

# The First Step Is a Doozy: The Accessibility of Law School Applications for Incarcerated Students

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## ABSTRACT

Many incarcerated individuals who are interested in law school seek out applications while still in custody. But acquiring applications can prove problematic in the U.S., as the law school admissions process is now entirely online and incarcerated individuals do not have access to the Internet. Accordingly, an incarcerated person must request help from those on the outside, asking free advocates to reach out to potential law schools to secure an admissions application. This study explores U.S. law schools' willingness to 1) provide an incarcerated individual or their advocate a downloadable/printable admissions application and 2) directly process that application for admission. Drawing on original data collected during the 2020 law school admissions cycle, we found a stunning level of reluctance to accommodate these requests, as only 16 U.S. law schools (8 percent) expressed a willingness to send and process a downloadable/printable application. These findings strongly suggest that efforts to support applicants with a prior criminal history fail before they are ever initiated. We argue that sincere support for applicants with criminal legal system involvement must begin at the application stage and must include more comprehensive access to law school applications.

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## INTRODUCTION

In recent years, formerly incarcerated individuals in the United States have sought and won admission to law school and then the legal profession.<sup>1</sup> Today, formerly incarcerated attorneys occupy positions of influence as professors, policymakers, and activists.<sup>2</sup> Perhaps buoyed by these high-profile individual successes, several organizations now work to facilitate access to the legal profession for the formerly incarcerated.<sup>3</sup> One of the tasks of such organizations is to assist prospective law students with the law school admissions process.

Although the law school admissions process typically takes place after an individual is released from custody, changes in financial aid/grant eligibility and Law School Admission Test (LSAT) availability in prison have increased the likelihood that individuals will seek to apply to law

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<sup>1</sup> See James M. Binnall, *What Can the Legal Profession Do for Us? Formerly Incarcerated Attorneys and the Practice of Law as a Strengths-Based Endeavor*, 33 J. PRISONERS ON PRISONS 110, 111 (2022).

<sup>2</sup> See James M. Binnall, CAL. STATE UNIV. LONG BEACH, <https://www.csulb.edu/college-of-health-human-services/criminology-criminal-justice-and-emergency-management/page/james-m> (last visited Mar. 22, 2023); Shon Hopwood, *The Legal Profession Puts Itself on an Unsupportable Pedestal*, 47 STUDENT LAW. 4, 4 (2019); Tara Simmons, *Representative*, WASH. HOUSE DEMOCRATS, <https://housedemocrats.wa.gov/simmons/> (last visited Mar. 22, 2023); Tara Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Requirements*, 128 YALE L.J. F. 759, 769 (2019).

<sup>3</sup> See CAL. SYSTEM-INVOLVED BAR ASS'N, [www.csiba.org](http://www.csiba.org) (last visited Mar. 22, 2023).

school while inside.<sup>4</sup> Yet, in the United States, law school admission is overseen by a central entity – the Law School Admissions Council (LSAC) – and is entirely online.<sup>5</sup> Because those in custody have limited to no access to the Internet,<sup>6</sup> the application process can prove difficult if not impossible for the applicant to complete directly.

Most incarcerated applicants must seek out help from those on the outside, asking advocates to contact prospective law schools, acquire applications to send into prison, and then return those along with supporting documentation directly to law schools for processing. An advocate's success on this front turns on the willingness of law schools to 1) provide a downloadable/printable version of their applications and 2) process those applications directly. The aim of this article is to explore law school admissions' willingness to help incarcerated applicants overcome this admissions obstacle. To do so, we first discuss the law school admissions process in the United States, paying particular attention to those aspects that are entirely online. Next, we detail prior research on Internet insecurity in prison, noting the prevalence of policies forbidding online access to those in custody and the failed legal challenges to those policies. We then review the methods and results of our study, the first national survey of law school willingness to provide and process downloadable/printable applications. Finally, we situate our findings in a broader discussion of post-release adjustment and the need to diversify the legal profession.

## I. INTERNET IN U.S. PRISONS

### A. An Educational Tool?

The United States imprisons more people than any other country in the world.<sup>7</sup> Today, roughly 1.9 million people are incarcerated in

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<sup>4</sup> See, e.g., Lilah Burke, *After the Pell Grant*, INSIDE HIGHER EDUC. (Jan. 26, 2021), <https://www.insidehighered.com/news/2021/01/27/pell-grants-restored-people-prison-eyes-turn-assuring-quality>; see also Noah Austin, *Bringing Legal Education to Those Most Affected by the Law*, LSAC (July 12, 2021), <https://www.lsac.org/blog/bringing-legal-education-those-most-affected-law>.

<sup>5</sup> See *Steps to Apply: JD Programs*, LSAC, <https://www.lsac.org/jd-applicants/steps-apply-jd-programs> (last visited Mar. 22, 2023).

<sup>6</sup> See Bianca C. Reisdorf & Robert Vann Rikard, *Digital Rehabilitation: A Model of Reentry into the Digital Age*, 62 AM. BEHAV. SCIENTIST 1273, 1274 (2018).

<sup>7</sup> See Peter Wagner & Alison Walsh, *States of Incarceration: The Global Context 2016*, PRISON POL'Y INITIATIVE (June 16, 2016), <https://www.prisonpolicy.org/global/2016.html>.

America's jails and prisons,<sup>8</sup> and none have meaningful access to the internet.<sup>9</sup> Although the COVID-19 pandemic has exponentially increased the number of regular internet users,<sup>10</sup> American prisons and the people who reside behind their fences remain disconnected from online opportunities. This disconnect has led some scholars to describe prisons as "digital moats," noting that "denying internet access makes it harder for inmates to prepare for life on the outside."<sup>11</sup>

Despite this lack of internet access, incarcerated individuals are taking advantage of educational opportunities offered within prisons and correctional facilities.<sup>12</sup> Perhaps not surprisingly, data clearly demonstrates that incarcerated people who engage in educational programming enjoy higher rates of post-incarceration success.<sup>13</sup> For example, in a meta-analysis of correctional educational programming, RAND found that people who acquired educational programming while in prison are 43 percent less likely to recidivate.<sup>14</sup> Similarly, a study by Ellison et al. reveals that participation in educational programming makes it 24 percent more likely that a participant will find gainful employment upon release.<sup>15</sup> In short, those who take advantage of educational

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<sup>8</sup> See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>; see also Paul Guerino et al., *Prisoners in 2010: Bureau of Justice Statistics Bulletin, No. NCJ 236096*, U.S. DEP'T OF JUST. (2012); see also Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795, 1806 (2017).

<sup>9</sup> Carolyn McKay, *Digital Access to Justice from Prison: Is There a Right to Technology?*, 42 CRIM. L. J. 303, 303 (2018); Ashley Krenelka Chase, *Exploiting Prisoners: Precedent, Technology, and the Promise of Access to Justice*, 12 WAKE FOREST J. L. & POL'Y 103, 107 (2022).

<sup>10</sup> See Colleen McClain et al., *The Internet and the Pandemic*, PEW RSCH. CTR. (Sept. 1, 2021), <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/>.

<sup>11</sup> Dan Tynan, *Online Behind Bars: If Internet Access is a Human Right, Should Prisoners Have It?*, THE GUARDIAN (Oct. 3, 2016), <https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay>.

<sup>12</sup> See Kristin Rose & Chris Rose, *Enrolling in College While in Prison*, 65 J. CORR. EDUC. 20, 20-39 (2014).

<sup>13</sup> See Jillian Baranger et al., *Doing Time Wisely: The Social and Personal Benefits of Higher Education in Prison*, 98(4) PRISON J. 490, 491-513 (2018).

<sup>14</sup> Lois M. Davis et al., *How Effective is Correctional Education, and Where Do We Go from Here? The Results of a Comprehensive Evaluation*, RAND CORP. 1, 14 (2014).

