More on Dignity in Eighth Amendment Conditions of Confinement Claims

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In my article, Defining "Sufficiently Serious" in Claims of Cruel and Unusual Punishment, *I articulated and supported several factors that courts should use in deciding whether a prisoner's claim is "sufficiently serious" to give rise to conditions of confinement claims of Cruel and Unusual Punishment: severity, duration, and the effect on personal dignity.*[1] *In* Brown v. Plata *and* Hope v. Pelzer, *the Supreme Court re-emphasized that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."*[2] *This article further explores the meaning of dignity in the context of conditions of confinement claims. I will address the concept of dignity as a factor in Eighth Amendment jurisprudence, starting with* Brown v. Plata *and* Hope v. Pelzer *and working backwards into the 19th century precedent. This review indicates that an evolving notion of dignity is neither new nor the product of judicial activism. I will also discuss state cases addressing the notion of dignity in conditions of confinement. The article also reviews jury verdicts in cases brought by inmates alleging cruel and unusual punishment arising from conditions of confinement, and incorporates some settlement cases, all of which may serve as a very rough gauge of the concept of dignity in the context of confinement. Finally, I briefly touch upon the notion of dignity in international human rights legislation and how it may influence treatment of the incarcerated.*

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1. George Bach, *Defining "Sufficiently Serious" in Claims of Cruel and Unusual Punishment*, 62 DRAKE L. REV. 1 (2013).

2. Hope v. Peltzer, 536 U.S. 730, 738 (2001) (alteration omitted) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

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I. INTRODUCTION

In 2002, the Supreme Court decided *Hope v. Pelzer*, a case involving a claim for cruel and unusual punishment arising out of an incident during which the detainee was shackled to a hitching post in the hot sun for seven hours.[3] In *Hope*, the U.S. Supreme Court relied upon the Eighth Amendment notion of dignity in denying qualified immunity to prison officials.[4] The Court held:

> Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man."[5]

The question confronting the Supreme Court in *Hope* was whether the

3. *Hope*, 536 U.S. at 734–35.

4. *Id.* at 745–46.

5. *Id.* at 738 (alteration in original) (footnote omitted) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

officers were entitled to qualified immunity because there was no case directly on point holding such treatment violated clearly established Eighth Amendment law.[6] The Court, while noting the violation in *Hope* was obvious,[7] emphasized the violation of dignity as a predominant factor in finding an Eighth Amendment violation.[8] Although criticized for developing a new, unprecedented factor,[9] *Hope* stands as just another in a well-established line of cases reinforcing the idea of fundamental human dignity as a factor to be used in assessing cruel and unusual punishment claims.[10] While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.[11]

In 2011, the Court reiterated this notion of dignity in *Brown v. Plata*:

> Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man….
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> . . .
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> A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.[12]

This constitutional notion of dignity is neither new nor the product of activist justices. Rather, it is a notion deeply rooted in our nation's history

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6. *See id.* at 735–36.

7. *Id.* at 738.

8. *Id.* at 745.

> The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

9. *See id.* at 750 (Thomas, J., dissenting) (footnote omitted) (citations omitted) [P]etitioner [n]ever claimed [a particular defendant] was responsible for keeping him on the bar for seven hours, removing his shirt, denying him water, taunting him about his thirst, or giving water to dogs in petitioner's plain view. The relevance of these facts, repeatedly referenced by the Court. . . therefore escapes me.

10. *See* Gates v. Collier, 501 F.2d 1291, 1296 (5th Cir. 1974); Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring); Trop v. Dulles, 356 U.S. 86, 100 (1958).

11. *Trop*, 356 U.S. at 100–01.

12. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) (citing Atkins v. Virginia, 536 U.S. 304, 311 (2002)).

and well-established by two centuries of precedent.[13] *Hope* and *Brown* are only the most recent articulations.[14] By tracing the authority back, historical precedent illuminates this as a source of rights for those incarcerated by the state.[15]

II. DIGNITY AS A FACTOR IN CRUEL AND UNUSUAL PUNISHMENT CASES IS DEEPLY ROOTED IN OUR NATION'S HISTORY

In articulating the notion of dignity found within the Eighth Amendment, the Court in *Hope*[16] and *Atkins v. Virginia*[17] relied on its opinion in *Trop v. Dulles*.[18] The Court in *Trop* harkened back to the Magna Carta, when articulating the Eighth Amendment notion of dignity:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these

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13. "To deny. . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment." Hudson v. McMillian, 503 U.S. 1, 11 (1992) (internal quotation marks omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

14. *Brown*, 131 S. Ct. at 1928; Hope v. Pelzer, 536 U.S. 730, 738, 745 (2002).

15. *Estelle*, 429 U.S. at 101–02 (establishing what a plaintiff must plead in order to claim a violation of the Eighth Amendment in conditions of conditions of confinement for the first time).

