HUMAN DIGNITY UNDER THE FOURTH AMENDMENT

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In this Article, I propose that human dignity, as defined, should stand alongside privacy as a primary animating principle of the Fourth Amendment. While dignity as a concept has always existed around the periphery of search-and-seizure jurisprudence, and has intermittently been cited by the Supreme Court as a consideration in the reasonableness analysis, it has been severely underdeveloped both in the case law and in the academic literature. I seek to bring dignity to the fore as a usable interpretive device that supports a truly protective Fourth Amendment.

In Part I of this Article, I argue that privacy, a concept noted by many scholars to be in "disarray," has proven itself incapable of supporting vigorous Fourth Amendment protections. In Part II, I outline a brief history of the evolution of dignity, both in legal and moral thought, and, drawing from this history, attempt to craft a workable standard for incorporating dignity into the general Fourth Amendment reasonableness analysis. Finally, in Part III, I address proposed critiques about my approach, finding ultimately that dignity can comfortably fit within current Fourth Amendment models, while lending reasonableness jurisprudence the constitutional and moral foundation it currently lacks.

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INTRODUCTION

> *A modern bureaucracy's mission tends to dwarf competing values; the police officer sees herself as charged with suppressing crime, a jailer with keeping order in prison . . . . None is trained or encouraged to attend too closely to the demands of human dignity; that is viewed as someone else's job or as a secondary concern.*[1]

The reasonableness requirement of the Fourth Amendment[2] is just about the most unhelpful guidepost one could have concocted, given the burdens that have been placed upon it as the cornerstone of American criminal procedure and law enforcement.[3] Setting aside questions as to whether the generalized-reasonableness construction of the Fourth Amendment comports with original understanding,[4] "reasonableness" has emerged as the bottom-line constitutional requirement when the government subjects an individual to a search or seizure of person or property.[5] However, as any first-year law student taking a torts class

1. Seth F. Kreimer, *Rejecting "Uncontrolled Authority Over the Body": The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 451 (2007).

2. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

3. For a contrary view, see AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 10 (1997) ("Precisely because these searches and seizures can occur in all shapes and sizes under a wide variety of circumstances, the Framers chose a suitably general command.").

4. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 553 (1999) ("The generalized-reasonableness accounts claim that the Framers meant for 'unreasonable' to constitute the essence of the Amendment . . . . are based in large measure on erroneous historical premises.").

5. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 118–19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes

can tell you, reasonableness as an analytical concept is maddeningly frustrating and often little more than a shorthanded reference for "What would *I* do in this situation?" This squishy-at-best guidepost seems especially ill-suited for crafting workable standards governing the behavior of law-enforcement officers, whose lives and careers depend daily on making split-second decisions regarding the scope of their authority, and who benefit from clear, bright-line rules articulated with consistency by courts.[6]

Unfortunately, until some brave group of souls gets around to amending the Fourth Amendment, reasonableness is all we have. The federal courts, especially in the last half-century or so, have been game to the interpretive challenge. At the very highest level, the Warren

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upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))); *Houghton*, 526 U.S. at 299–300 ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed . . . . Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."); *United States v. Alverez-Tejeda*, 491 F.3d 1013, 1016 (9th Cir. 2007) ("An otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner . . . . The benchmark for the Fourth Amendment is reasonableness, which requires us to weigh the government's justification for its actions against the intrusion into the defendant's interests."); AMAR, *supra* note 3, at 10 ("On my reading, the Framers [said] what they meant, and what they said makes eminently good sense: all searches and seizures must be reasonable.").

6. *See* Jack E. Call, *Is the Fourth Amendment Only About Reasonableness?* 1 VA. POLICE LEGAL BULL., Dec. 2006, *available at* http://www.vachiefs.org/vapleac/vplb/1-2/index.html ("The problems with [a pure reasonableness] approach [to criminal procedure jurisprudence] are two-fold. First, it provides the police little guidance as to what behavior is permissible under the Fourth Amendment. The Fourth Amendment law that currently exists under the warrant requirement is certainly not a model of either clarity or consistency, but it is certainly more rule-oriented (and thus comparatively clearer) than the reasonableness approach. Totality of circumstances approaches result in cases that provide little guidance in future cases."); *see also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. (forthcoming 2009) (arguing that procedural rules which provide ex ante clarity to government agents are desirable), *available at* http://ssrn.com/abstract=1138128.

Alas, the Supreme Court has largely abandoned the campaign to cast bright-line rules for police under reasonableness analysis. *Georgia v. Randolph*, 126 S. Ct. 1515, 1529 (2006) (Breyer, J., concurring) ("[T]he Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever changing complexity of human life. It consequently uses the general terms 'unreasonable searches and seizures.' And this Court has continuously emphasized that '[r]easonableness . . . is measured . . . by examining the totality of the circumstances.'" (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996))); *Robinette*, 519 U.S. at 39 ("[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

Court "revolution"[7] and the resulting Burger and Rehnquist "counterrevolutions"[8] have, with varying degrees of jurisprudential and intellectual consistency, made continual attempts to strike an appropriate balance between liberty and security under the reasonableness requirement. Even listing the areas of law this jurisprudence touches would be a Herculean undertaking; suffice it to say, everything from international drug interdiction[9] to high-school sports[10] to the scope of privacy protection on the Internet[11] has been

7. *See, e.g.*, Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004) ("Together, [the Warren Court criminal procedure] cases produced what is widely known as the 'criminal procedure revolution,' so vast were the protections afforded to unpopular and politically powerless criminal defendants."); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1916 (2006) ("Indeed, the wholesale criminal procedure revolution wrought by the Warren Court in the 1960s was in large part an attempt to bring outliers—again, mostly southern states—up to a national standard of due process in criminal cases.").

8. *See, e.g.*, George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 OHIO ST. L.J. 947 (2005) (arguing that *Raich* may, counter to many observers' impressions, actually support the Rehnquist Court's "New Federalist" project begun in *United States v. Lopez* and *United States v. Morrison*, at least in the arena of substantive federal criminal law); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2466 (1996) ("In the almost thirty years since Nixon's victory, the Supreme Court's pulse-takers have offered periodic updates on the fate of the Warren Court's criminal procedure 'revolution' in the Burger and Rehnquist Courts.").

9. *See, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (upholding border search conducted on reasonable suspicion that discovered narcotics). "Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Id.* at 538.

10. *See, e.g.*, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (holding that student athletes' expectation of privacy was not "significant" in comparison to the need for schools to administer a random, suspicionless urinalysis program).

11. *See, e.g.*, Susan W. Brenner & Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J. L. & POL'Y 211, 214 (2006) ("Can the Fourth Amendment's privacy guarantee be adapted to deal with a world in which technology is increasingly pervasive—a world of ubiquitous technology?"); Tara McGraw Swaminatha, *The Fourth Amendment Unplugged: Electronic Evidence Issues & Wireless Defenses*, 9 INT'L J. COMM. L. & POL'Y 1, 6 (2004) ("As a new type of technology become [sic] inextricably linked with daily life, reasonable expectations of privacy are consequently redefined."); Jonathan Zittrain, *Searches and Seizures in a Networked World*, 119 HARV. L. REV. F. 83 (2006) ("[T]he application of the Fourth Amendment to the 'standard' searches of home computers—searches that, to be sure, are still conducted regularly by national and local law enforcement—an interesting exercise that is yet overshadowed by greatly increased government hunger for private information of all sorts, both individual and aggregate,

significantly affected—and in essence defined—by the Court's reasonableness jurisprudence.

It has become increasingly clear, though, that reasonableness jurisprudence, governed by the totality of the circumstances "test,"[12] is not currently up to the challenge of providing a coherent methodology for the creation of consistent decisions reflective of the underlying philosophical and moral structure of the Fourth Amendment and the Constitution. Increasingly, courts have allowed their analysis of reasonableness to devolve into little more than an awkward balancing exercise between the needs of law enforcement and the interests of privacy.[13] At first glance, this privacy/law-enforcement dichotomy seems quite appropriate; the Fourth Amendment has been primarily understood for decades now as a bulwark against unreasonable privacy invasions by the government in the course of its law-enforcement functions.[14] It therefore seems entirely natural to balance privacy, however defined, against the government's interest in effective law enforcement and social control. And, indeed, it is an appropriate

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and by rapid developments in networked technology that will be used to satisfy that hunger."), *available at* http://www.harvardlawreview.org/forum/issues/119/dec05/zittrainfor05.pdf.

12. *Samson v. California*, 547 U.S. 843, 852 (2006) ("[U]nder our general Fourth Amendment approach we 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001))).

I place the word "test" in quotations because it is highly questionable whether the idea that a totality-of-the-circumstances inquiry, which by its very name encompasses all the facts surrounding a given interaction between the police and a suspect, is any different or more helpful than the bare "reasonableness" requirement provided in the Fourth Amendment itself. One might legitimately wonder how a test that offers no guidance or principles more limiting than the answer it is seeking to elicit can fairly be called a test.

13. *See, e.g.*, *Knights*, 534 U.S. at 118–19 ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, (1999))); *see also* Kerr, *supra* note 6, at 15 ("[The] Fourth Amendment's prohibition on unreasonable searches and seizures is premised on a balance between privacy and security.").

14. *See* Kerr, *supra* note 6, at 15; *see also* Brenner & Clarke, *supra* note 11, at 218 ("The Fourth Amendment has historically been interpreted as incorporating a zero-sum conception of privacy . . . ."); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016 (1995) ("Although the constitutional doctrines that regulate the police protect a number of values or interests, one—privacy—tops the list. The cases and literature on search and seizure, and to a lesser extent on self-incrimination, routinely emphasize the individual's ability to keep some portion of his life secret, at least from the government . . . . Privacy language and privacy arguments are rampant in criminal procedure.").

inquiry to undertake when passing on the constitutionality of government action in most search-and-seizure contexts.

This privacy-centric analysis, however, is incomplete. Privacy, an exceedingly broad, multi-faceted concept nevertheless does not encompass a number of core constitutional values that should be understood to underlie the Fourth Amendment.[15] Chief among these values is human dignity. As courts' decisions have moved towards an almost exclusive focus on privacy as the counterbalance to the government's law-enforcement interest,[16] the government's interests have increasingly prevailed and the sphere of protection afforded to the individual has shrunk.[17] Simply put, it has become increasingly clear that privacy as a concept has proved itself an insufficient analytical tool to support an even moderately robust interpretation of the Fourth Amendment. Privacy alone is unequal to the task of providing a doctrinal framework that supports a truly protective Fourth Amendment.

If a more sound jurisprudence is to emerge, a value distinct from privacy must be articulated and incorporated into the reasonableness analysis. In this Article, I propose that human dignity, as defined, should stand alongside privacy as a primary animating principle of the Fourth Amendment. I seek to pair privacy, which, as noted, has become the dominant value behind the reasonableness requirement, with dignity, which is an even more fundamental value that underlies not only the Fourth Amendment, but arguably the entire constitutional

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15. In the Court's first major Fourth Amendment decision, *Boyd v. United States*, 116 U.S. 616 (1886), Justice Joseph Bradley enunciated three primary justifications for Fourth Amendment protection—only one of which was privacy. Bradley noted that the Fourth Amendment provides for the protection of personal "security," "privacy," and "private property." *Id.* at 630 ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .").

16. *See* Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 33 (2005) (describing how during the 1960s, the Warren Court began to "dismantle" traditional theoretical underpinnings of the Fourth Amendment, most notably property rights, and replace them with a privacy-based theory).

17. John D. Castiglione, Hudson *and* Samson*: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 114 (2007) ("[P]etitioners seeking to challenge government actions using Fourth Amendment reasonableness arguments will have to go above and beyond, as it were, to show that the challenged intrusion outweighs the law enforcement benefits, because at least five members of the High Court, including its newest members Justice Alito and Chief Justice Roberts, can be expected to default to the position that the government's law enforcement interests usually trump[] that of the individual's interest in privacy and autonomy.").

structure.[18] While dignity as a concept has always existed around the periphery of constitutional search-and-seizure jurisprudence,[19] and has intermittently been cited by the Supreme Court as a consideration in the reasonableness analysis,[20] it has been severely underdeveloped both in the case law and in the academic literature. I seek to bring dignity to the fore as a usable constitutional value and interpretive device.[21]

In Part I of this Article, I argue that overreliance on privacy as the sole animating principle of Fourth Amendment reasonableness has weakened the amendment's ability to effectively constrain government action. As the reasonableness test underlying Fourth Amendment analysis has become whittled down to little more than privacy versus law enforcement—both ill-defined concepts in and of themselves—privacy has proven itself unable to compete, creating a search-and-seizure jurisprudence that, both in theory and increasingly in practice, cannot help but favor the law-enforcement interests of the government over the individual's interest in being free from imposition by the government. Nowhere is this imbalance more prevalent than in the Roberts Court's initial Fourth Amendment decisions, where long-held tenants of Fourth Amendment jurisprudence, notably the knock-and-announce rule and the exclusionary rule, were rolled back in decisions that make the current imbalance in the application of reasonableness apparent.

In Part II, I argue that the concept of dignity captures a core Fourth Amendment value that privacy does not, and therefore must be explicitly incorporated into reasonableness analysis. First, I take initial steps in crafting a working definition of *dignity*, drawn from philosophy and the law. Next, I focus on the interplay between privacy and dignity, arguing that while these concepts often intersect in the criminal procedure context, they are analytically distinct and should be treated as separate values. To the extent one accepts that dignity, or concepts related thereto, are at the heart of our constitutional system, it only

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18. *See, e.g.*, Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006) (canvassing the Supreme Court's invocation of dignity in various constitutional settings); Erin Daly, *Constitutional Dignity: Lessons from Home and Abroad* (Widener Law Sch. Legal Studies Res., Paper No. 08-07, June 2007) (surveying American and foreign case law on "institutional" and individual dignity, noting that the Supreme Court has a long, still-developing jurisprudence recognizing dignity's place in the constitutional order), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991608.

19. *See infra* Part II.

20. *See id.*

21. *See* Goodman, *supra* note 18, at 792 ("With regard to Fourth Amendment search and seizure jurisprudence, the Court should use its current 'reasonableness' test, while explicitly including in reasonableness the impact of government action on the defendant's dignity.").

follows that impositions on the dignity of a suspect should be explicitly considered by courts in the reasonableness test that underlies every Fourth Amendment decision.

Finally, in Part III, I look to craft a workable standard for incorporating human dignity into the general Fourth Amendment reasonableness analysis. In short, I argue that courts should specifically explore whether government behavior unreasonably offends a suspect's inherent human dignity, and offer suggestions as to how courts may go about making this inquiry. While judicial consideration of the dignitary impact of a search or seizure will not be necessary in every case, dignity is a vital concept that should be explicitly considered by courts, with real consequences for emerging Fourth Amendment jurisprudence. I address the obvious critique that allowing an admittedly ethereal concept like dignity into the analysis is fraught with peril, not the least of which is that dignity as an analytical concept is potentially vulnerable to instrumentalist manipulation. I answer this critique by suggesting first that dignity as a concept is no more unworkable than privacy or law enforcement, the current animating principles of Fourth Amendment reasonableness jurisprudence. More importantly, I argue that it is incumbent upon courts to factor some conception of human dignity into Fourth Amendment analysis, lest the jurisprudence become even further detatched from its moral structure than it already is.

I. OVERRELIANCE ON PRIVACY HAS WEAKENED FOURTH AMENDMENT PROTECTIONS

> *We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control . . . . [T]he privacy and dignity of our citizens [are] being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of [a person's] life at will.*[22]

22. *Osborn v. United States*, 385 U.S. 323, 341, 343 (1966) (Douglas, J., dissenting).

