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Dignity is the New Legitimacy

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In a recent symposium, a retired federal district court judge made the following observation: If you walk into a judicial conference on criminal law in Europe and use the term "dignity," heads universally nod affirmatively. There is little need for explanation or definition, much less citing precedent or intellectual grounding. Use the term "dignity" in a similar setting with their American counterparts, and eyeballs will roll like numbers and symbols on a lunatic slot machine.

There are perfectly reasonable bases for the divided reaction. To the Europeans, and more recently to the South Africans and other transitional regimes, dignity has concrete meaning in constitutional law, and occupies familiar ground in the moral vocabulary of philosophy and jurisprudence.[1] The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, starting points for many new or revised constitutional designs, both mention dignity and link it closely with basic human rights.[2] Dignity is either essential to human rights in these charters, or is perfectly fungible with human rights.

American jurisprudence often wrestles with the term "dignity."[3] At least some of this skepticism is explained by the separation of (continental) European legal regimes from American common law foundations, and the tendency of American legal theorists to see both procedural and substantive rights doing the work of dignity. And dignity appears nowhere in the constitution. But despite its absence there, dignity appears in caselaw on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, and recent "dignitarian" moves suggest that it may have constitutional weight.[4]

Yet the meaning of dignity in these cases remains not just elusive, but an analytic challenge. Is it a religious term? An expression of a

The New Criminal Justice Thinking. Sharon Dolovich and Alexandra Natapoff.

moral norm about the sanctity of the individual and her right to human flourishing? Does it reflect the autonomy and privacy of the individual against an intrusive or coercive state? Is it a placeholder or vessel for a more concrete analysis of rights? And what work does affixing the term "human" do for a serious analysis of rights?

At least some of the distrust of the term "dignity" stems from just this lack of definition. Its definition is both indeterminate and prone to subjective attributions of legal and normative meaning, meaning that is more likely to reflect the definer's priors than a specific set of terms with shared meaning and a firm theoretical foundation.[5] Some refer to a "cult of dignity" that borders on the religious[6] or that substitutes for the more complicated moral questions that are raised by modern bioethics.[7] Given both the vagueness and diversity of the meanings attached to dignity, it may well be a concept that is better defined in the breach than in the affirmative.[8]

Still, we can assume that dignity has its place in law, both in the U.S. and in other legal regimes. One challenge—both for law and for constitutional regulators—is to determine exactly what kinds of remedial measures should follow a breach of dignity. Should these measures address punishment practices, such as execution methods or extended periods of psychologically disfiguring solitary confinement?[9] Or should the remedies address jurisprudential foundations of criminal law and procedure, requiring a reconceptualization of the premises of social and moral prohibitions on specific behavior? Should the remedies preserve those norms but recalibrate proportionality principles to replace draconian punishments with morally informed sanctions that preserve the essential respect that all humans deserve?[10] Should we subjectivize punishments so that we avoid disfiguring harms that inflict cruelty and pain in the name of the state, and thereby allow offenders to suffer deprivations that matter to them while maintaining our respect for their humanity?[11] Would dignity principles mean that our starting points for punishment recognize the status of prisoners as deserving of the respect of the state despite their transgressions?[12] In other words, should we dissolve the barriers of "condition status" (as a prisoner or defendant) to confer a normative personhood status that demands dignity?[13]

And how should we respond to procedural incursions on dignity, such as unwarranted arrests or searches or abrogations of trial rights?

Should respect for the rights of the accused be part of their dignity, or does dignity occupy a different space—and perhaps in a rights-based regime, a smaller space—where we honor those rights for moral reasons that are somewhat apart from conferred rights? How much work can *privacy* do as a vessel for dignity when it appears nowhere in the U.S. Constitution? Should there be a remedy beyond the exclusion of a case when a suspect is denied access to a lawyer, or is unable to confront an accuser, or cannot present mitigating evidence that lessens her blameworthiness? These rights are enshrined in American caselaw and in the Constitution, and at least some are embellished by references to dignity. Should there be a premium on the sanctions imposed for dignity incursions on top of the rights violation? Certainly, conceiving dignity as a jurisprudence independent from the jurisprudence of legality would suggest that, yes, remedies for such violations should indeed go beyond those imposed for rights violations alone.