Several scholars have done amazing work examining the notion of dignity in a more general way, to whom the concept is deeply indebted. *See, e.g.*, Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65 (2011); Eva Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007); Alex Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009); Judith Resnik and Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

16. "[I]n 1974, the Court of Appeals reviewed a District Court decision finding a number of constitutional violations in the administration of Mississippi's prisons. That opinion squarely held that several of those 'forms of corporal punishment run afoul of the Eighth Amendment [and] offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.' Among those forms of punishment were 'handcuffing inmates to the fence and to cells for long periods of time, . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods.'" *Hope*, 536 U.S. at 742 (internal citations omitted).

17. *See* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

18. "The use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man.' Trop v. Dulles, 356 U.S. 86, 100 (1958). This punitive treatment amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Hope*, 536 U.S. at 738; *see also Atkins*, 536 U.S. at 311–12.

> words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.[19]

In *Hope*, the Court also relied on the Fifth Circuit's opinion in *Gates v. Collier*. In *Gates*, the Fifth Circuit Court of Appeals points to then-Judge Harry Blackmun's opinion in *Jackson v. Bishop*:

> While the evidence indicated that the lash had not been used at Parchman since 1965, the record was replete with innumerable instances of physical brutality and abuse in disciplining inmates who are sent to MSU. These include administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and to cells for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods. Indeed, the district court found the superintendent and other prison officials acquiesced in these practices. Unquestionably, the district court correctly enjoined prison authorities from punishing inmates by these methods of corporal punishment. We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.[20]

In *Jackson*, Justice Blackmun, while sitting on the Eighth Circuit Court of Appeals, discussed this notion of dignity as a factor in assessing prison claims.[21] While acknowledging that the "limits of the Eighth Amendment's proscription are not easily or exactly defined," he added that "broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable."[22] Then-Judge Blackmun also points to *Trop*.[23]

> The principal opinion in *Trop v. Dulles*, although it commanded the votes of only four justices a decade ago, is, in our view, particularly pertinent. The issue was the validity of a federal statute which would dena-

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19. Trop v. Dulles, 356 U.S. 86, 99–100 (1958); *see also* Gregg v. Georgia, 428 U.S. 153, 169–170 ("The phrase first appears in English Bill of Rights 1689, which was drafted by Parliament at the accession of William and Mary. . .American draftsman. . .were primarily concerned with proscribing 'tortures' and other 'barbarous' methods of 'punishment.'").

20. Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).

21. *See* Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

22. *Id.*

23. *Id.* at 587.

> tionalize a native born citizen who deserts the military service in time of war and is convicted thereof by a court-martial and dismissed or dishonorably discharged. The opinion provides guidelines and overtones which we feel safe in regarding as illustrative of the general thinking of a majority of the justices on the subject today. The opinion casts aside the death penalty "as an index of the constitutional limit on punishment," for it "has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." The Eighth Amendment's basic concept "is nothing less than the dignity of man" and assures that a state's punishment power "be exercised within the limits of civilized standards." Fines, imprisonment, and even execution may be imposed "but any technique outside the bounds of these traditional penalties is constitutionally suspect." The scope of the Amendment is not "static." It "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Virtually all the world's civilized nations refuse to impose statelessness as punishment for crime.[24]

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24. Jackson v. Bishop, 404 F.2d 571, 578–79 (8th Cir. 1968)

Blackmun's opinion may be the strongest articulation of dignity:

> From that opinion we glean a recognition of, and a reliance in part upon, attitudes of contemporary society and comparative law. And the emphasis is on man's basic dignity, on civilized precepts, and on flexibility and improvement in standards of decency as society progresses and matures. Finally, it is 'any technique' outside the traditional bounds which 'is constitutionally suspect.'
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> In summary, then, so far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable. We recognize that some of these utterances by the Court were made in concurrence or dissent or in the approach, evidently now superseded, through the Fourteenth Amendment's due process clause rather than jointly through the Fourteenth and Eighth Amendments. All this, however, strikes us as of no import because we read and ascertain in the totality of the language used the basic attitude of the entire Court to the Eighth Amendment.
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> With these principles and guidelines before us, we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.

In addition to *Trop*, Judge Blackmun cites Justice Field's dissent in *O'Neil v. Vermont* and *Weems v. U.S.*[25] In *O'Neil*, Justice Field, stated:

> Fifty-four years' confinement at hard labor, away from one's home and relatives, and thereby prevented from giving assistance to them or receiving comfort from them, is a punishment at the severity of which, considering the offenses, it is hard to believe that any man of right feeling and heart can refrain from shuddering.[26]

The Court in *Weems* also cites *O'Neil*, and points to a number of 19th century cases.[27]

> While the state courts are not entirely in accord as to the meaning of the term, the majority of the cases hold that the words employed in the Constitution signify such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied.[28]

In *State v. Becker*, the South Dakota high court relied on Judge Cooley's commentaries.[29]

> 'Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. But those degrading punishments which in any state had become absolute before its existing constitution was adopted we think may well be forbidden by it as cruel and unusual.' Cooley, Const. Lim. p. 402. But, whether this view of the meaning of the expression as used in the constitution is too broad or too restricted, it is certain that it devolves upon the legislature to fix the punishment for crime, and that in the exercise of their judgment great latitude must be allowed; and the courts can reasonably interfere only when the punishment is so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally.[30]

Judge Blackmun also relies upon *Landman v. Peyton* and *Johnson v. Dye* in his lengthy discussion of dignity in *Jackson.*[31] In *Landman*, the

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25. Weems v. United States, 217 U.S. 349, 356–57 (1910); O'Neil v. Vermont, 144 U.S. 323, 337 (1892).

