DISRESPECT AS THE ESSENCE OF CONSTITUTIONAL RIGHT VIOLATIONS

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I. INTRODUCTION

All constitutional rights[1] are thought to have some underlying justification, in the sense of promoting certain values, goals, or purposes.[2] The underlying justification of a constitutional right crucially accounts for the invocation and limits of that right. In practice, there must initially be some minimal threshold at which the right is implicated and the possibility of legal redress arises.[3] And then, at the other end of the spectrum, there will be instances in which any further enforcement of the right is deemed

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[1] We survey below, for the sake of convenience, only the most significant and contested of such rights.

[2] See infra Section III for discussion of the variety of purposes and values underlying the constitutional rights addressed therein.

[3] For example, a case is simply not a free speech case if speech, and the purposes of protecting speech, are not thought to be sufficiently implicated.

inappropriate, perhaps in light of conflicting values.[4] These inevitabilities make necessary an understanding of the logic of recognizing, or not recognizing, particular constitutional rights, and of judicially determining the proper scope and bounds of those constitutional rights.

This Article presents a simple, broad-sweeping, unifying account of the underlying logic and limits of the important constitutional rights. Crucially, the underlying logic of constitutional rights turns out to be a matter of respect and disrespect. The essential focus of this account is thus on the idea of respect, and often more incisively, on the idea of disrespect. Certainly, no single idea can fully account for all phases of all constitutional rights. But the idea of respect, and of disrespect in particular, can aptly describe much of the territory of the most important constitutional rights, whether the rights in question are officially acknowledged, or as yet unacknowledged.

It is certainly true that the harms associated with constitutional rights violations, to legal plaintiffs and to the broader society, can take a wide variety of forms.[5] Many such harms are not entirely reducible to matters of respect and disrespect. And certainly, constitutional protection of particular rights may serve a variety of purposes, not all of which are fully expressed in terms of fundamental respect and disrespect. The recognition, the threshold enforcement, and the eventual limitation of constitutional rights is in this sense inevitably pluralistic. The argument herein, though, is that considerations of respect and disrespect, in a fundamental sense, generally structure and make distinctive sense of the pluralism of constitutional rights.

In the subsequent section,[6] we introduce the ideas of respect and disrespect themselves and begin to suggest their importance and breadth of application. While there are various senses of the ideas of respect and disrespect, the relevant important senses overlap, complement, and mutually sustain one another in our constitutional contexts. Ultimately, the ideas of respect and disrespect, and especially of basic respect for persons, allow for a consistent understanding of the underlying nature of constitutional right violations. [7]

[4] Thus, for example, courts may balance presumed rights and competing interests in one fashion or another.

[5] See infra Section II.

[6] *See id*.

[7] *See infra* Section III.

II. THE MEANING AND IMPORTANCE OF RESPECT AND DISRESPECT

The ideas of respect, lack of respect, failure to respect, and disrespect take on various meanings across a wide range of contexts.[8] In an extreme case, a mariner might be said to respect the sea, or the weather's capacity for unanticipated adverse changes. More centrally, we might choose to respect someone for some valued quality that is highly developed in that person, or that is rare among persons.[9] We might extend such respect whether we think that the quality in question is personally deserved or not.[10] But then, in contrast, we might choose to respect someone precisely for some quality we believe to be shared, whether in equal measure or not, among all persons.[11]

Cutting across and uniting most of these senses is the idea that respect is a matter of weighing, evaluating, assessing, and judging appropriately.[12] Improper weighting could take the form of what we might call excessive respect. There is the classic story in which Beethoven and Goethe, out for a walk, came upon the entourage of the hereditary nobility and disagreed as to the level of any outward respect to be properly paid.[13] Excessive respect in such a case might be thought of as exhibiting the vice of servility. [14]

More important, though, is the phenomenon of insufficient respect. Insofar as respect aims at appropriately weighing and judging,[15] respect avoids "degradation and discounting."[16] Respect for persons, in particular, requires recognizing and giving proper weight to personhood,[17] as distinct from treating persons as less than full persons, or as non-persons. Much of constitutional law, and in particular the law of constitutional rights, has

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[8] *See, e.g.*, Sarah Buss, *Respect for Persons*, 29 CAN. J. PHIL. 517, 517-18 (1999). Of course, any acknowledgement of any right can be called 'respect' for that right. We do not herein rely on 'respect' in that less interesting sense.

[9] *See, e.g.*, Suzy Killmister, *Dignity: Personal, Social, Human*, 174 PHIL. STUD. 2063, 2064 (2017); Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38-39 (1977) (noting that some instances of respect refer to the respected entity's perceived excellence along some dimension).

[10] Consider the sense in which some persons might respect an individual who has inherited a title of nobility, on just that basis.

[11] *See, e.g.*, Killmister, *supra* note 10, at 2064.

[12] *See* Darwall, *supra* note 10, at 38-39; Robin S. Dillon, *Respect*, STAN, ENCYCLOPEDIA PHIL. (rev. ed. February 18, 2018), at 4 (https://plato.stanford.edu/entries/respect).

[13] *See, e.g.*, Sudip Bose, *When Beethoven Met Goethe* (July 27, 2017), https://theamericanscholar.org/author/sudip-bose. The alleged incident is depicted in a painting by Carl Rohling, The Incident at Teplitz (1887).

[14] *See generally* Thomas E. Hill, Jr., *Servility and Self-Respect*, 57 MONIST 87 (1973).

[15] Killmeister, *supra* note 10; Darwall, *supra* note 10.

[16] Dillon, *supra* note 13, at 4.

[17] Darwall, *supra* note 10, at 39.

imposed, validated, critiqued, or rejected one form or another of a disinclination to respect persons as persons.[18]

The importance of a proper respect for persons in particular is difficult to overstate. The ideas of respect and disrespect are central to our responses to various forms of group-based discrimination.[19] Disrespect is manifested in "the denigration of individual or collective life-styles"[20] as deficient or inferior.[21] Disrespect in this sense may also take the form of "being structurally excluded from the possession of certain rights within a given society."[22]

More broadly, it has been argued that "protection from degradation and insult"[23] is the "central moral thrust" [24] of the natural law approach to jurisprudence.[25] With additional breadth, it has been said that "[c]oncern for justice and respect for personhood are powerfully and separably linked,"[26] at least as a matter of psychology. With further breadth, the "experience of personal disrespect"[27] is said "to represent a moral driving force in the process of societal development."[28] And with yet further breadth, respect for human beings as rational creatures has been characterized as even "the fundamental principle of morality."[29]

For our purposes, we need not make broad claims as to the role of respect for persons across the realms of justice and morality. Our concern is with the narrower realm of the major constitutional rights. The significance of respect for persons much more broadly, though, adds plausibility to the claim that matters of respect and disrespect are foundational in the realm of constitutional rights.

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[18] *See infra* Section III. *See also* Linda Zagzebski, *The Uniqueness of Persons*, 29 J. RELIG. ETHICS 401 (2001) (exceptionally thoughtful account of the subtleties of the idea of personhood).

[19] *See* Darwall, *supra* note 10, at 36 ("The appeal to respect also figures in much recent discussion of . . . racism and sexism"). In contemporary constitutional contexts, respect and disrespect for persons is typically inseparable from respect and disrespect for groups and group-affiliations.

[20] Axel Honneth, *Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition*, 20 POL. THEORY 187, 191 (1992).

[21] *See id*. The terminology of supposed inferiority leads naturally, in constitutional law contexts, to the rubric of equal protection.

[22] *Id*. at 190.

[23] *Id*. at 192.

[24] *Id.*

[25] *See id*.

[26] Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCH. 527, 545 (2001).

[27] Honneth, *supra* note 21, at 191 (referring to the work of Ernst Bloch).

[28] *Id*. *See also* David Schmidtz, *Equal Respect and Equal Shares*, 19 SOC. PHIL. & POL'Y FOUND. 244, 274 (2002).

[29] William K. Frankena, *The Ethics of Respect for Persons*, 14 PHIL. TOPICS 149, 151 (1986) (citing the work of the philosopher Alan Donagan). *See also* Glenn Tinder, *Against Fate: An Essay on Personal Dignity*, in IN DEFENSE OF HUMAN DIGNITY 11, 11 (Robert P. Kraynak & Glenn Tinder ed., 2003).

Assessing the role of respect and disrespect in the realm of constitutional rights requires, to begin with, some basic conceptual framework. The basic framework involved seems relatively uncontroversial. Respect, and disrespect, are relational terms.[30] We begin with a person, group, or governmental actor that does the respecting, or fails to respect, or disrespects.[31] Second, there is some object or person, etc., that is correspondingly thereby respected, not respected, or disrespected.[32] Third, there is some characteristic or quality in virtue of which the latter is respected.[33] And then, fourth and finally, there is some realm or context within which that respect, is extended.[34] Herein, our concern is for the realm of the major constitutional rights, rather than some either narrower or broader realm.

An initial consideration involves questions as to relevant states of mind. We can easily imagine cases in which respect or disrespect is extended freely, knowingly, and with deliberate intention.[35] Certainly, some cases of deliberate official disrespect are constitutionally actionable.[36] But could respect or disrespect, in constitutionally relevant senses, also be expressed through lesser states of mind than intent?

