

# Dignity and the Right to Primary and Secondary Public Education

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*“Freedom can exist only in a society of knowledge. Without learning men are incapable of knowing their rights, and where learning is confined to a few people, liberty can be neither equal nor universal.”*

- Benjamin Rush, Autobiography of Benjamin Rush: His “*Travels Through Life*” Together with his Commonplace Book for 1789–1813, 72 (1948).

*“The human being can only become human through education. He is nothing except what education makes him.”*

- Immanuel Kant, (Lectures on pedagogy (1803)(9:441/445).

*“The one continuing purpose of education since ancient times has been to bring people to as full a realization as possible of what it is to be a human being.... For it seeks to encompass all the dimensions of human experience.”*

- Arthur W. Foshay, The Curriculum Matrix: Transcendence in Mathematics, Journal of Curriculum and Supervision (1991).

## **Question Presented**

Whether *Obergefell* provides a dignity-based cause of action under the Due Process Clause to address the shortfalls in public education and how global and domestic jurisprudence can aid in its application?

## **Brief Answer**

*Obergefell* expands the due process analysis suggesting that rights not explicitly enumerated in the Constitution can still be protected under the guise of human dignity. In rejecting the traditional framework to identify and protect fundamental rights, Justice Kennedy invokes human dignity as the lens through which to interpret new rights in light of the evolving needs of a progressive modern society. Looking outward, international declarations as well as foreign constitutions have solidified dignity as a fundamental principle of humanity by protecting rights to autonomy, self-realization, and other rights not explicitly recognized. Foreign dignity jurisprudence makes clear that the protections to human dignity encompass what education seeks

to achieve; the ability to be an autonomous individual who is free to realize their full potential as productive members of society.

## **Introduction**

The quality of public education in Chester and Wilmington should be informed by the concept of human dignity. Dignity is an inherent value possessed by all presupposing that every human being is of equal worth. As expressed by perhaps the most authoritative internationally recognized text, the Universal Declaration of Human Rights proclaims that “all human beings are born free and equal in dignity and rights.”<sup>1</sup>

First, this paper exposes the hardships and inequality in education for both Chester and Wilmington students as evidenced from a statistical analysis of academic performance and educational opportunities. To contextualize the cause of these shortfalls in education we provide a brief history of education in American society and the inattention and disregard for establishing education as legally protected right. Next, we look to international texts, the birthplace of human dignity, as a means to understand its evolution and role in modern society. Then, looking to foreign jurisdictions, focusing primarily on Germany and South Africa, we show how the interpretations of dignity in its application can enforce the underlying principles of education. After this analysis, we look to the evolution of dignity in the United States and its role in connection to other rights explicitly protected under our Constitution. This leads us to a recent Supreme Court decision, *Obergefell v. Hodges*, where the Court makes a dramatic shift from the strict textual approach for establishing rights worthy of constitutional protection. Applying the Court’s holding that fundamental rights are dependent on whether the right is inherent to human dignity, we then argue that education, like marriage, is inherent to human dignity. Applying the

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217, at 71, U.N. Doc. A/810 (Dec. 12, 1948).

principles to establish what is inherent to human dignity, we show why education meets these criteria. In an effort to equip those deprived of a quality public education with legal recourse, we conclude that dignity, in the wake of *Obergefell*, and with guidance from foreign dignity jurisprudence, that those suffering from inadequate education may rely on human dignity as the means to legal remedy.

### **Educational Opportunity Chester and Wilmington**

The city of Chester is home to 34,133 residents, comprised predominantly of the economically disadvantaged minorities.<sup>2</sup> Chester is hailed as Pennsylvania's most dangerous city<sup>3</sup> and the second most dangerous city in the Nation.<sup>4</sup> Yet, perhaps more unsettling than the dangers to Chester residents, is the harm suffered by their children at the hands of a broken school system.

The statistics reflecting educational achievement in Chester are bleak and concerning. Of the 937 students enrolled at Chester High School, only 41% will graduate, compared to a state average graduation rate of 85%.<sup>5</sup> Only 12% of students are considered proficient in English, and as few as 4% are proficient in mathematics.<sup>6</sup> In comparison, the state proficiency averages are 70% and 60% respectively.<sup>7</sup> Only about 9% of students in the high school system in Chester

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<sup>2</sup> See, City-Data, *Chester, PA*, <http://www.city-data.com/city/Chester-Pennsylvania.html>.

<sup>3</sup> See, DelCo Times, *Chester called most dangerous city in PA*, <http://www.delcotimes.com/article/DC/20170320/NEWS/170329974> (2017).

<sup>4</sup> See, Newtown Patch, *America's Most Dangerous Cities*, <https://patch.com/pennsylvania/newtown-pa/americas-most-dangerous-cities-3-are-pennsylvania> (2015).

<sup>5</sup> US News, *Chester High School*, <https://www.usnews.com/education/best-high-schools/pennsylvania/districts/chester-upland-sd/chester-high-school-16875> (2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

passed standardized tests for the state, compared with a state average of 74%.<sup>8</sup> The students to teacher ratio is 22:1, however, the ratio is 15:1 for the rest of the state.<sup>9</sup> The overwhelming majority, 99%, of the student body is made up of minority groups, more than ¾ of which are economically disadvantaged, receiving free or reduced priced lunches.<sup>10</sup> Residents who are 25 years old or over who have failed to attain a high school diploma have a median yearly income of no more than \$18,700.<sup>11</sup>

The residents of the City of Wilmington face similar, yet distinct challenges within their education system. Only 68% of Wilmington's residents, and just 33% of African-American men here, have earned their high school diploma. Similarly, 70% of all the resident students here live in poverty. Surprisingly, Delaware's largest city, with a population of 71,817 residents, does not have a public high school of its own.<sup>12</sup> Instead, students in Wilmington could potentially find themselves bused to any one of four public school districts or apply to one of the thirteen charter schools in the district.<sup>13</sup> Some of the available public schools students may be bused to include William Penn High School (WPHS), Glasgow High School (GHS), or Thomas McKean High School (TMHS), just to name a few.

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<sup>8</sup> See, Startclass, *Chester High School*, <http://public-schools.startclass.com/l/76335/Chester-High-School-Main-Campus> (2016).

<sup>9</sup> See, U.S. News, *Chester High School* (2016).

<sup>10</sup> *Id.*

<sup>11</sup> See, Statistical Atlas, *Educational Attainment in Chester County, PA*, <http://statisticalatlas.com/county/Pennsylvania/Chester-County/Educational-Attainment> (2016).

<sup>12</sup> See, City-Data, *Wilmington, DE*, <http://www.city-data.com/city/Wilmington-Delaware.html> (2014).

<sup>13</sup> See, Delaware Online, *A Vision for Wilmington Schools* (2015).

WPHS, which has a 84% graduation rate, provides English proficiency to just over half of its students, while only 10% have attained proficiency in math.<sup>14</sup> Similarly, of the 77% of students who graduate from GHS, only 30% will attain proficiency in English, and only 6% will do so in math.<sup>15</sup> TMHS has a graduation rate of 85%, but only 25% of its students are considered proficient in English, with just 3% are considered proficient in math.<sup>16</sup>

There is also the opportunity for specific students to attend one of the 13 charter schools in the district.<sup>17</sup> Charter schools, although free, have the unsettling ability to shape their student enrollment by a variety of means.<sup>18</sup> While charters are public and promoted as open to all students, a Reuters survey has found that in the United States charter schools have a variety of methods for aggressively screening students applying for admission.<sup>19</sup> Among the documented methods the study observed included: applications that are made available for just a few hours a year; lengthy application forms often only printed in English, requiring students and parent essays, test scores, and medical records; and, assessment exams and academic prerequisites.<sup>20</sup> For example, Delaware permits charter schools to provide admission preference to children who demonstrate interest in their respective educational focus. Reuters explains that some schools use

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<sup>14</sup> See, U.S. News, *William Penn High School*, <https://www.usnews.com/education/best-high-schools/delaware/districts/colonial-school-district/penn-william-high-school-4608> (2016).

<sup>15</sup> See, U.S. News, *Glasgow High School*, <https://www.usnews.com/education/best-high-schools/delaware/districts/christina-school-district/glasgow-high-school-4605> (2016).