And that was in 1966. Justice William Douglas was nevertheless correct, if a bit premature; it has become increasingly clear that privacy, a concept widely considered as being in "disarray,"[23] is unequal to the immense constitutional burdens that have been placed upon it. Whereas some argue that courts had historically understood the Fourth Amendment to be in large part concerned with the protection of property rights,[24] the Warren Court revolution[25] marked a transition to an understanding of search-and-seizure law focused on the protection of personal privacy. Despite the common perception that the Warren Court was an unadulterated boon to criminal defendants, Professor Morgan Cloud, among others, has recently argued that the Warren-era recalibration of the Fourth Amendment actually left the Fourth Amendment substantially weakened.[26] He notes that "[a]morphous standards of privacy lack the sinew necessary to withstand what Justice Douglas once referred to as the 'hydraulic pressures' favoring expansive police power at the expense of privacy and liberty."[27]

Put simply, privacy, by itself, has proven itself an insufficiently vigorous concept to support an even moderately robust interpretation of the Fourth Amendment.[28] Courts have overrelied on privacy as the fundamental concept underlying the Fourth Amendment, the result of which is a jurisprudence that is overly vulnerable to government-friendly decisions that steadily chip away at personal security, broadly

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23. *See, e.g.*, Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 477 (2006) ("Privacy is a concept in disarray. Nobody can articulate what it means.").

24. *See* Cloud, *supra* note 16, at 33.

25. *See id.*

26. *Id.* at 72 ("Justice Stewart's attempt to replace [traditional] doctrines with a new set of theories that would effectively preserve Fourth Amendment privacy rights failed . . . .").

27. *Id.*; *cf. Terry v. Ohio*, 392 U.S. 1, 40 (1968) (Douglas, J., dissenting) ("There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.").

28. *See* Scott E. Sundby, "*Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1758 (1994) ("The argument that formulating Fourth Amendment interests in privacy terms has undermined the Amendment's protections initially may seem counterintuitive. One can easily imagine how a Court in a different time might have taken the ideal of the 'right to be let alone' and defined privacy in a way that would have led to a very different Fourth Amendment jurisprudence than that which exists today. However, a coalescence of different factors—social, doctrinal, analytical, and rhetorical—has prevented the vision underlying Justice Brandeis's words from coming to pass. The 'right to be let alone' no longer is capable of fully protecting Fourth Amendment values." (citation omitted)).

defined, in the face of government power.[29] The recent history of search-and-seizure doctrine makes clear that, at least as the concept is currently understood, privacy alone has become unable to provide a sufficiently strong underpinning for a balanced Fourth Amendment.[30] In this sense, Justice Douglas was not quite correct. It is not that we have allowed our privacy to be invaded by the government; rather, privacy alone is simply not equal to the task of preventing government invasions via unreasonable searches and seizures.

A. The Privacy-Centric Fourth Amendment

Professor Daniel Solove, among others, has recently noted that "[t]he Fourth Amendment is currently understood by the [Supreme] Court to protect privacy, and the test for determining the scope of the Fourth Amendment is the existence of a reasonable expectation of privacy."[31] This focus on privacy has been widely criticized as insufficiently protective of individuals' interest in being free from objectionable police behavior during a search or seizure.[32] This is largely due to the abstract, indeterminate nature of privacy as a

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29. *See* Solove, *supra* note 23, at 478 ("Privacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of 'privacy' do not fare well when pitted against more concretely stated countervailing interests.").

30. *See infra* Part I.B.

31. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 131 (2007); *see also* Kerr, *supra* note 6, at 15 ("[The] Fourth Amendment's prohibition on unreasonable searches and seizures is premised on a balance between privacy and security."); Robert C. Power, *Changing Expectations of Privacy and the Fourth Amendment*, 16 WIDENER L.J. 43, 48 (2006) ("The crux of the issue in the post-September 11 environment is the extent to which the expansion of governmental investigative powers and the public's awareness of or acquiescence in security intrusions have changed our expectations of privacy.").

32. *See* Jack I. Lerner & Deirdre K. Mulligan, *Taking the "Long View" on the Fourth Amendment: Stored Records and the Sanctity of the Home*, 2008 STAN. TECH. L. REV. 3, ¶ 8 (2007) (exploring "the inability of the Supreme Court's current Fourth Amendment jurisprudence to provide a rational and satisfying description of the privacy interests the Constitution protects in a world of networks, devices, and personal services that by design collect and retain personal information on private acts."), *available at* http://stlr.stanford.edu/pdf/lerner-mulligan-long-view.pdf; Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 COLO. L. REV. 693, 700 (1998) (criticizing the Court's "inordinate emphasis" on the primacy of privacy in Fourth Amendment law); Stuntz, *supra* note 14, at 1068 (noting that although "[a] focus on privacy has led to a great deal of law . . . about what police officers can *see*[,] [t]he doctrine pays a good deal less attention to what police officers can *do*.").

concept—a concept that courts are unable (or unwilling) to satisfactorily explicate.[33]

It is not a stretch, then, to posit that privacy can be expected to fall by the wayside in the face of even a superficially compelling law-enforcement need for the particular search or seizure at issue.[34] The totality-of-the-circumstances test courts use to define the reasonableness of a search[35] promotes this imbalance by allowing a court to assign any weight it sees fit to the respective values it considers. The test, at least as currently formulated, offers no meaningful constraint or guidance, theoretical or otherwise, in how to assign this weight. Unsurprisingly, the totality-of-the-circumstances test has evolved into a thumb-on-the-scale balance between the difficult-to-articulate right to privacy and the more concrete, more easily articulable governmental interest in law enforcement and crime control. When an individual's nebulous privacy interest (which many mistake as little more than the desire to hide criminal or other socially unacceptable activity)[36] is juxtaposed against bold invocations of public safety, violence prevention, and the need to bring criminals to justice, the outcome is almost foreordained. This comparison has increasingly resulted in decisions finding no violation of the Fourth Amendment, even in the face of egregious—or at least highly questionable—government conduct.[37]

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33. *See* sources cited *supra* note 32.

34. *Id.*; *see also* Cloud, *supra* note 16, at 33–34 ("During the 1960s, the liberals on the Warren Court . . . replace[d] . . . traditional construct[s] with a privacy-based theory of the Amendment. One of the liberal justices' goals was to impose constitutional constraints upon the use of intrusive modern technologies, which were largely unregulated by the Fourth Amendment following the Court's famous *Olmstead* decision. This effort culminated in *Katz v. United States*, where the Court replaced property-based theories with a two-part expectation-of-privacy test initially articulated in Justice Harlan's concurring opinion . . . . This has been an unfortunate development. In the hands of the Supreme Court justices, the so-called two-part expectation-of-privacy test has evolved into a flexible standard that allows them to rely on little more than their idiosyncratic views when deciding cases. It has permitted those who reject—at least rhetorically—the interpretive tradition grounded in property law to ignore the positive elements of that tradition. Ironically, the '*Katz* test' has not proven to be an effective device for protecting personal privacy against technological intrusions, but has typically been applied in ways that, like the old *Olmstead* trespass and tangible property rules, permit government actors to employ technological devices to pry into the lives of the people largely unconstrained by constitutional rules." (citations omitted)).

35. *United States v. Knights*, 534 U.S. 112, 118 (2001) ("[U]nder our general Fourth Amendment approach [the court] examin[es] the totality of the circumstances.").

36. *See* Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 746 (2007) (critiquing "[t]he argument that no privacy problem exists if a person has nothing to hide is frequently made in connection with many privacy issues").

37. *See, e.g.*, Castiglione, *supra* note 17, at 113–14 ("Given the Court's formulation of the balancing test, the government's interest will almost always seem

B. The Early Roberts Court Decisions—Privacy Gets Routed

The inadequacy of an exclusively privacy-based jurisprudence became especially clear in the wake of the personnel change on the Supreme Court in 2006, when Chief Justice William Rehnquist and Justice Sandra Day O'Connor were replaced by Chief Justice John Roberts and Justice Samuel Alito. In the first wave of criminal procedure cases to come before the Roberts Court, it quickly became clear that, standing alone, privacy as a doctrinal tool was incapable of competing on a level playing field with the government's law-enforcement interests, as broadly defined by the Court. In three important early cases, *Samson v. California,*[38] *Hudson v. Michigan*,[39] and *Los Angeles County v. Rettele*,[40] the Court balanced an individual's privacy interest with the government's interest in effective law enforcement to determine the reasonableness of a search under the Fourth Amendment.[41] In each case, the Court found that the individual's privacy interest was insufficiently compelling when balanced with the government's law-enforcement prerogatives. What was distressing was not necessarily the outcomes of the cases; decisions finding law-enforcement interests more compelling than a privacy interest in a given case are, of course, not necessarily indicative of some flaw in the jurisprudence. Rather, what was distressing in these cases was that the new Court came to its conclusions almost as a matter of course. The opinions in *Samson, Hudson*, and *Rettele* made clear that any privacy interest identified by the target of the search was effectively a priori outweighed by the government's law-enforcement interest as defined by the Court.

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more compelling when the threat of violence or the loss of evidence is at stake, and the imposition on a given individual (which oftentimes will be one who is clearly guilty of something) will almost always seem small by comparison . . . ." (citation omitted)); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 487 (1999) (arguing that the results of the Court's balancing test are "quite predictable" given the formulation of the test itself); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 261 (1998) (describing the Court's test as "flawed").

38. 547 U.S. 843 (2006).

39. 547 U.S. 586 (2006).

40. 127 S. Ct. 1989 (2007).

41. Only one of these cases, *Hudson*, has garnered widespread attention in literature; the others—*Samson* and *Rettele*—have largely been ignored, despite the clear implications of these decisions when viewed as a measure of the new Court's general theory of reasonableness jurisprudence.

1. *SAMSON V. CALIFORNIA*

In *Samson v. California*,[42] the Court upheld a California law mandating that every prisoner eligible for release on parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night . . . ."[43] Individualized suspicion of a parolee's wrongdoing was not a prerequisite to search under the law.[44] Six justices found that the law was reasonable under the Fourth Amendment.[45] Writing for the majority, Justice Clarence Thomas applied the totality-of-the-circumstances test, noting, "[w]hether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"[46]

First, Thomas found that parolees necessarily have a diminished expectation of privacy, equating a parolee's expectation of privacy with that of a prisoner—which is to say, essentially none.[47] He then looked

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42. 547 U.S. 843 (2006).

43. *Id.* at 846 (quoting CAL. PENAL CODE § 3067(a) (West 2000)).

44. *Id.*

45. *See id.* at 856. Chief Justice Roberts and Justices Scalia, Ginsburg, Kennedy, Thomas, and Alito constituted the majority, while Justices Stevens, Breyer, and Souter dissented. *See generally id.*

46. *Id.* at 848 (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001)).

47. *Id.* at 850–52. In holding that parolees have a diminished expectation of privacy, Thomas cited a rather curious strain of doctrine that has recently emerged, the so-called "continuum" model. *Id.* at 850. This model posits that prisoners have no expectation of privacy whatsoever, while "normal" individuals have the full range (whatever that may be) of privacy expectation under the Constitution. As one moves from being a "normal" individual to a prisoner, the expectation of privacy diminishes and the requirement for individualized suspicion lessens. Hence, probationers have less of an expectation of privacy than normal individuals, parolees have less than that, and so on down the line. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. A number of different options lie between those extremes, including confinement in a medium- or minimum-security facility, work-release programs, 'halfway houses,' and probation—which can itself be more or less confining depending upon the number and severity of restrictions imposed.").

This is a rather odd strain of doctrine because the Court has never adequately explained *why* individuals in different stages of confinement are necessarily subjected to more invasive governmental oversight (except in the situation of a confined prisoner, which the Court has long denied any privacy right out of penological necessity). Is it because, as you go down the line, suspects are more likely to commit crimes? Are they simply more "bad actors"? Are these inquiries justifiable when determining Fourth Amendment rights? The Court has never specified, leaving the foundations of the

to the substantial governmental interests in allowing warrantless, suspicionless searches of parolees, finding that the government's interest in preventing recidivism by closely supervising parolees was compelling.[48] Because the government's interests were strong, and the parolee's expectation of privacy was essentially nil, the Court held that it is reasonable to search a parolee for any reason, or no reason at all, during the pendancy of parole.[49]

Perhaps most surprising—and most telling—was the Court's decision to eschew special-needs analysis in favor of basic reasonableness analysis.[50] The Court could have held, consistent with precedent, that parole supervision is a special circumstance that essentially mandated the suspension of ordinary Fourth Amendment norms.[51] Instead, the Court held that the "regular" Fourth Amendment reasonableness analysis was sufficient, without recourse to a special-needs analysis that the Court has often used to address novel uses of police power that would seem to offend generally applicable notions of constitutional propriety.[52] Elsewhere, I have posited two potentially nonexclusive explanations for this choice. First, the Court knew that it could not convincingly tie suspicionless searches to the penological and rehabilitative goals of parole (thus requiring the Court to forego special-needs analysis altogether, lest the patent weakness in the Court's assumptions regarding the relation of suspicionless searches to the goals of a parole regime become apparent).[53] Second, the majority purposely eschewed special-needs analysis in order to demonstrate a pointedly narrow view of the scope of Fourth Amendment protections.[54]

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doctrine shrouded in mystery. *See* Castiglione, *supra* note 17, at 76 (arguing that the Court's "continuum" theory remains underdeveloped).

48. *Samson*, 547 U.S. at 853.

49. *Id.* at 856.

50. *Id.* at 852 n.3 ("[We do not] address whether California's parole search condition is justified as a special need under *Griffin v. Wisconsin* because our holding under general Fourth Amendment principles renders such an examination unnecessary." (citation omitted)).

51. *Id.* at 858–59 (Stevens, J., dissenting) ("Although the Court has in the past relied on special needs to uphold warrantless searches of probationers it has never gone so far as to hold that a probationer or parolee may be subjected to full search at the whim of any law enforcement officer he happens to encounter, whether or not the officer has reason to suspect him of wrongdoing." (citation omitted)).

52. *Id.* at 852 n.3.

53. Castiglione, *supra* note 17, at 80–81.

54. *Id.* at 81 ("[T]he Justices composing the majority in *Samson* did not need to resort to a special needs analysis because they believe that, as a general matter, the Fourth Amendment provides relatively little protection to the individual when the government can articulate an important-sounding reason to impose upon the individual's interests.").

2. *HUDSON V. MICHIGAN*

Similarly, in *Hudson v. Michigan*,[55] the Court surprised much of the legal community by holding that exclusion of evidence from trial was not mandated for knock-and-announce violations.[56] In *Hudson*, police executing an arrest warrant for possession of minor amounts of crack cocaine admittedly violated the knock-and-announce rule by announcing their presence and waiting just seconds before forcefully entering the suspect's home.[57] Justice Antonin Scalia, writing for the majority, found that the petitioner failed to show a convincing causal connection between the knock-and-announce violation and discovery of inculpatory evidence gleaned therefrom.[58] Because the rule exists primarily to protect "human life and limb,"[59] and not the sanctity of the home in and of itself, the connection between knock-and-announce violations and the discovery of incriminating evidence was too attenuated to warrant suppression.[60] While Scalia noted that "the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance . . . . giv[ing] residents the 'opportunity to prepare themselves for' the entry of the police," he nevertheless found that a civil action for damages is the only appropriate remedy, rather than exclusion of evidence gleaned from the violation.[61] The majority also held that there is limited deterrent value in the application of the exclusionary rule to knock-and-announce violations, in light of the possibility for post hoc civil remedies.[62]

The failing of *Samson* and *Hudson* was not so much the ultimate outcomes of those cases, although highly questionable; it was the manner in which the Court analyzed the reasonableness issue presented. It surprised no one that the *Samson* Court held that parolees are subject

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55. 547 U.S. 586 (2006).

