7

The Right to Rehabilitation

On Penal Degradation and Social Contribution

7.1 INTRODUCTION

States are increasingly thought to have a duty to enable convicted persons' rehabilitation, with some seeing this duty as grounded in convicted persons' *right* to rehabilitation. This rights-based argument for rehabilitation emerged alongside the increase in rights litigation for carceral populations within the United States in the 1970s,[1] and the contemporaneous development of the idea of imprisoned persons as "*Rechtsburgers*" or rights bearers in Europe.[2]

Admittedly, legal recognition of a right to rehabilitation is not universal. Many countries present rehabilitation as a "guiding concept" rather than a right that can be enforced against the state.[3] The United States had also considered it necessary to re-emphasise the importance its criminal justice system attaches to the goals of retribution, deterrence and incapacitation, following their ratification of the International Covenant on Civil and Political Rights (ICCPR) – which highlights the need for rehabilitative treatment within prison settings in Article 10 ICCPR.[4]

Still, even if rehabilitation's status as a legal right is not universally accepted, there is a trend within penal policy and prison law (particularly within Europe) towards a human-rights-based argument for rehabilitation.[5] This behoves us to ask what, if anything, this argument might imply for the use of neurotechnologies in criminal justice – specifically for those technologies that promise to reduce offending persons' risk of recidivism and otherwise facilitate their rehabilitation and reintegration into society.

In this chapter, we take up this question. We examine the existing law and jurisprudence surrounding rehabilitation (section 7.2), present the rationales that have been (or may be) advanced in support of a right to rehabilitation (section 7.3)

[1] Rotman 2024, pp. 22–25.
[2] Snacken & Van Zyl Smit 2008, pp. 573–584; Van Zyl Smit 2018, p. 11.
[3] Ploch 2012, p. 911.
[4] U.S. Reservations, Declarations, and Understandings on ICCPR, 138 Cong. Rec. S4781-01 (2 April 1992).
[5] Van Zyl Smit 2018, p. 9. See also Meijer 2017; Coppola & Martufi 2024.

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and analyse what these judgements and arguments imply for the case of *neuro*rehabilitation (section 7.4). Throughout, we understand the right to rehabilitation as the right to have access to rehabilitative *interventions* that can be expected to facilitate desistance from crime and rehabilitation more generally.[6] We recognise that "rehabilitation" also refers to the psychological process that renders a person no longer disposed to engage in crime. But when speaking of a *right* to rehabilitation, we are not alluding to a right to *become rehabilitated* but rather to a right to (various forms of) means aimed at *enabling* convicted persons to become rehabilitated. This aligns with the European position on state duties with respect to rehabilitation. The ECtHR makes it clear that the obligation to offer rehabilitation is "an obligation of means, not one of result", and that actual rehabilitation is the personal responsibility of convicted persons themselves.[7]

We also understand the right to rehabilitation as a (waivable) claim-right, as opposed to merely a permission or freedom to make use of rehabilitative interventions. We are examining whether and when rehabilitation is something that convicted persons may *claim*, and hence whether and when states have a duty to make rehabilitation – and neurorehabilitation – available to convicted persons.

Rehabilitative interventions, on our understanding (and as indicated in Chapter 1), are also those interventions that better enable persons to desist from future offending, to (re)integrate into the community and to lead fulfilling lives, but which do not produce these effects by making crime physically impossible or by merely disincentivising the potential perpetrator from committing crime.[8] Such an understanding allows that a broad range of interventions fall under the umbrella of rehabilitation – for example, psychotherapeutic, educational, vocational, social and restorative justice interventions that promise to promote the aforementioned outcomes.[9] But it distinguishes rehabilitative interventions from interventions that merely incapacitate or deter. This leaves room for the possibility that some neurotechnologies will not count as rehabilitative interventions.[10] Our analysis of the right

[6] Determining whether a given intervention can be expected to facilitate a person's rehabilitation, of course, necessitates some other sorts of interventions as a prerequisite – for example, interventions to assess the particular risks a person poses to the community so that the rehabilitative interventions made available to them can be tailored accordingly. If those who offend have a right to rehabilitation, then exercising this right may also require submission to these kinds of assessment.

[7] ECtHR (GC) 26 April 2016, 10511/10 (*Murray/the Netherlands*), par. 104. See also ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 (*Harakchiev and Tolumov/Bulgaria*), par. 264.

[8] See Forsberg & Douglas 2022, p. 105, for a similarly broad understanding of rehabilitation.

[9] It would, for example, also encompass interventions such as therapeutic gardening; see Timler, Brown & Varcoe 2019; Lee et al. 2021.

[10] For example, non-invasive brain stimulation that promises to mitigate a person's tendency to lash out aggressively when provoked might count as a rehabilitative intervention on this understanding. In contrast, brain stimulation that merely causes a person to become nauseous or physically weak whenever they become aggressive instead counts as an incapacitating or deterring intervention, depending on the extent of these effects.

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to rehabilitation in this chapter only pertains to those interventions and neurotechnologies that can be classed as rehabilitative.

As in other chapters, our concern is whether the right at hand exists in law or ought to be embraced by the law and, if so, what this might mean for neurorehabilitation in criminal justice. We are thus examining whether there ought to be a *legal* right to rehabilitation, but we appeal to both legal and moral rationales for such a right.[11] We consider both how a right to rehabilitation might be derived from existing legal rights and also how it might be supported by moral rights as yet unrecognised in the law.

7.2 OBLIGATION TO ENABLE REHABILITATION IN HUMAN RIGHTS LAW

Several international and European human rights instruments generate a mandatory requirement on the part of states to provide what has been described as "real opportunity" for rehabilitation.[12] These instruments do not couch this requirement in the language of rights; nor do all relevant instruments converge on the view that this requirement necessarily implies a right to rehabilitative *interventions*. The ICCPR gestures towards a requirement to deliver rehabilitation within prison settings when stating that "the penitentiary system shall comprise *treatment* of prisoners, the essential aim of which shall be their reformation and social rehabilitation" (Article 10(3)).[13] The Human Rights Committee (CCPR) uses similar mandatory language when stating that "penitentiary system[s] (. . .) should essentially seek the reformation and social rehabilitation of the prisoner".[14] This includes "teaching, (re)education, vocational guidance, work programmes".[15]

Within Europe, some hesitancy to endorse a right to rehabilitative *interventions* is observable.[16] The European Convention on Human Rights (ECHR)

[11] For this distinction between legal and moral rights, see Douglas & Forsberg 2021, pp. 179–201.

[12] ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, par. 264. Here, rehabilitation denotes the (psychological) process of rehabilitation.

[13] Emphasis added.

[14] CCPR General Comment No. 21, par. 10. The United Nations Standard Minimum Rules for the Treatment of Prisoners likewise suggests an imperative to promote imprisoned persons rehabilitation, including through treatment; see, for example, Rules 25, 88, 90, 102 and 107.

[15] CCPR General Comment No. 21, par. 11; Taylor 2020, p. 314. Note that the American Convention on Human Rights (ACHR) does not mention rehabilitative treatment or interventions specifically when referring to state responses to those who offend. Article 5(6) ACHR instead emphasises that "reform and social readaptation of prisoners" is an "essential aim" of liberty-depriving punishments, without specifying whether said aim ought to be fulfilled by affording detained persons access to rehabilitative interventions or treatment.