26. *O'Neil*, 44 U.S. at 340 (Field, J., dissenting).

27. *Weems*, 217 U.S. at 356.

28. *Id.* at 358 (citations omitted).

29. State v. Becker, 51 N.W. 1018, 1020–22 (S.D. 1892).

30. *Id.* at 1022. Cooley is also relied upon in *Wilkerson v. Utah* cited by Blackmun. 99 U.S. 130, 136 (1878).

31. Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) ("Although their fact situa-

Fourth Circuit held, "where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and Eighth Amendment questions inevitably arise."[32] And in *Johnson*, the Third Circuit explained the notion of dignity as one most fundamental to individual liberties.[33]

> We are of the opinion that the right to be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion.
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> ….
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> We know of no way in which degrees of cruelty may be measured coldly as if upon an altimeter, so much for the heights of cruelty, so much for the depths thereof. It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity. It must be pointed out also that she has failed also to observe the explicit mandates of her own Constitution which pointedly, as if the very evil here under consideration was in mind, go as far, if not further, than those of the Eighth Amendment to the Constitution of the United States.[34]

In 1910, the U.S. Supreme Court in *Weems* noted that the Cruel and Unusual Punishment Clause, "[I]n the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[35] In doing so, the Court cited *Ex Parte Wilson*.[36] There, the defendant passed a counterfeit U.S. bond and was sentenced to 15 years hard labor.[37] In the language of the nineteenth century, the Court questioned whether a punishment was considered "infamous," and thus in violation of the Eighth Amendment.[38] "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[39]

Case law preceding *Ex Parte Wilson* is less clearly linked to the notion

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tions are somewhat different, we regard the following cases as helpfully significant in this area.").

32. Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966).
33. Johnson v. Dye, 175 F.2d 250, 255 (3d Cir. 1949), *rev'd*, 338 U.S. 864 (1949).
34. *Id.* at 255–56.
35. Weems v. United States, 217 U.S. 349, 378 (1910).
36. *Id.* at 399.
37. *Ex parte* Wilson, 114 U.S. 417, 418 (1885).
38. *Id.* at 422.
39. *Id.* at 427.

of dignity and more clearly linked to the notion of "infamy."[40] Several of the authorities discussed above point to the Magna Carta, Blackstone's Commentaries, and the English Bill of Rights, as sources for the constitutional prohibition on Cruel and Unusual punishment.[41]

III. ARTICULATIONS OF DIGNITY FOUND IN STATE CASE LAW

State courts have also weighed in upon the notion of dignity in conditions of confinement claims. In *Harman v. State*, the Supreme Court of Kansas articulated a notion of dignity retained by those in confinement.[42]

> [W]e decline to find that a prison policy or practice would conform to the Eighth Amendment if it routinely deprived inmates of access to working toilets or comparable sanitary facilities for extended periods so those inmates had to foul themselves or their living space. That sort of policy would be incompatible with basic standards of sanitation, health, and hygiene encompassed in constitutionally acceptable conditions of confinement and would impose significant indignity and humiliation without apparent purpose. In the abstract, we cannot contemplate a constitutionally acceptable penological justification for a policy with those

40. *See Id.* at 424 (stating that an infamous crime includes "any infamous punishment").

41. For a history of those historical documents, see David Fellman, *Cruel and Unusual Punishments*, 19 J. POL. 34 (1957). The Court has addressed the notion of dignity in various other contexts. *E.g.* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (drawing a notion of dignity from a "penumbra" emanating from the Bill of Rights); Yamashita v. Styer, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) ("If we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."); Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) ("[T]o destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow"); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2621–22 (2015); Lawrence v. Texas, 539 U.S. 558, 568 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."); PAOLO CAROZZA, HUMAN DIGNITY IN CONSTITUTIONAL ADJUDICATION, RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW (2011); Glensy, *supra* note 15, at 73; Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 789 (2006); Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 ALB. L. REV. 1725, *passim* (2010); Jordan J. Paust, *Constitutional Prohibitions of Cruel, Inhumane or Unnecessary Death, Injury or Suffering During Law Enforcement Process*, 2 HAST. CONST. L.Q. 873, 886–90 (1975); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 148 (1984).

