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Article

"It Would 'Mean Little' Absent Governmental Recognition": Theorizing State Power and the New Jurisprudence of Dignity[1]

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Abstract

Dignity is increasingly central to the justificatory logic of US Supreme Court decisions. Yet the perils inherent in this jurisprudence of dignity, which we argue frames the right to dignity as a right to recognition, have been overlooked. Understanding dignity as synonymous with recognition clarifies its effects: dignity dethrones the autonomous, rights-bearing individual, instead figuring individuals as intersubjectively vulnerable and dependent upon institutional recognition. Dignity also casts state action as innocent, elides structural harms, and exacerbates injuries of marginalization. Applying our theoretical frame to *Obergefell v. Hodges*, we argue that the effects of the emerging jurisprudence of dignity are troubling.

Keywords

dignity, recognition, state power, US Supreme Court, autonomy

1. Quote is from *Obergefell v. Hodges*, 576 US _, 11 (2015) (Dissent, J. Thomas). Interior quote is from the Brief for Petitioners in No. 14–556, p. 33.

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I. Introduction

In the wake of Justice Anthony Kennedy's retirement, veteran US Supreme Court commentator Jeffrey Toobin wrote a piece for the *New Yorker* describing Kennedy's legacy.[2] Kennedy's "favorite word," begins Toobin, the word that defined him as a judge and shaped his landmark rulings on LGBT rights, was dignity. Dignity makes several appearances in *Lawrence v. Texas*, the 2003 Kennedy-authored ruling that legalized consensual sex between two people of the same sex. *Lawrence* would pave the way for *Obergefell v. Hodges* (2015), the case that legalized same-sex marriage. *Obergefell* invoked dignity repeatedly, and famously concluded with Kennedy's ringing statement that the Constitution grants same-sex couples a right to "equal dignity in the eyes of the law."[3]

Yet when Kennedy invoked dignity in these decisions, Toobin observes, "it was never quite clear what he meant by it." Kennedy's jurisprudence of dignity had a halo of rhetorical flourish or conceptual uncertainty; it was "never quite clear" what was "meant by it" or what purpose it served. Other scholars have noted the same uncertainty, calling jurisprudential dignity "a concept in disarray" whose "meanings and functions are commonly presupposed but rarely articulated," or describing it as "an empty formula without precise content."[4]

Despite this, dignity is more popular than ever: it has been invoked in hundreds of Supreme Court decisions and dissents since the 1960s, its use is accelerating, and it is especially in vogue with the Roberts Court.[5] The observation made by Toobin and others, therefore, raises a question of increasing importance: what *is* meant when dignity is invoked in the law? From this, other related questions follow: what kinds of cases and decisions does an emphasis on dignity prioritize? What other concepts or priorities does dignity smuggle into the law? Does a jurisprudence of dignity advantage marginalized people or does it empower the state? And are there existing or potentially liberatory capacities in the law that dignity erodes or elides?

This article seeks to answer these questions, shedding light on both the meaning and the effects of the new jurisprudence of dignity. We argue that what is meant by a right to dignity is in fact a right to recognition. Understanding the meaning of dignity as recognition clarifies its effects: dignity dethrones the autonomous, rights-bearing individual in favor of a view of the individual as intersubjectively vulnerable, inherently incomplete, and dependent upon institutional recognition. It centers state recognition as *the* solution to discrimination, inequality, and unfreedom. Such a development within the law is troubling, because it elides harms that originate with the state, positions state power as innocent, and may exacerbate injustices of marginalization. We advance our argument about the meaning and effects of jurisprudential dignity in the next four sections. We develop

2. Jeffrey Toobin, "After Kennedy." *The New Yorker*. July 9, 2018.
3. *Obergefell v. Hodges*, 576 US _, 28 (2015). Despite Kennedy's assertion of a Constitutional right to equal dignity, the word never actually appears in the Constitution. Dignity does appear, however, nine times in the Kennedy-authored decision in *Obergefell.*
4. Leslie Meltzer Henry, "The Jurisprudence of Dignity," *University of Pennsylvania Law Review* 160(1) (2011), 169–233. Gerhold Becker, "In Search of Humanity: Human Dignity as a Basic Moral Attitude," in Matti Hayry and Tuija Takala (eds), *The Future of Value Inquiry* (New York: Rodopi, 2001), pp. 53–65.
5. *See* Henry, "Dignity," 169.

our theoretical framework of dignity as recognition by highlighting the disjoint between dignity and autonomy (section II), building on existing legal theory to develop the link between dignity and recognition (section III), and drawing on contemporary political theory and socio-legal analyses of culture to show the paradoxical and problematic effects of a politics of recognition in the law (section IV). We then apply this framework of dignity as recognition to an analysis of recent LGBT rights cases, with an emphasis on *Obergefell v. Hodges*. By considering the language and outcomes of these cases, we seek to substantiate our claim that the reliance on jurisprudential logics of dignity produces concerning and paradoxical effects (section V).

II. Autonomy, Rights, and Recognition

When it appears in the law, dignity is typically presented as the foundation, as the right upon which other rights like equality and liberty are built. Although it appears nowhere in the Constitution, dignity serves as a foundation because it identifies the *harm* inflicted by the abrogation of other Constitutional rights, providing a normative justification for liberty and equality. In the denial of full liberty or equal treatment under the law, individuals suffer a wounding to their dignity.[6] In turn, this dignitary injury may further erode the individual's substantive ability to act politically or make use of equality or freedom.[7]

The Court has thus emphasized a triad: protecting liberty and rights is tantamount to protecting dignity, and possessing dignity is necessary for meaningful autonomy. As Lawrence Tribe has put it, the "unmistakable heart" of recent cases that invoke dignity "is an understanding that liberty is centered in equal respect and dignity."[8] In that vein, the Court has upheld substantive due process protections for "certain personal choices