<sup>16</sup> See, U.S. News, *Thomas McKean High School*, <https://www.usnews.com/education/best-high-schools/delaware/districts/red-clay-consolidated-school-district/mckean-thomas-high-school-4629> (2016).

<sup>17</sup> See, Delaware Online, *A Vision for Wilmington Schools* (2015).

<sup>18</sup> See, Washington Post, *A Disturbing Look at how Charter Schools are Hurting a Traditional School District*, [https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/09/a-disturbing-look-at-how-charter-schools-are-hurting-a-traditional-school-district/?utm\\_term=.77e76818efaf](https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/09/a-disturbing-look-at-how-charter-schools-are-hurting-a-traditional-school-district/?utm_term=.77e76818efaf) (2017).

<sup>19</sup> See, Simone *Special Report: Class Struggle - How Charter Schools get Students They Want* [www.reuters.com](http://www.reuters.com) (2013).

<sup>20</sup> *Id.*

that “leeway” to screen for those students who have higher levels of academic achievements.<sup>21</sup> However, restraints put on public school admission include merely a zip code.<sup>22</sup> That is, student families must have the economic means to buy or rent within that school district.

Kathleen MacRae, the executive director of the ACLU of Delaware argues that the fallout of the 1995 Charter School Act perpetuates a state sanctioned preferential treatment to those families navigating the special requirements for charter admission to charter schools.<sup>23</sup> Many groups have criticized the impact that charter schools have played in contributing to segregation. In Wilmington, of the 11,500 children enrolled in school, 75% are comprised of African Americans.<sup>24</sup> Despite efforts at reform, Tizzy Lockman, a member of WAEC, stated “the system has denied the right of those kids to get a good education.”<sup>25</sup> Dr. Atkins, the Legal Advocacy Director of the Disabilities Law Program of Community Legal Aid Society, Inc. describes the charter systems selection process as excluding those children with disabilities from attending the ‘high achieving’ charter schools as something constituting illegal discrimination.<sup>26</sup> The ACLU of Delaware alleges that high performing charter schools are nearly exclusively white whereas the those charter schools on the brink of failure have student populations comprised predominantly minorities.<sup>27</sup> Wilmington’s current education system leaves minority inner city students with just two alternatives; to attend the segregated public school where most of the white students have left to join charter schools, or attend the equally segregated charter school.<sup>28</sup> To illustrate this

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See, ACLU-DE, Fallout of the Charter School Act.*

<sup>24</sup> *See, City-Data, Wilmington. DE, <http://www.city-data.com/city/Wilmington-Delaware.html> (2014).*

<sup>25</sup> *See, ACLU-DE, Fallout of the Charter School Act.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

point, the Charter School of Wilmington has a graduation rate of 93%, with 61% of its students attaining proficiency in math, and 98% considered proficient in English.<sup>29</sup> Upon further inspection, however, more than two-thirds of the student body is white and only 2% of all the students are considered “economically disadvantaged.”<sup>30</sup> In contrast, the education provided at the schools that student-residents in Wilmington are bused to, are poorer in every respect, as stated above. These statistics strongly suggest, due to the Wilmington’s demographics, that few students attending CSW are members of the cities disadvantaged minority population. This can be easily demonstrated when looking at the demographics and academic achievements of the comparative academic institutions as outlined above.

Lack of a public high school in the neighborhood is detrimental for a community in more ways than just the obvious inconvenience to these inner city students. Schools provide local residents a sense of community, sparking involvement from both parents and neighbors, unlike any other institution. Further, it allows for children to attend school with local friends and strengthen their connection to communities.<sup>31</sup> Studies show that quality public education has a positive impact on the quality of life in a community.<sup>32</sup> Inversely, cuts to spending on public education results in reductions to individual income and earning capacity, as well as small business startups, and the overall employment rate.<sup>33</sup> When parents and communities work with schools, students tend to earn better grades, attend school more regularly, and stay in school

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<sup>29</sup> See, U.S. News, *Charter School of Wilmington* (2016).

<sup>30</sup> *Id.*

<sup>31</sup> See, Delaware Online, *A Vision for Wilmington Schools* (2015).

<sup>32</sup> See, Thomas Hungerford, *K–12 Education in the U.S. Economy Its Impact on Economic Development, Earnings, and Housing Values* (2004).

<sup>33</sup> *Id.*

longer.<sup>34</sup> This correlation remains constant regardless of the parent's own academic achievement or economic status.<sup>35</sup> As it stands now, it is often that case that two children on the same block in Wilmington will end up attending school in completely different districts.<sup>36</sup> This creates a disconnect between the community and the students that reside within it.

### **Education In American Society**

According to the most recent 2012 global rankings of education, conducted by the Pearson Publishing Company, the United States sits 17th out of a total 40 countries surveyed.<sup>37</sup> All the countries preceding the United States have a right to education guaranteed in either their constitutions, or by way of statute.<sup>38</sup> A "Constituteproject" search reveals that an overwhelming majority of countries (174) contain the term "education" in their constitutions.<sup>39</sup>

In addition, because of the obvious importance of education for children, numerous international texts provide extensive protections to the right of education. For example, the UDHR's states, "[e]veryone has the right to education . . . education shall be free, at least in the elementary and fundamental stages."<sup>40</sup> Similarly, Article 28(1)(a) of the Convention on the Rights of the Child (CRC), requires states to not only provide free primary education to all but also that such education be compulsory directed to the full development of a child's personality,

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<sup>34</sup> See, Belfield and Levin, *The Price We Pay: Economic and Social Consequences of Inadequate Education* (2007).

<sup>35</sup> *Id.*

<sup>36</sup> See, Delaware Online, *A Vision for Wilmington Schools* (2015).

<sup>37</sup> Laurie, Stephen (2013, October 2013). Why Doesn't the Constitution Guarantee the Right to Education? Retrieved from: <http://www.theatlantic.com/education/archive/2013/10/why-doesn't-the-constitution-guarantee-right-to-educate/280583/>

<sup>38</sup> *Id.*

<sup>39</sup> Constituteproject.org [accessed 3 May 2017].

<sup>40</sup> Universal Declaration of Human Rights, Art. 26.



talents, mental and physical abilities.<sup>41</sup> Like the CRC, the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 13(1) obliges education be “directed to the development of the human personality and the sense of its dignity . . . that education shall enable all persons to participate effectively in a free society.”<sup>42</sup> These influential texts make clear that education is essential to the development of a child’s capacity for self-realization and the achievement of autonomy. Therefore, education acts as the “vehicle” through which children are afforded the instruments necessary to develop into participating members of society by achieving economic opportunity and social mobility.<sup>43</sup>

The United States has not adopted these international and foreign commitments to primary education. In 1973, the Supreme Court rejected the notion of education as a right deserving of constitutional protections under the Fourteenth Amendment, which affords sanctuary to the entitlements of equality, liberty, privacy and the like.<sup>44</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, involved a class-action lawsuit by a group of economically disadvantaged Mexican-American parents on behalf of schoolchildren throughout the Texas.<sup>45</sup> The question presented to the Supreme Court was whether the significant funding disparities among school districts resulting from the property-tax system for funding public education violated the Fourteenth Amendment rights of students educated in impoverished districts.<sup>46</sup> The Court held that education was neither explicitly, nor implicitly a right guaranteed by the Constitution.<sup>47</sup> Rejecting the plaintiff’s convictions that education was vital to informed exercise of the right to

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<sup>41</sup> Convention on the Rights of the Child, Art. 28(1), 29(1)(a).

<sup>42</sup> International Covenant on Economic, Social and Cultural Rights, Art. 13(1).

<sup>43</sup> *Wisconsin v. Yoder* 406 U.S. 205 (1972).

<sup>44</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>45</sup> *Id.* at 4,5

<sup>46</sup> *Id.* at 17

<sup>47</sup> *Id.* at 35.

vote and intelligent exercise of the First Amendment, the Court reasoned no evidence was offered that reflected expenditures in education resulted in education that failing to fulfill these objectives.<sup>48</sup> Consequently, under the rational basis standard of review the Court upheld the Texas property tax system and opposed to offering an alternative, the Court chose to leave these questions to state legislators.<sup>49</sup>

But, as we later illustrate, the Fourteenth Amendment has undergone significant changes in both interpretation and application, furnishing protections to rights not traditionally recognized under the Constitution.<sup>50</sup> The dignity-based approach for protecting constitutional rights advances a superior individualized technique employed to reflect the needs of a changing society.

