

A Path Unfollowed:
The Disregard of Dignity Precedent in Justice
Kennedy’s Gay Rights Decisions

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I. INTRODUCTION

The theme of human dignity permeates all of Justice Kennedy’s gay rights decisions.¹ These decisions, however, largely ignore precedent from earlier cases establishing dignity as an important Constitutional

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1. See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

value. This Article explores that precedent and the wisdom of Justice Kennedy's decision to "reinvent the wheel" of dignity jurisprudence.

Justice Kennedy's opinions examining the treatment of gay and lesbian people invoke dignity in two different aspects.² Sometimes, Justice Kennedy refers to dignity as a basic quality of the human condition. Fundamental to such dignity is the belief that each human being possesses an underlying worth by virtue of simply being human.³ At other times, Justice Kennedy conceives dignity as an elevated status or recognition, which the state bestows on its citizens through the operation of social institutions such as marriage.⁴ Justice Kennedy believes government has a constitutional obligation to ensure that dignity in either case is allowed to flourish evenhandedly. Accordingly, government should take no action that diminishes or withholds dignity through a desire to stigmatize an unpopular group or class.⁵ The Constitution, in turn, actively affirms human dignity by granting every individual the right to make certain personal choices unhindered by government action. Justice Kennedy asserts a person's having the ability to make such choices makes human dignity whole.⁶

Justice Kennedy's application of these "Dignity Principles" to gay rights issues has received considerable criticism. Critics argue he substitutes his personal opinion for the law.⁷ Dignity, they assert, is an amorphous concept, the presence or absence of which lies so much in the eye of the beholder as to prove meaningless, making it an unsuitable element of constitutional decision-making.⁸ Lending credence to these

2. *See id.*

3. *See Lawrence*, 539 U.S. at 573-74.

4. *See Windsor*, 133 S. Ct. at 2692 (asserting the state confers upon couples through marriage dignity and status).

5. *See Romer*, 517 U.S. at 634 (noting animosity toward a particular class is not a rational government interest).

6. *See Lawrence*, 539 U.S. at 573-74 (associating human dignity with personal autonomy); *Obergefell*, 135 S. Ct. at 2600 (equating dignity with the ability of people to define themselves).

7. *See, e.g.*, Paul Kengor, *Justice Kennedy Replaces the "Laws of Nature" with His Own*, CRISIS MAG. (July 3, 2015), <http://www.crisismagazine.com/2015/the-laws-of-nature-vs-the-laws-of-anthony-kennedy> ("Freedom, properly practiced, isn't about the freedom of Supreme Court justices coming up with their own definitions of things."); Bradley C. S. Watson, *We Need Not, and Must Not, Give in to Obergefell*, NAT'L REV. (July 9, 2015), <http://www.nationalreview.com/article/420934/same-sex-marriage-and-rule-law> ("We must offer resistance to a decision so patently ungrounded in the Constitution that the dissenters themselves suggest it is owed no deference.").

8. Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity.' It May Provide Support for Same-Sex Marriage, but It Also Empowers Judges To Decide Whose 'Dignity' They Wish To Prioritize*. ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>.

arguments is Justice Kennedy's reluctance to cite dignity precedent other than that of his own making. In the chain of gay rights opinions written by Justice Kennedy, each case relies to a remarkable degree on the dignity precepts he announced in the chain's prior opinions.⁹ This has exposed these decisions to the charge that their legal standing is suspect.¹⁰

The gay rights decisions, however, did not have to suffer from this deficiency. The consideration of human dignity as a constitutional guidepost does not begin with Justice Kennedy. A rich vein of dignity jurisprudence can be found in Supreme Court opinions of the past. Had he chosen to do so, Justice Kennedy could have mined this precedent to enrich his dignity jurisprudence, defend it from critics, and place the gay rights decisions on a firmer legal foundation.

Part II of this Article examines the development of dignity jurisprudence in the United States Supreme Court from its founding to Justice Kennedy's invocation of dignity in gay rights cases.¹¹ Part III describes the evolution of Justice Kennedy's dignity principles in those gay rights decisions. Part IV compares Justice Kennedy's dignity principles to prior dignity jurisprudence. Part V speculates why Justice Kennedy disregarded dignity precedent in the gay rights cases. Part VI notes potential adverse consequences that could arise from his having done so.

II. THE DEVELOPMENT OF DIGNITY JURISPRUDENCE IN THE UNITED STATES SUPREME COURT

A. 1790 to 1940

Although the Supreme Court through this period noted with some frequency that governments, courts, and other social institutions

9. See *Lawrence*, 539 U.S. at 573-74 (citing Justice Kennedy's earliest pronouncement regarding human dignity in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) and at 574 (citing Justice Kennedy's first gay rights opinion in *Romer*); *Windsor*, 133 S. Ct. at 2693 (citing *Romer*, 517 U.S. 620) and at 2692, 2694 (citing *Lawrence*, 539 U.S. 558); *Obergefell*, 135 S. Ct. at 2596 (citing *Romer*), and at 2596, 2598, 2599, 2600, 2604, 2606 (citing *Lawrence*), and at 2597, 2599, 2600-01 (citing *Windsor*; 133 S. Ct. 2675).

10. William McGurn, *Justice Kennedy's Bitter Truth, the Same-Sex Marriage Ruling Will Unleash the Legal Furies Against Those Who Disagree with It*, WALL ST. J. (June 30, 2015), <http://www.wsj.com/articles/SB11486026120286184909004581077903807516280> (referring to the "extravagance" of Justice Kennedy's "unearth[ing] of a constitutional right for Americans to 'define and express their identity'" and calling *Obergefell* "one of the great flimflams of American life"); see also Ilya Somin, *A Great Decision on Same-Sex Marriage—but Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.83d62b01a12d.

11. A simple methodology underlies this study. It involved a term search for "dignity" in the Supreme Court database of Westlaw Next. References to the "dignity" of anything other than people were omitted from the sample.

possessed dignity,¹² only a handful of opinions equated dignity with persons.¹³ Moreover, these few references to human dignity mentioned it simply in passing within a sentence expressing a broader point.¹⁴ Human dignity does not, therefore, figure as a guiding principle in the jurisprudence of these years. Even so, a conception of human dignity can be extrapolated from the admittedly meagre evidence at hand.

Personal dignity for much of this period appears to have been viewed as neither universal nor necessarily innate. Some people, to be sure, acquired a measure of dignity by virtue of their status at birth. Thus, English-speaking people¹⁵ and citizens¹⁶ were cited as persons born with dignity. Others, however, were less fortunate. Some believed slaves, for example, entered life with no dignity at all.¹⁷

Nevertheless, dignity could be acquired in other ways. Social status conveyed dignity.¹⁸ This provided the opportunity for one to earn it. Thus, a person born with little or no dignity might acquire it incrementally as the person raised himself from a humble station in life to progressively more honorable and celebrated positions.¹⁹ Dignity also could be acquired when one's status changed through government action. In this way, African Americans acquired the dignity of citizenship with the adoption of the Fourteenth Amendment.²⁰ A person might, on the other hand, suffer a diminishment of dignity through the actions of himself or others.²¹ Accordingly, dignity seems to have been viewed

12. See, e.g., *Ex parte Bain*, 121 U.S. 1, 4 (1887) (referring to the dignity of the United States), *overruled on other grounds by* *United States v. Cotton*, 535 U.S. 625, 629 (2002); *Washington v. Oregon*, 297 U.S. 517, 529 (referring to the dignity of the states in litigation before the Court).

13. See *Scott v. Sandford*, 60 U.S. 393, 479 (1856) (Daniel, J., concurring) (dignity of freedmen), *superseded by* U.S. CONST. amend. IV; *Coleman v. Tennessee*, 97 U.S. 509, 516 (1878) (dignity of the sovereign); *Brown v. Walker*, 161 U.S. 591, 632 (1896) (Field, J., dissenting) (dignity of "English speaking peoples"); *Buchanan v. Warley*, 245 U.S. 60, 76 (1917) (dignity of citizenship).

14. See generally *id.*

15. See *Brown*, 161 U.S. at 632 (Field, J., dissenting).

16. See *Roberts v. Reilly*, 116 U.S. 80, 84 (1885) (noting the dignity of the people of the State of New York).

17. *Scott*, 60 U.S. at 479 (Daniel, J., concurring) (noting with approval this judgment of Roman society).

18. See *Coleman*, 97 U.S. at 516 (noting the dignity of a sovereign); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 84 (1807) (referencing the dignity of the individual justices of the Supreme Court).

19. See *Brown*, 161 U.S. at 632 (Field, J., dissenting) (noting the ability of a person to "[fight] his way from obscurity to dignity and honor").

20. *Buchanan v. Warley*, 245 U.S. 60, 76 (1917).

21. See *Brown*, 161 U.S. at 632 (Field, J., dissenting) (arguing that forcing a witness in a trial to disclose his shameful conduct would degrade his hard-won dignity); *Coleman*, 97 U.S. at

more as an acquired trait of personality on par with respectability than as an innate or permanent condition of general humanity.

