

# Dignity in the Criminal Legal System

A Policy Guide for Advocacy and Reform

Erin Daly

and the Students of the  
Dignity Rights Clinic  
Widener University Delaware Law School





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**Cover Image:** Eagle, Djan Shun Lin (Chinese), ca. 1994, folded magazine pages, paint, toilet paper, 80.2 cm x 84.0 cm x 77.0 cm, York County Prison, Pennsylvania, United States  
*Museum of International Folk Art, IFAF Collection, FA.1995.3.1*

This Policy Guide is dedicated to all those who are impacted by the criminal legal system in the United States and throughout the world, including those who live or who have lived inside prison walls as well as their families, friends, colleagues, and supporters who suffer alongside.

We also wish to acknowledge the dedication of retired Sixth Circuit Judge Bernice B. Donald, whose work on the bench and at the American Bar Association has affirmed that human dignity is the foundation of a just rule of law.

The students of the Dignity Rights Clinic dedicate this Policy Guide to Tokunbo Alero Macaulay whose spirit and belief in the inherent dignity of every person infuses each page.

How Would "YOU" Feel!  
By Jamila W. Harris® Help!

I've fallen and I can't get up  
So, I mind as well wear this uniform  
They did say Orange  
Was the new Black  
Right?  
So, shucks  
I am STUCK!  
In a nightmare  
Woke up this morning facing the cold brick wall  
I cannot reach out to my loved ones  
No money on my books to make a phone call  
Ya Lord!  
I scream  
How did I fall this hard?  
Now tell me, "How would 'YOU' feel"?!?!  
If they identified you not as a person, but only as a number  
And the day that you can leave  
You are left to wonder  
And suddenly you realize that you are stuck under  
The ground  
A level above Hell  
And what time of the day that it is  
You can only gaze through a dirty, cracked, window to tell

And the water is COLD  
Ice COLD and running low  
They said “shidddd”  
It was a luxury if your water even came on at all  
And it was a luxury if your toilet flushed  
And when it did, it was still backed up  
From the shit that the last person left  
In it  
No, not your cellie  
But the person who was released  
Two...Decades...Ago!  
Because the toilet does not clean  
No matter how hard you flushed it  
And your hair does not curl  
No matter how hard you pressed it  
And your lawyer does not visit  
No matter how hard you stressed it  
Now tell me, “How would ‘YOU’ feel?!?!”  
If you were stuck in  
A cellblock away from Hell  
Around the corner from the Devil  
Ringing the bell  
To wake the hell up  
Time to eat from a disgusting selection of food  
That would not make even the greediest person drool  
And the meat is not real and so tough

That you could not penetrate it with a knife or a fork

Oh! But there is comedy here

Because they expect you to cut it with a spork

And the lunches and dinner that they offer

Should be against the law

Serving humans this type of food

That is worse than what society feed their dogs

So, now you are going insane

And when they finally call your name

To visit the psych

You feel like Psych!

Because they did not help you at all

Just filled you with more drugs

During the med line call

Drugs that had you saying "goodnight"

Drugs that got you higher than any kind

That they locked you up for, right?!?!

And you are wondering if by chance

You get to see the sun of daylight

The gatekeepers of this Hell

Reply, "You might?"

"If you act right!"

But that promise was a lie

And instead, they throw you in the hole

Strip you of more than your clothes

Strip you of your dignity, pride, and soul

Oh! And do not forget another check of your asshole  
So, "Squat, spread your butt cheeks, and Cough!"  
You know, just in case we need to charge you with another offense  
Now tell me, "How would 'YOU 'feel!?!?"  
If you were stuck in the hole  
Because you were making too much noise  
Now you are stripped of any fraction of joy  
Simply because you had the nerve  
To advocate for the human rights of yourself and others  
So, you got what you deserved  
At least that is what they convinced you  
Therefore, you will never see the light of day  
You have been in the dark so long  
That when you return to population your "Celly's" hair is grey  
And you missed a thousand Mays  
And your lawyer's visit too  
It was only the public pretender anyway  
He had you on the list with a few  
But you did not miss your family's visit  
Because your mother already knew  
Not to come  
For she grew numb  
From the pain  
Of the trials and tribulations that incarceration was putting you through  
Now you are back in your cell, stuck in a 12 by 4  
Steadily pacing the floor



But you dare not make a roar  
To avoid the punishment that you just endured  
And it does not even matter  
Because the entire jail is a hole  
That chops you down to half of a person  
When you used to be whole  
And it only gets worse and  
Deep inside you are hurting  
As your release date lies in the hands  
Of the gatekeepers of Hell  
That do not give a damn  
And when it is finally time to leave  
And the gatekeepers use their keys  
To finally let you go  
They smile that devilish grin  
As they say, "See you when you get back"  
"It's just a matter of when!"  
Now tell me  
"How would 'YOU' feel?!?!"

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“Prison and the authorities conspire to rob each man of his dignity. In and of itself, that assured that I would survive, for any man or institution that tries to rob me of my dignity will lose, because I will not part with it at any price or under any pressure.”

– Nelson Mandela, Long Walk to Freedom

“It would be a mistake to think that the prison exists at the point where the convict’s stroke is dealt. Prison is not a mere physical horror. It is using a pickaxe to no purpose that makes a prison; the horror resides in the failure to enlist all those who swing the pick in the community of mankind.”

– Antoine de Saint Exupéry, Wind, Sand, and Stars

“There is something that feels more like freedom, more like equality, more like justice, waiting for all of us.”

– Bryan Stevenson

“Hasta que la dignidad se haga costumbre”  
 (“Until dignity becomes the custom”)

– Estela Hernández Jiménez

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## A Note on Authorship

This Policy Guide was developed by the students in the Dignity Rights Clinic at Widener University Delaware Law School, under the supervision of Professor Erin Daly. Students contributed idea development, original research, and drafting in the following areas:

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Sarah Plasse contributed extraordinary support with sources throughout the process; Brianna Turner and Vivian Hadian provided additional research support.

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Please contact Erin Daly at [edaly@widener.edu](mailto:edaly@widener.edu) with suggestions.

## A Note on Readership

The Policy Guide is intended for people who are system-impacted as well as people who seek to support them, including family and friends, lawyers and other advocates, and policy-makers, reformers, and academics.

We recognize that those who make use of this Policy Guide may be more interested in certain portions than others, so we offer explanations that are generally descriptive of dignity and dignity rights at the beginning (Preface, Bottom Lines, and introductory materials including visual dignity wheel and a glossary of dignity terms). We also provide abstracts of chapters, as well as advocacy points at the end of each chapter, and we've used **bold** font to highlight the terms that are central to dignity law. Some of the main aspects of dignity law are reiterated throughout the Policy Guide to ensure that they are understood in the various contexts in which they arise.

The law changes day by day and no source should be used in legal argument, written or oral, without verifying accuracy and relevance to the particular situation.



## PREFACE

Imagine a criminal justice system that balances the scales of justice by keeping communities safe while at the same time ensuring that all human beings are treated with respect for their essential humanity, notwithstanding what they did on their worst days, at their lowest points, in their darkest moments. Imagine a system that respects the inherent worth of every individual, that recognizes and seeks to protect their sense of self to help them fully develop their personalities, and that ensures that they will be able to live with dignity when they rejoin society on the outside. Imagine a society that reduces crime by enhancing the dignity of all.

Now imagine a criminal justice system that was designed to demean and diminish the humanity of huge numbers of individuals within our communities, often based on the color of their skin. Imagine that, in the name of justice, these people were taken from their families and friends, and isolated from their communities, sometimes without a fair trial. Imagine that, inside, they are treated with such persistent abuse that they were demeaned not only in the eyes of others but in their own eyes as well; that this form of treatment, over months, years, and indeed decades reduced their own sense of self-worth, near or at the point of hopelessness and suicide. Imagine a system that encouraged some people to treat others not as human beings with inherent dignity and worth, but as commodities, as property, as animals, as less than human.

We could have the first, but in fact we have the second.

This Policy Guide is designed to move us toward the society in which the dignity of all human beings is respected. By dignity, we mean, essentially, the rights 1) to live with dignity, 2) to be treated by others with dignity, and 3) to develop as a person with dignity.

This book focuses on human dignity for three reasons.

First, dignity is important because it describes what is essential about the human experience and it should therefore be reflected in law. The renowned scholar, activist, and defender of civil liberties, Michael Tigar proposes that “all of us who participate in this process — lawyers, judges, teachers, community groups, etc. — should be aware of the ways in which we can advocate for dignity, even by our conduct: what one might call the semiotics of dignity” and he suggests that how we act, and the ways in which we model dignity, can be as impactful as what we say. Dignity is important in our society because it is important to all people. Perhaps the most important thing, as Nelson Mandela suggests.

Second, throughout the world, the law is increasingly recognizing and affirming the inherent and equal dignity of every person, everywhere. Judge Neomi Rao of the U.S. Circuit Court for the D.C. Circuit has written about the importance of dignity not only in our constitutional law but in how we construct our society, how we define ourselves, and what we value:

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*This book identifies ways to move the law closer to justice by recognizing the inherent and inalienable worth of every member of the human family. It seeks to find ways within our present legal system to ensure that every person who is impacted by the criminal law can nonetheless live with dignity.*

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“[D]ignity in constitutional law and political life cannot simply be brushed aside. In modern constitutional systems, dignity is already a preeminent value. Even in the United States, it is increasingly a part of our discourse in thinking about individual rights and government action.”<sup>1</sup>

Judge Rao continues by making the normative argument to spur law reform to better protect human dignity:

“So it makes sense to think about what conceptions of dignity we want to promote in our political and social community. The type of dignity that a society protects is part of how a community defines itself—how individuals belong to the community and how the state must act to respect human dignity. An appeal to dignity cannot solve conflicts between competing visions of the good life, but it gives us an opportunity to discuss what we value and why.”<sup>2</sup>

Judge Thomas Ambro (sitting by designation in the District of Delaware) wrote in a prisoner rights case in 2023 that “Dignity, or respect of our fellow human beings, is an important principle underlying many constitutional rights. Because of this, the Supreme Court has routinely discussed dignity in cases where plaintiffs seek to vindicate those rights.”<sup>3</sup> Judge Ambro cited a series of cases in support of the claim that dignity is prevalent in US constitutional law: “*Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment protections are necessary to “comport with the premise of individual dignity and choice upon which our political system rests”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying

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*The American Bar Association has affirmed that dignity rights are the “foundation of a just rule of law”*

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the Eighth Amendment is nothing less than the dignity of man.”); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (“[T]hese liberties [protected by the Fourteenth Amendment] extend to certain personal choices central to individual dignity and autonomy.”).

Dignity is not yet recognized as a stand-alone right in the United States but it is an elemental value that works alongside of other rights such as rights against unwarranted searches, protection from cruel punishment, and the right to life.<sup>4</sup>

Indeed, the American Bar Association has affirmed that dignity rights are the “foundation of a just rule of law” and has urged governments around the world, including in the United States, to respect dignity in their judicial, legislative, and executive functions. This would of course include

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<sup>1</sup> Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 192 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106, at \*22-23 (D. Del. Aug. 17, 2023).

<sup>4</sup> *Id.* at \*23.

the criminal legal system.<sup>5</sup> Likewise, the Supreme Court has reaffirmed that the prohibition against cruel and unusual punishment is about “nothing less than the dignity of man.”<sup>6</sup>

Around the world, constitutions and courts are following international human rights law in affirming faith in the equal dignity and rights in which all members of the human family are born.<sup>7</sup> Because dignity matters to people, it matters to law.

A third reason that we focus on dignity is that human dignity is especially compromised throughout the criminal legal system in the United States. As the Vera Institute has noted: “Achieving transformative change in U.S. prisons and jails starts with focusing correctional practices on the human dignity of incarcerated people and staff.”<sup>8</sup> The Vera Institute’s “Dignity Behind Bars” project seeks to end mass incarceration and “affirm fundamental rights and human dignity” for people who are incarcerated.<sup>9</sup>

This Policy Guide goes beyond physical locations and seeks to achieve dignity-based change throughout the criminal legal system. The aim of this Policy Guide is to galvanize the legal recognition of human dignity throughout the criminal law in the United States.

This Guide provides a range of tools that, collectively, show how the American criminal legal system can be reoriented toward human dignity.

1. We provide a conceptual framework for what criminal law in the United States would look like if it respected and protected the equal, inherent, and inalienable worth of every human being at all times. It illustrates how we might reimagine the criminal legal system through the lens of human dignity.
2. We identify the language and vocabulary that judges and lawyers use when they respect and protect the dignity rights of all people. This includes notions of agency and the full development of the personality as well as protections against humiliation and objectification and protections for privacy and self-esteem. These terms are described in the Glossary at the end of this chapter and used in context throughout this Guide.
3. We encourage judicial acceptance of dignity claims by identifying the fundamental principles, general rules, and specific applications by which courts promote respect for

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*The aim of this Policy Guide is to galvanize the legal recognition of human dignity throughout the criminal law in the United States*

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<sup>5</sup> A.B.A. Resolution 113b (Aug. 2019). The full text is here: “RESOLVED, That the American Bar Association affirms that human dignity — the inherent, equal, and inalienable worth of every person — is foundational to a just rule of law; and FURTHER RESOLVED, That the American Bar Association urges governments to ensure that “dignity rights” — the principle that human dignity is fundamental to all areas of law and policy — be reflected in the exercise of their legislative, executive, and judicial functions.” *Id.*, <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/113b-annual-2019.pdf>.

<sup>6</sup> *Trop v. Dulles*, 356 U. S. 86, 100 (1958).

<sup>7</sup> G.A. Res. 217(III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) [hereinafter UDHR].

<sup>8</sup> Kayla James & Elena Vanko, *The Impacts of Solitary Confinement 1*, VERA INST. OF JUST. (Apr. 2021), <https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf>.

<sup>9</sup> *Dignity Behind Bars*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/dignity-behind-bars> (last visited Oct. 21, 2023).

human dignity. They do this when they (1) mandate executive authorities to always protect the dignity of all persons and (2) invalidate practices that violate human dignity, whether such practices are authorized by law or exercises of discretion. These claims may be constitutionally recognized causes of action that advance or protect human dignity or may be stand-alone dignity claims one day to be recognized in federal courts.<sup>10</sup>

4. We use legal resources to support and scaffold legal arguments for using human dignity as the measure of law in the United States and around the world. While the United States has begun to recognize the foundational relevance of dignity to law, this commitment is already more developed in human rights law at the international and regional levels, and in the constitutional law of countries that have active constitutional courts. The list of countries in which courts have developed or are developing a jurisprudence of dignity includes countries as diverse as Bangladesh, Brazil, Canada, Colombia, France, Germany, India, Israel, Italy, Japan, Kenya, Malawi, Mexico, Namibia, Nepal, Pakistan, Slovenia, South Africa, Spain, and Taiwan, among others. In the American constitutional system, Puerto Rico and Montana are already committed to dignity jurisprudence and the Kansas Supreme Court has found human dignity to be at the heart of the “inalienable natural right of personal autonomy.”<sup>11</sup> There are cases throughout the federal system that also refer to human dignity.<sup>12</sup>
5. We map out the gaps in dignity throughout the criminal legal system, in roughly chronological perspective, from initial encounters with police, through to pre-trial detention, sentencing, incarceration, and release/surveillance. We focus on areas where lawyers are not typically present; thus, we do not address formal proceedings such as the conduct of trials. While the criminal legal system directly impacts men at a far greater rate than women, we address how women are specifically impacted throughout the chapters, as the issues arise. We address specific considerations relating to young people in the system separately in Chapter 8.

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*Only in dignity can a criminal legal system become a criminal justice system.*

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The motivating force of this project is a commitment to the idea that the law should always reflect and protect the human dignity of “every member of the human family”<sup>13</sup> and that only in dignity can a criminal legal system become a criminal justice system.

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<sup>10</sup> For the distinction, see *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106 (D. Del. Aug. 17, 2023).

<sup>11</sup> *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 497 (Kan. 2019).

<sup>12</sup> For dignity case law outside the United States, see the *Dignity Rights Case Library*, [https://docs.google.com/spreadsheets/d/1GebYSEqcECDIa3Vt9Ohw5ivi1Tq9ywFgGwlfdHojg\\_w/edit#gid=51272552](https://docs.google.com/spreadsheets/d/1GebYSEqcECDIa3Vt9Ohw5ivi1Tq9ywFgGwlfdHojg_w/edit#gid=51272552). The Dignity Rights Clinic at Delaware Law School is currently constructing a database of dignity rights caselaw for US jurisprudence.

<sup>13</sup> UDHR, *supra* note 7, at preamble.

## THE BOTTOM LINES

Dignity stands for the inherent, equal, inalienable worth of every human being. Although there is no formal, legal definition of dignity, we define it in terms of these essential attributes.

To live with dignity is to

- have some agency over your life choices
- fully develop your personality
- maintain bodily integrity
- participate in social, economic, political, and cultural life on an equal basis with others
- be treated by others as a person of equal worth
- be a part of a community
- and more.

Because dignity inheres in the human person, the law, including the criminal law, can and should respect the dignity of every person at all times. In some instances, the government must take affirmative measures to protect human dignity. In other instances, it need only refrain from taking actions that threaten or damage a person's dignity.

This Policy Guide encourages advocacy, litigation, and reform to ensure that the criminal legal system respects human dignity. To that end, we make the following essential recommendations. Additional recommendations are made at the end of each chapter and throughout the text.

1. FEDERAL, STATE, AND LOCAL authorities MUST TAKE AFFIRMATIVE MEASURES to protect the dignity of those who are most vulnerable, including girls and women, those who suffer from mental health challenges including substance abuse and traumatic stress, LGBTQIA, the elderly, and those who manage physical, emotional, or mental disabilities.
2. PRETRIAL DETENTION VIOLATES HUMAN DIGNITY and should be used, if at all, only when justified by extraordinary and actual circumstances.
3. SENTENCING SHOULD BE PROPORTIONATE TO THE CRIME AND BE ORIENTED TOWARD DIGNITY: it should be designed to help the individual live a life of dignity before, during, and after one pays one's debt to society.
4. WOMEN AND GIRLS ARE ENTITLED TO DIGNITY-AFFIRMING MENTAL AND PHYSICAL HEALTH CARE.
5. YOUNG PEOPLE SHOULD BE TREATED LIKE YOUNG PEOPLE who are bearers of full dignity rights but whose bodies, minds, and spirits are still developing.
6. SENTENCING A PERSON TO DIE IN PRISON VIOLATES HUMAN DIGNITY.

7. SOLITARY CONFINEMENT VIOLATES HUMAN DIGNITY. People can be temporarily isolated under certain narrow circumstances and to the extent of the danger presented. People should not be isolated to protect them from the danger of others.
8. HUMAN BEINGS SHOULD NEVER BE CAGED. HUMAN BEINGS SHOULD NOT BE SHACKLED unless absolutely and actually necessary to prevent harm to themselves or other persons.
9. Places where people live should be clean. All people should have opportunities to fully develop their personalities, through access to education, tools of communication, and employment.
10. Dignity-based accountability is essential within administrative and judicial fora, including effective and protective grievance procedures.

## INTRODUCTION: TOWARD A DIGNITY-BASED CRIMINAL LEGAL SYSTEM

### I. HUMAN DIGNITY – A DEFINITION

There is no formal or official definition of human dignity, but every person instinctively understands that their own life has value, that their intrinsic worth as a human being is equal to that of everyone else's, and that they are entitled to have some measure of control and agency over their own lives. They understand that they need some space in which they can freely develop their personality according to their own needs and values and that they should be respected by others as beings of equal worth.

In one way or another, this idea is reflected in all of the world's most important human rights treaties, and in the constitutions of more than 170 nations on earth (out of about 190). It is reflected implicitly in the constitutional law of the United States, including in the Eighth Amendment's prohibition of cruel and unusual punishment which the United States Supreme Court has said is about "nothing less than the dignity of man."<sup>14</sup> It is reflected in state and federal court cases around the nation.<sup>15</sup>

A system committed to the principle of human dignity views all people as fundamentally equal and united; that is, connected to one another in their inherent dignity. The global consensus on

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*A system committed to the principle of human dignity views all people as fundamentally equal and united.*

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the primacy of dignity as "the foundation of a just rule of law"<sup>16</sup> derives from the Charter of the United Nations; it is reaffirmed in the Universal Declaration of Human Rights and the twin International Covenants of Civil and Political Rights and Economic, Social and Cultural Rights. These instruments, as well as many others at the international, regional, and national levels suggest certain elemental characteristics of human dignity that define what it means in law.

- Dignity represents the value or worth of every person's life.
- Dignity is an inherent quality of every human being; it is a fact of being born a member of the human family. Although human dignity itself is not a right because it is not granted or created by government, certain rights flow from the recognition of human dignity which governments must recognize. We refer to these as "dignity rights."
- Dignity is equal for every person. No one has more dignity or less dignity than anyone else. No one's life is more valuable than anyone else's and no one can control another person's destiny. We may be different in our physical bodies, in our mental capacities, and in other ways but in dignity we are all exactly the same.
- Dignity is inalienable. The government can no more take dignity away than it can grant it. Dignity is not forfeited or bargained away. A person who is guilty of even

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<sup>14</sup> *Trop v. Dulles*, 356 U. S. 86, 100 (1958).

<sup>15</sup> See *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106, at \*22-23 (D. Del. Aug. 17, 2023).

<sup>16</sup> A.B.A. Resolution 113B (Aug. 2019), *supra* note 5.

the most heinous crime is still a person and therefore is still entitled to be treated as a person, with respect for their dignity.

Human dignity is universal because it is an innate right that every human being has, no matter their place in the world. It is the common thread that unites all of humanity.

## II. DIGNITY IN LAW

In a state of nature, as long as there are human beings, there is human dignity. It exists regardless of what the law says or does. And it is such a profound fact of life on earth that, as the creators of the United Nations foresaw, its recognition is the ‘foundation of peace, justice, and freedom on earth.’<sup>17</sup> This is reflected, most recently, in the American Bar Association’s affirmation that dignity is indispensable to a just rule of law.

Indeed, the recognition of dignity is what distinguishes just from unjust systems of law: legal systems that ignore or violate human dignity are unjust precisely because they are cruel and dismissive of the value of human life (as in Nazi Germany), because they are illegitimate (as where sham elections ignore the will of the people), or because they fail to ensure that persons live with dignity (as in oligarchic or corrupt states where a few live very well at the expense of the many). In all these, the law exists, but it is an unjust law that ignores inherent, equal, and universal human dignity.<sup>18</sup>

Human beings are born equal in dignity and rights, but most people live their lives in various states of vulnerability – as girls and women, as poor people, as people of color in societies of racism, as people with mental, emotional, or physical disabilities, as people suspected of crimes or with criminal records, and so on. Society, sometimes through law and sometimes in law’s absence, thus distorts this notion of equal dignity: our legal and social systems make unequal that which is in its nature equal. It also makes divisions between people where none should be; in allowing “othering,” it distorts the aspect of dignity that demands that we all see each other as fundamentally the same, united in our common humanity.

As a general matter, the recognition of human dignity and the commitment to respect the equal human dignity of every person means that our legal and social systems must refrain from taking action that further reinforces vulnerabilities and inequalities and that allows us to separate ourselves from others. The principle of dignity makes othering impossible. In addition, it must take positive measures to ensure that every person has the capacity to live life in the fullness of their equal dignity as part of the community.

This Policy Guide explains how the criminal legal system in the United States can do that.

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<sup>17</sup> UDHR, *supra* note 7, at preamble.

<sup>18</sup> See generally Layla Skinns, Angela Sorsby & Lindsey Rice, “*Treat Them as a Human Being*”: *Dignity in Police Detention and Its Implications for ‘good’ Police Custody*, 60 THE BRITISH J. OF CRIMINOLOGY, 1667–1688 (Nov. 2020), <https://doi.org/10.1093/bjc/azaa051>.



### III. DIGNITY RIGHTS

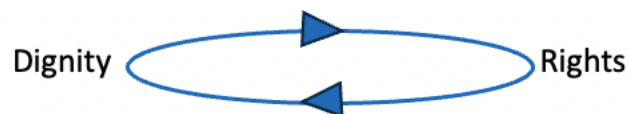
#### A. The Evolution of Dignity Rights

Until the twentieth century, “there was no right to dignity.”<sup>19</sup> The notion that human dignity instantiates human rights did not come until after the Second World War, when the atrocities of the war, including especially those committed by the Nazis, could no longer be ignored. The Charter of the United Nations affirms as one of its principal goals “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”<sup>20</sup> Then, the Universal Declaration of Human Rights (“UDHR”), adopted by the UN General Assembly in 1948, affirmed the interlocking nature of dignity and rights, thereby establishing a model for all nations of the world. Article One states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>21</sup>

Yet, neither the UN Charter nor the UDHR defines human dignity, leaving its substance to be filled in by courts and others over time.<sup>22</sup>

Indeed, courts worldwide have found that from the fact of human dignity flow certain inalienable rights. In thousands of cases around the world, international and regional tribunals and constitutional courts have found that dignity represents the right to have and to claim rights.<sup>23</sup> It can be said that in most of the world’s constitutional systems, “fundamental justice does include the protection of human dignity.”<sup>24</sup>

As a conceptual matter, it is thus both the source of human rights, and the very purpose of human rights: the fact of inherent dignity is what motivates people to seek to protect human rights and the ability to live with dignity is the desired outcome of rights protection.



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<sup>19</sup> ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 1 (University of Pennsylvania Press 2013) [hereinafter DIGNITY RIGHTS].

<sup>20</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>21</sup> UDHR, *supra* note 7, at art. 1

<sup>22</sup> DALY, DIGNITY RIGHTS, *supra* note 19, at 27, noting that from “sparse textual foundations, [] constitutional courts of many countries have developed a robust jurisprudence” to decipher the meaning of dignity. *See also* ERIN DALY & JAMES R. MAY, DIGNITY UNDER LAW: A GLOBAL POLICY GUIDE 5 (2021) [hereinafter GLOBAL POLICY GUIDE].

<sup>23</sup> *See* DALY, DIGNITY RIGHTS, *supra* note 19, surveying the global caselaw; *see also* Trop v. Dulles, 356 U.S. 86, 101-02 (1958) noting that “the expatriate has lost the right to have rights” (using without attribution Hannah Arendt’s phrase); *see also* Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting) (applying the same phrase to people facing execution: “Death, for whatever crime and under all circumstances, “is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity. . . . An executed person has indeed ‘lost the right to have rights.’”).

<sup>24</sup> R. v. Bissonnette, [2022] SCC 23, at para. 16 (Can.), <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19405/index.do>.

The growing caselaw affirming the centrality of human dignity indicates that while dignity is innate in the human person and representative of what defines our humanity and therefore not dependent on state recognition, the law can – and, we argue must – respect and protect human dignity.<sup>25</sup>

This has been recognized in the United States and throughout the world, as the following cases show. We present these cases not because they are binding – only the first one is – but because they demonstrate how courts are taking human dignity seriously. They show that the language courts use is compelling and powerful. And they illustrate the profound impact that attention to dignity rights can have on the law.

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*Courts are taking human dignity seriously*

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- In relation to the right of self-representation at trial, the Supreme Court of the United States has said that “‘Dignity’ and ‘autonomy’ of the individual underlie self-representation right.”<sup>26</sup>
- In relation to reproductive rights, the Supreme Court of Kansas has said that “At issue here is the inalienable natural right of personal autonomy, which is the heart of human dignity. It encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. It allows each of us to make decisions about medical treatment and family formation, including whether to bear or beget a child. For women, these decisions can include whether to continue a pregnancy.”<sup>27</sup> Many other courts, too, have decided abortion cases as a matter of dignity-based autonomy, including India,<sup>28</sup> Mexico,<sup>29</sup> and Colombia.<sup>30</sup>

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<sup>25</sup> Justice Thomas has argued that since dignity is inherent, the law can neither add to nor take away from it. *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting). This Policy Guide, however, arises out of the recognition that law can be shaped to permit violations of human dignity (as the criminal legal system does in many ways at present) or, as this Policy Guide demonstrates, the law can be shaped to protect and promote human dignity.

<sup>26</sup> *Indiana v. Edwards*, 554 U.S. 164, 176 (2008).

<sup>27</sup> *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 497-98 (Kan. 2019). The United States Supreme Court has said: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion). This case was overturned in 2022. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (holding that “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.” And that “The right to abortion does not fall within” the category of rights that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty”).

<sup>28</sup> *X v. The Principal Sec’y, Health & Fam. Welfare Dep’t, Govt. of NCT of Delhi & Another*, (2022) SCC OnLine SC 1321 (India).

<sup>29</sup> *Amparo en Revisión 267/2023* (Mex. 2023).

<sup>30</sup> See, e.g. *Corte Constitucional [C.C.] [Constitutional Court]*, de enero 16, 2009 Sentencia T-009/09, para 3.2 (Colom.). See also *BVerfGE 39, 1* (1975) (Ger.). But see *BVerfG, 2 BvF 2/90* (1993) (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528\\_2bvF000290en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvF000290en.html); see *Constitutional Court of the Republic of Croatia no. U-I-60/1991* (Feb. 21, 2017) (regarding abortion); see

- In relation to the right to refuse medical treatment, the Supreme Tribunal of Puerto Rico, interpreting its subnational constitution which protects the right to dignity, has said:

“The Bill of Rights of the Constitution of the Commonwealth of Puerto Rico consecrates the cardinal principle of the inviolability of the dignity of the human being. Art. II, Sec. 1, Const. Based on this, it recognizes as fundamental rights privacy and protection against abusive attacks on honor, reputation and private or family life. These rights have special preeminence in our constitutional scheme.

“[T]he State has a dual function to protect the rights contained therein: abstaining from acting in such a way that the scope of individual autonomy and privacy is violated and acting affirmatively for the benefit of the individual. ... Furthermore, we have resolved that the right to privacy is violated, among other instances, when the power of an individual to make personal, family or intimate decisions is limited.

“Consistent with the foregoing, we have recognized the right of every patient to make decisions regarding the medical intervention to which they must submit. This includes the right to consent or refuse medical treatment, after the doctor has provided the information necessary to make such a decision. This doctrine, known as the doctrine of informed consent, is based on the fundamental right that enshrines the inviolability of the human body as an inalienable right of people.”<sup>31</sup>

- A High Court in Pakistan has said that “Human dignity is based on the individual’s free will and his ability to develop his personality and fulfill his life. The dignity of a human being is his free will: the freedom to shape his life and fulfill himself. It is a person’s freedom to write his life story. ... Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity regards a human being as an end, not as a means to achieve the ends of others.”<sup>32</sup>
- In relation to military service, the Supreme Court of Israel has said: “At the foundation of human dignity lies the autonomy of individual desire, freedom to choose and freedom of action of man as a free creation. The dignity of man rests upon the recognition of man’s physical and spiritual integrity, his humanity, his value as a human being, all this without regard to the extent of utility which he creates for others.”<sup>33</sup>

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*also Contentious Croatian abortion goes ahead after medical officials step in*, THE GUARDIAN (May 11, 2022), <https://www.theguardian.com/world/2022/may/11/contentious-croatian-abortion-goes-ahead-after-medical-officials-step-in> (regarding the case of Mirela Cavajda).

<sup>31</sup> *Lozada Tirado v. Tirado Flecha*, 177 P.R. 893 (2010) (P.R. Offic. Trans.). Many courts, including the European Court of Human Rights, have treated the right to die as a matter of the autonomy or decisional aspect of the right to human dignity. See, e.g. *Pretty v. the United Kingdom*, App. No. 234/02, Eur. Ct. H.R. (July 7, 2002).

<sup>32</sup> *Ameen Masih v. Federation of Pakistan*, (2017) 2017 PLD 610 (Lahore High Court) (Pak.).

<sup>33</sup> H CJ 6427/02 *Movement for Quality Government in Israel v. The Knesset* (2006) (Isr.).

- In relation to the patenting of genes, the Supreme Court of Canada has said that a human being is “a subject, a moral agent with autonomy and dignity, [and therefore should not be] treated as if it can be used as an instrument for the needs or desires of others.”<sup>34</sup>
- In relation to protection of personal information, the Supreme Court of India, interpreting the constitutional protection for the right to life as “the right to live with dignity,” has said:

“Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions—the autonomy of the individual—and not to dictate those decisions. ‘Life’ within the meaning [the Constitution] is not confined to the integrity of the physical body. The right comprehends one’s being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life. ‘To live is to live with dignity.’”<sup>35</sup>

The court further elaborated on the relationship between autonomy and privacy in the context of human dignity:

“The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life.... The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution.”<sup>36</sup>

- In a case about information about reproductive choices including abortion, the Constitutional Court of Peru has explained: “The right to reproductive self-determination is a right implicitly contained in the more generic right to the free development of the personality. This right consists of the autonomy to decide things that pertain solely to the person. But it also is affirmed that the right to reproductive self-determination partakes of the recognition of the dignity of the human person and of the general liberty right in which it is inherent. Dignity and liberty in concrete terms

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<sup>34</sup> Harvard College v. Canada, [2002] 4 S.C.R. 45, at para. 176 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2019/index.do>.

<sup>35</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161 (India), <https://indiankanoon.org/doc/127517806/>.

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

start from the necessity to be able to exercise freely and without any interference the act of transcending across generations.”<sup>37</sup>

- In relation to family rights, the Supreme Court of Israel has said: “the right to live together as a family unit is a part of the right to human dignity. It falls within the scope of the essence of the right to dignity. One of the most basic elements of human dignity is the ability of a person to shape his family life in accordance with the autonomy of his free will, and to raise his children within that framework, with the constituents of the family unit living together. The family unit is a clear expression of a person’s self-realization”<sup>38</sup>

These cases, and thousands like them, show that, throughout the world, courts are holding government to the obligation to respect and protect inherent human dignity. We use cases like these throughout this Policy Guide where courts have weighed in on the specific issues addressed here.

## B. Three Baskets of Rights

Although the vast majority of the world’s constitutional systems and all of the regional and international human rights systems recognize dignity rights, the United States is still an outlier. Thus, we draw our inspiration and seek guidance from cases from other courts that have already charted a path to recognize dignity rights, even though they are not binding in the United States.

In general, the caselaw describes dignity rights in these three essential ways:

1. The right to be treated with dignity guarantees against man’s inhumanity to man. It includes the absolute ban on torture, inhumane conditions of custody and incarceration, and humiliating and degrading treatment. This can be thought of as the principle of humanity, because it implies that there are certain things that human beings simply cannot do to one another. Using the UDHR language, some cases describe this as the right to be treated “as a person,” as if personhood implies its own inherent standard of behavior.
2. The right to live with dignity relates to material and social goods including food, water, healthcare, education, and a healthy environment. For many courts, it includes the ability to interact in society with others. This can be thought of as the principle of decency because it entails a quality of life that is at least decent. Some courts refer to this as a right to a dignified life or a dignified standard of living (“*vida digna*”).
3. The right to develop as a person with dignity protects each person’s full and unique identity. It guarantees the full development of the personality and the right to have some control over one’s life or life project. It prohibits discrimination that limits the fullness of one’s personality. This set of rights also includes the right to freedom of expression, freedom of conscience, and political rights to participate in democratic activity, as well as rights relating to gender and

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<sup>37</sup> EXP.N.° 02005-2009-PA/TC, Lima ONG, “Acción De Lucha Anticorrupcion,” paras. 5-6 (Peru Constitutional Tribunal (2009)), discussed in DALY, DIGNITY RIGHTS, *supra* note 19, at 41–42.

<sup>38</sup> HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior, para. 32 (May 14, 2006) (Isr.) (Supreme Court sitting as the High Court of Justice).

sexual identity. In some constitutional cultures, these rights also include the right to psychological integrity including the right to retain hope and the right to not have one's personality altered. This can be thought of as the principle of individuality because it protects that which is most essential and unique to each individual.

These are the rights that flow from the law's recognition of human dignity, as understood and applied by jurists around the world.<sup>39</sup> As we read the global caselaw, we see certain characteristics of how the courts treat dignity, which are unique or uniquely relevant to dignity rights. These have particular relevance to the criminal legal system.

### C. Qualities of Dignity Rights

Dignity is absolute and dignity rights are inviolable: it is never permissible to violate a person's dignity. Once a dignity right is identified – such as, for instance, the right against degrading treatment – the court does not give the government the opportunity to justify itself nor will it countenance any excuse: “In a democratic society, ill treatment is never an appropriate response to the problems facing the authorities,” the European Court of Human Rights has said.<sup>40</sup> This rule is especially important in the criminal legal system because violations of dignity rights are often justified by excuses of public safety or the management of a carceral facility. Yet, the commitment to dignity requires government to accomplish even the most crucial goals without violating any person's dignity.

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*It is never permissible to violate a person's dignity.*

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The US Supreme Court has not sufficiently adhered to this. While it has said (at least in the context of prisons) that “courts may not allow Constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration,”<sup>41</sup> judges often defer to police officers, prison authorities, and others even when those officials demean the dignity of people in vulnerable situations. The court has been consistent that the alleged commission of a crime or even a conviction and sentence does not affect a person's dignity (although the federal constitution and the constitutions of several states still, shockingly, permit involuntary servitude as punishment for a crime).

To say that dignity is absolute and inviolable is to say that dignity analysis does not require any showing of either intent or effect: many of the conditions described in this Policy Guide violate dignity and decency standards per se. Thus, the claimant can prevail without having to bring forth any evidence that the prison officials knew their conduct denied dignity or acted with deliberate indifference as to whether or not the prisoner's dignity was harmed; nor does the claimant need to show evidence that their dignity was in fact harmed. It may also be possible to establish that

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<sup>39</sup> The Colombian Constitutional Court has identified the following elements as essential to the legal rights to dignity: “(i) human dignity understood as autonomy or as the possibility of designing a life plan (living as one wishes); (ii) human dignity understood as certain material conditions (living well) and, (iii) human dignity understood as intangible goods, i.e., physical and moral integrity (living without humiliation).” <sup>39</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 5, 2008, Sentencia T-088/08 (Colom.). See discussion in DALY, DIGNITY RIGHTS, *supra* note 19, at 26.

<sup>40</sup> Bouyid v. Belgium, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), <http://hudoc.echr.coe.int/eng?i=001-157670>.

<sup>41</sup> Brown v. Plata, 563 U.S. 493, 511 (2011).

the government defendants in these cases are not entitled to qualified immunity, where they would know that their conduct carried a risk of substantial harm without any penological purpose.<sup>42</sup>

Some rights that flow from the recognition of human dignity are negative rights in the sense that they merely require governments to refrain from violating dignity rights. Others are positive rights in the sense that they require governments to take affirmative measures to provide or secure goods to ensure that dignity is protected.

Moreover, to assure respect for the human dignity for all, the government must sometimes do more for one person than for another; individualized attention is essential to the government's obligation to treat every person "as a person."<sup>43</sup> This aspect of dignity rights is especially pertinent for those who are dependent on the state for their care and survival or who are otherwise vulnerable. And in the criminal legal system, everyone is vulnerable.

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*The commitment to dignity requires government to accomplish even the most crucial goals without violating any person's dignity.*

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Because they embody what makes us human and reflect the full range of human experience, dignity rights are interlocking. In human rights parlance, they are indivisible, inter-related and inter-dependent. They invite attention to how rights support and reinforce one another and how violations of rights cascade: nutritional deprivations and environmental degradation can lead to adverse health impacts and behavioral problems and impede learning; substandard education may affect a person's ability to advocate for themselves, which could in turn contribute to longer sentences and fewer educational and employment opportunities. Dignity is the fantail that connects the full spectrum of rights to one another. That is why we represent dignity as the hub of a wheel. (See VII.A. below). This aspect is important because one action or incident can impact a person's dignity in numerous ways.

In order to establish such claims, we suggest that lawyers and advocates who live outside prisons spend time inside prisons, getting to know both the facilities and their occupants. As Michael Tigar has explained, "How we speak and act, and how we seek to influence how others speak and act, are vital elements of dignity advocacy. If your client is incarcerated (pretrial or upon conviction), visit often in person.... Observe conditions and discuss with the prison personnel. Your frequent visits help to foster a culture of respect for your client's dignity." This is one way, Tigar explains, to ensure that "our concerns [carry] through all of our work."<sup>44</sup>

Dignity rights, as described here, are well developed throughout the world and are starting to be recognized in the state and federal courts of the United States.

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<sup>42</sup> See *Clark v. Coupe*, 55 F.4th 167, 173 (3d Cir. 2022): "Clark alleged prison officials imposed conditions they knew carried a risk of substantial harm and caused him to suffer debilitating pain that served no penological purpose." (finding no qualified immunity for placing someone with a mental illness in solitary confinement for extended time).

<sup>43</sup> UDHR, *supra* note 7, at art. 6; Acción de Inconstitucionalidad [Unconstitutionality Action], Promovente: Procurador General de la República, Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Febrero de 2010.

<sup>44</sup> Correspondence with Michael Tigar, on file with Erin Daly.

#### IV. UNDERDEVELOPED DIGNITY LAW IN THE UNITED STATES

##### A. Dignity in State Constitutions

Dignity does appear in most sub-national constitutions in the United States, most often associated with the rights of victims of crimes.<sup>45</sup> In addition, Illinois, Louisiana, Montana, Vermont, and Puerto Rico all explicitly protect individual or human dignity beyond the context of crime victims.<sup>46</sup>

- Louisiana's 1974 constitution contains a section entitled "Right to Individual Dignity" that guarantees equal protection of the laws and prohibits discrimination. However, it also prohibits "Slavery and involuntary servitude ... except in the latter case as punishment for crime."<sup>47</sup>
- Illinois' 1970 constitution also refers to individual dignity, which it seeks to promote by condemning communications "that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation."<sup>48</sup>
- As of November 2022, Vermont's constitution protects the dignity of reproductive choice, in words that echo constitutional courts in other countries: "That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means."<sup>49</sup>

Only Montana's and Puerto Rico's constitutions actually guarantee a right to individual dignity.

- In a section entitled "Individual dignity," Montana's 1972 Constitution proclaims, following the language of the German Basic Law, that "The dignity of the human being is inviolable." It then, like the Louisiana Constitution, guarantees equal protection of the laws and prohibits discrimination "in the exercise of his civil or

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<sup>45</sup> See A.B.A., *Dignity Resources Project* for a database of dignity provisions in state (and Puerto Rico) constitutions at [https://www.americanbar.org/groups/human\\_rights/dignity-rights-initiative/dignity-documents-project/](https://www.americanbar.org/groups/human_rights/dignity-rights-initiative/dignity-documents-project/).

<sup>46</sup> See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity States and Transnational Constitutional Discourse*, 65 MONT. L. REV. (2004), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1112&context=facpub#:~:text=21-,,to%20human%20or%20individual%20dignity.>

<sup>47</sup> LA. CONST. art. 1, §3. In 2022, Louisianans had the opportunity to remove involuntary servitude as punishment for a crime in their state constitution, but the measure was defeated by 39.15% in favor to 60.85% against. BALLOTPEDIA, *Louisiana Amendment 7, Remove Involuntary Servitude as Punishment for a Crime from Constitution Measure (2022)*, [https://ballotpedia.org/Louisiana\\_Amendment\\_7,\\_Remove\\_Involuntary\\_Servitude\\_as\\_Punishment\\_for\\_a\\_Crime\\_from\\_Constitution\\_Measure\\_\(2022\)](https://ballotpedia.org/Louisiana_Amendment_7,_Remove_Involuntary_Servitude_as_Punishment_for_a_Crime_from_Constitution_Measure_(2022)).

<sup>48</sup> ILL. CONST. art. 1, §20.

<sup>49</sup> VT. CONST. art. 22.



political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”<sup>50</sup>

- Likewise, the Puerto Rico Constitution proclaims the inviolability of human dignity and associates it with non-discrimination: “Section 1. The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.”<sup>51</sup> This section is interesting because, like many foreign constitutions, it protects dignity both as an enforceable right and as an underlying value. Puerto Rico’s caselaw bears this out.

Only the latter two jurisdictions have cases that interpret and apply the dignity provisions. The Montana Supreme Court has only sporadically applied this provision, once in a case involving a prisoner who was subjected to a series of atrocious conditions and punishments, which the majority found to be an “affront to the inviolable right of human dignity possessed by the inmate.”<sup>52</sup> We discuss this case further below.

In Puerto Rico, a robust dignity jurisprudence manifests a deep commitment to legal dignity, as exemplified by the Federal Supreme Tribunal’s dignity-affirming language: “[t]he principle of inviolability of the human dignity cannot be restricted to those living freely in the community. It reaches behind prison bars because those who are paying their debt to society are also human beings.”<sup>53</sup>

And, as noted, the Kansas Supreme Court has interpreted the natural rights guarantee in its state constitution to protect the dignity of personal autonomy and bodily integrity, including whether to continue a pregnancy.<sup>54</sup>

## B. Interpreting the Federal Constitution

At the federal level, the United States is an outlier in the world. The infrequency of dignity cases in the United States is connected to several unique features of our constitutional system. Some of these are related to the constitution itself. The US constitution is remarkably thin (or, as the late Justice Ginsberg once wrote, “skimpy”) compared with other constitutions: it is not only the oldest constitution currently in effect,<sup>55</sup> but it is also one of the shortest. It contains no social and economic rights (rights to live with dignity such as rights to health, education, shelter, adequate food, clean water, etc.). It contains no positive rights (e.g. rights to government resources to assure a life of dignity such as income guarantees). nor does it impose any duties on the state. Thus, it does not acknowledge any governmental role in ensuring that every person can live with dignity, nor in protecting those who are marginalized or particularly vulnerable (e.g living

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<sup>50</sup> MONT. CONST. art II, §4.

<sup>51</sup> PUERTO RICO CONST. art. II, §1.

<sup>52</sup> Walker v. State, 68 P.3d 872, 885 (Mont. 2003).

<sup>53</sup> People v. Falu Martinez, 116 D.P.R. 828 (1986).

<sup>54</sup> Hodes & Nausser, MDs, P.A. v. Schmidt, 440 P.3d 461, 497-98 (Kan. 2019).

<sup>55</sup> Technically, the Constitution of San Marino, a principality surrounded by Italy, with a population of less than 1/60 of the US prison population, is the oldest, having been adopted originally in 1600.

with mental or physical health challenges, or those who are poor, or disenfranchised).<sup>56</sup> As noted, the Thirteenth Amendment actually protects slavery and involuntary servitude “as a punishment for crime.”<sup>57</sup>

Nor does it commit to any underlying values such as are found in many other constitutions, committing to democracy, equality, or human dignity. Procedural rights such as the right to vote in federal or state elections is not guaranteed by the national constitution.

Other features of our constitutional system that depart from the global constitutional experience are the product of judicial decisions of the Supreme Court, the principal expositor of constitutional law in the United States. Throughout its history and with very few exceptions, the court has aligned the Constitution with the interests of the rich and powerful, including property owners (since 1793), slave-owners (1790s-1860s), corporations (1860s through today), and segregationists (1880s-1950s).<sup>58</sup> Correlatively, it has resisted claims for inclusion (see e.g. voting rights cases like *Shelby County v. Holder*<sup>59</sup>) and claims made on behalf of the most vulnerable, such as people on death row (*Gregg v. Georgia*<sup>60</sup>), non-white school children (*San Antonio v. Rodriguez*<sup>61</sup>), children with violent fathers (*Castle Rock v. Gonzalez*,<sup>62</sup> *DeShaney v. Winnebago County*<sup>63</sup>), and women needed medical care (*Dobbs v. Jackson Women’s Health Organization*<sup>64</sup>).

For instance, the right to equal protection has been read to exclude affirmative action<sup>65</sup> and to require proof of intentional discrimination,<sup>66</sup> that is, it requires the complainant to prove that the government discriminated because of someone’s race, not just in spite of it.<sup>67</sup> This is an important example of the court departing from textualism and originalism by imposing barriers to the vindication of dignity rights that are not written into the text of the constitution and for which there is no evidence of original intent. Thus, throughout its history, the United States and the Supreme Court in particular have resisted the movements that have shaped constitutional thought in the rest of the world – the turn toward human rights beginning in the late 1940s, away from colonialism in the 1950s and 1960s, toward democracy and anti-communism in the 1970s and

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<sup>56</sup> As Justice Thomas has written, in our constitutional system, “Human dignity has long been understood in this country to be innate.” And that “[t]he corollary of that principle is that...[t]he government cannot bestow dignity, and it cannot take it away.” And “[o]ne’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.” *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015) (Thomas, J., dissenting).

<sup>57</sup> U.S. CONST. amend. XIII (1865): “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted....”

<sup>58</sup> See also *Chisholm v. Georgia*, 2 U.S. 219 (1793), *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886), *Plessy v. Ferguson*, 163 U.S. 537 (1896) respectively.

<sup>59</sup> See *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>60</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976) (death penalty not unconstitutional).

<sup>61</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (no fundamental right to education).

<sup>62</sup> See *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (no affirmative right to protection).

<sup>63</sup> See *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (no affirmative right to protection).

<sup>64</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (no constitutional right to choose to terminate a pregnancy).

<sup>65</sup> See *Students for Fair Admissions, Inc., v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023).

<sup>66</sup> See *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>67</sup> See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

1980s, away from racial politics in the 1990s, and toward greater inclusiveness in the 21<sup>st</sup> century. The Supreme Court has stepped away from these global tides.

Some cases – including *Brown v. Board of Education*<sup>68</sup> (1954), *Gideon v. Wainwright*<sup>69</sup> (1963), *Miranda v. Arizona* (1964),<sup>70</sup> the *Civil Rights Act Cases* of 1964,<sup>71</sup> *Griswold v. Connecticut*<sup>72</sup> (1965), *Roe v. Wade* (1973),<sup>73</sup> *Brown v. Plata*<sup>74</sup> (2011), and *Obergefell v. Hodges*<sup>75</sup> (2015) – are well known but rare exceptions to the general rule of judicial protection of the powerful and the privileged at the expense of the poor and the vulnerable.

The Court's approach to constitutional interpretation has narrowed the applicability of the constitution. At times, it has done this through what it has called textualism (reading only the plain meaning of the words and not their implicit values or general purposes) and originalism (adhering to what it says are the intentions of the drafters of the Constitution). Both of these approaches to reading a constitution are unique to the United States: no other court on earth reads only the words but not the purpose of the language, and no other court on earth adheres to the worldview of the drafters.<sup>76</sup> This is true even though the text of the constitution is already remarkably narrow. And it is true even though the drafters of the U.S. constitution were exclusively privileged white men, whose moral compasses allowed most of them to own, rape, abuse, and demolish other human beings, and all of whom have been dead for two centuries, and none could have envisioned the world we live in today. And it's true even though the drafters themselves wrote into the text itself that the Constitution should not be so limited: the 9<sup>th</sup> Amendment tells courts to recognize rights not identified by the drafters themselves.<sup>77</sup> The drafters of the 14<sup>th</sup> Amendment, which contains the equal protection clause and other limitations on state power, were members of the Reconstruction Congress in the 1860s; their world views are still more than a century out of date.

Thus, unlike in India, the court has not read the right to life as the right to live with dignity. Unlike in South Africa, Germany, or Israel, the US Court has not read the Constitution to commit to the protection of human dignity: it has not, as in South Africa, recognized that civic dignity protects rights of political participation or, as in Germany, recognized that pension and other benefits must be sufficient to enable every person – including refugees – to live with dignity. Unlike in Latin America, the court has not recognized the government's role in protecting those who are vulnerable. And committing in general to an ideology of capitalist individualism, the court has not,

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<sup>68</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (right to integrated education).

<sup>69</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to legal counsel in criminal case).

<sup>70</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to protection against self-incrimination in police interrogation, and largely made unenforceable in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022)).

<sup>71</sup> *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964) (right to be free of racial discrimination in public accommodations); see also *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>72</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraceptives).

<sup>73</sup> Overturned by *Dobbs v. Jackson Women's Health Org.*, 597 U. S. 142 S. Ct. 2228 (2022).

<sup>74</sup> *Brown v. Plata*, 563 U.S. 493 (2011) (right against prison overcrowding).

<sup>75</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to marry person of same sex).

<sup>76</sup> See, e.g. *Edwards v. AG of Canada* [1930] A.C. 124 (Can.) (establishing the principle of living tree constitutionalism).

<sup>77</sup> U.S. CONST. amend. IX.

as in Brazil and South Africa, recognized the interdependence of all persons in a spirit of fraternity, solidarity, or ubuntu; it has thus failed to foster community or empathy among diverse people.<sup>78</sup>

This Policy Guide, however, builds on the exceptions and the opportunities for growth within this narrative of exclusion. In particular, it builds on the following:

1. The Supreme Court’s recognition of dignity is inherent in the human person and applies to all people including those who have been suspected, accused, or convicted of a crime.<sup>79</sup>
2. The Supreme Court’s often-repeated view that the prohibition against cruel and unusual punishment (in the 8<sup>th</sup> and implied in the 14<sup>th</sup> amendment) is “about nothing less than the dignity of man” and that these rights should be read not according to what the 18<sup>th</sup> century drafters thought was cruel and unusual but in line with “evolving standards of decency.”<sup>80</sup>
3. The recognition by Third Circuit Judge Thomas Ambro, sitting by designation in the District of Delaware, that “Dignity, or respect of our fellow human beings, is an important principle underlying many constitutional rights” and that dignity may be vindicated under the 8<sup>th</sup> and 14<sup>th</sup> amendments.<sup>81</sup>
4. The recent affirmation by the American Bar Association that “human dignity — the inherent, equal, and inalienable worth of every person — is foundational to a just rule of law” and that “‘dignity rights’ – the principle that human dignity is fundamental to all areas of law and policy — [should] be reflected in the exercise of [all] legislative, executive, and judicial functions.”<sup>82</sup>
5. The recent caselaw of the court in matters relating to personal relationships that recognizes that dignity lies at the intersection of the constitutional commitments to equal protection and due process.<sup>83</sup>
6. Caselaw within the United States, including in Montana, Kansas, and Puerto Rico, that recognizes the essential role of dignity in subnational constitutional law and in particular as it applies to the criminal legal system.

These are the seeds that will grow into the legal recognition of human dignity, and the commitment to shape law in the United States to respect and protect the human dignity of every person – beginning in the criminal legal system.

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<sup>78</sup> See, e.g. *Students for Fair Admissions, Inc., v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023) (viewing remedial efforts by academic institutions to be more inclusive and diverse as a zero-sum game).

<sup>79</sup> See generally *Brown v Plata*, 563 U.S. 493 (2011).

<sup>80</sup> *Trop v. Dulles*, 356 U. S. 86, 101 (1958).

<sup>81</sup> *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106, at \*22-23 (D. Del. Aug. 17, 2023).

<sup>82</sup> A.B.A. Resolution 113B (Aug. 2019), *supra* note 5.

<sup>83</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015). This is subject to overruling as per *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (Thomas, J., concurring).

## V. BY THE NUMBERS

This section provides a quantitative overview of the criminal legal system. The numbers are approximations; they derive from varied sources and were compiled at different times.

- About 0.66% of the United States population,<sup>84</sup> or about 1.9 million people, is currently in a federal or state prison or local jail.<sup>85</sup>
  - The US has 5% of the world's population and 20% of the world's incarcerated population (1 in 5 prisoners in the world is in prison in the United States).<sup>86</sup>
  - 664 people in the United States out of every 100,000 people is in Prison<sup>87</sup>
  - 42%+ of prison admissions is due to violations of supervision<sup>88</sup> including failing to report a change of address, or walking into a bar.<sup>89</sup>
  - Almost one in every four women and two of five Black women are related to someone who is incarcerated.<sup>90</sup>
- More than 3,700,000 individuals are under community supervision. This includes:
  - 2.963 million + are on probation<sup>91</sup>
  - 800,000+ are on parole<sup>92</sup>
  - Of the population under community supervision,
    - More than 30% are Black Americans.
    - 63% have an annual income of less than \$20,000 per year.<sup>93</sup>
    - More than 30% have a substance use disorder.<sup>94</sup>
- By comparison
  - If the 1.9 million people who are incarcerated joined together
    - As a state, they would be entitled to 3 representatives in the House plus 2 senators (roughly the entire population of Nebraska).<sup>95</sup>

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<sup>84</sup> Peter Wagner & Wanda Bertram, *What percent of the U.S. is incarcerated?*, PRISON POL'Y INITIATIVE (Jan. 6, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

<sup>85</sup> PRISON POL'Y INITIATIVE, *55 facts about mass incarceration*, [https://static.prisonpolicy.org/factsheets/55facts\\_2023.pdf](https://static.prisonpolicy.org/factsheets/55facts_2023.pdf) (last visited Dec. 20, 2023).

<sup>86</sup> Wagner & Bertram, *What percent of the U.S. is incarcerated?*, *supra* note 84.

<sup>87</sup> PRISON POL'Y INITIATIVE, *55 facts about mass incarceration*, *supra* note 85.

<sup>88</sup> PRISON POL'Y INITIATIVE, *Probation and Parole* (Dec. 19, 2023), [https://www.prisonpolicy.org/research/probation\\_and\\_parole/#:~:text=Key%20Statistics%3A,violations%20of%20supervision%3A%2042%25%2B](https://www.prisonpolicy.org/research/probation_and_parole/#:~:text=Key%20Statistics%3A,violations%20of%20supervision%3A%2042%25%2B).

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

<sup>90</sup> ELLA BAKER CTR., *WHO PAYS? THE TRUE COSTS OF INCARCERATION ON FAMILIES 9* (Sept. 2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf>.

<sup>91</sup> U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *Probation and Parole in the United States, 2021* (Feb. 2023), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf>.

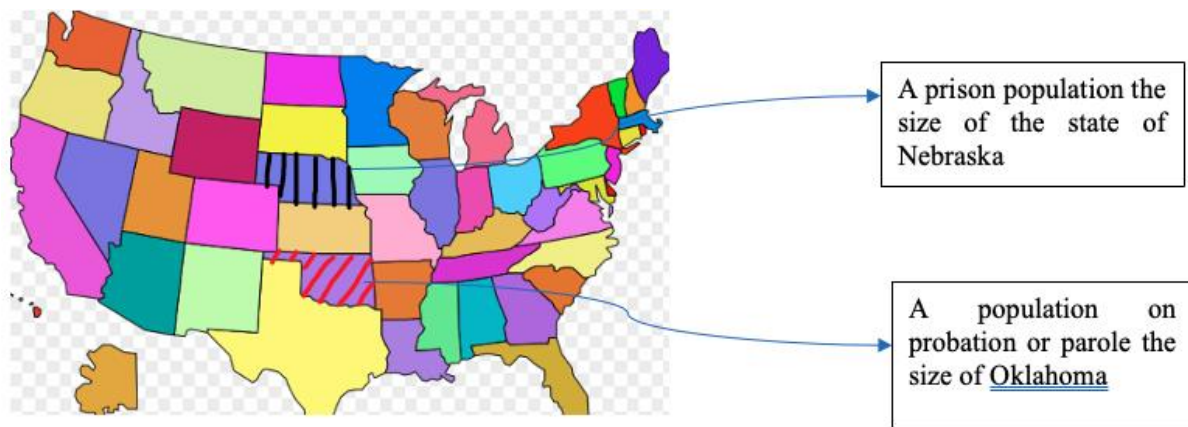
<sup>92</sup> *Id.*

<sup>93</sup> PRISON POL'Y INITIATIVE, *Probation and Parole*, *supra* note 88.

<sup>94</sup> *Id.*

<sup>95</sup> BALLOTPEDIA, *United States census, 2020*, [https://ballotpedia.org/United\\_States\\_census,\\_2020](https://ballotpedia.org/United_States_census,_2020) (last visited Dec. 20, 2023).

- As a nation, the US incarcerated population would rank 151 in population, just above Latvia.<sup>96</sup>
  - If the 3.7 million people who are on probation or parole joined together
    - As a state, the US population living under supervision would be entitled to 5 representatives plus 2 senators (roughly the population of Connecticut or Oklahoma,<sup>97</sup>)
    - As a nation, they would rank 132<sup>nd</sup>, between Georgia and Eritrea, with a larger population than the entire nation of Uruguay and Mongolia.<sup>98</sup>
  - The 36 jurisdictions that have the highest incarceration rates on earth are all U.S. states.
    - All states have higher incarceration rates than all but 20 nations on earth.<sup>99</sup>



## WOMEN

- 173,000 women are in federal or state prison or local jail.<sup>100</sup> Another 808,700 women are on probation or parole.<sup>101</sup>
  - 72,000 are in state prisons and 76,000 are in local jails,<sup>102</sup> more than half for drug and property offenses.<sup>103</sup>

<sup>96</sup> WORLDOMETER, *Countries in the world by population (2023)*, (July 16, 2023), <https://www.worldometers.info/world-population/population-by-country/>.

<sup>97</sup> BALLOTEDIA, *United States census, 2020*, *supra* note 95.

<sup>98</sup> WORLDOMETER, *Countries in the world by population (2023)*, *supra* note 96.

<sup>99</sup> Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

<sup>100</sup> Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2023* (Mar. 1, 2023), <https://www.prisonpolicy.org/reports/pie2023women.html>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

- 46,000 people, or 60% of women in jails under local control, have not been convicted of a crime and are awaiting trial.<sup>104</sup>
- More than half of incarcerated women (114,000) are in local jails – most likely because bail is set at an amount that approximates one year’s income.<sup>105</sup>
- 19% of women were in foster care as children and 43% came from families that received welfare or other public assistance. 12% of women reported homelessness before they turned 18 and 26% experienced homelessness in the year of their arrest that led to their incarceration.<sup>106</sup>
- 45% percent of women who are incarcerated had been arrested by age 18.<sup>107</sup>
- Women are 3 times as likely as men to be sexually victimized by prison or jail staff.<sup>108</sup>

## RACE

- Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans.<sup>109</sup>
- Nationally, one in 81 Black adults in the U.S. is serving time in state prison. Wisconsin leads the nation in Black imprisonment rates; one of every 36 Black Wisconsinites is in prison.
  - In 12 states, more than half the prison population is Black: Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia<sup>110</sup> and seven states maintain a Black/white disparity larger than 9 to 1: California, Connecticut, Iowa, Maine, Minnesota, New Jersey, and Wisconsin.<sup>111</sup>
- Latinx individuals are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of whites.<sup>112</sup>

## SENTENCING

- 203,865 people – or one in seven people in U.S. prisons – is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more).<sup>113</sup> This number

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<sup>104</sup> *Id.*

<sup>105</sup> Kajstura & Sawyer, *Women’s Mass Incarceration: The Whole Pie 2023*, *supra* note 100.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Ashley Nellis, THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (Feb. 17, 2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

has increased 66% since 2003.<sup>114</sup> More than two-thirds of those serving life sentences are people of color: one in 5 black men in prison is serving a life sentence; one of every 15 women in prison is serving a life sentence.<sup>115</sup>

- 3,972 people serving life sentences have been convicted for a drug-related offense and 38% of these are in the federal prison system.<sup>116</sup>
- Of people sentenced to death, 42% are White, 41% are Black, and 14% or Latinx.<sup>117</sup>

## YOUTH

- Arrest:
  - “American Indian youth were 1.5 times more likely, and Black youth were 2.4 times more likely to be arrested than White youths.”
- Prosecution:
  - “Eleven states have no minimum age for trying children as adults. Some states allow children to be prosecuted as adults at 10, 12, or 13 years old [or] as young as eight. More than half of the children under 14 transferred to adult court each year are African American or Latino.”<sup>118</sup>
- Incarceration and sentencing:
  - “Fewer than a third of the youth confined for delinquency were accused of or adjudicated for a serious violent offense (murder, sexual assault, armed robbery, or aggravated assault).”<sup>119</sup>
  - 25,000 people under 18 are held in juvenile facilities throughout the United States on a typical day.<sup>120</sup>
  - 4,500 children are housed in adult jails and prisons on any given day in America. Children are 36 times more likely to die by suicide in an adult jail than in a juvenile detention facility.<sup>121</sup>
  - The youth incarceration rate in the United States is 11 times higher than the rate for Western Europe and Asia and 3 to 10 times higher than the rate for any other region.<sup>122</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> NELLIS, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT, *supra* note 113, at 4.

<sup>117</sup> DEATH PENALTY INFO. CTR., *Race and the Death Penalty by the Numbers*, <https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers> (last visited Dec. 20, 2023).

<sup>118</sup> EQUAL JUST. INITIATIVE, *Underage Prosecution*, [https://eji.org/issues/children-in-prison/#Underage\\_Prosecution](https://eji.org/issues/children-in-prison/#Underage_Prosecution) (last visited Dec. 20, 2023).

<sup>119</sup> RICHARD MENDEL, THE SENTENCING PROJECT, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 10 (Dec. 2022), <https://www.sentencingproject.org/app/uploads/2023/03/Why-Youth-Incarceration-Fails.pdf>.

<sup>120</sup> Joshua Rovner, *Youth Justice by the Numbers* (May 16, 2023), <https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/>.

<sup>121</sup> EQUAL JUST. INITIATIVE, *Children in Adult Prisons*, [https://eji.org/issues/children-in-prison/#Underage\\_Prosecution](https://eji.org/issues/children-in-prison/#Underage_Prosecution) (last visited Dec. 20, 2023).

<sup>122</sup> MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE, *supra* note 119, at 10.



- The U.S. is the only country in the world where kids as young as 13 have been sentenced to life imprisonment without the possibility of parole.<sup>123</sup>
- Release: “The mortality rate is nearly six times higher for previously incarcerated youth than for the general population.”<sup>124</sup>
- Gender
  - 10% of girls and 3% of boys are confined to youth facilities for status offenses, such as “running away, truancy, and incorrigibility,” which tend to be “responses to abuse.”<sup>125</sup>
  - 40% of girls in the juvenile justice system are lesbian, bisexual, or questioning and gender non-conforming. (The comparable statistic for boys is just under 14%.)<sup>126</sup>
- Race
  - Of girls who are confined, 35% are Black, 20% are Latina and 38% are White.<sup>127</sup>
  - “Black girls are four times more likely to be arrested than White girls.”<sup>128</sup>
  - After adjudication, 32% of cases involving Black and Latino youth resulted in incarceration, while 27% of cases involving American Indians and 23% of cases involving White youth did.<sup>129</sup>

## MONEY

- \$182 billion annually includes the costs of federal, state, and local corrections and the entire police and court systems.<sup>130</sup>
  - \$81 billion annually addressing only the cost of running the corrections system (prisons, jails, juvenile facilities, immigration detention, parole, and probation).<sup>131</sup>
  - \$4.5 billion on legal defense counsel<sup>132</sup>

There’s money to be made in criminal law.

- \$3.9 billion to private prisons, which includes \$374 million in profits annually.<sup>133</sup>

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<sup>123</sup> EQUAL JUST. INITIATIVE, *Death in Prison Sentences*, [https://eji.org/issues/children-in-prison/#Underage\\_Prosecution](https://eji.org/issues/children-in-prison/#Underage_Prosecution) (last visited Dec. 20, 2023).

<sup>124</sup> Nora Leonard, *Racial and Ethnic Disparities in the Youth Justice System*, COAL. FOR JUV. JUST. (Mar. 2, 2023), <https://www.juvjustice.org/blog/1436#:~:text=Put%20differently%2C%20for%20every%20100%2C000,for%20young%20people%20of%20color.>

<sup>125</sup> Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

<sup>126</sup> *Id.*

<sup>127</sup> Kajstura & Sawyer, *Women’s Mass Incarceration: The Whole Pie 2023*, *supra* note 100.

<sup>128</sup> Leonard, *Racial and Ethnic Disparities in the Youth Justice System*, *supra* note 124.

<sup>129</sup> *Id.*

<sup>130</sup> Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

- \$1.6 billion to Commissary vendors who sell goods to incarcerated people.<sup>134</sup>
  - Poor people spend money to be system-impacted
- Poverty
  - 80% of incarcerated individuals are indigent and about two-thirds of those in jail report incomes below the poverty line.<sup>135</sup>
  - Nearly 2 in 3 families (65%) with an incarcerated member were unable to meet their family’s basic needs. Forty-nine percent struggled with meeting basic food needs and 48% had trouble meeting basic housing needs because of the financial costs of having an incarcerated loved one.<sup>136</sup>
  - The high cost of maintaining contact with incarcerated family members led more than one in three families (34%) into debt to pay for phone calls and visits alone. Family members who were not able to talk or visit with their loved ones regularly were much more likely to report experiencing negative health impacts related to a family member’s incarceration.<sup>137</sup>
- It costs to be in the criminal legal system
  - Criminal Legal System Debt:
    - On average families paid \$13,607 in court-related costs. These costs amount to nearly one year’s income for low-income families making less than \$15,000 per year.<sup>138</sup>
    - This totals more than \$50 billion per year in debt.<sup>139</sup>
    - Estimates indicate formerly incarcerated people owe as much as 60% of their income to criminal debts. According to one source, “up to 85% of people returning from prison owe some form of criminal justice debt” (compared to 25% in 1991).<sup>140</sup>
  - In the aggregate, families pay
    - \$1.4 billion to bail bond companies in nonrefundable fees (about 10% of the \$14 billion in bail bonds written every year).<sup>141</sup>
    - \$2.9 billion annually for calls and commissary purchases.<sup>142</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> ELLA BAKER CTR., *supra* note 90, at 9.

<sup>136</sup> *Id.* at 7-9.

<sup>137</sup> *Id.* at 9.

<sup>138</sup> *Id.* at 14.

<sup>139</sup> *Id.* at 15.

