

THE IMMATURE STATE OF OUR UNION: LACK OF LEGAL ENTITLEMENT TO PRISON PROGRAMMING IN THE UNITED STATES AS COMPARED TO EUROPEAN COUNTRIES

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I. INTRODUCTION: THE PROBLEM IS CLEAR, BUT IS THERE A SOLUTION TO INEFFECTIVE PRISON SYSTEMS?

“It is said no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”
— Nelson Mandela

The US prison system has become a hot topic of discussion in the world of academia, and rarely is it perceived in a positive light.¹ This is largely attributable to the mass incarceration of people in the United States—the highest percentage per capita in the world of incarcerated citizens—in addition to the extremely high recidivism² rates.³ In contrast, European prison systems—especially Norway’s—have become a topic of academic discussion for a very different reason: their success.⁴ The United States incarcerates 693 out of every

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¹ See generally Willa Payne & Matt Luton, *A Relocation of Prisoner Identity*, 10 N.Y. CITY L. REV. 299 (2006) (discussing the enormity of injustice facing incarcerated individuals in the United States in relation to legal advocacy for incarcerated persons); Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007) (highlighting the similarities between the current state of the US prison system and pre-civil war slavery conditions for African-Americans); Lauren Salins & Shepard Simpson, *Efforts to Fix A Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153 (2013) (analyzing the overcrowding epidemic in US prisons); Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265 (2006) (emphasizing the permanent psychological and mental damage to incarcerated persons after experiencing the ineffective prison systems in the United States); Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87 (2008) (discussing the dangerous state of prisons in the United States as mass incarceration and dehumanization of incarcerated persons increases).

² “A measurement of the rate at which offenders commit other crimes . . . after being released from incarceration.” *Recidivism*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Recidivism> (last visited Nov. 11, 2016).

³ Carolyn W. Deady, *Incarceration and Recidivism: Lessons from Abroad*, PELL CTR. FOR INT'L REL. & PUB. POL'Y (2014); WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Mar. 2, 2018).

⁴ See generally Ken Strutlin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 WM. MITCHELL L. REV. 1313, n.344 (2012) (highlighting the humanitarian approach of Norwegian prison systems); Kevin Warner, *'Valued members of society?'* *Social Inclusiveness in the Characterization of Prisoners in Ireland, Denmark, Finland and Norway*, 59 ADMIN. 87 (2011) (comparing the successful approach of Norway's prisons to the failure of US prisons); Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, NY TIMES MAG. (Mar. 26, 2015), <http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> (highlighting the effectiveness of Norway's humane prison system in getting incarcerated persons out of prison); Michelle D. Pettit, *Exemplary Educational Programs in Norwegian Prisons: A Case Study of Norwegian Educators' Attitudes and Humanitarian Practices*, (June 2012) (published Ph.D. dissertation, University of Idaho), <http://search.proquest.com/docview/1095744624> (examining the successful outcomes of implementing education and human practices in Norwegian prisons).

100,000 persons,⁵ yet Norway only incarcerates 70 out of every 100,000 persons.⁶ Additionally, in the United States, 67.8% of incarcerated persons are rearrested within three years of their release, and this number increases to 76.6% within five years of release.⁷ On the contrary, Norway has one of the lowest recidivism rates in the world, with 20% of incarcerated persons reentering prison after release.⁸

The vast discrepancy in the number of incarcerated persons and recidivism rates between the United States and many Westernized European countries is inevitably thought-provoking. Scholars have attempted to attribute this difference to a variety of reasons—racial make-up of the population, differences in policing strategies, differences in criminalization of drugs, differences in justice systems, etc. However, there is one area that has been shown to substantially decrease recidivism rates in both European countries and the United States—effective prison programming.⁹

Effective prison programming has been shown to decrease recidivism, thereby decreasing the prison population and increasing valuable reentry.¹⁰ The prison programs that have proved effective in decreasing recidivism rates in both European countries and the United States are rehabilitation, education, and vocational training programs.¹¹ Although both the United States and European countries offer these types of programs in their prisons, the frequency in which they are offered differs greatly. In the United States, incarcerated persons have no legal

⁵ WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Oct. 7, 2016).

⁶ WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/norway> (last visited Oct. 7, 2016).

⁷ Matthew R. Durose et. al, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUST. STATS. 1 (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

⁸ *Id.*

⁹ See generally Santiago Redondo, Julio Sanchez-Meca & Vicent Garrido, *What Works in Correctional Rehabilitation in Europe: A Meta-Analytic Review*, in *ADVANCES IN PSYCHOLOGY AND LAW: INTERNATIONAL CONTRIBUTIONS* (Redondo, Garrido & Barberet eds.) 499 (1997) [hereinafter Redondo, *What Works*]; JAMES MCGUIRE, *OFFENDER REHABILITATION AND TREATMENT: EFFECTIVE PROGRAMMES AND POLICIES TO REDUCE RE-OFFENDING* (James McGuire ed. 2002). See generally Christopher Zoukis, *Pell Grants for Prisoners: New Bill Restores Hope of Reinstating College Programs*, PRISON LEGAL NEWS (Aug. 2015); Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 *ANNUAL REV. OF L. & SOC. SCI.* 297 (2007); Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What is Promising*, 49 *CRIME & DELINQUENCY* 360 (2003); James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 50 *J. CORRECTIONAL EDUC.* 297 (2004); Jurg Gerber & Eric J. Fritsch, *Adult Academic and Vocational Correctional Education Programs: A Review of Recent Research*, 22 *J. OFFENDER REHABILITATION* 119 (2008).

¹⁰ See generally *infra* Part II, Section A.

¹¹ See generally *infra* Part II, Section B.

right to prison programming;¹² whereas in European countries, the right to effective prison programming is a legal entitlement held by the incarcerated persons.¹³

Without a legal entitlement to effective prison programming, incarcerated persons in the United States may well be deprived of the opportunity to participate in these programs. Moreover, because incarcerated persons have no legal right to invoke, they are essentially left without any avenue to pursue effective and consistent prison programming throughout the United States. Although prison programming is neither constitutionally nor statutorily required in the United States, there are a number of federal and state prisons that implement rehabilitative, educational, and vocational training programs. The need for consistency throughout detention facilities in the United States inevitably leads to the conclusion that incarcerated persons should have a legal entitlement to prison programming whether that be a constitutional right established under the Eighth Amendment, a recognition of human rights under the standards of Customary International Law (CIL), or legislation enacted by Congress establishing the right for incarcerated persons.

This Note will examine the framework of prison programming in the United States and European countries through three distinct parts. Part II will discuss what effective prison programming consists of and its impact on recidivism rates in the three program categories: (1) rehabilitation; (2) education; and (3) vocational training. Specifically, Part II will establish that research has proven that effective prison programs reduce recidivism and increase successful reintegration. Part III analyzes the federal law in the United States and compares it to European law on incarcerated persons' right to programming. This section will demonstrate that the United States does not recognize a right to these programs, but European rules and standards mandate such programming. Part IV will argue that under the current legal framework in the United States, a right to these programs could be established under either the Eighth Amendment or CIL. Part IV alternatively suggests that the United States should adopt legislation framed by European rules and standards to provide incarcerated persons a right to (1) rehabilitative programs; (2) education programs; and (3) vocational training programs.

¹² See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981); *Byrd v. Moseley*, 942 F. Supp. 642, 644 (D.D.C. 1996); *Maddox v. Berge*, 473 F. Supp. 2d 888 (W.D. Wis. 2007); *Freeman v. Berge*, 283 F. Supp. 2d 1009 (W.D. Wis. 2003); *Gabel v. Estelle*, 677 F. Supp. 514, 515 (S.D. Tex. 1987); see also Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation*, 77 J. CRIM. L. & CRIMINOLOGY 4 (1987).

¹³ See COUNCIL OF EUROPE, EUROPEAN PRISON RULES (2006), [hereinafter European Prison Rules]; United Nations Congress, *Standard Minimum Rules for the Treatment of Prisoners* (1977), http://www.ohchr.org/Documents/ProfessionalInterest/treatment_prisoners.pdf [hereinafter Standard Minimum Rules 1977].

II. EFFECTIVE PRISON PROGRAMMING AND ITS IMPACT ON REDUCING RECIDIVISM

Rehabilitation, education, and vocational training programs have all been found to reduce recidivism in both European and American prison systems. Although substantive material of the treatment programs slightly varies from prison to prison and across countries, generally the structure and goals of the programs are uniform.¹⁴ Not only is the opportunity for such programming humane and just, but it is also cost-effective.¹⁵ The specified prison programs return a profit in a short amount of time—with a \$1 investment reducing prison costs by \$4 to \$5 during the first three years of post-release.¹⁶ Furthermore, the direct costs of providing such programs is estimated to be \$1,400 to \$1,744 per inmate, with lifetime incarceration costs being \$8,700 to \$9,700 *less* for each inmate who received correctional education or vocational training.¹⁷ Therefore, correctional education—including education and vocational training programs—is almost twice as cost-effective as the current crime control policy in the United States.¹⁸ In order for the rehabilitation, education, and vocational training programs to be cost effective, they must also be successful in reducing recidivism and improving reintegration. In a review of 302 meta-analyses,¹⁹ Cullen and Gendreau found that incarcerated persons who participated in one of the offered programs—an array of rehabilitation, education, and vocational training programs—showed a 25% decrease in targeted behaviors (including recidivism) compared to the control group who received no programming.²⁰

¹⁴ Compare Federal Bureau of Prisons, *A Directory of Bureau of Prisons' National Programs*, (Nov. 21, 2016) https://www.bop.gov/inmates/custody_and_care/docs/BOP_NationalProgramCatalog.pdf [hereinafter FBP Programs], with European Prison Rules, *supra* note 13. From this point on, this Note will be using the Federal program guide for definitions of each type of program because they offer a succinct definition of each type of program.

¹⁵ Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND (2013), https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf.

¹⁶ *Id.*

¹⁷ *Id.* (emphasis added).

¹⁸ Audry Bozos & Jessica Hausman, *Correctional Education as a Crime Control Program*, UCLA SCH. PUB. POL'Y AND SOC. RES. 1, 2 (Mar. 2004).

¹⁹ A meta-analysis is “a quantitative statistical analysis of several separate but similar experiments or studies in order to test the pooled data for statistical significance.” *Meta-Analysis Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/meta-analysis> (last visited Nov. 6, 2016). Simply put, a meta-analysis is an analysis of published studies on the same topic with similar subjects, with the aim of finding generalizable results from multiple sources.

²⁰ Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 CRIM. JUST. 109, 110 (2000).

A. Rehabilitation Programs

Rehabilitation programs generally consist of some form of cognitive-behavioral therapy with a main focus on substance abuse problems and/or mental illness.²¹ The programs are centered around a therapeutic community approach with interactive groups and community meetings.²² Additionally, one of the goals of rehabilitation programs is to use cognitive-behavior challenges and thinking exercises to defuse criminal thinking and troublesome thought processes.²³

Prison rehabilitation programs are effective in reducing recidivism rates in both the United States²⁴ and European countries.²⁵ In a meta-analysis done on US prison rehabilitation programs, multiple researchers found that rehabilitation programs (those focusing on cognitive-behavioral therapy) were the most effective in reducing recidivism.²⁶ In Gaes et al.'s (1998) review of existing recidivism data, Gaes et al. concluded that "cognitive/behavioral treatment, on average, produces *larger effects* than interventions characterized as punishment, intensive community supervision, educational training, substance abuse, or group counseling."²⁷ Upon further review, these "larger effects" vary from study to study but often present statistically significant results.²⁸ One study found the recidivism rates for those who were assigned to the rehabilitation program were one-fourth that of the control group who were assigned no program.²⁹ Another study found that the recidivism rate in the non-rehabilitation group was 41.7%, a significant increase from the 25.5% of the group that received rehabilitation programming, and a three-year follow-up study on those same groups demonstrated that the treatment effect of the rehabilitation program did not diminish over a longer period of time.³⁰ Similarly,

²¹ FBP Programs, *supra* note 14.

