

Knowing What We Want: A Decent Society, A Civilized System of Justice & A Condition of Dignity

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*Human dignity as a value to guide criminal justice reform emerged strikingly in the 2011 Supreme Court decision in *Brown v. Plata*. But with Justice Kennedy retired and courts generally reluctant to go far down the road to practical reforms, its future lies in the political realm shaping policy at the local, state, and national levels. For human dignity to be effective politically and in forming policy, we need a vocabulary robust enough to convey a positive vision for the penal state. In this essay, I discuss three concepts that can provide more precision to the potential abstractness of human dignity, two of which the Supreme Court has regularly used in decisions regarding punishment: the idea of a “decent society,” the idea of a “civilized system of justice,” and the idea of a “condition of dignity.” In brief, without a much broader commitment to restoring a decent society, and to civilizing our justice and security systems, there is little hope that our police stations, courts, jails, and prisons will provide a condition of dignity to those unfortunate enough to end up in them.*

In 2011, in the historic *Brown v. Plata* decision ordering a major population reduction in California’s mammoth, overcrowded, and medically incompetent prison system, Supreme Court Associate Justice Anthony Kennedy wrote that “prisoners retain the essence of human dignity inherent in all persons,” and bluntly described California’s prisons as “incompatible with the concept of human dignity” and having “no place in civilized society.”¹ This strong language, none of which was necessary to the highly technical legal analysis of the rest of the opinion, identifies a cluster of values related to human dignity that reside at the very center of a number of constitutional provisions (the Eighth Amendment for sure, but also the Fourth and Fifth Amendments, and arguably the Bill of Rights as a whole). Justice Kennedy suggested, as no one with the authority of the Supreme Court had in a long time, that the nation’s forty-year experiment in extending security against crime as the supreme public value, what we can call “the war on crime,” could not be allowed to supersede these profound values enshrined in the Due Process Clause of the Fourteenth Amendment.²

Justice Kennedy has retired from the Court and, in the hands of his successors, the fate of his constitutional dignity jurisprudence is unclear. This essay is devoted to the view that reimagining our institutions and practices of security through the concept of human dignity remains not only possible but a more urgent priority than ever. As significant reforms happen in state legislatures (California's flawed bail reform law, for example), it becomes more vital than ever to define what values we want to see affirmed in what will undoubtedly, for some time to come, be seen as reformed and dignified institutions of security (whatever the truth or their practice). Just as vitally, that conversation must come from the bottom as well as the top of the American power structure: from the communities most criminalized and punished during the war on crime, from city and county governments, and from lower courts. It will have to be a movement in what is sometimes called "civil society," as well as within the institutions themselves that make up the system of justice.

Whatever I may have written in some of the exuberant passages in *Mass Incarceration on Trial*, my book on *Brown v. Plata*, it was never realistic to believe that the U.S. Supreme Court would end mass incarceration root and branch any more than it did slavery or Jim Crow, let alone Northern-style urban segregation.³ Supreme Court decisions are but signals in complex systems of politics and policy-making. If there is a reason for optimism, it is because hunger for the dignity that Justice Kennedy spoke of is radiating through our society, both from its young and its newly old. It has infused the transformation in social attitudes and laws regarding same sex marriage and parenting. It is visible in every new building in the United States in the form of ADA-compliant bathrooms and access that make it possible for people with disabilities to live whole and fully integrated lives. We hear it today at the top of the political structure in the dramatic calls for "Medicare for All" and a "Green New Deal" in Congress.

The *system of justice*, the term I use in this essay for the agencies through which the state exercises its authority to police and punish crime, what we commonly call "criminal justice," must become part of this dignity revolution. The demand for security that respects human dignity is, in fact, loud and clear today in the social movements emerging against mass incarceration and the forms of security it comprises. This includes the Black Lives Matter movement, the organized work of the formerly incarcerated, All of Us or None, and the astounding hunger strike movement in the California prisons that helped break the back of long-term solitary confinement in California.

