incarcerated person and for social welfare more generally. Likewise, reintegration into society is more beneficial than recidivism. The exact nature of the benefit may be spelled out in economic terms but also in terms of increased safety, family and community cohesion, opportunities for satisfying work, or personal satisfaction. It is reasonable to employ a similar strategy in calling for increased edtech access, as some have done. After all, **tech literacy is indispensable for functioning in the free world, and particularly for seeking employment.** These strategies lean into utilitarian reasoning, evaluating prison higher ed and edtech access in terms of their capacity to increase average social welfare.

Two influential analyses of prison higher education illustrate the utilitarian cast of the conversation. The first, Robert Martinson's 1974 meta-analysis of a variety of correctional rehabilitation programs, ignited a decades-long academic debate with its conclusion that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism," correctional education included.¹⁴¹ Martinson's paper emerged as public sentiment was shifting away from the consensus that corrections should be rehabilitative. It served as fuel for the punitive, "tough on crime" approach to corrections, culminating in the 1994 Crime Bill that revoked Pell Grant eligibility for incarcerated persons.

The second, a coauthored 2014 RAND meta-analysis commissioned by the Department of Justice, found that incarcerated persons "who participated in correctional education programs had 43 percent lower odds of recidivating" compared to those who did not.¹⁴² Like Martinson's paper, the RAND analysis appeared as public consensus about corrections was shifting, this time towards rehabilitative approaches. The study provided key evidence that the Second Chance Pell pilot program would likely yield measurable benefits for participants.¹⁴³

There may be disagreement about the significance of these examples—there certainly has been in the case of the Martinson piece. Nonetheless, they illustrate, first, that utilitarian analysis can be put to work for any purpose, even one that does not support incarcerated students' best interests. Second, in spite of the decades-long debate about findings, there is widespread agreement that the methods employed are correct: correctional ed should be evaluated in terms of quantified outcomes for relevant groups. The outcomes may be dollars saved, threats reduced, degrees earned, or any number of results the analyst regards as good.

Where utilitarianism fails incarcerated students

Utilitarianism has come under fire since its inception. Three prominent criticisms of utilitarian ethical reasoning indicate where it fails to meaningfully support incarcerated students' access to education and educational technology: (1) its focus on average welfare is at variance with established thinking about the value of education; (2) its method of determining ethical action privileges the interests of the majority; and (3) its apparently objective qualities are ripe for political mishandling and discount the significance of lived experience.

¹⁴¹ Robert Martinson, "What Works?—Questions and Answers about Prison Reform," *THE PUBLIC INTEREST*, n.d., 25.

¹⁴² Lois M. Davis, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults* (Santa Monica, CA: RAND, 2013), 57.

¹⁴³ "Second Chance Pell Fact Sheet" (Department of Education, n.d.).

The utilitarian determines a policy's goodness by summing up a policy's impact on all relevant parties. But this criterion of overall or average welfare loses track of the humanity of the individual.¹⁴⁴ This deficiency is reflected in conversations about the value of correctional education. The narrow focus on average outcomes means that the value of education itself is understood narrowly, in terms of its impact on recidivism, employment, the crime rate, or some other goods. However, most educational institutions are not founded on the promise of extrinsic benefits. More compelling rationales for providing education, such as the belief that it is essential to human flourishing and dignity, are not visible within the utilitarian frame.

Focusing on the average benefit enjoyed by the majority gives rise to a related problem—discounting minority rights. The utilitarian calculus may recommend policies that benefit the majority at the expense of the minority.¹⁴⁵ This failing shows up in the conversation about correctional education and educational resources, first, as the implicit or sometimes explicit belief that incarcerated people are less deserving of educational resources than those in the free world. This claim is only one aspect of the more general, punitive-minded view that those who break society's laws thereby forfeit their rights to society's benefits. Yet some argue the reverse—incarcerated persons' access to society's resources, including educational resources, deserve special protection, not least because certain characteristics of the incarcerated population are widely recognized as a basis for legitimate claims to protection.¹⁴⁶ This view is not easily accommodated or even expressed within a utilitarian-dominated policy environment.