[16] This hesitancy is evident at the ECtHR though it is not found within the Constitutions and jurisprudence of some European nations. The German Federal Constitutional Court, for instance, insists that a right to rehabilitation or "resocialisation" is an "integral part of the rights guaranteed" by Articles 1 and 2(1) of the country's Constitution or Basic Law, and further maintains that this right is "constitutionally required in any society that has human dignity as its centrepiece"; see German Federal Constitutional Court, 5 June 1973, 35 BVerfGE 202. In Italy, the Constitutional Court of 1974 has

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does not explicitly mention rehabilitation, nor guarantee a broad obligation to provide rehabilitative interventions to those who have offended. An imperative to *enable* the (psychological) process of rehabilitation is, however, articulated in a number of (non-binding) legal instruments to which the European Court of Human Rights (ECtHR) attaches importance.[17] For example, Rule 6 of the European Prison Rules stipulates that "all detention shall be managed so as to facilitate the reintegration into free society of persons deprived of their liberty". Rule 33.3 of this same document further states that "all prisoners shall have the benefit of arrangements designed to assist them in returning to free society after release". Rule 102.1 relatedly states that prison regimes "shall be designed to enable [prisoners] to lead a responsible and crime-free life".[18]

The ECtHR also identifies an imperative to *enable* the psychological process of rehabilitation, with reference to Article 3 ECHR. Four key cases are *Vinter and Others/the United Kingdom*,[19] *Harakchiev and Tolumov/Bulgaria*,[20] *Khoroshenko/Russia*,[21] and *Murray/the Netherlands*,[22] each of which focus either primarily or exclusively on the situation of *life-sentenced* persons. In *Vinter*, the Grand Chamber concluded that

> there is (...) now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.[23]

The Grand Chamber in *Harackchiev and Tolumov/Bulgaria*, referencing *Vinter*, reinforced this conclusion, stating:

> Article 3 (...) require[s] the authorities to give life prisoners a chance, however remote, to someday regain their freedom. For that chance to be genuine and tangible, the authorities must also give life prisoners a real opportunity to rehabilitate themselves.[24]

likewise ruled that, on the basis of the Italian Constitution, all incarcerated persons have a right to benefit from rehabilitative opportunities; see Italian Constitutional Court, 27 June 1974, 201/1974.

17 Meijer 2017, p. 147.

18 The 1955 United Nations Standard Minimum Rule for the Treatment of Prisoners – the document from which the European Prison Rules is adapted – is somewhat more specific in stipulating, across rules 59 and 58, that "the institutions should utilise all the remedial, educational, moral, spiritual and other forces and other forms of assistance which are appropriate and available" to enable imprisoned persons "to lead a law-abiding and self-supporting life".

19 ECtHR (GC) 9 July 2013, 66069/09, 130/10 and 2896/10 *(Vinter and Others/UK)*.

20 ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*.

21 ECtHR (GC) 30 June 2015, 41418/04 *(Khoroshenko/Russia)*.

22 ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*.

23 ECtHR (GC) 9 July 2013, 66069/09, 130/10 and 2896/10 *(Vinter and Others/UK)*, par. 114.

24 ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, par. 264.

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The "general evolution in European penal policy towards (...) the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence" was noted in *Khoroshenko/Russia*.[25] The Grand Chamber in this case also emphasised that "rehabilitation and reintegration has become a *mandatory factor* that the member states need to take into account in designing their penal policies".[26] The Grand Chamber case of *Murray/the Netherlands* moved to characterise states' obligations with respect to rehabilitation as *positive* ones, stating that states have "a *positive obligation* to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation".[27]

Precisely which kinds of "positive obligations" are required in order to afford convicted persons a "real opportunity" for rehabilitation is still open for debate. The precise meaning, scope and practical implications of the imperative to enable rehabilitation remain deliberately, and perhaps necessarily, vague. Meijer interprets the *Murray* reference to "positive obligations" as indicating that states are bound to "abide by certain standards" and to ensure "a minimum level of protection" with respect to person's prospects of rehabilitating themselves.[28] More specifically, she argues that, in recognising this positive obligation, the ECtHR "makes the provision of rehabilitative *activities* legally enforceable, which allows courts to intervene in the case of administrative reluctance".[29]

Yet, it is not clear that the ECHR imposes a duty on states to provide rehabilitative *interventions* as against other measures that might enable, or uphold persons' opportunity for, rehabilitation – such as shorter prison sentences, good conditions of detention or regular family visits while imprisoned. More precisely, it is not obvious that the duty to enable rehabilitation guarantees convicted persons a right to demand access to rehabilitation across the board and in all cases. For one thing, and as said, the case law referencing rehabilitation focuses on the situation of imprisoned persons and particularly those serving life sentences. The Grand Chamber in *Harackchiev and Tolumov/Bulgaria*, moreover, effectively denied that the ECHR guarantees a right to rehabilitative interventions in observing that

> the Convention does not guarantee, as such, a right to rehabilitation, and (...) Article 3 cannot be construed as imposing on authorities an absolute duty to provide prisoners with rehabilitation and reintegration programmes and activities, such as courses or counselling.[30]

Perhaps, then, the more accurate conclusion to draw is that the ECHR implicitly recognises imprisoned persons' right to have their rehabilitation enabled by the state,

[25] ECtHR (GC) 30 June 2015, 41418/04 *(Khoroshenko/Russia)*, par. 121. This is similarly noted in ECtHR (GC) 4 December 2007, 44362/04 *(Dickson/the United Kingdom)*, par. 75.
[26] ECtHR (GC) 30 June 2015, 41418/04 *(Khoroshenko/Russia)*, par. 121 (emphasis added).
[27] ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*, par. 104 (emphasis added).
[28] Meijer 2017, p. 161.
[29] Meijer 2017, p. 161 (emphasis added).
[30] ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, par. 264.

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and that this sometimes implies a right to be provided with rehabilitative interventions. The Grand Chamber in *Murray* allows that providing a "real opportunity" for rehabilitation might sometimes require that convicted persons "be enabled to undergo treatments or therapies – be they medical, psychological or psychiatric – adapted to their situation with a view to facilitating their rehabilitation".[31] It also allows that it might require affording convicted persons the opportunity to "take part in occupational or other activities where these may be considered to benefit rehabilitation".[32] But the reluctance of the ECtHR to endorse a right to rehabilitation across the board indicates that the provision of rehabilitative interventions will not always be necessary to preserve real opportunity for rehabilitation, in the Court's eyes. Sometimes, perhaps, simply ensuring that punishment is not excessive, that the conditions of detention are humane and that persons' social and other basic needs are met will be sufficient to preserve opportunity for rehabilitation. Consider a situation where the relevant party is already motivated, and has sufficient individual and familial resources and skills, to effect their own rehabilitation without state assistance.[33]

7.3 RATIONALES FOR A RIGHT TO REHABILITATION

Working on the understanding, then, that the imperative to enable rehabilitation at least sometimes implies a right to rehabilitation (i.e., to rehabilitative interventions), we shall now examine the moral and legal rationales lending support to a right to rehabilitation in certain circumstances. These rationales will bring us closer to elucidating the kinds of situations where a right to "real opportunity" for rehabilitation might imply a right to rehabilitation.

