

# WHY DIGNITY MATTERS: DIGNITY AND THE RIGHT (OR NOT) TO REHABILITATION FROM INTERNATIONAL AND NATIONAL PERSPECTIVES

AMANDA PLOCH\*

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## I. INTRODUCTION

All too often within the modern prison system, the situation of a single inmate can epitomize issues much larger than the particular individual involved. This was the case with John,<sup>1</sup> an inmate I met at a low-security prison tucked in a quiet, rural area of the northeast United States, who often filled the space of a volunteer-led discussion group with long, bitter monologues about his prison experience. Regardless of whether his frustration was justified or not, it was clear that he was filled with a lot of brokenness and hurt, which could not be fixed by the untrained ears of this discussion group alone. When asked if there was professional counseling available for John, a chaplain on staff at the prison replied that the only counseling option was for inmates to talk to religious clergy. With only some clergy serving all those inmates - a large portion of whom may not have wanted to turn to clergy for their counseling needs - it was clear that this simply was insufficient.

Thousands of miles away was David, a teenage boy in pre-trial detention in South Africa, who once made a simple request—to borrow a book from me, a literacy volunteer. Although the youth detention center had limited resources for learning, volunteers were advised not to lend books to the boys because they were known to destroy them or use the pages as rolling papers for drugs. When questioned whether he would take care of a book if lent one, he replied, “I would never hurt a book.” I later learned that the boy still treasured a book given to him by a former teacher.

These two individuals behind bars in opposite hemispheres - one needing professional help, and the other merely wanting a book to read - both vividly represent the need for a better model to promote rehabilitation of incarcerated individuals worldwide. This article examines the veracity of the right of prisoners to rehabilitation across various contexts, and focuses on how the concept of human dignity can support a strong right to rehabilitation. Some countries and international documents already assert that prisoners do have a right to rehabilitation; recognition of the right, however, is not universal.

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1. The names used in this introduction have been changed.

This article argues that prisoners should have a right to rehabilitation; this right entails more than the government merely providing sporadic opportunities for rehabilitation, as will be explained. Additionally, although many justifications for prisoner rehabilitation exist, human dignity should be the primary justification for prisoner rehabilitation; this is because the concept of “human dignity” has the strongest ability to promote a concrete, immutable right to rehabilitation for prisoners, rather than merely having vacillating rehabilitative services. Prisoner rehabilitation grounded in recognition of human dignity is more focused on the individual prisoner as recipient, rather than on how larger society benefits from rehabilitation. Currently, however, prisoner rehabilitation is not always underpinned by recognition of human dignity. The distinction between rehabilitation grounded in human dignity on the one hand, and rehabilitation grounded in other ideas, is crucial, as the particular justifications given for rehabilitation in a given context can affect how prisoner rehabilitation is carried out in practice.<sup>2</sup>

Section II provides theoretical grounding for major concepts in this article, including human dignity and rehabilitation. This section explores various justifications for prisoner rehabilitation, and why human dignity is the best lens through which to analyze and justify prisoner rehabilitation—namely, because human dignity strongly supports an actual right to rehabilitation for prisoners.

Sections III and IV explore dignity and prisoner rehabilitation through analysis of international documents, as well as national statutes and case law. Country-specific analysis focuses on the United States, the United Kingdom, and Germany. The United States is one area of focus because of its massive incarceration rate compared to other industrialized Western nations, while Germany is selected because it embraces a model of incarceration quite different from - and more facilitative of rehabilitation compared to - that of the

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2. The options laid out here—dignity-based rehabilitation and rehabilitation not based on prisoner dignity—draw on the arguments made by Edgardo Rotman, who explores humanistic/rights-based rehabilitation, but does not focus extensively on human dignity in such discussions. Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1026 (1986).

United States. Lastly, the United Kingdom is chosen because it hypothetically has a position between these two poles; the United Kingdom is a participant in the robust European regional human rights system, yet also shares deep roots with the United States, including with regards to development of penal structures.

Section III looks at some regimes and international documents which simultaneously recognize the importance of human dignity and prisoner rehabilitation. For example, the International Covenant on Civil and Political Rights makes a strong connection between rehabilitation and human dignity. Also, Germany's Basic Law mentions dignity, and the judiciary has supported the right to rehabilitation.

Section IV explores the other, more unfortunate side, exploring instances where neither human dignity nor prisoner rehabilitation receives as strong support as both should. This section scrutinizes the United States and United Kingdom as illustrative examples. Though U.S. written law largely omits the concept of dignity, the dignity of prisoners is a guiding value for U.S. courts to some degree. The U.S. Supreme Court, however, has never taken the step of stating that adult prisoners have an affirmative right to rehabilitation. Although European regional law (specifically for this discussion, the European Convention on Human Rights) influences both the United Kingdom and Germany, dignity does not appear to be a central guiding concept in British law.

Section V closes the article by presenting recommendations geared toward the United States for how the concept of human dignity can - and should - be used to strengthen the right of prisoners to rehabilitation, tying together theoretical arguments and practical realities explored earlier in the paper. This section also briefly explores reasons for divergent state behavior, and how international law affects national practice.

## II. FOUNDATIONS OF HUMAN DIGNITY AND PRISONER REHABILITATION

### A. *Prisoner Rehabilitation*

#### 1. *Prisoner Rehabilitation Is a Valuable Penal Goal*

Punishment can have several aims, of which rehabilitation is just one. Other goals of punishment include retribution, deterrence, incapacitation, and condemnation.<sup>3</sup> Legal systems differ in the emphasis they place on some goal(s) over others. This article proceeds on the premise that rehabilitation of prisoners is a valuable, worthwhile, and positive goal, and should be pursued within all modern prison systems. Rehabilitation improves the lives of inmates, helping them to succeed upon reentering society. For example, there is evidence that educational programs and vocational training for prisoners can increase job market success following incarceration and reduce the chance that former inmates will end up behind bars in the future.<sup>4</sup> Prisoner services addressing mental health or substance abuse can potentially reduce recidivism as well.<sup>5</sup> Taking this premise as true - that rehabilitation services improve the lives of prisoners - this article argues that the best way to promote prisoner rehabilitation is by establishing a right to rehabilitation; additionally, the right to rehabilitation should be grounded in the dignity of prisoners.

Many academics, politicians, and practitioners will disagree with my premise about prisoner rehabilitation and will argue that prisoner rehabilitation is not a worthy penal goal, or is much less important than other goals. For example, Immanuel Kant, one of the most influential minds in developing and fleshing out the concept of dignity, rejected rehabilitative punishment, because having rehabilitation in prisons would

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3. James Q. Whitman, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 38 (2003) ("All law students are trained to think of punishment as aiming at one of five goals: deterrence, retribution, rehabilitation, incapacitation, or the expression of society's condemnation.").

4. The Re-Entry Policy Council has chronicled many studies to this effect in their most recent report. COUNCIL OF STATE GOV'TS, *REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY* 213 (2005).

5. *See id.* at 168 (asserting that untreated mental illness is a "strong predictor of recidivism").

be treating the prisoner as a means to an end, with the end being helping society or the prisoner.<sup>6</sup> Kant instead supported the retributive theory of justice—punishing people in return for the crimes they have committed.<sup>7</sup> However, even for those who disagree with this article’s starting premise - that prisoner rehabilitation is a good thing - this article provides a useful illustration of the role which the concept of “human dignity” can have, and arguably *should* have, in addressing modern dilemmas.

## 2. *Operationalizing Rehabilitation*

But of course, a crucial preliminary issue is how to operationalize and define “rehabilitation” itself. Rehabilitation can encompass a wide variety of programs, including vocational training, educational services, and programs meant to address and curb addiction. One definition - useful in this analysis - conceptualizes rehabilitation in a broad way, explaining that rehabilitation is “an effort to remedy a vast array of personal and social problems experienced by some of society’s most disadvantaged members.”<sup>8</sup> In this way, one can view rehabilitation as programs and services provided with the aim of aiding personal improvement and reintegration into society.

## 3. *What a “Right to Rehabilitation” Means, and Why Focus on the Right Itself*

The right to rehabilitation, as opposed to merely “rehabilitation” (without the “right”), carries its own distinct meaning for purposes of this analysis. The right to rehabilitation, as used in this article, means the positive entitlement of prisoners to rehabilitative services, apart from the level of services that the prisoner receives in actuality. When prisoners have a right to rehabilitation, prisons must make efforts to provide rehabilitative services. Though prisons of course vary in their ability

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6. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, 140 (Mary Gregor trans., Cambridge Univ. Press, 1996) (“Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society.”).

7. *Id.* at 141.

8. Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 L. & INEQUALITY 343, 368 (2001). While other definitions may be available, this one captures the essence of what the term means for purposes of this article.

to deliver on this right, the presumption when there is a right to rehabilitation is that prisoners *should receive* rehabilitative services, and that resources *should be made available* for such. In contrast, when there is not a right to rehabilitation, the extent to which prisons provide rehabilitative services - even when resources are readily available - could fluctuate, or prisons might not provide any such services. In other words, when there is a right to rehabilitation, the next question for prisons is how to deliver on this right and actually provide rehabilitative services; when there is not a right to rehabilitation, the next question for prisons is whether to even provide rehabilitative services at all.

It makes sense to focus on the right to rehabilitation for three reasons, rather than looking at aspects of rehabilitation such as programmatic budgets or prisoner participation levels. First, the right to rehabilitation is a more discrete, easily measurable variable to use (though one still subject to considerable debate), compared to using more complicated statistics about the nature of rehabilitation on the ground. Second, even more importantly, the right to rehabilitation is a preliminary background issue; we should analyze whether rehabilitation is a concrete entitlement and moral imperative, as opposed to rehabilitation merely being a component of prison life, prior to determining the level of resources and attention that we give rehabilitation in practice. Our answer to the former issue should inform our answer to the latter, and allows for a more reasoned and thoughtful approach to the provision of rehabilitation and related resource allocation. Third, taking a rights-based approach makes sense given the language of rights commonly found in international and domestic documents alike.

### B. *Human Dignity*

Human dignity is the best justification for prisoners' right to rehabilitation, and is the best lens through which to understand prisoner rehabilitation, as will be discussed in Part C. In order to understand this argument, however, it is crucial to first explore what exactly "human dignity" entails. Admittedly, human dignity is a thorny concept, easily eluding a clear definition or an agreed-upon understanding among varied audiences. This article explores a few definitions especially rele-



vant for the topic of prisoner rehabilitation, but does not settle on any one definition specifically. Choosing one definition over others is not necessary because, as will be explored, human dignity still matters even if its meaning remains up for debate.

### 1. *Human Dignity as Inner Worth*

Immanuel Kant's writing on human dignity has been highly influential in the development of the concept. Kant distinguishes dignity, which he describes as inner worth, from price, which reflects relative worth:

In the realm of ends everything has either a price or a dignity. What has a price is such that something else can also be put in its place as its equivalent; by contrast, that which is elevated above all price, and admits of no equivalent, has a dignity.

That which refers to universal human inclinations and needs has a market price; that which, even without presupposing any need, is in accord with a certain taste, i.e., a satisfaction in the mere purposeless play of the powers of our mind, an affective price; but that which constitutes the condition under which alone something can be an end in itself does not have merely a relative worth, i.e., a price, but rather an inner worth, i.e., dignity.

Now morality is the condition under which alone a rational being can be an end in itself, because only through morality is it possible to be a legislative member in the realm of ends. Thus morality and humanity, insofar as it is capable of morality, is that alone which has dignity.<sup>9</sup>

Humans must treat others with respect and dignity even when others do not necessarily "deserve" such respect.<sup>10</sup> This

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9. IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS*, 52–53 (Allen W. Wood ed., trans., Yale Univ. Press 2002).

10. KANT, *supra* note 6, at 255 ("I cannot withdraw at least the respect that belongs to him in his quality as a man, even though by his deeds he makes himself unworthy of it."). To fit this idea into the terminology of Stephen Darwall, we must show "recognition respect," a type of respect based on an individual being a human being, although we may not feel that the individual deserves "appraisal respect," which is respect given to some-

idea is crucial, and is an essential component of “human dignity” as the concept is used in this article.

## 2. *Human Dignity as Rationality and Autonomy*

One can also view dignity as an individual’s possession of self-control or autonomy.<sup>11</sup> Rationality and inclinations exist in tension with one another, and dignity is partly the quality of being able to be rational instead of giving in to those inclinations.<sup>12</sup> Dignity is thus closely tied to the rationality and moral capacity which humans have a potential to exhibit, and which makes us unique compared to other living creatures. In a sense, we have dignity because we can be rational, and this dignity accompanies us regardless of how we act in reality, similar to the previous explanation of dignity based on inner worth. Innate human characteristics - including inner worth and capacity for rationality - provide the justification for being treated with dignity, apart from the conscious decisions we make.

## 3. *Why Human Dignity Matters Even if Its Meaning Is Contested*

Beyond the meanings explored above, others may use additional, alternate definitions of “human dignity”; those other definitions might be based on specific legal implications, humanitarian concerns, and religious values that certain people attach to the concept. The upshot is that the definition of human dignity is subject to considerable debate. Despite the lack of ultimate consensus on what dignity means, however, human dignity is still an immensely important concept.

One reason why human dignity is nonetheless important is because these various definitions may actually have a common baseline. For example, Christopher McCrudden explains how dignity can be reduced down to a core consisting of three elements: (1) an ontological claim, based on intrinsic worth, (2) a relational claim (as to what treatment violates intrinsic

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one based on our judgment of their character or actions. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 122–23 (2006).

11. Michael Meyer, *Kant’s Concept of Dignity and Modern Political Thought*, 8 *HIST. EUR. IDEAS* 319, 327 (1987) (exploring Kant’s view of dignity, as well as discussion of dignity by Burke and Paine).

12. *Id.*

worth, and what treatment this worth requires), and (3) a limited-state claim (the state exists for the individual's benefit, because humans have intrinsic worth).<sup>13</sup> Anchored by this minimum core, human dignity does not lose its value as a guiding concept simply because others may attach additional norms to it.