6. This relationship between rights and woundedness can be traced back to *Brown v. Board of Education* (1954), where the Court asserted that the material violation of one's rights "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (*Brown v. Board of Education of Topeka*, 347 US 483, 494 (1954)). While the decision doesn't use the word dignity, *Brown*'s analysis of the effect of discriminatory segregation on children could be read as the origin of the Court's growing insistence on the centrality of dignity and anti-humiliation. Bruce Ackerman has argued that the "lost logic" of *Brown* lies in its emphasis on the "distinctive wrongness of institutionalized humiliation" (pp. 129, 128). *See* Bruce Ackerman, *We the People: The Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2014). Similarly, Kenji Yoshino argues that Kennedy-authored LGBT cases beginning with *Windsor* "revived the 'lost logic' of Brown," p. 3084. *See* Kenji Yoshino, "The Anti-Humiliation Principle and Same-Sex Marriage," *Yale Law Journal* 123(8) (2014), 2574–3152.
7. The idea that experiences of indignity within state institutions or laws might stymie further political participation is explored, for example, in the literature around experiences with welfare agencies and incarceration. On welfare agencies, *see* Joe Soss, "Lessons of Welfare: Policy Design, Political Learning, and Political Action," *American Political Science Review* 93(2) (1999), pp. 363–80. On incarceration, *see* Vesla M. Weaver and Amy E. Lerman, "Political Consequences of the Carceral State," *American Political Science Review* 104(4) (2010), pp. 817–33.
8. Lawrence Tribe, "*Lawrence v. Texas*: The 'Fundamental Right' That Dare Not Speak Its Name," *Harvard Law Review* 117(6) (2004), pp. 1893–1955.

particularly central to individual dignity and autonomy," such as marriage or abortion.[9] Implicitly, this entwining of autonomy and dignity recognizes that the capacity to be truly free requires more than mere negative freedom.[10] It asserts that we cannot be meaningfully free without positive grants of what John Rawls has called the social bases of self-respect: a sense of dignity, of self-esteem, which offers us the ability to make plans and to use our freedom. The jurisprudence of dignity concerns questions of rights and autonomy *and* questions of social respect and legal recognition, because it positions such questions as elementally entwined.[11]

Yet, despite the ostensible link between autonomy and dignity, "the theme of autonomy floats weightlessly" in recent dignity-based cases.[12] The emphasis is less on the equality or liberty necessary to dignity – or on the subsequent autonomy that dignity generates – than on the role that the law directly plays as "a resource in signification" that either protects dignity or offers humiliation.[13] As the post-*Brown* court has come to recognize its role in what Bruce Ackerman calls institutionalized humiliation, it has correspondingly come to emphasize the symbolic importance of legal recognition more strongly than broad protections for rights.[14] Under the rubric of a right to dignity, laws which intend to demean the lives of certain individuals or groups, or whose primary purpose is to humiliate, have become constitutionally suspect.[15]

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9. *Obergefell* cites on this point, among others, *Eisenstadt v. Baird*, 405 US 438 (1972), *Loving v. Virginia*, 388 US 1 (1967), *Turner v. Safley*, 482 US 78 (1987), and *Griswold v. Connecticut*, 381 US 479 (1965). See *Obergefell v. Hodges* (summary), 576 US _, 2 (2015). In an early reflection of this logic, counsel for the plaintiffs in the interracial marriage case *Loving v. Virginia* could "urge that the Court say that [choice in marriage] is a fundamental right of liberty" at the same time that they asserted that restrictions on choice in marriage intentionally "robbed the Negro race of their dignity." Transcript of Oral Argument at 12, 3, *Loving v. Virginia*, 388 US 1 (1967).
10. Even the most famous theorist of the distinction between negative and positive liberties, Isaiah Berlin, recognized this point, in *Two Concepts of Liberty*, where he writes: "I am a social being in a deeper sense than that of mere interaction with others. For am I not what I am to some degree, in virtue of what others think and feel me to be? […] It is not only that my material life depends upon interaction with other men, or that I am what I am as a result of social forces, but that some, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only in terms of the social network in which I am (the metaphor must not be pressed too far) an element" (pp. 36–7). *See* Isaiah Berlin, *Two Concepts of Liberty* (Clarendon Press, 1959), accessed 5/1/18 at Isaiah Berlin Virtual Library: http://berlin.wolf.ox.ac.uk/published_works/tcl/tcl-e.pdf.
11. Paraphrase of Reva Siegel, "Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart," *Yale Law Journal* 117(1694) (2008), p. 1741.
12. Robert Post, "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," *Harvard Law Review* 117(4) (2003), p. 97. Or as Lawrence Tribe puts it, "the 'liberty' of which the Court spoke was as much about equal dignity and respect as it was about freedom of action – more so, in fact," Tribe, "Fundamental Right," p. 1898.
13. Robert Cover, "Nomos and Narrative," *Harvard Law Review* 97 (1984), p. 8.
14. Ackerman, "Rights Revolution." *See also* Yoshino, "Same Sex Marriage."
15. Kennedy wrote in *Lawrence v. Texas* (2003) that anti-sodomy laws were unconstitutional because they intended to "demea[n] the lives of homosexual persons" by criminalizing sodomy "with all that imports for the dignity of the persons charged" (*Lawrence v. Texas*, 539 US

This focus on the signifying role of the Court appears to reduce the harm of rights violations to subjective states of psychic discomfort. This is because a focus on dignity casts the harms of rights violations as primarily psychological rather than as directly economic or political. In *Brown v. Board of Education*, children were shown to be damaged psychologically by segregated schools; in *Obergefell*, psychological damage to homosexual people and their children was dwelt on at some length. The focus is on subjective experience: how rights violations *feel*, what they do to an individual's sense of self. This recalls, as George Kateb has pointed out, arguments like those used by the majority in *Plessy v. Ferguson*. Rejecting the assertion that segregation was a degrading badge of inferiority, Justice Brown wrote in 1896 that the "colored race *chooses* to put that [demeaning] construction upon" segregation.[16] Or, as Catharine MacKinnon has put it, reducing the injury of discrimination to the feeling of indignity in the subordinated person makes it all mental.[17]