Our analysis focuses on two rationales that have (or which are extensions of arguments that have) been advanced in the philosophical and legal literature. The first (legal) rationale sees persons' right to rehabilitation as deriving from the established human right against cruel, inhuman and/or degrading punishment enshrined in Article 3 ECHR and Article 7 ICCPR (which closely relates to Article 10 ICCPR).[34] The second (moral) rationale is more aspirational, in that it argues that a right to rehabilitation is contained in an (as yet unrecognised) human right to social contribution.[35]

[31] ECtHR (GC) 26 April 2016, 10511/10 (*Murray/the Netherlands*), par. 109. In the case of *James, Wells and Lee/UK*, the Court similarly suggests that real opportunity for rehabilitation might mean having the opportunity to "undertake courses aimed at helping [convicted persons] address their offending behaviour and the risks they pose"; see ECtHR 18 September 2012, 25119/09, 57715/09 and 57877/09 (*James, Wells and Lee/UK*).

[32] ECtHR (GC) 26 April 2016, 10511/10 (*Murray/the Netherlands*), par. 109.

[33] Meijer also acknowledges that the existing legal situation seems to suggest that assessments of what "proper opportunity for rehabilitation" consists in must be made on a case-by-case basis; see Meijer 2017, pp. 161–162.

[34] Taylor 2020, p. 285.

[35] For the case for persons' right to social contribution, see Brownlee 2020.

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There may well be other rationales too. A right to rehabilitation might, for instance, also derive from or be supported by the established human right to liberty (Article 5 ECHR and Article 9 ICCPR), such that imprisoned persons subject to long or indeterminate sentences have a right to rehabilitation.[36] A right to rehabilitation might further derive from persons' putative moral right to reparation for structural injustice, such that convicted persons whose crimes emanate at least in part from institutionally created poverty or concentrated disadvantage have a right to rehabilitation as a means of reparation for these injustices.[37] But for our present analysis, we focus on the two abovementioned rationales.

We focus on these two rationales for a number of reasons. One reason for focusing on the relationship between the right against cruel punishment and rehabilitation is that the jurisprudence invoking this relationship is reasonably extensive, and more extensive than the jurisprudence on the implications of the right to liberty for rehabilitation.[38] The right to liberty also likely generates support for a right to rehabilitation in the *same kinds* of situations as those in which the right against cruel and inhuman punishment provides support.[39] Focusing on just one of these established human rights thus prevents our analysis from being too repetitive, notwithstanding that a forceful argument for a right to rehabilitation could potentially also be made from the right to liberty. One reason for focusing on the implications of the putative human right to social contribution for rehabilitation is that the principal defender of the former right, Kimberley Brownlee, gestures towards this right's implications for criminal justice.[40] A focus on social contribution is also prudent because of the growing emphasis on human sociality, and its relevance for rights, in the philosophical literature on human rights.[41]

7.3.1 *The Right against Cruel, Inhuman and/or Degrading Punishment*

Consider first the idea that a right to rehabilitation is a derivative right of persons' right against cruel, inhuman and/or degrading punishment. As already mentioned

[36] This rationale has been invoked in a case of the United Kingdom's Supreme Court, where it was observed that it should be taken "*as implicit in the scheme of Article 5* [ECHR] that the state is under a duty to provide an opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public"; see *R (Haney & Ors)* v. *Secretary of State for Justice* [2014] UKSC 66, par. 36 (emphasis added).

[37] By institutionally created poverty, we mean systematic poverty that is generated and perpetuated by various governmental policies, such as policies that give rise to unequal access to education, health care and job opportunities. See Dore-Horgan 2023 for discussion of this right-to-reparation-line of argument as a candidate justification for a right to neurorehabilitation.

[38] Though relevant cases discussing the latter relationship include ECtHR 18 September 2012, 25119/09, 57715/09 and 57877/09 (*James, Wells and Lee/UK*), pars. 217–218. See also ECtHR 24 January 2022, 11791/20 (*Sy./Italy*).

[39] For example, both the right against cruel punishment and the right to liberty might support the provision of rehabilitation in the case of life sentences.

[40] Brownlee 2020, chapter 8.

[41] See Liao 2015; Brownlee 2020; Brownlee, Jenkins & Neal 2022; Metz 2024; McTernan 2024.

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in this section, this latter right is enshrined in Article 7 ICCPR – closely related to Article 10 ICCPR – and in Article 3 ECHR. It can also be justified at the level of fundamental morality in a myriad of ways: for example, by pointing to the strength and moral urgency of persons' interest in avoiding cruel and inhuman treatment;[42] by pointing to how a rights-based prohibition against cruel punishment produces the best overall consequences for persons;[43] or by suggesting that a group of hypothetical bargainers would agree upon a prohibition against cruel punishment, not knowing their own position in the world.[44] Often in the legal literature, however, the right against cruel, inhuman and/or degrading punishment has given a "dignitarian" justification. That is, persons' dignity, intrinsic value or full moral status is often invoked as justifying persons' right against cruel, inhuman or degrading punishments.[45]

How might the right against cruel and/or inhuman punishment serve as the source for a right to rehabilitation? There are at least two different ways by which it might, but each only serves to establish that *some* subpopulations of convicted persons have a right to rehabilitation. A first way appeals to the effects some forms of punishment might have on those convicted in the absence of rehabilitation. The thought typically advanced is that *carceral* punishment without attendant rehabilitation can have sufficiently degenerative effects as to constitute cruel, inhuman and degrading punishment, particularly when dispensed over a long period of time.[46] Prisons' potential degenerative effects are well-documented. Being imprisoned can lead to a decline in one's ability to interact socially[47] and to make decisions for oneself.[48] It can also be traumatising,[49] brutalising[50] and can incur damage to one's ability to exert inhibitory control or to self-regulate (i.e., to control one's automatic urges and think before one acts),[51] which could in fact frustrate a person's

[42] For a prominent interest-based account of rights, see Raz 1986.
[43] For a rule-consequentialist approach to justifying rights, see Mill 2014 [1861].
[44] For a contractarian or contractualist approach to rights, see Scanlon 2003 and Rawls 1999a.
[45] See, for example, ECtHR (GC), 28 September 2015, 23380/09 (*Bouyid* v. *Belgium*) par. 81; and *Laaman* v. *Helgemoe* 437 F. Supp. 269 (District of New Hampshire, 1977) at 307. The ECtHR has also often suggested that dignity is a foundational value for the generation and protection of the Convention's rights more generally: see, for example, ECtHR (GC) 9 July 2013, 66069/09, 130/10 and 2896/10 (*Vinter and Others/UK*), par. 113; ECtHR 31 July 2001, 41340/98, 41342/98, 41343/98 and 41344/98 (*Refah Partisi and Others* v. *Turkey*), par. 43; and Heri 2024. The ECtHR also most frequently references dignity in the case law pertaining to Article 3; see Fikfak & Izvorova 2022, for discussion.
[46] Other forms of punishment that involve some form of detention or movement restrictions (e.g., house arrest or probation) may also risk producing some degenerative effects. However, this first justification for a right to rehabilitation typically focuses on the case of imprisoned persons, presumably because imprisonment is home to particularly harsh realities across many jurisdictions.
[47] Sapsford 1978; Jose-Kampfner 1990.
[48] Haney 2012.
[49] DeVeaux 2013; Leidenfrost & Antonius 2020.
[50] Levan 2006.
[51] Meijers 2018 – this was a pilot study involving a limited number of prisoners. See also Umbach, Raine & Leonard 2018.