This is the jurisprudential and intellectual territory that Jonathan Simon's *The Second Coming of Dignity* seeks to occupy and expand. He implicates the legality principle in American jurisprudence as failing to provide workable principles to ensure a "humane and civilized system of criminal punishment" that can assure human dignity.[14] He does not argue to abandon legality as the jurisprudential principle to guide punishment, but to locate dignity alongside legality to provide a moral force against "cruel, inhuman and degrading treatment inherent in prolonged incarceration." He briefly surveys 20th-century theory and discourse on dignity in criminal law and procedure, noting that attempts to constitutionally instantiate dignity into criminal law and procedure were mostly aimed at procedural reforms rather than substantive rules. Simon concludes that the retributive turn in both punishment and procedure starting in the 1970s abandons two core elements of Leslie Henry's nosology of dignity: "personal integrity" and "collective virtue,"[15] elements that speak to the frailty of the individual before the state and the dignity that the state imparts by caring for and about the individual.

This degradation of dignity is the challenge that Professor Simon seeks to expose and reverse. His proposals for injecting dignity into the jurisprudence of criminal law and procedure would undo these harms at each of several critical junctures where dignity has been sacrificed to public security and to retribution. This is Dignity 2.0: a rich blueprint

for elevating the status of dignity in the everyday logic and actions of criminal justice institutions. The path is through law, procedure, and perhaps enhanced regulation.

My purpose is not to dispute Simon's exhortation toward instantiating dignity into jurisprudence and policy. My prior is that these measures will in fact enhance the dignity of the criminal law, if only by eliminating many of its features that produce indignities. The implicit moral realignment of punishment principles will also enhance dignity. But such a realignment leaves open the question of how these principles will be subjectively experienced when the state attempts to punish. Encounters with the law, whether with police on the street or behind bars with jailers, are inherently subjectively experienced events where not only may dignity be violated, but where emotional damage is a collateral injury. This essay suggests a complementary design that shifts the analysis to the processual, experiential, and consequentialist features of criminal law and procedure.

Similar to the conferring of legitimacy on criminal law and procedure,[16] dignity in this view is constructed through interactions between the state and the person who falls under the state's gaze, if not its control. Emotions—anger, fear, recognition, or respect, even pleasure at belonging and equality—are the bases of both dignity and legitimacy. Whereas legitimacy is a subjective evaluation of a legal institution, dignity is the byproduct of these interactions, and is a reflected appraisal of the individual as to her belongingness and equality before the law. Meaning, including dignity, is constructed from these interactions through processes that are brought to the situation by both the state actor and the individual. It is that process of interaction and social construction that is an important bridge from legal principles to the realization of dignity.

Feeling Dignified

Assume dignity. That is a starting point for thinking about how we negotiate our dignity over time through interactions with state actors and institutions. Since our concern here is the behavior of criminal legal institutions, we can assume that one brings dignity to a transaction with the police or other legal actors. We assume dignity because these institutions are obligated to honor the equal respect of each citizen.[17] Philosophers such as Alex Honneth and Charles Taylor cite respect and

recognition as fundamental human needs. For Honneth, one's worth is intersubjectively understood. [18] In other words, we imagine ourselves as how other people see us, and we understand who we are in and through our relationships with others, through a process of reflected appraisals.[19]

Our dignity derives from this sense of positive dignity: we have "the right to be beyond reproach" and to exercise our rational free will. This allows us to self-govern or self-regulate and therefore achieve autonomy.[20] A person enjoying or expressing her dignity experiences a sense of belonging within the social and political realms that bound everyday life.

Professor Ekow Yankah describes this as the dignity of citizenship: it confers the idea of the worth of the person and her status of belonging and entitlement to rights and respect in society.[21] Whereas Kant starts with free will and autonomy, the citizenship view assumes a social process of interactions between individuals and between the individual and social or legal institutions. We assume our dignity because we belong, not simply because we exist.[22] In other words, we flourish as humans through our participation in social and political communities.[23] Being recognized as being endowed with full social and political equality is part of our belonging, a foundation of our dignity.

Thus, we are endowed with positive dignity by virtue of our membership in the society, as well as by the more widely recognized Kantian vision of dignity's autonomy and privacy, which are highly individualized states. From exercising our citizenship in ways both small (freedom of movement) and large (voting, perhaps even holding office), we derive a sense of recurring validation. It may even be pleasurable, with each interaction or recognition churning the emotions that are aroused by experiencing political and social inclusion. Some of this exercise of dignitarian liberties is social, but much is political. Security and respect are markers of our citizenship, and interactions with state actors who hold the power to confer respect are particularly freighted with emotion. Dignity, then, at least before the state, and especially in the context of the criminal law where liberty is at stake, hangs in the balance of these interactions.