This emphasis on the subjective experience of rights violations turns the Court away from a focus on substantive autonomy. This emphasis elides the deeper structural or cultural constraints to freedom or equality, and reduces its focus to the psychology of the individual. At the beginning of this section, we noted that dignitary harms come from violations of one's rights: I suffer a loss of dignity when I do not receive equal protection under the law, or when my fundamental rights are abrogated without due process. I am humiliated, treated as lesser, unduly punished, cast as a second-class citizen. But identifying the dignitary harm that an individual suffers as a consequence of rights violations provokes one to consider whether dignitary harm captures the full measure of harm done. To be denied equality under the law surely has material consequences that go beyond the impact of subjective states of suffering or humiliation – or even beyond a given individual. For example, a black woman denied a seat on a jury through a racially biased peremptory challenge suffers dignitary harm, but the black defendant also suffers materially when the all-white jury is more eager to convict.[18] And the black community suffers in aggregate from the effects of disproportionate, mass incarceration.[19] These injuries are unintelligible in the language of dignity. Thus, to be focused on the dignitary harms or even corresponding political disempowerment that our prospective juror suffered is to consider only the first or most surface level effect of a rights violation. Indeed, it serves as a kind of sleight of hand: focusing remediation on dignitary harms has the effect of

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558, 575 (2003)). The Court's subsequent decision in *US v. Windsor* (2013) baldly asserted that the law must not humiliate, rejecting the Defense of Marriage Act because "interference with the equal dignity of same-sex marriages […] was more than an incidental effect of the federal statute. It was its essence." (*US v. Windsor*, 570 US ___, 3–4 (2013)).

16. *Plessy v. Ferguson*, 163 US 537, 551 (1896).
17. Quoted in Catherine Powell, "Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality," *Fordham Law Review*, 84(69) (2015), p. 70, fn. 9.
18. In fact, the Supreme Court has specifically described this circumstance as a situation in which the prospective juror suffers dignitary harm. In *Power v. Ohio* (499 US 400, 402 (1991)), the court held that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."
19. *See*, as one example of a growing literature in political science and sociology, Weaver and Lerman, "Carceral."

drawing the eye (and discourse) away from the structural and group-based limits to substantive autonomy that stem from violations of equal protection and due process.[20]

The Court's increasing emphasis on the institutional provision of dignity – focusing on how the law directly aids or destroys dignity – positions the law and the state as antecedent to, and generative of, individual dignity and recognition. This view is in deep tension with an autonomy and rights focused jurisprudence. A legal approach focused on rights and autonomy would "imagine persons as abstract, independent rational agents contracting with each other as equals, to see what rights they would then have" while at the same time conceptualizing true substantive autonomy as an aggregate, social, and structural phenomenon.[21] A legal approach focused on dignity, however, focuses on the individuated psychological experience, conceives of the individual as always already intersubjectively vulnerable, and sees law's role as providing dignity via institutional recognition. In this later approach, the centrality of substantive autonomy fades, and dignity becomes functionally synonymous with recognition.

III. Dignity as Recognition

Such a broad claim – that jurisprudential dignity is tantamount to recognition – seems at first to be willfully blind to the complexities of a concept like dignity. Dignity has been associated with many other concepts besides recognition, such as equality, liberty, status, collective virtue, or personal integrity. Sovereign or regal dignity was associated with lofty social hierarchies; this view was rejected by thinkers like Thomas Paine who celebrated the equal and natural dignity of man.[22] For Immanuel Kant, dignity was an outgrowth of liberty – of autonomous rationality – and as such all rational humans should be respected as free moral agents.[23] Often building on Kant, theorists of human rights argue

20. Ludger Viefues-Bailey, "Queering Justice Thomas: Theories of Dignity in *Obergefell*," *Law, Culture, and the Humanities* 14(3) (2016). Viefues-Bailey argues that Kennedy's jurisprudence of dignity in *Obergefell* only confers dignity to those citizens who are already seen as governable "active" citizens with claims to state power. Thus this jurisprudence of dignity overlooks the "dignity of women and men whose lives do not matter to the state, given that their bodies are destroyed by racialized police violence, systemic economic destitution, and other practices of deep seated and institutionalized racism" (p. 4).
21. Even those who question the empirical truth of such a conception or acknowledge its political shortcomings recognize the importance of this assumption of autonomy in the law. Virginia Held, *The Ethics of Care: Personal, Political, and Global* (New York: Oxford University Press, 2006), p. 88.
22. *See* Thomas Paine, *Rights of Man* (New York: Oxford University Press, 1995).
23. Kant is often read as positing that all persons, by virtue of their rationality and corresponding capacity for moral action, possess an innate dignity that demands the respect of others. Thus, in the *Groundwork of the Metaphysics of Morals*, Kant writes that "morality, and humanity insofar as it is capable of morality, is that which alone has dignity" (4: 435). In the *Metaphysics of Morals*, Kant develops the implications of this point, writing:

    > But a human being regarded as a *person*, that is, as the subject of a morally practical reason, is exalted above any price […] he possesses a *dignity* (absolute inner worth) by which he exacts

that there are certain norms of dignified human treatment, which must be upheld by the community in order to respect humans as humans. Yet, Cicero argued that humans gain dignity through a tranquility of spirit, even in the face of cruel or degrading treatment.[24] Rosa Parks described her experience of Jim Crow-era activism in a similar way, observing that, "what I learned best was that I was a person with dignity and self-respect."[25] Dignity, in these five contexts, offers a number of divergent, even contradictory, meanings.

Drawing on an historical analysis of all Supreme Court cases to use the term dignity, Leslie Meltzer Henry has shown that the Court utilizes dignity as a legal concept in all five of these ways. In her reading, each of these conceptions of "dignity has a particular judicial function oriented toward safeguarding substantive interests against dignitary harm."[26] Each type of dignity provides a normative justification for the Court's orientation toward certain types of rights and protections. For example, "the Court's equal protection jurisprudence continues to rely on equality as dignity to give substance to its egalitarian mandate."[27] Understanding which type of dignity is being invoked, then, allows us to understand "what is normatively and doctrinally at stake" in a given context.[28] In Henry's reading, the various types of dignity appear either unrelated or even substantively at odds with one another. Dignity as hierarchical status, for instance, cannot co-exist with dignity as universal equality. Henry sees only the weak unifying theme of "dignity as a substantive value animating our constitutional rights."[29]

Unnoticed, however, another substantively unifying theme runs through all of these conceptions of jurisprudential dignity: they are all grounded in recognition. Each are based on the need for, and granting or withholding of, recognition. Dignity across all of these types is concerned with a human need to be seen, to be validated, to be affirmed, to be recognized, as one sees oneself, in the eyes of others and in the eyes of the state. Dignitary harms are harms of mis- or non-recognition. This unified view of dignity as recognition accords with "our general view that others can diminish or destroy a person's dignity by disrespecting, demeaning, or degrading them."[30] William Parent puts it

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respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them (6: 434–5).