Admittedly, critiques about human dignity abound: even the minimum core is up for debate, and dignity is merely a mask for other ideas such as intrinsic worth, moral capacity, and/or autonomy, such that the word "dignity" could be tossed aside without losing anything meaningful.<sup>14</sup> Lack of consensus about dignity's meaning and importance, however, has not prevented human dignity from becoming an important concept in modern legal and political discourse. In the Twentieth Century, especially in the wake of World War II, the concept of human dignity became prominent in international dialogue, and the United Nations' utilization of "dignity" led to its use by other bodies.<sup>15</sup> While the human rights field is a favored venue for discussion of human dignity, the concept has sprung up in discourse on a wide variety of other topics as well.<sup>16</sup>

However contested its ultimate role is, the pervasiveness of human dignity, as a concept, is undeniable. This pervasiveness alone is reason enough to consider how the concept of

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13. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 679 (2008).

14. E.g., Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419 (2003) (equating human dignity with respect for autonomy); Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC (May 28, 2008), <http://www.tnr.com/article/the-stupidity-dignity> (noting the subjective nature of dignity and the potential for dignitarian arguments to impede the use of certain biomedical developments).

15. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1938 (2003).

16. E.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 916 (1992) (Stevens, J., concurring) (discussing dignity as related to abortion); *Commune de Morsang-sur-Orge*, CE Ass., Oct. 15, 1995, Rec. Lebon 372 (Fr.) (discussing dignity as related to dwarf tossing); Bartha-Maria Knoppers, *Human Dignity: In Danger of Banality? (The Case of Cloning)*, 35 CASE W. RES. J. INT'L L. 385 (2003) (discussing dignity as related to cloning); Jordan Paust, *The Human Right to Die with Dignity: A Policy-Oriented Essay*, 17 HUM. RTS. Q. 463 (1995) (discussing dignity as related to end-of-life decisions).

human dignity comes to bear on concrete issues of importance in modern society, such as prisoner rehabilitation. Even more importantly, it turns out that human dignity is especially worth analyzing in connection with prisoner rehabilitation because of the powerful work that human dignity can do in promoting a concrete right to rehabilitation.

### C. *Bringing Human Dignity and Prisoner Rehabilitation Together*

#### 1. *Justifications for Rehabilitation*

Arguments about prisoner rehabilitation reflect various opinions about why rehabilitation matters, if indeed it matters at all. This section explores various justifications for rehabilitation, particularly focusing on how dignity factors into some - but not all - of these justifications. It also theorizes how certain justifications may affect the way in which rehabilitation unfolds in practice.

##### a. *Macro-Level Impact and Utilitarianism*

One justification for prisoner rehabilitation is that such services can help redress longstanding, macro-level socio-economic inequalities and problems; under this view, rehabilitation is not important for its individual impact, but rather for how it remedies larger societal difficulties.<sup>17</sup> For example, if having low levels of education and wealth contributes to people committing crimes, prison rehabilitation can combat these underlying factors by providing marketable skills and increasing the chance of job stability upon release, which in turn can reduce recidivism and have other positive spill-over effects.

A problem with this theory of rehabilitation is that the prisoner becomes a means to an end, against the Kantian view of punishment discussed earlier. This theory might focus too heavily on measurements of progress and benefits to larger society caused by prisoner rehabilitation; this obsession with quantification would be at the expense of considering the im-

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17. See *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring) (asserting that indeterminate sentences and parole “seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society’s own best protection”); Rotman, *supra* note 2, at 1025–26, 1036 (describing authoritarian/paternalistic rehabilitation).

plementation of rehabilitation on a personal level and the individuals whose lives impact those statistics.

An offshoot of the macro-level view is the utilitarian perspective of rehabilitation. In this perspective, a state engages in cost-benefit analysis to determine whether the social benefits of rehabilitation - such as helping prisoners get jobs upon release, improving their education, and reducing criminal recidivism - outweigh the costs of providing rehabilitative services. Rehabilitation would only be provided to the extent that societal benefits of providing rehabilitation outweighed costs. While prisoners who receive rehabilitation here do benefit individually, the utilitarian focus allows for societal interests to trump the importance of the individual. These theories arguably connect to the authoritarian/paternalistic model of rehabilitation discussed by Edgardo Rotman,<sup>18</sup> where prisoners must conform themselves to larger correctional policies, rather than allowing for individualized development.<sup>19</sup> Government interests prevail, and prisoners passively receive rehabilitative services for the benefit of achieving social goals.<sup>20</sup>

b. *Dignity of Person Providing Rehabilitation and of Society as a Whole*

A second justification for rehabilitation, drawing from Kant, is that prisoners should have rehabilitative services based on the idea that non-prisoners should not harm their own sense of dignity. Kant warned of “punishments that dishonor humanity itself,” which “make a spectator blush with shame at belonging to a species that can be treated that way.”<sup>21</sup> R. James Fyfe explains that Kant’s idea of human dignity is more concerned with acting rationally so as not to reduce our own dignity, instead of how our actions affect the dignity of others.<sup>22</sup> Under this view, if a prison official prohibits access to

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18. Though his analysis focuses on the United States, his exploration of rehabilitation may have larger implications beyond the U.S., and so is worth discussing in this section.

19. Rotman, *supra* note 2, at 1025–26, 1036.

20. *See id.* at 1036.

21. KANT, *supra* note 6, at 255.

22. R. James Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, 70 SASK. L. REV. 1, 11 (2007) (quoting Izhak England, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1919 (2000)).

rehabilitative services, then this official could be said to be denying the human bond between him/herself and the inmates, inflicting damage to *the official's own dignity*.<sup>23</sup> The provision of rehabilitation services to prisoners can thus affirm the dignity of the person providing rehabilitation, and individuals in larger society;<sup>24</sup> while dignity is still a guiding value here, the main focus would be what the provision of rehabilitation says about the humanity and dignity of those other than the inmate.

c. *Dignity of the Prisoner*

A third justification of rehabilitation is the dignity of the prisoners themselves—namely, that prisoners should receive rehabilitation because of the innate capacity they have to act morally and rationally. An aspect of dignity is capacity for self-control, autonomy, rationality, and resisting temptations;<sup>25</sup> prisons should thus provide rehabilitation out of respect for this innate capacity of prisoners and to assist prisoners in exercising their own autonomy. Indeed, one might judge the effectiveness of rehabilitation by its ability to empower prisoners, helping them to be more emotionally mature and become better problem-solvers,<sup>26</sup> all of which speaks to this moral capacity and dignity of prisoners. Expanding on this view, prisoners should also receive rehabilitation based on their inherent worth as human beings. The intrinsic worth of human beings,

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23. Rotman notes the related “psychological need” of prison employees: “[d]ismantling the rehabilitative idea will hurt the morale of correctional officers by depriving them of a justifying philosophy that gives their work purpose and dignity.” Rotman, *supra* note 2, at 1034 (citing J. Irwin, *The Changing Social Structure of the Men’s Prison*, 8 CORRECTIONS & PUNISHMENT 21, 32 (1977)).

24. As Elizabeth Anderson indicates, it is possible to “detach claims to respect from measures of worth that one may have relative to other people, and ground it in something all members of society share—their humanity,” turning the provision of rehabilitative services into promotion of respect for humanity as a whole and a reflection of shared humanity among individuals. Elizabeth Anderson, *Emotions in Kant’s Later Moral Philosophy: Honor and the Phenomenology of Moral Value*, in KANT’S ETHICS OF VIRTUE 123, 140 (Monika Betzler ed., 2008).

25. Meyer, *supra* note 11, at 327.

26. See Jeremy Coylewright, *New Strategies for Prisoner Rehabilitation in the American Criminal Justice System: Prisoner Facilitated Mediation*, 7 J. HEALTH CARE L. & POL’Y 395, 406 (2004).

and the prohibition of violation of that intrinsic worth, together are two of McCrudden's three core elements of dignity.<sup>27</sup>

Rotman's humanistic/rights-based model of rehabilitation encompasses these inherent-worth and moral capacity arguments for rehabilitation.<sup>28</sup> This model is individualized, encouraging prisoners' self-awareness as a means to transformation.<sup>29</sup> It is within the humanistic model, more so than the authoritarian/paternalistic model, that dignity comes into play; a right to rehabilitation, in the words of Rotman, "requires a penal policy that maintains scrupulous respect for the dignity of prisoners and provides for the genuine fulfillment of their basic human needs, which go beyond mere physical survival."<sup>30</sup> He further states that "the rights model views rehabilitation from the perspective of the offender—as the culmination of a continuum of rights guaranteeing the dignity of human beings confronted with criminal conviction."<sup>31</sup> Rotman gives other passing mention to dignity a few additional times, but does not focus extensively on dignity as its own separate concept. Although his model is useful, Rotman does not go far enough in discussing the dignitarian implications of the humanistic/rights-based model. While this may simply be a question of differing research perspectives and priorities, looking at dignity as a discrete topic shows recognition of the independent weight and value that word has in international and domestic law.

The dignity-as-intrinsic-worth justification for rehabilitation and moral capacity justification (both partly embodied in the humanistic/rights-based model of Rotman), share a powerful aspect in common: by justifying prisoner rehabilitation using the innate characteristics of prisoners, measuring the tangible results of rehabilitation (such as reduced recidivism) is less important than the provision of these services in the first

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27. McCrudden, *supra* note 13, at 679.

28. Rotman also suggests that under the humanistic model, recognition of individual rights and achievement of social goals are not necessarily mutually exclusive. Rotman, *supra* note 2, at 1026, 1034, 1036.

29. *Id.* at 1026.

30. *Id.* at 1027.

31. *Id.* at 1037.

place, and macro-level cost-benefit analysis takes a back seat.<sup>32</sup> These two justifications can provide a powerful counterargument to those who critique the effectiveness of prisoner rehabilitation;<sup>33</sup> if providing rehabilitation is valuable in itself because it respects the moral capacity, dignity, and inherent worth of prisoners, any measurable positive effects of rehabilitation are to be celebrated, but should not necessarily be required for rehabilitation to continue.<sup>34</sup>

d. *Non-Degradation of the Prisoner*

A fourth justification for rehabilitation is non-degradation of prisoners.<sup>35</sup> Under this view, prisoners should not leave prison in worse condition than when they entered, such as with diminished intelligence and work skills, as a result of their incarceration. Rehabilitation thus counteracts prison's degrading effects, which is the focus here rather than improvement beyond the amount of degradation experienced. While it is possible that we might not want prisoners to experience degradation precisely because of their inherent dignity, the non-degradation view can also be based on degradation's harmful spill-over effects on society as a whole, once again bringing in macro-level analysis and cost-benefit considerations. The result is that the extent to which dignity drives this justification cannot be taken for granted. As the above analysis shows, many different rationales for prisoner rehabilitation can be at play for those wishing to promote rehabilitation.

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32. *Id.* at 1035–37 (describing how effectiveness of rehabilitation and rehabilitation as a right interact). One could alternatively argue that this justification redefines/recalibrates cost-benefit analysis, rather than supplanting cost-benefit analysis. To the extent, however, that dignity and moral capacity are what cause this recalibration, this justification still marks a valuable departure from cost-benefit analysis discussed earlier.

33. *See, e.g.*, Peter J. Lewis, *Prison Has to Work*, 151 (6994) NEW L. J. 1121, 1121 (2001) (explaining, based on author's own experience as an inmate in a British prison, that "courses are simply a way of rubberstamping inmates and thereby lulling a gullible public into thinking that prison really does work, whilst at the same time justifying huge amounts of funding on schemes that have little or no value to the average inmate.").

34. *See* Rotman, *supra* note 2, at 1036–37 (describing the independence of the value of rehabilitation from its effectiveness).

35. *See id.* at 1034 (framing rehabilitation as a countermeasure to the ills of incarceration). The anti-degradation justification of rehabilitation will be explored later on in the context of American views of rehabilitation.



## 2. *Why Dignity of the Prisoner Is the Most Important Justification for Rehabilitation*

Given these various justifications for rehabilitation - cost-benefit analysis, dignity of prison staff/society, dignity of prisoners, and non-degradation of prisoners - the most important justification for rehabilitation is the dignity of prisoners themselves. Grounding rehabilitation in the dignity of prisoners creates stronger support for a positive, constant right to rehabilitation than any of the other justifications for rehabilitation presented. When dignity explicitly underpins rehabilitative policy, it encourages prison officials and politicians to give more attention to the inherent worth and moral capacity of prisoners while making decisions about the provision of rehabilitative services; in turn, the focus on prisoners' moral capacity and inherent worth helps ensure that rehabilitation is conceived of as a right of prisoners. Taking this argument a step further, having an actual right to rehabilitation - a right grounded in dignity - is preferable to prisons merely providing services without stating that prisoners have a *right* to those services. This is because a concrete right to rehabilitation can trump other concerns that could infringe on the level of rehabilitation provided, such as rehabilitation's effectiveness, government interests, and paternalistic macro-level concerns.<sup>36</sup> Those other concerns can easily shift from encouraging rehabilitation in some circumstances to discouraging it at other times; in contrast, a right to rehabilitation is unwavering in its mandate that rehabilitative services *must* be provided.

In contrast, the other three justifications for rehabilitation do not push prisoner rehabilitation to its fullest potential. For example, the non-degradation justification merely ensures that prisoners do not deteriorate while in prison, rather than urging their improvement beyond their current state as the dignitarian justification does; the non-degradation justification thus comparatively falls short in the level of services and personal betterment of prisoners that it entails. Macro-level analysis and cost-benefit rationales do not promote an absolute,

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36. See Rotman, *supra* note 2, at 1036 ("Where rehabilitation is conceived as a right, effectiveness becomes a secondary consideration and no longer encroaches upon other priorities related to the needs of individual offenders and to the requirements of their actual sociopsychological improvement.").

concrete right to rehabilitation, as the level of services is tied to data and measures of effectiveness. Additionally, focusing on the dignity of prison staff and larger society unhelpfully shifts attention away from the recipients of services and the actual prison environment; this makes it easier to lose sight of the importance of prisoner rehabilitation in favor of myriad other items of concern, such as employment terms and working conditions, in the case of prison staff, and even more additional concerns in the case of larger society. In other words, when the dignity of people *other than prisoners* is the justification for rehabilitation, then rehabilitation is only a priority to the extent that other issues do not instead grab away the attention of those people.