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achievement of rehabilitation.[52] Imprisonment can also increase the likelihood that a person will recidivate.[53] This increased likelihood risks making persons more susceptible to reconviction and repeat punishment – a created risk that itself could be argued to be cruel.

A second way the right against cruel punishment might serve as a source for a right to rehabilitation appeals to the impact that imprisonment without rehabilitation might have on persons' *prospect of release* when they are subject to life, long or indeterminate sentences. The initial thought here is that carceral punishment can be rendered cruel and inhuman if it is dispensed with little realistic prospect of release and/or societal reintegration. The further thought is that, insofar as the provision of rehabilitation is necessary to sustain hope of release (as might be the case when a person is serving a life, long or indeterminate sentence and their release depends on their demonstrating that they have become rehabilitated),[54] then providing rehabilitation is necessary to avoid subjecting persons to cruel and/or inhuman punishment.

The first way identified above receives greater emphasis in U.S jurisprudence. The case law of the Federal Courts has repeatedly granted that persons are subject to cruel and unusual punishment when punitive conditions make it impossible or highly unlikely for them to make progress toward their rehabilitation.[55] The case of *Laaman* v. *Helgemoe* is an important example in this regard. In *Laaman*, the District Court judged that the right against cruel punishment is violated when "the cumulative impact of the conditions of incarceration threatens the physical, mental and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration".[56] Invoking the concepts of "human dignity" and the "intrinsic worth" of human beings as grounds for the right against cruel and unusual punishment, the District Court suggested that a "debilitating" prison environment that is "counterproductive to the inmates' efforts to rehabilitate themselves" is marked by "needless suffering" and hence is cruel.[57] It is marked by needless suffering, firstly, because debilitating prison environments pose risks to imprisoned persons' "sanity or mental well-being".[58] It is also marked by needless suffering because, in increasing the likelihood of prisoner degeneration, it makes recidivism and reincarceration – and hence further pain and suffering – "probable".[59]

[52] Ligthart et al. 2019; Ligthart et al. 2023b.
[53] Vieraitis, Kovandzic & Marvell 2007; Cid 2009.
[54] See, for example, *James* v. *Wallace*, 382 F. Supp. 1177 (M.D. Ala 1974); *Holt.* v. *Sarver*, 309 F. Supp. 362, 379.
[55] *Dawson* v. *Kendrick*; *Miller* v. *Carson*; *James* v. *Wallace*; *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N. H. 1977).
[56] *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977), 323.
[57] *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977), 323, 316, 315.
[58] *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977), 323, 316.
[59] *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977), 323.

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Note, that in *Laaman*, and in all the case law of the U.S. Federal Courts, the legal instrument under analysis is the Eight Amendment of the U.S. Constitution, which proscribes cruel and unusual punishment. However, given the near-identity between the content of this Eight Amendment and both Article 3 ECHR and Article 7 ICCPR, the reasoning here seems also relevant for – and could potentially be applied in the interpretative analysis of – these international human rights documents. Note, too, that U.S. jurisprudence teeters over whether persons' right to serve their sentences in non-debilitating, potentially rehabilitative prison environments requires that they are provided with rehabilitative *interventions*. The judgement in *Laaman* is that punishment *cannot hinder* the rehabilitation of those who offend, not expressly that those incarcerated can demand access to rehabilitative interventions or programmes.

Several outputs from the Federal Courts' jurisprudence, moreover, explicitly state that a broad duty to provide rehabilitation is *not* required. The Supreme Court, in *Rhodes* v. *Chapman*, for instance, claims that "we would have to wrench the Eighth Amendment from its language and history to hold that delay of (. . .) desirable aids to rehabilitation violates the Constitution".[60] The Court in the case of *Holt* v. *Sarver* was similarly unwilling to grant that detention in "an otherwise unexceptional penal institution" violated a person's right against cruel and unusual punishment "simply because the institution does not operate a school, or provide vocational training, or other rehabilitative facilities and services".[61] The Court in *James* v. *Wallace* likewise rejected the claim that those imprisoned have "an absolute entitlement to the provision of rehabilitative services".[62]

Still, many orders set forth by the Federal Courts have insisted that prison authorities provide rehabilitation to those they incarcerate. In *Laaman*, the Court ordered that the relevant prison provide work opportunities and vocational training "in order to minimise degeneration and succour what rehabilitative attempts were being made by inmates".[63] The Court in *Pugh* v. *Locke* similarly ordered that imprisoned persons "be assigned a meaningful job", and be given "the opportunity to participate in basic educational programs", "vocational training programs" and "transition program[s] designed to aid [their] re-entry into society".[64] The Court in *Barnes* v. *Government of the Virgin Islands* also ordered that imprisoned persons have access to "meaningful rehabilitational opportunities which would prepare inmates to return to society".[65] The U.S. position therefore seems to be that a right

[60] *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), 348.
[61] *Holt.* v. *Sarver*, 309 F. Supp. 362 (E.D.Ark.1970), 379.
[62] *James* v. *Wallace*, 382 F. Supp. 1177 (M.D. Ala 1974), 1180.
[63] *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977), 318.
[64] *Pugh* v. *Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), 335.
[65] *Barnes* v. *Government of the Virgin Islands*, 415 F. Supp. 1218 (D.V.I. 1976), 1227.

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to rehabilitation can be derived from the right against cruel punishment but only applies in *specific* cases. It does not imply a *broad* right to rehabilitative interventions.

The second way of deriving a right to rehabilitation from persons' right against cruel, inhuman and/or degrading punishment has been invoked (in the jurisprudence of the ECtHR and elsewhere) in relation to life imprisonment cases, and it involves two principal steps. The first step – prominent in the landmark ECtHR case of *Vinter and Others/the United Kingdom*[66] and in the German Constitutional Court's 1977 life imprisonment case[67] – interprets the prohibition against cruel and/or inhuman punishment as requiring real or *de facto* prospect of release for those imprisoned.[68]

In her concurring opinion to the *Vinter* judgement, Judge Power-Forde explicitly connects the lack of real prospect for release with degradation. She maintains that denying imprisoned persons "the right to hope" for atonement and release would deny them "a fundamental aspect of their humanity" and hence "would be degrading".[69] The German Federal Constitutional Court likewise affirms that real prospect of release must exist if life imprisonment is to be tolerable.[70]

Similar thoughts are advanced in the reports of the Council of Europe's Committee for the Prevention of Torture (CPT). For example, in its 2012 report to the Bulgarian government, the CPT asserted that "it is inhuman to imprison a person for life without any realistic hope of release" and expressed its "serious reservations about the very concept according to which life-sentenced prisoners are considered (. . .) to be a permanent threat to the community and are deprived of any hope of (. . .) conditional release".[71] The CPT's 25th General Report likewise affirmed that "excluding (. . .) any hope of rehabilitation and return to the community effectively dehumanises the prisoner".[72]

66 ECtHR (GC) 9 July 2013, 66069/09, 130/10 and 2896/10 (*Vinter and Others/UK*).

67 German Federal Constitutional Court, 21 June 1977, 45 BVerfGE 187.

68 Note, it is not the *imposition* of a life sentence that contravenes the Convention's prohibition against cruel or inhuman punishment, according to the Courts, but rather the *practical irreducibility* that might attend such a sentence. This point is explicitly made in ECtHR (GC) 12 February 2008, 21906/04 (*Kafkaris/Cyprus*), par. 97: "the imposition of a sentence of life imprisonment (. . .) is not itself (. . .) incompatible with Article 3" but "the imposition of an *irreducible* life sentence on an adult may raise an issue under Article 3" (emphasis added).