Rationality – and corresponding capacity for moral action – confers dignity, which in turn allows us to value ourselves and require that others respect us (as Rawls would put it, such a rational person is a self-originating source of valid *claims*). Kantian dignity is not the possession of an isolated individual; it is the means by which an individual can demand respect and recognition from others as a fellow-human, and measure himself against them. Moreover, it has a pre-condition: the social recognition of the "rationality" and corresponding morality of the individual. *See* Immanuel Kant, "Groundwork of the Metaphysics of Morals" and "Metaphysics of Morals" in *Practical Philosophy*, Mary Gregor (tr. and ed.) (New York: Cambridge University Press, 1996).

24. *See* Marcus Tullius Cicero, *De Officiis (*New York: Cambridge University Press, 1991).
25. Adam Fairclough, *Better Day Coming: Blacks and Equality 1980–2000* (Harmondsworth: Penguin, 2002), p. 228.
26. Henry, "Dignity," p. 177.
27. Henry, "Dignity," p. 203.
28. Henry, "Dignity," p. 178.
29. Henry, "Dignity," p. 180.
30. Henry, "Dignity," p. 184.

another way when he argues that dignity is a right not to be regarded or treated with unjust personal disparagement by others.[31] Dignity only makes sense in a deeply intersubjective world where our very sense of self is vulnerable to others. Even conceptions which frame dignity as an innate human possession – a view often ascribed to Kant – are grounded in a relationship of recognition where the dignity of one person is contingent on the respect and recognition of another.[32] Dignity is a way of describing our vulnerability and corresponding obligations of recognition to one another.

A look back at the various conceptions of dignity makes this point clear. Institutional status as dignity is grounded in a hierarchical order where the existence and spectatorship of the commons is necessary to valorize and provide contrast with the dignity of those at the top. Equality as dignity is premised on all human beings possessing an inherent trait – shared humanity – that is recognized by others. Liberty as dignity relates deeply to individual autonomy, but it is the *recognition* of the other as a moral agent that generates their autonomy. Dignity is affirmed when the individual is seen by others and treated as capable of making autonomous choices. Personal integrity as dignity is intimately related to social performance, to the perception of the individual as acting with dignity in the face of adversity: this is a social judgment, a recognition and affirmation of one's virtue. Finally, collective virtue as dignity is obviously social – it is comportment by society as a whole (we don't torture, we have moral prohibitions on certain inhumane acts) that allows us to recognize our community as progressing, as enlightened, as dignified.

Dignity as *recognition*, then, animates all of these seemingly distinct conceptions of dignity. In any of these forms, dignity is a positive demand for action, for recognition, in response to just claims. Unlike negative rights which are premised upon the absence of intervention or interaction – and so view the individual as an isolated and self-sufficient monad – dignitary claims are grounded in a view of the individual as intersubjectively needy. Dignity demands affirmative action from others to provide the recognition it requires. This facet of dignity may be powerful and important in interpersonal or political contexts. But its emphasis on recognition makes dignity within the law – the jurisprudence of dignity – profoundly dangerous. To understand why requires a more thorough consideration of political theories of recognition.

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31. William Parent, "Constitutional Values and Human Dignity," in Michael Meyer, William Parent and Rogers Spotswood (eds), *The Constitution of Rights: Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992), p. 62.
32. Despite theorizing a "world of abstract persons, demarcated as such only by their rationality," Charles Mills, Emmanuel Eze, and others have argued that Kant is also "the foundational theorist in the modern period of the division between *herrenvolk* and *untermenschen*, persons and sub-persons" (Charles Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997), p. 69 and 72). Full personhood for Kant – and thus status as a person with dignity – was dependent upon both race and gender, because who was *recognized* as a "rational" moral actor was raced and gendered. In his essay *On the Feeling of the Sublime and Beautiful*, Kant projects an inferior rationality and moral capacity on both women ("her philosophy is not to reason but to sense […] I hardly believe that the fair sex is capable of principles" (p. 79, 81)) and black people (the difference is "as great in regard to mental capacities as in color" (p. 111); "this fellow was quite black from head to foot, a clear proof that what he said was stupid" (p. 113)). Similar sentiments are echoed in the *Metaphysics of Morals* and other works. *See* Immanuel Kant, *On the Feeling of the Sublime and Beautiful*, John Goldthwait (ed.) (Berkeley, CA: University of California Press, 1965).

IV. The Politics of Recognition

The idea that recognition by others is essential to a whole and dignified self is not new. Beginning with Hegel, political theorists as well as developmental and social psychologists have produced a large body of work around the idea that our selves are not somehow prior to society but are instead made by – and vulnerable to – others.[33] "People do not acquire the languages needed for self-definition on their own," says philosopher Charles Taylor, in a clear articulation of this view; "the genesis of the human mind is in this sense not monological, not something each person accomplishes on his or her own, but dialogical."[34] In one way, this is a commonsensical acknowledgment that human beings do not spring, like Athena, autonomous and fully-formed from the heads of their creators; they require care and nurturing that is deeply formative.[35] But theorists of recognition also highlight the ongoing nature of this social constitution of the self and self-esteem. We are formed in society with others, and we remain continuously vulnerable to them. Even critics of the politics of recognition like Patchen Markell acknowledge "our basic condition of intersubjective vulnerability."[36]

Because our selves are intersubjectively vulnerable to one another in an ongoing and iterative way, Taylor asserts that "recognition is not just a courtesy we owe people. It is a vital human need."[37] The injustice of misrecognition or non-recognition is that it can lead to a crippled, scarred, or injured sense of self, interfering with "the basic degree of self-confidence that renders one capable of participating, with equal rights, in political will formation."[38] Moreover, those who are marked as different or lesser "will tend to find that their access to key privileges is limited and that their life chances are, on average, diminished."[39] Nancy Fraser, who began as a leading critic of recognition theory,

