

TO: LGBTQI Movement Advocates

FROM: Andrew Park

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SUBJ: Dignity as a core goal of the American LGBTQI movement

In this letter, I set out why and how dignity might be adopted as a central value in LGBTQI advocacy. In the past, equality, privacy, expression have been some of the central goals of the LGBTQI movement, along with broader values such as justice and diversity. Recent Supreme Court decisions have articulated an additional goal - dignity. The letter concludes with suggestions about how a dignity analysis might provide an additional framework for current and future activities of the LGBTQI movement. I also sketch out a dignity-based advocacy agenda.

THE SUPREME COURT'S RECOGNITION OF DIGNITY OF LGBTQI PEOPLE

In recent years, Courts at the state and federal level have begun to invoke the concept of dignity when finding in favor of LGBTQI plaintiffs. Justice Kennedy, who has authored several of these opinions, has stated that matters of sexuality are central to personal dignity and autonomy. Other courts have found that being able to live according to one's own identity is essential to dignity, and government attempts to compel people to live in ways that do not match their identity constitute violations of this dignity.

Advocates have recognized the importance of this new focus on dignity. Scholar Courtney Joslin, formerly with NCLR, has noted that recent gay rights decisions "express a deep concern for the protection of dignity." Larry Tribe, a scholar who has argued gay rights cases in the Supreme court, has said that the "The doctrine of equal dignity signals the beginning of the end for discrimination on the basis of sexual orientation." Oxford Scholar Michael Fink has concluded that "dignity has become of central importance in the adjudication of gay rights in the US."

This newly invigorated concept of dignity provides strategic opportunities for the LGBTQI movement to expand its goals and tactics. Dignity complements other values, such as equality, privacy, and free expression. At the same time, dignity expands these values by protecting the capability of all Americans to live according to who they are.

THE MEANING OF DIGNITY – THE QUICK VERSION

Inherent worth dignity. As a concept, Dignity can be broken down to a series of claims. There are many variations, but the logic of dignity based on inherent worth usually goes as follows:

1. Each person has inherent worth by virtue of being human.
2. Humans have inherent worth because of their ability, unique among creatures, to autonomously reason and make decisions about their lives.
3. Respecting the worth of each person means respecting their ability to live autonomously according to their own decisions about their lives.

When a government does something that limits this capability, it is limiting the very thing that makes us human. Governments respect dignity by supporting people's personal choices about their own lives.

Recognition dignity. Recognition dignity focuses on the capability to develop one's own identity in a culture and society that does not value it:

1. The capability of individuals to develop their identity is constrained, or supported, by the people and institutions around them.
2. Societies tend to view some identities as more worthy than others.
3. As long as one's identity is seen as less worthy, the capability to develop that identity is limited.
4. Dignity is achieved when all identities are recognized to have equal worth. Formal equality may not be enough if some identities are still devalued.

THE MEANING OF DIGNITY – THE LONGER VERSION

Dignity as a widely recognized concept. Dignity has been a subject of law and philosophy since ancient times. In 1948, dignity was chosen as one of the central principles in the Universal Declaration of Human Rights (UDHR). Article I of the UDHR reads "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Today, almost 170 national Constitutions include a dignity clause. Around the world, almost every high court decision about sodomy, same-sex relationships, and trans rights includes references to a dignity standard.

Types of Dignity. Though the United States Constitution does not have a dignity clause, dignity has been cited by the Supreme Court in 900 opinions, most frequently in cases after 1948. Many types of dignity have been recognized. Of the following five types of dignity, the first two, inherent worth dignity and recognition dignity, are the most common in US jurisprudence.

1. **Inherent worth dignity.** Dignity based on the inherent worth of each person and the obligation of the government to respect the choices of each individual. For purposes of this paper, religious dignity is categorized as inherent worth dignity.
2. **Recognition dignity.** Dignity associated with recognition and respect by and among members of society. This is a broad category that includes laws against defamation and hate speech, rights of indigenous peoples, and recognition of minorities.
3. **Substantive dignity.** Dignity based on substantive community standards. For example, dignity has been invoked in cases where a policy or activity violates specific community norms, such as bans on burkas, prohibition of dwarf tossing, and evaluating economic assistance programs.