69 Concurring opinion of Judge Power-Forde in ECtHR (GC) 9 July 2013, 66069/09, 130/10 and 2896/10 (*Vinter and Others/UK*). See also ECtHR 23 May 2017 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13 (*Matiosaitis and Others* v. *Lithuania*), 180.

70 German Federal Constitutional Court, 21 June 1977, 45 BVerfGE 187.

71 CPT/Inf (2012) 32, point 32.

72 CPT/Inf(2016)10, point 73. See also Rogan 2024, pp. 154–171.

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Now, it is one thing to claim that the *absence of hope* for release renders the dispensed punishment cruel and inhuman. It is a further step to claim that providing rehabilitation is necessary to sustain hope for release. This further step has been taken in the post-*Vinter* jurisprudence of the ECtHR, notably in the case of *Murray/the Netherlands*.[73] In *Murray*, the ECtHR's Grand Chamber ruled that the applicant – a person serving a life sentence in the Dutch Antilles – lacked a de facto prospect of release because he had not been provided with opportunities that could enable him to progress towards the rehabilitation on which his eligibility for release depended. The applicant argued that while his life sentence could, in theory, be reviewed, he could not realistically hope for release because, having never received psychiatric treatment, his recidivism risk would be deemed too high for him to be eligible for release.[74] The Grand Chamber concurred with the assessment of the applicant. It found a violation of Article 3 ECHR because this lack of treatment and assessment of treatment needs meant that any review of the applicant's request for release "was in practice incapable of leading to the conclusion that he had made (...) significant progress towards rehabilitation".[75] The Grand Chamber in this case also acknowledged, as already mentioned, that genuine prospect for rehabilitation may require, in certain circumstances, that imprisoned persons "be enabled to undergo treatments or therapies – be they medical, psychological or psychiatric – adapted to their situation" that can be expected to facilitate their rehabilitation.[76] It further acknowledged that imprisoned persons "should also be allowed to take part in occupational or other activities where these may be considered to benefit rehabilitation".[77]

The conclusion in *Murray* is thus that providing rehabilitation may sometimes be necessary to effect the possibility of release for those serving life, or otherwise indeterminate, sentences – something itself deemed necessary for compliance with Article 3 ECHR.

This echoes the position voiced in *Harakchiev and Tolumov/Bulgaria*.[78] Recall that the ECtHR observed, in this earlier case, that while Article 3 ECHR "cannot be construed as imposing on the authorities an *absolute* duty to provide prisoners with rehabilitation or reintegration programmes and activities (...) it does require the authorities to give life prisoners a chance, however remote, to someday regain their freedom".[79] Note, too, that the Court in this case further observed that "for that chance to be *genuine* and *tangible*, the authorities must also give life prisoners a real

[73] ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*.
[74] ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*, pars. 4, 87.
[75] ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*, par. 125.
[76] ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*, par. 109.
[77] ECtHR (GC) 26 April 2016, 10511/10 *(Murray/the Netherlands)*, par. 109.
[78] ECtHR 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, pars. 264–266.
[79] ECtHR 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, par. 264 (emphasis added).

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opportunity to rehabilitate themselves".[80] It also insisted that "efforts need to be made by the prison authorities" to promote these individuals' rehabilitation and resocialisation.[81]

Various non-binding human rights instruments likewise suggest a link between the provision of rehabilitation and the avoidance of cruel punishment in cases of life sentences. The Council of Europe holds that those sentenced to life should have the possibility of conditional release and that prison conditions "consistent with the principles of justice, equity and fairness" should afford persons "constructive preparations for release" with opportunities for "work, education, training and other activities".[82] The CPT similarly emphasises that "having a purely formal possibility to apply for release (. . .) is not sufficient" to satisfy this "prospect of release" requirement.[83] Rather, "member states must ensure, notably through the way they treat life-sentenced prisoners, that this possibility is real and effective".[84]

The foregoing discussion demonstrates that there is precedent within human rights law for deriving a right to rehabilitation from the existing human rights prohibition on cruel, inhuman and/or degrading treatment or punishment, at least in certain circumstances. Some scepticism might nonetheless arise about the *value* of linking rehabilitation with the right against cruel punishment, notwithstanding the support that this position receives within the case law. One thought might be that the prohibition on degrading punishment should not imply that convicted persons have a right to interventions that might counteract punishment's degrading effects, but rather that states must not impose punishments that have the potential to be degrading in the first place. Another thought might be that *providing* rehabilitation is unnecessary to preserve genuine hope for release, even in the case of life or long-term sentences, so long as ample opportunity to review sentences and reassess persons' risk of reoffending is preserved. Every imprisoned person *qua* rational agent, after all, has the capacity and potential to rehabilitate *themselves*.[85]

Three comments by way of assuaging this scepticism can be made. First, it goes without saying that the prohibition against degrading punishments would be *better* upheld if our punishment practices did not have the potential to have degenerative

[80] ECtHR 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, pars. 264–266.
[81] ECtHR 8 July 2014, 15018/11 and 61199/12 *(Harakchiev and Tolumov/Bulgaria)*, pars. 264–266.
[82] Committee of Ministers of the Council of Europe, Recommendation Rec(2003)23 of the Committee of Ministers to member states on the Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners (9 October 2003) (available from https://rm.coe.int/0900001680 5dec7a).
[83] CPT/Inf(2016)10, point 82.
[84] CPT/Inf(2016)10, point 82.
[85] Dore-Horgan 2023, p. 439. Or at least, in order to be held criminally responsible and hence convicted of a crime, a person has to pass some threshold of rationality. There may be some situations where an imprisoned person no longer meets this threshold – for example, due to the development of a severe psychiatric disorder. Also, some detained people judged as legally insane by the court may, depending on the course of their illness, lack the capabilities needed to rehabilitate themselves.

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effects. Reform of our carceral practices consequently should be a priority of criminal justice institutions in order to ensure compliance with Article 3 ECHR, Article 7 ICCPR and Article 10 ICCPR, and should take precedence over reform efforts that merely seek to counter penal degradation. That said, it remains the case that many persons *currently are*, or will *inevitably soon be*, subject to potentially degenerative punishments. So long as this is the case – and it is possible that criminal justice systems will always rely on some sort of detention-based (and hence potentially degenerating) sanctions for persons who pose a serious risk to the public[86] – then linking the avoidance of cruel punishment to the provision of rehabilitation makes sense and should be welcomed. We can accept this without diverting our attention away from the need and imperative to reform our punishment practices.