²² *Id.*

²³ *Id.*

²⁴ Lipsey & Cullen, *supra* note 9.

²⁵ MCGUIRE, *supra* note 9; Cullen & Gendreau, *supra* note 20, at 139; Santiago Redondo, Julio Sanchez-Meca & Vicente Garrido, *The Influence of Treatment Programmes on the Recidivism of Juvenile and Adult Offenders: An European Meta-Analytic Review*, 3 PSYCHOL. CRIME & L. 251 (1999) [hereinafter Redondo, *Influence of Treatment*]; Redondo, *What Works*, *supra* note 9 at 499.

²⁶ Lipsey & Cullen, *supra* note 9; Gerald G. Gaes et al., *Adult Correctional Treatment*, 26 CRIME & JUST. 1, 2 (1999).

²⁷ Gaes et al., *supra* note 26, at 14 (emphasis added).

²⁸ *See id.* at 2-4.

²⁹ *See generally* ROBERT R. ROSS & ELIZABETH A. FABIANO, TIME TO THINK: A COGNITIVE MODEL OF DELINQUENCY PREVENTION AND OFFENDER REHABILITATION (1985). Out of the control group 16 out of 23 participants recidivated, but only four out of 22 recidivated when they participated in the rehabilitation program. *Id.*

³⁰ G. Johnston & L. Hunter, *Evaluation of the Specialized Drug Offender Program*, in THINKING STRAIGHT: THE REASONING AND REHABILITATION PROGRAM FOR DELINQUENCY PREVENTION AND OFFENDER REHABILITATION 214, 214 (Robert R. Ross & R. D. Ross eds.,

multiple studies done in European countries have shown a decrease in recidivism among incarcerated persons who participated in a rehabilitation program.³¹ In addition to decreased recidivism rates, incarcerated persons who participate in rehabilitation programs tend to have fewer disciplinary problems while incarcerated and better constructive employment post-release.³² Overall, it is clear that rehabilitation programs, which base their program structure on cognitive-behavioral therapy, consistently reduce recidivism rates and improve reintegration.

B. Education Programs

Education programs, on the other hand, may have numerous different foci depending upon the level of education.³³ The most commonly offered educational programs are basic literacy programs, which provide instruction on foundational knowledge and skill in reading, math, and writing.³⁴ The main goal of the basic literacy programs is to provide incarcerated persons with their General Educational Development (GED) credential.³⁵ In addition to the basic foundational education programs, there are programs that offer instructional classes of special interest or secondary education.³⁶ Classes of special interest vary drastically from institution to institution, but they generally seek to promote positive leisure activities, a healthy lifestyle, and general knowledge.³⁷ The special interest classes vary from practical to recreational—Microsoft Word, nutritional training, typing, business skills, resume writing, job interviewing, painting, and drawing.³⁸ Although secondary and

1995) (showing that the recidivism rates after a three-year follow up were 35% for those in the control group and 19% for those in the rehabilitation group).

³¹ MCGUIRE, *supra* note 9 (showing a recidivism rate of 39.5% in treated groups and 60.5% in untreated groups – a differential of 21%); Redondo, *Influence of Treatment*, *supra* note 25, at 251 (demonstrating through meta-analysis that rehabilitation programs were the most effective out of many in reducing recidivism); Redondo, *What Works*, *supra* note 9, at 499 (producing statistical data stating that rehabilitation programs produced twice the reduction in recidivism rates than any other program).

³² Gaes et al., *supra* note 26, at 25–30; Cullen & Gendreau, *supra* note 20, at 128.

³³ Doris Layton MacKenzie, Structure and Components of Successful Educational Programs (Feb. 26, 2008) (unpublished Ph.D. dissertation, John Jay College of Criminal Justice), http://johnjay.jjay.cuny.edu/files/DorisMackenzie_Final.pdf.

³⁴ FBP Programs, *supra* note 14.

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ U.S. Department of Justice, *Inmate Occupational Training Directory*, FEDERAL BUREAU OF PRISONS (Mar. 31, 2017), https://www.bop.gov/inmates/custody_and_care/docs/inmate_occupational_training_directory.pdf [hereinafter *Inmate Occupational Training Directory*].

post-secondary education programs are very sparse in US prisons,³⁹ they are often offered in European prisons.⁴⁰ These education programs, depending on the institution, offer the opportunity for incarcerated persons to earn associate degrees, baccalaureate degrees, and occasionally master's degrees.⁴¹

Literature has consistently shown that carefully designed and administered education programs can significantly reduce recidivism rates in both the United States⁴² and European countries.⁴³ Most prisons in the United States strive to offer the most basic level of education (GED programs) for incarcerated persons because illiteracy and lack of education can greatly inhibit a released person's ability to obtain steady employment and contribute to society.⁴⁴ According to Emory University's Department of Economics, "prisoners who complete some high school recidivate at an average rate of 55%; with vocational training, recidivism falls to 20%."⁴⁵ Recidivism rates continue to decrease as education level increases.⁴⁶ For example, "[p]risoners who earn an associate degree recidivate at a rate of 13.7%, while for those who obtain a bachelor's degree the rate is 5.6%. Upon earning a master's degree, the rate is effectively 0%."⁴⁷

A meta-analysis of European studies found that while cognitive-behavior rehabilitation treatment was most effective in reducing recidivism, educational programs also reduced recidivism in a statistically significant manner—8% reduction compared to the control group.⁴⁸ Additionally, a comprehensive study of educational programs in prisons stated that a majority of the research, producing significant results between the variables, showed an inverse correlation between

³⁹ Zoukis, *supra* note 9. The removal of the availability of Federal Pell Grants (federal financial aid that does not need to be repaid based on need) for incarcerated persons largely inhibited secondary and post-secondary education programs in US prisons. *Id.* There was a very negative public perception of giving Pell Grants to incarcerated persons because people saw it as removing federal funding from law-abiding students and giving it to criminals. *Id.* In reality, every student who qualifies for the funding receives it regardless of how many students qualify. *Id.* But this negative perception prompted the Violent Crime Control and Law Enforcement Act which barred all state and federal prisons from federal financial aid programs. *Id.* Due to the removal of the federal funding, secondary and post-secondary education programs in prisons quickly collapsed. Zoukis, *supra* note 9. But with recent legislation there may be hope in restoring secondary and post-secondary education in US prisons. *See infra* Part III.

⁴⁰ *See generally* Deady, *supra* note 3; Linda Groning, *Education for Foreign Inmates in Norwegian Prisons: A Legal and Humanitarian Perspective*, 2 BERGEN J. CRIM. L. & CRIM. JUST. 164 (2014).

⁴¹ Zoukis, *supra* note 9.

⁴² *See generally* Zoukis, *supra* note 9; Vacca, *supra* note 9; Gerber & Fritsch, *supra* note 9 at 119.

⁴³ *See generally* MCGUIRE, *supra* note 9; Cullen & Gendreau, *supra* note 20, at 109; Gaes et al., *supra* note 26, at 56.

⁴⁴ Gaes et al., *supra* note 26, at 56.

⁴⁵ Zoukis, *supra* note 9.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Redondo, *Influence of Treatment*, *supra* note 25, at 264.

education programming and recidivism—the higher the level of education obtained, the lower the recidivism rates were.⁴⁹ Reduction in recidivism is not the only benefit of educational programs; studies have reliably shown that participation in educational programs improves institutional behavior, increases employment opportunities, decreases violence, and motivates incarcerated persons to partake in higher education opportunities upon release.⁵⁰

C. Vocational Training Programs

Vocational training programs are often classified as education programs rather than work programs because they focus on the skills necessary to be successful in a specific profession.⁵¹ These programs offer both classroom instruction and hands-on training or apprenticeship.⁵² The professions for which an incarcerated person can receive training differ depending on the institution, but some of the most common trades are electrician, carpenter, cook, welder, and HVAC Technician.⁵³ The mission of vocational training programs is to provide incarcerated persons with the skills necessary to effectively rejoin the workforce upon release and become contributing members of society.⁵⁴ The overarching goals of the aforementioned programs are to reduce recidivism and improve reintegration outcomes upon the incarcerated persons' release.⁵⁵

Closely related to education programs, vocational training programs were also found to reduce recidivism rates among released persons.⁵⁶ A study examining the success of federally implemented programs found that vocational training programs reduced recidivism rates from 50% to 37%.⁵⁷ Additionally, a comprehensive meta-analysis of vocational/educational/work programs showed an average decrease in recidivism of 12% upon completion of the offered program.⁵⁸

⁴⁹ Jurg Gerber & Eric J. Fritsch, *The Effects of Academic and Vocational Program Participation on Inmate Misconduct and Recarceration*, in PRISON EDUCATION RESEARCH PROJECT: FINAL REPORT 1, 6 (Sam Houston State University ed., 1994).

⁵⁰ Gaes et al., *supra* note 26, at 55; Gerber & Fritsch, *supra* note 9, at 119; Vacca, *supra* note 9.

⁵¹ MacKenzie, *supra* note 33, at 11.

⁵² *Id.*

⁵³ Inmate Occupational Training Directory, *supra* note 38.

⁵⁴ FBP Programs, *supra* note 14.

⁵⁵ *Id.*

⁵⁶ Gaes et al., *supra* note 26, at 55; Gerber & Fritsch, *supra* note 9, at 119; Vacca, *supra* note 9.

⁵⁷ MacKenzie, *supra* note 33.

⁵⁸ Lipsey & Cullen, *supra* note 9 (presenting the results of reduction in recidivism rates as follows: education and vocation programs showed a 20% and 6% reduction; education, vocational, and employment programs showed a 10% and 0% reduction). *Id.* at 308. These results varied based on juvenile and adult participants; the adults were much more

Another meta-analysis of 13 studies on vocational training programs found a reverse correlation between participation in the programs and recidivism—the more vocational training the person received, the less likely the person would recidivate.⁵⁹ In addition to reducing recidivism rates, vocational training and/or work release programs also improve job readiness skills and employment opportunities post-release.⁶⁰ One of the many possible reasons for the success of vocational training programs is that they provide training during the incarceration period and continue to assist in finding employment post-release.⁶¹

As demonstrated by the numerous studies outlined above, there is no question that effective prison programming decreases recidivism rates and increases ease of reentry into society after release.⁶² With the obvious success of these programs, one would imagine prison systems everywhere would implement them—as many European countries have⁶³—but unfortunately, that is not the case in the United States.⁶⁴ In the United States, the availability of rehabilitation, education, and vocational training programs in state and private facilities varies by state and even more so by facility.⁶⁵ However, the federal government mandates these programs at specific federal facilities in the *Directory National Programs Federal Bureau of Prisons*.⁶⁶ The rehabilitation programs offered by the Bureau of Prisons are scarcely provided in federal facilities.⁶⁷ The Rehabilitation and Values Enhancement Program—a cognitive-behavioral based therapy—is offered at only two of the 122 federal prison facilities, and the Challenge Program—another cognitive-behavioral based therapy—is offered at 13 federal prison facilities, mostly high-security institutions.⁶⁸ On the contrary, the basic Drug Abuse Education program—the equivalent of Alcoholics Anonymous—is offered at all federal prison facilities.⁶⁹ Although the Bureau of Prisons requires that all federal facilities offer the Adult Continuing Education courses and Literacy Courses, there are no programs that offer courses beyond foundational skills of reading, writing, and math, let alone secondary education courses.⁷⁰

likely to have a decrease in recidivism than juveniles after participation in these types of programs. *Id.*

⁵⁹ Gaes et al., *supra* note 26, at 61.

⁶⁰ Seiter & Kadela, *supra* note 9, at 373–74; Gerber & Fritsch, *supra* note 9, at 119.