<sup>15</sup> Mark Ellison et al., *A Rapid Evidence Assessment of the Effectiveness of Prison Education in Reducing Recidivism and Increasing Employment*, 64 PROB. J. 108, 125 (2017).

opportunities while in custody tend to experience a smoother transition from confinement to freedom.<sup>16</sup>

While educational programming in prison has gained popularity in recent years, accessing the internet is rarely – if ever – part of such instructional activity.<sup>17</sup> Rather, most prison education programs rely on in-person instruction,<sup>18</sup> correspondence courses,<sup>19</sup> or modified internet usage using a tablet and closed electronic environment.<sup>20</sup> These devices are typically populated with pre-downloaded materials or incarcerated people are given access to computers untethered from the internet.<sup>21</sup>

For instance, The Last Mile, a prison rehabilitation program, partners with the California Department of Corrections and Rehabilitations (CDCR) – the second largest prison system in the United States – to teach incarcerated people at Pelican Bay Prison how to develop digital skills by creating software and learning to code.<sup>22</sup> The students in this program learn by way of Chromebooks, yet as CDCR emphasizes: “The laptops are not able to access the internet. All activities are monitored for safety and security.”<sup>23</sup> Similarly, through the private company JPay, family members or supporters of an incarcerated individual at a partner facility may purchase an electronic tablet loaded with preset applications that comport with institutional rules and

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<sup>16</sup> See Chase, *supra* note 9, at 148.

<sup>17</sup> See Yvonne Jewkes & Helen Johnston, ‘Cavemen in an Era of Speed-of-Light Technology’: *Historical and Contemporary Perspectives on Communication within Prisons*, 48 HOW. J. CRIM. JUST. 132 (2009).

<sup>18</sup> See THE INSIDE OUT PRISON EXCHANGE PROGRAM, <https://www.insideoutcenter.org> (last visited Mar. 22, 2023); PRISON GRADUATION INITIATIVE, <https://www.calstatela.edu/engagement/prison-graduation-initiative> (last visited Mar. 22, 2023).

<sup>19</sup> See Danny Murillo, *The Possibility Report: From Prison to College Degrees in California*, MICHAELSON 20MM (Apr. 8, 2021), <https://20mm.org/2021/04/08/possibility-report-from-prison-to-college-degrees-in-california/>; Carmen Heider & Karen Lehman, *Education and Transformation: An Argument for College in Prison*, 10 CRITICAL EDUC. (2019); EMMA HUGHES, EDUCATION IN PRISON: STUDYING THROUGH DISTANCE LEARNING (2012).

<sup>20</sup> Helen Farley et al., *Providing Simulated Online and Mobile Learning Experiences in a Prison Education Setting: Lessons Learned from the PLEIADES Pilot Project*, 6 INT’L J. MOBILE AND BLENDED LEARNING, 17, 17-30 (2014).

<sup>21</sup> *Id.*

<sup>22</sup> *The Last Mile and California Prison Launch Revolutionary Laptop Program for Incarcerated Persons to Accelerate In-Person Tech Education*, CAL. DEP’T CORR. AND REHAB. (Dec. 6, 2021), <https://www.cdcr.ca.gov/news/2021/12/06/the-last-mile-and-california-prison-launch-revolutionary-laptop-program-for-incarcerated-persons-to-accelerate-in-prison-tech-education/>.

<sup>23</sup> *Id.*

regulations.<sup>24</sup> Still, these tablets cannot access the Internet.<sup>25</sup> Global Tel Link (GTL), another private company, also partners with U.S. prisons and credits itself with providing over 200,000 electronic tablets to incarcerated people nationwide in an effort to encourage education and entrepreneurship.<sup>26</sup> As is the case with all of the tablet initiatives, devices cannot access the internet, so users are left to choose from educational opportunities approved by prison administrators and equipped by the tablet provider.<sup>27</sup>

In sum, though education has gained a foothold inside America's prisons, the internet has not. While incarcerated people are encouraged to seek out educational programming that will benefit them upon release, prison officials have uniformly withheld from them a tool that has revolutionized the world and institutions of higher education. At no time was this juxtaposition more obvious than when the COVID-19 pandemic forced educators to adapt and to rely on – almost exclusively – digital access to instruction. Despite the global shift to online interaction during the pandemic, prison officials maintained the digital divide between the captive and free, placing security concerns above rehabilitative efforts and doing so with court approval.

## B. The Legal Landscape

Collectively, prior research makes clear that security risks are the primary justification for American penal policies that bar incarcerated people's access to the internet.<sup>28</sup> Prison authorities contend that security

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<sup>24</sup> See *JPay Tablets*, JPAY, <https://www.jpays.com/pmusic.aspx> (last visited Mar. 22, 2023).

<sup>25</sup> *Id.*

<sup>26</sup> See *Creating Plans and Setting Goals for a New Life – How the Brian Hamilton Foundation and GTL are Working Together to Bring Entrepreneurial Skills to Incarcerated Individuals*, GLOB. TEL LINK (Aug. 17, 2021), [https://www.gtl.net/about-us/press-and-news/brian\\_hamilton\\_foundation\\_and\\_gtl\\_bring\\_entrepreneurial\\_skills\\_to\\_incarcerated\\_individuals](https://www.gtl.net/about-us/press-and-news/brian_hamilton_foundation_and_gtl_bring_entrepreneurial_skills_to_incarcerated_individuals).

<sup>27</sup> *Id.* The Federal Bureau of Prisons endorses a similar system known as “Corrlinks” whereby incarcerated people in the federal system can correspond with approved public via email and video calls and manage funds for purchases. Notably, electronic mail on this system is not in real time, messages are screened and held and can only be accessed by incarcerated people at designated times. There is no access to the internet through the Corrlinks system. See *Corrlinks Video Service, Corrlinks Video Service #1 Installation*, YOUTUBE (Mar. 16, 2015), <https://youtu.be/AIqmrV-DnKI>.

<sup>28</sup> See Jewkes & Johnston, *supra* note 17; Titia A. Holtz, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855 (2002); Lisa Harrison, *Prisoners and Their Access to the Internet in the Pursuit of Education*, 39 ALT. L. J. 159 (2014).

is paramount in a carceral setting, arguing further that the internet exposes prisons to unwanted, unnecessary risks. Still, barring communication via the internet implicates incarcerated people's First Amendment protections and, as the Court has stated, "[p]rison walls do not form a barrier separating incarcerated people from the protections of the Constitution."<sup>29</sup> Accordingly, while not dispositive, Supreme Court precedent in the context of incarcerated people's communications and the First Amendment informs this issue.

In 1974, in *Procunier v. Martinez*, the Supreme Court weighed in on a case pivotal to the modern communication rights of imprisoned citizens.<sup>30</sup> The issue in the case centered on a California Department of Corrections and Rehabilitation (CDCR) policy barring incarcerated people's mail that "unduly complains"<sup>31</sup> or "magnif[ies] grievances"<sup>32</sup> or promotes "inflammatory political, racial, religious or other views or beliefs."<sup>33</sup> This policy gave CDCR the authority to screen incarcerated people's mail and censor correspondence at their discretion, arguably infringing on incarcerated people's First Amendment protections impermissibly.<sup>34</sup> The District Court held that the mail rules "authorized censorship of protected expression without adequate justification in violation of the First Amendment and that they were void for vagueness,"<sup>35</sup> and enjoined their continued enforcement.<sup>36</sup> The State appealed that ruling to the Supreme Court, which was then forced to balance the professed security interests of prison administrators against the First Amendment rights of those in custody. As the Court explained:

Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for

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<sup>29</sup> *Turner v. Safely*, 482 U.S. 78, 84 (1987).

<sup>30</sup> 416 U.S. 396 (1974).

<sup>31</sup> *Id.* at 398 n.2 (citing Director's Rule 2401).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ("This case concerns the constitutionality of certain regulations promulgated by appellant Procunier in his capacity as Director of the California Department of Corrections. Appellees brought a class action on behalf of themselves and all other inmates of penal institutions under the Department's jurisdiction to challenge the rules relating to censorship of prisoner mail...").

<sup>34</sup> *Id.* at 396.

<sup>35</sup> *Id.* at 400.

<sup>36</sup> *Id.*

maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. 9 Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.<sup>37</sup>

The Court ultimately held that the CDCR rule was constitutionally impermissible, and, in so ruling, established a two-pronged test for assessing limits on incarcerated people's communications. The Court held that any policy limiting communication with an incarcerated person must 1) "further an important or substantial governmental interest unrelated to the suppression of expression" and 2) "be no greater than is necessary or essential to the protection of the particular governmental interest involved."<sup>38</sup> In doing so, the Court preserved some First Amendment protections for incarcerated people's speech, but in a subsequent decision, it walked those protections back considerably.