There is no reason to suppose that constitutionally actionable disrespect must be intentional. Disrespect in general requires a failure to recognize and to appropriately respond to the presence of value, particularly the elemental value of a person or group.[37] A failure to recognize, fully or partly, an instance of value may reflect a range of mental states. Consider, for example, the classic exchange in the movie Casablanca between Peter Lorre and Humphrey Bogart:

> (Ugarte sells exit visas)
> Ugarte: "You despise me, don't you?"
> Rick: "If I gave you any thought I probably would."[38]

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[30] *See* Carl Cranor, *Toward a Theory of Respect For Persons*, 12 AM. PHIL. Q. 309, 310 (1975) (explaining that respect requires a respector, a subject to be respected, and the act of respecting).

[31] *See Id*. (while Cranor only explains his formula in terms of respect, the negative implications of disrespect are self-evident).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Consider Beethoven's assumed deliberate snub of the nobility referred to in Bose, *supra* note 14.

[36] *See, e.g.*, the religious-themed county seal case of Freedom From Religion Found. v. Cty of Lehigh, 933 F.3d 275, 284 (3d Cir. 2019).

[37] *See* Kasper Lippert-Rasmussen, *Discrimination and Disrespect by Benjamin Eidelson*, 20 ETHICAL THEORY & MORAL PRAC. 451, 452 (2017) (citing Benjamin Eidelson, *Discrimination and Disrespect*, OXFORD UNIVERSITY PRESS 79 (2015)).

[38] IMDB, www.imdb.com.title/++0034583/characters/nm000048 (last visited April 13, 2021).

Rick's disrespect for Ugarte is not a matter of deliberation or intent, but of something like indifference. Given his knowledge and understanding of Ugarte, Rick simply cannot be bothered with forming the intention to despise Ugarte. Ugarte is, in Rick's judgment, literally beneath contempt, and thus disrespected. But the mental effort necessary to intend to despise Ugarte is, correspondingly, not worth exerting.

Standardly, the law recognizes a range of mental states short of express or inferred intent. In our contexts, a person A might think about, and thus broadly deliberate about, what policy to set, or about what to do in particular in a setting, where person B may be directly or indirectly affected. Person A might then either intentionally, or recklessly and irresponsibly, or merely negligently ignore, overlook, or otherwise underrecognize person B's value. Perhaps person B is not on person A's radar screen. Or person A's efforts to understand person B have been to one degree or another insufficient. Any such situation need not, but may well, reflect person A's actual disrespect—not merely lack of respect, or insufficient respect—for person B.

Consider the cases in which person A—perhaps a government body, or a government official—adopts a policy that has, foreseeably, a severely adverse impact on person or group B. Person A does not intend, or even actually foresee, that impact. Perhaps person A has never bothered to think about the likely policy consequences for person B. Or perhaps person A did engage, in merely casual fashion, in some brief such consideration, to no evident effect. Person A may, or may not, be particularly knowledgeable with respect to person B. But in any event, person A may, in this context, disrespect person B, perhaps on the basis of irresponsible indifference, or even mere culpable negligence.[39] Disrespect in such cases is thus broader than conscious overt or any other form of intended contempt.[40]

More broadly, disrespect at a constitutional rights level also does not logically require a belief in the moral blameworthiness of the disrespected person.[41] As well, the impact of policy disrespect may be as much or more a matter of psychology than of any physical constraints or barriers.[42] Official contempt need not involve any substantive legal exclusion, for example. It is also possible that in some rare cases, official disrespect may, through one causal pathway or another, unintendedly lead to a better long-term outcome

[39] Lippert-Rasmussen, *supra* note 38, at 453. Many group identity-based microaggressions are of this sort. *See, e.g.*, *What to Know About Microaggressions*, NEW YORK-PRESBYTERIAN, https://healthmatters.nyp.org/what-to-know.

[40] Lippert-Rasmussen, *supra* note 38, at 454.

[41] See the parallel discussion of the phenomenon of contempt in Maria Miceli & Christiano Castelfranchi, *Contempt and Disgust: The Emotions of Disrespect*, 48 J. THEORY SOC. BEHAV. 205, 206 (2018).

[42] *See* Honneth, *supra* note 21, at 189.

for the disrespected person than would otherwise have been likely.[43] Official disrespect can certainly have unintended consequences. But in no case do we argue that the subjective attitude of disrespect, however objectionable, is in Zagzebski and of itself a constitutionally actionable harm.

The crucial focus on the idea of disrespect for persons in particular is well-grounded in a broad range of moral thought. It is possible to argue that at the constitutional level, disrespectful policies may violate some underlying loosely contractual agreement.[44] But more deeply, disrespectful policy is often thought to involve a non-contractual failure of proper valuing of persons as persons.[45] This is certainly true of the family of views traceable in one way or another to Immanuel Kant.

Kant's emphasis, in the broad moral realm, on respect for persons is well established.[46] Every metaphysically free and rational person exists "not merely as a means for arbitrary use by this or that will: he must . . . always be viewed at the same time as an end."[47] Kantian respect has a clear emphasis on equality.[48] Thus all persons are "under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being. Hence there rests on him a duty regarding the respect that must be shown to every other human being."[49]

Of course, the moral requirement of universal and equal respect for persons must then be somehow worked out in the legal and specifically constitutional realm. Kant himself appears to acknowledge a second, more familiar, sense of respect that allows for different degrees of respect for different categories of persons.[50] Thus Kant, writing in a still partly aristocratic culture, refers to "the different forms of respect to be shown to others in accordance with differences in their qualities or contingent

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[43] *See* Benjamin Eidelson, *Discrimination and Disrespect*, OXFORD UNIVERSITY PRESS 451 (2015).

[44] *But cf.* Leslie Green, *Two Worries about Respect for Persons*, 120 ETHICS 212, 216 (2010) (official respect and disrespect as not fundamentally matters of agreement or contract).

[45] *See* Eidelson, *supra* note 44, at 456; Zagzebski, *supra* note 16, at 401.

[46] *See, e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 95 (H.J. Paton trans., 1948) (Harper ed. 1964) (1785); IMMANUEL KANT, THE METAPHYSICS OF MORALS 186, 195, 211, 213 (Mary Gregor trans., 1996) (1797); IMMANUEL KANT, LECTURES ON ETHICS 173 (Peter Heath trans., reprt. ed. 2001) (1785).

[47] KANT, GROUNDWORK, *supra* note 47, at 95.

[48] *See* KANT, METAPHYSICS, *supra* note 47, at 186 (the absolute inner worth of persons, or fundamental dignity, as demanding respect from all persons, such that every person "can measure himself with every other [free and rational] being . . . and value himself on a footing of equality with them"). *See also* Roger J. Sullivan, IMMANUEL KANT'S MORAL THEORY 199 (1989) ("the moral law neither shows any preference for nor excludes any particular persons or groups"); Susan M. Shell, *Kant On Human Dignity*, in IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES 53, 74 (Robert P. Kraynak & Glenn Tinder eds., 2003).

[49] KANT, METAPHYSICS, supra note 47, at 209.

[50] For the idea of differential respect for dissimilar degrees of excellence, *see* Darwall, *supra* note 10, at 38-39.

relations."[51] Controversially, these partly arbitrary[52] qualities and relationships are thought by Kant to include "differences of age, sex, birth, strength, or weakness, or even rank and dignity."[53]

Among the forms of disrespect to be shunned, according to Kant, are displays of incivility in the form of verbal abuse, lying, caustic mockery, scoffing, disdain; and expressions of contempt.[54] For Kant, these responses to other persons, whether tactically effective or gratifying or not,[55] are denials of appropriate respect for persons, of whatever classification.[56] One could readily argue that all sorts of verbal abuse: bullying, mockery, scoffing, disdain, and contempt pervade not only our political discussions,[57] but constitutional rights-oriented discussions in particular.[58] To the extent that these abuses affect even otherwise fully justifiable legislative or judicial decisions as to any constitutional rights, the norm of Kantian respect is breached.

The difficulty in relying solely on Kant in this context, though, is that Kantianism may presume a metaphysics of agency, freedom, rationality, and autonomy that is more ambitious than many today find credible.[59] The problem is not that the parties bringing constitutional rights claims may, like everyone else, have engaged in immoral, and emotionally-driven, irrational behavior. Kantianism does not deny personhood on such grounds.[60] It is the mere potential for genuinely free and rationally motivated action that is instead crucial.[61] It is what one might call the fundamental nature and

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[51] KANT, METAPHYSICS, *supra* note 47, at 213.

[52] *See id*.

[53] *Id*. In this context, 'dignity' refers not to the inherent worth of every free and rational person, but to the aristocratic ranks, as distinct from commoners. Kantian respect in the key sense is no 'respecter' of persons. *See* Stephen D. Hudson, *The Nature of Respect*, 6 SOC. THEORY & PRAC. 69, 69 (1980).

[54] *See* KANT, METAPHYSICS, *supra* note 47, at 213 ("a mania for caustic mockery . . . has something of fiendish joy in it, and this makes it an even more serious violation of one's duty of respect for other human beings"). See also id. at 211; Kant, Lectures, supra note 46, at 211-12.

[55] *See* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 55 (1992). *See also* CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 211 (1996); ONORA O'NEILL, CONSTRUCTIONS OF REASON 115 (1989). For an argument, to the contrary, that "properly focused contempt may in some cases be morally required," *see* Michelle Mason, *Contempt as a Moral Attitude*, 113 ETHICS 234, 235 (2003).

[56] *See supra* text accompanying note 55, 56.

[57] *See, e.g.*, SUSAN HERBST, CIVILITY AND INCIVILITY IN AMERICAN POLITICS (2010); LILLIANA MASON, UNCIVIL AGREEMENTS: HOW POLITICS BECAME OUR IDENTITY (2018).