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

<sup>141</sup> Wagner & Rabuy, *Following the Money of Mass Incarceration*, *supra* note 130.

<sup>142</sup> PRISON POL’Y INITIATIVE, *Economics of Incarceration* (Dec. 19, 2023), [https://www.prisonpolicy.org/research/economics\\_of\\_incarceration/](https://www.prisonpolicy.org/research/economics_of_incarceration/).

- Staying connected is expensive. Companies charge up to \$24.95 for a 15-minute phone call.<sup>143</sup>
  - The average daily wage for a prisoner is 86 cents.
  - Prison Policy Initiative estimates that incarceration costs the average person \$500,000 in lost wages over a lifetime,<sup>144</sup> or between \$55 and \$372 billion in the aggregate (all of the money that people who would earn if they had not been incarcerated).<sup>145</sup>
    - 3 in 5 formerly incarcerated survey participants were unable to afford returning to school.<sup>146</sup>
    - 79% of formerly incarcerated women reported they were unable to afford housing after release.<sup>147</sup>
- The average annual cost of detention compared of community supervision
  - Pending trial: \$31,842 v. \$4,026
  - After sentencing: \$34,770 v. \$4,392<sup>148</sup>

These numbers, as shocking as they are, don't begin to tell the stories of the human beings who are impacted by the criminal legal system. They don't describe the myriad ways in which our carceral state diminishes the dignity of human beings throughout the nation. Nor do they describe the many ways in which the criminal legal system harms the dignity of people before they enter prison and after they leave. Nor how it harms the dignity of family members and others who are affected by how the system treats people who are suspected, charged with, or convicted of crimes.

While most of the world that adheres to constitutional rules and values has begun to reshape the law around the central axis of the human dignity, the United States continues to lag. This Policy Guide aims to change that.

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<sup>143</sup> Wagner & Rabuy, *Following the Money of Mass Incarceration*, *supra* note 130.

<sup>144</sup> PRISON POL'Y INITIATIVE, *Economics of Incarceration*, *supra* note 142.

<sup>145</sup> Terry-Ann Craigie, Ames Grawert & Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Ctr. For Just. (Sept. 15, 202), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>.

<sup>146</sup> ELLA BAKER CTR., *supra* note 90, at 45.

<sup>147</sup> *Id.* at 44.

<sup>148</sup> U.S. COURTS, *Incarceration Costs Significantly More than Supervision* (Aug. 17, 2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

## VI. DIGNITY IN THE CRIMINAL LEGAL SYSTEM

Justice Thomas is right when he writes that dignity is innate, and that people do not lose their dignity in conditions of servitude, confinement, or deprivation.<sup>149</sup> Likewise, those who are impacted by the criminal legal system continue to live as human beings and they therefore retain at all times their full dignity. But Justice Thomas has used this point to say that dignity is impervious to the law, and there we disagree: law can and does affect people's ability to live in the fullness of their dignity, as courts around the world have recognized. This Policy Guide focuses on the law as a tool to protect and enhance human dignity.

This Guide canvases our entire criminal legal system – from initial encounters with police, to arrest, custodial interrogations, pretrial detention, sentencing, incarceration, and life upon release, among other things – because human beings have the same quantum of dignity throughout. We aim to show that there are many ways that the law has chosen to diminish people's dignity, rather than protecting it. Much of this reflects social and legal racism that has been a marker of American society for centuries; racism allows people to “other” those who do not look like them – in contrast to the idea of dignity which represents the central quality of humanity that unites us all.

The practices we see throughout the system deepen people's sense of vulnerability and fear, diminish their sense of worth, and exacerbate mental and other health challenges, not because these are required by law and certainly not by any sense of justice, but simply because the law and society allows people to separate themselves from others, and gives to a few people discretionary power over the lives of many others: how people are treated by those who embody the authority of the state is as much a threat to human dignity as the official rules that govern those interactions.

Violations of dignity come in all shapes and sizes in the American criminal legal system. They result from a system that is willing to – if not designed to – ignore and diminish and try to destroy human dignity, a system that allows or encourages all forms of maltreatment with the merest pretext or justification. Thus, a sentence of time behind bars requires acceptance of an unbounded litany of punishments imposed simply because one is already vulnerable and powerless. It is a system that uses criminality – suspected or actual – as a justification for withdrawing not only liberty but the things that define our humanity: our need to take care of ourselves and our loved ones, and to fully develop our personalities and our identities emotionally, intellectually, materially, and in other ways; our need to protect our bodies from harm; our need to stand as people of equal worth in our communities and in society; our need to participate as agents in decisions that affect our lives. Each failure to protect these human needs is a violation of dignity.

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<sup>149</sup> “Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits.” *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015) (Thomas, J., dissenting).

Dignity violations can result from the application of rules and legal obligations, including those that have no logic or purpose but that discriminate, abuse, demean, and diminish; examples include the practice of detaining those who can not post bail, treating children as if they were adults, failing to provide information about transfers and other changes in a person’s status, isolating people from the general population in prison or from their families and supporters. They can be in the form of policies and practices that exploit people’s vulnerabilities, such as simple fear or mental illness or poverty.<sup>150</sup> Dignity violations can also result from the absence of rules, when those in control of other people’s lives are given unbridled discretion and use it to control and demean other human beings. They can be in the form of affirmative actions taken by state actors, as well as by omission – e.g. including the failure to protect, the failure to listen, the failure to treat each person as a person. They can be physical, psychological, or spiritual. The irony of course is that whereas the criminal legal system is ostensibly built on a commitment to accountability, there is no accountability for those who would hold the lives of others in their hands. The system echoes not only Jim Crow<sup>151</sup> but slavery.

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*Dignity should be the litmus test for all state actions in the criminal legal system*

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#### A. Reform

In highlighting the many ways in which the criminal legal system in the United States diminishes human dignity, we seek to find ways to reform the system. This Policy Guide focuses on the most tenable legal arguments; it does not, for instance, advocate for the wholesale abolition of prisons. But we do advocate for

- The abolition of the death penalty and sentences of life without parole, and an end to solitary confinement as a method of punishment, because these are “intrinsically incompatible with human dignity.”<sup>152</sup>
- Adequate, effective, and protective grievances procedures throughout the system.
- Consequences of crime to be aimed at socialization and framed by the principle of proportionality. Thus, certain forms of punishment are absolutely prohibited and retribution and deterrence are impermissible purposes of punishment.

Moreover, the Policy Guide identifies ways in which practices within the criminal legal system invariably offend human dignity and it makes proposals to alter the system so that the inherent and inalienable dignity of every person is protected, even as the state manages real challenges of crime and punishment. It argues that the legitimacy of legal rules should be measured by their adherence to well- developed principles of human dignity, and that, rather than being unreviewable and unreviewed, discretion should always be bounded by principles of human dignity. Essentially, it argues that human dignity should be the litmus test for all state actions in

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<sup>150</sup> There are numerous ways in which the system reinforces poverty and then punishes people for being poor. Costs are imposed for public defense, basic necessities of food and personal hygiene, dignity needs including communications by phone and mail, monitoring devices, and more. In addition, the system continues, in the 21<sup>st</sup> century, to take advantage of the 19<sup>th</sup> century loophole in the 13<sup>th</sup> Amendment that allows slavery for a person who has been convicted of a crime, permitting prisons violate principles of decency in payment for prison labor.

<sup>151</sup> See MICHELE ALEXANDER, *THE NEW JIM CROW* (New Press) (2012).

<sup>152</sup> *R. v. Bissonnette*, [2022] S.C.C. 23 (Can.), *supra* note 24, at para. 60.

the criminal legal system. This distills to two simple rules: 1) the government must refrain from any action or practice that violates human dignity unless it is made “strictly necessary” by the person’s own conduct<sup>153</sup> and 2) affirmative government action is required where necessary to assure that a person has the wherewithal to live with dignity. There must be independent administrative and judicial review of practices to ensure compliance with principles of dignity. The system should be reoriented toward dignity and people within the system should be incentivized to protect and respect, rather than to ignore, individual human dignity. This would make it a true criminal justice system.

The analyses and recommendations in this Policy Guide are based on meticulous research of domestic and global law. We focus on caselaw that in the aggregate reveals the principles of a dignity-based system of criminal law and demonstrates the applicability of those principles in the various aspects of the system. At root, we argue that our criminal justice system should aim to ensure that all persons – including suspects, offenders, victims, and others – are able to live lives of dignity that enable them to fully develop their personalities and to have agency over their own choices. This means that the system should treat every person as a person, and not on the basis of their race, gender, ethnicity, or membership in any particular group. And it means that all persons should, at all times, be treated with the respect due another human being.

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*Discretion should always be bounded by principles of human dignity.*

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To paraphrase Bryan Stevenson, there is something that feels more like dignity. This Policy Guide provides the tools to advocate for it.<sup>154</sup>

## VII. UNDERSTANDING DIGNITY

### A. The Dignity Wheel

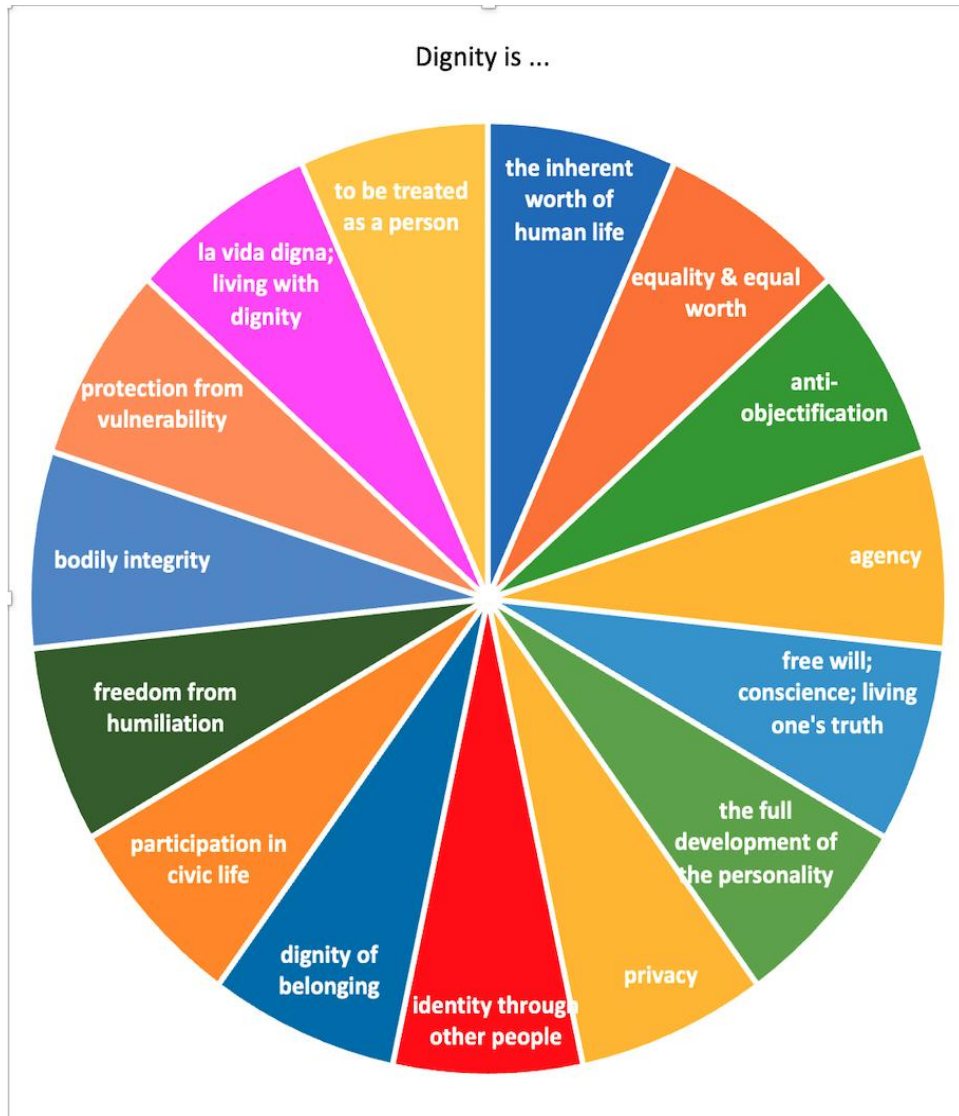
A survey of the law’s recognition of dignity in the United States and around the world reveals that human dignity is characterized in a large but finite number of ways. The wheel shown below identifies the principal values that courts have associated with human dignity. Although the courts applying the principle of dignity come from a variety of different legal traditions and cultures, and although they are applying the principle in an astonishingly broad range of factual contexts – from the criminal law to same sex marriage to political rights to access to education and health care, and so on – there is a remarkable consensus in how courts speak of dignity. They use their own language, but they are all saying essentially the same thing because they are writing about what is most important to the human experience: people want to exercise agency over their own lives and participate in the community with others, they want to protect their own bodies

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<sup>153</sup> This is adapted from the European Court of Human Rights’ decision in *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40.

<sup>154</sup> Viola Davis, INSTAGRAM, [https://www.instagram.com/tv/CaST6v6Adpr/?utm\\_medium=share\\_sheet](https://www.instagram.com/tv/CaST6v6Adpr/?utm_medium=share_sheet); *see also* Kim Chandler, *Expanded museum traces legacy of slavery in America*, FED. NEWS NETWORK (Sept. 30, 2021, 8:36 PM), <https://federalnewsnetwork.com/u-s-news/2021/09/expanded-museum-traces-legacy-of-slavery-in-america/>.

and secure not only basic biological needs (such as food and water) but also some measure of material comfort and personal and intellectual growth.



The chapters included in this Policy Guide discuss dignity in these essential ways. We provide a visualization of the impacts of criminal system practices on various aspects of dignity by marking with colors the aspects of dignity that are most significantly impacted in the respective chapters.

## B. A Glossary of Terms Relating to Human Dignity

This annotated glossary is designed to help construct a language or vocabulary for the advocacy of dignity rights.<sup>155</sup>

### Terms relating to the nature of human dignity

1. HUMAN DIGNITY is the quality of inherent worth that each “member of the human family” has in equal measure with every other. In the Universal Declaration of Human Rights (UDHR), it comes from the human capacity for reason and conscience and thus animates the human capacity to make decisions, including decisions about oneself and one’s life.
2. WORTH or value means that every life matters. No person is dispensable or disposable. Every life has worth and meaning. A person must be treated “as a person” because that means something; it means that a person can not be treated “inhumanely” – that is, as if they were not a person. Worth is the essential quality of dignity.
3. UNIVERSAL refers to the fact that every person, in past, present and future generations has equal dignity. This is consistent with some religious versions of dignity (e.g. Q’ranic recognition of the dignity of all the children of Adam) but is inconsistent with some historic understandings of dignity that associated it with people of high rank who had certain immunities and privileges due to their status or station. The UDHR changed how we think about dignity: now, the universality of equal dignity is recognized in human rights law throughout the world.
4. INHERENT refers to the fact that dignity is innate, born with the human person. It is not granted or defined by the state or by any other person or entity.
5. INALIENABLE means that no government or authority may take away a person’s dignity. It can be disrespected or “dented,” but it can not be eliminated or denied. Another way of saying this is that there is no legitimate basis for a person’s dignity to be denied.
6. EQUALITY and dignity are intimately interconnected but they are not identical. Dignity means that each person has worth and equal dignity means that each person has worth that is equal. Dignity must be distributed in equal measure because if it were not, then some people could decide how much other people’s dignity is worth, and is worth respecting, if at all. The UDHR’s lesson learned from the Holocaust is that no person can define the worth of another. (See “indignities” below).
7. FREE AND FULL DEVELOPMENT OF THE PERSONALITY is sometimes given as the purpose of dignity; also thought of as human flourishing. This imposes on the state the obligation to treat each person “as a person,” as an individual. It protects the

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<sup>155</sup> Some of the terms in this Glossary were suggested by students in the Professor Daly’s course, Dignity Law (Spring 2021) at Delaware Law School.



zone of privacy that allows the person to distinguish themselves from others and to protect themselves from government over-reaching. Education is particularly pertinent to this aspect of dignity, and should include not only vocational education, but educational opportunities that are broad enough to allow a person to grow and thrive and flourish.

8. AGENCY and AUTONOMY are two similar but distinct terms. ‘Agency’ means the capacity to make decisions. ‘Autonomy’ means the capacity to make rules for oneself; it has a more individualistic nuance. While humans should have agency over themselves, they live in community with others and therefore do not live autonomously. Agency recognizes each person’s right to control their own life but we prefer it to autonomy because it accommodates the communal. As the Indian Supreme Court has said, “The right to choose for oneself – be it as significant as choosing the course of one’s life or as mundane as one’s day-to-day activities – forms a part of the right to dignity.”<sup>156</sup>

9. PRIVACY is related to the free development of the personality and to agency, but it also relates to what Justice Douglas called “the zone of privacy” that was protected by various rights enumerated in the Bill of Rights. It demarcates the lines of individual personhood. The zone of privacy, or zone of dignity, protects not only decisional agency about one’s life choices, but also the right to not self-incriminate, rights relating to what we choose to say or choose not to say, and other rights of conscience that protect our personhood.<sup>157</sup>

10. BODILY INTEGRITY relates specifically to the control that each person must have over their own body. This is why torture, rape, medical experimentation and other attacks on a person’s body offend dignity and can never be countenanced. This is why even voyeurism is prohibited under the Prison Rape Elimination Act (see Chapter 4, III.A.2 below). The body is the physical incarnation of human dignity. Violations of bodily integrity also impair other aspects of human dignity. As the Colombian Constitutional Court has recounted, “the elimination of violence against women is a condition that is indispensable for her individual social development and her full and equal participation in all the spheres of life.”<sup>158</sup>

11. BELONGING implicates the aspect of dignity that recognizes that no individual lives alone and that our identities are bound up with others. The South African Constitutional Court has been among the most articulate in expounding what we have elsewhere called “the dignity of belonging:”<sup>159</sup> “Every individual is an

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<sup>156</sup> X v. The Principal Sec’y, Health & Fam. Welfare Dep’t, Govt. of NCT of Delhi & Another, (2022) SCC OnLine SC 1321 (India), <https://indiankanoon.org/doc/123985596/>.

<sup>157</sup> Griswold v. Connecticut, 381 U.S. 479, 484 (1965): “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U. S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy.” (Citing cases under the first, third, fourth, fifth, and ninth amendments).

<sup>158</sup> Corte Constiucional [C.C.] [Constituional Court], febrero 5, 2008, Sentencia T-088/08, ¶ 2.2.2. (Colom.).

<sup>159</sup> DALY, DIGNITY RIGHTS, *supra* note 19, at 117-122.

extension of others.... 'an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons.' This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity."<sup>160</sup>

12. CITIZENSHIP is more than the formal status of state citizenship. Sometimes, rights are granted only to citizens, with the result that children or people who are migrating who may not have full citizenship status, are denied certain fundamental rights such as the right to vote or the right to work or study. However, every person has equal human dignity, so even those who are not citizens nonetheless always retain the right to have their dignity respected, including the right to participate in society.

13. PARTICIPATORY DIGNITY refers to that aspect of human dignity that permits (or requires) engagement in political decision-making in one's community at the local, national, regional, or international levels. Participatory dignity guarantees the set of rights associated with political authority, including rights to free expression, association, voting, and running for office. Limitations on voting rights especially impair this aspect of dignity.

14. EMPATHY, RESPECT, GENEROSITY, COMPASSION and similar terms describe the interpersonal relationships that a culture of dignity invites. To treat a person with dignity is to have and express these sentiments. But dignity is far more than these interpersonal forms of connection.

#### Indignities

15. OBJECTIFICATION. The anti-objectification principle of the German philosopher, Emmanuel Kant (whose work has been extraordinarily influential in dignity law), holds that a person must always be treated as an end in and of themselves, and not as a means to another person's ends or goals. Thus, a person may not be objectified ("cosificar" in Spanish, to be made into a thing). This principle means, for instance, that a criminal penalty must not be imposed upon a person in order to deter others from committing the same crime because it uses the human being as an instrument of state policy. Sexual abuse is another form of objectification.

16. HUMILIATION is also forbidden because respect for human dignity means that no person may be made to feel "less than" human or less than another. Humiliation may be physical or emotional. Protection from humiliation ranges from the prohibition against torture to protection from defamation or stigmatization.<sup>161</sup> The

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<sup>160</sup> *MEC for Education: Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) at para. 53 (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2007/21.html>.

<sup>161</sup> H CJ 5100/94 *Public Committee Against Torture v. State of Israel* (1999) (President Judge Aharon Barak), [https://www.casebriefs.com/blog/law/criminal-law/criminal-law-keyed-to-kadish/exculpation/public-committee-against-torture-v-state-of-israel/?utm\\_source=casebriefs?utm\\_source=casebriefs](https://www.casebriefs.com/blog/law/criminal-law/criminal-law-keyed-to-kadish/exculpation/public-committee-against-torture-v-state-of-israel/?utm_source=casebriefs?utm_source=casebriefs).

European Court of Human Rights has said that even a single slap on the face from a police officer is a form of humiliation that can constitute a violation of dignity, under the Convention which prohibits demeaning treatment.<sup>162</sup>

17. VULNERABILITY is a condition of human existence that tends to impair people's ability to protect themselves. People may be vulnerable for one or more reasons – by virtue of age (high or low), poverty, physical or mental impairment, isolation, or any number of other reasons. Because the state must protect the dignity of every person, it may have an affirmative obligation to take steps to protect the dignity of people with vulnerabilities.<sup>163</sup>

#### Terms relating to how the law recognizes human dignity

18. LEGAL DIGNITY represents the idea that while dignity is an inherent human quality, it makes certain demands on the law. While the law does not grant or remove dignity, it can affirm and support it, or it can ignore, deny, and violate it.

19. DIGNITY RIGHTS are the rights – recognized in international and constitutional law – that flow from the recognition of human dignity. These include civil, political, social, economic, cultural, and environmental rights. There is no single or formal definition of dignity rights. This idea derives from the claim of the philosopher Hannah Arendt that dignity is the “right to have rights.”<sup>164</sup>

20. “INDIVISIBLE, INTERDEPENDENT AND INTERRELATED” describe the relationship among rights. Because dignity rights span human experience, the rights that human dignity protects and that are protected by dignity are interdependent: we need a healthy environment to fully enjoy the right to health and we need education to fully exercise our rights to free expression and voting. Some of these rights are also indivisible in the stronger sense that one can not exist without the other: the right to clean water can not exist without the right to a healthy environment.<sup>165</sup>

21. NEGATIVE AND AFFIRMATIVE OBLIGATIONS describe the obligations that states have to protect and promote dignity rights. The principles noted above exemplify

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<sup>162</sup> See *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R. ¶181 (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40; see also “Guide on Article 3 of the European Convention on Human Rights: Prohibition of torture,” First edition (31 August 2022) (“Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Indeed, the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity. The prohibition in question is absolute, no derogation from it being permissible...”) (Citing *Bouyid*), [https://www.echr.coe.int/documents/d/echr/Guide\\_Art\\_3\\_ENG#:~:text=Article%203%20of%20the%20Convention%20enshrines%20one%20of%20the%20most,%2C%202015%2C%20C2%A7%2081](https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG#:~:text=Article%203%20of%20the%20Convention%20enshrines%20one%20of%20the%20most,%2C%202015%2C%20C2%A7%2081).

<sup>163</sup> Corte Constitucional [C.C.] [Constitutional Court], abril 23, 2009, Sentencia T-291/09 (Colom.) (Clara Elena Reales Gutierrez, Magistrada (E); Gabriel Eduardo Mendoza Martelo, Magistrado; Luis Ernesto Vargas Silva, Magistrado; Martha Victoria Sachica Mendez, Secretaria General), <https://www.corteconstitucional.gov.co/relatoria/2009/t-291-09.htm>.

<sup>164</sup> Hannah Arendt, *The Rights of Man: Where Are They?* in 3 MODERN REVIEW 24-36 (1949).

<sup>165</sup> CRC/C/GC/26, General comment No. 26 on children's rights and the environment, with a special focus on climate change, para. 13 (22 August 2023). See generally DANIEL J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* (University of Pennsylvania Press 2010).

the distinction. A negative obligation entails government restraint: 1) the government must refrain from any action or practice that violates human dignity. An affirmative obligation entails government action: 2) government must assure that a person has the wherewithal to live with dignity. The US Bill of Rights is written in mostly negative terms (“Congress shall make no law...”) that are usually immediately enforceable with little cost or political impediments. Affirmative obligations require the state to take positive steps such as providing health care, education, and housing so that people can live with dignity. They therefore entail significantly more political and economic investment.

22. PROPORTIONALITY recognizes that respect for human dignity requires that laws be proportionate to their purpose: a law that imposes a much greater burden on a person than what the situation requires is using that person as a means for some purpose and is violating that person’s dignity. This is important in the context of sentencing and carceral discipline.

23. LA VIDA DIGNA, OR THE RIGHT TO LIVE WITH DIGNITY recognizes that the “right to life” is not only the right to not lose one’s life but the right to live with dignity. This is recognized in international law, in the UN Human Rights Committee’s interpretation of the right to life in Article 6 of the International Covenant of Civil and Political Rights. And it is established in constitutional law in countries including India (where there is no explicit right to dignity) and including Pakistan, Colombia, and Germany (where there is also an explicit right to dignity).<sup>166</sup>

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<sup>166</sup> UN Hum. Rts. Comm., *General comment no. 36, Article 6: Right to Life*, at para. 3 (Sept. 3, 2019), <https://www.refworld.org/docid/5e5e75e04.html>. Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, (1981) 2 SCR 516 (India) (Bhagwati, P.N.), <https://indiankanoon.org/doc/78536/>; Ashgar Leghari v. Federation of Pakistan, (2018) 2018 PLD 364 (Lahore High Court) (Pak.) (Chief Justice Syed Mansoor Ali Shah), Official stable link, <https://sys.lhc.gov.pk/appjudgments/2018LHC132.pdf>; BVerfG, 1 BvL 7/16, Nov. 5, 2019 (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/ls20191105\\_1bvl000716en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/ls20191105_1bvl000716en.html); Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16 (Colom.)(Center for Social Justice Studies et al. v. Presidency of the Republic et al. (“Rio Atrato” Case)), available in English at <http://files.harmonywithnatureun.org/uploads/upload838.pdf>.

## ABSTRACTS OF CHAPTERS

### CHAPTER 1: ARREST AND CUSTODIAL INTERROGATION

This chapter shows how dignity violations occur when police interact with members of the public and in the course of arrest and interrogation. Whether or not a member of the public is suspected of committing a crime, greater attention to the invariable imbalances of power and choice between the police and those engaging with them can reduce or alleviate those violations and protect and even promote the sense of dignity that each person has. The power imbalances are especially pronounced for those who are girls and women, who are black or brown, or who are otherwise in situations of vulnerability (such as from poverty or mental or physical disability). The chapter highlights the relevance of dignity at the point of initial stops and during interrogations, and shows how the use of psychological and physical force violates dignity. Dignity could be better protected by following the models in other countries and the experiences in some US jurisdictions. The chapter concludes with recommendations for reform to protect the dignity of people in especially vulnerable circumstances.

*Key dignity terms: the inherent worth of human life, equality and equal worth, anti-objectification, agency, privacy, freedom from humiliation, bodily integrity, to be treated as a person.*

### CHAPTER 2: PRE-TRIAL DETENTION AND BAIL

Detaining a person without a conviction violates fundamental principles of due process because it rests on a presumption of guilt rather than innocence. Moreover, detaining a person prior to trial simply because they lack the resources to post bail violates principles of equal protection and non-discrimination. All of these are elemental aspects of human dignity. Once in detention, further violations of dignity ensue. People are often dehumanized and objectified, because they are cut off from their families, denied access to physical and mental health care, and sometimes to legal advisors. Exacerbating the dignity violations, pretrial detainees also face additional hurdles when trying to report treatment that falls below the legal and constitutional standard or the standard of human dignity. This chapter examines the various ways that pretrial detention violates human dignity; it concludes with recommendation for alternatives and points to stress for further advocacy.

*Key dignity terms: equality and equal worth, agency, anti-objectification, privacy, dignity of belonging, participation in civic life, freedom from humiliation, bodily integrity, protection from vulnerability, living with dignity, to be treated as a person.*

## CHAPTER 3: SENTENCING

While in many parts of the world, and under international human rights law, sentencing for purposes of retribution (punishment) and deterrence is deemed inconsistent with human dignity, these goals are the mainstays of the American criminal legal system. This chapter will discuss the purposes of sentencing in general and advocate for sentencing reforms in order to support the commitment to dignity as inherent and inalienable in all human beings. First, we compare the penological goals of sentencing in the United States and in countries where the purpose of sentencing is defined by the demands of human dignity. Next, we consider the idea, accepted throughout the world, that respect for human dignity demands that the length of a sentence of incarceration be proportionate to the wrong done. The absence of a proportionality principle in US jurisprudence leads to disproportionately and unusually long sentences, including sentences of life, life without parole, and death which are generally prohibited in jurisdictions committed to principles of dignity. The chapter assesses the dignity violations inherent in these sentences, including as excessively long sentences apply to people who are young. It concludes with points for advocacy.

*Key dignity terms: the inherent worth of human life, equality and equal worth, anti-objectification, free will, bodily integrity, protection from vulnerability, to be treated as a person.*

## CHAPTER 4: GENERAL CONDITIONS OF INCARCERATION

Conditions in prisons (including jails and other centers of incarceration and detention) must affirm the dignity of all persons at all times. Because dignity is inherent and inalienable, those who are convicted of crimes may be required to give up their liberty for a time, but their right to retain their dignity is never lost. Courts in the United States and abroad have recognized the dignity rights of persons who are incarcerated as a matter of decency, as essential to establishing a just rule of law, and as a necessary part of the criminal legal system to ensure successful reentry into society after incarceration.

This chapter first establishes the dignity rights of all people including those who are incarcerated. It then offers a model of understanding prison conditions and practices as either promoting or affirming dignity or as denying or diminishing dignity. The chapter then analyses several aspects of prison life in terms of their relevance to human dignity and, looking in part to practices abroad, it provides some suggestions for enhancing the dignity of people who are incarcerated while still advancing legitimate penological goals. These aspects include sanitation, food, education, and employment. (We leave our examination of health care to the next chapter).

This chapter will help define what a life of dignity in prison looks like. It will identify ways incarcerated individuals, prison officials, jailhouse lawyers, and all those involved in the criminal legal system may protect the dignity of those who are in prison.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

#### CHAPTER 5: PHYSICAL AND MENTAL HEALTH FOR PEOPLE WHO ARE INCARCERATED.

This chapter examines access to physical and mental health care for people who are in carceral custody. Health care for people in prisons is mandated under international human rights law and US constitutional law. In practice, however, it is inadequate in quantity and quality, in violation of the human dignity interests in agency, self-esteem, bodily integrity, privacy, and equality among other things. We consider a range of medical needs, from chronic conditions to acute care, and we consider the need to provide physical and dental care appropriate to human dignity. The chapter notes that, despite the particular needs and vulnerabilities of girls and women in custody, they are disproportionately burdened in the availability of appropriate medical care. Moreover, for the hundreds of thousands of people with mental health illness, the problems are worse, as incarceration itself is an exacerbating condition. Dignity entails an inherent right to a safe place, both physically and psychologically, the right to be heard and provided physical and mental health treatment, the right to freedom from humiliation, and privacy. Most importantly, dignity demands individualized care as appropriate to each person's needs.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

#### CHAPTER 6: GRIEVANCE PROCEDURES AND DISCIPLINE

This chapter considers grievance procedures and discipline within prisons. Disciplinary measures may be taken for any reason, or no reason at all, and they are often taken in response to filing grievances. We therefore consider the two matters together.

Grievance procedures are essential to human dignity for reasons of both process and outcome: a fair grievance procedure allows each person to express themselves as they see fit and to speak their truth. A fair grievance procedure can also help each person secure a life of dignity while they are incarcerated. Inadequate grievance procedures – as most are – operate on a presumption of guilt, deny prisoners' voice, and diminish prisoners in their own eyes and the eyes of others. And if they are not responsive to the complaints, they may perpetuate the indignities

complained of. Disciplinary measures, which are often imposed as retaliation when prisoners self-advocate either formally in a grievance process or informally, often impose punishments that violate the human dignity of prisoners both because they are inherently torturous and because they are disproportionate to the infraction which are often vague and overbroad. Moreover, the abuse, over-use, and mis-use of solitary confinement as a means of both punishment and retaliation inherently violate the human dignity rights of belonging and community participation by placing people in an environment that completely isolates them from the world.

This chapter advocates for specific reforms to ensure that prisoners can self-advocate for better conditions with dignity. The chapter closes with recommendations on how to better uphold human dignity during these processes by examining how human dignity has been applied to prisoner discipline and retaliation in international law. We also specifically focus on solitary confinement as a common retaliatory disciplinary measure.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

## CHAPTER 7: LIVING WITH DIGNITY UPON RELEASE

This chapter examines how people released from prison, usually on probation or parole, can live with dignity. Typically, they face two sets of challenges. First, many people who have difficulty securing basic necessities like food and shelter and finding jobs or educational opportunities once they are released from prison. This makes it very challenging to live with dignity. This chapter considers the government's obligation to ensure that every person can live in dignified conditions. Second, people released on probation or parole face numerous restrictions on their freedom, including restrictions on movement, restrictions on freedom of association, restrictions on political participation, and other limitations that are themselves violative of human dignity. By some measures, there are as many as 46,000 collateral consequences of felony convictions in the United States. Moreover, violation of these conditions may result in reincarceration thereby further threatening their dignity. Many of these conditions violate the dignity principles of agency, bodily integrity, privacy, equality, the right to be treated "as a person," and participation in society. This chapter calls for reform in community supervision to ensure that all basic dignity needs are met, and the elimination of restrictions on voter eligibility. We also call for the elimination of collateral consequences of post-release conditions.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from*



*humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

## CHAPTER 8: YOUNG PEOPLE IN THE CRIMINAL LEGAL SYSTEM

Dignity law is especially important for young people because their personalities, their sense of self, and their true identities are developing. It is also important because they are particularly vulnerable to those who exert mental, physical, and emotional power over them. Yet, the criminal legal system denies and diminishes the dignity of thousands of young people every day. When the government places young people in adult correctional facilities, it denies their dignity rights to be treated as individuals, impinges on their ability to fully develop their identities and their personalities, and makes them especially vulnerable to dignity violations by others. The violations of dignity are exacerbated when additional punishments and burdens are placed on them, whether they are in juvenile or adult facilities.

This chapter demonstrates how treating children like adults violates their dignity. It shows how adult correctional facilities in the United States strip young inmates of the opportunity to develop their own sense of human dignity by treating them like adults. Additionally, this chapter focuses on how facilities can improve the dignity rights of young people by allowing for personality development, protecting the physical safety of youths who are incarcerated, and fostering more opportunities for socialization and community.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*



FROM ARREST TO RE-ENTRY:  
AN ANALYSIS OF DIGNITY IN THE CRIMINAL LEGAL SYSTEM



## CHAPTER 1: ENCOUNTERS WITH POLICE

This chapter shows how dignity violations occur when police interact with members of the public and in the course of arrest and interrogation. Whether or not a member of the public is suspected of committing a crime, greater attention to the invariable imbalances of power and choice between the police and those engaging with them can reduce or alleviate those violations and protect and even promote the sense of dignity that each person has. The power imbalances are especially pronounced for those who are girls and women, who are black or brown, or who are otherwise in situations of vulnerability (such as from poverty or mental or physical disability). The chapter highlights the relevance of dignity at the point of initial stops and during interrogations, and shows how the use of psychological and physical force violates dignity. Dignity could be better protected by following the models in other countries and the experiences in some US jurisdictions. The chapter concludes with recommendations for reform to protect the dignity of people in especially vulnerable circumstances.

*Key dignity terms: the inherent worth of human life, equality and equal worth, anti-objectification, agency, privacy, freedom from humiliation, bodily integrity, to be treated as a person.*

### I. INTRODUCTION: THE INDIGNITIES OF INITIAL ENCOUNTERS WITH POLICE

The Fourth Amendment and the applicable rules of criminal procedure outline the rights that individuals have with respect to arrests. The Fourth Amendment guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>167</sup> The Federal Rules of Criminal Procedure detail with specificity the rules and regulations relative to individual freedoms when people are approached by law enforcement. Neither of these sets of rules explicitly mentions the need to respect human dignity but both are implicitly based on that commitment.

Dignity, in its true sense, should be understood as the equal worth that all human beings have. The Universal Declaration of Human Rights (“UDHR”) associates dignity with equality, with rationality and conscience, with a moral obligation to treat every other person in a “spirit of brotherhood,” and with rights.<sup>168</sup> Nonetheless, abundant data and correlative experience indicate that those who encounter police are not always treated with dignity; some instances of flagrant abuse of dignity have been well documented.

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<sup>167</sup> U.S. CONST. art. IV.

<sup>168</sup> UDHR, *supra* note 7, at art. 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

This chapter describes some of the indignities in encounters with police, arrests, and interrogation. It advocates for reforms aimed at affirming and protecting the dignity of all persons who are impacted by the system. We consider police procedures throughout the country, using Delaware as an example.

Human dignity came to have legal significance – relevant to what the law is and how it is applied and to the definition and scope of legal rights – after the end of World War II when the drafters of the UDHR affirmed that dignity is the foundation of peace, justice, and freedom in the world and an essential concomitant of eliminating the scourge of war.<sup>169</sup> The UDHR sought to provide a set of rules to be followed globally and to instill the idea of equal dignity in all human beings, regardless of race, religion, sexual orientation, or any other categorical factor.<sup>170</sup>

In the context of arrests, the most important articles of the UDHR include the following:

- Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
- Article 6: “Everyone has the right to recognition everywhere as a person before the law.”
- Article 7: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

The moral and legal imperative to respect the equal and inherent dignity of every person, however, too often conflicts with the power that law enforcement holds over civilian members of society. Unlike in some other countries such as Germany,<sup>171</sup> the United States does not recognize dignity as a constitutional cornerstone, so those who hold governmental authority are not bound by the principle of dignity. Throughout the country, police are criticized for using excessive physical force, lethal force, and for humiliating individuals in police encounters. These practices violate human dignity because they reinforce differentials in power, they deny the sense of equal worth that a person feels about themselves and that others see in them, they can violate the bodily integrity of a person and their sense of privacy, they can be humiliating in the eyes of others and at worse, they diminish the value of each person’s life. All of this can happen before any evidence of guilt has been adduced.

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<sup>169</sup> UDHR, *supra* note 7, at preamble; see also Amnesty International, *What is the Universal Declaration of Human Rights and why was it Created*, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited Jan. 10, 2023).

<sup>170</sup> Amnesty International, *supra* note 169.

<sup>171</sup> Grundgesetz [GG] [Basic Law] art. 1 (Ger), “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

## A. Girls and Women in the Criminal Legal State

The situation for girls and women is worse. The rate of crimes committed by girls has not gone up, but the rate of arrests has.<sup>172</sup> While boys, specifically boys of color, may go through what is known as the school-to-prison pipeline, girls – often girls of color and Native American girls – go through what is known as the sexual abuse-to-prison pipeline.<sup>173</sup> While not as much research has been available regarding the experiences of girls, there is growing data showing how girls with traumatic upbringings, including sexual abuse, often end up in juvenile detention.<sup>174</sup> Then, as grown women, they may end up in prison.<sup>175</sup> The decision to arrest a girl and force her into the system “sets into motion a cycle of abuse and imprisonment that has harmful consequences for victims of trauma.”<sup>176</sup>

Girls are often sent to juvenile detention centers for minor offenses such as truancy, petty theft, substance abuse, and running away,<sup>177</sup> often because they are seeking to escape abusive situations. In addition, many girls and women are arrested for crimes connected with their involvement in abusive relationships. For instance, the criminal justice system penalizes girls for prostitution, when girls are often victims of sex trafficking rather than the perpetrators of sexual exploitation.<sup>178</sup> Further criminalization of girls and women is likely to result from the Supreme Court’s withdrawal of any constitutional protection for people who seek abortions:<sup>179</sup> even states that make exceptions for “rape or incest” (and not all do) may prosecute people for having untenable pregnancies except in the rare case where rape or incest is reported or legally proven. (Under *Roe v. Wade*, states were constitutionally compelled to protect abortions where the “life or health” of the girl or woman was in danger, whereas states now may or may not have such protections).

This does not account for the placement of adolescent girls in adult facilities, which raises further concerns about the impact of mixing a child into an adult-populated institution; this is discussed in chapter 8.

Upon initial encounters and arrest, police should be trained to recognize the vulnerabilities of girls and women, and should facilitate or support efforts to remove them from harmful, dangerous, exploitative and dignity-denying situations. The inherent human dignity of this population of girls is very rarely, if ever, recognized or affirmed; rather, their vulnerability exposes them to further manipulation and exploitation and objectification – all of which of course

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<sup>172</sup> Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html>.

<sup>173</sup> Malika Saada Saar et al., *The Sexual Abuse to Prison Pipeline: The Girls’ Story*, GEORGETOWN LAW CENTER ON POVERTY AND INEQUALITY 10 (2015), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf>.

<sup>174</sup> Haillie Parker & Chloe Johnson, *What Fuels the Sexual-Abuse-to-Prison Pipeline?*, Kids Imprisoned (Aug. 5, 2020), <https://kidsimprisoned.news21.com/blog/2020/08/what-fuels-the-sexual-abuse-to-prison-pipeline-2/>.

<sup>175</sup> *Id.*

<sup>176</sup> Malika Saada Saar et al., *supra* note 173, at 12.

<sup>177</sup> *Id.* at 10.

<sup>178</sup> Kristin Finklea, *Juvenile Victims of Domestic Sex Trafficking: Juvenile Justice Issues*, CONGRESSIONAL RSCH. SERV. (Aug. 5, 2014), <https://sgp.fas.org/crs/misc/R43677.pdf>.

<sup>179</sup> *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

interferes with their ability to fully develop their identities and personalities and live full lives as agents of their own destinies on an equal basis with others.<sup>180</sup>

#### B. Dignity and Racial Disparities in Arrest and Incarceration Rates

Racial disparities also constitute clear violations of dignity: they treat a person as less valuable than another on the basis of a group trait over which they have no control – thereby denying individuality, equality, and agency and often entailing humiliation and degradation. All of these are dignity violations because they do damage to a person’s essential sense of self-worth. Racial disparities in the criminal legal system in the United States are well known but are shocking nonetheless when understood as violations of the human dignity of every person involved.

Delaware provides a window into dignity violations in arrests and police interactions. Although it remains the second smallest state, it has one of the highest incarceration rates in the country, and therefore in the world. Estimates of Delaware’s incarceration rate range from 276 per 100,000 to 811 per 100,000 people in 2005.<sup>181</sup> Whatever numbers one uses, the rate of incarceration in Delaware is not only higher than many other states, but also significantly higher than most nations:<sup>182</sup> by comparison, the incarceration rates of the founding NATO countries range from 129 per 100,000 in the United Kingdom to 33 in Iceland.<sup>183</sup>

Moreover, incarceration rates in Delaware disproportionately impact African Americans. While African Americans make up 20% of the state population, they make up 42% of the arrests<sup>184</sup> and 64% of the prison population in the state.<sup>185</sup> The Sentencing Project puts the black/white disparity in Delaware at 5.3:1 (indicating that black people are imprisoned at 5.3 the rate of white people), higher than the shocking national average of 4.8:1.<sup>186</sup> Black people are thus far more likely to be arrested than white people in the general population, and upon arrest, they are 2½ times more likely to be incarcerated than white arrestees.<sup>187</sup> Eighty-six percent of the African American prison population are held for drug offenses.<sup>188</sup> And among those arrested on drug charges, African Americans are five times more likely to be sentenced to prison terms of a year or more

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<sup>180</sup> Malika Saada Saar et al., *supra* note 173, at 12–14.

<sup>181</sup> The Prison Policy Initiative estimates it at 631 in 2021, <https://www.prisonpolicy.org/global/2021.html>, while the Sentencing Project puts it at 276 per 100,000, <https://www.sentencingproject.org/research/us-criminal-justice-data/>, while THOMAS P. EICHLER, RACE AND INCARCERATION IN DELAWARE: A PRELIMINARY CONSIDERATION, 11 (Published by Delaware Center for Justice and Metropolitan Wilmington Urban League) (2005) puts it at 811 per 100,000, <https://www.prisonpolicy.org/scans/RaceIncarceration.pdf>.

<sup>182</sup> Eichler, *supra* note 181, at 4.

<sup>183</sup> Widra & Herring, *States of Incarceration: The Global Context 2021*, *supra* note 99.

<sup>184</sup> Eichler, *supra* note 181, at 4.

<sup>185</sup> *Id.*

<sup>186</sup> The Sentencing Project, *U.S. Criminal Justice Data*, <https://www.sentencingproject.org/research/us-criminal-justice-data/> (last visited Sept. 22, 2023).

<sup>187</sup> Eichler, *supra* note 181, at 2. It is difficult to untangle poverty and racial gaps in the United States because of the strong correlation between racial minority status and poverty: some of the racial disparities therefore are also attributable to poverty including that police are disproportionately present in under-resourced neighborhoods and wealthier people are more likely to be able to evade arrest and hide incriminating evidence. We thank a public defender who read this manuscript for this set of observations.

<sup>188</sup> *Id.* at 4.



than whites arrested on drug charges.<sup>189</sup> This reflects nationwide trends: although whites and blacks sell drugs at similar rates and whites use drugs at slightly higher rates, “black Americans are 2.7 times as likely to be arrested for drug related offenses.”<sup>190</sup>

This disproportionate involvement in the criminal legal system suggests race-based reasons which, without more, indicate violations of the dignity principle that every person be treated as a person<sup>191</sup> of equal and inherent worth. Specifically, this means that every person must be treated as an individual, based on their own unique circumstances and not as a suspect simply because of their membership in a group. Moreover, it means that no person should be objectified – that is, used to advance to goal or objective of another – or be harmed for someone else’s ulterior motive.

Arrests that disproportionately affect one group of people diminish them in the eyes of others and adversely impact their own self-esteem, making them feel less valued and less valuable than people in another group, defined by a trait over which they have no control. The arrest, detention, incarceration, and sentencing rates call into question whether African Americans are afforded the same presumption of innocence that white Americans enjoy – a presumption that itself derives from notions of human dignity. (The dignity basis for the presumption of innocence is discussed in Chapter 2).

## II. STOP AND FRISK, OR DETAIN

In order to execute a lawful arrest, an officer must have probable cause.<sup>192</sup> Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested.<sup>193</sup> The Supreme Court has upheld stops if there is reasonable suspicion of a crime and frisks if there is additional reasonable suspicion that a person is armed and dangerous.<sup>194</sup> Moreover, the court has upheld pretextual stops even if such actions are likely to bear disproportionately on African Americans.<sup>195</sup> In Delaware, police may take a person into custody for 2 hours if the officer has a “reasonable articulable suspicion” that the

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<sup>189</sup> Eichler, *supra* note 181, at 4; *see also* The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

<sup>190</sup> The Hamilton Project, *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race* (Oct. 21, 2016), <https://www.hamiltonproject.org/data/rates-of-drug-use-and-sales-by-race-rates-of-drug-related-criminal-justice-measures-by-race/>.

<sup>191</sup> UDHR, *supra* note 7, at art. 6.

<sup>192</sup> *United States v. Watson*, 423 U.S. 411, 417 (1976). A person can be arrested for a felony without a warrant, though it remains an open question whether a warrant is needed for an arrest for a misdemeanor.

<sup>193</sup> *Dempsey v. Bucknell Univ.*, 834 F.3d 457, 467 (3d Cir. 2016).

<sup>194</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>195</sup> *Whren v. U.S.*, 517 U.S. 806, 819 (1996) (search upheld where reasonable suspicion to stop defendant for fleeing at sight of police in high crime area); *see also Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (holding that “reasonable suspicion must be based on common sense judgments and inferences about human behavior.”).

person is in the process of or is about to commit a crime.<sup>196</sup> This is likely unconstitutional under *Terry v. Ohio*.<sup>197</sup> Moreover, Delaware is one of 23 states in which it is an arrestable offence for a person to refuse to provide identification or to explain their actions when a police officer asks.<sup>198</sup>

Rules like these that expand officer discretion and increase opportunities for people to be brought into the criminal legal system for a wider range of matters violate human dignity in a number of ways. They exacerbate the racial disparities identified previously because they allow stereotypes and prejudices to literally color decision-making. They invert the presumption of innocence by imposing burdens on people without establishing guilt. Often, stops and arrests involve isolation, assaults on bodily integrity, invasions of privacy, and they invariably involve denigration and humiliation.<sup>199</sup>

Humiliation as a dignity principle has been alleged, recorded, and ultimately ignored by the advocates and lawmakers in support of stop and frisk. People interviewed by the Center for Constitutional Rights described feeling a range of emotions during stops, including anger, fear, shame, and vulnerability.<sup>200</sup> Several interviewees said that being stopped and frisked makes you “feel degraded and humiliated.”<sup>201</sup> One went on to say: “When they stop you in the street, and then everybody’s looking... it does degrade you. And then people get the wrong perception of you. That kind of colors people’s thoughts towards you, might start thinking that you’re into some illegal activity, when you’re not. Just because the police [are] just stopping you for – just randomly. That’s humiliating [on] its own.”<sup>202</sup>

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Humiliation is a particularly important aspect of indignity.<sup>203</sup> The humiliation, the feeling of inferiority, the lowering of esteem in the eyes of others, and ultimately perhaps to oneself, are all

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<sup>196</sup> DEL. CODE ANN. tit. 11, § 1902 (West). Questioning and detaining suspects

(a) A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person’s name, address, business abroad and destination.

(b) Any person so questioned who fails to give identification or explain the person’s actions to the satisfaction of the officer may be detained and further questioned and investigated.

(c) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

<sup>197</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that officers may make a limited search of the outer clothing, for weapons, based on reasonable suspicion for the safety of the officers and others in the limited area).

<sup>198</sup> *See, e.g. Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>199</sup> The dignity implications of custodial interrogation are discussed further below.

<sup>200</sup> STOP AND FRISK-THE HUMAN IMPACT: THE STORIES BEHIND THE NUMBERS, THE EFFECT ON OUR COMMUNITIES, CENTER FOR CONSTITUTIONAL RIGHTS (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Human Dignity and Humiliation Studies, <https://www.humiliationstudies.org/whoware/humiliationdefinition.php> (last visited June 7, 2022).

aspects of the violations of dignity that result from constitutionally questionable stops and arrests. Beyond these, when people are under suspicion for reasons that are more closely aligned with police policy goals – numbers of arrests, racial bias, etc. – than with the suspect’s own conduct, objectification occurs, at the expense of human dignity – all in direct violation of the letter and the spirit of the Universal Declaration of Human Rights, and the 4<sup>th</sup> Amendment. The Supreme Court has said that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>204</sup>

### III. THE USE OF FORCE BY POLICE

Under international law, law enforcement must respect the dignity of all individuals. In 1979, the United Nations General Assembly adopted the Code of Conduct for Law Enforcement Officials dealing with how law enforcement officials should conduct their duties. The Code of Conduct attempted to rectify abuses of power that frequently come to fruition when there is a difference in power between individuals. Article Two establishes that “Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”<sup>205</sup> The purpose of this provision is to protect dignity even when such violations are not violent, predatory or harmful acts, but are violations to one’s emotional and mental state and sense of self. In prohibiting police from violating individual rights, recognition of power differences and the intimidation those can bring are vital to protect against the destruction of human dignity. This is especially pertinent during interrogations when a person’s life and liberty are at stake.<sup>206</sup>

#### A. Lethal Force by Police

Brutality and violence by police against citizens is too common in the United States.<sup>207</sup> While some instances are well known either because the facts are so horrific or the video evidence so compelling, or both, as in the case of George Floyd which sparked mass protests around the world in 2020, the violence by police against citizens is ongoing and pervasive.<sup>208</sup> In 2021, there were 15 days in which police did NOT kill people in the United States, and most days saw two or

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<sup>204</sup> *Schmerber v. California*, 384 U.S. 757, 767 (1966); *see also* *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106, at \*23 (D. Del. Aug. 17, 2023).

<sup>205</sup> G.A. Res. A/RES/34/169, Code of Conduct for Law Enforcement Officials, art. 2 (Dec. 17, 1979), <https://www.ohchr.org/en/instruments-mechanisms/instruments/code-conduct-law-enforcement-officials>.

<sup>206</sup> *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

<sup>207</sup> Steven M. Salky, Joshua A. Levy, *Reforming Police Use of Deadly Force to Arrest* (June 2020), <https://www.levyfirestone.com/wp-content/uploads/2020/09/The-Champion-Reforming-Police-Use-of-Deadly-Force-to-Arrest-June-2020.pdf>.

<sup>208</sup> *See, e.g.*, Press Release, Inter-American Comm’n on Human Rights [hereinafter IACHR] (June 8, 2020), [https://www.oas.org/en/iachr/media\\_center/PReleases/2020/129.asp](https://www.oas.org/en/iachr/media_center/PReleases/2020/129.asp); United Nations, *US must address deep-seated grievances to move beyond history of racism and violence* (June 3, 2020), <https://news.un.org/en/story/2020/06/1065572>; Press Release, United Nations (June 3, 2020), [https://www.ohchr.org/en/press-releases/2020/06/us-protests-deep-seated-grievances-must-be-addressed-bachelet?LangID=E&NewsID=25922\\_](https://www.ohchr.org/en/press-releases/2020/06/us-protests-deep-seated-grievances-must-be-addressed-bachelet?LangID=E&NewsID=25922_)

more killings, resulting in a total of 1,144 people killed by police in that year.<sup>209</sup> In 2022, the numbers were worse: according to the Mapping Police Violence database, police killed 1,176 people in 2022 and there were only 12 days in the year when police did not kill a person. Moreover, most killings begin with allegations of non-violent offenses such as traffic stops and mental health checks; only one in three police shootings begin with the allegation of a violent crime.<sup>210</sup> Indeed, between 2017 and 2022, police killed 730 people in traffic stops,<sup>211</sup> which accounts for approximately 10% of the number of victims of police killings.

The numbers disproportionately harm people of color who are more likely to be killed while fleeing.<sup>212</sup> In the ten-year period 2013-2022, blacks were nearly 3 times as likely to be killed by police as whites, though 1.3 times less likely to be armed.<sup>213</sup>

Again, Delaware offers a good case study. Over the last 15 years, police in Delaware have shot 56 people, three in 2021.<sup>214</sup> Officers have killed 30 of them, including a robbery victim.<sup>215</sup> Nearly half of those shot were Black in a state where Black people make up just one fifth of the population.<sup>216</sup> While circumstances have varied, no Delaware officer has to date been charged with a crime.<sup>217</sup>

This situation may be alleviated by two recent changes in Delaware law: in 2020, Delaware made the use of a chokehold a crime, called Aggravated Strangulation.<sup>218</sup> Then, in 2021, the law on police use of force was changed from a subjective standard to an objective standard, which may facilitate holding officers accountable for excessive use of force (even if there is no proof of the officer's state of mind).<sup>219</sup>

Nationally, officers are immune from liability even for the use of lethal force as long as the killing was not in violation of a clearly established right<sup>220</sup> meaning that "it would be clear to a

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<sup>209</sup> MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last visited Apr. 6, 2023).

<sup>210</sup> The Official Mapping Police Violence Database, *Mapping Police Violence*, <https://mappingpoliceviolence.us/> (last visited Apr. 6, 2023).

<sup>211</sup> Finesse Moreno-Rivera, Police kill far too many people during traffic stops. We must change why stops are made, USA Today (Nov. 20, 2022), <https://www.usatoday.com/story/opinion/policing/2022/11/20/police-killings-no-decline-despite-reforms-george-floyd/10648861002/>.

<sup>212</sup> MAPPING POLICE VIOLENCE, *supra* note 209.

<sup>213</sup> MAPPING POLICE VIOLENCE, *supra* note 209.

<sup>214</sup> Chris Barrish, *Del. police have shot 56 people since 2005, but law 'immunizes' them from prosecution*, WHY PBS (June 30, 2020), <https://why.org/articles/del-police-have-shot-56-people-since-2005-but-law-immunizes-them-from-prosecution/>.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Del.Code Ann. tit. 11, § 607A (West).

<sup>219</sup> Del.Code Ann. tit. 11, § 467 (West).

<sup>220</sup> See *Tennessee v. Garner*, 471 U.S. 1 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

reasonable officer that his conduct was unlawful in the situation he confronted.”<sup>221</sup> By contrast, courts in other countries have viewed state killing as violations of dignity, as well as life, in cases on the death penalty<sup>222</sup> and on the taking of life in the name of national security.<sup>223</sup>

The lack of accountability for police officers in the U.S. reinforces the violations of human dignity in the taking of life. Obviously, lethal police violence violates the right to life, as lives are taken and without any process whatsoever. But it should also be seen as violations of dignity, as the Fourth Circuit recognized in a case that was decided in the wake of the George Floyd killing:

“In 2013, Wayne Jones, a black man experiencing homelessness, was stopped by law enforcement in Martinsburg, West Virginia for walking alongside, rather than on, the sidewalk. By the end of this encounter, Jones would be dead. Armed only with a knife tucked into his sleeve, he was tased four times, hit in the brachial plexus, kicked, and placed in a chokehold. In his final moments, he lay on the ground between a stone wall and a wall of five police officers, who collectively fired 22 bullets.

“[W]e are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop.”<sup>224</sup>

These killings entail humiliation and violations of bodily integrity, but they also impinge on other dignity values, including privacy, free will, belonging, connection to and identity through other people, and protection from vulnerability. (It is precisely for these reasons that advocates for assisted suicide call their movement “death with dignity” – in order to protect a person’s agency, autonomy, control over their body, privacy, and so on – at the hyper-sensitive time of the end of life.) Moreover, most people who are shot by police don’t know why they are being shot or killed, adding another layer of indignity: it is not only the individualized treatment or assessment

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*We expect police officers to act with respect for the dignity and worth of black lives.*

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that is lacking, but the fact that victims of police shootings are unable to exert their agency or control their own actions to avoid lethal or near-lethal violations of their dignity. Information sufficient to enable a person to make an informed

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<sup>221</sup> *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); see also *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (reasoning that qualified immunity is intended to provide government officials the capacity “reasonably [to] anticipate when their conduct may give rise to liability for damages.”).

<sup>222</sup> See *State v. Makwanyane & Another* 1995 (3) SA 391 (CC) (S. Afr.) (Chaskalson, P.), <http://www.saflii.org/za/cases/ZACC/1995/3.html>.

<sup>223</sup> See *BVerfG*, 1 BvR 357/05, Feb. 15, 2006, (Air Transportation Security Act case) (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215\\_1bvr035705en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html).

<sup>224</sup> *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020).

choice is essential to the respect for human dignity.<sup>225</sup> Death on the streets at the hands of police office is certainly death without dignity – as the world-renowned video of the death of George Floyd attests.

## B. Non-lethal Physical Force by Police

“A person, even if lawfully detained, has a constitutional right to be free from the use of excessive force.”<sup>226</sup> However, under U.S. law, “a police officer is entitled to use such force as is reasonable in light of the circumstances and dangers facing him at the time of the encounter with a citizen”<sup>227</sup> and when and to the extent it is reasonably necessary to effect a seizure.<sup>228</sup> A better line would be to prohibit the use of any force that is not strictly necessary, since any force beyond that is not proportionate to the need and therefore violative of dignity.

The Grand Chamber of the European Court of Human Rights – controlling all 47 member states of the Council of Europe – has held that initial contacts with police and custodial interrogations must be governed by the principle of universal equal dignity. In *Bouyid v. Belgium*,<sup>229</sup> two young

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*Initial contacts with police and custodial interrogations must be governed by the principle of universal equal dignity.*

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men were questioned in a police station where they were each slapped on the face, once, in response to the officers’ perception of their insolence. The Court was extremely sensitive to the inherent imbalance of power between police and youth, their vulnerability and sense of intimidation, and the fact that they had done nothing to justify the violence. Moreover, the court noted that a slap on the face was especially humiliating because the face is the part of our body where we most express our personality – and, hence, our dignity. The Court found that:

“A slap has a considerable impact on the person receiving it. A slap to the face affects the part of the person’s body which expresses his individuality, manifests his social identity and constitutes the centre of his senses— sight, speech and hearing—which are used for communication with others.”<sup>230</sup>

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<sup>225</sup> EXP. N.o 02005-2009-PA/TC, para. 5 (Peru).

<sup>226</sup> See *Hamilton v. City of New Haven*, 213 F. Supp. 2d 125, 130 (D. Conn. 2002); see also *Graham v. Connor*, 490 U.S. 386, 397 (1989) (explaining that “the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”).

<sup>227</sup> *Hamilton*, 213 F. Supp. 2d at 130 (citing *Graham*, 490 U.S. at 394).

<sup>228</sup> *Id.* (A seizure of a person, within the meaning of the Fourth Amendment, occurs when the police’s conduct would communicate to a reasonable person, taking into account the circumstances surrounding the encounter, that the person is not free to ignore the police presence and leave at his will).

<sup>229</sup> *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40; See ERIN DALY & JAMES R. MAY, DIGNITY LAW: GLOBAL RECOGNITION, CASES AND PERSPECTIVES 368 (2021) [hereinafter DIGNITY CASEBOOK]; See *Bouyid* considered two separate incidents. The first incident occurred in December 2003 when an officer grabbed one of the boy petitioners, by the jacket and tore it when he was trying to get the attention of his parents to enter their home. The second incident occurred in February 2004, where both boy petitioners were slapped across the face by police after being taken into custody and interrogated.

<sup>230</sup> *Bouyid*, *supra* note 40.

Thus, the court ruled that “where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person’s conduct diminishes human dignity.”<sup>231</sup> The Court then held that such conduct infringes on petitioners’ rights under Article 3 of the European Convention on Human Rights, prohibiting torture and other degrading treatment or punishment.<sup>232</sup> A slap, especially a slap to the face, constitutes illegal degrading treatment because it is a humiliation in the eyes of the victims and therefore not within the bounds of police officers’ duty.<sup>233</sup>

The Court rested its commitment to dignity on the fact that, while the European Convention of Human Rights does not expressly include a right to dignity, it does incorporate dignity in its “very essence” given dignity’s universal and inherent aspect.

The rule in the United States is not as clear<sup>234</sup> although a dignity approach could be incorporated into the law, given the same power imbalances, structural intimidation, and inherent dignity of all people. This is in fact the basis on which *Miranda v. Arizona* was decided, as will be seen below.

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*Any recourse to physical force which has not been made strictly necessary by the person’s conduct diminishes human dignity.*

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To allow the use of force under other circumstances – that is, to effectuate a seizure or when unnecessary – violates two fundamental principles of dignity law.

- Dignity demands that each person be treated as an end in and of themselves, and not as a means to accomplish some other purpose. This rule, derived from the work of the German philosopher Immanuel Kant, has been adopted in Germany and throughout Europe as well as in Latin America and elsewhere as a central tenet of dignity rights. As applied here, the principle is that harming a person in order to effectuate a seizure or to accomplish some other policy goal is a violation of that person’s dignity in essence because it denies their humanity: it treats them as less than a person, ignores their individual needs and circumstances, prevents them from exercising their own agency, and in so doing, diminishes them in their own eyes and in the eyes of others.
- Relatedly, to harm a person where their own conduct has not made the use of force strictly necessary is to act disproportionately, and to their detriment; again, the person experiences not only physical pain and abuse but also harm to their

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<sup>231</sup> *Id.*

<sup>232</sup> European Convention on Human Rights, art. 3, 4 Nov. 1950, 213 U.N.T.S. 222, [hereinafter ECHR], [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

<sup>233</sup> *Bouyid*, *supra* note 40, at ¶105.

<sup>234</sup> *Lucier v. City of Ecorse*, 601 F. App’x 372, 379-80 (6th Cir. 2015) (holding that the genuine issue of material fact existed as to whether a police officer’s alleged slap of an arrestee was act of gratuitous force); cf. *Britschge v. Harmison*, 947 F.Supp. 435 (D. Kan. 1996); *Ye v. Gonzales*, 131 F.App’x 804 (3d Cir. 2005); *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010) (holding that a single slap, push, or shove that causes no discernible injury almost certainly fails to state a valid excessive force claim).

inherent dignity and worth in a way that is beyond what is needed for the circumstances.

Such force is therefore unjustifiable.

#### IV. POLICE ENCOUNTERS WITH PEOPLE WITH MENTAL HEALTH CHALLENGES

A person with a mental illness is especially vulnerable to homelessness, hunger, physical and sexual abuse, among other things.<sup>235</sup> Yet, the deinstitutionalization of America's mental hospitals produced the unintended consequence of tragic encounters between police officers and the mentally ill. Most emergency (911) calls for help involving a person with a mental illness are from caretakers and family members because the individual is in crisis, not necessarily relating to the commission of a crime.<sup>236</sup> Families and caretakers want their loved ones to receive compassion and care when they are experiencing a mental health crisis, but relatives fear a deadly outcome if they contact the police for help. In fact, a study conducted by the Washington Post found that nearly 1 in 4 victims of police shootings were in a mental health crisis.<sup>237</sup>

Unless properly trained, police officers – equipped with guns and tasers, and with fear for their own safety – are not equipped to deal with the psychological needs of a person in crisis.<sup>238</sup> A police officer is more likely to be trained in CPR than in de-escalation techniques to be used when confronted with a potentially violent situation involving a person experiencing a mental health crisis.<sup>239</sup> There is no nationwide approach to training police personnel and, as a result, people with mental illness make up a disproportionate number of those killed by police officers.

The Americans with Disabilities Act protects individuals with disabilities, including mental illness, from discrimination in public and private settings and its non-discrimination and reasonable accommodation provisions can be applied to police encounters with individuals suffering from a mental illness.<sup>240</sup> Law enforcement officers are required to make reasonable accommodations in their policies, practices, and procedures for individuals with mental illness.<sup>241</sup> A majority of the circuit courts have held that Title II of the ADA which states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination

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<sup>235</sup> Gary Howell, *The Dark Frontier: The Violent And Often Tragic Point Of Contact Between Law Enforcement And The Mentally Ill*, 17 THE SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. No. 2, 343, 358 (2015).

<sup>236</sup> Andrew Hanna, *Municipal Liability And Police Training For Mental Illness: Causes Of Action And Feasible Solutions*, 14 IND. HEALTH L. REV. 221, 237 (2017).

<sup>237</sup> Kimberly Kindy, Julie Tate, Jennifer Jenkins & Ted Mellnik, *Fatal police shootings of mentally ill people are 39 percent more likely to take place in small and midsized areas*, THE WASH. POST, (Oct. 17, 2020), [https://www.washingtonpost.com/national/police-mentally-ill-deaths/2020/10/17/8dd5bcf6-0245-11eb-b7ed-141dd88560ea\\_story.html](https://www.washingtonpost.com/national/police-mentally-ill-deaths/2020/10/17/8dd5bcf6-0245-11eb-b7ed-141dd88560ea_story.html).

<sup>238</sup> Howell, *supra* note 235, at 359.

<sup>239</sup> *Id.* at 360.

<sup>240</sup> American With Disabilities Act of 1990, 42 U.S.C. §§12101-12213 (2018).

<sup>241</sup> Hanna, *supra* note 236, at 240.



by any such entity”<sup>242</sup> requires reasonable accommodations during arrest.<sup>243</sup> The very purpose of the ADA and of its application in this context is to affirm the dignity of the individual involved (and their family) by protecting their bodily integrity, respecting their inherent worth as a fellow human being, and keeping them safe and free from violence and harm. In *Haberle v. Troxvell*, the Third Circuit found that “police officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee’s disability, thus subjecting him to discrimination.”<sup>244</sup>

Currently, de-escalation practices and police training for encounters with individuals with mental illness vary dramatically by state.<sup>245</sup> In much of the country, police officers are trained to demand compliance and use a confrontational approach when attempting to remedy a situation involving a person acting erratically.<sup>246</sup> A confrontational approach will not be successful with a person having a mental health crisis.<sup>247</sup> Police should be trained in verbal de-escalation techniques, scenario-based training, interaction practice, and on-site visitation to mental health facilities.<sup>248</sup> A person with a mental illness may be belligerent and unable to follow directions, but if an officer recognizes those as symptoms of the illness, rather than noncompliance, the situation can often be handled peacefully.<sup>249</sup>

Police can implement simple dignity-affirming solutions including providing the individual with personal space, speaking calmly, and encouraging the individual to express their feelings and needs in the moment. Reasonable accommodations allow the person to feel safe, in control of their own decisions, and to feel recognized as an equal and valued member of the community. Many law enforcement officers are already practicing dignity affirming techniques within their community, sometimes earning the moniker “street corner psychiatrists.”<sup>250</sup> These officers simply listen to the people in their community, validate their concerns, and make people feel valued and included – the essential markers of human dignity. Most police forces recognize the need to train officers in de-escalation techniques but lack the appropriate funding.<sup>251</sup>

Crisis Response Teams or Crisis Intervention Teams can be valuable in responding in dignity-affirming ways to people in crisis by offering support to enable them to make decisions for themselves. The Memphis Police Department’s Crisis Intervention Team provides one example.<sup>252</sup> The Team encompasses the assistance of mental health professionals, community partners,

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<sup>242</sup> 42 U.S.C.A § 12132 (West 2001).

