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# SECOND CHANCE PELL EXPERIMENT: HOW THE UNITED STATES IS STARTING TO RECOGNIZE EDUCATION AS A RIGHT

by Brittany Walker\*

## I. Introduction

For decades, education as a right has been an issue between U.S. citizens and U.S. courts.<sup>1</sup> U.S. courts maintain that education is not a right, as it was not explicitly stated in the U.S. Constitution.<sup>2</sup> Since the U.S. Constitution is silent about education, U.S. courts have applied the 14<sup>th</sup> Amendment to defer educational matters, such as compulsory school requirements, to

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1 See generally David Dorsey, *Education is Still (For Now) Not a Fundamental Right Under the U.S. Constitution*, KAN. POL'Y INST. (Sept. 17, 2020), <https://kansaspolicy.org/education-is-still-for-now-not-a-fundamental-right-under-the-u-s-constitution/> (explaining the lineage of cases brought to the U.S. Supreme Court regarding education as a constitutional right).

2 Janine Bowen, *Ask the Expert: What Does the Constitution Say About Education? Nothing Explicitly, but That Doesn't Mean It Can't Help Provide Students with Equal Educational Access*, COLL. EDUC. NEWS (Sept. 18, 2020), <https://ced.ncsu.edu/news/2020/09/18/ask-the-expert-what-does-the-constitution-say-about-education-nothing-explicitly-but-that-doesnt-mean-it-cant-help-provide-students-with-equal-educational-access-says-assistant-p/>; *San Antonio Independent School District v. Rodriguez*, No. 71-1332, 1973 U.S. LEXIS 91 (Mar. 21, 1973); *Wisconsin v. Yoder*, Nos. State 92, 93, 94, 1971 Wisc. LEXIS 1129 (Jan. 8, 1971).

each state.<sup>3</sup> Currently, education in the United States is generally a right until middle school.<sup>4</sup> After middle school, the American government allows parents and students to determine whether additional education is necessary in their situation.<sup>5</sup> This view causes disparities for students desiring to further their education at colleges and universities, between those that can and cannot afford post-secondary education tuition.<sup>6</sup> One segment of the American population that has been excluded from obtaining higher or post-secondary education are incarcerated individuals.<sup>7</sup> Until recently, the American government prohibited incarcerated individuals from having access to post-secondary educational programs within prisons.<sup>8</sup> Offering post-secondary educational programs in state and federal prisons could be as effective as substance abuse programs or vocational trainings currently offered, to provide them with the tools to be productive citizens once released.<sup>9</sup> If the United States permits incarcerated individuals to receive post-secondary education, they will in essence, acknowledge education as more than a right for all of their citizens and live up to the international human rights standards.

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3 Bowen, *supra* note 2.

4 *Compulsory School Age Requirements*, EDUC. COMMISSION STATES (2010), <https://www.ecs.org/clearinghouse/86/62/8662.pdf> (the reasons for compulsory school age requirements have changed throughout American history but some reasons include the need to protect children's safety and welfare, as well as prepare them to be productive citizens).

5 Cynthia A. Cave, *Compulsory School Attendance*, STATE UNIV. (last visited Feb. 24, 2023), <https://education.stateuniversity.com/pages/1878/Compulsory-School-Attendance.html>.

6 *A History of Privilege in American Higher Education*, BEST COLLS., <https://www.bestcolleges.com/news/analysis/2020/07/17/history-privilege-higher-education/>.

7 Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Oct. 2018), <https://www.prisonpolicy.org/reports/education.html#table3>.

8 Press Release, U.S. Dep't of Educ. Announces Expansion of Second Chance Pell Experiment & Actions to Help Incarcerated Individuals Resume Educ. Journeys & Reduce Recidivism (Apr. 26, 2022).

9 *Education Programs*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/education.jsp](https://www.bop.gov/inmates/custody_and_care/education.jsp) (last visited October 23, 2022).