42. Harman v. State, 303 P.3d 727, *4 (Kan. App. 2013) (unpublished).

> regularly realized consequences.[43]

In *Levier v. State*, the Court of Appeals noted that inmate rights include "entitlement to adequate food, light, clothing, medical care and treatment, sanitary facilities . . . and protection against . . . unnecessary indignity—in short, the basic necessities of civilized existence."[44]

In *Tindell v. Dep't of Corrections*, the plaintiffs alleged serious mistreatment: poor ventilation; forced air that was extremely cold, loud, and allowed fecal dust to enter cells; resulting infections, headaches, upset stomachs, loss of appetite, hypersensitivity, pneumonitis, and sleep deprivation; refusal to provide medical treatment for Type-1 Diabetes; social isolation that caused mental health problems; and behavior modification techniques that resulted in mental health problems.[45] The court noted that evolving standards of decency "mandate that petitioners' confinement does not deprive them of the minimal necessities of life."[46] The court articulated a dignity formula that balanced state interest with the individual right "to have confinement be humane and free from the unnecessary and wanton infliction of pain."[47]

In *Walker v. State*, an inmate with bipolar made three suicide attempts.[48] He was stripped of clothing and spent up to two weeks naked in his cell. In his cell, he was deprived of bedding/mattress, and spent a week sleeping on concrete bunk with nothing besides a "suicide blanket."[49] His sink and toilet water were turned off and on at regular intervals.[50] He received no hot meals and food was passed through same door slot as toilet cleaning supplies.[51] Furthermore, he received no mental health reviews, despite prison policy requiring one every seven days. His cell contained "blood, feces, vomit, and other types of debris," and staff told inmates to "live with it."[52]

The *Walker* Court noted the explicit provision of the Montana Constitution:

> The dignity of the human being is inviolable. No person shall be denied

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43. *Id.*

44. Levier v. State, 497 P.2d 265, 271 (Kan. 1972) (citing Sol Rubin, *A Model Act for the Protection of Rights of Prisoners*, 1973 WASH. U. L. REV. 553 (1973)).

45. Tindell v. Dep't of Corr., 87 A.3d 1029, 1034, 1036–37 (Pa. Commw. Ct. 2014).

46. *Id.* at 1042.

47. *Id.*

48. Walker v. State, 68 P.3d 873, 874–75 (Mont. 2003).

49. *Id.* at 876.

50. *Id.*

51. *Id.*

52. *Id.*

> the equal protection of the laws.[53] Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[54]

The Court asked whether the "core humanity of the prisoner is being treated with dignity."[55]

> [W]e must not punish or reform in a way that degrades the humanity, the dignity, of the prisoner False [I]f the particular conditions of confinement cause serious mental illness to be greatly exacerbated or if it deprives inmates of their sanity, then prison officials have deprived inmates of the basic necessity for human existence and have crossed into the realm of psychological torture.[56]

In *Inmates of the Riverside County Jail v. Clark*, the inmates alleged overcrowding.[57] They submitted documentary evidence of mattresses that were placed on floors of the dayrooms and in the shower areas. The inmates had dirty clothing and linen. The evidence also showed bad plumbing and fixtures were in a severe state of disrepair. Garbage pervaded the floor of dayrooms. Fungus and mildew grew in the shower areas. There was broken air conditioning, insect infestations, and requests for medical attention went unanswered. The California court employed federal standards for evaluating conditions of confinement (*Trop*—"evolving standards"; *Estelle*—deliberate indifference to medical needs) and looked to state regulations for "standards of decency."[58] Under both standards, the California Court of Appeal found the lower court properly looked to objective indicia to find that conditions violated contemporary standards of decency.[59] The facility was unquestionably overcrowded: as many as forty-six persons were held in four multiple occupancy tanks of 1286 square feet total, while California required thirty-five square feet of floor area per person in multiple occupancy tank, plus additional thirty-five square feet per person in day rooms.[60]

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53. MONT. CONST. art. II, § 4; *see Walker*, 68 P.3d at 877.

54. MONT. CONST. art. II, § 4. *See generally* 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, 307 (2000); Heinz Klug, *The Dignity Clause of the Montana Constitution*, 64 MONT. L. REV. 133, *passim* (2003).

55. *Walker*, 68 P.3d at 884.

56. *Id.*

57. Inmates of the Riverside Cty. Jail v. Clark, 192 Cal. Rptr. 823, 827–28 (4th Dist. 1983).

58. *Id.* at 828.

59. *Id.* at 833.

60. *Id.* at 830.

IV. JURY VERDICTS CAN SHED SOME LIGHT ON THE NOTION OF DIGNITY IN CONDITIONS OF CONFINEMENT CLAIMS

While not conclusive in defining the meaning of dignity under the Eighth Amendment's Cruel and Unusual Punishment Clause, and somewhat bound by the facts of the specific cases, jury verdicts may also be a source of definition.[61]

A. Over $1,000,000

In *Clark-Murphy v. Foreback*, the inmate suffered an episode where he collapsed, and then proceeded to engage in strange behavior (barking like a dog, tensing his arms, relinquishing use of his legs, and crying).[62] Correctional officials assumed the inmate was faking the episodes.[63] Leaving him in an observation cell, the prison turned off the water in his cell, despite high heat levels in the prison and the observation cell.[64] Five days after the episode began, the inmate died.[65] The jury awarded his estate $250,000 in actual damages and $1,250,000 in punitive damages.[66]

