

# Knowing What We Want: A Decent Society, A Civilized System

Justice Kennedy has retired from the Court and, in the hands of his successors, the fate of his constitutional dignity jurisprudence is unclear. This essay is devoted to the view that reimagining our institutions and practices of security through the concept of human dignity remains not only possible but a more urgent priority

dence that can help illustrate the lateral relations between social relations and institutions (like the labor market), the system of justice in all its prolix complexity (not a system), and the dignity of individuals whom we too often place alone at the center of the concept of dignity, as if they were demigods.

When Justice Kennedy talked about dignity in prisons, he also invoked the concept of a *penitentiary*. The modern Court has also invoked society as the source of “evolving standards of decency” in other Eighth Amendment decisions and “legitimate expectations of privacy” in its Fourth Amendment jurisprudence. I will say more about the meaning of these concepts in the legal realm, and how to cash them out in the currency of politics, but let me begin by stating them.

One cannot assure that prisons (and police custody and other sites of security) preserve the essential human dignity of the people in their jurisdiction at the point of delivery alone. It takes a complex and sustained commitment that begins well

Since Jeremy Bentham articulated his principle of “least eligibility,” students of security have recognized that the conditions of prisoners and other people in custody are inevitably tied to and limited by the least good conditions outside of custody.<sup>6</sup> Otherwise, Bentham noted, the whole logic of deterrence would be reversed for those “least eligible” outside of custody. This was observed in Dublin’s main jail at the height of the mid-nineteenth-century famine, when some committed crimes in order to be sent to jail for its guarantee of food.<sup>7</sup>

For many in the public, to the extent they know the case at all, the premise of the Supreme Court in *Johannes* that prisoners have a right to adequate medical care seems perverse or paradoxical in a society that fails to provide health coverage to all of its free citizens. The legal basis of the state’s obligation to provide for those it segregates is clear enough—public isolation of the prisoner incurs public responsibility to provide what otherwise would be available (or close enough)—but the threat of least eligibility remains. Although it never appears by name in *Johannes*, it is not hard to imagine that the justices were aware of the controversial package of health insurance expansions and regulations that was already making its way toward the Supreme Court (which would grant certiorari in a relevant case at the beginning of the fall term following *Johannes*). Whether coincidental or not, the Supreme Court’s highlighting of the problem of prison health care at a moment when the government had just enacted the largest expansion of the welfare state in general, and health care in particular, in a generation is highly fitting. Many of the people who would have gone to medically incompetent prisons before *Johannes* passed through local jails where they signed up for community-based health care under the Affordable Care Act, saving the person from incarceration and the system from unsustainable costs of delivering health care in highly overcrowded prisons.

It is not alone through least eligibility that the condition of the poor and disadvantaged in society more broadly relates to the well-being of people in the custody of the system of justice. By creating rights consciousness and facilitating organization, the social institutions of the good society—labor markets (including the rights and protections that come with advanced regulated labor markets), welfare entitlements, and health care—insulate people from being identified as security threats and allow those who have left the custody of the system of justice to reintegrate. This is what, borrowing from two great books,<sup>8</sup> I term the *decent society*, by which I mean, specifically, societies that value the dignity of their members and act on that through regulated labor markets, civil rights laws, and welfare institutions. Only a decent society would value civilized security over that which might be as effective but for its negative effects on outsider groups. Only a civilized security institution can reliably deliver a dignified condition in custody.

It is no secret that America’s decent society, and those labor market and welfare institutions I have referenced, has been reduced by a complex of bipartisan

policies that could be described as neoliberal in tenure but have led directly to less regulated labor markets, less civil rights enforcement, and reduced welfare benefits. In the final stages of World War II, President Roosevelt promised to spend his fourth and presumably final term delivering a second Bill of Rights to Americans at home, one that included an enhanced set of welfare and labor market protections. In the mid-1960s, at the height of U.S. economic growth, President Johnson envisioned a “Great Society” that would use its enormous economic strength to drain the deep pockets of poverty remaining in American society. His successor, Richard Nixon, promised a more economically responsible model of welfare, but one just as deeply committed to creating a decent floor under American families (through a guaranteed annual income).