### **Brief History of Human Dignity**

Dignity has embedded itself in the global legal framework as societies have grappled with the meaning of humanity in forming the modern concepts of civilization.<sup>51</sup> The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, is credited, with fostering the emergence of the concept in modern society.<sup>52</sup> Dignity is mentioned five times in the text, appearing twice in the declaration's Preamble.<sup>53</sup> The opening sentence states, "[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all

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<sup>48</sup> *Id.* at 25

<sup>49</sup> *Id.* at 58

<sup>50</sup> *See, Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015).

<sup>51</sup> Erin Daley, *Dignity Rights* (University of Pennsylvania Press, 2013)

<sup>52</sup> *Id.* at 13

<sup>53</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.unher.org/refworld/docid/3ae6b3712c.html>

members of the human family... ”<sup>54</sup> Then, again in section following, “[t]he United Nations have in the Charter reaffirmed their faith in the fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms . . . ”<sup>55</sup> The term is also found in numerous other articles throughout the text.<sup>56</sup> Article I provides, “[a]ll human beings are born free and equal in dignity and rights.”<sup>57</sup> Dignity and rights, though separate, dignity and human rights are interwoven, as dignity is the “tuning fork” or *key* according to which rights are harmonized.<sup>58</sup> Human dignity is the ultimate value that gives coherence to human rights.<sup>59</sup> Article 22 provides, “[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>60</sup> Despite these varied interpretations of the UDHR’s use of dignity, the Declaration’s affirmation of dignity significantly influenced cultures throughout the world.<sup>61</sup>

In the following decades, dignity evolved into a legal right with binding effect for those signatory states to the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>62</sup> Both Covenants

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at Article (1).

<sup>58</sup> Mary Ann Glendon, *Procter Honoria Respectful: Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1172 (1998).

<sup>59</sup> See, Immanuel Kant, *Groundwork Of The Metaphysics Of Morals* 42-43 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997).

<sup>60</sup> *Id.* at Article (22).

<sup>61</sup> Daly, *Dignity Rights*, 15.

<sup>62</sup> *Id.*

recognized, and added “content and specificity” to the inherent dignity of the human person.<sup>63</sup> However, the ICESCR took the first step in recognizing the key role of dignity in education by explaining, “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”<sup>64</sup>

The concept of dignity has since transcended into a vast number of domestic constitutional texts. A word search for the term dignity via the Constitute Project reveals that 158 constitutions include the word.<sup>65</sup> However, not all countries incorporate the concept in a uniform manner. For example, countries such as Spain have chosen to adopt dignity in its form at international law.<sup>66</sup> Others, such as South Africa and Brazil have placed dignity as a founding principle of the State,<sup>67</sup> while others, such as Germany, place dignity “as a central value of constitutional order.”<sup>68</sup> Then, there are those who merely enjoin dignity with other rights, such as rights of women and children, of the disabled, and of prisoners.<sup>69</sup> Yet, virtually all the constitutions that have adopted dignity share a common trait both with each other and the

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<sup>63</sup> *Id.*

<sup>64</sup> The United Nations General Assembly. (1996). International Covenant on Economic, Social, and Cultural Rights, Article 13(1).

<sup>65</sup> [constituteproject.org](http://constituteproject.org) [accessed May 1 2016]

<sup>66</sup> Spain Constitution, § 10(2): “Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”

<sup>67</sup> Brazil Constitution, Art. 1: “The Federal Republic of Brazil, formed by the indissoluble union of States and Countries, as well as the Federal District, is a Democratic State of Law founded upon: (I) Sovereignty; (II) Citizenship; (III) Human Dignity”; South Africa Constitution, Chapter I: “The Republic of South Africa is on sovereign, democratic state founded on the following values - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

<sup>68</sup> German Constitution, Basic Law, Art. I: “Human dignity shall be inviolable. To respect and protect is shall be the duty of all state authority.”

<sup>69</sup> Daly, *Dignity Rights*, 22

UDHR. That is, dignity applies to all members of humanity. In its application to all humanity, dignity has often been described as the right to have rights.<sup>70</sup>

The concept of Dignity has emerged rapidly in the context of contemporary constitutionalism following the resolve of the horrific atrocities in the Second World War.<sup>71</sup> For example, the German Constitution, referred to as the Basic Law, imposes a duty on all State authority to both respect and protect human dignity.<sup>72</sup> The text of Article 1 of the Basic law provides:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis for every community of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive, and the judiciary.<sup>73</sup>

The text of Article 1 posits dignity as a constitutional right whereby the inviolable human rights flow from the inviolability of human dignity. Of equal importance, the Basic Law places dignity in the absolute, with no exceptions or provisions for its limitation by legislation. Article 79(3) protects the right of human dignity by shielding the principles of article 1 from the possibility of constitutional amendments.<sup>74</sup>

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<sup>70</sup> See, Daly, May, *Environmental Dignity Rights*, (2017).

<sup>71</sup> See, Leslie Henry, *The Jurisprudence of Dignity*, 2011, at 181.

<sup>72</sup> German, Basic Law, Art 1: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

<sup>73</sup> *Id.*

<sup>74</sup> See German, Basic Law, Art. 1.

Like the Basic Law, the South African Constitution employs dignity as an independent enforceable right under the Constitution.<sup>75</sup> Dignity is a stand alone right as provided by section 10, “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”<sup>76</sup> The language in both Article 1 of the Basic Law and Article 10 of the South African Constitution recognize dignity as a right worthy not only of respect, but also one deserving of protection.<sup>77</sup> While the basic Law explicitly places the duty of protection on state authority,<sup>78</sup> the duty of protection on South Africa is best illustrated by its case law.<sup>79</sup>

However, both the German Basic Law and the constitution of South Africa do little in the way of defining the inherently vague concept of human dignity. The Canadian Supreme Court has attempted to capture the essence of dignity:

Human dignity means an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian Society.<sup>80</sup>

A glimpse into the constitutional interpretations of dignity from German and South African jurisprudence aid in the understanding of dignity in its application and the relationship this bears on education. Upon further inspection, the interpretations of dignity in the international

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<sup>75</sup>South Africa Constitution, Art. 10.

<sup>76</sup> *Id.*

<sup>77</sup> Germany, Basic Law Art. 1; South African Constitution, Art. 10.

<sup>78</sup> German Basic Law Art. 1

<sup>79</sup> *Dawood & Another v. Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), (stating that “Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected).

<sup>80</sup> *Law v. Canada (Minister of Employment and Immigration (1999)* 170 DLR 4th 1 (SCC) at ¶ 51.

context bear significant resemblance to the very goals sought to be achieved by public education.<sup>81</sup>

Essential to the role education plays in society is the right to freedom of self-development in the achievement personal autonomy.<sup>82</sup> In Germany, this right is protected under Article 2 of the Basic Law: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order of the moral law.”<sup>83</sup> While this specific right is recognized in Article 2, the development of the personality and right to free development harbors a close relationship with human dignity.<sup>84</sup> The German Federal Constitutional Court (FCC) has held that “because of his dignity, we must ensure the development of his personality at the highest level.”<sup>85</sup> Thus, human dignity gives Article 2’s right to development its meaning by placing human dignity as the primary reason for the protection of the development of personality “at the highest level.”<sup>86</sup> Addressing the right to personality development, the FCC has ruled that children have a right to know their origins.<sup>87</sup> In a 1988 decision, the FCC held that the right to personality inherently includes the right to know

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<sup>81</sup> See, John Dewey, *Democracy And Education 4* (Free Press 1966) (1916).

<sup>82</sup> *Id.*

<sup>83</sup> Germany, Basic Law, Art. 2.

<sup>84</sup> See *BVerfGE 5, 85*

<sup>85</sup> *Id.*

<sup>86</sup> *BBVerfGE 30* (stating “The Human dignity granted in article 1(1) of the Basic Law of constitutes the highest value of the case and does not allow interference. However, in the present case, not the human dignity as a whole is affected, but only the part of the general personality right. This, in turn, falls within the scope of Article 2(1) of the Basic Law.)