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33. While he was not the first ancient or modern political theorist to talk about our inherent sociality (see Rousseau, Locke, and Aristotle, among others), G.W.F. Hegel's *Phenomenology of Spirit* (1807) forms a common intellectual background for most contemporary theorists of recognition. Hegel is particularly important in Charles Taylor and Axel Honneth's thought. For a succinct discussion of Hegel's contribution to recognition theorizing, *see* Simon Thompson, *The Political Theory of Recognition* (Malden, MA: Polity Press, 2006), p. 11–12. For an insightful introduction to Hegel's philosophy of self-consciousness and recognition, *see* chapter 1 of Alexandre Kojève, *Introduction to the Reading of Hegel* (New York: Basic Books, 1969).
34. Charles Taylor, "The Politics of Recognition," in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992), p. 32.
35. In the vanguard of developing and reminding scholars of this seemingly "self-evident" truth are many contemporary feminist thinkers working on questions of care ethics. *See* Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2006) and Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Taylor & Francis, 1999).
36. Patchen Markell, *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003), p. 14.
37. Taylor, "Recognition," p. 26.
38. Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: The MIT Press, 1996), p. 38.
39. Anna Marie Smith, "Missing Poststructuralism, Missing Foucault: Butler and Fraser on Capitalism and the Regulation of Sexuality," *Social Text* 19(2) (2001), p. 112.

has come to argue that misrecognition is morally wrong because "it denies some individuals and groups the possibility of participating on a par with others."[40] Because it dramatically impacts political participation and access at both individual and group level, political theorists grappling with recognition like Taylor, Fraser, and Axel Honneth have attempted to frame a normative position from which denigrated members can make claims for recognition from the state.[41] Those denigrated within the polity on the basis of difference – racial, ethnic, cultural, sexual, religious, or linguistic – can demand redress from the state for such misrecognition. Because some groups "are prevented from vindicating their dignitary claim[s], while others face uncertain or uneven redress," state recognition and protection of rights for groups has come to be the coin of dignity.[42]

But while misrecognition has clear consequences in political life and state action is part of the solution, recognition's roots in psychoanalytic and group identity theory mean that theorists often view misrecognition as a primarily interpersonal or social phenomenon.[43] As Leonard Feldman has observed, the role of the state here is not quite clear.[44] Since misrecognition originates interpersonally or in civil society, the state is either not a source of misrecognition, or at most acts indirectly through what Foucault called capillary action to inform social and interpersonal dynamics. If misrecognition does take place within state institutions, Fraser tells us that "such institutions belong with 'the lifeworld' as part of the cultural structure that produces injustices of misrecognition."[45]

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40. Nancy Fraser, "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation," *Tanner Lectures on Human Values* (Salt Lake City, UT: University of Utah Press, 1997), p. 1–67.
41. Charles Taylor's essay, "The Politics of Recognition," set the stage for much of the theorizing around recognition and is widely cited. *See* Taylor, "Recognition." *See also* Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, MA: Harvard University Press, 1989). Axel Honneth has written extensively on recognition, beginning with *The Struggle for Recognition*, which appeared in English translation in 1996. He and Nancy Fraser published a volume in which they debated various issues surrounding recognition and redistribution politics in 2003. *See* Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003).
42. Henry, "Dignity," p. 185.
43. Both Honneth and Taylor focus on the way that recognition, and the struggle for recognition, shape the psychological development of the individual, particularly in the formative period of youth. Honneth in particular draws heavily upon the work of Freudian psychoanalysts in order to create a model of the struggle for recognition that leans on interpersonal dynamics, especially between the mother and infant. *See* Honneth, *Recognition*, p. 65–140. For Honneth, the struggle to be recognized is at the core of human psychology, and drives political conflicts; Honneth's view of individual psychological drives has been fruitfully criticized, however, by those who point out his inattention to other more destructive threads of ego development, most notably the Freudian death drive. *See* David McIvor, "The Cunning of Recognition: Melanie Klein and Contemporary Political Theory," *Contemporary Political Theory* 15(3) (2016), p. 243–63. Nancy Fraser has argued, against Honneth and Taylor, that "recognition should be considered a matter of justice, not self-realization." *See* Fraser, "Social Justice," p. 38.
44. Leonard Feldman, "Redistribution, Recognition, and the State: the Irreducibly Political Dimension of Injustice," *Political Theory* 30(3) (2002), p. 411.
45. Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age," *New Left Review* 212 (1995), p. 72.

In other words, while misrecognition may be codified in law or reproduced within state institutions, we should understand that the cultural base structure – civil society – is the true origin of such misrecognition.

In this way, recognition figures the state and the law as a largely neutral party: it acts to redress harms of misrecognition, but is not itself implicated in the production of subjects or relations of misrecognition. Consequently, law is potentially able to deliver lasting resolution to demands for recognition. As Clifford Geertz has put it, law is not "a mere technical add-on to a morally (or immorally) finished society," but rather it is "an active part of it"; law has a social and cultural life.[46] In this view the law "is a producer of culture" that will eliminate harms of mis- or non-recognition.[47] But figuring law in this way is also an *ideological* construction: it serves functions beyond the stated goal of offering recognition and redress of dignitary harms. The cultural effects of figuring law in this way extend beyond law's first-level efforts to address existing cultural pathologies by recognizing that "the law vindicates [cultural] feelings and attitudes" and thus can change hearts and minds at the level of society and culture.[48] Viewing law as an innocent solution to problems sourced elsewhere has second-level cultural effects: it naturalizes and "embodies particular arrangements of power and it affects life chances in a manner that is different from some other ideology or arrangement of power."[49] In other words, an emphasis on dignity in the law serves to instantiate a particular cultural relation to law itself, one that has extended ideological functions. It shapes not merely how we view ourselves but also how we understand our selves in relationship to others, including our relationship to the law and the state.[50]

This last point is particularly important. Characterizing the law as able to heal wounds of mis-recognition figures state power as largely innocent. The state vanishes as a source of harm because "the prioritization of civil society over the state as the primary locus of injustice permits the elision of state power."[51] The state actor is characterized as harmless to wound but able to heal. In other words, a focus on recognition inculcates a new relationship between individuals and the state: a paternalistic relationship that justifies potentially intrusive state power under the moralized guise of recognition-based dignity. Dignity-based calls for recognition focus almost exclusively on state intervention in the self–other relationship, while either largely ignoring, or sometimes even valorizing, the newly intrusive state–self relationship. Thus, while certain individuals might be benefited by state recognition, it comes at a larger cost. As Kristina Lepold has put it, "while being undeniably ethically significant to those who receive it, recognition can simultaneously

46. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), pp. 184 and 218. Cited in Austin Sarat and Thomas Kearns, *Law in the Domains of Culture* (Ann Arbor, MI: University of Michigan Press, 1998), p. 6.
47. Naomi Mezey, "Approaches to the Cultural Study of Law: Law as Culture," *Yale Journal of Law & the Humanities* 13(35) (2001), p. 46.
48. George Kateb, "*Brown* and the Harm of Legal Segregation," in Austin Sarat (ed.), *Race, Law, and Culture: Reflections on* Brown v. Board of Education (New York: Oxford University Press, 1997), p. 105.
49. Susan Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1(323) (2005), p. 333.
50. Sarat and Kearns, *Culture*, p. 7.
51. Feldman, "Redistribution," p. 417.

serve social functions behind the backs of the participants in relations of recognition and may be implicated in the reproduction of problematic social orders."[52]

In particular, the emphasis on dignity strikes at the very status of individuals *as* individuals within the law by constructing the individual as intersubjectively vulnerable and reliant on recognition. This matters because presuming the autonomy of the individual, rights-bearing legal subject is an important check on explicitly political forms of power. The Court's move away from due process and equal protection analysis toward a dignity-centered frame runs the risk of forgetting the origin story of liberal rights: intrusive, tyrannical state power must be checked by protections for autonomy and individual rights. This is particularly true for marginalized people. Both Uma Narayan and Patricia Williams have drawn attention to the utility of the legal fiction of the autonomous rights-bearing individual for people of color. For marginalized populations, the legal fiction of the autonomous rights-bearing individual provides a counter to the "total bodily and spiritual intrusion" of complete political and legal subjugation.[53] Thus, if the law protects us or responds to harms in a way that undermines our autonomy or presumes our incapacity, this is dangerous bargain. As Narayan reminds us, we must always evaluate legal logics "with regard to the instrumental political uses to which they lend themselves at concrete historical junctures."[54] It matters *what* the law does, but it also matters *how* the law does it.[55]

V. Dignity in *Obergefell*

As we have described in the preceding sections, a jurisprudence of dignity generates several interrelated and concerning effects. It discursively replaces an autonomous, rights-bearing subject with a subject constructed as intersubjectively vulnerable and in need of state recognition. It ignores the state's potential role as a source of harm, particularly for marginalized people. And it centers recognition and dignity-based redress instead of addressing deeper structural barriers to substantive autonomy. The net effect is to maintain many existing inequities while simultaneously introducing the potential for new and insidious modes of injustice.

The dignitary logic in *Obergefell v. Hodges* and other LGBT rights cases provides evidence for these claims, bringing to light the Court's new vision of permeable selves and innocent state power, while simultaneously revealing how dignity ignores structural harms and leads to new forms of marginalization. The 2015 marriage equality decision

52. Kristina Lepold, "An Ideology Critique of Recognition: Judith Butler in the Context of the Contemporary Debate on Recognition," *Constellations* 25(3) (2018), p. 475.
53. Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991).
54. Uma Narayan, "Colonialism and Its Others: Considerations on Rights and Care Discourses," *Hypatia* 10(2) (1995), p. 138.
55. We do not mean to suggest here that traditional rights are not problematic in their own ways or that they have been particularly successful at redressing structural harms. We acknowledge that rights cannot adequately and fully address the pressing structural problems of our shared world. Yet we also simultaneously caution that the jurisprudence of dignity is not a straightforward solution to the shortcomings of the liberal rights paradigm. Dignity elides structural problems, just as rights do. At the same time, however, dignity may also problematically undermine important elements of legal personhood and vital checks on state power.

trumpets dignity as its central theme. The dignity on offer in *Obergefell* "promises to defend against the sense of estrangement haunting our cosmopolitan world."[56] In the decision, individuals are figured as lonely and socially needy, unable to reach the higher echelons of the human experience. Through the acts of recognition – state and social – contained within marriage, the individual disappears into a dyad that is "greater than just the two persons."[57] Built on the same teleological views that define recognition theorizing, the individual once married emerges into full possession of dignity and rights to liberty, "expression, intimacy, and spirituality" that are simply unavailable to single, atomized individuals.[58] Human beings, once married in a state-recognized ceremony, are able to experience the fullness of what it means to be human. Thus, *Obergefell* evokes and then ostensibly defeats the specter that "a lonely person might call out only to find no one there."[59] In *Obergefell*, individuals are constructed as incomplete and lonely, reaching out for recognition and dignity conferred by the state. The individual in this case is figured not as an autonomous individual, but as a vulnerable dependent.

When considering *Obergefell* it is important to remember that reforms such as these "may not be a neutral vehicle that merely delivers specific goods to an already fully constituted subject."[60] The logic and discourse of such decisions may be intended to shape subjectivity in ways that enhance state power. In *Obergefell*, this character-shaping goal of the state emerges clearly in considering the picture of the intersubjectively vulnerable individual presented throughout the decision. The individual here is told that life's meaning is dyadic. The decision actively seeks to erode an individual's sense that their autonomous life is meaningful. Valorizing marriage by giving it social justice credentials and expanding its scope of potential influence, *Obergefell* shapes and disciplines the way that individuals view themselves. The Court smuggles in a porous view of the self, reliant on recognition and permeable to the state. When we are told that state-recognized marriage is "essential to our most profound hopes and aspirations," it is clear that this is not the revelation of a self-evident truth but rather state promotion of this view among members of the polity.[61]

The state's goal of disciplining individuals and promoting marriage is abundantly clear throughout the *Obergefell* majority opinion, the dissents, and previous marriage cases. Chief Justice Roberts notes in his dissent that "the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society."[62] In his dissent, Justice Alito argues that the Court's decision is grounded in the idea that marriage "benefits society because persons who live in stable, fulfilling, and

56. Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000), p. 226.
57. *Obergefell v. Hodges*, 576 US _, 3 (2015).
58. *Obergefell v. Hodges*, 576 US _, 13 (2015). This is directly at odds with earlier Court decisions that explicitly recognized that it was the individuals in a relationship who were the rights bearers; the rights came in with the individuals to the relationship, rather than the relationship generating its own rights. See *Eisenstadt v. Baird*, 405 US 438, 453 (1972): "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals."
59. *Obergefell v. Hodges*, 576 US _, 14 (2015).
60. Smith, "Poststructuralism," p. 120.
61. *Obergefell v. Hodges*, 576 US _, 8 (2015).
62. *Obergefell v. Hodges*, 576 US _, 49 (2015) (Roberts J., dissent).