B. 1940 to 1950

A different notion of dignity emerges in the years immediately following the New Deal. Notably, almost all of the cases mentioning dignity involved either civil rights or criminal procedure and, thus, dealt with allegedly discriminatory or unfair treatment by the government against individuals.²² Within these contexts, a number of the Justices asserted that all persons possessed dignity by virtue of their basic humanity and that government erred when failing to respect it.²³ For example, in *McNabb v. United States*, Justice Frankfurter noted that “[a] democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”²⁴ Justice Jackson echoed this theme, stating, “[D]ignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure.”²⁵ Thus, both Justices acknowledged not only the existence of a universal human dignity but also recognized that its respect by the state was essential to the wellbeing of the individual and democratic government alike.

No one, however, advanced this conception of human dignity more clearly than Justice Murphy. Civil equality and human dignity served as touchstones of Justice Murphy’s approach to questions of constitutional law.²⁶ Unjustly dismissed as a lightweight by some contemporaries and subsequent commentators, Justice Murphy deserves recognition for his

516 (explaining that a sovereign would suffer a loss of dignity were his warships lost through the interference of another state).

22. See, e.g., *McNabb v. United States*, 318 U.S. 332 (1943) (criminal procedure); *Brinegar v. United States*, 338 U.S. 160 (1949) (criminal procedure); *Korematsu v. United States*, 323 U.S. 214 (1944) (civil rights of Japanese Americans during World War II); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (substitution of military courts for civil and criminal courts in World War II Hawaii); *In re Homma*, 327 U.S. 759 (1946) (right to habeas corpus of enemy combatant); *Screws v. United States*, 325 U.S. 91 (1945) (abuse of civil rights of prisoner in police custody).

23. See, e.g., *McNabb*, 318 U.S. at 343 (Frankfurter, J.); *Brinegar*, 338 U.S. at 180-81 (Jackson, J., dissenting); *Korematsu*, 323 U.S. at 215-17 (Murphy, J., dissenting); *Duncan*, 327 U.S. at 334 (Murphy, J., concurring); *In re Homma*, 327 U.S. at 759-61 (Murphy, J., dissenting); *Screws*, 325 U.S. at 134-38 (Murphy, J., dissenting).

24. *McNabb*, 318 U.S. at 343.

25. *Brinegar*, 338 U.S. at 180-81 (Jackson, J., dissenting).

26. Thurgood Marshall, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745, 745 (1950) (“[I]n the field of civil rights, Mr. Justice Murphy was a zealot. To him, the primacy of civil rights and human equality in our law and their entitlement to every possible protection in each case, regardless of competing considerations, was a fighting faith.”).

“dramatic” condemnation of institutionalized racism in cases dealing with the constitutional ramifications of wartime restrictions upon the freedom and rights of American citizens of Japanese descent.²⁷

Korematsu v. United States examined the conviction of a Japanese American for remaining in an area where people of Japanese descent had been ordered excluded.²⁸ A majority of the Court upheld *Korematsu*’s conviction on the grounds of military necessity.²⁹ Justice Murphy dissented. Underlying the exclusion order, he noted, lay the inference “that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States.”³⁰ Moreover, “[t]o give constitutional sanction to that inference in this case . . . adopt[ed] one of the cruelest . . . rationales used by our enemies to destroy the dignity of the individual and open[ed] the door to discriminatory actions against other minority groups in the passions of tomorrow.”³¹

Similarly, in *Duncan v. Kahanamoku*, Justice Murphy branded the replacement of civil and criminal courts by military tribunals in post Pearl Harbor Hawaii as a product of “racism,” which “render[ed] impotent the ideal of the dignity of the human personality.”³² His respect for human dignity extended even to the treatment of Japanese enemy combatants.³³ In *Application of Homma*, Justice Murphy criticized the Court’s refusal to grant an order of habeas corpus sought by a Japanese general, notwithstanding the unquestionable atrocities the general had committed during the Japanese occupation of the Philippines.³⁴ Justice Murphy stated: “A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law.”³⁵

Screws v. United States demonstrates the lengths to which Justice Murphy pushed his belief in human dignity.³⁶ The petitioners, a Georgia sheriff, his deputy, and a policeman, had beaten a handcuffed black prisoner for between fifteen and thirty minutes until he had fallen unconscious.³⁷ The prisoner died.³⁸ Evidence indicated the sheriff had

27. See John P. Frank, *Justice Murphy: The Goals Attempted*, 59 YALE L.J. 1, 1, 11 (1949).

28. *Korematsu*, 323 U.S. at 215-17.

29. *Id.* at 223-24.

30. *Id.* at 240 (Murphy, J., dissenting).

31. *Id.*

32. *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring).

33. See *In re Homma*, 327 U.S. 759 (1946).

34. *Id.* at 759-61 (Murphy, J., dissenting).

35. *Id.* at 760-61 (Murphy, J., dissenting).

36. *Screws v. United States*, 325 U.S. 91, 134-38 (1945) (Murphy, J., dissenting).

37. *Id.* at 93 (majority opinion).

held a grudge against the prisoner before his arrest and also had “threatened to ‘get’ him.”³⁹ When the state took no action against the law enforcement officers,⁴⁰ federal prosecutors charged them under Title 18, § 20 of the United States Code.⁴¹ This made it a criminal offense to willfully deprive an inhabitant of the United States “of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race.”⁴² A federal jury convicted the officers.⁴³

On appeal, the petitioners attacked the statute as void for vagueness. They argued § 20 did not adequately specify the conduct it prohibited. Courts, they noted, determined the viability of allegations of Fourteenth Amendment violations by examining whether the defendant’s conduct infringed a “scheme of ordered liberty.”⁴⁴ This assessment required analyzing the facts of each specific case.⁴⁵ A defendant did not know the standard of guilt that governed his conduct until he had been charged and a court had made such a determination. The petitioners asserted the fluidity of this judicial review in Fourteenth Amendment cases brought under § 20 effectively put the cart before the horse, making meaningful notice of prohibited conduct impossible.⁴⁶

The majority opinion, authored by Justice Douglas, examined the case from several different angles. It refused to find the statute unconstitutionally vague.⁴⁷ However, ultimately, the Court reversed the lower court and ordered a new trial on grounds the petitioners had not stated in their appeal. The Court held the trial judge had not properly instructed the jury on the issue of intent.⁴⁸ The judge had told the jury to convict if it found the petitioners had used unnecessary force in arresting

38. *Id.*

39. *Id.*

40. *Id.* at 138 (Murphy, J., dissenting).

41. *Id.* at 93 (majority opinion). The petitioners also were charged with conspiracy to violate § 20 pursuant to 18 U.S.C. § 88.

42. *Id.* (citing 18 U.S.C. § 20).

43. *Id.* at 93-94. The jury also found the petitioners guilty of the conspiracy charge.

44. *Id.* at 95.

45. *Id.* at 95-96.

46. *Id.* at 96-98.

47. *Id.* at 100.

48. *Id.* at 106-07 (“The court charged that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner’s alleged assault. But in view of our construction of the word ‘willfully’ the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal.”).

the prisoner or protecting themselves from his alleged resistance. This, however, ignored the statute's stipulation that the deprivation of rights be willful. On this ground, the Court ordered a new trial to determine whether the petitioners "had . . . the right to be tried by a court rather than by ordeal."⁴⁹

In contrast to Justice Douglas's lengthy jurisprudential review, Justice Murphy's dissent expounded a simple rationale based on dignity and common sense. The petitioner's actions, he stated, had deprived a man of the right to life. "That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution."⁵⁰ The petitioners, he argued, should have known the taking of a life without due process violated the Fourteenth Amendment.⁵¹ It mattered not that other Fourteenth Amendment cases might present a close call requiring extensive judicial review. This case did not.⁵² The Constitution, § 20, and the petitioners' consciences should have alerted the petitioners to the wrong they were about to commit.⁵³ Whether they willfully violated the prisoner's due process rights was, in Justice Murphy's view, a red herring. The statute explicitly forbade the violation of a constitutional right and no right was more important than the right to life itself. No jury needed to determine the petitioners' willfulness in light of their wanton subversion of the prisoner's right to life and basic standards of due process.⁵⁴ A man had been stripped of the dignity owed to him.⁵⁵ For Justice Murphy, that was enough to make the petitioners' convictions stand.⁵⁶

C. 1950 to 1960

Justice Murphy's death in 1949 silenced the Court's most vocal advocate of the universal right of human dignity to date. In the decade following, no Justice matched his zeal. In several cases, references to dignity carried a different and less universal gloss. For example, in *American Communications Ass'n, CIO v. Douds*, Justice Jackson equated the "affront to individual dignity" with the "resent[ment]" a person suffered by being "compelled to exonerate himself from

49. *Id.* at 107.