4. **Dignity of position and nobility.** The dignity of specific offices and titles because of their accomplishments, responsibilities, or roles in society. This kind of dignity has been applied to the marital status.

5. **Religious dignity** is based on the view of man as god's children, created with the ability to understand and worship him yet having free will to make individual decisions.

The Logic of dignity. The first step in the analysis of inherent worth dignity is the recognition that humans, as compared to other creatures, have special value simply because of their humanity. This notion of universal dignity and worth held by all people is widely recognized:

- American historical views - "endowed by their creator" (Declaration of Independence).
- Constitutional liberty - "the essential dignity and worth of every human being" is "a concept at the root of any decent system of ordered liberty" (*Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).
- Government's role - "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders" (*Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970)).
- International Human Rights – "All human beings are born free and equal in dignity and rights" (Universal Dec. of Hum. Rts., Article 1).

Second, humans have inherent worth because of their ability to autonomously reason and make decisions about their lives. The view that humans, alone among all creatures, have the ability to think and reason is a common belief in Western law and philosophy.

- US Constitution – "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, ..." (*Lawrence v. Texas*).
- Western philosophy -- "autonomy is the ground of dignity of human nature" (Emmanuel Kant)

Some say that humans have inherent worth because we have the ability to form complex communities and relationships in which we give and receive love and care (the communitarian point of view). Others say we have inherent worth because we were created in the image of God with the ability to worship and live in a way that is close to God (Judeo-Christian point of view). Other views assert that non-human animals also think, reason, and form relationships. Thus, both human and non-human animals have different degrees of dignity. Each of these views attribute inherent human worth to a function that is unique, to some degree, to humans.

Lastly, dignity is being able to live in accordance with our own autonomous decisions about our lives. If, as a fundamental belief, we view humans as having unique worth, and if we believe that human worth is bound up with the human ability to reason, make decisions, and plan one's own life, then we must accept the outcome of that ability. Dignity is grounded in letting people reason and decide for themselves, even if we do not like what that decision is. If being human is to make our own decisions, then attempts to interfere with that are the same thing as attempts to keep us from being human.

Recognition dignity targets the ability of individuals to formulate their own identity when society values that identity less than others. The logic of recognition is as follows:

1. The capability of individuals to develop their identity is constrained, or supported, by the people and institutions around them.
2. Societies tend to view some identities as more worthy than others.
3. As long as one's identity is seen as less worthy, the capability to develop that identity is limited.
4. Dignity is achieved when all identities are recognized to have equal worth.

Laws that make certain groups second-class citizens violate dignity. In addition, laws giving minority identities equal opportunity may still fail to grant full dignity as long as society devalues those identities. Being valued equally may mean substantial reform of policies as well as the elimination of social stigma. Ultimately, both inherent worth dignity and recognition dignity require that people have the unconstrained ability to develop their own identity and make decisions about their own lives.

The Judeo-Christian tradition has produced its own version of inherent worth dignity.

According to this view, humans have inherent worth because they are uniquely created in the image of God with the ability to share in his knowledge and love. The Catholic Catechism states that "this is the fundamental reason for his dignity ... He is capable of self-knowledge, of self-possession and of freely giving himself and entering into communion with other persons."

Examples of Dignity Applied to Policies. Dignity is protected when individual's are permitted to determine their own views, identities and life course. In these examples from the US Supreme Court, dignity is paired with other rights that preserve individual rights and autonomy:

- Free speech. The Court said that the constitutional right of free expression puts the decision as to what views to hold in the hands of each of us, and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *Cohen v. Calif*, 403 U.S. 15, 24 (1971).
- Privacy. The Court emphasized that function of the 4th amendment is to protect personal privacy and dignity. (*Schmerber v. California*, 384 US 757,767 (1966)
- Fair Trial. Recognizing the worth of each individual, the Court noted that the right to appear pro se exists to affirm the accused individual's dignity and autonomy. *Faretta v. California* 422 US 806, 820-21 (1975)
- Reproduction. The Court concluded that "[t]hese matters, involving the most intimate and personal choices a person may make in a life- time, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood v. Casey*, 505 US 833, 851 (1992)(plurality opinion).
- School admissions. Addressing the issue of identity recognition, the Court stressed that "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment)