Certain efforts to ration correctional ed resources likewise reveal a disregard for the full humanity of minority groups. Under some correctional ed policies, those convicted of certain types of offenses or those serving a life sentence are ineligible to participate in higher educational programming, since doing so will not yield an average overall benefit. For example, the Second Chance Pell pilot design excluded incarcerated persons with life sentences and prioritized those who would be released in five years or fewer.¹⁴⁷ To put this in economic terms, there is no likely return on investment that will result from educating these groups. Whatever the merit of these arguments, their dominance in policy discussions means that alternative ways of understanding the responsibility to educate do not receive a fair hearing.

Utilitarianism's ambitious claim to adjudicate moral conflicts in a more or less objective manner have also been subject to critique. The mathematical nature of the utilitarian calculation seems to guarantee objectivity—nothing could be more objective than numbers. Of course, academic social scientists like Martinson do not ascribe to this dogma; the institution of peer review seeks to correct for the types of well-known errors that arise in collecting, analyzing, and communicating data. This process implies that objective truth is an ideal to be approached or

¹⁴⁴ As expressed by John Rawls, utilitarianism fails to "take seriously the distinction between persons." John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, 1999), 24, <https://doi.org/10.2307/j.ctvkjb25m>.

¹⁴⁵ The most frequently cited examples imagine cases where a suffering minority is enslaved, tortured, or killed for the benefit of the majority. See Rawls, 155–58. See also J. J. C. Smart and Bernard Williams, *Utilitarianism for and Against*, 27, (Cambridge: Cambridge Univ. Press, 2008), chap. 3. Negative responsibility: and two examples.

¹⁴⁶ Owens, "The Relationship of Instructional Delivery Method on Inmate Outcomes and Intent to Persist in Higher Education."

¹⁴⁷ Gerald Robinson and Elizabeth English, "The Second Chance Pell Pilot Program: A Historical Overview" (AEI, September 2017), 4.

approximated through dialogue, not a once-and-for-all achievement. But this more modest academic stance does not transfer well to the policy arena, where decisions must be made and justified to constituents using whatever evidence is on hand. These pressures make utilitarianism's promise of objectivity all the more appealing, whether or not it is able to deliver.

The fortunes of Pell in prison illustrate the risk assumed in leaning too heavily on the “objectivity” of utilitarian analysis. Martinson's article took root in the punitive-minded political climate that arose during the 1980s and 90s, fueling the slogan that “nothing works” in correctional education.¹⁴⁸ Ultimately, this was a key justification for the legislation that made incarcerated persons ineligible for Pell; the article made a compelling argument that the numbers showed no overall benefit of correctional education. Nearly 20 years later, the DOJ-commissioned RAND study landed differently as criticisms of mass incarceration were coalescing into a consensus. RAND experts showed that educational programming was in fact justifiable on utilitarian grounds; it yields a beneficial overall outcome.

This reversal may be interpreted as the normal workings of academic debate; considered opinion shifts as more evidence becomes available. Yet this process exacted a heavy cost from incarcerated persons and may do so again and again as additional evidence becomes available. It can be argued that the risk of further harm arises from assigning political meaning to academic findings. This might lead to the rather extreme position that these types of studies have no place in political debate. A more moderate approach would broaden the grounds of the debate so that average outcomes, arrived at by available data, are not regarded as the only legitimate grounds for political decision-making.

A final criticism of utilitarianism's promise of objectivity is especially relevant to its use in policymaking. “Objectivity” implies that *any* party doing the calculation—incarcerated person, advocate, correctional officer, or academic—will identify the *same* benefits and costs as salient, assign the *same* numbers to benefits and costs, and will thus arrive at the same result. This view has an important implication for the division of labor in policy arenas, where academics and analysts are the ones doing most of the work; if utilitarian calculations are truly objective, it is not necessary to invite diverse stakeholders to calculate costs and benefits. This strong notion of objectivity is at odds with the general consensus that lived experience influences a person's perception of what considerations are important. For example, a warden or correctional officer evaluating edtech policy is likely to give significant weight to controlling students' behavior, while incarcerated students might assign more weight to being caught up in the digital age.