Knowing for sure how causation between human dignity and rehabilitation works may be impossible. Indeed, there may be no way to determine if certain countries or international documents promote rehabilitation because they value the human dignity of prisoners (“we value human dignity, and therefore prisoners have a right to rehabilitation”), or if they promote human dignity because they value it as one of many benefits of prisoner rehabilitation (“we value prisoner rehabilitation, and therefore we support human dignity”). In the end, this distinction may be inconsequential or at least better left to fuller extrapolation elsewhere. For now, what matters is that those who want to promote prisoner rehabilitation should focus on human dignity as a justification for rehabilitation, because this justification most strongly encourages a concrete, constant, non-fluctuating right to rehabilitation for prisoners, compared to the other justifications mentioned above. With this explanation in mind, discussion now turns to how international documents and national law treat human dignity and prisoner rehabilitation.

### III. STATE AND INTERNATIONAL PRACTICE SUPPORTING DIGNITY AND THE RIGHT TO REHABILITATION

Two points emerge based on the analysis of national and international law in this article. First, not every regime/international document that names human dignity as a guiding value also recognizes the right of prisoners to rehabilitation. Second, many regimes/international documents that do recognize the right of prisoners to rehabilitation also name

human dignity as a guiding value.<sup>37</sup> This section explores contexts in which there is both the right of prisoners to rehabilitation and promotion of human dignity, illustrating the powerful connection that can and should exist between these two concepts.

### A. *International Documents*

#### 1. *The Universal Declaration of Human Rights: Laying the Groundwork*

The twentieth century saw an explosion in the volume of international human rights instruments. One of the most influential is the Universal Declaration of Human Rights (UDHR),<sup>38</sup> which was adopted by the United Nations in 1948 and has since been called one of the three pillars that make up the International Bill of Rights.<sup>39</sup>

Dignity is a central feature of the UDHR, appearing within the first few words of the preamble (“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”), and later in the preamble again.<sup>40</sup> Also, three operative articles of the UDHR mention dignity: all people have free and equal dignity at birth,<sup>41</sup> all are “entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality,”<sup>42</sup> and workers have the right to wages such

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37. The argument that a right to rehabilitation and human dignity can coexist in a given regime/document is distinct from an argument about *causation* (for example, that recognition of human dignity *causes* recognition of a right to rehabilitation). The difficulties in addressing causation were discussed in the previous section.

38. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

39. The other “pillars” of the International Bill of Rights are the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

40. “[T]he peoples of the United Nations have in the Charter reaffirmed their faith . . . in the dignity and worth of the human person . . . .” UDHR, *supra* note 38, pmbl.

41. *Id.* art. 1.

42. *Id.* art. 22.

that they are able to have an existence worthy of dignity.<sup>43</sup> At least one other article could be said to indirectly incorporate dignity, without explicitly mentioning the concept.<sup>44</sup>

Switching gears to see how the other main concept of concern for our analysis - prisoner rehabilitation - fares in the UDHR, we find that the articles laying out the basic structure of prisoner rights are very sparse, with remarkably little information given about how prisoner life should unfold. While the document addresses prisoner concerns by, for example, prohibiting torture,<sup>45</sup> mandating the right to trial,<sup>46</sup> and condemning arbitrary arrest,<sup>47</sup> it does not mention prisoner rehabilitation.<sup>48</sup>

This document's vagueness concerning treatment of prisoners generally may be understandable, however, if we view the UDHR as a basic human rights primer of sorts, meant to be expansive in the breadth of issues discussed rather than depth of their discussion. Indeed, the work of fleshing out what many of the rights mentioned in the UDHR mean in reality is done in later instruments. The take-away is that the UDHR exemplifies the emergence of the language of dignity within human rights discourse, and its separate provisions lay the groundwork for more robust exploration of rights subsequently, as will be seen below.

## 2. *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR), though passed by the U.N. General Assembly in 1966, did not receive the requisite state ratifications to come into force until 1976. Like its counterpart the International

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43. *Id.* art. 23, § 3.

44. The words "cruel," "inhuman," and "degrading," used in article 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.") and in other documents, can be associated with dignitarian ideals. *Id.* art. 5. See generally Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves*, 23 *CAN. J. L. & JURISPRUDENCE* 269 (2010).

45. UDHR, *supra* note 38, art. 5.

46. *Id.* arts. 8, 10, 11(1).

47. *Id.* art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile.").

48. For discussion of how other rights, such as to education, might encompass prisoner rehabilitation, see discussion of the International Covenant on Economic, Social and Cultural Rights below.

Covenant on Economic, Social and Cultural Rights (ICESCR), and unlike the UDHR, the ICCPR is legally binding on signatory nations, and not merely an aspirational document.

Article 10 brings dignity into the equation explicitly<sup>49</sup> for prisoners, with Section 1 explaining that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Section 3 of Article 10 goes a step further, stating, “The penitentiary system *shall comprise* treatment of prisoners the essential aim of which shall be their *reformation and social rehabilitation*” (emphases added). Given that the word “shall” is most commonly read as compulsory language, Article 10 seems to create a mandatory requirement to provide rehabilitation. Also, the provision of services shows respect for the prisoners’ inherent dignity, as Article 10 mandates. This document thus moves dignity from being a general grounding for human rights - as was seen in the UDHR - to a specific grounding for the right of prisoners to rehabilitation. By using human dignity to justify rehabilitation, this document illustrates the power of human dignity in promoting rights, and how using the language of dignity may be essential in proclaiming such a right at all.

### 3. *The International Covenant on Economic, Social and Cultural Rights*

The ICESCR was passed by the General Assembly on the same day as the ICCPR, and in similar fashion came into force in 1976, just a few months before the ICCPR. The ICESCR, like the ICCPR, mentions dignity twice in the preamble:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

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49. Like the UDHR, the ICCPR might also indirectly incorporate dignity. ICCPR, *supra* note 39, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”). However, a detailed discussion is beyond the scope of this paper. *See supra* note 44.

Recognizing that these rights derive from the inherent dignity of the human person . . . .

Based on the prominent mention of dignity in the preamble, dignity grounds all the rights in the document. That being said, dignity makes a special appearance in one particular article, as “education shall be directed to the full development of the human personality and the sense of its dignity . . . .”<sup>50</sup> The ICESCR does not specifically mention rehabilitation; however, the document might indirectly promote rehabilitation by mentioning crucial elements of rehabilitative services. For example, the ICESCR states that all have the right to education,<sup>51</sup> and education is often an important element of prisoner rehabilitation programs. Additionally, prisoner rehabilitation can be an avenue for fulfillment of the right to work<sup>52</sup> (such as through vocational training in prison), respect for family<sup>53</sup> and participation in cultural life<sup>54</sup> (through programs that help prisoners maintain positive relationships with their loved ones and communities), and attaining good health<sup>55</sup> (via mental and physical treatment programs, as well as substance abuse programs).

The idea that prisoners may claim rights on par with non-incarcerated individuals as general beneficiaries of the ICESCR is thrown into doubt, however, given that governments can limit individual rights pursuant to Article 4, albeit “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Particularly as protecting society’s general welfare is often a purpose of incarceration, the ability of prisoners to claim the rights mentioned above, or rehabilitation simply as a means to fulfill those rights, could be impeded. The implication is that prisoners and advocates should perhaps additionally turn elsewhere for support of prisoner rights, such as the ICCPR, with its stricter limitations on state derogations.<sup>56</sup>

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50. ICESCR, *supra* note 39, art. 13(1).

51. *Id.*

52. *Id.* art. 6.

53. *Id.* art. 10(1).

54. *Id.* art. 15(1)(a).

55. *Id.* art. 12.

56. 1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the

The ICCPR and ICESCR are meant to be complementary documents, discussing different sets of rights; prisoner treatment is more commonly seen as a civil and political rights issue, and so its omission from the ICESCR and inclusion instead in the ICCPR is understandable. Because the ICESCR - like the other documents of the International Bill of Rights - grounds rights in human dignity, it can therefore be seen as complimentary to the ICCPR's promotion of a human-dignity-based right to rehabilitation for prisoners.

#### 4. *Convention on the Rights of the Child*

Although this article focuses on the rights of adult prisoners, the rights of incarcerated minors merit brief discussion, as the legally binding Convention on the Rights of the Child<sup>57</sup> has achieved near-universal ratification.<sup>58</sup> Mirroring the ICCPR, the Convention mandates that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person . . . .”<sup>59</sup> The document goes so far as to say that incarcerated minors should “be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others . . . .”<sup>60</sup> Providing rehabilitation for incarcerated minors is one way to fulfill this provision of the Convention. Indeed, because children are still learning habits and mindsets

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States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision . . . .

ICCPR, *supra* note 39, art. 7.

57. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

58. The only states that have not ratified the CRC are Somalia and the United States. *Status: Convention on the Rights of the Child*, UN TREATY COLLECTION, [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) (last visited Feb. 25 2012). Many international instruments have not reached this level of widespread state acceptance.

59. CRC, *supra* note 57, art. 37(c).

60. *Id.* art. 40(1).

that will follow them into adulthood, it is difficult to imagine how youth incarceration could successfully reinforce the child's respect for others and self without rehabilitation.

Rehabilitation, cloaked in other words, makes several appearances. For example, children are to be treated in a way that "takes into account . . . the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."<sup>61</sup> Article 40 explains the right to many things considered crucial for effective rehabilitation: "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available . . . ."<sup>62</sup> The use of "shall" stands in contrast to use of the phrase "[w]henever appropriate and desirable" in another portion of that article,<sup>63</sup> further emphasizing the mandatory provision of these services.

##### 5. *American Convention on Human Rights*

The American Convention on Human Rights, adopted in 1969 and monitored by the Organization of American States,<sup>64</sup> parallels some of the documents discussed earlier. It also explicitly injects a dignitarian element into prisoner treatment, stating, "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."<sup>65</sup> The same article further states that rehabilitation is a goal of the penal system: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."<sup>66</sup> One could argue that this article of the Convention falls short of a clear right to rehabilitation, and instead merely presents social readaptation as a

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61. *Id.*

62. *Id.* art. 40(3)(b).

63. *Id.*

64. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]. This document is binding on those countries within the Organization of American States that have ratified it; the United States has yet to ratify the Convention. ORG. OF AM. STATES, *American Convention on Human Rights: General Information of the Treaty*, OAR.ORG, <http://www.oas.org/juridico/english/signs/b-32.html> (last visited Mar. 3, 2012).

65. ACHR, *supra* note 64, art. 5(2).

66. *Id.* art. 5(6).



guiding concept. To the extent that the document explicitly states that readaptation is a goal, rather than retribution, deterrence, or other possible purposes, furtherance of the Convention may require states to provide prisoner rehabilitation. By reading the clauses quoted above together, providing for rehabilitation and social readaptation is an avenue by which to respect the dignity of the incarcerated.

As the above documents illustrate, dignity and prisoner rehabilitation can go hand-in-hand, and human dignity is an essential element of the right to rehabilitation for prisoners. These documents present human dignity as a guiding foundational value, and recognize or support the right of prisoners to rehabilitation. Admittedly, the fact that both dignity and rehabilitation are mentioned does not necessarily mean that human dignity itself is the (sole) justification for rehabilitation. The fact that dignity is specifically mentioned, however, suggests that the documents' authors envision some sort of connection between incarceration and dignity. A clear connection between human dignity and rehabilitation does not appear in the text itself in all instances; these documents nonetheless suggest, however, that international regimes which support a right to rehabilitation also hold human dignity as valuable.

### B. *State Practice- Germany and Continental Europe*

While the international instruments discussed above indicate that dignity has a crucial role to play in promoting a right to rehabilitation for prisoners, it is important to also explore national law to see if human dignity has any leverage or influence on the national level, where more of the real work of prison administration occurs. This section will explore possibilities for promoting human dignity and prisoner rehabilitation on the national level, in particular looking at Germany. The practice of Germany illustrates how placing significance on human dignity as a legal concept can lead to a right to rehabilitation.

Germany energetically proclaims the importance of dignity, featuring the value within Article 1 of its Basic Law:

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.<sup>67</sup>

That the very first article of Germany's most recent constitution focuses on dignity may certainly speak to the importance, at least in theory, of dignity as an underlying concept in modern German law. The constitution does not substantially discuss rights of prisoners specifically.

The German judiciary has emphasized the importance of maintaining the dignity of prisoners. In its famous life imprisonment case,<sup>68</sup> the Federal Constitutional Court noted that in order for life imprisonment to be bearable, the prisoner must have hope of one day getting out; otherwise the human dignity of the prisoner suffers.<sup>69</sup> In coming to this conclusion, the court noted the trajectory of history, where punishments have become increasingly humane and individualized.<sup>70</sup> The court also noted that "penal institutions are obliged, even in the cases of life imprisonment, to promote the rehabilitation of the inmates, to maintain their ability and willingness to function as human beings and to offset damaging consequences caused by the loss of freedom and thereby especially counter all deforming alterations of personality."<sup>71</sup> Here, multiple justifications for rehabilitation are at work, including non-degradation and respect for the dignity of prisoners.

The *Lebach* case is cited for strongly supporting the right to rehabilitation for prisoners.<sup>72</sup> This case arose when a televi-

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67. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, *translated in* DEUTSCHER BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & David Currie, trans., 2010), *available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

68. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 1977, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 45 (187), 1977, *translated in* Jack Greenberg, 45 *BVerfGE* 187 (1977), BILL OF RIGHTS COMPARATIVE LAW MATERIALS (Mar. 26, 2008), <http://www.hrctr.org/safrica/dignity/45bverfge187.html>.