## II. Background

### A. The Pell Grant

In 1965, the United States Congress passed the Higher Education Act, which established the Pell Grant.<sup>10</sup> Pell Grants are federally funded grants that are awarded to students who meet certain need-based qualifications to assist with post-secondary education tuition costs.<sup>11</sup> When Congress passed the Higher Education Act, individuals who were incarcerated, applied for the Free Application for Federal Student Aid (FAFSA), and met the financial eligibility requirement, were also awarded Pell Grants.<sup>12</sup> The Pell Grants allowed incarcerated individuals to obtain a post-secondary education within the prison.<sup>13</sup> In 1982, there were approximately 350 post-secondary educational programs in U.S. prisons.<sup>14</sup> The number of post-secondary educational programs increased to nearly 800 within 1,300 prisons by the early 1990s.<sup>15</sup> However, when Congress passed the Violent Crime Control and Law Enforcement Act in 1994, a provision within the Act, revoked the eligibility of incarcerated individuals to receive a Pell Grant.<sup>16</sup> By 2005, there were only twelve post-secondary educational programs still operating within U.S. prisons.<sup>17</sup> In 2015, the Obama administration established the Second Chance Pell Experiment, which provided Pell Grants to incarcerated individuals to participate in post-secondary educational programs.<sup>18</sup> The Biden administration expanded the Second Chance Pell Experiment in 2022, enabling 200 schools to participate

10 Higher Education Act of 1965, Pub. L. No. 89-329, § 401, 79 Stat. 183, 184-204 (1965).

11 Federal Student Aid, <https://studentaid.gov/help-center/answers/article/federal-pell-grant-program> (last visited Nov. 20, 2022).

12 Wendy Sawyer, *Since You Asked: How Did the 1994 Crime Bill Affect Prison College Programs?*, PRISON POL'Y INITIATIVE (Aug. 22, 2019), <https://www.prisonpolicy.org/blog/2019/08/22/college-in-prison/>; Higher Education Act of 1965, Pub. L. No. 89-329, § 484, 79 Stat. 637, 637-38 (1965).

13 Bennett G. Boggs, *Correction by Degrees: Postsecondary Programs in Prisons*, NAT'L CONF. OF STATE LEGIS. (June 2019), [https://www.ncsl.org/Portals/1/Documents/educ/Postsecondary-Programs-in-Prisons\\_v02.pdf](https://www.ncsl.org/Portals/1/Documents/educ/Postsecondary-Programs-in-Prisons_v02.pdf).

14 *Id.* at 2.

15 *Id.*

16 Higher Education Act of 1965, Pub. L. No. 89-329, § 401(b)(6), 79 Stat. 183, 185 (1965).

17 Boggs, *supra* note 13 at 3.

18 See Press Release, U.S. Dep't Educ., *supra* note 8.

in the experiment.<sup>19</sup>

### B. The Universal Declaration of Human Rights

The United Nations General Assembly drafted the Universal Declaration of Human Rights (UDHR) in 1948, as a common standard of fundamental rights for all nations to strive to protect.<sup>20</sup> Article 26 of the UDHR declares that everyone has the right to education, that it be free in the elementary and fundamental stages, and that higher education be equally accessible to all on the basis of merit.<sup>21</sup> Higher education includes technical and professional education beyond high school.<sup>22</sup> The United States, a Member State of the United Nations, currently abides by some of Article 26 by providing free education to students from elementary to high school.<sup>23</sup> While the Universal Declaration of Human Rights is merely persuasive, the United States, as one of the world's most influential countries, should always strive to set the best humanitarian standards. Education can be used as a vehicle to promote human welfare by reducing poverty and crime, and by promoting equality and civic involvement.<sup>24</sup> However, the United States stops short of providing equal access to higher (or post-secondary) education on the basis of merit.<sup>25</sup> The reason for the partial implementation of Article

19 *Id.*

20 Universal Declaration of Human Rights, A/RES/3/217 A (Dec. 10, 1948).

21 *Id.*

22 *Structure of U.S. Education*, U.S. DEP'T. EDUC., <https://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-structure-us.html>. (last visited May 15, 2023) (The U.S. Department of Education classifies education after high school as postsecondary or tertiary education. This includes non-degree programs that lead to certificates and diplomas plus six-degree levels: associate, bachelor, first professional, master, advanced intermediate, and research doctorate).

23 Cassidy Francies & Zeke Perez Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N STATES (2020); *Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states#gotoU> (last visited Nov. 20, 2022).

24 Vinay Prajapati, *Top 25 Benefits of Education that Can Shape Our Future*, TECHPREVUE (Mar. 8, 2022), <https://www.techprevue.com/benefits-of-education/>.