⁶¹ MacKenzie, *supra* note 33, at 10; Gerber & Fritsch, *supra* note 9, at 119; FBP Programs, *supra* note 14.

⁶² *See infra*, Part II, Section B.

⁶³ *See* European Prison Rules, *supra* note 13.

⁶⁴ *See generally* FBP Programs, *supra* note 14.

⁶⁵ The only way to determine if a state or specific facility offers these programs is to dig into the state's correction resources.

⁶⁶ FBP Programs, *supra* note 14.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ FBP Programs, *supra* note 14; U.S. Dep't of Educ., *Correctional Education*, <http://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/correctional-education.html#5> (last visited Mar. 2, 2016). *See also* Zoukis, *supra* note 9.

Lastly, vocational training programs are offered at about half of the federal prison facilities.⁷¹ There are two main vocational training programs offered by the Bureau of Prisons: the Industries Program, offered at 62 of 122 facilities, and the Occupational Education Program, offered at facilities that are not metropolitan correctional centers, metropolitan/federal detention centers, the Federal Transportation Center, satellite camps, or the administrative maximum facility.⁷² The inconsistent availability of programs at federal facilities essentially makes it the luck of the draw when persons are assigned the detention facility where they are to carry out their sentences. Without a legal entitlement to such programming, an incarcerated person at one facility has no right to the programming being offered at another facility—an injustice that must be remedied.

III. INCARCERATED PERSONS' LEGAL ENTITLEMENT TO PRISON PROGRAMMING

An incarcerated person having legal entitlement to effective prison programming—a right they could invoke to mandate change when deprived of it—could solve the inconsistency of programming in the US prison system. Unfortunately, the current US federal legal framework does not provide for rights to programming. Contrastingly, many European countries⁷³ incarceration rules and regulations grant incarcerated persons the right to effective prison programming, including rehabilitation programs, education programs, and

⁷¹ FBP Programs, *supra* note 14.

⁷² FBP Programs, *supra* note 14.

⁷³ *ESPU Backs Norwegian Prison Officers' Complaint to the Council of Europe*, ESPU (May 26, 2010), <http://www.epsu.org/article/epsu-backs-norwegian-prison-officers-complaint-council-europe>; *Armenia's Prison System to Comply with European Prison Rules*, ARMENIAN NEWS (June 27, 2013), <https://news.am/eng/news/160051.html> (announcing the release of a new prison program in Armenia that is in compliance with the European Prison Rules, this program was made possible by the funding of the Government of Norway); *Human Rights of St. Patrick's Prisoners 'Ignored or Violated'*, RTE (Oct. 16, 2012), <http://www.rte.ie/news/2012/1016/341934-human-rights-of-st-pats-prisoners-violated/> (covering a case issued by a judge in Dublin, Ireland stating that the prison was acting contrary to the European Prison Rules and found many human rights violations); Council of Europe, *Closing of the Six Month Training Programme for Prison Regime Officers*, COE (Sept. 15, 2015), http://www.coe.int/en/web/criminal-law-coop/newsroom-georgia-health-care/-/asset_publisher/AM6pQADAYoFt/content/closing-of-the-six-month-training-programme-for-prison-regime-officers (outlining a training program for prison staff in Georgia to bring their professionalism in line with the European Prison Rules); Council of Europe, *Prison Reform*, COE, <http://www.coe.int/en/web/belgrade/prison-reform>, (last visited Jan. 18, 2017) (covering a project in Serbia that will introduce Serbia's prisons to modern instruments and working methods to build a safe and secure prison in line with the European Prison Rules).

vocational training programs.⁷⁴ When incarcerated persons are deprived of such rights, many European countries allow them to use the legal justice system to obtain programming.⁷⁵

A. United States Federal Law

In the United States, incarcerated persons are afforded a set of “Prisoner’s Rights.”⁷⁶ Incarceration is intended to limit, but not eliminate a person’s constitutional rights. These rights consist of: the right against cruel and unusual punishment, due process (including the right to administrative appeals and a right of access to the parole process), equal protection under the laws (against discrimination based on race, sex, creed, religion, or national origin), and limited rights to freedom of speech and religion.⁷⁷ Quite obviously, the rights afforded to incarcerated persons are a fraction of the rights free citizens of the United States enjoy.⁷⁸ The discrepancy in constitutional rights afforded to free persons versus incarcerated persons may stem from the ample discretionary power Congress and the judiciary have granted prison officials to control conditions of confinement and incarcerated persons’ rights.⁷⁹ Judicial oversight of prison conditions and confinement is very rare; as long as the conditions do not violate one of the few enumerated constitutional rights afforded to incarcerated persons, the Due Process Clause does not require judicial oversight.⁸⁰

Although incarcerated persons’ constitutional rights are limited, case law and legislation have afforded them additional rights,⁸¹ which will be discussed in depth below. However, all prison litigation has been strongly regulated and restricted by the Civil Rights of Institutionalized Persons Act⁸² and the Prison Litigation Reform Act of 1995.⁸³ As a consequence, prison litigation in this area has been discouraged—even to vindicate a right held by an incarcerated person—thereby making it clear that litigation over rights not held is virtually impossible. The rights afforded to incarcerated persons through legislation and judicial

⁷⁴ See *supra* note 13.

⁷⁵ See *supra* note 73.

⁷⁶ *Prisoners’ Rights*, CORNELL L. SCH. https://www.law.cornell.edu/wex/prisoners_rights (last visited Nov. 16, 2016).

⁷⁷ *Id.*

⁷⁸ See generally U.S. CONST.

⁷⁹ *Prisoners’ Rights*, *supra* note 76.

⁸⁰ *Id.*

⁸¹ See *infra* Part III, Section A, subsections 1–3.

⁸² Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 (2008) (restricting the rights of incarcerated persons who were filing lawsuits by requiring an exhaustion of administrative remedies before using the judiciary).

⁸³ Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (attempting to reduce the amount of prison litigation and narrow the scope of prison lawsuits).

interpretation, which are often ambiguous and complex, are discussed in the following sections.

1. Right to Rehabilitation Programs

In *Pell v. Procunier*,⁸⁴ the US Supreme Court indicated that rehabilitation is one of the three primary functions of the US penal system, yet federal courts have not confirmed rehabilitative programs to be a constitutional right.⁸⁵ Rather, federal courts have confirmed that “[t]he Constitution does not require that prisoners as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration.”⁸⁶ As unfortunate as it may be, this has become the accepted mantra of the courts with regard to incarcerated persons’ rights to anything beyond the narrow rights listed above.⁸⁷ This mantra against a right to rehabilitation was clearly articulated in an opinion by the Ninth Circuit: “[a]lthough methods of analysis differ, each circuit that has considered the issue has held that ... (a lack of rehabilitative treatment) ... does not constitute cruel and unusual punishment.”⁸⁸

However, the Supreme Court has determined that there are narrow circumstances in which incarcerated persons have a common law right to rehabilitative programs.⁸⁹ Namely, there are four limited circumstances in which federal courts have stated an incarcerated person’s right to rehabilitative programs, but there has yet to be a case in which the Supreme Court recognized one of these exceptions.⁹⁰ First, there is a stated right to rehabilitation when the incarcerated person’s confinement is made expressly contingent on receiving some form of

⁸⁴ *Pell v. Procunier*, 417 U.S. 817, 823 (1974).

⁸⁵ *Rotman*, *supra* note 12, at 1023. *See also Maddox*, 473 F. Supp. 2d at 888 (stating that denying a prisoner access to a rehabilitative program is not to deny a civilized measure of life’s necessities); *Freeman*, 283 F. Supp. 2d at 1009 (stating that the prisoner’s Eighth Amendment rights not violated as prisoners have no clearly established right to social interaction and sensory stimulation, which are often provided in rehabilitative programs); *Gabel*, 677 F. Supp. at 515 (stating there is no right to creation of counseling programs).

⁸⁶ *Newman v. State of Ala.*, 559 F.2d 283, 291 (5th Cir. 1977), *cert granted in part, judgment rev’d in part on other grounds*, 438 U.S. 781.

⁸⁷ *See supra* note 85.

⁸⁸ *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 n. 28 (9th Cir. 1986).

⁸⁹ Emily A. Whitney, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 777, 782 (2009).

⁹⁰ All of the decisions discussed below are by lower level federal courts. When the Supreme Court was provided the opportunity to affirm a constitutional right to treatment, they chose to avoid the issue. *O’Connor v. Donaldson*, 422 U.S. 563 (1975). Additionally, the Supreme Court of the United States denied certiorari for a case stating that incarcerated juveniles have a constitutional right to treatment. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3188.

rehabilitation.⁹¹ Second, there is a right to rehabilitation when absence of an activity contributes to prison conditions falling below “the minimal civilized measure of life’s necessities,” which is prohibited by the Eighth Amendment.⁹² Third, lower courts have stated there is a right to rehabilitative programs when the incarcerated person is a juvenile.⁹³ Lastly, several courts have identified a right to rehabilitative treatment for involuntarily committed mentally-ill persons.⁹⁴ This last exception is less applicable because the majority of civilly committed persons are housed in hospitals rather than prisons, but it is still important to note that the courts have been willing to state a right based on constitutional grounds to rehabilitative programs and treatment.⁹⁵

Although there is not a uniform recognition of an incarcerated person’s right—neither constitutional nor statutory—to rehabilitative programs in the federal courts, a number of states⁹⁶ have mandated rehabilitation programs in their prison

⁹¹ See, e.g., *Ohlinger v. Watson*, 652 F. 2d 775 (9th Cir. 1980) (providing that the inmate, a sex offender, was sentenced under an Oregon law that provided child sex offenders receive treatment under indeterminate life sentences and holding that “[h]aving chosen to incarcerate [inmates] on the basis of their mental illness,” the state was obligated to provide meaningful treatment for that illness); *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981) (holding that a state statute mandating individual and group treatment established a right to treatment in the West Virginia corrections system).

⁹² *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). See, e.g., *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 619 (D.P.R. 1986) (determining that idleness was contributing to violence in the prison; thus, there was a derivative right to programs where necessary to avoid a stultifying milieu that would violate the Eighth Amendment); *Capps v. Atiyeh*, 559 F. Supp. 894, 909 (D. Or. 1982) (indicating that the right to ordered programs exists if programs would lessen the amount of prison violence); *Battle v. Anderson*, 564 F. 2d 388 (10th Cir. 1977) (stating that failure to provide vocational rehabilitative programs may constitute an Eighth Amendment violation if it is tied to the totality of conditions in the institution); *Knop v. Johnson*, 667 F. Supp. 512 (W.D. Mich. 1987) (holding that although idleness does not violate the Eighth Amendment, a court may remedy it by mandating programs if the idleness results in high levels of violence).

⁹³ *Nelson*, 491 F.2d at 352 (holding that juveniles have a right to rehabilitative treatment under the due process clause of the 14th Amendment); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1973) (holding that children who were not temporary detainees were constitutionally entitled to adequate treatment); *Alexander S. By and Through Bowers v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995) (holding that where the goal of a state’s juvenile justice system is rehabilitation, due process requires programs that are reasonably related to that goal).

⁹⁴ *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (holding that civilly committed mental patients have a right to individual treatment that will improve their mental condition); *Welsch v. Linkins*, 373 F. Supp. 487 (D. Minn. 1946) (holding that due process requires that civilly committed persons have minimally adequate treatment that gives each person a realistic opportunity to be cured or improve that mental condition).

⁹⁵ *Wyatt*, 503 F.2d at 1305 (recognizing the right to rehabilitation on due process grounds).