50. *Id.* at 134-35 (Murphy, J., dissenting).

51. *Id.* at 137 (Murphy, J., dissenting).

52. *Id.* at 136 (Murphy, J. dissenting).

53. *Id.* at 137.

54. *Id.*

55. *Id.* at 135 (Murphy, J., dissenting).

56. *Id.*

connections he has never acquired.”⁵⁷ This occurred, for example, when a driver had to attest to not having stolen his car to obtain a driver’s license or, in the case at bar, when a person seeking to assume a position in a labor union had to take an oath forswearing membership in the Communist Party.⁵⁸

Justice Jackson gave dignity a different dimension in *Kunz v. New York*.⁵⁹ Here, in a challenge to an ordinance requiring religious groups to obtain a permit to preach in the streets, Justice Jackson conceived the loss of dignity in terms of the embarrassment and hurt a person suffered when hearing his religion or race publicly defamed.⁶⁰

The broader conception of dignity Justice Murphy had laid out resurfaced, however, in the opinions of other Justices during this period. For example, in *Johnson v. Eisentrager*,⁶¹ Justice Black’s dissent channeled Justice Murphy’s in *Application of Homma*.⁶² Both cases dealt with the right of an enemy combatant to seek a writ of habeas corpus challenging his conviction by a military tribunal.⁶³ Whereas in *Homma* the combatant had been a Japanese officer,⁶⁴ the petitioners in *Eisentrager* were German soldiers who had been convicted for continuing military operations in China against Allied Forces after the German surrender in World War II.⁶⁵ In *Eisentrager*, as in *Homma*, a majority of the Court found foreign soldiers lacked standing to seek the writ.⁶⁶ Justice Black dissented, arguing that any person within territory controlled by the United States had the right under the Constitution to contest illegal imprisonment.⁶⁷ “Our nation,” he stated, “proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live.”⁶⁸

Justice Douglas evoked again the theme of respect for common human dignity in *Trop v. Dulles*, which questioned the constitutionality of a statute authorizing military tribunals to strip United States soldiers of their citizenship in cases involving desertion resulting in dishonorable

57. *Am. Comm’n Ass’n, CIO v. Douds*, 339 U.S. 382, 434-35 (1950) (Jackson, J., concurring).

58. *Id.*

59. *Kunz v. New York*, 340 U.S. 290, 313 (1951) (Jackson, J., dissenting).

60. *Id.*

61. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (Black, J., dissenting).

62. *In re Homma*, 327 U.S. 759 (1946) (Murphy, J., dissenting).

63. *Id.* at 759; *Johnson*, 339 U.S. at 765-66.

64. *In re Homma*, 327 U.S. at 759 (Murphy, J., dissenting).

65. *Eisentrager*, 339 U.S. at 765-66.

66. *In re Homma*, 327 U.S. at 759.

67. *Id.* at 798 (Black, J., dissenting).

68. *Id.*

discharge.⁶⁹ Justice Douglas held that “[t]he basic concept underlying the Eighth Amendment [prohibition of ‘cruel and unusual punishment’] is nothing less than the dignity of man.”⁷⁰ The statute violated that concept because “the expatriate had lost the right to have rights.”⁷¹

Justice Douglas also broached the importance of preserving human dignity in cases dealing with issues of government overreach in criminal prosecutions. In *United States v. Carignan*, a case examining an allegedly involuntary confession made during an allegedly illegal detention, Justice Douglas noted that “[w]e in this country . . . early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.”⁷² The next year, Justice Frankfurter echoed this point in *Rochin v. California*.⁷³ The defendant in *Rochin* sought to overturn his conviction for drug possession on the grounds that police had violated his due process rights by forcing him to undergo stomach pumping to retrieve evidence he had swallowed.⁷⁴ Justice Frankfurter analogized the situation to a forced confession and noted that prior cases admitting evidence from newly devised procedures did not “suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.”⁷⁵

Justice Frankfurter reiterated this principle two years after *Rochin* in *Irvine v. California*.⁷⁶ *Irvine* presented another case of an allegedly coerced confession with the additional element of unauthorized bugging of the defendant’s home by the police.⁷⁷ Referring to the latter police action, Justice Frankfurter wrote:

The underlying reasoning of *Rochin* rejected the notion that States may secure a conviction by any form of skulduggery so long as it does not involve physical violence. The cases in which coercive or physical infringements of the dignity and privacy of the individual were involved

69. *Trop v. Dulles*, 356 U.S. 86, 87 (1958). Section 401(g) of the Nationality Act of 1940, as amended was the statute under review.

70. *Trop*, 356 U.S. at 100 (1958) (plurality opinion).

71. *Id.* at 102.

72. *United States v. Carignan*, 342 U.S. 36, 46 (1951) (Douglas, J., concurring).

73. *Rochin v. California*, 342 U.S. 165, 174 (1952), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying for the first time the exclusionary rule to the states, thereby substituting a Fourth Amendment reasonableness standard for the “shocks the conscience” test in instances of intrusive searches).

74. *Id.* at 166.

75. *Id.* at 174.

76. *Irvine v. California*, 347 U.S. 128, 146 (1954) (Frankfurter, J., dissenting), *overruled on other grounds by* *Mapp*, 367 U.S. 643 (applying the exclusionary rule and the Fourth Amendment reasonableness standard to highly intrusive searches by state authorities).

77. *Id.* at 130-31 (majority opinion).

were not deemed “sports in our constitutional law” but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct.⁷⁸

However, Justice Frankfurter seems to have been aware that a reliance on the dignity principle might expose him to the charge of yielding to personal feeling in judicial decision-making. In both *Rochin* and *Irvine*, he explicitly refuted the notion that his holdings in such Due Process cases were more the product of judicial inclination than strict application of the law.⁷⁹ In *Rochin*, he stated:

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of the judicial process.⁸⁰

D. 1960 to 1970

Although some deem the 1960s the apex of the civil rights movement in America,⁸¹ the Supreme Court in this period never accorded human dignity anything like the full-throated endorsement it had received from Justice Murphy nearly twenty years earlier. Nevertheless, the Court was not oblivious to the tenor of the era. Justice Douglas observed that “in times of crisis, when ideologies clash, it is not easy to engender respect for the dignity of suspect minorities and for debate of unpopular issues.”⁸² In the arena of racial equality, Justice Goldberg noted in *Heart of Atlanta Motel v. United States* that “the primary purpose of the Civil Rights Act of 1964 . . . [was] the vindication of human dignity and not mere economics.”⁸³ Yet, often when the Court invoked dignity during this period, it continued the former practice of

78. *Id.* at 146 (Frankfurter, J., dissenting).

79. *Rochin*, 342 U.S. at 170; *Irvine*, 347 U.S. at 147 (Frankfurter, J., dissenting).

80. *Rochin*, 342 U.S. at 170; *see also Irvine*, 347 U.S. at 147 (Frankfurter, J., dissenting) (“Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable. But that is a very different thing from conceiving the results as ad hoc decisions in the opprobrious sense of ad hoc.”).

81. CLINT BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 49 (1988) (asserting the Civil Rights Act of 1964 was “the apex of the golden decade in the quest for civil rights”).

82. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 561 (1963) (Douglas, J. concurring).

83. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring).

doing so more as an aside and in the vein of platitude than as the driving force of an opinion as a whole. Along these lines, Justice Douglas spoke of “that high regard for human dignity which is the proud hallmark of our law.”⁸⁴ Justice Fortas extolled the “cherished instruments by which we have established the freedom and dignity of the individual.”⁸⁵ And Justice Warren reiterated that “personal liberty and dignity” should never be “contingent on the whims of the police officer.”⁸⁶

One could argue, of course, that these increasingly routine acknowledgments of the existence and importance of human dignity signaled its ascendance in the jurisprudential canon. *Miranda v. Arizona*, one of the most important and enduring opinions of this decade, pinned “the constitutional foundation” of that most fundamental of privileges, a criminal defendant’s right against self-incrimination, on “the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”⁸⁷ As Justice Fortas during this period observed, “It is the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require, which has caused this Court to invest the command of ‘due process of law’ with increasingly greater substance.”⁸⁸ Yet, even if this were the case, the Court’s invocations of respect for human dignity occurred more often as matters of form than as products of empathy and deeply felt passion.⁸⁹

84. *Cohen v. Hurley*, 366 U.S. 117, 152 (1961) (Douglas, J., dissenting), *overruled on other grounds by Spevack v. Klein*, 385 U.S. 511, 514 (1967); *see also Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (noting “our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty”).

85. *United States v. Wade*, 388 U.S. 218, 262 (1967) (Fortas, J., dissenting in part).

86. *Wainright v. City of New Orleans*, 392 U.S. 598, 607 (1968) (Warren, J., dissenting).

87. *Miranda v. Arizona*, 384 U.S. 436, 460 (1961).

88. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Fortas, J., concurring).

