

**THE PROCREATIVE POWER OF DIGNITY:
DIGNITY'S EVOLUTION IN THE VICTIMS' RIGHTS
MOVEMENT**

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ABSTRACT

A common theme throughout victims' rights laws is that crime victims should be treated with dignity and respect. This goal is intuitive and meets very few objections. However, defining the specific scope of a victim's dignity rights and the role that dignity plays within victims' rights jurisprudence remains elusive. Some courts treat dignity as merely hortatory language with no enforcement power, while others characterize dignity as a background norm to help give deeper meaning to other more specific victims' rights. Other courts treat the statutory and state constitutional invocations of victim dignity as a substantive right, which in and of itself, allows for the identification and creation of broader victims' rights. This Article charts how the former two approaches mirror broader legal discussions regarding how the concept of dignity undergirds constitutional rights. In the constitutional law context, dignity appropriately operates as a background value because it is not specifically codified in the Constitution: it is an unspoken value that helps give meaning and context to other specifically enumerated rights. Conversely, in many victims' rights laws, dignity has been elevated to a spoken value through its explicit codification in state constitutions and state and federal statutes. In these instances, courts should not limit dignity to a purely background interpretive role. Rather, this Article contends that dignity should function as a substantive right whereby it has the power to identify a broad spectrum of treatment for victims to ensure they are not dishonored in the criminal justice process.

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INTRODUCTION

A common theme throughout victims' rights laws is that crime victims should be treated with dignity and respect. This goal is intuitive and is rarely rejected outright. However, once one moves beyond generalities, the discussion regarding victim dignity often loses its form. Questions arise regarding what one means by "dignity." Allied with the challenge of defining dignity, one must ask what role or purpose dignity fulfills within the victims' rights movement. Is dignity an enforceable right in and of itself; can it open the door to new rights for victims; or does it merely serve an aspirational role by providing broad direction to courts regarding how victims should generally be integrated into the criminal justice system? This Article grapples with these questions and asserts that the victims' rights movement has helped dignity evolve from a background interpretive norm into a right in and of itself, which can also create new victims' rights.

Dignity is integral within much of American law. However, even within the broader context of the American legal system, dignity is a topic that leaves philosophers, scholars, and jurists fumbling to define the term and its function within the law. Most coalesce around Kantian notions of honoring the inherent value and worth of an individual, but there remains a lack of tangible form to the topic. Dignity's complex and muddled nature therefore raises challenges when it is invoked as a standard by which victims should be treated.

Without a clear sense of how and why dignity is important to the victims' rights movement, its inherent power is limited.

Within federal constitutional jurisprudence, dignity is generally treated as what I define as an unspoken interpretive value. Unlike specific rights such as "due process" or "free speech," dignity is a term that does not appear in any of our founding documents, and is therefore "unspoken." Despite its unspoken nature, dignity nonetheless plays a vital role in helping courts interpret and evaluate otherwise spoken rights and liberties. The view of dignity as an unspoken interpretive value predominates scholarly and judicial discussion on the topic.

In contrast, within the victims' rights movement, dignity shifted from being solely an unspoken value to being a spoken value. Dignity is explicitly referenced and codified in state victims' rights constitutions and amendments, as well as in state and federal legislation. Because of its explicitly spoken nature, this Article asserts dignity can move beyond serving merely as a background norm to bearing fruit to a broader spectrum of new and otherwise uncodified victims' rights. Dignity's procreative power should give courts and advocates freedom to examine all facets of the justice system and more willingly embrace dignity's procreative powers to further the goals of the victims' rights movement.

This Article proceeds in three parts. Part I provides a broad discussion regarding how dignity has been used throughout history as well as how it has generally been treated as an unspoken value in federal constitutional law.¹ Part II addresses how dignity has evolved in the victims' rights movement.² This part provides a brief history of the goals of the victims' rights movement, and notes how dignity is defined and sometimes limited within victims' rights laws. This section also contrasts those courts and jurisdictions that treat dignity as an unspoken interpretive value with those that are beginning to fully embrace dignity's spoken and procreative powers. Finally, Part III addresses some of the potential concerns associated with treating dignity as a spoken and procreative value.³ The Article concludes by advocating that the legal community should more readily accept dignity as a spoken and procreative value, and in so doing, should broaden the scope of victims' rights within the American legal system.

1. See *infra* Part I.

2. See *infra* Part II.

3. See *infra* Part III.

I. DIGNITY AS AN UNSPOKEN INTERPRETIVE VALUE

A. *Kant's Dignity*

Throughout human history there has existed a collective sense that individuals possess an inherent dignity that should not be undermined or diminished by others.⁴ Hence, the general proposition that crime victims should be treated with dignity and respect by government actors is understandable. However, defining with particularity dignity's role within our legal system presents more of a challenge. While dignity is a concept that appears to animate much of American law, the word does not appear within any of our founding documents.⁵ It is a silent and unspoken principle. When dignity is invoked in legal discourse, its meaning and function is often presumed, with little discussion or testing of the foundations upon which the term rests.⁶ This somewhat presumptive approach to dignity has resulted in a messy and fluid doctrine.⁷ Without a clear sense of what dignity means, as well as the role it is meant to play within legal dialogue, the gravity we instinctively attribute to the term is diminished, thereby undermining its very invocation by those who seek to harness its heft.⁸

Many credit the philosopher Immanuel Kant with establishing contemporary understandings of dignity. Kant built upon the ideas proffered by classical philosophers and theologians regarding the central traits of humanity.⁹ He emphasized a person's ability to en-

4. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 68–69 (2011); Maxine D. Goodman, *Human Dignity in Supreme Court Jurisprudence*, 84 NEB. L. REV. 740, 745–46 (2006).

5. Glensy, *supra* note 4, at 70; Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 528 (2006).

6. Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. & PUB. POL'Y 81, 81 (2003); Wright, *supra* note 5, at 537–38.

7. Glensy, *supra* note 4, at 67 (“[I]t has been often remarked that the present use of dignity within a judicial opinion functions as a ‘hollow rhetorical’ device and thus is worthy of little if any consequence.”); Goodman, *supra* note 4, at 747 (noting one commentator who has termed dignity's role in the law as “episodic and underdeveloped”); Henry, *supra* note 5, at 173–75 (noting commentators' negative view of dignity); David A. Hyman, *Does Technology Spell Trouble with a Capital “T”? Human Dignity and Public Policy*, 27 HARV. L. J. & PUB. POL'Y 3, 4 (2003) (noting “difficulties in using human dignity as a meaningful public standard”).

8. See Glensy, *supra* note 4, at 66–68 (describing dignity as an “empty vessel of questionable utility”); Henry, *supra* note 5, at 174 (quoting Ruth Macklin's consideration of dignity as a “useless concept”).

9. See John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 677–78 (2008) (Kant brought the meaning of dignity into modern era, building in part, on ideas of Cicero and early theologians); see also Glensy, *supra* note 4, at 74–77 (noting religious influences on the concept of dignity and Kant's influence on secularizing the concept of digni-

gage in rational, autonomous, and self-directed thought,¹⁰ and the capacity to make moral decisions and take moral actions.¹¹ Together, these things highlighted the exceptional nature of humanity and the inherent dignity contained therein.¹² Because Kant viewed dignity as an integral and central characteristic of what it means to be human, he also contended that dignity was without a price.¹³ He suggested that if something had a price, it could be substituted with something of equal value.¹⁴ In contrast, if something “is exalted above all price and so admits of no equivalent, then it has dignity.”¹⁵ Because dignity cannot be traded nor sold, it must be honored in all individuals. This premise leads to Kant’s famous categorical imperative, which guides people to “[a]ct in such a way that you treat humanity, whether in your own person or in the person of any other, both in your person and in the person of each other individual, always at the same time as an end and never simply as a means.”¹⁶ To treat an individual contrary to Kant’s edict would violate that person’s dignity.¹⁷

Kant’s imperative did not merely apply to how individuals interacted with one another, but also extended to how the government

ty to create a modern “normative legal ideal”); Wright, *supra* note 5, at 539 (noting the arguments raised by Augustine and Thomas Aquinas regarding humans created in the likeness of God).

10. Castiglione, *supra* note 9, at 678 (“Kant, like Cicero, believed human beings have dignity because they have reason”); Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution’s “Dignity” Clause with Possible Applications*, 61 MONT. L. REV. 301, 310 (2000) (“For Kant, the concept of the individual as capable of rational, self-directed, and responsible action, logically required our respect”); Glensy, *supra* note 4, at 76 (“[A]utonomy and the consequent dignity that it entails are primarily derived from sentience, or the ability of humans to form a reasoned thought.”); Goodman, *supra* note 4, at 749 (noting that dignity arises from human autonomy and rationality).

11. Castiglione, *supra* note 9, at 678 (“human beings have dignity because they have reason”); *see also* Wright, *supra* note 5, at 543 (Kant refers to “our capacity for free and rational moral choice”).

12. *See* Glensy, *supra* note 4, at 76 (noting that dignity is a consequence of human autonomy); Goodman, *supra* note 4, at 749 (explaining that dignity exists as an intrinsic quality).

13. Glensy, *supra* note 4, at 76 (“[H]umanity is an end in itself and bears no price.”); Goodman, *supra* note 4, at 749 (“Kant contrasted human dignity from (with) something having a price.”); Wright, *supra* note 5, at 543 (“Kant distinguishes between dignity and price.”).

14. Goodman, *supra* note 4, at 749 (“Something with a price can be substituted for or replaced by something else of equal value.”).

15. Wright, *supra* note 5, at 543 (citing IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 103 (H.J. Paton trans., Harper Torchbooks 1964) (1785)).

16. Castiglione, *supra* note 9, at 678 (citing KATRIN FLIKSCHUCH, *KANT AND MODERN POLITICAL PHILOSOPHY* 92 (Cambridge Univ. Press 2000)) (“[E]very individual has the right to be treated as an end, not as a means.”); Goodman, *supra* note 4, at 749.

17. Castiglione, *supra* note 9, at 678 (noting that a violation of the categorical imperative is a violation of human dignity).

should interact with its citizens. “For Kant, the concept of the individual as capable of rational, self-directed, and responsible action, logically required our respect, and that respect must be expressed politically, in rights guarantee[d by government of] the liberties necessary for the realization of this distinctively human capacity for autonomous, moral action.”¹⁸ Therefore, under Kant’s categorical imperative, individuals should not be treated as an instrumentality by the state.¹⁹

Kant’s theories on dignity are evident amongst relatively current philosophical discussions of the topic.²⁰ Of particular note is Professor William A. Parent, who defines dignity as a “negative moral right not to be regarded or treated with unjust personal disparagement [and] not to be subject to or victimized by unjust attitudes or acts of contempt.”²¹ Under this variant of dignity, all individuals should be treated equally under the law and be free from “arbitrary government action that demeans, humiliates or degrades.”²² Similarly, Professor Jerry Mashaw equated dignity with due process.²³ His due process dignitary theory “holds that when the state fails to listen to individuals, it diminishes them and impairs their dignity. “Therefore, to protect individual dignity, due process must provide a meaningful opportunity to be heard.”²⁴ In particular, he notes that an inept process

[i]mplicitly defines the participants as objects, subject to infinite manipulation by the system. To avoid contributing to this sense of alienation, terror, and ultimately self-hatred, a

18. Clifford & Huff, *supra* note 10, at 310.

19. Glensy, *supra* note 4, at 76; *see also* Goodman, *supra* note 4, at 751 (“[D]ignity gives each of us equal standing against arbitrary government action that demeans, humiliates, and degrades.”).

20. *See, e.g.*, Glensy, *supra* note 4, at 79–82 (detailing contemporary writers’ development of dignity); Wright, *supra* note 5, at 548–58.

21. Goodman, *supra* note 4, at 751; *see also* MICHAEL J. MEYER, *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (W.A. Parent, ed. Cornell Univ. 1992).

22. Goodman, *supra* note 4, at 751.

23. *See* JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 162–67 (1985); Jerry L. Mashaw, *Administrative Due Process: The Question for a Dignitary Theory*, 61 B.U. L. REV. 885, 886–87 (1981); Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976); *see also* Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 972 (2009) (discussing Mashaw’s Due Process work); Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 554 (2012); Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 94–97 (2015); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 42–43 (1992).

24. Rutherford, *supra* note 23, at 42–43.

decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works.²⁵

In these more modern formulations of dignity by Professors Parent and Mashaw, the Kantian influence is evident. Where the state interacts with its citizens, it should treat them with value and worth, and not as a means to an end.

From our earliest utterances, dignity has been part of human philosophical conversations.²⁶ Because human beings could reason and make autonomous decisions, humanity was inherently dignified and, therefore, must be treated as such.²⁷ This treatment required honoring the dignity of another rather than treating that person as a means to fulfill an end. It also extended to exchanges between individuals and their governments.²⁸ The state was called to avoid treating citizens as instrumentalities and instead to ensure the equal and fair treatment of all.²⁹

B. *Dignity as a Background Interpretive Norm*

While the concept of dignity is prominent within philosophical thought, its specific definition and role within American jurisprudence continues to evolve and develop.³⁰ Examining how the courts have employed dignity in the course of interpreting and evaluating federal constitutional rights provides a rich resource from which to fashion an understanding of dignity's role within American law. So doing, this Article draws with particularity on the separate works of Professors Rex Glensy and Leslie Henry. In his article *The Right to Dignity*,³¹ Professor Glensy lays out four different functions dignity

25. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, *supra* note 23, at 175–76.

26. Castiglione, *supra* note 9, at 676 (Cicero defined dignity as “human beings as having worth and an expectation of respect by virtue of being human”); Glensy, *supra* note 4, at 74 (Cicero identified humanity’s dignity based on humans’ superior minds); Wright, *supra* note 5, at 538–39 (philosophers such as Plato, Aristotle, the Stoics, and Renaissance thinkers recognized humanity’s inherent strengths and qualities).

27. See Castiglione, *supra* note 9, at 677 (“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 shaper of his future.”).

28. See Clifford & Huff, *supra* note 10, at 310.

29. See Glensy, *supra* note 4, at 76.

30. See *supra* notes 4–8 and accompanying text.

31. Glensy, *supra* note 4, at 65.

serves in the law.³² Likewise, in her article *The Jurisprudence of Dignity*,³³ Professor Henry seeks to define dignity based on how it appears in Supreme Court jurisprudence.³⁴ Taken together, Professors Glensy and Henry's scholarship establish a structure upon which to examine dignity and its place in the victims' rights movement.

In wrestling with dignity, Professors Glensy and Henry come at the topic from slightly different perspectives. Professor Henry asserts that dignity can be defined as an expression of rank,³⁵ liberty,³⁶ equality,³⁷ personal integrity,³⁸ and as a collective virtue.³⁹ More broadly, Professor Glensy concludes that regardless of how dignity is defined, it serves a variety of functions within the law.⁴⁰ Under his analysis, dignity can function as a substantive positive right,⁴¹ a background interpretive norm,⁴² a proxy device,⁴³ or as hortatory language.⁴⁴

While the approaches taken by Professors Glensy and Henry are distinct, their resulting analyses overlap. First, Professor Glensy's functional treatment of dignity as a hortatory device aligns with Professor Henry's definition of dignity as a collective virtue. Second, one can draw parallels between Professor Glensy's determination that dignity can serve as a substantive positive right with Professor Henry's identification of dignity as rank, and in limited situations, dignity as personal integrity. Third, Professor Glensy's argument that dignity can serve as a background interpretive norm coincides with Professor Henry's assertion that dignity is manifested within the law as equality, liberty, and personal integrity. It is this third and final pairing which represents the most prevalent legal approach to dignity.

32. *Id.* at 111-40 (explaining four approaches: "The Positive Rights Approach," "The Negative Rights Approach," "The Proxy Approach," and "The Expressive Approach").

33. *See generally* Henry, *supra* note 5, at 169.

34. *Id.* at 189-229 (explaining five concepts of dignity: "Institutional Status as Dignity," "Equality as Dignity," "Liberty as Dignity," "Personal Integrity as Dignity," and "Collective Virtue as Dignity").

35. *Id.* at 190.

36. *Id.* at 206-08.

37. *Id.* at 202.

38. *Id.* at 212.

39. *See id.* at 220.

40. *See* Glensy, *supra* note 4, at 142.

41. *See id.* at 111-20.

42. *See id.* at 120-26.