⁹⁶ See *infra* Part IV, Section C.

facilities by statute.⁹⁷ Correctional standards⁹⁸ and the American Bar Association⁹⁹ also uniformly call for the provision of rehabilitative programs in prisons. Therefore, it is evident that the push for rehabilitative programs by institutions surrounding and supporting the criminal justice system is not enough for the prison systems to actually provide them in all of their facilities.¹⁰⁰ The lack of legislative action to create a right to rehabilitative programs and judicial resistance to interpret or enforce such a right have resulted in many US prisons failing to mandate effective rehabilitative programs. This means that prisons are not *required*¹⁰¹ to implement these programs; they are merely *encouraged*¹⁰² to do so.

2. Right to Educational Programs

While there is no mention of education in the “Prisoner’s Rights,”¹⁰³ there have been multiple legislative actions that grant incarcerated persons *limited* legal rights to education. One of the first steps the United States took towards establishing educational programs in its federal prison systems was in 1982 with the Mandatory Literacy Requirement.¹⁰⁴ This program required prisons to provide

⁹⁷ See, e.g., Ark. Code Ann. §§ 12-29-306–310, 12-27-103; Cal. Penal Code §§ 2002, 2022, 2032; Ga. Code Ann § 42-5-57; N.Y. Correct Law § 136; R.I. Gen. Laws § 42-56-1. See generally National Advisory Commission on Criminal Justice Standards and Goals, Corrections Standard 2.9 (1973). See also *Holt v. Sarver*, 309 F. Supp. 362, 369 (D. Ark. 1970) (describing the Legislative Act 50 in Arkansas as a sweeping statute recognizing that rehabilitation should be an essential objective of the prison system); JOHN W. PALMER & STEPHEN E. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS (7th ed. 2004).

⁹⁸ See, e.g., ABA Standards for Criminal Justice, Standard 4.3 (1986); American Correctional Assn., Standards for Adult Correctional Institutions, Standard 3-4448 (4th ed. 2003) (requiring full-time work and/or program assignments for all inmates in the general population); US Dept of Justice, Federal Standards for Prisons and Jails § 17.01 (1980).

⁹⁹ American Bar Association, *Standards on Treatment of Prisoners* (3d ed. 2011) (“For the duration of each prisoner’s confinement, the prisoner . . . should be engaged in constructive activities that provide opportunities to develop social and technical skills, prevent idleness and mental deterioration, and prepare the prisoner for eventual release Correctional authorities should develop an individualized programming plan for the prisoner, in accordance with correctional authorities should give each prisoner access to appropriate programs, including . . . mental health and substance abuse treatment and counseling.”).

¹⁰⁰ FBP Programs, *supra* note 14 (outlining that the Rehabilitation and Values Enhancement Program—cognitive-behavioral based therapy—is offered at only two of the 122 federal prison facilities, and the Challenge Program—cognitive-behavioral based therapy—is offered at 13 federal prison facilities—mostly high security institutions).

¹⁰¹ See *supra* note 85.

¹⁰² See *supra* note 98.

¹⁰³ *Prisoners’ Rights*, *supra* note 76.

¹⁰⁴ Whitney, *supra* note 89, at 777; 18 U.S.C. § 3624 (f) (2008); Richard A. Tewksbury & Gennaro F. Vito, *Improving the Skills of Jail Inmates: Preliminary Program Findings*, 58 FED. PROBATION 55, 56 (1994).

minimal educational services to incarcerated persons. The Mandatory Literacy Requirement set a minimum sixth-grade education level for incarcerated persons.¹⁰⁵ In 1991, the education requirement was finally increased to a twelfth-grade level by the Federal Bureau of Prisons.¹⁰⁶ The increase in level of education required by the Mandatory Literacy Requirement was encouraged by the National Literacy Act of 1991—highlighting the illiteracy crisis in the United States in the early 1990s.¹⁰⁷ Shortly thereafter, the United States Department of Education enacted the 1992 Functional Literacy for State and Local Prisoners Program in an effort to educate incarcerated persons and reduce recidivism.¹⁰⁸

This positive progress toward providing education programs for incarcerated persons was subsequently limited to rudimentary levels of education when President Bill Clinton signed the Violent Crime Control and Law Enforcement Act (VCCLEA) in 1994—barring all state and federal prisoners from receiving federal financial aid for education programs.¹⁰⁹ This law effectively eliminated the chances that an incarcerated person receives any post-secondary education while in prison.¹¹⁰ The VCCLEA was hotly debated in the public arena in 1994; while some people and many organizations were against it, many people supported it because they believed incarcerated persons did not deserve the opportunity to receive a college education “free of charge.”¹¹¹ Fortunately, in 2015, the Restoring Education and Learning (REAL) Act was introduced to a congressional committee in hopes of making state and federal prisoners eligible for Pell grants—federal financial aid for post-secondary education programs.¹¹² The REAL Act had a 1% chance of being enacted as is in 2017 and has since died in

¹⁰⁵ Tewksbury & Vito, *supra* note 104, at 56.

¹⁰⁶ 28 C.F.R. § 544.70–75 (2009) (“an inmate confined in a federal institution who does not have a verified General Education Development (GED) credential or high school diploma is required to attend an adult literacy program for a minimum of 24 instructional hours or until a GED is achieved, whichever occurs first.”).

¹⁰⁷ Whitney, *supra* note 89, at 788. *See generally* National Literacy Act of 1991, Pub. L. No. 102-73, 105 Stat. 333 (1991) (authorizing literacy programs, a National Institute for Literacy, state literacy resource centers, national workforce demonstrations, and state grants).

¹⁰⁸ U.S. Dep’t of Educ., *Adult Education—Functional Literacy and Life Skills Programs for State and Local Prisoners* 417-1 (1997), <http://www.ed.gov/pubs/Biennial/95-96/eval/417-97.pdf>.

¹⁰⁹ Zoukis, *supra* note 9.

¹¹⁰ *Id.* At the time the VCCLEA was signed into law, there were over 350 prison-based college programs, but all but eight collapsed by the end of 1994 because they lost their funding for their prison-based programs. *Id.*

¹¹¹ *Id.* This perception that incarcerated persons would be receiving a college education “free of charge” or that the tax payers would have to suffer in order to provide such education opportunities is incorrect. *Id.* The schools providing the education received the funding, not the individual person, and prison-based college programs are extremely cost effective due to the drastic decrease in recidivism rates with secondary education. Zoukis, *supra* note 9.

¹¹² *Id.*

Congress.¹¹³ However, secondary and post-secondary education are gaining a renewed interest in the public eye, largely due to the dismal state of the US prison systems.¹¹⁴

Although there are legislative acts that recognize an incarcerated person's right to basic levels of education, the Supreme Court has not yet held that education is a fundamental right.¹¹⁵ However, each state constitution now incorporates an education provision, and many states also establish education programs by statute, but the constitutional provisions and statutes may not apply to incarcerated persons—namely when the provision specifically mentions children or fails to mention prisoners at all.¹¹⁶ These state constitutional or statutory provisions establishing a right to education can be interpreted not only to exclude incarcerated adults but also incarcerated juveniles.¹¹⁷ In *Tunstall ex rel Tunstall v. Bergeson*,¹¹⁸ the only state supreme court decision that directly addresses a state constitutional challenge to education in juvenile detention, the Washington Supreme Court recognized that there is a state constitutional right to education, but interpreted the provision to apply only to juveniles—individuals under the age of 18.¹¹⁹ Not only did the court exclude incarcerated adults from enjoying a right to education, but the court also stated that because incarcerated and non-incarcerated youths are not similarly situated for the purpose of providing education, it is completely justified to treat incarcerated youths *differently* with respect to their education.¹²⁰ This *different* treatment of education in and out of prison has led to a trend of providing

¹¹³ Govtrack, H.R. 2521: REAL Act of 2015, <https://www.govtrack.us/congress/bills/114/hr2521> (last visited Nov. 19, 2016).

¹¹⁴ Zoukis, *supra* note 9.

¹¹⁵ Plyer v. Doe, 457 U.S. 202, 221 (1982) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, 35 (1973)).

¹¹⁶ Paul L. Tractenberg, *Education Provisions in State Constitutions: A Summary of a Chapter for the State Constitutions for the Twenty-First Century Project 1* (2004), <http://statecon.camden.rutgers.edu/sites/statecon/files/subpapers/tractenberg.pdf>. For example, a 1998 amendment to Florida's constitution states: "The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders." *Id.* at 6.

¹¹⁷ *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wash. 2d 201, 201 (2001), *cert. denied*, 532 U.S. 920 (holding that Washington's Basic Education Act and Special Education Act do not apply to state inmates, but instead, the educational rights of state prison inmates are governed by statutes establishing systems of corrections and those that specifically establish education programs for juvenile inmates). See Jamie Polito Johnston, *Depriving Washington State's Incarcerated Youth of an Education: The Debilitating Effects of Tunstall v. Bergeson*, 26 SEATTLE U. L. REV. 1017, 1017–20 (2003).

¹¹⁸ *Tunstall*, 141 Wash. 2d at 226–27.

¹¹⁹ *Id.* This decision effectively ruled that incarcerated individuals over the age of 18 do not have a right to basic education while incarcerated. Johnston, *supra* note 117, at 1020.

¹²⁰ *Tunstall*, 141 Wash. 2d at 226–27 (emphasis added) (stating that nothing in the provision controlling juvenile education, which has a rational-basis review, mandates that the education for incarcerated youths be the same as that for nonincarcerated youths).

incarcerated youth with minimal to no educational services.¹²¹ Often, incarcerated youths will meet sporadically for a fraction of the state-mandated class time for non-incarcerated youths, and these classes are based on an incoherent curriculum.¹²² Some correctional facilities that house youths do not have libraries, books, or classrooms.¹²³ Teachers are often poorly trained and are not required to meet the standard qualifications for those who teach non-incarcerated students, let alone the qualifications necessary to meet the special needs of youth in detention facilities.¹²⁴

Hence, advocates for prison education face an uphill battle in convincing legislators of the importance of educational programs in prisons,¹²⁵ especially after the ideological turn in 1994.¹²⁶ Although there is legislation in place that provides basic level education programs for incarcerated persons in federal prisons and provisions in state constitutions that mandate education programs—often focusing on juveniles¹²⁷—in their prison systems, there remains a need for secondary education and consistency among prison systems for educational programs offered. More often than not, the offered programs are woefully inadequate.¹²⁸

¹²¹ Johnston, *supra* note 117, at 1020. *See e.g.*, *Brian B. v. Commonwealth of Pennsylvania Dep't of Educ.*, 230 F. 3d 582 (3d. Cir. 2000) (holding that an expelled student under the age of 17 has a right only to minimal education (about five hours a week versus the usual 27.5 hours a week), and that an expelled student over the age of 17 has no entitlement to education at all); Michael Bochenek, *No Minor Matter Children in Maryland's Jails*, HUM. RTS. WATCH (1999), <http://www.hrw.org/reports/1999/maryland/Maryland-08.htm> (last visited Jan. 15, 2017) (stating that the only standard with which state jails and detention facilities are required to comply with make no provision for inmate education).

¹²² Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765 (2008) (citing Human Rights Watch, *High Country Lockup: Children in Confinement in Colorado* 46 (1997)).

¹²³ *Id.*

¹²⁴ *Id. See, e.g.*, Barbara A. Moody, *Juvenile Corrections Educators: Their Knowledge and Understanding of Special Education*, 54 J. CORRECTIONAL EDUC. 105, 105 (2003) (describing a study about teachers in Oregon who receive no special training to teach juvenile delinquents and are only required to hold the lowest form of a teaching license); Dimitria D. Pope & Sylvia Martinez, *Coke County Juvenile Justice Center Audit*, PRISON LEGAL NEWS 10 (2007), https://www.prisonlegalnews.org/media/publications/tyc_cokecounty_audit_report%255b1%255d.pdf (showing that teachers were teaching subjects that they are not certified to teach and were not providing instruction to children in the security unit); Letter from R. Alexander Acosta, Assistant Attorney General, to the Honorable Janet Napolitano, Governor of Ariz. 18 (Jan. 23, 2004), http://www.juvenile.state.az.us/CRIPA/CRIPA_Report.pdf (last visited Jan. 15, 2017) (describing a facility that employs only three teachers for eighty special education students).