<sup>243</sup> Hanna, *supra* note 236, at 243 ; *see also* Ryan Lefkowitz, What Are You En(Title)D Two? Protecting Individuals With Disabilities During Interactions With Law Enforcement Under Title II of the ADA, 49 U. MEMPHIS L. REV. 707, 712 (2019).

<sup>244</sup> *Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018).

<sup>245</sup> Hanna, *supra* note 236, at 235.

<sup>246</sup> *Id.* at 237.

<sup>247</sup> *Id.* at 237.

<sup>248</sup> *Id.* at 258.

<sup>249</sup> *Id.* at 238.

<sup>250</sup> *Id.* at 237.

<sup>251</sup> Hanna, *supra* note 236, at 235.

<sup>252</sup> Michael S. Rogers et al., *Effectiveness of Police Crisis Intervention Training Programs* 2, 47(4) J. AM. ACAD. PSYCHIATRY LAW ONLINE (2019).

emergency rooms, and family members of the people in crisis.<sup>253</sup> The Memphis model is a dignity-affirming solution to the problem of fatal or otherwise violent police encounters. People with mental illness and their families are met with kindness, understanding, and patience as opposed to deadly force.<sup>254</sup> The Memphis Police Department trains its officers to use a more humane and calm approach.<sup>255</sup>

This aligns with practices recommended at the international level. The United Nations' Human Rights Standards and Practice for the Police (HRSP)<sup>256</sup> makes the following recommendations:

1. Review regularly, for a clear understanding, your powers of arrest and the procedures to adopt upon and following arrest
2. Participate in training to develop and maintain the necessary interpersonal skills, and especially skills of communication, to enable you to effect arrests expertly, discreetly and with due respect for human dignity
3. Where resistance is not evident, attempt calm, polite, disarming language when effecting an arrest, resorting to strong, authoritative tones only when necessary
4. Develop and maintain the necessary technical and tactical skills to enable you to carry out arrests expertly, discreetly and with due respect for human dignity
5. Carry a small card in your uniform, setting out the rights of an arrestee, and read those rights, verbatim, to the arrestee once he or she has been secured
6. Study conflict-resolution techniques, through in-service training or community education programmes...

These should be followed because they are dignity-respecting and -affirming practices.

The movement to address mental health for victims of police brutality has demanded police training reform in addition to a revised allocation of state and federal resources for police officers and toward those, such as social workers, with training to deal with acute or chronic mental illness. Focusing on the specific needs of the suspect at the moment of the encounter with law enforcement respects the dignity of each person by treating them as a human being with individualized and unique needs and resources. This approach is advisable to protect the dignity not only of suspects with mental health challenges but of everyone involved.

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<sup>253</sup> *Id.* at 3.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> U.N. High Comm'n for Hum. Rts. Center for Hum. Rts., *Human Rights Standards and Practice for the Police* (2004), <https://www.ohchr.org/sites/default/files/Documents/Publications/training5Add3en.pdf>.

## V. DIGNITY IMPLICATIONS OF CUSTODIAL INTERROGATIONS

### A. The Power Imbalances in General

After an initial encounter with police, a suspect may be taken in for custodial interrogation. Custodial interrogations, which are a pivotal mechanism to the criminal justice system, are fraught with tactics and prejudice that demean the dignity of all those involved. The remainder of this chapter highlights the elements of custodial interrogations that fail to respect human dignity with the aim of educating citizens on their legal rights, demonstrating the negative impacts of interrogations practices and making dignity-affirming recommendations.

Law enforcement agencies customarily employ tactics to elicit a confession, admission or statement that “involve some deception”<sup>257</sup> or coercion. Training manuals on criminal investigation, including one on interrogation practices circulated by the Federal Bureau of Investigation, outline techniques and practices to be used in interrogations, some of which involve the use of untrue statements, trickery, or coercion.<sup>258</sup> Each of these has dignity-diminishing implications because they impair a person’s ability to make reality-based decisions for themselves. Coercion is “generally thought of as depriving the actor of free will or, to put it more helpfully, putting the actor to an unfair choice of undesirable alternatives.”<sup>259</sup> Deception “alters the actor’s perception of [their] choices so that, while [they] perceives [themselves] to be making a rational choice of the more attractive alternative, a rational actor would have decided differently if [they] were aware of the true facts.”<sup>260</sup> Thus, police officers can mislead persons being interrogated by fabricating that they found their fingerprints (when they, in fact, did not),<sup>261</sup> and can mischaracterize DNA evidence.<sup>262</sup> They can create coercive conditions such as threatening to imprison a suspect’s wife,<sup>263</sup> interrogating a suspect while naked,<sup>264</sup> interrogating a suspect for sixteen days<sup>265</sup> and using tactics that instill fear, stress and hopelessness.<sup>266</sup> Although there are some limits, police officers routinely use their “already superior power to gain an even greater advantage over the suspect at the expense of the dignity of the suspect.”<sup>267</sup>

Although these are permitted by the Supreme Court,<sup>268</sup> they are inconsistent with notions of human dignity. Through different means, these tactics are dignity-repressive because they deny

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<sup>257</sup> Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1168 (2001).

<sup>258</sup> FEDERAL BUREAU OF INVESTIGATION, HIGH-VALUE DETAINEE INTERROGATION GROUP, INTERROGATION BEST PRACTICES (Aug. 26, 2016), <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view>.

<sup>259</sup> Michael J. Zydney Mannheimer, *Fraudulently Induced Confessions*, 96 NOTRE DAME L. REV. 799, 799 (2020).

<sup>260</sup> *Id.*

<sup>261</sup> *Oregon v. Mathiason*, 429 U.S. 492 (1977).

<sup>262</sup> *State v. Nightingale*, 58 A.3d 1057 (Me. 2012).

<sup>263</sup> *Rogers v. Richmond*, 365 U.S. 534, 535 (1961).

<sup>264</sup> *Malinski v. New York*, 324 U.S. 401 (1945).

<sup>265</sup> *Davis v. North Carolina*, 384 U.S. 737 (1966).

<sup>266</sup> *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

<sup>267</sup> Amelia C. Hritz, *Voluntariness with a Vengeance: The Coerciveness of Police Lies in Interrogations*, 102 CORNELL L. REV. 487, 501 (2017).

<sup>268</sup> Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1208 (2001) (“The Court has suggested that a ‘shock the conscience’ standard may be useful for determining when police deception during interrogation goes too far. The Court applied the shock the conscience standard when it considered police deception not towards a suspect, but towards the attorney for the suspect who was interrogated.”)

free will: they impede a person’s ability to use their “reason and conscience” to make decisions of consequence to their own lives. Deception or trickery undermines the very basis of a decision and therefore denies a person’s capacity to act as a true agent for themselves.<sup>269</sup> Coercion involving humiliation, threats, or mere exhaustion, impairs a person’s ability to make a choice based on rational criteria. Exacerbating the imbalance of power between suspect and government by using some deceptive and coercive tactics also demonstrates that the officers are valuing the extraction of a confession over the protection of human dignity, thereby objectifying the suspect who is literally being used as a means to advance police goals.

In the 1960s, the Supreme Court developed dignity-based protections for those in custodial interrogation in *Escobedo v. Illinois*<sup>270</sup> and *Miranda v. Arizona*.<sup>271</sup> In the former, the Supreme Court held that when “an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody...”<sup>272</sup> Despite not mentioning the term of art “custodial interrogation,” this case was pivotal to lay the groundwork for the landmark case *Miranda v. Arizona*. In both cases, suspects confessed after hours of questioning in a police station without any notice of their rights or an attorney present, and in both cases, the Supreme Court held that the confessions could be suppressed. In *Miranda*, Chief Justice Warren wrote that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>273</sup> Simplified, courts may not admit confessions from a suspect when there is not a specific disclosure of such suspect’s constitutional rights and a knowing waiver of those rights.<sup>274</sup>

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*The absolute value of human dignity means that all government functions must be carried out in accordance with the human dignity of every person.*

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The two pillars of this decision were explicitly built on the concept of human dignity and a person’s free will.<sup>275</sup> The *Miranda* Court explained:

“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.”<sup>276</sup>

The Court here recognized that the imminent threat of physical violence, terrorization, and intimidation in police interrogations inherently threaten human dignity. Though law enforcement

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<sup>269</sup> Hritz, *supra* note 267, at 500 (The action of “deceiving suspects in order to obtain confessions diminishes the dignity of the suspect and other tactics can be more forceful.”).

<sup>270</sup> *Escobedo v. Illinois*, 378 U.S. 478, 479 (1964).

<sup>271</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>272</sup> *Escobedo*, 378 U.S. at 490-91.

<sup>273</sup> *Miranda*, 384 U.S. at 444.

<sup>274</sup> *Id.* at 470.

<sup>275</sup> Christopher Manfredi, *Human Dignity and the Psychology of Interrogation in Miranda v. Arizona*, 1 CAN. J.L. & Soc. 109, 109 (1986).

<sup>276</sup> *Miranda*, 384 U.S. at 457.

has a job to do, the absolute value of human dignity means that all government functions must be carried out in accordance with the human dignity of every person. Dignity is inviolable. This is a non-derogable duty.

Though this case mentions dignity and free will, seemingly laying the groundwork for their advancement in American jurisprudence, Chief Justice Warren “advanced neither” with his reasoning.<sup>277</sup> Without a solid theoretical explanation (as the European Court of Human Rights did in *Bouyid*), the values protected in *Miranda* are vulnerable to misuse and erosion and the Supreme Court has failed to provide the scaffolding to secure the dignity-protecting impulses of *Miranda*. Indeed, subsequent cases have dramatically restricted and ultimately undermined the dignity-affirming promise of *Miranda*.

In some cases, the court restricted the situations described in the phrase “deprived [a person of] freedom in any significant way” to ignore the experience of the person being interrogated. While the basis of *Miranda* is that interrogations are inherently threatening because of the imbalance of power and what is at stake for the suspect, later U.S. courts have insisted on a case-by-case analysis of the circumstances surrounding the interrogation.<sup>278</sup> As described in *Howes v. Fields*, some of the relevant factors include the location of the questioning, duration, statements made during the “interview,” the presence or absence of physical restraints, and the ultimate release of the person at the end of the questioning. These factors exclude the person’s subjective experience of fear, powerlessness, isolation, and the heightened feeling of vulnerability.

Nor do courts necessarily consider objective factors relating to the person being questioned, such as mental and physical health, age, intelligence, education, history of addictive behaviors, prior experience with the criminal legal system, and the presence of family members.<sup>279</sup> This open-ended list of factors – that exclude the suspect’s subjective experience of fear and vulnerability – gives courts great discretion in evaluating what does and what does not constitute a custodial interrogation sufficient to trigger constitutional protections. For instance, although traffic stops significantly affect the freedom of action of the driver or passengers, they do not constitute custodial interrogations to which *Miranda* warnings apply because they are “presumptively temporary and brief,” rarely involve more than two officers, and are conducted in a public manner.<sup>280</sup> While, as a matter of law such stops are not “custodial interrogations,” they can produce the same fear and vulnerability as other forms of interrogation, and can easily escalate to arrest, physical force and even death.

Nonetheless, the court distinguishes between custodial and non-custodial interrogations, considering only in the former situations the isolation, the physical confines, and the threats or use of force and the potential for psychological manipulation, over a prolonged period of time. These circumstances exacerbate the suspect’s vulnerability which, in turn, imposes on the government the obligation to take corrective action to protect the suspect’s sense of dignity. *Miranda* warnings are one way to respect the dignity of the suspect by allowing them to connect

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<sup>277</sup> Manfredi, *supra* note 275, at 121.

<sup>278</sup> *Howes v. Fields*, 565 U.S. 499, 509 (2012).

<sup>279</sup> *Id.* at 509 ; *see also* *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986); *United States v. Rohrbach*, 813 F.2d 142 (8th Cir. 1987).

<sup>280</sup> *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

with a legal representative, ensuring that the suspect need not compromise themselves by divulging information, and allowing them agency over their situation by providing information about the consequences of actions they may take. The concern for dignity and the obligation of police officers to protect the dignity of all should extend to all encounters between police and members of the public.

Courts in some other countries have been more protective of the dignity of people in vulnerable situations. To help it draw a line between permissible and impermissible treatments of a person held in custody, the High Court of Delhi (India) has accepted a rule of “custodial dignity, i.e. ensuring the dignity of an individual while in custody.” In a 2023 case, the court recognized that different standards may apply to individuals with different kinds of vulnerabilities; for instance, where the person in custody is a woman, “This Court holds that the concept of custodial dignity of a female will include her right to live with dignity even while in police custody.” The Court in that case held that a virginity test “not only amounts to interference of the investigating agency with the bodily integrity but also psychological integrity of a woman which will have serious and profound effects on the mental health of a woman.”<sup>281</sup> It rejected the police’s argument that a particular type of treatment of the woman was necessary because relevant to the case “since this argument itself flouts basic principles that a person’s dignity even in custody has to be upheld.”

This principle would be useful in the American courts to ensure that a person’s dignity is protected any time they are held in custody.

## B. Self-Incrimination

Some courts have held that the right against self-incrimination is a core dignity right. The Supreme Court of Hong Kong put it this way: “The consequences of a forced answer could be literally life-threatening. The privilege [against self-incrimination] protects personal freedom and

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*The privilege against self-incrimination protects personal freedom and human dignity.*

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human dignity. . . . It protects ‘the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth.’<sup>282</sup> By contrast, the U.S. Supreme Court has held that a person who voluntarily goes

to a police station is not entitled to Miranda warnings because they are not in custody and are not forced into the same position of vulnerability.<sup>283</sup>

The United States also recognizes an exception to Miranda called the Public Safety Exception,<sup>284</sup> allowing the waiver of Miranda rights if an officer reasonably believe that their own safety or the safety of another requires custodial interrogation before a warning can be given.<sup>285</sup>

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<sup>281</sup> Sr. Sephy v. CBI & Ors., (2023) SCC OnLine Del. 717 (India), <https://indiankanoon.org/doc/52519361/>.

<sup>282</sup> Salt & Light Development Inc. & Ors. v. SJTU Sunway Software Industry Ltd. [2006] 2 H.K.L.R.D. 279, 72 (C.A.), <http://legalref.judiciary.gov.hk>. See also, e.g., R. v. Amway Corp. [1989] 1 SCR 21 (Can.).

<sup>283</sup> Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

<sup>284</sup> New York v. Quarles, 467 U.S. 649, 655 (1984).

<sup>285</sup> United States v. Khan, 937 F.3d 1042 (7th Cir. 2019).

This departs from the notion in Europe and elsewhere that dignity is absolute and cannot be waived or compromised for reasons of public policy, including public safety.<sup>286</sup>

In general, the U.S. caselaw provides no safeguards that directly protect a person’s dignity, although Miranda warnings exemplify at least one instance of the Supreme Court’s sensitivity to the kinds of vulnerabilities that require government attention in order to protect human dignity. The most recent and perhaps most impactful undermining of Miranda came in 2022 in *Vega v. Tekoh*. There, the court held that Miranda is only a “prophylactic” rule and, while “constitutionally based,” its violation does not give rise to a constitutional right to sue or remedy under 42 U.S.C. §1983.<sup>287</sup> Miranda is still enforceable in the underlying criminal case where an un-Mirandized statement would be suppressed. But a stronger, fuller explanation of the dignity-rationale for Miranda warnings would protect against its erosion: in its simplest terms, the dignity rationale is that if every person has inherent and equal dignity, the dignity of suspects can not be diminished by the state and the inherent power imbalances must be rectified so that everyone involved is respected as having equal worth.

### C. Clearly Expressing the Right to an Attorney and Avoiding “Waiver”

Under the Sixth Amendment, an accused individual shall have the assistance of counsel to aid in his or her own defense. In addition, once a suspect invokes their right to counsel, the interrogation must cease and the police may not question the individual without counsel present.<sup>288</sup> As the court in *Miranda* explained: “Without the protections flowing from adequate warning and the rights of counsel, ‘all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.’”<sup>289</sup> Therefore, the suspect cannot be questioned by police officers and, possibly, incriminate themselves with their own statements. The *Miranda* Court recognized that coercion can be physical, emotional, or psychological:<sup>290</sup> “even the most ‘enlightened and effective’ interrogation techniques relied on psychological manipulation, intimidation, and trickery for the efficacy, thus threatening to overbear a suspect’s will and violate the dignity and liberty interests”<sup>291</sup> Yet, later cases that reduce *Miranda*’s reach and impact suggest the court’s interest in protecting only against indignities that violate a person’s bodily integrity.

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*A stronger explanation of the dignity-rationale for Miranda warnings would protect against its erosion*

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<sup>286</sup> *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40; *see also* *Air Transport Security Case* (holding that shooting down a hijacked passenger plane to prevent more deaths violates the dignity of those on board).

<sup>287</sup> *Vega v. Tekoh*, 142 S. Ct. 2095, slip op. at 5 (2022).

<sup>288</sup> *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

<sup>289</sup> *Id.* at 466.

<sup>290</sup> *Id.* at 448.

<sup>291</sup> Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 630 (1995-1996).

Nonetheless, the ultimate source of these rights lies in the premise of human dignity and in the equal integrity and agency of every person; the purpose of protecting these rights is to protect that which is most essential to the human personality and to the control that each person must have over their own lives. Counsel is often necessary to protect the dignity of people in vulnerable situations, not only from the psychological and emotional pressures of custodial interrogation but from the possibility that they will make statements that are not aligned with their own “reason and conscience” – the basis of dignity in the Universal Declaration of Human Rights.

And yet, contrary to the need to protect dignity, courts have tilted the balance away from the protective shield of the rights, and towards their waiver. They have built a presumption against the assertion of the right, requiring invocations to be unambiguous and unequivocal.<sup>292</sup> Consequently, statements similar to “Maybe I should talk to a lawyer,”<sup>293</sup> or “I think I would like to talk to a lawyer”<sup>294</sup> are not sufficient to invoke the right to counsel. Even questions such as: “Do you think I need an attorney here?”<sup>295</sup> or “Am I going to be able to get an attorney?”<sup>296</sup> are similarly insufficient statements to invoke the dignity-based protection of Miranda. (Similarly, and with similar disregard for dignity, waiver of 4<sup>th</sup> amendment rights can happen just as casually, as when a suspect allows a police officer to “take a look around.”)

On the other hand, the presumption in favor of waiving rights is strong and can be manifested by implication and inaction. After a suspect is read their Miranda rights and the individual invokes their right to counsel, they are deemed to have waived their constitutional and dignity-based right if they continue to speak or complete an act that could imply waiver.<sup>297</sup> According to the Supreme Court in *North Carolina v. Butler*, “an express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not. . . necessary or sufficient to establish waiver. . . . [A]t least in some cases waiver can be clearly inferred from the actions and words of the person interrogated.”<sup>298</sup> Where a defendant does not invoke their right to remain silent after fully understanding their Miranda rights, they implicitly waive their Miranda rights by making a voluntary statement to police.<sup>299</sup> Therefore, simply speaking after inquiring about an attorney may constitute a waiver but actual words are not necessary. Moreover, in *Fare v. Michael C.*, the Supreme Court held that a juvenile’s waiver of his Fifth Amendment rights and consent to continued interrogation were voluntary, along with the statements and sketches obtained from him, so that they could be admitted in the Juvenile Court proceeding.<sup>300</sup>

This body of law demonstrates a retreat from the commitment to dignity embodied in the Miranda decision’s approach; it works against the protection of the suspect’s dignity and limits

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<sup>292</sup> *Davis v. United States*, 512 U.S. 452, 462 (1994).

<sup>293</sup> *Id.*

<sup>294</sup> *Clark v. Murphy*, 331 F.3d 1062, 1070 (9th Cir. 2002).

<sup>295</sup> *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000).

<sup>296</sup> *United States v. Shabaz*, 579 F.3d 815, 819 (7th Cir. 2009).

<sup>297</sup> *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>298</sup> *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

<sup>299</sup> *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010).

<sup>300</sup> *Fare v. Michale C.*, 442 U.S. 707, 728 (1979).



their autonomy, while subjecting them to exploitation and manipulation, treating them not like a person but like an object whose humanity is debased and then ignored.

Moreover, there is significant evidence that there are economic and racial disparities in the respect for Sixth Amendment rights, further engraining the violations to individual dignity. Studies demonstrate that about 80% of all suspects agree to talk to law enforcement without a lawyer<sup>301</sup> but that those who are educated and wealthy are less likely to talk. By contrast, those who are most likely to waive their rights are “The poor. The undereducated. The young. The members of racial and ethnic minority groups who fear the way the police interact with their community.”<sup>302</sup>

Demonstrating to courts that Sixth Amendment rights are rooted in fundamental principles of human dignity is necessary to ensure that courts are sensitive to the extreme vulnerabilities of people – particularly those who are less educated, have fewer resources, and belong to groups that are more likely to have had adverse interactions with police in the past. It is then necessary to show courts what protective measures – including presumptions in favor of assertion of rights and against waiver – are necessary to protect the dignity of all persons.

#### D. Incarceration and Interrogation

After encounters with police officers and the American judicial system, a person’s life changes. In a typical year, “about 600,000 people enter prison gates, but people go to jail over 10 million times each year.”<sup>303</sup> This is because individuals are arrested and make bail, only remaining for hours or days, while others remain in jail until trial proceedings<sup>304</sup> (as will be discussed in the next chapter). But, “at least 1 in 4 people who go to jail will be arrested again within the same year – often those dealing with poverty, mental illness, and substance use disorders, whose problems only worsen with incarceration.”<sup>305</sup> The vast majority – 88% – of those individuals have not been arrested for serious violent offenses.<sup>306</sup> Yet, their dignity is impaired by single or repeated custodial detentions; thus, further assessments need to be made to ensure the dignity of those who are interrogated while they are detained.

Institutionalization strips an individual of their self-worth and of the “support that permits him to maintain [that] sense of self-worth and [their] physical and mental integrity.”<sup>307</sup> By virtue of having been disconnected from their outside lives and from their families and having the added stressors of incarceration (lack of information, lack of privacy, sleep and food deprivations, anxiety,

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<sup>301</sup> David Rossman, *Resurrecting Miranda’s Right to Counsel*, 97 B. U. L. REV. 1129, 1133 (2017).

<sup>302</sup> *Id.*

<sup>303</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems* (Aug. 2019), PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/reports/repeatarrests.html>.

<sup>307</sup> Steve Finizio, *Prison Cells, Leg Restraints, and “Custodial Interrogations”*: *Miranda’s Role in Crimes Occur in Prison*, 59 U. CHI. L. REV. 719, 732 (1992).

etc.), these individuals are even more vulnerable than those who remain connected to the outside. More measures should be taken to protect their dignity.

Unfortunately, the Supreme Court has moved in the opposite direction. In *Howes v. Fields*, the court held that there was no custodial interrogation (and thus no need for Miranda warnings) where an individual who was taken from the general population of the prison and questioned for five to seven hours until a confession was obtained.<sup>308</sup> Upon entering the room, two law enforcement officers began questioning Fields, telling him he was free to return to his cell at any time, but brandishing their guns.<sup>309</sup> The Court majority “reasoned that despite being in jail, Fields was not entitled to Miranda warnings because he was not in official ‘custody.’”<sup>310</sup> The Court held that when a prisoner is questioned, the determination of custody for these purposes should focus on all of the features of the interrogation, including the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted,<sup>311</sup> though the court did not pay attention to the additional factors that would contribute to the prisoner’s vulnerability, such as the brandishment of guns.

Dignity-based police reform enhances the dignity of all: the suspect, the public, the individual police officers, and the government as a whole.<sup>312</sup> It encourages police to use the least amount of force or intimidation necessary to accomplish the goal, not to use the maximum psychological or physical force.

## VI. MISDEMEANOR CHARGES

According to the Prison Policy Initiative, even minor misdemeanor charges carry significant threats to a person’s inherent dignity.

“The ‘massive misdemeanor system’ in the U.S. is another important but overlooked contributor to overcriminalization and mass incarceration. For behaviors as benign as jaywalking or sitting on a sidewalk, an estimated 13 million misdemeanor charges sweep droves of Americans into the criminal justice system each year (and that’s excluding civil violations and speeding). These low-level offenses typically account for about 25% of the daily jail population nationally, and much more in some states and counties.

“Misdemeanor charges may sound trivial, but they carry serious financial, personal, and social costs, especially for defendants but also for broader society, which finances the processing of these court cases and all of the unnecessary

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<sup>308</sup> *Howes v. Fields*, 565 U.S. 499, 504 (2012).

<sup>309</sup> *Id.* at 502-03, 519.

<sup>310</sup> Sherry F. Colb, *Why Interrogation in Jail May not Count as ‘Custodial’: The Supreme Court Makes New Law in Howes v. Fields Part One in a Town-Part Series of Columns*, VERDICT (JUSTIA) (Mar. 21, 2012), <https://verdict.justia.com/2012/03/21/why-interrogation-in-jail-may-not-count-as-custodial-the-supreme-court-makes-new-law-in-howes-v-fields>.

<sup>311</sup> *Howes*, 565 U.S. at 514.

<sup>312</sup> U.N. High Comm’n for Hum. Rts. Center for Hum. Rts., *Human Rights Standards and Practice for the Police*, at 2, *supra* note 256.

incarceration that comes with them. And then there are the moral costs: People charged with misdemeanors are often not appointed counsel and are pressured to plead guilty and accept a probation sentence to avoid jail time. This means that innocent people routinely plead guilty and are then burdened with the many collateral consequences that come with a criminal record, as well as the heightened risk of future incarceration for probation violations. A misdemeanor system that pressures innocent defendants to plead guilty seriously undermines American principles of justice.”<sup>313</sup>

Whatever the charge, an arrest harms a person’s dignity and reputation, regardless of more significant subsequent consequences: the mere fact of an arrest may affect a person’s present employment or their employment opportunities in the future, their housing, their family status and more – all of which stress a person’s sense of their own sense of self-worth and the esteem in which others might hold them.

## VII. ADVOCACY POINTS

1. The standard for the use of force against a suspect should track the European dignity-based standard that prohibits the use of force except when made strictly and actually necessary by the suspect’s own conduct.
2. The European dignity-based standard that forbids any use of force beyond what is made strictly necessary by the defendant’s own conduct should be enacted into state law and serve as a basis for police training.
3. Police must be trained to recognize and respect at all times the human dignity of every person they encounter.
4. Police must be trained to affirm the dignity of people with mental health challenges and minimize their risk of harm.
5. Police must be trained to affirm the dignity of young people.
6. There must be accountability for police officers who violate the constitutional and human rights of any person.
7. Custodial interrogations must be clearly defined by the impact on and sensibility of the suspect to ensure that their dignity is being respected.
8. Miranda warnings should be required as a matter of human dignity in custodial situations as well as for all questioning during stops. The strong presumption should be in favor of the application of Miranda protections and waiver should be unambiguous and unequivocal. Police, not the suspect, should bear the burden if Miranda rights are not provided in a timely and effective way.

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<sup>313</sup> Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2022*, *supra* note 303.



## CHAPTER 2: PRETRIAL DETENTION

Detaining a person without a conviction violates fundamental principles of due process because it rests on a presumption of guilt rather than innocence. Moreover, detaining a person prior to trial simply because they lack the resources to post bail violates principles of equal protection and non-discrimination. All of these are elemental aspects of human dignity. Once in detention, further violations of dignity ensue. People are often dehumanized and objectified, because they are cut off from their families, denied access to physical and mental health care, and sometimes to legal advisors. Exacerbating the dignity violations, pretrial detainees also face additional hurdles when trying to report treatment that falls below the legal and constitutional standard or the standard of human dignity. This chapter examines the various ways that pretrial detention violates human dignity; it concludes with recommendation for alternatives and points to stress for further advocacy.

*Key dignity terms: equality and equal worth, agency, anti-objectification, privacy, dignity of belonging, participation in civic life, freedom from humiliation, bodily integrity, protection from vulnerability, living with dignity, to be treated as a person.*

### I. INTRODUCTION: THE INCARCERATION OF PEOPLE WHO HAVE NOT BEEN CONVICTED OF A CRIME VIOLATES HUMAN DIGNITY

Pre-trial detention is not a flaw of the criminal legal system, but an integral feature of it. According to the Prison Policy Initiative, “the growth in the total jail population over the last 25 years is the direct result of increases in pretrial detention, not increases in the number of convicted people held in jails.”<sup>314</sup> That is, we are locking up more people without proving them guilty of crimes, not more people who are found to have committed crimes. Notwithstanding the presumption of innocence that defines a legal system under a just rule of law, approximately half a million individuals who have not been found to have committed any crime are serving time in the United States.<sup>315</sup> That’s about the entire population of Kansas City, Missouri. Pretrial detainees encompass approximately 60% of the incarcerated population<sup>316</sup> and more than 70% of the jail

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<sup>314</sup> Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

<sup>315</sup> The Prison Policy Institute puts the number at 465,000, [https://www.prisonpolicy.org/research/pretrial\\_detention/#:~:text=More%20than%20400%2C000%20people%20in,%22hold%22%20on%20their%20release](https://www.prisonpolicy.org/research/pretrial_detention/#:~:text=More%20than%20400%2C000%20people%20in,%22hold%22%20on%20their%20release). The Brennan Center for Justice puts the number at 536,000. <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

<sup>316</sup> Justice Pol’y Inst. , *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice?*, at 2 (Sept. 2012) [hereinafter *For Better or For Profit*], [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/\\_for\\_better\\_or\\_for\\_profit\\_.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf). However, due to the COVID-19 pandemic, many jurisdictions decreased the use of pretrial detention. See NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *COVID-19 Policy Response Survey* (June 19, 2020) at 5, <https://drive.google.com/file/d/1-jkFffQRmTTcqQ0VOEJWlmyyJI--gExB/view>.

population.<sup>317</sup> Three-quarters of those individuals have only been charged with low-level drug or property crimes or other non-violent crimes.<sup>318</sup> That is who we are locking up.

Most of these individuals are incarcerated because they cannot afford to post bail:<sup>319</sup> of those accused of felonies, almost 90% cannot afford to make bail,<sup>320</sup> making up 38% of the pretrial detainee population. The remaining 62% of people in pretrial detention are serving time based on accusations of misdemeanors.

Pretrial detention (PTD) should not exist except in the most extraordinary circumstances. Nonetheless, it has become normalized in the United States in violation of basic concepts of human dignity and even of the constitutional and legal principles to which the United States holds itself.

Pretrial detention cannot be justified by any overriding policy goal because it serves no criminal justice or penological purpose. As a routine matter, it has not been shown that individuals subject to PTD pose any danger to society, since most are detained due to poverty and on non-violent charges, so the goal of protecting society – as Justice White suggested in *Miranda*<sup>321</sup> – is not at issue. Nor does it advance deterrent interests since, again, the individuals involved have not been proven to have made choices that they (or others) might be deterred from making again. It cannot be justified by any rehabilitative inclination – as in the Quaker position from the 19<sup>th</sup> century, advocating for detention to encourage the opportunity for self-reflection and spiritual growth<sup>322</sup> -- because, again by definition, these individuals have not been found to have committed any crimes for which they need to be rehabilitated. These principal purposes of sentencing are examined in more detail in Chapter 3; they are raised here simply to make the point that they have no application where people have not been found guilty of any crime.

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*Approximately half a million individuals who have not been found to have committed any crime are serving time in the United States*

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PTD could be justified in instances where a person is shown to be a flight risk but other forms of control (such as electronic monitoring) could assure a person's compliance with their pre-

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<sup>317</sup> Brennan Center for Justice, *How Cash Bail Works*, (February 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>. See also Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AMERICAN ACTION FORUM (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>. The numbers are 471,000 human beings are in jail without having been convicted of a crime while 161,000 have been convicted.

<sup>318</sup> *Id.*

<sup>319</sup> Wendy Sawyer, *How does unaffordable money bail affect families?*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>.

<sup>320</sup> *Id.*

<sup>321</sup> "More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved," he wrote, concerned that if the *Miranda* rules resulted in the freedom of criminals on technicalities, the potential increased crime rates would "not be a gain, but a loss, in human dignity." *Miranda v. Arizona*, 384 U.S. 436, 542 (1966) (White, J., dissenting), discussed in DALY, DIGNITY RIGHTS, *supra* note 19, at 88-89.

<sup>322</sup> Pennsylvania Prison Society, Society of Friends (Website), <https://www.prisonersociety.org/> (last visited Jan. 4, 2022).

trial and trial legal obligations. Only in the very rare instance where electronic monitoring is shown to be impossible or ineffective may some form of PTD be justified.<sup>323</sup>

The only way to accept the legitimacy of systemic PTD is to discard the social and constitutional commitment to the presumption of innocence – the most fundamental element of the criminal legal system that reflects the dignity of every person – and to allow liberty to be withdrawn on the bases of a presumption of guilt and poverty. *United States v. Salerno*, in which the Supreme Court upheld pretrial detention under the Bail Reform Act, in the name of community safety, nonetheless threatens individual dignity by objectifying the defendant and balancing their dignity rights against the needs of the community.<sup>324</sup> Although the court may weigh the “Government’s regulatory interest in community safety” against “an individual’s liberty interest,” it may not so compromise individual dignity which is, as we’ve seen, inviolable and protects individuals against objectification.<sup>325</sup>

In the context of PTD, the implications of this presumption are particularly pernicious because it not only takes away a person’s liberty during the pretrial period, but also increases the likelihood that guilt will be found during trial.

The injustice and indignity of PTD are exacerbated in the United States because of its systemic targeting of people who are poor and people of color. One study of indigent criminal defendants in San Francisco described the following:

“Specifically, defendants of color are more likely to be held in custody during their cases, which tend to take longer than the cases of White defendants. Their felony charges are less likely to be reduced, and misdemeanor charges more likely to be increased during the plea bargaining process, meaning that they are convicted of more serious crimes than similarly situated White defendants. In addition, Black and Latinx defendants are more likely to plead guilty, and the nature of those pleas are different; Black defendants plead guilty to more charges than White or Latinx defendants, while Latinx defendants plead guilty to a smaller fraction of the charges they are booked for than Black or White defendants.”<sup>326</sup>

Moreover, many people who have mental and psychological health challenges are detained pre-trial. Not only does the fact of their detention violate their dignity, but the conditions of detention – usually without providing appropriate physical or mental health care – do too. As one report has explained:

“Policymakers and criminal justice and behavioral health professionals know that significant numbers of people with mental illnesses enter and move through local

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<sup>323</sup> See *United States v. Salerno*, 481 U.S. 739, 751 (1987) (“When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”); see, e.g., *Commonwealth v. Talley*, 265 A.3d 485, 528-29 (Pa. 2021).

<sup>324</sup> *Salerno*, 481 U.S. at 755.

<sup>325</sup> *Id.* at 748.

<sup>326</sup> EMILY OWENS, ERIN M. KERRISON & BERNARDO SANTOS DA SILVEIRA, EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO, Quattrone Center for the Fair Administration of Justice (May 2017), <https://www.law.upenn.edu/live/files/6793-examining-racial-disparities-may-2017-full>.

criminal justice systems every day: nation-wide, approximately two million adults with serious mental illnesses are admitted into jails each year... Nationally, about 17 percent of people entering jails pretrial met criteria for a serious mental illness. In addition, about three-quarters of people with serious mental illnesses in jail have a co-occurring substance abuse disorder. These individuals, by and large, are eligible to receive publicly funded health care.”<sup>327</sup>

Pretrial detention exacts punishment that denies human dignity. Some dignity violations are characteristic of incarceration in general (discussed in more detail in Chapters 5 and 6) while others are particularly pernicious for people who are awaiting trial.

## II. ABANDONING THE PRESUMPTION OF INNOCENCE VIOLATES HUMAN DIGNITY

The very fact of pretrial detention – holding someone against their will without proof that they are responsible for committing a crime – violates the presumption of innocence on which a just criminal legal system must be based. The presumption of innocence is perhaps the most fundamental pillar of human rights. It is recognized in the Universal Declaration of Human Rights<sup>328</sup> and in the International Covenant of Civil and Political Rights<sup>329</sup> (to which the United States is a Party). It has been integral to the American criminal justice system since at least the 19<sup>th</sup> century.<sup>330</sup> In *Coffin v. United States*, the U.S. Supreme Court held that judges have the duty to ensure that the jury understands the presumption of innocence by giving jury charges, even if not requested by defense counsel, holding that “the principle that there is a presumption of innocence in favor of the accused is undoubted law, axiomatic, and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>331</sup> The United States Supreme Court has referred to this so often that it no longer requires citation. In *Portuondo v. Agard*, for instance, Justice Stevens noted that the “Sixth Amendment right ‘to be confronted with the witnesses against him’ ... reflects respect for the defendant’s individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned.”<sup>332</sup>

Throughout the world, courts have recognized the importance of adhering to the presumption of innocence to protect human dignity; both are foundational to a just rule of law.<sup>333</sup> The following examples illustrate the dignity implications of the presumption of innocence generally, not only in the context of pretrial detention.

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<sup>327</sup> *Improving Responses to People with mental Illnesses at the Pretrial State: Essential Elements* (Sept. 2015), [https://csgjusticecenter.org/wp-content/uploads/2020/02/Essential\\_Elements\\_Pretrial\\_Two-Page.pdf](https://csgjusticecenter.org/wp-content/uploads/2020/02/Essential_Elements_Pretrial_Two-Page.pdf).

<sup>328</sup> UDHR, *supra* note 7, at art. 15.

<sup>329</sup> International Covenant on Civil and Political Rights, art. 14.2, 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

<sup>330</sup> *Coffin v. US*, 156 U.S. 432 (1895). *See also Dignity in Criminal Proceedings*, part of the American Bar Association Center for Human Rights’ Dignity in Practice Project (2020) [hereinafter A.B.A. *Dignity in Criminal Proceedings*], [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/dignity-rights/dignity-criminal-proceedings.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/dignity-rights/dignity-criminal-proceedings.pdf).

<sup>331</sup> A.B.A. *Dignity in Criminal Proceedings*, *supra* note 330.

<sup>332</sup> *Portuondo v. Agard*, 529 U.S. 61, 76 (2000).

<sup>333</sup> A.B.A. Resolution 113B (Aug. 2019), *supra* note 5.



- The Chilean Constitutional Court has held that the presumption of innocence “concretises” the value of the human dignity.<sup>334</sup>
- The Federal Constitutional Court of Germany puts it in these terms:
 

“Prison sentences and preventive detention are fundamentally different in their constitutional legitimation. The authorisation for the state to impose and execute prison sentences is essentially based on the culpable commission of the criminal offence. The offender may only be sentenced to imprisonment and subjected to its execution for the culpable commission of a wrong. This is based on the Basic Law’s image of humanity, which is of a person capable of free self-determination; consideration is to be given to this image in the principle of blameworthiness rooted in human dignity. In its function of controlling the determination of penalties, the principle of blameworthiness restricts the duration of imprisonment to what is appropriate to the blameworthiness of the offence.”<sup>335</sup>
- In a review of the global caselaw on the subject, the High Court of Malawi has said: “many jurisdictions have elaborated on the importance of the presumption of innocence in upholding the right to dignity and protecting citizens from arbitrary arrests.” It noted that “In Canada, the right to dignity has been held to require a State to be able to prove the guilt of an accused. The presumption of innocence is stated to be a hallowed principle lying at the very heart of criminal law. It is integral to the general protection of life, liberty, and security of the person.”<sup>336</sup>
- In the southern African nation of Eswatini (formerly Swaziland), a suspect was ordered to do pushups and engage in certain degrading acts and the Supreme Court found that even such minimal burdens were violative of human dignity because they violated the presumption of innocence until proven guilty:
 

“Therefore, harming a person without first granting a hearing infringes upon human dignity. Many rights of the accused derive from his dignity as a human being. The presumption that every person is innocent until proven guilty by law is part of human dignity; the right of the accused to a fair trial is part of human dignity; the right of the accused to a speedy trial is part of human dignity; the right of a person to know the charges against him or why he has been arrested and his ability to defend effectively against those charges, are part of human dignity.”<sup>337</sup>

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<sup>334</sup> Tribunal Constitucional [Constitutional Court of Chile], 5 junio 2007, Sentencia Rol 519-2006, Considerando 42° (Chile).

<sup>335</sup> BverfGE, 2 BvR 2365/09, May 4, 2011 (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504\\_2bvr236509en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html).

<sup>336</sup> Gwonda v. The State, [2017] MWHC 23 (Jan. 10, 2017) (High Court of Malawi 2015), <https://malawilii.org/mw/judgment/high-court-general-division/2017/23>.

<sup>337</sup> Swaziland Government v. Aaron Ngomane, 25/2013 [2013] SZSC 73, ¶164 (Nov. 29, 2013) (Sup. Ct. Swaziland), <https://www.eswatinilii.org/na/judgment/supreme-court-eswatini/2013/73>.

- In Pakistan, the Supreme Court has held that one of the grave consequences of pre-arrest confinement was the resulting humiliation and disgrace, not only for the accused but for his family and people attached to him as well. Arrest, the court said, caused irreparable harm to a person’s reputation and standing in society, often subjecting him to hate, vitriol, and infamy. It therefore had to be justified not only by referring to prima facie evidence and adequate actionable material sufficiently connecting the person with the offence/crime complained of, but also by showing that in the given circumstances, there were no other less intrusive or restrictive means available. The power of arrest, the court said, should not be deployed as a tool of oppression and harassment.<sup>338</sup>

In the United States, as well, “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>339</sup> At least in principle. Pretrial detention is, under the law, authorized when someone “charged with [a serious felony is] found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.”<sup>340</sup> In practice, however, courts too often order the detention of people without an individualized finding of danger and based on charges that don’t involve serious felonies.

In fact, according to one study, “the population in pretrial detention is a major cause of jail overcrowding across the country.”<sup>341</sup>

“While a percentage of pretrial defendants are confined because the court has determined that they pose a danger or present a flight risk, seventy-five percent of pretrial detainees are charged with relatively minor property crimes, drug offenses or other non-violent acts, and remain in jail simply because the money bond was set in an amount they cannot afford to pay. ... As a result, money bail becomes a sub rosa form of preventive detention for the poor and nonviolent, and “bail eligible” pretrial detainees languish in local jails.”<sup>342</sup>

Indeed, “[b]ecause most pretrial detainees are charged with minor offenses, they probably would not receive a sentence of incarceration if convicted. Thus, ironically, they will be required to spend far more time behind bars pretrial while they are presumed innocent than they will be required to serve after they are convicted and are subject to punishment.”<sup>343</sup> The argument could forcefully be made that pre-trial detention for these people violates their dignity by imposing a punishment that is, per se, disproportionate and excessive.

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<sup>338</sup> Khawaja Salman Rafique v. National Accountability Bureau, (2020) 2020 PDL 456 (SC) (Pak.).

<sup>339</sup> United States v. Salerno, 481 U.S. 739, 755 (1987)

<sup>340</sup> *Id.*

<sup>341</sup> Cynthia E. Jones, “Give us Free”: Addressing Racial Disparities in Bail Determinations, 16 LEGIS. & PUB. POL’Y, 919, 935 (2013).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 936.

Beyond the mere fact of punishment without individualized assessment, the use of pretrial detention significantly adversely affects the outcomes of subsequent proceedings, thereby compounding the presumption of guilt: “those who are held pretrial are four times more likely to be sentenced to prison than defendants released prior to trial.”<sup>344</sup> Across the board, people in pretrial detention are more likely to take a plea bargain, more likely to be found guilty at a jury trial, and more likely to be incarcerated after sentencing.<sup>345</sup> This phenomenon may still occur after judges instruct jurors about the presumption of innocence.<sup>346</sup>

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*Pre-trial detention violates dignity by imposing a punishment that is, per se, disproportionate and excessive.*

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This may result in part from what might be called the “aesthetics of guilt” – that is, how a jury and court officers (including a judge) view a person in pretrial detention. Presenting people who are merely accused of criminal acts as if they are guilty in the courtroom contributes to the aesthetics of guilt, such as when the prosecutor calls a person “the defendant,” “the criminal,” or “the killer” in front of the jury<sup>347</sup> rather than treating them with dignity as a person by calling them by their name, without any implication of guilt. Other aesthetic implications are more blatant. The European Court of Human Rights has held that holding defendants in a metal cage during trial constitutes an affront to human dignity in violation of Article 3 of the European Convention on Human Rights (whose “very essence” is the protection of human dignity though this is not explicitly stated) in part because it undermines the presumption of innocence.<sup>348</sup> For more than 40 years, India has prohibited shackling because it violates the right to human dignity implied in the constitutional protection for the right to live with dignity. As the Indian Supreme Court has explained, “to manacle man is more than to mortify him; it is to dehumanize him and, therefore, to violate his very personhood too often using the mask of 'dangerousness' and security.”<sup>349</sup>

In the United States, by contrast, handcuffs and shackles of a pretrial detainee brought into a courtroom have been held to affect the jury’s perception of the person accused, although the rule against shackling is not absolute as it would be if it were seen as a dignity violation. “The Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is ‘justified by an essential state interest’ – such as courtroom security – specific to the defendant on trial.”<sup>350</sup> The commitment to dignity requires

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<sup>344</sup> Adureh Onyekwere, *How Cash Bail Works*, THE BRENNAN CENTER FOR JUSTICE (updated Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

<sup>345</sup> Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 226 (Feb. 2018).

<sup>346</sup> Vicki S. Helgeson & Kelly G. Shaver, *Presumption of Innocence: Congruence Bias Induced and Overcome*, 20 J. OF APPLIED SOC. PSYCHOLOGY 276, 298 (Mar. 1990).

<sup>347</sup> FAIR TRIALS, *Innocent until proven guilty? The presentation of suspects in criminal trials*, 28 (June 3, 2019), <https://www.fairtrials.org/articles/publications/innocent-until-proven-guilty-report/>.

<sup>348</sup> *Svinarenko and Slyadnev v. Russia*, App. No. 32541/08 and 43441/08, Eur. Ct. H.R. (July 17, 2014), <https://lovdata.no/static/EMDN/emd-2008-032541-2.pdf>.

<sup>349</sup> *Prem Shankar Shukla v. Delhi Administration*, (1980) SCR (3) 855 (India), <https://indiankanoon.org/doc/853252/>.

<sup>350</sup> *Deck v. Missouri*, 544 U.S. 622, 624 (2005).

that the government assure courtroom security without violating any person’s dignity or only to the extent made necessary by the person’s own conduct.<sup>351</sup>

Appearance in the courtroom in a prison uniform can also affect the perceptions of the jurors.<sup>352</sup> In *Estelle v. Williams*, the Supreme Court held that requiring a criminal defendant to appear before a jury in prison attire can impair the presumption of innocence, but it is permissible if the defendant does not object. Justice Brennan wrote in dissent, saying that putting the burden on the defendant or their counsel “robs [the] accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt.”<sup>353</sup> Again, if dignity is the basis of the holding, then the right is absolute. Any need to restrain a person must be met in ways that do not offend their dignity.

Detention before any evidentiary finding has been made violates the presumption of innocence by imposing significant and life-changing burdens on people without any individualized assessment. Strict adherence to the presumption of innocence is necessary to ensure that each person is judged according to acts for which they are personally and individually responsible. This ensures that the government is treating each person as an individual person, according to their chosen actions, their individual nature, and their inherent human dignity, which is inviolable and absolute.

### III. PRETRIAL DETENTION DISCRIMINATES AGAINST PEOPLE ON THE BASIS OF THEIR POVERTY

#### A. Bail and Poverty

One of the principal drivers of pretrial detention is the American system of cash bail.

Bail is “. . . the amount of money defendants must post to be released from custody until their trial. Bail is not a fine. It is not supposed to be used as punishment. The purpose of bail is simply to ensure that defendants will appear for trial and pretrial hearings for which they must be present. Bail is returned to defendants when their trial is over, in some states minus a processing fee.”<sup>354</sup>

The bail system thus assumes that a suspect or defendant will be incarcerated before a trial but gives them the opportunity to buy their freedom while waiting for trial: failure to pay is met with incarceration. This not only shifts the presumption of freedom but it discriminates against those who can not afford to buy their freedom. It is unjust and unnecessary: in the 21<sup>st</sup> century, there are non-punitive, non-discriminatory ways to ensure that defendants will appear for hearings and trial. The current system criminalizes poverty and violates human dignity in

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<sup>351</sup> See *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40, discussed in Chapter 1.

<sup>352</sup> *Estelle v. Williams*, 425 U.S. 501, 505 (1976).

<sup>353</sup> *Id.* at 518, cited in A.B.A. *Dignity in Criminal Proceedings*, *supra* note 330.

<sup>354</sup> AM. BAR ASS’N, *How Courts Work* (Sept. 9, 2019),

[https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/).

multiple ways: it treats individuals as commodities, it abuses people’s dignity for reasons over which they have no control, it denies agency and control to individuals, and it treats people without concern for their individual financial situations.

The statistics bear this out:

“Adults in poverty are three times more likely to be arrested than those who aren’t, and people earning less than 150 percent of the federal poverty level are 15 times more likely to be charged with a felony—which, by definition, carries a longer sentence—than people earning above that threshold.... [T]he share of the imprisoned population that was in poverty prior to being arrested equaling 57 percent for men and 72 percent for women, despite a national poverty rate of 11.8 percent.”<sup>355</sup>

Three-quarters of women who are arrested live in poverty. More than half of men who are arrested live in poverty.<sup>356</sup> The average yearly income of a person who can’t afford bail is \$16,000 for a man and \$11,000 for a woman.<sup>357</sup> One report said that in Pennsylvania, “the average statewide bail amount was \$38,433 — more than half the average household income” for the state.<sup>358</sup> Even if bail is set at \$1000, it amounts to more than what 70% of Americans have in their bank accounts.<sup>359</sup>

Indeed, although the Eighth Amendment to the United States Constitution declares that “[e]xcessive bail shall not be required nor excessive fines imposed,” bail is routinely set at rates that are excessive for the population: 81% of those needing to post bail cannot afford bail that is less than \$5,000 and 44% cannot afford less than \$1,000 bail.<sup>360</sup> The eight current members of the Supreme Court who are millionaires may have little empathy for those who are subject to bail conditions.

Added to this, the system requires payment of bail in order to avoid imprisonment. What makes the system incompatible with human dignity is not only the requirement that persons accused of committing a crime pay a bond to insure their appearance in court, but that inability to pay results in incarceration and that there are no

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*Innocent defendants plead guilty in order to exit jail.*

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<sup>355</sup> O’Neill & Barnhorst, *supra* note 317.

<sup>356</sup> *Id.*

<sup>357</sup> Prison Pol’y Initiative, *Pretrial Detention Exploring cost and outcome of detaining people before trial or deportation (ie. Instead of bail or other alternatives)* [hereinafter *Pretrial Detention*], [https://www.prisonpolicy.org/research/pretrial\\_detention/](https://www.prisonpolicy.org/research/pretrial_detention/) (last visited Jan. 4, 2022).

<sup>358</sup> ACLU of Pa., *Broken Rules How Pennsylvania Courts Use Cash Bail to Incarcerate People Before Trial* (Dec. 2021), [https://aclupa.org/sites/default/files/field\\_documents/broken\\_rules\\_statewide\\_bail\\_report.pdf](https://aclupa.org/sites/default/files/field_documents/broken_rules_statewide_bail_report.pdf).

<sup>359</sup> G. Dautovic, *American Savings Statistics: How Much Should You Have in Your Savings Account?*, FORTUNLY (Feb. 7, 2022), <https://fortunly.com/statistics/american-savings-statistics/#:~:text=American%20savings%20statistics%20for%202020,%245%2C000%20stands%20at%20roughly%2012%25:> “American savings statistics for 2020 show that nearly 70% of Americans have less than \$1,000 stashed away in their bank accounts. ... Meanwhile, the number of those with savings between \$1,000 and \$5,000 stands at roughly 12%. Only 5% of Americans have savings accounts that range between \$10,000 and \$20,000.”

<sup>360</sup> Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. OF LAW AND ECONOMICS 530 (Aug. 2017).

protections for people of limited or no means. As early as 1927, researchers have pointed out that this cash bail system criminalized poverty, since those who could not afford bail remained in pretrial detention.<sup>361</sup> That trend continues today, forcing poor people into prisons simply because they are poor and violating the dignity of people who cannot afford to buy their freedom.<sup>362</sup>

According to the American Bar Association, in the cash bail system of the United States, the amount of bail is set by weighing a number of factors:

- The risk of the defendant fleeing,
- The type of crime alleged,
- The ‘dangerousness’ of the defendant, and
- The safety of the community.<sup>363</sup>

It is not clear if these factors are in fact used, when the result is that hundreds of thousands of poor people are in pretrial detention on non-violent, non-felonious charges. What is clear and what is in direct defiance of the principles of individual dignity, is that the defendant’s ability to pay is often disregarded by judges. “For example, a 2018 study found that although monetary bail was set in approximately two-thirds of the cases in Philadelphia, there was no evidence that judges considered people’s ability to pay.”<sup>364</sup>

Even a relatively low bail amount may result in incarceration: In one study of New Jersey, 1500 people were in jail because they were unable to pay bails of \$2500 or less, including 800 people who were in jail because they could not afford to pay bail amounts of \$500 or less.<sup>365</sup>

According to a 2016 study of New York City, in “45 percent of felony cases and 43 percent of misdemeanor cases, people could not make bail before the end of their cases and therefore remained in jail. Even when bail was set at low amounts - \$500 or less—40 percent of people remained in jail until their cases were over.”<sup>366</sup> For the 43% of pretrial detainees who are held on misdemeanor charges “pretrial detention poses a particular problem because it may induce innocent defendants to plead guilty in order to exit jail, potentially creating widespread error in case adjudication.”<sup>367</sup> This accounts for approximately 200,000 individuals who have not been found guilty of committing any crime, who are charged only with a misdemeanor, and yet who are incarcerated.

When the bail is set at a higher amount (typically \$5,000 or more), a person may be able to borrow the money from bail bondsmen. Bail bondsmen may be available to pay up to 90% of the amount of bail required, but under conditions that may be onerous, requiring sureties of property and other assets. Under some circumstances, to help defendants avoid these obligations,

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<sup>361</sup> *For Better or For Profit*, supra note 316, at 6.

<sup>362</sup> *Id.*

<sup>363</sup> *How Courts Work*, supra note 354.

<sup>364</sup> Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, at 6 (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

<sup>365</sup> Jones, supra note 341, at 935 n. 86.

<sup>366</sup> Digard & Swavola, supra note 364, at 6-7.

<sup>367</sup> Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 73 (2017).

courts may release defendants upon payment of the 10%.<sup>368</sup> Moreover, while courts typically return the funds when the case is closed, bail bondsmen typically hold 10% of the bail. Still, one half million people – a number that “has nearly quadrupled since the 1980s”<sup>369</sup> – are in custody awaiting trial. This is a political choice.

Recognizing the multiple indignities of pretrial detention based on the inability to post bail, several states are reforming their bail procedures. California, Illinois, Indiana, New Jersey, New Mexico, and New York have moved away from cash bail. Some states, including Delaware,<sup>370</sup> are using assessment tools to assist in making bail decisions; these assessment tools may help in tailoring bail decisions, but they may also compound the problems of poverty and lack of resources.<sup>371</sup>

## B. Holding Youth in Pretrial Detention Violates their Dignity

We discuss youth in the criminal legal system in Chapter 8. For now, we simply highlight that thousands of young people in America are held in jails and prisons without having been convicted of any crime, and the vast majority of those are charged only with non-violent offenses. This is a patent violation of their human dignity, deriving from their human rights as children, the presumption of innocence, and fundamental notions of justice and fairness.

According to the Prison Policy Initiative:

- Nearly 16,000 youth in juvenile facilities are detained awaiting a hearing, sentencing, or placement.<sup>372</sup>
- Of these, 4,000 are charged with status offenses or technical violations.<sup>373</sup>
- Nearly 1,000 young people are locked in long-term secure facilities — essentially prisons — without even having been convicted. No more than 500 of these are accused of violent offenses.<sup>374</sup>
- 3,200 young people are detained for technical violations of probation or parole, or for status offenses, which are “behaviors that are not law violations for adults.”<sup>375</sup>
- White youth are far less likely to be detained than non-whites: fewer than 21% of white youth with delinquency cases are detained, compared to 32% of Hispanic youth, 30%

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<sup>368</sup> *How Courts Work*, *supra* note 354 (“In many jurisdictions bail bondsmen are becoming obsolete because courts release defendants upon their payment of 10 percent of the bail to the court.”).

<sup>369</sup> *Pretrial Detention*, *supra* note 357.

<sup>370</sup> Del. Code. Ann. tit. 11, §2104 (2019).

<sup>371</sup> See NAT’L CONF. OF STATE LEGISLATORS, *Pretrial Release: Risk Assessment Tools* (June 30, 2022), [https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-risk-assessment-tools#:~:text=\(2\)%20For%20purposes%20of%20this,recommendations%20as%20to%20bail%20or](https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-risk-assessment-tools#:~:text=(2)%20For%20purposes%20of%20this,recommendations%20as%20to%20bail%20or) (for a state by state summary of pretrial risk assessment tools).

<sup>372</sup> Sawyer, *Youth Confinement: The Whole Pie 2019*, *supra* note 169.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

of Black youth, 26% of American Indian youth, and 25% of Asian, Native Hawaiian, or Pacific Islander youth.<sup>376</sup>

- Over 40% of detained youth had been held for longer than 30 days, and nearly 500 had already been detained for over a year, even though detention necessarily isolates youth from their families and communities and exposes them to victimization while detained.<sup>377</sup>

Young people can be affected by the system of pre-trial detention even if they are not detained themselves, but if a parent is. By removing parents from the family, pretrial detention rips families apart. Two-thirds of women and more than half of men who can't afford bail have children who are minors. The Prison Policy Initiative found that "over 150,000 children had a parent in jail because they couldn't afford their bail bond."<sup>378</sup> This affects not only the dignity rights of those who are accused of committing a crime, but also the ability of their children and families to live in dignity as well. The dignity impacts on children of having a parent in detention, even one who has not been convicted of any crime, can be enormous, ranging from diminished self-esteem and stigma from others in society, to interrupted connections with parents and other family members which can impair the full development of a child's personality, and their sense of belonging – all of which are essential to the full protection of a young person's dignity.

### C. Racial Disparities in Pretrial Detention

Of the population of people detained in jails without convictions, "nearly 7 in 10 (69%) of these detainees were people of color, with black (43%) and Hispanic (19.6%) defendants especially overrepresented compared to their share of the total U.S. population" in 2002.<sup>379</sup> According to one study:

- In large urban areas, black felony defendants are over 25% more likely than white defendants to be held pretrial.
- Across the country, black and brown defendants are at least 10-25% more likely than white defendants to be detained pretrial or to have to pay money bail.
- Young black men are about 50% more likely to be detained pretrial than white defendants.
- Black and brown defendants receive bail amounts that are twice as high as bail set for white defendants – and they are less likely to be able to afford it.

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<sup>376</sup> Sawyer, *Youth Confinement: The Whole Pie 2019*, *supra* note 169.

<sup>377</sup> *Id.*

<sup>378</sup> Sawyer, *How does unaffordable money bail affect families?*, *supra* note 319.

<sup>379</sup> Wendy Sawyer, *How race impacts who is detained pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/).



- o Even in states that have implemented pretrial reforms, racial disparities persist in pretrial detention.<sup>380</sup>

The practice in the United States of (1) charging more people with crimes including minor misdemeanor offenses, (2) requiring people who are charged with a crime to post bail without attention to their ability to pay and (3) incarcerating those who can not pay bail all combine to result in an extraordinary number of people who are living incarcerated simply for being poor, disproportionately burdening those who are already vulnerable and struggling with poverty, along with their families. There is no evidence that people – the vast majority of whom are charged with non-violent offenses – are flight risks or dangers to society whose presence at trial can only be secured by incarceration. Moreover, gender and racial disparities in the criminal legal system combined with gender- and race-based economic disparities in the United States result in a system of incarcerating people who are presumptively not guilty of committing any crime that disproportionately burdens those who are poor and those who are not white and women.

#### IV. PRETRIAL DETENTION VIOLATES HUMAN DIGNITY BY DENYING AGENCY, COMMUNITY, AND WELL-BEING

Pretrial detention harms individuals, their families, and communities in numerous ways that are also pertinent to the population of convicted people.

As noted, from a *justice* standpoint, pretrial detention serves no purpose. People served time have not been convicted of any criminal offence and there is no evidence that pretrial detention is necessary to secure appearance at trial. It therefore serves no penological purpose.

From a dignity standpoint, the violations to individuals who have not been adjudicated are comparable to the violations of dignity imposed on those who have been convicted of a criminal act. These violations will be discussed briefly here because it is important to understand how the US criminal legal system violates the dignity of those who are legally innocent, and they will be discussed

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*Judicial and administrative authorities must “ensure that the deprivation of freedom of persons held in pre-trial detention is, in all circumstances, carried out with respect for the dignity of the individual.”*

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in more detail below in reference to those who have been adjudicated. Here we discuss them in the framework of some of the broadest dignity deprivations.

Some courts have already recognized the dignity implications of pre-trial detention. The Constitutional Court of France held in 2020 that people in pre-trial detention had the right to challenge their prison conditions because “it is the responsibility of the judicial authorities as well as the administrative authorities to ensure that the deprivation of freedom of persons held in pre-trial detention is, in all circumstances, carried out with respect for the dignity of the individual.”<sup>381</sup> The court further held that it was the obligation of the authorities to “prevent and punish acts that

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<sup>380</sup> Sawyer, *How race impacts who is detained pretrial*, *supra* note 379. “These national studies of felony cases in large counties generally conclude that the *direct* impact of race on pretrial decisions is weak, but that racial bias acts *cumulatively* to affect outcomes, and *indirectly* via factors like ability to pay for bond or a private attorney.”

<sup>381</sup> Conseil constitutionnel [CC] (Constitutional Court) decision No. 2020-858/859 QPC of 2, Oct. 2020, para. 14 (Fr.).

violate the dignity of persons in pretrial detention and to order compensation for damages.”<sup>382</sup> Finally, the court put the onus on lawmakers to ensure that those in pretrial detention have rights of action to challenge conditions of detention that violate human dignity.<sup>383</sup>

#### A. Violations of Agency

Jails and prisons limit individuals’ freedom and capacity to make choices, including whom they can see and interact with, as well as what items are allowed in their possession, food, recreation, and every other decision a person normally makes for themselves as a matter of personal agency. Bureaucrats and correctional officers make final decisions about medical and mental health treatment of pretrial detainees, and often fail to protect people in their custody or make them feel less than human. Pretrial detention denies these aspects of dignity de facto to people accused of criminal acts.

In a criminal legal system that values the presumption of innocence, pretrial detention inherently denies individuals of two important aspects of dignity – autonomy and agency. These two concepts are closely intertwined. Autonomy indicates a person’s freedom to act or function independently, while agency refers to a person’s capacity to act with or exerting power or control over one’s situation. Both are intrinsic parts of human dignity, deriving from the “reason and conscience” that the Universal Declaration of Human Rights attributes to dignity in Article I.<sup>384</sup>

Although the cases most commonly use the term “autonomy,” we prefer “agency” as it connotes control and authority in relation to others, rather the ability to make rules for oneself in the absence of a social web. Whatever the terminology, these cases correlate to the aspects of dignity that are impaired by detention practices that are especially unjustified for those who have not been convicted of any crime.

Pretrial detention violates the autonomy and agency dimensions of human dignity by reducing or eliminating the sphere of **free choice** for those individuals who are incarcerated without a conviction. Some decisional authority is eliminated, such as decisions relating to work, and

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*Autonomy indicates a person’s freedom to act or function independently, while agency refers to a person’s capacity of exerting control over one’s situation.*

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movement, while other decisions are reduced such as those relating to eating and sleeping and seeing family or friends which may still be possible although it is limited and controlled. These limitations reduce the individual to an object of the state’s policy, thus violating the fundamental precept of dignity rights: that no individual may be used as a means or object of another’s will. Treating a person in this way, for reasons that have not been shown to have been made necessary by the person’s own conduct, assaults their dignity.

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<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> UDHR, *supra* note 7, at art. 1.

## B. Violations of Belonging

Detention, by definition, removes a person from their **community**. This is another of the essential dignity-depriving qualities of detention.

### 1. The Human Dignity Need to Connect with Others

The human need to belong to and remain connected to a community is an essential part of human dignity.<sup>385</sup> This was made explicit in the UDHR: “Article 29: “(1) Everyone has duties to the community in which alone the **free and full development of his personality** is possible.”<sup>386</sup> And it is an elemental part of dignity law in many countries. In Brazil, it is thought of as fraternity; in Europe, it is sometimes described as solidarity. The South African court has explained it this way:

“[A]n individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons. This thinking emphasizes the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one’s sense of self-worth is defined by one’s identity. ... And belonging involves more than simple association; it includes participation and expression of the community’s practices and traditions.”<sup>387</sup>

Often, courts recognize the **dignity of belonging** in the context of another dignity need: the need to develop one’s personality in relation to others, to make life choices in relation to others, to have sufficient material comforts to enable engagement and participation with others in a community.

- In relation to the right of same-sex couples to marry, the U.S. Supreme Court has noted that the social stigma that couples feel when they are legally prohibited from marrying violates their dignity: “With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”<sup>388</sup>
- In a case about a prisoner’s right to have visits from family and legal counsel, the Supreme Court of India explained, in often repeated language: “We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.”<sup>389</sup>
- In relation to poverty, the Colombian Constitutional Court has noted that those who work as recyclers in trash dumps are “invisible” to society even though their work has

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<sup>385</sup> DALY, DIGNITY RIGHTS, *supra* note 19, at 117-122.

<sup>386</sup> UDHR, *supra* note 7, at art. 29.

<sup>387</sup> *MEC for Education: Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) at para. 53 (S. Afr.), *supra* note 160, (quoting Gyekye Person and Community: Ghanaian Philosophical Studies (1992)).

<sup>388</sup> *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).

<sup>389</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors*, (1981) 2 SCR 516 (India), *supra* note 166.

social utility: “But far from being valued, each day makes them more invisible and excludes them the opportunities to engage in those exchanges.”<sup>390</sup>

- In a case about the minimum social security required to ensure that a person can live with dignity, the Constitutional Court of Germany has explained: “The fundamental right to guarantee a subsistence minimum that is in line with human dignity, ... ensures every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life.”<sup>391</sup>

It is recognized throughout the world that belonging to and being able to connect with others in a community is essential to identity and the full development of the personality – among the quintessential values of human dignity – as well as for participation in social, cultural, political, and economic life. Pretrial detention limits or eliminates a person’s social interactions and ability to belong in their family, work, religious, and social communities.

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*... material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life.*

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Prisons and jails could alleviate the disconnection that incarcerated people feel by ensuring access to family and friends, limited only by actual and real penological interests. Instead, most facilities limit communication between the detainee and people in their community: telephone calls of pretrial detainees are limited<sup>392</sup> and costs on callers can be prohibitive.<sup>393</sup> Costs are also imposed on postage for mail, except for free postage legal documents<sup>394</sup> as well as video calls.<sup>395</sup> And correctional facilities can limit even the amount of legal documents an individual can mail free of cost.<sup>396</sup> All of these impinge on a person’s dignity and none is necessary to achieve any penological interest or the supposed interest in keeping communities safe. At present, the US system views these opportunities to connect with others as privileges, to be provided only upon

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<sup>390</sup> Corte Constitucional [C.C.] [Constitutional Court], abril 23, 2009, Sentencia T-291/09 (Colom.).

<sup>391</sup> BVerfG, 1 BvL 1/09, Feb. 9, 2010 (“Hartz IV”) (Ger.),

[https://www.bundesverfassungsgericht.de/e/ls20100209\\_1bvl000109en.html](https://www.bundesverfassungsgericht.de/e/ls20100209_1bvl000109en.html).

<sup>392</sup> Jane C. Christie, *Disconnected: The Safe Prisons Communications Act Fails to Address Prison Communications*, *Development in Science and Technology Law*, 2010.

<sup>393</sup> Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The problem, the progress, and what’s next*, PRISON POL’Y INITIATIVE (Dec. 2022), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice\\_2022.html](https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html);

<sup>394</sup> *Van Poyck v. Singletary*, 106 F.3d 1558 (11th Cir. 1997) (“The First Amendment does not compel prison officials to provide indigent prisoners with unlimited free postage and materials for non-legal mail. ...The Eighth Circuit has held persuasively that “indigent inmates have no constitutional right to free postage for nonlegal mail.”); *Lindell v. O'Donnell*, No. 05-C-04-C, 2005 WL 2740999 (W.D. Wis. Oct. 21, 2005) (“However, there is no requirement that the government subsidize plaintiff’s postage costs. (The Constitution does not require the State to subsidize inmates to permit personal correspondence.”)).

<sup>395</sup> Bernadette Rabuy & Peter Wagner, *Screening Out Family Time: The for-profit video visitation industry in prisons and jails* (Jan. 15), <https://www.prisonpolicy.org/visitation/report.html>.

<sup>396</sup> *Van Poyck v. Singletary*, 106 F.3d 1558 (11th Cir. 1997) (“This Court has ruled that for legal mail, the Sixth Amendment access-to-court right only “entitles indigent to some free stamps ... not unlimited free postage[.]”).

fulfillment of conditions and removed or restricted at the will of the officials. On the contrary, the dignity-based right of belonging must be protected because it is rooted in the human need to connect with others, touching the essential quality of our humanity. Moreover, as noted above, dignity rights are inviolable in the sense that there are no justifications for their restriction.