56. *Id.* at 594.

57. *Id.* at 588.

58. *Id.* at 594.

59. *Id.*

60. *Id.*

61. *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)).

62. *Id.* Writing for the dissent, Justice Breyer argued that permitting the fruits of a knock-and-announce violation to be admitted at trial would grossly underdeter police, and that the majority's reliance on 23 U.S.C. section 1983 as a viable remedy was both wishful thinking and against the arc of precedent. "What reason is there to believe that those remedies (such as private damages actions under 42 U.S.C. § 1983), which the Court found inadequate in *Mapp*, can adequately deter unconstitutional police behavior here?" *Hudson*, 547 U.S. at 609 (Breyer, J., dissenting) (citing Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 126–29 (2003) (arguing that no feasible alternative to the exclusionary rule has yet been discovered in the years since *Mapp v. Ohio*)).

to suspicionless searches—just five years earlier in *United States v. Knights*,[63] the Court held that probationers are not entitled to full Fourth Amendment protections. The Court's holding in *Samson* naturally followed. What was surprising about *Samson*, though, was that under the Court's generalized-reasonableness analysis, parolees' privacy interests were, by very definition, not commensurate with the imposition on law-enforcement prerogatives that would come by requiring an individualized suspicion before search.[64] This is troubling not because parolees should necessarily have the right to be searched only upon probable cause, but because the Court so easily brushed aside the argument that parolees have any recognizable privacy rights at all, even in the face of the highly questionable penological and rehabilitative value of the search regime the Court condoned.[65]

Similarly, in *Hudson*, the Court rather cavalierly held that an individual's fundamental right to privacy in the home, expressed via the knock-and-announce rule, could be violated without any realistic remedy.[66] I have argued elsewhere that the Court's assumption that civil remedies can make knock-and-announce violation victims whole or deter future violations is unpersuasive, because it ignores the unlikelihood of a timely, meaningful judgment for most plaintiffs.[67]

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63. 534 U.S. 112 (2001) (upholding a California law providing that individuals on probation could be stopped and searched at any time during the probationary period upon reasonable suspicion of criminal activity, as opposed to the usual requirement of probable cause).

64. *See supra* note 15.

65. *See Samson v. California*, 547 U.S. 843, 857–58 (2006) (Stevens, J., dissenting) ("What the Court sanctions today is an unprecedented curtailment of liberty. Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons than do prisoners. However superficially appealing that parity in treatment may seem, it runs roughshod over our precedent. It also rests on an intuition that fares poorly under scrutiny. And once one acknowledges that parolees do have legitimate expectations of privacy beyond those of prisoners, our Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a search supported by neither individualized suspicion nor 'special needs' is nonetheless 'reasonable.'").

66 547 U.S. at 594.

67. *See* Castiglione, *supra* note 17, at 94–96 ("Justice Scalia would have us believe that § 1988(b), which provides for attorney's fees for civil rights plaintiffs, offers an adequate incentive for attorneys to pursue knock-and-announce claims in federal court. Justice Scalia notes that '[t]he number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.' The insincerity of this argument is apparent. Even given the existence of § 1988(b), relatively few defendants would have the wherewithal and the resources to find representation and bring such claims to their conclusion . . . . Prospects for pro se plaintiffs are even dimmer . . . . Justice Scalia provides no evidence (nor even explicitly argues) that there are sufficient numbers of attorneys available and willing to handle the new civil suits that he claims will take the place of suppression motions, nor does he provide any

This clear flaw in the Court's reasoning[68] raises legitimate questions over whether, despite Justice Anthony Kennedy's reassuring words in concurrence, it is really true that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt,"[69] and whether the majority in *Hudson* intended that outcome.[70] Given the questionable working future of the knock-and-announce rule,[71] the Court's lack of concern over the potential disappearance of an ancient right, one essentially grounded in privacy,[72] was glaring:

> And what, other than civil suit, is the "effective deterrent" of [a] police [officer's] violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? *Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes* . . . .[73]

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guidance as to whether the Court would be willing to re-establish an exclusionary remedy for violations should that unknown number of civil-rights attorneys dip below a certain level—or whether such a thing could conceivably be measured accurately." (citations omitted)).

68. Needless to say, not all share the view that an exclusionary remedy is the only effective remedy for a Fourth Amendment violation; many prominent commentators have argued that an exclusionary remedy is not generally appropriate for such violations. *See, e.g.*, AMAR, *supra* note 3, at 20 ("The Court has failed to nurture and at times has affirmatively undermined the tort remedies underlying the amendment, has concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt, and has then tried to water down this awkward and embarrassing remedy in ad hoc ways.").

69. *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring).

70. *See* David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283. Associate Dean David Moran, who argued for the petitioners in *Hudson*, stated that: "While I certainly realized that it was possible I could somehow lose *Hudson*, it never occurred to me that I could effectively kill an 800-year-old rule protecting personal privacy and simultaneously put the entire exclusionary rule at risk." *Id.* at 296.

71. *See, e.g.*, Daniel A. Gutin, *Technical Knockout:* Hudson v. Michigan *and the Unfortunate Demise of the Knock-and-Announce Rule*, 44 AM. CRIM. L. REV. 1239, 1266 (2007) ("The Court's decision in *Hudson* means police will face few, if any, consequences for violating the knock-and-announce rule. Indeed, without the sanction of exclusion to encourage obedience, the rule is now essentially a dead letter.").

72. *See Hudson*, 547 U.S. at 594 ("[T]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance . . . . giv[ing]residents the 'opportunity to prepare themselves for' the entry of the police." (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997))).

73. *Id.* at 597 (emphasis added).

The Court's decision in *Hudson* made clear that whatever privacy interest existed in the right to have an officer announce himself before executing a warrant—which has deep historical roots and is among the more well-defined rights based in privacy—was almost as a matter of course insignificant when balanced with the purported need for the government to enter a suspect's home quickly, forcefully, and without announcement.

3. *LOS ANGELES COUNTY V. RETTELE*

The trend continued in *Los Angeles County v. Rettele*,[74] decided in the Roberts Court's second term. In *Rettele*, deputies investigating a fraud and identity-theft crime ring obtained a warrant to search a house for African-American suspects, one of whom had a registered 9mm. handgun.[75] When they arrived early in the morning, they detained a white teenager who answered the door.[76] The deputies proceeded into the bedroom, guns drawn, where two white adults were sleeping.[77] They were ordered to get out of bed and show their hands. As the Court described it:

> Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler [the other individual in the bed] also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress . . . . By that time the deputies realized they had made a mistake. They apologized . . . and left . . . .[78]

In a per curiam decision, the Court held that Rettele and Sadler's Fourth Amendment rights were not violated.[79] Noting the danger to officers executing a home search, the Court held that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."[80] The Court found, in fairly summary fashion, that the Fourth Amendment was not

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74. 127 S. Ct. 1989 (2007).
75. *Id.* at 1990–91.
76. *Id.* at 1991.
77. *Id.*
78. *Id.*
79. *Id.* at 1990.
80. *Id.* at 1993 (quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981)).

violated. Despite the fact that the officers were mistaken, the Court held that:

> [P]eople like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; *and the resulting frustration, embarrassment, and humiliation may be real, as was true here*. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.[81]

The Court's opinion in *Rettele* was short, and analysis regarding the balance of privacy and law enforcement was almost nonexistent. The Court's decision essentially declared that whatever privacy interest one has in not being awoken in one's bedroom and forced to stand naked before policemen bearing guns does not outweigh the government's interest in gaining command of the situation, even when it has become obvious that the police have mistakenly detained innocent people.[82] The summary nature of the decision is perhaps not surprising, given that the Court has no coherent methodology for describing what constitutes privacy,[83] much less one for applying privacy principles consistently in Fourth Amendment cases. Given that inherent limitation in its own jurisprudence, the Court essentially had no choice but to declare the government's law-enforcement interest more compelling *sans* probing analysis.[84]

This first wave of criminal procedure cases in the Roberts Court demonstrates that there is a fundamental skew in the Court's Fourth Amendment jurisprudence, away from protection of the individual and towards increasingly unfettered law enforcement in most circumstances.[85] As these cases demonstrate, not only is privacy not up

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81. *Id.* at 1993–94 (emphasis added).

82. *Id.* at 1993.

83. Solove, *supra* note 23, at 477.

84. *Rettele*, 127 S. Ct. at 1992–94. This case also illustrates Professor Amar's point that current Fourth Amendment doctrine wrongly condones searches, no matter how unreasonable in theory, when a warrant has been issued, which is at odds with what he argues is the proper understanding of the Amendment. *See* AMAR, *supra* note 3, at 44. In *Rettele*, the Court clearly gave short shrift to a real analysis of whether the officers acted reasonably in entering the home and seizing its inhabitants (despite steadily increasing indications that the inhabitants were not the suspects the officers were looking for) because a valid warrant had been issued. 127 S. Ct. at 1992.

85. Others have long made this assertion. *See, e.g.*, Kamisar, *supra* note 37, at 487 (arguing that the results of the Court's balancing test are "quite predictable" given the formulation of the test itself); Norton, *supra* note 37, at 261 (describing the Court's jurisprudence as "flawed").

to the task of being the sole counterbalance to law-enforcement interests in these cases, it often is not even in the game, being overridden almost as a matter of course. Given the current formulation of the reasonableness balancing test as a bilateral balance between privacy and law enforcement, such decisions are to be expected, and can continue to be expected going forward given that every justice on the Supreme Court has apparently subscribed to this general formulation.[86]

II. DIGNITY CAPTURES CORE FOURTH AMENDMENT VALUES THAT PRIVACY DOES NOT

> *[T]hose who try to formulate substantive principles of justice should reserve a prominent place for human dignity. If this is not done, the distinctively moral aspects of justice will be absent; and the claims of justice will be at best legalistic and at worst arbitrary.*[87]

So why, then, dignity? Why should this concept—of all the values that could be considered to underlie the Fourth Amendment—be the vehicle to bring search-and-seizure jurisprudence back into balance?[88] One might be tempted to simply continue the ongoing project of enunciating increasingly robust theories of privacy that, in theory, would have the sinew necessary to balance the law-enforcement temptation. Given the acknowledged (even if lamented) pliability of privacy as an analytical concept,[89] it would seem as though advocates of a more protective Fourth Amendment jurisprudence might simply look to articulate a more expansive (and more coherent) conception of privacy, the goal being to define the concept both broadly and specifically enough to stand on roughly equal ground with the

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86. *Rettele* was a per curiam opinion; *Samson* drew six votes (Justices Roberts, Alito, Ginsburg, Kennedy, Scalia, and Thomas), and while *Hudson* only drew five votes (Justices Roberts, Alito, Kennedy, Scalia, and Thomas), there is no indication that the other justices—specifically Justices Breyer, Souter, and Stevens—do not subscribe generally to the notion that privacy is effectively the sole counterbalance to the law-enforcement underpinning of the Fourth Amendment.

87. Michael S. Pritchard, *Human Dignity and Justice*, 82 ETHICS 299, 300–01 (1972).

88. Other commonly cited values include security, liberty, and property. *See* Cloud, *supra* note 16, at 33; Kerr, *infra* note 220.

89. *See* Solove, *supra* note 23, at 477–78; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153 (2004) ("[H]onest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define. 'Nobody,' writes Judith Jarvis Thomson dryly, 'seems to have any very clear idea what [it] is.' Not every author is as skeptical as Thomson, but many of them feel obliged to concede that privacy, fundamentally important though it may be, is an unusually slippery concept." (citation omitted)).

governmental interests applicable to the search-and-seizure concept. Such attempts would, however, be of ultimately limited utility, because privacy does not and cannot encapsulate core Fourth Amendment interests that fall outside the purview of even the most expansive definition of privacy. At least one of those core interests, and the interest I focus on here, is human dignity.

The Supreme Court has hinted at dignity's place as a Fourth Amendment value, but has alternately conflated the dignitary interest with the privacy interest, or ignored the dignitary interest altogether.[90] While there is significant overlap (and, in some cases, concurrence) between the two concepts, they are distinct values, and should be treated as such. As an intuitive matter, one can have no privacy at all—either as an expectation or an objective fact—and still maintain a legitimate expectation of being treated with dignity. Even if one has no privacy, liberty, or property, or the legitimate expectation of the same, such as is the case with a prisoner, there remains a core human right to be free of government action that unreasonably or unnecessarily strips one of his dignity or intrinsic humanity. Put another way, the search and seizure of the individual (or even just the threat of it) can, under certain circumstances, strip an individual of his dignity in a manner that can objectively be categorized as unreasonable, which would thereby violate the Fourth Amendment. Thus, courts' current focus on privacy as the sole counterbalance to the state's law-enforcement interest[91] is inadequate because it fails to protect (both as a doctrinal matter and increasingly in practice) against dignitary impositions, and courts must now move to formally factor dignity into the reasonableness equation.

In this Part, I attempt to find a working definition of *dignity* in order to at least begin to grasp what it is (and what it is not) in a constitutional sense, applying an exploration of the concept as it has been sparingly used in the cases. I then formally distinguish dignity from privacy as analytical concepts, something which must be accomplished if dignity is to be of any added utility in the Fourth Amendment context. Later, in Part III, I will suggest ways to incorporate this value into the current generalized-reasonableness analysis, setting forth a simple test for courts to use in evaluating when a suspect's dignity has been unconstitutionally violated.

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90. *See supra* Part I.B.

91. *See United States v. Knights*, 534 U.S. 112, 118–19, (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))).

A. Defining Dignity

1. GENERAL CONCEPTIONS

Across all disciplines, human dignity is an underexplored topic.[92] Perhaps the most telling thing that can be said is that "dignity can mean many things,"[93] and that there is no universally agreed-upon definition.[94] And yet, it must mean *something.* The question, for our purposes, is whether it can be defined sufficiently so as to have useful meaning for purposes of constitutional analysis.

A brief detour through history is appropriate. The modern conception of human dignity can be traced back to classical Roman thought, where Cicero referred to *dignitas* as a concept regarding human beings as having worth and an expectation of respect by virtue of being human.[95] Importantly, the recognition of human worth and entitlement to some measure of respect arose independently of any particular social status.[96] This entitlement to worth or respect, Cicero argued, is a consequence of the "superior minds" of humans—superior, at least, to that of beasts.[97] Dignity arises in man, Cicero claimed, as a consequence of man's ability to reason, both practically and morally.[98]

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92. *See* GEORGE W. HARRIS, DIGNITY AND VULNERABILITY 1 (1997) ("Moralists of various sorts use the terms 'human dignity' and 'human worth' often, but frequently these words have little more than rhetorical effect, even among professional philosophers. The fact is that we have a fairly vague concept of human worth and dignity, though there is a core that is instructive."); Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEENS L.J. 61, 62 (2002) ("[D]ignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers.").

93. R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 528, 528 (2006); *see also* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, EUROPEAN J. OF INT'L L. (forthcoming 2008) (manuscript at 2) ("But what does dignity mean in these contexts? Can it be a basis for human rights . . . or is it simply a synonym for human rights? In particular, what role does the concept of dignity play in the context of human rights *adjudication*?" (emphasis added)), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162024.