¹²⁵ Whitney, *supra* note 89, at 777.

¹²⁶ Zoukis, *supra* note 9. The positive outlook on prison education took a turn when the VCCEA was signed by President Bill Clinton in 1994. *Id.*

¹²⁷ *See generally* Johnston, *supra* note 117, at 1020; Twomey, *supra* note 122; Christine D. Ely, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795 (2008).

¹²⁸ *See generally* Zoukis, *supra* note 9; Johnston, *supra* note 117, at 1020; Twomey, *supra* note 122; Ely, *supra* note 127, at 795.

3. Right to Vocational Training Programs

Despite the suggestion in the American Bar Association's Standards for Criminal Justice that "prisoners generally should work under the same conditions that prevail in similar types of employment in free society"¹²⁹ and that "[p]risoners should not be excluded from otherwise applicable legislation concerning employment,"¹³⁰ the general rule followed by a majority of courts is that incarcerated persons do not have any constitutional right to work or to vocational training programs.¹³¹ While there is no Supreme Court decision on the issue of a constitutional right to vocational training, there is a general consensus among lower courts that the US Constitution does not establish such a right.¹³² Although a few courts, in older opinions and on the basis of statutory interpretation, have held that work opportunities must be provided to avoid the stultifying idleness that might otherwise happen,¹³³ the standard rule is that there is no legal right to work, let alone a right to vocational training for incarcerated persons.¹³⁴ The courts often reason that incarcerated persons have no liberty or property interest¹³⁵ in a job or training

¹²⁹ American Bar Association, *Legal Status of Prisoners*, 4 ABA's Standards for Criminal Justice 23-4.2 (1983).

¹³⁰ *Id.*

¹³¹ *Kritenbrink v. Crawford*, 313 F. Supp. 2d 1043 (D. Nev. 2004); *Jackson v. Hogan*, 388 Mass. 376, 446 N.E.2d 692 (1983); *Watson v. Secretary Pennsylvania Dept. of Corrections*, 567 Fed. Appx. 75 (3d Cir. 2014); *Johnson v. Rowley*, 569 F.3d 40 (2d Cir. 2009) (prisoner had no protected interest in job; due process claim failed); *Fuller v. Lane*, 686 F. Supp. 686 (C.D. Ill. 1988); *Jackson v. O'Leary*, 689 F. Supp. 846 (N.D. Ill. 1988); *Williams v. Sumner*, 648 F. Supp. 510, 1 I.E.R. Cas. (BNA) 1399, 43 Empl. Prac. Dec. (CCH) P 36995 (D. Nev. 1986).

¹³² *See Hoptowit v. Ray*, 682 F.2d 1237, 1254, 9 Fed. R. Evid. Serv. 1511 (9th Cir. 1982) (stating that idleness and lack of programs were not Eighth Amendment violations). *See also Robbins v. South*, 595 F. Supp. 785 (D. Mont. 1984) (concluding that 18 U.S.C.A. § 4122(b)(1) did not guarantee a job for every physically fit federal prisoner and the inmate's claim of a property or liberty interest in prison employment was unsuccessful).

¹³³ *See Pugh v. Locke*, 406 F. Supp. 318, 326 (M.D. Ala. 1976), *judgment aff'd and remanded*, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part, judgment rev'd in part on other grounds*, 438 U.S. 781 (1978); *Laaman v. Helgemoe*, 437 F. Supp. 269, 318 (D.N.H. 1977); *Barnes v. Government of Virgin Islands*, 415 F. Supp. 1218, 1226 (D.V.I. 1976); *Smith v. Owens*, 135 Pa. Commw. 631, 582 A.2d 85 (1990) (holding that state law requires all inmates not in restrictive housing to be employed).

¹³⁴ *Supra* note 132.

¹³⁵ *Boulware v. Federal Bureau of Prisons*, 518 F. Supp. 2d 186 (D.D.C. 2007) (no denial of liberty interest in receiving vocational training from the Federal Bureau of Prisons); *Jones v. U.S. ex rel. Dept. of Justice*, 412 Fed. Appx. 690 (5th Cir. 2011) (not published) (because inmate's Department of Justice's Federal Prison Industries (UNICOR) employment was not subject to constitutional protections, the inmate fails to state a violation of a constitutional right in claiming that the termination of his employment was retaliation on the part of prison officials); *Dawson v. Frias*, 397 Fed. Appx. 739 (3d Cir. 2010) (inmate had

programs; therefore, not offering these programs does not give rise to a due process violation.¹³⁶

Not only do incarcerated persons not have a legal entitlement to work or vocational training, but those who do get to work are not guaranteed the same rights and protections as non-incarcerated workers.¹³⁷ The Fair Labor Standards Act of 1938 (FLSA)¹³⁸ regulates wages and hours of many workers, and like many of its state counterparts, it is silent on whether prison labor is covered. There is no evidence that Congress intended to exclude incarcerated persons working in prisons from the protections of the FLSA.¹³⁹ Therefore, the inquiry becomes one of statutory interpretation—whether an incarcerated person is an “employee” within the meaning of the FLSA. The Supreme Court implemented the “economic reality” test to examine the employer-employee relationship,¹⁴⁰ and most courts, although not categorically excluding incarcerated persons from the FLSA,¹⁴¹ have held that incarcerated persons working in the prison are not “employee[s],” and therefore, do

neither a liberty nor property interest in prison employment, of kind required to support claim that he was terminated from prison works program in violation of his due process rights); *Alderson v. Shelby County Government*, 2012 WL 566934 (W.D. Tenn. 2012) (inmate did not have constitutionally protected property or a liberty interest in prison employment).

¹³⁶ *Locklear v. Thomas*, 2012 WL 669934 (E.D. N.C. 2012) (the loss of a job as a retaliatory measure is not actionable given that a prisoner has no right to work); *Marshall v. Federal Bureau of Prisons*, 518 F. Supp. 2d 190 (D.D.C. 2007) (no violation of due process rights when Federal Bureau did not offer placement in a vocational program); *Tanner v. Federal Bureau of Prisons*, 433 F. Supp. 2d 117 (D.D.C. 2006) (when pending transfer denying inmate of a vocational training program does not implicate due process protection); *Preston v. Ford*, 378 F. Supp. 729 (E.D. Ky. 1974) (no constitutional requirement that a State establish a work-release program).

¹³⁷ *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992) (“Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned to work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.”); *Dmytryszyn v. Hickenlooper*, 527 Fed. Appx. 757, 760 (10th Cir. 2013) (rejecting inmate’s claim that requiring him to work as a prison janitor for pay below the federal minimum wage violated Thirteenth Amendment’s prohibition against slavery, and the Fourteenth Amendment’s due-process and equal-protection clauses by stating “[t]he Thirteenth Amendment’s prohibition on ‘slavery [or] involuntary servitude’ does not apply to ‘a punishment for crime whereof the party shall have been duly convicted.’”) (citing U.S. Const. Amend. XIII). *See Ruark v. Solano*, 928 F.2d 947, 949–50 (10th Cir. 1991) (“The thirteenth amendment’s restriction on involuntary servitude does not apply to prisoners.”), *overruled on other grounds* by *Lewis v. Casey*, 518 U.S. 343 (1996).

¹³⁸ 29 U.S.C. § 201 (2008).

¹³⁹ *Hale v. Arizona*, 993 F.2d 1387, 1403 (9th Cir. 1993) (pointing out that inmates are not on the list of excluded employees).

¹⁴⁰ *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (using this test first on a non-prison case).

¹⁴¹ *Barnett v. Young Men’s Christian Ass’n, Inc.*, 175 F.3d 1023 (8th Cir. 1999).

not enjoy the standard protections of the FLSA.¹⁴² This statutory interpretation of “employee” demonstrates judicial reluctance to interfere with prison labor policies, absent a clear violation of constitutional rights—such as discrimination based on race, religion, or sex.¹⁴³

In sum, the United States does not provide an explicit legal right for incarcerated persons to participate in rehabilitation, education, or vocational training programs.¹⁴⁴ As previously discussed, these programs are not only beneficial to the incarcerated persons, but also to society as a whole.¹⁴⁵ These

¹⁴² See, e.g., *Bennett v. Frank*, 395 F.3d 409, 10 Wage & Hour Cas. 2d (BNA) 394 (7th Cir. 2005) (holding that prisoners do not qualify as employees for purposes of the FLSA and are therefore not entitled to the minimum wage, whether they work in private or public prisons. “The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.”); *Villarreal v. Woodham*, 113 F.3d 202 (11th Cir. 1997) (holding that a pretrial detainee is not an employee); *Franks v. Oklahoma State Industries*, 7 F.3d 971 (10th Cir. 1993) (FLSA definition of employee does not extend to inmates working in prison; “[Prisoners] have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.”); *Washington v. Cornell Corrections, Inc.*, 30 P.3d 1162, 1164 (Div. 1 2001) (holding an inmate’s confinement at a privately owned correctional facility did not alter his status as a prisoner and, thus, did not make him an employee under the FLSA). See also Kip Davis, *Recent Development: Fair Labor Standards Act*, 27 STETSON L. REV. 1156, 1158 (1998) (“the majority of the courts have held that prisoners should not be considered employees under the FLSA”); *Cox v. Ashcroft*, 603 F. Supp. 2d 1261, 1272 (E.D. Cal. 2009) (granting defendants’ motion to dismiss former prisoner’s claim alleging that the warden required him to work below the minimum wage in violation of the Fair Labor Standards Act (FLSA), and the court held that the plaintiff lacks standard to bring this claim since prisoners are not employees within the meaning of FLSA.); *Smith v. Dart*, 803 F.3d 304, 314 (7th Cir. 2015) (holding that a pretrial detainee, working in a jail laundry room as part of a veterans’ program, is not a jail employee and is therefore not entitled to compensation according to federal minimum wage laws.).

¹⁴³ See Catherine B. Crandall, *The Need for a Different Standard and Analysis in Equal Employment Opportunity Cases Arising in the Prison Setting*, 45 Ohio St. L.J. 737 (1984). See also *Al-Zubaidy v. TEK Industries, Inc.*, 406 F.3d 1030, 1037 (8th Cir. 2005) (involving a prisoner who failed to establish that workplace harassment and dismissal from his position from his prison job were related to his Shi’ite Iraqi background); *Walker v. Gomez*, 370 F.3d 969, 979 (9th Cir. 2004) (stating there was no denial of equal protection when prisoner was not permitted to return to his job and was excluded from a “critical workers list” after prison lockdown following violent racially motivated gang violence since prison had had legitimate interest in prison safety); *Marshall*, 518 F. Supp. 2d at 196. (holding there were no equal protection rights violated where an 18–25 age requirement had rational basis to encourage young inmates to participate in vocational training); *Allah v. Poole*, 506 F. Supp. 2d 174, 181 (W.D.N.Y. 2007) (stating that English-only communication rule for employees working in commissary was legitimately related to safety concerns and there was no First Amendment violation since communication was still permitted in English and ban on Spanish only had modest effect on inmate).

¹⁴⁴ See *supra* Part III, Section A.