69. *Id.* § III(4)(a).

70. *Id.* § II(1).

71. *Id.* § II(2)(aa).

72. *See* DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY: IN NATIONAL AND INTERNATIONAL LAW 144 ("In its judgment in the so-called *Lebach* case, the Constitutional Court adopted a clear position . . . that con-

sion station attempted to use the likeness of a convicted robber in conjunction with a film about the robbery, and presented a collision between the rights of the media, and the rights of the incarcerated, here specifically their right to dignity and free development of personality.<sup>73</sup> In this case, the Constitutional Court stated that prisoners do have a right to rehabilitation, and this right was grounded in the “constitutional right to human dignity and their related right to develop their own personalities.”<sup>74</sup> Indeed, Article 2(1) of the Constitution states that each person has the right to develop his or her personality freely, subject to the limitation that the individual cannot “violate the rights of others or offend against the constitutional order or the moral law” in doing so.<sup>75</sup> Furthermore, the Court explained that “As bearer of the guaranteed fundamental rights to human dignity the convicted offender must have the opportunity, after completion of his sentence, to establish himself in the community again.”<sup>76</sup>

This case can be characterized as illustrating the German penal theory of “Sozialstaat”- that society must pursue resocialization of prisoners, based on Articles 1 and 2(1) of the German constitution.<sup>77</sup> This theory is community-based, as the community must help prisoners with less-than-optimal social development to encourage their flourishing within society.<sup>78</sup> This theory can be characterized as one in which the state’s obligation to assist those in need translates into a duty to rehabilitate prisoners.<sup>79</sup>

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stitutional rights and duties for both prisoners and prison authorities could be derived from the concept of resocialization . . .”).

73. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202, § A(II)(1)-(2), 1973. The sort of “collision” presented in this case parallels that in the *Venables* case of the United Kingdom, described later in this article.

74. VAN ZYL SMIT, *supra* note 72, at 14 (quoting 35 BVerfGE 202 (235–36)).

75. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 2(1), May 23, 1949, BGBl. I, *translated in* DEUTSCHER BUNDESTAG, *supra* note 67.

76. VAN ZYL SMIT, *supra* note 72, at 14 (quoting 35 BVerfGE 202 (235–36)).

77. *Id.* at 144 (quoting 35 BVerfGE 202 (236)).

78. *Id.*

79. Rotman, *supra* note 2, at 1058.

In addition to the constitutional provisions mentioned above, Article 25 also bears on our exploration of rehabilitation. This article explains how international law interacts with domestic law in Germany: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." Thus, to the extent that general rules of international law protect dignity above and beyond the Basic Law, and to the extent that general rules of international law also support prisoner rehabilitation, then such law binds Germany. Deciding what counts as a general rule of international law, however, could be difficult.<sup>80</sup>

Turning to domestic statutes, the theory of imprisonment enunciated in the life imprisonment case and the *Lebach* case is supported by Germany's Prison Act, which states that "[b]y serving his prison sentence the prisoner shall be enabled in [sic] future to lead a life in social responsibility without committing criminal offence . . . . The execution of the prison sentence shall also serve to protect the general public from further criminal offences."<sup>81</sup> The next section reiterates the reintegration of prisoners following release, stating that "[i]mprisonment shall be so designed as to help the prisoner to reintegrate himself into life at liberty."<sup>82</sup> Furthermore, the state must counteract harm caused by incarceration.<sup>83</sup>

Another intriguing aspect of German prison policy for purposes of our discussion is that prison conditions are to mirror life outside of prison to the greatest extent feasible.<sup>84</sup>

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80. "General rules of international law" might be akin to "the general principles of law recognized by civilized nations" mentioned in the Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

81. Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsziehenden Maßregeln der Besserung und Sicherung [Strafvollzugsgesetz] [StVollzG] [Prison Act], Mar. 16, 1976, BGBl. I at 2274, § 2, translated in *Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty (Prison Act)*, CENTRE FOR GERMAN LEGAL INFORMATION, [http://www.cgerli.org/fileadmin/user\\_upload/interne\\_Dokumente/Legislation/Prison\\_Act.pdf](http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Prison_Act.pdf) (last visited Feb. 27, 2012) [hereinafter *Prison Act Translation*].

82. *Id.* § 3(3).

83. *Id.* § 3(2).

84. *Id.* § 3(1).

Called the “principle of approximation,” James Q. Whitman comments that this is not an empty principle, but rather has tangible manifestations; for example, those employed while in prison get paid vacation as those outside of prison would, and cannot be fired arbitrarily.<sup>85</sup> By minimizing unnecessary discord between life within and outside of prison, this principle shows respect for human dignity and sets the stage for an easier transition back into society following incarceration.

Additionally, individualization of treatment and prison conditions is essential within German prisons, as each prisoner, subject to certain exception, shall have a treatment program.<sup>86</sup> This program may entail such elements as work and training activities, treatment groups, and preparation for release.<sup>87</sup> The prisoner’s development and study of his or her personality guide the treatment program.<sup>88</sup> Also, a rehabilitative thread runs through specific opportunities for prisoners. For example, work and training opportunities are given with the goal of “furnish[ing] the prisoner with skill and knowledge to make him capable of earning a livelihood after his release, or to preserve or promote such skill and knowledge.”<sup>89</sup> The Act mentions dignity once: “Where direct coercion is ordered by a superior or any other person so authorised, the prison officers shall be obliged to apply it, except where the order violates human dignity or was not given for official purposes.”<sup>90</sup> It is notable that the German legal system both clearly mandates respect for human dignity and recognizes a right to rehabilitation. Though causation arguments can run many ways here, it seems that dignity is indeed a major grounding for the right to rehabilitation in Germany.

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85. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 8 (2003).

86. Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsziehenden Maßregeln der Besserung und Sicherung [Strafvollzugsgesetz] [StVollzG] [Prison Act], Mar. 16, 1976, BGBl. I at 2274, § 7(1), *translated in Prison Act Translation, supra* note 81. If a prisoner does not receive a treatment examination due to the fact that “it appears to be unnecessary in view of the length of the sentence to be served,” then a treatment program will not be developed for him. *Id.* § 6(1).

87. *Id.* § 7(2).

88. *Id.* § 7(3).

89. *Id.* § 37(1).

90. *Id.* § 97(1).

Germany is not the only continental European country to take a firm view of rehabilitation for prisoners.<sup>91</sup> Spain, for example, mentions dignity in its constitution, stating that it is part of the foundation of social peace and political order.<sup>92</sup> Furthermore, the Spanish constitution states that “[p]rovisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”<sup>93</sup> Rehabilitation is arguably specifically required in the constitution, as “[p]unishments entailing imprisonment and security measures shall be aimed at reeducation and social rehabilitation and may not involve forced labour . . . .”<sup>94</sup> Similarly, the Italian Constitution explains that “[p]unishments may not be inhuman and shall aim at re-educating the convicted.”<sup>95</sup>

Though legal statements about dignity and rehabilitation may in theory be a good thing, translating these high-aspiring phrases into actual practice that stays true to the letter and spirit of the law is admittedly no small task, and there is often uncertainty about the extent that these mandates are fulfilled on the ground. Adding even more complexity, there can be ambiguity as to what the letter and spirit of these mandates

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91. For some discussion of the Italian and Spanish constitutions, see Rotman, *supra* note 2, at 1023 n.2, and VAN ZYL SMIT, *supra* note 72, at 13. While a fuller exploration of Spain and Italy—such as in regards to case law—is beyond the scope of this article, these two countries nonetheless merit brief mention because of their constitutional provisions.

92. C.E., B.O.E. n. 311, Dec. 29, 1978, § 10(1) (Spain), *translated in* SENADO DE ESPAÑA, SPANISH CONSTITUTION, *available at* [http://www.senado.es/constitu\\_i/indices/consti\\_ing.pdf](http://www.senado.es/constitu_i/indices/consti_ing.pdf).

93. *Id.* § 10(2).

94. *Id.* § 25(2).

95. Art. 27 Costituzione [Cost.] (It.), *translated in* SENATO DELLA REPUBBLICA, CONSTITUTION OF THE ITALIAN REPUBLIC, *available at* [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf). The Italian Constitution mentions dignity twice, stating that “[a]ll citizens have equal social dignity and are equal before the law. . . .” and that private economic enterprise “may not be carried out against the common good or in such a manner that could damage safety, liberty, or human dignity.” *Id.* art. 3, 41(2). Given this, and that Article 27 on prisoner re-education also forbids inhuman punishments, I feel that a larger argument of this paper—that a connection between dignity and rehabilitation exists—is mostly left intact. *Id.* art. 27.

actually entail. Dirk Van Zyl Smit explores the conflicting notions of what rehabilitation means in practice:

On the one hand, it has been argued that the rehabilitative ideal led to the claim that the State had a duty to 'treat' or 'improve' prisoners and that on this basis the State had claimed powers over offenders that exceeded its legitimate powers to punish. This in turn led to the introduction of indeterminate sentences that could be disproportionately severe in effect, even to the extent that the resultant sentence was inhuman and degrading. On the other hand, it has been argued that the provisions relating to rehabilitation in international and national law lead to the recognition that prisoners have a positive right to rehabilitation that they can enforce against the State.<sup>96</sup>

As the above quote indicates, rehabilitative provisions can be a double-edged sword, capable of affirming prisoner dignity or chipping away at such dignity. Regardless of how rehabilitation of prisoners unfolds in all instances, some dignitarian grounding for the right to rehabilitation, at the least, seems likely in the above examples. The extent to which human dignity and rehabilitation are explicitly connected varies in these instances. Nonetheless, complementary references to rehabilitation and human dignity suggest that, at the least, recognition of human dignity and rehabilitation for prisoners is somehow related. In the end, drawing on these examples, individuals who want to promote a right to rehabilitation for prisoners should at the same time promote human dignity as a crucial legal value and an important foundation for that right.

#### IV: STATE PRACTICE AND INTERNATIONAL INSTRUMENTS WHERE HUMAN DIGNITY AND A RIGHT TO REHABILITATION ARE UNFORTUNATELY LACKING IN STRENGTH

This section explores international documents and national law that do not recognize - as much as they should - the importance of human dignity as a guiding value, a right to rehabilitation, or both. The documents and countries below do not give human dignity the attention it deserves - compromis-

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96. VAN ZYL SMIT, *supra* note 72, at 13.

ing the ability of prisoner rehabilitation to be taken seriously as a concrete right - or recognize human dignity to some degree, yet do not take the next step of stating that there is a right to rehabilitation.

### A. *International Documents*

#### 1. *European Convention on Human Rights*

The Council of Europe created the European Convention on Human Rights<sup>97</sup> in 1950. The Convention, though coming at a time when the concept of human dignity was especially en vogue, does not mention dignity; nevertheless, the European Court of Human Rights<sup>98</sup> has read the concept of dignity into the convention.<sup>99</sup> Indeed, the Court has even suggested that dignity is “at the heart” of Article 3 of the Convention,<sup>100</sup> which states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Further indicating dignity’s importance in the Convention, a simplified version of the Convention mentions dignity in regards to Article 3—counter-intuitively making the “simplified” version of Article 3 longer than the actual version.<sup>101</sup>

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97. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. It is also referred to as the Convention for the Protection of Human Rights and Fundamental Freedoms.

98. The European Court of Human Rights is another notable product of the Council of Europe, and is still an important apparatus on the continent today.

99. See *Kafkaris v. Cyprus*, App. No. 21906/04, Eur. Ct. H.R. ¶ 96 (2008) (“In accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity . . .”). The Court also found that “the existence of a system providing for consideration of the possibility of release is a factor to be taken into account when assessing the compatibility of a particular life sentence with Article 3.” *Id.* ¶ 99.

100. See *Gafgen v. Germany*, App. No. 22978/05, Eur. Ct. H.R. ¶ 120 (2010) (expressing satisfaction with the lower court’s acknowledgement that applicant’s Article 3 rights have been violated).

101. Directorate of Communication, Eur. Court of Human Rights, Simplified Version of Selected Articles from the European Convention on Human Rights and Its Protocols, Directorate of Communication, art. 3, *available at* [http://www.echr.coe.int/NR/rdonlyres/AC4030F7-3FA7-41EF-9F35-FD3B56E9B280/0/ENG\\_Convention\\_simplifi%C3%A9e.pdf](http://www.echr.coe.int/NR/rdonlyres/AC4030F7-3FA7-41EF-9F35-FD3B56E9B280/0/ENG_Convention_simplifi%C3%A9e.pdf) (“No one ever has the right to hurt you or torture you. Even in detention your human dignity has to be respected.”). The “simplified” version, however, is “included for educational purposes only” and has no legal authority.



Other articles discussing confinement and treatment of potential criminals do not mention rehabilitation.<sup>102</sup> Furthermore, the European Court of Human Rights has not explicitly recognized the right to rehabilitation through subsequent interpretation of the Convention, and has even called the right to rehabilitation “controversial.”<sup>103</sup> Because of this, perhaps the strongest bases for prisoner rehabilitation in the Convention are articles other than those directly addressing criminal justice, as the Court has “agreed that prisoners do not forfeit their Convention rights when they are imprisoned.”<sup>104</sup> Dignity is a guiding value for prisoner treatment, but does not achieve a recognized right to rehabilitation under the Convention.

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102. ECHR, *supra* note 97, arts. 4–7. Importantly, while article 15(1) permits derogations from the Convention in some instances, “[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.” *Id.* art. 15(2).

103. [T]he applicant stated that in both France and Italy it had been explicitly recognised that an offender sentenced to life imprisonment had a fundamental right to be considered for release. In addition, the Federal Constitutional Court of Germany had recognised that a life sentence that had been fully implemented invariably entailed the loss of human dignity and the denial of the controversial right to rehabilitation. A release mechanism had been set up in Germany to ensure that life sentences were not implemented in a way that undermined human dignity by suppressing all hopes of release. Furthermore, it was a general requirement of international human rights law that a convicted person should not be deprived of a second opportunity to return to society, following a non-problematic serving of his punishment and sentence and the completion of a rehabilitation procedure.

