

On America's Inexplicit Dignity

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While the United States explicitly protects many rights, it holds a few as unenumerated rights. This paper seeks to explain the lack of a constitutional right to dignity in America, and argue for such a right. The U.S. common law system allows rights to be developed only after a case of first impression. Nonetheless, some rights-violations are so detrimental to democratic function that a case of first impression must not be required and preemptive protections must be put in place. The right to dignity is such a right.

Since 1787, the American Constitution has been defined by malleability. The ability to adopt rights necessitated by the circumstances of evolving times secures the Constitution as a “living” document. Citizens of the United States enjoy the benefits of malleability through their protected rights, which, in an ideal democracy, help us address pertinent issues faced every day in a context of security. As the common law system teaches, the development of such rights may be traced back through prior cases. However, one of the detriments to a precedent-based legal system highlights an issue with legal development. More often than not, a right becomes protected only after injustice is committed. The prevalence of the Miranda rights, for example, came only after Ernesto Miranda was unjustly arrested. The United States corrects our legal course only after we wander astray. There may be times, however, when a preemptive violation of a to-be-determined right would cause such harm that prophylactic legal measures are a necessity. An example is the protection of the “right to dignity.” This right protects a human’s ability to be treated as such, and reinforces the basic tenets of equality and freedom of all citizens. The ramifications of a violation of this right fundamentally undermines the foundations of democracy. Thus, the ability to violate such a right must be stifled before any specific “triggering injustice” can occur.

What courts and lawmakers call the “right to dignity” is prevalent in many nations across the globe, primarily to prevent injustice in light of past experiences of political instability or tyranny. Accordingly, the nation with the strongest protection of the right to dignity remains Germany, who,

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following the atrocities of World War Two, protects this right above all others. The German Right to Dignity reads “Human dignity is inviolable. To respect and protect it is the duty of all state authority.”²² Dignity is established as a fundamental German right even before the right to life itself. This logic holds true considering the abomination of the Third Reich, which treated dignity as a preferential right bestowed only on those with the features or religion the government preferred. It could be argued that, had the right to dignity been instilled in each German citizen prior to the rise of the Nazi Party, genocidal policies could not have prevailed. The right to dignity ensures that each human is treated as such, and thus the dehumanization genocide demands would not be possible. Dignity is upheld as a right across the European Union, India, Iran, South Africa, and Israel. There is no question that while America has yet to ratify this right, powers across the globe have successfully done so, holding the right to dignity up along with the same fundamental rights American values cherish.

The history of dignity in America, however, is complicated by the preference for precedents that characterizes our common law system. American lawmakers never saw it fit to establish the right to dignity as a concrete, protected right in the Constitution. Alternatively, our courts only occasionally deploy the concept to supplement other rights, mentioning dignity in various cases as justification for a certain ruling. Justice Harlan, for instance, referenced dignity in his ruling on *Cohen v. California*. He hoped that the right to freedom of expression would “ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”²³ His teachings are representative of dignity in America, which is thought to be a notion that simply justified other, specifically-protected rights. While Germany may hold dignity as its first, most valued right, America presumes that its own most cherished rights, such as free speech, reflect a concern for dignity, even if that concern remains unspoken.

In *Lawrence v. Texas*, Justice Kennedy associates dignity with the Fourteenth Amendment. He highlights a quote from a prior case, *Planned Parenthood of Southeastern PA v. Casey*. “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices

²² The provisions of Article 1(1) of the German Basic Law.

²³ *Cohen v. California*, 403.



central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment²⁴ Here, dignity yet again is used as nothing but a supplemental concept, extrapolated through explaining or justifying other rights. Thus, legal scholars looking to American law presume that a right to dignity is protected by the very existence of other legal protections. In his defense of a bill of rights, New York University law professor and legal philosopher, Jeremy Waldron, contends that the very presence of protected rights acknowledges dignity.²⁵ He argues that when a government gives rights to a citizen, they automatically assume that the citizen has both autonomy and dignity; rights must be enforced, in this view, to respect and protect human dignity. In sum, American thinking on the right to dignity is simple: it is established through the application of our other rights, and this being so, there is little need to place it explicitly in the Constitution.

America has relied on this assumption since its founding, assuming that dignity will be protected through precedential application in past cases involving other, existing rights. Of course, amending the Constitution, while cherished as a common American practice, is arduous at best. If jurisprudence relies on implied rights, ratifying the right to dignity may not be worth the trouble. Nonetheless, while American security in the protection of dignity is rooted in past success, prevention of future injustice requires a more solidly-grounded right to dignity ratified in the Constitution.