¹⁴⁵ See *supra* Part II.

benefits have been observed through reductions in recidivism, increased efficiency, and fiscal responsibility of prison systems.¹⁴⁶ These benefits have been demonstrated by multiple European countries that have given incarcerated persons a legal entitlement to prison programming.¹⁴⁷

B. European Countries

The European Prison Rules explicitly state that there *shall* be rehabilitation programs, education programs, and vocational training/work programs available for all incarcerated persons.¹⁴⁸ The Committee of Ministers of the Council of Europe originally adopted the European Prison Rules in 1973. Following several revisions, a new version was adopted in 2006, replacing all previous versions entirely to reflect prison healthcare and medical service updates.¹⁴⁹ There are nine parts in the European Prison Rules ranging from conditions of imprisonment to sentencing.¹⁵⁰

The European Prison Rules are based on the United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).¹⁵¹ The United Nations General Assembly adopted a new version of the Standard Minimum Rules in 2015 after a five-year revision process.¹⁵² Before their official adoption by the United Nations General Assembly in 2015, the United Nations Congress on the Prevention of Crime and the Treatment of Offenders first adopted them in 1955.¹⁵³ Being the first legal instrument in the body of law in crime prevention and criminal justice, the Standard Minimum Rules have been shaping penal systems worldwide since 1955.¹⁵⁴ Although legally non-binding, more than 100 countries have relied on these standards for over 50 years in writing their national laws and policies on criminal justice.¹⁵⁵ The language of the Standard Minimum Rules alone suggests the authoritative nature the General Assembly intended them to have on Member States to the UN Charter, and many Member States have modeled their criminal justice systems directly on the Standard Minimum Rules,¹⁵⁶ including the Council of Europe in drafting the European Prison Rules.¹⁵⁷

¹⁴⁶ See *supra* Part II.

¹⁴⁷ See *infra* Part III, Section B, subsections 1–3.

¹⁴⁸ See generally European Prison Rules, *supra* note 13.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Standard Minimum Rules 1977, *supra* note 13; R. Walmsley, *The European Prison Rules in Central and Eastern Europe*, 3 EUR. J. CRIM. POL'Y 73 (1995).

¹⁵² G.A. Res. 65/230, at 11 (Dec. 21, 2010).

¹⁵³ See Standard Minimum Rules 1977, *supra* note 13.

¹⁵⁴ United Nations Office on Drugs and Crime, *United Nations Prison-Related Standards and Norms*, <http://www.unodc.org/newsletter/pt/perspectives/no02/page004a.html> (last visited Jan. 17, 2017).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Standard Minimum Rules 1977, *supra* note 13; Walmsley, *supra* note 151, at 73.

Although the European Prison Rules are not legally binding for Member States of the Council of Europe and are based on the technically non-binding Standard Minimum Rules, multiple European nations have used them as binding law as the basis for complaints against inadequate prison services.¹⁵⁸ Since the European Prison Rules' latest revision in 2006, 47 European governments have signed on to hold them as the *minimum* standards on correctional services.¹⁵⁹ Norway, one of the 47 European governments to sign onto and ratify the European Prison Rules,¹⁶⁰ has used violations of the European Prison Rules as grounds for suit in the European Court of Human Rights.¹⁶¹

Therefore, although the European Prison Rules and the Standard Minimum Rules are legally non-binding, some countries have adopted them as binding law, violations thereof enforceable in a court of law.¹⁶² Because multiple European countries have adopted the European Prison Rules as the foundation for their prison systems and the specific codification of each country varies (their codification is based on the widely adopted Standard Minimum Rules), the following sections are excerpts from both the European Prison Rules and the Standard Minimum Rules establishing the rights granted to incarcerated persons in each category of program.

1. Right to Rehabilitation Programs

The European Prison Rules deliberately avoid the use of the term “rehabilitation,” which carries the connotation of forced treatment. Instead, the European Prison Rules highlight the importance of providing incarcerated persons ample opportunities to develop treatment in their own customized way, enabling them to lead law-abiding lives upon reentry into society.¹⁶³ The progressive approach to rehabilitation of incarcerated prisoners is codified in the European Prison Rules as follows:

102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.

¹⁵⁸ *Supra* note 73.

¹⁵⁹ ESPU, *supra* note 73. (emphasis added)

¹⁶⁰ *Id.*; Kriminalomsorgens Yrkesforbund, *Complaint Against the Norwegian Correctional Service Concerning Contravention of Regulations Established in the European Prison Rules*, (Sept. 9, 2009), http://www.epsu.org/sites/default/files/article/files/KY-YS_complaint-2.pdf (“The European Prison Rules have been ratified by Norway”).

¹⁶¹ ESPU, *supra* note 73 (covering the first case in which a trade union was using the rules as a basis for their claim against Norway’s Correctional Services).

¹⁶² *Id.*

¹⁶³ European Prison Rules, *supra* note 13, Commentary on Rule 103.

103.2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release.

103.3 Sentenced prisoners shall be encouraged to participate in drawing up their individual sentence plans.

103.4 Such plans shall as far as is practicable include:

a) work; b) education; c) other activities; and d) preparation for release.

103.5 Social work, medical and psychological care may also be included in the regimes for sentenced prisoners.

103.6 There shall be a system of prison leave as an integral part of the overall regime for sentenced prisoners.

103.7 Prisoners who consent to do so may be involved in a programme of restorative justice and in making reparation for their offences.

103.8 Particular attention shall be paid to providing appropriate sentence plans and regimes for life sentenced and other long-term prisoners.¹⁶⁴

Rule 88 from the Standard Minimum Rules addresses the right to rehabilitation programs as follows:

The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.¹⁶⁵

The language in the above quoted rules explicitly provide for rehabilitation programming. Incarcerated persons have the advantage of invoking this right through the judicial system in countries that have

¹⁶⁴ European Prison Rules, *supra* note 13, Rules 102–03.

¹⁶⁵ G.A. Res. 70/175 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 88 (Jan. 8, 2016) [hereinafter Nelson Mandela Rules] (providing additionally in Rule 25 for immediate evaluation of the incarcerated persons' psychological and mental state with qualified personnel with sufficient expertise in psychology and psychiatry; also, Rule 76 provides that all staff shall at a minimum have training on the psychosocial needs of incarcerated persons including the early detection of mental health issues).

implemented or established their legal framework around the European Prison Rules or the Standard Minimum Rules.

2. Right to Educational Programs

A right to an education for all prisoners is made explicitly clear in the European Prison Rules, and the rules provide additional guidelines for sentenced prisoners' education:

28.1 Every prison shall seek to provide all prisoners with access to educational programmes which are as comprehensive as possible and which meet their individual needs while taking into account their aspirations.

28.2 Priority shall be given to prisoners with literacy and numeracy needs and those who lack basic or vocational education.

28.3 Particular attention shall be paid to the education of young prisoners and those with special needs.

28.4 Education shall have no less a status than work within the prison regime and prisoners shall not be disadvantaged financially or otherwise by taking part in education.

28.5 Every institution shall have a library for the use of all prisoners, adequately stocked with a wide range of both recreational and educational resources, books and other media.

28.6 Wherever possible, the prison library should be organized in co-operation with community library services.

28.7 As far as practicable, the education of prisoners shall: a) be integrated with the educational and vocational training system of the country so that after their release they may continue their education and vocational training without difficulty; and b) take place under the auspices of external educational institutions....

106.1 A systematic programme of education, including skills training, with the objective of improving prisoners' overall level of education as well as their prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners.

106.2 All sentenced prisoners shall be encouraged to take part in educational and training programmes.

106.3 Educational programmes for sentenced prisoners shall be tailored¹⁶⁶ to the projected length of their stay in prison.¹⁶⁷

The educational provisions in the Standard Minimum Rules provide for education of all incarcerated persons who would benefit from such instruction, and the rules make education of illiterate and young prisoners¹⁶⁸ compulsory.¹⁶⁹ The Standard Minimum Rules also emphasize that education programs offered by the prison should be integrated with the education system of the country so that after release the incarcerated persons can easily continue to further their education.¹⁷⁰

3. Right to Vocational Training Programs

Under both the European Prison Rules and the Standard Minimum Rules, vocational training is required, and the incarcerated persons are able to choose which area of work they want to receive training in. Additionally, the incarcerated persons are compensated for their work, have maximum work hours, and are protected by the same health and safety rules of non-incarcerated persons.¹⁷¹ The European Prison Rules pertinent sections state the following:

26.1 Prison work shall be approached as a positive element of the prison regime and shall never be used as a punishment.

26.2 Prison authorities shall strive to provide sufficient work of a useful nature.

26.3 As far as possible, the work provided shall be such as will maintain or increase prisoners' ability to earn a living after release.

26.5 Work that encompasses vocational training shall be provided for prisoners able to benefit from it and especially for young prisoners.

26.6 Prisoners may choose the type of employment in which they wish to participate, within the limits of what is available, proper

¹⁶⁶ Note the language in this rule that suggested each incarcerated person has an education program that is offered and encouraged and one that is uniquely tailored to their needs.

¹⁶⁷ European Prison Rules, *supra* note 13, Rule 28.

¹⁶⁸ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice call upon government officials to ensure that children deprived of their liberty (incarcerated) "do not leave the institution at an educational disadvantage." G.A. Res. 45/113 U.N. Rules for the Protection of Juveniles Deprived of Liberty, Article 38 (Dec. 14, 1990).

¹⁶⁹ Nelson Mandela Rules, *supra* note 165, Rule 104 ("Provision shall be made for the further education of all prisoners capable of profiting thereby. . . . The education of illiterate prisoners and of young prisoners shall be compulsory").

¹⁷⁰ *Id.*

¹⁷¹ European Prison Rules, *supra* note 13, Rule 26.

vocational selection and the requirements of good order and discipline.

26.7 The organization and methods of work in the institutions shall resemble as closely as possible those of similar work in the community in order to prepare prisoners for the conditions of normal occupational life.

26.10 In all instances there shall be equitable remuneration of the work of prisoners.

26.13 Health and safety precautions for prisoners shall protect them adequately and shall not be less rigorous than those that apply to workers outside.

26.15 The maximum daily and weekly working hours of the prisoners shall be fixed in conformity with local rules or custom regulating the employment of free workers.¹⁷²

The Standard Minimum Rules are completely in line with the European Prison Rules in their vocational training provisions:

Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners. Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.¹⁷³

The collective intent of the European Prison Rules and the Standard Minimum Rules is clear. Both guarantee incarcerated persons the right to rehabilitation, education, and vocational training programs. Each provision states that these programs *shall* be offered.¹⁷⁴ As previously mentioned, many countries have adopted these rules as binding law and enforce them in their prison systems. Norway, being one of the strongest supporters of the European Prison Rules (enforcing them not only in their own country¹⁷⁵ but financially supporting other

¹⁷² European Prison Rules, *supra* note 13, Rule 26.

¹⁷³ Nelson Mandela Rules, *supra* note 165, Rule 98.

¹⁷⁴ See generally European Prison Rules, *supra* note 13; Nelson Mandela Rules, *supra* note 165.

¹⁷⁵ Kriminalomsorgen, The Execution of Sentences Act, Jan. 20, 2004 §3-18, 4–49 (stating that prisoners are entitled to participate in work, training, programmes, or other measures and that facilities need to be provided to facilitate such programmes); Kriminallomsorgen, Regulations to the Execution of Sentences Act, Feb. 22, 2002 §6-4 (stating that inmates whose social interactions are limited due to being kept in high security facilities will have extended contact with staff and satisfying facilities for work, training, and other leisure pursuits).

countries' implementation of the rules),¹⁷⁶ has one of the lowest recidivism rates in the world.¹⁷⁷ These programs have been extremely effective in European countries and the United States alike.¹⁷⁸ Unfortunately, despite the clear evidence that these programs are beneficial to both the incarcerated persons and society as a whole, the United States has not yet granted such rights to incarcerated persons.¹⁷⁹

IV. FORMULATING A LEGAL ENTITLEMENT TO PRISON PROGRAMMING IN THE UNITED STATES

Although incarcerated persons currently hold no right to prison programming in the United States, there are several arguments for establishing this right under current law. First, the evolution of the Eighth Amendment under evolving standards of decency should include deprivation of basic prison programming as “cruel and unusual.” Second, the Standard Minimum Rules have become CIL by their wide acceptance and practice throughout the globe. However, it is not likely that an interpretation of the current legal framework will establish a right to prison programming. Therefore, in the alternative, a right to prison programming should be created through Congressional legislation.