Kafkaris v. Cyprus, App. No. 21906/04, ¶ 82.

104. See Emily Jackson, *Prisoners, Their Partners and the Right to Family Life*, 19 CHILD & FAM. L.Q. 239 (2007) (discussing the holding of the European Court of Human Rights in *Dickson v. United Kingdom*, App. No. 44362/04, Eur. Ct. H.R.). A similar argument has been made about U.S. prisoners in regard to some of their American constitutional rights. Rotman, *supra* note 2, at 1053 (quoting *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968)).

## 2. *1955 United Nations Standard Minimum Rules for the Treatment of Prisoners*

The Standard Minimum Rules for the Treatment of Prisoners<sup>105</sup> were approved by the U.N. Economic and Social Council, after adoption by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders. These Rules are not legally binding, but nonetheless can have powerful soft law impact, especially given their promotion by the U.N. The Rules go into more detail concerning treatment of prisoners than the instruments discussed previously, yet this amount of detail, coupled with its non-binding nature, may lend an aspirational - rather than practical - gloss to the Rules as a whole. The Guiding Principles section of the Rules, for example, goes into substantial discussion about overarching guiding themes for prison management. Many of these principles are relevant to our discussion:

57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system *shall not*, except as incidental to justifiable segregation or the maintenance of discipline, *aggravate the suffering inherent in such a situation.*

58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to *protect society against crime.* This end can only be achieved if the period of imprisonment is *used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.*

59. To this end, the institution *should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance* which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

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105. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C (XXIV), Annex I, U.N. Doc. A/CONF/611 (July 31, 1957), *amended by* E.S.C. Res. 2076 (LXII), 62 U.N. ESCOR, Supp. No. 1, at 35 (May 13, 1977), *available at* <http://www2.ohchr.org/english/law/treatmentprisoners.htm> [hereinafter Standard Minimum Rules].

60(1). The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the *respect due to their dignity as human beings*.<sup>106</sup>

Only Article 60 mentions dignity, and while dignity may in fact guide prison administrators, dignity is not itself the ultimate aim on the penal system under the Rules. Rather, the main goal is protection of society;<sup>107</sup> respect for dignity and the provision of rehabilitative services are arguably only means to achieving this goal, and are not ends in themselves.<sup>108</sup> Article 59's caveat that a prison should merely utilize "appropriate and available" rehabilitative services lends doubt as to whether rehabilitation is a right at all under these Rules; this characterization brings to mind the progressive realization of rights called for in the ICESCR, rather than a concrete right accompanied by compulsory language.<sup>109</sup> Article 60(1) mentions that prisoners' responsibility should be decreased as little as possible while incarcerated; although this brings to mind the moral capacity argument for rehabilitation, the language of rights is still missing. The result is that the Rules treat rehabilitation as a means to serve society as a whole rather than a right of the imprisoned based on their dignity.

The Rules provide detail regarding release and reintegration. The following articles are especially illustrative in this regard:

60(2). Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure

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106. *Id.* ¶¶ 57–60(1) (emphasis added).

107. *Id.* ¶ 58 ("The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime.")

108. *Id.* ¶¶ 58–60.

109. Paragraph 60(2) of the Rules also uses non-compulsory language regarding services:

(2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but *should be* combined with effective social aid.

*Id.* ¶ 60(2) (emphasis added).

for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.

61. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

64. The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.<sup>110</sup>

These articles, like those discussed above, do not treat rehabilitation as a right. While treatment and post-release services should facilitate social rehabilitation, the language of "should" falls short of a command for social rehabilitative services, and gives those provisions an aspirational tone. The Rules overall give little attention to human dignity, and rehabilitation does not take on the full force of being a right for prisoners.

### B. *The United States*

The United States has wrestled with human dignity as a legal concept, and with how to address the treatment of prisoners, including in regards to rehabilitation. Given the high incarceration rate of the United States and its current policy, it

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110. *Id.* ¶¶ 60(2), 61, 64.

makes an interesting point of comparison with European nations. While dignity does factor into analysis of prison conditions in some instances, the weight of human dignity as a legal value within U.S. law is unfortunately not enough to lead to recognition of a right to rehabilitation for prisoners. Furthermore, whatever support for rehabilitation may exist short of a right to such, dignity seems to be only one justification providing such support.

### 1. *The U.S. Constitution and Statutory Law*

The U.S. Constitution<sup>111</sup> does not mention “dignity,” yet constitutional doctrine may have included underlying meanings and connotations of the word before the word itself came into more common parlance after World War II.<sup>112</sup> Given the time period during which the Constitution was written, it is understandable that the word “dignity” does not appear in the Constitution, and its absence should not be read as a conscious decision on the part of the Framers.

One could critique this time-based argument of why the Constitution does not mention “dignity”: the United States was founded during the same period that Kant wrote about dignity, and the Framers, as learned and well-connected men, should have arguably been aware of Kant’s work on the subject. However contemporaneous these two events were, though, ideas spread much more slowly during that time; additionally, Kant’s explanation of dignity was still very much an emerging concept and in the early stages of development at that period. Similarly, the Bill of Rights was written when the modern prison concept was first coming into existence, making it understandable that this system, still in its relative infancy, had not developed more complex components yet, the right to rehabilitation being one such component.<sup>113</sup>

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111. Analysis of U.S. state constitutions is beyond this paper’s scope, but those interested in such analysis should refer to Rotman, *supra* note 2, at 1061–64.

112. See Resnik & Suk, *supra* note 15, at 1938 (“[I]n U.S. law, the constitutional properties of personhood denoted by dignity were not so labeled until the 1940s. Many of the concepts entailed were a part of our constitutional jurisprudence before then. But the term was not.”).

113. See Rubin, *supra* note 8, at 351 (“The American Bill of Rights and the French Declaration of the Rights of Man are contemporaneous with the birth of the prison. This belief [that all humans have natural political rights]

Given the historical difficulties noted above, U.S. statutory law may be a more reasonable place - in theory - to look for discussion of prisoner rehabilitation and dignity. U.S. statutes do mention these two concepts, but unfortunately not in clear connection with one another, and not in a way that creates a right to rehabilitation grounded in dignity. For example, Title 42 of the U.S. Code, on the Public Health and Welfare, explicitly connects rehabilitation with the prison system by defining "criminal justice" as including "activities of corrections, probation, or parole authorities and related agencies assisting in the rehabilitation, supervision, and care of criminal offenders . . ." <sup>114</sup> Also, boot camp prisons might offer rehabilitation, by definition. <sup>115</sup> Several other statutes also deal with rehabilitation, but do not use the term in a way that appears directly focused on prisoners. <sup>116</sup> For example, part of the Rehabilitation Act, <sup>117</sup> although construed to apply to prisoners <sup>118</sup> on its face is focused on helping individuals with disabilities.

Title 18 of the U.S. Code, which deals with crime, criminal procedure, and prisons, is the Title most directly relevant to the rights of prisoners specifically. Only one statute in Title 18, however, includes rehabilitation in its name, and does so in connection with post-sentencing matters, rather than in-prison treatment. <sup>119</sup> The Bureau of Prisons is charged with safekeeping, care, subsistence, and instruction of the incarcerated, as well as giving them reentry information on, *inter alia*, education and employment. <sup>120</sup> Also, the Attorney General can re-

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did not yield the idea that the criminal has a right to be rehabilitated, but it did produce the attitude that it was desirable to do so.".)

114. 42 U.S.C. § 3791(a)(1) (2006) (appearing in the Chapter entitled "Justice System Improvement Definitions").

115. "[B]oot camp prison' includes a correctional facility in which inmates are required to participate in a highly regimented program that provides strict discipline, physical training, and hard labor, together with extensive rehabilitative activities and with educational, job training, and drug treatment support." 42 U.S.C. § 3791(a)(23) (2011).

116. *E.g.*, 5 U.S.C. § 8104 (2006) (discussing rehabilitation for those with compensable work-related injuries); 29 U.S.C. § 741 (2011) (discussing grants in the context of rehabilitation services for American Indians).

117. 29 U.S.C. § 794 (2006).

118. *Onishea v. Hopper*, 171 F.3d 1289, 1296 n.11 (11th Cir. 1999) (stating that the Rehabilitation Act applies in the prison setting).

119. U.S. Sentencing Guidelines Manual, § 5K2.19 (20).

120. 18 U.S.C. § 4042(a) (2006).

quest health professionals to serve the incarcerated.<sup>121</sup> While statutes entailing the Bureau and the Attorney General may certainly facilitate prisoner rehabilitation - especially the Bureau's mandate to "provide for the . . . instruction. . . of all persons charged with or convicted of offenses against the United States"<sup>122</sup> - they do not create a clear right to such.

Prison operation is to include individualized treatment and care.<sup>123</sup> Additionally, participation in rehabilitation can justify federal prisoners having a reduced work schedule,<sup>124</sup> and work assignments can be ignored in providing for vocational training.<sup>125</sup> One of the most rigorous statutory rehabilitative services for prisoners appears to be shock incarceration programs, where prisoners engage in boot-camp style regimented, disciplined activities as well as job training, counseling, substance abuse activities, and educational programs.<sup>126</sup> The existence of shock incarceration programs in theory does not translate into a right to rehabilitation, however; the Bureau of Prisons has the discretion to end shock incarceration programs,<sup>127</sup> and there is no individual right to take part in shock incarceration programs.<sup>128</sup> While U.S. statutes may certainly allow and encourage rehabilitation, they do not create a clear right to rehabilitation. Title 18 only mentions "dignity" twice, both times in regards to victims of crimes rather than perpetrators.<sup>129</sup> Overall, U.S. statutory law and the Constitu-

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121. 18 U.S.C. § 4005(a) (2006).

122. 18 U.S.C. § 4042(a)(3) (2006).

123. 18 U.S.C. § 4081 (2006) ("The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.").

124. Crime Control Act of 1990, Pub. L. No. 101-647, § 2905(a)(2)(D), 104 Stat. 4789 (1990).

125. 18 U.S.C. § 4122(c) (2006).

126. 18 U.S.C. § 4046(b) (2006).

127. *See Serrato v. Clark*, 486 F.3d 560, 569 (9th Cir. 2007) ("Congress provided authority for BOP to operate boot camp in 18 U.S.C. § 4046, but in using the word "may," did not mandate that the program operate continuously.").

128. *Gissendanner v. Menifee*, 975 F. Supp. 249, 251 (W.D.N.Y. 1997).

129. 18 U.S.C. § 1116(b)(4)(B) (2006) (defining "internationally protected persons" to include those who have their dignity specially protected

tion both give inadequate attention to the dignity of prisoners, and forego providing prisoners a right to rehabilitation.

## 2. *U.S. Case Law on Dignity*

Given the amount of pertinent U.S. case law for this discussion, it is helpful to proceed by exploring specific themes, first looking at how courts have approached dignity, then how they have addressed punishment, and lastly the judiciary's treatment of prisoner rehabilitation. Case law overall presents a curious picture of prisoner dignity. On one hand, a robust line of cases supports the dignity of prisoners and connects dignity to law-breakers; yet, the veracity of human dignity as a legal concept could be stronger. This lack of veracity partially explains why U.S. law does not recognize the right to rehabilitation for prisoners.

Dignity is at the core of Eighth Amendment jurisprudence. One of the most historic cases noting the human dignity of people who break the law is *Trop v. Dulles*.<sup>130</sup> In deciding that revoking the citizenship of an Army private - as punishment for war-time desertion - was unduly harsh, the Court, in plurality, explained that the Eighth Amendment, prohibiting cruel and unusual punishment, had as its "basic (underlying) concept" "nothing less than the dignity of man."<sup>131</sup> The plurality also cited the dissenting opinion in the U.S. Court of Appeals below condemning this punishment, as "the American concept of man's dignity does not comport with making even those we would punish completely 'stateless'. . . ."<sup>132</sup>

The proposition that punishments, under the Eighth Amendment, must respect the dignity of the punished, was later affirmed in *Gregg v. Georgia*.<sup>133</sup> The Court not only drew on the dignitarian notions of *Trop v. Dulles*, but also on the importance of societal changes noted in that case, affirming that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a

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under international law); 18 U.S.C. § 3771(a)(8) (2006) (stating that crime victims have a right to have their dignity respected).

130. *Trop v. Dulles*, 356 U.S. 86 (1958).

131. *Id.* at 100.

132. *Id.* at 101 n.33 (quoting *Trop v. Dulles*, 239 F.2d 527, 529 (2d Cir. 1956) (Clark, dissenting)).

133. *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the death penalty did not violate the Eighth Amendment).



maturing society.”<sup>134</sup> *Gregg v. Georgia* marked a departure from *Furman v. Georgia*, a Supreme Court case from a few years earlier where the Court had held that the Eighth and Fourteenth Amendments prohibited the death penalty (though in modern America, the death penalty is once again legal).<sup>135</sup> Dignity guided Justice Brennan’s interpretation of the Eighth Amendment in his *Furman* concurrence, as he stated “A punishment is ‘cruel and unusual,’ . . . if it does not comport with human dignity.”<sup>136</sup>

### 3. *U.S. Case Law on Goals of Punishment*

Justice Black’s concurrence in *Trop v. Dulles* explains that penal law has many goals, such as rehabilitation and deterrence.<sup>137</sup> He suggests that rehabilitation is not served by the punishment overturned in that case - revocation of citizenship - “for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast.”<sup>138</sup> Justice Stewart, concurring in *Furman v. Georgia*, also saw the importance of rehabilitation, noting the obvious fact that the death penalty does not serve rehabilitative goals.<sup>139</sup>

This reasoning begs the question of whether decrying punishments that prevent rehabilitation is analogous to stating that prisoners must, at some point, be given the opportunity for rehabilitation. One could argue that a negative prohibition (no ultimate denial of opportunity for rehabilitation, or no degradation while in prison) could be viewed as (leading to) a positive right (right of prisoners to rehabilitation).<sup>140</sup>

134. *Id.* at 173 (quoting *Trop*, 356 U.S. at 101).