[58] *See randomly* the comments trailing many politically and legally-related blog and Twitter posts and, more analytically, Yannis Theocharis, et al., *The Dynamics of Incivility On Twitter*, SAGE OPEN, (May 13, 2020), https://journals.sagepub.com/doi/pdf/10.1177/2158244020919447.

[59] For discussion, *see* ALLEN M. WOOD, KANT'S ETHICAL THOUGHT 144-45 (1999). *See also* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 9 (2012).

[60] *See* HILL, *supra* note 56 at 55; Shell, *supra* note 49 at 74.

[61] *See* Shell, *supra* note 49 at 74.

grounding of robust ideas of freedom, rationality, and autonomy that is in controversy.[62]

It may be[63] that no strongly controversial metaphysical assumptions are necessary for a constitutional theory and practice of respect for persons. On John Rawls's approach, for example, respect for the inviolability of persons refers in some way to social conceptions of moral justice properly arrived at.[64] More practically, the system of reciprocal and mutual respect promotes, on Rawls's view, the individual self-respect that we are all presumed to need.[65] Professor George Kateb's defense of the related idea of equal dignity[66] singles out 'humanity' as a distinct category, but does not otherwise refer to especially controversial premises.[67] And even less ambitiously, Thomas Hobbes classically argued for something like equality of respect based largely on ordinary psychological sentiments, primal motives, and sheerly practical consequences.[68]

More generally, constitutional rights, along with rights in general, are commonly thought of without any reference to any elaborate metaphysical assumptions. In particular, constitutional rights can be thought of in terms of whatever interests, or dimensions, of the sustained well-being of persons are at stake.[69] Constitutional rights can be thought of in terms of the right-holder's will or control in the sense of demanding or waiving some behavior by those against whom one holds a right.[70] It is certainly fair to say that upholding constitutional rights is typically a matter of accommodating the basic interests of the persons affected. One might equally say that respect for constitutional rights is typically a matter of respecting the will, whether deeply autonomous or not, of the constitutional right holder in question.[71] These approaches to the logic of rights do not seem to require obscure metaphysical assumptions. In any case, constitutional rights are, by their

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[62] *See supra* note 60. For background on alternative, less metaphysically ambitious views, see Daniel Stoljer, *Physicalism*, STAN. ENCYCLOPEDIA PHIL., (rev. ed. Mar. 9, 2021), http://plato.stanford.edu/entries/physicalism. *See also* David Papineau, *Naturalism*, STAN. ENCYCLOPEDIA PHIL., (rev. ed. Mar. 31, 2020), https://plato.stanford.edu/entries/naturalism.

[63] *But see* ALAN DONAGAN, THE THEORY OF MORALITY 242 (1977) ("All respect rests on the recognition of something as intrinsically worthy of it. If one does not find rational nature intrinsically worthy of respect, to confer value on it in order to be able to respect it is impossible").

[64] *See* JOHN RAWLS, A THEORY OF JUSTICE 513 (rev. ed. 1999).

[65] *See id*. at 297.

[66] GEORGE KATEB, HUMAN DIGNITY 5 (2011).

[67] *See generally id*.

[68] THOMAS HOBBES, LEVIATHAN 50-51 (indep. pub. 2020) (1651).

[69] For background, see the essays in MATTHEW H. KRAMER, N.E. SIMMONDS & HILLEL STEINER, A DEBATE OVER RIGHTS (1999). *See also* Mark McBride, *Preserving the Interest Theory of Rights*, 26 LEGAL THEORY 3 (2020).

[70] *See id*.

[71] *Id.*

very nature, utterly inseparable from the idea of respect for persons and their basic affiliations.

On these understandings, then, let us explore more concretely the roles of basic respect and disrespect for persons and groups in the context of the most important constitutional rights, whether those rights are recognized or as yet unrecognized.

III. RESPECT AND DISRESPECT IN THE MAJOR CONSTITUTIONAL RIGHT CONTEXTS

A. Some Explicit Case Law References to Respect

In a few cases, the Supreme Court has quite explicitly linked the idea of human dignity and respect for persons to the particular constitutional right in question. We see this most often in the Eighth Amendment cruel and unusual punishment cases.[72] Thus, in the major death penalty case of *Furman v. Georgia*,[73] the Court declared that "[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."[74] To generally similar effect is the Court's declaration in *Brown v. Plata*[75] that "[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishments."[76]

The Court's explicit concern for human dignity,[77] as a subset of the idea of respect for persons, occasionally carries over into other constitutional right contexts as well. Some searches and seizures are deeply objectionable, and are explicitly declared to violate the interest not only in privacy, but in

[72] *See, e.g.*, Moore v. Texas, 581 U.S. ___, *11 (2017) (execution and intellectual disability); Hall v. Florida, 572 U.S. 701, 708 (2014) (execution and intellectual disability); Brown v. Plata, 563 U.S. 493, 510 (2011) (prison medical care); Gregg v, Georgia, 428 U.S. 153, 182 (1976) (application of the death penalty); Furman v. Georgia, 408 U.S. 238, 270 (1972) (application of the death penalty).

[73] *See* Furman, 408 U.S. at 270.

[74] *Id.* (emphasis added).

[75] *See* Brown, 563 U.S. at 510.

[76] *Id.* (emphasis added).

[77] For background on the judicial use of the dignity rubric, *see* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 746-47 (2006). Herein, our focus is on respect and disrespect rather than on the concept of dignity. In small part, this choice reflects the fact that 'A disrespects B' and similar expressions have no convenient equivalent in the language of dignity and indignity. But much more importantly, respect and disrespect, in constitutional cases and elsewhere, can be extended or denied on grounds other than any form of dignity or indignity. Person A can thus respect person B for reasons apart from B's dignity. Thus, we might respect a person's more, or less, autonomous choice to pursue their basic interests in one way rather than another. *See infra* notes 99-100. For a critique of an undue reliance on the concept of dignity in promoting equality, *see* Darren Leonard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017).

"human dignity."[78] Some searches and seizures can be "so brutal and offensive to human dignity that they shoc[k] the conscience."[79] Such acts violate the constitutional concerns against enforced self-incrimination and for elemental due process of law.[80] The First Amendment, along with the Fourth and Fifth Amendments, has occasionally been referred toas safeguarding human dignity specifically.[81] And "the vindication of human dignity"[82] has even been explicitly cited as the most crucial purpose of major Commerce Clause statutes,[83] apart from any direct connection to constitutional rights.

Admittedly, though, explicit judicial references to respect or disrespect for persons are rare in any context. But the value of respect for persons, and the disvalue of disrespect for persons, certainly need not be recognized, let alone explicitly referred to judicially, in order to be fundamental to constitutional rights. The role and status of respect and disrespect more importantly require reflection upon the logic of the relevant constitutional case law opinions.

B. Equal Protection and Respect

At the level of particular constitutional rights, clearly among the most important is that of the equal protection of all persons. Equality of protection of the laws clearly tracks, among other traditions, the Kantian emphasis on equality of respect.[84] This concern for equality cuts, sweepingly, across a range of categories and classifications.

Discussions of equality of treatment in general have pointed to a large, perhaps indefinite number of considerations.[85] Professor T.M. Scanlon has helpfully addressed linkages between inequality in general and humiliating

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[78] Schmerber v. California, 384 U.S. 757, 770 (1966).

[79] Chavez v. Martinez, 538 U.S. 760, 774 (2003) (quoting Rochin v. California, 342 U.S. 165, 172, 174 (1952)).

[80] In the due process context, *see* United States v. Raddatz, 447 U.S. 667, 697 (1980) (Marshall, J., dissenting) ("the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity").

[81] *See* Stanford v. Texas, 379 U.S. 476, 485 (1965) (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)).

[82] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring).

[83] *See id*.

[84] KANT, *supra* note 47, at 186-187.

[85] *See, e.g.*, T.M. SCANLON, WHY DOES INEQUALITY MATTER? (2018); Martha Albertson Fineman, *Equality and Difference - The Restrained State*, 66 ALA. L. REV. 609, 616 n.33 (2015) ("the whole point of equal protection under the law is to erase differences in treatment"). Classically, Rousseau links the rise of inequality to the rise of moral vice and the sense of personal affront. *See* JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 114 (Maurice Cranston trans., 1984) (1755). To these approaches to the harms of inequality, one might add the sense that inequality tends to undermine any genuine community. *See* R. George Wright, *Equal Protection and the Idea of Equality*, 34 LAW & INEQ. 1, 41 & 41 n.222 (2016) (citing authorities).

status differences,[86] unacceptable power differentials,[87] as well as insufficiencies of economic opportunity and the basic unfairness of political institutions.[88] Ultimately, though, any plausible purposes underlying equality, and equal protection of the laws in particular, can be best accounted for in terms of respect and disrespect.

The idea of disrespect, to begin with, allows us to better understand the error of those courts that would limit equal protection redress to only those harms that are intentionally inflicted.[89] Disrespect can certainly be manifested by means of expressly or implicitly intentional acts. But equally, disrespect can, as we have seen,[90] take the form of, for example, culpable neglect or indifference.[91] Consider, for example, a state regulation that severely, and foreseeably, harms the vital interests of one or more subordinated and vulnerable groups. But in adopting the regulation, no such harm was intended, or even actually foreseen. The subordinated groups were simply not on the radar screen in the regulatory drafting context. The subordinated can seem invisible. In this case, we have a clear instance of disrespect, and all else equal, a clear case of an equal protection violation.