94. In this sense, dignity shares many of the frustrating traits of privacy. *See supra* Part I.B.

95. McCrudden, *supra* note 93, at 3.

96. *See id.*

97. Mette Lebech, *What is Human Dignity?*, 1 MAYNOOTH PHIL. PAPERS 3 (2004), *available at* http://eprints.nuim.ie/archive/00000392/01/Human_Dignity.pdf ("Cicero . . . refers to the idea of *dignitas humana* . . . . This special status is due to the superior mind of humans, which obliges them to stay superior to the beasts.").

98. *See id.* at 6 (discussing the Kantian notion, growing out of Cicero's work, that "because humans are autonomous (in other words they are capable of legislating the moral law unto themselves) . . . their nature is dignified"). Cicero was not, as

The ability to reason turned man into an autonomous being, able to choose his fate and act upon that choice.[99] This conception of dignity, as being based in man's ability to reason, has been described as "the central claim of modernity—man's autonomy, his capacity to be lord of his fate and the shaper of his future."[100] This reason-based conception of individual worth evolved through the Middle Ages, when a theologically based conception of dignity began to emerge. This conception emphasized the notion that man has dignity (by having worth and being deserving of respect, in accordance with Cicero's model)[101] not only—or not necessarily—because he can reason, but because he is made in the image of God.[102] This theologically based conception of dignity was explicated most clearly by Thomas Aquinas, who postulated that dignity is inherent in every person by virtue of God having created humankind in his image.[103]

The late eighteenth century brought a new vision of human dignity, when Immanuel Kant articulated what is considered to be one of the more cogent explanations of the meaning of dignity in the modern era, as well as offering a test for determining when it has been

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Lebech notes, an "egalitarian"; he believed—in conformity with his times—that slavery was acceptable and that society was rightly stratified, with not all individuals being equal in all respects. *Id.* at 3–4. Nevertheless, Cicero's writings introduced into Western thought the idea that humans have *some* baseline worthiness based on their very status as humans that sets them apart from, and above, all other creatures.

99. *Id.* at 3.

100. Yehoshua Arieli, *On the Necessary and Sufficient Condidtions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 1, 12 (David Kretzmer & Eckart Klein eds., 2002). Of course, ancient Romans and their successors would have viewed the consequences of this insight quite differently than a modern individual would; slavery, execution, physically severe punishment for minor crimes, radical gender inequality, and so forth persisted in that society, and there is little reason to believe that adherents to Cicero's model of *dignitas* would have recognized any inherent conflict.

101. *See* JOHN FINNIS, AQUINAS: MORAL, POLITICAL AND LEGAL THEORY 176 n.206 (1998) ("The word and concept *persona* entails *dignitas*, and so is applicable to every individual of a rational nature . . . . It is the nobility and dignity of the species {natura} that counts, not the individual's present accomplishments or loss or immaturities of capacities . . . ." (citations omitted)).

102. *Id.*; *see also* CATECHISM OF THE CATHOLIC CHURCH 424 (2nd ed. 1997) ("The dignity of the human person is rooted in his creation in the image and likeness of God . . . .").

103. *See, e.g.*, THOMAS G. WEINANDY ET AL., AQUINAS ON DOCTRINE 233 (2004) ("Aquinas maintains the God-given dignity of individual persons."); *see also* MICHAEL A. SMITH, HUMAN DIGNITY AND THE COMMON GOOD IN THE ARISTOTELIAN-THOMISTIC TRADITION 1 (1995) ("In Catholic social teaching . . . . [o]ne theme is the dignity of the human person. Every human person is of great worth. Every human person, by virtue of his or her nature, is endowed with inalienable rights—rights which exist even when positive law refuses to recognize them.").

offended.[104] Kant, like Cicero, believed that human beings have dignity because they have reason, but formulated reason as the ability of humans to appreciate the implications or "universality" of their actions.[105] Kant's well-known categorical imperative instructs, in its first formulation, that individuals should "act only according to principles which can be conceived and willed as a universal law."[106] From this principle Kant derived his second formulation, which provides that individuals should "[a]ct in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never simply as a means."[107] Accordingly, a violation of that precept is a violation of human dignity, because every individual has a right to be treated as an end, not as a means.[108] Dignity, therefore, can be conceived as the inherent right of all men to be treated by others in accordance with the categorical imperative.[109] Failure to be so treated is an offense against dignity.

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104. *See* McCrudden, *supra* note 93, at 6 ("[O]ver time, this connection between dignity and Kant has become probably the most often cited non-religiously based conception of dignity. Some, indeed, regard him as 'the father of the modern concept of human dignity.'" (quoting Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM, SCIENCE AND TECHNIQUE OF DEMOCRACY NO. 37 (Georg Nolte ed., 2005))).

105. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54 (Lewis White Beck trans., 1983) ("Autonomy is thus the basis of the dignity of both human nature and every rational nature."); *see* H. J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 183–89 (Univ. Pa. Press 1971) ("[T]he making of particular moral laws constitutes the dignity and prerogative of *man* as a rational animal . . . . This autonomy is the ground of their absolute value, their 'dignity' or 'prerogative,' their inner value or worth or worthiness."); *see also* Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 383 (2000) ("[T]he concept of human dignity is . . . . primarily concerned with actions that reduce a person's status as a thinking being, a citizen and a member of a community.").

106. KATRIN FLIKSCHUH, KANT AND MODERN POLITICAL PHILOSOPHY 92 (Cambridge Univ. Press 2000).

107. *Id.*

108. *Id.*; *see* KANT, *supra* note 105, at 53 ("In the realm of ends, everything has either a *price* or a *dignity*. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity . . . . [T]hat which constitutes the condition under which alone something can be an end in itself does not have mere relative worth, i.e., a price, but an intrinsic worth, i.e., *dignity*.").

109. *See* Roger J. Sullivan, *Introduction* to IMMANUEL KANT, THE METAPHYSICS OF MORALS, at xviii (Mary Gregor ed., Cambridge Univ. Press 1996) ("[The second formulation of the categorical imperative] forbids actions that are contrary to (that contradict) the respect we owe those ends that are duties, most particularly the dignity of persons, whether ourselves or others. Still a formula of the ultimate moral principle, it also provides the incentive for adopting those ends that are one's duties.").

Today, all of those conceptions of dignity survive and are accepted, informing our notions of what *dignity* means. If one were to consult the dictionary, *dignity* today is formally defined as "[t]he quality of being worthy or honourable; worthiness, worth, nobleness, excellence."[110] This definition is largely in accord with the three long-standing conceptions of dignity outlined earlier, yet still amorphous in its own right.

Some in the legal field have attempted to bring clarity to the proceedings. Professor R. George Wright, in an engaging recent work exploring the foundations of the "dignity of the person" from a philosophical and general constitutional case law perspective,[111] goes about the task of defining dignity somewhat in reverse. Because dignity as a concept is, to some extent, inherently ethereal, Wright argues that defining what dignity stands *in contrast to* is informative in determining what it actually *is*.[112] As he sees it, dignity stands in contrast to "brutality, cruelty . . . humiliation, uncivilized or barbarous behavior, harsh treatment . . ." and so on.[113] Others have similarly negatively triangulated the definition of *dignity*, noting that the concept of "degradation" offers important definitional lessons.[114] This view posits a "subjective degradation" in which one's dignity can be offended when one psychologically feels degraded.[115]

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110. 4 OXFORD ENGLISH DICTIONARY 656 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

111. See Wright, *supra* note 93.

112. *Id.*

113. *Id.* at 534; *see also* Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2125 (2001) ("[O]ffenses against dignity involve a failure to show people the respect and deference to which they are entitled by virtue of their intrinsic humanity.").

114. Wright, *supra* note 93, at 551–53.

115. *Id.* at 552. The problem with this method, of course, is that it substitutes one sticky term, dignity, with another: degradation. How does one define degradation? To me, degradation conjures thoughts of unnecessary embarrassment, humiliation, belittling, or disrespect. "Unnecessary" is key to this conception—while much happens in life that embarrasses or belittles, it is not an affront to dignity if such feelings are conjured as a necessary effect of a worthwhile enterprise. For instance, while a doctor would be justified in asking a patient to remove all of his clothes to be weighed, it would be unnecessary for the doctor to leer at the patient as the patient did so. While someone might be embarrassed to take off their clothes in front of the doctor even in private, dignity can be maintained in the face of that embarrassment. However, one would be justified in feeling degraded if the doctor had an inappropriate (and unnecessary) reaction such as leering or gratuitously commenting on the individual's appearance. *Cf.* Réaume, *supra* note 92, at 61 (arguing for a conception of dignity centered on the notion of "intentional infliction of nervous shock," a concept similar in many ways to the American tort of intentional infliction of emotional distress). Ultimately, as with dignity, the concept of degradation would benefit from further exploration.

2. DIGNITY IN THE SEARCH-AND-SEIZURE JURISPRUDENCE

Given dignity's central, if unevenly understood, place in Western moral, religious, and political thought, it would not be surprising to think that it has been cited by American courts as an underlying value that the Constitution was designed (or, at least, should be interpreted) to protect.[116] And it has been, but only to a certain degree; American courts have intermittently cited dignity as an underlying concern in the application of state power against the individual in certain contexts.[117] The dignity of the individual has been a consideration in the Court's interpretation of, in roughly decreasing order of influence, the Eight Amendment,[118] the Fifth Amendment,[119] the right to private consensual sexual activities,[120] the extent of the constitutional right to an abortion,[121] and First Amendment free speech (to a limited extent).[122]

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116. The Constitution, Justice Brennan once declared, "is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

117. Originally, the Court referenced "dignity" only in connection with, as one commentator put it, "inanimate objects and abstract concepts (or contrivances)." Daly, *supra* note 18, at 7. Most notably, early cases like *Chisolm v. Georgia* spoke of a state's dignity, which would be offended by being subject to suit without its consent. 2 U.S. (2 Dall.) 419, 450–51 (1793) ("[In] a controversy between a citizen of one State and another State . . . . [is there] a sufficient ground from which to conclude, that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and citizen of another State, must not answer be in the affirmative? A dispute between A. and B. [is] assuredly a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named, in respect to the dignity of a State. But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a State is plaintiff."); *see also United States v. Diekelman*, 92 U.S. 520, 524 (1876) ("One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed.").

118. *See Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

119. *See, e.g.*, *United States v. Balsys*, 524 U.S. 666, 713 (1998) (Breyer, J., dissenting) ("This Court has often found, for example, that the privilege [against self-incrimination] recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth.").

120. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to

However, unlike those contexts—many of which, perhaps not coincidentally, are among the most controversial constitutional issues of the last half-century—the Court's invocation of dignity as an animating principle of the Fourth Amendment has been indirect and infrequent. Not surprisingly, interpretive or definitional guidance in those few instances is almost entirely absent. The Court, at least since the "criminal procedure revolution" era,[123] has intermittently cited the protection of human dignity as a concern under the Fourth Amendment, especially in regards to highly physically intrusive searches,[124] although it has never gone so far as to explicitly base a holding on excessive government imposition on dignity alone. Indeed, the Court has never really engaged in a searching analysis of what it means to offend human dignity by searching or seizing the individual. As a result, the Court's precedent is of, at best, marginal value in deciding just what dignity does, or should, mean in the Fourth Amendment context.

Nevertheless, a brief review is in order. The Court's modus operandi in the search-and-seizure cases that even mention the concept of dignity seems to be to cite the protection of dignity as a fundamental concern of the Fourth Amendment, fail to define the concept or even explicitly incorporate it into its analysis, and move on to a more

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define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

121. *See Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

122. *Cf.* Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957 (critiquing the use of dignity as an independent justification for free-speech protection, noting that articulations of a dignity rationale are either so broad as to threaten restriction of speech, or are subsumed under the "argument from autonomy"). For a discussion of dignity across all these topics, see Goodman, *supra* note 18, at 743 ("[T]he Court has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees.").

123. *See* Cloud, *supra* note 16, at 33 (describing the Warren Court).

124. *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) ("[T]he reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles."); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

comfortable analysis centered on privacy.[125] *Schmerber v. California*,[126] seminal for its place in the annals of Fifth Amendment jurisprudence,[127] is perhaps the prime example. In *Schmerber*, a driver was hospitalized following an automobile accident.[128] The arresting officer smelled liquor on the driver's breath, noticed other symptoms of intoxication, and placed the driver under arrest while he remained at the hospital.[129] At the officer's direction, a physician took a blood sample from the suspect despite the suspect's refusal.[130] That sample indicated intoxication and was used at trial to convict the suspect.[131] On appeal, the defendant argued, among other things, that the search was unreasonable under the Fourth Amendment.[132] Writing for the Court, Justice William Brennan noted immediately that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[133] After noting that traditional conceptions of constitutional restraints on searches had little relevance to the situation at hand,[134] Brennan determined that the necessity of preserving evidence (in this case, an accurate reading of the suspect's blood-alcohol content), the probability that the officer was correct in determining that the suspect was in fact drunk, and the minimally intrusive nature of the blood test satisfied the reasonableness requirement.[135]

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125. *See* Daly, *supra* note 18, at 5 (arguing that across all constitutional provisions, the Supreme Court has often referred to, and at times relied on, dignity, but that "defining it and understanding it have almost completely escaped the Court's grasp"); *cf.* Réaume, *supra* note 92, at 62 ("[O]ften, [dignity] is mentioned as a way of putting the final rhetorical flourish on a conclusion that can be adequately justified by reference to other, subordinate, values or interests.").

126. 384 U.S. at 757.

127. AMAR, *supra* note 3, at 62 (describing *Schmerber* as "landmark").

128. 384 U.S. at 758.

129. *Id.* at 768–69.

130. *Id.* at 759.

131. *Id.*

132. *Id.*

133. *Id.* at 767.

134. *Id.* at 767–68 ("Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and effects'—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant, as distinct from the procedures for search and the permissible scope of search, are not instructive in this context." (citations omitted)).

135. *Id.* at 769–70 ("The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.").

The main problem with *Schmerber* lies not necessarily in the outcome of the case, but in the Court's patently inadequate analysis of the role human dignity must play in determining reasonableness in such a context. After explicitly holding that "[t]he overriding function of the Fourth Amendment is to protect personal privacy *and dignity* against unwarranted intrusion by the State,"[136] Brennan failed to even attempt to consider how one's dignity could be unreasonably infringed upon by an involuntary intravenous blood sample. Rather, Brennan seemed to simply assume that an individual's dignitary interest (whatever it was) in not being subject to an unconsented invasive medical procedure was outweighed by the need to preserve evidence.