The utilitarian may acknowledge varying perspectives and still maintain that utilitarian reasoning is preferable *by comparison*; the academic or analyst calculating results may introduce some subjectivity, but the output is still more objective than what other methods would yield. This modest stance would still undermine the status quo in utilitarian-informed policymaking. If subjectivity in moral reasoning is truly inescapable, then academics, analysts, and politicians may not be capturing the same benefits and harms that other correctional stakeholders would. A utilitarian who acknowledges that objective calculation is not possible should seek the

¹⁴⁸ Rick Sarre, “Beyond ‘What Works?’ A 25-Year Jubilee Retrospective of Robert Martinson’s Famous Article,” *Australian and New Zealand Journal of Criminology* 34, no. 1 (2001): 38–46.

perspectives of other stakeholders, in particular, incarcerated persons and those who advocate for them.

Solution: Humanist and discursive ethical perspectives should be employed in evaluating correctional ed and edtech policies.

A human rights approach to correctional education and edtech

Human rights ethics grounds our responsibilities to each other in humanity, where "humanity" is elaborated in terms of widely-shared capacities and needs.¹⁴⁹ Good political and social institutions cultivate human capacities and fulfill human needs, while dehumanizing ones push society in the direction of survival mode. In this mode, the economy, the legal system, government regulatory agencies, and other institutions will increasingly appear to be beyond human control.¹⁵⁰ For example, the housing market's boom and bust cycles may appear to be natural forces rather than the outcome of government policy. Ethical behavior becomes difficult or even impossible in the face of life-threatening phenomena.¹⁵¹ Policies informed by the ethics of human rights seek to fend off this possibility, advocating for social institutions that support human thriving.

The human rights notion of "humanity" diverges significantly from the utilitarian's view of persons as mere bearers of pleasure and pain, benefits and harms. The *quality* of a harm, not its quantity, is the deciding factor in whether actions, policies, or institutions are "good" or "bad." Humans can never thrive when subjected to certain kinds of harms, such as enslavement, manipulation, dishonesty, and exploitation. The human rights framework deems these unethical in their very nature; no quantity of beneficial consequences could counterbalance them. Respect for humanity will mean that some actions, policies, and institutions are categorically out of bounds.

¹⁴⁹ This perspective is sometimes elaborated in terms of equality, in expressions such as "all people are equal." Two questions immediately arise: (1) How do we define and identify "humans"? and (2) What do we mean by "equality"? The first is a thorny philosophical question that has invited many answers over the millennia; this paper will not address them. With regard to the second, it is important to note that "equality" need not mean "factual equality," i.e. the belief that all people are the same in all relevant respects. Following Peter Singer and others, "equality" may be interpreted as "deserving of equal consideration." Peter Singer, *Animal Rights and Human Obligations*, 2nd ed. (New Jersey, 1989).

¹⁵⁰ This notion of dehumanization is inspired by Georg Lukács' interpretation of reification, and by Jürgen Habermas' critical concept of the "colonization of the lifeworld." See Georg Lukács, "Reification and the Consciousness of the Proletariat," in *Karl Marx*, by Kevin B. Anderson, ed. Bertell Ollman and Kevin B. Anderson, 1st ed. (Routledge, 2017), 28, 95–125, <https://doi.org/10.4324/9781315251196-1>. See Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy, vol. 2 (Boston: Beacon Press, 1984), 186–87, 196, http://archive.org/details/lifeworld-and-system-a-critique-of-functionalist-reason-juergen-habermas-thomas-m_202402.

¹⁵¹ My interpretation of human rights ethics depends on Immanuel Kant's notion of human dignity and agency as elaborated in Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Yale University Press, 2008), <https://doi.org/10.12987/9780300128154>. Kant's account famously centers human freedom, i.e., the recognition that I (and not something else) cause my actions.