<sup>87</sup> *BVerfGE 79, 256* (stating that “the right to free development of personality and human dignity ensure an individual autonomous sphere of private life in which he can develop and maintain his individuality. The understanding and development of individuality are closely connected with the knowledge of factors constituting them. Among these, among others, the descent belongs.”)

one's origins, "its purposes being to ensure the autonomous sphere necessary for shaping the individual's private life."<sup>88</sup>

Similarly, the Constitutional Court of South Africa has also recognized dignity as providing for the attainment of reaching one's full potential, explaining that dignity, properly understood, secures the space for self-actualization.<sup>89</sup> Justice Ackerman, a leading innovator in South Africa's dignity jurisprudence explains that "human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential" and that "part of the dignity of every human being is the fact and awareness of this uniqueness."<sup>90</sup>

In addition, the FCC describes individuals as autonomous beings developing freely in society.<sup>91</sup> In the context of artistic freedom, the FCC has affirmed the state's role in protecting the person's dignity because "each person must shape his own life."<sup>92</sup> Similarly, Court explained that not only is dignity the highest value in constitutional order, but also the protections of the

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<sup>88</sup> *Id.*

<sup>89</sup> *Ferreira v. Levin* 1996 (1) SA 984 (CC)

<sup>90</sup> *Id.* at 984 (writing "Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each Human being is uniquely talented. Part of the dignity every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfillment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity").

<sup>91</sup> *Mephisto Case*, 30 BVerfGE 173, 193 (1971)

<sup>92</sup> *Id.*



State are a requirement based on the fact that individuals are endowed with freedom to determine and develop themselves.<sup>93</sup>

However, dignity is not confined to merely those duties owed by the state to each individual.<sup>94</sup> Instead, human dignity's interpretation has extended to the broader community as that which binds people together.<sup>95</sup> Therefore, when the dignity of certain persons is assailed, society as a whole is demeaned when state action exacerbates further marginalization of certain groups.<sup>96</sup> Further, dignitary violations to individuals within a community impact the society in another negative, but equally important way. Specifically, when dignitary violations to individual autonomy create a subset of the population into forced dependency on society, this creates an undue burden on other members of the community which in turn impacts the dignity of such community members.<sup>97</sup>

In addition, the result of continued marginalisation of vulnerable members in society effectuates a harmful stigma by which those affected are viewed. Not only does this stigma

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<sup>93</sup> Life Imprisonment Case, 30 BVerfGE 173 (explaining “The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself”).

<sup>94</sup> *Khosa v Minister of Social Development* 2994 (6) SA 505 (CC).

<sup>95</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>96</sup> *Id.* (imparting that “It is not only the dignity of the poor that is assailed when the homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation).

<sup>97</sup> *Khosa* at para 76: (holding that [t]he exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants).

attach to the valuation of self-worth, but also the public's view of an individual's self worth.<sup>98</sup> In the context of same-sex marriage, South African courts not only focused their analysis on the rights of gay persons to marry, but also the right to equal recognition and respect for differences.<sup>99</sup> The stigmatization imposed on the prohibition of same-sex marriage was that these individuals were less capable of forming meaningful relationships.<sup>100</sup> Therefore, barring same-sex couples from engaging in marriage denied this group of individuals of the full moral citizenship in society.<sup>101</sup>

German case law has expressed a commitment to providing a means of supporting those freedoms not explicit in the Constitution.<sup>102</sup> The Constitutional Court explains this idea in connection with personality rights:

“ [t]hey complement as undefined freedom, the special freedoms (those defined in article 2), like the freedom of conscience or expression equally constitute elements of personality. Their functions in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions that are not encompassed by traditional concrete guarantees.”<sup>103</sup>

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<sup>98</sup> *Khumalo v Holomisa* 2002 5 SA 401 (CC), (explaining “[H]uman dignity is harmed by unfair treatment that is premised upon personal traits or circumstances that do not relate to the needs, capacities and merits of different individuals. Often such discrimination is premised on the assumption that the disfavored group is not worthy of dignity. At times, our history amply demonstrates, such discrimination proceeds on the assumption that the disfavored group is inferior to other groups).

<sup>99</sup> *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

<sup>100</sup> *Id* at para 60, 78

<sup>101</sup> *Id* (holding that “In the case of gays history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the experience of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group).

<sup>102</sup> 54 BVerfGE 148, 153 (1980)

<sup>103</sup> *Id.* at 153

Therefore, in effect, Germany shifts from the strict contextual language of the Basic Law, and encompass those rights that the textual language attempts to capture. The importance for this approach in regards to personality rights stems from modern societal developments and the potential threats these create to the human personality.<sup>104</sup>

Dignity is also used as a means to evaluate state action. In South Africa human dignity is fundamental to the evaluation of reasonableness to state action.<sup>105</sup> On this issue, Justice Yacoob has written:

It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.<sup>106</sup>

In addition, Court explained that when the autonomy of persons most vulnerable in society is so greatly impeded by state actions, the burden of the state in discharging its duty to provide such persons with the entitlements necessary for dignity is much greater.<sup>107</sup> This case stands as a proposition that South Africa is under a heightened obligation to protect these vulnerable persons in their society.<sup>108</sup>

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<sup>104</sup> 79, BVerfGE 256, 268 (1988)

<sup>105</sup> *Government of the Republic of South Africa & Others v. Grootboom & Other 2001 (1) SA 46 (CC)*

<sup>106</sup> *Id.*

<sup>107</sup> *Id. Government of the Republic of South Africa & Others v. Grootboom & Other 2001 (1) SA 46 (CC)*

<sup>108</sup> *Id.* (stating “ the right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational”)

So too does Germany balance the reasonableness of state action against the evaluation of dignity for the justification of the FCC's limits to the protections to the right of personality.<sup>109</sup> This is accomplished whereby, "the court weighs the personal interests against the weight of the official interests."<sup>110</sup> Despite the Court holding that "the state could take no measure or enact any law which would violate . . . or otherwise infringe upon the essence of personal freedom as encompassed in Article 2," the Court held permissible as evidence the use of a personal diary of an alleged murderer.<sup>111</sup> Even though the Court explained, "the Basic Law guarantees individual citizens an inviolable area of personal freedom in which one can freely form one's life, the effect of which is to remove all official power," the public interest of solving a serious crime allowed the Court to enter the diary as evidence.<sup>112</sup>

While the aforementioned foreign uses of dignity focus on state action, therefore appearing to be less than useful for the issue for quality education in the United States, the German courts have imposed certain duties whereby the state must act to prevent infringements upon human dignity by third parties.<sup>113</sup> For example, the state would fail to protect a person's dignity by failing to criminalize sexual assault or rape.<sup>114</sup> Therefore, in certain situations, German courts suggest that failing to take certain legislative action may itself be an infringement

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<sup>109</sup> 6 BVerfGE 32 (stating "A passport must be refused if facts justify the supposition that if an applicant threatens the internal or external security or other vital interests of the Federal Republic of Germany or one the German States").

<sup>110</sup> *Id.*

<sup>111</sup> 80 BVerfGE 367 (1980)

<sup>112</sup> *Id.*

<sup>113</sup> *See, Henk, Human Dignity In Comparative Perspective*, weblaw.haifa.ac.il.

<sup>114</sup> *Id.*

to dignity.<sup>115</sup> This idea is explored later but is of significant importance to the discussion of the United States' failure to enact legislation that would provide quality education for all students.

Finally, most recently, human dignity's place among the rights in German society extinguished all doubts as to its profound importance.<sup>116</sup> In the wake of the September 11, 2001 terrorist attacks on the United States, German Parliament enacted a statute authorized the German Military to shoot a passenger aircraft should the same situation occur in Germany.<sup>117</sup> The FCC held the act unconstitutional on the grounds of the inviolability of human dignity in Article I of the German Basic Law despite whether shooting down the aircraft would save significant numbers of lives on the ground.<sup>118</sup> Even when the passenger's fate would result in their death absent such state action, human dignity prevailed notwithstanding the duration of the physical existence of the human being.<sup>119</sup>

Although "human dignity" is not mentioned in the United States Constitution, the term can be traced back to the Founding Fathers.<sup>120</sup> Alexander Hamilton, arguing in support of constitutional democracy, expressed this new form of government as the "safest course to your liberty, your dignity, and your happiness."<sup>121</sup> Yet despite the absence of "dignity" in our Constitution, it has played an extensive role as a constitutional value animating our constitutional rights and protections.<sup>122</sup> In 1946 "human dignity" made its first appearance in a Supreme Court

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<sup>115</sup> *Id.*

<sup>116</sup> *See* BVerfGE, 115, 118

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at para 35

<sup>119</sup> *Id.* at para 119

<sup>120</sup> Alexander Hamilton, *The Federalist No. 1*, at 14 (1787).