Second, while regular sentence review and regular risk reassessment should be sufficient to preserve genuine prospect for release *in theory – in practice*, it is not always sufficient. Sentence review procedures in many jurisdictions often require that long-term- or life-sentenced persons *demonstrate* that they have made progress toward their rehabilitation.[87] One option would, of course, be to change this requirement. But again, so long as this requirement exists, demonstrating that one has made progress towards rehabilitation will likely be easier if there are positive reports from various courses, interventions and/or therapies undertaken to draw upon. And this may be particularly relevant for those serving indefinite sentences based on the presumption that they pose a danger to the public (i.e., preventive detention). Consider how the ECtHR's approach to rehabilitation under Article 5 ECHR, as Martufi summarises below, emphasises the relevance of rehabilitation for this kind of situation:[88]

> even when detention is justified on grounds of public protection, prisoners shall be offered real opportunities to rehabilitate and, as a result, must be entitled to an effective possibility to progress through the prison system and become eligible for parole. In the absence of such offending-behaviour programmes, a deprivation of

[86] We say this while acknowledging that there are moral reasons that can be advanced in support of an upper limit on punishment length. Negative retributivists, for instance, maintain that there should be an upper limit on punishment based on considerations of proportionality, such that imprisoned persons should be released when this point is reached regardless of their dangerousness. See Lippke 2014 for discussion of negative retributivism.

[87] For example, in Sweden, parole decision-makers are required to make decisions about release on the basis of a number of criteria, including the candidate parolee's "rehabilitative efforts" and their "overall behaviour and development"; see Schartmueller 2013, table 1. Similarly, in Ireland, parole decision-makers must consider whether a parole applicant "has become rehabilitated and would, upon being released, be capable of reintegrating into society"; see Parole Act 2019.

[88] ECtHR 18 September 2012, 25119/09, 57715/09 and 57877/09 (*James, Wells and Lee/UK*), pars. 217–218; ECtHR 24 January 2022, 11791/20 (*Sy./Italy*); ECtHR (GC) 31 January 2019, 18052/11 (*Rooman/Belgium*).

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> liberty based exclusively on the presumed dangerousness of the offenders would amount to "arbitrary detention", within the meaning of Article 5(1)(a) ECHR.[89]

Third, while all persons *qua* rational agents are in principle capable of rehabilitating themselves, it seems overly demanding, and arguably inhuman, to expect people to do so without support. The right to have a genuine "prospect of release" is surely most acceptably understood as a right to this prospect through *realistic* effort – not through gargantuan effort. Achieving rehabilitation and eligibility for release without external support will likely sometimes be a gargantuan task. Consider how it likely would be extremely difficult for a person whose violent crimes stem in part from impulsive aggression to curb their aggressive behaviour without some form of professional support.[90] Consider also how rehabilitation might be very difficult to achieve when one's crimes emanate, at least in part, from economic and educational disadvantage unless one is helped to improve one's employability and job prospects. Given these realities, the mere fact that persons could in principle rehabilitate themselves does not undermine the claim – voiced in *Murray* and elsewhere – that rehabilitative interventions may sometimes be necessary to make rehabilitation and release reasonably achievable.[91] Linking the avoidance of cruel punishment to the provision of rehabilitation is thus a reasonable link to make, at least in certain circumstances.

7.3.2 *The Right to Socially Contribute*

In the previous subsection, we focused on the ways in which a right to rehabilitation might be derived from the established human right against cruel, inhuman and/or degrading punishment. We shall now articulate another route by which a right to rehabilitation might be supported, drawing on the recent scholarship of Kimberley Brownlee.[92] Brownlee defends a human right to *socially contribute*. By this, she means that persons have a moral right to "contribute (. . .) to others' survival and well-being"[93] that applies universally and which ought to be recognised in law.

Contributing to others' survival and well-being, according to Brownlee, includes providing others with material support and security, and also companionship and

[89] Martufi 2018, p. 678. See also *R (Haney & Ors)* v. *Secretary of State for Justice* [2014] UKSC 66, par. 36.

[90] Professionals tasked with the delivery of rehabilitation, after all, can direct people to helpful rehabilitative tools. These professionals also have the knowledge and experience to help people navigate the challenges that arise on their path to reform, while providing much needed emotional support.

[91] ECtHR (GC) 26 April 2016, 10511/10 (*Murray/the Netherlands*), par. 104. Recall, also, the claim voiced in ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 (*Harakchiev and Tolumov/Bulgaria*), par. 264, that life prisoners must have a "genuine and tangible" chance to rehabilitate themselves.

[92] Brownlee 2016a, 2016b, 2020, 2022.

[93] Brownlee 2016a, p. 328.

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closeness.[94] She defends a right to socially contribute by appealing to humans' fundamental *need to belong* – viz., to affiliate with and be accepted by a minimum quantity of others.[95] She emphasises that this need is a "non-contingent, morally urgent need" of ours[96] – something that we must have if we are to "survive and flourish".[97] She then contends that contributing to others' survival and well-being "is a key way to satisfy our need to belong",[98] and argues for a *human right* to social contribution by appealing to the idea that persons have "human right(s) to the conditions necessary to realize a minimally good human life".[99]

Brownlee considers her proposed right to social contribution to have both positive and negative dimensions. It contains both a right *against* having one's opportunities to socially contribute thwarted and a right *to* the material and temporal resources required for social contribution.[100] Brownlee also sees the right as sharing the same moral standing as existing civil and political rights. She acknowledges that social human rights – that is, rights that pertain to interpersonal, as against political or economic, interests – "have long been the poorest of the poor cousins in human rights debates",[101] often considered "desirable goal[s]" or "liberal aspirations" rather than "things to which we can have human rights".[102] Brownlee takes issue with this and maintains that many social rights, including the right to socially contribute, are *as* important to fulfil as those rights classed as "first generation rights".[103] They are important because of the role that social rights play in helping people lead minimally good lives.[104]

We shall not defend the credentials of the proposed human right to socially contribute here. Our interest is in exploring what a right to socially contribute, as defended by Brownlee, could imply for the provision of rehabilitation in criminal justice. Interestingly, Brownlee's defence of this right is partly motivated by her concern for the situation of convicted persons.[105] She points to how convicted persons are one subpopulation often denied a right to socially contribute insofar as they are subjected to exclusionary punishments that "sever their social bonds", or are

94 Brownlee 2020, pp. 78–79. As examples of acts of companionship and closeness, Brownlee points to engaging in "meaningful joint projects" and spending quality time with, and speaking to, others with affection and kindness.

95 Brownlee 2020, pp.17–19. For some of psychological literature documenting and defending this need, see Baumeister & Leary 1995; Seligman 2011; DeWall 2013.

96 Brownlee 2020, p. 26.

97 Brownlee 2020, pp. 26, 24.

98 Brownlee 2020, p. 76.

99 Brownlee 2020, pp. 76, 55. Here, Brownlee is following Nickel 2007 and Shue 1996 in assuming that we have human rights to the conditions necessary for having a minimally good life.

100 Brownlee 2016a, p. 332. See also Calhoun 2023.

101 Brownlee, Jenkins & Neal 2022, p. 4.

102 Brownlee, Jenkins & Neal 2022, pp. 4, 1.

103 Brownlee, Jenkins & Neal 2022, pp. 2–4.

104 Brownlee 2020, p. 8. See Brownlee, Jenkins & Neal 2022 for an anthology that aims to remedy this neglect of social rights in human rights theory and practice.

105 Brownlee 2016a, p. 328; Brownlee 2020, p. 172.

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given "criminal records they can never spend".[106] And while Brownlee does not explicitly argue that her proposed human right implies a right to rehabilitation, we think that the right to socially contribute (if it exists) *would imply* this, at least for some subpopulations of convicted persons.[107]

Consider how Brownlee insists that the right to socially contribute places governments under a defeasible duty to help protect and preserve people's *social resources*, to a minimally adequate level.[108] By social resources, Brownlee means a person's social abilities (the set of skills that people need for interacting with others); their social opportunities (occasions at which interaction is possible); and their social connections (enduring links with others that meet a standard of decency). Consider, too, how this putative governmental duty to help protect and preserve people's social resources entails a duty to make rehabilitation available to convicted persons, if and when rehabilitation is *necessary* to help protect and preserve people's social resources to a minimally adequate level.