## 2. Pretrial Detention Deprives People of Their Rights to Belong to a Political Community

One important aspect of the dignity right to belong to a community is the exercise of civil and political rights. This includes the right to vote, the right to information, and the right to express oneself. These rights are protected by the Universal Declaration of Human Rights, as well as by the International Covenant of Civil and Political Rights, which the United States ratified in 1992 – both of which are rooted in the recognition of human dignity. In the landmark case of *Trop v Dulles*, involving the loss of citizenship and nationality as a punishment for war-time desertion, the court explained why such punishment violates dignity and the evolving standards of decency embodied in the 8<sup>th</sup> Amendment:

“There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.”<sup>397</sup>

Courts in other countries have also recognized the dignity claim to participate in a political community. We have elsewhere coined the phrase “participatory dignity”<sup>398</sup> to stress the dignity rights of active engagement in political affairs. As Justice Brennan wrote about the inhumanity of capital punishment, “An executed person has indeed 'lost the right to have rights.’”<sup>399</sup>

- In relation to a prisoner’s right to write a weekly newspaper column, the Supreme Court of Israel has said: “Within the framework of freedom of speech, man realizes his desires and aspirations that are part of his nature and that reflect his intellectual freedom: to be educated and acquire knowledge, to be involved in communal life, to hear the opinions of others and express his own views.”<sup>400</sup>

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<sup>397</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>398</sup> See Erin Daly, *Judicial activity/democratic activity: The democratising effects of dignity* (for elaboration on the concept of participatory dignity. Daly uses this term rather than the narrower “civic dignity” used elsewhere), in DANIEL BEDFORD ET AL, *HUMAN DIGNITY AND DEMOCRACY IN EUROPE: IDENTITY, CITIZENSHIP AND SOLIDARITY*, pt. 1 (Edward Elgar 2022); see, e.g. CIVIC DIGNITY, <https://cividdignity.com/> (last visited Jan. 11, 2023) (concerning the voting rights of people who are incarcerated in the U.K.); *August & Another v. Electoral Comm’n & Others* 1999 (3) SA 1 (CC) (S. Afr.) (1999).

<sup>399</sup> *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 290 (1972)) (Brennan J., dissenting).

<sup>400</sup> *Golan v. Prisons Service* [1996] SC PPA 4463/94, para. 19 (Aug. 25, 1996) (Isr.) (opinion of Justice E. Mazza), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Golan%20v.%20Prisons%20Service.pdf>.

- In words that are as pertinent to the United States as they are in South Africa, the South African Constitutional Court has held that the right to vote must be guaranteed to all persons, including persons who are incarcerated and those who have been convicted.

“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity....

“It is a well-established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed.

“Of course, the inroads which incarceration necessarily makes upon prisoners’ personal rights and liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.”<sup>401</sup>

- The Canadian Supreme Court has long held that “denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. . . . Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter.”<sup>402</sup> This is true even though the Canadian Charter of Rights and Freedoms, like the U.S. Constitution, does not explicitly protect human dignity in the text.

Denial of the right to vote is a violation of civic or participatory dignity. Political theorist Josiah Ober has described the lack of civic dignity as “when our presence goes unacknowledged, when we are unduly subject to the paternalistic

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*The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.*

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<sup>401</sup> August & Another v. Electoral Comm’n & Others 1999 (3) SA 1 (CC) (S. Afr.) (1999), <http://saflii.mobi/za/cases/ZACC/1999/3.html>.

<sup>402</sup> Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.), paras. 35 & 44, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2010/index.do>.

will of others, and when we are denied the opportunity to employ our reason in making choices that affect us.”<sup>403</sup>

The denial of the franchise is different for pretrial detainees than for those who have been convicted. Many states prohibit those who have been convicted of a crime from voting. This is a violation of human dignity that will be explored further in Chapter 7 in connection with those who have been released. But pre-trial detainees are not subject to the same legal restrictions as those who are statutorily disenfranchised; yet, detention facilities and state legislatures impose many barriers to prevent people accused of criminal acts from voting while in pretrial detention.<sup>404</sup> Factors that cause “de facto disenfranchisement” of pretrial detainees include, but are not limited to, inaccessibility of voter registration and absentee ballot information; inability to meet application deadlines; costs of mail; voter identification laws that require more information than pretrial detainees have access to; and uninformed election officials, among other things.<sup>405</sup>

Dignity-based rights to participate in elections must be protected, even where that requires affirmative actions by the state to ensure that people who are incarcerated can vote.

### C. Access to Information

Jails and prisons limit the types of personal items a person in pretrial detention may have in their personal possession.<sup>406</sup> If the mail is not privileged, a pretrial detainee’s mail may be censored by correctional staff. Incoming mail may also be inspected for “safety” and “legitimate penological interests of maintaining order and preventing the commission of a crime” – again, when there is no legitimate penological interest in pretrial detention itself. There may also be limitations on visitors or burdens placed on family and friends that deter them from visiting. Although pretrial detainees may receive some publications available to the public, correctional officers may place limits based on “legitimate penological interests” and may also establish time, place, and manner restrictions on the content of the material. This violates the dignity interest of a person to **define themselves** as they wish, to **fully develop their personality**, and to live according to their own conscience, without serving any penological purpose. As noted, by definition, there is no “legitimate penological interest” in pretrial detention itself insofar as the basis for detention is not a finding of guilt but the unchallenged presumption of guilt and poverty. People who have not been found guilty of any crime must be permitted to live with material comfort, including having access to books and personal items or mementos, so long as those items do not infringe on the dignity of others or threaten the safety of other people in their proximity. The burden is on the government to justify withholding items, limiting visits and contact with others, and violating these dignity-based interests.

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<sup>403</sup> *Id.*

<sup>404</sup> Ginger Jackson-Gleich & Rev. Dr. S. Todd Yeary, *Eligible, but excluded: A guide to removing the barriers to jail voting*, PRISON POL’Y INITIATIVE (Oct. 10, 2020), [https://www.prisonpolicy.org/reports/jail\\_voting.html](https://www.prisonpolicy.org/reports/jail_voting.html) (last visited June 20, 2022).

<sup>405</sup> *Id.*

<sup>406</sup> *Bell v. Wolfish*, 99 U.S. 1861 (1979).

To live with dignity, a pretrial detainee should also have access to courts in order to defend themselves. Jails can fulfill this constitutional obligation solely by “maintenance of a law library or by adequate assistance of counsel.”<sup>407</sup> Too often, however, such resources are not available and pretrial detainees are left without access to legal information or to legal advice. This gravely affects their dignity, insofar as earlier access to legal representation increases a person’s chance of bail reduction and acquittal in the first place.<sup>408</sup>

#### D. Violations of Well-Being and Living with Dignity

Well-being, a modicum of comfort, and bodily integrity are all inviolable rights derived from the law’s recognition of human dignity. Individuals who have been presumed guilty without due process experience deprivations of human dignity on a daily basis. Conditions in prisons and jails not only violate the dignity right to live “as a person,” they also contribute to adverse legal consequences, encouraging confessions and plea bargaining simply to avoid the intolerable conditions in prison.<sup>409</sup> In one study, unsanitary conditions played a role in many people’s decision to accept a plea bargain in order to avoid remaining in the facility until their court date. Many formerly detained people described vile conditions such as overflowing toilets, spoiled food on the ground, and vermin overtaking the living quarters.<sup>410</sup> Bed bugs, roaches, and rats carry diseases in addition to providing unpleasant company. Overcrowding contributes to the unsanitary conditions in many pretrial detention facilities. Some have described that the overpopulated “bullpen” did not have enough places for people to sleep.<sup>411</sup> Additionally, many people accepted plea bargains to leave jails due to the treatment they received by correctional officers. Many correctional officers berate pretrial detainees verbally, which can escalate to physical assault.<sup>412</sup>

The Constitutional Court of Colombia has found unconstitutional violations of dignity where prisoners lived in overcrowded conditions and lacked sanitary conditions and water to wash their clothes, and where medium risk detainees were housed with high-risk prisoners.<sup>413</sup> The Court agreed that the penitentiary had infringed on their rights to life, personal integrity and dignity. It explained that the respect for human dignity constituted the central pillar in the relationship between the State and the person deprived of their freedom. In Colombia, this right to dignity encompasses the rights of living well, without humiliation, and without being subjected to overcrowded conditions. The same values could be said to underlie American constitutionalism.

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<sup>407</sup> 72 C.J.S. Prisons § 120 (*Rights of pretrial detainees as to access to courts*).

<sup>408</sup> Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit*, CALIFORNIA POL’Y LAB (June 2018).

<sup>409</sup> Amy E. Lerman ET. AL, *Pleading for Justice: Bullpen Therapy, Pre-Trial Detention, and Plea Bargains in American Courts*, 68 CRIME & DELINQUENCY 159 (Mar. 3, 2021).

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> Corte Constitucional [C.C.] [Constitutional Court], mayo 4, 2007, Sentencia T-322/07 (Colom.), T-322/07 Guarantee of rights to prisoners. *See also* Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶150 (Sept. 7 2004) (stating “keeping a detainee in overcrowded conditions, lacking natural light, and ventilation, without a bed to rest on or adequate hygiene conditions...constitutes a violation of that person’s right to human treatment.”).



Privacy is one of the cardinal dignity values that is unjustifiably compromised by pretrial detention. It remains the cornerstone of living with dignity and what it means to be treated as a person. Privacy allows each person to develop their personality as they see fit, and to protect the boundary between their own person and others.

In a case about personal information, the Indian Supreme Court has held as follows (again, interpreting a constitution that does not contain an explicit right to dignity, or to privacy):

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*“Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion.”*

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“Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.”<sup>414</sup>

A case from the Supreme Court of Justice of Argentina has noted the link between personal privacy and the protection against authoritarianism. In a case involving the political protest rights of sexual and gender minorities, the court explained: “The protection of the scope of privacy ... is one of the greatest values of respect for the dignity of the human being and a feature of essential differentiation between the rule of law and authoritarian forms of government.”<sup>415</sup> This has

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*By eliminating the privacy rights of pretrial detainees, jails and prisons expand the reach of state authority and threaten individual human dignity.*

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salience not only in countries like Argentina with recent experience with authoritarianism, but in the carceral system in the United States as well where the population has no liberty, and limited freedom of movement and choice, and no personal physical privacy.

#### E. Freedom from Humiliation

Dignity demands that pretrial detention centers protect people in custody from vulnerability and keep them free from humiliation. Humiliation can encompass any act that is demeaning or that makes a person feel **less than equal**.

- As discussed previously, the European Court of Human Rights has held that “that even one unpremeditated slap devoid of any serious or long-term effect on the person receiving it may be perceived as humiliating by that person” and is therefore violative

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<sup>414</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161 (India), *supra* note 35.

<sup>415</sup> Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 21/11/2006, “Association for the struggle of Transvestite-Transexual Identity v. Inspector General of Justice,” (Argentina National Supreme Court of Justice 2006) (Arg). The Court further explained: “The protection of this ambit of privacy, we conclude, turns out to be one of the best values for the respect of the dignity of the human being and a basis of the essential difference between a state of rights and authoritarian forms of government.”

of the principle of dignity that is the implicit essence of the European Convention on Human Rights.<sup>416</sup>

- The Supreme Court of Eswatini, in a case involving an unusual punishment of a suspect, has explained the dignity need to protect against humiliation by officials in these terms:

“It is universally recognized that human dignity is firstly the dignity of each human being as a human being. In this encapsulates the viewpoint that human dignity includes the equality of human beings. Discrimination infringes on a person’s dignity. Human dignity is a person’s freedom of will. This is the freedom of choice given to people to develop their personalities and determine their own fate. Human dignity is infringed if a person’s life or physical and mental welfare is harmed. It is infringed when a person lives or is subjected to humiliating conditions which negate his humanity. It envisages a society predicated on the desire to protect the human dignity of each of its members.”<sup>417</sup>

- The Supreme Court of Kenya found that a strip search was humiliating and violated the dignity protections in the Kenyan constitution.<sup>418</sup>
- The Supreme Court of India has found that holding a prisoner in irons in public while traveling from the jail to the court was humiliating and constituted torture in violation of the inherent dignity of all persons.<sup>419</sup>

Jails and prisons put people in a vulnerable position physically, mentally, and emotionally. To promote the freedom from humiliation, detention centers must prevent involuntary exposure to conditions and practices that humiliate. This encompasses bans on unnecessary or excessive strip searches intended to harass, intimidate, punish, objectify, or cause injury to individuals. In addition, affirmative measures must sometimes be taken to ensure that detainees are not humiliated; such measures may include procedures and physical spaces to guarantee personal privacy, or training and accountability measures to minimize transgressions by staff. (Staff-on-prisoner sexual predation is discussed below in Chapter 4).

The right to be free from humiliation is absolute because it is rooted in the human dignity of every human being. There is no argument or reason that ever justifies humiliating another human being, so claims of “security” or “legitimate penological interest” should never be accepted – not because they are ill-defined and may not be factually based – but because even if they were, they would not justify degrading or humiliating another person: legitimate goals can always be

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*Legitimate goals can always be accomplished by means that don't humiliate.*

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<sup>416</sup> Bouyid v. Belgium, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40.

<sup>417</sup> Swaziland Government v. Aaron Ngomane, 25/2013 [2013] SZSC 73, ¶13 (Nov. 29, 2013) (Sup. Ct. Swaziland), *supra* note 337.

<sup>418</sup> A.N.N. v. The Hon Attorney General (2013) eKLR (Kenya), <http://kenyalaw.org/caselaw/cases/view/83334>.

<sup>419</sup> Prem Shankar Shukla v. Delhi Administration, (1980) SCR (3) 855 (India), <https://indiankanoon.org/doc/853252/>.

accomplished by means that don't humiliate. This is what it means to have an inalienable and inviolable right to dignity.

#### F. Bodily Integrity

Pretrial detention greatly affects a person's bodily integrity, another important aspect of dignity: people are exposed to unsanitary and vile conditions, they are restricted in when and how and where they can seek medical care for physical or mental conditions, their ability to maintain physical and mental wellness through fresh air and recreation is severely limited, to name just a few examples. Some administrative actions are particularly dehumanizing, such as hosing down pretrial detainees with chemical delousing solution if not done in a way that protects human dignity.<sup>420</sup> Moreover, detention facilities must also protect people in their care from violence perpetrated by others, including staff, in the facility.<sup>421</sup>

Pretrial detainees have the constitutional right to medical care for their physical and mental health under the Fifth and Fourteenth Amendments.<sup>422</sup> Mental health is a critical component of health. America incarcerates an estimated 90,000 people considered incompetent to stand trial due to mental illness.<sup>423</sup> Jails and state-run hospitals have become de facto mental health treatment facilities.<sup>424</sup> Pre-trial detention facilities must have access to sufficient funding to treat people who need mental health care.<sup>425</sup>

And yet, the "interruption of treatment is one of the most complex issues facing pre-trial detention centres and detainees. For people who have been receiving treatment for a medical condition in the community, arrest and detention represent a potentially deadly interruption of treatment. Treatment may be discontinued for short or long periods of time following arrest and detention in police cells, when detainees are transferred to other facilities or have to appear in court, and upon release."<sup>426</sup>

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<sup>420</sup> *Id.*

<sup>421</sup> See 72 C.J.S. Prisons § 121; see also *Smith v. Artison*, 779 F.Supp. 113, 115 (E.D. Wis. 1991).

<sup>422</sup> 72 C.J.S. Prisons § 117 (*Rights of pretrial detainees as to health and medical care*); see *Nagle v. Gusman*, 61 F.Supp. 3d 609, 628 (E.D. La. 2014) (to ensure that pretrial detainees get the same constitutional protections afforded to convicted prisoners, such as safety and medical care, they must "look to the procedural and substantive due process guarantees of the Fourteenth Amendment.").

<sup>423</sup> Doris A. Fuller ET AL., *Emptying the 'New Asylums': A Beds Capacity Model to Reduce Mental Illness Behind Bars*, TREATMENT ADVOC. CTR. (Jan. 2017), [https://www.treatmentadvocacycenter.org/reports\\_publications/emptying-the-new-asylums-a-beds-capacity-model-to-reduce-mental-illness-behind-bars/](https://www.treatmentadvocacycenter.org/reports_publications/emptying-the-new-asylums-a-beds-capacity-model-to-reduce-mental-illness-behind-bars/).

<sup>424</sup> *Id.*

<sup>425</sup> Michael L. Perlin & Meredith R. Schriver, *You Might Have Drugs at Your Command: Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALB. GOV'T L. REV. 381 (2015).

<sup>426</sup> Denise Tomasini-Joshii et al., *Ch. 6 Health in pre-trial detention*, in WORLD HEALTH ORGANIZATION, REGIONAL OFF. FOR EUROPE, PRISONS AND HEALTH [HEREINAFTER WHO, PRISONS AND HEALTH] 37-38 (2014), [https://www.unodc.org/lpomex/uploads/documents/Publicaciones/Prevencion-del-delito-y-justicia-penal/2014\\_WHO\\_UNODC\\_Prisons\\_and\\_Health\\_eng.pdf](https://www.unodc.org/lpomex/uploads/documents/Publicaciones/Prevencion-del-delito-y-justicia-penal/2014_WHO_UNODC_Prisons_and_Health_eng.pdf), (noting that "Of particular concern is the interruption of treatments (such as for HIV) that can lead to negative health outcomes for the individual patient and also, through development of drug-resistant strains of HIV, to negative public health consequences... Health delivery in prisons should meet the minimum standards set out in international laws, rules and conventions.").

Some jurisdictions analyze denial of medical care claims using the Eighth Amendment deliberate-indifference standard. Under this standard, the detainee seeking to state a claim for denial of medical care must show both a serious medical need and a deliberately indifferent response to that.<sup>427</sup> These are high standards to meet, requiring both objective and subjective evidence. Obtaining such evidence can also be very costly, thereby making it nearly impossible for most claimants to meet. Other courts aiming to broaden protections of people in pretrial detention use an objective-reasonableness standard or an inquiry based in the detainee's own experience. The latter is more dignity protective: there is no justification for allowing violations of human dignity just because the prison official was only negligently indifferent or had any other state of mind. Nor is there any justification for setting an evidentiary standard that is likely to be out of reach for most claimants. This is described briefly by the Second Circuit Court of Appeals in *Willey v. Kirkpatrick*.

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<sup>427</sup> Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). See *Estelle v. Gamble*, 429 U.S. 97 (1976).

Important precedent: *Willey v. Kirkpatrick*, 801 F.3d 51 (2d Cir. 2015)

Aaron Willey alleged that while he was incarcerated at the Wende Correctional Facility in New York, “he endured a cruel campaign of harassment at the hands of corrections officers in retaliation for his refusal to provide false information against another inmate.” The Court agreed.

The court explained: “Where, for example, an exposure to human waste lasts merely ten minutes, but that exposure takes the form of working in a well while facing ‘a shower of human excrement without protective clothing and equipment,’ a jury may find an Eighth Amendment violation. *See Fruit v. Norris*, [905 F.2d 1147, 1151](#) (8th Cir.1990). Spending three days in that well was not required to state a claim. Likewise, a less severe exposure may be constitutionally permissible if rectified in short order but may become cruel and unusual with the prolonged passage of time. *See McCord*, [927 F.2d at 846–47](#) (holding that occasional sewage backup onto cell floor on which inmate slept over two-year period, among other conditions, violated Eighth Amendment).

“The severity of an exposure may be less quantifiable than its duration, but **its qualitative offense to a prisoner's dignity should be given due consideration**. Here, the district court's analysis did not appear to consider the effect that the cell shields would have in exponentially amplifying the grotesquerie of the odor of the accumulating waste. Another relevant consideration increases the severity of Willey's second alleged exposure, which the district court did not discuss. Over those fourteen days in a filthy cell, Willey alleges that he was kept naked and without access to clothing. We do not mean to set out any precise formula—we do not say, for example, that this 14–day exposure without clothing was more or less grave than the later 28–day exposure with clothing—but any analysis must consider both the duration and the severity of an inmate's experience of being exposed to unsanitary conditions.”

Although this is not a case about pre-trial detention, it can be used to show that a harm to a person's dignity is actionable even without evidence of defendant's state of mind. The impacts of prison conditions and conduct on a person's dignity may constitute a constitutional violation under the 8<sup>th</sup> Amendment.

Correctional facilities have an affirmative duty to ensure individuals in pretrial detention do not inflict self-harm or commit suicide.<sup>428</sup> All but three states require suicide risk and mental health evaluations when a person enters a carceral facility.<sup>429</sup> However, the rule is generally that correctional officers, medical staff, and other officials have a duty to protect people in pretrial detention from inflicting self-harm only if the circumstances make those officials aware of an individual's risk for self-harming behavior.<sup>430</sup> Moreover, the response to such situations must respect the dignity of the person involved. In many instances, officials respond to acute mental health problems not by protecting their dignity but by isolating detainees on suicide watch, thereby exacerbating mental health stressors in a vulnerable population and often diminishing their sense of self-worth and their ability to exercise agency in a healthy and holistic way that would affirm their dignity.

Closely tied to the dignity aspects of bodily integrity and mental health, dignity-affirming treatment of people with physical disabilities should remain a priority. However, correctional facilities often lack the training and resources to care for the needs of those who have special physical needs. The lack of adequate medical care, correctional officers' misconceptions of mental or physical illness, and even the infrastructure in jails greatly affects the quality of life for people in pretrial detention who are disabled.<sup>431</sup>

## V. JUDICIAL REVIEW

The harms of pretrial detention are compounded by grievance procedures that are inadequate or non-existent, disciplinary measures that are often retaliatory, and standards for judicial review that are nearly impossible to meet, even for a person who is legally innocent. For instance, the Supreme Court has held that a pretrial detainee's claim of excessive force against prison officials under 42 U.S.C. § 1983 is invalid unless the detainee can prove that prison official's use of force was objectively unreasonable.<sup>432</sup> Some circuits, however, hold the legally innocent detainee to an even higher standard under the 8<sup>th</sup> Amendment, under which a correction officer's use of excessive force is constitutionally protected unless the detainee can prove that he acted with "deliberate indifference."<sup>433</sup> In order to prevail in court under this Eighth Amendment standard, an incarcerated person or a pretrial detainee must show that the prison official was

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<sup>428</sup> See 72 C.J.S. Prisons § 121.

<sup>429</sup> Fuller ET AL., *supra* note 423.

<sup>430</sup> See 72 C.J.S. Prisons § 117, *see also* Nagle v. Gusman, 61 F.Supp. 3d 609, 628 (E.D. La. 2014) ("The officer must be 'aware of a subatnatial and significant risk' that the prisoner will commit suicide and 'effectively disregard[] it.'").

<sup>431</sup> Penal Reform International, *Key facts*, <https://www.penalreform.org/issues/people-with-disabilities/key-facts/> (last visited Jan. 11, 2023).

<sup>432</sup> Kingsley v. Hendrickson, 576 U.S. 389, 390 (2015). *See also* Kate Lambroza, *Pretrial Detainees and the Objective Standard after Kingsley v. Hendrickson*, 58 AM. CRIM. L. REV. 429, 431-32 (2021).

<sup>433</sup> Lambroza, at 431-32.

actually aware of, yet disregarded, a substantial risk of harm to that person's safety.<sup>434</sup> Courts will often analyze the legal issues a pretrial detainee brings forth under both standards.<sup>435</sup>

To comport with human dignity, however, the standard should be whether the force or the conditions violate a person's right to be treated as a person with dignity or to live with dignity. The court should be considering the impact on the person subjected to the allegedly violative conduct, rather than requiring the injured person to adduce elusive and illusory proof of the prison official's mental state. Moreover, again, there should be no opportunity to defend a violation of dignity for because there is always a way to accomplish a legitimate penological goal with respect for dignity.

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*Reducing the risk of flight may be accomplished in ways that are consistent with human dignity*

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## VI. ALTERNATIVES TO PRETRIAL DETENTION

The legitimate penological purpose of pre-trial detention is to reduce the risk of flight pending trial; as noted above, retribution, deterrence, and rehabilitation are inapplicable where a person has not been found guilty of committing a crime<sup>436</sup> and restricting a person's liberty in the name of community safety is inconsistent with human dignity. It is clear, moreover, that reducing the risk of flight may be accomplished in ways that are consistent with human dignity. Court date reminders, such as phone calls, texts, mail, and e-mail, have proven to decrease the rate of people failing to appear at court hearings.<sup>437</sup> A Jefferson County, Colo., court notification program raised the appearance rate from 79% to 92% when the court-involved person was called to be reminded of the court date.<sup>438</sup> People who lack resources can be provided with information (and a ride). Social workers can work with people accused of a crime to determine whether there are social services can support the person.

The Inter-American Commission on Human Rights recommends the following:

1. the promise of the accused to submit to the procedure and not obstruct the investigation;
2. the obligation to submit to the care or surveillance of a given person or institution, in the conditions that are set for that purpose;

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<sup>434</sup> Farmer v. Brennan, 511 U.S. 825, 837 (1994).

<sup>435</sup> See 72 C.J.S. Prisons § 117; see also Gilmore v. Hodges, 738 F.3d 266, 271 (11th Cir. 2013) ("the minimal standard for providing medical care to a pretrial detainee is identical to the minimum standard required by the Eighth Amendment for a convicted prisoner, and thus we analyze the claim under the decisional law of both amendments.")

<sup>436</sup> As discussed in Chapter 3, retribution and deterrence are not consistent with human dignity even when there has been a conviction.

<sup>437</sup> Digard & Swavola, *supra* note 364, at 8.

<sup>438</sup> Timothy R. Schnacke ET AL., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 COURT REVIEW 86, 89 (2012),

<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview>.

3. the obligation to appear periodically (in person or by telephone or video) before the judge or the authority he or she may designate;
4. the prohibition on leaving a given geographic area without prior authorization;
5. withholding travel documents;
6. immediate abandonment of the domicile, in the case of domestic violence where the victim and the accused live together;
7. posting, by oneself or by a third person, of a bond in a sufficient amount based on individualized assessment of resources;
8. surveillance of the accused by some electronic device for tracking or determining his or her physical location; and
9. house arrest, in one's own home or in the home of another person, without surveillance or with such surveillance as ordered by the judge.<sup>439</sup>

These measures may be consistent with human dignity because they do not humiliate the person, they do not eliminate the aspects of the human experience that make a person what he or she is (agency over one's own life, engagement in a **community, full development of the personality**, protection of one's **body**) or deprive the person of what he or she needs to live with dignity (privacy, health, connection to others). Rather, they are burdens that are proportionate to the need and therefore avoid objectification, and because they are tailored to the individual situation, they ensure that the suspect is treated "as a person." This would parallel the Bouyid standard which prohibits the use of force against a person in a vulnerable situation except when made strictly necessary by the person's own conduct.

While home arrest is preferable to incarceration because it does not remove the person from their community or expose them to the dehumanization of carceral facilities and permits greater agency, there are nonetheless concerns about the indignities of electronic monitoring devices which may often be used in conjunction with home arrest to reduce the risk of flight. According to a recent study from George Washington University Law School,<sup>440</sup> the dignity-related harms of electronic monitoring include:

- Cost: "Monitoring fees, which sometimes range from \$2,800 to over \$5,000 a year, are imposed on people who are historically least positioned to pay."<sup>441</sup> The financial burden of electronic monitoring should not be imposed on any person whose guilt has not been established and without a reasonable assessment of their ability to pay.
- Lack of autonomy: "People on monitors are almost always required to remain in their home and cannot leave unless they obtain pre-approval—a process that is often not clear and often required days of advance planning.... [Furthermore, they] are subject to a range of restrictions that invade personal and family life and undermine autonomy

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<sup>439</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICA'S 123 (Dec. 30, 2013), <http://www.oas.org/en/iachr/pdl/reports/pdfs/report-pd-2013-en.pdf>.

<sup>440</sup> GEORGE WASHINGTON UNIVERSITY LAW SCH., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM (2021), <https://issuu.com/gwlawpubs/docs/electronic-prisons-report?fr=sOGI5NDcxODg3>.

<sup>441</sup> *Id.* at 3.



and dignity. In most places, people on monitors are limited in where, and with whom, they can live and are subject to home searches, exposing everyone in the house to unpredictable privacy invasions. Family members, friends and employers are often required to help supervise the person on a monitor, thus placing them in the role of de facto supervising agent.”<sup>442</sup> Restrictions on the person should be limited to their freedom of movement and those restrictions should be limited to what is necessary to protect against the risk of flight. In most situations, no other person needs to be aware that the person is being monitored so that the monitoring can be consistent with respect for the dignity of the suspect.

- Lack of privacy. “Agencies in every state contract with private companies to track, analyze and store location activity and movement data. This data is often shared with police, courts and other agencies. . . In many places, ankle monitors have audio features that allow for supervising agents to speak with and listen to people on the monitors, or the device has a beeping feature that alerts everyone in earshot of the person on the monitor.”<sup>443</sup> Again, monitoring information must be limited to the government authorities who need it to prevent flight; to respect the suspect’s dignity, no one who is not required to prevent flight should have access to information about the suspect, and no other use should be permitted.
- The threat of incarceration: “Monitoring sets people up to fail and be reincarcerated. The number and nature of monitoring rules, combined with the capacity of surveillance technology, facilitates easier detection of technical rule violations, which in turn drives reincarceration.”<sup>444</sup> Pre-trial conditions should not include penalties that threaten liberty without proof of guilt.

Monitoring is in almost all circumstances more protective of human dignity than incarceration and the threats to dignity of monitoring can often be minimized with attention to the individual circumstances and a commitment to proportionality of the burden with the risk of flight. Better technology, cost-shifting, and reformulated policies are all necessary to protect the dignity of a person under house arrest prior to trial. To be consistent with human dignity, these measures must have three qualities.

1. Conditions must not be so onerous that they treat a person as less than a person: they must ensure that people retain their agency (except what is necessary to protect against risk of flight), ensure that people retain connection to their communities and supporters, which is especially important when a person is going through a difficult time and is especially vulnerable, and they must avoid all humiliation and degradation.
2. They must not discriminate against people who are vulnerable, including the vulnerability of poverty. Requiring payment – whether for bail, for communication, for the use of monitoring devices, or otherwise – from people who have no resources is

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<sup>442</sup> GEORGE WASHINGTON UNIVERSITY LAW SCH., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM, *supra* note 440, at 3.

<sup>443</sup> *Id.* at 2.

<sup>444</sup> *Id.* at 3.

exploitative and dignity-diminishing. In the United States, discrimination on the basis of poverty has manifest disparate impact on women and on people who are not white. Other forms of vulnerability (disability, trauma, mental and physical health challenges) must also be taken into account.

3. Responses to violations of pre-trial conditions must be consistent with human dignity; incarceration and other dignity-denying punishment may not be used as a threat against violation or in response to violation.

Monitoring is also addressed in Chapter 7, relating to conditions of release.

Although in some circumstances, incarcerated and detained activists have catalyzed changes in the American criminal legal system by organizing behind bars, activism by those most affected is rarely possible for those who are detained before their trials who are at particular risk of retaliation.<sup>445</sup> Political organizing inside jails and prisons also involves repercussions and increased penalties for the individuals involved, such as placement in solitary confinement and additional criminal charges.<sup>446</sup> However, many local activists and progressive organizations rely on the experiences of people in pretrial detention to help effectuate broader criminal legal reform.<sup>447</sup>

Getting connected with community organizers during detention and after release enables people to share their individual stories more broadly with policy makers, the media, and other people outside of the criminal legal system. Personal stories create a powerful tool to effectuate change: raising awareness by sharing personal stories allows people to understand and helps individuals assert their dignity by speaking their truth and showing that their lives have meaning.<sup>448</sup>

## VII. ADVOCACY POINTS

To protect the human dignity of those who are suspected of or accused of committing a crime, we make the following recommendations.

1. Reduce unnecessary arrests. Contact with police or law enforcement does not have to lead to jail. Statutes can be changed to downgrade some offenses. Law enforcement officers can exercise discretion to resolve by a case treatment or services. In some situations, individuals with particular needs – those with mental health or substance-use issues, for example – may be deflected to support services without entering the

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<sup>445</sup> Daniel Teehan, *Inside the Dangerous World of Prison Organizing*, CURRENT AFFAIRS (Apr. 2, 2021), <https://www.currentaffairs.org/2021/04/inside-the-dangerous-world-of-prison-organizing>.

<sup>446</sup> *Id.*

<sup>447</sup> See Jennifer Peirce et. al, *A Toolkit for Jail Decarceration in Your Community*, VERA INST. OF JUST. (Oct. 2021), <https://www.vera.org/a-toolkit-for-jail-decarceration-in-your-community>.

<sup>448</sup> Jarret S. Lovell, *Media Power & Information Control: A Study of Police Organizations & Media Relations*, THE NAT'L INST. OF JUST. (May 2001), <https://www.ojp.gov/pdffiles1/nij/grants/197060.pdf>; see also Constance Grady, *How 70 years of cop shows taught us to valorize the police*, Vox (Apr. 12, 2021), <https://www.vox.com/culture/22375412/police-show-procedurals-hollywood-history-dragnet-keystone-cops-brooklyn-nine-nine-wire-blue-bloods>.

- criminal justice system.<sup>449</sup> (This is mentioned here rather than in the chapter on Arrests to highlight the implications for pretrial detention).
2. Replace money bail. Money bail discriminates against poor and working-class people and leads to unequal outcomes based on wealth. Common sense reforms include measures to accelerate the pace of court processes and to highlight relevant information early in the legal process. The use of unsecured bonds, which allows people accused of crimes to go home without paying bail, and would only require bonds upon failure to appear at a court date, is commonly used throughout the United States.<sup>450</sup>
  3. Expand access to legal counsel to defend individuals early in the judicial process.<sup>451</sup>
  4. Eliminate pre-trial detention<sup>452</sup> except where government can assert the need actual in extraordinary circumstances.
  5. Develop incentives for officials to work *with* the person accused of committing a crime rather than against them, including teams of professionals including social workers and others to help ensure that people accused of crimes will abide by pre-trial conditions and requirements.
  6. Improve conditions in facilities that house pretrial detainees and hold accountable officials who deprive detainees of their inherent human dignity.

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<sup>449</sup> Digard & Swavola, *supra* note 364, at 8.

<sup>450</sup> Digard & Swavola, *supra* note 364, at 8.

<sup>451</sup> *Id.* at 1.

<sup>452</sup> See, e.g., PRETRIAL JUSTICE INST., *Resources*, <https://www.pretrial.org/publications> (last visited Sept. 25, 2023).



## CHAPTER 3: SENTENCING

While in many parts of the world, and under international human rights law, sentencing for purposes of retribution (punishment) and deterrence is deemed inconsistent with human dignity, these goals are the mainstays of the American criminal legal system. This chapter will discuss the purposes of sentencing in general and advocate for sentencing reforms in order to support the commitment to dignity as inherent and inalienable in all human beings. First, we compare the penological goals of sentencing in the United States and in countries where the purpose of sentencing is defined by the demands of human dignity. Next, we consider the idea, accepted throughout the world, that respect for human dignity demands that the length of a sentence of incarceration be proportionate to the wrong done. The absence of a proportionality principle in US jurisprudence leads to disproportionately and unusually long sentences, including sentences of life, life without parole, and death which are generally prohibited in jurisdictions committed to principles of dignity. The chapter assesses the dignity violations inherent in these sentences, including as excessively long sentences apply to people who are young. It concludes with points for advocacy.

*Key dignity terms: the inherent worth of human life, equality and equal worth, anti-objectification, free will, bodily integrity, protection from vulnerability, to be treated as a person.*

### I. INTRODUCTION: REHABILITATION IS THE ONLY SENTENCING GOAL THAT IS CONSISTENT WITH HUMAN DIGNITY

The commitment to human dignity limits the very purposes for sentencing a person to prison, as well as the lengths of sentences, and the types of sentences imposed. Some sentences and some terms are inherently violative of human dignity. In the United States, sentencing decisions are made without regard to their impact on the dignity of the person being sentenced. This Chapter first addresses general principles and purposes of sentencing and then considers sentences of death, life, and virtual life.

The Supreme Court of the United States recognizes four penological goals – retribution (punishment), deterrence, rehabilitation, and incapacitation – as relevant to Eighth Amendment sentencing analysis.<sup>453</sup>

- Retribution is “punishment imposed (as on a convicted criminal) for purposes of repayment or revenge for the wrong committed.”<sup>454</sup>
- Deterrence can take two forms. Specific deterrence refers to the idea that punishments serve to prevent a sentenced person from engaging in future criminal

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<sup>453</sup> DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1 (2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf>.

<sup>454</sup> *Retribution*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/retribution> (last visited Jan. 12, 2023).

behavior, whereas general deterrence is meant to dissuade others from committing the same or similar crime.<sup>455</sup> Some forms of punishment, like beatings, can serve both purposes.

- Rehabilitation, as it relates to the criminal legal system, is “the process of restoring someone to a useful and constructive place in society.”<sup>456</sup> It can be used interchangeably with reintegration or resocialization since the purpose of rehabilitation is reintegration into society.<sup>457</sup>
- Incapacitation is a goal in sentencing because of the idea that removing someone who has committed a crime from society will disable them from committing future crimes.<sup>458</sup>

Of these, only rehabilitation is consistent with human dignity. The other sentencing theories used in the United States violate human dignity because they objectify people who have been convicted of crimes by burdening them for the purpose of advancing some purported social goal; moreover, these violations of dignity are arbitrary and unjustified because they don’t typically advance those goals.

It should also be noted that sentencing in general in the United States is not consistent with public opinion, even among victims of crime. Prison Policy Initiative reports that, in a 2016 study of crime victims, only 25% of respondents prefer to hold people accountable by imprisoning them, while 69% prefer to hold people accountable through different options beyond just prison.<sup>459</sup> Sixty-one percent prefer shorter sentences and spending more on prevention and rehabilitation whereas only 27% prefer longer prison sentences. The aversion to prison may be related to the fact that 52% think prison makes people more likely to commit crimes, compared with only 19% who believe prison helps to rehabilitate people.<sup>460</sup> Clearly, if we wanted a system that would help reduce crime and help people live with dignity, and even if we just wanted a system that truly advanced some form of justice, we would have a different system.

In addition to the goals of sentencing and the form of the sentence, the practice in the United States now deviates from other countries in the length of time to which people are sentenced to prison. Prior to the 1970s, the United States criminal legal system focused on indeterminate sentencing and rehabilitation.<sup>461</sup> An indeterminate sentence is one that is expressed in a range of years and works on the premise that some sentenced individuals will

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<sup>455</sup> *Specific Deterrence*, LEGAL DICTIONARY (Aug. 12, 2017), <https://legaldictionary.net/specific-deterrence/>.

<sup>456</sup> *Rehabilitation*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/rehabilitation> (last visited Jan. 12, 2023).

<sup>457</sup> Although we understand that rehabilitation may have a problematic or offensive connotation for some, we use it in this Policy Guide because it is the term most commonly used to describe the overall dignity-aligned goal of helping to ensure that a person can successfully rejoin society and live with dignity after they have been incarcerated.

<sup>458</sup> MACKENZIE, *supra* note 453, at 9.

<sup>459</sup> Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2022*, *supra* note 303.

<sup>460</sup> *Id.*

<sup>461</sup> MACKENZIE, *supra* note 453, at 9.

successfully rehabilitate in prison and may thus become eligible for release prior to the maximum possible term.<sup>462</sup>

Beginning in the 1970s, the criminal legal system shifted away from indeterminate sentencing and rehabilitation and used incapacitation and retribution.<sup>463</sup> This trend emphasized punishment and clearly established terms, known as mandatory minimum sentencing that withdraw a judge's discretion to impose a more lenient sentence, regardless of individual circumstances.<sup>464</sup> In the 1990s, retribution became the predominant goal and sentences became even harsher. For instance, "three-strikes" laws began to proliferate in many states. These laws sentenced to life a person who had been convicted of three serious offenses, with "seriousness" varying widely across different jurisdictions.<sup>465</sup> Unique in the world, the three-strike laws exemplify the total rejection of any rehabilitative or re-socializing inclination and, with it, the disposal of human dignity: without regard to individual circumstances, the nature of the past convictions, or the likelihood of effective re-entry, three-strike laws strike at the core of a person's dignity by reducing the value of their life to a simple, harsh, and disproportionate rule. This, combined with the advent of truth in sentencing laws, which require that a sentenced person complete a minimum of 85% of their sentence before they can be considered for release, has led to harsher sentencing, longer sentences being served, and less judicial discretion in sentencing<sup>466</sup>— all in violation of principles of human dignity which value the inherent and inalienable right of each person to live their entire lives with dignity.

These policies have not contributed to a reduction in crime, but they have dramatically increased the prison population. The Vera Institute reports that by 2012, the impact of these policies

"had become clear: in 40 years, the prison population grew by 705 percent, from nearly 175,000 state inmates in 1972 to just under 1.4 million as of January 1, 2012. With more than one in every 104 American adults in prison or jail, the U.S. has the highest incarceration rate in the world—at 716 per 100,000 residents."<sup>467</sup>

The United States incarceration rate is dramatically out of proportion with the rest of the world. For instance, in Germany and the Netherlands, the number of residents incarcerated per 100,000 is 79 in Germany and 82 in the Netherlands.<sup>468</sup>

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<sup>462</sup> Cornell Law Sch., Legal Information Institute, Wex, *Indeterminate sentence*, [https://www.law.cornell.edu/wex/indeterminate\\_sentence](https://www.law.cornell.edu/wex/indeterminate_sentence).

<sup>463</sup> MACKENZIE, *supra* note 453, at 12.

<sup>464</sup> *Id.* at 18.

<sup>465</sup> *Id.* at 19.

<sup>466</sup> *Truth in Sentencing Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/t/truth-in-sentencing/> (last visited Sept. 25, 2023).

<sup>467</sup> Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, at 7, VERA INST. OF JUST. (Oct. 2013), <https://www.vera.org/downloads/publications/european-american-prison-report-v3.pdf>.

<sup>468</sup> *Id.* at 5.

## II. THE PURPOSE OF THE CRIMINAL LEGAL SYSTEM SHOULD BE TO ADVANCE HUMAN DIGNITY

The purpose of any legal system should be to advance human dignity. (The alternative would be a legal system that advances some other goal, at the expense of human dignity). That is true in US as it is anywhere else in the world, and it is true in the criminal law as it is in any other area of law.

From a dignity standpoint, both retribution and deterrence are problematic. Although the motivations differ – retribution acts out of a desire for revenge, while deterrence acts with the intent of preventing future wrongdoing – they both objectify the person being sentenced by imposing a burden on them that is not made strictly necessary by their own conduct (see Bouyid).<sup>469</sup> In both instances, the sentence is a means to an end and thus violative of human dignity. Incapacitation is similar because it imposes a punishment not for what the person has done but for presumed future guilt. It thus violates the dignity-based principle of presumed innocence and responsibility.

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*“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”*

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Retribution is additionally incompatible with human dignity because it has no rationale: why is taking a person out of society and forcing them to live in inhumane conditions for a period of their lives a rational response to the commission of a crime, even a serious one? Nor does it contain any articulable goal (retribution until ... what happens?) or limiting principle: How many years for how many ounces or how many victims or how much property stolen? How much punishment is enough? Where is the line that distinguishes proportionate punishment from excessive punishment? Often, in the popular vernacular, retribution is renamed as “justice,” as in when people call for harsh punishments in order to have “justice” for the victims. But retribution does not right the scales of justice; it simply harms the dignity of the person convicted.

Deterrence is additionally problematic because the evidence about the effectiveness of imprisonment as a deterrent is uncertain at best. According to the National Institute of Justice:

“Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime. Prisons are good for punishing criminals and keeping them off the street, but prison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.

Increasing the severity of punishment does little to deter crime. Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions

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<sup>469</sup> Bouyid v. Belgium, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40.



for specific crimes. More severe punishments do not “chasten” individuals convicted of crimes, and prisons may exacerbate recidivism.”<sup>470</sup>

#### A. Rehabilitation Advances Dignity

Sentencing based on rehabilitation or reintegration is the most likely to be dignity affirming. This is consistent with international law and the law of many other countries. As Terrell Carter, Rachel López & Kempis Songster have written,

“the International Covenant on Civil and Political Rights (ICCPR), which is binding on the United States, guarantees respect for detained individuals and ensures their humane, restorative treatment as follows. First, Article 10(1) provides that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ Second, Article 10(3) provides that ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.’ General Comment No. 21 on Article 10 by the U.N. Human Rights Committee, the treaty body that monitors the implementation of the ICCPR, further clarified that ‘[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.’”<sup>471</sup>

Following this principle, the Canadian Supreme Court has written:

“The objective of rehabilitation is intimately linked to human dignity in that it reflects the conviction that all individuals carry within themselves the capacity to reform and re-enter society. ... [The] criminal law is based, and must be based, ‘on a conception of the human being as an agent who is free and autonomous and, as a result, capable of change.’”<sup>472</sup>

Similarly, the German Constitutional Court explains it this way:

“Penal institutions are obliged, even in the cases of life imprisonment, to promote the rehabilitation of the

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*“All individuals carry within themselves the capacity to reform and re-enter society.”*

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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.

“The court has emphasized several times that the demand to achieve a reintegration into society [of the criminals] is constitutionally consistent with the self-understanding of a community which put human dignity at its center and which

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<sup>470</sup> Nat’l Inst. of Just. Five Things About Deterrence, U.S. DEP’T OF JUST. (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>.

<sup>471</sup> Terrell Carter, Rachel López, and Kempis Songster, *Redeeming Justice*, 116 Nw. U. L. Rev. 315 (2021), <https://scholarlycommons.law.northwestern.edu/nulr/vol116/iss2/1>.

<sup>472</sup> R. v. Bissonnette, [2022] S.C.C. 23 (Can.), *supra* note 24, at para. 83.

is committed to the principle of social justice... The condemned offender must be granted the chance to reenter the community after having atoned for his crime. It is the duty of the state to take all possible measures it can [reasonably] be expected to bear, which are useful and necessary to achieve this goal of the execution of the criminal penalty."<sup>473</sup>

According to an extensive study conducted by the Vera Institute, sentencing in Germany and the Netherlands is limited to rehabilitation as understood in the sense of resocialization.<sup>474</sup> Indeed, rehabilitation is clearly stated in the law:

"According to Germany's Prison Act, the sole aim of incarceration is to enable prisoners to lead a life of social responsibility free of crime upon release, requiring that prison life be as similar as possible to life in the community (sometimes referred to as "the principle of normalization") and organized in such a way as to facilitate reintegration into society."<sup>475</sup>

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*Prisoners are encouraged to maintain and cultivate relationships with others both within and outside the prison walls.*

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Similarly, "the core aim of the Netherlands 1998 Penitentiary Principles Act is the re-socialization of prisoners in which incarceration is carried out with as few restrictions as possible through the principle of association (both within prison and between prisoners and the community), and not separation. Thus, prisoners are encouraged to maintain and cultivate relationships with others both within and outside the prison walls."<sup>476</sup>

Understanding rehabilitation as reintegration or resocialization is the best way to ensure that the goals of rehabilitation are aligned with human dignity. As we've seen, an essential component of dignity is ensuring each person is able to live in community with others (as described in Chapter 2 concerning pretrial detention). By contrast, there is simply no evidence to support the view that separating a person from society and enclosing them with others who have also struggled with the criminal legal system will help them live with dignity in society.

Because sentencing practices in both Germany and the Netherlands focus more on rehabilitation than retribution, intermediate and non-custodial sanctions are used more frequently, with incarceration only used sparingly, for much shorter periods of time than in the United States.<sup>477</sup> Using incarceration only when no alternative is suitable ensures that more people can maintain greater connections with other people while they are paying their debt to society.<sup>478</sup> This respects their dignity as people

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*Understanding rehabilitation as reintegration or resocialization is the best way to ensure that the goals of rehabilitation are aligned with human dignity*

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<sup>473</sup> BVerfG, Life Imprisonment (*lebenslange Freiheitsstrafe*) 45 BVerfGE 187, June 21, 1977 (Ger.).

<sup>474</sup> Subramanian & Shames, *supra* note 467, at 3.

<sup>475</sup> *Id.* at 7.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.* at 8-9.

<sup>478</sup> *Id.* at 13.

while the sentence is served, and contributes to their well-being and reconnection with society upon completion of the sentence. (See Chapter 7 on dignity following release from prison in the United States). A smaller prison population would also help make sure that those who are incarcerated have the support they need and are able to live with dignity even while inside. There is a very strong link between prison overcrowding and the undignified conditions in which people in prison live.

### III. DIGNITY REQUIRES PROPORTIONALITY BETWEEN CRIME AND PUNISHMENT

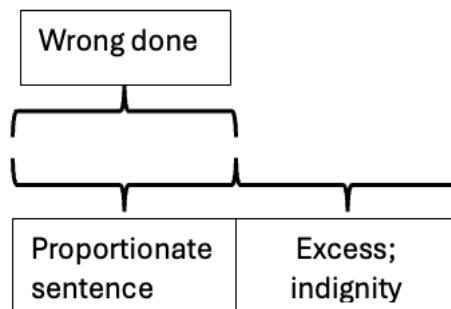
In 1996, Clarence Givens was sentenced to 110 years in Wisconsin for selling less than three grams of heroin to an undercover informant. Because of prior nonviolent offenses on his record, the prosecutor was authorized to charge him under the state’s habitual offender law, which allows additional years to be added to a sentence based on prior convictions, regardless of the severity of the present offense. The sentencing judge referred to Givens as a “genocidal merchant of death” and cautioned him and others not to expect “...leniency from the courts if they persist in their vile behavior.” The judge said he wished to send “a message to those struggling to raise their children in neighborhoods ruled by violence and drugs that the courts will deal harshly with those who drain the lifeblood of their neighborhoods.”<sup>479</sup>

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*Any punishment that exceeds the severity of the crime violates human dignity*

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The United States is an outlier in that its constitutional guarantee against cruel and unusual punishment contained in “The Eighth Amendment contains no proportionality guarantee.”<sup>480</sup> Courts around the world, from the most developed nations to nations still developing their constitutional commitment to dignity, have recognized that a sentence must be proportional if it is to comport with human dignity. Proportionality means that the punishment fits the crime; any punishment that exceeds the severity of the crime violates human dignity because while some portion of the sentence is suited to the crime, the remainder objectifies the person by burdening them not for what they have done but for some other purpose, be it general or specific deterrence, or retribution.



<sup>479</sup> Ashley Nellis, *America’s surge in life sentences*, WORLD PRISON BRIEF (June 16, 2021), <https://www.prisonstudies.org/news/america%E2%80%99s-surge-life-sentences>.

<sup>480</sup> Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

Proportionality is required not only to accomplish the stated goal of the criminal law – to impose a burden for a wrong done – but also to accomplish dignity goals: to ensure individualized assessment, to protect against sentences so harsh that they demean the humanity of the person, and to protect against objectification. The story of Mr. Givens violates each of those dignity values.

In Canada, the principle of proportionality, though not itself constitutionally required by the cruel and unusual punishment section of the Canadian Charter of Rights and Freedoms, nonetheless has “constitutional dimension” because that section implicitly demands adherence to dignity. As the Supreme Court has repeatedly explained “The principle of proportionality is so fundamental that it has a constitutional dimension under s. 12 of the Charter, which forbids the imposition of a sentence that is so grossly disproportionate as to be incompatible with human dignity.”<sup>481</sup>

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*Where the length of a sentence bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender’s dignity is assailed.*

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The Federal Constitutional Court of Germany has several times invalidated sentences of life with or without the possibility of parole as violative of human dignity on account of disproportion. As the court has explained:

“Every penal sanction must bear a just relation to the severity of the offense and the guilt of the offender. The command to respect human dignity means in particular that cruel, inhuman and degrading punishments are not permitted. The offender may not be turned into a mere object of [the state’s] fight against crime under violation of his constitutionally protected right to social worth and respect. The fundamental prerequisites of individual and social existence of men must be preserved.”<sup>482</sup>

These principles are embedded in constitutional law throughout the world. In one case concerning the theft of some stock from a nearby farm, the Constitutional Court of Namibia insisted that a sentence in Namibia be proportionate in order to respect human dignity:

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender’s dignity is assailed.

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<sup>481</sup> R. v. Bissonnette, [2022] S.C.C. 23 (Can.), *supra* note 24, at para. 52. See also R. v. Hills, [2023] S.C.C. 2, para. 35 (Can.) (stating that section 12 of the Canadian Charter “protects against the imposition of punishment that is ‘so excessive as to be incompatible with human dignity.’”).

<sup>482</sup> BVerfG, Life Imprisonment (*lebenslange Freiheitsstrafe*) 45 BVerfGE 187, June 21, 1977 (Ger.).

“Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise would be to breach the constitutional principle of dignity.”<sup>483</sup>

These principles need to be adopted and adhered to in the United States. So far, the Supreme Court has not been open to these arguments.

The problem is exacerbated by the court’s deference for state policy regarding criminal sentencing, even when the policy allows for excessive sentences and even when it serves no purpose. For example, the court in *Hutto v. Davis* held that a statutorily mandated prison term of 40 years and a fine of \$20,000 for the possession and distribution of approximately nine ounces of marijuana was not excessive.<sup>484</sup> Without concern for the life or dignity of Roger Trenton Davis, (whom it did not name), the court concluded that federal courts should be “[reluctant] to review legislatively mandated terms of imprisonment.”<sup>485</sup> Even Justice Powell who viewed the sentence as “unjust and disproportionate to the offense,”<sup>486</sup> concurred on the ground that the limits of a prison sentence are normally “a matter of legislative prerogative.”<sup>487</sup> Roger Trenton Davis was sent to prison for the remainder of his life for cannabis possession.

It is not clear why the courts in the United States are willing, repeatedly, to subordinate the need to treat each person with dignity to abstract principles of federalism (where the federal government including the courts defer to state authority to decide what behavior to criminalize and to determine the appropriate punishments) and of separation of powers (where the judiciary defers to legislative authority). Other countries, like Germany and the Netherlands, have managed to maintain structural integrity while respecting individual dignity in sentencing.

Like dignity, neither separation of powers nor federalism is explicit in the federal constitution. The Court has inferred them from the structure of the Constitution, but it could just as well infer human dignity from Bill of Rights. But unlike dignity, both federalism and separation of powers prioritize majoritarian political preferences at the expense of individual rights. A dignitarian approach, however, would preserve the non-derogable rights of the individual even against the presumed preferences of a majority, particularly when that preference is for harsher penalties and longer prison sentences. Moreover, any majoritarian justification for harsher retributive penalties is belied by the fact, as noted above, that public opinion does not favor them. Nor, to repeat, is there evidence that administrative or legislative preferences for dignity-depriving punishments even work.

The Court's reluctance to review sentencing policies enacted by individual states has led to multiple decisions upholding excessive and unfair prison terms. In *Lockyer v. Andrade*, the court upheld a sentence of two consecutive terms of 25 years to life as a penalty for stealing \$150 worth

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<sup>483</sup> Daniel and Another v. Attorney General and Others [2011] NAHC 66, at para 80 (Mar. 10, 2011) (Namib.), <https://namiblii.org/na/judgment/high-court/2011/66>.

<sup>484</sup> *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

<sup>485</sup> *Id.* at 374 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

<sup>486</sup> *Id.* at 375 (Powell, J., concurring).

<sup>487</sup> *Id.* at 377 (Powell, J., Powell concurring).

of videotapes.<sup>488</sup> In *Ewing v. California*, the court upheld a prison term of 25 years as penalty for the crime of stealing \$1200 worth of golf clubs.<sup>489</sup> The court held that California's public-safety interest in incapacitating and deterring recidivist felons justified these excessive prison terms.<sup>490</sup> This view of sentencing which values the asserted public-safety interest of a state over the human impact of excessive penalties degrades human dignity both because it is cruel and because it objectifies the person and fails to take into account their individual and inherent worth, denying them the right to live lives of dignity. The justification further dissolves because no evidence supports the proposition that the excessive sentence in fact advances public safety.

In his dissent in *Lockyer*, Justice Souter examined the way California's Career Criminal Punishment Act requires the imposition of sentences that are disproportionate to the crime. Justice Souter wrote:

“Whether or not one accepts the State's choice of penological policy as constitutionally sound, that policy cannot reasonably justify the imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense.... Since the defendant's condition has not changed between the two closely related thefts, the incapacitation penalty is not open to the simple arithmetic of multiplying the punishment by two, without resulting in gross disproportion even under the State's chosen benchmark.”<sup>491</sup>

Consistent with human dignity as understood in the court's own Eighth Amendment jurisprudence as well as with the constitutional law of nations around the world and globally respected international human rights law, the court should at the very least ensure that sentences imposed by legislatures and courts in both state and federal systems are proportional to the crime found to have been committed and based on an individualized assessment of the convicted person's wrongdoing.

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*The court should at the very least ensure that sentences are proportional to the crime found to have been committed and based on an individualized assessment of the convicted person's wrongdoing.*

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#### IV. THE DEATH PENALTY IS INCONSISTENT WITH HUMAN DIGNITY.

In 1976, the United States Supreme Court affirmed that the constitutional prohibition against cruel and unusual punishment allows the imposition of the death penalty,<sup>492</sup> finding that it “comports with the basic concept of human dignity at the core of the Amendment.”<sup>493</sup> By contrast, many countries and the European Union have banned it on the ground that it, per se, violates human dignity.

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<sup>488</sup> *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

<sup>489</sup> *Ewing v. California*, 538 U.S. 11, 30-31 (2003).

<sup>490</sup> *Id.* at 29.

<sup>491</sup> *Lockyer*, 538 U.S. at 81-82 (Souter, J., dissenting).

<sup>492</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>493</sup> *Id.* at 182.

The US Supreme Court, however, has not only found it to be not inconsistent with dignity, it has accepted the asserted penological goals of retribution and deterrence of prospective offenders as justifications for taking their life.

As to the first, the court recognized that “Retribution is no longer the dominant objective of the criminal law,” but neither is it “a forbidden objective, nor one inconsistent with our respect for the dignity of men.”<sup>494</sup> Despite arguments to the contrary, the court decided that the retributive goals of the criminal law system (a) supported the death penalty and (b) ensured that “citizens [would] rely on legal processes, rather than self-help, to vindicate their wrongs.”<sup>495</sup> That is, the court explained, because members of the public want people who are convicted of certain crimes to be killed, it must be constitutional. The Court allowed it – entirely ignoring that the death penalty violated human dignity and therefore the people’s desire for it (even if true) would never justify the violation of dignity. Who are these citizens? And why must their voices prevail?

The second justification stands on even weaker ground: as the court acknowledged, “Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders... have been inconclusive.”<sup>496</sup> That is, there is literally no factual basis that justifies capital punishment. Moreover, the court explicitly allowed states to impose a harsher penalty even if they deemed “less severe penalties adequate to serve the ends of penology.”<sup>497</sup> Thus, the court has held, the death penalty is not inherently inconsistent with human dignity, there is no basis for believing that it is effective in reducing crime, and it may be used even if it is no more effective than a lesser sentence.<sup>498</sup>

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*“a society for which the dignity of the individual is the supreme value.”*

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It is permissible even though it is disproportionate and ineffective. We kill people because some group of citizens can be said to want it. Notwithstanding a perfunctory nod to the concept of dignity, the court has entirely failed to evaluate the impact of the death penalty on the dignity of the people who are sentenced to die.

In *Gregg v. Georgia*, Justices Brennan and Marshall took up the challenge and examined the role of dignity in American law with greater care than in any other Supreme Court opinion. Their opinions are worth quoting at length: like the foreign cases quoted in this chapter, these dissenting opinions are not binding on any court, but they illustrate a judicial capacity for understanding and explaining the law’s need to protect human dignity and they provide a language for forming arguments in favor of dignity in sentencing.

In framing the question, Brennan assumed the American commitment to human dignity: “The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some

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<sup>494</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

<sup>495</sup> *Id.*

<sup>496</sup> *Id.* 184-85.

<sup>497</sup> *Id.* at 182-183.

<sup>498</sup> *Id.* at 183-85 (“Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view.”).

of its members to death.”<sup>499</sup> Note his assumption that the United States is a society “for which the dignity of the individual is the supreme value.” He then contrasts the commitment to dignity with the retributive impulse adopted by the majority, as if the two approaches are mutually exclusive.

“[T]he struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are a result of the growth of sciences of behavior during the nineteenth, and the twentieth centuries.”<sup>500</sup>

This understanding of the inherent dignity of every person comes to us from the founders’ conception of democracy, but is continually enriched by modern science. Moreover, this satisfies even the court’s stringent reading of constitutional liberty as encompassing only those things that are “deeply rooted in the nation’s history and traditions” and central to the nation’s commitment to “ordered liberty.”<sup>501</sup>

Once accepted, he continues, dignity must be seen as an absolute value. It must be respected at all times for all people, no matter what: the commission of even a horrific crime does not eliminate human dignity.

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*The State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings.*

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“Moral concepts’ recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be degrading to human dignity.”

Courts are therefore obligated not only to acknowledge the fact of human dignity but to make a “judicial determination whether the punishment of death comports with human dignity.”<sup>502</sup> That is, dignity is not subordinate to the American concept of justice; rather, it is the measure of it. Brennan continues:

“Death, for whatever crime and under all circumstances, is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity. . . . An executed person has indeed ‘lost the right to have rights.’

“Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits

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<sup>499</sup> *Id.* at 228 (Brennan, J., dissenting).

<sup>500</sup> *Gregg v. Georgia*, 428 U.S. 153, 228 (1976).

<sup>501</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2283 (2022).

<sup>502</sup> *Gregg*, 428 U.S. at 229-30.



pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment.

“The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.”<sup>503</sup>

Note Justice Brennan’s point: the death penalty takes not only the life of a person but, without any possible justification, their dignity as well.

Justice Marshall’s dissent was equally attentive to human dignity, though pithier. He concluded that in order to be sustained by the Eighth Amendment, the punishment must “comport with the basic concept of human dignity at the core of the Amendment.” The death penalty, therefore, must fail: the taking of a life “because the wrongdoer deserves it,” is absolutely invalid insofar as “such a punishment has as its very basis the total denial of the wrongdoer’s dignity and worth.”<sup>504</sup> No human life deserves to be annihilated.

Although not prevailing in the United States at this time, the approach of Justices Brennan and Marshall has been influential in other parts of the world. For example, in 1995, the South African Constitutional Court invalidated the death penalty, despite it being permitted under the 1993 Interim Constitution, in partial reliance on these opinions. In *State v. Makwanyane*, the court noted specifically, “[the death penalty] is also an inhuman punishment for it involves, by its very nature, a denial of the executed person’s humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.”<sup>505</sup> In Tanzania, a landmark case, *Mbushu Alias Dominic Mnyaroje & Another v. Republic*, also held that the death penalty violated human dignity. The Tanzanian court based its holding upon an amendment to their national constitution, which in summation holds that dignity is valued above all else in humanity and that the execution of a human being violates such articles of the Tanzanian Constitution.<sup>506</sup>

Justices Brennan and Marshall aligned with global thinking on dignity rights in one additional way. It is well established that the Eighth Amendment – perhaps alone among the first 8

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*The arc of the law bends toward dignity.*

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constitutional amendments – “has not been regarded as a static concept [and] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>507</sup> That is, dignity carries within it the capacity for growth and promise of progress. The arc of the law, as it were, bends toward dignity. But whereas the majority of the U.S. Supreme Court took note of public opinion which, it said, continued to seek retribution and believe, despite the lack of evidence, in deterrence, courts in other countries see a progressive evolution that

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<sup>503</sup> *Id.* at 230 (quoting *Furman v. Georgia*, 408 U.S. 238, 273 (1972)).

<sup>504</sup> *Gregg*, 428 U.S. at 240-241.

<sup>505</sup> *State v. Makwanyane & Another* 1995 (3) SA 391 (CC) (S. Afr.) (Chaskalson, P), *supra* note 222.

<sup>506</sup> *Mbushu Alias Dominic Mnyaroje & Another v. Republic* [1995] TZCA 1 (Jan. 30, 1995) (Tanz.).

<sup>507</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

reflects increasing attention to human dignity. In the Life Imprisonment case, the German Constitutional Court explained:

“The dignity of the human being is indispensable. The recognition of what is necessary to comply with the command to respect human dignity is, however, inseparable from the historical development. The history of criminal law clearly shows that most cruel punishments were always replaced by milder punishments. The progress, away from more raw towards more humane, away from more simple towards more differentiated forms of punishment, has continued, and the path future progress will take becomes visible [from this historical analysis]. The judgment on what is necessary for [the maintenance of] human dignity can therefore only rest on present understanding and claim no right to timeless validity.”<sup>508</sup>

The Canadian Supreme Court has reiterated the same time and again:

“Since a society’s standards of decency are not frozen in time, what constitutes punishment that is cruel and unusual by nature will necessarily evolve, in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world... ‘[w]hat is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity’. Punishments that we regard as incompatible with human dignity today were common and accepted in the past. The reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values.”<sup>509</sup>

This evolving understanding of dignity aligns with the attitude toward dignity of the drafters of the Universal Declaration of Human Rights who wrote, in the preamble:

“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom...”<sup>510</sup>

*Gregg v. Georgia*, by contrast, reflects the U.S. Supreme Court’s determination to rely on deterrence and retribution as valid bases for punishment despite their inconsistency with principles of dignity and despite the absence of evidence that they even advance these goals. It also reflects the Supreme Court’s turning away from a commitment to growing dignity rights. It was decided nearly 50 years ago and has not been revised with an eye toward dignity.

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<sup>508</sup> BVerfG, Life Imprisonment (*lebenslange Freiheitsstrafe*) 45 BVerfGE 187, June 21, 1977 (Ger.).

<sup>509</sup> *R. v. Bissonnette*, [2022] S.C.C. 23 (Can.), *supra* note 24, at para. 65.

<sup>510</sup> UDHR, *supra* note 7, at preamble (emphasis added).

## V. DIGNITY PROHIBITS SENTENCES OF LIFE WITHOUT A REASONABLE POSSIBILITY OF PAROLE

The United States sentences more people to life in prison than any other country. More than 200,000 people are serving life sentences – one out of every seven people in prison.<sup>511</sup> More people are now serving life sentences than there were people in prison serving any sentence in 1970.<sup>512</sup> About 17,120 people convicted of nonviolent offenses are serving life sentences, including 5,300 people convicted of a drug offense and 4,700 people convicted of a property offense.<sup>513</sup>

A foreseeable result of sentencing people to spend their life in prison is that people are aging in the custody of prison facilities. As a result of decades of imposing life sentences, over 60,000 people aged 55 or older are spending their lives in prison.<sup>514</sup> However, prison facilities are ill equipped to provide care for elderly people or people in poor health. Due to the living conditions in prison and the stresses involved in serving life sentences, these elderly people are likely in worse health than they would be had they not spent their lives in prison.

Internationally, confining people to penal facilities for their entire lives is falling out of favor as a criminal penalty.

“Nine member nations of the Council of Europe have no provisions for a life sentence, and 32 nations allow a life sentence but with a fixed term of years after which the individual can be considered for parole. The range of these terms is generally between 7 and 25 years. Only five nations make no provision for parole of life-sentenced prisoners, and six others prohibit parole release for some categories of offenses. In addition, many Latin American nations—including Brazil, Costa Rica, Columbia, El Salvador, Peru, and Mexico—have banned any form of life imprisonment.”<sup>515</sup>

In 2022, the Supreme Court of Canada reviewed a provision that permitted a convicted murderer to apply for parole only after serving 25 years in prison, and a further provision that allowed the 25-year period to run sequentially in the case of multiple convictions. Under the scheme, someone who was convicted of killing 4 people would not be able to apply for parole before serving 100 years – effectively a sentence of life without parole. The Court held that a functional sentence of life without parole violated s. 12 of the Canadian Charter of Rights and Freedoms (akin to the 8<sup>th</sup> Amendment) because it violated human dignity.<sup>516</sup>

“This Court recently stated that the purpose of s. 12 is ‘to prevent the state from inflicting physical or mental pain and suffering through degrading and

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<sup>511</sup> Nellis, *America’s surge in life sentences*, *supra* note 479. See generally Terrell Carter, Rachel López, and Kempis Songster, *Redeeming Justice*, 116 Nw. U. L. Rev. 315 (2021), <https://scholarlycommons.law.northwestern.edu/nulr/vol116/iss2/1>.

<sup>512</sup> *Id.*

<sup>513</sup> MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE* 9-10 (New Press, 2018).

<sup>514</sup> NELLIS, *NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT*, *supra* note 113, at 20.

<sup>515</sup> Marc Mauer, *Incarceration Rates in an International Perspective*, THE SENTENCING PROJECT (June 28, 2017), <https://www.sentencingproject.org/policy-brief/incarceration-rates-in-an-international-perspective/>.

<sup>516</sup> *R. v. Bissonnette*, [2022] S.C.C. 23 (Can.), *supra* note 24 (considering s. 12 of the Canadian Charter of Rights and Freedoms: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”).

dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals.’ Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all Charter rights. Generally speaking, the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect. This respect is owed to every individual, irrespective of their actions.”<sup>517</sup>

The Court then explained that dignity serves two functions in the interpretation and application of s. 12: “Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity.”<sup>518</sup> That is, a sentence may violate dignity because it is inherently inhumane (as the death penalty is considered to be in most countries) or because it is disproportionate (a long sentence for a minor infraction). Both are impermissible.