<sup>121</sup> *Id.*

<sup>122</sup> *See*, Leslie Henry, *The Jurisprudence of Dignity*, 2011, at 181.

opinion, *In re Yamashita*.<sup>123</sup> Since this first mention, dignity has gone on to appear in more than 900 Supreme Court cases being used in connection with the 1st<sup>124</sup>, 4th<sup>125</sup>, 6th<sup>126</sup>, 8th<sup>127</sup>, 9th<sup>128</sup>, and 14th<sup>129</sup> amendments.

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<sup>123</sup> See *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting).

<sup>124</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”)

<sup>125</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (explaining that one purpose of the knock-and-announce rule is to protect “dignity that can be destroyed by a sudden entrance”); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 613-14 (1989) (stating that the Fourth Amendment “guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government”); *Winston v. Lee*, 470 U.S. 753, 760, 766-67 (1985) (holding that a person cannot be compelled by the state to undergo surgery to remove a bullet linked to a crime because such an act would be an unwarranted intrusion on personal dignity, which the 4th amendment seeks to protect); *Rochin v. California*, 342 U.S. 165, 174 (1952) (overturning a drug conviction on the basis that the police’s decision to pump the defendant’s stomach against his will to acquire evidence was “offensive to human dignity”); cf. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (noting that “some level of suspicion in the case of highly intrusive searches of the person” is warranted due to “dignity and privacy interests,” whereas searches of vehicles do not prompt the same concerns).

<sup>126</sup> See, e.g., *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (noting that a defendant “who lacks the mental capacity to conduct his defense without the assistance of counsel” is not allowed to represent himself, as the resulting “spectacle . . . is at least as likely to prove humiliating as enabling” and will not “affirm the dignity” of such a defendant, (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984)).

<sup>127</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 419-20 (2008) (restricting the imposition of capital punishment to a narrow range of cases based on “[e]volving standards of decency” that “express respect for the dignity of the person”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (setting aside the death sentence of a juvenile under the age of eighteen and noting that “the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons”); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding that handcuffing a prisoner to a hitching post in the sun for seven hours violated the “basic concept underlying the Eighth Amendment [which] is nothing less than the dignity of man” (alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)); *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (prohibiting the execution of mentally ill persons and explaining that the Eighth Amendment “protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance”); *Gregg v. Georgia*, 428 U.S. 153, 158, 173, 207 (1976) (upholding the death penalty of an individual convicted of murder but noting that the Eighth Amendment requires penalties to be in accord with “the dignity of man” (quoting *Trop*, 356 U.S. at 100); *Furman v. Georgia*, 408 U.S. 238, 285 (1972) (Brennan, J., concurring) (commenting that “the State, even as it punishes, must still treat its members with respect for

In particular, dignity as a constitutional value has fluctuated in weight due to competing societal interests in the context of the 4th Amendment. The Court has repeatedly offered dignity as a substantive value to animate the 4th amendment by declaring that the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>130</sup> However, the Court’s application of this right to preserve dignity soon eroded to meet the public’s interest in waging the “War on Drugs.”<sup>131</sup> Since the Court’s first mention of “human dignity” in 1946 and up until the mid-1980s, the Court placed significant emphasis on preserving the integrity and dignity of an individual from State intrusions. Specifically, in *Rochin*, the Court overturned a drug conviction on the basis that the police’s decision to forcefully pump the defendant’s stomach against his will was “brutal and . . . offensive to human dignity.”<sup>132</sup> This demonstrates the Court’s commitment to preserve the “dignity and privacy interests” of the individual against “highly intrusive searches of the person” by the State, maintaining that evidence obtained in a manner that “shocks the conscience” is incompatible with human dignity.<sup>133</sup> However, the Court’s diminished emphasis on human dignity is plainly evident in the context of drugs in America. The Court upheld a drug conviction

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their intrinsic worth as human beings” and cannot inflict punishments that do not comport with human dignity).

<sup>128</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (granting the “same dignity,” or status, to privacy as it had previously given to other “peripheral rights”).

<sup>129</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567, 578-79 (2003) (overturning Texas’s antisodomy statute on the ground that “adults may choose” to engage in same-sex relationships and still “retain their dignity as free persons”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (characterizing “personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing, and education” as “central to personal dignity and autonomy”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (“Few decisions are . . . more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy”).

<sup>130</sup> *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)).

<sup>131</sup> See, Maxine Goodman, *Human Dignity in Supreme Court Jurisprudence*, 2006, at 767.

<sup>132</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>133</sup> *Id.*

in which an individual was detained for more than 16 hours before she submitted to an involuntary rectal exam.<sup>134</sup> “Human dignity” was nowhere mentioned in the opinion, although the Court noted that the process was “uncomfortable [and] indeed humiliating.”<sup>135</sup> These cases serve to demonstrate the importance of public opinion and its reflection in the Court’s treatment of human dignity.

Additionally, the Court has noted that the 8th amendment, “affirms the duty of the government to respect the dignity of all persons.”<sup>136</sup> However, in doing so, the Court looks to the evolving society and its changes in acceptance in protecting prisoners against “cruel and unusual punishment.”<sup>137</sup> In *Ford*, the Court emphasized the “natural abhorrence civilized societies feel” when holding that it was unconstitutional to execute a mentally insane prisoner.<sup>138</sup> In *Atkins*, the Court held that when determining if the execution of a mentally deficient defendant is constitutional, it should be “judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”<sup>139</sup> Similarly, the Court looked to societal standards to conclude that human dignity precludes prisons from using hitching posts as punishment for disruptive conduct.<sup>140</sup> Societal influence on preventing dignitary harms to the treatment and execution of

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<sup>134</sup> *US v. Montoya de Hernandez*, 473 U.S. 531 (1985).

<sup>135</sup> *Id.* at 544.

<sup>136</sup> *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

<sup>137</sup> U.S. Const. Amend. VIII.

<sup>138</sup> *Ford v. Wainwright*, 477 U.S. at 399.

<sup>139</sup> *Atkins v. Virginia*, 536 U.S. 304, at 311.

<sup>140</sup> *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (noting in particular that the punishment “subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs... to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation).



prisoners is apparent when determining the extent of protections guaranteed by the 8th amendment, “which is nothing less than the dignity of a man.”<sup>141</sup>

The idea that individuals should be free to shape their own destiny and be free against arbitrary government action that demeans, humiliates, and degrades is entrenched in the notion of human dignity.<sup>142</sup> This suggests that a person’s dignity is dependent on their ability to be an autonomous individual, and therefore, can be infringed upon. In American jurisprudence, dignity has played a central role in protecting ability to shape their own destiny by animating our constitutional rights to privacy, liberty, and protection against unreasonable searches and seizures.<sup>143</sup> Most notably, the Court has characterized personal choices relating to “marriage, contraception, family relationships, child-rearing, and education” as “central to personal dignity and autonomy.”<sup>144</sup> In *Planned Parenthood v. Casey*, the Court protected a woman’s right to terminate her pregnancy.<sup>145</sup> Justice O’Connor, writing for the majority, provided what would come to be known as the “Mystery of Life” passage that would help substitute the rigid framework for identifying and protecting fundamental liberties:

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<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., William Parent; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (recognizing that exclusion from public accommodations on the basis of race denies individuals the equal dignity and respect they merit as human beings); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (explaining that gender discrimination similarly deprives persons of their individual dignity as it is an injury that is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race); *Brown v. Board of Education*, 347 U.S. 483 (1954) (protecting children from feeling inferior and discouraged by having to attend a separate inferior school).

<sup>143</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 440, 454-55 (1972) (upholding the right of unmarried couples to access contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (prohibiting the state from interfering with married couples’ right to use contraception); *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923) (recognizing the right to direct the education and upbringing of one’s children).

<sup>144</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).

<sup>145</sup> *Planned Parenthood*, 505 U.S. at 851.