135. *Furman v. Georgia*, 408 U.S. 238, 238 (1972).

136. *Id.* at 270 (Brennan, J., concurring).

137. *Trop*, 356 U.S. at 111 (Black, J., concurring).

138. *Id.*

139. *Furman v. Georgia*, 408 U.S. at 306 (Stewart, J. concurring).

140. While denying the existence of a constitutional federal right to rehabilitation, American courts have acknowledged it in a negative way as the right to counteract the deteriorating effects of imprisonment. The courts have also granted the prisoner a limited right to psychiatric and psychological treatment. Arguments based on the eighth and fourteenth amendments, as well as the application of customary international law, reveal the existence of an implicit right to rehabilitation in the United States Constitution.

See Rotman, *supra* note 2, at 1068.

Drawing a positive right from a negative prohibition may be problematic, however;<sup>141</sup> one reason is because, as will be discussed later on, the positive right to rehabilitation seems to be absent from Supreme Court precedent.

Part of the challenge in promoting rehabilitation in the United States is that even if rehabilitation exists, it is at the same time competing with other penal goals. This reality is illustrated in *Powell v. Texas*, in which the Court upheld a public intoxication conviction and noted that rehabilitation is not constitutionally mandated to be the only purpose of penal sanctions.<sup>142</sup> Today, the rehabilitative focus of decades past has taken a backseat, as both proponents and opponents of more severe punishments have leveled criticisms at rehabilitation over the past few decades.<sup>143</sup> And calls for harsher punishments have achieved victory in a sense, as evidenced by increased frequency of life sentences without parole, severe sentencing under “three strikes” legislation, and modern life-sentencing for drug violations.<sup>144</sup>

#### 4. *U.S. Case Law Continued: Rehabilitation as Informed by Dignity, and Lack of an Explicit Right to Rehabilitation*

As the above discussion shows, rehabilitation is one goal of incarceration, among many, that modern American law gives credence to. To add even more complexity, rehabilitation is arguably not the only goal which allows for respecting prisoners’ dignity.<sup>145</sup> This next part dives a bit deeper, and explores the right to rehabilitation specifically within American jurisprudence, beyond rehabilitation as a goal of punishment, and its interaction with dignity specifically.<sup>146</sup> Though

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141. Rotman seems to imply this controversy, discussing the Supreme Court of Washington’s rejection of the right to certain programming in *Bresolin v. Morris*, 558 P.2d 1350 (Wash. 1977), and the dissent’s support of an indirect right to rehabilitation based on the Eighth Amendment. Rotman, *supra* note 2, at 1047–49.

142. *Powell v. Texas*, 392 U.S. 514, 530 (1968).

143. *VAN ZYL SMIT*, *supra* note 72, at 49.

144. *Id.* at 51–62.

145. The Court in *Gregg v. Georgia* noted that respect for prisoners’ dignity can still occur when retributive aims are sought in the penal system, yet at the same time states that retribution is not a main goal above all others. *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976) (citations omitted).

146. Past scholarship has analyzed the right to rehabilitation. *See, e.g.*, Rotman, *supra* note 2. However, such scholarship seems to lack a major fo-

dignity has been the basis for legal interpretation of punishment and prison conditions, its force as a guiding value has not been sufficient to lead to a right to rehabilitation. Arguably, if the dignity of prisoners was a more important value within the U.S. legal system, then there might be a positive right to rehabilitation. Indeed, the right of prisoners to rehabilitation does not exist under the Constitution, according to the Supreme Court.<sup>147</sup> That being said, more promising ground for the right to rehabilitation appears to be had in lower courts.<sup>148</sup> This section is not meant to provide an exhaustive overview of all U.S. cases dealing with prisoner rehabilitation; indeed, more thorough review has already been done elsewhere,<sup>149</sup> and is beyond the scope of this article. Instead, the discussion here is meant to give an illustrative picture, in broad strokes, of the lukewarm reception that prisoner rehabilitation has received in U.S. courts.

*Laaman v. Helgemoe*<sup>150</sup> stands out as an important case regarding the right to rehabilitation. In this case, prisoners at New Hampshire State Prison filed a class action civil rights claim, alleging that the sub-adequate availability of programs and living conditions within the prison violated rights of the class. The District Court affirmed the dignitarian grounding of the Eighth Amendment, drawing on reasoning presented in *Trop v. Dulles*, *Gregg v. Georgia*, and *Furman v. Georgia*.<sup>151</sup> Even

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cus on dignity explicitly as a possible guiding value for the courts. Conversely, while the U.S. judiciary's treatment of dignity has been written about as well, this concept has not, it appears, extensively been applied to the right to rehabilitation in the U.S. Petra Mária Gyöngyi, Variations on a Theme by the European Court of Human Rights and the U.S. Courts: A Dignity-Based Approach to Overcrowding in Prisons and Alternative Punishments (Nov. 30, 2009) (LL.M. thesis, Central European University), available at [www.etd.ceu.hu/2010/gyongyi\\_petra.pdf](http://www.etd.ceu.hu/2010/gyongyi_petra.pdf).

147. Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 166 (2007) (citing *Rhodes v. Chapman*, 452 U.S. 337, 349–50 (1981)).

148. See *id.* at 166 (“Some lower courts have found Eighth Amendment violations where prison conditions made debilitation likely.”).

149. Rotman's article, *supra* note 2, takes the reader through many cases dealing with rehabilitation, including *Pugh v. Locke*, 406 F. Supp. 318, 326 (M.D. Ala.), and *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), as well as *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977), and *Rhodes v. Chapman*, 452 U.S. 337 (1981), which are the focus of this section.

150. *Laaman*, 437 F. Supp. at 269.

151. *Id.* at 307–08.

more importantly, the court took a further step as it connected dignity, crucial to the Eighth Amendment, to prisoner treatment:

Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions *does violence to our societal notions of the intrinsic worth and dignity of human beings* and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment. . . .

. . . .

. . . .Time at [prison] costs a man more than part of his life; it robs him of his skills, his ability to cope with society in a civilized manner, and, most importantly, his essential human dignity.<sup>152</sup>

The District Court here set forth an incredibly detailed, lengthy order that prison officials had to follow to improve prison conditions, including offering vocational training in marketable skills, effective religious and educational programs, therapy, and individual counseling.

The *Laaman* court suggests that debilitating conditions within prisons are what cause a loss of dignity for the incarcerated.<sup>153</sup> While the state cannot hinder the self-improvement of prisoners,<sup>154</sup> and rehabilitation programs for the prison in question are ordered, the court does not take the additional step of explicitly stating that prisoners have a positive right to rehabilitation. Instead, the court suggests that prisoners have a right not to experience personal degradation while incarcerated. Edgardo Rotman discusses the distinction between a positive right to rehabilitation and a right against degradation:

*Laaman* established a negative indirect right to rehabilitation as a consequence of a right not to degenerate. . . .The corresponding obligation of the state to provide opportunities to stave off degeneration and

152. *Id.* at 323, 325 (emphasis added).

153. *Id.* at 323–25.

154. *See id.* at 323 (“Obstructions to self-improvement are not tolerable.”).

to minimize impediments to reform is measured through the totality of the conditions of confinement. Remedial orders must be issued by the courts when these “conditions create an environment in which it is impossible for inmates to rehabilitate themselves - - or to preserve skills and constructive attitudes already possessed - - even for those who are inclined to do so.”<sup>155</sup>

Based on the court’s decision and Rotman’s explanation, while dignity appears to do some work in supporting the rights of prisoners, this takes the form of an anti-degradation principle, rather than a positive right to rehabilitation. It is crucial to reiterate the point, discussed earlier, that drawing a right from a negative prohibition (here, non-degradation), is a problematic stretch. An anti-degradation focus does not as forcefully and expansively promote rehabilitative services compared to a positive right to rehabilitation itself, where prisoners are encouraged to improve beyond the state they were in when they entered prison. Characterizing *Laaman*’s reasoning as providing a “negative indirect right to rehabilitation” glosses over the importance of the distinction. The court engaged in a delicate balancing act overall, the end result being a mandated minimum level of rehabilitation as a means of discouraging personal deterioration. As such offerings can all be considered rehabilitation services, the District Court can be characterized as promoting prisoner rehabilitation, although a clear right to rehabilitation is lacking.

Moving on, in *Rhodes v. Chapman*,<sup>156</sup> decided by the Supreme Court a few years after *Laaman*, the majority took a step backwards from *Laaman*’s dignity-based analysis, and ignored any dignitarian basis for judging prison conditions, not mentioning dignity at all. In this case, the majority explained that double-celling prisoners (putting two prisoners in a cell where

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155. Rotman, *supra* note 2, at 1044–45 (citing *Laaman*, 437 F. Supp. at 317 (itself citing *Pugh v. Locke*, 406 F. Supp. 318, 326 (M.D. Ala. 1976))). Rotman also notes a “judicial trend adverse to the recognition of rehabilitation as a right [that] departs from the “totality of conditions” approach. Some lower federal courts have recently denied that the cumulative effect of several conditions violates the eighth amendment in cases where no single condition is violatory.” *Id.* at 1047.

156. *Rhodes v. Chapman*, 452 U.S. 337 (1981). For a detailed discussion of *Rhodes*, see Rotman, *supra* note 2, at 1045–46.

only one is supposed to be housed) was not unconstitutional. Notably, Justice Brennan's concurrence in *Rhodes v. Chapman* departed from that of the majority by looking at the issue in terms of the dignity of prisoners, stating "The task of the courts in cases challenging prison conditions is to 'determine whether a challenged punishment comports with human dignity.'"<sup>157</sup> Brennan also borrowed from *Laaman* in using a totality of the circumstances approach to judge whether prison conditions are constitutional, considering, *inter alia*, services like rehabilitation.<sup>158</sup> However, Brennan's analysis can be seen as supporting the claim that the existence of rehabilitative services "is not required when other factors are satisfactory" in the totality of the circumstances approach.<sup>159</sup> Also, the case indicates that even when human dignity is considered, its force in the eyes of U.S. judges is generally not great enough such that prisoners are granted a right to rehabilitation. Overall, U.S. case law has not affirmed that prisoners have a right to rehabilitation.

##### 5. *Making Sense of U.S. Law: Three Assaults on the Right to Rehabilitation*

The dignity of prisoners grounds analysis of the prison system to some degree in the United States, as seen in the *Laaman* majority and the *Rhodes v. Chapman* concurrence. The plethora of competing values in American penal law and jurisprudence, however, eclipse and weaken the power of dignity. The result is that while the rights-based, humanistic model described by Rotman has some force, it is *simultaneously* competing with an authoritarian model of rehabilitation, grounded in government interests rather than individualized focus, and with other aims of imprisonment, such as deterrence and punishment.<sup>160</sup> Additionally, the U.S. legal system focuses on values in addition to dignity. One reason why there is no right to rehabilitation in the United States may be that human dignity is not embraced as an essential value to the degree that it should be within U.S. legal discourse. In other words, based

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157. *Rhodes*, 452 U.S. at 361 (Brennan, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring)).

158. *Id.* at 364.

159. Rotman, *supra* note 2, at 1042.

160. *See id.* at 1025–26.

on the analysis above, a dignity-based right to rehabilitation for prisoners faces assault on three fronts: (1) from insufficient explicit focus on human dignity in the United States, (2) from justifications for rehabilitation that are not firmly based in the dignity of the prisoner, or from situations where dignity is one among many justifications, and (3) from a system of imprisonment that can focus on punishment, deterrence, etc. rather than rehabilitation.

The lack of a focus on dignity, and the lack of a right to rehabilitation that partially results from it, does a disservice to American prisoners, preventing them from having a concrete right to the services that will both respect their inherent worth and allow for the flourishing of their mental capacity. One could argue that human dignity has no relation to why the United States does not give prisoners a right to rehabilitation; however, given that sub-optimal recognition of dignity appears to at least occur in tandem with inadequate support of prisoner rehabilitation, and in light of the discussion earlier, some connection seems to exist between these concepts, whatever the exact nature of causation between them is. Therefore, those promoting prisoner rehabilitation should also promote human dignity as a legal value supporting that right.

### C. *The United Kingdom*

The United Kingdom provides an interesting point of comparison given its unique position vis-à-vis the United States and Europe. Specifically, U.S. legal foundations draw heavily on British tradition, and shared history creates opportunity for similarities in how the United States and United Kingdom approach punishment. At the same time, the United Kingdom is a player within the European human rights system, and it is worth examining how the strong regionalism of Europe impacts the policies of the United Kingdom. Overall, the United Kingdom is in a better position than the United States regarding rehabilitation, but it falls short of the example of Germany, as British courts have not ardently recognized a right to rehabilitation.

#### 1. *Written Law of the United Kingdom*

The United Kingdom has no written constitution per se, though case law, Acts of Parliament, etc., together create the

U.K. Constitution as understood in modern times. One Act of Parliament of particular relevance to the state of human rights in the country is the Human Rights Act 1998.<sup>161</sup> This Act partially brought the European Convention on Human Rights into domestic law, such as providing for decisions of the European Court of Human Rights to inform the rulings of British courts.<sup>162</sup> Unfortunately, the Act does not mention dignity or rehabilitation; this is not surprising, as the Act directly incorporates articles from the European Convention on Human Rights,<sup>163</sup> and such Articles do not mention dignity or rehabilitation.<sup>164</sup> Extensive elaboration concerning conditions inside prisons is not given in the Act, this again being consistent with the Convention itself.

The Human Rights Act could potentially promote both the dignity of prisoners and their right to rehabilitation, for to the extent that the European Court of Human Rights has read dignity into the Convention<sup>165</sup> the United Kingdom is arguably bound to consider such interpretations.<sup>166</sup> The European Convention on Human Rights has been a guiding document in the United Kingdom for the treatment of mentally ill prisoners,<sup>167</sup> buttressing the argument that the Convention and related case law should be used to support rehabilitation as well. Also, as explained earlier, prisoners are still entitled to their rights under the Convention.<sup>168</sup>

Several factors weigh against the Human Rights Act's potential, however, in further promoting prisoner rehabilitation

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161. Human Rights Act, 1998, c. 42 (U.K.).