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*“No crime, no matter how appalling it might be, can justify imposing a punishment that is intrinsically incompatible with human dignity.”*

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“Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. The conclusion that a sentence of imprisonment without a realistic possibility of parole is incompatible with human dignity is supported by an analysis of the effects that such a sentence may have on all offenders on whom it is imposed, as well as by a review of international and comparative law.”<sup>519</sup>

“No crime, no matter how appalling it might be, can justify imposing a punishment that is intrinsically incompatible with human dignity, like a sentence of imprisonment for life without a realistic possibility of parole. Since such a punishment must quite simply be excluded from the arsenal of punishments available to the state, the mere possibility that it may be imposed constitutes an infringement of s. 12 of the Charter.”<sup>520</sup>

The Court surveyed international and comparative law and found a broad global consensus both on the principle that dignity underlies the criminal law and on the dignity-based prohibition against the death penalty and life sentences, with the United States as the outlier.

“Not only do such punishments bring the administration of justice into disrepute, but they are cruel and unusual by nature and thus contrary to s. 12 of the Charter. They are intrinsically incompatible with human dignity because of their degrading

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<sup>517</sup> *Id.* at para. 59.

<sup>518</sup> *R. v. Bissonnette* [2022] S.C.C. 23 (Can.), *supra* note 24, at para. 60.

<sup>519</sup> *Id.* at 73.

<sup>520</sup> *Id.* at para. 111.

nature, as they deny offenders any moral autonomy by depriving them, in advance and definitively, of any possibility of reintegration into society. Sentences of imprisonment for life without a realistic possibility of parole may also have devastating effects on offenders, who are left with no incentive to rehabilitate themselves and whose incarceration will end only upon their death.

“Parliament may not prescribe a sentence that negates the objective of rehabilitation in advance, and irreversibly, for all offenders. This penological objective is intimately linked to human dignity in that it reflects the conviction that every individual has the capacity to reform and re-enter society. ... What is at stake is our commitment, as a society, to respect human dignity and the inherent worth of every individual, however appalling the individual’s crimes may be.”<sup>521</sup>

This follows the decades-old practice in Europe, galvanized by the German Constitutional Court in 1977 which invalidated a sentence of life unless the sentenced person “has a concrete and principally attainable possibility to regain freedom at a later point in time; for the core of human dignity is struck if the convicted criminal has to give up any hope of regaining his freedom no matter how his personality develops.”<sup>522</sup>

Those who know they are likely to spend the rest of their lives in prison are deprived of their dignity right to hope for a future outside. They lose the ability to envision a life where they make decisions free from the confines of incarceration. The idea of hope as an essential element to the legal right of human dignity is seen in court decisions around the world. The European Court of Human Rights adopted this view in barring the imposition of Life Without Parole based on the principle that incarcerated people have the “right to hope.”<sup>523</sup> Therefore, as one analysis explains, “individuals who have transformed themselves in prison and have atoned for the harm they have caused should be considered for release at some point in their prison term.”<sup>524</sup>

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*“What is at stake is our commitment, as a society, to respect human dignity and the inherent worth of every individual, however appalling the individual’s crimes may be.”*

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In the United States, we have only just recently recognized this and only with respect to people who were minors when their crime was committed. In *Miller v. Alabama*, Justice Kagan wrote:

“The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment.

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<sup>521</sup> R. v. Bissonnette [2022] S.C.C. 23 (Can.), *supra* note 24, at paras. 140, 141.

<sup>522</sup> BVerfG, Life Imprisonment (*lebenslange Freiheitsstrafe*) 45 BVerfGE 187, June 21, 1977 (Ger.), available at <https://hrcr.org/safrica/dignity/45bverfge187.html>.

<sup>523</sup> Case of Vinter and Others v. The United Kingdom, App. No. 66069/09, 130/10 and 3896/10, Eur. Ct. H.R. (sitting as a Grand Chamber) (July 9, 2013) (Power-Forde, J., concurring), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2266069%2F09%22%2C%22itemid%22:%5B%22001-122664%22%5D%7D>.

<sup>524</sup> MAUER & NELLIS, THE MEANING OF LIFE, *supra* note 513, at 86, quoted in Richards, Why is Boris Johnson So Eager to Complete Brexit?, <https://betweenthebars.org/posts/28232/why-is-boris-johnson-so-eager-to-complete-brexit>.

State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and 'greater capacity for change' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"<sup>525</sup>

This approach needs to apply more broadly not only when the defendants are children but whenever a sentence is so disproportionate and so inherently demeaning of human dignity as to be dehumanizing.

## VI. ADVOCACY POINTS

1. Rehabilitation (resocialization or reintegration) is a goal of the criminal legal system that is consistent with human dignity. Deterrence objectifies a person by imposing a burden on a person for the claimed purpose of achieving a policy of deterring the person who was convicted or others from committing a crime. It is therefore inconsistent with human dignity. Retribution is inconsistent with human dignity insofar as it entails punishments that are intrinsically cruel and serve no social purpose. Incapacitation violates human dignity because it presumes guilt for possible future offenses. (See discussion in Chapter 2 regarding presumption of guilt).
2. Rehabilitation should be understood as re-socialization or reintegration (for reasons alluded to in Chapter 2 in the discussion of the dignity of belonging).
3. Sentences must be proportionate to the crime so that the burden of the punishment is measured by the individual's degree of culpability for crimes actually committed and their responsibility for the acts.
4. Sentences in which the person is likely to die in prison are inconsistent with human dignity and therefore unconstitutional because they deny the possibility of rehabilitation and of living a life of dignity in society.
5. The death penalty is inconsistent with human dignity and therefore unconstitutional because it deprives a person not only of their life but their humanity as well.

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<sup>525</sup> *Miller v. Alabama*, 567 U.S. 460, 465 (2012). *Miller* still permits the imposition of life without parole sentences for children as long as the decision is made on the basis of individual facts and not applied as a mandate.

## CHAPTER 4: GENERAL CONDITIONS OF INCARCERATION

Conditions in prisons (including jails and other centers of incarceration and detention) must affirm the dignity of all persons at all times. Because dignity is inherent and inalienable, those who are convicted of crimes may be required to give up their liberty for a time, but their right to retain their dignity is never lost. Courts in the United States and abroad have recognized the dignity rights of persons who are incarcerated as a matter of decency, as essential to establishing a just rule of law, and as a necessary part of the criminal legal system to ensure successful reentry into society after incarceration.

This chapter first establishes the dignity rights of all people including those who are incarcerated. It then offers a model of understanding prison conditions and practices as either promoting or affirming dignity or as denying or diminishing dignity. The chapter then analyses several aspects of prison life in terms of their relevance to human dignity and, looking in part to practices abroad, it provides some suggestions for enhancing the dignity of people who are incarcerated while still advancing legitimate penological goals. These aspects include sanitation, food, education, and employment. (We leave our examination of health care to the next chapter).

This chapter will help define what a life of dignity in prison looks like. It will identify ways incarcerated individuals, prison officials, jailhouse lawyers, and all those involved in the criminal legal system may protect the dignity of those who are in prison.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

### I. INTRODUCTION: PEOPLE RETAIN THEIR HUMAN DIGNITY WHEN THEY ARE INCARCERATED

A person sentenced to prison loses their liberty but they do not lose their humanity, their equal worth as a person. Courts around the world have affirmed this fundamental principle. The Israeli Supreme Court reminds us “that the human dignity of a prisoner is like the dignity of every person. Imprisonment violates a prisoner’s liberty, but it must not be allowed to violate his human dignity.”<sup>526</sup> The Indian Supreme Court has said:

“the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity, and human sympathy.”<sup>527</sup>

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<sup>526</sup> *Golan v. Prisons Service* [1996] SC PPA 4463/94, at para. 13 (Isr.), *supra* note 400.

<sup>527</sup> T. K. Gopal v. State of Karnataka, AIR 2000 SC 1669 (India).

International human rights law demands no less: the First Basic Principle for the Treatment of Prisoners adopted by the UN General Assembly is “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”<sup>528</sup>

The US Supreme Court has from time to time aligned itself with this view – notably in *Brown v. Plata*:

“As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. ‘The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.’”<sup>529</sup>

And yet, in the United States, the more common experience is that going to prison is not just the punishment itself but what opens the door to more extreme and inhumane forms of punishment.

Mistreatment in prison happens in myriad ways. It happens acutely, as when a prisoner is disciplined for a perceived violation of the prison rules or norms or when visits and phone calls and commissary goods are withheld, or when a person is forced into solitary confinement for an extended period. It happens in the personal treatment by officers or other prisoners, which can be demeaning, threatening, physically abusive, sexually violent, and in many cases simply sadistic. It also happens chronically and daily: the physical environment which is often ugly and devoid of warmth, natural light or fresh air; the routine, inadequate, and unpalatable food; the lack of privacy; the absence of opportunities for physical and mental healing and growth; the lack of employment or educational opportunities or opportunities to maintain healthy social connections; and the near-absence of opportunities to fully develop one’s personality, among many others.

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*“Prisoners retain the essence of human dignity inherent in all persons.”*

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This chapter examines living conditions inside prisons.<sup>530</sup> The chapter first explains why both federal and state facilities must recognize and affirm the inherent and inalienable dignity of

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<sup>528</sup> G. A. Res. 45/111, Basic Principles for the Treatment of Prisoners (Dec. 14, 1990), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners>.

<sup>529</sup> *Brown v. Plata*, 563 U.S. 493, 510 (2011), citing *Atkins v. Virginia*, 536 U. S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion)).

<sup>530</sup> This book does not address the specific harms that result from the privatization of the state’s responsibility to implement criminal justice. Although justice-for-profit, *by definition*, harms human dignity because it commodifies human beings and treats them as a means to the goal of financial gain, the experience of carceral indignity is not limited to private prisons but exists throughout the penal system in the United States. Some studies show that conditions are worse in private prisons (see Curtis Blakely & Vic Bumphus, *Private and Public Sector Prisons—A Comparison of Select Characteristics*, 68 Fed. Prob. 1, [https://www.uscourts.gov/sites/default/files/68\\_1\\_5\\_0.pdf](https://www.uscourts.gov/sites/default/files/68_1_5_0.pdf) (last visited Dec. 27, 2023)). Private prisons account for only 7% of prisoners. Thus, the vast majority of prisoners are under direct state or federal control. PRISON POL’Y INITIATIVE, *Private Prisons Data on the Private Prison Industry*, [https://www.prisonpolicy.org/visuals/private\\_prisons.html](https://www.prisonpolicy.org/visuals/private_prisons.html) (last visited Dec. 27, 2023). We therefore address the



all those who are in their custody, and identifies ways in which correctional institutions can do so. We show why dignity matters within prison walls, and provide a schematic overview of dignity-affirming and dignity-denying practices and conditions. We then turn our attention to specific threats to human dignity. First, we examine the pervasive problem of sexual exploitation, visited especially (but not exclusively) on women and girls who are incarcerated. We then address conditions relating physical conditions, sanitation, food and nutrition, education and employment. As always, we conclude with advocacy points.

## II. ALL PERSONS HAVE A RIGHT TO LIVE IN CONDITIONS OF DIGNITY

Incarceration itself necessarily infringes on a person’s dignity because it invariably impacts on their ability to make free choices and it reduces their autonomy and control over how they live and how they fully develop their personality. It threatens the dignity of belonging by removing a person from their community and forcing contact with others. However, these threats to dignity can be mitigated by the implementation of policies that affirm and support dignity. Moreover, prisons can protect against further violations of dignity such as threats against and attacks on bodily integrity to allow each person to control how their body is used and to protect it from injury. Beyond that, prisons can ensure that every person in custody lives “as a person” – that is, in conditions of human decency in terms of cleanliness, privacy, and comfort.

### A. People in Prison Retain Their Dignity Even if They Lose Their Liberty

The innate dignity of human beings is characterized by each individual’s intrinsic worth and governed by laws of basic humanity. Dignity belongs to all, as recognized in *Toussaint v. McCarthy*, a Ninth Circuit case that addresses dignity for people placed in administrative segregation.<sup>531</sup> “These consolidated appeals involve a class of prisoners, who, as a class, are the toughest for a prison to handle. They are at the bottom of the social heap. They have, nonetheless, a human dignity and certain rights secured by the Constitution of the United States.”<sup>532</sup> While the language itself in this case is offensive and dignity-diminishing, it at least reflects a commitment to human dignity and highlights the difference between dignity and respect. Although often conflated and sometimes used interchangeably, they are not the same: dignity is an inherent and inalienable fact of human life that the law must protect; respect, by contrast, is earned. The Court here, even while lacking respect for the petitioners, nonetheless recognizes their human dignity.

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*Dignity is an inherent and inalienable fact of human life that the law must protect; respect, by contrast, is earned.*

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Likewise, courts in countries around the world – spanning the full range of economic resources and systems of governance – have recognized that incarceration eliminates liberty but

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entire spectrum of carceral facilities in the United States and identify ways in which the system itself degrades the dignity of those who are impacted, whether they are in private or public institutions.

<sup>531</sup> *Toussaint v. McCarthy*, 926 F.2d 800 (9th Cir. 1990).

<sup>532</sup> *Id.* at 801.

not dignity. This sets forth a clear obligation on the part of courts to protect against and remedy violations of dignity of those held in custody.

- In *Francis Coralie Mullin vs. Administrator of the Union Territory of India* the Indian Supreme Court stated,

“In regards to conditions of detention, a prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. It must therefore now be taken to be well-settled that a prisoner or detenu is not stripped of his fundamental or other legal rights, save those which are inconsistent with his incarceration, and if any of these rights are violated the court will immediately spring into action and run to his rescue.”<sup>533</sup>
- The Supreme Court of Malawi, recognizing “that every sentenced prisoner has the right to be detained under conditions consistent with human dignity,” has held that prison conditions must include “at least the provision of reading and writing materials, adequate nutrition and medical treatment at expense of the state.”<sup>534</sup>
- The Supreme Court of Taiwan has held that

“The purpose of incarceration is to facilitate reform and rehabilitation. It does not aim at total deprivation of rights and liberties. Except for the restriction of liberty of person and other incidentally restricted liberties, such as freedom of residence and migration, inmates enjoy constitutional rights not essentially different from what is guaranteed to other people.”

Applying this principle, the court invalidated the law that allowed inspection and deletion of correspondence to inmates:

“The purpose of [the fundamental rights of secrecy of correspondence] is to protect the people’s right to choose whether, with whom, when, how, and what to communicate without arbitrary interference by the State or others. This [along with freedom of expression] is one of the concrete modes of the right to privacy protected by the Constitution. It is a fundamental right essential for maintaining human dignity, individual autonomy and sound development of personality. Furthermore, this right is necessary to safeguard the personal intimate sphere of life from arbitrary invasion by the State or others, and it is necessary for upholding autonomous control of personal information” to which people in prison are entitled.<sup>535</sup>

- The European Court of Human Rights has repeatedly held that violations of human dignity are violations of the prohibition in Art. 3 of the European Convention against

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<sup>533</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors*, (1981) 2 SCR 516 (India), *supra* note 166.

<sup>534</sup> *Masangano v. The Attorney General & Others*, [2009] MWSC 31 (Nov. 8, 2009) (Supreme Court of Appeal of Malawi 2009) (JUSTICE R.R. MZIKAMANDA), <https://malawilii.org/mw/judgment/supreme-court-appeal/2009/31>.

<sup>535</sup> J.Y. Interpretation No. 756 [Prisoner’s Freedom of Secrecy of Correspondence and Freedom of Expression Case], at paras. 4 & 13 (Constitutional Court, Dec. 1, 2017) (Taiwan).

“torture and inhuman or degrading treatment or punishment.” In *Keenan v. United Kingdom*,<sup>536</sup> the European Court held that even where a person incarcerated cannot point to proof of injury caused by the authorities,

“in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3. Similarly, treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be able, or capable of, pointing to any specific ill-effects.”<sup>537</sup>

Even in such a case, the court held, a person may recover damages.<sup>538</sup>

These international cases allow us to gauge a broader sense of what dignity entails in the context of incarceration, and the specific things one should look for when approaching a matter through a dignity lens.

They are matched in part by case law in the United States which also identifies dignity affirming practices and recognizes dignity violations in various forms.

#### B. The Right to Live with Dignity in Prison

Like the US Constitution, the Indian Constitution protects the right to life but does not contain a justiciable dignity right. Nonetheless, the Indian Supreme Court has repeatedly held that the right to live is the right to live with dignity and is therefore not lost upon imprisonment. It protects not only the right to be alive but extends to the quality of life, including a right to a certain quality of life in prison. In the landmark case of *Francis Coralie Mullin*, for instance, the court described the essential elements of the right to live with dignity in prison:

“The right to life includes the right to live with human dignity and all that goes along with it namely, bare necessities of life such as adequate nutrition, clothing, shelter, and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and comingling with human beings.”<sup>539</sup>

These requirements and conditions are inherent to dignity.

In the United States, the right to life refers to procedural protections against the death penalty but has not been interpreted to apply to the conditions in which people live. In prison, where the state is entirely responsible for the conditions of life, there may be more opportunity

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<sup>536</sup> Case of *Keenan v. The United Kingdom*, App. No. 27229/95, Eur. Ct. H.R. (Third Chamber 2001) (Apr. 3, 2001), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2227229%2F95%22%5D%2C%22itemid%22:%5B%222001-59365%22%5D%7D>.

<sup>537</sup> Case of *Keenan v. The United Kingdom*, at para. 113.

<sup>538</sup> *Id.* at para. 74: “A prisoner able to prove that his conditions of confinement have caused him injury, physical or psychiatric, resulting from the negligence of the prison authorities may claim an award of damages. If a prisoner is assaulted, he may maintain an action for assault, even in the absence of proof of physical injury. Damages may be awarded for any indignity or humiliation suffered, while exemplary damages may be awarded where the court concludes that there has been “oppressive, arbitrary or unconstitutional action by the servants of the government” (*Rookes v. Barnard* [1964] Appeal Cases 1226).”

<sup>539</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors*, (1981) 2 SCR 516 (India), *supra* note 166.

to claim dignity violations based on the conditions or quality of life. Instead, many of these cases are decided under the 8<sup>th</sup> Amendment such that the idea of human dignity furnishes the benchmark for violations of the protection against cruel and unusual punishment.

The problem with this approach is that the standard of dignity is tied not to whether a person is living with dignity, in dignified conditions, and being treated by others with dignity, as is essential for human life. Instead, it is tied to a punishment that has already been imposed, and the question is limited to whether the further punishment violates dignity beyond what the initial sentence encompassed. There are a few cases where the standard of care falls so far below any conception of decency that even courts in the United States find violations of the 8<sup>th</sup> amendment, but the cases are rare.

Using the notion of “humane conditions” as a stand-in for dignity, the court in *Farmer v. Brennan* recognized that, “the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners” and “also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee safety of inmates.’”<sup>540</sup>

In *Toussaint v. McCarthy*, inmates brought action challenging conditions of confinement in segregation. The court, held that: (1) conditions of confinement were unconstitutional with respect to such matters as double-celling, heating and ventilation, lighting, noise, plumbing, and storage and preparation of food; (2) there were inadequate provisions for access to courts; (3) inadequate clothing, laundry, and bedding was provided; and (4) injunctive relief was required to remedy violations.<sup>541</sup>

The district court used the notion of decency to establish constitutional violations: “Clothing is a basic area of Eighth Amendment concern.... Reasonably clean, sanitary bedding is likewise required by the Eighth Amendment. The bedding issued to lockup inmates is frequently filthy and unsanitary. This condition is indecent, and violates the Eighth Amendment. Decency also requires that each cell be furnished with a clean, untorn pillow. Many lockup cells are not so furnished. This, too, violates the Eighth Amendment.”<sup>542</sup>

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<sup>540</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

<sup>541</sup> See generally *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984).

<sup>542</sup> *Id.* at 1410-11.

Important Precedent: Brown v. Plata, 563 U.S. 493 (2011)

In this Supreme Court case, the California prisons system was sued by a group of prisoners over inadequate living conditions, with many of the facilities at the time housing more than double the number of people they were originally designed to hold. This caused conditions in the California system to become unsanitary and unsafe as the overcrowding caused an increase in violence, overburdened the limited clinical and custodial staff, and strained the medical and mental health facilities.

In *Brown*, the court held that the California prisons fell “**below the standard of decency that inheres in the 8th Amendment . . .**”, although the court did not define what that standard of decency entails. It further held that the conditions must be remedied including a reduction in overcrowding. “Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. **A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.**”

This is a relatively recent Supreme Court case that demonstrates the court’s understanding that people who are incarcerated must be treated with dignity and that a person’s dignity is implicated in many aspects of prison life, including how prisoners are treated, the conditions in which they live, and the provisions they receive that enable them to live with dignity while in prison.

In these cases, we see that that the dignity analysis does not require any showing of either intent or effect: the conditions described here violate the 8th Amendment’s dignity and decency standards per se. Thus, the plaintiff can prevail without having to produce evidence that prison officials knew their conduct denied dignity or acted with deliberate indifference as to whether or not their dignity was harmed. Nor does the plaintiff need to show that their dignity was in fact harmed. Moreover, in some of these cases qualified immunity may not protect officials, where they would know that their conduct carried a risk of substantial harm without any penological purpose.<sup>543</sup>

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*The dignity analysis does not require any showing of either intent or effect*

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Sometimes, prison conditions and practices raise concerns under aspects of dignity that are recognized under other constitutional provisions. For instance, medical policies might limit a person’s agency not only as a matter of their dignity but also by violating their religious freedom rights or privacy rights, although the Supreme Court has not been especially sensitive to first amendment claims inside prisons.<sup>544</sup>

### C. Dignity-Affirming and Dignity-Denying Practices

To illustrate the differences between what is and what should be, we use the terminology of practices or conditions that deny dignity versus those that affirm it. While dignity-affirming practices bolster a person’s inherent dignity, dignity-denying practices are either actively dignity diminishing in nature, or fail to protect the dignity of an incarcerated individual.

- Dignity-affirming practices can be administrative actions ranging from positive language, employing dignity-based vocabulary, eye contact and body language, adopting practices that protect the individual choices and self-worth of individuals. Dignity-affirming judicial practices can be court-ordered remedies and injunctions to ensure that human dignity is always respected; in some cases, courts may retain ongoing jurisdiction to ensure compliance. Prison administration should monitor practices and conditions to ensure that they continually affirm the dignity of all.
- Dignity-denying practices can also be practices that diminish elements of dignity including one’s self-worth, bodily integrity, privacy, identity, or full development. Dignity-denying practices are also failures to provide protection to an incarcerated individual from humiliation or vulnerability, or a court’s failure to remedy administrative violations.

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<sup>543</sup> Clark v. Coupe, 55 F.4th 167, 173 (3d Cir. 2022).

<sup>544</sup> Beard v. Banks, 548 U.S. 521, 538 (2006) (finding that a policy denying “especially difficult” prisoners magazines, newspapers, or photographs was not unreasonable and therefore not violative of the prisoners’ first amendment rights).

This distinction is necessary and important because it reminds us that although dignity is inherent and irrevocable, those who are in control of prisons make decisions every day to affirm or deny the dignity of those in their custody. Courts and prison officials can (and, we argue, must) make choices that affirm human dignity. The tables below demonstrate that such choices are often simple and efficacious.

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*Prison officials make decisions every day to affirm or deny the dignity of those in their custody.*

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The tragic irony is that so many of those incarcerated have done little that denies the dignity of others, yet they are subjected to dignity-denying behaviours and conditions by those who purport to hold them accountable. These conditions and practices are discussed throughout the Policy Guide.

#### IMPACT ON HUMAN DIGNITY OF PRISON CONDITIONS

Dignity Denying Conditions...	Dignity Affirming Conditions...
Occur when courts deny relief Threaten the agency, sense of identity, and sense of self-worth of people inside Make people more vulnerable Humiliate and degrade people; makes them feel “less than” Threaten bodily integrity and make people more susceptible to violence Alienate people from the community of others Include torture, physical abuse, sexual abuse, punishment through denial of food and other bodily needs Objectify and commodify people; use people for the benefit or entertainment of others.	Protect people from humiliation Protect people in their vulnerabilities Uplift and provide opportunity for self-development Protect bodily integrity/freedom from violence Include all people in community Encourage participation through education and employment Are advanced when courts recognize dignity violations Are advanced when courts issue injunctive and protective orders to remedy dignity violations and ensure compliance.

#### IMPACT ON HUMAN DIGNITY OF CONDITIONS IN CELLS

Cells are dignity-denying if they ...	Cells are dignity-affirming if they ...
Are dirty Have no windows to the outside	Are clean Have windows

Have no light or have excessive light	Are well-lit
Are small or cramped or overcrowded	Are spacious and open and well-ventilated
Have no bed or only a metal bed without adequate coverings	Have a comfortable bed
Have no bathroom facilities	Provide adequate facilities for sanitation
Provide no privacy	Provide privacy (from guards and from others)

IMPACT ON HUMAN DIGNITY OF ACCESS TO PERSONAL ITEMS

Dignity Denying Conditions	Dignity Affirming Conditions
Limited or No clothes/ Inadequate Undergarments/socks Lack of Warm Clothes Denial of grooming supplies Denial of towels Denial of toiletries Denial of blankets, sheets and pillows	Access to clean and weather-appropriate clothes Access to grooming supplies, including razors, lotions, etc. Access to towels Access to toiletries Access to real bed, blankets, sheets and pillows

IMPACT ON HUMAN DIGNITY OF ACCESS TO SANITATION

Dignity Denying Conditions	Dignity Affirming Conditions
No clean or functioning water Denial of hot water Lack of time to access showers sink and toilets Denial of privacy Presence of feces, blood, other bodily excrements that are indecent and may be health hazards	Access to clean and functioning sinks, toilets, and showers Suitable hot water Time to access showers, sinks, toilets Sanitation of overall prison maintained in cleanly and safe way Privacy

IMPACT ON HUMAN DIGNITY RELATING TO FOOD

Dignity Denying Conditions	Dignity Affirming Conditions
Food poisoning	Healthy & Nutritious Meals



<p>Food tampering</p> <p>Dirty/contaminated food</p> <p>Unappetizing (e.g. Nutriload)</p> <p>Lacking in vitamins &amp; nutrients</p> <p>Food used as punishment</p> <p>Deprivation of Food Starving</p> <p>Failure to respect</p> <p>Religious &amp; allergy concerns</p>	<p>Balanced meals</p> <p>Adequate quantities of food for the individual</p> <p>Food treated as means of sustenance</p> <p>Food served free of degradation or humiliation</p> <p>Religious &amp; allergy conditions respected</p>
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IMPACT ON HUMAN DIGNITY RELATING TO HEALTH

Dignity Denying Conditions	Dignity Affirming Conditions
<p>Deliberate Indifference to health concern (torture)</p> <p>Ignoring health grievances</p> <p>Lack of access/administration of proper care</p> <p>Denial of treatment</p> <p>Disrespectful treatment</p> <p>Respect for medical privacy</p>	<p>Healthcare accessible and available</p> <p>Treatment provided in timely manner</p> <p>Individualized health conditions respected</p> <p>Protection from harm</p> <p>Mental and physical health respected</p> <p>Adequate &amp; Preventative care available</p>

IMPACT ON HUMAN DIGNITY RELATING TO EDUCATION AND EMPLOYMENT

Dignity Denying Conditions	Dignity Affirming Conditions
<p>Limited or no access to reading and writing materials</p> <p>Limited or no access to books libraries and internet sources</p> <p>Limited or no education and employment opportunities including more than vocational education</p> <p>Excess labor</p> <p>Low compensation</p> <p>High costs to participate in programs</p>	<p>Access to writing and reading supplies</p> <p>Sufficient educational and employment programs for each person</p> <p>Provides opportunity for personal growth and development</p> <p>Provides affordable certification programs</p> <p>Adequate access to books and access to internet sources</p> <p>Individualized attention to each person's educational and employment needs</p>

### III. SEXUAL EXPLOITATION IN PRISON DAMAGES THE DIGNITY OF PEOPLE WHO ARE INCARCERATED

Men, women, boys, and girls who are incarcerated experience sexual exploitation including rape, humiliation, objectification, and more. For women and girls in detention, the exposure to violations of dignity are especially likely to be experienced as violations of bodily integrity and as sexual predation, whether implied, threatened, or physical. This compounds the sexual trauma that most women and girls have experienced prior to entering prison.

For women and girls in society at large, “1 in 5 women have experienced completed or attempted rape in their lifetime” and “1 in 4 girls experience[d] sexual abuse in childhood.”<sup>545</sup> Many of those same women and girls end up in the criminal justice system. When women enter the system, “86 percent report having experienced sexual violence in their lifetime.”<sup>546</sup> This means that people whose dignity has been violated in the past are often subjected to repeated dignity violations by corrections officers and other people who are incarcerated.

Sexual violence against people who are incarcerated is not about sexual gratification but as much as about exploiting the power and control prison staff has over people in their custody.<sup>547</sup> The damage is life long, immeasurable, and inexpressible and its scars are often experienced as violations to their dignity; that is, as threats to their sense of **personhood**, their sense of **control** over their lives, their ability to protect their **bodies**, and as impediments to the **full development of their personality**.

Courts in some countries have articulated the harms of rape in terms of human dignity. The Supreme Court of the Philippines has said that “rape is a grave physical violation. It debases a woman’s dignity, leaves a scar in her body and soul that not even time can heal.”<sup>548</sup> The Supreme Court of Papua New Guinea adds, “women and girls can not freely move around in a full realisation of their constitutionally guaranteed freedom of movement and or function in society as human beings, without the fear of being raped or otherwise sexually abused and harassed.”<sup>549</sup> Self-identity, self-esteem, freedom of movement and overall wellbeing are all parts of dignity, which are negatively impacted when a woman is raped or sexually assaulted. For a woman in prison, her freedom of movement and her choices are already severely restricted due to the nature of incarceration. Looming threats of rape and other forms of sexual predation further deny her the limited movement she has within the prison. Efforts to advocate for herself or file a grievance typically bring about retaliatory measures.

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*Rape is the cultural wallpaper of American correctional facilities.*

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<sup>545</sup> *Sexual Violence is Preventable*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2021), <https://www.cdc.gov/injury/features/sexual-violence/index.html> (last visited Dec. 21, 2023).

<sup>546</sup> *Prison Rape Elimination Act of 2003* [hereinafter *ACLU PREA*], ACLU (2011), <https://www.aclu.org/other/prison-rape-elimination-act-2003-prea> (last visited Jan. 18, 2023), The number may be as high as 94%.

<sup>547</sup> *Women in Prison: A Fact Sheet*, PRISON POL’Y INITIATIVE, [https://www.prisonpolicy.org/scans/women\\_prison.pdf](https://www.prisonpolicy.org/scans/women_prison.pdf) (last visited Jan. 18, 2023).

<sup>548</sup> DALY & MAY, DIGNITY CASEBOOK, *supra* note 229, at 352.

<sup>549</sup> *Id.* at 352—353.

## A. Sexual Exploitation Is Common in Prisons

### 1. Sexual Abuse in Prisons is Under-Reported

There is no way to know exactly how common sexual abuse is in carceral facilities. Reports of sexual assaults in correctional facilities depend almost entirely on self-reporting by administrators who have every incentive to fail to report or to underreport accusations against themselves, their employees (whom they fail to supervise), or the people in their custody (whom they failed to control). Given that the overall rate of reporting sexual assault and rape is about 35%, the reporting rate in correctional facilities is likely to be far lower.<sup>550</sup> Still the number that is reported is staggering. The Bureau of Justice Statistics has put the number of women and men who experience sexual abuse in correctional facilities at approximately 80,000. That's the number of people who have endured sexual assault in one year; the number of assaults that have been perpetrated would be significantly higher.

As of June 2021, the Bureau of Justice Statistics reported that:

- Correctional administrators reported 27,826 allegations of sexual victimization in 2018, a 14% increase from the 24,514 reported in 2015.<sup>551</sup>
- Of the 1,673 substantiated incidents of sexual victimization in 2018, about 58% were perpetrated by other inmates and 42% by staff.

It is important to remember that all sexual contact between a prisoner and a staff member is, by law, without consent, since a person can not consent to sexual contact with a person who controls her.

As Chandra Bozelko has written, "Rape persists, in other words, because it's the cultural wallpaper of American correctional facilities."

For youth who are girls or nonbinary, the system puts them at the same or greater risk of harm than when they were outside. Often, they may suffer more abuse at the hands of other juveniles serving time or by the corrections staff.<sup>552</sup> Most likely, they feel unable to speak out, especially if they already carry the burden of previous abuse or issues surrounding sexual or gender identities.

Because girls often do not report or file grievances for assault, there are currently limited court decisions or efforts at reform. However, there have been instances where the law has sought to protect the dignity of those who are most vulnerable. In one case where employees of a juvenile facility were found guilty of sexual assault, the court explained: "there is clearly a right, under the Fourteenth Amendment, to bodily integrity. 'There is a right to be free from sexually motivated

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<sup>550</sup> Chandra Bozelko, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), <https://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html>.

<sup>551</sup> Emily D. Buehler, *Sexual Victimization Reported by Adult Correctional Authorities, 2016-2018*, U.S. DEP'T OF JUST. (June 2021), <https://bjs.ojp.gov/library/publications/sexual-victimization-reported-adult-correctional-authorities-2016-2018>.

<sup>552</sup> Malika Saada Saar et al., *supra* note 173, at 12.

assaults.”<sup>553</sup> By recognizing that the Constitution includes the idea of bodily integrity, the Alabama court in this case affirmed that dignity is inherently part of our law, too.

Nationally, it is rare for staff to be prosecuted for sexual abuse of prisoners (or for failing to protect prisoners from the abuse of other prisoners). In December 2022, a federal court found Ray Garcia, the former warden of the Dublin Correctional Facility for Women, guilty of “seven counts involving sexually abusive conduct against three female victims who were serving prison sentences and one count of making false statements to government agents.”<sup>554</sup> He was sentenced to “70 months in prison, 15 years of supervised release and \$15,000 in restitution.”<sup>555</sup> Additional civil lawsuits are being brought.<sup>556</sup> Seven additional staff members at Dublin, including the prison chaplain, have pleaded guilty, been convicted, or are awaiting trial for sexual abuse of inmates (as of March 2024). In April 2024, Dublin was closed down, but the mistreatment of the women continued as they were transferred to locations across the country in what can only be described as a transfer from hell, during which, among other things, the women were harangued and blamed for speaking out.<sup>557</sup> Across the country, in New Jersey, several lawsuits alleging excessive force and sexual abuse have been filed as part of an investigation into prison staff at the Edna Mahan Correctional Facility for Women, where the state’s failure to implement effective change to ensure inmate safety led to a riot.<sup>558</sup> One woman reported being punched in the head 28 times by officers while others said they were hit with plastic shields. At least ten guards were charged for the attacks and 34 officers were suspended.<sup>559</sup> While these are rare vindications of women’s experiences, they are the exception that prove the rule that the vast majority of sexual abuse and rape by correctional officials against women who are in custody goes unpunished. A recent Senate Report found that within the Bureau of Prisons, “There is currently a backlog of 8,000 internal affairs cases, including at least hundreds of sexual abuse cases.”<sup>560</sup>

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<sup>553</sup> K.M. v. Ala. Dep’t of Youth Servs., 360 F. Supp. 2d 1253, 1257 (M.D. Ala. 2005).

<sup>554</sup> Press Release, U.S. Dep’t of Just., *Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates* (Dec. 8, 2022), <https://www.justice.gov/opa/pr/jury-convicts-former-federal-prison-warden-sexual-abuse-three-female-inmates>.

<sup>555</sup> Press Release, U.S. Dep’t of Just., *Former Federal Prison Warden Sentenced for Sexual Abuse of Three Female Inmates* (Mar. 22, 2023), <https://www.justice.gov/opa/pr/former-federal-prison-warden-sentenced-sexual-abuse-three-female-inmates>.

<sup>556</sup> Amy Larson, *Dublin prison guards hit with ‘avalanche’ of sex abuse lawsuits*, KRON4 (MAR. 8, 2024, 03:22 PM), <https://www.kron4.com/news/bay-area/dublin-prison-guards-hit-with-avalanche-of-sex-abuse-lawsuits/> (March 8, 2024).

<sup>557</sup> Richard Winton, *Warden is ousted as FBI raids California women’s prison known as the ‘rape club,’* L.A. TIMES (Mar. 12, 2024), <https://www.latimes.com/california/story/2024-03-12/fbi-raid-warden-ousted-dublin-california-womens-prison>. For more on the transfer, see <https://www.ktvu.com/news/fci-dublin-prison-closure-women-describe-horrific-journey-across-u-s>.

<sup>558</sup> Doha Madani, *New Jersey to close state’s only women’s prison following ‘horrific attacks’ by guard*, NBC NEWS (June 7, 2021), <https://www.nbcnews.com/news/us-news/new-jersey-close-state-s-only-women-s-prison-following-n1269879>.

<sup>559</sup> *Id.*

<sup>560</sup> JON OSSOFF & RON JOHNSON, U.S. S. PERMANENT SUBCOMM. ON INVESTIGATIONS COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., *SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS STAFF REPORT 1* (Dec. 13, 2022), <https://www.ossoff.senate.gov/wp-content/uploads/2022/12/PSI-Embargoed-Staff-Report-re-Sexual-Abuse-of-Female-Inmates-in-Federal-Prisons.pdf>. See generally Erin Daly, Stanley Holdorf, Kelly Harnett, Jane Doe &

## 2. The Prison Rape Elimination Act (PREA) Must Live Up to Its Name

In 2003, Congress adopted the Prison Rape Elimination Act (PREA) which aimed to “provide for the analysis of the incidence and effects of prison rape in federal, state, and local institutions to provide information, resources, recommendations and funding to protect individuals from prison rape.”<sup>561</sup> The Act further sought to eradicate prison rape by creating the National Prison Rape Elimination Commission, whose job was to develop standards that would aid in achieving that goal,<sup>562</sup> although it took until 2012 for those standards to become effective.<sup>563</sup> While PREA does promise the “elimination” of “rape,” it “lacks real teeth”<sup>564</sup> and thus has had little impact on the rate, incidence, or severity of sexual predation for people in custody throughout the nation, whether perpetrated by correctional officers or allowed by them.<sup>565</sup> The ongoing, pervasive, and “horrific” experiences of women in prisons has been exposed by the United States Senate in its 2022 Staff Report of the Permanent Subcommittee on Investigations, “Sexual Abuse of Female Inmates in Federal Prisons.”<sup>566</sup>

PREA has been wholly ineffective in eliminating or even reducing sexual abuse of women in carceral facilities in the United States. In part, its inadequacies are written into the law: its primary mode of implementation is auditing and self-reporting by individuals at the federal Bureau of Prisons (BOP), the very people who should be held accountable under it. According to the Senate Report, “BOP has failed to successfully implement the Prison Rape Elimination Act (“PREA”). It failed to prevent, detect, and stop recurring sexual abuse in at least four federal prisons, including abuse by senior prison officials.... Further, BOP failed to systematically analyze PREA data, missing a key opportunity to identify problematic facilities or employees.”<sup>567</sup>

We highlight here two of its many failings.

- Retaliation. Retaliation by prisoner staff against prisoners who report sexual abuse is pervasive. For example, Kelly Harnett has written about her experience at a state facility in New York, where she was raped by a guard while working her prison job in the library. After filing a grievance, she was dismissed from her job which had helped her endure her incarceration with dignity. The vivid description she provides sheds light on what women face when their dignity is denied and harmed by those who have power over them. In other cases, the retaliation may subject people to

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Domonique Grimes, *Women’s Dignity, Women’s Prisons: Combatting Sexual Abuse In America’s Prisons*, 26 CUNY L. REV. 260 (2023) [hereinafter *Women’s Dignity, Women’s Prisons*].

<sup>561</sup> *ACLU PREA*, *supra* note 546.

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> Derek Gilna, *Five Years after Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), <https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/>.

<sup>565</sup> Gilna, *Five Years after Implementation*; *see also*, Alysia Santo, *Prison Rape Allegations Are on the Rise*, THE MARSHALL

PROJECT (2018), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise>.

<sup>566</sup> OSSOFF & JOHNSON, *supra* note 560, at 2. *See also*, Daly et al., *Women’s Dignity, Women’s Prisons*, *supra* note 560, in which two survivors share their personal experiences.

<sup>567</sup> OSSOFF & JOHNSON, *supra* note 560, at 1 & 3.

further sexual predation or other bodily harm. Facilities tend to ignore grievances (see Chapter 6 for discussion of grievance procedures) and/or allow retaliation against the person who filed grievances. In either case, the correctional facility is at fault for violating women’s rights and for failing to protect them. And the culture of retaliation further deters women from reporting sexual predation – which allows it to continue.

- o Lack of access to justice. Women who are raped and assaulted have been barred from seeking redress under PREA because courts have read PREA as *not creating a private right of action*, “meaning it does not give them the right to sue under this Act.” Rather, it was “enacted to study the problem of prison rape.”<sup>568</sup> It could more aptly be called the Prison Rape Study Act, not the Prison Rape Elimination Act. Consistently, courts state that “there is nothing in PREA which suggests that it was intended to create a private cause of action, independent from any complaint alleging violation(s) of the Constitution of the United States.” As interpreted, the PREA makes it all but impossible for a survivor of staff-on-prisoner sexual abuse to seek justice in court to reaffirm her dignity.<sup>569</sup>

The remaining alternative for legal redress is to frame claims of rape and sexual abuse as violations of the Eighth Amendment. Understanding the dignity harm of rape, one court has said that “[. . .] no lasting physical injury is necessary to state a cause of action [for sexual assault]. Rather, the only requirement is that the officer's actions be ‘offensive to human dignity.’”<sup>570</sup> But even when courts recognize dignity violation, it is challenging to meet the standards the courts consider when deciding these cases. For instance, although the Senate called the sexual abuse at FCI Dublin “horrific,” Ray Garcia, the former warden was convicted only of “sexual abuse of a ward.”<sup>571</sup>

For substantial change to be seen within the system, PREA needs to be amended, or another act needs to be passed to hold accountable those in power who cause substantial harm through acts of rape and sexual assault to women in their custody. Dignity demands at least that. First, standards for exhaustion of administrative remedies need to be adjusted so that people are protected from retaliation. Another meaningful step would be to employ compliance officers and/or ombudspople to guard against abuse and retaliation and to ensure compliance with PREA standards. Additional oversight in juvenile facilities is also needed. In September 2022, a bipartisan group of lawmakers introduced federal legislation that would increase oversight of federal prisons and would establish an ombudsman’s office “to take complaints — via a secure hotline and online

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*PREA should be amended to allow prisoners to sue for staff-on-prisoner sexual abuse.*

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<sup>568</sup> Law v. Whitson, No. 2:08-cv-0291-SPK, 2009 U.S. Dist. LEXIS 122791, at \*9 (E.D. Cal. Dec. 14, 2009); See Pirtle v. Hickman, No. CV05-146-S-MHW, 2005 U.S. Dist. LEXIS 40419, at \*3 (D. Idaho Dec. 9, 2005).

<sup>569</sup> Daly et al., *Women’s Dignity, Women’s Prisons*, *supra* note 560, at 280-282.

<sup>570</sup> Schwenk v. Hartford, 204 F.3d 1187, 1196 (9th Cir. 2000).

<sup>571</sup> Press Release, U.S. Dep’t of Just., *Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates* (Dec. 8, 2022), <https://www.justice.gov/opa/pr/jury-convicts-former-federal-prison-warden-sexual-abuse-three-female-inmates>.

form — and investigate and report to the attorney general and Congress dangerous conditions affecting the health, safety, welfare and rights of inmates and staff.”<sup>572</sup> However, the law and mechanisms for enforcement and for protection from retaliation need to be far more expansive and explicit if people who are incarcerated are to be protected from sexual predation and have their dignity respected. As a last resort, it is essential that “incarcerated people [have] legal rights to sue corrections agencies and officials, in particular, a private right of action, to enforce the PREA regulations.”<sup>573</sup>

Sexual violence is pervasive in prisons and jails. It **demeans** and **humiliates** its victims, **objectifies** them, limits their **freedom of movement** and **agency**, and limits their ability to **develop as people** due to fear, and other emotional and physical responses. It is terrible for all its victims and worse for young people and for those who have suffered previous abuse. Our legal system’s tolerance for sexual violence against people who are incarcerated is a national shame.

## B. Day-To-Day Practices and Conditions Must Respect Human Dignity

### 1. The Architecture of Prison Cells Must Ensure That People Can Live In Dignity

Facilities, outside areas, and cells should be built and maintained in a manner that respects the dignity of every incarcerated individual at least in terms of comfort, shelter, and safety. At the very least, this means that every person should have access to a decent quality of life suitable for all, even while incarcerated. It should also ensure space for individual expression of **identity, growth, and privacy**.

The physical architecture of a cell can be dignity affirming or dignity denying. Courts have recognized how space, air, and light are necessary for human dignity. Windows to the outside, access to natural light, spacious and private rooms have all been identified as dignity affirming conditions because they allow people the space in which to grow as individuals. In *Toussaint v. McCarthy*, the Northern District of California court recognized

“Lighting is an indispensable aspect of adequate shelter and is required by the Eighth Amendment. The physically and mentally debilitating effects of a lack of adequate lighting [have been noted]... [T]he Court concludes that each inmate must be afforded sufficient light to permit him to read comfortably while seated or lying on his bunk.”<sup>574</sup>

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<sup>572</sup> *Ossoff leads effort pushing new oversight to combat federal prison crises*, WABE (Sept. 28, 2022), <https://www.wabe.org/senator-john-ossoff-leads-legislation-to-push-new-oversight-to-combat-federal-prison-crises/>.

<sup>573</sup> Lena Palacios, *The Prison Rape Elimination Act and the Limits of Liberal Reform*, UNIV. MINN. GENDER POL’Y REP. (Feb. 17, 2017), <https://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/>.

<sup>574</sup> *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1409 (N.D. Cal. 1984); *see also* *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980); *Martino v. Carey*, 563 F. Supp. 984, 999 (D.Ore.1983); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 961 (D.R.I. 1977).

That said, many prisoners complain that lights are on too much and are too bright. Both extremes can be considered violations of dignity, particularly since there is no penological benefit to this treatment. The Toussaint court also recognized that heating and ventilation are essential to shelter. “It is clear that adequate heating and ventilation are fundamental attributes of ‘shelter,’ which is a basic Eighth Amendment concern. An institution must therefore provide all inmates, including segregated inmates, with ‘adequate’ heat and ventilation.”<sup>575</sup> By contrast, the use of double ceilings specifically to restrict air flow and reduce space is designed to reduce the sense of dignity of the person inside. All of these factors that were considered in Toussaint affect the ability of people in custody to live with dignity; they must be recognized in law, and in practice in every detention facility for every person.

Prisons must also afford opportunities for those in custody to choose privacy and quiet at some times, as well as community and social interactions at other times. The choice must be, as much as possible, left to the prisoner to make as a matter of their own **agency**.

## 2. Sanitation Measures Must Allow People to Live with Dignity

Prison cells should be maintained in a manner that affirms dignity. This includes general cell conditions, sanitation, providing adequate belongings for basic needs and privacy and safety concerns. Overcrowding and segregated housing are also dignity concerns.

The Toussaint court explained that “A sanitary environment is a basic human need that a penal institution must provide for all inmates.”<sup>576</sup> In Toussaint, the district court went on to find that, “solid waste containers, service areas stinking of raw sewage and human feces and tiers encrusted with rotting garbage, amply establishes that conditions of sanitation in the lockup units involved in this case are inconsistent with any standard of decency and present a serious hazard to the health of each plaintiff.”<sup>577</sup> The Toussaint court used a standard of adequacy and decency, but impliedly, the notion of human dignity defines what is adequate and decent:

“[Such] condition[s] violates the Eighth Amendment. As an aspect of ‘sanitation,’ plumbing is a basic Eighth Amendment concern. See Ramos, 639 F.2d at 566, 568; Martino, 563 F.Supp at 999. Consequently, the plumbing in a facility used to house inmates, including segregated inmates, must be ‘adequate.’ See Hoptowit, 682 F.2d at 1246. The evidence established that the plumbing in most if not all of the units housing lockup inmates at the prison is grossly inadequate. In fact, the leaking pipes and fixtures, clogged drains, rotting sewer lines, and other plumbing and sewage deficiencies are a major cause of the serious health hazards prevalent in lockup units of the two prisons. These conditions are inconsistent with human decency, and violate the Eighth Amendment.”<sup>578</sup>

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<sup>575</sup> *Toussaint*, 597 F. Supp. at 1409; *See Ramos*, 639 F.2d at 568 (10th Cir.1980), *cert. denied*, 450 U.S. 1041 (1981); *Martino*, 563 F. Supp. at 999.

<sup>576</sup> *Toussaint*, 597 F. Supp. at 1411.

<sup>577</sup> *Id.*

<sup>578</sup> *Id.* at 1409.



The court recognized certain dignity claims hold constitutional weight and must be remedied. The Toussaint court continued:

“The fundamental requisites of sound personal hygiene [bear] a clear relation to ... shelter, sanitation, and medical care. See Martino, 563 F. Supp. at 999 (“the provision of adequate means of hygiene, and the sanitary disposal of bodily wastes so that the wastes do not contaminate the cells, are constitutionally required”). Many lockup inmates at the prison have no hot water in their cells and are permitted indoor showers as rarely as once per week. Some regular access to a personal cleaning facility is critical for inmates such as these, living amidst the conditions of filth that prevail in lockup units of both prisons. The Court concludes that minimum standards of decency require that lockup inmates without hot running water in their cells be accorded showers three times per week in facilities reasonably free of standing water, fungus, mold and mildew. See 15 Cal. Admin. Code §3343(f)(1983) (evidence that this represents standard of decency under the California Code). As this requirement is not presently met, conditions of personal hygiene violate the Eighth Amendment.”<sup>579</sup>

The Montana Supreme Court has also considered prison conditions as a matter of human dignity. In *Walker v. State*, the Montana Supreme Court addressed the horrific prison conditions and treatment endured by prisoners in one facility.

“Walker asserted that the living conditions in A-block were intolerable. Numerous inmates who resided in A-block testified about the filthy, uninhabitable cells. These inmates testified that the cells commonly had blood, feces, vomit and other types of debris in the cells they were forced to inhabit. One inmate recounted an instance where he was placed in a cell with human waste rubbed all over the walls and vomit in the corner. He claims the corrections staff ignored his complaints and told him to ‘live with it.’ Another inmate testified that he had bloodied a cell by smashing his head against the wall. His blood remained in the cell until Walker eventually inhabited the cell. After Walker was removed from that cell sometime later, the inmate who originally bloodied the cell was moved back in. He testified that the blood streaks and the words he previously had written in blood on the wall of the cell remained unchanged.”<sup>580</sup>

Walker suffered from a host of mental health issues that made him especially vulnerable because he was dependent on others for his care and was susceptible to enormous suffering if not appropriately cared for. The court relied on the protection of dignity in the state constitution, a provision that is unique among the states.

“Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the

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<sup>579</sup> Toussaint v. McCarthy, 597 F. Supp. 1388, 1411 (N.D. Cal. 1984).

<sup>580</sup> Walker v. State, 68 P.3d 872, 884 (Mont. 2003).

exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”<sup>581</sup>

Relying on the state constitutional obligation to protect the dignity of every person, the court held that Walker’s dignity rights were violated and it identified an affirmative obligation on the state to take measures necessary to protect the dignity of every person within its care.

Women face additional hardships with respect to sanitation while in prison because the vast majority of girls and women in detention are of reproductive age. Access to undergarments made for menstruation or sanitary items is indispensable to a woman’s bodily integrity and dignity because it allows her control over her menstrual cycle, while also feeling clean and hygienic and avoiding embarrassment. Sanitary items are too often unavailable or too expensive to purchase at the prison commissary.<sup>582</sup> The alternatives are ineffective and dangerous. Kimberly Haven, a formerly incarcerated woman and now an activist, created her own tampons using toilet paper since she had minimal options. Haven stated that “as a result of my creativity to survive with some modicum of dignity, I ended up needing a hysterectomy.”<sup>583</sup> She is not alone in having suffered ill health effects from homemade products, when a simple, inexpensive appropriate undergarment could have been made available.

Many women have spoken about the terrible conditions they endure while in jail or prison. Tiffany Roberts, an Atlanta-based civil rights and criminal defense lawyer who works for the Southern Center for Human Rights, reported that “[p]eople who experience menstrual cycles are forced to live in filth and discomfort simply because of something that happens to their bodies naturally.... Hygiene is not even seen as being an extension of human dignity for these folks who are incarcerated.”<sup>584</sup> Roberts sees women of color primarily affected and their dignity diminished by lack of access to sanitary products.<sup>585</sup> Instances of this type of dignity-diminishing practice are a widespread problem throughout the nation.

Sanitary products should be provided for free upon request or simply made freely available. Haven has advocated for legislation in Maryland to give incarcerated women access to these necessary products for free, although prison facilities have not implemented the law.<sup>586</sup> Currently, federal prisons and only twelve states and the District of Columbia offer free sanitary products to inmates.<sup>587</sup> The recommendation regarding women’s health is to adopt and assure

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<sup>581</sup> MONT. CONST., art. II, pt. 2, §. 4.

<sup>582</sup> *The Unequal Price of Periods*, ACLU, <https://www.aclu.org/report/unequal-price-periods> (last visited Jan. 19, 2023).

<sup>583</sup> Kimberly Haven, *Why I'm Fighting for Menstrual Equity in Prison*, ACLU (Nov. 8, 2019), <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison/>.

<sup>584</sup> Jaclynn Ashly, *'Treated worse than animals': Black women in pretrial detention*, AL JAZEERA (July 7, 2021), <https://www.aljazeera.com/features/2021/7/7/treated-worse-than-animals-black-women-in-us-pretrial-detention>.

<sup>585</sup> *Id.*

<sup>586</sup> Leah Rodriguez, *Maryland's Free Sanitary Product Policy Isn't Being Enforced*, GLOBAL CITIZEN (June 6, 2019), <https://www.globalcitizen.org/en/content/women-paying-for-tampons-in-maryland-prisons-2019/>.

<sup>587</sup> Jean Lee, *5 Pads for 2 Cellmates: Period Inequity Remains a Problem in Prisons*, USA TODAY (July 18, 2021), <https://www.usatoday.com/story/news/nation/2021/07/13/lack-access-period-products-prisons-widespread-us/7932448002/>.

implementation of legislation that recognizes women’s hygiene in dignity-affirming ways and that provides for free feminine hygiene products for all inmates who menstruate.

### 3. Food and Nutrition Must Enhance Human Dignity

Prisons commonly violate the dignity of those who are incarcerated in ways relating to food; food is regularly denied, or presented in a way that is demeaning and degrading. Prisoners complain of inadequate amounts, lack of variety, and unpalatability. In many cases, food is leveraged as punishment and retaliation, and used to humiliate and degrade people in violation of basic decency and respect for their dignity. The Walker case illustrates this phenomenon.

“Walker was deprived of food and water under the guise of a [Behavior Modification Plan (“BMP”)]. Walker also complained that the correctional staff mishandled his food. Correctional officers passed the food through the same hatch in which toilet brushes and other cleaning supplies were passed through. While on a BMP, an inmate’s food consisted of bread, lunch meat and cheese. Often this food was placed on the dirty food hatch, unwrapped. Walker also contended that on several occasions, correctional officers threw his food into the cell onto the floor where it occasionally landed under the toilet and in one instance landing in the toilet. While correctional officers testified that these incidents never occurred, other A-block inmates testified that they had either seen it happen or had heard Walker complain when it happened.”<sup>588</sup>

Unlike in some European prisons, most carceral facilities in the United States deny those who are in custody the ability to control their own food intake. As a result, the facility itself takes on the complete responsibility of ensuring that food for each individual is prepared in sanitary ways, is presented in palatable and sanitary ways, contains adequate nutrition for health and strength, and is provided in quantities that are adequate for the health and well-being of each individual. Moreover, it should be varied and tasty enough to ensure that prisoners feel that they are being **treated as people** and not as less than human. Using language that echoes these dignity concerns, the Toussaint court recognized that “food served to inmates is deficient under constitutional standards, even when nutritionally complete, if it is prepared under conditions so unsanitary as to make it unwholesome and a threat to the health of inmates who consume it.”<sup>589</sup>

Furthermore, while seeking to define what is adequate under a dignity lens, it is also important to take into account the individual dietary needs and religious observances of each person. This is essential to protecting one’s **bodily integrity** and **identity** which are both elements of one’s dignity. Adequate nutrition requires individuals to be provided with a nutritious, healthy and balanced meal that they are able to eat.

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<sup>588</sup> Walker v. State, 68 P.3d 872, 883 (Mont. 2003).

<sup>589</sup> Toussaint v. McCarthy, 597 F. Supp. 1388, 1412 (N.D. Cal. 1984). *See also* Corte Constitucional [C.C.] [Constitutional Court], junio 6, 2019, Sentencia T-260/19 (Colo.) (recognizing that individuals deprived of their liberty have the fundamental right to adequate food, for their health and human dignity).

Even in the poorest countries in the world, courts have insisted that prisoners be treated with dignity with respect to food service. The Supreme Court of Malawi has sought to define what “adequate” and “basic” means with respect to dignity. Here, the court said that the current diet of serving prisoners just beans as a meal was inadequate nutrition, and thus undignified – although beans contain far more nutrition than a steady diet of stale bread, as happens in US prisons. In the Malawi case, the court explained: “Access to certain resources such as medical treatment, adequate nutrition and educational resources [are] essential to dignity.”<sup>590</sup>

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*“Access to certain resources such as medical treatment, adequate nutrition and educational resources are essential to dignity.”*

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The courts have recognized that the government has a responsibility to provide for incarcerated individuals under conditions of dignity. While foreign cases like the one from Malawi are not binding, they illustrate that courts around the world have coalesced around a common standard of dignity for prisoners. The United States should at least adhere to these standards as well.

#### 4. Prisoners Must Have Access to Educational Opportunities

Access to education is a dignity affirming practice that contributes to one’s ability to learn and grow as a human being. Education allows for personal, intellectual, and emotional growth. It provides people with resources to better themselves, and grow in a manner that helps them realize their own **identity** and **fully develop their personality** – the essential quality of human dignity. This is no more or less true for people who are incarcerated than for people who are not. As noted above, the Indian Supreme Court has repeatedly stated that the bare necessities for life including for those in prison include “facilities for reading, writing and expressing one-self in diverse forms...”<sup>591</sup>

Education in all forms is dignity-affirming in and of itself, and instrumental in fostering a sense of dignity to support a person’s individual personal goals. This is why education must include not only vocational training that will help inmates secure jobs upon release but must also include the full range of educational and intellectual opportunities that are generally available on the outside.

Education can be especially valuable in carceral settings because it is essential to rehabilitation. It can help individuals find new pathways for their lives and understand themselves

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<sup>590</sup> Masangano v. The Attorney General & Others, [2009] MWSC 31 (Nov. 8, 2009) (Supreme Court of Appeal of Malawi 2009) (Justice R.R. MzikaManda), *supra* note 534.

<sup>591</sup> Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, (1981) 2 SCR 516 (India), *supra* note 166. The Court said: “We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.”

in new dimensions. It can be a vehicle for resetting one's life, or a means to retain a connection to a community or to re-integrate someone into the community.

And yet, detention facilities in the United States rarely provide sufficient educational opportunities either in quality or quantity to meet the demands and the dignity needs of all incarcerated individuals. This has been a particular challenge since 2020 when many prisons used the Covid 19 epidemic to shut down educational and other opportunities for humanity and growth. But as of 2024, many of these opportunities have not been restored.

Educational opportunities should not be denied to those living in solitary confinement. Solitary is a punitive measure that is designed to remove a person from the society of others if they may be a danger to others. It should not be used more extensively than necessary and it should not be a basis for additional punishments, such as denial of food, sanitary facilities, education, employment, or health care. Solitary confinement is discussed further in Chapter 6.

## 5. Employment

Prisons can protect the dignity of prisoners by providing adequate opportunities for employment and by ensuring that prisoners are adequately compensated and recognized for their work. Employment can be dignity affirming if coupled with the proper safeguards to protect the employee.

Employment opportunities in prisons can provide opportunities to build on past professional experiences or to develop new marketable skills and if the employee feels valued and is able to learn and grow through skills gained in employment. By shoring up skills, employment can help people prepare for the time when they will be released (as discussed in Chapter 7). It can allow them to continue working on a skill set that they might have obtained prior to incarceration, or it can allow them to learn something new. Either way, employment opportunities in prison help people live with dignity inside and outside.

While employment is an avenue for prisons to create dignity affirming practices, it is important

to ensure that workers are not treated in an inhumane manner or exposed to inhumane labor conditions. Slavery and slave-like conditions may be permitted by the terms of the 13<sup>th</sup> Amendment from 1865 and its state corollaries, but they are absolutely prohibited under international law,<sup>592</sup> precisely because there is no justification for violating human dignity in this way. Like the 8<sup>th</sup> amendment, the 13<sup>th</sup> amendment should be understood and applied according to evolving standards of decency, which denounces slavery in absolute terms, and not by the lights of the 19<sup>th</sup> century Congress addressing the sudden end of slavery.

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*The 13<sup>th</sup> amendment should be consistent with evolving standards of decency and with international human rights law.*

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<sup>592</sup> G.A. U.N. Doc. A/77/10, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, at 16 (2022), [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_14\\_2022.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf) ("Conclusion 23, Non-exhaustive list: Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (jus cogens), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status" includes "(f) the prohibition of slavery.")

And yet, according to a 2022 ACLU Report, “Captive Labor: Exploitation of Incarcerated Workers,” prisons pay workers cents per hour, and often the amount they earn is sequestered for post-release costs or victims’ compensation funds, or are used to pay for dignity essentials such as food and phone calls.<sup>593</sup> According to the Prison Policy Initiative, for instance, “In Colorado, for example, it costs an incarcerated woman two weeks’ wages to buy a box of tampons; maybe more if there’s a shortage. Saving up for a \$10 phone card would take almost two weeks for an incarcerated person working in a Pennsylvania prison.”<sup>594</sup> That investigation also found that “With a few rare exceptions, regular prison jobs are still unpaid in Alabama, Arkansas, Florida, Georgia, and Texas.”<sup>595</sup> And wages have actually been going down: the ACLU found that “prisons appear to be paying incarcerated people less today than they were in 2001. The average of the minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents, down from 93 cents reported in 2001.”<sup>596</sup>

And yet: incarcerated workers produce more than \$2 billion a year in goods and commodities and over \$9 billion a year in services for the maintenance of the prisons where they are warehoused.<sup>597</sup>

In the 21<sup>st</sup> century, not paying people appropriately for work done, providing opportunities for only menial work and forcing people to work under inhumane conditions violate dignity rights in multiple ways:

1. It is demeaning and degrading in violation of the dignity’s equality principle;
2. It can violate a person’s bodily integrity if the bodily burdens of the work are excessive;
3. It prevents people from living as a person while inside in violation of the principle of humanity; and
4. It impedes preparation for living with dignity upon release in violation of dignity’s socialization principle. Rather, it reinforces the cycle.

As the ACLU has explained,

“Core human rights instruments ratified by the United States, as well as other authoritative documents at the international level, provide a basic standard that prohibits dehumanizing and exploitative treatment undermining incarcerated people’s human dignity.”<sup>598</sup>

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<sup>593</sup> ACLU, *Captive Labor: Exploitation of Incarcerated Workers* (June 15, 2022), <https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers> [hereinafter *Captive Labor*].

<sup>594</sup> Wendy Sawyer, *How much do incarcerated people earn in each state?* (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> ACLU, *Captive Labor*, *supra* note 593, at 6.

<sup>598</sup> ACLU, *Captive Labor*, *supra* note 593, at 18.

Moreover, principles like respect for human dignity and prohibitions on forced and exploitative labor are arguably at the core of established U.S. constitutional protections.<sup>599</sup>

Prison workers deserve dignity. They should be properly trained for the work they perform, and we should be investing in programs that provide incarcerated workers with marketable skills that will help them find employment after release and eliminate barriers to employment and release.”<sup>600</sup>

The commitment to human dignity prohibits not only conditions that are inhumane and pay that denies equal worth; it also prohibits the objectification of persons and their use to accomplish other goals of the state as happens when states make money from prison labor.

By contrast, the European policy of paying prisoners a living wage for their work is rooted in human dignity because it treats people like adults and provides them the wherewithal to exercise **agency** and autonomy.<sup>601</sup> It allows people to buy items in the commissary, to remain connected to friends and family, and it provides a foundation for them upon release. In the United States, where housing subsidies are limited and health care and transportation are often not affordable, earning a living while in prison is indispensable for a successful experience upon release.

#### IV. PRISON PERSONNEL SHOULD NOT TREAT PRISONERS AS LESS THAN HUMAN

Prisons in the United States routinely treat people as less than human, degrading and diminishing their sense of worth and self-esteem, and their value in the eyes of others. They do this in quotidian ways, in how prison personnel speak to prisoners, in how they force people to buy necessities when they have no access to funds, in how they violate their privacy by searching their things, the cells that are their homes, and their very bodies. And they do this in acute but random ways, by failing to provide information about changes in routines or transportation to other parts of a facility or to facilities in other counties and in other states. Disciplinary punishments— as described in Chapter 6 — are rife with dignity-degrading measures.

*Walker v. State*, the Montana Supreme Court case, provides a brutal example of violations of dignity borne by one unfortunate man, as well as others in his facility by what are euphemistically called Behavior Modification Plans. The Walker court held that “reading Article II, Sections 4 and 22 [of the Montana Constitution] together, BMPs and the living conditions on A-block constitute an affront to the inviolable right of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate’s mental health condition.”<sup>602</sup>

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<sup>599</sup> *Id.* at 84.

<sup>600</sup> *Id.* at 18.

<sup>601</sup> *German top court tells two states to pay prisoners better* (June 20, 2023), <https://www.dw.com/en/german-top-court-tells-two-states-to-pay-prisoners-better/a-65977679>.

<sup>602</sup> *Walker v. State*, 68 P.3d 872, 885 (Mont. 2003).

Here, the court recognized that the State constitution forbids correctional practices that permit prisons in the name of behavior modification to disregard the innate dignity of human beings, especially in the context where those persons suffer from serious mental illness.<sup>603</sup> These practices violate human dignity at its core because they are humiliating and degrading to a person's sense of self and sense of humanity. The result of this culture of inhumanity is predictable. As the court related:

“One inmate described life in A-block as follows: ‘My feeling of worth, you know, was just—I didn't feel worth anything, you know, I didn't want to—I didn't want to carry on. When I finally went to the mental health block [in Max], I didn't care whether I lived or died. It's—eating like a dog, eating your food off the ground, and really, you know, you don't even feel human after a while....’”<sup>604</sup>

Dignity, being inviolable, must always be respected. A prison that seeks to modify a person's behaviour must always do so in ways that respect the person's humanity and innate sense of dignity. The dignity-respecting goal of rehabilitation demands that penal institutions “counter all deforming alterations of personality,”<sup>605</sup> as described by the German Constitutional Court.

#### A. Models for Dignity-Based Incarceration

As the Montana Supreme Court in *Walker* explained, dignity demands that the government take all affirmative measures necessary to ensure that such conduct is not repeated.

“[W]hatever means we use to reform, we must not punish or reform in a way that degrades the humanity, the dignity, of the prisoner. Protecting dignity should include, for example, security from physical harm, including security from sexual violation, by other prisoners or guards. It should also include attention to such basic human needs as adequate medical care, humane rules for visitation, adequate exercise, and adequate opportunity for education or other capacity-developing activity.”<sup>606</sup>

Prisons with dignity do exist. Some prison officials in the United States have looked to Europe to identify best practices that respect every person's dignity and that aim toward the successful reintegration of every person into society after their period of incarceration. In Germany, this process is referred to as “normalization.”<sup>607</sup> This model has a number of elements.

**Goal of incarceration:** The goal of incarceration is not retribution or deterrence but rehabilitation or resocialization: the purpose of the criminal legal system is to help people live lives of dignity and to avoid being system-impacted. This is consistent with the International Covenant on Civil and Political Rights (to which the U.S. is a party), which states: “The penitentiary system shall

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<sup>603</sup> MONT. CONST. art. 2, §§ 4, 22.

<sup>604</sup> *Walker*, 68 P.3d at 884.

<sup>605</sup> BVerfG, Life Imprisonment (*lebenslange Freiheitsstrafe*) 45 BVerfGE 187, June 21, 1977 (Ger.) (noting also that penal institutions must “substantially counter ... the threat of changing personalities of inmates.”)

<sup>606</sup> *Walker*, 68 P.3d at 884.

<sup>607</sup> Subramanian & Shames, *supra* note 467, at 2.



comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”<sup>608</sup> The warden of a Connecticut prison explained simply that the punishment is the incarceration and it is not the job of correctional officers to punish somebody even more while they are incarcerated.<sup>609</sup> A former inmate from this Connecticut prison confirmed this, noting that the correctional officers and staff cared about him.<sup>610</sup> For instance, one particular correctional officer took an interest in him and helped him pursue his dream of playing college basketball.<sup>611</sup>

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*One prisoner noted that the correctional officers and staff cared about him.*

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**Architecture designed to respect dignity** and invoke outside world. In some prisons following the European model, each living space has a bathroom that provides privacy, and certain other amenities that provide comfort and connections to the outside world. In North Dakota, some prisons allow individuals to apply for private rooms, to which they are given a key.<sup>612</sup> At SCI Chester, in Pennsylvania, a unit was refurbished with Scandinavian style furniture. The Unit, known as “Little Scandinavia,” focuses on “rehabilitation and reintegration. ... Little Scandinavia residents have access to a communal kitchen, green space, and redesigned cells, furniture and common areas.” The program – a partnership with the Norwegian Correctional Service and the Swedish Prison and Probation Service – will also involve monitoring “prison climate, staff, disciplinary actions and the well-being of the people serving their sentences there.”<sup>613</sup>

**Activities designed to empower prisoners** to take responsibility for their own lives both during and after incarceration. People in prison should have some agency or control over how they spend their time and should have control over their lives to the extent compatible with incarceration. Some prisons allow people to cook their own meals, to wear their own clothes, and to choose educational programs. Education is not only vocational but opens the mind and helps to fully develop the personality. Educational opportunities must also take into account different learning

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*Some prisons allow people to cook their own meals, to wear their own clothes, and to choose educational programs.*

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styles and the fact that many people in prison do not have a strong educational foundation and may face particular learning or intellectual challenges. Employment should provide fair compensation and teach skills.