The primary reason for an explicit right to dignity may be found in the very principles of democracy. Democratic theorists such as Alexis de Tocqueville have established a set of traits which define the democratic citizen.²⁶ Democratic principles include tolerance, cooperation, moderation, and ease of collective action. Leniency in allowing the disruption of such principles in the citizenry could indicate democratic shortcomings. In a society without respect for dignity, such qualities would struggle to surface amongst the population. Where dignity is not properly acknowledged, democratic engagement must suffer. Perhaps it is no coincidence that America, which has no explicit right to dignity, suffers from widespread intolerance as political polarization increases. Today, the breakdown of

24 *Planned Parenthood of Southeastern Pa. v. Casey*, 851.

25 Waldron, J. (2004). *Law and disagreement*. Oxford University Press.

26 Tocqueville, A. de, Goldhammer, A., & Zunz, O. (2012). *Democracy in America*. Library of America Paperback Classics.



respect for core human dignity is interfering with democratic function. An equal and fair election, for example, is the hallmark of a democracy. The current rash of voter-suppression laws is hard to imagine in a place where all citizens respect each other's essential dignity. A society which does not consistently reinforce the importance of dignity does not inspire democratic trust.

Especially in view of these recent developments, it is no longer enough to allow the right to dignity to reside on the margins of our law. Protection against search and seizure and freedom of speech, for instance, are instilled in the average American through constant repetition. Students memorize the amendments in grade school. Americans are raised with a theoretical knowledge that they can speak their minds openly and should expect to be treated just as their peers would be under the law. Students do not, however, recognize the existence of dignity as a protected right due to its obscurity. The average American is not aware of Justice Kennedy's application of the *Casey* ruling to use dignity to determine *Texas v. Johnson*. This average American may very well be aware of dignity as an important force in every-day life, but they are not repeatedly told that the government has an overriding interest in protecting their dignity. The logic which follows is that such an absence of reinforced dignity protection may cause a decline in trust, which, while not spelling the demise of democracy, makes it more likely that people will fall prey to polarization, and support more voter suppression laws.

Beyond hindering democratic function, where dignity is not enshrined as a freestanding right, there is a greater potential for the worst atrocities known to man. Just as democracy cannot function without dignity, the atrocities of genocide, ethnic cleansing, and ethnic war can be prevented by a zealously protected dignity right. The Holocaust, the Rwandan Genocide, and the ethnic violence in Yugoslavia all involved the demonization of the "other." A government forced by its constitution to protect dignity at all costs could not allow this demonization to take place. The United Nations defined genocide in eight stages: classification, symbolization, dehumanization, organization, polarization, preparation, extermination, and denial²⁷. In a government with a cherished and protected

27 Wilson, T. (2020, August 29). Eight stages of genocide: From classification to denial. The Borgen Project. Retrieved November 30, 2021, from <https://borgenproject.org/eight-stages-of-genocide/>.



right to dignity, only the first two steps could occur. A breakdown of one group's conception of dignity as equally applied to their fellow citizens is a requisite to genocide. Dehumanization simply cannot prevail should a government have the means, will, and capacity to enforce a right to dignity. A functioning democracy with a proper system of checks and balances could prevent such a horrendous outcome if dignity is instilled in each government official and citizen.

Critics may argue the American common law system has worked for centuries, and so there is no reason to break the tradition and preemptively establish a right without a triggering case of first impression. However, the potential consequences of not explicitly ratifying the right to dignity before a case of first impression make it essential. America has relied on precedent to shape its legal applications and definitions of dignity. This process, while perfectly acceptable under common law, is far from preventative. The abominations which may only arise without dignity are far too destructive to be recognized only with the benefit of hindsight. The actions of the Nazi regime will leave a stain on modern day Germany permanently. Germany's current emphasis on dignity stems from some of the most violent actions in human history. The German "case of first impression" was the greatest horror known to man. There is no reason why the rest of the world should not learn from such atrocities and make their prevention the first priority of a state. In fact, as determined above, many states have taken this lesson to heart, working dignity into their constitutions as a preventative measure. Some may argue that if America equally takes such action, such atrocities could never be committed under American rule. However, recent events have taught us all too well the fallacy of believing that we are immune to the influence of dignity-denying demagogues.