Just as the utilitarian framework dominates U.S. policy, the human rights framework is relied upon internationally to ground claims that states should provide certain goods and refrain from certain actions. This widespread acceptance is not in and of itself reason to accept human rights ethics as authoritative, but it presents a wealth of resources and models for crafting human rights-observant policy. The most prominent of these are the United Nations' Universal Declaration of Human Rights and the UN's corrections-specific "Standard Minimum Rules for the Treatment of Prisoners," or Nelson Mandela Rules.¹⁵² A number of regional organizations support human rights work in Africa, Europe, and the Americas.¹⁵³

The conversation around correctional edtech would look very different if the human rights perspective were given the same air time as utilitarianism. Access to education, including higher education, is a well-established human right according to Article 26 of the Universal Declaration of Human Rights and Articles 13 and 15 of the UN's "International Covenant on Economic, Social, and Cultural Rights".¹⁵⁴ The latter declares that "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means."¹⁵⁵

Incarcerated persons' right to educational technology is rarely addressed explicitly in these documents, but the principle of fair treatment—the "universal" dimension of human rights—provides a solid grounding. The UN Educational, Scientific, and Cultural Organization's "Convention Against Discrimination in Education" demands that all groups receive the same quality of education.¹⁵⁶ Similarly, the Council of Europe asserts that "all prisoners shall have access to education...like [that] provided for similar age-groups in the outside world."¹⁵⁷ If educational technology is understood to be an integral aspect of education in the information age, then "funds, equipment, and teaching staff needed...should be made available," according to the Council.¹⁵⁸ Vernor Muñoz, the UN's Special Rapporteur on the Right to Education, argued in 2009 that prohibitions on incarcerated persons' internet access, even when computers are

¹⁵² United Nations, "Universal Declaration of Human Rights," United Nations (United Nations), accessed July 13, 2024, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; "The Nelson Mandela Rules: Protecting the Rights of Persons Deprived of Liberty | United Nations," accessed August 26, 2022, <https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty>.

¹⁵³ "A Rough Guide to the Regional Human Rights Systems | Universal Rights Group," accessed July 13, 2024, <https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-regional-human-rights-systems/>. These include the African Commission on Human and Peoples' Rights, the Council of Europe, and the Organization of American States.

¹⁵⁴ See also the Mandela Rules, esp. Rules 4, 92, and 104: "The Nelson Mandela Rules: Protecting the Rights of Persons Deprived of Liberty | United Nations" and "Basic Principles for the Treatment of Prisoners," OHCHR, para. 6, accessed July 13, 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners>.

¹⁵⁵ United Nations, "Universal Declaration of Human Rights"; "International Covenant on Economic, Social and Cultural Rights," OHCHR, arts. 13, Sec. 2(c), accessed July 13, 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

¹⁵⁶ "Convention against Discrimination in Education; Adopted by the General Conference at Its Eleventh Session, Paris, 14 December 1960 - UNESCO Digital Library," accessed July 13, 2024, <https://unesdoc.unesco.org/ark:/48223/pf0000183342>.

¹⁵⁷ "Education_In_Prison_02.Pdf," 4–5, accessed July 13, 2024, https://www.epea.org/wp-content/uploads/Education_In_Prison_02.pdf.

¹⁵⁸ "Education_In_Prison_02.Pdf."

provided, "affects...the relevance of educational provision in this technological age."¹⁵⁹ As the UN Economic and Social Council asserts, education must be "suitable to the needs and abilities of prisoners and in conformity with the demands of society."¹⁶⁰

As should be apparent, these criteria for correctional ed and edtech policy do not hinge on outcomes. Claims that educational resources should equip students to function competently in society should not be assimilated to popular concerns about employability and recidivism. Muñoz explicitly addresses the temptation to do so, remarking that "education is much more than a tool for change. It is an imperative in its own right."¹⁶¹ From the human rights perspective, educational resources should be adequate to support incarcerated students' functioning in the digital age, first, because they are regarded as essential to quality educational programming for students on the outside. Providing similar access to resources on the inside as well as on the outside emphasizes to incarcerated students that their humanity is as important as that of students in the free world and thus that their needs should be given the same weight and concern. This approach accords with the principle of normalization discussed above—prison conditions should be as "normal" (similar to the outside world) as possible.¹⁶² A human rights ethic supports this principle, holding that people living in prisons have the same needs and capacities as those who are living in the free world.