43. *See id.* at 126-34.

44. *See id.* at 134-40.

As to the first pairing, Professor Henry's definition of dignity as a collective virtue aligns nicely with Professor Glensy's suggestion that dignity can serve as a hortatory device. Here, Professor Henry argues that "[c]ollective virtue as dignity addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity. It is less concerned with individual dignity per se than with how a society values the totality of human life."⁴⁵ This expression of dignity invokes the Kantian imperative that treating a person as a means to an end violates that person's dignity.⁴⁶ How we collectively treat one another, especially when that treatment is degrading or inhumane, not only undermines the dignity of others, but also lowers the overall dignity and virtue of society.⁴⁷ Similarly, in categorizing dignity's function as a hortatory device, Professor Glensy notes that when a court or the legislature invokes the term, those invocations represent a collective understanding of "aspirations to be sought by all participating members of society."⁴⁸ Hence, when the word dignity is stated, it is done to emphasize the weight of the topic at hand and to signal to listeners the importance of the pronouncement.⁴⁹

The challenge with using dignity as a hortatory device or a collective virtue is that it runs the risk of becoming an empty "rhetorical flourish."⁵⁰ Given dignity's loose definitional form,⁵¹ little prevents the term from being invoked for any purpose or in any setting, thereby undermining the gravity that most intuitively associate with the word. If dignity is limited solely as hortatory language or a collective virtue, scholars and jurists would need to tighten its defini-

45. Henry, *supra* note 5, at 220–21.

46. See *supra* notes 9–25 and accompanying text.

47. Henry, *supra* note 5, at 221.

48. Glensy, *supra* note 4, at 136.

49. See *id.* at 137; see, e.g., *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (explaining that punishing someone by leaving him tied for several hours to a hitching post was "antithetical to human dignity . . . [and] degrading and dangerous."); *Tropp v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); *Rochin v. California*, 342 U.S. 165, 173 (1952) (stating that forced stomach pumping violated "the general requirement that States in their prosecutions respect certain decencies of civilized conduct"); *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (noting that the majority's conclusion that racial classifications were permissible was to "adopt one of the cruelest rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups . . ."). These cases all demonstrate the Court invoking the language of dignity to serve as an "alarm bell to signal conduct so reprehensible as to violate the core precept of what it means to be human." Glensy, *supra* note 4, at 90.

50. Glensy, *supra* note 4, at 137, 139–40.

51. See *supra* notes 6–8 and accompanying text.

tional scope and cabin its use.⁵² Otherwise, it could fall prey to becoming a lightweight concept.

For example, the Illinois state Constitution contains a section promoting individual dignity. That clause states: "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."⁵³ In *AIDA v. Time Warner Entertainment Co., L.P.*,⁵⁴ the non-profit organization AIDA, which sought to promote the history, culture, and language of Italian immigrants in the United States, brought an action asserting that the television show *The Sopranos* violated the state's Individual Dignity Clause. The court rejected the group's claims, ruling the state's Individual Dignity Clause was purely hortatory in nature.⁵⁵ The state court noted that nothing in that portion of the state constitution created a cause of action.⁵⁶ Rather, "[t]he plain and ordinary meaning of the clause is to condemn [certain] communications, not to make them unlawful. The legislature is merely expressing its distaste and disapproval of such communications."⁵⁷ So doing, the state stripped the term "dignity" of any strength or heft. State condemnation without enforcement power reduces that condemnation to a simple suggestion that the public can reject or accept. Hence, treating dignity merely as a collective virtue or hortatory device is limiting.

The second area where Professor Glensy and Henry's discussions overlap is where Professor Glensy suggests that dignity can serve as a substantive positive right⁵⁸ and Professor Henry identifies dignity as rank along with personal integrity.⁵⁹ Professor Glensy's substan-

52. For example, there are several instances in the federal code where Congress has bestowed dignity on a variety of different things, including the federal parks, 54 U.S.C. § 100101(b), the agricultural industry, 36 U.S.C. § 20102(4), and the Thurgood Marshall Federal Judiciary Building, 40 U.S.C. § 6502(c)(3)(C). While I have no intent to denigrate the things honored by Congress, if one were seeking to strengthen dignity by limiting its application, one might question whether the many different things to which Congress has attributed dignity has resulted in watering down the term.

53. ILL. CONST. art. I, § 20.

54. 772 N.E.2d 953, 956 (Ill. App. Ct. 2002).

55. *Id.* at 961.

56. *See id.*

57. *Id.*

58. Glensy, *supra* note 4, at 111-20.

59. Henry, *supra* note 5, at 190-91, 212-20.

tive legal rights approach⁶⁰ proffers that “respect for human dignity is not merely a vague goal,”⁶¹ but rather a private right of action that individuals could bring against one another as well as the government.⁶² Here, Professor Henry’s discussions regarding dignity as rank⁶³ and dignity as personal integrity⁶⁴ resonate.

Dignity as rank is not frequently invoked within U.S. law, likely because of its incongruence with a more Kantian definition of dignity.⁶⁵ Originally stemming from the Roman political aristocracy, the term *dignitas* was used to identify a hierarchy among members of society.⁶⁶ In this context, dignity is not an inherent trait, but rather something that could be bestowed upon an individual or be taken away.⁶⁷ A particular place where this concept of dignity has appeared in U.S. law is how jurists have discussed the concept of dignity in regards to courts and governments, other nations, and the sovereign immunity of states.⁶⁸

Professor Henry also describes dignity as personal integrity,⁶⁹ which could allow for the enforcement of a substantive positive right. The defamation and privacy-based torts provide an entrée to this variant of dignity.⁷⁰ When one considers the four privacy-based torts as formulated by William L. Prosser, the preservation of individual integrity and dignity underlies each.⁷¹ Whether framed as

60. Glensy, *supra* note 4, at 111–20; see also Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133, 142–43, 145 (2003).

61. Glensy, *supra* note 4, at 111.

62. *Id.*

63. See Henry, *supra* note 5, at 190–99.

64. See *id.* at 212–20.

65. See *supra* Part I.A.

66. Henry, *supra* note 5, at 190–91.

67. *Id.*

68. See *id.* at 195–99. See generally Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); Jeremy M. Sher, *A Question of Dignity: The Renewed Significance of James Wilson’s Writings on Popular Sovereignty in the Wake of Alden v. Maine*, 61 N.Y.U. ANN. SURV. AM. L. 591 (2005); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003) (discussing how the present court justifies according dignity to states by invoking their “status as sovereign entities”).

69. See Henry, *supra* note 5, at 212–20. Dignity as personal integrity also arises in the context of Fourth Amendment search and seizure settings. See *infra* note 92 and accompanying text.

70. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”).

71. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

“intrusion upon . . . seclusion,” “public disclosure of embarrassing . . . facts,” “false light,” or “[a]ppropriation,”⁷² each of these privacy-based causes of action seeks to protect a person’s “independence, dignity and integrity.”⁷³ What is distinctive about this variant of dignity, however, is that it is far more focused on how individuals treat one another rather than on how the state and its citizens interact.⁷⁴

In terms of the relationship between individuals and the state, Professor Glensy’s substantive legal rights approach to dignity suggests that instead of the government merely being prohibited from taking certain actions which violate citizens’ constitutionally articulated civil rights, the government would also be bound to provide citizens with specific positive rights to further their dignity.⁷⁵ Examples might include increased welfare entitlements, housing, health care, and education.⁷⁶

72. *Id.* at 389; see also Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 965 (1964).

73. Bloustein, *supra* note 72, at 971; Glensy, *supra* note 4, at 115.

74. See Bloustein, *supra* note 72, at 971-93 (discussing each privacy-based tort action as a private citizen infringing on another private citizen).

75. Such an approach is not entirely uncommon. Many foreign nations place positive-rights obligations on their governments rather than take the negative-rights approach, the latter predominating in the United States. See Glensy, *supra* note 4, at 96-106, 112-13; Klug, *supra* note 60, at 149-55.

76. Glensy, *supra* note 4, at 113-14. To a very limited measure, the Supreme Court has hinted at this type of dignity. In *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970), the Court addressed whether in the process of discontinuing welfare benefits, the government was obliged to provide pre-termination hearings to individuals who previously received those benefits. Couched in the terms of procedural due process, the Court concluded that such a hearing was necessary because procedural due process “assumes a ‘basic commitment . . . to foster the dignity and well-being of persons within its border.’” Glensy, *supra* note 4, at 116 (quoting *Goldberg*, 397 U.S. at 264-65); see also *supra* notes 23-25 and accompanying text. While the Supreme Court has subsequently limited the scope of the *Goldberg* holding, see *Mathews v. El-dridge*, 424 U.S. 319, 348-49 (1976) (distinguishing and limiting *Goldberg*), its suggestion that the Procedural Due Process Clause exists to protect dignity has been heralded by scholars to advance arguments that process, in and of itself, should be given more value within our legal system. See, e.g., MASHAW, *supra* note 23; Mark R. Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 DENV. U. L. REV. 303, 316-17 (1995); Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85-96 (2010); Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 330-32 (2007); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 262-64 (2004). By ensuring that all individuals receive fair process, the state honors its citizens and treats them with dignity. Perhaps too in this context, dignity through fair treatment highlights dignity’s role as a collective virtue. See *supra* notes 4-64. How our government treats individuals during an adjudicative process sets a benchmark for who we are as a society.

A drawback to a substantive legal rights approach to dignity is that it extends far beyond U.S. law's current structures.⁷⁷ It is commonly understood "that the Constitution is a charter of negative rather than positive liberties."⁷⁸ In a Kantian manner, all individuals possess specific rights, which exist not because those rights were granted by the government, but rather, because humans inherently possess those rights.⁷⁹ This notion of negative liberties directs that the Constitution lays out the rights already possessed by the citizenry and directs that the government may not infringe upon those rights.⁸⁰ Hence, there is the concern that in treating dignity as a substantive positive right, one might upend the government's role as a negative protector of rights rather than as a positive grantor of them.

The final area where Professor Glensy and Professor Henry's theories commingle is where Professor Glensy discusses dignity as a background interpretive norm or proxy,⁸¹ and Professor Henry defines dignity as equality, liberty, and personal integrity.⁸² Despite not appearing in our founding documents, dignity is a term that is frequently invoked by the Supreme Court to give meaning to explicitly stated rights and liberties.⁸³ When dignity serves as a background norm, it helps explain why the government is negatively bound from violating some other more specific and articulated right.⁸⁴ Similarly, "[u]nder the proxy approach to the right to dignity, the invocation of a dignitary interest in a particular circumstance does not signify something independent of another enumerated right, but rather acts as a proxy for that right."⁸⁵ Hence, the term dignity can be used as a way to bring together and describe a variety of closely related, if not inseparable concepts that together comprise dignity.⁸⁶ Dignity therefore stands as a composite synonym for such closely intertwined terms as personhood, autonomy, liberty,

77. Glensy, *supra* note 4, at 113-15.

78. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (citing Harris v. McRae, 448 U.S. 297, 318 (1980)).

79. See Glensy, *supra* note 4, at 96-97.

80. See Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 362 (2014); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 865-74 (2001); Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 33 (2011).

81. Glensy, *supra* note 4, at 120-34.

82. See *supra* notes 45-47 and accompanying text.

83. See Glensy, *supra* note 4, at 121-22.

84. *Id.* at 121; see also Klug, *supra* note 60, at 147.

85. Glensy, *supra* note 4, at 126; see also Henry, *supra* note 5, at 181-82 ("[D]ignity's features are so well aligned with some other concept that dignity is in fact reducible to that concept.").

86. See Glensy, *supra* note 4, at 128.

and equality.⁸⁷ It stands in for, and represents a part of, the more specific terms it is representing, rather than existing as its own noun.

Using dignity as a background norm best describes how the Supreme Court has generally approached the term. For example, in the Court's Equal Protection jurisprudence as well as in the Civil Rights cases, dignity plays a central role in explaining why state distinctions on the basis of race should be treated with great suspicion.⁸⁸ Likewise, when examining the scope of the Fifth and Fourteenth Amendments' Substantive Due Process clauses, the Court invokes dignity as an animating principle to support a woman's right to make certain procreative decisions,⁸⁹ individuals' rights to make marriage and child rearing choices,⁹⁰ as well as decisions regarding how to be intimate with others.⁹¹ Finally, when the Court has dis-

87. *Id.* at 127–28.

88. *See, e.g.,* *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (noting that classifying individuals on the basis of race is “to adopt one of the cruelest rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups”); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)) (“[O]ne of the principle reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and individual qualities.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 99-872, at 2370 (1964)) (stating that the core purpose of Civil Rights Act was to “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”). It is here where Professor Henry equates dignity with equality. *See* Henry, *supra* note 5, at 199–206.

89. *See, e.g.,* *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (“[A] law that forbids abortion would condemn many American women to lives that lack dignity”); *Planned Parenthood of 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 the mystery of human life.”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (“Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy.”); *see also* *Armstrong v. State*, 989 P.2d 364, 389 (Mont. 1999) (“Respect for the dignity of each individual . . . demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions.”).

90. *See, e.g.,* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (deeming same sex marriage a constitutionally protected right); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (recognizing the fundamental right of parents to raise their children in the way they see fit); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the fundamental right to marriage);

91. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their private lives and still retain their dignity as free persons.”). It is here where Professor Henry defines dignity as liberty. *See* Henry, *supra* note 5, at 206–12.

cussed the scope of the Fourth Amendment's protection against unreasonable searches and seizures, preserving individual privacy and dignity is the benchmark against which the government action is evaluated.⁹²

When the Court invokes the term dignity in each of these settings, it informs "our understanding of how all the other protected rights must be interpreted. Here, dignity is not merely the general goal served by the protection of human rights, but rather the lens through which all protected rights should be interpreted."⁹³ Therefore, just as one may invoke his or her health to explain why he or she exercises, eats a particular diet, or aims to sleep a set number of hours each night, courts invoke dignity to explain why our legal system should treat people equally, honor individual decisions, and punish people fairly. Inversely, when the state seeks to punish someone, limit a person's individual decisions, or treat them differently from similarly situated individuals, society should be prompted to ask whether such actions violate the dignity of those so affect-

92. See Glensy, *supra* note 4, at 89; see also, e.g., *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (noting that one of the individual interests supported by the "knock-and-announce rule" is to give individuals an opportunity to preserve their dignity and privacy); *Winston v. Lee*, 470 U.S. 753, 767 (1985) (forcing an individual to undergo surgery so that the state can obtain evidence is beyond the bounds of the Fourth Amendment because of the extensive intrusion of bodily integrity); *Rochin v. California*, 342 U.S. 165, 174 (1952) (noting that involuntary stomach pumping was "brutal" and "offensive to human dignity."). *But see* *Schmerber v. California*, 384 U.S. 757, 772 (1996) (holding that blood alcohol testing was not a Fourth Amendment violation); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 678 (1989) (holding "that the suspicionless [urine] testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable."); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 633-34 (1989) (finding that employee blood and urine testing was reasonable under the Fourth Amendment). The dissents in both *Skinner* and *Von Raab* nonetheless invoked the term dignity several times in disagreeing with the majority's conclusions that the searches in those cases were permissible. See, e.g., *Von Raab*, 489 U.S. at 686 (Scalia, J., dissenting) (requiring an individual to take a urine test, where a monitor listened to ensure that the test taker was not cheating in any manner, was an "affront to their dignity" because it was intrusive); *Skinner*, 489 U.S. at 644 (Marshall, J., dissenting) ("Compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the 'personal privacy and dignity against unwarranted intrusion by the States' against which the Fourth Amendment protects."). In this context, Professor Henry links dignity with personal integrity. See Henry, *supra* note 5, at 215-16. Dignity as liberty also is linked to Fifth Amendment self-incrimination decisions; see generally Goodman, *supra* note 4, at 765-67; Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *HOW. L. J.* 145, 180 (1984), as well as in First Amendment free expression matters; see generally Clifford & Huff, *supra* note 10, at 312-14; Goodman, *supra* note 4, at 786-89; Wright, *supra* note 5, at 564-75, and right-to-die controversies; see generally Goodman, *supra* note 4, at 779-83.