25 *Why Meritocracy is a Myth in College Admissions*, THE CONVERSATION, (Mar. 15, 2019, 6:42 AM), <https://theconversation.com/why-meritocracy-is-a-myth-in-college-admissions-113620> (mentioning that there are few spots remaining in highly selective colleges after legacy students, student-athletes, and students with highly desirable qualities are admitted).

26 by the United States is the government's sentiment that post-secondary education is a privilege and not a right.<sup>26</sup> This sentiment was expressed by the Supreme Court of the United States in 1972, when it concluded that education was "not among the rights afforded explicit protection under [the] Federal Constitution" nor implicitly protected by the Constitution.<sup>27</sup> Students benefit from "free" public education through high school, mostly due to state's desire to have literate citizens.<sup>28</sup> However, without the proper funding (either federal or private) accessing education for incarcerated individuals will be nearly impossible, even to those with merit to attend.<sup>29</sup>

### III. Legal Analysis

Not providing post-secondary educational programs in U.S. prisons causes consequences on many levels. On the individual level, released inmates face discrimination in the job market due to their criminal convictions.<sup>30</sup> Further, individuals who are uneducated or lack higher education face more hurdles to obtain legal employment and have a higher chance of reoffending.<sup>31</sup> Studies show that current and formerly incarcerated individuals have less education than the general population and are less competitive in the job market.<sup>32</sup> A longitudinal study by the U.S. Sentencing Commission found that individuals who were incarcerated with less than a high school diploma had the highest recidivism rates compared to individuals who obtained a

college degree prior to being incarcerated.<sup>33</sup> Formerly incarcerated individuals who had access to educational programs within prisons have higher employment rates and better wages than those who were not offered those programs.<sup>34</sup> Additionally, at the state and federal levels, not providing post-secondary education in prisons has been costly.<sup>35</sup> The U.S. Department of Education compared the state and local spending of prisons versus pre-K-12 public education from 1979 – 2013.<sup>36</sup> They found that the spending on prisons was three times the rate of funding for pre-K-12 public education, and that the bulk of the funds went toward housing incarcerated individuals.<sup>37</sup>

Although funding post-secondary educational programs within prisons could temporarily increase state and local spending on prisons, the goal is to give inmates the necessary tools to reduce recidivism rates and reduce inmate populations.<sup>38</sup> The implementation of post-secondary educational programs within U.S. prisons produced positive results for released inmates and their communities.<sup>39</sup> For instance, a report found that individuals who participated in any type of educational program while in prison were forty-three percent less likely to return to prison.<sup>40</sup> With results like these, the United States should desire to provide post-secondary educational programs to incarcerated individuals.

Perhaps more importantly, the United States has an

26 Bowen, *supra* note 2.

27 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1972).

28 Cave, *supra* note 5.

29 Press Release, NORC, Survey: Americans See Cost as the Biggest Barrier to Higher Education (May 3, 2022), <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/survey-americans-see-cost-as-the-biggest-barrier-to-higher-education.aspx>.

30 *Employment after Prison: A Longitudinal Study of Releasees in Three States*, URBAN INST. (2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF>.

31 Alexandra Gibbons & Rashawn Ray, *The Societal Benefits of Postsecondary Prison Educ.*, BROOKINGS (Aug. 20, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/08/20/the-societal-benefits-of-postsecondary-prison-education/>.

32 Couloute, *supra* note 7.

33 United States Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) (indicating that those with less than a high school diploma have a 60.4% rate of recidivism compared to 19.1% of individuals who obtained a college degree).

34 Christopher Zoukis, *Educated Inmates Have Higher Employment Rates and Wages*, ZOUKIS CONSULTING GRP. (May 10, 2022, 12:16 AM), <https://federalcriminaldefenseattorney.com/correctional-education-boosts-employment-and-wages/>.

35 *Id.* (noting the U.S. economy loses around \$60 billion each year from loss labor from the high rates of incarcerated individuals).

36 *Id.*

37 *Id.*

38 See generally Kathleen Bender, *Education Opportunities in Prison are Key to Reducing Crime*, CTR. FOR AM. PROGRESS (Mar. 2, 2018), <https://www.americanprogress.org/article/education-opportunities-prison-key-reducing-crime/>.

39 *Id.*

40 *Id.*

obligation to provide education in general to all their citizens, as a matter of promoting human rights.<sup>41</sup> As previously mentioned, education can be used to reduce poverty.<sup>42</sup> Post-secondary education, in particular, can create more informed individuals and create better health in those individuals.<sup>43</sup> The United States must acknowledge that the times have changed between now and when the Constitution was created in 1776. While the United States Constitution may not have listed education as a fundamental right, education should still be made available to all those with merit and the desire to learn.<sup>44</sup> In doing so, the United States would acknowledge and strengthen the human rights of its citizens.