162. *Id.* § 2(1).

163. *Id.* § 1. The Act incorporates the ECHR's prohibitions on torture and degrading or inhuman treatment or punishment at schedule 1, article 3. The Act also incorporates Convention articles addressing the right to liberty and security, the right to a fair trial, and the principle that there be no punishment without law. *Id.* sch. 1, arts. 5, 6, 7.

164. But see *supra* Section III(A) for discussion of the European Convention on Human Rights, including how the Convention has been interpreted to encompass dignity.

165. Again, see *supra* section III(A) on the European Convention on Human Rights and accompanying notes.

166. Human Rights Act, 1998, c. 42, § 2(1) (U.K.).

167. Kim P. Turner, *Raising the Bars: A Comparative Look at Treatment Standards for Mentally Ill Prisoners in the United States, United Kingdom, and Australia*, 16 *CARDOZO J. INT'L & COMP. L.* 409, 446 (2008).

168. Jackson, *supra* note 104, at 243.



and prisoner dignity. For example, U.K. law that is incompatible with the Convention can be held valid if the British court issues a declaration of incompatibility.<sup>169</sup> Furthermore, the Human Rights Act might not create significant changes in how the United Kingdom approaches human rights compared to before the Act was passed, especially in regards to human rights in prison; this is because the Act may largely have codified existing British law concerning prisoners.<sup>170</sup> For example, British prisoners have been turning to the European Court of Human Rights for many years for vindication of their rights; because of this, U.K. prison law was arguably already responsive to this trend, and largely in accord with the Convention regardless of the Act's existence.<sup>171</sup>

The Rehabilitation of Offenders Act 1974 is meant to, *inter alia*, "rehabilitate offenders who have not been reconvicted of any serious offence for periods of years."<sup>172</sup> The concept of "rehabilitation" as used in this Act, however, seems to be a legal term of art relating to a person's status, and not necessarily congruent to how "rehabilitation" is understood for purposes of this article's discussion.<sup>173</sup> The Prison Rules<sup>174</sup> do go further, mentioning that "[a] prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation."<sup>175</sup> Also, every prison must have education classes,<sup>176</sup> and participation "shall be encouraged"<sup>177</sup>. Furthermore, "The purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a

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169. Human Rights Act, 1998, c. 42, § 4 (U.K.).

170. Victoria MacCallum, *A Captive Audience*, LAW SOCIETY GAZETTE (Nov. 10, 2001), <http://www.lawgazette.co.uk/print/35212>.

171. *Id.*

172. Rehabilitation of Offenders Act, 1974, c. 53, pmbl. (U.K.).

173. *See e.g. id.* at §1(2) ("A person shall not become a rehabilitated person for the purposes of this Act in respect of a conviction unless he has served or otherwise undergone or complied with any sentence imposed on him in respect of that conviction").

174. Prison Rules, 1999, S.I. 1958/73 (U.K.).

175. *Id.* art. 4(2).

176. *Id.* art. 32(2).

177. *Id.* art. 32(1).

good and useful life.”<sup>178</sup> This does, laudably, come close to a right to rehabilitation.<sup>179</sup> The Act does not mention dignity.

Though the Criminal Justice Act 2003<sup>180</sup> provides an avenue for offender rehabilitation, it does so in a way that does not create an affirmative right. Under this Act, specific inmates can be ordered to fulfill certain conditions as part of their confinement, including unpaid work requirements, activity requirements, and programme requirements.<sup>181</sup> Officers must, under the Act, make arrangements for these orders to be fulfilled, promote the prisoner’s adherence to the order, and enforce the order itself.<sup>182</sup> The duty to enforce rehabilitative orders, however, only comes into play if a court orders participation in rehabilitative programs. The result is that this Act’s provisions are not the equivalent of mandating a right for all prisoners to participate in rehabilitative programs.

As the above suggests, dignity is not a major value explicitly within U.K. law. Whatever support there may be in British law for prisoner rehabilitation, there is no indication that dignity of prisoners, more than any other potential justifications, is motivating the provision of that rehabilitation.

## 2. *Case Law in the United Kingdom*

Case law in the United Kingdom does little to affirm a right of prisoners to rehabilitation. It has been suggested that prison officials have a duty not to harm prisoners,<sup>183</sup> as seen in

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178. *Id.* art. 3.

179. One could argue that the British law stated above puts the United Kingdom on the same footing as Italy and Spain (two countries discussed earlier) and it is conceded that fuller analysis of Spain and Italy—which was beyond the scope of this paper—may have led to different conclusions. However, Spain and Italy were discussed in the previous section of this article mainly because of their (discrete) constitutions, and the use of the word “constitution” is different for purposes of British law (where no discrete constitution exists). Also, because the United Kingdom is one of three countries of focus in this article, I have chosen to look at U.K. written law in conjunction with case law, and my analysis overall leads me to group the U.K. with the U.S., yet at the same time acknowledge that the United Kingdom is closer to getting rehabilitation right than is the United States.

180. Criminal Justice Act, 2003, c. 44 (U.K.).

181. *Id.* §§ 199, 201–02.

182. *Id.* § 198.

183. Turner, *supra* note 167, at 428 (citing David Feldman, *Human Dignity as a Legal Value: Part 2*, 5 PUB. L. 61, 65 (2000)).

*R v. Deputy Governor of Parkhurst Prison*.<sup>184</sup> However, also based on this case, U.K. prison officials are not obligated to go beyond this and further respect the dignity of prisoners above the duty not to harm.<sup>185</sup> Also, officials arguably are to be guided by the goal of rehabilitation, as the court in *Re Morgan* has stated, explaining that having a prison library and letting prisoners borrow books “benefits the prisoner, [and] promotes the rehabilitative principles underlying modern prison philosophy. . . .”<sup>186</sup>

Another case of interest concerning the right to rehabilitation is the *Venables* case.<sup>187</sup> This case originated when two young boys gruesomely murdered a two-year-old, the murder creating massive media attention. As the time came for their release many years later, the perpetrators, now young men, wished to prevent the media from publishing information that would have allowed for the boys to be more easily identified after their release, and sought an injunction to this end. The court thoughtfully weighed the freedom of expression of the newspapers, as guaranteed under Article 10 of the European Convention on Human Rights, against Article 2’s right to life, Article 3’s prohibition of torture and inhuman or degrading treatment or punishment, and Article 8’s protection of privacy.<sup>188</sup> In the end, injunctions were given, despite the newspaper groups’ argument that the public had a right to know about the rehabilitation of the offenders, as the rehabilitation was of public concern.<sup>189</sup> In arriving at its decision, the court noted that Articles 2 and 3 could not be derogated from, while Article 10 (freedom of expression) could be under that article’s derogation clause,<sup>190</sup> finding derogation justified in this

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184. *R v. Deputy Governor of Parkhurst Prison*, [1992] 1 A.C. 58 (U.K.).

185. *See Turner, supra* note 167, at 428 (citing Feldman, *supra* note 183, at 65). In this case, the segregation of a prisoner for safety reasons was upheld, and as the case involved treatment of mentally unstable prisoners, admittedly, it may not be entirely applicable to my analysis.

186. *Re Morgan*, [2010] N.I.Q.B. 103, [11] (N. Ir.).

187. *Venables v. News Group Newspapers Ltd.*, [2001] EWHC (QB) 32, [2001] Fam. 430 (Eng.).

188. *Id.* at [34]–[51], [2001] Fam. at 449–453.

189. *Id.* [68], [2001] Fam. at 459.

190. ECHR, *supra* note 97, art. 10(2) (“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territo-

case.<sup>191</sup> Dignity is not mentioned in any part of the case, and the biggest role dignity has to play is perhaps as a guiding concept read into Article 3.

Rehabilitation, though not dignity, did make its way into the court's opinion, being phrased here as a duty of government officials, rather than a right of the incarcerated. Specifically, counsel for the two young men argued that the injunction preventing publication was necessary so that authorities could properly fulfill their duties regarding rehabilitation of said offenders,<sup>192</sup> and that beneficiaries of the duties could litigate for an injunction on this basis in place of the institution itself which had those duties.<sup>193</sup> The court rejected counsel's argument as grounds for the injunction, fearing that supporting an injunction based on the duty to provide rehabilitation in the present case may result in such a rationale being "extended far too widely."<sup>194</sup> The proposition seems to stand open as to whether the duty to provide rehabilitation could, on its own, be invoked as grounds for an injunction in the future.<sup>195</sup>

It is also important to note that one of the authorities cited by the court for supporting the duty to rehabilitate largely discusses child offenders<sup>196</sup>—after all, the willingness of the state to provide rehabilitative services for children is not necessarily the same as that for adult offenders. Had the offenders in *Venables* been sentenced and incarcerated as adults, rather than as minors, any support that can be gleaned from the case concerning a right to rehabilitation would likely be stronger.

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rial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

191. *Venables*, [2001] EHC (QB), [77], [79]–[86], [104], [2001] Fam. 430 at 461–64, 470.

192. *Id.* [107]–[08], [2001] Fam. at 471. (citing *Broadmoor Hosp. Auth. v R*, [2000] Q.B. 775, 795 (Eng.)).

193. *Id.* [108], [2001] Fam. at 471.

194. *Id.* [110], [2001] Fam. at 472.

195. *Id.*

196. *Venables*, [2001] EHC (QB), [110], [2001] Fam. 430 at 472 (citing *R v Sec'y of State for the Home Dep't (Venables)*, [1997] A.C. 407, 499–500, 530 (H.L.)).

To sum up this exploration of U.K. written law and case law, rehabilitation is proclaimed as a goal in the Prison Act, but it is not clear that a full right to rehabilitation results, particularly as it does not seem like British courts have fully recognized the right of prisoners to rehabilitation. Also, dignity is not an explicit major foundational concept regarding prisoners. Though U.K. involvement in the European human rights community via the European Convention on Human Rights and the Human Rights Act can create increased pressure to respect human rights, in reality the U.K. rehabilitative ideal does not seem firmly grounded in dignity. Though the dignity of the prisoner may be behind the duty that officials have to enforce rehabilitation orders, it is also plausible that larger social policies could be the justification; U.K. law is not clear about the justification for rehabilitation as it exists currently. Even when rehabilitation occurs, dignity may not be the guiding force behind the provision of rehabilitation. The United Kingdom, like the United States, thus falls short in the degree to which it could protect the inner worth and capacity of prisoners via prisoner rehabilitation, but is in a better position than the United States. Given the treatment of rehabilitation in British law in the Prison Rules and influence from the European human rights community, it seems as though the United Kingdom is closer to getting it right than the United States.

#### IV. UNDERSTANDING DIFFERENCES IN PRACTICE, AND RECOMMENDATIONS FOR MOVING FORWARD

As the examples above show, even when prisoner rehabilitation exists (though prisoners may not have a *right* to such), dignity is not necessarily the only, or even primary, rationale for the rehabilitation. However, when a clear *right to rehabilitation* exists, dignity is often proclaimed as an important value in conjunction with that right, either in the same document - as in the case of the ICCPR - or elsewhere within the national legal system, as in the case of German law. Therefore, though focusing on human dignity may not in all instances lead to a right to rehabilitation, a right to rehabilitation is less likely to exist when human dignity is not a major background legal value. And human dignity is overall the best way of looking at rehabilitation; this is because human dignity provides the strongest justification for a constant, concrete right to rehabili-

tation, which is the strongest form of providing prisoner rehabilitative services. Before making practical and effective suggestions for how prisoners rights advocates can move forward in strengthening the right of prisoners to rehabilitation, however, it is crucial to first dive deeper into possible reasons for the divergent approaches of states noted in previous sections.

A. *Trying to Understand Differences in State Practice*

Differences in how dignity and the right to rehabilitation are treated in the United States, United Kingdom, and Germany are seen above, but the trickier question is why such differences exist. One possible explanation is that Germany's rehabilitation of prisoners is an extension of the welfare state, or the rehabilitation of prisoners is driven by the same motivations that fuel the welfare-state machinery of Germany; neither the United States nor the United Kingdom boasts such an extensive welfare-state system. David Garland has explored this view:

Garland has written shrewdly about the functioning of the penal system within the welfare state. Criminal offenders, he observes, generally belong to the same broad swathe of low-income citizens who are cared for by states with social welfare policies. Correspondingly, classic rehabilitationist approaches resemble other social welfare policies. Inmates are low-income clients, served by social welfare professionals just as other low-income clients are . . . . Indeed, we cannot understand current continental prison practices if we do not recognize that they are integrated into the social welfare order of their societies. But once again, if it is correct as an account of continental Europe, it does not describe the United States well at all. France and Germany cling to their social welfare states, and they cling to rehabilitationist practices as well. This is not well explained by describing them as "modern." It [is] better explained by observing they have stronger state traditions than ours.<sup>197</sup>

James Q. Whitman mentions an additional explanation for variations between treatment of prisoners in continental

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197. WHITMAN, *supra* note 3, at 205 (describing the work of Garland).

Europe and elsewhere: continental European nations like France and Germany are ones with a long legacy of condescending care by those of high social position.<sup>198</sup> This explanation reveals how provision of rehabilitation, like provision of living assistance, may not necessarily be based purely on the dignity of the individuals receiving services; rather, paternalism might cloud rehabilitation, tying back to Rotman's paternalistic rehabilitation model. After all, Rotman characterizes Germany's *Lebach* decision as "premised on a view of criminal offenders as psychologically handicapped and consequently in need of resocialization-oriented compensatory action."<sup>199</sup> As Germany's paternalism, to the extent it actually exists, has led to a robust, extensive welfare state, rather than a constrained public safety net obsessed with cost-benefit analysis and results, it is possible that dignity of prisoners underlies this paternalism in a way that paternalistic justifications of rehabilitation elsewhere lack to the same degree. Therefore, even if the above views are correct, this does not necessarily mean that dignity is not also influencing the provision of rehabilitation.