93. Klug, *supra* note 60, at 144-45; see also Glensy, *supra* note 4, at 122 (describing "a certain synonymy between dignity and human rights"); Goodman, *supra* note 4, at 743 ("[T]he Court has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees.").

ed. In the former example, dignity is the goal. In the latter example, dignity serves as the benchmark against which to evaluate the government's actions. Hence, while not a right in and of itself, dignity can be used to explain why we have specific rights as well as to determine the scope of those rights.⁹⁴

As Professors Glensy and Henry's work exemplifies, how we define dignity intersects with how dignity functions within legal discourse. Under our current legal constructs, dignity is least likely to be invoked as a substantive positive right. Rather, we most frequently use it to identify background constitutional norms or to highlight broader collective ideals in the form of a hortatory device.⁹⁵ In these latter categories, dignity is an unspoken value. It is invoked, despite its absence in our founding texts, to give those texts deeper meaning. Therefore, there is universal agreement that dignity is an important, if not essential, ingredient in understanding the structure of American government and the relationship between the government and the people. As Professor Glensy noted:

[D]ignity is routinely invoked to make extremely foundational points that range from the notion that the right to dignity is the underlying source of some of the most important rights in the Bill of Rights and the Reconstruction Amendments, to statements that dignity is *the* motivating force behind the whole Constitution itself: "the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty."⁹⁶

Dignity's role as a background norm or as a means to signal the importance of certain government actions helps guide us in giving meaning to our spoken constitutional rights.⁹⁷ Hence, despite being

94. Wright, *supra* note 5, at 528.

95. Glensy, *supra* note 4, at 120.

96. *Id.* at 93 (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); Henry, *supra* note 5, at 181 ("The Court's repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights."); *see also* Clifford & Huff, *supra* note 10, at 313-14 (footnotes omitted) ("[T]he Court assumes that the dignity of persons is a central, foundational ideal of our political tradition closely allied to our ideals of liberty and autonomy. Respect for dignity affirms the worth of the individual as capable of making autonomous decisions regarding what to say, what medical care to accept or reject, or whether to bear a child; or it protects the individual from degradation by an attack on reputation or by the arbitrary treatment of government agents.").

97. *See supra* notes 40-44 and accompanying text.

a silent value, dignity reverberates throughout constitutional jurisprudence.

C. *Dignity Evolving Beyond its Unspoken Role?*

Treating dignity solely as a silent interpretive value may not be appropriate in the victims' rights context. Indeed, the analysis must shift when dignity is not a silent value, but instead is explicitly stated and codified in state victim rights amendments and constitutional provisions,⁹⁸ along with state⁹⁹ and federal law.¹⁰⁰ When dignity is spoken rather than silent, it should be treated as more than a background interpretive norm. Instead, it should be elevated to the same level as such terms as "equal protection" and "due process." Such terms allow courts and legislatures to develop additional laws to give those terms tangible and enforceable meaning. The same should be true for dignity when it is explicitly spoken in the law.

At least one state has approached dignity in this manner. The Montana Constitution includes a clause specifically referencing the dignity of all its citizens. Article II, § 4 of the state constitution reads:

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

98. See ARIZ. CONST. art. II, § 2.1(A)(1)(LexisNexis through all 2016 legislation); CAL. CONST. art. I, § 28(a)(2); IDAHO CONST. art. I, § 22(1); ILL. CONST. art. I, § 8.1(a) (LexisNexis through all 2015 legislation); IND. CONST. art. I, § 13(b); LA. CONST. art. I, § 25 (LexisNexis through all 2015 Legislation); MD. CONST. art. XLVII(a); MICH. CONST. art. I, § 24(1); MISS. CONST. art. III, § 26A(1); N.M. CONST. art. II, § 24(A)(i); OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34A (LexisNexis through Act of the 2015–2016 Legislative Sess.); OR. CONST. art. I, § 42(1); R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24(A)(1); TEX. CONST. art. I, § 30(a)(1); UTAH CONST. art. I, § 28(1)(a); VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

99. CAL. PENAL CODE § 679 (Deering 2016); COLO. REV. STAT. § 24-4.1-302.5(1)(a) (2016); GA. CODE ANN. § 17-17-1(9) (2016); HAW. REV. STAT. ANN. § 801D-1 (Lexis Nexis 2016); IDAHO CODE § 19-5306(1)(a) (2016); 725 ILL. COMP. STAT. ANN. 120/2 (2016); LA. STAT. ANN. § 46:1841 (2016); N.H. REV. STAT. ANN. § 21-M:8-k(II)(a) (Lexis Nexis 2016); N.J. STAT. ANN. § 52:4B-36(a) (2016); N.M. STAT. ANN. § 31-26-4.A (Lexis Nexis 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 11.102 (West 2016); R.I. GEN. LAWS § 12-28-2(1) (2016); TENN. CODE ANN. § 40-38-102(a)(1) (2016); UTAH CODE ANN. § 77-37-1 (Lexis Nexis 2016); VT. STAT. ANN. tit 13, § 5303(a) (West 2016); VA. CODE ANN. § 19.2-11.01(A) (2016); WASH. REV. CODE ANN. § 7.69.010 (West 2016);

100. 18 U.S.C. § 3771(a)(8) (2016) (stating that victims have "the right to be treated with fairness and with respect for the victim's dignity and privacy").

political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.¹⁰¹

Several Montana cases focus on the equal protection language which appears in article II, § 4,¹⁰² but there have been a few instances in which the state supreme court has focused its attention on the dignity language contained in its constitution.¹⁰³ These cases indicate that dignity can be employed not only as a background principle to help provide meaning to other rights afforded to citizens under the state's laws and constitution, but also as a right in and of itself.

In particular, in *Walker v. State*,¹⁰⁴ the Montana Supreme Court addressed whether a state prisoner's punishment violated the state's prohibition against cruel and unusual punishment, along with the state's requirement that "the dignity of the human being is inviolable."¹⁰⁵ In addressing the prisoner's claims, the court first indicated that the state constitution's individual dignity provision should be read in concert with other individual rights, to give those other rights broader meaning. Specifically, the court stated:

Just as we read the privacy provision of the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans with greater protections from government intrusion, so too do we read the dignity provision of the Montana Constitution together with [the state cruel and unusual punishment provision] to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution. The federal constitution does not expressly provide for the right to human dignity.¹⁰⁶

101. MONT. CONST. art. II, § 4; see also Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Klug, *supra* note 60, at 60; Clifford & Huff, *supra* note 10, at 302 (quoting language from the Constitution).

102. See *Albinger v. Harris*, 48 P.3d 711, 719 (Mont. 2002); *Stratemeyer v. Lincoln City*, 855 P.2d 506, 507 (Mont. 1993); *Orberg v. City of Billings*, 674 P.2d 494, 494-95 (Mont. 1983).

103. See *Walker v. State*, 68 P.3d 872, 882 (Mont. 2003); *Armstrong v. State*, 989 P.2d 364, 384 (Mont. 1999); see also *Associated Press, Inc. v. Montana Dep't of Revenue*, 4 P.3d 5, 15 (Mont. 2000) (Nelson, J., concurring) (referencing state dignity clause); *Girard v. Williams*, 966 P.2d 1155, 1171 (Mont. 1998) (Nelson, J., concurring) (referring to the dignity rights of children in custody proceedings); *Gryczan v. State*, 942 P.2d 112, 115 (Mont. 1997) (noting party's invocation of state's dignity clause).

104. 68 P.3d. at 872.

105. *Id.* at 882 (citing MONT. CONST. art. II, § 4).

106. *Id.* at 883.

Here, the court treated dignity as a background norm that gave further meaning and scope to the state's provisions regarding cruel and unusual punishment.¹⁰⁷ However, the Montana Supreme Court did not stop there. It also noted that there could be situations in which the state right to individual dignity was "specially implicated"¹⁰⁸ and, therefore, required courts to evaluate, separate from any other rights, whether an individual's dignity interests were violated.

In *Walker*, state corrections officers occasionally left a prisoner's meals unwrapped on a dirty food hatch. Other times, correctional officers threw the prisoner's food onto the floor of his cell, sometimes resulting in his food landing in the cell's toilet.¹⁰⁹ As stated by a fellow inmate: "It's—eating like a dog, eating your food off the ground, and really . . . you don't even feel human after a while. . . ." ¹¹⁰ In response, the court noted "treatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, directly violates their dignity."¹¹¹ The court therefore concluded that under the state's individual dignity clause, the state correctional officials violated the dignity of the prisoner under their care.¹¹² So ruling, the court did not merely relegate the state's dignity clause to a background norm or hortatory language.¹¹³ It gave the clause power in and of itself to instill rights within its citizens, as well as providing the court with power to protect those rights.

Of course, not every state court's statutory and constitutional interpretation of its dignity clauses may result in a conclusion that dignity is a substantive enforceable right. Alternative interpretations may very well result in state courts determining that explicit invocations of dignity serve as general purpose statements¹¹⁴ and therefore function as a background norm to substantiate already explicitly stated rights.¹¹⁵ However, because many state victims' rights laws explicitly speak dignity's name, as do select portions of federal statutory law, one must acknowledge that as a spoken value, dignity opens the door to additional rights for victims beyond that which

107. See Glensy, *supra* note 4, at 120–26.

108. *Walker*, 68 P.3d at 883.

109. *Id.*

110. *Id.* at 884.

111. *Id.* (quoting Clifford & Huff, *supra* note 10, at 307).

112. *Id.* at 885 (citing MONT. CONST. art. II, § 4).

113. *Id.*

114. See *supra* notes 53–57; *infra* notes 162–88 and accompanying text.

115. See *infra* Part II.C.

specifically appears within any statute. Hence, when dignity is spoken, it should not only serve a background interpretive role giving existing rights more form and definition, but also serve a procreative role thereby creating and expanding rights for victims.¹¹⁶

II. DIGNITY AND VICTIMS' RIGHTS: EMBRACING DIGNITY'S SPOKEN AND PROCREATIVE POWERS

A. *Goals of the Victims' Rights Movement*

Promoting dignity for victims is an important feature of the victims' rights movement. However, just as the precise definition and role of dignity within broader United States jurisprudence is varied and somewhat unsettled within the law, the same is true for dignity and the victims' rights movement. Whether within the state legal system or within federal law, questions exist about whether dignity is meant to be a specific and enforceable right, a background principle giving broader meaning to other victims' rights, or merely an aspirational concept to motivate government actors to be more considerate of crime victims.¹¹⁷ To better address these questions, a few salient points regarding the history and growth of the victims' rights movement are important to consider.¹¹⁸

The American criminal justice system is grounded in the public prosecution model.¹¹⁹ This model begins with the proposition that certain wrongs are so violative of social norms that they injure the

116. See *infra* Part II.D.

117. See Glensy, *supra* note 4, at 68–69 (discussing the notion of dignity in varying contexts).

118. For a more in-depth treatment of the history and growth of the victims' rights movement see, e.g., Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1 (1997); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839 (1997); Susan E. Gegan & Nicholas Ernesto Rodriguez, Note, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT 225, 225–28 nn. 3–7 (1992); Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583–91 (2005); Michael E. Solimine & Kathryn Elvey, *Federalism, Federal Courts, and Victims' Rights*, 64 CATH. U. L. REV. 909, 911–15 (2015); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999).

119. See, e.g., Barajas & Nelson, *supra* note 118, at 8–11; Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1138–40 (2007) [hereinafter Beloof, *Weighing Crime Victims' Interests*]; Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L. J. 237, 250–57 (2008); Cellini, *supra* note 118, at 845–48; Tobolowsky, *supra* note 118, at 23–26.

entire body politic, rather than just the specific individual against whom the harms were committed.¹²⁰ In these settings, it is the state rather than the individual that holds offenders accountable for their actions and oversees the prosecution process.¹²¹

There exists significant actual, as well as expressive, power in the public prosecution model. The state, rather than the individual, devotes its time, money, and resources to investigating, prosecuting, and where appropriate, punishing the defendant.¹²² Hence, the criminal justice process does not require the individual victim to invest his or her own resources in prosecuting the crime. A drawback, however, is that the system is also subject to the discretion of prosecutors to determine whether to fully prosecute a criminal action, thereby potentially undermining a victim's specific interests in that action.¹²³ Nonetheless, there is great expressive force in the state proclaiming to the citizenry that it has taken on the mantle to right the wrongs perpetuated by an alleged criminal. By treating a criminal wrong as a harm that impacts the entire body politic, the public prosecution model sends a message that the state stands in solidarity with, and is furthering the interests of, its citizens.¹²⁴

Under the public prosecution model, the contest of rights is between the state and the defendant. Hence, the rules of criminal procedure are designed to fairly manage the opposing parties' conflicting interests.¹²⁵ Within this construct, the victim did not originally possess an acknowledged place or role. To the extent victims were included, it was often as a utilitarian means to an end for the state in its attempt to hold the defendant responsible for his or her actions.¹²⁶ Victims might provide evidence for the prosecution's case in the form of witness testimony,¹²⁷ photographs of bruises and injuries, or

120. See, e.g., George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992).

121. Barajas & Nelson, *supra* note 11818, at 11; Blondel, *supra* note 119, at 250; Tobolowsky, *supra* note 118, at 26.

122. See Barajas & Nelson, *supra* note 118, at 8-11; Blondel, *supra* note 119, at 245-47; Tobolowsky, *supra* note 118, at 26.

123. Barajas & Nelson, *supra* note 118, at 11; Blondel, *supra* note 119, at 250-51; Cellini, *supra* note 118, at 849-51; Tobolowsky, *supra* note 118, at 26.

124. See, e.g., Fletcher, *supra* note 120, at 51; Hampton, *supra* note 120, at 1659.

125. Blondel, *supra* note 119, at 244-45; Hebert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9 (1964).

126. Cellini, *supra* note 118, at 846-47; see also *supra* notes 18-25 and accompanying text.

127. See Barajas & Nelson, *supra* note 118, at 11; Cellini, *supra* note 118, at 847-48.

a deceased body.¹²⁸ However, a victim's interests regarding what charges should be brought against the offender, the timing or location of trial, or a final sentence for the offender, were largely dismissed or ignored.¹²⁹ Therefore, despite the laudatory goals of the public prosecution model, it deviates from the Kantian edict that the government should not treat individuals as a means to an end.¹³⁰ Rather, victims are very much objects that may enhance and aid the government in reaching its goals, but otherwise are not honored participants in the process. As a result, many victims have found the process of participating in the trial of the offender more traumatic than the underlying crime itself. For example, "[o]ne crime victim stated that her 'sense of disillusionment with the judicial system is many times more painful [than the crime itself]. I could not, in good faith, urge anyone to participate in this hellish process.'" ¹³¹ Hence, under the public prosecution model, the criminal justice system increasingly shut out the individuals most directly impacted and harmed by the crimes the state sought to prosecute.

In the late twentieth century, victims began to challenge their treatment in the criminal justice system. Victims' rights groups, motivated greatly by the 1982 Final Report of the President's Task Force on Victims of Crime,¹³² spurred their state legislatures to pass victims' rights amendments to their constitutions and victims' rights legislation,¹³³ all with the goal of improving how criminal justice professionals interacted with and treated victims. On the federal level, Congress similarly passed a series of victims' rights laws,¹³⁴ culminating in the passage of the Crime Victims' Rights Act ("CVRA") in October 2004.¹³⁵

Two interrelated goals motivate victims' rights laws. A core goal is to temper, if not eliminate, the so-called "secondary victimiza-

128. See, e.g., Kyl et al., *supra* note 118, at 582-83 (providing examples of cases in which victims and their families suffered injustices in the court system).

129. Blondel, *supra* note 119 at 245-46; Cellini, *supra* note 118, at 849; Tobolowsky, *supra* note 118, at 26-27.

130. Cellini, *supra* note 118, at 849; Tobolowsky, *supra* note 118, at 26.

131. Giannini, *supra* note 76, at 83 (quoting S. REP. NO. 97-532, at 537 (1982), as reprinted in U.S.C.C.A.N. 2515, 2543).

132. Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU. L. REV. 835, 841-42 (2005) [hereinafter Cassell, *Recognizing Victims*]; see Kyl et al., *supra* note 118, at 584; Tobolowsky, *supra* note 118, at 29-30.

133. See Kyl et al., *supra* note 118, at 587-88; Cassell, *Recognizing Victims*, *supra* note 132, at 842-43; Solimine & Elvey, *supra* note 118, at 911-15.