Whether and when rehabilitation *is* necessary for preserving one's social resources is, of course, an empirical question. However, it is reasonable to suppose that it might sometimes be necessary. Rehabilitative interventions such as family therapy/group counselling could conceivably be necessary for preserving a convicted persons' supportive social connections in cases where their crime(s) are serious in nature and/or when they involve victims from their own social circle.[109] Educational or vocational interventions might likewise be necessary to preserve people's social opportunities in cases where imprisonment forecloses previously relied upon opportunities and networks. Various psychotherapies could further be necessary when persons, due to mental illness or particular personality traits, have difficulty forging and sustaining supportive social connections. As said, we cannot pass judgement on how *commonly* rehabilitation will be necessary to effect these outcomes. Our point is simply that, assuming there will be some occasions when preserving convicted persons' social resources requires rehabilitative interventions, the (defeasible) moral right to social contribution implies a defeasible moral right to have access to them. Defeasible because access and availability will always be subject to resource constraints, and because rights to access various interventions will need to be balanced against other rights' considerations.[110]

[106] Brownlee 2016a, p. 327. Brownlee does not consider that people, in committing crime, forfeit this right; see Brownlee 2020, chapters 3 and 8.

[107] Brownlee may take this to be implicit in her argument. She does, after all, stress the importance of post-prison provisions to mitigate the damage done to a person's social connections during their time in prison and to ease their reintegration into society, see Brownlee 2016a, pp. 348–349; Brownlee 2020, p. 188.

[108] Brownlee 2020, pp. 20–21. This suggests that Brownlee takes the moral right to social contribute to be a defeasible rather than an absolute moral right.

[109] For a discussion of the promise and challenges of rehabilitative interventions that involve family members, see Garofalo 2020.

[110] For example, the rights of other persons who participate in family therapy, educational or psychotherapeutic interventions. Consider how permissible infringement of the putative moral right to

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7.4 A STATE DUTY TO PROVIDE NEUROREHABILITATION?

We shall now assess what these two candidate justifications for a right to rehabilitation imply for the specific case of neurorehabilitation. More precisely, we ask whether the right against cruel and degrading punishment and/or the putative right to social contribution imply a right to have access to safe and effective neurorehabilitation, at least in certain circumstances and provided that the intervention in question does not violate (other) human rights.[111]

Consider first the prohibition against cruel and/or degrading punishment. How might this support a right to *neuro*rehabilitation? We suggest that the right against cruel punishment implies a defeasible right to neurorehabilitation when either (a) neurorehabilitation would counter the degenerative effects of punishment more effectively than conventional rehabilitation would do alone; or (b) when neurorehabilitation is necessary to make the achievement of rehabilitation and eligibility for release reasonably achievable.[112] In suggesting this, we assume the prohibition against cruel and/or degrading punishment – insofar as it implies a right to rehabilitation – further implies a right to an *effective* package of interventions for offsetting punishment's degenerative effects or for preserving genuine prospect for release. Such a view seems to be accepted when it comes to offering traditional forms of rehabilitation: while convicted persons do not have a right to all and every rehabilitative intervention, insofar as they *have* a right to rehabilitative interventions, this right is to effective interventions from among the reasonably affordable alternatives.[113]

Whether neurorehabilitation will in the future be part of an effective approach is again an empirical question. However, it is reasonable to postulate that in some cases it might be. For one thing, neurorehabilitation combined with conventional rehabilitative measures might sometimes help counteract imprisonment's potential degenerative effects effectively when conventional rehabilitative measures *alone* do not. Neurorehabilitation might also sometimes provide a means for preserving genuine hope of rehabilitation and release in situations where hope is lost. We cannot defend these thoughts definitively here. Still, we shall provide some motivation for them.

First, consider the potential *anti*-degeneration effects of some existing and emerging neuropharmaceuticals and technologies. At one level, we have the

access social contribution-enabling interventions might reasonably occur when delivering these interventions threatens, for instance, others' physical safety and mental health.

[111] For example, the right to bodily integrity.

[112] Some of the reasoning advanced here borrows from Dore-Horgan 2023.

[113] For example, in *Barnes* v. *Government of the Virgin Islands*, 415 F. Supp. 1218 (D.V.I. 1976), 1232-33, an emphasis is placed on "effective rehabilitation" and on the importance of "determin[ing] the educational, recreational (. . .) work (. . .) [and] physical and mental health care" needs of each imprisoned person" if "effective rehabilitation is to take place". Recall also the observation in ECtHR (GC) 26 April 2016, 10511/10 (*Murray/the Netherlands*), par. 109, that imprisoned persons should "be enabled to undergo treatments or therapies (. . .) adapted to their situation".

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neuropharmaceuticals already in use within forensic psychiatry – so, for example, medication that might help to combat the traumatising and brutalising effects that sometimes attend incarceration.[114] These kinds of interventions clearly can be utilised to help counter the potentially degenerative effects of our carceral practices. Providing these interventions might also sometimes be required, not only to protect and fulfil the right to rehabilitation but also to protect and fulfil persons' right to mental health.[115] And in the future, novel developments might further broaden the range of interventions at our disposal for forestalling penal degeneration.[116] Again, the prospect of these anti-degeneration neurointerventions does not obviate the need to reform our carceral practices such that they do not produce degenerative effects in the first place. Indeed, it might be objected that a person is *still* subjected to cruel and degrading punishment if neurointerventions are required for, and harnessed for the purpose of, making prison tolerable.[117] Our point here is thus not that neurorehabilitation might render otherwise unacceptable punishments acceptable but rather that *as and when* persons are subject to punishment-induced degeneration that can be countered more effectively with neurorehabilitation, *refraining* from providing neurorehabilitation may be cruel and in violation of the prohibition on cruel treatment.

Consider next how the offer of neurorehabilitation might sometimes be necessary to preserve hope for release in cases where a person is subject to life, long or indeterminate (preventive) detention and where conventional rehabilitative measures have *failed* to enable rehabilitation. Again, we cannot comment on how *likely* it is that candidate and emerging neurotechnologies will succeed when conventional measures have failed. But as things stand, conventional rehabilitation proves ineffective for some individuals. Some such individuals consequently lack genuine prospect of release when their release depends on their demonstrating that they have become rehabilitated.[118] Offering safe and effective neurorehabilitation in these circumstances – if it exists – would put hope back on the table. The right against cruel, inhuman and degrading punishment would thus support a (defeasible) right to access safe and effective neurotechnologies *if and when* these are necessary to preserve hope for rehabilitation and release.[119]

Looking next to the putative human right to socially contribute and the implications this proposed right might have for neurorehabilitation, one possible implication is a right to have access to neurorehabilitation when one exhibits dispositions

[114] Harner et al. 2015; Jakobowitz et al. 2017.
[115] See Chapter 6.
[116] See Friedman et al. 2016; Tan et al. 2020 for ongoing research on treatments for depressive symptoms.
[117] We thank Tom Douglas for pressing us on this point.
[118] An example may be some persons scoring highly on measures of psychopathy. Indeed, no specific conventional rehabilitative intervention is consistently efficacious in this population; see Rice and Harris 2013; and Hecht, Latzman & Lilienfeld 2018. Cf. González Moraga et al. 2019.
[119] The right to liberty (article 7 ECHR and article 9 ICCPR) would perhaps also support a right to access neurotechnologies here.