In *Haley v. Gross*, the inmate claimed he had requested to be removed from the cell with his cellmate due to persistent problems, weeks before the cellmate set fire to the cell with them both in it.[67] The inmate was injured when his clothes caught fire, leaving second and third degree burns over fifty percent of his body.[68] The jury awarded $1,650,000.[69]

In *Rangolan v. County of Nassau*, the inmate plaintiff was improperly placed in an area with another inmate, even though the latter had been determined to pose a danger to the plaintiff.[70] Acting as a confidential informant, the plaintiff had purchased drugs from his cellmate while wearing a wire, and cooperated with the subsequent arrest.[71] The plaintiff was at-

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61. *See infra* Sections A–F.

62. Clark-Murphy v. Foreback, 439 F.3d 280, 283 (6th Cir. 2006).

63. *Id.*

64. *Id.* at 283–85.

65. *Id.* at 285 ("His body lay naked on the floor, in full rigor mortis, with eyes open and vomit encrusted on his mouth.").

66. Jury Verdict Form, Clark-Murphy v. Foreback, 4:04-CV-00103, 2007 WL 1921019 (W.D. Mich. May 4, 2007).

67. Haley v. Gross, 86 F.3d 630, 633 (7th Cir. 1996) ("Wilborn was moved into this cell with Haley on March 17, 1989, approximately two-and-one-half weeks before the fire. Haley and Wilborn did not get along from the beginning.").

68. Verdict and Settlement Summary, Haley v. Gross, No. 89-3376, 1995 WL 17008173 (S.D. Ill. May 12, 1995).

69. *Id.*

70. Rangolan v. Cty. of Nassau, 51 F. Supp. 2d 236, 239–40 (E.D.N.Y. 1999).

71. *Id.* at 239.

tacked and received permanent brain damage.[72] The jury awarded the plaintiff $1,550,000 for pain and suffering.[73]

B. $100,000–$500,000

In *Valdez v. Ayers*, a female detainee was stunned by a Taser, causing her to have a miscarriage.[74] The detainee had been tazed after she refused to undergo a strip search in front of male officers.[75] The jury awarded her $225,000.[76]

In *Smith v. Franklin*, the inmate plaintiff alleged his glaucoma medicine was taken away from him for three weeks, resulting in complete blindness.[77] The jury awarded $225,000.[78]

In *Ford v. Grand Traverse County*, the jury awarded the inmate $214,000 when corrections officials failed to provide her with medicine to treat her epilepsy.[79] As a result, the inmate suffered a seizure and broke her hip and collarbone.[80]

In *Williams v. Epps*, three inmates were attacked with shanks by other inmates when a guard left his keys out.[81] They suffered multiple slash wounds, and one of the three died from his injuries.[82] The jury awarded each of the surviving inmates $25,000, and $100,000 to the wrongful death estate of the deceased.[83]

C. $50,000–$100,000

In *Atkinson v. Way*, an inmate claimed he suffered second-hand smoke from cellmates, harassment by a corrections officer, food tampering, unwarranted strip searches, and having his mail read publicly.[84] The jury

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72. *Id.* at 240.

73. *Id.* at 238. *See generally* Rangolan v. Cty. of Nassau, 370 F.3d 239, 239 (2d Cir. 2004) (reviewing the amount awarded by the jury in the district court).

74. Valdez v. Ayers, 988 F.2d 126, 126 (9th Cir. 1993).

75. Settlement Summary, Valdez v. Ayers, No. CIVS 89-0939 DFL-GGH, 1991 WL 718915 (E.D. Cal. June 20, 1991).

76. *Id.*

77. *See* Settlement Summary, Smith v. Franklin, No. 1-88-CV-549-RLV, 1000 WL 183873 (Unknown State Ct. Ga.).

78. *Id.*

79. *See* Ford v. Cty. of Grand Traverse, 535 F.3d 483, 485–86 (6th Cir. 2008).

80. *Id.* at 487.

81. Verdict Summary, William v. Epps, No. 4:08-CV-00163, 2012 WL 7669603 (N.D. Miss. Apr. 26, 2012).

82. *Id.*

83. *Id.*

84. Atkinson v. Delaware Dep't of Corr., No. Civ.A. 99–562–JJF, 2001 WL 34368331, at *2–3 (D. Del. June 27, 2001).

awarded him $85,000 in pain and suffering, and $15,000 in punitive damages against the prison officer.[85]

In *Chao v. Ballista*, a thirty-one year-old female inmate was sexually assaulted and coerced into sex by a corrections officer.[86] The jury awarded $67,500 in compensatory damages and $6200 in punitive against the officer.[87]

D. $25,000–$50,000

In *Meyer v. McNicholas*, an inmate was attacked by inmates who wanted him to steal food for them.[88] He complained about the attack and his fear of the inmates to prison officials who did not protect him.[89] The inmate was subsequently attacked and sexually assaulted.[90] The jury awarded him $10,000 in compensatory and $30,000 in punitive damages.[91]