In particular, racial equal protection is typically and most fundamentally a matter of respect and disrespect. Again, both the disrespect and the actionable constitutional violation may not always be consciously intended. For example, constitutionally actionable cases, and broader patterns, of racial profiling by police in traffic stop cases may or may not manifest conscious intent to treat with disrespect.[92] But a clearly established pattern of racial profiling, in whatever context, either can, or should be, actionable under the equal protection clause or other constitutional provisions. It should not defeat all such claims that the state's disrespect took the form of, say, indifference or culpable and irresponsible lack of attention and reflection, rather than intent.

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[86] SCANLON, *supra* note 86, at 8.

[87] *See id*.

[88] *See id*.

[89] *See, e.g.*, A.N. by and through Ponder v. Syling, 928 F.3d 1191, 1196 (10th Cir. 2019) (the purpose of the equal protection clause is "to secure every person . . . against intentional and arbitrary discrimination") (per curiam) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)).

[90] *See supra* notes 38-41 & accompanying text.

[91] *See id*.

[92] For background, see the cases collected in Kimberly J. Winbush, Annotation, *Racial Profiling by Law Enforcement Officers in Connection with Traffic Stops as Infringement of Federal Constitutional Rights or Federal Civil Rights Statutes*, 91 A.L.R. Fed. 2d § 1 (2015). *See also* State v. Brown, 930 N.W.2d 840, 895-97 (Iowa 2019) (Appel, J., dissenting) (citing the scholarly literature). From among that literature, *see* David A. Harris, *Racial Profiling Past, Present, and Future?*, 34-4 CRIM. JUST., Winter 2020, at 10, 11.

In the racial context, it has been argued that "racism can be understood in terms of disrespect."[93] Consider the historical sweep of the racial equal protection and closely related cases[94] from the perspective of racial disrespect. In *Plessy*, for example, the state statute required passenger train officers "to assign each passenger to the coach or compartment used for the race to which each passenger belongs."[95] Further, any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine . . . or imprisonment. . . .."[96] Such a statute disrespects not only the elemental dignity of the persons affected, but the interests, status, values, autonomy, preferences, and even the practical convenience of those parties as well.

Even outside the framework of the Fourteenth Amendment, the racial discrimination at issue in cases such as *Heart of Atlanta Motel* tells a similar story of constitutional-level disrespect. The record in that particular case referred to the difficulties and to the merely partial work-arounds required in cases of travel that was not already deterred by racial discrimination.[97] The impeachment therein of basic human dignity is clear. But more broadly, racial segregation in public accommodations directly and predictably disrespects the affected parties and their most basic interests, statuses, values, decisional autonomy, preferences, and their practical convenience,[98] in essential life activities.[99]

The racial equal protection cases also illustrate how regulations that may seem similar in some abstract, formalistic sense can in reality be poles apart in their underlying motivations and constitutional justifiability. In the racial affirmative action case of *Adarand Constructors, Inc. v. Pena*,[100] the Court attempted to address this problem. In a centrally important point,

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93 Joshua Glasgow, *Racism as Disrespect*, 120 ETHICS 64 (2009).

94 The most significant such cases would of course include Dred Scott v. Sandford, 60 U.S. 393 (1857); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Plessy v. Ferguson, 163 U.S. 537 (1896); Korematsu v. United States, 323 U.S. 214 (1944); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Loving v. Virginia, 388 U.S. 1 (1967).

95 *Plessy*, 163 U.S. at 540-41.

96 *Id.*

97 *See Heart of Atlanta Motel*, 379 U.S. at 252-53.

98 Note also that in Katzenbach v. McClung, Ollie's Barbecue restaurant offered, to African-American travelers in the hot summer months, either no service at all, or take-out hot barbecue to be consumed typically in one's non-air-conditioned car. *See Katzenbach*, 379 U.S. at 296-97. While certainly not all systematic inconvenience amounts to disrespect or contempt, this arrangement, in practice, clearly did.

99 For an instance of formalized state disrespect on the basis of race in a more intimate realm of choice, see *Loving*, 388 U.S. at 6-8 (race-based patent official disrespect for choice in the realm of marriage partners).

100 515 U.S. 200 (1995).

Justice Stevens, dissenting,[101] distinguished between racially explicit programs metaphorically displaying either a no-trespassing sign or a welcome mat.[102]

In practice, there are cases in which racially based government programs have significant unforeseen consequences, either favorable or unfavorable, over time. But in general, a racial no-trespassing sign, as in a vote on racial grounds not to confirm Thurgood Marshall for a seat on the Court, contrasts with the racial welcome mat extended by many, if not all, of those voting in favor of Marshall's confirmation.[103] Voting on either basis would amount to an expression of some form of racial disrespect or racial respect. The potentially misleading element in this metaphor of signs and mats concerns the role of intent. We may assume that posting a no trespassing sign and setting out a welcome mat are, typically, reflections of an intent to convey the associated message. But as we have seen,[104] disrespect may also be conveyed, for constitutional purposes, by states of mind well short of any express or inferred intent.

Matters of individual and group-based respect and disrespect are central, as well, to the broadest range of non-racial equal protection cases. Consider, for example, the sex discrimination case of *United States v. Virginia*.[105] In this case, the Virginia Military Institute denied admission to women as a class, with interested women then being directed toward a program at Mary Baldwin College.[106]

The available Mary Baldwin alternative program, however, was in a number of crucial respects not merely different from, but inferior to, the military training experience at VMI.[107] One could argue, perhaps, that being denied admission at VMI and admitted at the Mary Baldwin program did not impugn the elemental dignity of the affected women. But to deny admission to a qualified woman applicant to VMI, while holding open admission to an alternative program evidently far less attuned to the interests and aspirations of that applicant, is in any event an expression of constitutional-level disrespect.

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[101] *See Adarand Constructors*, 515 U.S. at 242, 245 (Stevens, J., dissenting).

[102] *See id*. at 245 (Stevens, J., dissenting). *See also* the majority's reference to this distinction as drawn by Justice Stevens in *Id*. at 229.

[103] For background, *see, e.g.*, Andrew Glass, *Senate Confirms Thurgood Marshall*, POLITICO, www.politico.com/story/2018/08/30/this-day-in-politics-aug-30-1967-797371 (referring to the event of July 30, 1967).

[104] *See* Lippert-Rasmussen, *supra* note 38, at 453, 454; *see* IMDB, *supra* note 39.

[105] 518 U.S. 515 (1996).

[106] *See id*. at 534.

[107] *See id*. at 551-52.

Disrespect is central as well to the same-sex marriage case of *Obergefell v. Hodges*.[108] Justice Kennedy therein declared crucially that prohibiting same-sex marriage "serves to disrespect and subordinate"[109] gays and lesbians.[110] Certainly, Justice Kennedy's opinion refers variously to phenomena such as hurtfulness,[111] dignity,[112] stigma,[113] demeaning treatment,[114] and "pain and humiliation."[115] Justice Kennedy had earlier, in *Lawrence v. Texas*,[116] declared that "[t]he petitioners are entitled to respect for their private lives."[117] In *Lawrence*, it should be noted, Justice Kennedy focused not on equal protection,[118] but on the appellants' substantive due process rights under the Fourteenth Amendment.[119] A fundamental concern for respect and disrespect under both rubrics, however, is fully appropriate.

Disrespect is also pervasive in the burdening of persons with disabilities. Consider, in particular, the tone and implications of Justice Holmes's opinion in the involuntary sterilization case of Buck v. Bell.120 In this case, Justice Holmes declared that

> the public welfare may call upon its best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the Fallopian tubes. . .. Three generations of imbeciles are enough.[121]

This language bespeaks official, and specifically judicial, disrespect for persons in the petitioner's position along many dimensions. Certainly, among these dimensions is disrespect for the inherent dignity of Carrie Buck.

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[108] 576 U.S. 644, 675.

[109] This language of disrespect has been cited in, e.g., Yerkes v. Ohio State Highway Patrol, 455 F. Supp. 3d 523, 542 (S.D. Ohio 2020); M.E. v. T.J., 854 S.E.2d 74, 106 (N.C. 2020); State v. Arlene's Flowers, 193 Wash. 2d 469, 505, 441 P.3d 1203, 1122 (2019).

[110] *See Obergefell*, 576 U.S. at 675.

[111] *See id*. at 658.

[112] *See id*. at 660, 663, 666, 678, 681.

[113] *See id*. at 668, 671.

[114] *See id*. at 647, 675.

[115] *Id*. at 678 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[116] 539 U.S. 558, 578 (2003).

[117] *Id*.

[118] As endorsed by Justice O'Connor. *See id*. at 579 (O'Connor, J., concurring).

[119] *See id*. at 578.

[120] 274 U.S. 200 (1927).

[121] *Id*. at 207.

But the metaphysics of personhood and the dignity thereof do not exhaust the dimensions of disrespect inherent in Justice Holmes's opinion.[122]

The discussion of the category of respect and disrespect, and its constitutional centrality, could be readily extended to a range of other equal protection categories. Across all of the equal protection categories, though, it is important to bear in mind two general observations.

First, there are equal protection cases in which the import of the disrespect, in itself, far exceeds any form of tangible concrete harm suffered by the disrespected party as an individual. Suppose, for example, that Person A is denied the right to vote in a national or state-level election, perhaps on grounds of their poverty.[123] In any such individual case, the tangible substantive benefits of voting would likely have been close to zero,[124] and the parallel costs of being denied the opportunity to vote thus similarly minimal. The most significant purely individual-level harm in such a case is instead the sheer public official disrespect, along with any psychological impact traceable precisely to that disrespect.

