Dignity, too

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Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity", 66 **Stan. L. Rev.** 987 (2013).

The police killing of Michael Brown this summer in Ferguson, Missouri, sparked a nationwide wave of outrage at heavy-handed police behavior generally and toward young men of color in particular. But scores of young black men are killed every year by the police, many in even more suspicious circumstances; what made Ferguson different? One significant element was the fact that police left Michael Brown's body exposed to public view and the hot sun for some four hours. Perhaps even more than the shooting of Michael Brown (which might yet be given an explanation), the exposure of his body for such a prolonged period, conveyed to millions through social media, constituted a striking violation of social norms of respect which appeared to have no possible explanation. Leaving his body to deteriorate in the view of his family and neighbors seemed to reflect the fact that police did not view Michael Brown as a human being, or his neighbors as citizens worthy of respect. The police shooting may in fact have been justified, but their treatment of Michael Brown's body defiled human dignity

The growing sense that the carceral state (both police and prisons) has become a threat to the human dignity of Americans is an important new dimension of political and legal opposition to the supersized role that it now plays in our lives. Objections to NSA digital snooping, outrage at mistreatment of mentally ill prisoners, and protests against the routinized degradation of "stop and frisk" policing are growing. And these arguments are working not just in the street but in courts, where in *Brown v. Plata* in May 2011, the Supreme Court reminded American states that prisoners "retain the essence of human dignity inherent in all person[s]." So far, however, the force of dignity has had little influence on challenges to police using their arrest and related powers under the Fourth Amendment.

In "Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a Pointless Indignity," Josh Bower's offers us a compelling argument for placing dignity as a core part of the Fourth Amendment analysis of such police action. In addition to showing how important human interests in law are implicated by dignity and ignored without it, Bower's use of dignity will help reassure dignity skeptics that the concept can be used in a disciplined and judicious way.

Bower's starts with a case that has frustrated many of the Court's criminal procedure scholars, 2001's *Atwater v. City of Lago Vista*, in which the majority upheld the arrest of Gail Atwater for a minor traffic violation (not wearing a seat or securing her children in seat belts) for which jail was not even a possible sanction once convicted. The case in which the majority acknowledged that the police officer's behavior was an example of a "pointless indignity" and a "gratuitous humiliation" is a powerful example of the limits of the legality principle as a protection against arbitrary state power. For centuries now, criminal lawyers and criminal law scholars have embraced the idea that state coercion in general, and punishment in particular, must be authorized by discoverable and clearly understandable law. This broad principle has constitutional effect in such doctrines as the bar on "ex post facto" laws and the "void for vagueness" principle. Bower's argues persuasively that the probable cause doctrine in the Fourth Amendment is another radiation of this idea, here applied to what Michel Foucault would have called the "capillary level," regulating when the police may interfere with a person.

Yet probable cause, and *Atwater*, are revealing as to why the legality principle, which for so long seemed a way to make criminal justice more fair and reasonable, has ceased to play this role in the age of mass incarceration. For a long time legality was loosely coupled to progress in reducing the arbitrariness and cruelty of criminal justice. By tying this civilizing process of criminal law to the centralized state and especially its law making power, legality harnessed the power of both democratization and professionalization. As states became more democratic and increased the suffrage and thus the political voice of previously marginalized citizens, criminal laws became less of a crude cudgel of class power and more of an individualized inquiry into guilt. As the exercise of police and penal power came to be tied to professional bureaucracies, the ability to reliably enforce legal values was improved. Neither process was flawless, but as we compare justice in the 1850s to the 1950s, the regression line of respect for human rights is at least modestly correlated upward with both the processes.

But the era of mass incarceration has reversed that. As “tough on crime” became a politically populist message, the historic restraint of democracy on criminal justice has turned into an escalating factor. As the resulting value of “governing through crime” has raised the political influence of prosecutors, and police, lawmakers have generated hundreds of criminal laws designed to increase the reach and scope of law enforcement. Professionalism and modernization of criminal justice agencies has generated its own bureaucratic demand for harsh justice. But if police can use scores of low level possession and simple conduct crimes (like not wearing a seat belt) to pick and choose who to arrest (and then search based on the authority of that arrest), legality becomes a black box surrounding whole groups of individuals and communities that police can act on with virtually no restraint.

Bowers sees dignity joining not replacing the legality principle. Fourth Amendment searches and seizures would require probable cause (the legality principle) and something more: a general reasonableness test in which the dignitary cost to the individual of police action would be part of the equation. As Bowers shows, this kind of general reasonableness has long been part of the Court’s Fourth Amendment jurisprudence, but limited to the areas bracketed off from criminal justice — the so called “special needs” category like school searches, civil warrants, and police stops to address “suspicious” behavior that does not arise to probable cause of crime.

For many observers dignity is just too broad and plastic a concept to place judicial authority on. Of course all of the great values in the Constitution — liberty, equality, and due process are broad. Bowers focuses (as does *Atwater*) on what should be a fairly uncontroversial core of a right to have government respect human dignity, and not subject its citizens to “gratuitous humiliation.” Humiliation, say being stripped naked, or subjected to unwanted probing in intimate places, subjects a person to a sense of being lower than human status, a subject of contempt to be toyed with. Even if such conduct does no direct physical harm, it denies that the subjectivity of the victim matters. This captures an aspect of the modern concept of dignity that both James Whitman and Jeremy Waldron have pointed to, that is that modern dignity retains a link to the hierarchical and aristocratic conception of dignity which originates in the Greco-Roman culture and survived in various ways in Europe until the 20th century. The modern human rights concept of dignity levels up ordinary citizenship to the dignitary rights of the old aristocracy. The modern citizen does not have the power or assets that sometimes came with aristocracy, but they retain the right to be treated as if their subjective experience matters. As Bowers shows, this concern is not altogether missing in our constitutional jurisprudence, just strangely under developed.

Of course contact with government agents can seem humiliating (like semi undressing in the TSA line), but it is not as humiliating (and therefore not incompatible with dignity) when the purposes for compliance with demands are transparent and reasonable. Not many cases will present as clearly gratuitous as the arrest of Atwater. Police will often have reasons that more closely align with judicial

understandings of reasonableness. This is especially true when the suspects are young, black and male (rather than white, female, and a mother, as was Atwater). However, Bowers is right to encourage lawyers to dig into the micro-justifications (and micro-degradations) that are endemic in the policing of minority communities and that have received widespread recognition since Ferguson.

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