But if the Supreme Court will not likely grant us security with a dignity-compatible security and justice system, we will have to learn to demand it from the democratic branches of our political system.⁴ To do so, we will need a vocabulary robust enough to convey our affirmative desires for security. In this essay, I want to connect three ideas with roots in the Supreme Court's dignity jurispru-

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

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

One cannot assure that prisons (and police custody and other sites of security) preserve the essential human dignity of the people in their jurisdiction at the point of delivery alone. It takes a complex and sustained commitment that begins well before custody: it is achieved (if it is at all) in the mission definition, training, and evaluation of the workers who make up the system of justice.

It starts with a *decent society*, one that is already generally committed to preserving human dignity and does so affirmatively through such institutions as the labor market (as a source not simply of income but rights), the welfare system, public education, and public health care. A society ready to abandon human dignity for security at any price is not one that can sustain the profound reworking of the system of justice that we need. Without a revival of a broader commitment to a decent society (of which Obamacare is a striking example), there are not enough federal judges in the country to protect human dignity at the point of custody.

A decent society demands what legal scholars Ian Loader and Neil Walker have called *civilized security*.⁵ But how can such a society know what kind of security it is getting? And how can a state that, even in good faith, seeks to deliver civilized security organize itself to incorporate the many people who now live outside the institutions of the decent society (and sometimes literally outside)? I borrow the phrase *condition of dignity* from an interview with a brave French mayor who has responded to the flow of mostly African immigrants through his town, a flow that he has no political control over and that was creating homelessness on the streets of his city, by creating a dormitory and resource center in which, for as long as the migrants remain in his city, they will be in a “condition of dignity.” Most of our system of justice in the United States is based at the state and local levels and is funded and organized by a patchwork of different agencies answering to different bits of democratic accountability. Thus, the work of civilizing security will have to come from the bottom and rely on local agencies under local political pressure to use its resources and powers creatively to assure that anyone passing through their cities and towns can be assured they will be in a condition of dignity.

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

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

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

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

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

The story is familiar. The disorienting combination of high inflation and unemployment in the 1970s brought an end to visions of growing labor regulations, civil rights, or welfare. Under Ronald Reagan’s version of populism, both welfare and labor regulations got turned into enemies of the common worker, who would thrive more in an unregulated economy, no longer burdened by sustaining the unproductive. President Clinton made it bipartisan in the 1990s, signing laws toughening sentences, subsidizing police forces, and reducing civil rights access to the courts for prisoners, while at the same time ending income support for poor families as a national entitlement.

Few doubt the relationship between this general reshaping of welfare and work, on the one hand, and new aggressive policing and prison policies, sometimes shorthanded as neoliberal penalty, on the other. Harsh punishment has been part of a larger makeover of the social world of the poor in which the (never generous) reach of labor laws, civil rights laws, and welfare benefits has been diminished, severely limiting access to those caught up in the system of justice or leaving it.⁹

But, critically, the declines in the decent society have now been recognized by activists, researchers, and an increasing number of policy-makers and members of the public and, in some cases, are starting to be reversed.¹⁰ We have already mentioned the Affordable Care Act, which, in those states that have expanded Medicaid under its provisions, touches on virtually everyone incarcerated, and many of those arrested, on an annual basis. The health care crisis inside prisons will continue to grow as the stock of prisoners ages and the prevalence of chronic illnesses among them increases. The availability of meaningful health care on the outside will ultimately help states move people out of incarceration. Similar societal fixes for contemporary housing and income insecurity are imaginable, as is support for extending those benefits to those who have had contact with the system of justice and especially the formerly incarcerated, who face high risks of homelessness and unemployment.