Another explanation for state differences in approaches to dignity and rehabilitation is the historical roots of the penal system in each country. The United States and United Kingdom historically had different punishments for high-status and low-status offenders, and high-status punishments were becoming less and less common starting over 250 years ago.<sup>200</sup> As time progressed, all offenders became subject to low-status punishments, which tended to be harsher in nature and less protective of dignity than high-status punishments.<sup>201</sup> The lack of a right to rehabilitation today in the United States and United Kingdom might exemplify the harshness of that system.

In contrast, some countries in continental Europe had a two-track system of punishment, where those of high status in society often faced more humane punishments than those of low status.<sup>202</sup> Over time, high-status punishments increasingly became the norm for all prisoners as "leveling up" within soci-

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198. *Id.*

199. Rotman, *supra* note 2, at 1058.

200. WHITMAN, *supra* note 3, at 11.

201. *Id.*

202. *Id.* at 9–10, 180.

ety and the prison system occurred, whereby all individuals attained high social status.<sup>203</sup> This may partly explain why the dignity of prisoners is a key feature of modern German prison policy in a way not seen in the United States and United Kingdom. These explanations might only scratch the surface of exploring such differences, and additional inquiry would be helpful, particularly in creating recommendations for moving forward beyond those proffered at the end of this article.

### B. *National Acceptance of International Law*

In trying to understand state approaches to imprisonment, the possible influence of international law cannot be ignored. This section will focus on the United States, as the recommendations presented at the end of this article are especially aimed at reform of U.S. law and practice. While earlier portions of this article discussed many important international instruments that relate to dignity and treatment of prisoners, there are additional international documents that could be consulted for further insight into these topics.<sup>204</sup>

In addition to taking the form of written instruments, international law can also come to bear on states through international norms becoming customary international law. To the extent that some of the documents already discussed, such as the ICCPR, have perhaps become customary international law, states may have an obligation to pursue rehabilitative ends, provide rehabilitative services, and respect prisoner dignity regardless of whether they have ratified such documents or

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203. *Id.* at 10–11.

204. *E.g.*, Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, Annex, ¶ 4, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49, at 200 (Dec. 14, 1990) (explaining that “[t]he responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State’s other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society”); Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, Annex, ¶ 2, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 186 (Dec. 17, 1979) (stating that “law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons”). For a detailed list of instruments, including these two mentioned above see ANDREW COYLE, *A HUMAN RIGHTS APPROACH TO PRISON MANAGEMENT: HANDBOOK FOR PRISON STAFF* 155-56 (2d ed. 2002).



not.<sup>205</sup> There is an especially strong case that the obligation to respect the dignity of prisoners has attained customary status, as human dignity is mentioned over and over within international documents.

Notably, the United States has often been hesitant to recognize international law as a binding source of obligation in addition to its own domestic law, despite the place of treaties, alongside the Constitution and U.S. laws, as “the supreme law of the land.”<sup>206</sup> The result is that whatever grounding there may be in international law for the dignity of prisoners and their right to rehabilitation, such law may have minimal bearing domestically. For example, while the United States has ratified the ICCPR, the reservations, understandings, and declarations attached to that ratification unfortunately hinder the document’s practical impact. Furthermore, the United States has not ratified the ICESCR. Though both of these documents are arguably customary international law,<sup>207</sup> and therefore binding on the United States, this might not in actuality change the extent to which the United States follows either document. The United States has also not ratified the American Convention on Human Rights, and the U.N. Standard Minimum Rules are guidelines not available for standard ratification.<sup>208</sup>

The challenge of bringing international law to bear on the United States is additionally compounded by the vibrancy of the individual states in relation to the federal system as a whole. Foreign relations are largely the domain of the federal government, as opposed to the individual state governments.<sup>209</sup> However, federal attempts to bring international law

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205. See Rotman, *supra* note 2, at 1059–61 (discussing customary international law in the context of the U.S.).

206. U.S. CONST. art IV, § 2.

207. It should be noted that the ICCPR is more commonly seen as customary than is the ICESCR, however.

208. That being said, the Administrative Directives of the Connecticut Department of Corrections uses the U.N. Standard Minimum Rules as a preamble, and both the Supreme Court of Oregon and U.S. District Court for the District of Connecticut have referred to the Rules. Rotman, *supra* note 2, at 1060.

209. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (invalidating Massachusetts law limiting business with companies themselves doing business with Burma, because this infringed the ability of the federal government to negotiate effectively with Burma).

into U.S. prison policy may be limited by the willingness of state governments to adhere to and implement related changes within state-run institutions. Additionally, as the case of *Medellin v. Texas* illustrates,<sup>210</sup> many treaties and international legal documents are often framed as “non-self-executing” by U.S. officials; this means that if the document lacks clear language stating that no additional legislation is needed in order for the document to be part of domestic law or have domestic effect, then it is easier for domestic actors to claim that the treaty has no such national impact unless implementing legislation is passed. This further increases the difficulty of successfully applying international law to prisoners in the United States.

In contrast, the United Kingdom has tried to explicitly bring regional European law into domestic law via the Human Rights Act. Also, the German constitution suggests that general international law is not merely on the same plane as Germany’s domestic law, but rather can be superior to it.<sup>211</sup> Though, of course, much more could be written about how these nations approach international law in theory and in practice, the general point to be made here is that countries vary in their willingness to accept international obligations, and some countries may be particularly hesitant to embrace international law, which will affect strategies for promoting concepts found in international law at the national level.

### C. Recommendations

Based on the analysis presented above, those who wish to strengthen the right to rehabilitation at the national level, particularly within the United States, should also focus on promoting the human dignity of prisoners as a legal value within national discourse, as this strategy can encourage legal recognition of a concrete right to rehabilitation. Dignitarian justifications for rehabilitation can help create a right to rehabilita-

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210. *Medellin v. Texas*, 552 U.S. 491, 509–511 (2008) (holding that the United States did not have to follow the ICJ’s ruling in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), which ordered review of the cases of 54 Mexicans incarcerated in the U.S., because the ICJ’s judgment was not self-executing).

211. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 25, May 23, 1949, BGBl. I, *translated in* DEUTSCHER BUNDESTAG, *supra* note 67.

tion focused on the inner worth and mental capacity of prisoners, a right that can more easily be separated from extraneous considerations such as efficacy.

Promoting human dignity as a legal value, however, is much more easily said than done in those countries that do not already firmly embrace the concept. For example, within the United States, one option is amending existing legislation about prisoners so that the legislation more explicitly treats dignity as a guiding value. Attaining such amendments could be nearly impossible, however, given that legislators may be more concerned with reworking the nuts and bolts of prisoner treatment rather than fine-tuning behind-the-scenes values for prison administration.

In comparison, pushing for recognition of the human dignity of prisoners in future laws may be more practical. As a starting point, advocates could encourage inclusion of human dignity in the preambles or findings that accompany laws addressing treatment of prisoners; this would mirror the use of dignity in the UDHR. Indeed, including “human dignity” in the non-operative language may seem like a safe bet to legislators who are hesitant to throw this concept into new laws at all. To this end, advocates may want to consider aligning with other groups that already firmly embrace human dignity as a valuable concept, such as human rights advocates, and even religious groups.

Of course, a preferable goal for supporters of rehabilitation would be to have human dignity, and a right to rehabilitation grounded in that dignity, included in legislation’s operative language. Having human dignity given as a justification for the right to rehabilitation would make it more difficult, in theory, for administrators to shy away from their responsibility to provide rehabilitative services. That being said, advocates of prisoner rehabilitation will likely have to pick and choose their battles as far as promoting certain concepts within a given piece of legislation. With this in mind, there may be a sort of rough hierarchy of priorities that advocates of prisoner rehabilitation should keep in mind, as far as what combination of concepts will be the most helpful in legislation to arrive at the goal of promoting prisoner rehabilitation as strongly as possible. The following options are given in the order that they should be pursued, when practicable, by advocates of prisoner rehabilitation, starting with the most preferable option:

1. Legislation gives a clear right to rehabilitation for prisoners, and names human dignity as the most important justification for the rehabilitation.
2. Legislation gives a clear right to rehabilitation, without naming human dignity as a justification. Having a right to rehabilitation is crucial, from the standpoint of advocating for prisoner rehabilitation. Practically speaking, however, having legislation recognize the right when the legal system does not hold dignity to be a crucial value may be challenging.
3. Legislation states that prisoners *should* receive rehabilitation (though not worded as an immutable right), and human dignity is named as the most important justification for the rehabilitation. Even if rehabilitation is not framed as a right, by naming dignity as the justification for rehabilitation, it may be harder to later bring in macro-economic and cost-benefit concerns to limit the provision of rehabilitation in practice. One could think of this as a “back-door” way of encouraging a right to rehabilitation.
4. Legislation states that prisoners should receive rehabilitation, but does not mention dignity. Advocates of prisoner rehabilitation may have to settle for this approach in situations where a focus on results and cost-effectiveness prevails among legislators. The obvious downside of this approach, based on earlier discussions, is that even if empirical evidence supports prisoner rehabilitation in some instances, proof to the contrary later on could destabilize whatever ground had been gained in promoting rehabilitation. Nonetheless, it must be acknowledged that an empirical justification for rehabilitation, however much that approach may leave rehabilitation in flux overall, might lead prisons to provide rehabilitative services to a greater extent in some circumstances, compared to an approach solely based on the dignity of prisoners.
5. Legislation mentions the human dignity of prisoners as an important legal concept, but does not mention rehabilitation. In situations where it is not possible to have rehabilitation mentioned at all in a given piece of legislation, advocates should remember that in-

cluding dignity in the legislation can be a foundation for greater respect of prisoner rights in the future, and may even contribute to an eventual embrace of the right to rehabilitation.

Attempting to influence legislation can be extremely challenging, and so use of the courts is an additional avenue to consider for bringing dignity and rehabilitation more prominently into the national discourse. For example, the European Court of Human Rights' interpretation of Article 3 of the European Convention on Human Rights attached the concept of dignity to the Convention. Proponents of rehabilitation could attempt to use existing constitutional provisions to bolster the claim that there should be a right to rehabilitation, most notably the Eighth Amendment or the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution;<sup>212</sup> in such arguments, dignity might come in as a peripheral value, or not at all. Such legal arguments present significant challenges, however, specifically as neither Amendment grants a right to rehabilitation explicitly in its language.<sup>213</sup>

Other obstacles abound in using the courts. If supporters of prisoner rehabilitation want to use *amicus curie* briefs to encourage recognition of the right to rehabilitation, then they will be at the mercy of the court docket, waiting for the right case to come along. Additionally, even should a relevant case come along, there is no guarantee as to what sort of consideration the court will actually give to the brief filed. Another option is for advocates to pursue their own impact litigation case; however, this option is time-consuming and costly, and of course runs the risk that the court will decide against the proponents of prisoner rehabilitation. Relying on judicial interpretation is also somewhat unsatisfying because even if a given court's holding promotes dignity and/or prisoner rehabilitation, the holding might be rejected by other courts, including those above it or not otherwise bound by that court's decision.

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212. For discussion of the Equal Protection clause in this regard, see Rotman, *supra* note 2, at 1053–59.

213. *See id.* at 1057 (“An equal protection inquiry should first determine the extent to which education, work, vocational training, therapy or any other rehabilitative component has become a legally enforceable right of the public. The second stage of the inquiry should determine whether the exercise of such rights can be legitimately curtailed or abolished because one is imprisoned.”).

Indeed, the impact of a given case may be limited by the reach of the jurisdiction of the court which hears the case.

Another option is to encourage ratification of and adherence to international law affirming the dignity of prisoners and the right to rehabilitation at the national level. Eva S. Nil- sen discusses the positive impact that a greater focus on dignity could have in the United States:

The fact that prisoner health, rehabilitation, and re- integration are essential components of human dig- nity abroad is potentially instructive to the Court and highly relevant given the limited prison programs, mentally destructive prison conditions, and post-sen- tence barriers that are routine in the United States. . . .

. . . .

. . . . Adoption of consistent global standards of human dignity will go a long way toward correcting the current distortion in American punishment juris- prudence.<sup>214</sup>

Because a given nation may be hesitant to embrace certain in- ternational law concepts, it may be wise for advocates of pris- oner rehabilitation to utilize ideas subject to widespread ac- ceptance when making international law arguments. In such situations, efforts should focus on discussing human dignity, as this concept has been mentioned in many international docu- ments, and is a core foundation of international law. Dignity- based international law arguments may be especially difficult for countries like the United States to ignore and brush aside, compared to other international legal concepts, even in the face of the nation's often-obstinate attitude towards this area of law. Also, proponents of rehabilitation could claim that re- spect for the human dignity of prisoners is a norm of custom- ary international law, encouraging the United States to con- front its obligation to respect dignity in practice and pointing to prisoner rehabilitation as one route for the United States to fulfill its obligation.

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214. Nilsen, *supra* note 147, at 168.

## VI. CONCLUSION

Dignity and the right to rehabilitation each are complicated legal concepts at the national and international levels; their interaction with one another creates further complexity. That being said, human dignity provides an informative perspective from which to analyze the right of prisoners to rehabilitation, shedding light on the varied justifications for rehabilitation, approaches to incarceration, and national and international law. The road ahead for promoting prisoner rehabilitation will certainly not be easy, as the approaches of the United States and some parts of international law suggest. Other examples discussed, however, indicate that if human dignity is firmly embraced as a foundational concept, then this can pave the way for a right to rehabilitation. Those wishing to encourage expansion of rehabilitative services for prisoners should use the concept of human dignity in their efforts, as human dignity not only provides support for a right to rehabilitation, but does this in a more beneficial way than other justifications for rehabilitation. Only time will tell whether a dignity-based right to rehabilitation for prisoners comes to fruition in more legal contexts in the future. In the meantime, however, we should not lose sight of the powerful potential that human dignity has in ensuring respect for the rights of this vulnerable group.