89. Compare the high-minded but measured quotations noted above with the language in the Report prepared by the Senate Commerce Committee in conjunction with the passage of the Civil Rights Act of 1964:

The primary purpose of [the Act] . . . is to solve . . . the problem of the denial of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

S. Rep. No. 872, 88th Cong., 2d Sess., 16, (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring)).

E. 1970 to 1980

During the first half of this decade, Justice Powell, harkening back to earlier Supreme Court decisions, referred to dignity as a fundamental component of the human condition and noted that respect for it was equally fundamental to the operation of a democratic government.⁹⁰ Justice Brennan echoed this sentiment, stating that “[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”⁹¹ Similarly, Justice Harlan wrote of “the premise of individual dignity and choice upon which our political system rests.”⁹² Justices Marshall,⁹³ Burger,⁹⁴ White,⁹⁵ and Burger⁹⁶ also referred to dignity in their opinions from this period.

In the second half of the decade, various Justices declared that the command for governmental respect for human dignity arose as a consequence of the First,⁹⁷ Fourth,⁹⁸ Fifth,⁹⁹ Eighth,¹⁰⁰ and Fourteenth

90. See *Rosenfield v. New Jersey*, 408 U.S. 901, 908 (1972) (Powell, J., dissenting) (quoting Brandeis, J., concurring); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (noting “the premise of individual dignity and choice upon which our political system rests”); *Gerstein v. Pugh*, 420 U.S. 103, 118 (1975) (quoting *McNabb v. United States*, 318 U.S. 332, 343 (1943): “A democratic society [is one] in which respect for the dignity of all men is central . . .”).

91. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970), *superseded by* 42 U.S.C. § 601 (1996).

92. *Cohen v. California*, 403 U.S. 15, 24 (1971).

93. *E.g.*, *United States v. Mara*, 410 U.S. 19, 34 (1973) (Marshall, J., dissenting) (quoting *Miranda v. Arizona*, 384 U.S. 436, 460 (1961), in support of governmental respect for “the dignity and integrity of its citizens”).

94. *E.g.*, *Ashe v. Swenson*, 397 U.S. 436, 469 (1970) (Burger, C.J., dissenting) (referring to “the dignity of the human personality,” particularly in regard to the victims of crime).

95. *E.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 262-63 (1974) (White, J., dissenting) (castigating the Court’s decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) giving states greater latitude in formulating liability laws in cases involving the defamation of private individuals: “To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press . . .”).

96. *E.g.*, *Tarver v. Smith*, 402 U.S. 1000, 1001 (1971) (Douglas, J., dissenting) (noting governmental and private collection of personal data for their unrestricted use “raises problems concerning the privacy and dignity of individuals”).

97. See *Time Inc. v. Firestone*, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting) (noting laws governing defamation and the invasion of privacy are directed toward “ensuring ‘the essential dignity and worth of every human being’”); *Herbert v. Lando*, 441 U.S. 153, 186 n.1 (1979) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (Brennan, J., dissenting) (“freedom of speech is intrinsic to individual dignity”).

98. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 573 n.4 (Brennan, J., dissenting) (asserting searches at border checkpoints violate the Fourth Amendment as an “affront to the dignity of American citizens of Mexican ancestry and Mexican aliens lawfully within the country”); *New York v. Earl*, 431 U.S. 943, 948 (1977) (Burger, C.J., dissenting) (noting the dignity interests protected by the Fourth Amendment); *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977).

Amendments.¹⁰¹ The most significant development in the affirmation of dignity as a guiding principle occurred in 1976 in *Gregg v. Georgia*.¹⁰² The Court examined whether the death penalty under all circumstances violated the Eighth Amendment's prohibition of "cruel and unusual punishment."¹⁰³ In determining it did not, the Court considered the appropriate standard by which to identify such unjust punishment. It rejected considering only "public perceptions of standards of decency with respect to criminal sanctions," calling this test "not conclusive."¹⁰⁴ Rather, the Court held that "[a] penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"¹⁰⁵ The "basic concept of human dignity test" thus became an essential element in determining Eighth Amendment violations. The principle of dignity had truly arrived. For the first time, lower courts were obliged to assess how state actions affected human dignity in resolving a constitutional question.

F 1980 to 1990

During the 1980s, the importance of preserving dignity arose in a variety of contexts, most frequently in dissents. Justices invoked dignity concerns in cases dealing with court procedure,¹⁰⁶ voting rights,¹⁰⁷ the

99. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 (1976) (citing cases applying the Due Process Clause of the Fifth Amendment "requiring that aliens be treated with the dignity and respect accorded to other persons").

100. See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'"); *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

101. See *Paul v. Davis*, 424 U.S. 693, 734-35 (1976) (Brennan, J., dissenting) ("I have always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth.").

102. *Gregg*, 428 U.S. at 153.

103. *Id.* at 168.

104. *Id.* at 173.

105. *Id.* (quoting *Trop v. Dulles*, 365 U.S. 86, 100 (1958) (plurality opinion)).

106. See *United States v. Raddatz*, 447 U.S. 667, 697 (1980) (Marshall, J., dissenting) ("[T]he requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity."); *Cabana v. Bullock*, 474 U.S. 376, 397 (1986) (Blackmun, J., dissenting) (noting that the imposition of a death sentence without considering defendant's personal culpability is "a kind of deprivation of human dignity which the Eighth Amendment forbids"), *overruled on other grounds by* *Rose v. Clark*, 478 U.S. 570 (1986); *Allen v. Illinois*, 478 U.S. 364, 384 (1986) (Stevens, J., dissenting) (arguing that the state's procedure that determined petitioner was sexually dangerous "create[d] a shadow criminal law without the fundamental protection of the Fifth Amendment [which] conflicts with the respect for liberty and individual dignity that has long characterized, and that continues to characterize, our free society").

treatment of prisoners,¹⁰⁸ citizenship,¹⁰⁹ racial equality,¹¹⁰ search and seizure,¹¹¹ age limits,¹¹² coerced confessions,¹¹³ and capital punishment.¹¹⁴ Notably, the greatest advocate of human dignity in these cases was Justice Brennan, one of the Court's most celebrated liberal Justices, who invoked it regularly in dissent.¹¹⁵

107. See *City of Mobile v. Bolden*, 446 U.S. 55, 89 n.10 (1980) (Stevens, J., concurring) (quoting *Cousins v. City Council of Chicago*, 466 F.2d 830, 852 (7th Cir. 1972) (Stevens, J., dissenting)) (noting that members of different political groups go to vote with equal dignity and a right to be protected from discrimination), *superseded on other grounds by* 52 U.S.C. § 10301(b) (2016) (formerly 42 USC § 1973 (b)).

108. See *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting) (arguing that homosexual rape or other prison violence “is offensive to any standard of human dignity”); *Davidson v. Cannon*, 474 U.S. 344, 356 (1986) (Brennan, J., dissenting) (“[E]xcusing the State’s failure to provide reasonable protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity.”); *Roach v. Aiken*, 474 U.S. 1039, 1042 (1986) (Brennan, J., dissenting) (arguing that condemned prisoner should be determined competent in order to allow him to face execution with dignity); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting) (denying prisoner “the opportunity to affirm membership in a spiritual community . . . may extinguish an inmate’s last source of hope for dignity and redemption”), *superseded on other grounds by* 42 U.S.C. § 2000bb(a)(5) (2016).

109. See *Vance v. Terrazas*, 444 U.S. 252, 273 (1980) (Marshall, J., concurring in part & dissenting in part) (quoting H.R. Rep. No. 1086 87th Cong., 1st Sess. 41(1961)) (affirming “the dignity and priceless value of citizenship”); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981) (Brennan, J., concurring) (noting prisoner punishment must be consistent with standards of human dignity (citing *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring))).

110. See *Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (referring to “the basic rights of dignity and equality that this country had fought a Civil War to secure”).

111. See *United States v. Leon*, 468 U.S. 897, 972-73 (1984) (Stevens, J., concurring) (noting that the exclusionary rule implicates dignitary concerns (quoting *Brinegar v. United States*, 338 U.S. 160, 180-81(1949) (Jackson, J., dissenting)); *United States v. Montoya de Hernandez*, 473 U.S. 531, 556 (1985) (Brennan, J., dissenting) (arguing that stomach searches are an “extreme invasion of privacy and dignity”); *Winston v. Lee*, 470 U.S. 753, 760 (1985) (holding that compelling the suspect to undergo surgery for removal of a bullet as evidence was not an intrusive violation of personal dignity (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)); *Florida v. Riley*, 488 U.S. 445, 462 (1989) (Brennan, J., dissenting) (objecting to surveillance of private property by air, observing the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion” (quoting *Schmerber*, 384 U.S. at 767))).

112. See *W. Air Lines v. Crew*, 472 U.S. 400, 409-10 (1985).

113. See *Colorado v. Connelly*, 479 U.S. 157, 176 (1986) (Brennan, J., dissenting) (arguing that limiting involuntary confessions to those obtained by police officers offends values of human dignity).