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the 14th am. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.<sup>146</sup>

The Court later protected and extended this framework for identifying constitutionally protected liberties in *Lawrence v. Texas*, where the Court held that privacy was a fundamental liberty.<sup>147</sup> In so holding, the Court invalidated a Texas's anti-sodomy statute on the basis that the choice to enter into a homosexual relationship was "central to personal dignity and autonomy."<sup>148</sup> The Court explained that constitutional protections should be identified and invoked by current and future generations in "their own search for greater freedom," rather than only by those who wrote and ratified the Due Process Clause.<sup>149</sup> The Court recognized that individuals have a right to choose to "enter upon this relationship... and still retain their dignity as free persons" and be free from laws that demean and stigmatize their very existence as homosexual individuals.<sup>150</sup> Here, the Court's preservation of individual autonomy to protect their human dignity has opened the door for future courts to limit State activity that may restrict a person's ability to "define [their] own concept of existence."

### **Obergefell Provides for a Dignity-Based Due Process Analysis**

In the landmark case In *Obergefell v. Hodges*,<sup>151</sup> the Supreme Court rejected the traditional framework, and instead uses human dignity as the means for identifying and protecting fundamental rights. Indeed, the term "dignity" appears nine times in *Obergefell*. In

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<sup>146</sup> *Id.*

<sup>147</sup> *Lawrence*, 539 U.S. at 575.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 574.

<sup>151</sup> *See, e.g., Obergefell*, 135 S. Ct. 1039 (2015).

doing so, the Court held that the right to marry is fundamental and is applied with equal force to both opposite and same-sex couples.<sup>152</sup>

Traditionally, the Court's ability to identify a new fundamental liberty entitled to constitutional protection was confined to a narrow 3-prong test that required the liberty in questions be "defined in a most circumscribed manner, with central references to specific historical practices."<sup>153</sup> This test placed heavy emphasis on historical opinion of the right, rather than current social views. In rejecting this framework, the Court relies on Justice Harlan's famous *Poe* dissent, that "identification and protection of fundamental rights... has not been reduced to any formula," and instead expressly argues that rights afforded constitutional protection should not, and cannot, come from ancient sources alone.<sup>154</sup> The Court reasons that "if rights were defined by those who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."<sup>155</sup> Thus, the Court determined that it should not be up to those who wrote and ratified the Bill of Rights and Fourteenth Amendment, but current and future generations to determine the rights and protections individuals shall enjoy in their own era, "as [they] learn their meaning."<sup>156</sup> In its place, the Court uses Justice O'Connor's famous "Meaning of Life" passage to identify such rights, holding that "the fundamental liberties protected by this clause... extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."<sup>157</sup> This new framework fuses the double-helix of the Equal

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<sup>152</sup> *Id.*

<sup>153</sup> *See, Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>154</sup> *Poe v. Ullman*, 367 U.S. 497 (1961); *see* 522-55 (Harlan, J., dissenting); *Obergefell*, 135 S. Ct. at 2584.

<sup>155</sup> *Id.* at 2584.

<sup>156</sup> *Id.* at 2589.

<sup>157</sup> *Id.*

Protection Clause and the Due Process Clause into the doctrine of human dignity, providing that all people are deserving in equal measure of personal autonomy and freedom to “define [their] own concept of existence” opposed to having their identity and social role defined by the state.<sup>158</sup> Thus, *Obergefell*, provides a cause of action for dignitary violations under the Due Process Clause.

The Court even goes a step further in protecting individuals from dignitary harms by implementing marriage equality on a national level, opposed to leaving the decision of such implementation to the states. This reflects the premise that the “dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.”<sup>159</sup> The Court emphasizes the pain and humiliation men and women would suffer in the interim had they had to wait for majority votes in state legislatures before asserting their equal right to marriage, noting that “dignitary wounds cannot always be healed with the stroke of a pen.”<sup>160</sup>

The Court lays out principles to shape this dignity-based framework to give structure for future identification of rights so as not to leave future courts in the dark.<sup>161</sup> Using this framework, the Court outlines principles to analyze whether the right in question is central and inherent to an individual’s dignity and thereby entitled to constitutional protection: The right in question (1) is inherent in the concept of individual autonomy, (2) provides safeguards to

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<sup>158</sup> See, Lawrence Tribe, *Equal Dignity: Speaking Its Name*, at 7 (2015).

<sup>159</sup> *Id.* at 10.

<sup>160</sup> *Id.* at 9.

<sup>161</sup> See, *Obergefell*, 135 S. Ct. 1039 (2015).

children and families, and (3) the Nation’s traditions make clear that the right is a keystone of our social order.<sup>162</sup>

### **Education is Inherent to Individual Autonomy**

The Court in *San Antonio* rejected the argument that education was a fundamental right because it was essential to the effective exercise and intelligent utilization of the right to vote.<sup>163</sup> However, we do not argue this principle under the Equal Protection Clause of the 14th Amendment, as the plaintiffs did in *San Antonio*.<sup>164</sup> Instead we formulate our argument on the basis that the fundamental liberties protected by the Fourteenth Due Process Clause, which include those personal choices inherent to human dignity, as outlined in *Obergefell*, encompass the right to quality public education.<sup>165</sup>

Despite *San Antonio*’s failure to solidify education as a right, 18 years earlier the Supreme Court did not shy away from proclaiming public education as imperative to a child’s development in perhaps the most well-known Supreme Court case, *Brown v. Board of Education*. In *Brown*, the Court openly conceded that education “is a principle instrument awakening the child to cultural values, in preparing him for later professional training,” and that absent education “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life.”<sup>166</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> *See, San Antonio Indep. Sch. Dist*, 411 U.S. 1 (1973).

<sup>164</sup> *Id.*

<sup>165</sup> *See, Obergefell*, 135 S. Ct. 1039 (2015).

<sup>166</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954), supplemented sub nom. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

Since *Brown's* 1957 decision, the requirement of education as the prerequisite for success has substantially increased. Today's technological, knowledge-based society has employers seeking better-qualified, highly *skilled* workers than ever before. More than 3/4 of the fastest growing occupations require at least post-secondary education.<sup>167</sup> These children who receive an "education" failing to prepare their meaningful participation in society by developing skills such as reading, writing, and arithmetic, are effectively precluded from a majority of the job market. Economic opportunity is an important consideration for the achieving autonomy, and the inability to achieve even a minimal level of socioeconomic stability diminishing one's ability to shape their destiny.

Because 59% of Chester High School students fail to graduate, and only 68% of Wilmington residents have their high school diplomas, these are among those excluded from 3/4 of these emerging career opportunities. A recent study indicates that the weekly earnings for high-school graduates are 50% more as compared to those without a high school diploma.<sup>168</sup> Similarly, the dropout rate, at least in part, likely contributes to why just 9% of Chester residents between the age of 25-34 have attained a bachelor's degree.<sup>169</sup> Another element effectuating this result is that merely 12% and 4% of Chester High School's students reach proficient levels in English and math respectively.<sup>170</sup> Wilmington's statistics, although better, still do not provide an adequate education. From the schools mentioned above, the rates of English proficiency range

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<sup>167</sup> See, Linda Darling-Hammond, *Soaring Systems: High Flyers All Have Equitable Funding, Shared Curriculum, and Quality Teaching*, *AM. EDUCATOR*, Winter 2010-2011, <http://www.aft.org/pdfs/americaneducator/winter1011/DarlingHammond.pdf>.

<sup>168</sup> Breslow, Jason, (2012, September 21) *By the Numbers: Dropping Out of High School*. Retrieved at [www.pbs.org](http://www.pbs.org).

<sup>169</sup> See, Statistical Atlas, *Educational Attainment in Chester County, PA*, <http://statisticalatlas.com/county/Pennsylvania/Chester-County/Educational-Attainment> (2016).

<sup>170</sup> See, U.S. News, *Chester High School* (2016)

from 25-55% and proficiency rates in math range from 3-10%.<sup>171</sup> Regardless of the exact cause, the result that remains is an unacceptably high level of our most vulnerable population suffering blatant affronts to their ability to achieve autonomy through economic independence.