Indignities

Again, assume dignity. It is nurtured, cultivated, shaped, and reinforced through social and political interactions across a wide landscape of

interactions, including interactions with legal authorities. Procedurally pleasant encounters can confirm and reinforce citizenship, and in turn, one's social and political dignity. But what are the consequences for dignity of adverse encounters? Of encounters where one's sense of belonging is not simply denied, but undermined and corroded? It is not only punishments that can be disfiguring, as Professors Simon and Steiker point out. Procedural encounters and interactions can also be disfiguring. The consequences are a loss of dignity.

This is a consequentialist view of dignity that goes beyond simply the denial of constitutional rights. It is inherently processual, and indignities are not easily managed by either a reinvigorated legality principle or by a procedure-based regulatory apparatus that responds formally to dignity incursions. The consequentialist view assumes that there are observable, if not measurable, harms that can be physical, social, and even political in the sense that dignity violations violate citizenship and belonging. These harms can be the beginning of a jurisprudence of dignity, a point on which Professor Simon and I are in strong agreement.

The harms that accrue from everyday encounters with police in contemporary criminal justice are the substance of the consequentialist view of dignity in this essay. These front-end encounters with the police under the "new policing"[24] are fertile grounds for petty or pointless indignities or gratuitous humiliations that arise in everyday encounters with the police and those who process arrests.[25] With its emphasis on stopping crimes before they happen, and on police aggressiveness in these proactive encounters, the "new policing" creates a capacious space for police to act on thin bases of suspicion—at times, actuarial or even Bayesian estimates of suspicion—to infringe on freedoms and bodily integrity;[26] in other words, to treat citizens as "objects to be manipulated," as persons whose criminality is assumed (thereby reversing the burden of proof during the encounter), and undeserving of the rights that come with their citizenship.[27] What the Warren Court in *Terry* worried about as a "petty indignity" has grown over nearly 50 years to innumerable pointless indignities or "horribles"[28] with a far wider range of potential harms. The outrages to dignity stand alone and are distinctive in their harms.

Professor Simon cites examples of dignity-violating abuses by police, mainly in the modern era of field interrogations that are the staple of

the "new policing": physical degradation, punitive cavity searches of the body, damage to personal property, dog sniffs, and a host of other humiliations. The link to dignity is in the injuries that these acts produce, the incursions on dignity. William Stuntz defined at least four.[29] The first is the unwarranted invasion of the person's privacy—the coercive incursion on one's person or property or even identity robs the citizen of the dignity of control and privacy: for example, an unwarranted police stop and field interrogation that is part of a dragnet or a program of street detentions.[30]

Second is "targeting harm"—being singled out in public by the police and treated like a criminal suspect.[31] The fact that so few stops yield evidence of criminal wrongdoing ensures the spread of the denial of the dignity of innocence, especially among citizens in the more powerless communities. A person might well ask *why me? Why did the police stop me if they had no evidence, if they did it on a hunch that I might be a criminal?* The privacy harm is compounded by the targeting harm, doubling down on the denial of autonomy and, in turn, the incursions on dignity. When done in a public space, as is often the case, the act is a public discounting of worth by state actor. The confusion of *why me* can transform into feelings of humiliation and rage from the experience of being singled out as a criminal, of being stopped and suspected of criminality by a state actor.

The third harm flows from the racial bias in the distribution of these incursions:[32] the signaling of suspicion of criminality—if not criminality itself—on Black citizens simply by virtue of being Black or moving about in a Black neighborhood. When done to Black or Latino people, it becomes a form of public shaming by a state actor that signals to bystanders that Black or Brown or Asian people are not equal to Whites.[33] The indignity also derives in part from the knowledge that their uniqueness as individuals is accorded less respect than that of others. The singling out of Black or Brown people signals that state actors value the autonomy of White people more, accord them greater respect, and regard Whites as more unique than are Black or Brown people.[34]