114. See *Stanford v. Kentucky*, 492 U.S. 361, 382-83 (1989) (Brennan, J., dissenting) (objecting to death sentence for defendant who committed crime while still a juvenile, noting a criminal penalty must conform to principles of human decency (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)), *overruled on other grounds by* *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

115. See *Dahlia Lithwick, Getting to Five*, N.Y. TIMES: SUNDAY BOOK REV. (Oct. 8, 2010), http://www.nytimes.com/2010/10/10/books/review/Lithwick-t.html?_r=0 (calling Justice Brennan a “legendary liberal”).

Noteworthy are several opinions that foreshadowed in different ways dignity arguments later expressed by Justice Kennedy in the gay rights opinions. Justice Stevens's dissent in *Bowers v. Hardwick* addressed the same question Justice Kennedy re-examined seventeen years later in *Lawrence v. Texas*: whether criminal prohibitions of homosexual sodomy violate the constitutional rights of gay people.¹¹⁶ The *Bowers* majority held such prohibitions did not, based largely on the longstanding opprobrium accorded to homosexual activity throughout history.¹¹⁷ Justice Stevens countered in kind, going back to “the origins of the American heritage of freedom.”¹¹⁸ Implicit here was an “abiding interest in individual liberty” and a corresponding condemnation of government interference with “the citizen’s right to decide how he will live his own life.”¹¹⁹ Thus, “our . . . respect for the dignity of individual choice in matters of conscience” accorded individuals “the right to engage in non-reproductive sexual expression others might find offensive.”¹²⁰

Although Justice Stevens acknowledged this right had thus far been applied only to sexual conduct in a marital context, he found no rational reason why the state should selectively restrict homosexuals from its exercise.¹²¹ Homosexuals and heterosexuals, he noted, shared the same interest in determining how to conduct their lives and form personal associations.¹²² Nor was mere dislike of a particular group an appropriate rationale for differential treatment.¹²³ For these reasons, Justice Stevens believed the state lacked constitutional authority to substitute its judgment for that of any couple, gay or straight, in matters concerning voluntary intimate relations behind closed doors.¹²⁴

The conflation of human dignity with the freedom to make fundamental personal life choices appeared again in *Thornburgh v.*

116. See *Bowers v. Hardwick*, 478 U.S. 186, 217-18 (1986) (Stevens, J., dissenting) (examining whether homosexuals have a constitutional right to engage in sodomy), *overruled on other grounds by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Lawrence*, 539 U.S. at 662 (expressing the issue as “the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct”).

117. See *Bowers*, 478 U.S. at 192 (majority opinion) (noting that “[p]roscriptions against [sodomy] have ancient roots”).

118. *Id.* at 217 (Stevens, J., dissenting) (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975)).

119. *Id.* at 217.

120. *Id.* (Stevens, J., dissenting).

121. See *id.* at 220.

122. See *id.* at 218-19.

123. See *id.* at 219.

124. See *id.*

American College of Obstetricians & Gynecologists.¹²⁵ The case examined the constitutionality of various restrictions on the right to an abortion.¹²⁶ The Reagan administration had presented the case to the Court as an opportunity to overturn *Roe v. Wade*'s determination that women had a constitutional right to choose whether to procreate.¹²⁷ *Thornburgh* upheld *Roe*.¹²⁸ In the majority opinion, Justice Blackmun stated: "[T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."¹²⁹ Men and women, alike, enjoyed this liberty and in exercising it affirmed their human dignity. Applying these principles to abortion, Justice Blackmun asserted "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . to end her pregnancy. . . . Any other result, in our view, would protect inadequately a central part of the sphere of liberty our law guarantees equally to all."¹³⁰

Justice Marshall's dissent in *City of Cleburne v. Cleburne Living Center* addressed the intersection of the social opprobrium of a particular group with the dignity interests of the group's members.¹³¹ The operator of a group home for mentally disabled persons had challenged the constitutionality of a city's zoning ordinance requiring a special use permit for the establishment of such facilities.¹³² The Court held the restriction violated the Equal Protection Clause.¹³³ Although the majority

125. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), *overruled in part on other grounds by* *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992).

126. See *id.* at 760-61. The Pennsylvania statute required the woman to give her voluntary and informed consent to the abortion in conjunction with the delivery of certain information to her twenty-four hours prior to the procedure. This information included the name of the doctor performing the abortion, a warning of harmful physical and psychological effects of abortion generally, a warning of risks associated with the particular procedure to be performed, an estimate of the gestational age of the fetus, a warning of the risks associated with bringing the pregnancy to term, and statements informing the woman of the availability of benefits for prenatal care and of the father's obligation to provide child support.

127. See Brief for the United States as Amicus Curiae in Support of Appellants *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379), 1985 WL 669705, at *2-4; see also Memorandum of Samuel A. Alito Dated May 30, 1985 to the U.S. Solicitor General Recommending the Justice Department File an Amicus Brief in Support of the Pennsylvania Legislation, <https://www.archives.gov/news/samuel-alito/accesion-060-89-216/Thornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf>.

128. See *Thornburgh*, 476 U.S. at 772.

129. *Id.*

130. *Id.*

131. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 467 (1985) (Marshall, J., concurring in part and dissenting in part).

132. See *id.* at 435 (majority opinion).

133. See *id.* at 450.

declined to deem the mentally disabled a quasi-suspect class,¹³⁴ the Court found that, even under the standard rational basis test, the city had advanced no rational reason for segregating the entire class of mentally disabled persons from the general community.¹³⁵ Justice Marshall concurred in the result but argued the case had warranted a more stringent standard of review. He stated:

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.¹³⁶

Accordingly, Justice Marshall proposed that the degree of scrutiny be triggered not by the presence or absence of specified group traits, i.e., gender, race, alienage, or national origin, but rather by an inquiry into whether the classification at issue could be viewed as potentially discriminatory in light of a history of systemic unequal treatment.¹³⁷

Finally, *City of Memphis v. Greene* broke new ground by defining the contours of human dignity to include social responsibilities as well as social benefits.¹³⁸ Black residents sued a city, seeking to enjoin a road closure in a white neighborhood, which they believed would impact adversely their black neighborhood.¹³⁹ They argued the closure was racially motivated in violation of the Civil Rights Act of 1886 or the Thirteenth Amendment.¹⁴⁰ The Court ruled against the black residents, finding no evidence the city had contrived the street closure to advance racial prejudice.¹⁴¹ The Court observed that, given the prevalence in cities of neighborhoods with distinct racial or ethnic identities, a government action in one neighborhood, which burdened another, did not inevitably trigger Thirteenth Amendment concerns, even though a discrete group

134. *See id.* at 442.

135. *See id.* at 450 (holding the permit requirement was based on an irrational prejudice against the mentally retarded).

136. *Id.* at 467 (Marshall, J., dissenting).

137. *See id.* at 470.

138. *See City of Memphis v. Greene*, 451 U.S. 100, 128 (1981).

139. *See id.* at 102.

140. *See id.* (referencing 42 U.S.C. § 1982).

141. *See id.* at 127.

might bear the brunt of the impact.¹⁴² Such was a not uncommon burden of city life. And, as the Court concluded, “Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin.”¹⁴³

III. JUSTICE KENNEDY’S DIGNITY PRINCIPLES IN THE GAY RIGHTS CASES

Justice Kennedy joined the Supreme Court on February 18, 1988.¹⁴⁴ In modern times, Justice Kennedy has been the Supreme Court’s most ardent advocate of the importance of preserving human dignity in the face of adverse government action, particularly in the area of gay rights.¹⁴⁵ His invocation of dignity as a guiding principle has become more pronounced as his tenure on the Court has progressed. It first appeared in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁴⁶ *Casey* examined the constitutionality of a Pennsylvania statute, which established certain prerequisites for women seeking to obtain abortions absent a medical emergency.¹⁴⁷ Justice Kennedy has been credited with the following passage:

Our precedents “have respected the private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158, 166, (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about

142. *See id.*

143. *Id.* at 128.

144. *Biographies of Current Justices of the Supreme Court, Anthony M. Kennedy, Associate Justice*, SUP. CT. U.S. (Mar. 18, 2017), <https://www.supremecourt.gov/about/biographies.aspx>.

145. Robert Barnes, *Kennedy Emerges as Judicial Champion of Gay Rights*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/courts_law/kennedy-emerges-as-judicial-champion-of-gay-rights/2015/06/26/b295eb60-1c22-11e5-ab92-c75ae6ab94b5_story.html.

146. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

147. *See id.* at 844. The statute required a woman to receive specified information about abortions at least twenty-four hours before an abortion was performed to ensure her “informed” consent to the procedure; mandated a minor seeking an abortion to obtain the informed consent of a parent or, alternatively, the consent of a judge; and required a married woman to attest she had informed her husband of her intention to have an abortion.

these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁴⁸

Justice Kennedy returned to this notion of constitutionally protected self-actualization in *Romer v. Evans*.¹⁴⁹ Although *Romer* did not explicitly refer to “dignity” as such, it set the course Justice Kennedy would follow in a trio of gay rights opinions that followed, where “dignity” figured with increasing prominence.¹⁵⁰ *Romer* addressed the constitutionality of Amendment 2, a voter-endorsed Colorado ballot initiative, which amended the state constitution to repeal municipal ordinances prohibiting discrimination on the basis of sexual orientation. Amendment 2 also made any subsequent adoption of gay rights protections contingent on the repeal of the constitutional ban.¹⁵¹

The thrust of Justice Kennedy’s invalidation of Amendment 2 as a violation of the Equal Protection Clause of the Fourteenth Amendment lay in his characterization of its having been motivated by the voters’ “animosity” against the homosexual residents of Colorado.¹⁵² As a baseline, he noted Amendment 2 made it harder for gay citizens than others to obtain protections relating to “an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹⁵³ Thus, whatever its purported legislative ends, Amendment 2 effectively classified a politically unpopular group “to make them unequal to everyone else.”¹⁵⁴ “A State,” Justice Kennedy observed, “cannot so deem a class of people a stranger to its laws.”¹⁵⁵ By so doing, Colorado’s Amendment 2 violated the Equal Protection Clause.¹⁵⁶

In *Lawrence v. Texas*, Justice Kennedy quoted the passage he had written in *Casey*, noted above, thereby reiterating the significance of dignity as an element of personal liberty commanding governmental

148. *Id.* at 851; Jeffrey Rosen, *Supreme Leader: On the Arrogance of Anthony Kennedy*, NEW REPUBLIC (June 15, 2007), <https://newrepublic.com/article/60925/supreme-leader-the-arrogance-anthony-kennedy> (attributing the passage, which appeared in an opinion authored jointly by Justices O’Connor, Kennedy, and Souter, to Justice Kennedy).

149. See *Romer v. Evans*, 517 U.S. 620 (1996).

150. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (referencing dignity one time); *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692-95 (2013) (referencing dignity a total of nine times); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-96, 2598-99, 2603, 2606, 2608 (2015) (referencing dignity a total of twelve times).

151. *Romer*, 517 U.S. at 623-24.

152. *Id.* at 634.

153. *Id.* at 631.

154. *Id.* at 635.

155. *Id.*

156. *Id.*

respect.¹⁵⁷ This, in fact, served as the common thread that wove together the separate parts of his opinion, which held Texas's criminal statute prohibiting sodomy in violation of the Due Process Clause.¹⁵⁸ On the one hand, by placing homosexual conduct under the umbrella of respect for dignity and personal liberty and framing that, in turn, as a longstanding and widely held value, Justice Kennedy sought to counteract the argument that the condemnation of homosexuality had "ancient roots."¹⁵⁹ On the other hand, the command of respect for dignity and personal liberty also reinforced his argument that criminalizing homosexual conduct branded gay people as criminals with the intent and effect of demeaning them.¹⁶⁰ Justice Kennedy noted that the decision of consenting adults to enter into private sexual relations is an integral aspect of personal autonomy whatever the sexual orientation of the actors.¹⁶¹ By singling out the sexual relations of gay people for condemnation, while condoning heterosexual sexual expression, the State engaged in the kind of disparate treatment, which Justice Kennedy had previously held to be unjust and unconstitutional in *Romer*.¹⁶² Thus, by melding dignity with personal autonomy, the *Lawrence* opinion built upon the foundations, which Justice Kennedy had erected in *Casey* and *Romer*.¹⁶³

Ten years later, Justice Kennedy mentioned "dignity" nine times in his majority opinion in *United States v. Windsor*.¹⁶⁴ *Windsor* found unconstitutional a provision of the federal Defense of Marriage Act (DOMA) forbidding agencies of the United States government from recognizing the validity of same-sex marriages deemed legal in the participants' states of residence.¹⁶⁵ The plaintiff, Edith Windsor, had sued the United States because, although having been legally wed under New

157. *Lawrence v. Texas*, 539 U.S. 558, 573-74 n.155 (2003) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

158. *See id.* at 577.

159. *See id.* at 570 (noting that the historical grounds relied on in upholding the criminal sanction of homosexual conduct are overstated).

160. *See id.* at 575-76.

161. *See id.* at 574.

162. *See id.* at 573-74 (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

163. *See id.*; *see also Casey*, 505 U.S. at 851; *Romer*, 517 U.S. at 635.

164. *See United States v. Windsor*, 133 S. Ct. at 2689, 2692-95 (2013).

165. *See id.* at 2683, 2696. Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

York State law to her now deceased same-sex spouse, she was disqualified by DOMA from receiving the spousal deduction accorded to surviving heterosexual spouses in the assessment of the federal estate tax.¹⁶⁶

Justice Kennedy predicated his dignity analysis on the observation that, through the institution of marriage, a state dignifies not only the personal relationship between the marital parties but also the parties themselves.¹⁶⁷ This implicated an iteration of dignity different from that discussed in *Casey*, *Romer*, and *Lawrence*.¹⁶⁸ In those cases, Justice Kennedy had framed dignity as a condition universally shared by all people and one to which every person was entitled by virtue of birth.¹⁶⁹ Thus, the constitutional defect of the respective statutes in *Casey*, *Romer*, and *Lawrence* lay in the roadblocks they had placed in the way of the persons affected to assume the dignity that was their natural birthright.¹⁷⁰ In *Windsor*, however, the dignity at issue was not an innate status the state sought to diminish, but rather a status conferred by the state itself, which the federal government refused to honor in the case of a certain class of similarly situated persons, i.e., same-sex couples in marital relationships.¹⁷¹

However, even though the issue in *Windsor* involved a variety of dignity fundamentally different in origin from that discussed in the earlier cases, Justice Kennedy ultimately segued into a by-now familiar analysis. Depriving same-sex couples of the marital status accorded to their heterosexual peers equated to discrimination against a class of socially disfavored persons.¹⁷² This discrimination, in turn, demeaned and stigmatized gay people and their committed relationships.¹⁷³ It also barred gay people from achieving a dignified status routinely accorded to others and closely associated with human fulfillment, thereby preventing homosexual couples from defining their personal existence as they, themselves, saw fit.¹⁷⁴ As Justice Kennedy opined in *Casey*, *Romer*, and

166. *See id.* at 2683.

167. *See id.* at 2692 (asserting marriage dignifies the class of people who enter into it and creates “a relationship deemed by the State worthy of dignity”).

168. *See Casey*, 505 U.S. at 581; *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 573-74.

169. *See Casey*, 505 U.S. at 581; *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 573-74.

170. *See Casey*, 505 U.S. at 581; *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 573-74.

171. *See Windsor*, 133 S. Ct. at 2692 (asserting the state confers upon couples “a dignity and status of immense import”).

172. *Id.*

173. *Id.*

174. *See id.* at 2694 (noting that the Constitution protects a couple’s “moral and sexual choices” and “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person”).

Lawrence, such a deprivation of personal liberty once again offended constitutional protections of autonomy, here afforded by the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments respectively.¹⁷⁵

Justice Kennedy's opinion in *Obergefell v. Hodges* affirming same-sex marriage¹⁷⁶ stands as a landmark in the development of gay rights in America.¹⁷⁷ Yet, it largely retread the dignity principles previously expressed in *Windsor*.¹⁷⁸ Ultimately framing the issue as whether same-sex couples desiring to enter into marriage were entitled to "equal dignity in the eyes of the law," Justice Kennedy held "[t]he Constitution grants them that right."¹⁷⁹

Obergefell shares with *Windsor* the underlying supposition that couples who enter into the state-sponsored institution of marriage benefit from a sense of dignity and an enhanced social status.¹⁸⁰ In Justice Kennedy's view, this gift of dignity is not dependent on the couples' sexual orientations but arises from the bond that cements their relationships and "in their autonomy to make such profound choices."¹⁸¹ Out of marriage arise certain burdens, such as responsibility for the welfare of one's spouse, which, in turn, contribute to its dignity.¹⁸² It thus follows that depriving same-sex couples of the right to marry denies them the dignity of marriage in all its aspects, limits their autonomy to make a fundamental life choice, and trivializes and, indeed, stigmatizes their relationship choices that remain.¹⁸³

Justice Kennedy also took a longer view, asserting the stigma generated by same-sex marriage bans harms all gay people by subordinating them in society and diminishing their personhood.¹⁸⁴ Accordingly, the prohibition of same-sex marriage leaves gay people "condemned to live in loneliness, excluded from one of civilization's

175. *Id.* at 2695-96.

176. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

177. Ariane de Vogue & Jeremy Diamond, *Supreme Court Rules in Favor of Same-Sex Marriage Nationwide*, CNN (June 27, 2015), <http://www.cnn.com/2015/06/26/politics/supreme-court-same-sex-marriage-ruling/> (calling the decision a "landmark ruling").