134. Kyl et al., *supra* note 118, at 584-87; Cassell, *Recognizing Victims*, *supra* note 132, at 843-50.

135. 18 U.S.C. § 3771 (2012).

tion" suffered by many victims in the state's process of prosecuting offenders.¹³⁶ As referenced earlier, many victims felt that their treatment by the criminal justice system equaled, if not rivaled, their treatment at the hands of the offender.¹³⁷ Hence, victims' rights laws include within their terms the command that victims be treated with dignity, fairness, and respect.¹³⁸ This initial goal to ensure that victims are protected from secondary victimization leads naturally to the second goal motivating victims' rights laws, that being to appropriately increase victim involvement in the criminal process.

When victims feel excluded from the state's process of investigating, prosecuting, and punishing the individuals who harmed them, they often interpret that exclusion to indicate that "society doesn't value them enough to take their views and concerns into account."¹³⁹ Therefore, a primary way to ensure that victims are not abused, overlooked, or neglected is to provide them with more information about the process, and broaden the manner by which they can participate in the process. This goal of increased victim information and participation is embodied in laws that afford victims the right to notice of proceedings against the defendant,¹⁴⁰ the right to be present at those proceedings,¹⁴¹ and the right to be heard at appropriate times throughout the criminal justice process.¹⁴² Therefore, a very tangible way to treat victims with dignity and respect is to keep them informed, hear their views, and let them participate in the prosecutions against the individuals who harmed them.¹⁴³ This increased victim involvement helps ensure that crime victims, who already have been disregarded and treated as "less-than" by the criminal,¹⁴⁴ are not treated similarly by government actors. Crime

136. See Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294–96 [hereinafter Beloof, *The Third Model*]; Beloof, *Weighing Crime Victims' Interests*, *supra* note 119, at 1150; Gegan, & Rodriguez, *supra* note 118, at 226 n. 4.

137. See *supra* note 131 and accompanying text.

138. See, e.g., 18 U.S.C. § 3771(a)(8) (2012) (stating that victims have "the right to be treated with fairness and with respect for the victims' dignity and privacy"); see also *supra* notes 98–100.

139. Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44, *46 (2006) (quoting DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 20 (2d ed. 2006)).

140. See, e.g., 18 U.S.C. § 3771(a)(2) (LEXIS through Pub. L. No. 114–219).

141. See, e.g., *id.* § 3771(a)(3).

142. See, e.g., *id.* § 3771(a)(4) (including being heard at proceedings "involving release, plea, sentencing, or any parole proceeding").

143. See O'Hear, *supra* note 76, at 326, 330–31.

144. See Beloof, *Weighing Crime Victims' Interests*, *supra* note 119, at 1150–51; Gegan & Rodriguez, *supra* note 118, at 226 n.4; see also *supra* notes 23–25 and accompanying text.

victims are honored as autonomous beings, rather than utilitarian means to an end.¹⁴⁵

The United States has seen a revolution over the last thirty years in terms of increasing the presence and role of crime victims in the criminal justice system. While the public prosecution model still predominates, crime victims possess a far greater and independent role in the criminal justice process.¹⁴⁶ Most victims' rights laws provide victims with specific participatory rights,¹⁴⁷ while many laws also explicitly state that victims have an independent right to fair and dignified treatment.¹⁴⁸ However, the scope of a victim's right to dignified treatment remains varied.

B. Definitions and Limits on Dignity in Victims' Rights Laws

Given that a core motivating goal of the victims' rights movement is to ensure that victims are not subject to a second wave of harm from the state,¹⁴⁹ it should come as no surprise that the language of dignity, often coupled with such terms as "fairness," "respect," and "privacy," appear in state and federal victims' rights laws. A textual examination of how state and federal law codifies "dignity" reveals that the standard canons of statutory construction limit some dignity clauses to the role of a background interpretive value,¹⁵⁰ while in other settings victim rights laws are structured in such a manner that their dignity provisions should be viewed as spoken and procreative in nature.¹⁵¹ Common however throughout all the laws is the notion that dignity furthers the Kantian edict of honoring individuals and limiting the treatment of victims as a means to an end.

Nearly half the states include victims' rights amendments to their constitutions, which specifically address victim dignity,¹⁵² and an equal number have passed legislation further codifying that right.¹⁵³ However, the role and meaning courts give to the term is largely

145. See *supra* Part I.A.

146. See generally *Kyl et al.*, *supra* note 118 (noting how the CVRA has given victims an enforceable role within the prosecutorial process); *Beloof*, *The Third Model*, *supra* note 136 (noting that with the growth of the victims' rights movement, victims are now active participants in the criminal justice process).

147. See, e.g., 18 U.S.C. § 3771(a)(1)–(10) (LEXIS through Pub. L. No. 116-219).

148. See *supra* notes 98–99 and accompanying text.

149. See *supra* notes 136–39 and accompanying text.

150. See generally *Schilling v. Wis. Crime Victims Rights Bd.*, 692 N.W. 2d 623 (Wis. 2005).

151. See *infra* Part II.D.

152. See *supra* note 98 and accompanying text.

153. See *supra* note 99 and accompanying text.

dependent upon where the dignity language appears within victims' rights amendments or legislation.¹⁵⁴ When reviewing the state constitutional victims' rights amendments that reference dignity, three basic formulations emerge: dignity serves as an introductory or background principle;¹⁵⁵ dignity serves as a guiding principle but is also reiterated as a specific right;¹⁵⁶ or dignity exists as one right among many afforded to victims.¹⁵⁷ State victims' rights statutes can be similarly categorized. There are statutes that reference dignity in their general purpose statements;¹⁵⁸ statutes that appear to represent a mix of dignity as a general purpose as well as a specific right;¹⁵⁹ and finally, statutes that list dignity as one right among many.¹⁶⁰ Where dignity is characterized as a general purpose or introductory provision, it tends to be viewed as a background and interpretive norm rather than a substantive right in and of itself.¹⁶¹

The one state court to examine with particularity its codified dignity victims' rights language concluded the language was essentially unspoken and interpretive, rather than spoken and procreative. In *Schilling v. Wisconsin Crime Victims Rights Board*,¹⁶² the Wisconsin Supreme Court ruled that the state's constitutional provision requiring the state to "treat crime victims . . . with fairness, dignity, and respect for their privacy"¹⁶³ was not a self-executing provision which

154. See generally *Schilling v. Wis. Crime Victims Rights Bd.*, 692 N.W. 2d 623 (Wis. 2005).

155. See, e.g., LA. CONST. art I, § 25; MD. CONST. art. XCVII(a); MICH. CONST. art. I, § 24(1); OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34(a); OR. CONST. art. I, § 42(1); R.I. CONST. art. I, § 23; TEX. CONST. art. I, § 30(a)(1); WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

156. See, e.g., CAL. CONST., art. 1, § 28(a)(2), (b)(1); VA. CONST. art. I, § 8-A.

157. See, e.g., ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1(A)(1); CONN. CONST. art. XXIX; IDAHO CONST. art. I, § 22(1); ILL. CONST. art. I, § 8.1(a)(1); MICH. CONST. art. I, § 24(1); N.M. CONST. art. II, § 24(A)(1); S.C. CONST. art. I, § 24(A)(1).

158. See, e.g., CAL. PENAL CODE § 679 (Deering through 2016 Sess.); HAW. REV. STAT. ANN. § 801D-1 (LexisNexis through 2016 Sess.); 725 ILL. COMP. STAT. ANN. 120/2 (LexisNexis through 2016 Reg. Legis. Sess.); LA. REV. STAT. ANN. § 46:1841; 18 PA. CONST. STAT. § 11.102(1); R.I. GEN. LAWS § 12-28-2 (LexisNexis through 2016 Sess.); UTAH CODE ANN. § 77-37-1 (West, Westlaw through 2016 Third Special Session); VT. STAT. ANN. TIT. 13, § 5303 (LexisNexis through 2015-2016 Sess.); WASH. REV. CODE ANN. § 7.69.010 (LexisNexis through 2016 Sess.); WISC. STAT. § 950.0 (Lexis 2016 Legis. Sess.).

159. See, e.g., N.M. STAT. ANN. §§ 31-26-2, -4 (LexisNexis through 2016 Legis. Sess.).

160. See, e.g., COLO. REV. STAT. § 24-4.1 - 302.5(1)(a) (LexisNexis through 2015 Legis. Sess.); GA. CODE ANN. § 17-17-1 (LexisNexis through 2016 Reg. Sess.); IDAHO CODE § 19-5306(1) (LexisNexis through 2016 Reg. Sess.); N.H. REV. STAT. ANN. § 21-M:8-k(II) (LexisNexis through 2016 Reg. Sess.); TENN. CODE ANN. § 40-38-102(a) (LexisNexis through 2016 Sess.); VA. CODE ANN. § 19.2-11.01(A) (West through 2016 Reg. Sess.).

161. See, e.g., *Schilling v. Wis. Crime Victims Rights Bd.*, 692 N.W.2d 623 (Wis. 2005) (deeming dignity language as stating a general purpose, rather than establishing an enforceable right); *State v. Lane*, 212 P.3d 529 (Utah 2009).

162. 692 N.W.2d, at 623.

163. *Id.* at 625 (quoting WISC. CONST. art. I, § 9m).

allowed the state Victims Rights Board to issue a reprimand to a prosecuting attorney for how he treated some crime victims.¹⁶⁴ Instead, the amendment laid out a general purpose provision to guide courts, policy makers, and prosecutors in how to treat and interact with crime victims.¹⁶⁵

In *Schilling*, during the sentencing proceedings of a murder case, the prosecutor played part of a 911 telephone call the victim's son made to the police after he discovered his murdered mother.¹⁶⁶ While the prosecutor made sure that the victim's children were not in the courtroom when he played the tape, he did not inform the other family members present at sentencing that he was going to do so, nor did he give them an opportunity to leave the courtroom before he played the tape.¹⁶⁷ The family members subsequently filed a complaint with the state's Crime Victims Rights Board (the "Board"), asserting that the prosecutor had violated their right to be treated with "fairness, dignity, respect, courtesy, and sensitivity."¹⁶⁸ The Board determined that the prosecutor had indeed violated the victims' rights and issued a private reprimand.¹⁶⁹ The attorney sought review of the Board's decision, which subsequently was brought for review before the state supreme court.

There, the court stated that

At issue . . . is whether the first sentence of Article I, Section 9m of the Wisconsin Constitution, which reads, "This state shall treat crime victims . . . with fairness, dignity and respect for their privacy," creates a "right" that the Board may enforce . . . or whether it is descriptive of policies to be furthered by the State.¹⁷⁰

In concluding that the amendment's language represented a general purpose provision rather than a specific enforceable right, the court turned to three core canons of statutory construction.¹⁷¹ It examined the plain language of the amendment; debates or discussion, which occurred at the time of the amendment's passage; and any

164. *Id.* at 626.

165. *Id.*; see also WISC. CONST. art. I, § 9m.

166. *Schilling*, 692 N.W.2d at 625.

167. *Id.*

168. *Id.* at 625-26.

169. *Id.*

170. *Id.* at 626.

171. *Id.* at 627.

early interpretations of the amendment by the legislature after its passage.¹⁷²

Stated in full, the Wisconsin Victims' Rights Amendment reads:

This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.¹⁷³

The court looked at the linguistic structure of the amendment and noted that the dignity language appeared at the beginning of the amendment and was set off in its own sentence, separate from the later and more specific listing of victims' rights.¹⁷⁴ From this, the court concluded that the first sentence of the amendment was meant to serve as a general purpose statement, identifying for state legislators and other state actors the broad nature and goals of the amendment.¹⁷⁵ The court buttressed this conclusion by examining the history surrounding the amendment's passage, noting that the state passed its victims' rights amendment in the context of a broader national movement spurred by concern about the unfair and insensitive treatment victims often experienced at the hands of the state.¹⁷⁶ Finally, the court examined the victim rights laws passed by the legislature after the amendment was passed.¹⁷⁷ The court noted that subsequent legislation followed the same structure of the

172. *Id.*

173. WIS. CONST. art. I, § 9m.

174. *Schilling*, 692 N.W.2d at 628.

175. *Id.*

176. *Id.* at 628–29.

177. *Id.*

amendment.¹⁷⁸ The right to dignity was mentioned in a general purpose provision of the statute,¹⁷⁹ but not mentioned again in the statutory provisions specifically listing victims' rights.¹⁸⁰ The court therefore concluded that the victims' rights amendment did not create a self-executing right that the Board could enforce.¹⁸¹

While the *Schilling* court rejected that victims possessed a substantive legal right to be treated with dignity,¹⁸² the court did not entirely undermine the role dignity fulfills for victims in the administration of criminal justice.¹⁸³ The court emphasized that it did not intend that its holding be

construed as rendering the first sentence of Article I, Section 9m of the Wisconsin Constitution without meaning Rather, [it] is a constitutional mandate. It articulates this State's policy regarding the treatment of crime victims. It also functions to guide Wisconsin courts' interpretations of the state's constitutional and statutory provisions concerning the rights of crime victims.¹⁸⁴

Hence, the *Schilling* court treated the state amendment's dignity provision as something more than mere hortatory language¹⁸⁵ or the expression of a collective virtue.¹⁸⁶ Rather, the court signaled that even though dignity was explicitly stated in the law, it served as a background norm,¹⁸⁷ which should guide courts, policy makers, and prosecutors in how to treat crime victims.¹⁸⁸

By contrast, in the federal context, courts have the benefit of floor statements made by drafters of the Crime Victims' Rights Act ("CVRA")¹⁸⁹ to determine the meaning of that legislation's dignity language.¹⁹⁰ The CVRA states that victims have the "right to be treated with fairness and with respect for the [his or her] dignity

178. *Id.* at 630–31.

179. See WISC. STAT. § 950.01, construed in *Schilling*, 692 N.W.2d at 630–32.

180. *Schilling*, 692 N.W.2d at 631–32.

181. *Id.* at 632.

182. *Id.* at 624; see *supra* notes 60–80 and accompanying text.

183. See *Schilling*, 692 N.W.2d at 632.

184. *Id.*

185. See Glensy, *supra* note 4, at 134–40.

186. See Henry, *supra* note 5, at 220–29; see also *supra* notes 45–57 and accompanying text.

187. See Glensy, *supra* note 4, at 120–26; see also *supra* notes 81–96 and accompanying text.

188. See *Schilling*, 692 N.W.2d at 632.

189. See Crime Victims' Rights Act, 18 U.S.C. § 3771 (2016).

190. *Id.* at § 3771(a)(8).

and privacy.”¹⁹¹ The CVRA’s authors indicated they did not intend for the terms “dignity” and “fairness” to be merely hortatory or to solely represent a collective value. Rather, § 3771(a)(8) of the CVRA was meant to have its own specific meaning with the particular goal of preventing a victim’s secondary victimization during the prosecution of the defendant. The CVRA drafters also indicated their intent for § 3771(a)(8) to be expansive in nature. As to both these points, Senator Jon Kyl of Arizona stated:

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. . . . Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judiciary branches, to treat victims of crime with the respect they deserve.¹⁹²

Seemingly channeling Kant, Senator Kyl further explained that:

[h]uman dignity and the right that all people are made in God’s image is such an important part of the foundation of our country that we would be remiss if we did not recognize that concept, that value, especially for those who have been victimized in our society because we could not as a government provide adequate protection for them.¹⁹³

However, both Senators Feinstein and Kyl seemed to be far more focused on § 3771(a)(8)’s fairness language than its dignity language, and perhaps equated the two. For example, Senator Kyl stated:

The right to fairness for crime victims . . . [is a] deeply rooted concept[] in the United States of America. This country is all about fair play and giving power to the powerless in our society. It is about recognizing the values of liberty of the individuals against the encroachments of the Government. Fair play for crime victims, meaningful participation of

191. *Id.*

192. Senate Floor Statements in Support of the Crime Victims’ Rights Act, Proceedings and Debates of the 108th Congress, Second Session, 150 Cong. Rec. S4260-01, April 22, 2004, reprinted in 19 FED. SENT R. 62 at *64.

193. 150 CONG. REC. S4260-01 (daily ed. April 22, 2004) (statement of Sen. Kyl), 108 CONG. REC. S4260, at *S4264.

crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process—these are consistent with the most basic values of due process in our society.¹⁹⁴

Nonetheless, the CVRA's drafters were clear that § 3771(a)(8) represented more than a mere exhortation to courts and prosecutors to treat victims kindly. Rather, the language in § 3771(a)(8) was intended to be read broadly and to create tangible and enforceable rights for crime victims.