In *Turner v. Safley*, the Court heard a First Amendment challenge to a prohibition on correspondence between incarcerated people.<sup>39</sup> Citing the two-pronged test proffered in *Martinez*, the lower courts held that *Safley* had a constitutionally protected right to communicate with another incarcerated person.<sup>40</sup> Yet, on appeal, the Supreme Court seemingly disregarded their own precedent, noting that *Martinez's* two-pronged test was too broad.<sup>41</sup> Instead, the Court opined, any prison policy will be ruled constitutional so long as it is "reasonably related to legitimate penological interests."<sup>42</sup> To determine whether a policy comports with this decree, the

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<sup>37</sup> *Id.* at 404-05.

<sup>38</sup> *Id.* at 396-97.

<sup>39</sup> 482 U.S. 78 (1987).

<sup>40</sup> *Id.* at 83.

<sup>41</sup> *Id.* at 85 ("As the Court of Appeals acknowledged, *Martinez* did not itself resolve the question that it framed.").

<sup>42</sup> *Id.* at 89 ("when a prison regulation impinges on inmates' constitutional rights, the



Court articulated four factors that are salient in their analysis of prison policy.<sup>43</sup>

The Court held that the reasonableness of any policy will turn on 1) whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forth to justify it,”<sup>44</sup> 2) whether “there are alternative means of exercising the right that remain open to inmates;”<sup>45</sup> 3) how an accommodation of these rights will impact “guards and other inmates, and [] the allocation of prison resources generally;”<sup>46</sup> and 4) whether an alternative accommodation of the right at issue exists, weighed against the reasonableness of the policy.<sup>47</sup> Using this four-factor analysis, the Court found the rule barring communication between incarcerated people constitutional, giving great deference to the institutional managerial needs of prison administrators.<sup>48</sup>

Two years after *Turner*, in 1989, the Court again confronted the issue of incarcerated people’s speech in *Thornburgh v. Abbot*.<sup>49</sup> At issue in *Thornburgh* was a Federal Bureau of Prisons policy which gave prison administrators discretion to censor any publication that was sent into the prison.<sup>50</sup> The Court found the policy facially constitutional, because the regulation was found to be “reasonably related to legitimate penological interests.”<sup>51</sup> Ultimately, the Supreme Court distinguished *Martinez*, and instead applied the *Turner* test in upholding the policy.<sup>52</sup> Notably, in doing so, the Court emphasized the need for deference to prison authorities on matters impacting security, even when a fundamental right is at issue:

In *Turner*, we dealt with incoming personal correspondence from prisoners; the impact of the correspondence on the internal environment of the prison was of great concern. There, we recognized that *Martinez* was too readily understood as failing to afford prison officials sufficient discretion to protect prison security. In light of these same concerns, we now hold that

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regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if ‘prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.’”)

<sup>43</sup> *Id.* at 79.

<sup>44</sup> *Id.* at 89.

<sup>45</sup> *Id.* at 90.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 91-93.

<sup>49</sup> 490 U.S. 401 (1989).

<sup>50</sup> *Id.*

<sup>51</sup> *Turner*, 482 U.S. at 89.

<sup>52</sup> *Thornburgh*, 390 U.S. at 401.

regulations affecting the sending of a “publication”...to a prisoner must be analyzed under the Turner reasonableness standard.<sup>53</sup>

In *Beard v. Banks*, the Court again used the state-deferential *Turner* test and ruled that the ban did not offend constitutional principles.<sup>54</sup> There, the Court analyzed a Pennsylvania Department of Corrections policy that banned newspapers, magazines, and photographs for high-security incarcerated people located in a segregated housing unit.<sup>55</sup> In upholding the policy, the Court opined that the constitutional ban could actually incentivize good behavior.<sup>56</sup> Specifically, the Court held that “[t]he articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones.”<sup>57</sup> But recognizing the virtually unlimited application of this logic, the dissent in *Banks* noted:

Any deprivation of something a prisoner desires gives him an added incentive to improve his behavior. This justification has no limiting principle; if sufficient, it would provide a “rational basis” for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.<sup>58</sup>

Nonetheless, the majority found the Pennsylvania policy constitutional, striking a blow to the First Amendment protections of those in segregated housing units.<sup>59</sup>

First Amendment jurisprudence in the custodial setting makes clear that the U.S. Supreme Court holds paramount the ability of officials to effectively manage prisons.<sup>60</sup> Since abandoning its own test in

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<sup>53</sup> *Id.* at 413.

<sup>54</sup> 548 U.S. 521 (2006).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 531-532.

<sup>58</sup> *Id.* at 546.

<sup>59</sup> *See id.*

<sup>60</sup> *See Holtz, supra* note 28 (compiling case law on this point and making the case that security concerns are exaggerated in this context); Steve Silberman, *Twice Removed: Locked Up and Barred from the Net*, WIRED (Dec. 3, 1997), <https://www.wired.com/1997/12/twice-removed-locked-up-and-barred-from-net/> (“According to the federal view, logging on is simply incompatible with incarceration. As chief bureau spokesman Todd Craig states, in bureaucratese, ‘Access to the Internet is not a necessary tool for the correctional process’ – which means that...a significant population is being left behind by the network revolution.”); *see also Jewkes & Johnston, supra* note 17, at 140 (discussing the political aspects of internet access in prison, “[p]olitical justifications for denying prisoners Internet access are founded on perceptions

*Martinez*,<sup>61</sup> the Court has consistently ruled in favor of prison administration, suggesting that a direct challenge to internet bans in U.S. prisons will almost certainly fail given precedent in this context.<sup>62</sup> Outside of the U.S., incarcerated people face similar prospects. In *Jankovskis v. Lithuania*, a case from the European Court of Human Rights, a person incarcerated in Lithuania sought to pursue higher education, requiring him to complete an online application.<sup>63</sup> Ultimately, he was denied access to the internet for this purpose, creating an unnecessary barrier to his educational attainment.<sup>64</sup> Similarly, in the United Kingdom, Open University is “the main provider of degree level courses in prisons for the past 30 years and typically recruits over 300 students annually,”<sup>65</sup> but has moved to exclusively online instruction.<sup>66</sup> Thus, since internet access in UK prisons is highly restricted or non-existent, incarcerated people are unable to take advantage of Open University’s educational programming, eliminating a pro-social pursuit that has been proven to facilitate rehabilitation and successful reentry.<sup>67</sup>

Recently, and in the wake of the era of mass incarceration in the U.S. and abroad, prison administrators and policymakers have sought a return to rehabilitative ideals and principles.<sup>68</sup> One effort in this realm has been an increased emphasis on educational attainment for those with prior carceral involvement.<sup>69</sup> Still, without meaningful access to online

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of the technology’s inherent insecurity: a rationalization that is difficult to counter within a system of governance characterized by audit, accountability and assessments of risk.”).

<sup>61</sup> See *Turner v. Safely*, 482 U.S. 78 (1987).

<sup>62</sup> See, e.g., *id.*

<sup>63</sup> *Jankovskis v. Lithuania*, App. No. 21575/08, Eur. Ct. H.R. (2017).

<sup>64</sup> Peter Schraff Smith, *Imprisonment and Internet-Access—Human Rights, the Principle of Normalization and the Question of Prisoners Access to Digital Communications Technology*, 30 NORDIC J. HUM. RTS., 454, 456 (2013) (“Furthermore, the case is obviously an example of a missed opportunity in terms of furthering a prisoner’s possibilities of effective rehabilitation and reintegration into society.”).

<sup>65</sup> See *Jewkes & Johnston*, *supra* note 17, at 134.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* (continuing “the demands of prison security make online learning fraught with difficulty. Not only does the lack of Internet access preclude degree level study, but many prisoners are not allowed to possess CD-roms or DVDs because the discs are considered potential weapons for assault or self-harm. Consequently, they have to make do with simulated tutorials that are loaded onto their computers, rather than the real thing.”); see also Smith, *supra* note 64.

<sup>68</sup> See FRANCIS E. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION, ivx (2013) (noting “rehabilitation has survived the mean season of corrections” but warning “[t]he larger challenge is how to reaffirm rehabilitation responsibly.”).