However, more significant than the impractical opportunities for socioeconomic advancement is that employment is required to secure even that which is most basic to humanity; access to food, shelter, and health care services.<sup>172</sup> Similarly, research demonstrates that when children fail to acquire basic literacy skills, it impairs basic mental and physiological functions such as “cognitive functioning, brain development, motor functions, calculation and number processing, language skills, memory, reading comprehension, communication skills, and overall ability to grasp new concepts.”<sup>173</sup> As such, those most negatively affected will be those young-adults with no employment at all. Individuals without high school diplomas have unemployment rates of 12%, which is 4% higher than the national average.<sup>174</sup> The students from Chester and Wilmington who do not receive high school diplomas are undoubtedly at the highest risk for

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<sup>171</sup> See, e.g., *U.S. News, William Penn High School, Thomas McKean High School, Glasgow High School*, (2016).

<sup>172</sup> See, Tomasevski, *Human Rights Obligations in Education*, 47.

<sup>173</sup> See, e.g., Oh Dae Kwon et al., *Effect of Illiteracy on Neuropsychological Tests and Glucose Metabolism of Brain in Later Life*, 22 *J. Neuroimaging* 292, 292 (2012); Karl Magnus Petersson et al., *Cognitive Processing in Literate and Illiterate Subjects: A Review of Some Recent Behavioral and Functional Neuroimaging Data*, 42 *Scandinavian J. Psychol.* 251, 251 (2001); Alfredo Ardila et al., *Illiteracy: The Neuropsychology of Cognition Without Reading*, 25 *Archives Clinical Psychol.* 689, 693 (2010) (stating that “Phonological processing is an auditory processing skill. It relates to words, but occurs in the absence of print. It involves detecting and discriminating differences in phonemes or speech sounds under conditions of little or no distraction or distortion . . . . Working memory is the system responsible for the transient holding and processing of new and already stored-information and is an important process for reasoning, comprehension, learning and memory updating.” Ardila, *supra* note 84, at 696; Illiterate adults perform more poorly than schooled literates on neuropsychological memory measures such as wordlist learning and recall, story learning and recall, verbal paired associates, digits backwards, number-months, and complex figure drawing).

<sup>174</sup> Breslow, Jason, (2012, September 21) *By the Numbers: Dropping Out of High School*. Retrieved at [www.pbs.org](http://www.pbs.org)

facing these aforementioned insurmountable challenges. Thus, lack of access to adequate public education violates both Chester and Wilmington students' dignity because of limitations to personal autonomy insofar as their ability to stop the perpetuating vicious cycle of poverty.<sup>175</sup> This leaves the overwhelming majority of students limited in both economic opportunities and social mobility. This correlation in turn diminishes the liberties that dignity seeks to protect: autonomy, ability to lead a stable life, and right to social status and esteem.

The notion that access to quality education is inherent to individual autonomy can additionally be demonstrated in the absence of education and its direct correlation to incarceration.<sup>176</sup> Incarceration is perhaps the most apparent constraint on an individual's autonomy, as it revokes an individual's liberty. Due to the severe limitations low-educational achievements place on a person's ability to attain stable employment, such individuals are more likely to resort to criminal behavior.<sup>177</sup> As stated by the Department of Justice, "[t]he link between academic failure and delinquency, violence, and crime is *welded to reading failure*."<sup>178</sup> Not surprisingly then, 85% of all juveniles and 60% of all incarcerated individuals cannot read or write on a level that is necessary to participate in society.<sup>179</sup> Also, absent literary assistance, the majority juveniles are likely to be reincarcerated.<sup>180</sup> Those who are incarcerated are also more likely to experience certain health-related problems that citizens don't typically face if they have

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<sup>175</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 683–84 (2002) (Thomas, J., concurring).

<sup>176</sup> See, e.g., *Alliance for Excellent Education, Saving Futures, Saving Dollars: The Impact of Education on Crime Reduction and Earning* 3 (2013) (finding a direct correlation between lower-educational achievement and increased arrest/incarceration rates).

<sup>177</sup> *Id.*

<sup>178</sup> Department of Justice, <http://www.begintoread.com/research/literacystatistics.html>.

<sup>179</sup> See, Ruben Rosario, *Troubled Youths Get a Message of Hope*, Pioneer Press, (Nov. 12, 2015) <http://www.twincities.com/2010/11/13/ruben-rosario-troubled-youths-get-a-message-of-hope/>.

<sup>180</sup> *Id.*



not been imprisoned.<sup>181</sup> Finally, among high school dropouts between the ages of 16-24, the rate of incarceration is 63 times higher when compared with college graduates.<sup>182</sup>

In Chester and Wilmington, as described above, the overall education achievement is concerning low. It is no surprise then that the crime rates in these cities are exceedingly high, as compared to the rest of their respective states. For example, in Chester, the chances of becoming a victim of a violent crime in Chester is 1 in 61, while the chances drop dramatically to 1 in 317 for the rest of the state.<sup>183</sup> In Wilmington, the chances of being a victim to violent crime are 1 in 55, while it is 1 in 200 for the state of Delaware.<sup>184</sup> These saddening facts support the strong relationship between lack of academic success and criminal behavior, and thereby, likelihood of incarceration. In conclusion, education is inherent to individual autonomy due to its relationship to criminal behavior and incarceration and its impairment on the ability to lead a stable life.<sup>185</sup>

But autonomy encompasses far more than a child's ability to one-day secure economic freedoms. As South Africa's Justice Ackermann explains, "[e]ach human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of his uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is

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<sup>181</sup> See, Human Impact Partners, *Health Impact Assessment of School Discipline Policies 2* (2013) (noting that juveniles are more likely to experience poor birth outcomes, adult chronic disease and obesity, mental health disorders, heart disease, and substance abuse, in addition to psychiatric problems, suicide attempts, and increased HIV, Hepatitis C, and tuberculosis, compared to their non-incarcerated counterparts).

<sup>182</sup> See, PBS, *By the Numbers: Dropping Out of High School*, <http://www.pbs.org/wgbh/frontline/article/by-the-numbers-dropping-out-of-high-school> (2012).

<sup>183</sup> Chester, PA Crime Analytics, <https://www.neighborhoodscout.com/pa/chester/crime> (2017).

<sup>184</sup> Wilmington, DE Crime Analytics, <https://www.neighborhoodscout.com/de/wilmington/crime> (2017).

<sup>185</sup> See, e.g., *Alliance for Excellent Education, Saving Futures, Saving Dollars: The Impact of Education on Crime Reduction and Earning 3* (2013) (finding a direct correlation between lower-educational achievement and increased arrest/incarceration rates).

permitted to develop his or her unique talents optimally.”<sup>186</sup> In both Chester and Wilmington, students are not afforded the opportunity to develop their uniqueness, which in turn prohibits the respect to human dignity. Recognizing the importance of individual development, Thomas Jefferson noted that education is necessary to prepare citizens to participate effectively and intelligently in our own political system if we are to preserve freedom and independence.<sup>187</sup> Thus, educated persons have the ability to make informed choices, such as voting for political representatives or even running for public office themselves. As the literal definition of autonomy, self-govern, the ability to make informed political decisions as to those elected to govern, and quite possibly curtail the exercise of self-governing, partaking in the political process is important to ensure continued liberty. South Africa’s Justice Sachs explained that, “[t]he universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”<sup>188</sup>

Literacy, perhaps the strongest indicator of the ability to receive and process information, plays a determinative role in participation in the political process. It follows that because voting requires at least a rudimentary understanding of the English language, this segment of the population, those who have no retained proficiency in English, are essentially precluded from participation in our democratic process. The statistics from Wilmington and Chester regarding literacy contribute the 32 million adults in the US who cannot read.<sup>189</sup> Studies show that voter turnout is significantly lower amongst those lacking college education as compared to

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<sup>186</sup> *Ferreira v. Levin*, 1996 1 SA 984 (CC) [49].

<sup>187</sup> See, Kern Alexander, M. David Alexander, *Cengage Learning* (2011).

<sup>188</sup> See, *August v. Electoral Commission*, 1999 (SA), 1 (CC), 1999 (4) BCLR 363 (CC) at ¶ 17..

<sup>189</sup> See, U.S. Department of Education and National Institute of Literacy, <http://www.statisticbrain.com/number-of-american-adults-who-cant-read/> (2015).

individuals with college degrees.<sup>190</sup> More significantly, however, is the even lower voter turnout rate for those who have not completed high school.<sup>191</sup> These studies suggest that education in of itself not only invites but also enables individuals to meaningfully exercise their right to vote and participate in our democratic society. *Obergefell* stands for the proposition that prohibiting same-sex couples from exercising their right to marry was incompatible with the notion of human dignity. Analogously, the lack of quality education that the students of Chester and Wilmington are receiving precludes their meaningful participation in our democratic society by prohibiting their ability to exercise their right to vote. Literacy more importantly informs individuals in order to participate in the political process and make informed decisions in accordance with their beliefs. In a government “of the people, by the people, for the people,” the children need to be educated such that they are able to participate in the political process that Thomas Jefferson stated was necessary to preserve our freedom and independence.