A plain reading of the statute's language reinforces this interpretation. The first subsection of 3771 states that "[a] crime victim has the following rights . . ." ¹⁹⁵ The statute then lists ten separate rights for victims,¹⁹⁶ the eighth of which includes the fairness, respect, and dignity language.¹⁹⁷ Taking into account the standard statutory construction canon that words grouped in a list should be given similar meaning or effect,¹⁹⁸ one can legitimately reason that a victim's fairness and dignity rights are on par with all of the other rights

194. 150 CONG. REC. S4260-01 (2004), as reprinted in SENATE FLOOR STATEMENTS IN SUPPORT OF THE CRIME VICTIMS' RIGHTS ACT, 19 FED. SENT'G REP. 62, 63 (2006).

195. 18 U.S.C. § 3771(a).

196. In particular, the statute reads:

(a) Rights of crime victims. — A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Id. § 3771(a)(1)-(10).

197. *Id.* § 3771(a)(8).

198. See *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985).

listed in §§ 3771(a)(1)–(10). The dignity language is not placed within the statute in such a way to suggest that it is either an introductory general-purpose clause or a concluding all-encompassing clause.¹⁹⁹ Therefore, federal advocates, prosecutors, and judges should embrace the spoken nature of dignity in the CVRA and treat it as a substantive right with procreative powers.

Regardless of whether state and federal laws designate dignity as a spoken or unspoken term, the laws nonetheless invoke dignity in distinctively Kantian terms.²⁰⁰ Among the state courts, treating victims with dignity requires that victims be acknowledged²⁰¹ and treated with worthiness, honor, esteem, regard, and value.²⁰² Likewise, state- or defendant-based activity that intimidates or harasses crime victims violates victim dignity.²⁰³

Federally, the court in *United States v. Heaton* devoted a significant part of its ruling discussing the dignity language in § 3771(a)(8) of the CVRA, which guides that victims have the “right ‘to be treated with fairness and with respect for [their] dignity and privacy.’”²⁰⁴

199. In 2015, two new rights were added for victims under the CVRA—the right to “be informed in a timely manner of any plea bargain or deferred prosecution agreement,” and the right to be informed of the rights afforded to victims under the CVRA and other federal laws. See 18 U.S.C. § 3771(a)(9)–(10); see also Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113, 129 Stat. 227 (2015). Prior to the inclusion of these two new rights, the dignity and fairness provision of the CVRA was the last in the list of victims’ rights. However, if Congress intended that the fairness and dignity provision serve as a concluding and all-encompassing clause, it could have renumbered the rights, with the dignity provision listed as number ten, and the two new rights as numbers eight and nine. However, Congress did not do so. Moreover, the statute’s legislative history belies any suggestion that Congress intended the dignity and fairness provision to serve merely as a conclusory all-encompassing clause. See *supra* notes 189–94 and accompanying text.

200. See *supra* Part I.A.

201. See, e.g., *In re Wheat v. State*, 907 So. 2d 461 (Ala. 2005) (ruling that upholding the abatement *ab initio* doctrine would disregard victims); *State v. Carlin*, 249 P.3d 752 (Alaska 2011) (same); *State v. Korsen*, 111 P.3d 130 (Idaho 2005) (same); *State v. Benn*, 274 P.3d 47 (Mont. 2012) (same); *State v. Devin*, 142 P.3d 599 (Wash. 2006) (same); see also *infra* notes 343–51 and accompanying text.

202. *State v. Worthen*, 222 P.3d 1144, 1157 (Utah 2009) (quoting UTAH CODE ANN. § 77-38-2(2), (3), (8) (2008)) (noting that Utah Rights of Crime Victims Act “defines dignity as ‘treating the crime victim with worthiness, honor, and esteem;’ fairness as ‘treating the crime victim reasonably, even-handedly, and impartially;’ and respect as ‘treating the crime victim with regard and value.’”).

203. See, e.g., *State v. O’Neil*, 836 P.2d 393, 395 (Ariz. Ct. App. 1991) (inferring, in part, from state’s victim dignity language that victims are not to be intimidated during conferences with the prosecutor); *Florida Bar v. Buckle*, 771 So. 2d 1131, 1134 (Fla. 2000) (“Certainly, the principles underlying the rules [of professional conduct] include basic fairness, respect for others, human dignity, and upholding the quality of justice. . . . A lawyer’s obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation.”).

204. 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (quoting 18 U.S.C. § 3771(a)(8) (2006)).

The court described fair treatment as that which is just and equitable.²⁰⁵ Likewise, the court stated that to wholly ignore the victim, or to respond to the victim with animus, would be an “affront to the victim’s dignity.”²⁰⁶ The Sixth Circuit Court of Appeals echoed this theme in *In re Simons*.²⁰⁷ There, the trial court had failed to rule on a motion filed three months earlier by the crime victim asserting his rights under the CVRA, and had otherwise sealed the criminal action.²⁰⁸ The appellate court construed the trial court’s silence as a denial of the victim’s motion, and stated that the trial court’s “sealing of the record prevented the [victim] from determining whether his rights under the statute were being violated.”²⁰⁹ The appellate court then cited § 3771(a)(8), noting that victims have the “right ‘to be treated with fairness and with respect for the victim’s dignity.’”²¹⁰ In doing so, the appellate court suggested that ignoring the victim and preventing him from learning the status of his case constituted unfair and disrespectful treatment that consequently violated the victim’s dignity.

Similarly, the Kantian theme that individuals should not be treated as utilitarian objects²¹¹ is embodied in *United States v. Okun*²¹² and *United States v. Kaufman*.²¹³ In *Okun*, the defendant was charged with several counts of mail fraud, wire fraud, money laundering, and conspiracy that impacted over 500 victims.²¹⁴ A number of the victims asserted their right to be present in the courtroom during the trial,²¹⁵ to which the defendant objected.²¹⁶ In part, the defendant argued that because of the large number of victims, it would be impracticable for the court to permit all of them to attend the trial, and therefore their presence should be barred.²¹⁷ The trial court rejected this position, stating that such an approach “treats victims as a fun-

205. *See id.*

206. *Id.* at 1272–73.

207. 567 F.3d 800 (6th Cir. 2009).

208. *Id.* at 800–01.

209. *Id.* at 801.

210. *Id.* (citing 18 U.S.C. § 3771(a)(8) (2006)).

211. *See supra* Part I.A.

212. No. 3:08CR132, 2009 WL 790042, at *1 (E.D. Va. Mar. 23, 2009).

213. No. CRIM.A.04-40141-01, CRIM.A.04-40141-02, 2005 WL 2648070, at *1 (D. Kan. Oct. 17, 2005).

214. *Okun*, 2009 WL 790042, at *1.

215. *See* § 3771(a)(3) (victims may only be excluded from a court proceeding if “the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.”).

216. *Okun*, 2009 WL 790042, at *1.

217. *Id.* at *2.

gible commodity with class rights instead of individuals with personal rights; this reading of the statute is squarely at odds with the need to 'respect [] the victim[s'] dignity and privacy.'"²¹⁸

Finally, in *United States v. Kaufman*, the trial court relied on the privacy and dignity language in § 3771(a)(8) to limit the presence of press sketch artists in the courtroom where those sketches might later be broadcast on television.²¹⁹ In *Kaufman*, the defendants, some of whose conduct had been recorded on videotapes, were charged, in part, with sexual misconduct against mentally ill patients.²²⁰ The court noted that a number of the victim witnesses had already exhibited distress in the course of responding to questions presented to them during trial.²²¹ In rejecting the press's request to have sketch artists in the courtroom, the court stated

[i]f [the victims'] distress was compounded with concerns that the witness' picture was going to be shown on television as one of those "victims" who appeared in the graphic videos, the victim undoubtedly would not only face considerable additional distress and loss of dignity, but the individual might not even be able to testify, thereby damaging the truth-seeking function of a criminal trial.²²²

The *Kaufman* court acknowledged that the victim testimony would help further the truth-seeking goal of the trial, and implicitly recognized that the victims served as a utilitarian means to the end of prosecuting the wrongdoers.²²³ However, the court tempered that objectification by taking the victims' dignity into account and prohibiting press sketch artists in the courtroom.²²⁴ These cases highlight that courts recognize instances when the judicial system fails to treat victims with dignity or respect by treating victims as less than

218. *Id.* at *3 (quoting § 3771(a)(8)).

219. No. CRIM.A.04-40141-01, CRIM.A.04-40141-02, 2005 WL 2648070, at *1, *4 (D. Kan. Oct. 17, 2005).

220. *Id.* at *1. The tapes were entered as evidence and shown at trial. However, the court ensured that the tapes were shown in such a manner that they were not viewable by individuals observing the trial from the gallery. *Id.* at *1-2.

221. *Id.* at *4.

222. *Id.* at *4; see also *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 199 n.1 (E.D.N.Y. 2009) (declining to use victim's name in court order, out of respect for the victim's dignity and privacy).

223. See *Kaufman*, 2005 WL 2648070 at *4.

224. *Id.* at *4-5.

whole and autonomous individuals,²²⁵ or by subjecting those individuals to unnecessary distress.²²⁶

C. *Victim Dignity as an Unspoken Interpretive Value*

Whether because of the constraints of statutory construction or because of a disinclination to embrace dignity as a spoken and procreative value, a number of courts limit dignity to the role of a background norm and interpretive value. This narrow treatment of dignity is evidenced in three related contexts. First, some courts treat dignity solely as a general-purpose provision to instruct courts on how to interpret and apply other specifically stated victims' rights.²²⁷ Second, and allied to the first, courts often link victim dignity language with more specific victims' rights language in the course of furthering their analyses regarding a specific right at issue in the case before them.²²⁸ Finally, as exhibited in how the federal CVRA terms have been integrated into the Federal Rules of Criminal Procedure, some government officials have displayed great discomfort in embracing the dignity and fairness provisions which exist in federal law.²²⁹

As discussed earlier, the linguistic structure of a statute or state victims' rights amendment may prompt courts to treat dignity solely as an interpretive value.²³⁰ The Wisconsin Supreme Court's decision in *Schilling v. State Crime Victims Rights Board* aptly exhibits this reality.²³¹ Just as the *Schilling* court limited Wisconsin's dignitary language to a background interpretive norm, other state courts have indicated that the dignity clauses appearing in their victims' rights laws also represent a background norm against which more specific victim rights are measured and understood.²³²

For example, in *State v. Lane*, the Utah Supreme Court addressed whether victims had the right to appeal the trial court's dismissal of

225. See *supra* notes 212–18 and accompanying text.

226. See *supra* notes 219–24 and accompanying text.

227. See, e.g., *State v. Lane*, 212 P.3d 529 (Utah 2009); *Schilling v. State Crime Victims Rights Board*, 692 N.W.2d 623 (Wis. 2005).

228. See, e.g., *McNamara v. State*, No. A-9935, 2009 WL 877918 (Alaska Ct. App. Apr. 1, 2009); *Romley v. Schneider*, 45 P.3d 685 (Ariz. Ct. App. 2002); *State v. Soto*, No. 98-2268-CR, 1999 WL 649234 (Wis. Ct. App. Aug. 26, 1999); *J.D. v. Hegyi*, 335 P.3d 1118 (Ariz. 2014).

229. See *infra* notes 282–311.

230. See *supra* notes 162162–88 and accompanying text.

231. See 692 N.W.2d 623; see also *supra* notes 162–88 and accompanying text.

232. See, e.g., *Hegyi*, 335 P.3d 1118; *State v. Lee*, 245 P.3d 919 (Ariz. Ct. App. 2011); *Lane*, 212 P.3d 529; *State v. Murtagh*, 169 P.3d 602 (Alaska 2007); see also *supra* notes 53–57 and accompanying text.

the defendant's plea in abeyance.²³³ In rejecting the victim's appeal, the court noted that the state's victims' rights amendment "sets forth the *general rights* of crime victims," including the right to be "treated with fairness, respect, and dignity . . . throughout the criminal justice process."²³⁴ Additional victims' rights were set out with more specificity in the state statutory code.²³⁵ The court noted that nothing within the code, however, gave victims the right to appeal the dismissal of the defendant's plea in abeyance.²³⁶ Here, in similar fashion to the Wisconsin Supreme Court in *Schilling*,²³⁷ the Utah Supreme Court suggested that the dignity provisions appearing in the state's victims' rights amendment represented broad goals rather than specific enforceable rights.²³⁸

In addition to courts that view victim dignity clauses as broad general-purpose provisions, other courts link a victim's right to fair and dignified treatment with separate specific rights.²³⁹ In doing so, these courts use the dignity provisions within the law to explain why the other specific victims' right should be enforced. For example, in *Romley v. Schneider*, the Arizona Court of Appeals reviewed whether it was appropriate for the defense to request that the victim be fingerprinted as a means of determining whether the victim was a former client of the public defender.²⁴⁰ The court noted that Arizona Rule of Criminal Procedure 39(b)(1) detailed that "[a] victim has the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."²⁴¹ The *Romley* court went on to note that Arizona statute 13-4434

also guarantees a victim certain rights . . . [including] the right at any court proceeding not to testify regarding the victim's addresses, telephone numbers, place of employment or other locating information unless the victim consents or the court orders disclosure on finding that a compelling need for the information exists.²⁴²

233. 212 P.3d at 530-32.

234. *Id.* at 533 (citing UTAH CONST. art. I, § 28(1)(a)) (emphasis added).

235. *Id.* at 533.

236. *Id.*

237. 692 N.W.2d 623, 627 (Wis. 2005); see also *supra* notes 162-88 and accompanying text.

238. *Lane*, 212 P.3d at 533.

239. See, e.g., *Romley v. Schneider*, 45 P.3d 685, 686-88 (Ariz. Ct. App. 2002).

240. *Id.*

241. *Id.* at 687 (quoting ARIZ. R. CRIM. P. 39(b)(1)).

242. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-4434 (2001)).

The court engaged in a specific analysis of the language of § 13-4434, concluding that while it did not contain specific language about fingerprinting, allowing defense counsel to fingerprint the victim would represent a significant intrusion into the victim's privacy, and hence should not be sanctioned.²⁴³ The court referred back to Arizona Rule of Criminal Procedure 39(b) and concluded that requiring the victim to be fingerprinted would undermine the rule's goal to "reduce the harm and trauma inflicted on a victim by a criminal act."²⁴⁴ The court's primary analysis, however, focused on statute 13-4434 regarding victim identification information. Its reference to the dignity and fairness provisions of state law served to bolster its holding that the defense could not fingerprint the victim.²⁴⁵ Thus, dignity played a supporting and background role in the court's analysis, which helped effectuate the state statute that limited the type of access and information a defendant could obtain from a victim.

A similar pattern can be observed in *J.D. v. Hegyi*, where the Arizona Supreme Court addressed whether the parent of a minor crime victim had the right to refuse a defendant's requests for interviews after the minor victim turned eighteen.²⁴⁶ The state's victims' rights laws included a variety of provisions permitting victims to decline being interviewed by the defendant, or the defendant's attorney or agent,²⁴⁷ and also extended this right to parents or legal guardians of minor victims.²⁴⁸ The court noted that the state's victims' rights amendment "*broadly recognizes that victims are entitled '[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.'*"²⁴⁹ The court then remarked that these broad rights were further effectuated through the state's passage of a variety of more specific rights for victims.²⁵⁰ In concluding that the right to refuse an interview could extend to a parent of a minor victim who had turned eighteen, the court stated

243. *See id.* at 687-88.

244. *Id.* at 688 (quoting *State v. Draper*, 784 P.2d 259, 266 (Ariz. 1989)).

245. *See id.*

246. 335 P.3d 1118, 1119 (Ariz. 2014).

247. *Id.* (referencing ARIZ. REV. STAT. ANN. § 13-4433(A) (2014)).

248. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-4433(G)).

249. *Id.* at 1120 (citing ARIZ. CONST. art. 2, § 2.1(A)(1)) (emphasis added).

250. *Id.* at 1120-21.