been no direct demographic transfer of people from asylums to prisons (different populations in many respects), the loss of confidence in the treatment of mental illness or social denial of its existence (the latter being an extreme version of the former) went along with the incarceration of large numbers of people with symptomatic mental illness. There are plenty of signs today of a rich revitalization of interest and innovation in delivering more-effective community-based mental health care. Again, few today doubt that finding stable housing options in the community is both more dignified and less costly than cycles of jailing, let alone long-term imprisonment for people living with chronic mental illness. And once again, breaking out of the correctional cycle of failure in treating mental and other chronic illnesses will take an enhancement of decent society's efforts to address homelessness more generally on the streets of our largest cities. Outdoor encampments are unsustainable and the opposite of what I call a *decent society*. The Bay Area— with its liberal social policies and high-tech economy as a source of tax revenue— is an ideal place to see what these strategies can amount to.

In short, the decent society never went away. But it shrunk and was stigmatized, and too often its growth was replaced by a system of justice with little commitment to civilized security or assuring the conditions of dignity. Our efforts to reimagine the organs of justice or security need to complement efforts to reestablish and expand access to the decent society— including the labor market, public schools (school closure is a major issue), health care, welfare, and housing— for whole communities whose populations are regularly touched by the system of justice, such as the formerly incarcerated, arrested, and stopped.

We may also need to imagine new forms of welfare targeted to those most disabled by mass incarceration (such as geriatric prisoners who served long incapacitating sentences). Or some kind of prison pension designed to make sure the formerly incarcerated are not homeless and have the resources to sustain their own dignified stay in the community. In the absence of that, we may find a least-eligibility problem with aged former prisoners coming back, as they do in Japan, due to food insecurity and a lack of the rudiments of human life.

The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of criminal law.<sup>11</sup>

In trying to name what we should most want from the system of justice, conserving human dignity is not enough and comes too late. Only a system of justice that already strives to deliver its services in ways that accord equal dignity to all can conserve dignity once people are in its custody. This is what I call, following a frequently cited passage from the Supreme Court's decision in *Gregg v. Georgia*, a *decent society*.<sup>12</sup> This phrase also draws on Loader and Walker

who, in their book *Security and Dignity*, begin with two points often overlooked in discussions of security or criminal justice. First, that at its broadest level, security is a thick public good that is vital to a dignified life in society and that actually civilizes people. Second, that too often, security and its agents, such as the police, act in ways that diminish the security and dignity of some people. Loader and Walker suggest we should imagine the role of the state in security as civilizing it, “taming private violence by redirecting the passions that security and threats to it arouse into and through political and legal institutions.”<sup>13</sup> Loader and Walker argue for a primary role for public security, as opposed to private security, that aims at civilizing the security that it produces.

Civilized state actions also resonate with the Supreme Court’s efforts to conserve dignity in prisons. In the first important precedent recognizing both dignity and civilized standards as implicit in the Constitution (and decided in 1958, a mere decade after the Universal Declaration of Human Rights was drafted), the Court explained that the constitutionality of a sentence that involved stripping a person of their U.S. citizenship (for wartime desertion of the military) must be answered by asking “whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”<sup>14</sup>

In *Estelle v. Gamble* (1983), an important prison conditions case, the Supreme Court reaffirmed that the Eighth Amendment “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’” They did not rely on dignity per se to find that “denial of medical care is surely not part of the punishment which civilized nations may impose for crime.”<sup>15</sup>

This suggests that civilized security must be considered against what the Court in other Eighth Amendment contexts has called an “evolving standard of decency,” one that takes into account the progress made in this and other democracies. The kind of policing, for example, that was tolerable when London-style policing was brought to big East Coast cities in the 1840s and 1850s no longer accords with what a society without slavery and with equal citizenship should aspire to. Yet, a century later, when sociologists studied American policing in the 1960s, they found a reliance on overwhelming and situationally governed force to still be central to policing. Now, another half-century later, too little has changed.