<sup>69</sup> See *Murillo*, *supra* note 19; *Heider & Lehman*, *supra* note 19; Sally Coates, UNLOCKING POTENTIAL: A REVIEW OF EDUCATION IN PRISON, MINISTRY OF JUSTICE

resources, educational programming is – in many cases – impossible. So too is the ability of incarcerated people to solidify plans for their release.<sup>70</sup> Of those who have been able to access education inside – perhaps through correspondence courses or live instruction – many seek out additional educational opportunities to commence upon release.<sup>71</sup> However, applying to institutions of higher education while in prison is difficult, and almost always requires the help of a free associate in the case of no internet capabilities.<sup>72</sup> As for access to the legal profession from the inside, a centralized online law school application process makes this a near impossible path for those incarcerated in the U.S. to navigate alone.<sup>73</sup>

## II. ACCESSING THE LEGAL PROFESSION: APPLYING FROM THE INSIDE

In recent years, perhaps buoyed by the expansion of educational programming in prisons, many formerly incarcerated individuals have sought and gained access to the legal profession, receiving admission to law school and securing professional licensure after a period of confinement.<sup>74</sup> A number of these individuals now occupy positions of influence in academia and legislature.<sup>75</sup> They have also organized to further diversify the profession by fostering the inclusion of those with “experiential carceral knowledge.”<sup>76</sup> Today, several nascent organizations serve to promote the legal profession among the formerly incarcerated and system-involved. As part of those efforts, these organizations have recently begun to assist imprisoned students who seek to access the legal profession as a potential vocation.<sup>77</sup>

While steps should still be taken to increase LSAT accessibility, it is much easier to take the LSAT in prison today than it was at the

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(2016); Joe Louis Hernandez et al., *Hustle in Higher Education: How Latinx Students with Conviction Histories Move from Surviving to Thriving in Higher Education*, 66 AM. BEHAV. SCIENTIST 1394 (2022); Melissa Abeyta et al., *Rising Scholars: A Case Study of Two Community Colleges Serving Formerly Incarcerated and System-Impacted Students*, 28 J. APPLIED RSCH. CMTY. COLL. 99 (2021).

<sup>70</sup> See Jewkes & Johnston, *supra* note 17, at 136 (“Prison inmates are no exception, but in the context of those who are preparing for release at the end of their sentence, the facilitation of communication with local external agencies may be equally important, not least in determining their desistance from crime in the future.”).

<sup>71</sup> See Hernandez et al., *supra* note 69; Murillo, *supra* note 19.

<sup>72</sup> Binnall, *supra* note 1, at 111-12; Jewkes & Johnston, *supra* note 17.

<sup>73</sup> See *Steps to Apply: JD Programs*, *supra* note 5.

<sup>74</sup> See *supra* note 2.

<sup>75</sup> *Id.*

<sup>76</sup> James M. Binnall, *Carceral Wisdom*, INQUEST (Oct. 15, 2021), <https://inquest.org/carceral-wisdom/>.

<sup>77</sup> See CAL. SYSTEM-INVOLVED BAR ASS’N, *supra* note 3.

beginning of the 21<sup>st</sup> century. To secure admission to law school in the United States, a prospective law student must first take and complete their LSAT. That test is offered eight times per year and administered by LSAC,<sup>78</sup> but is seldom offered to those in prison. Roughly twenty years ago, one of the authors completed their LSAT while incarcerated, before subsequently applying to and being accepted to law school while still incarcerated.<sup>79</sup> While this was a rarity at that time, taking the LSAT in prison is a far more realistic option today.<sup>80</sup> Perhaps in line with an increased focus on increasing the broad diversity of law schools and the legal profession, today some law schools are proactively taking measures to increase accessibility. For example, in April 2021, Dean Niedwiecki of Hamline Mitchell Law School proctored the LSAT for two incarcerated people in the Minnesota Department of Corrections.<sup>81</sup> In an interview about these efforts, the Dean noted, “Our prison system is set up to be punitive, and not necessarily to try to fix the issues that might have led a person to prison . . . . We need to expand our thinking of what should be done to support these people.”<sup>82</sup> For most incarcerated people, taking the LSAT in prison requires them to seek out and receive permission from prison authorities who must administer and proctor the exam. Such requests are typically handled on an institution-by-institution basis and are largely the exclusive purview of the warden or prison superintendent. Having a law school and its dean, such as Dean Niedwiecki, support efforts to administer LSATs makes LSATs and a legal education far more accessible to incarcerated individuals.

Once an incarcerated person has completed their LSAT, they are then able to apply to law school; in the United States, this process is entirely online. When a student wants to apply to law school, they must first create an LSAC account. Per LSAC, through that account an applicant can “track every status of every step you take as you apply to your selected schools. Each school has specific application requirements and timelines. My Calendar lets you track those all-important deadlines.”<sup>83</sup> On the LSAC website, applicants are also able to research law schools that may be of interest.

After an applicant has chosen the schools to which they wish to apply, they must then register for LSAC’s Credential Assembly Service

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<sup>78</sup> See *Steps to Apply: JD Programs*, *supra* note 5.

<sup>79</sup> Binnall, *supra* note 1, at 117.

<sup>80</sup> See Austin, *supra* note 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *Steps to Apply: JD Programs*, *supra* note 5.

(CAS). LSAC recommends registering with CAS roughly six to eight weeks prior to an applicant's first law school admission deadline.<sup>84</sup> Through CAS, an online service only, applicants can upload transcripts and references can upload letters of recommendation. As LSAC notes, "CAS will help streamline the application process: you'll only need to submit your transcripts and letters of recommendation once to LSAC. We will compile all your material in a law school report for the law schools that you choose."<sup>85</sup>

LSAC also offers the Candidate Referral Service (CRS), an online recruiting service that allows law schools to find applicants based on a variety of criteria including, but not limited to, LSAT score, undergraduate GPA, age, citizenship, race or ethnicity, and geographic background.<sup>86</sup> The CRS allows law schools to sort applicant data for both JD and LLM applicants – there is no paper alternative to the online CAS service.<sup>87</sup>

The final piece necessary to complete the application process through the LSAC portal is the completion and submission of each law school's application. To do so, applicants log onto the LSAC website, find the school they wish to apply to, and then complete the online application. Through LSAC, applicants do not have the option of printing or downloading a blank application.<sup>88</sup> Instead, all fields must be completed online before being sent by LSAC – along with the rest of the file compiled through CAS – to any law school the applicant identifies.<sup>89</sup>

What is clear when examining this application process is that for those who do not have access to the Internet, applying to law school in the U.S. is daunting. LSAC has not established workarounds for the access issues that plague its role in law school admissions, impacting the educational aspirations of the incarcerated. At best, a lack of access forces incarcerated applicants and their advocates to create potential, but not always successful, workarounds to address LSAC's application access

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *Candidate Referral Service*, LSAC, <https://www.lsac.org/choosing-law-school/candidate-referral-service> (last visited Mar. 22, 2023).

<sup>87</sup> *Id.*

<sup>88</sup> In attempting to assist incarcerated students interested in law school, we reached out to LSAC and their representatives on five separate occasions to inquire about obtaining downloadable/printable applications that we could provide to our interested incarcerated students. On each occasion, we were told that LSAC cannot provide an individual school's application in downloadable/printable form and that we would have to contact the individual law schools directly. Those responses prompted the current research.

<sup>89</sup> See *Steps to Apply: JD Programs*, *supra* note 5.

barrier. At worst, these digital barriers foster application attrition among those residing in our nation's prisons without the opportunity to apply online, harming their chances for post-release success and removing a valuable perspective from legal education and the legal profession.

### III. A SURVEY OF LAW SCHOOL APPLICATION ACCESS

We assessed the accessibility of law school admissions for incarcerated students by simulating the law school application process as experienced by incarcerated prospective law students. We began by accessing the American Bar Association (ABA) website, which lists contact information for all ABA accredited law schools in the United States and Puerto Rico.<sup>90</sup> Of the ABA's list of 200 approved law schools, we surveyed 196 from forty-nine states, the District of Columbia, and Puerto Rico.<sup>91</sup> Using the ABA's list of approved law schools, we located the websites of each school, navigated to locate specific admission contact information and preferred method of contact, and then compiled that information into a preferred method contact list.<sup>92</sup>

From this list, we contacted each respective admissions office – using their preferred method between call and email – to ask directly whether obtaining a printable/downloadable admission application is possible. We explained to each law school that we are assisting currently incarcerated students who are seeking to apply to their institution.<sup>93</sup> We made initial contact between the spring and fall semesters of 2020, allowing ample time for admissions representatives to respond during the COVID-19 pandemic. When our initial contact went unanswered for a period of 30 days, we followed up with another contact, again using the school's preferred method of correspondence. If we did not receive a response to our follow-up contact within 30 days, we then attempted to make contact using the school's preferred method a third time. Only schools that did not respond to any of our three inquiries were considered non-responsive.

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<sup>90</sup> *List of Approved Law Schools: In Alphabetical Order*, ABA, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/in\\_alphabetical\\_order/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/) (last visited Mar. 13, 2023).

