

POSTED IN **Criminal Law**
OCTOBER 5, 2015
JOSEPH MARGULIES

Dignity as an Indispensable Condition of Criminal Justice



As many have observed, there is a gathering consensus that the criminal justice system has run off the rails. But what is the alternative? We know we don't want to be *here*, but where should we be instead? In my last column, I began to describe a new vision for criminal justice based on a different organizing philosophy. This column continues the discussion.

As I indicated, no criminal justice system in the United States can be legitimate unless it satisfies three distinct conditions:

1. People have a right to be treated with dignity and respect;
2. Communities deserve to thrive;
3. Government must be fair and just.

These conditions do not weigh against one another. Unlike other framings—liberty vs. security, for instance, or public safety vs. the rights of the accused—these conditions are separate and independent. People have rights; communities have interests; and the state has obligations. All three matter; each is non-negotiable.

In this column, I discuss the inviolable right to human dignity.

* * *

What is this thing, dignity? Like so many abstract concepts, dignity has changed with the times, its meaning shaped by the perceived demands of the day. The term originated to denote high social status or rank, along with the honors and respect accorded to someone who held that exalted position.

The Founders did not much speak of dignity, and when they did, they tended to use it in this original sense. In fact, the term apparently did not surface in presidential remarks until 1939, when President Roosevelt warned that democracies risked the long slide into dictatorship if its people were denied “as large a share of material success and of human dignity as they have a right to receive.”

But once the Nazis exposed the desperate need for a universal commitment to humanity’s intrinsic worth, dignity became a staple of international human rights discourse. The movement began in 1948, when the UN General Assembly adopted the Universal Declaration of Human Rights. In the first sentence of the first Article, the Declaration proclaims that “all human beings are born free and equal in dignity and rights.”

The following year, the Grundgesetz (Basic Law) of the Federal Republic of Germany announced in its first Article that “Human dignity is inviolable. To respect and protect shall be the duty of all state power. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.”

It would take no particular effort to fill this column and many others with comparable passages from constitutions, charters, and laws from around the world, all of which dedicate themselves to the protection, promotion, and preservation of human dignity. These documents use dignity in its modern sense, to signify the intrinsic worth of all human beings, shared equally merely because they are human, without regard to their status or condition—a worth untethered to the vagaries of circumstance.

It is this meaning that President George W. Bush had in mind when he spoke of “the non-negotiable demands of human dignity.” And it is the same meaning the Supreme Court intended when it held that overcrowding in California prisons forced people to live under conditions that deprived them of “the essence of human dignity inherent in all persons.”

Yet the increasing universality of dignity does not, in itself, tell us *why* it should be the basis around which we build a new criminal justice system. What is it about dignity that suits it to this role? We might start by contrasting dignity with another right that conventionally occupies a prominent place in discussions of criminal justice: liberty. Liberty is undoubtedly a right of

inestimable importance and many political scientists rank it first among equals in the American creed.

But the fact is that the State *can* deprive a person of her liberty. Indeed, that is the premise of any criminal justice system: those who refuse to follow society's rules can be restrained. So long as certain procedures are followed and protections observed, the State may—and routinely does—deprive people of their liberty in countless ways, and not simply in the criminal justice system.

Quarantines and blockades are obvious examples, as is the military draft. In truth, the State has the power to order people around with great regularity. Liberty, therefore, is by its nature subject to compromise, to arguments that purport to balance someone's liberty against another's safety.

Dignity, by contrast, cannot be compromised. The State *cannot* deprive someone of her dignity. It cannot—at least not legitimately—degrade her, or treat her as some might an animal. This in turn disqualifies certain arguments. Unlike with liberty, the State cannot invoke the seductive language of imminent catastrophe to justify behavior that tramples on human dignity, nor may it say restrict dignity to some but not others—to the citizen, for instance, but not the visitor.

Dignity extends to all people, at all times, under all circumstances. It is the quintessentially moral insistence that there is a point below which we will not descend, and beyond which we may not pass. It is more than a Rubicon, since Caesar crossed that point of no return. It is the point at which humanity declares, “No more,” for beyond that point we are no longer human.

In fact, the Supreme Court recognized precisely this distinction between liberty and dignity in the California overcrowding case. The Court wrote that “prisoners may be deprived of rights that are fundamental to liberty,” but cannot be stripped of “the essence of human dignity” that inheres “in all persons.”

In this way, dignity—and dignity alone—responds to and mitigates the most pernicious impulse in American history—*viz.*, the frenzy to dehumanize, to construct mythical monsters who do not so much walk the street as haunt the imagination, and whose specter is invoked to justify yet another round of repression.

This impulse has particularly bedeviled the modern criminal justice system, which has relied on an unbroken series of omnipotent demons—almost always black, brown, and poor—to coerce acceptance of still more punishment and control. Liberty, with its built-in commitment to compromise, cannot resist this impulse. And *that* is why a legitimate criminal justice system must be built around dignity.

* * *

Naturally, some will complain that “dignity” cannot be defined with precision, as if that were enough to disqualify it from consideration. But this of course is no objection at all, since the same is and will always be true for the values Americans have held so dear for so long: liberty, equality, the rule of law—these and other expressions are hopelessly abstract, and acquire meaning only in the super-heated crucible of the public square. The difference is that a commitment to dignity signals the aspiration to put certain behavior beyond compromise, beyond politics.

Relatedly, some will fret that the law will give lip service to dignity but deny its moral essence. But this is just the latest expression of an old fantasy—the idea that the written law can magically bestow what we have not yet embraced as our own. In 1944, reflecting on the perennial quest for liberty, Judge Learned Hand wondered aloud “whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes,” he said. “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it While it lies there, it needs no constitution, no law, no court to save it.”

I do not know whether genuine transformation of the criminal justice system is at last upon us. But if it is—in particular, if we finally embrace dignity as humanity’s irreducible core—the written law will follow, of that I am certain. Yet if we still have not come to this place—if instead of transformation we seek nothing more than modest reform—no written law can bridge the divide, of that I am equally certain.



*Joseph Margulies is a Professor of Law and Government at Cornell University. He is the author of *What Changed When Everything Changed: 9/11 and the Making of National Identity* (Yale 2013), and is also counsel for Abu Zubaydah, for whose interrogation the torture memo was written.*