In *Norwood v. Vance*, the inmate complained of being in lock down for fourteen out of twenty-two months between January 2002 and November 2003.[92] The jury awarded $11.00 in nominal damages and $39,000 in punitive damages.[93]

E. $10,000–$25,000

In *Card v. Pearson*, the inmate plaintiff alleged he was repeatedly placed in five-point restraints on a metal bunk, with cuffs on each arm and leg, and a strap across the chest.[94] He was allegedly restrained forty-six to forty-eight hours at a time, and given a twenty-minute break every four to six hours to eat and use the restroom.[95] The jury awarded $5000 for every in-

85. Atkinson v. Delaware Dep't of Corr., No. Civ.A. 99–562–JJF, 2004 WL 1906111, at *1 (D. Del. Aug. 25, 2005).

86. Chao v. Ballista, 772 F. Supp. 2d 337, 362 (D. Mass. 2011).

87. *Id.* at 363.

88. Meyer v. McNicholas, No. 2:07-cv-1253, 2010 WL 348311, at *1 (S.D. Ohio Jan. 26, 2010).

89. *Id.*

90. *Id.* at *4.

91. *Id.*

92. Norwood v. Vance, No. 2:03-cv-2554-GEB-GGH-P, 2008 WL 686901, at *1 (E.D. Cal. Mar. 12, 2008), *vacated by*, 591 F.3d 1062, 1067 (9th Cir. 2010) (vacating a jury verdict for the plaintiff because the District Court failed to provide a jury instruction explaining the deference to correction officials' decisions and failed to hold that the correction officials had qualified immunity for restricting the plaintiff's outdoor recreational time during violent prison riots).

93. *Id.*

94. Card v. Peason, 2:00-cv-00631-JBF, 2006 WL 7070918 (E.D. Va. Apr. 20, 2006).

95. *Id.*

cident of restraint, for a total of $25,000.[96]

In *Cantu v. Jones*, the inmate alleged defendants failed to protect him from an attack by another inmate, resulting in razor cuts to his face and neck.[97] A jury awarded the inmate $22,500.[98]

In *Bell v. Luna*, the plaintiff alleged he was forced to sleep on a slashed, foul, mildewed mattress that resulted in health issues.[99] The jury awarded $7000 in compensatory damages and $5000 in punitive damages.[100]

F. Under $10,000

In *Austudillo v. County of Los Angeles*, the plaintiff inmate was attacked by other inmates in three separate incidents.[101] The inmate claimed the guards could hear him being attacked.[102] The jury awarded $5000.[103]

In *Gorton v. Bick*, an inmate serving a sentence for child sex crimes asked a guard to remove him to safety after being threatened by a Skinhead gang.[104] Soon thereafter, the inmate was escorted to the Custody office.[105] The only supervising guard in the office left to make a phone call, but failed to lock the door behind him. A Skinhead gangmember entered into the office and attacked the inmate.[106] The jury awarded $4000 in pain and suffering.[107]

In *Tudor v. South Carolina Dep't of Corrections*, an inmate, suffering from asthma, was awarded $3200 for pain and suffering as a result of secondhand smoke.[108] The jury found the plaintiff's allegations that the defendants designated inmates who were smokers into his cell, violated his civil rights to clean air.[109]

In *Sher v. Moore*, the plaintiff alleged that a prison guard threatened to end his life if he did not assist with bringing contraband into the prison, and

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96. *Id.*
97. Cantu v. Jones, JVR No. 450683, 2001 WL 35946360 (W.D. Tex. Jul. 1, 2001).
98. *Id.*
99. Bell v. Luna, 10-cv-00008, 2014 WL 1088185 (D. Conn. Jan. 31, 2014).
100. *Id.*
101. Astudillo v. Cty. of L.A., No. 203CV04719, 2005 WL 2899701 (C.D. Cal. Aug. 3, 2005).
102. *Id.*
103. *Id.*
104. Gorton v. Bick, No. 11CV00966(DAD), 2011 WL 4377934, (E.D. Cal. May 26, 2011).
105. *Id.*
106. *Id.*
107. *Id.*
108. Tudor v. S.C. Dep't of Corr., 2005 WL 4041311 (Unknown State Ct. S.C. 2005).
109. *Id.*

that another guard repeatedly harassed him by entering his cell and destroying items.[110] The jury awarded the plaintiff $1000 in punitive damages against each guard.[111]

In *Hall v. Pugliese*, the plaintiff inmate alleged that he was placed in restricted housing after complaining about the defendant officer.[112] The plaintiff had complained that the officer had denied meal and shower privileges to inmates.[113] Plaintiff also alleged that while in restricted housing, he was denied visitors, calls, access to the library, recreation and rehabilitation time, and meals.[114] The jury awarded the inmate $500.[115]

In *Kiner v. Newman*, the plaintiff inmate alleged that a guard unnecessarily pepper sprayed him and then refused to let him wash off the irritant.[116] The jury awarded him $252.[117]