<sup>91</sup> Note that Florida Coastal, Thomas Jefferson, and University of La Verne were on a teach out plan and were excluded from the survey. Concordia was scheduled to close in 2020 and was also excluded from the survey. UNT Dallas was provisionally accepted at the time of the survey and was included in the data set.

<sup>92</sup> Alaska does not have any ABA accredited law school and was therefore omitted from the survey.

<sup>93</sup> Calls/emails were conducted/drafted in both English and Spanish for law schools in Puerto Rico.

All responses were then grouped into a total of three categories: (1) schools that will provide and process a paper application; (2) schools that will provide but not process a paper application; and (3) schools that will not provide or process a paper application. Notably, schools who failed to respond to our three inquiries were placed in the final category (“Schools that will not provide or process an application”). We placed non-responsive schools in this category to comport with ecological validity (noted in the Appendix).

Namely, when we as advocates for people incarcerated received no response from a law school’s admissions staff, we typically removed that school from an incarcerated student’s law school application list (at their urging most often). This created an incredible barrier for incarcerated people because it limits the accessibility of these law schools and can therefore potentially hinder an opportunity of successful reintegration.

#### **A. Schools that Will Provide and Process**

Schools in this category agreed to provide a downloadable/printable application and agreed to process the application along with any other required materials. Out of the 196 ABA approved law schools surveyed, only 16 schools (8 percent) were placed in this category.<sup>94</sup> Upon request, all schools in this category provided a downloadable/printable application. California and New York have the most law schools with 18 in California and 15 in New York. Only one school in California (Southwestern) and one school in New York (Yeshiva-Cardozo) agreed to provide and process an application for admission. Notably, of all law schools that agreed to provide and process a downloadable/printable application, Fordham is the only school to have a link to their application on their law school website. This resource makes facilitating the application process far more seamless for advocates working with currently incarcerated applicants.

In addition, there is no clear correlation between a school’s ranking and whether the school will provide and process an application. Of the 16 school that will provide and process applications, their U.S. News ranking range from 21 to 192.

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<sup>94</sup> *List of ABA-Approved Law Schools: In Alphabetical Order*, *supra* note 90. Those schools include Akron, Boston College, Northeastern, Texas A&M, Yeshiva (Cardozo), Catholic University, University of Florida, DePaul, University of New Hampshire, Fordham, Mitchell Hamline, Case Western, Temple, Lincoln Memorial, Southwestern and University of Washington.



### **B. Schools that Will Provide but not Process**

Schools placed in this category indicated that they would send a downloadable/printable application to an incarcerated person but will not process that application or any other documents that are part of the admissions process. While this allows an incarcerated person to fill out the application, it imposes an additional burden of finding an advocate who has internet access themselves and is willing to transfer the incarcerated person's application information from paper to the online format. This category consists of 22 schools (11%).<sup>95</sup> In California, for example, Pepperdine and the University of California, Los Angeles, stated they are willing to send a downloadable/printable application, but that the applicant must contact admissions for further information because they would not send the application to an advocate. This response makes little sense considering that an incarcerated person is not able to simply "make a phone call" to a new contact in most circumstances. Instead, a phone call almost always requires pre-approval by the institution, a process that can take months. Both schools also flatly stated they will not process the application, leaving the incarcerated student to apply via LSAC, an impossibility without online access. Out of the 22 schools that agreed to send an application, at the time of publication of this paper, only 9 schools had actually sent the documents. Among the schools that ultimately fulfilled the request for a downloadable/printable admission application, all have stated they would *not* process the application or any supporting required material.<sup>96</sup>

Schools that responded that they would send an application for reference only were also placed in this category,<sup>97</sup> and notably, St. John's School of Law in New York was the only school in this category to have a link to download a PDF application on their admissions website.

### **C. Schools that Will not Provide**

Schools placed in this category refused our request to furnish and/or process an application for admission to their law school. Schools that did not respond to our repeated requests were also placed in this category.<sup>98</sup> A total of 158 schools fell into this category, making up 81

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<sup>95</sup> See Appendix.

<sup>96</sup> Schools that provided the application but stated that they would not process include ASU, University of Miami, University of Massachusetts, St. John's, North Carolina, North Dakota, Lewis and Clark, and Seattle.

<sup>97</sup> These schools include New York University, State University of New York, and North Dakota.

<sup>98</sup> Non-response law schools include Georgetown, Golden Gate, Missouri, Missouri

percent of the total sample. In certain jurisdictions, the vast majority of schools (e.g., California 15/18 and New York 11/15) categorically declined to send an application to an incarcerated person or their advocate. This was an interesting finding given the progressive reputation of both jurisdictions and ironically the size of the carceral systems in California and New York, which rank second and eighth in the United States respectively as to the number of people they imprison.<sup>99</sup> In Virginia, law school options for incarcerated students are even more limited, as all law schools in that jurisdiction indicated a complete unwillingness to work with an incarcerated student or their advocate.

In denying our request for an admission application, schools varied in their reasoning, some suggesting a complete reluctance to work with those who have prior carceral experiences,<sup>100</sup> while others seemed to shift their role in the process, placing access issues directly at the feet of LSAC, or recommending other institutions that may be better suited for our population. For example, American University made the recommendation to contact LSAC for possible accommodations, while Drake University recommended that the student apply when internet becomes available and suggested other schools that “may be a better fit” and would possibly work with us on the application process.

Other reasons for refusing our request seemed to turn on irrelevant factors. For instance, the University of Minnesota reported that they ‘may’ send an application, but only if the student had already taken the LSAT. Additionally, Michigan State specified that the school will decide to send an application on a case-by-case basis but provided no criteria for that decision and further stated their strong preference that the student apply via LSAC. Like Michigan State, the University of California, Los Angeles admissions office did not provide an application and instead recommended that the prospective student contact admissions “when

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Kansas City, Northern Kentucky, North Carolina Central, Northwestern, Nova Southeastern, New England, Ohio Northern, Ohio State, Oklahoma, Pace, Penn State Dickinson, Penn State University Park, Pontifical Catholic, Puerto Rico, Saint Louis University, Southern, South Dakota, Southern Illinois, Touro, Tulane, University of Chicago, University of New Mexico, UNT Dallas, Vanderbilt, Vermont, Wayne University, Western State Cooley University, Widener, William and Mary, Wyoming and Yale.

<sup>99</sup> *Prison Population by State 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/prison-population-by-state> (last visited Mar. 14, 2023).

<sup>100</sup> A representative from the University of Arkansas, Little Rock Admissions Department stated that “their school would be hesitant to accept people who have been incarcerated.” They recommended that we “go through” LSAC to apply.

ready to apply”. The admissions office at University of California, Irvine explained that although they do not accept applications outside of LSAC, they “will entertain an application filled out by proxy”. Finally, Appalachian University recommended that the student “reach out to LSAC directly to inquire about accommodations or have a person fill out LSAC information on the student’s behalf.”

In sum, out of the 196 sampled, 8 percent will send an admissions application and process that application should an incarcerated applicant choose to apply. The remaining schools either refused to provide and/or process a downloadable/printable application. In effect, these results limit those schools to which incarcerated applicants can apply, reducing the odds that they will be accepted to law school and will be able to pursue their dream of practicing law.<sup>101</sup>

#### IV. REDUCED ACCESS TO LAW SCHOOL APPLICATIONS: IMPLICATIONS

In 2011, the United Nations categorized access to information via the internet as a fundamental right.<sup>102</sup> Though for those in U.S. prisons, the internet is forbidden, and courts do not recognize access to the internet as a fundamental or even important right.<sup>103</sup> Thus, for those inside, advancing their educational goals is made imminently more difficult, and in the case of applying to law school, nearly impossible. Law school applications in the U.S. are completed and processed entirely online, shutting out applicants who are internet insecure because they are imprisoned.<sup>104</sup>

Results from the present study suggest that U.S. law schools are seemingly disinterested or unable to accommodate applicants in custody. Only 16 U.S. law schools (8%) agreed to send and process a downloadable/printable admissions application to a citizen in custody or to their advocate. The remaining law schools, virtually all accredited schools in the U.S. (N=180, 92%), either agreed to send an application but not process (N=16, 11%), refused to send a downloadable/printable application (N=125, 64%), or simply did not respond to our request for

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<sup>101</sup> See, e.g., Megan Denver & James M. Binnall, *The Lure of the Law for the Formerly Convicted: Pursuing the Legal Profession as a Resistance Strategy*, L. & SOC. INQUIRY (forthcoming 2023).