And second, it is possible that a government, precisely in seeking to promote equality and the equal protection of the laws, might impose requirements that convey a lack of respect for some of the persons directly affected.[125] Imagine a case in which the government genuinely wishes to promote equal protection in some regard. But at some point in the administrative process, persons are asked to "acknowledge embarrassing facts about themselves."[126] The conscious government aim, in whatever context, would be to determine who deserves or needs some benefit, and who does not. But making those determinations as accurately as possible might prove intrusive, privacy-invasive, or even humiliating. In those cases, there

[122] Buck v. Bell is merely an especially egregious manifestation of constitutional disrespect. See also the legislative disrespect, in the equal protection context, apparently underlying the food stamp program amendments at issue in *USDA v. Moreno*, 413 U.S. 528, 534 (1973) ("The legislative history that does exist . . . indicates that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program").

[123] *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966).

[124] *See, e.g.*, Andrew Gelman, Nate Silver & Aaron Edlin, *What Is the Probability Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321 (2012) (estimating a likelihood of affecting a presidential election at one in sixty million). One would thus be better off, in tangible terms only, by devoting the saved hour or so to productive work, relaxation, healthful exercise, or in elsewhere expressing one's political statements. And this figure does not consider the possibility that one's preferred electoral candidate would in fact benefit one less, overall, than the candidate who would have won had one not voted.

[125] Without, we may assume, thereby violating anyone's independent right to procedural due process. For discussion of procedural due process and questions of respect and disrespect, see *infra* notes 145-159 and accompanying text.

[126] Timothy Hinton, *Must Egalitarians Choose Between Fairness and Respect?*, 30 PHIL. & PUB. AFF. 72, 72 (2001).

would be a tradeoff "between the values of fairness and respect."[127] With regard to such cases, it has been suggested that "[e]galitarians should not only be motivated by a concern for fairness, but also by the idea of respect for all."[128] Government intrusiveness in the name of equality may itself amount to a denial of respect. In such cases, the most significant constitutional value tradeoffs can be minimized by using reasonably accurate, and less embarrassing, substitutes or proxies for any data that can be obtained only by disrespectful means.[129]

C. Freedom of Speech and Respect

The broad realm of equal protection law is often reinforced, complemented, or limited and opposed by the law of freedom of speech. The free speech cases, certainly, rarely refer explicitly to the category of respect and disrespect. But as it turns out, the idea of respect and disrespect indeed underlies, explains, and promotes useful critique of the logic of the free speech cases.

The constitutional protection of speech is often thought of in terms of values, purposes, or goals. Among the most commonly cited values are the optimal pursuit of truth,[130] promoting a genuinely meaningful process of democratic government,[131] and facilitating personal autonomy and self-realization.[132] The scope, depth, and limits of constitutional free speech protection reflect these values.

The category of respect and disrespect certainly does not exhaust the meaning of these three distinct values. But consider that each of the three major free speech values above are most naturally accounted for, in constitutional rights contexts, in terms of respect and disrespect. Consider first the free speech value of the pursuit of truth. In his classic exposition,

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[127] *Id.* (responding to Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97 (1998)).

[128] Wolff, *supra* note 128, at 97.

[129] Note, e.g., that as we cannot uncontroversially measure how well-off a person is, we utilize proxy data of various degrees of adequacy, including annual income over time. *See, e.g.*, Mark R. Montgomery, et al., *Measuring Living Standards with Proxy Variables*, 37 DEMOGRAPHY 155 (2000).

[130] *See, e.g.*, Frederick Schauer, *Free Speech, the Search for Truth and the Problem of Collective Knowledge*, 70 SMU L. REV. 231 (2017); Frederick Schauer, *Reflections On the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1987).

[131] *See, e.g.*, Ashutosh Bhagwhat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

[132] *See, e.g.*, C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011); Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 313 (1998); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.-R. -- C.L. L. REV. 443 (1998); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Beyond the American constitutional context, see JOHN STUART MILL, ON LIBERTY 127-28 (Gertrude Himmelfarb ed., 1974) (1859).

John Stuart Mill argues that anyone, including those who are partially or entirely mistaken, can contribute usefully to the collective search for truth.[133] In that sense, persons, and their acts of expression, are worthy of respect. Immanuel Kant, it will be recalled, denounced, at a moral level, even verbal disrespect for persons whose views we take to be mistaken.[134] Mill's logic as to the pursuit of truth in effect elevates that precept, on partly pragmatic grounds, into the realm of public policy and of law.

The second free speech value, that of promoting meaningful democratic government, is inseparable from the first insofar as democratic deliberation and debate aims at truth in the public policy realm. But more fundamentally, the democratic ideal presumes basic equality of respect for all those who would wish to contribute to the democratic process, as cases such as the Harper poll tax case[135] and the line of rigorous one-person-one-vote cases[136] establish.

Most fundamentally, though, the third of the basic free speech values, that of promoting personal autonomy and self-realization, is intimately tied to the category of respect and disrespect. As John Rawls notes, social respect, self-respect, and flourishing are practically inseparable.[137] And public authorities can in most cases hardly promote the autonomy and self-realization interests of persons in general, while violating their expressed preferences as speakers and listeners.

The most familiar way in which governments disrespect persons,[138] and their autonomy and self-realization interests, in the realm of speech is by presuming to censor and suppress speech without some constitutionally adequate justification. Speech paternalism may involve treating competent adults as, in effect, children. But other forms of free speech violation impairing autonomy and self-realization can sometimes be even more disrespectful of the affected persons. Consider a state requirement that a person continually display a message that the person, as a matter of autonomous choice, finds deeply objectionable. In such legally compelled speech cases, the directly affected party is disrespected by the legal requirement of being largely reduced in this context to serving as "a mobile

133 *See* MILL, *supra* note 133, at 115-16.

134 *See supra* notes 56-60 and accompanying text.

135 *See, e.g.*, Harper v. Virginia State Bd. Of Elections, 383 U.S. at 666 ($2.50 poll tax case).

136 *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964); Karcher v. Daggett, 462 U.S. 725 (1983).

137 *See* RAWLS, *supra* notes 65-66.

138 The disrespected persons could certainly include not only actual or potential speakers, but actual and potential hearers of the message in question. *See, e.g.*, Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976); Kansas Jud. Rev. v. Stout, 519 F.3d 1107, 1115 (10th Cir. 2008); Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974, 995 (D. Kan. 2020).

billboard."[139] Whether this disrespectful imposition can be justified in any given case is, of course, a further question.[140]

More generally, in a given case, official respect for the particular speakers themselves clearly may not also enhance respect, official and unofficial, for any targets of the constitutionally protected speech. The Illinois Nazi Party demonstration case of *Collin v. Smith*,[141] for example, involved appellate court respect for the speech interests of the Illinois Nazi Party speakers.[142] The demonstration in question, however, was to take place specifically at a location well-recognized as the home for large numbers of Nazi concentration camp survivors.[143] Such a location choice might well produce increased national publicity for the speakers. Conversational clarification and persuasion, however, were hardly on the speaker's agenda in this case. Judicially protecting the rights of the speakers under these circumstances does not enhance judicial respect for affected persons overall.[144]

D. Procedural Due Process and Respect

In contrast, the constitutional right to procedural due process may, at first blush, seem remote from concerns for personal respect and disrespect. The courts have said that "a primary function of legal process is to minimize the risk of erroneous decisions."[145] Mere accuracy in decision making might seem somehow mechanical, and perhaps achievable through a sophisticated algorithm that is incapable of either respect or disrespect.

On the other hand, accurate decisions in due process contexts may require not only pure knowledge, but some degree of respect for all affected persons in investigating and assessing the available evidence. In any event,

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[139] *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977). *See also* the compelled flag salute conscientious objection case of West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630-634 (1943).

[140] Though no such sufficient justification was found in either Wooley or Barnette, *supra* note 140, regardless of whether anyone would have incorrectly interpreted their compliance as indicating agreement with the compelled speech.

[141] 578 F.2d 1197 (7th Cir. 1978).

[142] *See id*. at 1205-07.

[143] *See id* at 1205.

[144] This is not to claim that respect for persons is something that either can, or should, be maximized. Perhaps the idea of maximizing respect for persons overall would require comparisons that cannot be coherently done. Or perhaps respect for persons should be accorded to constitutional right holders in ways that fail to maximize an overall sum total of respect. On these questions, we need take no position. For discussions of a related problem, see Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 632-33 (2001); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087, 2106-07 (2001).

[145] Mackey v. Montrym, 443 U.S. 1, 13 (1979) (citing Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 12-13 (1979)); Balliet v. Whitmire, 626 F. Supp. 219, 227 (M.D. Pa. 1986).

the Court has made clear that procedural due process is not essentially a matter of accuracy in decision making.[146] The nature and timing of a hearing that comports with due process is, as well, a matter of the weight of the government's interest,[147] which itself may reflect the government's desire to respect the persons affected. More importantly, though, the nature and timing of any required hearing must invariably consider the interests of the persons most directly affected by the government action at issue.[148] And as the Court has established, the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[149]

The latter requirement of personally tailored procedural due process is fundamentally a matter of respect for persons, as they are. It would be technically possible in many cases to require written submissions of the persons most directly concerned, perhaps with minimal loss of decision-making accuracy. But requiring written submissions by persons who lack legal counsel and whose compositional skills may be limited[150] would indicate an official lack of respect for persons in such a position.