**Support.** Prisons must also provide effective therapy programs. Therapy may help people who have committed crimes understand how and why they came to engage in such conduct, and it may help all those who are incarcerated to endure the impacts of incarceration. This practice allows the individual to have agency with their life even while in prison. Idaho is attempting to

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<sup>608</sup> ICCPR, art. 10(3), supra note 329.

<sup>609</sup> Bill Whitaker, *German-style Program at a Connecticut Maximum Security Prison Emphasizes Rehab for Inmates*, (Mar. 31, 2019), <https://www.cbsnews.com/news/german-style-true-program-at-cheshire-correctional-institution-emphasizes-rehab-for-inmates-60-minutes/>.

<sup>610</sup> *Id.*

<sup>611</sup> *Id.*

<sup>612</sup> Dashka Slater, *North Dakota’s Norway Experiment*, MOTHER JONES (July/Aug. 2017), <https://www.motherjones.com/criminal-justice/2017/07/north-dakota-norway-prisons-experiment/>.

<sup>613</sup> Christina Griffith, *A Local Experiment in Scandinavian Justice*, THE PHILA. CITIZEN (July 19, 2023), <https://thephiladelphiacitizen.org/little-scandinavia/>.

replicate changing the role of the correctional officers, who in the European system take on the duty of role models by talking to inmates, helping them navigate their daily lives, assisting them with homework, or coaching them before job interviews.

These efforts support rehabilitation and socialization by treating all people as people and dissolving the barriers between inmates and others. They are designed to reduce crime and keep society and prisons safer by treating everyone like a human being.

#### V. ADVOCACY POINTS

1. Prison conditions must be maintained in a manner that upholds the dignity of each individual.
2. Prisons should aim toward the successful re-entry into society of people who are incarcerated, principally by treating people who are incarcerated with dignity and in line with conditions on the outside.
3. Prisons have an affirmative duty to protect the dignity – including the psychic and bodily integrity – of prisoners by protecting them from assaults and attacks by both prison officials and other prisoners.
4. People should have privacy even while incarcerated.
5. Prison cells should provide adequate living space, windows and appropriate access to light. They should have proper ventilation and be maintained at comfortable temperatures. Cells must be maintained and cleaned and prisoners should have the wherewithal to clean their cells so that they can at all times live with dignity.
6. Prisoners must at all times be able to maintain sanitary conditions, maintain hygiene and grooming commensurate with conditions on the outside.
7. Food should be commensurate with what is generally available outside.
8. Prisoners should have opportunities for education and employment to allow them to fully develop their personalities and support effective and dignified reentry, as appropriate for each individual.
9. Prisoners should have maximum opportunities to communicate with and maintain relationships with people on the outside. This includes ample opportunity for visits and phone calls, and materials for reading and writing.

## CHAPTER 5: HEALTH CARE IN PRISON

This chapter examines access to physical and mental health care for people who are in carceral custody. Health care for people in prisons is mandated under international human rights law and US constitutional law. In practice, however, it is inadequate in quantity and quality, in violation of the human dignity interests in agency, self-esteem, bodily integrity, privacy, and equality among other things. We consider a range of medical needs, from chronic conditions to acute care, and we consider the need to provide physical and dental care appropriate to human dignity. The chapter notes that, despite the particular needs and vulnerabilities of girls and women in custody, they are disproportionately burdened in the availability of appropriate medical care. Moreover, for the hundreds of thousands of people with mental health illness, the problems are worse, as incarceration itself is an exacerbating condition. Dignity entails an inherent right to a safe place, both physically and psychologically, the right to be heard and provided physical and mental health treatment, the right to freedom from humiliation, and privacy. Most importantly, dignity demands individualized care as appropriate to each person's needs.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

### I. INTRODUCTION: HEALTH CARE IS A HUMAN RIGHT THAT IS ESSENTIAL FOR DIGNITY

The World Health Organization explains in its Prisons and Health guide, that “[r]egardless of the circumstances, the ultimate goal of healthcare staff must remain the welfare and dignity of the patients. It should be made clear to the patients, prison staff and the prison director that the primary task of the prison healthcare staff is the healthcare of prisoners, and that all work is based on the strict medical and ethical principles of healthcare professionalism: independence, equivalence and confidentiality of care.”<sup>614</sup>

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*The ultimate goal of healthcare staff must remain the welfare and dignity of the patients.*

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Of the 2 million people incarcerated in the United States,<sup>615</sup> approximately 44% of the state and federal prison population experience a chronic health condition.<sup>616</sup> The most prevalent medical

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<sup>614</sup> WHO, PRISONS AND HEALTH, *supra* note 426, at 12.

<sup>615</sup> The Sentencing Project, *Growth in Mass Incarceration*, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Sept. 26, 2023).

<sup>616</sup> Laura M. Maruschak, Marcus Berzofsky & Jennifer Unangst, *Medical Problems of State and Federal Prisoners and Jail Inmates*, 2011-12 at 3, U.S. DEP'T OF JUST. (revised Oct. 4, 2016), <https://bjs.ojp.gov/content/pub/pdf/mpsfjji1112.pdf>.

conditions are high blood pressure (30.2%), heart related problems (9.8%), arthritis (15%), asthma (14.9%), and diabetes (9%).<sup>617</sup> Moreover, the prison setting is ideal for the spread of communicable disease, due to overcrowding, poor nutrition, violence, poor ventilation, and lack of opportunities for adequate hygiene.<sup>618</sup> The frequency of transmission for HIV, hepatitis and tuberculosis are higher among the prison population than the non-prison population.<sup>619</sup> And prisons are ill-equipped to protect people from viral pandemics such as Covid-19.<sup>620</sup>

Access to adequate healthcare in prison has been deemed a fundamental right by the Supreme Court. In *Estelle v Gamble*, the court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’, proscribed by the Eighth Amendment.”<sup>621</sup> The Court explained that the “deliberate indifference to serious medical needs” standard is met “whether the indifference is manifested by prison doctors in response to prison needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed.”<sup>622</sup> Either way, a violation of the 8th Amendment may be found. In *Brown v. Plata*, Justice Kennedy, writing for the majority, explained that although prisoners lose their freedom due to their actions, they “retain the essence of human dignity inherent in all persons.”<sup>623</sup> The Court recognized that prisoners cannot be denied basic sustenance, including adequate medical care.<sup>624</sup>

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*People in prison “retain the essence of human dignity inherent in all persons.”*

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Lower courts have followed suit. In *Scott v. Clarke*,<sup>625</sup> the United States District Court for the Western District of Virginia, held that “[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”<sup>626</sup> The case was a class action suit filed by prisoners in a women’s correctional facility in Virginia, alleging the facility violated their Eighth Amendment rights by providing inadequate medical care.<sup>627</sup> One inmate, T.G., was given the wrong medication for her diabetes, leaving her diabetes poorly controlled, which led to fainting spells and vision loss.<sup>628</sup> Another diabetic woman, M.W., endured two amputations to her right leg<sup>629</sup> after her complaints of numbness and pain were not adequately addressed.<sup>630</sup> These complications could have been

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<sup>617</sup> Maruschak, Berzofsky & Unangst, *supra* note 616, at 3.

<sup>618</sup> WHO, PRISONS AND HEALTH, *supra* note 426, at 47 (Fig. 1).

<sup>619</sup> *Id.* at foreword.

<sup>620</sup> The Covid Prison Project, <https://covidprisonproject.com/> (last visited Jan. 19, 2023).

<sup>621</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>622</sup> *Id.* at 104-05.

<sup>623</sup> *Brown v. Plata*, 563 U.S. 493, 510 (2011).

<sup>624</sup> *Id.* at 511.

<sup>625</sup> *Scott v. Clarke*, 61 F. Supp. 3d 569 (W.D. Va. 2014).

<sup>626</sup> *Id.* at 583 (quoting *Brown v. Plata*, 563 U.S. at 510).

<sup>627</sup> *Id.* at 572.

<sup>628</sup> *Id.* at 582.

<sup>629</sup> *Id.* at 580.

<sup>630</sup> *Id.*

avoided, and the dignity of the prisoners protected, if the facility had taken their health concerns seriously and provided adequate medical care.

Providing healthcare to prisoners while they are incarcerated is essential to the aspect of dignity that protects a person's **bodily integrity** and their dignity-based rights to have agency for and take responsibility for what happens to their body. Maintaining the health of prisoners will result in the prisoners experiencing fewer health problems, allowing them to live more productive lives within or outside prison. Furthermore, those whose health was protected while they were incarcerated are more likely to find suitable housing and secure employment,<sup>631</sup> be more physically active,<sup>632</sup> and be able to embrace and enjoy life.<sup>633</sup> This can lead to the person finding purpose and fulfillment, allowing them to **develop their personalities**,<sup>634</sup> and live a fuller life – all essential to a person's inherent dignity.

#### A. The Legal Standard of Care Should Be Based on Dignity, Not Government Indifference

While *Estelle v. Gamble* may be commended for recognizing a dignity-based right to health care while in prison, its “deliberate indifference” standard is too difficult to meet as a practical matter and inconsistent with human dignity as a legal matter. It is nearly impossible for a person who has suffered a medical condition while incarcerated to have the wherewithal to adduce evidence of the state of mind of one or more prison official, let alone sufficient evidence to persuade a judge or jury that the defendant had acted with deliberate indifference.

But the problem with the standard is not only that it's nearly impossible to meet. It's that the test of a violation is irrelevant to the harm. The real harm of lack of health care is not that an official was indifferent to a prisoner's needs; rather it is that the failure to attend to the prisoner's needs is per se unconstitutional because it violates their dignity.

The test should be whether the challenged action or inaction violated the human dignity of the person who is incarcerated. This could be shown by evidence of the claimant's actual state of mind or showing that a person in that situation would feel humiliated and demeaned, would lack sufficient agency to control what happens to their body, and was diminished in their sense of self. Dignity cannot be measured but there can be evidence of diminishment, of humiliation, of offenses to one's body, of lack of choice and decisional agency that are not strictly the result of medical conditions or incarceration. The German Constitutional Court considers where the treatment of the prisoner results in “alterations to the personality” that indicate a violation of that person's dignity.<sup>635</sup>

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<sup>631</sup> UDHR, *supra* note 7, at art. 23(1).

<sup>632</sup> International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR], art 12(1), 16 Dec. 1966, 993 U.N.T.S. 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>633</sup> UDHR, *supra* note 7, at art. 27(1) (“the right freely to participate in cultural life of the community, to enjoy arts...”).

<sup>634</sup> *Id.* at art. 22.

<sup>635</sup> BVerfG, Life Imprisonment (lebenslange Freiheitsstrafe) 45 BVerfGE 187, June 21, 1977 (Ger.).

*Brown v. Plata* uses a more objective approach that is more consistent with dignity violations. Its reasoning has been extended to mental health care as well. In *Thomas v. Bryant*, the Eleventh Circuit held, “mental health needs are no less serious than physical needs.”<sup>636</sup> In that case, the court held that Florida’s policies and practices dealing with the mentally ill “are extreme deprivations violating the ‘broad and idealistic concepts of dignity...’”<sup>637</sup> The court held that

“the policy and practice of spraying inmates with chemical agents, as applied to McKinney under the circumstances found here — i.e., when he was fully secured in his seven-by-nine-foot steel cell, when he was not presenting a threat of immediate harm to himself or others, and when he was unable to understand and comply with officers’ orders due to his mental illness — are extreme deprivations violating the ‘broad and idealistic concepts of dignity, civilized standards, humanity and decency’ embodied in the Eighth Amendment.”<sup>638</sup>

The Court was reacting to correction officers inflicting painful punishments without justification or need and without regard to an inmate’s mental health.<sup>639</sup> The court acknowledged that being gassed when a person cannot control their actions due to their mental illness fails rehabilitation goals and becomes brutality.<sup>640</sup> Using excessive force on an inmate or confining them to a cell when a person is having a mental health emergency or is unable to follow directions is a violation of their dignity and of the Eighth Amendment.<sup>641</sup> The *Thomas* court held that an inmate cannot be punished for behaviors that are a result of their illness, and the punishment only adds to the deterioration of inmate’s condition – that is, “when their mental illnesses become more active and their symptoms more pronounced.”<sup>642</sup> Importantly, the Eleventh Circuit connected the underlying principles of the Eighth Amendment to treating inmates suffering with mental illness with dignity. Moreover, the court recognized the additional responsibility of the

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*Certain conditions violate the "broad and idealistic concepts of dignity, civilized standards, humanity and decency" embodied in the Eighth Amendment*

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government when dealing with a person in their care who is in a state of particular vulnerability. Because the individual does not at that time have the resources to protect themselves, prison staff has a special obligation to ensure that they are treated at all times as moral equals, to keep them safe from abuse and humiliation, and to protect their bodies and keep them safe and healthy.

## B. Women Experience Additional Forms of Dignity Violations

Women are of course subject to almost all of the same medical risks as men – including stress-related diseases and communicable diseases – and in addition have health needs that men

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<sup>636</sup> *Thomas v. Bryant*, 614 F.3d 1288, 1312 (11th Cir. 2010).

<sup>637</sup> *Thomas*, 614 F.3d at 1312.

<sup>638</sup> *Id.* (citing *Hope v. Pelzer*, 240 F.3d 975, 979 (11th Cir. 2001)).

<sup>639</sup> *Id.* at 1311.

<sup>640</sup> *Id.*

<sup>641</sup> *Id.* at 1312.

<sup>642</sup> *Id.* at 1297.

do not have. Facilities must ensure that women’s needs regarding menstruation, pregnancy, abortion, childbirth, breastfeeding, menopause, and other health-related matters are attended to. Medical care with dignity ensures both that women have access to the medications and procedures they need and that they are treated with respect and dignity in the provision of medical care. Moreover, it recognizes that women may feel especially vulnerable in matters relating to their physical health that have emotional and psychological dimensions as well as physical ones.

Although “all U.S. prisons and jails are required to provide prenatal care under the Eighth Amendment of the Constitution,”<sup>643</sup> many do not. Routinely, women’s dignity is denied in two principal ways. First, by what might be called “medical gaslighting” which tends to be more pronounced for women than for men.<sup>644</sup> In *Mori v. Allegheny County*, the court held that the defendants did violate the Eighth Amendment rights of Loni Mori by “being deliberately indifferent to a prisoner’s serious illness or injury”<sup>645</sup> when they denied her medical care and ignored and dismissed her complaints.<sup>646</sup> Mori was 7 months pregnant at the time of her incarceration and the prison’s mistreatment of her led to the death of her child. This medical gaslighting is common for women inside and outside of the criminal legal system and compounded by the vulnerability of being in custody. It is worse for women who are black or brown.

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*The egregiousness of a dignity violation should be sufficient to end the practice, regardless of an officer’s state of mind.*

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Second, prisons often treat women who are vulnerable – and especially women who are pregnant – with cruelty. Although more than half of incarcerated women serve sentences for non-violent offenses,<sup>647</sup> prisons treat women – particularly when they are at their weakest and most vulnerable – as if they are dangerous and worse. A 2019 study revealed that “83% of perinatal nurses who cared for incarcerated women during pregnancy or the postpartum period reported that shackles were used on their patients sometimes to all of the time, and 12.3% reported that their patients were always shackled.”<sup>648</sup> In *Nelson v. Corr. Med. Servs.*, Shawanna Nelson, who had not been convicted of any violent crime, had both ankles shackled to opposite sides of the hospital bed, thus completely restricting her movement while she was giving birth.<sup>649</sup> She suffered needless pain, discomfort, and humiliation,

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<sup>643</sup> Anna Roh, *Forced to Give Birth Alone: How Prisons and Jails Neglect Pregnant People Who are Incarcerated*, COLUMBIA MAILMAN SCH. OF PUB. HEALTH (Feb. 28, 2022), <https://www.publichealth.columbia.edu/public-health-now/news/forced-give-birth-alone-how-prisons-and-jails-neglect-pregnant-people-who-are-incarcerated>.

<sup>644</sup> Among the general population outside the prison context, gender discrimination is rampant in the provision of medical care and especially pernicious for women of color. See, e.g., News Medical Life Sciences, *Women’s inequitable healthcare experiences reflect implicit bias, discrimination and disempowerment* (Dec. 20, 2022), <https://www.news-medical.net/news/20221220/Womene28099s-inequitable-healthcare-experiences-reflect-implicit-bias-discrimination-and-disempowerment.aspx>; Harvard T.H. Chan, Sch. of Pub. Health, *How discrimination can harm black women’s health*, <https://www.hsph.harvard.edu/news/hsph-in-the-news/discrimination-black-womens-health/> (last visited Jan. 19, 2023).

<sup>645</sup> *Mori v. Allegheny Cty.*, 51 F. Supp. 3d 558, 566 (W.D. Pa. 2014) (quoting *Estelle v. Gamble*, 429 U.S. 97, 105).

<sup>646</sup> *Id.* at 563.

<sup>647</sup> Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, *supra* note 125.

<sup>648</sup> *Shackling of Pregnant Women in Jails and Prisons Continues*, EQUAL JUSTICE INITIATIVE (Jan. 29, 2020), <https://eji.org/news/shackling-of-pregnant-women-in-jails-and-prisons-continues/>.

<sup>649</sup> *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 525 (8th Cir. 2009).

and her unborn child was put at additional harmful risks.<sup>650</sup> The 8<sup>th</sup> Circuit found a violation of the 8<sup>th</sup> Amendment in the officer’s deposition acknowledgment that she knew that shackles could be detrimental. But the egregiousness of the dignity violation should be sufficient to end the practice, regardless of an officer’s state of mind.

The American Medical Association (AMA) has affirmed that “freedom from physical restraints is especially critical during labor, delivery, and postpartum recovery after delivery. Women often need to move around during labor and recovery, including moving their legs as part of the birthing process.”<sup>651</sup> The AMA’s guidelines support treating women in labor with dignity by providing **bodily integrity** throughout childbirth and allowing **freedom of movement**. In addition, shackling creates a higher risk of injuries. In Shawanna Nelson’s case, she suffered “extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia [that] requir[ed] surgical repair.”<sup>652</sup> And it’s just plain cruel.

Currently, thirty-seven states have anti-shackling laws that either ban the act or severely limit it for pregnant women in jails; however, there are still states that can and do shackle women during childbirth.<sup>653</sup> In 2018, the First Step Act was passed into law, and one of the provisions prohibits “using restraints on pregnant inmates;” however, restraints may be used “if the inmate is determined to be an immediate and credible flight risk or poses an immediate and serious threat of harm to herself or others that cannot be reasonably prevented by other means, or a healthcare professional determines that the use of restraints is appropriate for the medical safety of the inmate.”<sup>654</sup> This language does not sufficiently protect pregnant women. The state needs to take particular care to protect the inherent and inviolable dignity of women, especially when they are in situations of physical and emotional vulnerability.

## C. Good Practices to Ensure Mental and Physical Health Care with Dignity

### 1. Training

Interactions between prisoners and staff around medical needs can potentially represent moments of dignity and respect, in which people on either side of the correctional divide see each other with empathy in their common humanity. Too often, however, the carceral state discourages these interactions by reinforcing the divide between those on the inside and all others, including those who work with them. As a result of the distance that grows between those who are incarcerated and others, those who work with them are more likely to distrust a prisoner’s claim of a health need, to discount the pain they describe, to diminish the agency that prisoners sometimes are able to assert when they advocate for themselves, and to denigrate their need for privacy. There is abundant evidence that, throughout society, the medical needs of racial

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<sup>650</sup> *Id.* at 526.

<sup>651</sup> Am. Med. Ass’n., *Issue Brief: Shackling of Pregnant Prisoners* (2015), <https://www.ama-assn.org/delivering-care/public-health/public-health-improvement> (last visited Feb 28, 2022)

<sup>652</sup> *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 526 (8th Cir. 2009).

<sup>653</sup> Joe Hernandez, *More States are Restricting the Shackling of Pregnant Inmates, but it Still Occurs*, NPR (Apr. 22, 2022), <https://www.npr.org/2022/04/22/1093836514/shackle-pregnant-inmates-tennessee>.

<sup>654</sup> NATHAN JAMES, CONGRESSIONAL RSCH. SERV., *THE FIRST STEP ACT OF 2018: AN OVERVIEW* 17 (Mar. 4, 2019), <https://crsreports.congress.gov/product/pdf/R/R45558>.



minorities and women are not being met<sup>655</sup> and there is no reason to think that such biases disappear inside prison walls.

However, such biases can sometimes be reduced with proper training. For example, staff should be trained to avoid questions that diminish a person's dignity or that are likely to result in the person closing down (such as questions relating to the basis for incarceration): such questions draw distance between patient and provider and reinforce an inequality between the two. At worse, such questions serve to dehumanize the patient by defining them by their vulnerability and can thus provide an internal justification to administer inadequate healthcare. Asking instead about family or interests can, by contrast, draw people into community as people of equal dignity.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") sets the minimum standards regarding information sharing of protected health information<sup>656</sup> in order to protect the health **privacy** of all Americans. But it further compromises the privacy of people who are incarcerated. Pursuant to 45 C.F.R. § 164.512, health information may be shared with a correctional facility or officer without the written consent or authorization of the individual when the individual remains in lawful custody.<sup>657</sup> Since a supervising officer is not considered a "covered entity" or a "federally assisted program" under HIPAA,<sup>658</sup> officers are not necessarily prohibited from informing the court about a probationer's diagnosis and treatment.<sup>659</sup>

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*Women designed and implemented a nutrition and circuit training program.*

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Training of prison officials should also include recognizing medical emergencies to mitigate their impact and support the dignity of a patient needing urgent care. For instance, a 2008 report from the American Diabetes Association emphasizes that all prison staff should be trained to recognize and treat hyper- and hypo-glycemia, emergency situations in which the prisoner needs to receive treatment promptly.<sup>660</sup>

Inmates delivering healthcare to their fellow inmates are sometimes referred to as "compassion workers" and this can be an effective way to deliver health care if education and confidentiality standards are implemented. A compassion worker can affirm the dignity of the

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<sup>655</sup> See, e.g. Antoinette Schoenthaler & Natasha Williams, *Looking Beneath the Surface: Racial Bias in the Treatment and Management of Pain*, JAMA NETWORK (June 9, 2022) ("Research has consistently documented inequities in the quality of care experienced by Black patients, with negative downstream effects on patient outcomes. Chronic pain is an area where substantial racial and ethnic differences in the management and treatment of Black individuals' pain have been well-documented."), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2793179>; see, e.g. Lindsey Bever, "From heart disease to IUDs: How doctors dismiss women's pain," Washington Post, December 13, 2022 ("Several studies support the claim that gender bias in medicine routinely leads to a denial of pain relief for female patients for a range of health conditions"), <https://www.washingtonpost.com/wellness/interactive/2022/women-pain-gender-bias-doctors/>.

<sup>656</sup> The Health Insurance Portability and Accountability Act [hereinafter HIPAA], 42 C.F.R. Part 2 (1996).

<sup>657</sup> 45 C.F.R. § 164.512.

<sup>658</sup> JOHN PETRILA & HALLIE FADER-TOW, INFORMATION SHARING IN CRIMINAL JUSTICE-MENTAL HEALTH COLLABORATIONS: WORKING WITH HIPAA AND OTHER PRIVACY LAWS 5 Bureau of Just. Assistance (2010).

<sup>659</sup> *Id.*

<sup>660</sup> American Diabetes Association, *Diabetes Management in Correctional Institutions* (Jan. 1, 2008), [https://diabetesjournals.org/care/article/31/Supplement\\_1/S87/24480/Diabetes-Management-in-Correctional-Institutions](https://diabetesjournals.org/care/article/31/Supplement_1/S87/24480/Diabetes-Management-in-Correctional-Institutions).

patient by serving as an intermediary between the prisoner and the staff, by expressing concern and providing emotional support, and by helping to ensure that the patient receives the care they need. This work can also support the dignity of the worker by helping them develop useful skills and medical knowledge, and by providing them with a way to help others even while they are incarcerated. However, proper education and training are necessary to ensure that the compassion worker provides support to the patient and does not reinforce their vulnerability and to protect patient confidentiality and privacy to ensure that each person is treated with individual dignity.

## 2. Agency and Self-advocacy

Agency and self-advocacy advance human dignity both as ends and means. In one medium security prison for women in Canada,<sup>661</sup> women designed and implemented a nutrition and circuit training program, and post-program assessments showed an improvement in the overall health of the inmates.<sup>662</sup> Programs like this are dignity affirming, both physically and psychologically, as they provide prisoners some level of agency over their health and the opportunity to maintain or improve it. Healthy diet and exercise aid in prevention and control of chronic illness and this in turn improves overall health and aid in the protection of the prisoner's bodily integrity.

## 3. Preventive Care

In 2008, the American Diabetes Association released guidelines for the care of the estimated 80,000 diabetic prisoners.<sup>663</sup> The guidelines state that prisoners with diabetes should receive care that "meets the national standards."<sup>664</sup> The recommendations include: medical screenings at intake, including a complete medical history performed by a licensed medical provider; individualized goals, including self-management for the prisoners; nutrition counseling and a heart healthy diet to be coordinated with the administration of medications; access to medications and allowing prisoners to self-inject their insulin; diabetic education for both prisoners and all prison staff; and referrals to specialists as needed to mitigate complications related to diabetes.<sup>665</sup> Prisons that implement these recommendations will not only reduce health care costs but will protect prisoners' dignity by protecting their **bodily integrity** and promoting their **agency**.<sup>666</sup>

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*Prisons that implement these recommendations will not only reduce health care costs but will protect prisoners' dignity by protecting their bodily integrity and promoting their agency.*

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Measures can also be taken by prisons to lessen the spread of communicable diseases if appropriate support is provided. Making educational information available on communicable

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<sup>661</sup> WHO, PRISONS AND HEALTH, *supra* note 426, at 84 (Box 1).

<sup>662</sup> *Id.*

<sup>663</sup> American Diabetes Association, *supra* note 660.

<sup>664</sup> *Id.*

<sup>665</sup> *Id.*

<sup>666</sup> *Id.*

diseases is vital<sup>667</sup> as is ensuring that facilities are following proper standards when disinfecting surfaces, sterilizing medical and dental equipment, and disposing of medical waste.<sup>668</sup> Making sure staff and prisoners are up to date on their vaccinations for communicable diseases such as influenza<sup>669</sup> and Covid is also indispensable. Respecting the dignity of prisoners includes not jeopardizing their health by exposing them to communicable diseases.

The Supreme Court in *Brown v. Plata* affirmed the lower court's finding that overcrowding in the California prison system was the principal reason that inmates were being denied adequate medical and mental health care.<sup>670</sup> The Eighth Amendment violations found in *Brown* were well-documented to have caused unnecessary death and suffering to the prisoners.<sup>671</sup> The prison was operating at 200% capacity:<sup>672</sup> fifty-four prisoners shared a single toilet,<sup>673</sup> fifty sick inmates were held together in a 12x20 cage for five hours while awaiting treatment,<sup>674</sup> and exam tables where prisoners with communicable disease were treated were not disinfected.<sup>675</sup> This not only threatens their life and impairs their health but it violates their dignity by failing to treat each person **as a person** of inherent worth and value.

#### D. Dental and Oral Health Is Also an Essential Part of Human Dignity

Dental hygiene services should be made available to all prisoners. According to the WHO Prisons and Health report, “[d]ental teams should incorporate the values of fairness, respect, equality, dignity and autonomy into high standards of clinical care and the provision of a service accessible to all.”<sup>676</sup> Dental care should be delivered with the same standard of care that any person would receive outside of prison. Giving prisoners some **agency** by allowing them to schedule dental hygiene services is also dignity affirming; it respects their **bodily integrity** and educates them on self-care that will aid them in whole body health.

The prison population exhibits a higher prevalence of dental decay and periodontal disease,<sup>677</sup> which is exacerbated by a lack of access to adequate dental care, home care supplies, substance abuse, and stress.<sup>678</sup> Periodontal disease has been linked systemically to heart disease,

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<sup>667</sup> WHO, PRISONS AND HEALTH, *supra* note 426, at 47.

<sup>668</sup> *Id.* at 49.

<sup>669</sup> *Id.* at 73.

<sup>670</sup> *Brown v. Plata*, 563 U.S. 493, 502 (2011).

<sup>671</sup> *Id.* at 501.

<sup>672</sup> *Id.* at 502.

<sup>673</sup> *Id.*

<sup>674</sup> *Id.* at 504.

<sup>675</sup> *Id.* at 508.

<sup>676</sup> WHO, PRISONS AND HEALTH, *supra* note 426, at 101.

<sup>677</sup> RDH Magazine, *A system for the link? The oral-systemic link is spilling over into multiple health-care settings*, Kathryn Gilliam, RDH, Oct. 1, 2017, <https://www.rdhmag.com/patient-care/article/16409813/a-system-for-the-link-the-oral-systemic-link-is-spilling-over-into-multiple-healthcare-settings>.

<sup>678</sup> WHO, PRISONS AND HEALTH, *supra* note 426, at 99.

diabetes, respiratory disease, an increased risk of certain types of cancer, Alzheimer's disease, premature birth and low birth weight.<sup>679</sup>

Prisoners lack the autonomy to access preventative dental care, or sometimes even basic self-care items such as floss, a toothbrush and toothpaste. The lack of routine preventative dental care can leave a person with significant gum disease that may manifest itself in eventual tooth loss. Tooth loss itself holds social stigma both in the prison and post-release. According to the Marshall Project, due to societal standards in aesthetics, tooth loss or noticeable tooth decay can often leave a person with a lack of employment opportunities<sup>680</sup> and result in other forms of social ostracism upon release and reentry into society. Neglecting dental health can leave the person embarrassed, leading to a lack of self-confidence, which negatively affects their sense of **self-worth**. It affects the prisoner's bodily integrity, makes them feel humiliation, and impairs their ability to maintain **social and familial ties**.

Some courts have agreed. The Tenth Circuit Court of Appeals has stated that access to dental care is particularly important for the incarcerated, recognizing that the prison population generally has an increase in dental disease when viewed against citizens not incarcerated.<sup>681</sup> This can be due to former drug use, such as methamphetamine use, which has been known to cause significant damage to teeth, or the lack of access to routine dental care prior to incarceration. *Ramos v. Lamm* was a class action brought by incarcerated individuals in Colorado who challenged the adequacy of healthcare, including dental health care. The court found that even 40 hours per week of dental care was given the large population in the prison.<sup>682</sup> The court recognized that because they had not received adequate care in a timely manner, prisoners were prone to "unnecessary pain and loss of teeth."<sup>683</sup> In *Sullivan v. Dennehy*, the Superior Court of Massachusetts held that denying dental care over a period of years violated the Department's own policy which read in pertinent part: "All healthcare services shall be provided in an atmosphere that assures privacy and dignity for both the inmate and the provider. ... All healthcare services shall be comparable in quality to that available in the community."<sup>684</sup> This is a dignity-affirming policy that must be adhered to.

In *Boards v. Farnham*, the Seventh Circuit held that the long-term deprivation of toothpaste to inmates may constitute a constitutional violation if the deprivation leads to serious injury.<sup>685</sup> In *Boards*, two prisoners alleged inhumane treatment (and inadequate conditions) at the prison they were being housed in, partly because they were denied toothpaste for an extended period of time, even though both men made multiple requests for the toothpaste.<sup>686</sup> One man

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<sup>679</sup> American Dental Association, Oral Systemic Health, <https://www.ada.org/resources/research/science-and-research-institute/oral-health-topics/oral-systemic-health>.

<sup>680</sup> Taylor Elizabeth Eldridge, *Another Hurdle for Former Inmates: Their Teeth*, THE MARSHALL PROJECT (June 28, 2018), <https://www.themarshallproject.org/2018/06/28/another-hurdle-for-former-inmates-their-teeth>.

<sup>681</sup> *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980).

<sup>682</sup> *Id.*

<sup>683</sup> *Id.*

<sup>684</sup> *Sullivan v. Dennehy*, 29 Mass. L. Rep. 248 (2011).

<sup>685</sup> *Board v. Farnham*, 394 F.3d 469, 483 (7th Cir. 2005).

<sup>686</sup> *Id.* at 473.

claimed that as a result of the lack of toothpaste, he suffered tooth decay eventually leading to the extraction of several teeth.<sup>687</sup>

The European Court of Human Rights has found similar treatment to be degrading and therefore a violation of the European Convention's prohibition on inhumane and degrading treatment: both inhumane and degrading treatment come within the ambit of the European Convention because both are "a value of civilisation closely bound up with respect for human dignity"<sup>688</sup> – even though dignity is not explicitly protected in the Convention. Though seemingly minor, the deprivation of toothpaste clearly is a significant dignity violation: it treats another person as of lesser worth and demeans them for themselves and in the eyes of others; typically, it is retaliatory (See Chapter 6). The fact that it's minor does not mean that the harm to dignity is insignificant but that the continued deprivation may be an intentional effort to demean the dignity of those in custody and could be easily remedied. Providing an adequate toothbrush, fluoridated toothpaste, and floss is a dignity affirming practice. This would allow the prisoners to have some **agency** over their oral health care and it gives the prisoners some sense of **bodily integrity**. Training for prison staff must emphasize the inherent and equal dignity of each person and prohibit any treatment that is demeaning or degrading even in small ways, like provision of toothpaste and dental floss.

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*Providing an adequate toothbrush, fluoridated toothpaste, and floss, is a dignity affirming practice.*

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## II. PEOPLE WHO ARE INCARCERATED HAVE A DIGNITY-BASED RIGHT TO MENTAL HEALTH CARE

People with mental illness are more likely to (1) be homeless, (2) suffer from substance abuse, (3) cycle through hospital emergency rooms, (4) be arrested for nuisance crimes, and (5) become involved in the criminal legal system than the general population.<sup>689</sup> People with a severe mental illness account for one in five of all jail and prison inmates.<sup>690</sup> Furthermore, 44.8 percent of federal prison inmates, 56.2 percent of state prison inmates, and 64.2 percent of local jail inmates have reported suffering from some type of mental health issue.<sup>691</sup>

People with mental illness living in prisons are often undertreated, mistreated, or provided psychotropic medications that impair their ability to function and follow rules. Individuals with

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<sup>687</sup> *Id.*

<sup>688</sup> See generally Bouyid v. Belgium, No. 23380/90, Judgment, Eur. Ct. H.R. (Sept. 28, 2015) (sitting as a Grand Chamber) (holding that an unnecessary slap violated the dignity of two brothers, including one minor, who had been detained by local police), *supra* note 40.

<sup>689</sup> See generally Doris Fuller, H. Richard Lamb, Michael Biasotti & John Snook, *Overlooked in the Undercounted The Role of Mental Illness In Fatal Law Enforcement Encounters*, TREATMENT ADVOCACY CENTER (Dec. 2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.

<sup>690</sup> *Id.* at 1.

<sup>691</sup> Consensus Workgroup, *Consensus Workgroup Policy Recommendations to the 116<sup>th</sup> Congress and Trump Administration on Behavioral Health Issues In The Criminal Justice System: Next Steps*, <https://www.nami.org/getattachment/About-NAMI/NAMI-News/The-Criminal-Justice-and-Behavioral-Health-Workgro/SJ-RPT-29519-PolicyRecs.pdf?lang=en-US>.

one or more mental illnesses may suffer from delusions, hallucinations, unrealistic perceptions of reality, chaotic thinking, uncontrollable mood swings, and debilitating fears. As a result, their behavior may be erratic and difficult for officers to manage, particularly in crowded conditions.

Still, all interactions with people inside must be conducted with respect for the dignity of every person, whether they are acting rationally or not and whether they are compliant or not. Dignity-affirming practices can include (1) allowing people to participate in their own care, thus enhancing their **agency** as appropriate; (2) building relationships through therapy which enhances their ability to **connect with other people**; (3) offering meaningful activities which enhance their ability to set personal goals and to exert agency and control over their own **bodies**; and (4) recognition by prison staff as a valuable member of the **human community** which enhances their sense of **self-worth**. All of these are essential aspects of human dignity.

A mental illness can leave a person even more vulnerable than would otherwise be the case because it may be difficult for them to make positive decisions for themselves or to seek help. Negative stigma damages a person's dignity, and can lead to feelings of shame and unworthiness, and from there to social isolation.<sup>692</sup> Recovery requires dignity affirming practices including validating experiences without stigma, accepting the humanness of feeling different, and finding social validation in support groups and therapy as well as informal communities of friends and family.<sup>693</sup> Recovery and maintaining a sense of self-worth is even more challenging when the individual is also trying to survive inside the criminal justice system.

#### A. Training and Physical Space

To protect the dignity of people with mental health challenges, every facility must have a corps of properly trained mental health care professionals. This can be challenging in part because prisons are often located in rural communities where there are few mental health professionals even to serve populations on the outside. This often leads to staffing shortages and using corrections officers as counselors, as well as using trained counselors in other capacities.<sup>694</sup> In 2016, the Federal Bureau of Prisons instructed wardens to stop using psychologists for tasks not related to mental health such as working on gun towers and being a prison escort.<sup>695</sup> However, the Bureau contradicted itself when it claimed that all staff are professional law enforcement officers first, and the agency does not consider mental health to be the primary role of counselors or social workers.<sup>696</sup> Unfortunately, this treats people who are incarcerated as if they are nothing more than security risks, rather than whole human beings with unique health needs. Further, this

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<sup>692</sup> San Fernando Valley Cmty. Mental Health Ctr., Inc., *Reclaiming One's Dignity: Overcoming the Prejudice and Discrimination of Mental Illness*, (Apr. 16, 2014), <https://www.movinglivesforward.org/2014/04/16/reclaiming-ones-dignity-overcoming-the-prejudice-and-discrimination-of-mental-illness/>.

<sup>693</sup> *Id.*

<sup>694</sup> Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, THE MARSHALL PROJECT (Nov. 21, 2018), <https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons>; see also Nicolette Taber, *How To Provide Adequate Mental Health Care in the U.S. Criminal Justice System*, 28 ANNALS. HEALTH L. ADVANCE DIRECTIVE 173, 175 (2019).

<sup>695</sup> Thompson & Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, THE MARSHALL PROJECT, *supra* note 694.

<sup>696</sup> *Id.*

approach has severe implications for the provision of mental health care to people who are incarcerated, including making it much harder to prove deliberate indifference when the facility fails to provide adequate mental health care to people who are incarcerated.<sup>697</sup>

In addition to adequate and properly trained staffing, prison facilities need to have appropriate physical spaces in which to treat mentally ill prisoners with dignity. Prisoners suffering from mental illness need actual space to meet with therapists, be evaluated, and discuss their progress in confidence.<sup>698</sup>

#### B. An Accurate Mental Health Diagnosis Is Essential Upon Intake

Dignified psychiatric assessments require time, diagnostic tools, and trained staff. However, under present conditions, an initial mental health assessment of new inmates may last only about twenty minutes<sup>699</sup> and in many cases produces a result that is misleading or inaccurate. Prisoners may be apprehensive about answering mental health screening questions honestly<sup>700</sup> and may not be forthcoming for reasons that include (1) the negative stigma surrounding the label of a diagnosis, (2) apprehension regarding the use of the information, (3) not realizing the importance of giving truthful answers, and (4) an inability to pay attention to the questionnaire<sup>701</sup> due to stress or the mental condition itself. Language and cultural expectations may pose additional barriers. Additional information regarding current diagnoses or medications that family members or friends could provide may not be available if logistical, practical, or legal barriers prevent contact with the jail or prison.<sup>702</sup> In addition, correctional staff assigned to give the screening may lack appropriate mental health experience.<sup>703</sup>

A dignity approach to accurately assessing an individual's mental illness requires the removal of negative stigma. It is essential for an individual with a mental illness to have their experiences **validated** by the person providing the health screening. Furthermore, it is essential for the therapist to spend time reassuring the individual with the mental illness that the results are to help identify the proper placement and accommodations needed to transition to prison life and will not be used to stigmatize or further punish the individual.

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<sup>697</sup> See, e.g. *Rasho v. Jeffreys*, 22 F.4th 703, 714 (7th Cir. 2022).

<sup>698</sup> See generally Nicolette Taber, *How To Provide Adequate Mental Health Care in the U.S. Criminal Justice System*, 28 ANNALS. HEALTH L. ADVANCE DIRECTIVE 173, 174 (2019).

<sup>699</sup> Bette Michelle Fleishman, *Invisible Minority: People Incarcerated with Mental Illness, Developmental Disabilities, and Traumatic Brain Injury in Washington's Jails and Prisons*, 11 SEATTLE J. FOR SOC. JUST. 401, 408 (2015).

<sup>700</sup> *Id.* at 434.

<sup>701</sup> *Id.* at 409-10.

<sup>702</sup> *Id.*

<sup>703</sup> Arthur J. Lurigio & James A. Swartz, *Mental Illness in Correctional Populations: The Use of Standardized Screening Tools For Further Evaluation or Treatment*, 70(2) FED. PROB. 29 (2006).

Important Precedent: Porretti v. Dzurenda, 11 F.4<sup>th</sup> 1037 (9<sup>th</sup> Cir. 2021)

The Ninth Circuit has recognized that human dignity demands recognition and treatment of serious medical needs, including mental health needs. In *Porretti v. Dzurenda*, the court explained, “the public has an interest in ensuring the continued dignity of individuals incarcerated in federal prisons” and “inherent in that dignity is the recognition of serious medical needs, and their adequate and effective treatment.”

In this case, the inmate had a medication combination that had successfully treated his mental illness, but the prison insisted he take alternative medication in order to reduce prison costs. The choice of taking medication and suffering insurmountable physical pain or not taking medication and suffering serious psychotic symptoms denied the inmate his dignity in the form of bodily integrity, autonomy, and agency. The court found the prison psychiatrist’s examination was not credible because she had only examined the plaintiff once over multiple years, the one visit was short and over a videoconference, and her conclusion contradicted the conclusions of multiple previous psychiatrists who had seen the plaintiff before. A person with a mental illness has the capacity to make medical decisions for themselves whether or not they are incarcerated. A medically credible report was obtained by treating the individual being evaluated with care and dignity.

This case can be used to establish a dignity-based right to an accurate diagnosis, based on professional standards of care. It refutes a facility’s discretion to objectify any person by providing them inadequate care simply to lower costs.

### C. Protecting People with Mental Illness from The Consequences of Their Symptoms.

An incarcerated person with a mental illness may have difficulty adapting to prison if left untreated, especially if medication is needed.<sup>704</sup> If not properly assessed, the person may have a difficult time complying with the daily routines of the correctional facility.<sup>705</sup>

Untreated inmates with mental illness are more likely to be victimized because of their symptoms. Some symptoms left untreated include delusions, yelling, intrusive talking to other inmates, and hyperactivity. These symptoms often lead to attacks from other people, and the inmates with untreated mental illness are much more likely to turn to self-harm and suicide.

Moreover, people with emotional and mental disabilities may have difficulty following prison rules. Inmates may be unsuccessful in the prison environment because their behavior is

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<sup>704</sup> Lurigio & Swartz, *supra* note 703, at 30.

<sup>705</sup> *Id.*



seen as misconduct; often, however, the behavior is a symptom of untreated mental illness<sup>706</sup> rather than an intentional decision to violate rules. If correctional officers are not trained to recognize the symptoms of mental illness, they are likely to respond with punishment rather than treatment.<sup>707</sup> This violates the person’s right to be assessed according to their **individual needs** and may subject them to objectification when the prison punishes them in order to advance some prison policy, such as ensuring compliance. In many facilities, the mental health staff are not part of the decision-making process when an inmate with a mental illness exhibits “punishable” behavior.<sup>708</sup> But because prison officers will continue to be the primary human interactions for inmates, they should be trained to identify behaviors that manifest mental illness.

Treating an inmate with a mental illness with dignity can be done in simple dignity affirming actions. Officers can initiate meaningful conversations, listen to the needs of the inmate, acknowledge and validate the inmate’s fears and concerns, provide information relevant to the person’s situation, and offer treatment instead of punishment. All of these are ways of showing respect for the person as a person of value and equal worth.

Under no circumstance should an individual with mental illness be put in solitary confinement. We address solitary confinement more fully in Chapter 6 in the context of disciplinary actions because it is most often used as a disciplinary measure: “The Vera Institute of Justice has found that incarcerated people are frequently sent to restrictive housing in response to low-level and nonviolent misbehaviors, because they need protection, due to custody or risk assessments, or in response to symptoms of mental illness.”<sup>709</sup> Thus, it is not surprising that “Numerous studies have also found that solitary has a disproportionate impact on Black and brown people, youth, and people with mental illnesses.”<sup>710</sup> Here, we discuss the specific problem of assigning to solitary confinement people who already have mental health challenges.

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*Under no circumstance should an individual with mental illness be put in solitary confinement.*

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The mentally ill make up nearly half of all the prisoners in solitary confinement,<sup>711</sup> often because their illness makes it difficult for them to follow prison rules.<sup>712</sup>

The Vera Institute’s investigation of solitary confinement concludes that it has physiological, psychological, and neurological impacts.<sup>713</sup> Vera notes that “[s]olitary is particularly

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<sup>706</sup> Jamie Fellner, *A Corrections Quandary: Mental Illness And Prison Rules*, 41 HARV. C.R. – C. L. L. REV. 391, 395 (2006).

<sup>707</sup> *Id.* at 396.

<sup>708</sup> *Id.* at 411.

<sup>709</sup> *Why Are People Sent to Solitary Confinement? The Reasons Might Surprise You*, VERA INST. OF JUST. (Mar. 2021), <https://www.vera.org/publications/why-are-people-sent-to-solitary-confinement>.

<sup>710</sup> James & Vanko, *supra* note 8, at 1.

<sup>711</sup> *Id.* “A 2019 report that examined 6,559 records of solitary confinement in ICE detention centers found that about 40 percent of placements in solitary were of people with a mental illness.” *Id.* at 10.

<sup>712</sup> Andy Mannix, *Legislators push to limit solitary confinement, ban it for mentally ill*, STARTRIBUNE (Feb. 3, 2017), <https://www.startribune.com/legislators-push-to-limit-solitary-confinement-ban-it-for-mentally-ill/412749603/>; “Minnesota prisons routinely send mentally ill inmates to solitary, and some of these prisoners have deteriorated in isolation and continued to misbehave, which in turn led to even more segregation time.” *Id.*

<sup>713</sup> See generally James & Vanko, *supra* note 8.

harmful for people with preexisting mental illness. The isolation, forced idleness, and lack of intensive therapeutic mental health services can exacerbate mental illness and cause people’s mental health to significantly deteriorate.”<sup>714</sup> Inmates in solitary confinement may commit suicide as the only means of escape.<sup>715</sup>

Moreover, “[n]egative mental health repercussions can persist long-term. They may last well after a person leaves solitary confinement and even after their release from jail, prison, or immigration detention.”<sup>716</sup> Indeed, “a study of more than 200,000 people released from prison found that those who had spent any time in solitary were 78 percent more likely to die from suicide within the first year after their return to the community than people who had been incarcerated but not placed in solitary.”<sup>717</sup>

For women, the situation is even more dire than for men: “There is a higher prevalence of serious mental illness among incarcerated women than men. Nearly 70 percent of women in prison or jail have a history of mental health issues. Likewise, women with mental illness are generally overrepresented in solitary confinement. “Incarcerated women have high rates of past trauma and abuse. The isolation of solitary can be retraumatizing, as can strip searches, cell shakedowns, use of restraints, and other practices that are common in solitary units.”<sup>718</sup> This does not take into account the physical and sexual abuse most women in prison have endured before they arrive in prison, or the sexual abuse they experience while incarcerated. (See Chapter 4).

Solitary confinement violates the underlying dignity principles found in the Eighth Amendment and litigation must continue in order to hold this dignity denying practice unconstitutional. The Supreme Court of the United States has not decided if solitary confinement violates the Eighth Amendment. However, a series of Supreme Court decisions have set constitutional standards for prison conditions. In *Farmer v. Brennan*, the Supreme Court established a two-prong test in order to determine if an inmate has been the victim of cruel and unusual punishment. The first is objective and requires the plaintiff to show “a substantial risk of serious harm.”<sup>719</sup> The second is subjective and requires the plaintiff to show the prison officials are deliberately indifferent and “aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists.”<sup>720</sup> First, solitary confinement is proven to be “a substantial risk of serious harm” to all persons’ mental health regardless of the existence or non-existence of

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*Some actions are minimal and cost-free but have significant impact for protecting and enhancing human dignity*

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<sup>714</sup> *Id.* at 2.

<sup>715</sup> “Even though people in solitary confinement comprise only 6% to 8% of the total prison population, they account for approximately half of those who die by suicide” and noting that “In 2011, about 45% of people in the Pelican Bay Security Housing Unit had been in solitary for longer than a decade. A more recent study by Yale Law School’s Arthur Liman Center for Public Interest Law found that 11 percent of people in solitary had been segregated for at least three years.” Tiana Herring, *The research is clear: Solitary confinement causes long-lasting harm*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), [https://www.prisonpolicy.org/blog/2020/12/08/solitary\\_symposium/](https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/).

<sup>716</sup> James & Vanko, *supra* note 8, at 2.

<sup>717</sup> *Id.*

<sup>718</sup> *Id.* at 8.

<sup>719</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

<sup>720</sup> *Farmer*, 511 U.S. at 837.

a prior mental health disorder.<sup>721</sup> Second, prison guards are aware of the negative psychological effects solitary confinement has on inmates, and the prison staff continues to use solitary confinement as a punishment for people with mental illness. Prison officers must be encouraged to implement accommodations before placing an individual in solitary confinement. These can be minimal and cost-free but have significant impact for protecting and enhancing human dignity: for example, giving the individual time to process instructions, engaging the individual in conversation, using eye contact and speaking to the person with respect, and allowing the individual to express themselves by sharing their fears or concerns can help a person regain their sense of dignity by feeling connected to another person who sees them as having **equal inherent worth as a human being**.

Some courts are moving in the right direction and finding solitary confinement of individuals with mental illness a violation of the Eighth Amendment. In 2022, the Third Circuit found that prison officers did not have qualified immunity where they had kept a person “in conditions of almost complete isolation for seven months [knowing] him to be seriously mentally ill.”<sup>722</sup> The Court found that the allegation of this “gratuitous infliction of suffering”<sup>723</sup> was sufficient to state a cause of action where the “[e]stablished law at the time of Clark’s SHU [segregated housing unit] stay prohibited prison officials from imposing conditions that threatened a substantial risk of serious harm and inflicted such harm for no penological reason.”<sup>724</sup>

The Court explained that “[t]he touchstone is the health of the inmate.”<sup>725</sup> While the law recognizes that prison officials are authorized to punish for disciplinary infractions, the Constitution forbids them to do so “in a manner that threatens the physical and mental health of the prisoners.”<sup>726</sup> Although the court stopped short of holding that solitary confinement per se violates the Constitution, it did recognize that the “conditions of confinement [must not be] foul, inhuman or totally without penological justification.”<sup>727</sup> If taken seriously, these limitations could provide meaningful protections for people who are forced into solitary or segregated confinement.

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<sup>721</sup> See Clark v. Coupe, 55 F.4th 167, 180-81 (3d Cir. 2022).

<sup>722</sup> *Id.* at 180.

<sup>723</sup> *Id.* at 183.

<sup>724</sup> *Id.* at 178.

<sup>725</sup> *Id.* at 183.

<sup>726</sup> *Id.*

<sup>727</sup> Clark, 55 F.4th at 183.

Important Precedent:

Disability Rights Mont., Inc. v. Batista, 930 F.3d 1090, 1095 (9th Cir. 2019)

In *Disability Rights Mont., Inc. v. Batista*, the Ninth Circuit considered allegations that it said were “horrifying, involving prisoners with very severe symptoms of mental illness who went largely untreated and who were subjected to extreme and lengthy solitary confinement punishments.” The court acknowledged that the conditions led to the suicides of three of the prisoners.

Determining that the plaintiffs had met both prongs of the test set out in *Farmer v. Brennan*, the court said: “The complaint’s allegations that these practices and policies compromise the health and dignity of prisoners with serious mental illness are thoroughly consistent common sense and legal experience.” The Ninth Circuit concluded, “once persons are incarcerated, they can no longer see to their own medical needs. In these circumstances, the state, which incarcerated them and limited their ability to seek care for themselves, stands in a unique relation that requires it to provide necessary medical care and protect against serious medical risks.” Solitary confinement is never necessary medical care, and always poses a serious medical risk to any person forced to endure the humiliation.

This case is important because it shows that solitary confinement does raise concerns about the prison’s respect for the dignity of people with mental illness. It shows how the *Farmer* factors should be applied, and it imposes on government the obligation to care for the dignity of those who are in their custody and particularly vulnerable and unable to effectively advocate for themselves.

The Supreme Court of Montana has held that solitary confinement “constitute[s] an affront to the inviolable right of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate’s mental health condition.”<sup>728</sup> In *Walker*, one inmate recalled his feelings about solitary confinement, “I didn’t feel worth anything, you know, I didn’t want to—I didn’t want to carry on.”<sup>729</sup> Referring to the Montana constitution, the state Supreme Court held, “[t]he plain meaning of the dignity clause commands that the intrinsic worth and basic humanity of persons may not be violated.”<sup>730</sup> In addition, the court held that the punishment violated the dignity clause when “the conditions of

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<sup>728</sup> *Walker v. State*, 68 P.3d 872, 885 (Mont. 2003).

<sup>729</sup> *Id.* at 884.

<sup>730</sup> *Id.*

that punishment violate the cruel and unusual punishment prohibition, and that violation might most easily be elaborated by asking whether the core humanity of the prisoner is being treated with dignity.”<sup>731</sup> While the court relied on the dignity clause in the state constitution, courts interpreting state or federal constitutions that do not explicitly protect human dignity can nonetheless find the right to dignity to be implicit.

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*Courts interpreting state or federal constitutions that do not explicitly protect human dignity can nonetheless find the right to dignity to be implicit.*

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Solitary confinement impinges on human dignity in every way imaginable. Incarcerated individuals with mental illness have experienced treatment that makes them feel less than human; they are ridiculed, shamed, discriminated against by officials; and they are not protected from abuse by

other inmates. Furthermore, people in solitary confinement are typically denied safe or palatable food, adequate clothing, or decent shelter. Inmates are ignored, their voices silenced, they are left to succumb to their mental illness, and never provided opportunity to heal. In some cases, we heard reports that guards actually encouraged people to take their own lives. Solitary confinement is an unconstitutional, dignity denying, loathsome punishment and should be eradicated.

People in prison are constitutionally entitled to health care for their minds and their bodies that affirms their inherent and inalienable human dignity, allows them as much agency as possible, enhances their ability to care for themselves, and the increases the likelihood that they will be physically and mentally healthy when they rejoin society.

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*Ask whether the core humanity of the prisoner is being treated with dignity*

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### III. ADVOCACY POINTS

1. The full panoply of health care should be available to those who are in custodial detention, including preventive health care, wellness, dental care, and mental health care.
2. Appropriate attention to privacy should be accorded to every person.
3. Women should receive appropriate mental and physical health care.
4. People with mental illness should be properly diagnosed, be consistently monitored to identify improvement or deterioration and to assess impacts of treatment. They should have regular access to appropriate medications, in combination with effective and meaningful therapy, as needed.
5. People with mental or physical health matters should not be isolated except when necessary to protect their physical or mental safety and only for the period time during which isolation is necessary.

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<sup>731</sup> *Walker*, 68 P.3d at 884.



## CHAPTER 6: GRIEVANCE PROCEDURES AND DISCIPLINE

This chapter considers grievance procedures and discipline within prisons. Disciplinary measures may be taken for any reason, or no reason at all, and they are often taken in response to filing grievances. We therefore consider the two matters together.

Grievance procedures are essential to human dignity for reasons of both process and outcome: a fair grievance procedure allows each person to express themselves as they see fit and to speak their truth. A fair grievance procedure can also help each person secure a life of dignity while they are incarcerated. Inadequate grievance procedures – as most are –operate on a presumption of guilt, deny prisoners’ voice, and diminish prisoners in their own eyes and the eyes of others. And if they are not responsive to the complaints, they may perpetuate the indignities complained of. Disciplinary measures, which are often imposed as retaliation when prisoners self-advocate either formally in a grievance process or informally, often impose punishments that violate the human dignity of prisoners both because they are inherently torturous and because they are disproportionate to the infraction which are often vague and overbroad. Moreover, the abuse, over-use, and mis-use of solitary confinement as a means of both punishment and retaliation inherently violate the human dignity rights of belonging and community participation by placing people in an environment that completely isolates them from the world.

This chapter advocates for specific reforms to ensure that prisoners can self-advocate for better conditions with dignity. The chapter closes with recommendations on how to better uphold human dignity during these processes by examining how human dignity has been applied to prisoner discipline and retaliation in international law. We also specifically focus on solitary confinement as a common retaliatory disciplinary measure.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one’s truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

### I. INTRODUCTION: EVERY PERSON HAS A DIGNITY RIGHT TO COMMUNICATE GRIEVANCES

While the two previous chapters discussed chronic conditions of inhumanity within prisons, this chapter considers interactions between prisoners and prison officials in response to those conditions. How can prisoners try to improve their living conditions? And what are appropriate correctional responses when prisoners try to take advantage of the right to petition their grievances? Human dignity is implicated in both these sets of interactions.

Dignity is the inherent value that each person has, and our awareness of our own human dignity is our sense of self-worth. It is what tells us that we are entitled to be treated as a person,

as something more than property, or an animal, or some lesser being to be exploited for someone else's purpose or, worse, for their entertainment, as people inside sometimes describe it. Our sense of dignity is what motivates us to claim our rights, and the recognition of our dignity is what protects us when we claim them. Human rights, according to the Inter-American Court of Human Rights, are an inherent attribute of human dignity.<sup>732</sup>

A grievance procedure in prisons is therefore a concomitant of human dignity because people must have the right to assert their rights and to improve their living conditions and their treatment. Therefore, the grievance process must provide dignity in process and in result. A prison grievance process is not only the process for claiming rights but it is the principal means that prisoners have to assert their needs to prison authorities. As a form of communication, the process must ensure that prisoners are treated with respect, as **people of equal inherent worth**. A process that demeans the aggrieved or that diminishes them in the eyes of others violates the dignity of the prisoners. This can happen if the process is inaccessible, if the forms are too hard to read, the instructions too hard to follow, or the requirements too hard to meet. And it happens when there is retaliation for filing a grievance.

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*“Human rights are an inherent attribute of human dignity.”*

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The grievance process must also entail a fair and reasonable prospect for a response. A system that produces no response or delayed response or that invariably results in denial is not an effective mechanism for claiming rights and therefore violates human dignity; it is worse if its consequences are punitive or retaliatory. Respect for dignity means that there should never be any penalty for filing a grievance. Adjudicating grievances should be done in a way that is substantively fair and procedurally open and respectful of each person's experience. Petitions should not be denied for technical reasons, though they of course may be denied if it is impossible or impracticable to approve the requests. Each petition should be individually considered, and genuine reasons for denial should be given.<sup>733</sup> Where possible, prisoners should be involved in the decision on whether to grant a petition in whole or in part and how to implement the remedy.

Prisoners who file grievances often receive disciplinary measures as retaliation. Because discipline so often follows grievances, we consider the two issues together in this chapter.

Disciplinary measures within prisons have to be understood in a certain context that is particular to the United States. Yet, we can learn from the experiences of other countries.

1. In countries that we might look to as models, prison is for rehabilitation and to keep society safe by removing a someone who threatens public safety. As discussed in Chapter 3, the United States sentences people to prison for the purpose of punishment. With that mindset, the treatment that people receive in prison is part of the punishment that is imposed on them due to their criminal conviction.
2. In countries that we might look to as models, the commitment to respecting the inherent and inalienable dignity of every person limits how a person in custody can be

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<sup>732</sup> Residents of La Oroya v. Peru, Judgment of 27 November 2023, para. 107. See also Hannah Arendt, *The Rights of Man: Where Are They?* in 3 MODERN REVIEW 24-36 (1949).

<sup>733</sup> 5 U.S.C. § 555(e).



treated: they can not be treated in ways that harm their human dignity. That idea is just beginning to take hold in the United States.<sup>734</sup>

Add to this the general principles of separation of powers and federalism, by which federal courts and sometimes state courts are more likely to defer to prison authorities than to hold them accountable for abuses of human and constitutional rights. The result is a carceral system that permits or even encourages widespread physical and mental abuse on prisoners for any reason at all, including, commonly, the filing of a grievance.

In the United States, “[o]ffenders are sent to prison as punishment, not for punishment, and conditions of confinement, including prison rules, should be consistent with this crucial distinction.”<sup>735</sup> Prisons, however, avoid this limitation because the United States Supreme Court

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*Respect for dignity means that there should never be any penalty for filing a grievance.*

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has held that “discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law.”<sup>736</sup> These “expected parameters of the sentence” allow prison administrators to handle the violation of their discretionary rules by

prisoners as administrative issues. As a result, any consequence that flows from that violation is viewed as part of the original sentence, not a separate criminal punishment. There is therefore no independent liberty interest that triggers due process rights. The facts of *Sandin v. Conner* demonstrate the problem. According to the Supreme Court:

“In August 1987, a prison officer escorted [Conner] from his cell to the module program area. The officer subjected Conner to a strip search, complete with an inspection of the rectal area. Conner retorted with angry and foul language directed at the officer. Eleven days later he received notice that he had been charged with disciplinary infractions. ...

Conner appeared before an adjustment committee on August 28, 1987. The committee refused Conner's request to present witnesses at the hearing, stating that “[w]itnesses were unavailable due to move [sic] to the medium facility and being short staffed on the modules.” At the conclusion of proceedings, the committee determined that Conner was guilty of the alleged misconduct. It sentenced him to 30 days' disciplinary segregation.”<sup>737</sup>

This was permitted by the court because a sentence of 30 days in solitary confinement “was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.”<sup>738</sup> The Court had no regard for the fact that 30 days in solitary confinement is twice the length of time that constitutes torture under international law, no regard for the fact that solitary confinement for any period of time is unjustified, no regard for the fact

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<sup>734</sup> See, e.g., *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106 (D. Del. Aug. 17, 2023).

<sup>735</sup> James E. Robertson, “*Catchall*” *Prison Rules and the courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 165 (1994).

<sup>736</sup> *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

<sup>737</sup> *Id.* at 475.

<sup>738</sup> *Id.* at 487.

that the punishment was imposed as retaliation for his speech, no regard for the questionable need for the strip and rectal searches in the first place, no regard for the inadequate grievance process.

Prison officials have extraordinary and largely unreviewed power to punish inmates in myriad ways for little or no reason: by forcing them into solitary confinement; locking them in their cell for up to 22 hours or more; withholding dignity rights to work, to visits and calls; withholding rights to use television and radio; issuing food that is unpalatable, insufficient, unsanitary, and not nutritious; reducing or eliminating “good time” credits; and transferring them to another facility, along with others potential punishments. These are permissible punishments because they are viewed as “privileges” that are conditioned on good behavior, rather than essential dignity needs. The only limitation – that additional punishments must be an “expected” part of the original sentence – is self-fulfilling: the more prisons impose additional punishments on prisoners, the more prisoners can expect additional punishments. And, of course, it is not the prisoner’s actual expectation that matters, as no one would subjectively expect the kind of treatment that awaits many people in prison.

The system of punishment within prisons is inconsistent with fundamental notions of a just rule of law by allowing officials themselves to define the punishment and to implement it – thereby blurring the lines between regulatory and adjudicative functions. Furthermore, courts have abdicated their responsibility of judicial review by giving blind deference to prison officials. The United States Supreme Court has held that “Prison administrators . . . should be accorded wide-range deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security.”<sup>739</sup>

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*Deference should be limited by the demands of human dignity.*

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Generally, prison officials enjoy relative freedom in determining the rules and the penalties attached for breaking the rules, so long as the penalties are related to the “legitimate institutional needs of assuring the safety of inmates and prisoners . . . and preserving the disciplinary process as a means of rehabilitation.”<sup>740</sup>

As a practical matter, then, prison officials decide when there is cause to act to assure the safety of prisoners, the extent of the need, the scope of the threat to safety, and the measures that are to be taken to ensure safety. They are the legislator defining when punitive action needs to be taken, the executive deciding what action must be taken and taking it, and functionally the adjudicator, given the extensive deference that they receive in court. In other countries, deference is limited by the demands of human dignity; it should be in the United States as well.

Moreover, disciplinary measures in the United States regularly violate human dignity in at least 3 ways.

1. Dignity demands that procedural safeguards be in place to ensure fairness: the rules must be clear, the presumption of innocence must be fully respected, and the treatment of each situation must be fitted to each person’s individual responsibility.

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<sup>739</sup> Hewitt v. Helms, 459 U.S. 460, 472 (1983).

<sup>740</sup> Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 454-55 (1985).

2. Dignity requires that punishments be proportionate to the infraction; disproportionate pain and suffering violates dignity not only because it may be cruel but also because in the excess (the part that is out of proportion), the individual is objectified and treated as a means to accomplish the goal of those who run the prison.
3. Dignity forbids certain actions taken by one person upon another: degrading and demeaning treatment and torture are absolutely prohibited and can never be justified. This includes solitary confinement for any more than 15 days, deprivations of basic human needs, and abuse that is cruel and inhumane.

Although American courts have said that these limitations are not required by the 8<sup>th</sup> Amendment nor by the due process clause, the equal protection clause, or any other constitutional guarantee, the recognition by the US legal system of human dignity requires these limitations be respected.

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*Degrading and demeaning treatment and torture are absolutely prohibited and can never be justified.*

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## II. GRIEVANCE PROCESSES AND RECOMMENDATIONS

Using Delaware as an example, in 2016 alone, the 4,500 inmates residing in four prison facilities statewide in Delaware submitted a total of 14,863 prison grievances.<sup>741</sup> While this may attest to the overuse of prison grievances, it also reflects the human need to **communicate** with those in control of our lives, and the profound human desire to improve one's **well-being** and quality of life. In the context of prisons, it also reflects the desire of those who are themselves being held accountable to seek justice by seeking to ensure that those who have done wrong against them are held to account. As previously noted, the irony of the double standard is not lost on people who are serving time.

Prisons must develop and implement procedures that allow prisoners to communicate their unmet needs and their suggestions for improvement in their quality of life without denigration and with the legitimate expectation that the response will be reasoned and respectful, even if not always affirmative.

There are at least three reasons why prisons must establish and implement a fair and effective grievance procedure. One is simply for the safety and security of those who work and live in prison. The failure of the grievance processes in the Delaware state prisons is one reason why a riot broke out in 2017, resulting in an 18-hour standoff and the death of one prison officer.<sup>742</sup> As Jarreau Ayars explained it, the riot evolved from peaceful protests the inmates had initiated for about 2 months prior over “things like access to showers and telephones.” Small remedies, Delaware Online reports, “would lead to a cool down but other issues presented

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<sup>741</sup> State of Delaware Inmate Grievance Process/Procedures, Contract No. DOC 18050-Grievance (Jan. 11, 2017), [https://bidcondocs.delaware.gov/DOC/DOC\\_18050Grievance\\_rfp.pdf](https://bidcondocs.delaware.gov/DOC/DOC_18050Grievance_rfp.pdf).

<sup>742</sup> *Vaughn prison riot timeline, from the siege to charges being dropped*, DEL. ONLINE (June 14, 2019), <https://www.delawareonline.com/story/news/crime/2019/06/14/vaughn-prison-riot-timeline-siege-charges-being-dropped/1437144001/>.

themselves.” Ayers said, “It continued to build up, build up, build up.”<sup>743</sup> And there was no outlet for the frustration because of an inadequate grievance process.

The second reason is that in order to file a claim in a federal court, a prisoner needs to have exhausted their remedies, which means filing a grievance with the appropriate administrative body and, where appropriate, exhausting all administrative appeals.<sup>744</sup> If a state prison has a grievance process at all – whether or not it is fair or effective – a prisoner must use it, lest their claims be dismissed by a federal court. The exhaustion requirement is onerous and is applied stringently by federal courts. As Human Rights Watch has explained, in order to be heard in court, a prisoner must

“must first take his complaints through all levels of the prison’s or jail’s grievance system, complying with all deadlines and other procedural rules of that system. If the prisoner fails to comply with all technical requirements, or misses a filing deadline that may be as short as a few days, his right to sue may be lost forever.”<sup>745</sup>

However, the failure to establish or implement a grievance process cannot itself be the basis of a claim under the Prison Litigation Reform Act.<sup>746</sup>

And of course the third reason is that a commitment to human dignity demands that prisoners have an opportunity to express themselves and improve their quality of life.