supportive relationships make better citizens."[63] As such, same-sex marriage "serves the States' objectives in the same way as opposite-sex marriage."[64] In *Loving v. Virginia*, a unanimous Court held that marriage is "one of the vital personal rights essential to the *orderly* pursuit of happiness by free men."[65] In the eyes of the state, marriage's disciplinary function is that it makes *orderly* citizens, shaping and regulating individual character to more closely resemble a certain human model more desirable to the state.[66] Indeed, as the *Obergefell* majority notes, "Confucius taught that marriage lies at the foundation of government."[67]

In *Obergefell*, the state demonstrates a clear interest in using state recognition as a tool to construct orderly citizens with certain values and orientations toward their lives. While such exercises of state power at the level of the self are deeply troubling, such a project is particularly concerning at its margins. If, for instance, the state valorizes marriage because marriage is a means of disciplining and shaping citizens, it does so at the cost of those who cannot or will not marry. The Court's claim that marriage "has promised nobility and dignity" is more than an accidental pairing of two words.[68] Marriage confers legal status and economic privileges, it institutionalizes and regulates relationships through recognition, and it is inherently inegalitarian. It denigrates individuals who do not marry as lacking. As Clare Huntington trenchantly observes, "every statement that Justice Kennedy makes for the Court can be read as an implicit criticism: a non-marital family is *not* the keystone of the social order; it does *not* embody the ideal of family; and it is *not* essential to profound hopes and aspirations."[69] If marriage is presented as allowing us to access elements of human existence and spirituality that cannot be experienced without it, those who do not marry can be correspondingly understood as less than fully human.

The exaltation of marriage, monogamy, and the family outlined in *Obergefell* and supported by a jurisprudence of dignity demeans individuals who cannot or will not assimilate to the idea that marriage is the pinnacle of meaningful existence. The result of

63. *Obergefell v. Hodges*, 576 US _, 98 (2015) (Alito J., dissent).
64. *Obergefell v. Hodges*, 576 US _, 99 (2015) (Alito J., dissent).
65. *Loving v. Virginia*, 388 US 1, 12 (1967), emphasis added.
66. For a discussion of the relationship between the state and the disciplinary function of marriage *see* Melissa Murray, "Marriage as Punishment," *Columbia Law Review* 100(2) (2012). Murray reminds us that marriage was once used as a punishment for the felony crime of seduction; marriage worked analogously to the prison, imposing a state-sanctioned and disciplined identity on those identified as sexual criminals. Although anti-seduction laws are no longer on the books, Murray asks us to seriously consider marriage – if not as punishment – then as an "institution of critical importance to the state's project of constructing a *disciplined* citizenry" (p. 40, emphasis ours).
67. *Obergefell v. Hodges*, 576 US _, 8 (2015).
68. Murray, "Marriage," p. 51.
69. Clare Huntington, "Obergefell's Conservatism: Reifying Familial Fronts," *Fordham Law Review* 84(23) (2015), p. 28. Indeed, while some who opposed same-sex marriage argued that it would denigrate the institution of marriage such that opposite-sex couples would be less likely to marry, the Court dismissed such arguments as absurd. Melissa Murray wryly observes "it would be absurd to willingly forego the many benefits (material and otherwise) of marriage and subject oneself to the indignity and stigma of being unmarried simply because same-sex couples are able to exercise the right to marry" (Melissa Murray, "*Obergefell vs. Hodges* and Nonmarriage Inequality," *Berkeley Law Review* (2016), p. 1216.

this is the further marginalization of individuals who already exist at the fringes. For example, *Obergefell*'s insistence that marriage, regardless of gender, is between two people, actively works to undermine the legitimacy of those engaged in polyamorous relationships.[70] Further, this notion has material consequences; it prevents those engaged in polyamory from accessing state resources that remain exclusively reserved for married couples. The same is true for queer individuals who chose not to assimilate to the narrow specifications of meaningful life proffered by *Obergefell* and prevalent in the dominant culture.[71] In general, the social, economic, and political cost of remaining unmarried is high. Those who chose not to marry are "subjected to social and economic pressure and penalty."[72] For those who already exist on the social and economic margins of society, a range of harms are generated by the *Obergefell* decision, harms which extend far beyond the indignity of not being married.

The elision of non-dignitary harms is not merely a concern for the most marginalized individuals. At the expense of addressing deeper structural injustices relevant to all LGBT people, the LGBT rights cases have been myopically focused on dignitary harms and harms of humiliation. In *Lawrence v. Texas* (2003), Kennedy wrote that anti-sodomy laws were unconstitutional because they intended to "demea[n] the lives of homosexual persons" by criminalizing sodomy "with all that imports for the dignity of the persons charged."[73] The Court's subsequent decision in *US v. Windsor* (2013) baldly asserted that the law must not humiliate, rejecting the Defense of Marriage Act because "interference with the equal dignity of same-sex marriages […] was more than an incidental effect of the federal statute. It was its essence."[74]

Yet such dignitary harms do not capture the full measure of discriminatory harm facing LGBT people. As Vice President Biden noted in the weeks following the *Obergefell* decision, "there are 32 states where you can be married in the morning and fired in the afternoon."[75] LGBT rights activists echo his concern when they point to the still-pressing need, post-*Obergefell*, for broad anti-discrimination and civil rights legislation to enshrine sexual orientation as a protected class entitled to strict scrutiny.[76] In *Obergefell*,

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70. For an excellent discussion of *Obergefell* and the potential of polygamous marriages see: Amberly Beye, "The more, the marry-er? The future of polygamous marriage in the wake of *Obergefell v. Hodges*," *Seton Hall Law Review* 47(1) (2016), p. 224.
71. Cyril Ghosh, "Marriage Equality and the Injunction to Assimilate: Romantic Love, Children, Monogamy, and Parenting in *Obergefell v. Hodges*," *Polity* 50(2) (2018), p. 275–99.
72. Serena Mayeri, "Marriage (In)equality and the Historical Legacies of Feminism," *California Law Review Circuit* 6 (2015), p. 134.
73. *Lawrence v. Texas*, 539 US 558, 575 (2003).
74. Kennedy wrote in *US v. Windsor* that the Defense of Marriage Act impermissibly disparaged same-sex couples, *US v. Windsor*, 570 US __, 3–4 (2013).
75. *New York Daily News*, "Vice President Biden Joins Marriage Equality Celebration in Manhattan," July 10, 2015.
76. The American Civil Liberties Union, which was closely involved in *Obergefell*, immediately shifted gears to talking about the wide range of civil rights still unsecured for LGBT individuals. See "After Obergefell, What the LGBT Movement Still Needs to Achieve," https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve, accessed October 15, 2017. *See also* Timothy Phelps, "New Frontier for Gays is Employment and Housing Discrimination," *LA Times*, June 26, 2015.