We need only to look at the canon of Supreme Court cases we teach law students to appreciate how uncivilized American policing has become in the era of mass incarceration. For example, take a tactic I witnessed as a “ride-along” participant-observer with Oakland police officers in the 1980s. Police may pull up to and chase residents on the chance that they will reveal criminal activity (by dropping drugs or a gun they are carrying). Until they actually physically contact someone (in the instance I witnessed, by tackling a teenager), the Court held that chasing requires no particularized reason at all: no reasonable suspicion, no probable cause, and no problem.<sup>16</sup> Police may also arrest a person for a nonjailable offense, as was the

case, in *Whelan v. State* (2010), when a woman with two children in her car was arrested for not having assured that their seat belts were fastened, even though the majority opinion acknowledged the arrest was a pointless indignity.<sup>17</sup> Once at jail, even a person arrested for a minor offense may be subject to strip searches that include close examination of the genital and rectal regions.<sup>18</sup> In a re-



*Knowing What We Want*

but the current system of justice achieves security gains for some at the expense of insecurity for others. A decent society should achieve security through civilized means and institutions that prioritize civility. Taking our identity as a decent society seriously may require abolishing (or at least transforming) parts of our historically accumulated systems of justice and security because they simply are not civilized according to contemporary standards, including racialized automobile stops, aggressive stop-and-frisk tactics, routine strip searches in jails and prisons, long-term solitary confinement, and the death penalty, whether by lethal injection or through old age or untreated illness in prison. Finally, at the level where it really matters, inside the custody of the system of justice, the question must be what is necessary to assure the “condition of dignity” during a person’s stay of whatever length, from a few minutes in a Terry stop to decades in prison.

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- <sup>5</sup> Ian Loader and Neil Walker, *Practical Reason and Preference* (Cambridge: Cambridge University Press, 2007).
- <sup>6</sup> Jeremy Bentham, *Practical Reason and Preference*, ed. John Browning (Edinburgh: William Tait, 1843).
- <sup>7</sup> Niamh O’Sullivan, *Practical Reason and Preference* (Dublin: Liberties Press, 2007).
- <sup>8</sup> Avishai Margalit, *Practical Reason and Preference* (Cambridge, Mass.: Harvard University Press, 1996); and Robert Bellah, Richard Madsen, William M. Sullivan, et al., *The Habits of Democracy* (New York: Random House, 1991).
- <sup>9</sup> Loïc Wacquant, *Practical Reason and Preference* (Durham, N.C.: Duke University Press, 2009).
- <sup>10</sup> The massive wave of federal spending under both Presidents Trump and Biden in response to the COVID-19 pandemic and the likelihood of some further entitlement expansion during the Biden administration are all consistent with this reversal.
- <sup>11</sup> *Shelton v. Federal Bureau of Investigation*, 384 U.S. 486 (1966), <https://supreme.justia.com/cases/federal/us/384/436/>.
- <sup>12</sup> *Shelton v. Federal Bureau of Investigation*, 474 U.S. 104 (1985), <https://supreme.justia.com/cases/federal/us/474/104/>.
- <sup>13</sup> Loader and Walker, *Practical Reason and Preference*, 17 n. 4.
- <sup>14</sup> *Shelton v. Federal Bureau of Investigation*, 356 U.S. 86 (1958), <https://supreme.justia.com/cases/federal/us/356/86/>.
- <sup>15</sup> *Shelton v. Federal Bureau of Investigation*, 429 U.S. 97 (1983), <https://supreme.justia.com/cases/federal/us/429/97/>.
- <sup>16</sup> *Shelton v. Federal Bureau of Investigation*, 499 U.S. 621 (1991), <https://supreme.justia.com/cases/federal/us/499/621/>.
- <sup>17</sup> *Shelton v. Federal Bureau of Investigation*, 532 U.S. 318 (2001), <https://supreme.justia.com/cases/federal/us/532/318/>.
- <sup>18</sup> *Shelton v. Federal Bureau of Investigation*, 566 U.S. 318 (2012), <https://supreme.justia.com/cases/federal/us/566/318/>.
- <sup>19</sup> *Shelton v. Federal Bureau of Investigation*, 579 U.S. \_\_\_ (2016), <https://supreme.justia.com/cases/federal/us/579/14-1373/>.
- <sup>20</sup> Adam Nossiter, “France Dispatch: French Mayor Offers Shelter to Migrants Despite the Government’s Objections,” *New York Times*, February 12, 2019, <https://nyti.ms/2URYsZH>.
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Bruce Western, *Practical Reason and Preference* (New York: Russell Sage Foundation, 2018).