A. Deprivation of Prison Programs as a Violation of the Eighth Amendment

The Eighth Amendment prohibits government actors from using “cruel and unusual punishments.”¹⁸⁰ There are three phases that can be identified in the development of the Cruel and Unusual Punishments Clause. Each phase expanded the scope of the protection provided by the Eighth Amendment, and each phase relied more on international norms for interpretative standards.¹⁸¹

In the first phase, the Supreme Court interpreted the Eighth Amendment as prohibiting only “barbaric or torturous punishments” or disproportionate punishments.¹⁸² Even during this first phase, the Supreme Court looked to the customs and norms of other civilized nations to establish standards for interpreting

¹⁷⁶ *Armenia's Prison System to Comply with European Prison Rules*, *supra* note 73.

¹⁷⁷ *Deady*, *supra* note 3.

¹⁷⁸ *See supra* Part II.

¹⁷⁹ *See generally supra* Part III, Section A.

¹⁸⁰ U.S. CONST. amend. VIII.

¹⁸¹ David Heffernan, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 488 (1996).

¹⁸² *Id.* at 488 (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (holding that “punishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden by ... [the Eighth Amendment]”); *In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that “[p]unishments are cruel when they involve torture or a lingering death”); *Weems v. United States*, 217 U.S. 349, 389–81 (1910) (holding for the first time that the Eighth Amendment prohibits disproportionate punishments)).

the Eighth Amendment. The Eighth Amendment is the principle of civilized treatment, which is a continuously evolving standard of decency.¹⁸³ The second phase began when the Supreme Court expanded the protection of the Eighth Amendment to prohibit infliction of wanton or unnecessary pain on incarcerated persons.¹⁸⁴ This interpretation of the Eighth Amendment expanded the protection beyond torturous punishments to a much lesser standard of wanton infliction of pain. The final phase of judicial interpretation started during the 1970s, when the Supreme Court expanded Eighth Amendment protections to prison conditions.¹⁸⁵ The Court granted inmates rights, albeit limited, regarding correspondence, parole revocation, prison discipline, medical care, and court access.¹⁸⁶

A lower court decision, *Holt v. Sarver*,¹⁸⁷ encompassed this progressive period of Eighth Amendment expansion. The court in *Holt* stated that an incarcerated person's status as a "functioning member" of society becomes more problematic as the disparity grows between the free world and confinement.¹⁸⁸ The court held that the conditions in the Arkansas State Penitentiary violated the Eighth Amendment because confinement amounted to banishment to a "dark and evil

¹⁸³ *Paquete Habana*, 175 U.S. 677, 712 (1900) (confronting tension between customary international law and original intent in interpretation of the Constitution and stating that where international law applies those customs prevail over original intent); *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that evolving standards of decency that mark the progress of a maturing society should influence the interpretation of Eighth Amendment protection). This evolving standard of decency was also implemented in *Roper v. Simmons*, which dealt with the death penalty for juveniles. 543 U.S. 551 (2005). The Court stated that when applying the Eighth Amendment it is *necessary* to refer to the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 551 (emphasis added). In applying this evolving standard, the Court relied heavily on European law—European Court of Human Rights, European Convention, European courts, and European Criminal Procedures—in their holding that the death penalty for juveniles was unconstitutional. *Id.* at 624–28. In addition to public international law, the Court has referred to studies and data composed by international bodies. Shawn E. Fields, *Constitutional Comparativism and the Eighth Amendment: How A Flawed Proportionality Requirement Can Benefit from Foreign Law*, 86 B.U. L. REV. 963, 968 (2006).

¹⁸⁴ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (holding that accidental infliction of pain—malfunctioning electric chair—did not violate the Eighth Amendment).

¹⁸⁵ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (noting that deliberate indifference to serious medical needs of prisoners by prison officials could violate the Eighth Amendment); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (holding that solitary confinement periods exceeding 30 days violated the Eighth Amendment).

¹⁸⁶ *Procunier v. Martinez*, 416 U.S. 396, 398 (1974) (correspondence); *Morrissey v. Brewer*, 408 U.S. 471, 490 (parole revocation); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (prison discipline); *Estelle*, 429 U.S. at 104 (medical care); *Bounds v. Smith*, 430 U.S. 817, 817 (1977) (courts assess).

¹⁸⁷ *Holt v. Sarver*, 309 F. Supp. 362, 381 (D. Ark. 1970).

¹⁸⁸ *Id.*

world completely alien to the free world.”¹⁸⁹ Thereby the court emphasized the importance of keeping prisons as close to the free world as practically possible.

Unfortunately, the progressive nature of the Supreme Court came to a halt under the Rehnquist Court in the 1980s¹⁹⁰—mainly by narrowing the interpretation of wanton and unnecessary pain and deliberate indifference.¹⁹¹ The Court greatly narrowed the application of unnecessary pain in a landmark detention case, *Rhodes v. Chapman*.¹⁹² In *Rhodes*, the Court held that double-celling¹⁹³ did not meet the standard for Eighth Amendment protection, which overruled several lower court decisions protecting inmates from idleness by providing work and programs.¹⁹⁴ Additionally, the Court developed a two-prong test for deliberate indifference, including both a subjective and objective test.¹⁹⁵ Under the objective test, an injury must be “sufficiently serious” to fall under the protection of the Eighth Amendment, and under the subjective test, the prison official responsible for the violation must have had a culpable state of mind.¹⁹⁶ Although this two-prong inquiry raised the Eighth Amendment threshold, the Court also stated that “conditions of confinement” could meet the requirements of the objective test,¹⁹⁷ but the Court promptly reneged on that glimmer of hope in *Farmer v. Brennan*,¹⁹⁸ which emphasized the prohibition on cruel and unusual “punishments” and not “conditions.” Regrettably, the narrow two-prong test implemented in the 1980s under the Rehnquist Court is the current standard for challenging prison conditions. However, many state and circuit courts have not followed or have declined to extend the two controlling decisions—*Farmer* and *Wilson*.¹⁹⁹ There has been much resistance, confusion, and inconsistency regarding the application of the current two-prong test for prison conditions violating the Eighth Amendment.²⁰⁰

¹⁸⁹ *Holt*, 309 F. Supp. at 381.

¹⁹⁰ Note this is also the time a “hands-off” approach was taken by the judiciary in prison regulation cases. *See supra* Part III, Sec. A.

¹⁹¹ Heffernan, *supra* note 181, at 495–96.

¹⁹² *Rhodes v. Chapman*, 452 U.S. 337, 347–48 (1981).

¹⁹³ The practice of housing two incarcerated persons in a cell designed to hold one.

¹⁹⁴ *Rhodes*, 452 U.S. at 337.

¹⁹⁵ *Wilson v. Seiter*, 501 U.S. 294 (1991).

¹⁹⁶ *Id.* at 303–305.

¹⁹⁷ *Id.*

¹⁹⁸ *Farmer v. Brennan*, 511 U.S. 825 (1970).

¹⁹⁹ *See, e.g., Giraldo v. California Dept. of Corrections and Rehabilitation*, 85 Cal. Rptr.3d 371 (2008) (imposing a duty of care between the jailer and the prisoner); *Sheperd v. Washington County*, 962 S.W.2d 779 (Ark. 1998) (adopting a standard of conscious indifference); *Wilkins v. Moore*, 40 F.3d 954 (8th Cir. 1994) (declining to extend the two-prong test to prison brutality); *Stone v. City of San Francisco*, 968 F.2d 850 (9th Cir. 1992) (holding that the two-prong test does not apply when a prison has consented to improving prison conditions).

²⁰⁰ Brittany Glidden, *Necessary Suffering? Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1828 (2012).

The inconsistent application of the Eighth Amendment is in itself evidence that a reevaluation of the current standards is necessary. This is further evident when the current standards of prison conditions in the United States are compared with prison conditions in European countries. Until the United States adjusts its policies and legislation to align with other Western nations' treatment of incarcerated persons, the United States will remain an immature nation.²⁰¹ If the Supreme Court were to step away from the narrow two-prong test and rely on earlier decisions, it could develop a standard more consistent with today's international norms on penal justice, which are reflected in the UN's adoption of the Standard Minimum Rules. Education and work training have become a necessity to maintain a livelihood in today's society. The need for education and work training is even more pronounced when an individual is trying to support himself or herself while suffering the collateral consequence of having the permanent mark on their record in the form of a criminal conviction. According to the *Trop* decision, the Eighth Amendment must draw its meaning from the evolving standards of decency in maturing societies. In light of the language used in *Wilson*, depriving an incarcerated person of a single basic need may violate the Eighth Amendment. Given this precedent and the basic necessities needed to survive outside of incarceration, the deprivation of prison programs arguably violates the Eighth Amendment.

B. Prison Programming Entitlement Under Customary International Law

Binding international law takes two forms: treaties and customary international law (CIL).²⁰² CIL is established by acts of States that are similar, repeated, and undertaken with a sense of legal obligation.²⁰³ Once state practice reaches a consensus²⁰⁴ to which states feel legally obligated to act in conformity with this norm, it becomes binding under CIL.²⁰⁵ Although the United Nations Standard Minimum Rules for the Treatment of Prisoners is a declaration rather than a treaty, and therefore "soft" law and non-binding, it still has a force of authority and impact when invoked due to its establishment as a custom.²⁰⁶ Because the development of international law is a complex process and has many moving parts, international human rights law has utilized a combination of binding and non-binding instruments to set forth human rights guarantees and obligations.²⁰⁷

²⁰¹ See *infra* Part IV, Section B.

²⁰² Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 762 (1994).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS PROBLEMS OF LAW POLICY, AND PRACTICE, 142 (Vicki Been et al. eds., 5th ed. 2011).

²⁰⁷ *Id.* at 143.

The Standard Minimum Rules are categorized as primary soft law.²⁰⁸ Primary soft law is the most authoritative form of non-binding international law, which often takes the form of normative texts addressing the international community as a whole or the entire membership of the adopting institution.²⁰⁹ The Standard Minimum Rules take the form of the latter; as a UN declaration, they address the entire membership of the United Nations and declare updated norms for all Member States to abide by.²¹⁰ When a declaration is used to announce new norms, the institution often intends for it to be a precursor to a treaty or convention, if the norm does not first become binding under CIL.²¹¹ Primary soft law is often used as a mechanism for announcing the international consensus of a forming norm before all States are prepared to sign onto or ratify a treaty on the same rights.²¹² Essentially, declaratory soft law is used as a segue into either CIL or binding treaty law.

There is a widespread acceptance of the Standard Minimum Rules on an international scale, which strengthens the proposition that these are forming recognizable and enforceable norms under CIL. The adoption process itself demonstrates the authority and support behind the standards. The Standard Minimum Rules are the product of five years of extensive consultation and negotiations between government organizations, civil society groups, and independent experts.²¹³ Various UN entities partook in consultations of the standards, including: the Office of the High Commissioner for Human Rights, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Office on Drugs and Crime, specialized agencies, and the World Health Organization.²¹⁴ Prior to the adoption by the UN General Assembly, the United Nations Commission on Crime Prevention and Criminal Justice (CCPCJ) adopted the revised Standard Minimum Rules in early 2015.²¹⁵ The CCPCJ's adoption of the standards was sponsored by Argentina, Austria, Brazil, Chile, Ecuador, El Salvador, France, Italy, Lebanon, Mexico, Nicaragua, Panama, Paraguay, Poland, South Africa, the United States, and Uruguay. Additionally, the Dominican Republic, Norway, Switzerland, Serbia, Bolivia, Liechtenstein, Japan, Canada, and Latvia co-sponsored the adoption on behalf of the European Union as a whole.²¹⁶ Over 25 countries from all over the globe

²⁰⁸ HANNUM ET AL., *supra* note 206, at 143.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 147.