The verbal and physical violence that often accompanies these encounters is the fourth indignity. These are not discrete either: the damage to dignity from both verbal and physical assaults adds up to more than the sum of their individual pain. The indignity from inaccurate,

if not unjustified, police incursions on liberty is compounded by the mix of these harms within any single interaction.[35] Harsh treatment compounds the second and third harm—the assault on the dignity of innocence[36]—by signaling the legitimacy of the predicate of race-based suspicion that seems to have motivated an unjustified police interdiction. First-hand accounts of police encounters make plain the racial degradation, verbal threats, physical violence, and sexual aggression in these encounters.[37]

When someone feels that she had no ability to prevent any of these humiliations, either because she was targeted in the specific incident, or because of features that would make her targeted over and over again, then the feeling of loss of autonomy (loss of control over what happens with one's own life), and the feeling of being treated as less worthy of respect than others (less human), are likely to deepen the subjective feeling of humiliation.[38] A person targeted by police for any of the humiliations and affronts described by Brunson and Weitzer has little to no space to negotiate her dignity.[39] Even encounters involving only minor intrusion on privacy or liberty (such as being stopped on the street by a police officer and being asked to identify oneself), are likely to be experienced as subjectively and cumulatively humiliating if one feels that the stop was mistaken or unjustified, that there is nothing she could have done to stop it from happening this time, and that there is nothing she can do to stop it from happening again and again. This experience of loss of autonomy, in the sense that one's own choices could not have prevented unpleasant encounters with law enforcers, plus the feeling of being treated as someone whose individual circumstances and liberty are less worthy of respect than those of others, are at the heart of the antagonism (or erosion of legitimacy)[40] caused by adverse encounters with law enforcement.

The persistence of indignities inflicted by agents of the law, both to an individual and vicariously to the persons around her, can metastasize into fundamental problems of social exclusion, where a profound sense of loss of recognition, respect, and self-worth follows. In Charles Taylor's work on the self and the importance of recognition, he argues that our identities are deeply moral, that we understand ourselves as moral entities.[41] Denial of basic and essential recognition—or respect or the belonging that accompanies it—means denial of the recognition

of others that one is a unique and worthy human being, worthy of social inclusion and worthy of citizenship. In Taylor's view, indignities confer a harsh status: those who suffer indignities are regarded as having weaker moral claims to recognition and respect.

So, indignities cause harms that go beyond the legal violations and the personal harms that individuals suffer. Indignities have social meaning in the sense that their consequences and harms carry weight that affects the ties of groups to legal authority, and to the moral norms that legal actors both express and enforce. More than a legitimacy argument, this suggests that indignities affect the social relationships necessary to have a full and dignified life. Indignities, then, have both individual costs to autonomy and social costs to the capacity of communities to provide the social resources necessary for dignity.

Dignity 3.0

Professor Simon proposes a shift from the formalism of the principle of legality (Dignity 1.0) toward a jurisprudential principle of "no punishment without dignity" (Dignity 2.0). I want to push further, to propose a jurisprudence that moves beyond formality of law and policy and the inherently institutional basis of legitimacy, toward one that recognizes the emotional highway between dignity and legitimacy. This would be Dignity 3.0.

Modern case law treats the source of indignities from policing as technical violations that should merit a constraining response in the form of "cut it out."[42] But technical parsing of constitutional violations strips them of their moral harms and consequences. It minimizes the protections of citizens from the types of indignities from everyday aggressive policing that are evident under order-maintenance tactics. The trend neutralizes and dismisses the emotional residue of indignity. When transformed to a regulatory regime, not only does the risk of indignity harms increase, but the harm is compounded by the dismissal or impossibility of redress.

The cumulative harm to the individual and the aggregate harm to the community from indignities provide reason to consider a jurisprudence of respect or dignity as a means to provide a set of principles for thinking about the harms of order maintenance. This requires more than sim-

ply creating mechanisms for redress of dignity harms; in fact, we have recourse such as §1983 remedies and (though subject to a variety of barriers) tort relief. And it requires more than administrative accountability measures where citizens can activate public service amenities such as civilian review boards to correct wrongs, especially when those wrongs may not be viewed as such by the court.[43]

One might see this as merely a move from procedural due process (Dignity 1.0) to asking nothing more than that we take substantive due process more seriously (Dignity 2.0). Perhaps, but there are considerations that might set Dignity 3.0 apart from either of those perspectives. First is the recognition of emotion as the basis of both dignity and legitimacy. We feel good when our dignity is confirmed: when we are treated respectfully, when our privacy and autonomy are honored, when we are accommodated by legal actors because of our status as citizens and persons. We view those institutions as legitimate because they have treated us with respect. We view ourselves with renewed dignity from these encounters. The emotional highway connects the two to a common source.