The United States Supreme Court has once found that due process requires attention to human dignity in the context of administrative hearings outside of an Article III court. In *Goldberg v. Kelly*, the court held, in the context of a welfare termination hearing, that “[f]rom its founding, the Nation’s basic commitment has been to foster the dignity and wellbeing of all persons within its borders.”<sup>747</sup> The court went on to hold that those whose welfare benefits would be terminated are entitled to an evidentiary hearing before termination in order to ensure that, during the pendency of the process, they would be able to maintain a life with dignity. Moreover, the court held that certain procedural safeguards were necessary to ensure that the poorest and most vulnerable among us are treated with dignity before the law, not only for the benefit of the petitioner but for the benefit of society as a whole.<sup>748</sup> This accords with the mandate of the

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*Government officials are required in all circumstances to treat a person “as a person” before the law. There is no exception for prisons.*

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<sup>743</sup> Xerxes Wilson, *Vaughn inmate-defendant takes stand, says riot was born of ‘good intentions,’* DEL. ONLINE (Nov. 13, 2018), [delawareonline.com/story/news/2018/11/13/vaughn-inmate-defendant-takes-stand-says-riot-born-good-intentions/1948479002/](https://delawareonline.com/story/news/2018/11/13/vaughn-inmate-defendant-takes-stand-says-riot-born-good-intentions/1948479002/)

<sup>744</sup> 42 U.S.C. § 1997e (a): “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

<sup>745</sup> *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (June 15, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states>.

<sup>746</sup> 42 U.S.C. § 1997e (b): “The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.”

<sup>747</sup> *Goldberg v. Kelly*, 397 U. S. 254, 265 (1970).

<sup>748</sup> What the court said in the context of administrative welfare hearings is apt in the context of grievance and disciplinary matters: “The opportunity to be heard must be tailored to the capacities and circumstances of those who

Universal Declaration of Human Rights that “Everyone has the right to recognition everywhere as a person before the law.”<sup>749</sup> Government officials are required in all circumstances to treat a person “as a person” before the law. There is no exception for prisons.

One case that offers lessons for dignity-based dispute resolution concerns the mass eviction of a group of squatters on private property in South Africa. This is neither a prison case nor an American case but its analysis offers a lesson for courts in the U.S. In *Port Elizabeth Municipality v. Various Occupiers*, the Constitutional Court of South Africa found that mediation was a better avenue of redress for the lawsuit against the squatters.<sup>750</sup> Finding that “justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity,”<sup>751</sup> the court held that mediation would better ensure that everyone involved including the vulnerable squatters would have a **voice** and **agency** in resolving the dispute. “[B]y bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking points in a manner that the adversarial judicial process might not be able to.”<sup>752</sup>

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*People in vulnerable positions may lack legally recognized rights, but are nonetheless entitled to respect for their individual dignity*

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This dignity-based approach to process could help prisoners who, like the squatters in South Africa, are in a vulnerable position with respect to the authorities, and although may be lacking in legally recognized rights, are nonetheless entitled to respect for their individual **dignity as people**. The process must ensure that the prisoners are able to communicate their needs and grievances and be heard with **respect** and **empathy** for their humanity. By adhering to these principles, prisons can develop mechanisms that encourage dialogue and improvement of conditions. Failing to do so is an unjustifiable violation of human dignity.

To that end, the grievance procedure should empower prisoners to communicate with authorities through these processes.

- It should allow prisoners to identify themselves anonymously if need be, or by their names and not by their numbers.

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are to be heard. It is not enough that a welfare recipient may present his position to the decisionmaker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally.” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

<sup>749</sup> UDHR, *supra* note 7, at art. 6.

<sup>750</sup> *Port Elizabeth Municipality v. Various Occupiers* 2004 (1) SA 217 (CC) at para. 39 (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2004/7.html>.

<sup>751</sup> *Port Elizabeth Municipality v. Various Occupiers*, at para 41.

<sup>752</sup> *Id.* at para 42.

- It should facilitate the identification of problems by asking precise questions and leave room for explanation and context.
- It should eliminate unnecessary restrictions on the filing of grievances to ensure that all prisoners are able to express themselves and fully articulate their needs as effectively as possible.
- It should avoid unnecessary restrictions relating to the timing of the event or condition complained of as well as the timing of the filing.
- It should eliminate unnecessary exhaustion requirements.
- It should eliminate unnecessary limitations on content, such as single-item rules.
- It should include opportunity to provide additional information or amendments rather than dismissing a complaint for lack of completeness.
- Authorities should at all times be alert to the limited educational foundations of many prisoners, and of their vulnerability in the prison system, following the ethos of *Goldberg v. Kelly*.

One proposal is to establish a neutral body within the prison system (e.g. comprising prisoners and prison authorities and perhaps members of the public), or a neutral ombudsman outside the prison system, or some other entity to provide a neutral or objective mediator in the dispute between the individual and the institutional authorities. This body or office should be adequately resourced to provide timely responsiveness and avoid the kind of backlog that currently exists in the Bureau of Prisons with respect to PREA complaints.<sup>753</sup> This office could also provide generalized guidance to prisons to ensure that conditions and treatment are consistent with human dignity for all.

According to the ACLU, “The United States is the only democracy in the world that has no independent authority to monitor prison conditions and enforce minimal standards of health and safety.”<sup>754</sup> Presently some states have an Ombudsman Office that are part of the State Criminal Justice agency (as in Texas) or the Legislative Corrections Office (as in California and Michigan) or the Inmates Affair Office (as in Georgia). However, the main duty of the Ombudsman in these states is to address complaints made by prisoners after they have exhausted the Prison Grievance process. Moreover, the Ombudsmen in these states have the power to investigate complaints and issue reports, but the reports are non-binding and the prison is therefore under no obligation to abide by the recommendations or findings. As mentioned earlier, a small bipartisan group of members of Congress has introduced legislation to establish an ombudsman’s office for the Federal Bureau of Prisons.<sup>755</sup>

In every case, the system should have as its guiding principle the dignity of the prisoners. It should explicitly aim to treat each prisoner with respect and to improve the quality of life and well-being of all prisoners. Of course, that does not mean that every grievance is accepted but that it is heard with respect and with the aim of treating the aggrieved prisoner as an individual person

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<sup>753</sup> See OSSOFF & JOHNSON, *supra* note 560, at 1 (noting a backlog of 8,000 cases).

<sup>754</sup> Prisoners’ Rights, ACLU, <https://www.aclu.org/issues/prisoners-rights> (last visited Oct. 21, 2023).

<sup>755</sup> Wabe, *supra* note 565.

of **inalienable worth**. Dignity is a win-win for the prisoners and the prisons: prisons where prisoners are well treated and are permitted to live with dignity are likely to see less violence and are likely to lower stress and turnover among staff; as it is now, correctional jobs show a very high turnover rate and correctional officers report high levels of trauma and post-traumatic stress disorder due to the violent conditions in which they work.<sup>756</sup>

### III. DISCIPLINE AND PUNISHMENT

#### A. Dignity Demands Procedural Safeguards to Ensure Fairness

The 5<sup>th</sup> and 14<sup>th</sup> Amendments prohibit the federal government and the states from depriving “any person of life, liberty, or property without due process of law.”<sup>757</sup> While the court has not denied that a “prisoner does not shed his basic constitutional rights at the prison gate,”<sup>758</sup> it has defined due process rights narrowly and without regard to human dignity, thus allowing innumerable and immeasurable violations of dignity. In particular, the court has held that due process does not even apply to deprivations of liberty and property of those who are already serving a prison sentence.<sup>759</sup>

As this section (and others throughout this Guide) show, however, the very nature of due process rights are rooted in human dignity. The commitment to respecting and protecting human dignity can not be excised from the due process clause without reducing it to an empty legalistic shell.

Yet, the Supreme Court has said that the due process clause offers virtually no protection during disciplinary hearings if the punishment would not increase the length of the original sentence, even if it materially changes the conditions of confinement.<sup>760</sup> By defining punishment only in terms of time to be served, and not in terms of the experience of incarceration or quality of life during incarceration, the Supreme Court entirely ignores the dignity of the person who is living in custody. It allows prison officials discretion to conduct proceedings and impose punishments that are unbridled by any process at all or any sense of fairness. By contrast, a system oriented toward human dignity will have

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*The very nature of due process rights are rooted in human dignity.*

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1. Procedural safeguards in place to ensure that every person is treated with equal dignity and respect and
2. Substantive restrictions that prohibit dignity-denying punishments and treatment including treatment that degrades and demeans a person.

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<sup>756</sup> PRISON POL’Y INITIATIVE, *Working in “a meat grinder”: A research roundup showing prison and jail jobs aren’t all that states promise they will be* (May 9, 2022), [https://www.prisonpolicy.org/blog/2022/05/09/correctional\\_jobs/](https://www.prisonpolicy.org/blog/2022/05/09/correctional_jobs/).

<sup>757</sup> U.S. CONST., amend. XIV, §1.

<sup>758</sup> *Wolff v. McDonnell*, 418 U.S. 539, 580-81 (1974).

<sup>759</sup> *Sandin v. Conner*, 515 U.S. 472, 487 (1995).

<sup>760</sup> *Id.*

Below we consider three aspects of disciplinary hearings in particular that contravene general principles of dignity law.

## B. Withholding Information

One form of dignity-denial that is common in the carceral system is the withholding of information relevant to a person inside. Withholding information can be done in two ways, both of which deny the dignity of those who are in custody.

First, a prison official can choose not to inform a person of information that is important and useful to them. This is common whenever there are changes in routine: for instance, a prisoner is likely to not be told why they are being transferred or where they are going or how long they will stay in solitary.

Second, prisons use vague terms to describe behavioral boundaries so that people who are subject to those rules don't know where the line is between permitted and forbidden behavior for which they may be held accountable, nor the extent of the penalty for crossing the line. Prisoner rule books are commonly filled with vague rules that prohibit behaviors such as silent insolence, troublemaking, poor conduct, and disrespect, and even "awkward sleeping." These permit subjective assessment by guards when determining if a violation has occurred.<sup>761</sup>

Vague rules give officers unfettered discretion to enforce them, or not, and to choose what penalty, if any, is appropriate: for the same action, an officer might ignore the action, might give the prisoner a warning or a mild penalty, or might impose the maximum punishment within their broad discretion. These can include penalties that can seriously affect the course of a person's life, such as extended stays in solitary confinement, loss of all privileges, and forced transfer. Prisoners accused of violating vague rules are faced with infractions before the disciplinary board that they have little or no opportunity to rebut<sup>762</sup> but that nonetheless have significant consequences. Asking about the basis for the charge or responding or explaining it often expose the person to retaliation.

Often, the dignity burden of these policies is compounded, as when a prisoner who is "under investigation" is placed in the segregated housing unit or SHU. (Solitary confinement is discussed further below and in Chapters 2 and 8). What makes this a vague rule is that a prisoner could be under investigation for any reason or no reason at all and prison officials often don't provide the reason, thereby precluding any possibility of defense or rebuttal. Prison officials will use these vague rules that could subjectively be violated by any and all behavior as way to place anyone under investigation. This means that prisoners find themselves removed from their cells and placed in solitary without any conscious knowledge of what rule, if any, they had violated, thus imposing a tremendous burden on someone without any penological purpose and without proportionality to their responsibility, if any.

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<sup>761</sup> Robertson, *supra* note 735, at 161.

<sup>762</sup> *Id.* "The Trial" is Franz Kafka's dignity-denying dystopia revolving around Joseph K's not knowing for what he is on trial.



Withholding information and subjecting a person to inconsistent enforcement diminishes their dignity in a number of ways. It diminishes their agency by reducing their capacity to make decisions that require full access to information. Insofar as dignity is based on “reason and conscience”<sup>763</sup> and empowers people to make decisions on their own behalf, that capacity is compromised if a person is not made aware of what is permitted and what is not. The dignity right of being viewed as a human being of equal value by prison officials is violated because withholding information positions them as less important and less valuable than the person who has the information who is making a choice to share or not. It instills fear and humiliation, thus demeaning and degrading them.

People who are incarcerated often express the willingness to be held accountable for their actions, but find the insult to their dignity in the arbitrary and disproportionate standards of accountability to which they, but not the prison officials, are held.

Moreover, when prisons enforce their rules arbitrarily – allowing the same behavior to produce a range of consequences depending solely on the authority’s exercise of discretion – they violate the very premise of due process of law – that people may be punished only by the “law of the land,” as opposed to by executive or arbitrary fiat. The “law of the land” principle, going at least as far back to the Magna Carta of 1215,<sup>764</sup> is designed to promote the equal dignity of all by eliminating the arbitrary imposition of burdens. Nonetheless, the U.S. Supreme Court has accepted and promoted the broad exercise of disciplinary discretion within the carceral system, which gives unfettered discretion to officials and violates the dignity-based premise of due process.

In *Rios v. Lane*, the petitioner had been punished under a “gang activity” rule because he had handed another inmate a card with a schedule of Spanish-speaking radio broadcasts.<sup>765</sup> On appeal, the inmate demonstrated that this card contained information taken from a newspaper authorized by prison officials and was found to have been denied a fair warning because “he could reasonably assume that what was permissible in one instance would not subject him to serious disciplinary sanctions in another.”<sup>766</sup> This violates dignity rights because a person lacks the decisional agency to conform their behavior to the rules and regulations if they are not made aware of the “rules of the game” until after an infraction has been assessed.

Withholding information is a policy and a practice within carceral facilities. Indeed, the very purpose of withholding information both about what constitutes a violation of the rules and what

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<sup>763</sup> UDHR, *supra* note 7, at art. 1.

<sup>764</sup> Clause (39) of the original 1215 Magna Carta reads: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” King Edward III signed the Liberty of Subject Act 139 years after Runnymede, fixing the concepts of Clauses 39 and 40 into the common law and, in updating the translation from Latin, gave us that vital expression, “due process of the law.” The statute, cited today as *28 Edw. 3*, states that: “No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.” Leonard W. Klingen, *Our Due Process Debt to Magna Carta*, 90(2) FLA. BAR J. 16 (Feb. 2016), <https://www.floridabar.org/the-florida-bar-journal/our-due-process-debt-to-magna-carta/>.

<sup>765</sup> *Rios v. Lane*, 812 F.2d 1032, 1034 (7th Cir. 1987); see Robertson, *supra* note 735, at 166.

<sup>766</sup> *Rios*, 812 F.2d at 1038.

consequences may flow from a violation is precisely to further deny the dignity of the person who is in custody. These dignity denials are a pervasive and intrinsic aspect of incarceration: people are thus sent to prison not just as punishment, but to be subjected to additional dignity-denying punishment.

### C. Presumption of Innocence

When a charge is brought against a person who is already incarcerated, they are typically brought before a disciplinary board to assess guilt or liability for the alleged infraction. Because the consequence of a finding of guilt is not considered a punishment separate from the original sentence, due process does not apply. This technical distinction between punishments imposed outside and inside of prisons ignores that the latter can be as burdensome and painful as the former. To sentence someone to a term of years in prison, and then to sentence them to solitary confinement for weeks, months, or years are both punitive; neither should be imposed without due process of law. Moreover, some disciplinary hearing sanctions are identical to the initial punishment since they amount to extensions of time to be served, for example by withholding good time credits.

Yet, because disciplinary board proceedings are not constitutionally required to provide due process, the evidentiary standard is met and “the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board.”<sup>767</sup> To prove responsibility, officers typically rely on the incident report, which constitutes “some evidence.” This makes presenting exculpatory or countervailing evidence ineffective unless it completely nullifies the report, which is nearly impossible. And, again, trying to do so may subject a person to retaliation.

Disciplinary board procedures violate dignity in a number of ways. The low evidentiary bar and the futility of bringing forth exculpatory evidence reverses the presumption of innocence which, as a matter of human dignity, should be the only basis on which a punishment should be imposed. (The dignity basis of the presumption of innocence is more fully addressed in Chapter 2). The process also denies the humanity of the individual prisoner who may not be permitted to share their experiences, to tell their story, and to express their own views and perspectives. Denial of the opportunity to speak also denies them agency in the process. This puts them on an unequal footing vis-à-vis other prisoners and the officers who bring charges against them and it impinges on their dignity right to belong by isolating them from the community of dignity-holding agents in the decision-making. All of this diminishes their sense of self-worth and lowers the esteem in which others hold them.

These dignity violations could be easily reduced or eliminated by a process that respects the basic humanity of each individual. This would entail treating them as a person of equal worth according the basic elements of due process to meet standards of fairness and equity and involving them in the decision-making process and in the process of resolving the dispute that gave rise to

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<sup>767</sup> Superintendent, Mass. Corr. Inst., *Walpole v. Hill*, 472 U.S. 445, 455 (1985) (“This standard is met if ‘there was some evidence from which the conclusion of the administrative tribunal could be deduced’”).

the hearing. A model for this, albeit outside the prison system, is the Port Elizabeth case from South Africa, discussed above.

#### D. Proportionate Punishment

In its chapter on Sentencing, this Policy Guide explains why dignity requires that punishments be proportionate to the act. The same principle applies to disciplinary measures to people who are already in custodial detention.

As explained, most prisons do not have clear and written policies in place that indicate what consequences result from particular types of infractions<sup>768</sup>; the discretion rests with prison officials to choose whether and how to respond to a perceived infraction. Yet, while the infractions may be minor (e.g. insolence, trouble-making, disrespect, failure to follow a command), the punishments are significant and can have a profound effect on a person’s life and dignity. Nationally, studies have shown that the most frequent punishments levied by prison administrators are “solitary confinement (31% of rule violators); forfeiture of good conduct time (25%); denial of entertainment and recreational opportunities (15%); and loss of commissary privileges (13%).”<sup>769</sup> In Pennsylvania, for instance, the range of punishments handed down to prisoners includes (1) being removed from general population and confined to personal cell for up to 24 hours; (2) denial of connection with the outside by withholding phone calls and visitations rights; (3) denial of the right to live with dignity by being deprived of access to commissary items; (4) commitment to solitary confinement; and (5) if already in solitary, indefinite confinement. In Delaware, an alleged infraction may be met with “Loss of All Privilege,” which is, by definition, punitive, disproportionate and inherently violative of dignity.

Except in extraordinary cases, none of these punishments is a necessary or proportionate response to a violation of rules; they are arbitrary and disproportionate, in violation of basic principles of human dignity<sup>770</sup> and in some cases independently violative of human dignity. It is only a narrowly legalistic fiction and a failure to acknowledge the human dignity implications of incarceration that allow prison officials to use “time” in incarceration as a chip to be bartered against.

Of course, if a prisoner endangers another person, then action must be taken to ensure the safety of all. But in that case or in any other, loss of privileges on which people depend for their dignity – including access to commissary, connections with people outside, and recreational opportunities as explained in Chapter 4 – is not justified. In one way or another, most punishments are designed to further demean and isolate the prisoner with increasing severity for subsequent infractions. Even minor or first-level offenses involve

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*Loss of privileges on which people depend for their dignity is not justified.*

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<sup>768</sup> See generally Robertson, *supra* note 735, at 158-59.

<sup>769</sup> *Id.* at 159.

<sup>770</sup> Or, as Justice Brennan explained, “the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting the irrationality of many classifications based on sex).

isolating the prisoner from either contacting their friends and family or the rest of the prison population. These punishments stigmatize prisoners and effectively cut them off from the rest of society, which on its face infringes on the right of **belonging**. They reinforce their sense of isolation, of being an outsider, beyond even the extreme feeling of ostracism inherent in incarceration. These also contribute to feelings of humiliation and loss of self-esteem in violation of basic principles of dignity.

In addition, in order to respect agency, disciplinary measures should respond to the specific situation to ensure that the burden imposed on a person is in proper relation to their responsibility. Prior to administering a disciplinary punishment, consideration must be given to the nature of the prisoner's wrongdoing, their personality and circumstances, whether it was the prisoner's first or repeated violation of prison rules, and whether it was the result of mental health challenges or PTSD or some other condition or circumstance beyond their control. The European

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*A court committed to a rule of dignity would consider not only the proportionality and the nature of the punishment, but the suffering a person is forced to endure.*

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Court of Human Rights (ECtHR) has criticized prison officials who, after being presented several disciplinary options had chosen the most severe punishment without conducting a proper assessment into all the facts and circumstances surrounding the case.<sup>771</sup> In *Ramishvili and Kokhredize v. Georgia*, the ECtHR explained:

“No consideration was apparently given to such facts as . . . the nature of the applicant's wrongdoing, his personality and the fact that it was his first such breach. The Court recalls in this connection that the proportionality of an additional punitive measure imposed upon a prisoner is of importance when assessing whether or not the unavoidable level of suffering inherent in detention has been exceeded.”<sup>772</sup>

This is a key point and stands in stark contrast to the US Supreme Court's determination that additional punishments beyond the original sentence raise are permitted without due process of law as long as they are “expected.” A court committed to a rule of dignity would consider not only the proportionality and the nature of the punishment, but the suffering a person is forced to endure.

Punishment that is purely retaliatory and manipulative can violate human dignity if it is inherently cruel and even if it is not. Retaliation violates human dignity by definition because it is not proportionate to the actions taken, and objectifies the person by treating them not as a person but as an example or subject of another person's decisions.

Guards can expose prisoners to dignity violations even if they do not engage in the behavior themselves. Prison official conduct like this violates the dignity of the prisoners by fomenting abuse by prisoners toward another, and thereby subjecting the person to physical violence, stigma, ostracism, and isolation – all forms of dignity violations because they break the

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<sup>771</sup> *Ramishvili & Kokhredize v. Georgia*, App. No. 1704/06, Eur. Ct. H.R., at §82-83 (Jan. 27, 2009).

<sup>772</sup> *Id.* This is in direct contrast with the U.S. Supreme Court's decision upholding the death penalty even if a less harsh sentence would serve the ends of justice, *Gregg v. Georgia*, 428 U.S. 153, 181-182 (1976), *see supra* Chapter 3.

bonds between a person and their **community** and diminish the person in the eyes of others and, consequently, risk diminishing their own sense of **self-worth**. Women who file grievances or violate rules are faced with the full panoply of retaliatory responses, and in addition face sexual assault, sexual battery, and threats of sexual battery by prison officials and/or other inmates.

#### IV. SOLITARY CONFINEMENT VIOLATES HUMAN DIGNITY

##### A. What is Solitary Confinement?

We address solitary confinement<sup>773</sup> here because it is used most often in response to perceived or real infractions. Whether it is called solitary confinement, segregated housing, restricted release, or anything else, it refers to the punishment of isolation, meted out for no penological reason to those who have no due process rights. It is common in the United States but inconsistent with international law.

“Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner’s sentence.”<sup>774</sup>

It is estimated that in the United States, 80,000 to 100,000 human beings are living in solitary confinement at any given time.<sup>775</sup> This is more than the entire prison population of France and the United Kingdom, and nearly twice the prison population of Germany.<sup>776</sup> If these people were joined together geographically, they would constitute a city that is larger than 17 state capitals in the US, and approximately the size of the capital cities of Vermont, South Dakota, Maine, Kentucky and Montana, combined.<sup>777</sup> Over the course of a year, more than 300,000 people experience segregation<sup>778</sup> – the equivalent population of nearly one half of a congressional district. By some counts, this does not include people in local jails, juvenile facilities, or in military and immigration detention.<sup>779</sup>

In the United States, persons are sent into isolation for any reason or virtually no reason at all. “Low-level nonviolent offenses were among the most common infractions to result in

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<sup>773</sup> Solitary confinement goes by many different euphemistic names. We use this term to refer to all forms of segregated housing where a person is intentionally and effectively forced to live in isolation.

<sup>774</sup> U.N. Off. on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, Rule 45(1), U.N. Doc. E/CN.15/2015/L.6/REV.1 (May 21, 2015), [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf).

<sup>775</sup> Penal Reform International, *Solitary confinement*, <https://www.penalreform.org/issues/prison-conditions/key-facts/solitary-confinement/> (last visited Jan. 20, 2023).

<sup>776</sup> WORLD PRISON BRIEF, <https://www.prisonstudies.org/> (last visited Oct. 21, 2023).

<sup>777</sup> WIKIWAND, *List of U.S. State Capitals*, [https://www.wikiwand.com/simple/List\\_of\\_U.S.\\_state\\_capitals](https://www.wikiwand.com/simple/List_of_U.S._state_capitals) (last visited Oct. 21, 2023).

<sup>778</sup> *Why Are People Sent to Solitary Confinement? The Reasons Might Surprise You*, VERA INST. OF JUST., *supra* note 709.

<sup>779</sup> NAT’L RELIGIOUS CAMPAIGN AGAINST TORTURE, <http://www.nrcat.org/torture-in-us-prisons> (last visited Oct. 21, 2023).

disciplinary segregation sanctions”<sup>780</sup> and the use of threatening or profane language is often the next most common reason for disciplinary segregation. That is, in America, a person can be locked away for a lengthy or indefinite period of time with minimal human contact and almost no sensory stimulation simply because they disobeyed an order or used disrespectful language. This is what happened in *Sandin v. Conner*, discussed above.

Solitary confinement is incompatible with human dignity because it robs inmates of their **bodily integrity** and **agency**, humiliates inmates, damages them psychologically, and removes **human contact**. Inmates are typically required to stay in their cell for twenty-two to twenty-three hours a day, the cell is usually windowless and small, food passes through a metal slot in the door, and usually the only human interaction is with the guard providing meals, if that.

Such treatment also tends to be accompanied by other dignity-denying punishment, including sensory deprivation, lack of fresh air, confinement in small spaces, inadequate and unpalatable food, and so on – all of which impair the human need to **develop oneself**, make decisions that affect one’s life, and grow and thrive.

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*80,000 to 100,000 human beings are living in solitary confinement at any given time.*

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“As individuals, inmates tell us what it is like in solitary confinement. In solitary confinement, your world is a gray concrete box. You may spend around 23 hours a day alone in your cell which are only furnished with a toilet, sink, and bed. When prisoners are escorted out of their cells, they are first placed in restraints through the cuff port and sometimes with additional leg or waist chains and tethered by the hooks on their cuffs to an officer. Prisoners are controlled by bodily restraints, with pervasive and unforgiving round the clock surveillance, and the restricting hallways and cells they exist in. They are led to solitary exercise each day and a brief shower three times a week then back to their cells. Confined to their own concrete cells, prisoners are both physically and psychologically removed from anyone else. Prisoners depend on officers to bring them anything they may need and are allowed to have such as toilet paper, books, or letters they may receive. Many prisoners relate with dark thoughts that haunt them in isolation. Many become angry and hateful behind compliance.

Where many express anger, they all express a struggle to maintain dignity and a sense of self or humanity. Being alone, prisoners forget how to interact with others. Feeling as though they have nothing to live for in isolation, prisoners may give up on these things. Many interviews describe watching others who were locked in indefinite solitary choosing between giving up by either through suicide or turning into an unfeeling and uncaring creature.”<sup>781</sup>

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<sup>780</sup> Leon Digard, Sara Sullivan & Elena Vanko, *Rethinking Restrictive Housing*, VERA INST. OF JUST. (May 2018), <https://www.vera.org/rethinking-restrictive-housing>

<sup>781</sup> Lilli Harhash, *Solitary Confinement Amounting to Torture*, UNIV. ALA. BIRMINGHAM INST. FOR HUM. RTS. BLOG (Mar. 20, 2020), <https://sites.uab.edu/humanrights/2020/03/20/solitary-confinement-amounting-to-torture/> (noting that 200 years ago, Alexis de Tocqueville wrote about the American use solitary confinement: “This absolute solitude, if nothing

Some conditions attendant on solitary, such as excessive light and inadequate access to fresh air, constitute torture in and of themselves under international law.

Not in the United States, where the Supreme Court has many times left in place lower court rulings accepting such conditions or affirmed that such conditions do not violate the Constitution. In 2023, the court left in place a circuit ruling that dismissed Michael Johnson's 8<sup>th</sup> amendment claim challenging his 3-year solitary confinement "in a windowless, perpetually lit cell about the size of a parking space. His cell was poorly ventilated, resulting in unbearable heat and noxious odors. The space was also unsanitary, often caked with human waste," according to the dissent from the denial of certiorari.<sup>782</sup> His particular claim was that he was denied release into the exercise yard for nearly the entire time he was in solitary. This is more common than it should be.

The negative psychological effects of solitary confinement are especially damaging for a person with a mental illness. Hallucinations, agitation, delusions, and violence are all symptoms of an extended incarceration in solitary confinement. Unsurprisingly, people who do not suffer from mental illness often experience the symptoms of mental illness as a result of solitary confinement.

#### B. Solitary Confinement for More than 15 Days is Torture

Solitary confinement for more than 15 days is torture under international law.<sup>783</sup> After fifteen days, the psychological harm from isolation can become permanent, regardless of a person's prior mental health status. In the United States, however, "Stays typically start at 30 days, but can often last years or even decades. According to [one] study, most inmates spend at least one month in isolation."<sup>784</sup>

This makes clear that solitary confinement is used in the United States not for any rehabilitative purpose and not necessarily for any purpose relating to safety or security, but in fact for the purpose of diminishing a person's humanity.

For more than 20 years, the international community, in countless documents and reports, has been calling for solitary to be used, if at all, only in the most exceptional and narrowly circumscribed circumstances.<sup>785</sup>

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interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.").

<sup>782</sup> Johnson v. Prentice, 144 S. Ct. 11, 12 (2023) (Jackson, J., dissenting).

<sup>783</sup> U.N. Off. on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 774. Rule 43(1) states "In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment." 43(1)(b) specifically lists "[p]rolonged solitary confinement," as one of the practices that shall be prohibited. Rule 44 defines "prolonged solitary confinement" as solitary confinement "for a time period in excess of 15 consecutive days." *Id.*

<sup>784</sup> Dan Nolan & Chris Amico, *Solitary by the Numbers*, PBS Frontline (Apr. 18, 2017), <http://apps.frontline.org/solitary-by-the-numbers/#:~:text=In%20the%20U.S.%2C%20however%2C%20it,least%20one%20month%20in%20isolation.>

<sup>785</sup> See *International Human Rights Law on Solitary Confinement*, HUM. RTS. FIRST (Summer 2015), citing dozens of sources condemning solitary confinement as amounting to torture,

For more than 10 years, the United Nations has condemned the use of solitary confinement as a violation of human dignity and a practice amounting to torture. In a 2011 Report, the UN Special Rapporteur on Torture found that

“Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment.”<sup>786</sup>

The Mandela Rules, adopted by the United Nations General Assembly in 2015<sup>787</sup> are specifically “based on an obligation to treat all prisoners with respect for their inherent dignity and value as human beings, and to prohibit torture and other forms of ill-treatment.”<sup>788</sup> Rule 1 says “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification.”<sup>789</sup> To repeat: there can be no justification for committing torture, which includes solitary confinement for more than 15 days.

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*Solitary confinement may only be imposed in exceptional circumstances, and ‘prolonged’ solitary confinement of more than 15 consecutive days is regarded as a form of torture.*

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In 2020, the United Nations Special Rapporteur on Torture specifically called out the United States’ practice of regular use of solitary confinement:

“Inflicting solitary confinement on those with mental or physical disabilities is prohibited under international law. Even if permitted by domestic law, prolonged or indefinite solitary confinement cannot be regarded as a ‘lawful sanction’ under the Mandela Rules. ... Solitary confinement may only be imposed in exceptional circumstances, and ‘prolonged’ solitary confinement of more than 15 consecutive days is regarded as a form of torture.

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[prisonlegalnews.org/media/publications/International%20Human%20Rights%20Law%20on%20Solitary%20Confinement%2C%20HRF%2C%202015.pdf](https://www.prisonlegalnews.org/media/publications/International%20Human%20Rights%20Law%20on%20Solitary%20Confinement%2C%20HRF%2C%202015.pdf).

<sup>786</sup> Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, /05/08/2011, A/66/268 at para. 81.

<sup>787</sup> U.N. Off. on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 774.

<sup>788</sup> Andrew Gilmour, *The Nelson Mandela Rules: Protecting the Rights of Persons Deprived of Liberty*, UN CHRONICLE, <https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty>.

<sup>789</sup> U.N. Off. on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 774, at Rule 1.



“The severe and often irreparable psychological and physical consequences of solitary confinement and social exclusion are well documented and can range from progressively severe forms of anxiety, stress, and depression to cognitive impairment and suicidal tendencies. This deliberate infliction of severe mental pain or suffering may well amount to psychological torture.”<sup>790</sup>

The Red Cross also opposes the overuse of solitary confinement in U.S. prisons. “The construction of such a system...cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.”<sup>791</sup>

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*“an intentional system of cruel, unusual and degrading treatment and a form of torture.”*

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In this Policy Guide, we focus on the deprivation of human contact because the essence of the punishment is separation from other people and human dignity is so intrinsically bound up in connections to other people; segregation or solitary confinement therefore profoundly threatens dignity.

The UDHR includes the human dignity right of **socialization** that should be afforded to all. Article 27 of the UDHR declares, “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” This is the wellspring for the notion of the “dignity of belonging.”<sup>792</sup> The Vera Institute also emphasizes socialization as a key dignity right:

“Human dignity also encompasses human connection. A person’s inherent worth and sense of dignity is often bound up in his or her relationships with others—in the context of a prison, this means relationships among those living in prison, between corrections staff and residents, and between incarcerated people and their families and friends on the outside. Accordingly, Vera’s second practice principle focuses on allowing people who are living in prison to develop relationships with others and, indeed, facilitating those relationships. It prohibits actions that serve to extinguish or hamper such interactions. At a minimum, the

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<sup>790</sup> Press Release, U.N., *United States: prolonged solitary confinement amounts to psychological torture, says UN expert* (Feb. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture>. We note that the Special Rapporteur for Torture recognizes multiple terms to refer the same thing: “These dehumanising conditions of detention, sometimes euphemistically referred to as “segregation,” “secure housing,” the “hole” or “lockdown,” are routinely used by US correctional facilities, particularly against inmates designated as “high risk” due to previous gang affiliations, behaviour abnormalities or mental conditions.” *Id.* The statement was also endorsed by Dainius Pūras, UN Special Rapporteur on the right to health, <https://www.ohchr.org/en/special-procedures/sr-health>; the UN Working Group on arbitrary detention, <https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention>; and Catalina Devanda-Aguilar, UN Special Rapporteur on the rights of persons with disabilities, <https://www.ohchr.org/en/special-procedures/sr-disability>.

<sup>791</sup> American Friends Service Committee Northeast Region Healing Justice Program, *Torture in United States Prisons, Evidence of Human Rights Violations* [hereinafter *Torture in United States Prisons*], at 47 (2011), [https://www.afsc.org/sites/default/files/documents/torture\\_in\\_us\\_prisons.pdf](https://www.afsc.org/sites/default/files/documents/torture_in_us_prisons.pdf).

<sup>792</sup> See DALY, DIGNITY RIGHTS, *supra* note 19, at 117-122.

prison should ensure that its residents have a chance to develop and sustain real human relationships.”<sup>793</sup>

Courts, too, have recognized the dignity of belonging.

- The constitutional court of Colombia explained the importance of socialization as a dignity right and that isolation in prison violates human dignity: “The isolation in prisons is contrary to the human dignity of prisoners, especially when the measure is carried out in inappropriate places, which do not have conditions of safety and health and, of course, ignores the minimum principles of people without freedom. In this order of ideas, only in special conditions and duly justified prisoners can be confined in places of isolation, provided that the establishment has appropriate places, the measure is carried out under strict medical supervision and the prison authorities and carried out for the indispensable time to achieve the proposed objective -health, discipline or security.”<sup>794</sup>
- Aharon Barak of the Supreme Court of Israel has written “It is not the humanity of a person on a desert island. It is humanity built upon relations between the individual and other individuals, and between the individual and the state.”<sup>795</sup>
- South African Constitutional Justice Laurie Ackerman has explained it this way by referring to the African concept of ubuntu: “The notion that ‘we are not islands unto ourselves’ is central to the understanding of the individual in African thought. It is often expressed in the phrase umuntu ngumuntu ngabantu which emphasises ‘communality and the inter-dependence of the members of a community’ and that every individual is an extension of others.”<sup>796</sup> Ubuntu is thus sometimes described this way: “a person is a person through other persons” or “I am because we are.”<sup>797</sup>

“[I]t is only through ‘the engagement and support of others that a person is able to realize a true individuality.’ Our social relations to others are ‘inseparable from how we are both embedded and supported by a community that is not outside each of us but is inscribed alongside each of us. ... Thereby, the inscription brings about relations of mutual support for the safeguarding of the potential inherent within every person.’”<sup>798</sup>

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<sup>793</sup> Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Director’s Note: Why Reimagine Prison?*, VERA INST. OF JUST. (Oct. 2018), <https://www.vera.org/reimagining-prison-web-report>.

<sup>794</sup> Corte Constitucional [C.C.] [Constitutional Court], noviembre 2, 2006, Sentencia T-291/09 (Colom.), <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9349>.

<sup>795</sup> Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015), at 130.

<sup>796</sup> LAURIE ACKERMANN, *HUMAN DIGNITY: LODESTAR FOR EQUALITY IN SOUTH AFRICA*, at 114 (Juta & Co., 2012).

<sup>797</sup> *Id.*

<sup>798</sup> *Id.* at 80. In the context of marriage and family relationships, the South African Constitutional Court has said: “But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others.” As the philosopher John O’Donohue wrote: “Where you are understood, you are at home. Understanding nourishes belonging. When you really feel understood, you feel free to release yourself into the trust and shelter of the other person’s soul... This art of love discloses the special and

- In Canada, the Supreme Court has liberally protected language rights for this reason:
 

“The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.”<sup>799</sup>
- The Supreme Court of India has held that these dignity rights are included under Article 21 of their Constitution which guarantees the right to life.<sup>800</sup> The court has interpreted the right to life to encompass “the right to live with human dignity and all that goes with it ... which includes freely moving about and mixing and commingling with fellow human beings.”<sup>801</sup> What the court is describing is the dignity right to belonging and to community participation. The right of community participation simply refers to the right to participate in a community, no matter what type of community the person is in.

Under European law, factors to be considered in determining whether solitary confinement violates Art. 3 of the European Convention (prohibiting torture and degrading treatment, including violations to dignity) include “the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.”<sup>802</sup> On the other hand, “the complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.”<sup>803</sup> Some treatment is per se unjustifiable.

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*Any rule, policy, or practice that isolates a person and prevents them from this vital social interaction is a violation of human dignity and the rights that flow from inherent human dignity.*

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Some jurisdictions within the United States have begun to take notice. Following the European model, North Dakota has begun to modify its use of solitary confinement. The segregated housing unit is now called the Behavioral Intervention Unit (BIU) with the focus shifting away from punishment and more towards human dignity.<sup>804</sup> The BIU focuses on behavioral

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sacred identity of the other person.” O’Donohue, JOHN. ANAM CARA: A BOOK OF CELTIC WISDOM (1st ed., HarperCollins Publishers, Inc. 1998).

<sup>799</sup> R. v. Beaulac, [1999] 1 SCR 768 (Can.), at para. 16, quoting Reference re Manitoba Language Rights, [1985] 1 SCR 721, 744 (Can.).

<sup>800</sup> Francis Coralie Mullin, (1981) 2 SCR 516 (India) (N. Bhagwati, J.), *supra* note 319.

<sup>801</sup> *Id.*

<sup>802</sup> Rodhe v. Denmark, App. No. 69332/01, Eur. Ct. H.R., at §93 (July 21, 2005); Rzakhanov v. Azerbaijan, no. 4242/07, Eur. Ct. H.R., at para 64 (July 4, 2013).

<sup>803</sup> Rzakhanov v. Azerbaijan, no. 4242/07, Eur. Ct. H.R., at para. 64 (July 4, 2013).

<sup>804</sup> Cory Allen Heidelberger, *For Real Prison Reform Ideas, Study North Dakota and Norway?*, DAKOTA FREE PRESS (July 29, 2021) <https://dakotafreepress.com/2021/07/29/for-real-prison-reform-ideas-study-north-dakota-and-norway/>

treatment sessions and classes towards a GED diploma.<sup>805</sup> Since making this shift, the percentage of people who find themselves returning to BIU is at 21 percent as of February 2019, half of the return rate of 42 percent before the implementation of the European Practices.<sup>806</sup> This drop in return rate suggests that the adoption of the European model has helped inmates avoid committing offenses that would see them placed in BIU; this in turn suggests that inmates are exercising greater **agency** over their own lives and living with greater dignity. It may also suggest that prison officials are responding to infractions in more dignity-affirming ways.

While it is obvious that one will be prohibited from “freely moving” during their period of incarceration, all human beings are still entitled to the dignity right of commingling with fellow human beings, which includes the dignity rights of belonging to and participating in a community.

This is why incarceration is itself (more than) sufficient punishment for violations of social norms: the punishment is in the removal from society and the extreme limitations on social contact. (This is why, as seen in the chapters on pretrial detention and release, home arrest or community surveillance is invariably preferable to incarceration from a dignity standpoint). And this is why solitary confinement – as anything more a necessary cooling off period, as described in the Mandela Rules– is absolutely inconsistent with human dignity. The First Step Act prohibits solitary confinement for juveniles “for discipline, punishment, retaliation, or any reason other than as a temporary response to a covered juvenile's behavior that poses a serious and immediate risk of physical harm to any individual, including the covered juvenile, is prohibited.”<sup>807</sup> This should be the standard for all use of solitary confinement.

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*The complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.*

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Being placed in solitary confinement explicitly and egregiously violates an individual's dignity right to belonging and community participation. Solitary confinement as punishment is inconsistent with human dignity. As such, there is no justification for its use and it should be absolutely prohibited in accordance with the “evolving standards of decency” embedded in the 8<sup>th</sup> Amendment, with international law, and with basic principles of human dignity.

## V. ADVOCACY POINTS

1. Constitutional due process rights should apply to the deprivation of life, liberty, and property of those who are serving prison sentences.
2. Grievance procedures should be accessible to all and avoid technical rules that disadvantage prisoners.

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<sup>805</sup> *Id.*

<sup>806</sup> Heidelberg, *supra* note 807.

<sup>807</sup> First Step Act of 2018, Public Law 115-391, §613, <https://www.congress.gov/bill/115th-congress/senate-bill/756/text>. See Chapter 8 for further discussion.

3. Grievances should be heard with respect for the petitioner as a person.
4. Grievances should be decided with attention to the individual circumstances of each petition and with the purpose of protecting and promoting the dignity of each person who is incarcerated.
5. Disciplinary hearings should apply a presumption of innocence and should show respect for the person who is charged with a rule violation and allow them to meaningfully share their perspective and their experience.
6. Decisions in disciplinary hearings should be based on evidence and should be explained to the person(s) involved.
7. Consequences for rule violation should be clear and known to ensure that people have and exercise informed agency in the decisions they make.
8. Consequences for rule violation should never be retaliatory.
9. Consequences for rule violation must in all cases be proportionate to the infraction.
10. Punishment for violating rules should aim to promote a person's dignity and should never inherently deny a person's dignity: disciplinary measures should never deny dignity essentials including both direct segregation and indirect social isolation and stigmatization.
11. There is no justification for Loss of All Privileges.
12. Solitary confinement should be prohibited in accordance with dignity principles of the First Step Act, the Mandela Rules, and international human rights law.



## CHAPTER 7: RE-ENTRY WITH DIGNITY

This chapter examines how people released from prison, usually on probation or parole, can live with dignity. Typically, they face two sets of challenges. First, many people who have difficulty securing basic necessities like food and shelter and finding jobs or educational opportunities once they are released from prison. This makes it very challenging to live with dignity. This chapter considers the government's obligation to ensure that every person can live in dignified conditions. Second, people released on probation or parole face numerous restrictions on their freedom, including restrictions on movement, restrictions on freedom of association, restrictions on political participation, and other limitations that are themselves violative of human dignity. By some measures, there are as many as 46,000 collateral consequences of felony convictions in the United States. Moreover, violation of these conditions may result in re-incarceration thereby further threatening their dignity. Many of these conditions violate the dignity principles of agency, bodily integrity, privacy, equality, the right to be treated "as a person," and participation in society. This chapter calls for reform in community supervision to ensure that all basic dignity needs are met, and the elimination of restrictions on voter eligibility. We also call for the elimination of collateral consequences of post-release conditions.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; participation in civic life; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

### I. INTRODUCTION: PEOPLE WHO ARE RELEASED FROM PRISON SHOULD BE SUPPORTED IN THEIR EFFORTS TO LIVE WITH DIGNITY

Approximately 650,000 prisoners are released from state and federal prisons in the United States every year and face re-integration into society.<sup>808</sup> How should the government respect, promote, and fulfill the dignity of a person re-entering society after incarceration? There are of course many answers to this but courts around the world (and some government actions in the United States) are forming the answer in terms of what it takes to live with dignity: to have access to sufficient food and adequate shelter, as well as access to employment or educational opportunities, to have privacy and control over one's life and to be able to have relationships with others on the basis of equal participation. Yet those who are released from incarceration may find it hard to live with dignity in these ways and the government may have a particular obligation to protect the dignity of those who are so vulnerable. We consider below some of the main forms of

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<sup>808</sup> U.S. DEP'T OF JUST., *Prisoners and Prisoner Re-Entry*, [https://www.justice.gov/archive/fbci/progmnu\\_reentry.html](https://www.justice.gov/archive/fbci/progmnu_reentry.html) (last visited Oct. 21, 2023).

vulnerability such as lack of access to food and employment for income, and barriers to participate in democratic activity.

In addition, the government imposes conditions on most people who are released. In the US federal system, courts “sentence almost 75% of the defendants convicted of federal offenses to a term of supervised release” after imprisonment, thus giving rise to the phrase “mass probation”<sup>809</sup> or “community supervision,” since people live in community (rather than in prison) but they are supervised in their everyday activities. Supervision entails ensuring compliance with a vast panoply of conditions, most of which are not imposed on the general population. Standard conditions can include refraining from owning or possessing firearms or other weapons, maintaining regular contact with supervision staff, submitting to random drug or alcohol testing, submitting to warrantless searches without probable cause, and refraining from criminal activity, among many others. These conditions violate dignity rights in a number of ways including that they limit **agency** and **equality**, they encroach on a person’s **privacy** and **bodily integrity**, and they restrict the **communities** to which a person can belong, all contributing to the diminution of **self-esteem** and of the **respect** which others hold a person. We discuss some of the complexities of the US legal system in Part II of this chapter. In Parts III and IV, we examine conditions of release and barriers to a dignified life.

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*Conditional release serves as a tripwire to imprisonment.*

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Whatever it is called – whether supervised release in the federal system, parole in the state system, or probation<sup>810</sup> (supervised release instead of rather than after imprisonment), the system violates dignity in another profound way: while complying with the multitudinous conditions is difficult enough, in the United States, the penalty for violating a condition is within the discretion of the probation officer (another loss of **agency**). Consequences for violations can range from a simple warning to re-arrest and reincarceration. Conditional release thus serves as a “tripwire to imprisonment, creating a vicious cycle of reincarceration” for the most vulnerable individuals, as they attempt to reintegrate back into society.<sup>811</sup> Part V of this chapter examines the problem of reincarceration for those who violate conditions of release. The chapter closes with some advocacy points.

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<sup>809</sup> Michelle. S. Phelps, *Reducing Justice System Inequality, Ending Mass Probation: Sentencing, Supervision, and Revocation*, 28 THE FUTURE OF CHILDREN 125, 125 (Spring 2018), <https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/vol28issue1.pdf>.

<sup>810</sup> John Petersilla, *Probation in the United States*, The University of Chicago Press, at 149 (1997).

<sup>811</sup> David Muhammad & Vincent Schiraldi, *How to End the Era of Mass Supervision*, THE IMPRINT (Sept. 30, 2019), <https://imprintnews.org/justice/how-to-end-the-era-of-mass-supervision/37846>.



## II. THE STRUCTURE OF DIGNITY RIGHTS FOR PEOPLE UNDER COMMUNITY SUPERVISION

### A. The Right to Live with Dignity

Dignity is an existential condition of human life: we are all born equal in dignity and rights.<sup>812</sup> But it also describes the quality of human life: to recognize human dignity is to commit to ensuring that every person is able to live with dignity.

The U.N. Human Rights Committee, in interpreting the International Covenant of Civil and Political Rights (which the United States has ratified) has explained that:

“The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant (“Right to Life”) guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.”<sup>813</sup>

At the national level (and as quoted previously), courts in India and elsewhere have interpreted the constitutionally protected right to life as entailing the right to live with dignity:

“We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”<sup>814</sup>

In this way, the law gives substantive meaning to the constitutional protection of life, just as the US Supreme Court has sometimes given substantive content to the constitutional protection of liberty.<sup>815</sup> In India, the content of the right to life is a direct manifestation of human dignity: “it must, in any view of the matter, include ... the right to carry on such functions and activities as constitute the bare minimum expressions of the human self.”<sup>816</sup>

It doesn’t matter that the term “dignity” is not used in the constitutional text: “dignity as a quality of human beings is immanent in nature ... [Thus, dignity exists] regardless of whether the positive law gives it expression.”<sup>817</sup> Throughout the world, dignity is assumed to be a part of a just

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<sup>812</sup> UDHR, *supra* note 7, at art. 1.

<sup>813</sup> UN Hum. Rts. Comm., *General comment no. 36, Article 6: Right to Life*, at para. 3 (Sept. 3, 2019), <https://www.refworld.org/docid/5e5e75e04.html>. The Committee also explains: “While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations.” *Id.* at para. 9.

<sup>814</sup> Francis Coralie Mullin, (1981) 2 SCR 516 (India) (N. Bhagwati, J.), *supra* note 319.

<sup>815</sup> *See, e.g.* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); BMW of N. Am. v. Gore, 517 U.S. 559 (1996); Obergefell v. Hodges, 576 U.S. 644 (2015).

<sup>816</sup> Francis Coralie Mullin, (1981) 2 SCR 516 (India) (N. Bhagwati, J.), *supra* note 319.

<sup>817</sup> DALY & MAY, DIGNITY CASEBOOK, *supra* note 229, quoting District Court in Czestochowa from 2016-03-18, (District Court, Poland 2016).

rule of law, whether it is explicit in the constitutional text or not,<sup>818</sup> precisely because it reflects the bare minimum expressions of the human self.

But living with dignity can be elusive for people who are re-entering society after incarceration in the United States. According to The Sentencing Foundation, “The system is not structured to support the re-entry of formerly incarcerated individuals nor is it built to humanely house and feed millions of people, thereby trapping society in a system of incarceration.”<sup>819</sup> The Sentencing Foundation notes that, “about 44% of people released from prison are re-arrested within the first year after release, and 68% were re-arrested within the first 3 years,” according to the National Institute of Justice.<sup>820</sup>

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*Throughout the world, dignity is assumed to be a part of a just rule of law, whether it is explicit in the constitutional text or not.*

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After incarceration, many individuals find it difficult to live with dignity. The conditioning required to survive inside is often at odds with the conditioning required to thrive on the outside, where one is expected to manage one’s schedule and resources, advocate for oneself, and negotiate the complications of daily life in modern America. In addition, many people lack sufficient educational or employment experience to help them thrive on the outside and they are likely to be among the poorest individuals in the community. Consider some of the information provided above in the section “By the Numbers” (see Introduction pages 36-42):

- 80% of incarcerated individuals are indigent and about two-thirds of those in jail report incomes below the poverty line.
- Nearly 2 in 3 families (65%) with an incarcerated member were unable to meet their family’s basic needs. Forty-nine percent struggled with meeting basic food needs and 48% had trouble meeting basic housing needs because of the financial costs of having an incarcerated loved one.
- Estimates indicate formerly incarcerated people owe as much as 60% of their income to criminal law debts. According to one source, “up to 85% of people returning from prison owe some form of criminal justice debt” (compared to 25% in 1991).<sup>821</sup>
- On average families paid \$13,607 in court-related costs. These costs amount to nearly one year’s income for low-income families making less than \$15,000 per year.

And remember that most people who are incarcerated have no prison employment and those who do earn mere cents per day, most of which is used to buy basic necessities. By reason

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<sup>818</sup> See, e.g., *Davis v. Neal*, No. 1:21-cv-01773-TLA, 2023 U.S. Dist. LEXIS 144106, at \*22-25 (D. Del. Aug. 17, 2023).

<sup>819</sup> THE SENTENCING FOUNDATION, *Resource-Base Sentencing and Supervision, Reducing Crime by Reducing Recidivism*, <https://www.thesentencingfoundation.org/> (last visited Jan. 4, 2023).

<sup>820</sup> *Id.*

<sup>821</sup> ELLA BAKER CTR., *supra* note 90, at 7-15.

of the experience of prolonged incarceration, individuals on probation are especially vulnerable and are entitled to government support to assure that they can live with dignity upon release.

One important aspect of living with dignity is having a recognized **identity**. Prisons must ensure that every person who is released has appropriate and adequate forms of identification.

#### B. The Government's Affirmative Obligation to Ensure that Every Person can Live with Dignity

Dignity rights demand not only that governments refrain from interfering with one's ability to live with dignity but, where people are particularly vulnerable, dignity rights demand that government take measures to ensure that people can live with dignity. In Germany, the Federal Constitutional Court has insisted that the government ensure that every person live a "dignified minimum existence."<sup>822</sup> This is the basis of social safety nets in the United States including social security, unemployment insurance, housing and food assistance, Medicaid and Medicare: all of these government programs ensure that people are cared for as persons "of eminent dignity"<sup>823</sup> even if they can not, for whatever reason, care for themselves.

Dignity demands that the government provide assistance and doesn't distinguish between those who have been convicted of a crime and those who have not. Indeed, in Germany, all persons are entitled to a minimum standard of existence, including non-citizens and even those who are in the country temporarily seeking asylum.<sup>824</sup> In the Benefits for Asylum Seekers case, the Federal Constitutional Court in Germany identified resources that human beings need to be afforded a "dignified minimum existence" that allows them to function as members of society: ". . . food, clothing, household items, housing, heating, hygiene, and health, that guarantees the possibility to maintain interpersonal relationships ... since a human as a person necessarily exists in a social context."<sup>825</sup> This standard applies to all persons, at all times, whether or not they have been convicted of a crime.

Throughout the world, courts have recognized the dignity-based claim to positive rights; that is, the principle that the state's obligation to protect human dignity includes not only the prohibition of engaging in certain dignity-denying practices and actions, but also the affirmative obligation to take the necessary legislative and administrative steps to ensure that every person can live a life of dignity, and the obligations of the courts to hold governments accountable when they fail to do so.

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<sup>822</sup> BVerfG, 1 BvL 1/09, Feb. 9, 2010 ("Hartz IV") (Ger.), *supra* note 391.

<sup>823</sup> Acción de inconstitucionalidad 2/2010, Suprema Court de Justicia de la Nación [SCJN] (Mex.).

<sup>824</sup> BVerfG, 1 BvL 10/10, July 18, 2012 (Ger.),

[https://www.bundesverfassungsgericht.de/e/ls20120718\\_1bvl001010en.html](https://www.bundesverfassungsgericht.de/e/ls20120718_1bvl001010en.html).

<sup>825</sup> BVerfG, 1 BvL 10/10, June 20, 2012,

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2012/bvg12-035.html> (This case used the "subsistence minimum" analysis formed in another case from the BVerfG, *Hartz IV*, that construed 1.1 of GG (Basic Law), the article that contains dignity, to mean that the state is required to provide for individuals a minimum existence that corresponds with their dignity).

- The Indian Supreme Court has also eschewed any bright line between the affirmative and the negative steps governments must take in order to protect human dignity: “The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction.”<sup>826</sup>
- Even within the United States, in the Commonwealth of Puerto Rico, whose constitution “consecrates the cardinal principle of the inviolability of the dignity of the human being,” the Supreme Tribunal has recognized that
  - “[Dignity rights] have special preeminence in [the] constitutional scheme. ... The State has a dual function to protect the rights contained therein: abstaining from acting in such a way that the scope of individual autonomy and privacy is violated and acting affirmatively for the benefit of the individual.”<sup>827</sup>

The division between positive and negative obligations, while important in theory, breaks down in practice. Voting rights, for instance, are thought of as a negative right (in the sense that the government’s obligation is to not interfere with the right to vote) but the exercise of the right to vote nonetheless requires the government to provide places to vote, information about voting, protection from the interference of private interests and so on. Property rights are not only negative rights that prohibit the government from interfering with property ownership but positive rights that impose on the government the obligation to ensure that affordable housing is available, that non-discrimination laws are enforced, and that renters’ rights of habitability are respected, and so on.

The line between civil and political rights on the one hand and socio-economic rights on the other also breaks down and is less relevant in the dignity-based experience of human beings than it is in law: in life, all rights are connected to one’s sense of self-worth and the respect that others give a person. Thus, rights are said to be interdependent and indivisible with one another: without a job that secures income to ensure access to food, one can not exercise or enjoy any other rights.<sup>828</sup> And these challenges are exacerbated by the physical limitations imposed on people who are under community supervision and by the extraordinary fees that are imposed on them, further limiting the resources they have to build lives of dignity.

The American Bar Association’s endorsement of dignity rights does not limit the government’s obligation to certain types of rights or certain types of actions; it affirms that government in every branch and at every level should “ensure that ‘dignity rights’ – the principle that human dignity is fundamental to all areas of law and policy — be reflected in the exercise of their legislative, executive, and judicial functions.”<sup>829</sup> Governments are obligated to respect dignity whether that means refraining from certain actions that would diminish a person’s dignity or

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<sup>826</sup> M. Nagaraj & Others v. Union of India & Others, (2006) (India), <https://indiankanoon.org/doc/102852/>.

<sup>827</sup> Lozada Tirado v. Tirado Flecha, 177 P.R. 893 (2010) (Puerto Rico, U.S. Supreme Tribunal).

<sup>828</sup> See generally, Jack Donnelly and Daniel J. Whelan, *International Human Rights*, 6<sup>th</sup> ed. Routledge, (2020).

<sup>829</sup> A.B.A. Resolution 113B (Aug. 2019), *supra* note 5.

affirmatively providing services and legal protections to respect, protect, and fulfill a person’s dignity.

### C. The Complexity of Legal Regimes and Services in the United States

While dignity needs and rights are constant and absolute, the decentralization of services in the United States complicates the fulfillment of government obligations. First, “we don’t have a single monolithic system. Instead, we have a federal system, 50 state systems, and thousands of local government systems.”<sup>830</sup> System-impacted individuals feel this most deeply, as they are generally subject to more than one level of government control from pre-trial detention to release.

Second, and further complicating life for people who have been incarcerated, many of the services that define their experience are provided not by the government but by private companies or contractors. For instance, GEO Group operates nearly 30% of all halfway houses nationwide.<sup>831</sup> Electronic monitoring is provided by for-profit companies rather than by the government entity that imposes it as a legal condition of freedom. Unlike the government, these private entities are not obligated to orient their services toward the public good nor do they have any constitutional obligation to respect and protect the dignity of every person. Like any company, their interest is in profit. The profit motive embodies the objectification of people because it treats them not as individuals but as commodities with monetary value. By contracting with private entities, then, the government loses control over the provision of services and avoids its obligation to treat every person with dignity. Neither federal nor state governments should be able to avoid their responsibility to protect human dignity by contracting government services to private enterprise.

## III. BARRIERS TO LIVING WITH DIGNITY

According to Reform Alliance, there are as many as 46,000 collateral consequences imposed on people throughout the United States.

### A. “Participatory Dignity” and the Right to Belong

Some states permanently prohibit every person who has a felony conviction from voting in all elections,<sup>832</sup> resulting on the total disenfranchisement of 4.6 million Americans.<sup>833</sup> This disenfranchised population is roughly the size of Louisiana and larger than the entire populations

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<sup>830</sup> Wagner & Rabuy, *Following the Money of Mass Incarceration*, *supra* note 130.

<sup>831</sup> Roxanne Daniel & Wendy Sawyer, *What you should know about halfway houses*, PRISON POL’Y INITIATIVE (Sept. 3, 2020), <https://www.prisonpolicy.org/blog/2020/09/03/halfway/>.

<sup>832</sup> Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, THE SENTENCING PROJECT (October 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/>.

<sup>833</sup> *Id.*

of 25 other states.<sup>834</sup> Those on probation, parole, or community supervision have the right to vote restored upon release in only twenty-one states.<sup>835</sup> On the other hand, in only Maine, Vermont, and the District of Columbia do individuals retain their right to vote while in prison.<sup>836</sup> This shows that it can be done.

As a matter of participatory and civic dignity,<sup>837</sup> citizens should not lose their right to vote simply because they have been convicted of a crime. The right to vote of probationers, parolees, and those under supervised release should be guaranteed. The right to vote is a dignity right, based in the need to **participate** in the community and to make decisions that affect one's own life and the lives of others within our communities. As noted above, the South African Constitutional said it eloquently:

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*An estimated 4.6 million Americans are barred from voting due to a felony conviction.*

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“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”<sup>838</sup>

Ensuring that all persons over 18 can vote while in prison and facilitating the exercise of the franchise for those who are on parole or probation is necessary to protect the dignity of all persons. The right to vote is not only justified by the dignity need to participate, but also contributes to a better quality of life for all: studies on probationers, parolees, and community supervised populations have shown that restoring voting rights upon release supports the transition back into community life.<sup>839</sup> Moreover, it protects the integrity of the nation's democracy.

There is no penological justification at all for limiting the franchise. No valid justification exists to discourage or burden a person's exercise of their right to vote. Moreover, providing access to vote even in prison is inexpensive, simple, and well within the administrative ability of states. For instance, voting machines could be installed in prisons and jails for use on election days and parole and probation centers could become automatic voter registration sites.

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*There is no penological justification at all for prohibiting people from voting.*

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<sup>834</sup> See U.S. CENSUS BUREAU, *State Population Totals & Components of Change: 2020-2022*, (June 13, 2023), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#v2022>. Louisiana, with a population of 4,590,241 in 2022, ranks 25<sup>th</sup> in population.

<sup>835</sup> Uggen et al., *supra* note 835.

<sup>836</sup> *Id.*

<sup>837</sup> See Erin Daly, *Judicial activity/democratic activity: The democratising effects of dignity*, *supra* note 398.

<sup>838</sup> August & Another v. Electoral Comm'n & Others 1999, at para. 17, (3) SA 1 (CC) (S. Afr.), *supra* note 401.

<sup>839</sup> Jean Chung, *Voting Rights in the Era of Mass Incarceration*, THE SENTENCING PROJECT (July 28, 2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

## B. Occupational Licenses

Those with a criminal record often have great difficulty obtaining job licenses. This includes certifications in law, cosmetology, nursing, physical or occupational therapy, social work, real estate, and accounting, among others, because of state regulations. Those pursuing a license in a profession should not be denied eligibility because of an unrelated criminal record or after they have completed their sentence. At present, the federal government, 37 states, and more than 150 cities have passed some sort of measure that make it easier for justice-impacted people to build a career by prohibiting employers from asking about prior arrest or conviction records.<sup>840</sup> As a matter of the right to earn a livelihood and live with dignity, all states have a responsibility to ensure that all who aspire to obtain professional licenses have the opportunity to do so. The Clean Slate Initiative is working to “pass and implement laws that automatically clear eligible records for people who have completed their sentence and remained crime-free, and [to expand] who is eligible for clearance.”<sup>841</sup>

## C. Government Assistance

The government must also act affirmatively to ensure that every person has enough to eat. In direct violation of dignity and decency, the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) imposes a lifetime ban on food support including SNAP (Supplemental Nutrition Assistance Program) and TANF (Temporary Assistance for Needy Families) for those with a previous drug felony conviction, including nonviolent and low-level offenses.<sup>842</sup> All states except for South Carolina have removed or modified the rule,<sup>843</sup> so that formerly incarcerated individuals and their family members can rely on SNAP and TANF for basic human needs. Furthermore, many states such as California limit services such as childcare to individuals receiving TANF. Those with children who are reentering society must rely on private childcare in order to pursue employment and they must be eligible for food assistance in order to get child care. All of these dignity interests are bound up in one another, showing how human dignity rights are indivisible and interdependent on one another.

To deny SNAP and TANF benefits to some of the most vulnerable individuals in society is not only cruel but also a violation of human dignity: it prevents people from living a dignified life<sup>844</sup> and it diminishes them and stigmatizes them in the eyes of others.<sup>845</sup> It thereby limits their ability to live on an equal basis with others in their communities.<sup>846</sup> As a matter of dignity, all states must

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<sup>840</sup> Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, And States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT (Oct. 1, 2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

<sup>841</sup> The Clean Slate Initiative, *CSI’s Mission*, <https://www.cleanslateinitiative.org> (last visited Apr. 5, 2024).

<sup>842</sup> Darrel Thompson & Ashley Burnside, *No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Convictions*, at 1, THE CTR. FOR LAW AND SOC. POL’Y (Apr. 2022), [https://www.clasp.org/wp-content/uploads/2022/04/2022Apr\\_No-More-Double-Punishments.pdf](https://www.clasp.org/wp-content/uploads/2022/04/2022Apr_No-More-Double-Punishments.pdf).

<sup>843</sup> *Id.*

<sup>844</sup> BVerfG, 1 BvL 1/09, Feb. 9, 2010 (“Hartz IV”) (Ger.), *supra* note 391.

<sup>845</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>846</sup> Corte Constitucional [C.C.] [Constitutional Court], abril 23, 2009, Sentencia T-291/09 (Colom.).

ensure that all people, regardless of previous experience, are eligible for all life-sustaining benefits, including TANF, SNAP, and childcare, at a minimum.

The Federal Bureau of Prisons (BOP) can and to some extent does act as a model for state, territorial, and local facilities, as the federal government does in other areas of public law. In limited ways, the federal government has accepted the responsibility to provide affirmative support to ensure that reentering citizens can live with dignity. For instance, the First Step Act requires “BOP to assist prisoners and offenders who were sentenced to a period of community confinement with obtaining a social security card, driver’s license or other official photo identification, and birth certificate prior to being released from custody.”<sup>847</sup> The Act further requires “BOP to establish prerelease planning procedures to help prisoners apply for federal and state benefits and obtain identification” and “to help prisoners secure these benefits, subject to any limitations in law, prior to being released.”<sup>848</sup> Programs like these should be adequately funded and staffed to ensure that appropriate services are available for each person who needs them.

#### IV. CONDITIONS OF RELEASE OFTEN VIOLATE HUMAN DIGNITY

Courts retain broad discretion to craft conditions of release to the extent that they “are reasonably related to the relevant sentencing factors” and “involve only such deprivations of liberty or property as are reasonably necessary.”<sup>849</sup> These conditions tend to violate human dignity and to be inconsistent with a just rule of law.

- Some conditions are inherently and invariably violative of human dignity, including certain invasions of privacy, limitations on association rights, and warrantless, unnecessary and unfounded searches.
- Others violate human dignity because they are disproportionate or entirely unrelated to any responsibility the person may bear for a wrong, such as drug testing, requirements to check in, disenfranchisement, and so on.

Nonetheless, conditions must comport with dignity in three essential ways.

- Conditions must at all times be consistent with human dignity.
- Probation and supervised release/parole boards must tailor the conditions to an individual’s unique circumstances. This is an essential element of dignity rights, which demand that every person be treated by the government “as a person,” – that is, with attention to individual needs and to each person’s unique living circumstances. A “one size fits all” approach to community supervision disregards the strengths, challenges, and goals of individuals and their families during the reentry or probationary period.
- The consequences of violating conditions of probation and parole must themselves respect human dignity. It diminishes people’s sense of equality and security and their sense of self-worth if they are made to live in fear that any false move will

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<sup>847</sup> JAMES, THE FIRST STEP ACT OF 2018: AN OVERVIEW, *supra* note 654, at 18-19.

<sup>848</sup> *Id.* at 19.

<sup>849</sup> 18 U.S.C. §§ 3563(b) & 3583(d).



land them back behind bars. Ideally, probation and parole officers support and assist the person in helping them to meet their conditions. This could be a supportive relationship instead of an adversarial one.

Across the nation, policymakers and legislators have begun to adopt reforms, including shorter terms, earned compliance credits, and reduced or inactive supervision.<sup>850</sup> Reforms should be geared toward protecting and respecting the inherent human dignity of people who are affected directly and indirectly, and should enable all those who are system-impacted to live with dignity.

The conditions upon which people are released from prison are too numerous and too varied to address in full detail here. In the sections that follow, we highlight some of the dignity implications of some of these conditions.

#### A. The High Costs of Being Released

People on probation and released from prison are often required to pay for the costs of supervision.<sup>851</sup> Fees can be levied for administrative functions of the courts, the costs of a public defender, and community supervision fees such as court-ordered drug tests, cognitive-behavioral therapy, and electronic monitoring. One study found that fifty-two percent of a reentry population owed some form of legal financial obligations – that can be as high as \$13,000.<sup>852</sup> These costs can be exorbitant in a country where the median bank account holds \$8,200 for white people but only \$1,200 and \$1,910 for people who are black and Hispanic, respectively.<sup>853</sup>

Though the system holds some people financially hostage, it works largely because it is profitable for others. Parole and probation in some of the poorest counties in states such as Georgia, Alabama, and Mississippi are “golden business opportunities for the for-profit probation industry precisely because so many residents struggle to pay off their fines.”<sup>854</sup> It also contributes to public budgets: in Texas, supervision fees make up one-third of the probation department’s operating budget.<sup>855</sup>

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<sup>850</sup> The Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW (Sept. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

<sup>851</sup> ACLU, *In For a Penny, The Rise of America’s New Debtor’s Prisons* (Oct. 2010), [https://www.aclu.org/sites/default/files/field\\_document/InForAPenny\\_web.pdf](https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf); Casey Kuhn, *The U.S. spends billions to lock people up, but very little to help them once they’re released*, PBS NEWS HOUR (Apr. 7, 2021), <https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released>.