In a rather different due process context, the Supreme Court validated corporal punishment on public students prior to, and without the benefit of, a formal hearing on the students' alleged misbehavior.[151] The underlying problem with such jurisprudence is its underappreciation in some cases of the category of respect and disrespect. To inflict corporal punishment on a student for a classroom infraction, based on dramatically limited powers of observation and investigation, and relying on the merely technical availability of possible legal redress after the fact, is to convey insufficient respect for the person involved.[152]

More fundamentally, though, the category of respect in procedural due process cases cannot be confined to the stage of determining the nature and timing of a hearing. Respect and disrespect are inherently relevant, as well, to the earlier stage of determining whether a party holds a cognizable liberty

[146] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). More broadly, people in general care about procedural justice not just for the sake of accurate outcomes, "but as an end in itself." Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANNUAL REV. PSYCH. 527, 529 (2001).

[147] *See* Eldridge, 424 U.S. at 335.

[148] *See id*. *See also* R. George Wright, *Due Process on Campus: Where Do Procedural Rights Come From, and What Do They Require?*, 22 NEVADA L.J. ____ (2021).

[149] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

[150] *See id*. at 269. Relatedly, consider the role of respect for persons as they are, with their actual capacities and limitations, in the Sixth Amendment right to counsel case of Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

[151] *See* Ingraham v. Wright, 430 U.S. 651 (1977).

[152] See the discussion in the dissenting opinion in *Ingraham*, 430 U.S. at 683, 690-97 (White, J., dissenting).

or property interest, for purposes of invoking due process, in the first place.[153] Why recognize even a limited property or liberty interest as against corporal punishment in a public school? The answer must refer not only to government-inflicted physical pain, but more fundamentally to appropriate respect for the persons to be subjected to any such punishment.[154]

An emphasis on these dimensions of procedural due process is found in Professor Jerry Mashaw's "dignitary theory"[155] of due process. Professor Mashaw's theory is elaborated in terms of "values such as autonomy, self-respect, [and] equality."[156] In our terms, Professor Mashaw refers to "process affronts"[157] as a matter of "disrespect for our individuality."[158] More generally, it has been rightly suggested that "the idea of a right to due process . . . involves the recognition of those subject to authority as entitled to demand justification for its uses and entitled to protection against its unjustified use."[159] This recognition, and the corresponding entitlement, are fundamentally a matter of respect for persons.

E. Other Constitutional Rights and Respect

Beyond procedural due process, the full range of other important constitutional rights not discussed above partake at least equally of the underlying logic of respect and disrespect for persons. An exhaustive documentation of how this works out in the case of every constitutional right

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153 For background, see Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) and Perry v. Sindermann, 408 U.S. 593, 599 (1972) (jointly establishing the general nature and sources of property and liberty interests sufficient to trigger due process hearing rights).

154 *See Ingraham*, 430 U.S. at 651, 673-74 (citing Rochin v. California, 342 U.S. 165 (1952)).

155 *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 161-64 (1985); *Jerry L. Mashaw, Administrative Law: The Quest For a Dignitary Theory*, 61 B.U. L. REV. 885 (1981).

156 MASHAW, *supra* note 156, at 162.

157 *Id*. at 163.

158 *Id*. Again, we treat the central cases of dignitary claims as a subset of a more inclusive concern for respect, particularly of persons. *See supra* note 77 and accompanying text. Others prefer to focus on the idea of human dignity in human rights and some constitutional contexts. *See, e.g.*, Jeremy Waldron, *Human Dignity—A Pervasive Value* (N.Y.U. Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 19-51 2019), papers.ssrn.com/so13/papers.cfm?abstract_id=3463973 ("we may think of human dignity as, so to speak, the flavor of certain constitutional rights, as a way of making sense of them and establishing their significance"). In contrast, the philosopher Ruth Macklin rejects appeals to the idea of human dignity as adding nothing to the concepts of respect and autonomy. *See* Ruth Macklin, *Dignity is a Useless Concept*, 327 BMJ 1419, 1420 (2003). *See also* Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), https://newrepublic.com/article/64674/the-stupidity-dignity ("dignity is relative, fungible, and often harmful . . . what ultimately matters is respect for the person"). The idea that dignity is a distinctively useful concept in some contexts, above and beyond respect and autonomy, has its defenders. *See, e.g.*, Bjorn Hofmann, *The Death of Dignity is Greatly Exaggerated*, 34 BIOETHICS 602, 608 (2020). Any claim, however, that the idea of dignity is superior to that of respect for persons in addressing, in particular, human rights violations in the form of oppression or genocide, *see id*., seems doubtful.

159 T.M. Scanlon, *Due Process*, 18 NOMOS 93, 97 (1977).

is unnecessary. For the sake of illustration, though, consider the following brief scenarios involving a further range of rights.

In the Establishment Clause area, the Courts often ask whether a given official practice or public display sends a signal to reasonable and informed persons that they are, in effect, civic outsiders, second-class citizens, or are not fully respected members of the relevant community.[160] Coercion-based approaches to the Establishment Clause are, similarly, largely a matter of respect and disrespect. The case of *Lee v. Weisman*,[161] for example, is of this character.

The middle school graduation benediction case of *Lee v. Weisman* involved what the Court held to be coercion[162] of, or "subtle coercive pressure"[163] on, the objecting students to cooperate with, if not to fully participate in, a religious practice.[164] The Establishment Clause issue in *Lee* and all similar cases is ultimately one of respect and disrespect for objecting students in particular. A student who feels "indirect" coercion,[165] embarrassment,[166] or intrusion[167] in the context of a religious element of an officially planned and sponsored public school activity is essentially raising a question of constitutionally insufficient personal respect.

Matters of respect and disrespect are equally central on the free exercise of religion side of the First Amendment. Consider, again merely for example, the multi-lateral and unavoidably conflicting claims to constitutional-level respect in *Wisconsin v. Yoder*.[168] In *Yoder*, there was testimony to the effect that requiring school attendance at the high school level by Old Order Amish students "could result in great psychological harm to Amish children."[169] More fundamentally, it was claimed that such a requirement would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States."[170]

Yoder thus involved claims of a failure of fundamental respect for Old Order Amish students, as well as for members of the Old Order Amish community more generally, as set off, in some fashion, against any state

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160 *See*, classically, the endorsement theory of Justice O'Connor presented in Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

161 505 U.S. 577 (1992).

162 *See id*. at 592-94.

163 *Id*. at 592.

164 *See id*. at 592-94.

165 *Id*. at 592.

166 *Id*. at 594.

167 *Id*.

168 406 U.S. 205 (1972).

169 *Id*. at 212.

170 *Id*. at 212, 218.

interests in requiring further school attendance.[171] The important further question, though, is whether allowing parents to withdraw their children from schooling before age 16 amounts to insufficient respect by the state for those Old Order Amish students who might wish to engage more fully with the broader secular society.[172] Focusing on the idea of respect for persons does not, again, unequivocally determine the outcome of all constitutional rights cases.

Issues of respect and disrespect were central, as well, to the foundational substantive due process privacy case of *Griswold v. Connecticut*.[173] *Griswold*, after all, involved the criminalization of the use in private, by a married couple, of a contraceptive for one particular purpose rather than for another such purpose.[174] How the police, prosecutors, and judges would process such substantive underlying offenses without elemental disrespect for the persons of the defendants is at best unclear.

Relatedly, the substantive due process and equal protection case of *Moore v. City of East Cleveland*[175] involved similar lack of respect for competent basic preferences as to family living arrangements. The City in this case chose to address housing congestion and related problems[176] not through minimum square footage requirements, but by regulating which members of a family were permitted to live under the same roof.[177] The City thus chose, impermissibly, to "regulate the occupancy of its housing by slicing deeply into the family itself."[178] What is most deeply objectionable here is not the congestion-related merits of one housing policy rather than another, but the government's gratuitous disrespect for the persons who comprise the family unit.

Finally, the constitutional prohibition of some instances of the government power of condemnation and eminent domain presents important issues of official respect and disrespect for persons as well. The degree to which the eminent domain cases meaningfully implicate fundamental respect or disrespect certainly varies according to circumstances and context.

Thus, some exercises of eminent domain may take on the character, roughly, of an ordinary business transaction, with or without any genuine voluntariness on the part of the private party most directly concerned. But

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171 In this case, facing a traditional strict scrutiny test. *See id*. at 215.

172 As raised in the Yoder case by Justice Douglas. *See Yoder*, 406 U.S. at 241, 241-46 (Douglas, J., dissenting in part).

173 381 U.S. 479 (1965).

174 *See id*. at 480.

175 431 U.S. 494 (1977).

176 *See id*. at 499-500.

177 *See id*. at 498-99.

178 *Id*. at 498.

not all takings case will conform to this category. There are takings cases in which fair market value with or without compensation for psychic distress, sense of loss, disruption of basic attachments, identity impairment, destruction of neighborhood, or even the need to hire an attorney and to relocate, does not fully acknowledge the fundamental harms that the condemnation has inflicted.[179] Ancestral lands, neighborhoods, or tribal lands, are not in this context equivalent to, say, recently acquired pure investment properties. Even the future use to which the condemned property is intended to be put can be relevant to matters of respect and disrespect.[180]

IV. RESPECT AND THE THRESHOLD RECOGNITION AND EVENTUAL LIMITATION OF CONSTITUTIONAL RIGHTS

The most important role for considerations of respect and disrespect in the constitutional cases is to allow for better understanding of those cases and, to the extent possible, to help guide the resolution of those cases on the broader merits. But important as well is a prior role for questions of respect and disrespect. Specifically, a focus on respect and disrespect can help determine: first, threshold questions of whether a constitutional right is even implicated at all in a given case context, second, if an otherwise valid claim of constitutional right violation is outweighed or otherwise no longer properly redressable.