<sup>102</sup> Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report*, U.N. Doc. A/HRC/17/27/Add.1 (May 27, 2011).

<sup>103</sup> See *supra* note 60 and accompanying text.

<sup>104</sup> See *Steps to Apply: JD Programs*, *supra* note 5.

assistance (N=34, 17%).<sup>105</sup> Given this demonstrated unwillingness to work with incarcerated applicants and the lack of internet access on the inside, the possibility of one securing admission to a U.S. law school while in custody is highly improbable, creating a lack of access that has implications for those in U.S. prisons and for the legal profession generally.

### A. Threatening Post-Release Success

Research strongly suggests that education helps to facilitate post-release success after a period of confinement.<sup>106</sup> Studies demonstrate that educational programming spawns such positive outcomes, in large part, by improving one's self-concept.<sup>107</sup> Education impacts self-concept by reconfiguring one's "master status."<sup>108</sup> Internalizing how others conceive of them, many people with a conviction history identify primarily as the pejorative labels often affixed to those with prior criminal legal system contact.<sup>109</sup> Education, or the anticipation of educational programming, likely operates to blunt the acceptance of such labels.<sup>110</sup>

In his seminal work on criminal desistance mechanisms, psychologist/criminologist Shadd Maruna suggests that to achieve post-release success, those who have endured direct experiences with the criminal legal system must undergo identity transformation, amounting to "identifiable and measurable changes at the level of personal identity or the 'me' of the individual."<sup>111</sup> As to factors likely to prompt pro-social

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<sup>105</sup> See Appendix.

<sup>106</sup> See *supra* notes 13-16.

<sup>107</sup> See Alexis Halkovic et al., *Higher Education and Reentry: The Gifts They Bring. Reentry Research in the First Person*, PRISONER REENTRY INST. (2013).

<sup>108</sup> See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

<sup>109</sup> A wealth of research suggests that those with a conviction history internalize external perceptions of their character and evaluations of their worth. This phenomenon or process has been termed the "looking glass," see, e.g., CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (1902); GEORGE H. MEAD, *MIND, SELF AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (1934); HARRY STACK SULLIVAN, *CONCEPTIONS OF MODERN PSYCHIATRY* (1947); Viktor Gecas & Michael L. Schwalbe, *Beyond the Looking-Glass Self: Social Structure and Efficacy-Based Self-Esteem*, 46 SOC. PSYCH. Q. 77 (1983); "reflected appraisals," see, e.g., Ross L. Matsueda, *Reflected Appraisals, Parental Labeling, and Delinquency: Specifying a Symbolic Interactionist Theory*, 97 AM. J. SOC. 1577 (1992); John W. Kinch, *A Formalized Theory of Self-Concept*, 68 AM. J. SOC. 481 (1963); and "labeling theory," see, e.g., Raymond Paternoster & LeeAnn Iovanni, *The Labeling Perspective and Delinquency: An Elaboration of the Theory and an Assessment of the Evidence*, 6 JUST. Q. 359 (1989).

<sup>110</sup> See Halkovic et al., *supra* note 107.

<sup>111</sup> Shadd Maruna, Russ Immarigeon & Thomas P. LeBel, *Ex-Offender Reintegration:*

identity shifts among those with criminal conviction histories, scholars argue that pro-social opportunities – like the chance to gain acceptance to law school – create pro-social roles (e.g. future law student, future attorney, etc.).<sup>112</sup> In turn, when one assumes such a role and comports to the requirements that the role demands, adherence to the role over time then influences self-concept, such that one begins to characterize oneself not as a criminal, but as a future law student or future attorney.<sup>113</sup>

A change in self-concept may also derive from the “agentic moves”<sup>114</sup> often made by those with a carceral history.<sup>115</sup> Specifically, someone who successfully desists from criminal activity must, at some point in the desistance process, rectify their criminal past with their new and anticipated law-abiding present and future.<sup>116</sup> To do so, such individuals build “desistance narratives” to explain, not excuse, past deviance.<sup>117</sup> One method of explanation involves the reframing of a criminal past into a constructive experience, deriving meaning and value from prior deviance.<sup>118</sup>

Viewed through a criminological/psychological lens, law school

*Theory and Practice*, in AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 19 (2004); see also SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001).

<sup>112</sup> See, e.g., JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE (2003); Ross L. Matsueda & Karen Heimer, *A Symbolic Interactionist Theory of Role-Transitions, Role-Commitments, and Delinquency*, in DEVELOPMENTAL THEORIES OF CRIM. & DELINQUENCY 163 (1997); Karen Heimer & Ross L. Matsueda, *Role-Taking, Role Commitment, and Delinquency: A Theory of Differential Social Control*, 59 AMER. SOC. REV. 365 (1994); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1 (2001).

<sup>113</sup> See LAUB & SAMPSON, *supra* note 112.

<sup>114</sup> Peggy C. Giordano et al., *Gender, Crime, and Desistance: Toward a Theory of Cognitive Transformation*, 107 AM. J. SOCIO. 990, 993 (2002).

<sup>115</sup> See Barry Vaughan, *The Internal Narrative of Desistance*, 47 BRIT. J. CRIMINOLOGY 390 (2007).

<sup>116</sup> MARUNA, *supra* note 111, at 87 (“[D]esisting narrators . . . maintain this equilibrium by connecting negative past experiences to the present in such a way that the present good seems an almost inevitable outcome.”).

<sup>117</sup> *Id.*; see also Sam King, *Early Desistance Narratives: A Qualitative Analysis of Probationers’ Transitions Towards Desistance*, 15 PUNISHMENT & SOC’Y 147, 152 (2013) (“[I]t is the building of a desistance narrative which underpins the development of new identities . . .”); Giordano et al., *supra* note 114; Vaughan, *supra* note 115.

<sup>118</sup> See MARUNA, *supra* note 111, at 98 (“Sometimes the benefits of having experienced crime and drug use are literal. Ex-offenders say they have learned from their past lives, and this knowledge has made them wiser people.”). Maruna also notes that this reframing of a criminal past often occurs through the use of what he terms a “redemption script.” *Id.* at 87.

application access for incarcerated students takes on an added layer of salience. Forcing an incarcerated applicant to, at best, delay, and, at worst, abandon their application to law school, likely disrupts any change in self-concept that can occur while inside. Application access obstacles foreclose potential pro-social roles and make a coherent desistance narrative exceedingly difficult to construct by emphasizing one's perceived anti-social identity over their pro-social pursuits. In this way, facilitating access to legal education for those in prison, along with access to education generally, may facilitate a positive shift in identity, such that post release success is far more likely.

Restricting access to legal education for those in custody also presents practical release challenges for those seeking to enter the legal profession. In many jurisdictions, release from custody is contingent upon successfully demonstrating an acceptable post-release plan.<sup>119</sup> That plan requires a person in custody to establish suitable living arrangements, employment or schooling alternatives, and treatment feasibility prior to release.<sup>120</sup> Recent legislation making financial aid/grant access available to those on the inside,<sup>121</sup> as well as efforts to facilitate the LSAT in prisons,<sup>122</sup> make securing admission to a law school a viable option for incarcerated individuals seeking out educational programming as part of their release plan. Stunting the ability to win admission from the inside then poses practical obstacles to constructing an acceptable release plan.

Those who wait and apply after release incur delays to the start of their legal education and may risk losing a competitive timing edge in the application process. If an incarcerated individual's law school is in another jurisdiction, supervising authorities will almost certainly require a formal interstate supervision agreement and that will in all probability delay enrollment even longer. Thus, by removing an option increasingly more attractive to those with a conviction history, law school application access barriers impact both their psychological transition from captive to releasee and the practical aspects of moving from a cell to the free world.

By refusing to accommodate those in custody or their advocates in the admission process, LSAC and U.S. law schools have effectively denied incarcerated individuals an educational opportunity that prior

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<sup>119</sup> See, e.g., *People v. Strother*, 72 Cal.App. 5th 563 (2021); see also N.Y. Exec. L. § 259-i(c)(A)(iii) (2023) (noting “release plans including community resources, employment, education and training and support services available to the incarcerated individual”).

<sup>120</sup> See § 259-i(c)(A)(iii).

<sup>121</sup> See, e.g., *Burke*, *supra* note 4.