None of this implies that outcomes should not be considered within a human rights paradigm. The framework is able to accommodate policy and program evaluations for a variety of purposes. Tracking educational outcomes can guide design decisions with regard to academic support systems, modes of instruction, pedagogical methods, curriculum, and selection of educational providers. Evaluations of various tutoring programs might show, for example, that peer tutoring gets better results than contracting with a professional tutoring company, or that both are more effective than relying on a local nonprofit. Commitment to a human rights approach in these matters only establishes that the provision of quality higher ed and edtech cannot *depend* on outcomes, just as the provision of free public education does not depend on whether some make poor use of it.¹⁶³

¹⁵⁹ Vernor Muñoz Villalobos and UN Human Rights Council Special Rapporteur on the Right to Education, "The Right to Education of Persons in Detention : Report of the Special Rapporteur on the Right to Education, Vernor Muñoz," April 2, 2009, para. 60, <https://digitallibrary.un.org/record/652897>. Twenty-five years later, digital literacy is even more critical for functioning in society.

¹⁶⁰ UN Economic and Social Council (1990 and 1st sess : New York), "Prison Education," July 16, 1990, pt. 1(d), <https://digitallibrary.un.org/record/99409>.

¹⁶¹ Muñoz Villalobos and Education, "The Right to Education of Persons in Detention," para. 4.

¹⁶² Subramanian, "How Some European Prisons Are Based on Dignity Instead of Dehumanization | Brennan Center for Justice"; "Transforming Correctional Culture and Climate | National Institute of Justice," accessed July 20, 2024, <https://nij.ojp.gov/topics/articles/transforming-correctional-culture-and-climate>.

¹⁶³ The FSA stipulates that the "best interest" determination *may* consider a higher ed program's impact on recidivism and employment rates, but need not. This is likely a nod to the dearth of quality data, but may also signal a shift away from utilitarian methods of evaluating prison higher ed. The latter is particularly plausible since the best interest determination *must* employ equity criteria in evaluating whether a higher ed program would serve students' best interests: program quality and design must be substantially similar to "outside" higher ed programs. See "Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10); Change in Ownership and Change in Control," sec. 688.241.

Support where utilitarianism falters

Grounding the obligation to provide education and educational resources in human rights promises protections for incarcerated students that a utilitarian approach cannot. In the first place, the criterion of overall welfare is displaced by support for human dignity. This means that incarcerated students' right to an education must be observed even in the absence of evidence of an average economic benefit. That is, observance of human rights requires that resources are devoted to educational programming and technology, regardless of the outcome.

This is not to say that corrections agencies must provide education immediately, on demand. It is to affirm, however, that the failure to provide education to all, *even for reasons of resource scarcity*, is a moral failure, not a necessary evil, and not a harm for some that is justified by an overall greater benefit. As the European Prison Rules assert, "prison conditions that infringe prisoners' human rights are not justified by lack of resources."¹⁶⁴ Viewed from this perspective, the failure to provide education should motivate a corrective plan of action.

Second, the human rights approach to correctional education shores up protections for minority groups, even groups that have not yet won explicit legal protections. Principles of fair treatment and equal consideration do not permit policies or institutions that deny some the right to an education, even if doing so would more efficiently allocate resources. In fact, fair treatment of minority populations might require that *more*, not fewer, resources are devoted to protecting their access to education. This would apply in cases where a subpopulation has been denied its fair share of educational resources.

Finally, human rights ethics offers more stable ground for incarcerated persons' access to higher education and educational resources. Claims on educational resources that are grounded in utilitarianism must defer to results research; as findings change, claims are rendered more or less defensible. By contrast, the human capacity for and enjoyment of education is relatively unchanging. Moreover, the claim that education is a human right is not a new one. As described above, it has been repeatedly expressed and elaborated upon since the middle of the last century. Leaning on this tradition would better protect incarcerated students' access to educational opportunities, even in the face of changing political currents.

A discourse ethical approach to correctional education and edtech

Like human rights ethics, discourse ethics grounds moral principles in humanity, zeroing in especially on one particular mode of language use. According to philosopher and social theorist Jürgen Habermas, members of modern societies employ "communicative action" in attempting to cooperate on a plan of action. Communicative action is so mundane as to be invisible; it is used to get consensus on projects as lofty as pyramid building and as quotidian as going out to dinner.¹⁶⁵ For Habermas, the existence of communicative action gives us grounds for identifying

¹⁶⁴ "European Prison Rules, Revision," July 1, 2020, sec. Basic Principles, [https://search.coe.int/cm/#{%22CoEIdentifier%22:\[%2209000016809ee581%22\],%22sort%22:\[%22CoEValidationDate%20Descending%22\]}](https://search.coe.int/cm/#{%22CoEIdentifier%22:[%2209000016809ee581%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}).