Constitutional rights inevitably have some required minimal threshold of applicability before which a case is simply not classifiable as involving even the possibility of a violation of the right in question. The courts must determine whether a particular constitutional right is implicated at all, or, in some instances, implicated beyond a constitutionally insufficient, or merely "de minimis,"[181] degree. The idea of having standing to sue presumes some sufficient cognizable injury.[182]

The question then becomes one of how, in general, courts should go about determining whether a particular constitutional right is implicated, or

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[179] *SEE* R. George Wright, *Fundamental Property Rights*, 21 VAL. U.L. REV. 75, 78 (1986).

[180] Consider a case in which property that is deeply meaningful to the owner is taken in order to promote a public purpose to which the current owner would object. Assume particularly that other condemnable properties that are easily replaceable could serve the public purpose equally well. Such a case would raise issues of constitutional-level respect and disrespect.

[181] For background on 'de minimis' doctrine and application in the law, *see* Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. PA. L. REV. 429 (1927); Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315 (2001); Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537 (1947). *See also* Andrew Inesi, *A Theory of De Minimis and a Proposal For Its Application in Copyright*, 21 BERKELEY TECH. L.J. 946 (2006).

[182] *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021); Carney v. Adams, 141 S. Ct. 493, 498-99 (2020); Frank v. Gaos, 139 S. Ct. 1041, 1045 (2019); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016).

is sufficiently implicated, in a given set of circumstances, such as to properly invoke the court's jurisdiction and the possibility of judicial redress. The key complication in constitutional rights cases is that the courts have never resolved whether there can be a constitutional rights injury that is in a sense real, but too minimal or too trivial to invoke the judicial machinery.

The principle of *de minimis not curat lex*—that the law does not address itself to trifling matters[183]—is of extended pedigree.[184] The doctrine, in general, retains current vitality.[185] But the courts are hopelessly split on whether the de minimis principle can,[186] or cannot,[187] apply in constitutional rights cases. Thus, it is said, on the one hand, that "[t]he maxim de minimis non curat lex retains force even in constitutional cases, even in civil rights cases."[188] And "[t]here is, of course, a de minimis level of imposition with which the Constitution is not concerned."[189]

On the other hand, though, it has equally been said that "there is no de minimis exception for a speech restriction that lacks sufficient tailoring or

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[183] *See supra* note 182. *See also, e.g.*, Sandifer v. U.S. Steel Corp., 571 U.S. 220, 233 (2014) ("the law does not take account of trifles").

[184] Certainly, the idea was well-established as of the adoption of the Constitution. *See, e.g.*, Ware v. Hylton, 3 U.S. 199, 256, 268 (1796) (Iredell, J.) ("*De minimis non curat lex*, is an old legal maxim"); Sandifer, 571 U.S. at 233 ("the roots of the *de minimis* doctrine stretch to ancient soil"); Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 515, 12 P.3d 720, 750, 101 Cal. Rptr. 2d 470, 504 (2000).

[185] *See, e.g.*, Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("the venerable maxim *de minimis non curat lex* . . . is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept"); Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

[186] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2504 (2019) (citing the trial court in the First Amendment context); Ingraham v. Wright, 430 U.S. 651, 674 (1977) (procedural due process liberty interest context); Goss v. Lopez, 419 U.S. 565, 576 (1975) (procedural due process property interest context); Swick v. City of Chicago, 11 F.3d 85, 87 (7th Cir. 1993) (citing Hessel v. O'Hearn, 977 F.2d 299, 303-04 (7th Cir. 1992)); Bart v. Tedford, 677 F.2d 622, 625 (7th Cir. 1982) (free speech section 1983 context); Gerawan, 24 Cal. 4th at 514, 12 P.3d at 750, 101 Cal. Rptr. 2d at 504 (free speech context); Felkner v. Rhode Island College, 203 A.3d 433, 462, 462 n.2 (2019) (Robinson, J., concurring in part and dissenting in part). James Madison seems to have endorsed the *de minimis* principle in the Establishment Clause context in a letter to Edward Livingston. *See* James Madison, WRITINGS 787, 788 (Jack N. Rakove ed.) (Library of America ed. 1999) (letter to Edward Livingston of July 10, 1802).

[187] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("Applicants are irreparably harmed by the loss of free exercise rights for even minimal periods of time") (internal quotation marks deleted); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001) (free speech context); KDM ex rel. WJM v. Reedsport School Dist., 196 F.3d 1046, 1056 (9th Cir. 1999) (Kleinfeld, J., dissenting) (equal protection, Establishment Clause and Free Exercise contexts); Lewis v. Woods, 848 F.2d 649, 651 (5th Cir. 1988) (property deprivation case), *but see* note 186, *supra* (discussing procedural due process cases).

[188] *Swick*, 11 F.3d at 87.

[189] *Ingraham*, 430 U.S. at 674.

justification."[190] More broadly, it has been flatly declared that "[a] violation of constitutional rights is never de minimis."[191]

Assume, though, that a constitutional right claimant has shown the bare applicability of the right in question, and has also shown, if necessary, a greater than merely de minimis burden on that right. It may sometimes be further necessary to show that the burden on a statutory[192] or even a constitutional right,[193] qualifies as 'substantial.'[194] That is, there may be a gap[195] between a minimally cognizable right impairment, and a substantial burdening of the right in question, especially in cases in which the constitutional right violation does not appear to have been intentional or discriminatory.[196]

Courts that are reluctant to require that the constitutional right burden be substantial are sometimes motivated by a fear of the adverse consequences of imposing such a requirement. In particular, there is a concern that "[a]pplying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment."[197]

It is fair to say, then, that the initial applicability and effective enforceability of constitutional rights, in context, is deeply uncertain even at

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[190] *Lorillard Tobacco Co.*, 533 U.S. at 567.

[191] *Lewis*, 848 F.2d at 651. One further complication is that the concept of a *de minimis* violation may refer not to the legal or practical impact on the right holder's activities, but to the presumed minimal—or *de minimis*—constitutional value of the type of activity in which the right holder is engaged. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 747-48 (1982) (distinguishing the category of child pornography as of *de minimis* constitutional value).

[192] *See, e.g.*, the statutory Religious Freedom Restoration Act case of Goodall by Goodall v. Stafford Cty. School Bd., 60 F.3d 168, 171 (4th Cir. 1995) ("RFRA provides that government 'shall not substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability'") (citing Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995)).

[193] *See, e.g.*, Dousa v. Dep't of Homeland Sec., No. 19cv1255-LAB (KSC) (S.D. Cal. Jan 27, 2020) (requiring, in some cases, a showing of a substantial burdening of the plaintiff's free exercise rights, as distinct from a mere chilling effect thereon) (citing Am. Fam. Ass'n, Inc. v. City of San Francisco, 277 F.3d 1114, 1123-24 (9th Cir. 2002)); Vernon v. City of L.A., 27 F.3d 1385, 1394 (9th Cir. 1994)). For a broader discussion of Free Exercise burdening requirements, see California Parents For Equalization of Educational Materials v. Torkalson, 973 F.3d 1010, 1016 (9th Cir. 2020).

[194] *Supra* notes 193 & 194. For broader discussion, *see* R. George Wright, *Substantial Burdens in the Law*, 46 SW. L. REV. 1 (2016).

[195] *But cf.* Norwood v. Strada, 249 F. App'x 269 at *2, (3d Cir. 2007) (per curiam) (unpublished opinion) (apparently finding the categories of merely *de minimis* burdens and substantial burdens on the free exercise of religion to exhaust the scope of the cases). *See also* Aikens v. Hunter, No. 17-CV-12668, 2021 WL 878501 at *6 (W.D. N.Y. Mar. 9, 2021) (distinguishing a *de minimis* burden on free exercise from a substantial burden).

[196] *Supra* note 193, as well as Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 170 (3d Cir. 2002) ("there is no substantial burden requirement when government discriminates against religious conduct"); Brown v. Mahaffey, 35 F.3d 846, 849-50 (3d Cir. 1994).

[197] *Tenafly Eruv Ass'n*, 309 F.3d at 170.

the level of basic principle. The differences, if any, among constitutional standing requirements, initial threshold relevance, de minimis versus non-de minimis cases, and insubstantial versus substantial burdens remain unclear even in theory. We simply lack any useful theory as to how to begin to draw such distinctions.

When we consider these various threshold determinations, it may seem natural to ask about the relevance, legitimacy, or weight of any public interest that the government seeks to pursue through the regulation in question. The public interest underlying the rights regulation may range from illegitimate to overridingly important. But any such inquiry into the reasons for a regulation comes, for our purposes, too early in the adjudication process. The threshold distinctions above refer instead to something like the nature, character, or weight of any impact or burden precisely on the right-holding party. The impact or burden on that party is the same, regardless of any public interest that the government might cite in order to justify that impact or burden. The interests cited by the government do not somehow feed back to affect the nature of the impact on the plaintiff right-holder. The burden of the constitutional right regulation, if any, is the same.

But this approach to the threshold questions of rights impairment and enforcement above does steer us toward a useful analysis. As it turns out, all of the above threshold boundary line determinations can hinge on matters of the intent, motive, or some other state of mind of any of the relevant government actors in adopting and applying the government action or policy in question. The relevant intent, motive, or state of mind of a government actor can certainly extend far beyond, reinforce, or even contradict, any public interests by which the regulation at issue is then said to be justified.