In *Gonnella v. Frey*, the plaintiff inmate alleged he was attacked by other inmates, harassed, and intimidated.[118] The jury awarded $100 in damages and another $100 in punitive damages against each of the two defendants.[119]

In *Sanders v. Confidential*, the plaintiff alleged he was placed in administrative segregation and that eight officers were deliberately indifferent to his conditions of confinement in denying him food, water, restroom use, and mental health care.[120] The jury awarded the plaintiff $1 per defendant.[121] No punitive damages were awarded.[122]

In *Skinner v. City of St. Louis*, the inmate claimed he was denied saline solution for contact lenses and suffered eye infections.[123] The jury awarded $2.[124]

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110. Sher v. Moore, VI JVRS 45-11, 1989 WL 1114703 (E.D. Mo. Oct. 5, 1989).

111. *Id.*

112. Hall v. Pugliese, No. 1:06-cv-01528-WWC-PT, 2010 WL 2404272 (M.D. Pa. Jan. 25, 2010).

113. *Id.*

114. *Id.*

115. *Id.*

116. Kiner v. Newman, 1:03-CV-0164 JDT-TAB, 2006 WL 1788362 (S.D. Ind. Mar. 8, 2006).

117. *Id.*

118. Gonnella v. Frey, 84-1265C(3), 1985 WL 667842 (E.D. Mo. Aug. 28, 1985).

119. *Id.*

120. Sanders v. Confidential, CV0110509(CJC)(II), 2007 WL 2389555 (C.D. Cal. Jan. 12, 2007).

121. *Id.*

122. *Id.*

123. Skinner v. City of St. Louis, 88-1231C(3), 1989 WL 1114787 (E.D. Mo. Dec. 20, 1989).

124. *Id.*

In *Woodall v. State of California*, the inmate alleged that he suffered from a rotator cuff tear and a degenerative disc disease.[125] He was placed in handcuffs at the detention facility and taken to a holding cage.[126] He pled with officials to remove his handcuffs, but remained cuffed for over two hours.[127] A jury awarded the inmate $1.[128]

V. SETTLEMENT AMOUNTS MAY ALSO SUPPORT A GENERAL DEFINITION OF DIGNITY IN CONDITIONS OF CONFINEMENT CLAIMS

Although less an expression of a public notion of dignity than jury awards, settlement amounts in cases involving cruel and unusual punishment in conditions of confinement may have some persuasive value.

In *Ramirez v. County of Orange*, the plaintiff inmate was attacked when other inmates learned he had been accused of child molestation.[129] The inmate suffered a traumatic brain injury and would need around-the-clock care for the rest of his life.[130] The parties settled for $3.75 million.[131]

In *Estate of James Quigley v. Lanman*, the inmate had been placed in segregated custody for 118 days.[132] This led to his mental and physical deterioration and ultimately, his suicide.[133] The complaint alleged that segregated custody had been in retaliation for the inmate's filing of grievances.[134] The estate settled the case for $750,000.[135]

In *Aranda v. County of Glenn*, the complaint alleged that decedent in-

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125. Woodall v. State, 08CV01948(LJO), 2012 WL 4713064 (E.D. Cal. May 25, 2012).

126. *Id.*

127. *Id.*

128. *Id.* In *Schaub v. Cty. of Olmsted*, an inmate plaintiff with paraplegia was assigned to a cell that was not handicap accessible. No. 0:06-cv-02725, 2009 WL 6356730 (D. Minn. 2009). He claimed that he slipped and fell trying to use the toilet, fracturing his femur. *Id.* Even after his injury, he was not provided a handicap accessible commode, and he soiled himself for two days until he was given an adaptive device. *Id.* Because he was unable to use the shower, he suffered numerous skin conditions and infections. *Id.* His bandages were not changed often enough, and he developed additional infections, which metastasized and required surgery. *Id.* After a bench trial, the court awarded $214,000 in compensatory damages and $750,000 in punitive damages. *Id.*

129. Ramirez v. Cty. of Orange, No. SACV07-601JVS(SSX), 2009 WL 1324836 (C.D. Cal. 2009).

130. *Id.*

131. *Id.*

132. Estate of James Quigley v. Lanman, No. 1:04-CV-277, 2005 WL 6950988 (Unknown State Ct. Vt. 2005).

133. *Id.*

134. *Id.*

135. *Id.*

mate did not receive necessary anti-depressant medication while at the jail, and the inmate eventually hung himself.[136] When he was found, the correctional officers also refused to permit another inmate to administer cardiopulmonary resuscitation.[137] The case settled for $375,000.[138]

In *Barnard v. County of Los Angeles*, the plaintiff inmate claimed he had been attacked and raped, and asked to be transferred to protective custody.[139] A judge granted the transfer.[140] When the defendant failed to move him, he was raped and attacked again.[141] The case settled for $350,000.[142]

In *Crowder v. Solano County*, the facility failed to treat the detainee's ongoing testicular infection, ultimately resulting in amputation of his only testicle.[143] The case settled for $200,000.[144]