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and behaviours that hinder one's ability to socially contribute, and when these dispositions and behaviours are amenable to alteration via neurorehabilitation. Clearly, some convicted persons exhibit dispositions and behaviours that may hinder their efforts to socially contribute. Think of people who lash out aggressively or who have significant difficulty experiencing compassion for others.[120] These challenges are not confined to offending populations.[121] Nor do such challenges necessarily impede one's ability to socially contribute – we each vary in our dispositions and most of us still manage to contribute to the survival and well-being of at least some others notwithstanding. Our point is simply that there are some persons who appear unable to successfully forge social connections, and for whom this hampers their rehabilitation. For these persons, we think the putative right to socially contribute implies defeasible governmental duties of assistance to enable social contribution. And as and when neurotechnologies are a necessary component of an effective assistance package, then relevant neurotechnologies may be something to which persons have a right, accepting their right to social contribution.

Only time will tell what these relevant neurotechnologies might be. Research is still at a very early stage, so we can only speculate. One relevant technology might be the use of transcranial magnetic stimulation on regions of the brain involved in inhibitory control and communication to help increase brain activity in these regions.[122] Other examples might be the use of neurofeedback techniques or neuropharmaceuticals to train or stimulate inhibitory control or compassionate responses in their users.[123]

The analysis in this section will likely meet with some reservations. Some may doubt, on the one hand, that the right against cruel punishment implies a right to *neuro*rehabilitation specifically. Others – while accepting that the putative right to socially contribute, insofar as it implies a right to rehabilitation, will also imply a right to neurorehabilitation – may worry about the consequences of recognising this relationship. More precisely, the first objection might be that the right against cruel punishment does not imply a right to *neuro*rehabilitation because rehabilitation ought to be the responsibility of the convicted person themselves – and effective neurorehabilitation essentially *rehabilitates*, rather than leaving the responsibility for rehabilitation to, the relevant party.[124] The second objection might be that

[120] Some such persons may meet the criteria for diagnosis of a personality disorder. They may face enduring difficulties in social interaction and unstable social connections.

[121] As Brownlee points out, it is possible that "no one person could ever realize the full set of social abilities"; see Brownlee 2020, p. 20.

[122] For the protocol for an ongoing trial on the effectiveness of repetitive transcranial magnetic stimulation for promoting social communication in a population with autism spectrum disorder, see Enticott et al. 2021.

[123] For research providing preliminary support for the thought that neurofeedback can be used to build empathy or compassion, see Moll et al. 2014. For some evidence to suggest that the neuropeptide oxytocin promotes emotional empathy, see Le et al. 2020.

[124] Recall how personal responsibility for one's own rehabilitation is emphasised in ECtHR (GC) 8 July 2014, 15018/11 and 61199/12 (*Harakchiev and Tolumov/Bulgaria*), par. 264; and ECtHR (GC) 26 April 2016, 10511/10 (*Murray/the Netherlands*), par. 104.

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appealing to a right to social contribution to support a right to neurorehabilitation expresses objectionably disrespectful messages about those who exhibit (neuro) diverse forms of sociality and hence is a line of reasoning that should be resisted.

These objections require more extended discussion than we can afford them here. However, we shall make two brief remarks by way of reply to them. First, neurorehabilitation does not necessarily absolve persons of the responsibility for rehabilitating themselves. On the one hand, a person has to *choose* to undergo neurorehabilitation when exercising their right to it – something that itself is the first step in taking responsibility for one's rehabilitation. Furthermore, candidate dispositional changes elicited by neurorehabilitation – for example, attenuated aggression, enhanced empathy or increased social understanding – probably do not in-and-of-themselves lead to desistance from crime. For desistance to occur, it is likely that those who have offended still have to be *willing*, and *make the decision*, to desist. A parallel can be made here with how the neurostimulant caffeine can enhance, but is not responsible for, a person's productivity. Just as caffeine may help facilitate concentration while leaving decisions about how to direct this newly focused state up to the individual consumer, most candidate neurointerventions may only deliver on their promise of reducing reoffending if the person is, in fact, willing to desist.[125]

The objection that deriving a right to neurorehabilitation from a right to social contribution expresses objectionably disrespectful messages about those who exhibit neurodiverse forms of sociality should give us cause for pause. Clearly, a broad range of interactional styles can and should be recognised as acceptable, and neurorehabilitation should be developed and delivered in an environment that acknowledges this. Yet, *does* acknowledging a relationship between a right to social contribution and a right to neurorehabilitation express such a disrespectful message? We think not necessarily, particularly if (a) the right to neurorehabilitation is understood as a right to have *access to* neurorehabilitation while retaining the prerogative to refuse it (as per our understanding); and (b) neurorehabilitation is not proffered as a tool for changing a person's particular interactional style. The above discussion endeavoured to illustrate that *sometimes*, persons' prerogative to alter their (justice-relevant) dispositions and behaviours might be something they are entitled to claim assistance for, accepting a right to social contribution. But this is not the same as saying that a right to social contribution implies a right to neurotechnological tools that promote neurotypical sociality or that neurotypical sociality is necessary for social contribution. Any movement towards this kind of conclusion should be resisted.[126]

[125] Dore-Horgan 2023.

[126] We concede that, collectively, convicted persons and their clinicians might tend to choose interventions that promote neurotypical traits, and that this collective tendency might express a negative message about neurodivergent traits. We thus accept that there will be *challenges* in ensuring that any messages expressed in delivering neurorehabilitation remain respectful of those who exhibit neurodivergent sociality. However, we do not believe these challenges are insurmountable, nor do we think they constitute a knock-down reason for resisting the line of argument for

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This second objection thus underscores the need for safeguards in making neurorehabilitation available even when there is reason to think persons have a right to it, given the potential unintended sequelae that might follow from introducing neurorehabilitation.

7.5 CONCLUDING REMARKS

To conclude, this chapter has documented existing law and jurisprudence with respect to rehabilitation, raised and interrogated two arguments that seem to support convicted persons' right to rehabilitation under certain conditions and queried what these candidate justifications might imply for the specific case of neurorehabilitation. More specifically, we explored how persons' moral and legal right against cruel, inhuman or degrading punishment, and persons' putative moral right to socially contribute, implies a right to rehabilitation under certain conditions. These conditions are when rehabilitation is necessary to prevent or counter the degrading impact of imprisonment, when it is necessary or important for preserving genuine hope for release in the case of life-sentenced or preventatively detained persons; and when it is necessary for preserving convicted persons' ability to contribute to the survival and well-being of at least some others.

Based on this analysis, we argued that the right to rehabilitation implies a defeasible right to neurorehabilitation, when neurorehabilitation is necessary to effect the above outcomes. In practice, this would of course depend, in the first place, on the availability of neurotechnologies that have been shown to be effective for rehabilitative purposes at least in some subgroups of convicted persons.

a right to neurorehabilitation advanced above. We thank Tom Douglas for drawing our attention to the possibility of this collective tendency.

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