We . . . consider the purposes of the VBR [Victims' Bill of Rights] *generally* and the victim's right to refuse an interview more specifically. The VBR and its implementing legislation were adopted "to provide crime victims with basic rights of respect, protection, participation" and to aid the "healing of their ordeals."²⁵¹

Hence, the court in *J.D.* used the broader provisions of the victims' dignity rights to give fuller meaning to more specific victims' rights.²⁵²

Similarly, in *State v. Soto*²⁵³ and *McNamara v. State*,²⁵⁴ state appellate courts examined whether a trial court's denial of a defendant's request to withdraw a guilty plea was appropriate. Each court cited its state's laws granting crime victims the right to a timely disposition of the criminal action against the offender.²⁵⁵ In holding that the lower courts did not err in their rulings, the appellate courts both referenced the victims' right to be treated with dignity and respect as a justification for not granting the defendants' plea withdrawals.²⁵⁶ Again, rather than treating dignity as its own enforceable right, these courts used it to give fuller meaning to a victim's right to a timely disposition of the underlying criminal action.

In similar fashion to many of the state cases, federal courts often invoke fairness and dignity rights in tandem with more particular victim rights listed in the CVRA.²⁵⁷ For example, in one of the earliest cases to closely examine the rights provided to victims under the CVRA, the court in *United States v. Turner* tangentially connected a victim's dignity and fairness rights with the victim's right to notice, the right to be heard, and the right to "proceedings free from unreasonable delay."²⁵⁸

251. *Id.* at 1121 (emphasis added) (quoting *Champlin v. Sargeant*, 965 P.2d 763, 767 (Ariz. 1998)); see also *State v. Lee*, 245 P.3d 919, 922 (Ariz. Ct. App. 2011) (noting that rights listed in the Victims' Rights Amendment have been implemented by statute).

252. 335 P.3d at 1121.

253. No. 98-2268-CR, 1999 WL 649234, at *1 (Wis. Ct. App. Aug. 26, 1999).

254. No. A-9935, 2009 WL 877918, at *1 (Alaska Ct. App. Apr. 1, 2009).

255. *McNamara*, 2009 WL 877918, at *5-6; *Soto*, 1999 WL 649234, at *1.

256. *McNamara*, 2009 WL 877918, at *6; *Soto*, 1999 WL 649234, at *1.

257 See e.g., *In re Simmons*, 567 F.3d 800 (6th Cir. 2009); *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 435 F.3d 1011 (9th Cir. 2006); *United States v. BP Prods. N. Am., Inc.*, No. H-07-434, 2008 WL 501321, at *1 (S.D. Tex. Feb. 21, 2008); *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005); *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005).

258. 367 F. Supp. 2d 319, 331-36 (E.D.N.Y. 2005) (discussing 18 U.S.C. § 3771(a), (d) (Supp. 2004)).

When the *Turner* court issued its opinion, the CVRA had only been in force for six months and very little, if any, judicial examination of the statute existed at the time.²⁵⁹ Hence, the *Turner* court devoted a substantial part of its decision working through each provision of the Act to lay out an initial roadmap regarding the responsibilities of the courts and prosecutors in responding to crime victims.²⁶⁰ In discussing a victim's "right to be treated with fairness and with respect for the victim's dignity and privacy," the court noted that

[n]either the text of the statute nor its legislative history provides guidance as to what specific procedures or substantive relief, if any, Congress intended this provision to require or prohibit. The provision's broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom. Nevertheless, the Senate sponsors of the law were clear in their articulation of the overall import of the provision: to promote a liberal reading of the statute in favor of interpretations that promote victims' interest in fairness, respect, and dignity.²⁶¹

Turning to the particular issues before it in *Turner*, the court specifically referenced the victim's rights to receive notice regarding public court proceedings involving the defendant, the ability to be heard at any bail release hearings, and ensuring that any delays in the proceedings that impact the victim's "right to proceedings free from unreasonable delay" are taken into account.²⁶² While the *Turner* court did not explicitly reference the fairness and dignity provisions in § 3771(a)(8)²⁶³ as it addressed the victims' more specific CVRA rights, its earlier discussion regarding the intentional breadth of the fairness and dignity provision signals that the court was importing those terms into its analysis regarding the victims' notice, hearing, and timeliness rights.²⁶⁴

259. *See id.* at 321.

260. *Id.* at 321-35.

261. *Id.* at 335 (quoting 18 U.S.C. § 3771(a)(8)).

262. *See id.* at 334-36.

263. *See* 18 U.S.C. § 3771(a)(8) ("The right to be treated with fairness and with respect for the victim's dignity and privacy.").

264. *Id.* at 335.

In re Simons presents a similar pairing of a federal victim's fairness and dignity rights with the victim's right to be reasonably heard.²⁶⁵ There, the appellate court ruled that the trial court should unseal the case so that the victim could have an opportunity to review the record and "assert whatever rights he has under the CVRA."²⁶⁶ The court reasoned that without unsealing the record, the victim would not be able to assert his rights and be heard by the court, which would result in the deprivation of fairness and respect.²⁶⁷

Promoting victim dignity is also a central feature in courts' evaluation of the victim's right to be reasonably heard during sentencing proceedings.²⁶⁸ In both *United States v. Degenhardt* and *Kenna v. United States District Court*, the courts noted that permitting a victim to be heard during court proceedings provides a forum in which the victim can "regain a sense of dignity and respect rather than feeling powerless and ashamed."²⁶⁹ While neither court explicitly referenced the fairness nor dignity language in § 3771(a)(8), both courts determined that by providing victims with the opportunity to be heard by the court, their dignity would be acknowledged and honored.²⁷⁰

Federal courts have also invoked the CVRA's fairness and dignity provision²⁷¹ when addressing a victim's right to confer with the prosecution.²⁷² In *United States v. BP Products North American, Inc.*, victims asserted that prosecutors did not exert their best efforts to confer with the victims prior to entering into a plea deal with the defendants.²⁷³ The court coupled the victim's right to confer with the prosecution with the right to be treated with fairness.²⁷⁴ It articulated that prosecutors are meant to use their best efforts to afford victims their rights, thereby giving meaning to the victim's right to be treated with fairness and dignity.²⁷⁵ In particular, the court stated that

265. 567 F.3d 800, 801 (6th Cir. 2009).

266. *Id.*

267. *Id.*

268. See *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006); *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1348 (D. Utah 2005).

269. *Kenna*, 435 F.3d at 1016 (quoting Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)); see also *Degenhardt*, 405 F. Supp. 2d at 1348 (quoting Barnard, *supra*).

270. See *Kenna*, 435 F.3d at 1016; *Degenhardt*, 405 F. Supp. 2d at 1348.

271. 18 U.S.C. § 3771(a)(5) (2012).

272. See *United States v. BP Prods. N. Am., Inc.*, No. H-07-434, 2008 WL 501321, at *1 (S.D. Tex. Feb. 21, 2008).

273. *Id.*

274. See *id.* at *15-16.

275. *Id.* at *16.

“[t]he reasonable right to confer with the government and the government’s obligation to use its best efforts to provide notice of this right are not only a right and an obligation, but also mechanisms through which the CVRA guarantees victims’ rights to fairness.”²⁷⁶

Other areas in which one can observe courts enforcing specific CVRA rights by referencing a victim’s fairness and dignity rights include: a victim’s right to be present at trial,²⁷⁷ a victim’s right to reasonable protection from the accused,²⁷⁸ and a victim’s right to proceedings free from unreasonable delay.²⁷⁹ These cases highlight the courts’ reluctance to let dignity stand as a spoken right in and of itself, and tendency to relegate it to the role of explaining or developing some other specifically stated victims’ right. However, by treating dignity as a background norm, courts have not entirely stripped dignity of its value. In many instances, it has served as a motivating force for courts to uphold other victims’ rights.²⁸⁰

The tension between treating § 3771(a)(8)’s fairness and dignity provision as silent and merely interpretive, rather than as spoken and hence procreative in nature, is starkly exhibited in how the Federal Rules of Criminal Procedure incorporate victims’ rights into its provisions. After Congress passed the CVRA, Professor Paul G. Cassell, one of the nation’s leading victims’ rights advocates, provided the Advisory Committee on the Federal Rules of Criminal Procedure (Advisory Committee) with a set of recommendations for how the Federal Rules of Criminal Procedure could best integrate the leg-

276. *Id.*; see also *Doe v. United States*, 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013) (indicating that failure to confer with victims about “non-prosecution agreement” implicates fair and dignified treatment of victims); *United States v. Okun*, No. 3:08CR132, 2009 WL 790042, at *3 (E.D. Va. Mar. 24, 2009) (excluding victims from trial merely because of their voluminous number is an affront to victim dignity); *United States v. Kanner*, No. 07-CR-1023-LRR, 2008 WL 2663414, at *8 (N.D. Iowa June 27, 2008) (indicating that venue decisions are fair when they take into account victim ability to attend trial); *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006) (indicating that to confer with a victim and consider her views is to treat that victim with dignity and fairness).

277. 18 U.S.C. § 3771(a)(3).

278. 18 U.S.C. § 3771(a)(1); see, e.g., *United States v. Vaughn*, No. S-08-0052 LKK (GGH), 2008 WL 4615030, at *2 (E.D. Cal. Oct. 17, 2008) (referencing both the victim’s right to be reasonably protected from the accused and the victim’s right to be treated with fairness and respect in crafting evidentiary and discovery orders that may require victims to interact with the defendant or defense counsel).

279. 18 U.S.C. § 3771(a)(7); see, e.g., *Carter v. Bigelow*, 869 F. Supp. 2d 1322, 1325-28 (D. Utah 2011) (ordering briefing to continue in a nine year old habeas case referencing a victim’s right to proceedings without unreasonable delay and the right to fairness). *But see United States v. Sampson*, 68 F. Supp. 3d 233, 241 (D. Mass. 2014) (acknowledging how delay in trial could be viewed as undermining victims’ right to be treated with fairness and dignity, but nonetheless delaying trial).

280. See *supra* notes 88-96 and accompanying text.

islative commands of the CVRA.²⁸¹ In a subsequent article, Professor Cassell detailed the areas where the Advisory Committee declined to adopt his recommendations.²⁸²

As indicated by Professor Cassell, when the Advisory Committee sought to integrate the terms and provisions of the CVRA into the Federal Rules of Criminal Procedure, they generally interpreted the fairness and dignity provisions in § 3771(a)(8) narrowly.²⁸³ At best, the Advisory Committee treated the CVRA's spoken and codified dignity as an unspoken term. The result is that while § 3771(a)(8) commands the fair and dignified treatment of victims, there are many places within the Federal Criminal Rules where that mandate is not fully embodied, and sometimes overlooked entirely.²⁸⁴

Professor Cassell's core criticism of the Advisory Committee's work is that it was "timid" and "parsimonious" in its reading and integration of § 3771(a)(8)'s terms into the Federal Criminal Rules.²⁸⁵ The Advisory Committee suggested that § 3771(a)(8)'s language was more akin to a general-purpose provision,²⁸⁶ rather than a "springboard for a variety of victim rights not otherwise provided for in the CVRA."²⁸⁷ The Advisory Committee therefore "concluded that the rules should incorporate, but not go beyond, the specific statutory provisions"²⁸⁸ of the CVRA. Hence, it declined to "create new victim rights [in the federal rules that were] not based upon the statute."²⁸⁹ Therefore, in large measure, the Advisory Committee merely found ways in which to directly integrate language from the CVRA into the federal rules, but did not go any further.

As rightly noted by Professor Cassell, the Advisory Committee missed the mark.²⁹⁰ The Advisory Committee was wrong to read § 3771(a)(8) as a hortatory provision²⁹¹ and therefore contravened the specific intent of the statute's drafters.²⁹² Congress created for vic-

281. See generally Cassell, *Recognizing Victims*, *supra* note 132.

282. This issue has been addressed in great depth by Professor Paul G. Cassell in his article *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861 (2007) [hereinafter Cassell, *Treating Crime Victims Fairly*], which serves as the basis for this discussion.

283. *Id.* at 863.

284. *Id.* at 872-80.

285. *Id.* at 864, 872-73.

286. *Id.* at 872.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 873.

291. *Id.* at 874.

292. See *supra* notes 189-94 and accompanying text.

tims the specific rights to fair, respectful, and dignified treatment by including language regarding each of these entitlements within a list of other specific victim rights, rather than in a preamble or concluding statement.²⁹³ However, the Advisory Committee undermined Congress' intent by reading § 3771(a)(8) more like a general purpose provision or hortatory language.

Professor Cassell also noted that the Advisory Committee was confusingly inconsistent in rejecting § 3771(a)(8)'s command regarding fair and dignified treatment of victims.²⁹⁴ On some occasions, the Advisory Committee made changes to the rules to effectuate § 3771(a)(8), while in other instances it did not. For example, the Advisory Committee accepted Professor Cassell's recommendation for changes to Criminal Rule 18.²⁹⁵ There, the Advisory Committee amended the rule, which addressed where a trial should be held, to consider not only the convenience of the defendant and witnesses, but also the victims.²⁹⁶ In making this change, the Advisory Committee referenced the victim's right to fair treatment under § 3771(a)(8).²⁹⁷ Likewise, in redrafting Criminal Rule 17(c)(3), which addresses inappropriate subpoenas for personal or confidential information about victims,²⁹⁸ the Advisory Committee invoked § 3771(a)(8)'s language regarding victim dignity and privacy.²⁹⁹ The Advisory Committee, however, did not integrate victims into the process with regard to many other provisions within the Federal Criminal Rules.³⁰⁰

293. See 18 U.S.C. § 3771(a)(1)-(10) (separately enumerating the individual victims' rights); see also *supra* notes 195-96 and accompanying text.

294. Cassell, *Treating Crime Victims Fairly*, *supra* note 282, at 877-78.

295. *Id.* at 920. Rule 18 currently reads as follows:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

FED. R. CRIM. P. 18.

296. Cassell, *Treating Crime Victims Fairly*, *supra* note 282, at 877.

297. *Id.* at 902.

298. The rule reads as follows:

Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

FED. R. CRIM. P. 17(c)(3).

299. Cassell, *Treating Crime Victims Fairly*, *supra* note 282, at 877-78.

300. Professor Cassell's article engages in an in-depth examination of the twenty-eight different rule-change suggestions he made to the Advisory Committee and his evaluation of the

A primary illustration of the Advisory Committee's reluctance of integrating victims is its treatment of Rule 2, which lays out the core interpretive standard for all the Federal Criminal Rules. That rule reads: "Rule 2. Interpretation. These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."³⁰¹ Professor Cassell recommended that the Advisory Committee alter the rule as follows: "These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration *to the government, defendants, and victims*, and to eliminate unjustifiable expense and delay."³⁰² So doing, the newly redrafted rule would fulfill § 3771(a)(8)'s mandate of fair and dignified treatment of victims. Without any explanation, the Advisory Committee declined to alter Rule 2.³⁰³

Conversely, while the Advisory Committee was willing to include victim interests in Rule 18 regarding the place of a prosecution and trial,³⁰⁴ it was unwilling to do so for Rule 20, which addresses transferring cases.³⁰⁵ The Advisory Committee suggested that the reason it rejected Professor Cassell's proposal for victim interests to be included in Rule 20 was because "[t]he CVRA does not specifically address transfer."³⁰⁶ However, this reasoning does not square with the Advisory Committee's decision to include victim interests in Rule 18, which addresses fixing the place of prosecution.³⁰⁷ If the consideration of victims' interests is appropriate under Rule 18, despite silence in the CVRA regarding a victim's right to have their views considered regarding the place of trial, then it is hard to rationalize why victim consideration regarding the transfer of a case would be inappropriate for Rule 20.³⁰⁸

At bottom, the Advisory Committee treated the spoken dignity in § 3771(a)(8) as barely interpretive,³⁰⁹ much less as a procreating right in and of itself. So doing, the Advisory Committee misapplied the

committee's adoption or rejection of the same. Only a few of his suggestions are recounted here.

301. FED. R. CRIM. P. 2.

302. Cassell, *Treating Crime Victims Fairly*, *supra* note 282, at 883 (emphasis added).

303. *Id.*

304. *See supra* notes 295–300 and accompanying text.

305. Cassell, *Treating Crime Victims Fairly*, *supra* note 282, at 921–23.

306. *Id.* at 922.

307. *Id.* at 920.

308. *Id.* at 922–23.