Central to such official states of mind will often be what we have referred to as respect and disrespect for the persons affected. Consider, merely for example, hypothetical variants of a scenario raised in the classic free speech case of *Schneider v. State of New Jersey*.[198] Imagine a speaker on an uncrowded public sidewalk that amounts to a traditional public forum.[199] We may assume that "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[200]

We further assume that the speaker in question is not speaking unduly loudly, or at an objectionable hour, and that the speech in question is not

[198] 308 U.S. 147 (1939).

[199] *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 480 (holding that public streets are traditional public forums) (1988); McCraw v. City of Oklahoma City, 973 F.3d 1057, 1070 (10th Cir. 2020) (holding that street medians are traditional public forums).

[200] *Schneider*, 308 U.S. 151-52.

defamatory, or akin to fighting words. But a police officer has, in our hypothetical, nevertheless required the speaker to move some distance down the sidewalk. The distance of the required move could be anywhere from, say, three feet to a hundred feet. And we may assume, as well, that the police officer either is, or is not, aware of some possible state interest in requiring the speaker to move. Perhaps the particular pavement block currently occupied by the speaker is scheduled for removal. Or an automatic water sprinkler is scheduled to activate. Or the particular spot is involved in a repair. Or perhaps there is not any even merely legitimate state interest in requiring the speaker to move.

We may also vary our assumptions as to the intentions and broader state of mind of the police officer in question. And we may vary the language and manner of that police officer, as well, in requiring that the speaker move. We do again assume, however, that the speaker's initial position on the sidewalk counts, prima facie, as an "appropriate"[201] place from which to speak. There is no point in assuming from the beginning that the speaker's current position on the sidewalk is ultimately and conclusively constitutionally proper, all things considered- that would merely assume away all of the problems of the threshold applicability of free speech rights.

Given, then, any set of particular circumstances within the hypothetical possibilities outlined above, we then ask whether the police officer's required move of the speaker burdens or impairs the speaker's free speech rights in any judicially cognizable way. At an extreme, it is possible to assert that a requirement to move, say, three feet, or three inches, in any direction amounts in all instances to a judicially cognizable burdening of the speaker's free speech rights. After all, we are assuming that the speaker's initial sidewalk position was prima facie "appropriate."[202]

But it also seems plausible to conclude that in some cases, a required move of merely three feet, or three inches, does not really impair the speaker's free speech rights, at all, or only in some non-de minimis[203] fashion. Thus, there inevitably arises the problem of determining, at least in some very general sense, the proper placement of a threshold or initial boundary line, beyond but not before which there arises a cognizable free speech issue to be resolved on the merits.

It would seem unduly arbitrary to try to set such a threshold dividing line between constitutional impairment and constitutional non-impairment or insufficient impairment merely on the basis of, say, the number of feet that the speaker is required to move. A required move of, say, three inches, three

[201] *Id.*

[202] *Id.*

[203] *See supra* notes 181-197 and accompanying text.

yards, three blocks, or three miles, may at some utterly indeterminate point begin to sufficiently implicate one or more of the basic reasons or values underlying free speech protection in general.[204] But there seems not even the slightest hint of any principle as to how to begin to make such a threshold determination.

In contrast, though, consider an alternative approach to all such threshold determinations that focuses, as we have throughout suggested, on official respect and disrespect for persons. There is again no free-standing constitutional right to respect, or to the absence of disrespect, from public officials. Verbal politeness, and in that sense respectfulness, does not always negate the burdening of a constitutional right. And verbal impoliteness does not always mark out a violation of any particular constitutional right.

But what we might call fundamental respect and disrespect, whether subjectively intended or not,[205] seems a more sensible focus in addressing close threshold rights violation cases. Consider a case involving verbally expressed respect or disrespect, whatever the spatial distance between the speaker's current position and the different position that is now required by the police officer. All else equal, overall fundamental respect for the speaker on the part of the police officer would suggest, in any otherwise close threshold case, the absence of a cognizable rights impairment. And in contrast, all else equal, fundamental disrespect for the speaker, as conveyed by the police officer, should suggest, in a similarly close case, the presence of a cognizable constitutional rights impairment.

In some such hypothetical free speech cases, a judicial inquiry into relevant respect and disrespect may involve a number of considerations.[206] But consider two otherwise similar sets of circumstances in which a speaker is required to move, say, fifty feet down the sidewalk. Assume this to be a borderline case of any meaningful impairment of the speaker's free speech. In one case, this fifty-foot move requirement is officially imposed with verbal respect for the speaker, if not for the message as well, and for the speaker's choice of message. In an otherwise similar case, the requirement to move fifty feet is imposed with clear and explicit fundamental disrespect, if not dismissive contempt, for the speaker. Finding a judicially cognizable free speech burden more readily in the second case than in the first, all else equal, seems entirely sensible in an otherwise close case.

In such contexts, considerations of fundamental respect and disrespect can help us draw, at least at a general level, useful adjudicatory boundary

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[204] See *supra* notes 130-137 and accompanying text for the discussion of the pursuit of truth, of democratic self-government, and of autonomy and self-realization.

[205] *See supra* notes 37-40 and accompanying text.

[206] *See supra* Section II.

lines. Crucially, the inquiry into official basic respect or disrespect is similarly helpful across the range of other borderline instances of the range of constitutional rights violations.

Think, merely for example, of threshold equal protection claims with regard to official dress codes or grooming codes.[207] Or consider the practice of price differences based on gender in cases of access by state actors to bars and clubs.[208] Or cases of the discriminatory or objectionable direct personal address in public settings.[209] In general, any threshold constitutional right violation case can be usefully addressed through considerations of the presence or absence of intended, or unintended, fundamental disrespect for persons.

At the other end of the spectrum are the cases in which the force of an acknowledged and generally established constitutional right runs up against strong and otherwise unfulfilled state interests, or the rights of other parties. All such cases will inevitably involve some level of judicial scrutiny.[210] Commonly, there will be some form of balancing,[211] perhaps as an element of what is called proportionalism.[212] Constitutional balancing and proportionalist methodologies inevitably depend upon considerations of basic respect and disrespect.[213] But matters of respect and disrespect are useful, more particularly, in the "later" boundary line cases at which an acknowledged constitutional right loses its cogency in light of competing

[207] *See* the discussion in Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

[208] *See* the discussion in Jessica E. Rank, Comment, *Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 SETON HALL L. REV. 223 (2005).

[209] For a recent controversial approach emphasizing individual academic freedom, *see* Meriwether v. Hartap, 992 F.3d 492 (6th Cir. 2021). The Meriwether case involved a public university classroom and therefore the presence of state action. The crucial relevance of fundamental respect and disrespect for persons, whether intentional or not, plainly extends beyond the realm of constitutional rights against government actors, and into the private sphere as well.

[210] For background, *see* R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN'S L. REV. 1119 (2019).

[211] *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[212] For background, *see* CAMBRIDGE U. PRESS, PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki C. Jackson & Mark Tushnet eds., 2017); CAMBRIDGE U. PRESS, PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Grant Huscroft, Bradley W. Miller & Gregoire Webber eds., 2014). For a response to moral proportionalism, *see* FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (2018).

[213] *See supra* Section III. As well, applying stare decisis in constitutional cases may also reflect respect for the legally recognizable and settled life-plans of persons. *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1461 (2013).

rights[214] and the public interests underlying the restriction of the right in question.[215]

Finally, the proper role of fundamental respect and disrespect in the constitutional realm must also include reflecting upon cases in which respect and disrespect suggest that a right not yet judicially recognized in principle should, in reality, be thus recognized. The cogency of the claims to respect recognized in the context of, for example, *Obergefell v. Hodges*[216] did not spring into existence in 2015. The historical rejection of federal constitutional rights to minimum housing opportunities,[217] to a subsistence-level minimum income,[218] and to any meaningful public-school access[219] are contestable as well on grounds ultimately of basic respect and disrespect. And there are certainly candidate-rights for constitutional status, such as to some sufficient opportunity for gainful employment,[220] that are ultimately well-grounded in considerations of fundamental respect and disrespect of persons.

V. CONCLUSION

The above excursion through the territory of the major constitutional rights has not rendered irrelevant any of the ways in which constitutional case analysis is done. Judges cannot decide constitutional cases by inquiring merely into whether the challenged action manifests official disrespect, at a fundamental level, for the personhood of any relevant actor.

Instead, a judicial concern for matters of basic respect and disrespect can assist with inescapable questions of the initial threshold applicability of any asserted constitutional right. As well, considerations of respect and disrespect for persons can assist in later-stage borderline cases in which a clearly applicable constitutional right claim loses its force in light of competing rights and interests. Most importantly, though, concern for official respect and disrespect underlies, and most fundamentally justifies, the most important constitutional rights, whether the rights in question are judicially recognized or as yet not thus recognized.

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[214] The competing constitutional rights will themselves be, in large measure, grounded in considerations of respect and disrespect as well.

[215] For a sensitive discussion of the need to properly acknowledge conflicts among constitutional rights, and with competing public interests, see Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28 (2018). Consider, merely for example, established rights of free assembly or free exercise in the context of possible impending pandemic disease.

[216] 576 U.S. 644 (2015). For discussion, *see supra* notes 108-119 and accompanying text.

[217] *See* Lindsey v. Normet, 405 U.S. 56 (1972).

[218] *See* Dandridge v. Williams, 397 U.S. 471 (1970).

[219] *See* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[220] For discussion, *see* R. George Wright, *Toward a Federal Constitutional Right to Employment*, 38 SEATTLE U.L. REV. 63 (2014).