While it is not clear that a consideration of dignity would have changed the outcome of *Schmerber*, a reader is stunned by the Court's bold invocation of the protection of dignity, along with privacy, as "*[t]he overriding function of the Fourth Amendment*,"[137] and the complete absence of this concept in the Court's analysis of the case. This methodology has not changed over time. Consider *Skinner v. Railway Labor Executives Ass'n.*,[138] where the Court notes that "[t]he [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."[139] The Court does not mention dignity again in its opinion, but rather focuses on the fact that "[b]y and large, intrusions on privacy under the FRA regulations [mandating drug tests for railway workers] are limited."[140] Or consider *Wyoming v. Houghton*,[141] in which the Court held that "the degree of intrusiveness upon personal privacy *and indeed even* personal dignity"[142] in the search of a package within an automobile's vehicle compartment was outweighed by the needs of law-enforcement officials to search for contraband,[143] but turned around and proclaimed its familiar test, free from any mention of dignity: "We must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[144] The Court's

136. *Id.* at 767 (emphasis added).
137. *Id.* (emphasis added).
138. 489 U.S. 602 (1989).
139. *Id.* at 613–14.
140. *Id.* at 624.
141. 526 U.S. 295 (1999).
142. *Id.* at 303 (emphasis added).
143. *Id.* at 304.
144. *Id.* at 299–300.

silence on the question of the government's imposition on the dignitary interest that the Court itself articulated is stunning.[145]

Two possibilities emerge. First, it is possible that the Supreme Court believes that privacy and dignity are perfectly coterminous concepts in the Fourth Amendment arena, and do not require separate analyses; if privacy and dignity are the same, there is no reason to analyze dignity separately.[146] Perhaps the Court believed that dignity is essentially identical to privacy, in which case there would be no reason for the Court to evaluate the concepts separately; if the suspect's privacy was not unreasonably violated by the search, necessarily neither was the suspect's dignity. This might explain cases like *Schmerber*, *Skinner*, and *Houghton*, where the Court mentions dignity but analyzes only privacy. Of course, if that were the case, there would seem to have been no reason for the Court to bother noting both concepts. That the Court did so indicates recognition that the concepts differ in a constitutionally meaningful way. For instance, in *Schmerber*, the Court speaks of "[t]he overriding function of the Fourth Amendment is to protect personal privacy *and* dignity against unwarranted intrusion by the State," and notes "[t]he interests in human dignity *and* privacy which the Fourth Amendment protects . . . ."[147] Brennan clearly seems

145. In *Houghton*, it seems clear that the Court, per Justice Scalia, recognized that the privacy and dignity interests are distinct, even more so than in *Schmerber* or *Skinner*; in *Houghton*, the Court held that courts must evaluate "the degree of intrusiveness upon personal privacy *and indeed even* personal dignity." *Id.* at 299 (emphasis added).

146. This reading of the Court's understanding of these concepts is supported by cases like *Winston v. Lee*, 470 U.S. 753 (1985). In that case, per Justice Brennan, the Court held that "*Schmerber* noted that '[the] overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State' . . . . [and] we observed that these values were 'basic to a free society.'" *Id.* at 760 (citations omitted). The Court goes on to remark that "[a]nother factor [in the reasonableness of a search] is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," noting that "[i]ntruding into an individual's living room, eavesdropping upon an individual's telephone conversations, or forcing an individual to accompany police officers to the police station, typically do not injure the physical person of the individual. Such intrusions do, however, damage the individual's sense of personal privacy and security and are thus subject to the Fourth Amendment's dictates." *Id.* at 761–62 (citations omitted). In this passage, the Court seems to conflate the individual's interest in personal privacy and bodily integrity to the dignitary interest. Certainly, if one conceptualizes the dignitary interest as being primarily concerned with the maintenance of the individual as an autonomous private being, one might justifiably subordinate the privacy interest to the dignitary interest. However, the better conception of dignity, that of prohibiting degrading, humiliating, or embarrassing actions upon the individual, stands comfortably apart from generally held conceptions of the contours of the privacy interests.

147. *Schmerber v. California*, 384 U.S. 757, 769–70 (1966).

aware of a distinction between the privacy and dignitary interests, even if that distinction was not articulated or explained in the opinion.[148]

The second, more likely, explanation for these cases is that by singling out both a privacy and a dignitary interest, the Court has been at least cognizant of the fact that privacy and dignity are not coterminous,[149] but has been unable or unwilling to elaborate the contours of the dignitary interest and propose a method for incorporating it into the reasonableness analysis. This failure to clarify dignity's place in Fourth Amendment analysis has had significant effects because it has deprived the lower courts of the ability to recognize constitutional dignitary injuries and render decisions accordingly.

One recent example is the United States Court of Appeals for the Eighth Circuit's 2007 opinion in *United States v. Williams.*[150] In *Williams*, police obtained a warrant to search defendant Williams's home and person for drugs and firearms.[151] They stopped Williams while driving away from his home during daylight hours, where a pat-down search revealed "something" inside Williams's pants.[152] The officers decided not to search Williams more extensively on the street, out of alleged concern about his privacy.[153] They took Williams into custody and drove him back to the precinct.[154] The officers then took Williams out of the squad car in the precinct parking lot. One officer reached into Williams's underwear and retrieved a "large amount" of crack and powder cocaine from near Williams's genitals.[155]

Balancing the "need for the particular search against the invasion of personal rights that the search entails,"[156] the Eighth Circuit upheld the search.[157] Responding to Williams's argument that the thrust of the officer's hand into Williams's underwear was unreasonable, the court held that the reasonable officer "may well have concluded that the incidental contact that resulted from the search inside Williams's pants

148. *See also Winston*, 470 U.S. at 760 ("*Schmerber* noted that '[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State' . . . . [and] we observed that these values were 'basic to a free society.'" (citations omitted)). The use of the plural "values" by Justice Brennan again indicates the recognition of two distinct concepts.

149. *See infra* Part II.B.

150. 477 F.3d 974.

151. *Id.* at 975.

152. *Id.*

153. *Id.*

154 *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 977–78.

was a lesser intrusion on Williams's privacy than forcing him to strip and submit to an inspection of his private areas."[158] The court also held that the officers took "sufficient precautions to protect Williams's privacy" before executing their search.[159] As such, the court found that it could not be said that Williams's privacy was unreasonably violated by performing the search in the parking lot instead of inside the precinct house.[160]

Ultimately, upholding the search in *Williams* was probably correct. Nevertheless, the court's opinion is patently deficient. The word *dignity* never appears in the decision, despite the Eighth Circuit's stated goal of balancing the need for the search against "the invasion of personal rights,"[161] of which dignity is doubtlessly included. Nowhere is it even considered that the officer's search into Williams's underwear and around his genitals, in broad daylight in a parking lot, might implicate Williams's dignitary interest. Indeed, the decision reads bizarrely given its focus on privacy and that a situation like Williams's seems to only indirectly implicate a privacy interest. The real concern given the facts of the case seems to be whether Williams's dignity was unnecessarily infringed by being subjected to a "genital search" in broad daylight in a parking lot when there was an enclosed precinct house merely feet away.[162] While this case may not have come out any differently had a dignitary interest been considered (because the Eighth Circuit may ultimately have found that the dignitary imposition was tolerable when compared to the need to search the suspect in that particular location at that particular time), the court's opinion is patently incomplete in the absence of such analysis.

Perhaps the closest the Supreme Court has ever come to exploring the dignitary interest in a Fourth Amendment context came in *Los Angeles v. Rettele*,[163] discussed earlier,[164] a case that never even

158. *Id.* at 976.

159. *Id.* at 977.

160. *Id.* at 977–78.

161. *Id.* at 975.

162. The Eighth Circuit in *Williams* stresses how the parking lot in question partially shielded the suspect from public view. *Id.* at 977. While this was no doubt appreciated by Mr. Williams, it makes the court's analysis even more inadequate. Even if the risk of a member of the public seeing Mr. Williams in a state of undress or in an otherwise embarrassing state was slight, thus blunting the argument that Mr. Williams's privacy interest was violated, there is still a clear potential injury here—the arguably degrading genital search in a parking lot, which could have been conducted indoors. Again, whether that search was an *unreasonable* imposition on dignity is not the point; the point is that the failure to consider the real injury here leaves the Eighth Circuit's opinion lacking.

163. 127 S. Ct. 1989 (2007).

164. *See supra* Part I.B.3.

mentions the word *dignity*. In *Rettele*, the police entered a suspect's home pursuant to a warrant and proceeded to rouse two individuals out of their beds, naked, and hold them at gunpoint for a number of minutes before the officers determined that the homeowners were not the individuals being sought (despite the fact that the homeowners, a male and female, were white and the suspects were black males).[165] In rejecting the homeowner's Fourth Amendment claims, the Court, per curiam, noted that:

> Officers executing search warrants on occasion enter a house when residents are engaged in private activity; *and the resulting frustration, embarrassment, and humiliation may be real*, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.[166]

One could take from *Rettele* the notion that the Court was in fact unwittingly pointing to an ostensible dignitary offense by the police, using the "negative triangulation" method described earlier[167] to define what the Fourth Amendment protects against: unnecessarily degrading, humiliating, or dehumanizing government behavior. Even though the Court did not base its holding on a dignitary violation as such, or find it sufficiently compelling to hold for the petitioners, the Court provided a glimpse at what might be its conception of such an offense: undue humiliation, frustration, or embarrassment. While this certainly is not a sophisticated analysis of what constitutes an unconstitutional dignitary harm, it is nevertheless instructive and consistent with the modern understandings of the concept discussed earlier.[168]

B. The Dignity/Privacy Distinction

Even given the underdeveloped understandings of both dignity and privacy in the cases and the legal scholarship in general, one can still fairly easily arrive at the conclusion that dignity is a concept distinct

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165. 127 S. Ct. at 1991.

166. *Id.* at 1993–94 (emphasis added).

167. *See supra* Part II.A.1.

168. *See id.* Professor Andrew Taslitz has done crucial work in regards to the importance of "respect" concepts in Fourth Amendment search-and-seizure law. Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 98–99 (2003) (arguing for a "respect-based approach" to the Fourth Amendment, but noting that the "Supreme Court has never clearly defined the concept nor adequately explored its implications in the highly emotionally-charged setting of police searches and seizures . . . . ").

from privacy in many important respects in the Fourth Amendment context.[169] This is not necessarily a self-evident proposition, given the Supreme Court's arguable conflation of the concepts noted earlier.[170] This confusion has very real consequences; by refusing to recognize a distinct dignitary interest and only subjecting law-enforcement practices to privacy-based scrutiny, only those government practices that unreasonably intrude on an individual's privacy are subject to invalidation. If, however, an individual holds a dignitary interest separate from that of a privacy interest, and government search or seizure unreasonably violates *only* that dignitary interest, the practice will be upheld. This begs the question: *is* there a constitutionally significant difference between an individual's privacy interest and an individual's dignitary interest?

The answer is undoubtedly yes. While giving due regard to Professor Solove's conclusive arguments that privacy as a concept is not amenable to simple, categorical definition,[171] and remaining cognizant that such a notion perhaps applies with even more force to dignity, one can see that privacy and dignity, under any definition, often will encompass different interests, and violations of one respective interest can be perpetrated independently of violations of the other. Privacy, as generally conceived by courts and scholars, concerns limiting others' access to personal information, secrets, thoughts, intimacies, and to the physical person.[172] In contrast, dignity, rather

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169. Goodman, *supra* note 18, at 752 ("[T]he American notion of privacy is not grounded in a concern of human dignity." (citing Whitman, *supra* note 89, at 1161)).

170. *Wyoming v. Houghton* encapsulates the Court's confusion on whether there is indeed a meaningful distinction between privacy and dignity in the Fourth Amendment context. 526 U.S. 295 (1999). In *Houghton*, Justice Scalia, writing for the majority, noted that the legality of a search depends upon "the degree of intrusiveness upon personal privacy *and indeed even personal dignity*," *id.* at 303 (emphasis added), indicating clearly that these concepts are separate, and yet goes on to hold that the Court "must evaluate the search or seizure . . . by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 299–300. Dignity thus is unceremoniously dropped from the Court's test.

171. *See, e.g.*, Solove, *supra* note 23, at 481–82 ("[All] violations [of privacy] are clearly not the same . . . . I endeavor to shift focus away from the vague term 'privacy' and toward the specific activities that pose privacy problems.").

172. *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1092 (2002) ("Despite what appears to be a welter of different conceptions of privacy, I argue that they can be dealt with under six general headings, which capture the recurrent ideas in the discourse. These headings include: (1) the right to be let alone . . . ; (2) limited access to the self—the ability to shield oneself from unwanted access by others; (3) secrecy—the concealment of certain matters from others; (4) control over personal information . . . ; (5) personhood—the protection of one's personality, individuality, and dignity; and (6) intimacy—control over, or limited access to, one's

than limiting others' access to various aspects of the individual, generally concerns a limitation on the manner in which an individual is interacted with. Thus, protecting the dignitary interest requires prohibition of interactions that demean, humiliate, or otherwise impress upon the individual the feeling that the individual is not to be fully accorded human status or be treated with the respect one reasonably expects to receive from others.[173]

That this distinction has consequences for search-and-seizure analysis is clear; while Fourth Amendment reasonableness, since *Katz v. United States*,[174] has been interpreted to require consideration of the privacy interest,[175] it is almost inconceivable that the Fourth Amendment does not (or should not) protect against degrading or humiliating government actions, even if a violation of a privacy interest cannot be identified. The open-ended "reasonableness" language confirms this notion.

Of course, privacy and dignity interact and, to some degree, overlap. Commentators have noted that privacy and dignity, especially in the search-and-seizure context, can orbit each other closely.[176] One prominent theory of the philosophical basis of privacy, the so-called "personhood" theory, essentially contemplates privacy as a "unified and coherent concept protecting against conduct that is 'demeaning to individuality,' 'an affront to personal dignity,' or an 'assault on human

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intimate relationships or aspects of life."); *see also* Rosen, *supra* note 113, at 2124 (noting sociologist Robert Merton's definition of privacy as "freedom from observability"). Professor Solove, in *Conceptualizing Privacy* and other works, has convincingly argued that the search for a "unified field" theory of privacy, in which one irreducible, necessary element to all (proper) conceptions of privacy can be discovered and elucidated, is misguided. *See* Solove, *supra*, at 1087–89. The simplified notion of privacy presented here in no way challenges this view. Nevertheless, it seems as though however privacy, or all the specific concepts that combine to form what we colloquially call *privacy*, is conceptualized, a significant portion of the dignitary interest falls outside that definition.

173. *See supra* Part II.A.1 (discussing the philosophical basis for and a working definition of "dignity").

174. 389 U.S. 347 (1967).

175. *See supra* Part I.A (discussing the "privacy-centric" Fourth Amendment).

176. Rothstein, *supra* note 105, at 383 ("The concept of human dignity is a social one that promotes a humane and civilized life. The protection of human dignity allows a broader scope of action against treating people in intrusive ways. While also concerned with intrusions upon a person's intimacy and autonomy with regard to her or his private life, human dignity, unlike privacy (at least as embodied in U.S. law), is primarily concerned with actions that reduce a person's status as a thinking being, a citizen and a member of a community."); Wright, *supra* note 93, at 534 ("[I]t is entirely common to see some invasions of physical privacy as impinging upon dignity.").

personality,'"[177] a conception that not only closely mirrors the elements of dignity discussed earlier, but may go so far as to encompass the entire dignitary interest itself. This personhood theory has much to recommend; it is undoubtedly true that one's dignity can be offended by an invasion of what one might more naturally conceive of as one's privacy,[178] and it would be hard to imagine an autonomous being who did not consider at least a measure of privacy as central to his or her conception of personal dignity. And yet, as Professor Solove notes, "personhood theories [of privacy] are . . . too broad,"[179] not only because of the vague definition of the term *personhood*,[180] but because "there are ways to offend dignity and personality that have nothing to do with privacy."[181] Some state constitutions, for instance, recognize this distinction, expressly protecting dignitary interests in explicit contrast to distinctly defined privacy interests.[182]

One vivid example of this distinction (in a context that is instructive for our purposes) can be found in a prison setting. Prisoners

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177. Solove, *supra* note 172, at 1116 (quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964)).

178. For instance, barging in on someone in a state of undress is probably best seen as an invasion of privacy, but could also plausibly be described as an assault on dignity. *Cf.* Rosen, *supra* note 113, at 2123 (considering the interplay between modern norms of dignity, autonomy, and privacy, and posing the specific hypothetical—presumably—of "the indignity that would result if I went to a nude beach with a colleague and a photograph was snapped without my permission").

179. Solove, *supra* note 172, at 1118.

180. *Id.*

181. *Id.* (quoting Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 438 (1980)).