The second distinction is the method of remedy that indignities would ignite. We can't rely on enhanced training, or even other forms of police oversight that incentivize constitutional compliance, to produce contacts that reinforce dignity, not when constitutional interpretation of what is legal or permissible—even if it produces indignities—is left to police administrators under a narrowly conceived administrative regime of police control. Formal recourse—through litigation, regulation, or the political process leading to statutes—to ensure that everyday interactions avoid indignities and degradation seems to be impotent in the face of hegemonic and enduring police cultures that have been virtually immunized under current remedies.[44] Even when police departments are doing all they possibly can to ensure that their officers are well-trained, rules such as those in *Herring*, *Whren*, and *Moore*[45] can create the not-so-odd situation that the well-trained officer may be perfectly compliant with constitutional requirements while compiling indignities in the course of her everyday patrol. These everyday indignities could be explicitly rejected under a jurisprudence that recognizes and internalizes the central role of dignity and respect to regulate the relations between citizens and criminal legal actors.

What indicia would a court look to for positive guidance to legal actors when allegations of indignity are made? Stuntz's four harms provide a starting point.[46] But these tell courts when and perhaps how indignities have occurred, and the depth and nature of the harm as well. Translating the actions that led to the harms into jurisprudential principles for preserving dignity also requires us to look inside the social science of legitimacy, and to identify its components.

The aspirations for dignified treatment of individuals who are subject to the power of the state—regardless of whether they run afoul of the state's authority and norms, or if they are innocent but suspected—run deep in both American law[47] and in common law.[48] Those values can serve as guiding principles for state actors and citizens alike in their exercise of authority and power. It is now up to judges to develop the language of dignity and to instantiate its components into jurisprudence and ultimately in the institutional cultures of policing. Dignity may indeed be the new legitimacy.

NOTES

1 Grundgesetz für die Bundesrepublik Deutschland [Constitution] (Ger.); Constitution of the Republic of South Africa, 1996; Manuel Wackenhaim v. France, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002) [French dwarf-tossing case].

2 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966).

3 See, for example, Leslie Henry, "The Jurisprudence of Dignity," *University of Pennsylvania Law Review* 160 (2010).

4 Vicki C. Jackson, "Constitutional Dialogue and Human Dignity: State and Transnational Constitutional Discourse," *Montana Law Review* 65 (2004); Bruce Ackerman, "Dignity Is a Constitutional Principle," *New York Times*, March 30, 2014, at SR5.

5 See, for example, David A. Hyman, "Does Technology Spell Trouble with a Capital 'T'? Human Dignity and Public Policy," *Harvard Journal of Law and Public Policy* 27 (2003).

6 Stephen Pinker, "The Stupidity of Dignity," *New Republic*, May 28, 2008.

7 Ruth Macklin, "Dignity Is a Useless Concept," *British Medical Journal* 327 (2003).

8 *The Simpsons* offers a brilliant illustration of the definitional vagueness of dignity. In "A Milhouse Divided," an episode of *The Simpsons* from the 1990s, several Simpson friends are playing a game of Pictionary following a dinner party at the Simpsons' home. (Pictionary is a sort of visual version of charades). Kirk Van

Houten (father of Bart's friend Milhouse) draws a shapeless blob on the easel and exclaims to his wife, Luann, who sits looking confused, "It could not be more simple." The timer runs out and he cries, "It's dignity, gah! Don't you even know dignity when you see it?" Luann decides that she can "do better." With the easel turned away from the television audience, she produces a drawing that the viewers never see. But the people in the Simpsons' parlor are ecstatic with recognition: "Oh that's dignity alright" and "Worthy of Webster's."

9 See, for example, *Richard E. Glossip et al. v. Kevin J. Gross, et al.*, Supreme Court of the United States, 14–7955, Oral Argument, April 29, 2015.

10 Joseph Raz, *Value, Attachment and Respect* (2000); Harry Frankfurt, "Equality and Respect," in *Necessity, Volition, and Love* (1999).