<sup>122</sup> See *Austin*, *supra* note 4.

studies suggest would facilitate post-release success in multiple ways.<sup>123</sup> In doing so, law schools undermine their own inclusivity and diversity initiatives,<sup>124</sup> while LSAC ignores its professed mission to “advance law and justice by encouraging diverse, talented individuals to study law and by supporting their enrollment and learning journeys from prelaw through practice.”<sup>125</sup>

### B. Undermining Diversity and Inclusivity Initiatives

Today, the legal profession does not reflect the racial composition of the population it serves. Non-Latino White lawyers (81%) are grossly overrepresented compared to their share of the population (60%), while the share of Black (13.4%) and Latino (18.5%) Americans are significantly underrepresented, comprising only 10 percent of all attorneys combined.<sup>126</sup> Law schools fare only marginally better. In its 2022 Profile of the Legal Profession, the American Bar Association reported that among first-year law students nationally in 2021, only 7.7% were Black and 13.2% Latino, while 61.6% were White.<sup>127</sup> This homogeneity has led some commentators to characterize the law as one of the whitest professions,<sup>128</sup> noting that “minority representation [in the law] regrettably lags far behind minority representation in the U.S. general population.”<sup>129</sup>

As a way of addressing this disparity between the U.S. populace and its legal practitioners, many law schools have increased their efforts to attract and support minoritized candidates and other prospective law

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<sup>123</sup> See *supra* notes 13-15 and accompanying text.

<sup>124</sup> See Elizabeth Bodamer & Debra Langer, *Justice-Impacted Individuals in the Pipeline: A National Exploration of Law School Policies and Practices*, Law School Admission Council, LSAC (Feb. 3, 2021), <https://www.lsac.org/data-research/research/justice-impacted-individuals-pipeline-national-exploration-law-school>.

<sup>125</sup> *Mission Statement*, LSAC, <https://www.lsac.org/about/mission-history> (last visited Mar. 22, 2023) (emphasis added).

<sup>126</sup> *ABA Profile of the Legal Profession 2022*, ABA (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>; see also *Summary Tape File 1. Profile of General Population and Housing Characteristics*, U.S. CENSUS BUREAU (2010), <https://www.census.gov/data/datasets/1990/dec/summary-file-1.html>.

<sup>127</sup> See *ABA Profile of the Legal Profession 2022*, *supra* note 126.

<sup>128</sup> See Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—A Case for Cultural Competency*, 38 SUL REV. 1, 39 (2010); Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1012 (2009).

<sup>129</sup> Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 287 (2014).

students with non-traditional legal backgrounds.<sup>130</sup> But very few of these efforts have focused on formerly incarcerated or system-involved (convicted but not imprisoned) students,<sup>131</sup> and as demonstrated by the present results, even fewer contemplate or seek out applications from currently incarcerated individuals.<sup>132</sup>

In the United States, imprisonment is unfortunately not an uncommon occurrence. Today, approximately 2.2 million Americans are behind bars,<sup>133</sup> and almost 20 million U.S. citizens—roughly 8% of the adult population—now bear the mark of a felony conviction,<sup>134</sup> adding to the roughly 77.7 million who have criminal records already on file with the FBI.<sup>135</sup> Combined, these statistics make clear that a substantial portion of our population has experienced conviction and/or imprisonment, and overwhelmingly, those most impacted by the ubiquity of our criminal legal system are racial minorities. In its 2018 report, the Sentencing Project found that Black and Latino citizens are far more likely than their White counterparts to experience confinement, noting “[a]lthough African Americans and Latinos comprise 29% of the U.S. population, they make up 57% of the U.S. prison population. This results in imprisonment rates for African American and Hispanic adults that are 5.9 and 3.1 times the rate for white adults, respectively . . . .”<sup>136</sup> When

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<sup>130</sup> See Bodamer & Langer, *supra* note 124 (discussing efforts made in this area).

<sup>131</sup> See *PREP Scholarship Fund*, N.Y.U., <https://www.law.nyu.edu/NYULawPREPScholarship> (last visited Mar. 22, 2023); see also *Yale Access to Law School Program*, YALE L. SCH., <https://law.yale.edu/centers-workshops/law-and-racial-justice-center/access-law-school> (last visited Mar. 22, 2023); *New Scholarship Helps Formerly Incarcerated Students Come Full Circle*, SEATTLE U SCH. L. (Oct. 6, 2012), <https://law.seattleu.edu/about/newscenter/2021/new-scholarship-helps-formerly-incarcerated-students-come-full-circle.html>; Chrissy Holman, *Formerly Incarcerated Law Students Advocacy Organization (FILSAA) and their Path to the Legal Workplace*, CUNY SCH. L. (Dec. 3, 2020), [https://www.law.cuny.edu/newsroom\\_post/formerly-incarcerated-law-students-advocacy-organization-filsaa-and-their-path-to-the-legal-workplace/](https://www.law.cuny.edu/newsroom_post/formerly-incarcerated-law-students-advocacy-organization-filsaa-and-their-path-to-the-legal-workplace/).

<sup>132</sup> See Austin, *supra* note 4 (noting that the only known effort to recruit and support currently incarcerated applicants is that initiated by Dean Niedwiecki of Hamline Mitchell Law School).

<sup>133</sup> Sawyer & Wagner, *supra* note 8.

<sup>134</sup> Shannon et al., *supra* note 8, at 1814.

<sup>135</sup> See Gary Fields & John Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

<sup>136</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.



considering application access obstacles to U.S. law schools for those currently incarcerated, data makes clear that the issue impacts minoritized populations to a far greater extent than it does White applicants.<sup>137</sup> By creating a system of online applications only that most U.S. law schools refuse to work around, LSAC has directly undercut their stated goal to provide “innovative solutions to *expand and diversify the range of prelaw students.*”<sup>138</sup>

For those with a conviction history, adding to the application access obstacle is the continued use of criminal history inquiries in the law school admission process.<sup>139</sup> Probing an applicant’s prior contact with the criminal legal system,<sup>140</sup> criminal history inquiries are purportedly employed to ensure campus safety and to protect law schools from unnecessary liabilities. But research does not support this justification.<sup>141</sup> Moreover, evidence shows that the racial composition and jurisdictions of law schools shape criminal history inquiries,<sup>142</sup> and that such inquiries likely cause application attrition among those with a conviction history.<sup>143</sup> As such, criminal history inquiries have been eliminated by statute in several U.S. jurisdictions.<sup>144</sup> Nonetheless, law schools are uniformly

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<sup>137</sup> See Bodamer & Langer, *supra* note 124.

<sup>138</sup> See *Mission Statement*, *supra* note 125.

<sup>139</sup> James M. Binnall & Lauren M. Davis, *Do They Really Ask That? A National Survey of Criminal History Inquiries on Law School Applications*, 32 STAN. L. & POL’Y REV. ONLINE 1 (2021); see also Binnall, *supra* note 1, at 111.

<sup>140</sup> *Id.*

<sup>141</sup> See Malgorzata J.V. Olszewska, *Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants’ Disciplinary Background Information and Its Relation to Campus Crime* (2007) (Ph.D. dissertation, East Carolina University); Bradley Custer, *College Admissions Policies for Students with Felony Convictions: Why They Are Not Working at One Institution*, 88(4) COLL. & UNIV. 28 (2013); Bradley Custer, *Admissions Denied: A Case Study of an Ex-Offender*, 219 J. COLL. ADMISSION 16 (2013).

<sup>142</sup> See James M. Binnall & Nick Petersen, *Criminal History Inquiries and Minority Threat in the Legal Profession: An Analysis of Law School and State Bar Admission Applications*, \_\_ L. & POL’Y \_\_ (2023) (forthcoming).

<sup>143</sup> See Alan Rosenthal et al., *Boxed Out: Criminal History Screening and College Application Attrition*, CTR. CMTY. ALTS. 9 (Mar. 2015),

<http://www.communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf> (finding that “throughout the SUNY system as a whole, each year 2,924 applicants check the box disclosing a felony conviction. Of those, 1,828 do not complete the application and are never considered for admission, resulting in a mean felony application attrition rate of 62.5 percent – almost two-thirds of all such applicants”).

<sup>144</sup> See, e.g., Noel Vest et al., *Celebrating Banning the Box in Higher Education in California*, ROOT & REBOUND (Oct. 22, 2020),

<https://rootandrebond.medium.com/celebrating-banning-the-box-in-higher-education-in-california-e50bf01e0f06>.

exempted from those reforms,<sup>145</sup> and continue to question applicants about their prior criminal history and use those responses when evaluating a prospective law student's application.