¹⁶⁵ Habermas' theory of communicative action is the centerpiece of his expansive body of work, including his outline of discourse ethics. Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, trans. Thomas McCarthy, vol. 1 (Boston : Beacon Press, 1984),

and criticizing manipulative, deceitful, or otherwise force-driven ways of coordinating social action.

No interaction is completely free of power play, much less the social institutions and relationships that are built of human interaction. Like human rights ethics, discourse ethics identifies principles that can only be approximated in the everyday. Yet, Habermas argues, unpacking communicative action reveals that it is woven into real-life exchanges. The potential for non-coercive action coordination is therefore embedded in the everyday; we need only build on an already-existing foundation. Many modern institutions do just this; communicative action is evident in the dialogic character of the peer review process and in the way that a judicial opinion engages in reasoned conversation with other opinions. Less lofty social arenas also aim for non-coercive communication. In the medical field, for example, informed consent carves out a space for patient voices to be heard and honored. And in the private sphere, norms for romantic relationships presume a partnership between equals who work out their differences in respectful communication.

Compared to utilitarianism and human rights ethics, discourse ethics is still in its infancy. Habermas' "Discourse Ethics: Notes on a Program of Philosophical Justification" does not fully develop a decision rule, as utilitarianism, or set of commitments, as human rights ethics, but only specifies two foundational principles of a discourse ethical framework. According to Habermas, these principles define what can qualify as a "good" ethical norm or rule. First, all parties to the conversation must agree to adopt it: "only those norms can claim to be valid that meet (or could meet) with the approval of all in their capacity as participants in a practical discourse."¹⁶⁶ Second, the "agreement of all parties" means that everyone affected by the norm understands how its adoption will impact them and, even so, prefers it to alternatives.¹⁶⁷

These principles describe only the most basic criteria that should guide a group of stakeholders in the dialogic process of setting up ethical norms. Before that process has taken place, it's not clear what the norms would be. Even so, they require that all interested parties, including those who are affected by the policies, engage in respectful and reasoned discourse to establish norms. Perhaps most importantly, all parties must reach consensus in this manner. Norms that are *not* the result of such a process may reflect the workings of coercion, manipulation, or administrative efficiency. Such norms would be invalid by discourse ethical standards.

Discourse ethics can be captured more intuitively as a formal version of the disability rights slogan "Nothing About Us Without Us."¹⁶⁸ The phrase captures activists' demand that

<http://archive.org/details/theoryofcommunic01habe>; Habermas, *The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason*.

¹⁶⁶ Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, Mass. : MIT Press, 1990), 66, <http://archive.org/details/moralconsciousne0000habe>.

¹⁶⁷ The "U" or universalization principle stipulates that all who will be affected by the norm in question must be able to "accept the consequences and side effects its general observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities)." Habermas, 65.

¹⁶⁸ The phrase dates back to 16th century Poland; it was coined during the nation's transition from monarchy to constitutional state and was in fact the name of the constitution. It was popularized by the disability rights movement. James Charlton reports that he heard it from South African disability rights leaders who had themselves heard it from an Eastern European disability rights activist. See James I. Charlton, *Nothing about Us Without Us*:

"political-economic and cultural systems...incorporate people with disabilities into the decision-making process and...recognize that the experiential knowledge of these people is pivotal in making decisions that affect their lives."¹⁶⁹ Experiences of "powerlessness, poverty, degradation, and institutionalization" are particularly salient for activists in the disability rights movement.¹⁷⁰ The demand to be included in decision-making, to be involved in shaping the social and political institutions that shape disabled persons' lives is viewed as essential to improving their material conditions, increasing capacity for self-determination, and gaining respect.

Unlike human rights ethics, discourse ethical principles do not explicitly rule out any particular norms or policies in advance of the conversation. Yet some norms would surely not survive a dialogue aimed at universal agreement. For example, it is unlikely that incarcerated students, their families, and advocates would agree that DOCs or legislatures should be able to unilaterally set prison higher ed programming policy. And if decision-making power is shared, it is unlikely that higher ed programming would be placed on the chopping block or that students would have to make do with substandard edtech.