182. *See, e.g.*, ILL. CONST. art. I, § 8.1(a) ("Crime victims, as defined by law, shall have the . . . right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."); ILL. CONST. art. I, § 20 ("To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned."); MONT. CONST. art. II, § 4 ("Individual dignity: The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."). The Louisiana Constitution protects "individual dignity" generally, but premises that dignity on the right to equal protection of the laws and freedom from slavery. LA. CONST. art. I, § 3 ("Right to Individual Dignity: No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.").

obviously have no privacy whatsoever.[183] This is true not only from a common-sense standpoint, but from a legal one as well; in *Hudson v. Palmer*,[184] the Supreme Court wisely proclaimed that incarcerated prisoners have no expectation of privacy for purposes of Fourth Amendment analysis and may be subject to suspicionless searches at any time.[185] The elimination of an enforceable privacy right is, according to the Court, necessary not only to maintain internal prison security,[186] but to support the deterrence and retributive goals of incarceration, and there has been little, if any, significant opposition to this general rule.[187]

And yet, most—if not all—corrections officers (and, increasingly, jurists and academics) understand that respecting a prisoner's dignity is essential for maintaining order, insuring safety, and promoting good behavior, and that unnecessary or arbitrary impositions on a prisoner's dignity are a recipe for inciting disobedience and violence.[188] Hanging just beyond the entranceway to a former penitentiary on Rikers Island is the "Correctional Officers' Creed," which implores corrections officials:

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183. *See* Richard G. Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFF. L. REV. 669, 669 (1972) ("[T]he concepts of privacy and prison are antithetical beyond comparison . . . .").

184. 468 U.S. 517, 527–28 (1984) (holding that traditional Fourth Amendment analysis is inapplicable to prisoners because the recognition of any privacy right is incompatible with the concept of incarceration and the needs of penal institutions).

185. *Id.* at 525–26 ("Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

186. *Id.* at 524 ("The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, chief among which is internal security." (citation omitted)).

187. *Id.* ("Of course, these restrictions or retractions also serve, incidentally, as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction.").

188. *See, e.g.*, *United States v. Sutton*, No. 07-426 (KSH) (D. N.J. Oct. 25, 2007) (granting variance below the sentencing guideline range based on inhumane conditions in state prison, noting that "[m]ore fights broke out and there were more assaults because of everyone's close proximity to each other"); Editorial, *Barbaric Jail Conditions*, N.J.L.J., Nov. 12, 2007, at 22 (discussing the "deplorable conditions" at Passaic County Jail and noting that "[i]nmate violence, caused by the predictable consequences of . . . overcrowded conditions, is common"); *cf.* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 125 (2007) ("[T]oday's prison conditions are harsher, more violent, and more degrading than anyone might have imagined in [an] earlier era.").

> To speak sparingly . . . to act, not to argue . . . to be in authority through personal presence . . . to be neither insensitive to distress nor so distracted by pity as to miss what must elsewhere be seen . . . . [t]o hold freedom among the highest values though I deny it to those I guard . . . to deny it with dignity that in my example they find no reason to lose their dignity . . . .[189]

Similarly, the American Correctional Association Code of Ethics requires that members display "unfailing honesty, respect for the dignity and individuality of human beings and a commitment to professional and compassionate service."[190] This concept has been echoed by prisoners themselves; inmates in some of the most notorious institutions in the nation have written vividly about the importance of receiving respect from corrections officials and about the strife that can be caused when those prisoners perceive unnecessary impositions on their dignity.[191]

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189. Correctionhistory.org, Correctional Officers' Creed, http://www.correctionhistory.org/html/chronicl/murals/jatcwallcreed.html (last visited Sept. 20, 2008).

190. ACA.org, Preamble to American Correctional Association Code of Ethics, http://www.aca.org/pastpresentfuture/ethics.asp (last visited Sept. 20, 2008).

191. Leon "Whitey" Thompson, an inmate-turned-educator who spent most of his adult life behind bars, including a stint in Alcatraz in the 1950s, vividly described in his memoirs how, even in an environment where privacy was nonexistent, dignity was a commodity that could quite literally be stripped away through harassment and unnecessary searches. LEON "WHITEY" THOMPSON, LAST TRAIN TO ALCATRAZ (1995). Thompson described how, all else being equal, prison guards could turn inmates against them through unnecessary strip searches, unwarranted tossing of cells, and so forth, and how guards that treated prisoners with at least a modicum of respect helped keep the peace inside the prison. *Id.* One particular incident Thompson recalled illustrates how a search can become an affront to basic dignity, through nothing more than the appearance of caprice by the officer. He described lining up for lunch one day:

> The line was moving at a snail's pace, and Whitey thought they would never make it [to the mess hall]. Finally, they arrived . . . . Just inside were five guards shaking prisoners down at random. Whitey thought going through the electronic metal detector was bad enough without guards shaking you down.
>
> The officers allowed Russell and Chili [inmate friends of Whitey's] to pass, but one of them blocked Whitey's path.
>
> "Strip," the guard ordered.
>
> "Ah shit it's cold man, are you crazy?"
>
> "I said strip."
>
> "Ain't this the shits," Whitey sighed.
>
> He commenced to take off his clothes, as he peeled off each garment he handed it to the guard, who checked each item carefully before dropping it to the ground. The same procedure was repeated with his shoes and socks. The guard was deliberately taking his time, while Whitey stood naked, shivering in the chilly wind.

The Supreme Court in *Hudson* recognized that prisoners retain at least some fundamental rights, both as a matter of constitutional philosophy and as a matter of practical necessity: "We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other. Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[192]

In this vein, the Court has recognized that prisoners are accorded variably limited rights to equal protection,[193] redress of grievances through access to the courts,[194] worship,[195] free speech,[196] due process,[197] and freedom from cruel and unusual punishments.[198] Each of these exceptions has, at its base a common denominator, quite familiar to the constitutional universe in which we live: basic human dignity. Even some commentators that took issue with the Court's holding in *Hudson* have recognized that privacy and dignity are analytically distinct concepts, and that unreasonable searches are as invasive of a prisoner's dignity (if not more) than any expectation of privacy the prisoner may erroneously harbor.[199]

> "Come on man, come on hurry up, I'm freezing my balls off!"
>
> The guard paid no attention to Whitey's plea, he was in no hurry. Then with a sardonic smile, he gave Whitey a degrading order, to turn around and bend over, spreading his buttocks. He was shivering uncontrollably, as the cold wind penetrated his naked body.
>
> "This fucker is getting his jollies off," Whitey thought as he bent over.
>
> The humiliating period was over, and with the completion of the shakedown, he was told to put on his clothes.
>
> *Id.* at 187–88.

192. 468 U.S. 517, 523 (1984) (citation omitted).

193. *See Lee v. Washington*, 390 U.S. 333 (1968) (per curiam).

194. *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

195. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam).

196. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

197. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam).

198. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

199. *See, e.g.*, Paul C. Giannelli & Francis A. Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1069 (1976) ("Without the privacy and dignity provided by [F]ourth [A]mendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished. It is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures.").

III. TOWARD A WORKABLE INCORPORATION OF DIGNITY INTO THE REASONABLENESS TEST

Despite its somewhat conspicuous absence in the constitutional text, and the underdeveloped understanding in the case law and commentary, dignity is a concept that pervades the American system, operating as an undercurrent to the core constitutional rights embodied in the Bill of Rights and the Fourteenth Amendment.[200] It would be difficult to even conceive of a convincing argument that the Fourth Amendment does not, or should not be understood to, assume that humans have dignity that can be offended by the unreasonable use of government power to search and seize a person or his property, and that the Constitution is not best understood as protecting against such impositions.[201] Given that privacy (another extratextual bedrock principle of the Constitution)[202] is held in such high regard in Fourth Amendment jurisprudence,[203] and that dignity, an analytically distinct concept,[204] has been acknowledged to play some role in the protections granted by the amendment, it is anomalous that privacy has become the sole counterbalance to the titan law-enforcement interest in the reasonableness test. Clearly, if it can be said that one of the purposes of the Fourth Amendment is to protect human dignity, courts should be evaluating whether search-and-seizure tactics unnecessarily offend a suspect's dignity.

Dignity should therefore be raised from the unstated bedrock of doctrine and become a recognized, fully integrated element of the reasonableness analysis. Simply put, searches and seizures that infringe

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200. *See* Wright, *supra* note 93, at 535 ("Dignity may be at the heart of Fourteenth Amendment substantive due process or procedural due process claims as well." (citations omitted)).

201. *See id.* at 534–35 ("The Fourth Amendment's prohibition of unreasonable searches and seizures similarly protects dignitary interests." (citing *Schmerber v. California*, 384 U.S. 757, 769–70 (1966) ("The interests in human dignity and privacy which the Fourth Amendment protects . . . .")).

202. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)); *Id.* at 486–87 n.1 (Goldberg, J., concurring) ("My Brother Stewart dissents on the ground that he 'can find no . . . general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.' He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." (citation omitted)).

203. *See supra* Part I.A.

204. *See supra* Part II.B.

on an individual's reasonable expectation of being treated with dignity, independent of any violation of any other protected interest, are unreasonable and in violation of the Fourth Amendment. Of course, the most challenging aspect to incorporating dignity into Fourth Amendment jurisprudence is articulating a workable framework to govern its use.[205] The risks are evident; conceiving the interest too narrowly would limit its effectiveness as a compliment to privacy and a counterweight to law enforcement, while conceiving the interest too broadly risks letting it grow into a monster that swallows up Fourth Amendment jurisprudence, excluding what should otherwise be valid uses of the government's search-and-seizure power.

A. Toward a Workable Standard

The basic formulation is simple: whether a search or seizure is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's dignity and, on the other hand, the degree to which the search or seizure, and the manner in which it is conducted, is needed for the promotion of legitimate governmental interests. Searches or seizures that demean, degrade, or humiliate the suspect (or otherwise offend notions of the dignity of the person),[206] and which cannot be justified given the law-enforcement interest at stake, are unreasonable, leading to remedies that normally arise from an unreasonable search or seizure. Courts should make two inquiries: (1) was the search or seizure itself—or the manner in which it was conducted—degrading, dehumanizing, or otherwise offensive to the individual's legitimate sense of dignity, and if so, (2) should that imposition on the individual's dignitary interest be tolerated in light of the government's interest in executing that search and seizure? If the answer to inquiry (1) is yes and the answer to inquiry (2) is no, the search or seizure is invalid under the Fourth Amendment.

Of course, an evaluation of a dignitary imposition by the government need not, and should not, be exclusive of an evaluation of the imposition on an established privacy interest, as the open-ended textual command of reasonableness (and the Court's totality test)[207] makes clear. Courts can and should evaluate both, if applicable to the situation. Privacy should retain its place at the center of Fourth

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205. Indeed, I believe that the very real practical problem of finding a workable standard is the lone compelling argument against including dignity as a stated element in the reasonableness test.

206. *See supra* Part II.A.

207. *See supra* note 12 and accompanying text (describing the totality-of-the-circumstances test).

Amendment jurisprudence, standing alongside dignity and fulfilling the Supreme Court's mandate in cases like *Schmerber* that "[t]he overriding function of the Fourth Amendment is to protect personal privacy *and* dignity against unwarranted intrusion by the State."[208] Under this model, courts would still evaluate the imposition of the government's actions on the suspect's privacy while having a method for evaluating the dignitary interest that is lost when analysis focuses solely on privacy. Searches that intrude on both the suspect's privacy and dignitary interest would be especially susceptible to invalidation. Searches that intrude on both interests, but perhaps not enough on either interest in isolation to warrant invalidation, could be a candidate for invalidation based on the combined harm.

For instance, in the case of *United States v. Williams*,[209] discussed earlier,[210] in which police officers searched a suspect for drugs in broad daylight in a police parking lot by inserting their hands into his underwear, the court found the privacy imposition alone to be inadequate to invalidate the search.[211] The Eighth Circuit found the parking lot to be secluded from the public street, blunting Williams's assertion that his privacy had been invaded by the search.[212] Had the possibility of a dignitary imposition been considered, the court may well have found that the method of search—in a parking lot, during the day, in a manner that might reasonably be construed as having been degrading—may have been enough to invalidate the search. Certainly, even if the search was not ultimately upheld, the Eighth Circuit's analysis would have been more satisfying in that it would have actually grappled with the gravamen of the injury to the suspect, which appears primarily dignitary.

B. Critiquing the Inclusion of Dignity in the Reasonableness Analysis

> If there is any statement to which virtually all constitutional scholars would agree, it is that orthodox Fourth Amendment jurisprudence is a theoretical mess, full of doctrinal incoherence and inconsistency, revealing not much more than

208. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (emphasis added).
209. 477 F.3d 974 (2007).
210. *See supra* Part II.A.2.
211. 477 F.3d at 975.
212 *Id.* at 977–78.

> the constitutionally unmoored ideological predispositions of shifting majorities of Supreme Court justices.[213]

There are risks that emerge by bringing dignity into the foreground of the reasonableness analysis, given that it is an underdeveloped concept that acquits itself of no immediately obvious definitional parameters. The first issue with this proposal that should be addressed is that the amorphous nature of dignity as a concept may provide incentive for judges to act instrumentally. Rather than offering a simple, consistent, and useful decisional tool to determine what is or is not reasonable in the context of a search or seizure, consideration of dignitary interests may risk invitation of personal value judgments and thereby may invite worrying levels of instrumentalism into constitutional decision making.[214] A second critique, something of a derivative of the first, is that the amorphous nature of dignity as a concept will fall victim to the same forces that bedevil privacy in this context; that is, dignity may be a value that cannot, as a general proposition, withstand the onslaught of the government's "concrete" law-enforcement interest in the reasonableness analysis. This is an especially acute problem when one considers a third critique, which is that even good-faith applications of a dignity standard risk further confusing an already confused Fourth Amendment jurisprudence. Because these are serious critiques that deserve in-depth treatment, each is addressed in turn.

1. INSTRUMENTALIST DECISION MAKING

Imagine that the Supreme Court decided a case tomorrow and, citing this Article, pronounced that henceforth the dignitary impact of police procedures should be considered alongside privacy when assessing reasonableness of a search or seizure.[215] What then? Given the little-understood nature of dignitary theory in the Fourth Amendment

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213. Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. CIV. RTS. L.J. 261, 261 (2005) (countering this orthodoxy).

214. This risk becomes increasingly acute in proportion to the breadth of the conception of the dignity interest. *See, e.g.*, Réaume, *supra* note 92, at 79 (theorizing one conception of dignity as "[doing] something in order to cause harm of whatever sort is to do more than cause the specific harm—it also, even primarily, violates the dignity of the person so injured"). Such an account of the dignitary interest is certainly too broad, and would likely lead to impermissibly instrumentalist judging, at least as measured by historical American standards.

215. I hereby invite the United States Supreme Court to make this hypothetical a reality.

context,[216] how would courts go about determining whether a given suspect has suffered an unconstitutional dignitary violation? While the mechanics of enunciating a black-letter standard are simple, as I have attempted to show earlier,[217] things get more difficult when balancing competing interests in specific cases. Which police tactics are unreasonably degrading? How much humiliation is too much humiliation? What law-enforcement prerogatives are compelling enough to constitutionally impose upon a suspect's legitimate expectation of being treated with dignity, and how shall such interests be balanced in the general run of cases?[218] One is tempted to conclude that, in the absence of good answers to these sorts of questions, courts might be tempted to use dignity as a catch-all value to prohibit any law-enforcement technique objectionable to that particular jurist. Dignity presents a special risk in this regard, given the relative dearth of case law and scholarship as it relates to searches and seizures and that any arrest and search might fairly be described as humiliating or otherwise offensive to the target subject.