Results from the present study demonstrate clearly that U.S. law schools, with notable exceptions, have not – in a meaningful way – worked to remove application barriers for those in custody. Instead, law schools rely exclusively on LSAC's application system, which is entirely online and without the possibility of exception despite a common understanding that those in custody do not have effectual internet access. Along with criminal history inquiries, which are used by all but two U.S. law schools, application access barriers make pursuing a legal career daunting for those with conviction histories and nearly impossible for those currently incarcerated.

### CONCLUSION

In 2021, the American Bar Association's (ABA) House of Delegates initiated a mandate that would require law schools to provide bias training.<sup>146</sup> This change corresponds with a June 2020 letter in which 150 law school deans joined together in urging the ABA to consider instituting such a requirement "as part of a wider anti-racism movement in legal education."<sup>147</sup> However, this movement towards inclusivity in legal education remains incomplete when it implicitly excludes formerly incarcerated people from participating.

Formerly incarcerated prospective students, the general student body, and future clients are all disserved by the status quo of limiting applicants to those with internet access. In a study conducted by Dr. Megan Denver and Dr. James M. Binnall, for example, participants noted their desire to draw upon their own experiences to serve clients facing similar circumstances.<sup>148</sup> Complicating access to the law school application process therefore denies formerly incarcerated people the ability to use their lived experience in service of clients and denies clients access to lawyers who are most intimately familiar with the criminal legal system. Moreover, it denies other students the ability to engage with the critically important perspectives of formerly incarcerated people. In their pursuit of creating more culturally competent lawyers, law schools should

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<sup>145</sup> See, e.g., CAL. EDU. CODE § 66024.5(b) (2020).

<sup>146</sup> Karen Sloan, *U.S. Law Students to Receive Anti-Bias Training After ABA Passes New Rule*, REUTERS (Feb. 14, 2022), <https://www.reuters.com/legal/legalindustry/us-law-students-receive-anti-bias-training-after-aba-passes-new-rule-2022-02-14/>.

<sup>147</sup> *Id.*

<sup>148</sup> See La Rue, *supra* note 102, at 29.

recognize the opportunity available to them to create more inclusive and diverse classrooms by simply adding a link to their admissions webpages or allowing LSAC to do so.

## APPENDIX

## ABA Accredited Law Schools by State

Schools	Schools that will Provide and Process	Schools that will Provide not Process	Schools that will not Provide (* denotes no response)
<b>Alabama</b>			
University of Alabama			X
Faulkner			X
Samford			X
<b>Alaska</b>			
No Schools			
<b>Arizona</b>			
University of Arizona			X
Arizona State		X	
<b>Arkansas</b>			
University of Arkansas, Fayetteville			X
University of Arkansas, Little Rock			X
<b>California</b>			
University of California, Berkeley			X
University of California, Davis			X
University of California, Hastings			X
University of California, Irvine			X
University of California, Los Angeles		X	

USC			X
California Western University			X
Chapman			X
Golden Gate			X*
Loyola Marymount University			X
Pepperdine University		X	
Santa Clara			X
Southwestern	X		
Stanford			X
University of San Diego			X
University of San Francisco			X
University of the Pacific (McGeorge)			X
Western State University- Irvine			X
<b>Colorado</b>			
University of Colorado			X
Denver			X
<b>Connecticut</b>			
University of Connecticut			X
Quinnipiac University			X
Yale			X*
<b>Delaware</b>			
Widener			X*
<b>District of Columbia</b>			
American University			X
Catholic University	X		

University of DC			X
Georgetown			X*
George Washington University			X
Howard			X
<b>Florida</b>			
Ave Maria			X
Barry University			X
University of Florida	X		
Florida A&M			X
Florida International			X
Florida State			X
University of Miami		X	
Nova Southeastern			X*
St. Thomas			X
Stetson			X
<b>Georgia</b>			
Atlanta's John Marshall		X	
Emory			X
University of Georgia			X
Mercer			X
Georgia State			X
<b>Hawaii</b>			
University of Hawaii			X
<b>Idaho</b>			
University of Idaho			X
<b>Illinois</b>			
University of Chicago			X*
Chicago-Kent			X
DePaul	X		

University of Illinois			X
UIC John Marshall			X
Loyola Chicago			X
Northern Illinois			X
Northwestern			X*
Southern Illinois			X*
<b>Indiana</b>			
University of Indiana, Bloomington			X
University of Indiana, Indianapolis			X
Notre Dame			X
<b>Iowa</b>			
Drake University			X
Iowa University			X
<b>Kansas</b>			
Kansas University			X
Washburn			X
<b>Kentucky</b>			
Kentucky University			X
Louisville			X
Northern Kentucky			X*
<b>Louisiana</b>			
Louisiana State			X
Loyola New Orleans			X
Southern			X*
Tulane			X*
<b>Maine</b>			

University of Maine			X
<b>Maryland</b>			
University of Baltimore			X
University of Maryland			X
<b>Massachusetts</b>			
Boston College	X		
Boston University		X	
Harvard University			X
University of Massachusetts		X	
New England			X*
Northeastern	X		
Suffolk			X
Western New England			X
<b>Michigan</b>			
Detroit Mercy			X
University of Michigan			X
Michigan State University			X
Wayne University			X*
Western State - Cooley University			X*
<b>Minnesota</b>			
University of Minnesota			X
Mitchell Hamline	X		
St. Thomas MN			X
<b>Mississippi</b>			
Mississippi			X
Mississippi College			X



<b>Missouri</b>			
Missouri			X*
Missouri-Kansas City			X*
Saint Louis University			X*
Washington University, St. Louis		X	
<b>Montana</b>			
University of Montana			X
<b>Nebraska</b>			
Creighton University			X
University of Nebraska		X	
<b>Nevada</b>			
University of Nevada, Las Vegas			X
<b>New Hampshire</b>			
University of New Hampshire	X		
<b>New Jersey</b>			
Rutgers			X
Seton Hall		X	
<b>New Mexico</b>			
University of New Mexico			X*
<b>New York</b>			
Albany			X
Brooklyn			X
CUNY			X
Columbia			X
Cornell			X
Fordham	X		
Hofstra			X
New York Law			X
New York University		X	

Pace			X*
Yeshiva (Cardozo)	X		
St. John's		X	
SUNY Buffalo		X	
Syracuse			X
Touro			X*
<b>North Carolina</b>			
Campbell			X
Duke			X
Elon			X
North Carolina		X	
North Carolina Central			X*
Wake Forest			X
<b>North Dakota</b>			
North Dakota		X	
<b>Ohio</b>			
Akron	X		
Capital			X
Case Western	X		
Cincinnati			X
Cleveland State			X
Dayton			X
Ohio Northern			X*
Ohio State			X*
Toledo			X
<b>Oklahoma</b>			
Oklahoma			X*
Oklahoma City			X
Tulsa			X
<b>Oregon</b>			
Lewis and Clark		X	
Oregon		X	
Willamette			X
<b>Pennsylvania</b>			
Drexel			X
Duquesne			X
University of Pennsylvania			X

Penn State Dickinson			X*
Penn State University Park			X*
Pittsburgh			X
Villanova			X
Temple	X		
Widener Commonwealth			X
<b>Puerto Rico</b>			
Inter-American		X	
Pontifical Catholic			X*
Puerto Rico			X*
<b>Rhode Island</b>			
Roger Williams			X
<b>South Carolina</b>			
Charleston			X
South Carolina		X	
<b>South Dakota</b>			
South Dakota			X*
<b>Tennessee</b>			
Belmont			X
Lincoln Memorial	X		
Memphis			X
Vanderbilt			X*
Tennessee		X	
<b>Texas</b>			
Baylor			X
Houston			X
UNT Dallas			X*
St. Mary's			X
South Texas Houston			X
Southern Methodist			X
Texas			X
Texas A&M	X		
Texas Southern			X
Texas Tech			X
<b>Utah</b>			

Brigham Young			X
Utah			X
<b>Vermont</b>			
Vermont			X*
<b>Virginia</b>			
Appalachian			X
George Mason			X
Liberty			X
Regent			X
Richmond			X
Virginia			X
Washington and Lee			X
William and Mary			X*
<b>Washington</b>			
Gonzaga			X
Seattle		X	
University of Washington	X		
<b>West Virginia</b>			
West Virginia			X
<b>Wisconsin</b>			
Marquette		X	
Wisconsin			X
<b>Wyoming</b>			
Wyoming			X*