Another area in which health care institutions of the decent society can diminish the likelihood of being in custody is mental health care. While there may have

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

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

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

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

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

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

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

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

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

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

case, in *Atwater v. City of Lago Vista* (2010), when a woman with two children in her car was arrested for not having assured that their seat belts were fastened, even though the majority opinion acknowledged the arrest was a pointless indignity.¹⁷ Once at jail, even a person arrested for a minor offense may be subject to strip searches that include close examination of the genital and rectal regions.¹⁸ In a remarkable dissent to the Supreme Court's decision in *Utah v. Strieff* (2016), Justice Sonia Sotomayor stated that these and other cases send the message to Americans that "you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."¹⁹

Cases that reach the Supreme Court are hardly a random sample of police behavior (and police are only one part of our system of justice), but if they establish norms of reasonableness for America's thousands of local law enforcement agencies, we can only take these decisions to be warnings of how uncivilized security may be for millions of Americans.

To civilize security in America will take concerted action by local criminal justice leaders, frontline workers, and social movement-awakened democratic political bodies. *The New York Times* recently highlighted one inspiring example.²⁰ Jean-René Etchegaray, mayor of Bayonne, a French city near the Spanish border, was concerned about the growing population of migrants in his city who were crossing from Spain, hoping to find work in the bigger northern economies of Europe. Most of them were just passing through this town, but they gathered in the town's square to rest while planning their next moves, appearing as a growing problem of homelessness. Rather than join the increasing political demands across Europe to tighten the border and cut off the flow of migrants, this mayor of the political center-right cobbled together different resources, including a former military barracks, some temporary bedding, and donated clothes, and created a hostel-like dormitory and resource center for the migrants to escape the growing cold of winter. The mayor has come under plenty of criticism for allegedly attracting migrants to come or stay in Bayonne, including from a national government that wants to appear tough enough against migrants to head off losses to explicitly anti-immigrant parties of the far right. To the mayor, however, it is a humanitarian obligation that for as long as the migrants remain in his town, they remain in a "condition of dignity." "I don't think I can do less."²¹

What do we mean by a *condition of dignity*? Let me share a personal story about the first time I heard a demand for dignity and appreciated its urgency and specificity. It was the recorded voice of my father, speaking with his oncologist about an extremely grim prognosis for his metastatic lung cancer. I was actually listening some months after his death, which had come so quickly after the tape was made that I had not used it for its intended purpose of enabling me to advise my father and his wife from afar on how to interpret the medical news they were getting. On

the tape, my father, who once gave vivid lectures on the sociology of sex and gender to classrooms of college students, was uniformly monotonic and passive. The doctor was asking him whether he wanted more chemotherapy, none of which was very promising. “I want,” my father said, his voice suddenly filling out to his old self, “my dignity.” And as I heard it, I knew exactly what he meant and felt. He wanted to make sure that his doctors would still value him as a patient and use their skills not to cure him but to sustain him for as long as possible in a condition of dignity as his body failed.

As a sociologist, he would have appreciated that it was a demand that not just he but tens of thousands of people facing the end of life were making, leading to a revolution in hospice care in the United States in the nearly two decades since my father died in 2000. Dignity is too often treated as a kind of mystical property, but as Mayor Etchegaray aptly put it, a condition of dignity for as long as a person is in your jurisdiction is a very concrete, practical framework that includes housing, bedding, medical care, and hope.

Studies of the formerly incarcerated, including Bruce Western’s recent study of reentry, underscore the extreme precarity that faces people returning from prison.²² Assuring conditions of dignity for reentering citizens is a key priority, but it will not be sustainable if it is not aligned with the effort to revitalize the decent society discussed above.

An inside-out effort will be needed to civilize security in the United States. In our highly fragmented system, police, parole, courts, and corrections cannot generally control the inputs that determine who ends up in their custody (although police can more than most of the rest of the system actors). What they should be able to control is the ability to provide those in the custody of the state with a condition of dignity, and if not, they should consider forms of loyal rebellion.

Reimagining criminal justice institutions and practices in the United States through the lens of human dignity is a task that will fall to state and local governments, state courts, and social movements. That scale and location of change suggest leveraging the relationship between three different streams of policy and politics: a decent society, a civilized system of justice, and a condition of dignity. Meaningful reform to the landscape of security institutions after mass incarceration will require continued revitalization of the decent society and institutions of modern governance, like regulated labor markets with rights, civil rights law enforcement, and broad welfare institutions. Those seeking legislation for a more civilized security should consider specific reforms designed to diminish some of the barriers that “hidden sentences” and discrimination of other kinds often place in front of people who have arrests, convictions, or incarcerations on their record in accessing labor markets and welfare benefits.