Some of the protective measures instituted by the FSA align with the spirit of discourse ethical principles. For example, the Act defines an "advisory committee" that may provide feedback to DOCs in their determination of whether a particular college program is in the best interest of incarcerated students. A more stringent requirement has DOCs collect feedback from relevant stakeholders, including representatives of incarcerated persons, as they make this determination.¹⁷¹ Even the FSA's requirement that the accrediting agency approve the PEP's design represents a formalized process for stakeholder weigh-in.

Improving on utilitarian ethics

Like utilitarianism, discourse ethics takes into account how each stakeholder is impacted by a policy, but there is a critical difference. Utilitarian calculations are carried out by a spectator who can only estimate how stakeholders will benefit or suffer from a policy. Discourse ethics moves the deliberation from the privacy of the spectator's mind (or the analyst's desk) to a public back-and-forth among stakeholders, with the goal of setting rules that all parties endorse. By setting consensus as the standard for rule-setting, discourse ethics emphasizes that no one's voice should be lost in a calculation of averages. Incarcerated students, advocates, and educational experts would have opportunities to participate at some stage of deliberations. This level of inclusion would no doubt dramatically change the conversation about prison higher ed program design and edtech adoption, not to mention the more foundational question of the value of prison higher ed.

Disability Oppression and Empowerment (Berkeley, UNITED STATES: University of California Press, 1998), chap. 1, <http://ebookcentral.proquest.com/lib/umichigan/detail.action?docID=224299>; W. J. Wagner, "May 3, 1791, and the Polish Constitutional Tradition," *The Polish Review* 36, no. 4 (1991): 384; Kazimierz Smogorzewski, "Poland's Foreign Relations," *The Slavonic and East European Review* 16, no. 48 (1938): 14.

¹⁶⁹ Charlton, *Nothing about Us Without Us*, 12.

¹⁷⁰ Charlton, 1.

¹⁷¹ "Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10); Change in Ownership and Change in Control," sec. 688.235.

By insisting on inclusion, the discourse ethical framework has a built-in capacity to resist policymaking that leaves minority groups at a disadvantage. The framework holds that *all* stakeholders must agree to the rules that policymaking or rule-setting must abide by. Rule-setting deliberative bodies should include representatives from the incarcerated population and representatives of local or national advocacy groups. These voices would seek to ensure that the policymaking process protects subpopulations whose needs otherwise tend to be overlooked, such as incarcerated students with few or no tech skills, or those serving life sentences.

For the same reason—inclusion—incarcerated students' claims on higher ed access and edtech access will be less vulnerable to reversals in research when the claims are grounded in discourse ethics. This is because their demand for prison higher ed programming is more constant than research results. Even in the decades following Pell revocation, students and advocacy groups demanded the restoration of prison higher ed programming to its pre-Crime Bill prevalence; these groups' interest in prison higher ed did not wane as a result of Martinson's research findings. Within the discourse ethical framework, incarcerated students' formal role in rule-making would lend weight to their claims that higher ed programs and resources are beneficial. Students' lived experience would thus displace, though not replace, the importance of “objective” results, where that term is understood in the narrow sense promoted by utilitarians.

Diversifying the debate

Some may conclude from the foregoing that the utilitarian framework provides poor support for prison higher ed and edtech access. But utilitarianism is not unique among moral theories in its capacity to inflict harm. For example, human rights ethics has often come under fire for imposing a Westernized notion of “humanity” on non-Western cultures—disguising imperialism with ethical language. The unfortunate truth is that ethical reasoning of any variety may fail to move institutions in the right direction because of its theoretical inconsistencies, dubious assumptions, or because it is carried out in bad faith; the best arguments may harm rather than help.

Policy analysts, decision-makers, and other stakeholders can mitigate this risk in three ways. First, **explicit and careful consideration should be given to the ethical framework employed in conversations about prison higher ed and edtech.** The framework's assumptions, strengths, and limits should be clarified together with analyses of what is politically or economically feasible or desirable. This is a challenging task, since “framework” talk easily drifts into abstraction. An approach that promises to keep things on the ground would examine applications of the framework, then attempt to identify where these have led to unacceptable outcomes. This approach would reveal what is at stake and make visible the potential for unintended consequences.