309. *See supra* notes 283–89 and accompanying text.

standard federal constitutional analysis of treating dignity as a silent value with, at most, interpretive powers.³¹⁰ The Advisory Committee also contravened the CVRA founders' clear intent that § 3771(a)(8)'s provisions should increase victims' rights, not limit them.³¹¹

In order to determine whether dignity should be treated as a background and interpretive norm rather than a spoken term with procreative value, courts must faithfully review the explicit statutory or constitutional language where the term dignity appears. It is here where advocates and legislators should revisit their statutory and victim rights amendment language and redraft that language to give their invocations of dignity more heft. However, there are other instances, especially within the federal system, where there is less ground to argue that dignity should be treated as an unspoken value that only serves to bolster other already existing victims' rights. Rather, the term should be given broader power.

D. Victim Dignity as a Spoken Procreative Value

Despite some courts' inclination to limit dignity to an unspoken interpretive role, there are many instances where both state and federal courts have reviewed the victim dignity language within their laws and determined that dignity is a spoken procreative value. In victims' rights laws, dignity is often an explicitly stated and codified value.³¹² Of course, and as noted above, sometimes statutory interpretation can limit dignity's role.³¹³ Nonetheless, where dignity unambiguously and explicitly appears in state and federal laws, advo-

310. See *supra* Part I.B.

311. See *supra* notes 192-94 and accompanying text.

312. See *supra* notes 98-99 and accompanying text; see also 18 U.S.C. § 3771(a)(8) (2012).

313. See *supra* notes 162-88 and accompanying text. It should be noted that courts have had little problem treating the privacy language that often appears alongside the dignity and fairness language as a spoken and procreative right. See, e.g., *In re K.K.*, 756 F.3d 1169 (9th Cir. 2014); *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995); *In re Nat'l Broad. Co.*, 653 F.2d 609 (D.C. Cir. 1981); *United States v. Belfort*, No. 98-CR-0859, 2014 WL 2612508 (E.D.N.Y. June 11, 2014); *United States v. Spensley*, No. 09-CV-20082, 2011 WL 165835 (C.D. Ill. Jan. 19, 2011); *United States v. Rand*, No. 11-60088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011); *United States v. McClure*, Nos. CR.08-100 WBS, CR.08-270 WBS, 2009 WL 937502 (E.D. Cal. Apr. 7, 2009); *United States v. Robinson*, No. 08-10309-MLW, 2009 WL 137319 (D. Mass. Jan. 20, 2009); *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193 (E.D.N.Y. 2009); *United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495 (W.D.N.C. May 26, 2009); *United States v. Madoff*, 626 F. Supp. 2d 420 (S.D.N.Y. 2009); *United States v. Patkar*, No. 06-00250 JMS, 2008 WL 233062 (D. Haw. Jan. 28, 2008); *United States v. Vaughn*, No. S-08-0052 LKK (GGH), 2008 WL 4615030 (E.D. Cal. Oct. 17, 2008); *United States v. Kaufman*, No. CRIM.A.04-40141-01, CRIM.A.04-40141-02, 2005 WL 2648070 (D. Kan. Oct. 17, 2005); *United States v. Stamper*, 766 F. Supp. 1396 (W.D.N.C. 1991).

cates and courts should treat it as a spoken procreative value at every opportunity.

Courts have treated as procreative the dignity clauses within their laws in a variety of ways. First, some courts review dignity language as giving a victim specific rights to particular treatment by professionals in the criminal justice system.³¹⁴ Second, courts treat victim dignity language as expanding the scope of victim rights beyond that specifically listed in the law, thereby influencing their interpretation of other court rules or procedures to benefit victims.³¹⁵ Third, courts have invoked dignity language to review and shape legal doctrines separate from specific criminal actions in which the victim is involved.³¹⁶

First, in *United States v. Heaton*, the district court interpreted the CVRA's dignity clause to embody both the idea that dignity is a right in and of itself, and also that § 3771(a)(8) is meant to be applied broadly for victims' benefits throughout the criminal justice process.³¹⁷ The court ruled that § 3771(a)(8) applied to all aspects of the criminal justice process and not just to specific proceedings otherwise listed in the CVRA.³¹⁸ Hence the privacy and dignity provisions of § 3771(a)(8) "may apply before any prosecution is underway and isn't necessarily tied to a 'court proceeding' or 'case.'"³¹⁹

In *Heaton*, the government filed a motion to dismiss.³²⁰ Before granting the motion, the court sought to ensure that the victim was properly afforded her rights under the CVRA.³²¹ The court noted that the victim's right "to be treated with fairness and with respect for the victim's dignity and privacy,"³²² is not limited to specific court proceedings,³²³ and that "the crime victims' right to be treated with fairness and dignity applies not only to public court proceedings but more broadly to all aspects of the criminal justice system . . .

314. See *infra* notes 317–25 and accompanying text.

315. See *infra* notes 326–42 and accompanying text.

316. See *infra* notes 343–51 and accompanying text.

317. 458 F. Supp. 2d 1271, 1273 (D. Utah 2006); see also *In re Petersen*, No. 2:10-CV-298RM, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010) (applying 18 U.S.C. § 3771(a)(8) broadly); *Patkar*, 2008 WL 233062 (same).

318. See *Heaton*, 458 F. Supp. 2d at 1272 (citing 18 U.S.C. § 3771(a)(3), (4) (articulating specific rights for victims in "public proceedings").

319. *Petersen*, 2010 WL 5108692, at *2 (citing *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *United States v. BP Prods. N. Am.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)).

320. *Heaton*, 458 F. Supp. 2d at 1272.

321. *Id.*

322. *Id.* (quoting 18 U.S.C. § 3771(a)(8)).

323. See, e.g., 18 U.S.C. § 3771(a)(2), (3) (articulating specific rights for victims in "public court proceedings").

.³²⁴ In addressing whether it should grant the government's motion to dismiss, the court noted that it first needed to hear the victim's views on the matter.

When the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal. It is hard to begin to understand how a victim would be treated with fairness if the court acted precipitously to approve dismissal of the case without even troubling to consider the victim's views. To treat a person with "fairness" is generally understood as treating them "justly" and "equitably." A victim is not treated justly and equitably if her views are not even before the court. Likewise, to grant the motion without knowing what the victim thought would be a plain affront to the victim's dignity.³²⁵

Here, the *Heaton* court embraced § 3771(a)(8)'s spoken mandate and applied it broadly. The court recognized that the victim was deeply invested in the progress of the case, and by ensuring that it heard her views on dismissal, it treated her fairly and with dignity. Finally, the court was not frugal in reading § 3771(a)(8)'s language. It honored the specific language of the statute, which did not limit its application to particular proceedings of the criminal justice process, and extended rights to the victim beyond that specifically listed in the statute.

Second, in *United States v. Mitchell*,³²⁶ a federal court used the victim's right to dignity to justify broadening the scope of rights afforded to victims in a criminal proceeding. In *Mitchell*, the court addressed a defendant's motion to preclude a victim/witness from testifying at his competency hearing.³²⁷ The court acknowledged that while the CVRA does provide victims with "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding," the statute does not specifically include competency hearings within its scope.³²⁸ The court nonetheless denied the defendant's motion and permitted the

324. *Heaton*, 458 F. Supp. 2d at 1272.

325. *Id.* at 1272.

326. No. 2:08CR125DAK, 2009 WL 3181938, at *1 (D. Utah Sept. 28, 2009).

327. *Id.*

328. *Id.* at *8, *8 n.3 (quoting 18 U.S.C. § 3771(a)(4)).

victim to testify at the competency hearing, noting that the CVRA's "intent is to provide a victim with appropriate access to the proceedings and . . . that the victim has a right to be 'treated with fairness.'"³²⁹ Hence, while the *Mitchell* court did not explicitly refer to the dignity language in the CVRA, it nonetheless suggested that § 3771(a)(8)'s command of fair, respectful, and dignified treatment for victims, coupled with the Act's overall intent to ensure greater victim participation in the criminal justice process, warranted allowing the victim to testify at the defendant's competency hearing.

State courts have also used the dignity clauses within their victim rights laws to broaden victim treatment within the criminal justice process while also treating dignity as a specific right. For example, in *State v. Gomez*, the New Jersey Court of Appeals addressed whether it was appropriate for the trial court to order the victim to undergo a physical exam as requested by the defendant.³³⁰ The *Gomez* court noted the state's victims' rights amendment provided that "[a] victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system."³³¹ The court also noted that these general rights were supported by more specific statutory rights including the right to be "treated with dignity and compassion, the right to participate in criminal prosecutions free of intimidation, harassment or abuse, and the right to have inconveniences minimized to the fullest extent possible."³³² Finally, the court noted that before ordering any type of exam of the victim, the trial court was required to "consider the hardship and inconvenience to the victim."³³³ Taking into account the hardship and inconvenience to the victim in the context of an evidentiary decision, the trial court treated the victim with dignity and fairness, whereby these rights existed independently of any other stated victims' rights.

Likewise, in *N.G. v. Superior Court*, the appellate court reviewed the scope of the psychotherapist-patient privilege in the context of a defendant's request for twenty years of the victim's medical records.³³⁴ The majority's decision focused primarily on the scope of the asserted privilege and concluded that the defendant had not presented sufficient proof to justify an extensive examination of the victim's records.³³⁵ Notably, the concurring judge stated that pursuant

329. *Id.*

330. *State v. Gomez*, 62 A.3d 933, 935 (N.J. Super. Ct. App. Div. 2013).

331. *Id.* at 939 (quoting N.J. CONST. art. I, para. 22).

332. *Id.* at 939 (internal citations and quotations omitted).

333. *Id.* at 940.

334. 291 P.3d 328, 329 (Alaska Ct. App. 2012).

335. *Id.* at 340.

to the state's victims' rights amendment, the victim "had the right to 'be treated with dignity, respect, and fairness during all phases of the criminal . . . process;'"³³⁶ therefore further substantiating the majority's evidentiary ruling against the defendant.³³⁷

Finally, in *Asbury Park Press v. Ocean County Prosecutor's Office*, the New Jersey Superior Court addressed a press request under the state's open records law for a 911 tape associated with a double homicide.³³⁸ In initially rejecting the press' request, the state prosecutor invoked portions of the state's victims' rights laws, which afforded victims fairness, compassion, respect, and dignity.³³⁹ In opposition, the press contended that the state's victims' rights laws existed for the sole purpose to enhance a victim's ability to participate more fully in the criminal justice process, but could not be employed as a means to create an exception to the state's open records laws.³⁴⁰ In essence, the press characterized the victim's dignity right as a background norm to define more specific victims' rights. The court disagreed and stated that when the state legislature passed the open records law, they were aware of, and took into account the state's existing laws regarding dignity and privacy protections for victims.³⁴¹ The court concluded that "it is beyond doubt that the victims' survivors would reasonably expect that they would never have to share their loved ones' words with an inquisitive media or curious public."³⁴² Hence, the court applied the dignitary and privacy aspects of the state's victim rights laws in an action separate from any criminal action in which the victims would have direct participation. The court acknowledged that in the context of reviewing the press' open records law request, the fair and dignified treatment of victims should influence its decision regardless of any specific victims' rights in the matter.

A third area where victims' dignitary interests have served a spoken and hence procreative value, is in the growing movement among state courts to repeal the abatement *ab initio* doctrine.³⁴³ The

336. *Id.* at 340 (Bolger, J., concurring) (quoting ALASKA CONST. art. I, §24).

337. *Id.*

338. 864 A.2d 446, 448 (N.J. Super. Ct. Law Div. 2004).

339. *Id.*

340. *Id.*

341. *Id.* at 457.

342. *Id.* at 458.

343. *In re Wheat v. State*, 907 So.2d 461 (Ala. 2005); *State v. Carlin*, 249 P.3d 752 (Alaska 2011); *State v. Korsen*, 111 P.3d 130 (Idaho 2005); *State v. Benn*, 274 P.3d 47 (Mont. 2012); *State v. Devin*, 142 P.3d 599 (Wash. 2006). *But see* *People v. Robinson*, 719 N.E.2d 662 (Ill. 1999); *State v. Burrell*, 837 N.W.2d 459 (Minn. 2013).

abatement *ab initio* doctrine provides that if a defendant dies prior to sentencing or pending appeal, the defendant's conviction is erased.³⁴⁴ A collateral consequence of this doctrine is that crime victims, often seeking restitution from the defendant, are left without any recourse to address their harms. For quite some time, this doctrine has been prominent in a majority of state jurisdictions.³⁴⁵ However, there has been a developing trend among the states to eliminate it.³⁴⁶

In moving away from the doctrine, many courts have invoked their states' laws calling for the fair and dignified treatment of victims. For example, in *Wheat v. State*, the Alabama Supreme Court decided to repeal the doctrine, noting "the callous impact such a procedure necessarily has on the surviving victims of violent crime."³⁴⁷ Likewise, in *State v. Carlin*, the Alaska Supreme Court noted that its state laws required the accommodation of victims' rights,³⁴⁸ and that allowing an action to proceed despite the death of the defendant would "protect both victims and defendants by providing the opportunity to have criminal charges fully litigated and decided."³⁴⁹ Finally, in *State v. Korsen*, the Idaho Supreme Court stated that "abatement of the conviction would deny the victim of the fairness, respect, and dignity guaranteed by [the state's victim rights laws] by preventing the finality and closure [those laws] are designed to provide."³⁵⁰ In each of the foregoing examples, the

344. See, e.g., Sabrina Margret Bierer, Note, *The Importance of Being Earned: How Abatement after Death Collaterally Harms Insurers, Families, and Society at Large*, 78 BROOK. L. REV. 1699 (2013); Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943 (2002); Timothy A. Razel, Note, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice – And What Should be Done Instead*, 75 FORDHAM L. REV. 2193 (2007).

345. See, e.g., Bierer, *supra* note 344, at 1739–43 (charting how different jurisdictions across the United States apply the abatement *ab initio* doctrine).

346. See *infra* notes 347–51.

347. 907 So. 2d at 461, 463 (quoting *People v. Robinson*, 699 N.E.2d 1086, 1091–92 (Ill. App. Ct. 1998), *rev'd*, 719 N.E.2d 662 (Ill. 1999)).

348. 249 P.3d at 759.

349. *Id.* at 762.

350. 111 P.3d 130, 135 (Idaho 2005). Some courts that have rejected the repeal of the abatement *ab initio* doctrine, despite invocations of victim's rights. In *People v. Robinson*, for example, in reversing the appellate court, the Illinois Supreme Court reviewed the state's victims' rights amendment that commanded that victims "be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." 719 N.E.2d at 664 (citing ILL. CONST. art. I, § 8.1(a)(1)). However, the court stated that "the Crime Victim's Rights Amendment has neither application nor reference to the abatement of criminal prosecutions. That is to say, it is wholly irrelevant to the issue at hand." *Id.* at 663. Likewise, in *State v. Burrell*, in disagreeing with the majority's decision to uphold the abatement *ab initio* doctrine, dissenting Justice Dietzen chided his colleagues noting that "abating a defendant's conviction denies vic-

courts viewed the dignity clauses as a right, which gave the courts leave—if not required the courts—to repeal a doctrine that otherwise undermined victims' rights.³⁵¹

Dignity's role within the victims' rights movement is evolving. While some courts and jurists express discomfort in vesting dignity with full procreative powers, a number of state and federal courts are increasingly embracing and promoting dignity's spoken nature.³⁵² In light of this judicial recognition, dignity should no longer remain solely a background norm and interpretive tool. Instead, it has the capacity to open the door to broader rights for crime victims. As courts and advocates seek to harness dignity's procreative powers, they must nonetheless be prepared to respond to potential criticisms and concerns about this more expansive approach to victims' rights.

III. THE CHALLENGES OF DIGNITY'S PROCREATIVE POWERS

Given the mixed manner by which courts have approached the dignity language that appears in victims' rights laws, advocates and forward-thinking jurists should be prepared for resistance against attempts to expand dignity's role for victims. First, some critics may assert that, in designating dignity as a spoken and procreative value, dignity becomes a positive enforceable right against the government, thereby contravening the negative rights construct that traditionally exists within American law.³⁵³ Second, if dignity is recognized as a right in and of itself, courts may be called to resolve conflicts that arise between the victim's right to be treated with dig-

tims fairness, respect and dignity and prevents finality and closure," and that the court's decision "turns a blind eye to the interests of society and the victims of the crimes involved." 837 N.W.2d 459, 472 (Minn. 2013) (Dietzen, J., dissenting).