11 Adam Kolber, "The Subjective Experience of Punishment," *Columbia Law Review* 109 (2009); David Luban, *Legal Ethics and Human Dignity* (2007), 70–71.

12 Carol Steiker, "To See a World in a Grain of Sand: Dignity and Indignity in American Criminal Justice," in *The Punitive Imagination*, ed. A. Sarat (2014). Steiker includes shaming of prisoners as a dignity violation, as well as the infliction of psychological or physical pain.

13 Jeremy Waldron, "What Do Philosophers Have against Dignity?" (NYU School of Law, Public Law & Legal Theory Working Paper no. 14–59).

14 Carol Steiker agrees, arguing that "the collective aspect of dignity may be . . . more normatively attractive" in an era of mass and harsh incarceration. Steiker, supra note 12 at 21–22.

15 Henry, "Jurisprudence of Dignity," supra note 3 at 169.

16 Tom R. Tyler, "Legitimacy and Legitimation," *Annals of the American Academy of Political and Social Sciences* 593 (2006); Jonathan Jackson, "On the Dual Motivational Force of Legitimate Authority," in *Cooperation and Compliance with Authority: The Role of Institutional Trust*, ed. B. H. Bornstein and A. J. Tomkins (2015); Anthony Bottoms and Justice Tankebe, "Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice," *Journal of Criminal Law and Criminology* 102 (2012).

17 See, for example, South African Bill of Rights § 36: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." See also Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buffalo Criminal Law Review* 7 (2004): 314 ("If the idea of a liberal democracy means anything, it means a commitment to what we can think of as the 'baseline' liberal democratic values: individual liberty, dignity, and bodily integrity; limited government; the primacy and sovereignty of the individual; and the entitlement of all citizens to equal consideration and respect").

18 Alex Honneth, *The Struggle for Recognition: The Moral Grammar of Conflicts* (1996); Charles Taylor, *Sources of the Self: The Making of Modern Identity* (1989).

19 Richard Felson, "Reflected Appraisal and the Development of Self," *Social Psychology Quarterly* 48 (1985).

20 Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. Mary Gregor (1998), 7–14; Immanuel Kant, *The Metaphysics of Morals*, ed. Mary Gregor (1996), 13–14.

21 Ekow Yankah, "Policing Ourselves: A Republican Theory of Citizenship, Dignity and Policing" (2013), at http://ssrn.com.

22 Professor Ekow Yankah of Cardozo Law School pointed out this distinction; my thanks to him.

23 Ekow Yankah, "Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the Corruption of Lawfulness," *Criminal Law and Philosophy* 7 (2012); Douglas B. Rasmussen, "Human Flourishing and the Appeal to Human Nature," *Social Philosophy and Policy* 16 (1999). Some might simply call this version of dignity "franchise."

24 Phillip B. Heymann, "The New Policing," *Fordham Urban Law Journal* 28 (2000).

25 See Josh Bowers, "Probable Cause, Constitutional Reasonableness and the Unrecognized Point of a 'Pointless Indignity,'" *Stanford Law Review* 66 (2014). Professor Bowers uses the example of the custody arrest of Gayle Atwater in Lago Vista, Texas, for a seat belt violation. Her children were in the car, and the arresting officer did not allow her to drop the children at her house, just a few doors from the arrest location, before taking her into custody. See, generally, Jeremy Waldron, *Cruel, Inhuman and Degrading Treatment: The Words Themselves* (2008). See also Avishai Margalit, *The Decent Society* (1996), 10–11.

26 For an example, see Bernard E. Harcourt, "Unconstitutional Police Searches and Collective Responsibility," *Criminology & Public Policy* 3 (2004), describing a futile cavity search for drugs alongside a public thoroughfare.

27 Waldron, *Cruel, Inhuman and Degrading Treatment*, supra note 25.

28 *Atwater v. City of Lago Vista*, 532 U.S. 318, 321 (2001) (noting the "dearth of horribles demanding redress").

29 William J. Stuntz, "*Terry's* Impossibility," *St John's Law Review* 72 (1998).

30 For an example, see Tracey L. Meares, "Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident," *University of Chicago Law Review* 82 (2015).