Therefore as the leaders within the United States government are subject to the people, such that these leaders are public servants, and not supreme rulers.<sup>192</sup> It follows, because all citizens possess the right to vote but rely on education to achieve the requisite capacity to

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<sup>190</sup> See, e.g., Barry C. Burden, *The Dynamic Effects of Education on Voter Turnout*, 28 *ELECTORAL STUD.* 540 (2009) (analyzing survey data from 1952 to 2004, demonstrating the effect of college education has increased starting in 1980s, thereby magnifying the ability of educational attainment to predict turnout); Aina Gallego, *Understanding Unequal Turnout: Education and Voting in Comparative Perspective*, 29 *ELECTORAL STUD.* 239, 240 (2010) (discussing findings that individuals with high educational achievements vote more frequently than the lower academically achieving individuals in some countries, including the United States).

<sup>191</sup> See, R. Sondheimer & D. Green, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 *AM. J. POL. SCI.* 174-79 (2009) (arguing that there is a strong relationship between education and voter turnout and noting that political participation is a function of one’s level of education; people with only a high school education or less are not as likely to vote).

<sup>192</sup> See, Alexis De Tocqueville, *DEMOCRACY IN AMERICA* 94-95, 123-24, 175, 287-88 (David Campbell trans., *Everyman’s Library* 1995) (1835, 1840).

meaningfully participate in the political process, that both elected officials and those who elect them must be educated enough to be capable of self-governance.<sup>193</sup>

### **Education as a Keystone of Social Order**

*Obergefell* draws on a string of marriage cases as well as the rights and responsibilities afforded by the federal government to demonstrate that the fundamental right to marry is a “keystone of our social order.”<sup>194</sup> The Court in *Obergefell* recognized that the contributions of governmental rights, benefits, and responsibilities, such as taxation, inheritance and property rights, adoption rights, and hospital access, afforded to married persons evidenced that marriage was a “building block of our national community.”<sup>195</sup> Similarly, the government affords benefits and responsibilities to educated individuals, lending support to the notion that education is a keystone to our social order. For example, adoption rights were at the forefront of the fight for marriage equality.<sup>196</sup> Once homosexuals were *afforded* the right to adopt children, the right to marry was soon to follow.<sup>197</sup> Yet, the overwhelming majority of states require individuals who seek to adopt a child to have at least a high school diploma.<sup>198</sup> This demonstrates that lack of education can effectively preclude individuals from the benefit of forming their own family. Specifically, in the instance when natural conception is not a viable option, these uneducated persons are barred from establishing a family until the required level of education is achieved. As explicitly argued in *Obergefell*, the right to “establish a home and bring up children is a central

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<sup>193</sup> *Id.*

<sup>194</sup> *See, Obergefell*, 135 S. Ct. 1039 (2015).

<sup>195</sup> *Id.* at 2601.

<sup>196</sup> *See, e.g., Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003); *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013); *Obergefell*, 135 S. Ct. 2584 (2015).

<sup>197</sup> *Id.*

<sup>198</sup> *See*, National Adoption Center, *Adoption Laws*, <http://www.adopt.org/adoption-laws>.

part to the liberty protected by the Due Process Clause.” Therefore, lack of education prevents individuals from participating in a central aspect of American society, family formation.

In addition, as the Court in *Brown* explains education is required for the most basic public responsibilities including serving in the armed forces.<sup>199</sup> Today, our military excludes candidates who have not graduated high school, and even those with a GED are routinely rejected, as 99% of our armed forces have at least a high school diploma.<sup>200</sup> Benefits conferred from military participation include educational benefits, tax-free housing and food allowances, and health and dental for both the individual and their family, to mention a few. Finally, the federal government recognizes the importance of education as evidenced by their yearly contribution amounting to over a *trillion* dollars disbursed throughout the states for the purpose of funding primary and secondary education.<sup>201</sup> These benefits bestowed on individuals harboring a basic level of education, a high school diploma, is indicative that our traditions make clear that education is a keystone to our social order. As demonstrated above, local adoption laws as well as compulsory school attendance laws and the great federal expenditures for education all demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces.

Next, *Obergefell* relies on a string of marriage cases to give evidence that the right to marry is fundamental.<sup>202</sup> Although the Court determined that the right to education was not

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<sup>199</sup> *Brown* 347 U.S. 483, 493 (1954).

<sup>200</sup> CNN, *Getting into the Military is Getting Tougher*, Annalyn Kurtz, (2013).

<sup>201</sup> See, U.S. Department of Education (2016).

<sup>202</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating bans on interracial unions, holding that marriage is a vital right essential to happiness by free men); *Zablocki v. Rehal*, 434 U.S. 374 (1978) (holding a law invalid which prohibited fathers who were behind on their child support from marrying); *Turner v. Safley*, 482 U.S. 78 (1987) (holding that prison regulations limiting inmates from marrying was invalid); *Maynard v. Hill*, 125 U.S. 90, 211 (1888)

fundamental, education's roots in the social order of this country date back to the Founding Fathers of this country. Benjamin Franklin, Benjamin Rush, and Noah Webster, to name a few, all shared the belief that right to education was so fundamental to the founding and structure of the United States, that it did not require explicit mention in the Constitution.<sup>203</sup> Notably, Benjamin Rush advocated for education for all people, including women and Blacks, because “[f]reedom can exist only in the society of knowledge. Without learning, men are incapable of knowing their rights, and where learning is confined to a few people, liberty can be neither equal or universal.”<sup>204</sup>

Since then, education has played a large role in Supreme Court jurisprudence. Although the Court ultimately refused to find that education is a fundamental right, the Court has recognized its importance. For example, in the landmark case *Brown v. Board of Education*, the Court abolished segregation in schools, demonstrating the unambiguous recognition of the importance of public education:

It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>205</sup>

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(explaining that marriage is the “foundation of the family and of society, without which there would be neither civilization nor progress”).

<sup>203</sup> See, Malhar Shal, *The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education After Rodriguez and Plyler* (2011).

<sup>204</sup> See e.g., Abraham Blinderman, *Three Early Champions of Education: Benjamin Franklin, Benjamin Rush, and Noah Webster* 7 (1976); Benjamin Rush, *Autobiography of Benjamin Rush: His “Travels Through Life” Together with his Commonplace Book for 1789–1813*, 72 (1948).

<sup>205</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954)

This bold language signifies the Court’s recognition that education is necessary for success. This gives support that education, is in fact, the foundation on which our society is built upon. Similarly, *Plyler* reasoned that completely depriving children of an education would “place an insurmountable burden” on the children.<sup>206</sup> This means that there is a degree of education that states must provide to their residents, and falling below that line places an insurmountable burden on the child. Additionally, the U.S. Supreme Court notes that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our own political system if we are to preserve freedom and independence.”<sup>207</sup> These cases serve to demonstrate that our nation’s traditions make clear that an education is a keystone to our social order as well as an invaluable tool for a child’s development.

## **Conclusion**

Education, like marriage, is not expressly provided for in the U.S. Constitution. In the wake of *Obergefell*, however, such a strict construction of the Constitutional language may not preclude education from constitutional protections. Applying the principles derived from *Obergefell* in the educational context, the right to quality public education is inherent to human dignity. Education is inherent to individual autonomy because it is essential self-governance, self-realization, and the freedom to make the intimate choices to define one’s meaning to the mystery of life. In addition, education provides safeguards to families and children by providing the means to live a stable and free from social stigma. Finally, education is a keystone to our

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<sup>206</sup> *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (invalidating a Texas statute that “revised its education laws to withhold from local school districts any state funds for the education of children who were not ‘legally admitted’ into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not ‘legally admitted’ to the country . . .”).

<sup>207</sup> *Wisconsin v. Yoder* 406 U.S. 205 (1972).

social order, evidenced by our nation's traditions. Because education meets the factors outlined in *Obergefell*, like marriage, education is inherent to human dignity and should be protected under the Fourteenth Amendment.