- Voting Rights. Addressing the issue of identity and individual worth, the Court noted that “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” *Rice v. Cayetano* 528 U.S. 495 517 (2000).
- Jury Exclusion. The Court concluded that being excluded from jury service based on a peremptory challenge exercised on the basis of gender injures "personal dignity and ... the individual's right to participate in the political process." *JE.B. v. Alabama*. 511 U.S. 127, 153 (1994)
- Women. The Court has noted that the law of coverature was abandoned as society began to understand that women have their own equal dignity. *Obergefell* at 6.
- Marriage. 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. *Obergefel*, slip op at 13.

DIGNITY AND LGBTQI MOVEMENT

Adopting dignity as a core value would provide a framework to expand movement activities and to provide additional analysis to support current movement activities. What follows are thoughts about how dignity might be used by LGBTQI movement advocates.

Vision and Mission

The vision of dignity advocates would be to ensure that all Americans have the capability to live the life they choose, in accordance with their own sexuality and gender. The goals would include securing self-determination for sexuality and gender, and eliminating social, legal, and cultural barriers that limit the ability of people to live the life they choose. Currently, some LGBTQI groups have missions that focus on seeking civil rights or equal opportunity for all. However, many groups already have missions that reference goals similar to dignity. For example, some groups emphasize lived experience, forming and choosing family, creating accepting workplaces, and providing multi-issue support for LGBTQI people as they deal with issues of youth or aging.

Messaging about LGBTQI people

Using dignity to oppose stigma. Stigma is a belief that someone is worthless because of their sexuality and gender. Dignity is a belief that LGBT people have worth because of their sexuality and gender. Whereas the LGBT movement has sometimes argued that we are equally worthy regardless of sexuality and gender (a common equality approach), dignity provides more opportunities to directly confront stigmatizing beliefs by talking about the positive worth and morality of LGBTQI people

Sexuality and gender are valid (rather than immutable). Equality advocacy often accepts the belief that sexual orientation and gender are fundamental characteristics and are therefore immutable. Claims of dignity are based on respecting the capability of

an individual to make decisions about themselves, including decisions about sexuality and gender. Decisions that arise out of that capability are imbued with a certain validity.

Pride in differences. As equality advocates, we sometimes downplay differences between LGBTQI and non-LGBTQI people because we fear those differences will be used to rationalize unequal treatment. As dignity advocates, we are more free to discuss differences because those differences are the result of the reasoning abilities that make us human.

Setting movement priorities

People-centered. Dignity is about who people are and what they do. A dignity agenda would focus on people and see institutional reform as a means to an end. For example, the question is not just whether trans people are allowed to vote, it is whether they actually go to the polls. It is not about whether employers have non-discrimination policies, it is whether LGBTQI people can get and keep a job.

Redefining what is an LGBTQI issue. Our movement often decides what problems to address by looking at whether sexuality and gender are the drivers of the problem. For example, if we look at LGBTQI people in Flint, we might conclude that poverty, not sexuality or gender, is the nexus between LGBTQI people and the suffering they face. This analysis follows a typical equality analysis which asks the following: but for a person's sexuality and gender, would they face this problem? Dignity is based on the inherent worth of the entire LGBTQI person, not just their sexuality or gender. From a dignity perspective, problems that LGBT people face are LGBT issues by virtue of the fact that LGBT people are suffering, regardless of whether the suffering is triggered by some other trait. Achieving dignity requires us to alleviate their suffering of LGBTQI people regardless of the cause.

Equality is necessary for dignity. Dignity is violated by unequal treatment. In fact, equality laws are best seen as a way to respect dignity. The following is from a Senate Report about the Civil Rights Act of 1964, the federal law which prohibits discrimination in employment, education, and other sectors.