<sup>852</sup> Nathan W. Link et al., *Considering the Process of Debt Collection in Community Corrections: The Case of the Monetary Compliance Unit*, 37(1) J. OF CONTEMP. CRIM. JUST. 128, 130 (2021).

<sup>853</sup> Rene Bennett & Nell McPherson, *The average amount in U.S. savings accounts – how does your cash stack up?*, BANKRATE (Dec. 21, 2022), <https://www.bankrate.com/banking/savings/savings-account-average-balance/>.

<sup>854</sup> *Profiting from Probation*, Hum. Rts. Watch (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.

<sup>855</sup> *Id.*

Imposing draconian financial obligations on people who are system-impacted, whether in the forms of fees or fines, contributes to the public and private economy, but violates human dignity in a number of ways, including the following:

- It discriminates against people who lack resources and therefore disproportionately burdens people in violation of the equal dignity of each person.
- It limits the agency of those who are subject to burdensome costs by limiting their control over their financial resources.
- It reduces their ability to live with dignity by preventing them from spending their limited resources on other needs (food, rent, transportation school fees, etc.).
- It is humiliating to not have the resources to pay for one's obligations or the obligations one has to one's family.
- It ignores individual differences and the unique circumstances of each person.

Court-ordered fees fail to improve public safety and the costs of collecting and enforcing them remains extremely burdensome to those impacted by the criminal legal system. In a study examining Texas, Florida, and New Mexico, the Brennan Center for Justice found that judges rarely hold hearings to establish a probationer or parolee's ability to pay.<sup>856</sup> Since courts impose fines without regard to an individual's ability to pay, jurisdictions have millions of dollars of unpaid court debt. As a result, probation officers report individuals for violating parole simply because of the inability to pay back these fines.

In some jurisdictions, probation and parole officers may use nonpayment of court-ordered fees as evidence of noncompliance. Debt collectors may also use the court system to jail thousands of debtors each year, and sentencing people for non-payment of court-imposed fines without due process is not uncommon.<sup>857</sup>

In *Bearden v. Georgia*, the Supreme Court held that an individual's probation cannot be revoked for failure to pay fines or restitution unless the court finds that the individual had the means to pay or "failed to make sufficient bona fide efforts legally to acquire the resources to pay."<sup>858</sup>

And yet, since *Bearden*, state courts have carved out plea-bargaining exceptions – exceptions that arguably violate the constitutional rights of people affected by the criminal legal system and almost certainly violate their dignity rights. For example, in Morgan County, Alabama, criminal defendants over the past twenty years regularly signed a "notice and waiver of indigency status" form as a condition of a plea deal.<sup>859</sup> In other words, impoverished people have to sign

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<sup>856</sup> Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, THE BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF LAW, at 5 (Nov. 21, 2019), <https://www.brennancenter.org/media/5290/download>.

<sup>857</sup> *Id.* at 6.

<sup>858</sup> *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

<sup>859</sup> Conor Sheets, *'It's robbery': When plea deals hinge on promising to always have money for court fees*, Advance Local (Aug. 12, 2021), <https://www.al.com/news/2021/06/its-robbery-when-plea-deals-hinge-on-promising-to-always-have-money-for-court-fees.html>.

waivers that they are not indigent in order to be released from prison, and upon release they are subject to reincarceration for failing to pay their fines because they had affirmed that they had the capacity to pay. These practices are probably unconstitutional under both *Bearden* and *Boykin v. Alabama*.<sup>860</sup> Still, these protections are not likely sufficient to protect a person from reincarceration for penury nor to protect them from the violations of dignity that the criminalization of poverty entails.

#### B. Court Ordered Treatment and Random Drug Testing Diminishes Dignity

Probation and parole officers regularly perform random drug testing at any time of day, on any day of the week, including weekends and holidays. Random drug testing is highly disruptive to individuals as they seek to reintegrate back into society, as people are often called in for testing during hours of employment, or when they are engaged in personal and family obligations. When it is done for people with ongoing substance use or abuse disorders (SUDs) or challenges, it is arbitrary and intrusive and irrational in that it criminalizes an illness or a matter of personal, legal choice. When this is done for people with no history of substance use or abuse, it is all those things and it is entirely unjustified.

A graduate of Project New Start, a reentry program in Wilmington, Delaware, was subjected to mandatory completion of a drug treatment program even though she had no prior substance abuse issues simply because her parole officer reasoned that given the crime for which she had been convicted (a financial crime), “she had to have been on drugs.”<sup>861</sup> The offense was non-violent, and there was no information in her background to support an inference of SUD. Such conditions violate the privacy of the person who has been released and is inherently humiliating, demeaning them in their own eyes and in the eyes of others.

Random drug testing poses particular harms for people in certain groups. The adverse consequences of drug testing fall significantly more heavily on non-white people. Black individuals on supervision are nearly three times more likely to test positive for cannabis use, while white individuals are 1.4 times more likely to test positive for hard drug (amphetamines, cocaine, narcotics, and benzodiazepines) use.<sup>862</sup> However, black individuals who test positive only for cannabis are statistically more likely to have their probation or parole revoked.<sup>863</sup>

Many states have legalized recreational drug use and still others have legalized the use of marijuana for medical purposes. People subject to random drug testing in those states have disabilities imposed on them that are not imposed on the general population for reasons that may or may not bear any relation to the criminal activity for which they had been convicted. Those with valid legal authority to use medical marijuana or other scheduled substances may be found to violate release conditions, even for conduct which they are permitted to do. States including

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<sup>860</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983); see *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (holding that a guilty plea can only be accepted if it is made voluntarily, intelligently, and understandingly).

<sup>861</sup> Meeting with J.E. in Dignity Rights Clinic, 2022.

<sup>862</sup> William Hicks et al, *Drug Testing and Community Supervision Outcomes*, 47 CRIM. JUST. & BEHAV. 419, 426 (Jan. 15, 2020).

<sup>863</sup> *Id.* at 427.

Pennsylvania<sup>864</sup>, Michigan<sup>865</sup>, and Arizona,<sup>866</sup> and Oregon have already begun to recognize this right and adopted statutes protecting probationers' rights as registered patients to use medical marijuana while under community supervision.

For many, a failed random drug test could constitute a violation of release that would return them to prison, even though they are nonviolent offenders and pose no threat to public safety. Punitive responses to drug tests run counter to guidance from the American Society of Addiction Medicine, which state that "drug testing should be used as a tool for supporting recovery rather than exacting punishment."<sup>867</sup> They are a dignity-diminishing practice.

### C. Forced Waivers of Protected Health Information Violate Dignity

While the provision of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) permitting communication of protected health information (PHI) to correctional facilities (see above in Chapter 5) no longer applies when a person is released on probation, parole, supervised release, or otherwise no longer in lawful custody, courts often order people to waive confidentiality as a mandatory condition of release. Conditions that require community supervised individuals to waive their privacy rights regarding PHI to supervisors are rarely necessary to ensure compliance sentencing goals and are a blatant violations of an individual's dignity right to privacy.

Furthermore, as mentioned above, private medical information that is disclosed to a supervisor may be disseminated by them without limitation and without consent. Some states have adopted statutes requiring permission before an officer can disclose PHI from a covered entity, such as a mental health treatment provider.<sup>868</sup> However, these waivers can be exploitative because the person has no real choice. Such conditions therefore diminish, rather than reinforce, a person's agency and control over information about their own mental and physical health and related private information.

### D. Restrictions on Freedom of Movement

State-imposed restrictions on mobility may violate the constitutional right to travel<sup>869</sup> and may violate the dignity right to freedom of movement.<sup>870</sup> As a practical matter, they make it extremely difficult for people impacted by parole or probation to find or keep a job, attend school, care for children, and visit family members. This is true because it limits the choices that people under supervision can make about how they socialize, but it is also true because social interactions are often unplanned and are difficult or impossible for the person to control. These restrictions, both *de jure* and *de facto*, deprive people affected by the criminal legal system of their basic

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<sup>864</sup> Gass v. 52nd Jud. Dist., Lebanon Cnty., 232 A.3d 706 (Pa. 2020).

<sup>865</sup> People v. Thue, 969 N.W.2d 346 (Mich. Ct. App. 2021).

<sup>866</sup> Reed-Kaliher v. Hoggatt, 347 P.3d 136 (Ariz. 2015).

<sup>867</sup> Hurford et al., *Appropriate Use of Drug Testing in Clinical Addiction Medicine*, 11 JOURNAL OF ADDICTION MEDICINE 1, 5 (2017).

<sup>868</sup> Hurford et al., *supra* note 870, at 8.

<sup>869</sup> Shapiro v. Thompson, 394 U.S. 618, 643 (1969).

<sup>870</sup> See, e.g., Maneka Gandhi vs Union Of India, (1978) 2 SCR 621 (India), <https://indiankanoon.org/doc/1766147/>.

human needs for connection and belonging. They may also lack justification if they are unrelated to the sentencing needs or goals.

If courts impose such restrictions during sentencing, the restrictions must be limited to people with violent offenses who pose a danger to others. If time and place restrictions are imposed, the restrictions must be flexible enough to account for basic human needs such as quality time with family members – especially those raising young children. Conditions that impose restrictions on trips to the grocery store, medical appointments, job interviews, and work obligations must be reasonable and flexible and should only be imposed when made necessary by the defendant’s own conduct and only to the extent they are proportional to the need.

#### E. Electronic Monitoring in Community-Based Corrections

Some criminal legal system advocates present electronic monitoring (“EM”) as a “lesser evil” to incarceration, as it allows for more human contact with the outside world, prevents individuals from remaining incarcerated in deplorable conditions, protects individuals from other inmates and from prison officials who may pose a threat to their health and safety, and allows them to live a more normal life. Courts may at their discretion implement restrictions such as curfew, home detention, home incarceration, and stand-alone monitoring using voice recognition technology, radio frequency monitoring, and global positioning system (GPS) satellite monitoring.<sup>871</sup>

While it is used in some form by all states, Florida, Texas, California, Massachusetts, and Michigan have the most common use of monitoring.<sup>872</sup> Use of EM has grown since the Covid pandemic due to concerns about overcrowding in jails and prisons.<sup>873</sup>

Electronic monitoring presents a host of independent dignity issues. We address some of these issues below.

##### 1. Discrimination on the Basis of Poverty

In at least thirty states, agencies require monitored individuals to pay for electronic monitoring themselves, driving indigent defendants further into debt.<sup>874</sup> To comply with the terms of their probation or parole, an individual may pay an average of \$10 per day for the equipment alone. Some counties also require activation fees that typically run between \$150 and \$200.<sup>875</sup>

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<sup>871</sup> ADMIN. OFF. OF THE U.S. CTS., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 73 (Nov. 2016), <https://www.uscourts.gov/services-forms/location-monitoring-probation-supervised-release-conditions>.

<sup>872</sup> ELEC. FRONTIER FOUND., *Street-Level Surveillance: Electronic Monitoring* (July 12, 2019), <https://www EFF.ORG/pages/electronic-monitoring>.

<sup>873</sup> Brian Dolinar & James Kilgore, *Cages Without Bars are Widening the Net: The Explosion of Electronic Monitoring*, PRISON LEGAL NEWS (Jan. 1, 2023), <https://www.prisonlegalnews.org/news/2023/jan/1/cages-without-bars-are-widening-net-explosion-electronic-monitoring/>.

<sup>874</sup> *Defendants Driven into Debt by Fees for Ankle Monitors from Private Companies*, EQUAL JUST. INITIATIVE (July 23, 2019), <https://eji.org/news/defendants-driven-into-debt-by-fees-for-ankle-monitors/>.

<sup>875</sup> See generally *Electronic Monitoring Fees, A 50-State Survey of the Costs Assessed to People on E-Supervision*, FINES & FEES JUST. CTR. (Sept. 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf>.

This obviously imposes a significant burden on those with limited resources who are already burdened by the other costs of release and re-entry into society.

## 2. Privacy

While the use of EM may be less onerous on the individual, it gives the state an extraordinary and unprecedented level of information about the individual (and those with whom they come into contact). It gives the government the authority to monitor “political speech, religious affiliations, health information, and the romantic and personal communications of thousands of juveniles and adults on community supervision.”<sup>876</sup> Law enforcement authorities must develop standards and practices for electronic monitoring and provide transparency on how the data collected will be utilized and protected. There must also be limits on what can be done with the information in order to respect the dignity of every person implicated in the information. While there may be a place for electronic surveillance in community supervision, it must be narrowly tailored to the circumstances of the individual and impose minimal burdens on privacy and only where necessary to accomplish the public safety objective.

The practice of implementing mandatory and continuous electronic surveillance at minimum supervision levels violates the recognized dignity right to privacy. While the pandemic limited in-person contact, probation and parole boards expanded the use of mobile platforms such as Tracktech, Shadowtrack, and Telmate – smartphone apps that allow probationers and parolees to connect with case officers through text or video.<sup>877</sup> Much of this has continued after the pandemic abated. An increasing number of probationers and parolees under minimum supervision (supervision on a less-than-monthly basis) must enroll in a mobile platform as a condition of their probation. For many probationers and parolees, shifting from regularly scheduled in-person meetings to an app with the ability to track user data (audio, video, and movements) twenty-four/seven has increased convenience and lowered the likelihood of violations, but it has actually increased the intrusion into their privacy and therefore continues to pose a threat to their dignity rights.<sup>878</sup>

## 3. Bodily Integrity

In cases where ankle monitors are court-mandated for probation or parole, government agencies must ensure that devices are designed and fitted to prevent foreseeable discomfort and bodily injury. Emerging research on ankle monitors sheds light on the physical and psychological trauma they can cause for probationers and parolees. Ankle monitors have been known to cause

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<sup>876</sup> Kate Weisburd, Note, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L.REV. 717, 720 (2020).

<sup>877</sup> Todd Feathers, *‘They track every move’: how US parole apps created digital prisoners*, THE GUARDIAN (Mar. 4, 2021), <https://www.theguardian.com/global-development/2021/mar/04/they-track-every-move-how-us-parole-apps-created-digital-prisoners>.

<sup>878</sup> *Id.*

lower back problems, foot numbness, scarring, bleeding, lacerations, and swelling, and some side effects can cause irreparable harm.<sup>879</sup>

As government agencies contract with private companies that develop EM technology, the agencies must as a matter of dignity ensure that monitors are minimally disruptive to the wearer. Ankle monitors have been widely used since the 1980s, yet their design has not kept pace with wearable technology devices such as smart watches and exercise and glucose monitors, which have become less conspicuous, lighter, smaller, and sleeker.<sup>880</sup> The most widely used ankle monitor weighs 6.1 ounces, which is approximately six times as much as other wearable technology on the market.<sup>881</sup>

Electronic monitoring is a preferable alternative to incarceration. In order to comport with human dignity, however, regulations must control how information about people who are on probation or parole is gathered, stored, used, and disseminated. Further, the tracking device itself should be unobtrusive and comfortable in order to protect the dignity of the person using it. As a matter of globally recognized dignity rights to **agency, privacy, free will, and bodily integrity**, EM should comport with the following:

- Policies regarding the use of information and the enforcement of rules must be clearly communicated to the individual being monitored;
- Limitations on mobility and privacy (voice verification, facial recognition, GPS tracking, etc.) must allow maximum agency and autonomy to the individual and must be proportionate to legitimate penological goals and to the risks that a probationer or parolee poses to the community;
- Law enforcement authorities must develop standards and practices for electronic monitoring, provide transparency on how the data collected will be utilized and protected, and protect the privacy of individuals under supervision, as well as the privacy of others with whom they interact (e.g. family members, work associates, friends, etc.).

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<sup>879</sup> April Glaser, *Incarcerated at home: The rise of ankle monitors and house arrest during the pandemic*, NBC NEWS (July 5, 2021), <https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008>. See also Bart Besinger & Sydney Ryckman, *Septic Malleolar Bursitis in a Patient with an Ankle Electronic Monitoring Device: A Case Report*, 5(1) CLINICAL PRACTICE & CASES IN EMERGENCY MED. 97, 97 (Feb. 2021), <https://escholarship.org/content/qt2165v83m/qt2165v83m.pdf?t=qp34bh>; Olivia Thompson, *Shackled: The Realities of Home Imprisonment* (June 14, 2018), EQUAL JUST. UNDER LAW, <https://equaljusticeunderlaw.org/thejusticereport/2018/6/12/electronic-monitoring>.

<sup>880</sup> Melanie Lefkowitz, *Ankle monitors could stigmatize wearers, research says*, CORNELL CHRON. (June 17, 2020), <https://news.cornell.edu/stories/2020/06/ankle-monitors-could-stigmatize-wearers-research-says>.

<sup>881</sup> BI Incorporated, <https://bi.com/gps/> (last visited Jan. 22, 2023).

## V. VIOLATION OF CONDITIONAL RELEASE SHOULD NOT BE A TRIPWIRE TO REINCARCERATION

Although the purpose of community release is the avoidance of prison, approximately 25 percent of the total prison population in the United States consists of people who have been convicted not of a crime but of a violation of condition of release including such technical violations as missing appointments, staying out past curfew, or failing a drug test.<sup>882</sup> According to Prison Policy Initiative, in 2019 alone, at least 153,000 people were incarcerated for non-criminal violations of probation or parole. That's more than 400 individuals every day incarcerated for "technical violations."<sup>883</sup> Moreover, according to the Congressional Research Service, "Where revocation of parole could result in a defendant's return to prison to finish out his original sentence, revocation of supervised release can lead to a return to prison for a term in addition to that imposed for the defendant's original sentence."<sup>884</sup> The policy choice to incarcerate or reincarcerate a person simply because they have violated the terms of their parole or probation, which are often unnecessary obligations and technical, is disproportionate to the sentencing goal and usually not made necessary by the defendant's own conduct.<sup>885</sup>

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### A. Discretionary Revocations of Parole and Probation

Reincarceration is made worse by the fact that decisions of whether and how to hold a person accountable for violations of a community supervision conditions are often within the discretion of the probation or parole officer.

Arbitrary authority over a person violates human dignity. As noted in Chapter 6, this is the foundation of the due process clause which, in its original articulation in the Magna Carta of 1215, prohibited the government from taking life, liberty, or property except "by the law of the land," – that is, only if pursuant to a lawfully adopted rule, but not by the arbitrary will of the sovereign. Protection from exercise of administrative discretion is what protects individuals from arbitrary or unbridled abuses of power.

To respect individual dignity, courts must sufficiently advise individuals of the rules and conditions of their probation at the time of sentencing so that they understand what does and doesn't constitute a violation and can exercise choices accordingly. Systems that give probation officers broad discretion to arrest and arbitrarily detain any probationer or parolee suspected of

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<sup>882</sup> NAT'L CONF. OF STATE LEGISLATORS, *Limiting Incarceration for Technical Violations of Parole* (June 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/limiting-incarceration-for-technical-violations-of-probation-and-parole.aspx>.

<sup>883</sup> Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2022*, *supra* note 303.

<sup>884</sup> *Supervised Release (Parole): An Overview of Federal Law*, CONGRESSIONAL RSCH SERV. (Sept. 28, 2021), <https://sgp.fas.org/crs/misc/RL31653.pdf>.

<sup>885</sup> *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R., at para. 56 (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40.



either a technical or substantive violation of probation impinge on the person’s ability to use their “reason and conscience” to serve as their own agents. Some states, including Pennsylvania, have recognized this right and afford some protection to supervised individuals suspected of technical violations based on officers’ unilaterally imposed conditions.<sup>886</sup>

Moreover, to respect human dignity, the consequences of violating a condition of parole or probation must respect the person “as a person.” This eliminates certain practices either because they are disproportionate (in that the consequence of reincarceration is far more severe than the infraction), thereby objectifying the person by using punishment to teach a lesson or to deter others, or because they are inhumane (such as imprisonment for reasons other than conviction of a crime). In addition, forcing a person to live in fear of reincarceration diminishes the fullness of their humanity and their sense of equality with others.

Despite the inhumane conditions in detention facilities, remand occurs quite frequently, without due process. In Philadelphia, probationers suspected of violating the terms of their release are guaranteed a preliminary probation hearing, but the rule only requires that the hearing “be held within a reasonable period” after the individual is initially detained.<sup>887</sup> Preliminary probation detention can last for weeks or months; consequently, thousands of probationers accused of violating the conditions of their probation by failing a drug test or failing to pay restitution are detained.<sup>888</sup>

The International Covenant for Civil and Political Rights (“ICCPR”), to which the U.S. is bound, guarantees protections against arbitrary arrest and detention under Article 9(1).<sup>889</sup> One assessment of the Human Rights Committee’s review of individual complaints has “made it clear that detention which may be initially legal may become ‘arbitrary’ if it is unduly prolonged or not subject to periodic review.”<sup>890</sup> Following the Charter of the United Nations and the Universal Declaration of Human Rights, the ICCPR is founded on the principle that “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 that the rights enumerated in the ICCPR “derive from the inherent dignity of the human person.”<sup>891</sup> Dignity rights to agency, bodily integrity, and protection from vulnerability are directly implicated when an individual released on probation or some other form of community supervision is held in confinement for an extended period before a preliminary hearing and it is even more egregious when it is based on a correctional officer’s arbitrary use of discretion.

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<sup>886</sup> Commonwealth v. Koger, 255 A.3d 1285, 1287 (Pa. Super. Ct. 2021)

<sup>887</sup> Note, *The Right to be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126 (Feb. 10, 2022).

<sup>888</sup> Samantha Melamed, *Probation is closed in Philly. But probationers are being jailed through the pandemic*, PHILADELPHIA INQUIRER, Apr. 29, 2020, <https://www.inquirer.com/news/philadelphia-jail-population-probation-coronavirus-pandemic-detainers-20200429.html>.

<sup>889</sup> ICCPR, art. 9(1), *supra* note 329.

<sup>890</sup> Alfred de Zayas, *The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, in G. ALFREDSSON ET AL. (EDS), INT’L HUM. RTS MONITORING MECHANISMS 67-121 (Martinus Nijhof Publishers) (2001).

<sup>891</sup> ICCPR, preamble, *supra* note 329.

## VI. AN ALTERNATIVE MODEL

The Sentencing Foundation has developed an alternative model called “Resource-Based Sentencing and Supervision.” Founded by a Philadelphia judge, it supports criminal court sentencing judges who want to treat defendants with respect and dignity by providing them with “networks of cost-free re-entry resources that can be utilized during court proceedings to assist defendants based upon their apparent preventative need.” The organization’s aim is “to reduce recidivism and effectuate real change to move the needle on mass incarceration, while simultaneously shrinking the trust gap between ordinary citizens and the criminal justice system.”<sup>892</sup> This is one example of a dignity-based approach to re-entry.

## VII. ADVOCACY POINTS

1. The Government has both affirmative and negative obligations to ensure that all people can live with dignity. This applies with special force to those who are especially vulnerable to harm, especially those who are without emotional and financial resources or family support. Public benefits should be available to those who have served their time on an equal basis as those who are not system-impacted.
2. Conditions of parole and probation should be designed to help people live with dignity. Prisons should develop programs to help ensure that people who are incarcerated have the resources they need and develop the skills they need to survive and thrive on the outside. Parole and probation officers should be trained to support and help people under their authority and to respect their equal dignity, as human beings.
3. Judges should treat every person who comes before them as a person of dignity.
4. Conditions of parole and probation should never violate dignity rights including rights to privacy, to agency, and to self-sufficiency. They should not be degrading or demeaning. They should not burden people because of poverty.
5. Conditions of parole and probation should not be punitive and satisfying the conditions should be realistically possible.
6. Violations of the conditions of parole or probation should not result in reincarceration.

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<sup>892</sup> THE SENTENCING FOUNDATION, *supra* note 822.

## CHAPTER 8: YOUNG PEOPLE IN THE CRIMINAL LEGAL SYSTEM

Dignity law is especially important for young people because their personalities, their sense of self, and their true identities are developing. It is also important because they are particularly vulnerable to those who exert mental, physical, and emotional power over them. Yet, the criminal legal system denies and diminishes the dignity of thousands of young people every day. When the government places young people in adult correctional facilities, it denies their dignity rights to be treated as individuals, impinges on their ability to fully develop their identities and their personalities, and makes them especially vulnerable to dignity violations by others. The violations of dignity are exacerbated when additional punishments and burdens are placed on them, whether they are in juvenile or adult facilities.

This chapter demonstrates how treating children like adults violates their dignity. It shows how adult correctional facilities in the United States strip young inmates of the opportunity to develop their own sense of human dignity by treating them like adults. Additionally, this chapter focuses on how facilities can improve the dignity rights of young people by allowing for personality development, protecting the physical safety of youths who are incarcerated, and fostering more opportunities for socialization and community.

*Key dignity terms: inherent worth of human life; equality and equal worth; anti-objectification; agency; free will, conscience, living one's truth; the full development of the personality; privacy; identity through other people; dignity of belonging; freedom from humiliation; bodily integrity; protection from vulnerability; living with dignity; to be treated as a person.*

### I. INTRODUCTION: THE DIGNITY OF YOUNG PEOPLE MUST BE PROTECTED IN THE CRIMINAL LEGAL SYSTEM

The United States has the harshest criminal laws and practices for children and youth than any nation in the world.<sup>893</sup> Children and youth are disproportionately arrested, sentenced, and incarcerated, and upon incarceration are treated without regard to their developing bodies and minds. As it applies to children and youth, the carceral system in the United States violates universally accepted notions of human dignity and the international law that is accepted in almost every other country on earth. Only the United States and Somalia have not ratified the Convention on the Rights of the Child,<sup>894</sup> as will be discussed further below.

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<sup>893</sup> This chapter will refer to people who have not reached the age of majority as young people or youth or in some cases, children – the designation of people under the age of majority who are not system-impacted. The criminal legal system uses the term “juveniles,” to further stigmatize and diminish them as people. In most states, the age of majority is 18.

<sup>894</sup> U.N. G.A. Res. 44/25, Convention of the Rights of the Child, art. 37 (Nov. 20, 1989)

In the United States, almost 200,000 youth enter adult prisons for non-violent offenses every year.<sup>895</sup> According to PrisonPolicy.org:

- More than 5,000 young people are “behind bars for non-criminal violations of their probation rather than for a new offense.
- “An additional 1,400 youth are locked up for ‘status offenses,’ which are ‘behaviors that are not law violations for adults such as running away, truancy, and incorrigibility.’
- “About 1 in 14 youth held for a criminal or delinquent offense is locked in an adult jail or prison, and most of the others are held in juvenile facilities that look and operate a lot like prisons and jails.”<sup>896</sup>

Sentences for young people in the United States are harsher than anywhere else in the world. According to the Sentencing Project, “The United States stands alone as the only nation that sentences people to life without parole for crimes committed before turning 18.”<sup>897</sup> While the numbers are declining, the Sentencing Project found, in its national survey of life and virtual life sentences in the United States “1,465 people serving [Juvenile Life Without Parole] sentences at the start of 2020.”<sup>898</sup> Moreover, the Sentencing Project has found striking racial disparities in the sentencing of young people to life without parole (“JLWOP”):

- Sixty-two percent of people serving JLWOP, among those for whom racial data are available, are African American.
- While 23% of juvenile arrests for murder involve an African American suspected of killing a white person, 42% of JLWOP sentences are for an African American convicted of this crime.
- White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a JWLOP sentence as their proportion of arrests for killing an African American (6.4%).<sup>899</sup>

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*“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”*

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The childhood experiences of people who are later sentenced to life in prison are further evidence of the indignities of the system. According to the Sentencing Project’s 2012 analysis:

- 79% witnessed violence in their homes regularly
- 32% grew up in public housing

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<sup>895</sup> Jessica Lahey, *The Steep Costs of Imprisoning Youth With Adults*, The Atlantic (Jan. 8, 2022), <https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-youth-in-adult-prisons/423201/>.

<sup>896</sup> Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2022*, *supra* note 303.

<sup>897</sup> Joshua Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (May 24 2021), <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/>.

<sup>898</sup> *Id.*

<sup>899</sup> *Id.*

- Fewer than half were attending school at the time of their offense
- 47% were physically abused
- 80% of girls reported histories of physical abuse and 77% of girls reported histories of sexual abuse.<sup>900</sup>

Indeed, many young people are part of the “Foster Care to Prison Pipeline” and the “Sexual Abuse to Prison Pipeline.” The treatment that girls receive at the hands of the state only compounds and intensifies the trauma they’ve already experienced by their family and others. For all young people, sentences for the purpose of punishment and deterrence, rather than support and rehabilitation, are entirely without basis because only the latter respects human dignity.

Although U.S. courts recognize that children are especially vulnerable and entitled to special protection, the prison system fails to afford special protection or treatment to young persons who are confined in adult facilities and, too often, even where vulnerable young people are affected, courts defer to officials and employees of the carceral institutions.

One way to break the pipeline is for the U.S. to adopt better laws regarding juvenile justice. This could be achieved by following the United Nation’s Convention on the Rights of the Child, which holds that “children should be diverted away from judicial proceedings whenever possible and redirected to community support services” and “the detention of children should always be a measure of last resort and for the shortest appropriate period of time.”<sup>901</sup> Locking children up in prisons and prison-like facilities further harms them because it limits their freedom of movement and the ability to be a child.

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*U.S. courts recognize that children are especially vulnerable and entitled to special protection*

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Moreover, facilities need to “recogniz[e] and address the impact of trauma” on women and girls by providing trauma-informed care.<sup>902</sup> Although social and vocational programs can protect and promote the sense of dignity in girls, there is a significant gender gap between programs available for boys and girls. Protecting the dignity of girls should be an equal priority and should address the distinctive vulnerabilities of girls and the distinctive ways in which girls are harmed, both sexually and otherwise, by predators.<sup>903</sup> Policies should also help people build their resources and their strengths.

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<sup>900</sup> Rovner, *Juvenile Life Without Parole: An Overview*, *supra* note 899 (citing Ashley Nellis, *The lives of juvenile lifers: Findings from a national survey*, THE SENTENCING PROJECT (Mar. 2012), <https://juvenilesentencingproject.org/sentencing-project-the-lives-of-juvenile-lifers/>).

<sup>901</sup> *Juvenile Justice*, DEFENCE FOR CHILD INT’L. (Apr. 21, 2010), <https://defenceforchildren.org/juvenile-justice/> (last visited Jan. 22, 2023); *see* U.N. G.A. Res. 44/25, Convention of the Rights of the Child, art. 37 (Nov. 20, 1989); *see also* Case of Bulacio v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 133 (Sept. 19, 2003) (stating that international instruments, including the Convention on the Rights of the Child “establish the duty of the State to adopt special protection and assistance measures in favor of children under their jurisdiction.”).

<sup>902</sup> Sawyer, *Youth Confinement: The Whole Pie 2019*, *supra* note 169.

<sup>903</sup> Chandlee Johnson Kuhn, *Gender Disparities in the Juvenile Justice System*, COAL. FOR JUV. JUST. (2013), <https://juvjustice.org/blog/598>.

## II. THE DIGNITY RIGHTS OF YOUNG PEOPLE

### A. Young People have Rights Under International Law

The United Nations Convention on the Rights of the Child is the most broadly applicable of all human rights instruments, having been ratified by every country except the United States and Somalia, as noted.<sup>904</sup> This means that while it articulates a global consensus on how children should be treated, the United States (and Somalia) are not technically bound by its provisions. Nonetheless, it articulates basic principles of humanity for the protection of children, including children who have been deprived of their liberty. Article 37 requires State Parties to ensure that:

“(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”<sup>905</sup>

International law demands in the most simple and straightforward terms that young people be treated with respect for their inherent dignity.

### B. Treatment of Young People

Dignity law is especially important for young people.

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<sup>904</sup> U.N. Treaty Collection, *Ch. IV Hum. Rts., Convention of the Rights of the child*, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en) (last visited Oct. 22, 2023) (showing the ratification status of participant countries).

<sup>905</sup> U.N. G.A. Res. 44/25, *Convention of the Rights of the Child*, art. 37 (Nov. 20, 1989).

- Because dignity is inherent in the human person, it exists in each person as a fact of being born, regardless of conditions of birth and life circumstances.<sup>906</sup>
- Because it is a human quality, it is with a person always; it is inalienable, regardless of what a person might have done.
- Because it is inviolable, it cannot be taken away, under any circumstances; there can be no justification for violating a person’s dignity.
- Because dignity is not a static right but an evolving one that promises progress toward the full development of the personality<sup>907</sup> and toward truer identity,<sup>908</sup> it is especially relevant for people who are at the stage of their life when their personalities are developing.
- Because dignity has not only a mental aspect but a physical aspect as well, a child’s control over their own body is essential and government must protect each child’s bodily integrity where the child can not fully protect it themselves.
- Because it entails not only an existential quality, but a quality of life, it demands that governments ensure the protection of each person’s dignity, by negative measures and, where necessary, by affirmative measures.

Youth – and particularly those who are impacted by the adult criminal legal system including its correctional facilities – are especially vulnerable and can make special dignity claims against the government to ensure that their dignity is protected.<sup>909</sup>

A “juvenile” in legal terms is someone who has not yet reached the age of majority. Under certain circumstances, they are treated as if they are adults; they are prosecuted in courts designed for adults, given sentences designed for adults, and sent to facilities designed for adults. Although in 47 states, juvenile court is reserved for those facing

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*Dignity is not a static right but an evolving one that promises progress toward the full development of the personality.*

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criminal charges who are under the age of 18, all states have “transfer laws” that require or permit a young person to be prosecuted as an adult no matter their age.<sup>910</sup> These laws may require adult prosecution for certain crimes outlined in the statute. Young people may also be transferred to

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<sup>906</sup> UDHR, *supra* note 7, at art. 1.

<sup>907</sup> *Id.* at preamble: “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom...”

<sup>908</sup> Sunil Babu Pant & Others v. Government of Nepal, Writ No. 917 (2064 BS) (2007 AD) ( Supreme Court Division Bench, Hon’ble Justice Mr. Balram K.C. & Hon’ble Justice Mr. Pawan Kumar Ojha), <https://www.icj.org/sogicasebook/sunil-babu-pant-and-others-v-nepal-government-and-others-supreme-court-of-nepal-21-december-2007/>.

<sup>909</sup> See above at Overview of dignity law principles above at pp. 14-15.

<sup>910</sup> Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, THE NAT’L CONF. OF STATE LEGISLATURES (Apr. 8, 2021), <https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws>.

adult court at the discretion of the prosecution or by court order under state law. Moreover, 31 states have “once an adult, always an adult” policies that mandate transfer to adult court if a person has ever been charged as an adult, so that all of their future cases are handled in the adult court system, no matter their age.<sup>911</sup> This is one of myriad examples of how the criminal legal system uses procedural rules to harm, but not benefit, individuals who are impacted. And it does not spare young people.

The decision to treat a young person as an adult – whether mandated by state law or authorized by a statutory delegation of discretion – is done for the sole purpose of facilitating harsher punishment. It literally has no other purpose. It violates reality and common sense (in that young people are, by definition and in reality, not adults) and, most fundamentally, it violates their dignity in multiple ways. The failure to treat a young person as a young person impairs their ability to fully develop their personality and their sense of identity forged through belonging to communities that protect them. Imprisonment of a young person in adult facilities will alter a person’s personality and the development of their identity. The environment created by staff inside adult facilities threatens the physical safety of young people. Moreover, the more limited and developing agency of young people should be protected and nurtured, whereas the disciplinary measures and other strict prison and jail policies prevent youth from developing and socializing and inhibits their ability to build community inside the facility and to maintain ties to families and friends outside.

### III. SENTENCING FOR YOUNG PEOPLE

Although the Supreme Court has not forbidden the practice of incarcerating young people with adults in adult facilities, it has imposed certain narrow limits on punishment and laid out some principles designed to protect the dignity of young people who are incarcerated in adult facilities.

Roper v Simmons is one of several cases dealing with the nature of young defendants in which the Supreme Court recognized the obvious fact that children are different than adults. Roper established that the death penalty for youth is unconstitutional.<sup>912</sup> Relying on social and neuroscientific evidence, Justice Kennedy writing for the majority held that children are less deserving of the most severe punishments because they have lessened culpability.<sup>913</sup> The opinion identified three important ways children fundamentally differ from adults. First, as compared to adults, young people lack maturity and have an underdeveloped sense of responsibility, resulting in impetuous and ill-considered actions and decisions. Second, young people are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure. Third, the character of a young

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*The United States stands alone as the only nation that sentences people to life without parole for crimes committed before turning 18.*

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<sup>911</sup> Teigen, *supra* note 912.

<sup>912</sup> Roper v. Simmons, 543 U.S. 551, 575 (2005).

<sup>913</sup> *Id.* at 569.



person is not as developed as that of an adult, so they possess more potential for rehabilitation than adults do.<sup>914</sup>

Roper understood that the juvenile death penalty violates human dignity: “By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons,” wrote Justice Kennedy for the majority.<sup>915</sup> The court then found in the Constitution a teleological commitment to protect human dignity:

“The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.”<sup>916</sup>

In subsequent cases, the court – albeit by increasingly divided majorities – continued to protect the dignity of young defendants, though it failed to build on the foundation of constitutional dignity proposed in Roper.

In *Graham v. Florida*, the court held that it was unconstitutional to impose the penalty of life imprisonment without the possibility of parole on youth for non-homicidal offenses.<sup>917</sup> The opinion echoed the same logic used in Roper: “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”<sup>918</sup>

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*The constitution sets forth “broad provisions to secure individual freedom and preserve human dignity.”*

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In *Miller v. Alabama*, the court held that a youth cannot be sentenced to life without the possibility of parole for homicide crimes, where such a sentence is the only option. Justice Kagan’s opinion identified several mitigating factors that must be considered before a young person can be sentenced to life without the possibility of parole. The first factor entails a presumption of the childlike nature of young people<sup>919</sup> and requires courts to consider the “hallmark features” of youth, “among them, immaturity, impetuosity, and failure to appreciate risks and

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<sup>914</sup> *Id.* at 569-570.

<sup>915</sup> *Roper*, 543 U.S. at 560.

<sup>916</sup> *Id.* at 578.

<sup>917</sup> *Graham v. Florida*, 560 U.S. 48 (2010). According to Penal Reform International, “The Convention on the Rights of the Child (CRC) prohibits the application of life imprisonment without parole to juveniles below the age of 18. The International Covenant on Civil and Political Rights (ICCPR) states that the purpose of the prison system is the ‘reformation and social rehabilitation’, indicating that every person sentenced to prison should have the opportunity to be rehabilitated back into society and lead law-abiding and self-supporting lives. Even under the Rome Statute, which provides for the gravest offences within the jurisdiction of the International Criminal Court – war crimes, crimes against humanity and genocide – life sentences must be reviewed after 25 years.” <https://www.penalreform.org/issues/life-imprisonment/key-facts/>. The United States and Somalia are the only two countries in the world that have not ratified the Convention on the Rights of the Child.

<sup>918</sup> *Graham*, 560 U.S. at 68.

<sup>919</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

consequences.”<sup>920</sup> Because it is so engrained in the law that children are different, the state should have the burden to prove that a child is not different than an adult for sentencing purposes.<sup>921</sup>

Relying on the above cases, the New Jersey Supreme Court has reiterated the vulnerable nature of youth:

“The law recognizes what we all know from life experience -- that children are different from adults. Children lack maturity, can be impetuous, are more susceptible to pressure from others, and often fail to appreciate the long-term consequences of their actions. *Miller v. Alabama*. They are also more capable of change than adults. *Graham v. Florida*.”<sup>922</sup>

While this is a welcome trend, the United States remains out of alignment with the rest of the world on its treatment of young people in not even committing to comply with the standards set forth in the Convention on the Rights of the Child, which prohibits “the application of life imprisonment without parole to juveniles below the age of 18.”<sup>923</sup> Moreover, as noted above, the International Covenant on Civil and Political Rights (to which the U.S. is a party) states that “the purpose of the prison system is the ‘reformation and social rehabilitation’, indicating that every person sentenced to prison should have the opportunity to be rehabilitated back into society and lead law-abiding and self-supporting lives.”<sup>924</sup>

#### IV. CUSTODY AND CARE FOR YOUNG PEOPLE

Childhood is the stage of greatest mental and physical development. Between ages 12 to 18, adolescents begin to develop tools vital to maintaining physical and mental health. The most important of these directly relate to the creation of identity, to physical and sexual development, and to social skills. Young people who are tried as adults and placed in adult facilities are at a high risk for disruption of these necessary developmental tools.<sup>925</sup> Moreover, young people – precisely because of these developing qualities – are particularly vulnerable in their bodies, their spirits, and their minds. They are therefore entitled to special solicitude to ensure that their dignity is protected.

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*The needs of protection of the weaker definitively require an interpretation of the right to life so as to comprise the minimum conditions of life with dignity.*

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<sup>920</sup> *State v. Comer*, 266 A.3d 374, 407 (NJ 2022) (holding that 17-year old defendant sentenced to 75 years may petition for a review of the sentence after 20 years); see also *Miller v. Alabama*, 567 U.S. 460, at 477.

<sup>921</sup> *Comer*, 266 A.3d at 407.

<sup>922</sup> *Id.* at 480.

<sup>923</sup> PENAL REFORM INT’L, *Key Facts*, <https://www.penalreform.org/issues/life-imprisonment/key-facts/> (last visited Oct. 22).

<sup>924</sup> *Id.* (noting that “Even under the Rome Statute, which provides for the gravest offences within the jurisdiction of the International Criminal Court – war crimes, crimes against humanity and genocide – life sentences must be reviewed after 25 years.”).

<sup>925</sup> U.S. Nat’l Libr. of Med., *Adolescent Development*, MEDLINE PLUS, <https://medlineplus.gov/ency/article/002003.htm> (last visited Oct. 22, 2023).

The Inter-American Court of Human Rights has affirmed that

“The needs of protection of the weaker—such as the children in the streets, — definitely require an interpretation of the right to life so as to comprise the minimum conditions of life with dignity. Hence the inexorable link ... between Articles 4 (right to life) and 19 (rights of the child) of the American Convention.”<sup>926</sup>

The recognition of human dignity imposes an affirmative obligation on state authority to take measures that are necessary to protect young people. This is especially true of people who can not fully take care of themselves, by virtue of youth, limited ability, lack of resources, or the fact of custodial detention. As one court in the Czech Republic has written in a case involving the custodial care of a youth with disabilities:

“[H]uman dignity is the same for all natural persons regardless of their social status and is therefore protected from interventions that would reduce human dignity, so that a person is treated as an object. Therefore, it is not possible for the human dignity of a disabled person to be at a different level from that of a healthy person. Respect for human dignity is essential for the general development of a natural person, for the quality of his life and for the full enjoyment of his personality rights, and therefore interference with this personality sphere should be avoided as much as possible.”<sup>927</sup>

Although the United States recognizes that children are entitled to the recognition of and protection for their human dignity and are especially vulnerable, it continues to allow children to be treated without respect for their inherent worth. This is true even when children are tried and sentenced in juvenile proceedings and facilities, but the threats to human dignity are amplified when young people are tried as adults and sentenced to adult facilities.

This Policy Guide asserts that young people should be treated as young people in all circumstances. They are not adults and there is no reason in logic or law for treating them as anything else, particularly when the deviation is exclusively designed to further harm them. They should be tried in courts with rules designed for young people, they should be sentenced as young

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*Young people should be treated as young people in all circumstances.*

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people, and, when incarceration is absolutely necessary, they should serve their terms in facilities designed for them. We make three recommendations to protect the inherent human dignity of young people, whether they are living in adult or youth facilities.

A. All Facilities Must Ensure that Youth Can Fully Develop Their Personalities and Their Identities

Among the most central axes of human dignity is the right to develop one’s personality and sense of identity, which is most vulnerable in youth. This is the essence of our humanness. The

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<sup>926</sup> Villagran-Morales et al. v. Guatemala (Case of the “Street Children”), Inter-Am. Ct. H.R. (Nov. 19, 1999).

<sup>927</sup> JM v. Bohnice Psychiatric Hospital, Supreme Court (Czech Republic 2013).

UDHR mentions this right in Article 29(1): “Everyone has duties to the community in which alone the free and full development of his personality is possible.”<sup>928</sup>

Courts throughout the world recognize the importance of protecting identity-development for young people. The constitutional tribunal of Taiwan has recognized this in connection with youth who run away from home.

“The right of personality is indispensable in guarding the individuality and free development of character, closely related to the safeguarding of human dignity, and is therefore protected by ... the Constitution. To protect the physical and mental health of children and juveniles, and to foster the healthy development of their character, the state bears the obligation to provide special care. Necessary measures in the best interests of the children and juveniles must be adopted while taking into consideration the care that has been given to them by their families and the state of our society and economy.”<sup>929</sup>

Moreover, the court explained that rehabilitative education is essential to this endeavor:

“Rehabilitative education is carried out by various agencies such as juvenile reform and correctional schools and under the auspices and supervision of the Ministry of Justice; the objectives [and] missions are to correct the juveniles’ bad habits so that they repent and turn over a new leaf, to teach life skills, and to provide remedial education, among other things.”<sup>930</sup>

The United States recognizes that children are psychologically less developed than adults and that they have less education and life experiences to draw upon when assessing the consequences, risks, and propriety of their behavior, in addition to differences in biological brain development.<sup>931</sup> And yet, youth in juvenile facilities rarely have access to nurturing and developmentally appropriate resources. This is exacerbated in adult facilities which treat youth and adults alike, denying education and avenues for personal growth to young and old. Moreover, many facilities stunt the development of identity-formation with strict policies that regulate and limit clothing, food, personal belongings, personal relationships, privacy, and free time,<sup>932</sup> among other things essential to identity formation.

Further exacerbating the limits on their individual personality development, most facilities have strict rules related to keeping personal belongings. Federal prisons prohibit wearing any clothing not issued by the government or purchased at the commissary, and there are further limitations on keeping hobby materials, radios and watches, and personal photos. In some facilities, prisoners are allowed just 25 personal photos so long as they are deemed for “the good order of the institution.”<sup>933</sup> In addition, prison officials sometimes refer to people by their

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<sup>928</sup> UDHR, *supra* note 7, at art. 29.

<sup>929</sup> J.Y. Interpretation No. 664, at 2 (Constitutional Court, July 31, 2009) (Taiwan).

<sup>930</sup> *Id.* at 5.

<sup>931</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>932</sup> See 20 U.S. Code § 6434.

<sup>933</sup> 28 CFR §553.11 (2023), Limitations on inmate personal property, (h) personal photos, <https://www.ecfr.gov/current/title-28/chapter-V/subchapter-C/part-553/subpart-B/section-553.11>.

identification number rather than their first or even last name, again for the purpose of diminishing each person’s individuality and humanity.

Facilities may also limit access to opportunities for intellectual and emotional development by restricting access to educational materials, as well as artistic, literary, and musical materials. Too often, adult facilities fail to meet the minimum educational requirements mandated by law or demanded by human dignity. Youth who are still experiencing neurological development while confined are more negatively impacted in the long term by the absence of opportunities to develop and grow.

Youth are supposed to receive an education equal to that of the district’s public school.<sup>934</sup> But in practice, education for youth in adult facilities is either minimal or nonexistent<sup>935</sup> and opportunities for youth in juvenile facilities are not much greater. Large and small county jails also struggle to provide education. According to the Southern Poverty Law Center, in 2016, several small counties in Florida reported zero hours of educational instruction for youthful inmates in county jails, and others reported a range of 1-6 hours per week. Large county jails reported restricted educational services to those in lockdown and solitary. Sarasota County provided just five hours of instruction per week, as opposed to five hours per day required by law.<sup>936</sup>

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*Youth are supposed to receive an education equal to that of the district’s public school.*

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Where education is provided, it must not only provide information and teach skills but must also help young people to fully develop their personalities and their individual identities. Education should include not only the basics of literacy and numeracy but should also include classes in sciences and the humanities, the arts, and the full range of educational experiences. Carceral facilities should create an environment that emphasizes individualized treatment of each person to create a space where young people can freely develop a sense of their own human dignity. Thus, facilities should adopt or at least emulate practices rooted in human dignity by providing at least the amount of education required by law to young people, in addition to the therapeutic support systems needed to help those who are struggling with identity development to thrive. Moreover, these facilities should permit opportunities for youth to partake in meaningful activities and hobbies.

## B. Solitary Confinement of Young People Violates Human Dignity

Children should not be put in solitary confinement, no matter what. It is prohibited under international law: the Convention on the Rights of the Child prohibits it as a form of cruel and unusual punishment.<sup>937</sup> According to a 2014 Report of the ACLU on the experience of children in

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<sup>934</sup> See 20 U.S. Code § 6434.

<sup>935</sup> THE SOUTHERN LAW POVERTY CENTER, DESTINED TO FAIL: HOW FLORIDA JAILS DEPRIVE CHILDREN OF SCHOOLING 5-6 (2018), [https://www.splcenter.org/sites/default/files/cr\\_ctaa\\_report\\_2018\\_web\\_final.pdf](https://www.splcenter.org/sites/default/files/cr_ctaa_report_2018_web_final.pdf).

<sup>936</sup> *Id.* at 5.

<sup>937</sup> U.N. Comm. on the Rights of the Child, 44th Sess., General Comment No. 10, Children’s rights in juvenile justice, at 24, U.N. Doc. CRC/C/GC/10 (2007), <https://www.refworld.org/docid/4670fca12.html>; see generally *Youth Solitary Confinement: International Law and Practice*, ACLU, <https://www.aclu.org/files/assets/4%203%20International%20Law%20and%20Practice.pdf> (“International law

solitary confinement, the use of isolation, including solitary confinement, in [state or federal juvenile detention facilities across the United States ] “is widespread.”<sup>938</sup> The Report explains that juvenile detention facilities generally justify solitary confinement and other forms of physical and social isolation for one of four reasons: disciplinary isolation; protective isolation; administrative isolation (e.g. for administrative convenience); and medical isolation, including suicide watch.<sup>939</sup>

Limiting opportunities for social interactions including – in the extreme – solitary confinement or segregated housing – are per se violations of dignity. Compounding the dignity deprivations entailed in separation from community and lack of opportunities for personality development that imprisonment necessarily entails, harsh disciplinary measures developed for adults such as isolation and segregation are inimical to human dignity because they are punitive, because they are inherently dehumanizing, and because they deprive individuals of opportunities to develop their personalities.

In cultures around the world, human dignity is recognized as entailing fraternity and solidarity with others, embodied in the African word, ubuntu: I am who I am through other people,<sup>940</sup> as discussed in Chapter 6. Yet, carceral facilities restrict, both by rule and by circumstance, opportunities for young people to interact with others, including family members, teachers, friends, and others who may contribute to their personal growth and development.

These forms of punishment are especially harmful to young people because their sense of identity is developing and isolation can, as the U.S. Supreme Court memorably wrote about the impact of racial segregation on children, “affect their hearts and minds in a way unlikely ever to be undone.”<sup>941</sup>

Solitary is particularly cruel because it is often compounded by associated punishments, such as denial of educational opportunities. Lockdown for 23 hours a day, and education for only 2-3 hours per week on average is not atypical.<sup>942</sup> Prisons do not – but could – allow individuals to have access to books and other educational resources, including workbooks, even when isolated, to help maintain sanity and to protect individual growth.<sup>943</sup> Yet, punitive isolation and segregation are commonplace in the carceral state in federal and state facilities. Youth are afforded no special treatment and are stripped of the human dignity right to thrive and grow in community.

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prohibits anyone below 18 years of age from being subjected to solitary confinement, and condemns the practice as a form of cruel, inhuman or degrading treatment or punishment.” and noting that “Likewise, the U.N. Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) recognize punitive solitary confinement of children as a form of cruel, inhuman, or degrading treatment. The U.N. Rules for the Protection of Juveniles Deprived of their Liberty (Beijing Rules) also explicitly prohibit solitary confinement of children.”).

<sup>938</sup> *Alone & Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities*, ACLU (July 10, 2014), <https://www.aclu.org/publications/alone-afraid#:~:text=And%20still%2C%20on%20any%20given,problems%2C%20or%20worse%2C%20suicide.>

<sup>939</sup> *Id.*

<sup>940</sup> See ACKERMANN, *supra* note 799.

<sup>941</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>942</sup> See THE SOUTHERN LAW POVERTY CENTER, *DESTINED TO FAIL: HOW FLORIDA JAILS DEPRIVE CHILDREN OF SCHOOLING*, *supra* note 937, at 6.

<sup>943</sup> *Id.* at 5.

Solitary confinement and lockdown are tactics used sometimes to punish a young person and sometimes to protect them from the depredations of others. Yet, as noted, extended and indefinite solitary confinement constitutes torture, even for adults. In the United States, torture practices and solitary confinement are identical: the CIA’s psychological paradigm for “no touch” torture used “sensory disorientation” and “self-inflicted pain” which, in combination, in theory, would cause victims to feel responsible for their own suffering and thus capitulate more readily to their torturers. The combination of these two techniques produces physical and psychological trauma whose sum is a hammer-blow to the existential platforms of personal identity.<sup>944</sup>

The prison system in Louisiana is a grim, yet common example of facilities depriving youth their human dignity rights. In 2019, two youth held in solitary confinement in a Louisiana adult prison committed suicide. Recently, the Department of Justice investigated the overuse of solitary confinement in juvenile facilities in Texas, South Carolina, and other states. The investigations

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*The First Step Act rules for solitary confinement should apply to every person in federal or state custody.*

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uncovered countless reports of young prisoners forced into solitary confinement for days on end in clear violation of state and federal law.<sup>945</sup> Those in solitary confinement typically spend 22-24 hours per day alone in a cell, or 1-2 hours per day in contact with other human beings.

The recently adopted First Step Act, however limited, provides a template for extinguishing solitary confinement for young people.<sup>946</sup> Although the provisions relating to solitary confinement only apply to “juveniles who have been charged with an alleged act of juvenile delinquency; have been adjudicated as delinquent ...; or are facing charges as an adult in a federal district court for an alleged criminal offense,” the rules governing solitary should apply to every person in federal and state custody.

According to the Congressional Research Service (CRS), the First Step Act “prohibits juvenile facilities from using room confinement for discipline, punishment, retaliation, or any reason other than as a temporary response to a covered juvenile’s behavior that poses a serious and immediate risk of physical harm to any individual.”<sup>947</sup> The CRS’s detailed description of the procedures is provided below, with interlineations identifying ways in which the procedures protect and respect human dignity.

- **De-escalation:** “Juvenile facilities are required to try to use less restrictive techniques, such as talking with the juvenile in an attempt to de-escalate the situation

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*Solitary confinement must be “temporary” and may only be imposed if a person’s behavior “poses a serious and immediate risk of physical harm to any individual.”*

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<sup>944</sup> See *Torture in United States Prisons*, *supra* note 794, at 47.

<sup>945</sup> Beth Schwartzapfel, “No Light, No Nothing.” *Inside Louisiana’s Harsheset Juvenile Lockup*, THE MARSHALL PROJECT (Mar. 10, 2022), <https://www.themarshallproject.org/2022/03/10/no-light-no-nothing-inside-louisiana-s-harsheset-juvenile-lockup>.

<sup>946</sup> First Step Act of 2018 (P.L. 115-391), at 5247-49, <https://www.congress.gov/115/plaws/publ391/PLAW-115publ391.pdf>.

<sup>947</sup> JAMES, THE FIRST STEP ACT OF 2018: AN OVERVIEW, *supra* note 654, at 21.

or allowing a mental health professional to talk to the juvenile, before placing the juvenile in room confinement.”

Providing opportunities to rectify a situation enables a person to use their reason and conscience and to act as their own **agents**, and as the UDHR reminds us, “to act toward one another in a spirit of brotherhood.”<sup>948</sup>

- Information: “If the less restrictive techniques do not work and the juvenile is placed in room confinement, the staff of the juvenile facility is required to tell the juvenile why he/she is being placed in room confinement. Staff are also required to inform the juvenile that he/she will be released from room confinement as soon as he/she regains self-control and no longer poses a threat of physical harm to himself/herself or others.”

Ensuring that every person has the information needed to make a decision empowers them to be their own agents; this is in stark contrast to a common dignity-denying practice in prisons of denying information to inmates (such as when and where a transfer will take place or how long a period of confinement will last, or the reasons therefor).

- Limited: “If a juvenile who poses a threat of harm to others does not sufficiently regain self-control, staff must inform the juvenile that he/she will be released within three hours of being placed in room confinement, or in the case of a juvenile who poses a threat of harm to himself/herself, that he/she will be released within 30 minutes of being placed in room confinement.”

This amount of time is designed to be **rehabilitative**. It is not inherently cruel or degrading. It does not use the person as an object to further punitive or retributive policies. It does not make the person an object lesson for deterrence to others.

This amount of time is **proportional** to the problem and, in these circumstances, is “made strictly necessary by the [person’s] own conduct” (in the words of the European Court of Human Rights).<sup>949</sup>

- “The act prohibits juvenile facilities from using consecutive periods of room confinement on juveniles.”

This protects the dignity of each person by prohibiting the facility from circumventing the dignity protections afforded and from denying their dignity rights to information about the extent or endpoint of the punishment.

- Individual care: “If after the maximum period of confinement allowed the juvenile continues to pose a threat of physical harm to himself/herself or others, the juvenile is to be transferred to another juvenile facility or another location in the

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<sup>948</sup> UDHR, *supra* note 7, at art. 1.

<sup>949</sup> *Bouyid v. Belgium*, No. 23380/90, Judgment, Eur. Ct. H.R., at para. 56 (Sept. 28, 2015) (sitting as a Grand Chamber), *supra* note 40.



current facility where services can be provided to him/her. If a qualified mental health professional believes that the level of crisis services available to the juvenile are not adequate, the staff at the juvenile facility is to transfer the juvenile to a facility that can provide adequate services.”

This ensures that each individual is treated as an individual and provides the person, who is in a very vulnerable situation, with the additional resources they need to become healthy. This respects the individual worth of each person and promotes their mental and physical well-being.

Some states have also taken steps to protect human dignity from the impacts of solitary confinement. New Jersey’s Isolated Confinement Restriction Act, adopted in 2019, prohibits solitary confinement unless there is “clear and convincing” evidence the person poses a “substantial” risk of harm.<sup>950</sup> It also prohibits placing people into solitary confinement for more than 20 consecutive days, or for 30 out of a 60-day period. While this still exceeds international norms and violates human dignity,<sup>951</sup> it at least improves the situation. The New Jersey Act specifically prohibits vulnerable populations, including those under 21-years old, from being placed in solitary confinement unless specific conditions are met.<sup>952</sup>

These efforts build on pre-existing limitations on solitary confinement that have existed at the federal level and in 24 states. Some of these provide special protections for young people while others apply to all people in custody. The federal Prison Rape Elimination Act (PREA) expressly limits the use of solitary confinement for youth and adults:

“§ 115.342 Placement of residents in housing, bed, program, education, and work assignments....

(b) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged.”<sup>953</sup>

Under PREA, “agencies shall not deny residents in isolation daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation are entitled to receive daily visits from a medical or mental health care clinician and access to other programs and work opportunities to the extent possible.”<sup>954</sup>

Specifically, under the PREA guidelines, prison staff must make their “best efforts” to avoid placing youth in solitary confinement.<sup>955</sup> The Guidelines also require that a PREA Coordinator is present to ensure compliance with these standards.<sup>956</sup> The facility is then subjected to an audit,

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<sup>950</sup> N.J. Stat. §30:4-82.5, Isolated Confinement Restriction Act.

<sup>951</sup> Internationally, as noted above, solitary confinement for more than 15 days is prohibited. See U.N. Off. on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 774, Rule 44.

<sup>952</sup> N.J. Stat. §30:4-82.5.

<sup>953</sup> PREA Guidelines § 115.342 (b); see generally Nat’l PREA Resource Ctr., *Implementation, Standards Overview*, <https://www.prearesourcecenter.org/implementation/prea-standards/overview#expand-4> (last visited Apr. 5, 2024).

<sup>954</sup> PREA Guidelines § 115.342 (b).

<sup>955</sup> *Id.* at § 115.14(c).

<sup>956</sup> *Id.* at § 115.11(b).

and the results are reviewed by the governor.<sup>957</sup> As noted above in Chapter 4, the PREA does not afford an individual the right to sue for violation of the Act nor any other enforcement mechanism.

Limited and temporary solitary confinement or segregation as a form of rehabilitation, to enable a person, in particular instances, to assert control, in line with reason and conscience, and to make decisions for themselves may be consistent with and even affirm human dignity. Isolation for purposes of punishment, denigration, stigmatization, or retribution, or even deterrence is never consistent with dignity in that it is inherently cruel, **objectifies** the person, denies them the **community** of others, and fails to treat each person “**as a person.**” The impact on youth is especially damaging and must be avoided. To repeat, violations of dignity are never justified.

#### V. ADULT PRISONS MUST PROTECT THE PHYSICAL SAFETY AND BODILY INTEGRITY OF YOUNG PEOPLE

The standards developed pursuant to the Prison Rape Elimination Act includes a section dedicated to protecting “youthful inmates” from harm while in adult facilities. The purpose of this section is “[t]o protect inmates who are under the age of 18 ... and living in adult correctional facilities from sexual abuse or sexual harassment they might experience from adults....”<sup>958</sup>

The PREA requires that adult facilities house youth separately from adult inmates.

“§ 115.14 Youthful inmates, youth and youthful detainees

(a) A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.

(b) In areas outside of housing units, agencies shall either:

(1) maintain sight and sound separation between youthful inmates and adult inmates, or

(2) provide direct staff supervision when youthful inmates and adult inmates have sight, sound, or physical contact.”<sup>959</sup>

However, the provisions of PREA aiming to protect the dignity of young people in adult prisons are not effectively enforced. The 2009 National Prison Rape Elimination Commission Report shows that in 2005, roughly 7.7% of all victims of violence by prisoners in adult facilities were under 18. The report also emphasized that “[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse.”<sup>960</sup> The National Inmate Survey is the first national report of sexual victimization of youth confined in adult

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<sup>957</sup> *Id.* at §115.501(a).

<sup>958</sup> *Id.* at § 115.14.

<sup>959</sup> *Id.* at § 115.14 (a)-(b)(2).

<sup>960</sup> U.S. Dep’s of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, at 18 (2013), <https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf>.

facilities encompassing reports from 233 state and federal prisons, 358 jails, and 15 special confinement facilities across the United States. In 2011 and 2012, people between the ages 16 and 17 who were incarcerated reported strikingly similar rates of sexual abuse as adults in prisons and jails across the United States. Rates of abuse against inmates at the hands of staff were also statistically similar between adults and youth —that is, prison staff sexually abuse minors and adults at approximately the same rates.<sup>961</sup>

Prisons must prioritize the physical safety of youth in order to uphold their human dignity rights and ensure their bodily integrity and healthy physical and psychological **development**. Prison authorities must protect against all threats to the health and safety of young people in prisons, whether from other prisoners or from correctional officers. Youth who suffer sexual and physical abuse are much more likely to suffer from mental illness, criminality, and substance abuse<sup>962</sup> -- all of which profoundly impairs their ability to live with dignity both inside and outside prison walls.

## VI. ADVOCACY POINTS

1. Youth should be tried and sentenced as youth, not as adults.
2. Youth should not be housed with adults.
3. Incarceration of youth should be avoided, except in the rare instances where it is absolutely necessary. If incarceration is absolutely necessary, it should be done in conditions that allow the young person to fully develop their personalities and their individual identities.
4. Youth should be protected in their bodies and minds from predations by other prisoners and from prison employees, including all form of sexual predation.
5. Prisons have an affirmative duty to foster the full development of the young person's personality, through education and otherwise, to enable them to grow and learn and thrive during their period of incarceration.
6. Youth should have maximum access to family and supporters during their period of incarceration.

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<sup>961</sup> *Id.* at 19.

<sup>962</sup> *Id.* at 17.



# APPENDICES

## APPENDIX I: PRINCIPLES FOR A MODEL CRIMINAL JUSTICE SYSTEM

The Universal Declaration of Human Rights affirms that “every member of the human family is born equal in dignity and rights.” The law of every nation must reflect and protect the equal, inherent, and inalienable worth of every person, everywhere. The American Bar Association recognizes that dignity rights – the rights that flow from the recognition of human dignity – are the foundation of a just rule of law. Dignity rights ensure that a criminal legal system is a criminal justice system.

Dignity rights are legal rights that reflect the essential qualities of human dignity:

- Dignity is inherent in the human person; it does not await recognition.
- Dignity is equal in every person: no person’s life has greater or lesser value than any other.
- Dignity is inalienable: it cannot be given or taken away.
- Dignity is universal: it belongs to every person, everywhere, at all times.

The following principles reflect and seek to protect the human dignity of all persons. They are offered as a statement of values, and as a step toward legislative and constitutional recognition. They help to develop a vocabulary to express the feeling of dignity, and the need to protect and respect the essential value of each person impacted by the criminal legal system. These principles are consistent with international and regional human rights law in every region of the world, and with the dignity law of countries around the world, from Colombia to South Africa to Germany to Israel to India. And they are consistent with the foundational value of the constitutional right against cruel and unusual punishment which is “about nothing less than the dignity of man” and other constitutional acknowledgments of the essential role of human dignity in law in the United States.

These principles are the product of a day-long workshop held at Delaware Law School in April 2022 co-sponsored by the Dignity Rights Clinic at Delaware Law School, Delaware Humanities, and Dignity Rights International involving people who are justice-impacted and those in Delaware who work with them.

- Part A identifies general principles.
- Part B identifies principles for the treatment of people living inside government facilities: when people are detained, they lose their liberty, but they do not lose their human dignity.
- Part C identifies principles to ensure that people live with dignity both before or after times of incarceration.

## Part A: GENERAL PRINCIPLES

1. Every human being has equal human worth.
2. Every person shall be treated as a person.
3. Every person shall be treated as an individual.
4. No person may be objectified or treated as an instrument of another; consequences for wrongful conduct must be proportionate and must not be designed to punish or deter any person.
5. Every person shall have the opportunity to live with dignity throughout their lives.
6. Children shall be protected and treated as children.

## Part B: INSIDE

1. Basic Necessities
  - a. Every person shall have access to goods and services to allow them to live a healthy life: this includes medical care, items for hygiene and self-care, clean air and water, nutritious food, natural light, comfortable temperature, adequate clothing.
  - b. Every person shall have opportunities for self-expression and education for personal growth, including intellectual, musical, physical, and artistic learning and self-expression.
  - c. Every person shall have the opportunity for human contact including kindness and human touch. Contact with family members and others should be encouraged and facilitated to respect the dignity of all. No person shall be forced to have contact with another.
2. Physical and bodily integrity
  - a. Every person has the right to control their own bodies.
  - b. Every person has the right to be free from violence including sexual violence.
  - c. Every person shall have appropriate medical care, including preventative health care.
3. Agency and full development of the personality
  - a. Every person shall have control over their lives and opportunities to develop their identity.
  - b. Every person shall have care for their mental health.
  - c. Every person shall have privacy.

- d. Every person shall have a reasonable plan for re-entry including a plan for housing, employment, logistical support, social interactions, and counseling.

## Part C: OUTSIDE

### 1. Pre-arrest and arrest

- a. Police should be trained in dignity rights to ensure that interactions with people are respectful of each person's humanity and that de-escalation techniques are used wherever possible. Police officers must consider the dignity needs of family and community members, particularly where minors are involved.
- b. Every person shall be treated as an individual and not on the basis of judgments about a group.
- c. Every person is entitled to be free from force except as is made strictly necessary by their own conduct.

### 2. Pre-trial procedures

- a. The presumption of innocence in pretrial proceedings is necessary to protect human dignity. No person should be detained in the absence of a legal conviction.
- b. No person should be penalized for the inability to pay security or costs associated with the administration of the criminal justice system.
- c. Every person is entitled to the least restrictive methods of interrogation and supervision.
- d. Every person is entitled to be free from force except as is made strictly necessary by their own conduct.

### 3. Trial procedures

- a. The presumption of innocence is necessary at trial to protect human dignity.
- b. Every person is entitled to present themselves to judge and jury as a person equal in dignity and rights.
- c. Every person has the right to make decisions that impact their lives: waiver of rights should be done with actual free, prior, and informed consent, and with full understanding of the implications of a decision.
- d. People under 18 should be treated as children.

### 4. Post Incarceration and Re-entry

- a. Parole and probation officers should be trained in dignity rights to ensure that interactions with people are respectful of each person's humanity and that de-escalation techniques are used wherever possible.
- b. Post-release restrictions on liberty should enable every person to live with dignity.
- c. The government must ensure that every person can live with dignity.



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*“This is a great and significant work. It provides us a lens through which to view the system that calls itself ‘criminal justice.’ ... All of us who participate in this process — lawyers, judges, teachers, community groups, etc. — should be aware of the ways in which we can advocate for dignity”*

*– Michael Tigar*

Throughout the world, courts are reshaping the law to recognize every person’s equal and inherent value, so that all people, including those who are system-impacted, can live with dignity. Dignity law gives us a language for talking about what’s wrong with our criminal legal system, and it gives us the tools to fix it.

This Policy Guide maps out the places within the system – from initial encounters with police and pre-trial detention through sentencing, incarceration, and post-release – to see how we can protect and promote everyone’s right to be treated as a person of inviolable worth. It contains an overview of the law of human dignity, abundant resources, and advocacy points for reform.

Because, surely, the arc of the law must bend towards dignity.