Second, **policy conversations must consider the ways that the institutional and cultural context interacts with the ethical framework that informs the conversation.** The preceding analysis underscores that utilitarian policy risks harming those impacted by a policy because utilitarian values are inscribed in policymaking institutions (in the form of the cost-benefit analysis). The framework's assumptions and outputs are thus shielded from scrutiny they might otherwise be subject to. Additionally, *correctional* policy grounded in utilitarian values carries risk because the U.S. correctional system itself imposes risks on incarcerated persons. As

discussed above, no oversight body is specifically tasked with protecting incarcerated persons' well-being, nor their access to educational resources.¹⁷² Oversight at state and local levels is weak where it exists at all, and legislation offers only fragmentary protection where it does not outright undermine protective mechanisms. Nor do other institutions reliably afford incarcerated persons and their advocates a voice, much less policy influence.¹⁷³ There is no analogue to the PTO's representation of parent interests in public schools or to patient participation in mental health policy planning.¹⁷⁴ With these institutional contexts in mind, extra care should be taken when invoking a moral framework that makes it easier to prioritize economics over equity.

Finally, **policies should be grounded in more than one ethical framework.** Approaching a policy issue from multiple ethical perspectives has two advantages. First, diversifying makes it possible to identify a broader range of policy benefits, lending force and staying power to policy recommendations. The policy conversation leading up to Pell revocation relied almost exclusively on utilitarian reasoning. It might have instead taken place on the same grounds as conversations about public education—rights and intrinsic value first, average benefits as the icing on the cake. Second, bringing diverse ethical frameworks to bear on a policy issue opens up new avenues for action. For example, discourse ethics implies that incarcerated students and their families should be consulted at some stage of policymaking. This way of thinking might inspire correctional reform efforts in new directions.

Conclusion

Reinstatement of Pell Grant eligibility for incarcerated students demands attention to their access to educational resources, including educational technologies. There is more than enough evidence to show that access falls far short of demand and, more importantly, short of the access enjoyed by their non-incarcerated peers. Corrections agencies should take definitive steps to expand edtech access as soon as is feasible.

At the same time, any expansion must be undertaken with care, keeping in view those economic, cultural, and institutional forces channeling edtech use in detrimental directions. These include the restrictive notion of security that prevails in U.S. prisons, the absence of accountability, transparency, and oversight in the prison system, and entrenched patterns of tech contracting that exploit incarcerated users. This interplay of forces runs counter to ed policy that centers students' learning needs. Instead, these forces clear the way for a relatively unregulated tech industry to profit in the correctional ed “market”. Sound prison edtech policy should be designed to work for

¹⁷² The ADA protects incarcerated persons with disabilities from disparate treatment, but if poor or no educational programming is provided at all, the law would not offer a remedy. Further, those with grievances under the ADA must still exhaust all administrative remedies as directed by the Prison Litigation Reform Act. See “Prisoner-Rights-Under-the-ADA.Pdf,” accessed June 15, 2024, <https://www.equipforequality.org/wp-content/uploads/2016/04/Prisoner-Rights-Under-the-ADA.pdf>.

¹⁷³ As noted above, the FAFSA Simplification Act gives corrections agencies oversight powers in determining which, if any, higher ed institutions will be permitted to teach in prisons. Further, the Act suggests, but does not require, that agencies consult with other stakeholder groups in exercising oversight.

¹⁷⁴ Beatrix Hoffman et al., *Patients as Policy Actors: A Century of Changing Markets and Missions* (Piscataway, UNITED STATES: Rutgers University Press, 2011), 122, <http://ebookcentral.proquest.com/lib/umichigan/detail.action?docID=858954>.

students in spite of the policy environment and must be accompanied by calls for large-scale change.

The trends and shifts discussed here demand new ways of articulating the responsibility to provide educational resources to all students. They demand ethical frameworks that prioritize incarcerated students' experiences and learning needs over measures of average economic success. While no ethical framework can guarantee that the good it envisions will be realized, this analysis recommends that edtech policy draw on values of humanity and inclusion. These frameworks open up new policy vistas and supply strong rationales for protecting incarcerated persons' access to educational resources.