The primary purpose of ... [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, ham- burgers 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. (quoting S. REP No. 88-872 (1964))

Supporting LGBTQI people outside the United States. Sadly, American efforts to advocate for equality overseas lack credibility. Governments and civil society

throughout the world are well aware of racial discrimination and economic inequality in the United States. Because dignity is widely recognized overseas, advocating for dignity may be more effective.

Litigation

Support the evolution of dignity jurisprudence. This would include cases where minority groups are challenging government policies that interfere with their ability to understand, express and live according to their own identity. As the notion of self-determination lies at the core of dignity, litigation effort might also challenge legal norms that require immutability.

Services and support

Unemployment, housing issues, lack of support networks, and other challenges can limit the ability of LGBTQI people to fulfill the promise of their inherent worth. These problems also make it more difficult for LGBTQI people to live according to their own identity. To address this, the movement should continue (its already happening so not much of a leap) movement priorities to support advocacy and services for the whole LGBT person, not just the parts related to sexuality and gender. This might include providing job training, legal assistance, housing for the elderly, recreational opportunities, etc.

A DIGNITY MOVEMENT AGENDA

The following are examples of potential activities and goals for a dignity agenda. I have identified three goals that, together, generally encompass what a person needs to live according to their own sexuality and gender. Currently, the movement is already undertaking many of these activities, just not in a dignity framework.

GOAL 1. Internally, each person must have the ability to understand and develop their own sexual and gender identity. The ability to determine one's own identity is a fundamental requirement for dignity.

- Monitoring. Research to identify whether youth have sufficient knowledge of diverse sexualities and gender and what is the state of mental health for LGBTQI people.
- Understanding sexuality and gender. Seek sexuality education and rainbow curricula so that young people understand their own identity.
- Promote the worth of LGBT People. Pride and coming out activities. Anti-defamation activities in media and public education. Talk about positive aspects of sexuality and gender.
- Affirming environments. Role models, supportive networks in sports, schools, churches, professional associations, etc.

- Key professions. Training/licensing of training of counselors, therapists, teachers and parents

GOAL 2. Externally, each person must be able to express their sexuality and gender to others in all areas of life. This goal is not just ensuring that each person has rights/freedoms of expression. Rather it is to ensure that each person has the capability to express their gender and sexuality as they wish on a day-to-day basis.

- Monitoring. Research to determine whether people feel they have the capability to be open in workplaces, schools, families, important institutions.
- Combat demands to downplay, pass, and conform. The dignity if LGBTQI people is constrained each time someone says “Don’t be so obvious.” Public education efforts should be geared toward community acceptance of LGBTQI expression.
- Non-discrimination. Protect the ability to come out through non-discrimination protections in employment, education, public accommodations, and government programs.
- Anti-violence/stigma. Laws, training, public education
- Disparities. Conduct research to understand the relationship between expressing one’s identity and disparities faced by openly LGBTQI people in educational attainment, income, violence, etc. and seek to eliminate those disparities. Seek to improve LGBTQI income, educational attainment, human capital, livelihoods, etc.
- Reform cis/hetero systems that restrain expressions of sexuality and gender. For example, cisgender and transgender people may both have a right to have their legal gender match their true gender. However, the administrative systems by which gender is recognized was built for cisgender people who face negligible burden regarding gender markers. The administrative maze faced by trans people limits their ability to live according to their own identity, thereby violating their dignity. Full dignity requires systemic reforms so that cis and trans people have their gender recognized with the same level of ease and administrative burden.

GOAL 3. Each person must be able to relate to other people in accordance with their own identities and life decisions (this includes sexually, intimately, in families, in community, and in governance.)

- Family formation. Support for different forms of family structure, parenting, and living situations. The capability to enter into relationships might involve adding to the menu of possible relationships, such as time-limited contract marriages, co-parenting arrangements, legally recognized companionate partnerships.
- Personal support networks. Support them, and encourage new forms of contracts, organizations, co-ops, co-living and business ventures that serve to provide support.
- Living in community. Support elder living arrangements.

- Support for LGBTQI political and advocacy infrastructure.
- Sexuality. Challenge restrictions on sexual behavior. Prohibit discrimination based on sexual acts.
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- Research research research. If LGBTQI were to have designed communities, families, relationships, etc., what would that look like?