#### IV. Recommendations

The American government is currently attempting to expand educational rights to all, mainly through the enactment and expansion of the Second Chance Pell Experiment. However, these efforts are not enough. The United States needs to recognize education (specifically post-secondary education) as a right for all and not a privilege to only those who can afford it. This would remove barriers that prevent incarcerated individuals from receiving funding for education, which would also decrease recidivism rates.<sup>45</sup> However, this change will not materialize until the American government sees and understands the benefits of providing post-secondary educational programs to incarcerated individuals. For example, for every dollar invested in post-secondary educational programs within prisons, taxpayers save four to five dollars that would have been spent on solely housing individuals.<sup>46</sup> The money saved on investing in these programs within prisons

41 See Universal Declaration of Human Rights, *supra* note 20 (Article 26 also states education should be purposeful in developing human personality and respecting human rights and fundamental freedoms).

42 Prajapati, *supra* note 24.

43 Isabel V. Sawhill, *Higher Education and the Opportunity Gap*, BROOKINGS (Oct. 8, 2013), <https://www.brookings.edu/research/higher-education-and-the-opportunity-gap/>.

44 Bowen, *supra* note 2.

45 Kelsie Chestnut et al., *Second Chancel Pell: Five Years of Expanding Higher Education Programs in Prisons, 2016-2021*, VERA INST. JUST. (May 2022) <https://www.vera.org/downloads/publications/second-chance-pell-five-years-of-expanding-access-to-education-in-prison-2016-2021.pdf>.

46 *Id.*

can be used for other societal programs such as public education, housing, and Medicare. Generational cycles of imprisonment can also be broken by continuing to expand access to post-secondary educational programs within prisons.<sup>47</sup>

#### V. Conclusion

In all, Article 26 of the UDHR recognizes the importance of education on all parts of an individual's life.<sup>48</sup> The drafters of the UDHR recognized that when an individual is afforded the opportunity of education, their standard of life could improve.<sup>49</sup> Mainly, education is not just about education. Education is about affording individuals the opportunity to receive a good paying job that will provide them with sufficient income to provide for themselves and their families. Denying access to education unjustly obstructs formerly incarcerated individuals' attempts to better themselves and their situation.<sup>50</sup> Article 26 establishes foundational education rights for its Member States to utilize regarding educational rights. The United States has incorporated part of the Article by providing free education until (generally) high school.<sup>51</sup> But, since the United States does not recognize education as a fundamental right for its citizens, those with merit (incarcerated or free) are not provided with equal access to post-secondary education.<sup>52</sup> When Congress revoked incarcerated individuals' ability to receive Pell Grants, they created larger, unintended consequences. They may have believed that incarcerated individuals should not receive the privilege of an education, but denying incarcerated individuals access to post-secondary education made it more likely for them to recidivate once released.<sup>53</sup> While the United States has recently tried

47 Bender, *supra* note 38.

48 Press Release, Off. of the High Comm'r for Hum. Rts., *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 26* (Dec. 5, 2018) <https://www.ohchr.org/en/press-releases/2018/12/universal-declaration-human-rights-70-30-articles-30-articles-article-26#:~:text=Article%2026%20of%20the%20Universal,benefit%20from%20education%20and%20literacy>.

49 *Id.*

50 Couloute, *supra* note 7.

51 See generally *Compulsory School Age Requirements*, *supra* note 4.

52 Bowen, *supra* note 2; *A History of Privilege in American Higher Education*, *supra* note 6.

53 Patrick Oakford et al., *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison*, VERA INST.

to correct this human rights issue by implementing and expanding the Second Chance Pell Experiment, more needs to be done. The American government and its citizens need to recognize the positive impact that post-secondary educational programs in prisons can provide on many levels. When they do, recidivism rates will decrease, funding for prisons in general will decrease, and communities will thrive.

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Just. 20 (2019), <https://www.vera.org/downloads/publications/investing-in-futures.pdf> (a study by RAND found that the odds of recidivating are 48 percent less for those incarcerated individuals who participate in a post-secondary education program within prison than incarcerated individuals who do not participate in the program).