The system of justice itself is one of those welfare institutions. Being secure against physical and emotional violence is a precondition for a life of equal dignity,

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

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ENDNOTES

¹ *Brown v. Plata*, 563 U.S. 493 (2011), <https://supreme.justia.com/cases/federal/us/563/493/>.

² The Fourteenth Amendment is America’s human rights charter. Like all such modern charters, it came only after the most horrendous bloodletting humans had seen, for the first time photographically: the U.S. Civil War. Beginning in the mid-twentieth century, the Supreme Court used its “incorporation” doctrine to hold the criminal procedure provisions of the Bill of Rights (the Fourth, Fifth, and Sixth Amendments) applicable to the states through their incorporation into the ideal of due process guaranteed against the states by the Fourteenth Amendment. During its 2018–2019 term, the Supreme Court added to the specificity of that charter by “incorporating” the “excessive fines” clause of the Eighth Amendment in *Timbs v. Indiana* 586 U.S. ___, 139 S. Ct. 682; 203 L. Ed. 2d 11 (2019).

³ Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014).

⁴ We could keep asking, but as I will sketch below, the Supreme Court will first have to undo a great deal of bad case law that authorizes uncivilized policing incompatible with respect for human dignity.

- ⁵ Ian Loader and Neil Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007).
- ⁶ Jeremy Bentham, *The Works of Jeremy Bentham, Volume 4: Panopticon, Constitution, Colonies, Codification*, ed. John Browning (Edinburgh: William Tait, 1843).
- ⁷ Niamh O’Sullivan, *Every Dark Hour: A History of Kilmainham Jail* (Dublin: Liberties Press, 2007).
- ⁸ Avishai Margalit, *The Decent Society* (Cambridge, Mass.: Harvard University Press, 1996); and Robert Bellah, Richard Madsen, William M. Sullivan, et al., *The Good Society* (New York: Random House, 1991).
- ⁹ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, N.C.: Duke University Press, 2009).
- ¹⁰ The massive wave of federal spending under both Presidents Trump and Biden in response to the COVID-19 pandemic and the likelihood of some further entitlement expansion during the Biden administration are all consistent with this reversal.
- ¹¹ *Miranda v. Arizona*, 384 U.S. 486 (1966), <https://supreme.justia.com/cases/federal/us/384/436/>.
- ¹² *Millerv. Fenton*, 474 U.S. 104 (1985), <https://supreme.justia.com/cases/federal/us/474/104/>.
- ¹³ Loader and Walker, *Civilizing Security*, 17 n. 4.
- ¹⁴ *Trop v. Dulles*, 356 U.S. 86 (1958), <https://supreme.justia.com/cases/federal/us/356/86/>.
- ¹⁵ *Estelle v. Gamble*, 429 U.S. 97 (1983), <https://supreme.justia.com/cases/federal/us/429/97/>.
- ¹⁶ *California v. Hodari D.*, 499 U.S. 621 (1991), <https://supreme.justia.com/cases/federal/us/499/621/>.
- ¹⁷ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), <https://supreme.justia.com/cases/federal/us/532/318/>.
- ¹⁸ *Florence v. Board of Chosen Freeholders*, 566 U.S. 318 (2012), <https://supreme.justia.com/cases/federal/us/566/318/>.
- ¹⁹ *Utah v. Strieff*, 579 U.S. ____ (2016), <https://supreme.justia.com/cases/federal/us/579/14-1373/>.
- ²⁰ Adam Nossiter, “France Dispatch: French Mayor Offers Shelter to Migrants Despite the Government’s Objections,” *The New York Times*, February 12, 2019, <https://nyti.ms/2URYsZH>.
- ²¹ *Ibid.*
- ²² Bruce Western, *Homeward: Life in the Year After Prison* (New York: Russell Sage Foundation, 2018).