Kennedy's reliance on dignity crucially side-stepped the question of whether sexual orientation is a protected class. As Serena Mayeri worries, "without a declaration that heightened scrutiny should apply to all sexual orientation-based classifications, it seem[s] possible to confine *Obergefell*'s analysis to marriage and leave other injustices untouched."[77] The marriage and dignity solution offered far less than a strict scrutiny analysis, sex- and orientation-based civil rights legislation, or broad prohibitions on discrimination in sites like education, housing, and employment; a discrimination analysis would potentially make protections more broadly applicable.[78]

Obergefell may not only leave these deeper structural issues untouched, it may also foster the illusion that these issues have *already* been addressed. The case was viewed by many supporters as an important, even landmark, success. But such success comes with political costs, demobilizing other efforts to protect the rights of the groups in question. Marriage equality was demanded by relatively privileged (white, professional, and urban) gay and lesbian couples who saw marriage as their *last* – their *final* – barrier to equality.[79] Dignity narratively positions itself in the sunset of group-based rights claims. There is a strong insinuation that the provision of dignity is the final legal task in a nearly-complete fight against discrimination. This may have negative effects on continuing legal and political efforts to fight structural inequality, and it may also empower backlash politics against additional demands.

Finally, a focus on dignity as recognition may allow the state to abdicate responsibility for structural inequality by providing institutional recognition instead. In the *Obergefell* case, this neatly dovetails with the state's historical investment in the expansion of marriage as a method of avoiding meaningful address of structural socioeconomic issues. During the 1970s conservative activists in government and civil society began to rhetorically situate state welfare as liberal attempts to emasculate male (overwhelmingly poor and black) citizens through government handouts.[80] They argued that this emasculation had deleterious effects on the essential bonds of marriage and the family. Yet calls to reinstate men back into the bonds of marriage and the family simultaneously absolved the state from providing much needed assistance or grappling with questions of major redistribution. Government policy to this day continues to see participation in marriage and the nuclear family as the antidote to mass inequality. For instance, two of the four main guiding principles of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act center around promoting marriage and the nuclear family. Dignity and state recognition can direct attention away from structural inequalities, serving as a kind of cover for

77. Mayeri, "Marriage," p. 131.
78. See, for example, H.R.3185 – Equality Act, introduced in the 114th Congress, which would prohibit discrimination on the basis of sexual orientation or gender identity. The long-overdue Equal Rights Amendment is another example.
79. Priya Kandaswamy, "State Austerity and the Racial Politics of Same-Sex Marriage in the US," *Sexualities* 11(6) (2008), p. 714. *See also* George Chauncey, *Why Marriage: The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2004).
80. Robert Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: Hill and Wang, 2012), p. 277.

governmental unwillingness to grapple with them. The legal logic of dignity aids the simultaneous expansion of state power and abdication of state responsibility. Such expansion and abdication is a consequence of viewing the state as the *solution* to the indignities of misrecognition rather than as the *cause* of rights violations and structural harms.

VI. Conclusion

While many have cheered the inclusion of dignitary language in cases like *Obergefell* as a victory for the oppressed and an opening for future litigation on their behalf, we are not so sanguine. The use of dignitary language in such cases must be carefully analyzed. By considering the jurisprudence of dignity through the lens of recognition theory, we argue that there are troubling implications to using dignity as a justification for rights – or, as *Obergefell* does, to describing dignity as itself a constitutional right. Dignity is a useful frame through which the state can cast its exercises of power as innocent, even as it takes a highly paternalist role in shaping and constructing individual orderly subjectivities. At the same time, such a focus on redressing dignitary harms at the level of the self allows the state to ignore or elide broader classes of harms: structural and group-based harms, particularly for the most marginalized groups and on issues of substantive due process and political economy.

While we have focused in this article on a recent collection of LGBT rights cases, this is not the only realm in which the court has invoked troubling dignitary logics. Recent cases on abortion and prisoners' rights, among many others, have relied on dignity in ways that, considering our preceding analysis, we find troubling. *Gonzales v. Carhart*, for instance, "deprives women of the right to make an autonomous choice" about abortion, conceptually opposing autonomy to dignity and empowering the state to confer and protect dignity.[81] *Brown v. Plata*, in response to overcrowded prisons symptomatic of racialized mass incarceration, elides the operating structural pathologies and reduces overcrowding to a dignitary harm.[82] These are just two examples of the increasing tendency in the US Supreme Court to rely on a troubling frame of jurisprudential dignity when considering a wide range of issues.

Scholars should analyze legal cases that rely on dignity with a critical eye. As we have argued, dignity is not a meaningless rhetorical flourish. It serves particular, though unacknowledged, ideological and cultural functions. Dignitary logics elide structural problems while also undermining important elements of legal personhood and vital checks on state power. As we look to the law to address pressing injustices, we must be cautious about introducing new forms of inequity. A jurisprudence of dignity has, in our view, the potential to be deeply unjust. As Kennedy writes in *Obergefell*, "the nature of injustice is that we may not always see it in our own times."[83] The jurisprudence of dignity may be an instance of this propensity to blindness.

81. *Gonzales v. Carhart*, 550 US 124, 17 (2007) (Dissent, J. Ginsburg).
82. *Brown v. Plata*, 563 US 493, 12 (2011).
83. *Obergefell v. Hodges*, 576 US _, 11 (2015).

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