A self-serving leader, turbulent times, and a population without respect for the democratic process resulted in the storming of the Capitol on January 6th, 2021. The Capitol riots are by no means akin to genocide. Nonetheless, the riot carries a much more powerful message: America may not rely on democracy to sustain itself. The functions which are essential to democracy are fragile, and demand reinforcement. A ratified right to dignity, held to the same standard as free speech, could very well be that reinforcement. The current system is simply not sufficiently preventative. Inexplicit rights may be used by judges to reach a fair ruling, but they do not instill that right in the values of the citizens. Moreover, they create loopholes



which may be exploited to allow for grave injustices. The magnitude of these injustices may be so large that it simply cannot be allowed to occur even once, requiring a preemptive establishment of the right to dignity to forestall such a horrendous outcome.

The ability to extract a right from judicial precedent is common in American law. Fundamental rights not stated in The Constitution have been adopted before in light of modern issues. Justice Douglas' opinion on *Griswold v. Connecticut* noted that a statute "forbidding the use of contraceptives violates the right of material privacy which is within the penumbra of specific guarantees of the Bill of Rights"²⁸ The prior legal consensus on the right to privacy perfectly mimics the current applications of dignity in American jurisprudence. Douglas highlights that the Bill of Rights creates "zones" of privacy via previously established amendments. The *Griswold* ruling brought the right to privacy out of the haze of unenumerated rights and into a more solidified application. Today, citizens expect that the government will not meddle with one's possessions or personal life. Moreover, the government knows to treat violations of the right to privacy with strict scrutiny, thus making an initial violation extraordinarily difficult.

The right to dignity shares a similar status as the old right to privacy. It is unenumerated, and restricted to its use as a judicial tool and a background concept, but nothing more. In a vein with Justice Douglas's ruling, dignity may be brought out from the penumbra of other rights. The difference between the two circumstances, however, are the implications of the potential violation. The right to privacy was not established until after *Griswold's* arrest. In the grand scheme of our nation's functioning as a democracy, an unjust arrest is nothing uncommon. Unjust arrest is, of course, a dire issue in need of resolution, but the violation of *Griswold's* right to privacy did not negate the values of democracy. A violation of human dignity, however, carries much more severe implications. For this reason, it is imperative that such a right be established not through the common law process but through a Constitutional amendment. Granted, a dignity-based case of first impression may not be as severe as the above paragraphs purport. It could very well be a simple nuisance in the life of one plaintiff. However, the very possibility that a case could carry such severe injustice mandates immediate action which bypasses a case of first

28 *Griswold v. Connecticut*, 381.



impression. Our present political crisis also confirms that the time for making the right to dignity a firm part of our legal landscape has arrived. Thus, the proposed action is not only desirable, but essential to the preservation of our democratic tendencies now and in the future.

The implications of incorporating the proposed right to dignity has limited negative ramifications. One may argue that incorporation of this new personal freedom would severely change government function. What constitutes “dignity” may be subjective and difficult to define in a given case. While judges may apply dignity in new, unexpected methods, such rulings need not be cause for concern. Every fundamental right suffers such constitutional growing pains. Cases still arise today which change the definition of “speech” as protected by the First Amendment. So long as the right to dignity is protected, the specificities of the protection will be shaped by a newly developing line of precedent. Incorporating a new fundamental right will undoubtedly tie the hands of the government but this is the nature of strict scrutiny as a legal construction. However, since the right to dignity has been previously enforced as a passive, unenumerated right, the expectations of the legislature would not alter greatly. As previously established, violations to human dignity often entail violations of other rights. This is the very reason dignity was used by prior justices as a judicial tool. It may be easily predicted that ratifying a right to dignity will create new cases which will guide legal applications of the amendment away from undue subjectivity. Moreover, the actual practice of this law will not drastically change the essential ability of legislatures to function, no more than other enumerated rights have done. The largest difference the right to dignity will make will be in the reassurance of the citizen in their newly protected dignity no matter how the future may challenge that right.

The American legal system roots itself in the past. We make mistakes, correct them, and carry that lesson with us through continued use of precedent. It is a stable system; it functions properly and will likely continue to do so for years to come. That said, there are certain rights which, even if not fully ratified, are so essential to the function of government and life itself, that to not “go through the trouble” of ratification could spell disaster in the future. America has relied on the common law system to support the unenumerated right to dignity while the rest of the world has learned not just from their own legal history, but from that of nations who have failed to protect their population’s dignity. As a global hegemon, it is



simply irresponsible to assume that our system will protect us while others have suffered the consequences of that assumption. Despite its status, the United States is not immune to democratic fault. To prevent severe ramifications of the potential failings of the future, we must take action today. A Right to Dignity must be added to the Constitution, not to undermine the benefits of our common law system, but to take preemptive action to preserve that very system.



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