In *Williams v. County of Los Angeles*, the plaintiff claimed he was exposed to raw sewage as a result of unrepaired plumbing problems at the facility.[145] He also alleged that an unlawful rectal cavity search was performed on him when officers suspected him of having contraband.[146] The case settled for $17,500.[147]

In *Fleming v. Molloy*, plaintiff inmate was a wheelchair user transported by the sheriff's department for a pending criminal hearing.[148] At one point, deputies directed the plaintiff to stand and when he refused, they pushed him over a curb, dumping him to the ground and causing him injuries.[149] They then refused to provide medical care.[150] The case settled for $15,000.[151]

VI. NOTION OF DIGNITY IN CONFINEMENT BORROWED FROM

136. Aranda v. Cty. of Glenn, No. 2:09CV02468, 2012 WL 6536938 (E.D. Cal. 2012).

137. *Id.*

138. *Id.*

139. Barnard v. Cty. of L.A., No. 1401210013, 2012 WL 10218854 (C.D. Cal. Sept. 18, 2012).

140. *Id.*

141. *Id.*

142. *Id.*

143. Crowder v. Solano Cty., FCS023764, 2005 WL 2899715 (Cal. Super. Ct. Jul. 18, 2005).

144. *Id.*

145. Williams v. Cty. of L.A., No. 2:05-cv-03085-PSG-FFM, 2009 WL 4731102 (C.D. Cal. Sep. 25, 2009).

146. *Id.*

147. *Id.*

148. Fleming v. Molloy, 1:07-cv-00118, 2009 WL 3244076 (D. Colo. May 4, 2009).

149. *Id.*

150. *Id.*

151. *Id.*

INTERNATIONAL LAW

There are general statements on the right to dignity in a number of international law declarations, including the Universal Declaration of Human Rights,[152] the International Covenant on Civil and Political Rights,[153] the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,[154] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment.[155] However, the United Nations Standard Minimum Rules for the Treatment of Prisoners is the most helpful in defining dignity in the context of conditions of confinement.[156]

The Standard Minimum Rules for the Treatment of Prisoners addresses accommodations, hygiene, clothing, bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, complaints put forward by prisoners, contact with the outside world, books, religion, retention of property, removal of prisoners, and personnel.[157]

With regard to discipline and punishment, the rules provide that

> [c]orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman, or degrading punishments shall be completely prohibited as punishments for disciplinary offenses. . . .Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is

152. *See* Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

153. *See* The International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, U.N. Doc. A/6316 (1966) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").

154. *See* Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. RES. 39/46, U.N. GAOR (1984) (stating that the covenant "recognizes that those rights derive from the inherent dignity of the human person . . . . No one shall be subjecting to torture or to cruel, inhuman, or degrading treatment or punishment").

155. *See* EUR. CONSULT. ASS'N., *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, Ch. I, art. 1* (Feb. 1, 1989), http://www.cpt.coe.int/en/documents/eng-convention.pdf (establishing a committee which "by means of visits, examines the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.").

156. *See generally United Nations Standard Minimum Rules for the Treatment of Prisoners*, (July 13, 1957), http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf (defining dignity in the context of conditions of confinement).

157. *Id.*

> fit to sustain it.[158]

The rules deal with instruments of restraint and prohibit their use as punishment (including handcuffs, chains, irons, and straight-jackets).[159]

> Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
>
> a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
>
> b) On Medical grounds at the discretion of the Medical officer;
>
> C) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others from damaging property . . . .[160]

VII. CONCLUSION

The notion of dignity, as an evolving standard of decency, inherent in the Eighth Amendment's ban on cruel and unusual punishment, is neither new nor the product of judicial activism.[161] Rather, it is molded by law from pre-revolutionary times and development through the nineteenth and twentieth centuries.[162] It is further informed by state law approaches, jury verdicts, and even settlement agreements.[163] Finally, as the Supreme Court has been increasingly inclined, it is influenced by international law.[164]

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158. *Id.* at 5.

159. *Id.*

160. *Id.*

161. William C. Heffernan, *Constitutional Historicism: Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1370–87 (2005); Nishi Kumar, *Cruel, Unusual, and Completely Backwards: An Argument for Retroactive Application of the Eighth Amendment*, 90 N.Y.U. L. REV. 1331, 1368 (2015) ("The Eighth Amendment protects not only the right to be free from unconstitutional punishment, but enforces a standard of decency and human dignity that evolves as our society evolves."); Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 61 (1995) ("After establishing that society historically accepted the death penalty, and thus the death penalty comported with evolving standards of decency, Justice Stewart argued that capital punishment served society in two ways—retribution and deterrence. He linked these two purposes to human dignity.").

162. *See supra*, Part II; Heffernan, *supra* note 161, at 1367–87.

163. *See supra* Parts III, IV, and V.

164. *See* Roper v. Simmons, 125 S. Ct. 1183, 1198–99 (2005); Lawrence v. Texas, 123 S. Ct. 2472, 2481, 2483 (2003).