351. Other examples abound. *See, e.g.,* State v. Maley, No. C-120599, 2013 WL 4041569 (Ohio Ct. App. Aug. 9, 2013) (referencing the dignity clause as partial justification to support victim presence at trial); State v. Tedesco, 69 A.3d 103, 113–14 (N.J. 2013) (holding that a defendant cannot miss a sentencing hearing since doing so would undermine a victim's dignity rights); State v. Muhammad, 678 A.2d 164, 174 (N.J. 1996) (noting that victim impact statements further victim dignity). Finally, victim dignity and privacy interests are often referenced in cases which seek to protect victim anonymity by using victim initials, rather than full names in court decisions and filings. *See, e.g.,* State v. Zimmerman, No. 27,988, 2012 WL 4550716 (N.M. Ct. App. June 24, 2010); Houston v. State, No. 09-14-00368-CR, 2015 WL 6521459 (Tex. Ct. App. Oct. 28, 2015); Cooper v. State, Nos. 09-13-00187-CR, 09-13-00188-CR, 09-13-00189-CR, 09-13-00190-CR, 09-13-00191-CR, 2014 WL 3387000 (Tex. Ct. App. July 9, 2014); Frank v. State, No. 09-09-00369-CR, 2011 WL 379041 (Tex. Ct. App. Feb. 2, 2011); Matoros v. State, 901 S.W.2d 470 (Tex. Crim. App. 1995).

352. *See* Bierer, *supra* note 344, at 1739–43 (listing jurisdictional recognition of the abatement *ab initio* doctrine).

353. *See supra* notes 77–80.

nity and a defendant's protected rights within the criminal justice process. Neither of these concerns, however, should deter courts and advocates from treating dignity as a spoken and procreative value.

Some scholars suggest that victims' rights laws provide victims with positive enforceable rights that must be provided by the government.³⁵⁴ In many respects, this is true. Many of the rights that appear in victims' rights laws relate to specific actions the government must take in relation to crime victims, as well as specific procedures within the criminal justice process to which victims must be permitted to participate.³⁵⁵ When the government does not afford victims these rights, victims have the opportunity to challenge the denial of these rights.³⁵⁶ Hence, one could proffer that a victim's right to dignity mandates the government to provide victims with specific procedures, thereby opening the door to any number of benefits that enhance and perpetuate the victim's dignified state.³⁵⁷ The challenge with this position is that it contradicts the prevalent negative rights construct within U.S. law, whereby the government is prohibited from infringing on specific rights and liberties, rather than being required to affirmatively provide citizens with specific benefits.³⁵⁸ Thus, treating a victim's right to dignity as a positive right enters uncharted legal territory.

However, dignity may be treated as a spoken and procreative value while still being categorized as a negative right. Moreover, treating dignity as a negative rather than positive right is more logically consistent with the Kantian notion of dignity that the victims' rights movement is seeking to advance. Kant suggested that dignity was a trait inherent in all individuals, and because of dignity's in-

354. See, e.g., Cassell, *Treating Crime Victims Fairly*, *supra* note 282, at 873-77 (noting that the CVRA created a substantive right to fair treatment for victims); Meg Garvin, *Victims and the Supreme Court's Eighth Amendment Jurisprudence in Miller v. Alabama: A Tale of a Constitutive Paradox for Victims*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 311 (2013) (noting "the tremendous evolution and codification of victims' rights with regard to participation and treatment in the criminal justice process generally"); Kyl et al., *supra* note 118, at 613-14 (noting that the CVRA's command of fair and dignified treatment for victims was not meant to be "merely symbolic").

355. See 18 U.S.C. § 3771(a)(1)-(6) (2012) (listing ten specific rights for victims including: the right to be reasonably protected from the accused, the right to receive timely notice of court proceedings, the right not to be excluded from public court proceedings regarding defendant's release, plea, sentencing, or parole, the right to be heard at specific public court proceedings, the right to confer with the government attorney for the case, and the right to restitution).

356. See, e.g., § 3771(d) (detailing how victims may enforce their rights).

357. See Glensy, *supra* note 4, at 111-20.

358. See *supra* notes 78-80 and accompanying text.

nate nature, all individuals were deserving of respect.³⁵⁹ This type of dignity does not need to be granted or specifically bestowed upon an individual because it already exists in that person. At the other end of the spectrum, one could define dignity as the conferral of rank or respect upon another.³⁶⁰ For example, there are many instances in federal law where Congress bestowed the status of dignity upon certain groups or geographical areas.³⁶¹ However, this type of dignity is temporal and can be removed by the power granting it.³⁶²

If dignity is defined as a positive right granted to victims by the state and federal governments, there is a risk it could be categorized as the conferral of rank. Categorizing the right to dignity this way would not only risk the withdrawal of the right, but also undermine the goals of the victims' rights movement.³⁶³ First, suggesting that dignity is bestowed as an indication rank intimates that some individuals may be more worthy of dignified treatment than others. Therefore, within a class of victims, some might be denied certain rights if they did not satisfy established benchmarks for "dignity."³⁶⁴

Categorizing dignity as rank is contrary to the embodiment of dignity in American law. Kant's teachings state that all individuals deserve dignified treatment and are not to be used as a means to an end.³⁶⁵ These Kantian notions of dignity drive the victims' rights movement in its goal to temper, if not eliminate, the secondary victimization suffered by many victims during the prosecution of criminal offenders.³⁶⁶ The explicit reference to dignity in victims' rights laws does not grant a heightened status to victims, but rather reinforces the dignified status victims inherently possess as individuals. The fact that dignity language now explicitly appears in state and federal law underscores a fact obscured by the public prosecution model: despite the focus in the criminal justice system on the conflict

359. See *supra* Part I.A.

360. See *supra* notes 58–68 and accompanying text.

361. See generally Henry, *supra* note 5 (discussing the numerous instances where courts have recognized and conferred dignity as a status); see also *supra* note 52 and accompanying text.

362. See *supra* notes 65–68 and accompanying text.

363. See *supra* Part II.A (discussing the goals of the victims' rights movement).

364. See generally Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087 (2013) (noting that how one speaks of victimization creates potential hierarchy among individuals harmed by crime); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) (examining the impact that victim characteristics have on death sentences).

365. See *supra* Part I.A.

366. See *supra* Part II.A.

between the state and the defendant, victims are integral players in the prosecutorial process and are directly impacted by the outcome of any criminal proceeding.³⁶⁷

By rejecting victim dignity as an indication of status or rank, and embracing it as an embodiment of Kantian notions of fair and respectful treatment, one can easily characterize dignity as a negative right to be protected from government interference. Just as courts view freedom of speech and the free exercise of religion as rights to be free from government interference, so too should courts view the right to dignity in state and federal victims' rights laws. Victim dignity, just like an individual's right to free expression, or an individual's right to worship how he or she might choose, should be something state and federal governments avoid violating.³⁶⁸ Therefore, to ensure that a victim's right to dignity is not violated, a court may determine that it must consider the victim's views prior to dismissing a case,³⁶⁹ it should deny an open records request from the press for a 911 tape,³⁷⁰ or should abrogate the abatement *ab initio* doctrine.³⁷¹ In each of these situations, the government is not bestowing new benefits on victims, but rather, it is protecting victims' existing and inherent dignity.

Even when a court takes steps to ensure a victim's dignity is not violated, the risk exists that the victim's dignity may conflict with a criminal defendant's panoply of rights, or with the state's interests in furthering its prosecutorial mandate. These potential conflicts, however, are not sufficient to undermine treating victim dignity as a spoken procreative value. Throughout our legal history, courts have regularly been asked to adjudicate between conflicting rights and have done so without excessive consternation.³⁷² The same is true in the victims' rights context.

367. See generally Beloof, *The Third Model*, *supra* note 136 (noting that with the growth of the victims' rights movement, victims are now active participants in the criminal justice process); see also Kyl et al., *supra* note 118, at 583 (noting that the CVRA has given victims an enforceable role within the prosecutorial process).

368. See *supra* notes 21–22 and accompanying text.

369. *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006); see also *supra* notes 204–06, 323–28 and accompanying text.

370. *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 864 A.2d 446, 458 (N.J. 2004).

371. See *supra* notes 343–51 and accompanying text.

372. See, e.g., *Goodman*, *supra* note 4, at 767–78 (discussing ways in which courts have balanced an individual's right to privacy and dignity implicated by the Fourth and Eight Amendments, with a state's interest in public safety); *Wright*, *supra* note 5, at 564–67 (noting how courts resolve conflicts between dignity and free speech cases).

First, when drafting the CVRA, legislators made it clear that the victim's right to dignity³⁷³ would not prevail in every instance. For example, California Senator Diane Feinstein noted that there would likely be instances where a victim's right to dignity and fair treatment would not prevail over a defendant's rights.³⁷⁴ She stated:

Let me be clear. I am not talking about the necessary emotional and psychological difficulties which are almost inevitable in our adversary system. Cross examination can be hard. The legal system sometimes must seem complex and irrational to those who do not work in it. Sometimes judges and juries make decisions that victims of crime do not like. But that is not the problem this law addresses. That problem is one of process and fairness.³⁷⁵

Victims' rights must be balanced with defendants' rights, as well as the government's interests in prosecuting crime.

For example, in *United States v. Sampson*, the court balanced the defendant's right to due process with the victim's right to a proceeding without unreasonable delay.³⁷⁶ The defendant had previously been found guilty of carjacking and murder and was sentenced to death, but after the case was affirmed on appeal, the sentence was vacated upon the court's finding of juror misconduct.³⁷⁷ On remand, the defendant sought a continuance so that his legal team would have more time to prepare for trial.³⁷⁸ In reviewing the defendant's claims, the court acknowledged that the victims, who by that point endured over ten years of litigation, had a right under the CVRA to proceedings "without unreasonable delay," as well as the "right to be treated with fairness and respect for their dignity and privacy."³⁷⁹ Moreover, the court acknowledged that any continuance in the matter would "prolong the agony and uncertainty . . . for the families and friends who loved and lost the people [who the defendant] murdered."³⁸⁰ Nonetheless, the court felt bound to grant the defendant's request for a continuance due to a variety of genuinely difficult and time consuming pre-trial matters requiring attention from both

373. 18 U.S.C. § 3771(a)(8) (2012).

374. See 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

375. *Id.*

376. 68 F. Supp. 3d 233, 234 (D. Mass. 2014).

377. *Id.* at 235-36.

378. *Id.* at 239-40.

379. *Id.* at 234 (quoting 18 U.S.C. § 3771(a)(7)-(8) (2012)).

380. *Id.* at 241.

the prosecution and defense teams.³⁸¹ However, in granting the defendant's motion, the court treated the crime victims in a fair and dignified manner. It noted the victims' interests in the matter, and explained the many factors it balanced in reaching its conclusion.³⁸²

Similarly, state courts have emphasized that where there is tension between a victim's right to dignified and fair treatment and a defendant's right to due process, those rights should always be harmonized, but the victim's rights will ultimately be deemed secondary to the defendant's rights.³⁸³ Similarly, a victim may not invoke his or her rights to impede a criminal prosecution.³⁸⁴ Hence, while courts acknowledge that states have "unquestionably legitimate" state interests in ensuring victims are treated with dignity,³⁸⁵ how the state goes about effectuating those rights must not violate a defendant's right to fair process.³⁸⁶ As noted by one court, the concept of emphasizing fair and dignified treatment for victims addresses "problems associated with victims who have been ignored, shunted aside, and kept in the dark by the criminal justice system."³⁸⁷ For example, ensuring victims' access to prosecutors may be an appropriate way to effectuate this goal, but, mandating victim access to prosecutors' files would stretch too far.³⁸⁸

Finally, in *State in Interest of A.B.*, the New Jersey Supreme Court echoed Senator Feinstein's statements regarding the inevitable balance that will need to be struck between a victim's right to dignified treatment and a defendant's rights.³⁸⁹ In *A.B.*, a minor defendant was charged with first-degree sexual assault of another minor.³⁹⁰ For evidentiary purposes, the defendant sought to enter the victim's house where the crime allegedly occurred in order to take photographs.³⁹¹ In considering the defendant's request, the court noted

381. *Id.*

382. *Id.* Other courts have similarly considered victims' interests. *See e.g.*, *Brandt v. Gooding*, 636 F.3d 124, 137 (4th Cir. 2011) (no dignity or fairness violation where victim given full opportunity to provide information and communicate views to the court); *In re Brock*, 262 F. App'x 510, 512 (4th Cir. 2008) (victim who was provided opportunity to provide written victim impact statement as well as address the court did not have dignity and fair treatment rights violated).

383. *State v. Riggs*, 942 P.2d 1159, 1163 (Ariz. 1997); *In re Interest of A.B.*, 99 A.3d 782, 791 (N.J. 2014); *State v. MacDonald*, 346 P.3d 748, 755 (Wash. 2015).

384. *Benton v. Superior Court*, 897 P.2d 1352, 1354 (Ariz. Ct. App. 1994).

385. *State v. Murtagh*, 169 P.3d 602, 615 (Alaska 2007).

386. *Id.*

387. *State ex re Hilbig v. McDonald*, 839 S.W.2d 854, 858-59 (Tex. App. 1992).

388. *Id.* at 859.

389. *See* 99 A.3d 782, 791 (N.J. 2014); *see supra* notes 374-75 and accompanying text.

390. *See* 99 A.3d at 784-85.

391. *Id.* at 785.

that the victim had the right to “be treated with fairness, compassion and respect,”³⁹² as well as the “right to be free from intimidation, harassment, or abuse by any person including the defendant or [his attorney.]”³⁹³ Nonetheless, the rights of the victim and defendant “can and must be harmonized.”³⁹⁴ In ultimately granting the defendant’s request, the court noted that

[t]he right privacy in one’s home is a basic right, and all alleged victims of crime have an interest in not revisiting a traumatic event. However, the undeniable reality is that a criminal prosecution will intrude into an alleged victim’s privacy. . . . Participation in the criminal justice process will undoubtedly be a source of inconvenience and anxiety, and will result in some incursion into privacy rights of witnesses. Some of these adverse consequences are the inevitable price that must be paid to ensure that the accused receives a fair trial.³⁹⁵

However, the court also made clear that a ruling in favor of the defendant by no means undermined the power of the state’s victims’ rights laws. The court stated:

Nevertheless, let us be clear: victims have a right to be free from intimidation, harassment, or abuse. Any discovery request that has its objective causing intimidation, harassment, or abuse of an alleged victim is wholly illegitimate and must be denied. We will not sanction the use of the criminal justice system for an impermissible purpose. . . . We emphasize that discovery requests based on sheer speculation about what is expected to be gained from an inspection of an alleged victim’s home will not suffice. The burden rests with the defendant to show a reasonable basis to believe that a home inspection of limited duration will yield relevant evidence.³⁹⁶

Here, the court sought to strike a reasonable balance between acknowledging the legitimate needs of the defendant and honoring

392. *Id.* at 791 (citation omitted).

393. *Id.*

394. *Id.*

395. *Id.* at 793.

396. *Id.* at 793–94 (citations omitted).

the rights afforded to victims to protect their privacy and ensure their fair treatment throughout the criminal process.

Treating a victim's right to dignified and fair treatment as a spoken and procreative value need not undermine our nation's negative rights system, nor create an untenable battle between victim and defendant rights. By grounding dignity firmly in its Kantian roots, dignity can exist as a right that should not be violated by the government, rather than as a right the government must affirmatively provide to its citizens. Moreover, courts have already demonstrated an ability to balance victim and defendant rights when the two conflict. Therefore, there is no reason to treat dignity solely as an unspoken interpretive value. Rather, courts and advocates should fully embrace dignity's spoken procreative powers.

CONCLUSION

Dignity is a powerful term that permeates American legal jurisprudence. In the constitutional context, dignity has played a silent background role. As an unspoken value, it has generally served as a means for courts to interpret and give meaning to otherwise explicitly stated rights. By codifying dignity in state and federal legislation, the victims' rights movement has endowed dignity with more weight. Bringing dignity out of the shadows and into the explicit light of statutory and constitutional language, the victims' rights movement has elevated dignity from a background explanatory norm to a procreative power that enables courts and advocates to develop an extended body of rights for crime victims. By embracing dignity's spoken and procreative powers, the victims' rights movement has not only furthered its goal to eliminate the secondary victimization often suffered by crime victims in the criminal justice system, but has also expanded dignity's role within the law.