178. *See Windsor*, 133 S. Ct. at 2692 (framing marriage as a dignified status, which the state confers upon couples).

179. *Obergefell*, 135 S. Ct. at 2608.

180. *See Windsor*, 133 S. Ct. at 2692 (noting the dignity granted to couples through marriage); *Obergefell*, 135 S. Ct. at 2599 (noting the same).

181. *Obergefell*, 135 S. Ct. at 2599 ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.").

182. *See id.* at 2601.

183. *See id.* at 2602.

184. *See id.* at 2602, 2604.

oldest institutions”¹⁸⁵ and deprived not only of the dignity marriage brings but also the dignity arising from the autonomy accorded to individuals to define themselves.¹⁸⁶ Taking all of these points into consideration, Justice Kennedy held that a state action leading to the kind of dignitary wounds such deprivations inflicted could not withstand constitutional scrutiny.¹⁸⁷

IV. THE CORRESPONDENCE OF JUSTICE KENNEDY’S DIGNITY PRINCIPLES TO SUPREME COURT PRECEDENT

Expressions of the importance of human dignity appeared in Supreme Court opinions long before Justice Kennedy’s Dignity Principles came to fruition in his gay rights decisions. Indeed, one would be hard pressed to point to any element of Justice Kennedy’s dignity jurisprudence that breaks entirely new ground.

Antecedents of the moral component of the Dignity Principles lie in Justice Murphy’s dissents of the 1940s. Like Justice Kennedy, Justice Murphy believed the state had a duty to respect and maintain the dignity of every human being without regard to the prevailing political or social climate.¹⁸⁸ Each believed every person possessed an innate dignity that public opprobrium could not dispel.¹⁸⁹ Both considered state action that diminished this dignity to be not only constitutionally but also morally wrong. And both Justices’ views of human dignity share an element that distinguishes them from the views of other Justices who perceived dignitary injustice principally as a defect of government. Unlike these other Justices, Justice Murphy and Justice Kennedy saw that the injustice perpetrated by the disregard of human dignity could not be laid solely at the door of the state. They looked beyond the state as a corporate entity to the improper motivations of the individuals who had brought the state’s action into being. Thus, Justice Murphy singled out popular racism against Japanese and Black Americans as the root of the

185. *Id.* at 2608.

186. *See id.* at 2600 (“The right to marry thus dignifies couples who wish to define themselves by their commitment to each other,” quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013)).

187. *See id.* at 2603, 2606 (noting the dignitary wounds caused by *Bowers v. Hardwick* endured even after *Lawrence* overruled *Bowers*’ affirmation of sodomy prohibitions because “[d]ignitary wounds cannot always be healed with the stroke of a pen”).

188. *See, e.g., In re Homma*, 327 U.S. 759, 760-61 (1946) (Murphy, J., dissenting) (noting the nation should not let wartime frenzy diminish its “central theme of the dignity of the human personality”).

189. *Id.*; *see also Romer v. Evans*, 517 U.S. 620, 635 (1996) (asserting a state cannot classify a politically unpopular group “to make them unequal to everyone else”).

Constitutional violations he condemned¹⁹⁰ much as Justice Kennedy would later focus on the public's animus toward homosexuals as the evil at the core of the anti-gay rights legislation he ruled unconstitutional. In so doing, both empathized strongly with those oppressed by the government's action and saw that oppression as the product of a broader moral lapse of American society as a whole.

Underlying the Dignity Principles of Justice Kennedy is a belief that the passage of years sometimes allows a broader perspective, which permits the recognition of dignitary values previously ignored.¹⁹¹ The idea that time transforms moral standards is, however, not unique to Justice Kennedy. Justice Marshall in *City of Cleburne* noted evolving views that allowed greater appreciation of the dignity of the mentally disabled.¹⁹² Even earlier, Justice Fortas in *Duncan* attributed the quickening pace of the development of Due Process jurisprudence in the twentieth century to "the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require."¹⁹³

Justice Kennedy also shares with certain of his predecessors the recognition that dignity arises out of the ability of a person to freely make those fundamental life choices that define the individual both in his or her own mind as well as to society at large.¹⁹⁴ Notably, Justice Brennan introduced this very point in a gay rights context in his dissent in *Bowers v. Hardwick*.¹⁹⁵ There, Justice Brennan equated the right of gay people to engage in sexual expression with self-actualization, an interest he deemed no different in importance to gay people as it was to heterosexuals.¹⁹⁶ Thus, Justice Brennan emphasized the commonalities shared by gay and straight people as human beings seventeen years

190. See *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring) (castigating racism against the Japanese); *Romer*, 517 U.S. at 634 (noting public animosity against homosexuals).

191. See *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) (noting prior analysis in *Bowers* regarding the opprobrium of homosexuality now seems overstated).

192. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part) (noting change in attitudes toward black people and the mentally disabled in recent years).

193. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Fortas, J., concurring).

194. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (linking dignity with the autonomy to make life choices).

195. *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Brennan, J., dissenting) (discussing "the citizen's right to decide how he will live his own life").

196. See *id.* at 218-19.

before Justice Kennedy made the equivalent argument in *Lawrence v. Texas*.¹⁹⁷

Moreover, Justice Blackmun had drawn a strong connection between individual autonomy and the realization of one's dignity in *Thornburgh v. American College of Obstetricians & Gynecologists*, this time in a majority opinion.¹⁹⁸ The emphasis on the dignity of self-determination found in *Thornburgh* reappeared in substance if not word for word in *Casey* in a passage widely attributed to Justice Kennedy and considered by some the first expression of his Dignity Principles. Allying personal autonomy with dignity and firmly placing both within the "sphere of liberty" protected under the Fourteenth Amendment, Justice Blackman thereby enunciated a theme that later would become the crux of Justice Kennedy's argument in his quartet of gay rights opinions.¹⁹⁹

Justice Kennedy's argument that the state confers dignity on couples entering into marriage also has precursors in some of the earliest Supreme Court jurisprudence. As noted above, the equation of dignity with social status goes back to the nineteenth century.²⁰⁰ The notion, too, that government may confer an additional dignity on individuals, apart from that which they already possess, was commonly advanced in cases addressing citizenship and the dignity attendant to it.²⁰¹ The dignity accorded by marriage and the dignity accorded by citizenship are alike in that both confer a special status on the individual, one that carries with it a range of additional benefits denied to those from whom the status is withheld.²⁰²

Finally, Justice Kennedy is not alone in declaring that burdens as well as benefits follow upon the conferral of dignity by state action. Justice Kennedy pointed, for example, to spousal financial reporting

197. *See id.* (noting heterosexuals have the same interest as homosexuals to decide how to live their lives).

198. *See Thornburgh v. Amer. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

199. *See Romer v. Evans*, 517 U.S. 620, 635 (1996); *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) (characterizing dignity as an element personal liberty); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (noting the protects people's "moral and sexual choices"); *Obergefell*, 135 S. Ct. at 2607 (noting the autonomy to make fundamental life choices as a constitutional value).

200. *See, e.g., R.R. Co. v. Barron*, 72 U.S. 90 (1866) (alluding to people's different measures of dignity, character, and position).

201. *See, e.g., Buchanan v. Warley*, 245 U.S. 60, 76 (1917) (noting dignity attributable to citizenship).

202. *See, e.g., City of Memphis v. Greene*, 451 U.S. 100, 128 (1981) (referencing the benefits of citizenship); *Obergefell*, 135 U.S. at 2601 (noting the numerous government benefits attendant to marriage).

requirements in certain instances of federal employment in demonstrating that gay couples seeking marriage will share with heterosexual couples the responsibilities of marriage along with its benefits.²⁰³ In similar fashion, the Court in *City of Memphis v. Greene* pointed out that just as black city dwellers are entitled to all of the benefits of city life owed to them by virtue of the dignitary interests protected by the Thirteenth Amendment and civil rights legislation, so do these dignitary protections require that black city residents also share city life's common burdens.²⁰⁴

In sum, the various facets of Justice Kennedy's Dignity Principles could be viewed as logical extensions of the Supreme Court's prior dignity jurisprudence. Two questions consequently follow: Why did Justice Kennedy disregard that precedent and what are the likely consequences of his so doing?

V. POSSIBLE REASONS WHY JUSTICE KENNEDY DISREGARDED DIGNITY PRECEDENT IN HIS OPINIONS IN THE GAY RIGHTS CASES

Any of several reasons could account for Justice Kennedy's disregard of dignity precedent in his gay rights opinions. It may be that legal analysts have mistakenly identified dignity as the underlying theme of these opinions. One could argue that *Lawrence*, *Windsor*, and *Obergefell* are, alternatively, really about personal autonomy. Justice Kennedy plainly believes dignity is manifested by the individual's ability to define the parameters of his or her personal life without government interference.²⁰⁵ Thus one could argue that he considers personal autonomy rather than dignity the more essential element in the dynamic of Constitutional liberty and the individual wellbeing it promotes. Although dignity arises from autonomy, autonomy is the engine that drives the self-actualization Justice Kennedy deems so important.²⁰⁶ Thus, it may be that Justice Kennedy did not cite dignity precedent because dignity, while a by-product of individual choice, appeared less important to him than the right to choose itself.