²¹³ International Justice Resource Center, *Mandela Rules Adopted: Landmark Revisions Made to UN Standard Minimum Rules for Treatment of Prisoners* (June 3, 2006), <http://www.ijrcenter.org/2015/06/03/mandela-rules-adopted-landmark-revisions-to-un-standard-minimum-rules-for-the-treatment-of-prisoners/>.

²¹⁴ *Id.*

²¹⁵ Penal Reform International, '*Mandela Rules*' on Prisoner Treatment Adopted (May 26, 2015), <https://www.penalreform.org/news/mandela-rules-on-prisoner-treatment-adopted/>.

²¹⁶ *Id.*

sponsored the adoption of these standards, expressing an international acceptance of the norms set out in the standards. The approval from the UN General Assembly came later in 2015, and this approval and adoption of the Standard Minimum Rules represented a powerful global consensus on norms for the *minimum* treatment of incarcerated persons.

Additionally, in 1973, following the adoption by the UN General Assembly, the Committee of Ministers adopted the European Prison Rules as well.²¹⁷ As discussed above, since their adoption in 2006, 47 European governments have elected to make these rules the minimum standards for the treatment of incarcerated persons in their States, as they were intended.²¹⁸ Countries have been strongly encouraged to adopt the Standard Minimum Rules in their national legislation so that they can be applied as uniform international standards like the 1955 Standard Minimum Rules, which were adopted at the very first Congress on Crime Prevention in Geneva.²¹⁹ The 1955 Standard Minimum Rules were regarded by States as the primary—and in some cases the only—source of international standards on treatment of incarcerated persons.²²⁰ Monitoring and inspecting bodies used the 1955 Standard Minimum Rules as the framework for their assessment of States' detention facilities.²²¹ The 2006 Standard Minimum Rules are merely an updated version of the 1955 Standard Minimum Rules, bringing the standards in line with the widely accepted norms of human rights applied to penal reform.²²² The international reliance on and acceptance of the 1955 Standard Minimum Rules strengthen the argument that the revision of those standards are CIL reflecting generally accepted norms of treatment of incarcerated persons.

Although the United States continually supported—vocally advocating for their adoption at meetings—the adoption of these standards by the United Nations and referenced them as the contemporary standards of decency in opinions,²²³ they have yet to implement them in domestic law.²²⁴ However, this is not the first time the United States has talked the talk but failed to walk the walk. In fact, the number

²¹⁷ See generally European Prison Rules, *supra* note 13.

²¹⁸ ESPU, *supra* note 73.

²¹⁹ Press Release. “Mandela Rules” Passed, Standards on the Treatment of Prisoners Enhanced for the 21st Century, <https://www.unodc.org/unodc/en/press/releases/2015/May/mandela-rules-passed--standards-on-the-treatment-of-prisoners-enhanced-for-the-21st-century.html> (last visited Feb. 15, 2017).

²²⁰ UN Insider, *UN Adopts the Nelson Mandela Rules for the Treatment of Prisoners* (Jan. 15, 2016), <http://www.indepthnews.net/index.php/global-governance/un-insider/83-un-adopts-the-nelson-mandela-rules-for-the-treatment-of-prisoners>.

²²¹ *Id.*

²²² *Id.*

²²³ *Lareau v. Manson*, 651 F.2d 96, 107 (1981). See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

²²⁴ Christopher Zoukis, *What ‘The Mandela Rules’ Mean for American Prisons* (June 24, 2016), http://www.huffingtonpost.com/christopher-zoukis/what-the-mandela-rules-mean-for-american-prisons_b_7649928.html.

of times the United States has fallen behind in the implantation of widely recognized norms of international law is too extensive to delve into; therefore, one brief yet applicable comparison is the execution of juveniles. Until 2005, the United States was of the opinion that it did not violate the Eighth Amendment to sentence juveniles to death.²²⁵ Despite the consistent and forceful international opposition to this practice for over a decade, the United States continued to execute juveniles well past the time its prohibition was an accepted international norm.²²⁶

One explanation the Supreme Court presented for its reluctance to use international instruments to interpret domestic law was that it is the *American* conception of decency that is dispositive, not international consensus.²²⁷ That rejection of the world consensus became the dissenting opinion in *Roper v. Simmons*.²²⁸ The Court's holding in *Roper*—execution of juveniles was a violation of the Eighth Amendment—relied on international norms and prohibition of juvenile execution in other countries.²²⁹ The Supreme Court relied on a number of international bodies of law such as resolutions and declarations adopted by the UN General Assembly prohibiting this practice.²³⁰ The United States should refrain from making the same mistake again—disregarding international consensus and practice—by implementing the Standard Minimum Rules as supported by CIL.

C. Policy Argument for Congressional Legislation – Proposed Legislation

Even if the United States does not comport with the Standard Minimum Rules under obligation of the Eighth Amendment or CIL, Congress should nonetheless enact legislation supplanting them, or their core ideas, as the *minimum* standards of the treatment of incarcerated persons in the United States. Setting aside all of the benefits to the true beneficiaries—the incarcerated persons—such legislation is beneficial to the United States as whole. Not only would it be sensible due to the ample research provided showing a strong relationship between prison programming and reduced recidivism rates, but it would be politically sensible both domestically and internationally. Such legislation would also be fiscally responsible and efficient, as discussed above.

The epidemic of over-incarceration in the United States is a bipartisan issue.²³¹ Conservatives and liberals have come to the conclusion that incarcerating huge numbers of people and re-incarcerating people is intrusive, destructive,

²²⁵ See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

²²⁶ Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 3.

²²⁷ *Stanford v. Kentucky*, 492 U.S. 361 (1989) (J. Scalia, plurality opinion).

²²⁸ *Roper*, 543 U.S. at 551, 622–630 (J. Scalia, dissenting opinion).

²²⁹ *Id.* at 551.

²³⁰ HANNUM ET AL., *supra* note 206, at 471.

²³¹ Jennifer Vogel, *In Defense of Public Defenders*, BENCH & B. MINN., Apr. 13, 2015, at ¶¶ 18, 19.

ineffective, and expensive.²³² There is even a bipartisan coalition being formed to lobby for reducing prison populations, reconstructing sentencing guidelines, and examining racial and economic disparities in detention.²³³ The bipartisan nature of the movement for reform, especially in these politically polarized times, demonstrates that the current penal system is not working. It would be politically sensible and appease both parties for Congress to enact legislation that would effectively lead to reductions in both recidivism and overcrowding of the prison population.²³⁴

From a global perspective, failing to abide by the Standard Minimum Rules could reflect negatively on the United States. The United States has been accused on multiple occasions of “talking out of both sides of its mouth.”²³⁵ The United States continually pronounces that human rights are central to US foreign policy, but that assertion is undermined when the United States portrays a sense of exceptionalism—that the Constitution and justice system cannot be improved upon—in their domestic incorporations of internationally recognized human rights.²³⁶ The failure to align US prison policies with the rest of the Westernized world strongly emphasizes the immature state of our union. The United States could solve this problem by drawing from other countries and using the Standard Minimum Rules to create a federal statute that provides for prisoner programming and human rights for incarcerated persons.²³⁷ The United States is in a unique position of power with its vast intellectual, financial, and political resources, and it could set in motion a global change in prison reform.²³⁸

Since their creation in 1955, the Standard Minimum Rules have been officially implemented in several states’ criminal codes.²³⁹ Pennsylvania, South Carolina, Ohio, Minnesota, Connecticut, and Illinois had all adopted the Standard Minimum Rules by 1974, and more states have accepted them throughout the years.²⁴⁰ Since their update in 2015, several states have embodied the updates in their state statutes on detention, such as Colorado and Virginia.²⁴¹ Colorado and Virginia have exemplary codifications of prison programming which not only embody the language from the Standard Minimum Rules, but also the ideals behind them. These state statutes exemplify the importance of bringing home the principles of the Standard Minimum Rules; therefore, Congress should enact legislation that grants incarcerated persons enumerated rights to effective prison programming.

²³² Vogel, *supra* note 231.

²³³ *Id.*

²³⁴ *See supra* Part II.

²³⁵ Whitney, *supra* note 89, at 805–06.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Bernard, *supra* note 202, at 770.

²⁴⁰ *Id.*

²⁴¹ *See, e.g.*, COLO. REV. STAT. § 17 (2016); VA. CODE ANN § 53 (2016).

Below is proposed legislative language based not only on the Standard Minimum Rules, but also the Colorado and Virginia statutes that embody the principles of the Standard Minimum Rules in their codification.

Proposed Legislation:

- (1) The treatment of incarcerated persons shall emphasize their inclusion in society not their exclusion from it. The focus of incarceration shall be rehabilitation not punishment. It is the intent of Congress that these programs shall benefit persons who are being incarcerated in prisons in the United States. Research demonstrates a clear relationship between employment, education, and mental stability of such persons and a reduction in their recidivism. The general purpose of state correctional facilities is to provide proper employment, vocational training, education, and treatment to all incarcerated persons in accordance with this title. It is therefore Congress's intent in enacting this article to ensure that funding is provided for rehabilitation, educational, and vocational training programs.
- (2) Upon admission to the detention center:
 - a. Reports shall be made by the following professionals:
 - i. Licensed and qualified psychologist regarding mental health and history of abuse;
 - ii. Medical doctor regarding physical health; and
 - iii. Social worker regarding aptitude for reintegration.
 - b. Each incarcerated person shall be assigned a counselor who will use these reports to develop a specified rehabilitation sentencing plan. The plan may include a combination of the following, but each incarcerated person is entitled under this title to participate in sections i, ii, and iii upon request:
 - i. Mental health treatment;
 - ii. Educational programming;
 - iii. Vocational training;
 - iv. Reentry program;²⁴²

²⁴² The definitions of reentry program, work, recreational activities, and any other programs or activities the counselor believes will most benefit the incarcerated person in rehabilitation and social reintegration are outside the scope of this note.

- v. Work;
- vi. Recreational activities; and
- vii. Any other programs or activities the counselor believes will most benefit the incarcerated person in rehabilitation and social reintegration.

(3) Under this title, “mental health treatment” shall mean:

- a. The cognitive-behavioral therapy based program for incarcerated persons developed and implemented by qualified mental health professionals in order to defuse criminal thinking, addiction mindsets, and troublesome thought processes through therapeutic community groups and meetings.

(4) Under this title, “educational programming” shall mean:

- a. The comprehensive competency-based educational program for incarcerated persons developed and implemented by qualified teachers and professors in order to meet each incarcerated person’s individual goals and aspirations through classes appropriate for each level of aptitude, including basic literacy and math skills, a GED program, and a college level curriculum.

(5) Under this title, “vocational training” shall mean:

- a. The trade-based program for incarcerated persons developed and implemented by qualified trade professionals in areas including but not limited to business, agriculture, culinary arts, welding, electricity, carpentry, highway maintenance and construction, and any other area which the correction facility can provide that would be useful for incarcerated persons’ reintegration and employment after release through hands-on training and classroom instruction.

This proposed legislation embodies the principles found in the Standard Minimum Rules and European Prison Rules. From the beginning of the legislation, it is clear that the goal of incarceration is rehabilitation, and the most efficient and successful method, supported by research, for rehabilitation and successful reintegration is effective prison programming. The focus of the programs must be to benefit incarcerated persons, which in turn will benefit society as a whole.

V. CONCLUSION

The mass-incarceration of citizens in the United States is a clear problem. However, there is a clear solution to this problem. Effective prison programming has been shown—both through research and practice—to significantly and successfully reduce recidivism rates, thereby reducing the incarcerated population. European countries have been implementing the programming mandated by the Standard Minimum Rules for decades and as a result, have seen a decrease in recidivism rates. However, the United States has failed to establish a right to effective prison programming, and as a result, has the highest recidivism rate in the world. It is morally, politically, and economically sensible for the United States to establish a right to effective prison programming—including the right to rehabilitative programs, the right to educational programs, and the right to vocational training programs.