Ultimately, this should not prove an intractable problem given the very nature of the Fourth Amendment reasonableness inquiry. Remaining mindful of Professor Wright's admonition that "[u]navoidably, intelligent judgment will be required in cases of conflict, or at least for general classes of conflict,"[219] judges will at first be blazing new trails when determining what, in broad strokes, constitutes a dignitary offense. One can expect only the most egregious violations to be prohibited in the early going, much along the lines of what is now prohibited under Fifth and Fourteenth Amendment "shock the conscience" review. In time, though, courts would likely arrive at generally accepted boundaries to permissible police behavior consistent with a dignity-sensitive reasonableness inquiry, and intelligent judgment would be necessary to decide cases on the margin. The dearth of precedent or academic guidance would pose a problem only in the short

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216. *See supra* Part II.A.2.

217. *Supra* Part III.A ("Courts should make two inquiries: (1) was the search or seizure itself—or the manner in which it was conducted—degrading, dehumanizing, or otherwise offensive . . . and if so, (2) should that imposition on the individual's dignitary interest be tolerated in light of the government's interest in executing that search and seizure?").

218. Take, for example, the facts of *Schmerber v. California*. 384 U.S.757 (1966). In that case, the police forcibly extracted a blood sample from the suspect in order to preserve evidence of his intoxication. *Id.* at 758–59. Is a forcibly extracted blood sample humiliating or degrading, or does it offend some other, more fundamental concept of personhood that implicates the dignity of the person? And what is the value to be assigned to the competing interests, namely, the right not to undergo unconsented to invasive procedures versus the need for government to preserve evidence of a crime?

219. Wright, *supra* note 93, at 529.

term. While the Supreme Court itself would be unable (and likely unwilling) to delineate all, or even a significant portion, of the contours of what constitutes an unconstitutional dignitary offense, the lower courts would, case by case, build a basic framework for deciding cases in which violations of a suspect's dignity are at issue, including a framework for establishing what "constitutional dignity" ultimately means.[220] Clear, egregious violations would be identified and prohibited first, with the more borderline factual scenarios becoming settled upon as the courts arrive at an agreed-upon notion of what types and degrees of harm are properly prohibited. New policing techniques and evolving societal expectations would require courts to constantly reevaluate demarcated boundaries. This process is unremarkable; the same evolution has occurred over the years as the courts have refined and reevaluated the boundaries of acceptable government behavior under each era's conceptions of the dominant value underlying the reasonableness requirement.[221] Ultimately, no concrete definition of a "dignitary offense" would be necessary because case law would provide, through real-world application, the general parameters of acceptable police tactics, much like the case law has eventually provided the parameters of reasonable conduct under the Fourth Amendment privacy paradigm (even if those parameters are narrower than some observers deem proper),[222] the general parameters of negligent conduct sounding in tort, or the conduct that supports an inference of scienter in securities fraud cases.[223] Like Eighth

220. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 537–39 (2007) (discussing the bottom-up nature of Fourth Amendment jurisprudence). Professor Kerr argues that the Supreme Court's narrow role requires lower courts to generate the overwhelming bulk of the narrow rules on what government conduct amounts to a "search," and that the law must evolve in a bottom-up fashion from trial and appellate courts in the state and federal systems all around the country. *Id.* He also argues that over time, many fact patterns have become common and the applicable Fourth Amendment rule well-settled. *Id.* at 538. But in the relatively common case of a practice not already covered by a rule, lower courts must announce rules as to whether and when the technique violates a reasonable expectation of privacy. *Id.*

221. *See id.* at 538–39.

222. *Id.*

223. Some commentators have taken this approach themselves in their definitional efforts. *See, e.g.*, Réaume, *supra* note 92, at 62–63, 65 ("[S]ince our philosophical institutions about dignity seem no better developed than our legal ones, I will . . . look for places in legal disputes where the value of dignity seems instinctively to have a role to play, then try to discern what we mean by the concept in those contexts and how it might factor into the construction of legal rules. This is a methodology more congenial to the common lawyer but, more importantly, more likely to be constructive in trying to understand a concept as pervasive as human dignity . . . . In true lawyerly fashion, we may inch forward creating rights and responsibilities

Amendment cruel-and-unusual-punishment jurisprudence—which, as the Supreme Court noted in *Trop v. Dulles*,[224] is fundamentally concerned with upholding the "dignity of man,"[225]—what constitutes an unreasonable dignitary offense under the Fourth Amendment would change over time as society evolves and "matures."[226] This is perfectly consistent with the Fourth Amendment's command that searches be reasonable, a command closely related to tort concepts, and one that contemplates changing conceptions of propriety over time and encourages fact-specific rulings.[227] Ultimately, the risk of instrumentalist decision making would be no greater than that which already exists, and is in some sense tolerated (or even required) by the open-ended reasonableness command.[228]

2. CONFUSING THE ALREADY CONFUSED JURISPRUDENCE

A related critique considers whether standing dignity alongside privacy risks exacerbating one of the more vexing problems of Fourth Amendment jurisprudence: doctrinal confusion.[229] If one agrees, as many do, that the Court's Fourth Amendment jurisprudence is already complicated (or, as some might say, confusing or directionless) enough, does adding a dignity consideration onto the reasonableness test merely stick search-and-seizure jurisprudence further into the mud?[230] Given the hard-to-define nature of the dignitary interest, and given the

around the idea of treating others with dignity without having, at the outset, a complete theory of the abstract concept at our disposal.").

224. 356 U.S. 86 (1958).

225. *Id.* at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

226. *Id.* at 101 ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

227. AMAR, *supra* note 3, at 10 ("Precisely because these searches and seizures can occur in all shapes and sizes under a wide variety of circumstances, the Framers chose a suitably general command.").

228. Steven Penney, *Reasonable Expectations of Privacy and Novel Search Technologies: An Economic Approach*, 97 J. CRIM. L. & CRIMINOLOGY 477, 479 (2007) ("As courts in both [the United States and Canada] have recognized, constitutional search and seizure decisions (including threshold reasonable expectation of privacy determinations) call for some kind of instrumentalist cost-benefit calculation.").

229. Kerr, *supra* note 220, at 505 (noting that the confused Fourth Amendment jurisprudence is widely noted among scholars to be "an embarrassment . . . . [and] [t]he Court's handiwork has been condemned as 'distressingly unmanageable,' 'unstable,' and 'a series of inconsistent and bizarre results'" (citations omitted)).

230. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The [F]ourth [A]mendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck.").

potential for fact-specific rulings that may turn on subtle questions of circumstance, one might argue that adding a dignity prong risks shuffling the deck chairs as Fourth Amendment jurisprudence continues to sink.[231]

Ultimately, though, the risk in exacerbating existing doctrinal confusion by elevating dignity in the manner suggested here seems small. Most critiques of the current state of Fourth Amendment jurisprudence center on the various exceptions and semicategorical rules promulgated by the Court, many of which seem illogical or doctrinally contradictory, as it continues to confront the essentially unconstrained nature of the reasonableness requirement and the question of how that relates to the Warrant Clause. A reasonableness analysis that focuses at least in part on the dignitary effects of a search or seizure does not exacerbate this problem by adding on layers of categorical rules (with their inevitable exceptions); rather, it takes the Fourth Amendment's simple command that a search be reasonable and informs courts as to what is not reasonable in a given circumstance. Additionally, dignity as a concept seems not to be any more amorphous than the two concepts that currently dominate the standard; there does not appear to be any theoretical limit to how one can interpret an individual's expectation of privacy or the government's interest in effective law enforcement. This balance of interests necessarily turns on how vital one characterizes the respective interests and the weight one accords them in calculating which is more compelling in a given instance.[232] Uncertainty is inherent, regardless of which value or values one might choose to impute. Any of the values one could theoretically select (privacy, property, etcetera, on the one hand; law enforcement, deterrence, efficiency, etcetera, on the other) will be dependent upon

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231. *See id.* at 1470 ("Fourth Amendment critics rank in rows, and it has been repeatedly pointed out that individual cases are inconsistent with each other or that whole chunks of doctrine, such as the automobile exception or the plain view exception, are either misconceived, too broad, or too narrow. But these critics all play the Court on its own field, simply arguing as tenth Justices that the doctrines should be tinkered with in different ways than the Court has done.").

232. The task of determining an individual's expectation of privacy gets even harder when one attempts to determine whether society is prepared to accept that individual's expectation of privacy as legitimate. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[T]here is a twofold requirement [for determining whether a search has occurred and whether the searchee has standing to object to a search under the Fourth Amendment], first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). Not only does the judge have to get into the suspect's head, but then he has to get into society's collective (and nonexistent) head to divine what it thinks about the suspect's expectations! Trying to determine whether something offends basic human dignity, while a subjective task, seems almost concrete in comparison.

necessarily subjective assignations of weight and import. Dignity is no different.

3. DIGNITY—TOO AMORPHOUS TO MATTER?

This rather free form methodology, while being perfectly consistent with the generalized-reasonableness interpretation of the Fourth Amendment, leads to a related concern. Given the experience of basing Fourth Amendment reasonableness largely on privacy, another ethereal concept that has repeatedly defied definitive interpretation,[233] would those concerned with strengthening Fourth Amendment protections be repeating their mistake by turning to dignity? Given the ethereal nature of dignity under any definition,[234] might dignity simply go the way of privacy—a largely theoretical value that cannot stand up to the concrete law-enforcement juggernaut that has slowly but surely overtaken Fourth Amendment analysis?[235] If that is to be dignity's fate, is it even worth incorporating it into the reasonableness analysis in most cases?

Preliminarily, there does seem to be efficacy in moving towards a dignitary approach. First, dignity as a value is not susceptible to many of the weaknesses that have bedeviled privacy in this context. Privacy is a conditional concept; one has it only to the extent that one's circumstances allow for it, as a matter of fact and law.[236] While it is widely accepted that situations occur in which a person may cede, be legitimately stripped of, or simply not have any expectation of privacy whatsoever,[237] dignity (as I have attempted to define it here) is an

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233. Whitman, *supra* note 89, at 1153 (describing privacy as "an unusually slippery concept").

234. *See supra* Part II.A.

235. *See* Cloud, *supra* note 16, at 72 ("Amorphous standards of privacy lack the sinew necessary to withstand what Justice Douglas once referred to as the 'hydraulic pressures' favoring expansive police power at the expense of privacy and liberty." (citing *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) ("There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today."))).

236. *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266–67 (1999) ("Privacy, in Fourth Amendment terms, is something that exists only in certain types of spaces; not surprisingly, the law protects it only where it exists. Rich people have more access to those spaces than poor people; they therefore enjoy more legal protection. That is not true of some other interests Fourth Amendment law protects.").

237. For example, society has accepted, and the law reflects, that prisoners have no expectation of privacy; more generally, current Fourth Amendment doctrine is premised on the notion that the individual cedes varying degrees of privacy depending

inherent possession of every person, regardless of circumstance. Dignity is an immutable value, held in equal measure at all times by all people,[238] a quality privacy does not share.[239] Dignity arises at birth (perhaps even before) and continues until death (and perhaps even after).[240] Indeed, of all core constitutional values, dignity is perhaps the only one that cannot be legitimately stripped entirely by the state under any circumstance. The state can take a person's life, his liberty, or his property, all of which are accepted under the Constitution given sufficient justification. However, one would be hard-pressed to argue that the state has any interest whatsoever in attempting to strip a person entirely of his dignity. What possible benefit would accrue to the state or to the people from such an action?[241] No court, to my knowledge, has ever held that a person may be lawfully stripped entirely of his dignity, whatever that would mean.[242] In that sense, dignity is an inherently more stable value than privacy—perhaps narrower, but much

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on that person's behavior—stepping out into the public, engaging in any number of transactions over the Internet, etc.

238. *See* Lebech, *supra* note 97, at 1 ("When 'human' and 'dignity' are used in conjunction they form the expression 'human dignity,' which means the status of human beings entitling them to respect, a status which is first and to be taken for granted.").

239. Professor William Stuntz, for instance, has criticized the privacy-centric Fourth Amendment on wealth disparity grounds. Stuntz, *supra* note 236, at 1267–68 ("In Fourth Amendment law, privacy has a positive definition: the kind of privacy protection citizens have vis-à-vis the police is tied to the kind of privacy the same citizens have with one another. That kind of privacy can be bought, so that people who have money have more of it than people who don't. It follows that people who have money have more Fourth Amendment protection than people who don't. One might solve this problem by giving privacy a normative definition, by deciding what privacy protection people *ought* to have vis-à-vis the government, without regard to the distribution of privacy in society. But the solution works only if one fundamentally changes what one means by 'privacy.' Under any definition that focuses on the interest in keeping certain spaces and activities secret, protecting privacy will tend to advantage wealthier suspects at the expense of poorer ones.").

240. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 285 n.79 (2005) ("It is important to recognize that even the death penalty does not give a liberal state absolute power over the condemned. Liberal justifications for capital punishment insist that the condemned retains various rights up to and beyond execution. For example, death row inmates may not be tortured or abused, and their corpses must be treated with dignity.").

241. Certainly, there is a long history of state actions that have the effect of lawfully imposing upon an individual's dignity in ways that would not offend the conception of dignity offered here. Shaming punishments are one such example. This does not, however, provide support for the notion that the Constitution permits actions that seek to strip a person *entirely* of his dignity.

242. *See generally* Lebech, *supra* note 97, at 5 ("Dignity, in other words, is essential to the existence of the individual person; it is what the person is before anything else, it is what identifies it.").

deeper, because its boundaries do not depend upon the circumstance of the individual and the state cannot legitimately fully infringe upon it.[243]

Thus, with privacy as the sole effective counterbalance to law enforcement in the reasonableness analysis, that analysis must inevitably skew towards the law-enforcement interest because privacy is inherently limited in scope and application. In contrast, any imposition on a suspect's dignity would seem to require a much more convincing showing of necessity, and the interest could never legitimately be infringed upon entirely, for there appears to be no plausible scenario in which the government would be justified in doing so.[244] And in that sense, even if dignity was not implicated in many of the more mundane search-and-seizure scenarios (something that I do not concede is the

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243. Depending on how one articulates the dignitary interest, it may be either more narrow or more broad than the privacy interest. If one (plausibly) believes that all violations of privacy are dignitary violations, even if minor, then dignity is both a broader and a deeper right than privacy. On the other hand, if one chooses to define dignity in a more circumscribed way (such as in the Kantian "means-ends" manner, *see supra* Part II.A), it becomes possible to imagine violations of privacy that do not implicate the dignitary interest.

244. This raises an intriguing question—is the government ever justified in attempting to totally strip an individual of his dignity? In other words, is it ever reasonable for the government to utterly demean, degrade, and humiliate an individual to the extent that the individual is no longer afforded the Kantian presumption of being treated as a worthy "end" in and of himself? *Cf.* Ristroph, *supra* note 240, at 285 ("No penological theory does (or could) grant a liberal government absolute power over an individual who breaks the law.").