31 See Sherry F. Colb, "Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence," *Columbia Law Review* 96 (1996).

32 The New York City "stop and frisk" litigation illustrates the breathtaking racial skew in these everyday police encounters. See Report of Jeffrey Fagan, Ph.D. (2010), for *David Floyd et al. v. City of New York et al.*, U.S. District Court for the Southern District of New York, 08 Civ. 01034 (SAS), October 28 (showing that African Americans and Latinos were the targets of over 85% of the 4.4 million "street stops" made by NYPD officers from 2004 to 2009, or approximately 1,700 stops per day of non-Whites).

33 I. Bennett Capers, "Policing, Race and Place," *Harvard Civil Rights–Civil Liberties Law Review* 44 (2009).

34 Capers, id.

35 See Stuntz, "*Terry's* Impossibility," supra note 29.

36 Rinat Kitai, "The Presumption of Innocence," *Oklahoma Law Review* 55 (2002): 267, 270.

37 For examples, see Rod K. Brunson and Ronald Weitzer, "Police Relations with Black and White Youths in Different Urban Neighborhoods," *Urban Affairs Review* 44 (2009): 866–68; Victor M. Rios, *Punished: Policing the Lives of Black and Latino Boys* (2011); Ross Tuttle (dir.), "The Nation, The Hunted and the Hated: An Inside Look at the NYPD's Stop-and-Frisk Policy" (October 9, 2012), at www.youtube.com; Jacinta Gau and Rod Brunson, "Procedural Justice And Order Maintenance Policing: A Study Of Inner□City Young Men's Perceptions Of Police Legitimacy," *Justice Quarterly* 27 (2010); Michael Powell, "Police Polish Image, but Concerns Persist," *New York Times*, January 4, 2009, at B1. See also U.S Department of Justice, Civil Rights Division, Special Litigation Section, Investigation of the Ferguson Police Department (March 4, 2015), at www.justice.gov.

38 Judith Resnik and Julie Chi-Hye Suk, "Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty," *Stanford Law Review* 55 (2003).

39 Avishai Margalit describes humiliation as the sense of being deprived of control: "Curtailing the freedom of the other, and making gestures designed to show that the other is severely limited in her control, may constitute a rejection of the other as human." Margalit says this is a way of marking them as subhuman, as a mere object. Margalit, *Decent Society*, supra note 25 at 118.

40 David Beetham, *The Legitimation of Power* (1991). See also Tom R. Tyler and Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities," *Ohio State Journal of Criminal Law* 6 (2008); Charles Ogletree, *The Presumption of Guilt: The Arrest of Henry Louis Gates, Jr. and Race, Class and Crime in America* (2012).

41 Charles Taylor, *Sources of the Self: The Making of Modern Identity* (1989).

42 Andrew Taslitz, "Respect and the Fourth Amendment," *Journal of Criminal Law & Criminology* 94 (2003); Wayne Logan, "Police Mistakes of Law," *Emory Law Journal* 61 (2012).

43 See Colb, "Innocence, Privacy, and Targeting," supra note 31 (noting that offenders have to function as their own private attorney general to prevent government misconduct).

44 See Joanna Schwartz, "Myths and Mechanics of Deterrence," *UCLA Law Review* 57 (2009).

45 *Whren v. U.S.*, 517 U.S. 806 (1996) (stating that any traffic offense was a legitimate legal basis for a stop even if conducted for some other law enforcement objective); *Virginia v. Moore*, 553 U.S. 164 (2008) (allowing evidence obtained unlawfully to be used in a criminal prosecution since the arrest was based on probable cause); *Herring v. U.S.*, 555 U.S. 135 (2009) (allowing evidence obtained by negligent error in recording mistaken information in a warrant to be used in a criminal prosecution).

46 Stuntz, "*Terry's* Impossibility," supra note 29.

47 Taslitz, "Respect and the Fourth Amendment," supra note 42; Colb, "Innocence, Privacy and Targeting," supra note 31; Judith Resnik, "Detention, the War on Terror, and the Federal Courts," *Columbia Law Review* 110 (2010); Martha Minow, "Equality and the Bill of Rights," in *The Constitution of Rights: Human Dignity and American Values*, ed. Michael J. Meyer and William A. Parents (1992), 118–28 (discussing how human dignity and equality are embraced in the Bill of Rights, especially in the protections of the First Amendment); George P. Fletcher, "Human Dignity as a Constitutional Value," *Univ. of Western Ontario Law Review* 22 (1984); Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law," *Columbia Journal of European Law* 14 (2008).

48 Kitai, "Presumption of Innocence," supra note 36.