Another reason for the avoidance of dignity precedent in the gay rights opinions could lie in the perception that, traditionally, the

203. See *Obergefell*, 135 U.S. at 2601 (noting the status of marriage carries with it responsibilities as well as benefits).

204. See *City of Memphis*, 451 U.S. at 128 (noting burdens of citizenship along with benefits).

205. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (noting that one's choice of sexual relations is an integral aspect of personal autonomy).

206. See, e.g., *Planned Parenthood of S.E. Pa v. Casey*, 505 U.S. 833, 851 (1992) (asserting dignity arises out of personal autonomy).

invocation of dignity interests in Supreme Court jurisprudence has been a loser's game. The survey of dignity precedent presented above demonstrates that, while dignity has often been discussed powerfully and persuasively, a greater number of these discussions appeared in dissents. Having successfully based majority opinions in *Romer* and *Lawrence* indirectly or directly on dignity principles of his own making,²⁰⁷ Justice Kennedy may have believed citation to this binding precedent in successive gay rights cases, even though self-made, presented more forceful authority.

Justice Kennedy may also have believed the contexts of the dignity precedent that *is* binding did not lend itself to the gay rights discussion. Many of these cases dealt with the treatment of criminal defendants or prison inmates.²⁰⁸ *City of Cleburne* involved the mentally disabled.²⁰⁹ To invoke these cases when homosexual conduct itself had been criminalized²¹⁰ and deemed symptomatic of mental illness²¹¹ may have seemed inappropriate. Justice Kennedy could have feared that analogizing the dignity interests of gay people to those of the persons in these other contexts might as likely have reinforced the traditional stigmas associated with homosexuality in the minds of some as shown the way toward greater tolerance.

VI. POTENTIAL CONSEQUENCES OF JUSTICE KENNEDY'S DISREGARD OF DIGNITY PRECEDENT IN THE GAY RIGHTS CASES

Whatever the reason Justice Kennedy sidestepped existing dignity precedent in the gay rights cases, his decision to do so is problematic in a number of respects. For one, it exposes Justice Kennedy to the criticism

207. *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence*, 539 U.S. 558.

208. *See, e.g., Rochin v. California*, 342 U.S. 165, 175 (1952) (noting the indignity of forced confession); *Irvine v. California*, 347 U.S. 128, 146 (1954) (Frankfurter, J., dissenting) (arguing that dignity should not be offended by police or prosecutorial skullduggery); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (arguing that prisoners have constitutional rights).

209. *City of Claiborne v. Cleburne Living Ctr.*, 473 U.S. 432, 467 (1985) (Marshall, J., concurring in part and dissenting).

210. *See Lawrence*, 539 U.S. at 570 (noting nine states had singled out same-sex relations as criminal conduct).

211. *See* Neel Burton, *When Homosexuality Stopped Being a Mental Disorder: Not Until 1987 Did Homosexuality Completely Fall Out of the DSM*, PSYCHOL. TODAY (Sept. 18, 2015), <https://www.psychologytoday.com/blog/hidden-and-seeking/201509/when-homosexuality-stopped-being-mental-disorder> (noting the classification of homosexuality as a mental disorder until 1984); *see also* Phil Hickey, *Homosexuality: The Mental Illness That Went Away*, BEHAVIORISM & MENTAL HEALTH, <http://behaviorismandmentalhealth.com/2011/10/08/homosexuality-the-mental-illness-that-went-away/> (last updated Jan. 2, 2013) (stating that “[a]ccording to the American Psychiatric Association, until 1974 homosexuality was a mental illness”).

that he made the law up to reach his personally desired ends.²¹² Although Due Process/Equal Protection jurisprudence lends itself to the charge of subjectivity in any case—recall Justice Brandeis’ highly defensive explanation of Due Process methodology in *Rochin*²¹³—Justice Kennedy’s piggybacking of his Dignity Principles from one gay rights opinion onto the next creates particular concerns. Although negative clamor arising from the application of an untested doctrine in an isolated case generally fades with time, serial use of such doctrine over a short period fans the flames of criticism. Indeed, the jurisprudence of Justice Murphy presents a cautionary tale precisely in this regard. During his tenure on the Court, critics chastised Justice Murphy for relying more on high-minded and highfalutin rhetoric than on solid legal doctrine.²¹⁴ The standing of his judicial opinions and his place in judicial history suffered accordingly.²¹⁵

Today, Justice Kennedy receives similar criticism for his gay rights opinions.²¹⁶ That criticism matters because *Obergefell* and the other gay rights cases challenged longstanding social norms. When the Court considers a fundamental realignment of the social order, the proponents and opponents of change rightfully expect and deserve a decision based firmly in precedent. The paucity of precedent (other than that of Justice Kennedy’s making) in the gay rights cases fails the expectations of those on both sides of the issues. Justice Kennedy’s avoidance of precedent here is all the more troubling because it need not have happened. As demonstrated above, the ideal of human dignity has considerable roots in Supreme Court jurisprudence, roots that might have better grounded opinions that predictably would prove life-changing and extremely controversial.

212. See, e.g., Kengor, *supra* note 7 (“Freedom, properly practiced, isn’t about the freedom of Supreme Court justices coming up with their own definitions of things.”); Watson, *supra* note 7 (“We must offer resistance to a decision so patently ungrounded in the Constitution that the dissenters themselves suggest it is owed no deference.”).

213. See *Rochin*, 342 U.S. at 170.

214. See Sergey Tokarev, *Frank Murphy (1890–1949)*, <http://uscivilliberties.org/biography/4177-murphy-frank-18901949.html> (last visited Apr. 20, 2017) (“His most severe critics charged that he was a result-oriented jurist: a politician in a black robe who had little knowledge of, or interest in, jurisprudence and little regard for legal precedent.”); see also William Michael Treanor, *Justice Tempered with Mercy*, FORBES (Aug. 6, 2009), <http://www.forbes.com/2009/08/06/sotomayor-justice-empathy-opinions-contributors-william-michael-treanor.html> (Murphy employed a judicial philosophy in which concerns of justice and fairness were central. Frankfurter savagely criticized Murphy behind closed doors, and his critics labeled Murphy’s approach, “Justice tempered with Murphy.”).

215. See Treanor, *supra* note 214 (noting Justice Murphy is largely forgotten today).

216. See Kengor, *supra* note 7; Watson, *supra* note 7.

VII. CONCLUSION

By choosing to take the dignity route alone, Justice Kennedy drafted opinions that, while affirming gay rights, may lack the heft to influence the law further. Like an island cut off by the sea from a continent beyond, the gay rights cases stand in a separate legal realm of Justice Kennedy's own making, apart from the law in general. This isolates them from wider applicability. Indeed, analysts have observed that, notwithstanding the significance of the outcomes in *Romer* and *Lawrence*, these opinions have had only a marginal effect on subsequent jurisprudence in the lower courts.²¹⁷ This is unfortunate because the gay rights cases presented an opportunity for Justice Kennedy to draw upon prior dignity theory, add his contribution, and meld it all into a coherent doctrine with a solid precedential foundation upon which lower courts might draw.

However, Justice Kennedy's disregard of dignity precedent in his gay rights opinions does more than diminish their potential influence in subsequent decision-making. These are decisions where Justice Kennedy put all the eggs—and eggs ostensibly of his own creation—in one basket. Their authority rests largely on acceptance of Justice Kennedy's Dignity Principles. Having piggy-backed successive decisions on the findings of earlier ones, Justice Kennedy created a chain of authority where the overruling of one of his gay rights decisions causes all the others to fall. Moreover, as a single thread, Justice Kennedy's Dignity jurisprudence is more vulnerable to subsequent changes in the political, social, or judicial climates than would the entire cloth of dignity jurisprudence developed by the Supreme Court over almost a century.

In sum, having disregarded the pathway of dignity jurisprudence paved by earlier Justices, Justice Kennedy unfortunately weakened the gay rights decisions upon which the quality of the lives of gay Americans greatly depends.

217. See William C. Duncan, *The Legacy of Romer v. Evans—So Far*, 10 WIDENER J. PUB. L. 161, 185 (2000) (“A review of cases discussing and citing *Romer* thus far seems to indicate that the opinion has not had a major impact on the law.”); see also Justin Reinheimer, Note, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 506-07 (2008) (“Although heralded as the lesbian and gay rights movement’s *Brown v. Board of Education*, *Lawrence* has had almost no discernable impact on subsequent same-sex marriage litigation.” (internal citations omitted)).