I have assumed here that the answer is no, because I cannot think of a scenario in which such treatment could possibly be justified (or, in other words, be reasonable). However, one can legitimately question whether the Bush Administration's commitment to torture amounts to a de facto acceptance of the notion that the state may exert absolute dominion over the dignity of the individual under the Constitution. *See* Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURVEY OF AM. L. 433, 438–40 (2007) (arguing that the Bush Administration's "adoption of policies designed to avoid both the web of [international] anti-torture rules and meaningful judicial review of detention decisions" promoted abuses that could be considered violations of international obligations to, inter alia, respect human dignity); *see also* Motion to Dismiss for Outrageous Government Conduct at 7–8, *United States v. Padilla*, No. 04-60001-CR-COOKE-BROWN(s)(s)(s)(s)(s) (S.D. Fla. filed Oct. 5, 2006) ("In an effort to gain Mr. Padilla's 'dependency and trust,' he was tortured for nearly the entire three years and eight months of his unlawful detention. The torture took myriad forms, each designed to cause pain, anguish, depression, and ultimately, the loss of the will to live . . . . Mr. Padilla is steadfast in his assertion that in a Nation of laws and of respect for the dignity of all persons, his prosecution is an abomination."). However, because public justifications for the Bush Administration's torture policy have been few and far between (and because those that have leaked into the public domain been so patently absurd), it is difficult to assess the Administration's constitutional justifications for its actions—or even to assess whether any good-faith effort has in fact ever been undertaken by the Administration to consider the constitutional issues.

case), its very nature as an immutable concept precludes it from falling victim, at least as a matter of course, to the government's law-enforcement interest like privacy has.

A look back at the Roberts Court's major Fourth Amendment decisions indicates that including dignity as a formal element in the reasonableness balancing test can have concrete impact, and indeed might have changed the outcome in *Samson v. California*[245] and *Los Angeles County v. Rettele*,[246] two cases whose reasoning was questionable at best.[247] Consider first *Samson*. In that case, the Court held that individuals on parole are subject to suspicionless search, at any time, for any reason or no reason at all.[248] Justice Thomas's continuum argument, upon which the majority's opinion rested, posited that parolees had no (or at least close to no) privacy expectation at all.[249] Given that formulation, it is not surprising that the searches were upheld since there was nothing against which to balance the government's law-enforcement interests.[250] This calculus changes if one considers suspicionless searches to be an inherent imposition on dignity. To the extent one conceives of human dignity arising as a consequence of every individual's status as an autonomous, reasoning being,[251] searching an individual without suspicion of wrongdoing raises serious questions as to whether the government has essentially taken away the individual's prerogative to choose to be free from governmental intrusion by not engaging in criminal or suspicious behavior.[252] In effect, the government has assigned a presumption of criminality to that parolee as a matter of course, essentially stripping the individual of the presumption of lawfulness generally accorded individuals in free societies. Instead, the government has thrust upon the individual a badge of criminality, since the general expectation is that only those acting criminally (or at least suspiciously) will be stopped and searched by police.[253] Assigning an individual with a

245. 547 U.S. 843 (2006).

246. 127 S. Ct. 1989 (2007).

247. *See supra* Part I.B; *see also* Castiglione, *supra* note 17, at 112–16 (arguing that the skewed balancing test used by the Court in *Samson* and *Hudson*, rather than the outcome of the cases, was most notable).

248. *See* Castiglione, *supra* note 17, at 69–81.

249. *See supra* text accompanying note 46.

250. *See id.*

251. *See supra* Part II.A.

252. *See* Rothstein, *supra* note 105, at 383 ("The concept of human dignity is . . . . primarily concerned with actions that reduce a person's status as a thinking being, a citizen and a member of a community.").

253. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) ("[T]o accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure.").

presumption of criminality, of a scarlet "A" that permits search without any suspicion of wrongdoing, devalues that individual's status as an autonomous being who can choose to act criminally (and therefore accept a heightened risk of being searched and seized) or choose to act lawfully and refuse all but the slightest risk (arising out of bona fide mistake by the government official) of being stopped.[254]

Had the dignitary interest been considered in *Samson*, the Court would have had to ask first whether it is degrading (or otherwise autonomy stripping to the extent of a dignitary violation) for an individual to be stopped and searched without cause or suspicion of wrongdoing, and second whether that imposition should be tolerated in the face of the government's interest in supervising parolees, rehabilitating them, and protecting the community. A strong case could be made for answering yes and no, respectively, and therefore invalidating the California state law that authorized such searches. A strong case could be made that it is inherently degrading to be searched based solely on the caprice of a government official, or for the government to apply a presumption without basis that an individual is acting criminally, which is what the *Samson* decision essentially countenances.[255] Given that, as I have argued elsewhere, the Court in *Samson* failed to offer a compelling argument that the penological or rehabilitative goals of parole are at all served by a suspicionless search,[256] it would seem unlikely that the government's interests are compelling enough to support such an infringement upon the individual's dignitary interest.[257]

And so, a reconsideration of *Samson* shows that dignity could have real implications for Fourth Amendment problems. A similar change in outcome also may have resulted in *Los Angeles County v. Rettele*, where the police mistakenly entered a home pursuant to a warrant and held the occupants, who had been sleeping and were nude, at gunpoint

254. *See supra* note 252.

255. Castiglione, *supra* note 17, at 78 ("[I]t appears as though the Court sanctions 'arbitrary and capricious' searches of parolees—in the sense that officers can permissibly search parolees for any reason, or no reason at all, at any time, as long as the government official knows of the searchee's status as a parolee—a necessary condition for implicating *Samson*'s holding . . . .").

256. *See id.* at 114.

257. This logic can be read as a broader critique on the Supreme Court's entire suspicionless-search regime that has been slowly but inexorably erected over the last few decades. While the Court has set up this regime by focusing on the privacy interest that can easily be overcome by showing a law-enforcement purpose behind suspicionless searches in all sorts of contexts (vehicle checkpoints, bag searches on public transit, video camera surveillance in public places), a consideration of the dignitary interest inherent in these sorts of searches places this entire line of decisions in question.

for a number of minutes, even though it was clear that they were not the warrant's targets.[258] In that case, a consideration of the dignitary interest would have required the Court to consider whether the officers' actions were degrading or embarrassing to the occupants (which both subjectively and objectively would seem to be the case), and whether that imposition was justified under the circumstances. That, of course, is the thorny question in *Rettele*, given the necessity for police to maintain control of the situation when executing a warrant.[259] Whatever the resolution of that question, though, grappling with such questions would have left the decision on much more solid moral ground, since the gravamen of the injury alleged, which was more dignitary than privacy-based, would have been addressed.[260]

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258. 127 S. Ct. 1989, 1991 (2007).

259. *Id.* at 1993 ("[T]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." (quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981))).

260. The same considerations emerge in *Hudson v. Michigan*, 547 U.S. 586 (2006), a case nominally about remedies for knock-and-announce violations, but was in fact more about the validity of the rule itself: is there an enforceable dignitary right to be informed before police enter the home? Put another way, does it offend a person's dignity for government officials to enter the home pursuant to a warrant without knocking and announcing their presence? Justice Scalia's majority opinion indicates that a dignitary interest *does* exist in the application of the knock-and-announce rule. Speaking to the propriety of limiting knock-and-announce remedies to post-hoc civil actions, he quipped, "And what, other than civil suit, is the 'effective deterrent' of [a] police [officer's] violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes . . . ." *Id.* at 597.

Certainly, a dignitary interest does exist in not being intruded upon in one's nightclothes, or in any of the many embarrassing, morally compromising, or simply unflattering situations one might legitimately be engaged in inside one's own home. The only question is whether the law-enforcement interest at stake is compelling enough to override that interest, considering the need for officers to command the situation when executing a warrant. Regardless of the answer to that question, without considering the dignitary injury to the suspect, the Court's analysis is incomplete. Certainly, one can conclude that the long-revered constitutional sanctity of the home implicates the dignitary interest. *See, e.g.*, *United States v. Dunn*, 480 U.S. 294, 300 (1987) (contrasting the protection afforded the home under the Fourth Amendment with the protection afforded open fields and curtilage); *see also* Lerner & Mulligan, *supra* note 32, ¶ 4 ("[H]ow [will] . . . the increased information about in-home activities generated, transmitted, and stored in demand response systems be dealt with under the Fourth Amendment?"); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . . [T]hey apply to all invasions on the part of the government and its employe[e]s of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction

It is of course true that, in actual practice, including dignity as a formal element in cases like *Samson* or *Rettele* may not change a significant number of outcomes, the preceding counterfactual exercises notwithstanding. Perhaps it is the case that the law-enforcement interests at stake were sufficiently serious that the respective individual interests must yield. Certainly, one must recognize that even if dignity were a primary consideration, the Court could have, in good faith, decided those cases the same. And yet, I cannot help but think that even a cursory examination of the imposition on dignity in *Rettele*, *Samson*, and *Hudson* would have made the Roberts Court's decisions far more satisfying. Those cases show that, in many circumstances, the persuasiveness of the Court's opinions is weakened by a failure to discuss a value that should be of great concern.

C. The Necessity of a Dignity-Based Approach

Finally, a Fourth Amendment jurisprudence sensitive to the history and underlying morality of the Constitution *must* account for the dignitary interest.[261] Fourth Amendment jurisprudence is patently insufficient when there is no informed understanding of suspects' dignitary interest and how this interest is impacted by government behavior. Searches and seizures can and often do cause injuries that are simply not cognizable to a regime predicated solely upon privacy.[262] When courts fail to consider the dignitary impact of the method in which a particular search or seizure was effectuated, or of the dignitary impact of a particular police procedure generally, a crucial individual interest is ignored. The passing, infrequent invocations by the courts that the Fourth Amendment protects human dignity[263] have proven themselves insufficient, having done little or nothing to give rise to a jurisprudence designed to effectuate that interest.[264] Given the Supreme Court's willingness to recognize the dignitary interests at stake in other core Bill of Rights cases,[265] and given the substantial bodies of law that have arisen in response to those efforts, courts should be similarly willing to consider dignitary interests in a context rife with potential for

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of some public offence . . . ."). Failure to account for this interest renders *Hudson* a highly unsatisfying decision.

261. *See* Lebech, *supra* note 97, at 10 ("Human dignity is the fundamental value of the human being . . . ."); Wright, *supra* note 93, at 557 ("A constitutional democracy cannot allow for a graded hierarchy of the basic dignity of persons.").

262. *See supra* Part II.B.

263. *See supra* Part II.A.2 (discussing *Schmerber*, *Skinner*, and related cases).

264. *See supra* Part II.B (discussing the distinctions between the privacy and dignitary interest in the Fourth Amendment context).

265. *See supra* notes 118–122 and accompanying text.

dignitary abuses. Short of such recognition, Fourth Amendment jurisprudence will remain fundamentally lacking.

CONCLUSION

> *Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity.*[266]

The generalized-reasonableness interpretation of the Fourth Amendment currently in ascendancy is, in some sense, a great weakness, because it inherently leads to the sort of complicated, often contradictory jurisprudence that has arisen over the years. Yet it is also a great strength, because it provides courts with a flexible textual tool for applying the Amendment to a continually changing social and technological environment, thereby (hopefully) preventing search-and-seizure doctrine from sliding into irrelevance and irrationality.[267] In this spirit, there is no reason why courts should remain wedded to a bilateral privacy versus law-enforcement balancing act that has proven itself increasingly incapable of protecting individuals' right to be free from unwarranted government intrusions.[268] Standing alone, current understandings of privacy as a concept cannot withstand the steady advance of the government's legitimate law-enforcement needs, an advance that risks overreaching (and perhaps already has). Rather than an amendment that rationally restrains the

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266. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citation omitted).

267. *See* AMAR, *supra* note 3, at 43–45.

268. *See* Kamisar, *supra* note 37, at 485, 487 (arguing that the results of the Court's privacy/law enforcement balancing test are "quite predictable" given the formulation of the test itself; although "not all post-Warren Court search and seizure rulings have been in favor of the government, in the main the Court has significantly reduced the impact of the exclusionary rule in *both* respects"); Solove, *supra* note 31, at 127 ("[T]hrough a combination of the Court's interpretive maneuverings and technological change, the Fourth and Fifth Amendments have receded from protecting against many instances of law enforcement activity . . . ."); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 747 (2005) ("Fourth Amendment protection continues to recede from a litany of law enforcement activities, and it is being replaced by federal statutes.").

government's ability to search and seize, the Fourth Amendment has largely become a vehicle to condone ever-expanding law-enforcement tactics.[269] Privacy, despite the best intentions of those in academia and on the bench, has not been equal to the burdens imposed upon it. Proponents of a balanced, truly protective Fourth Amendment must then turn to other values to effectuate that goal. I propose that dignity is one such value because it is one of the most fundamental (if underanalyzed) constitutional values and because it provides a deep, immutable counterbalance to the state's law-enforcement interest, one that is embedded in the very notion of a legal regime that seeks to constrain government activity vis-à-vis the individual.

The Fourth Amendment is not just about privacy. It is also, at its core, about dignity. Indeed, the jurisprudence fully coheres only when it is conceptualized as prohibiting unnecessary impositions on human dignity.[270] While a few cases have paid lip service to the notion that unreasonable impositions on dignity give rise to a Fourth Amendment violation,[271] this notion has been underdeveloped in the case law, limited largely to brief invocations and inconsistent application. There has been a dearth of examination into what it means to unconstitutionally infringe upon an individual's dignitary interest in the context of a search and seizure. Hopefully, this discussion will spark that examination.

It is important to note again that dignity cannot replace privacy as the fundamental counterbalance to the law-enforcement interest. It cannot be the lone, or often even the predominant, factor when weighing the reasonableness of government actions in the Fourth Amendment context. This is because it will not always be logically applicable to the facts of the case; as we have seen, because dignity is a value distinct from privacy, there will be instances where a legitimate expectation of privacy has been violated without justification, but where the dignitary interest has not been so violated.[272] Indeed, it is entirely

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269. *See* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1044 (2006) ("[T]he conventional wisdom about the Rehnquist Court is that its dominant mission in criminal law was to overrule or limit cases from the Warren Court era in order to cut back on criminal procedure protections.").

270. For a contrary view, see Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201 (2008) (criticizing calls for an incorporation of human dignity into American constitutional interpretation, and arguing that the value-based models prevalent in European constitutionalism are inappropriate for rights-based American constitutionalism).

271. *See supra* Part I.B.3.

272. For instance, tapping a phone, monitoring IP addresses, or opening mail without a warrant, while perhaps conceivably violative of an individual's dignity, are nonetheless best understood as invasions of privacy. *See* Rosen, *supra* note 113, at

possible that, in the majority of cases, adding a dignity prong to the analysis would not substantially change the results.[273] However, there are many classes of cases where a consideration of the dignitary impact of a search or seizure would impact or change the decision—cases like *Rettele*, discussed in Part II earlier, where the harm alleged appeared primarily dignitary, but in which the privacy-centric focus of the Court was simply unable to adequately account for that harm.[274] Giving attention to the dignitary impact of a search and seizure would place Fourth Amendment doctrine on more solid moral ground, and go far in lending many Fourth Amendment opinions—cases like *Samson*, *Rettele*, *Williams*, and others—the value-driven underpinning they currently lack. Many (or even all) of the venerated rights protected under the Constitution—the right to expression, the right to free exercise of religion, the right to equal protection of the laws, the right to be free from cruel and unusual punishment—can be conceptualized as having their fundamental bases in the dignity of the person.[275] The Fourth Amendment right to be free from unreasonable searches and seizures should be no different, and courts should act to give meaning to that understanding.

2122 ("Surveillance by faceless websites can hardly be conceived as a breach against dignity . . . .").

273. *See* Goodman, *supra* note 18, at 791 ("Ultimately this standard may not lead to different results.").

274. *See supra* Part I.A.

275. Goodman, *supra* note 18, at 789 ("[H]uman dignity as a constitutional value is a moral status affording individuals rights and standing against state action that demeans, offends, or humiliates."); *see* THE FEDERALIST NO. 1, at 14 (Alexander Hamilton) (E.H. Scott ed., 1898) ("Yes, my countrymen, I own to you, that, after having given it an attentive consideration, I am clearly of opinion, it is your interest to adopt [the Constitution]. I am convinced, that this is the safest course for your liberty, your dignity, and your happiness.").