What Ever Happened to Dignity?

Author : Gregory Keating

Date : October 12, 2018

Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell L. Rev.__ (forthcoming 2018), available at SSRN.

In *The Puzzle of the Dignitary Torts*, Ken Abraham and G. Edward White return our attention to a domain of tort law they rightly describe as neglected, namely, the "dignitary torts". In our time, the term is casebook catchall for an arguably heterogeneous collection of intentional wrongs— "offensive" battery, defamation, false imprisonment, intentional infliction of emotional distress (IIED) and the four privacy torts (intrusion upon seclusion, public disclosure of private facts, false light, and commercial appropriation).[1] The term is a taxonomic category, and little more. It was not always so. For the first two-thirds of the twentieth century, the "dignitary torts" were a subject of sustained scholarly and practical interest. In the 1970's they vanished from the scholarly radar and have not returned. In the courts, the long staccato expansion of these torts was halted by New York Times v. Sullivan and its progeny. *New York Times v. Sullivan* breached the wall that had insulated "private law" doctrines from public law criticism. Private law became another instance of state action and the dignitary torts became subject to constitutional scrutiny and curtailment insofar as their commission involved expression. In our time, the category endures almost untouched, but in so enduring it has become a hollowed-out husk of its former self. "Dignitary torts" is now just a hand box, a convenient pigeonhole which enables us to group together a number of distinct wrongs for purposes of classification and exposition. Nothing more is now said about "dignity" as a concept, or as a value, or as an overarching interest, which either captures a latent unity among these wrongs or identifies a common thread which ties the torts together. And the dignitary torts no longer struggle forward. They stand now in a defensive crouch, awaiting further constitutional confinement.

Abraham and White rightly think that there is an important story here, and they tell that story in a rich, illuminating, and provocative way. The history of the dignitary torts is indeed a puzzle. Why did scholarly interest in them disappear? Why are they still dormant even though dignity has built up a head of steam in both international human rights law and domestic legal developments such as same-sex marriage and the more general recognition of the dignity of LGBT persons? *The Puzzle of the Dignitary Torts* offers answers to these questions, and more. It also explores the concept of "dignity" and advances a jurisprudential argument that the dignitary torts were foreordained to wither on the vine. That argument is intuitive at first sight, but elusive on closer inspection. The basic idea is that because the common law creeps forward case by petty case it cannot build a body of law which is systematically organized around a highly general concept like "dignity".

The article begins with an examination of the "concept of dignity," distinguishing two competing conceptions—one conceives of dignity as a "status conception"; the other "involved the worth of the individual". Examples of both conceptions come readily to mind. Stevens, the butler in Kazuo Ishiguro's celebrated novel, *The Remains of the Day*, identifies "dignity" as the mark and aspiration of a great butler.[2] Dignity is a kind of self-possession and what a self-possessed butler does is to sublimate their personal concerns into their professional role. Erasing all personal thought and feeling and replacing them with professional appropriate deference to the thoughts and feelings of the great man a great butler serves is a mark of greatness in a butler. Great butlers inhabit their roles fully, and are wholly consumed by them. Status is central here. The "dignity" of a butler consists in conduct and bearing appropriate to the position, and the position itself is constituted by its place in the social hierarchy. Great butlers serve great men and their greatness is parasitic on the greatness of those they serve. Consequently, the role and responsibility of a Butler is to pursue the ends and projects of the great man that he serves. Perfection in the role all but extinguishes the butler as his own, independent person. At the other end of the spectrum, we are accustomed to Declarations of Human Rights which proclaim universal, and equal human dignity. Claiming the mantle of "dignity" these documents celebrate the intrinsic

and equal worth of every human being. And we are familiar, too, with a way of combining these apparently opposed conceptions. In the modern world, and under the influence of democratic ideas, there has been a kind of "leveling up" whose aspiration is to assign to every person the highest rank—the status of being an "end in themselves" as a member of the "kingdom of ends"—in one famous formulation.[3]

Abraham and White are hesitant to settle on a single account, a Dworkinian "best interpretation" of "dignity". Indeed, they suggest that the richness of dignity as an idea is an important reason why the "dignitary torts" lack the unity we might wish they had. The wrongs give voice to different, and often conflicting, dimensions of the concept and those dimensions don't always hang together gracefully. No one, for instance, would think that defamation as traditionally articulated expressed a democratic ideal of equal high status. But someone might well think that what makes a battery offensive in our law is that the touching disrespects and demeans its victims, treating them as inferior in status and rank to the person doing the touching. Fisher v. Carrousel Motor Hotel is a case in point. In Fisher, a white maitre'd snatched a plate from a black patron's hand in the course of ejecting the patron from the restaurant because of his race. The touching was itself offensive to a reasonable sense of personal dignity because it expressed contempt and asserted superior racial status.

Although they disown any single account of dignity, Abraham and White's emphasis on the richness of the concept also leads them, sometimes, to tell a story in which the slow march of the dignitary torts in the first two thirds of the twentieth century is the story of a kind of moral progress. In this story, case by case, and wrong by wrong, courts and commentators are working out what it is that the law of civil wrongs forbids in the way of conduct which embarrasses, humiliates, exploits, intimidates, restrains and ridicules *because* those particular ways of demeaning, embarrassing, exploiting, humiliating, and so on, are incompatible with the intrinsic worth and equal high status of democratic citizens. Put differently, one of the stories which can be told about the slow, halting march of the dignitary torts is a story about the articulation of a law of civil wrongs suited to a nation "conceived in Liberty, and dedicated to the proposition that all men are created equal."

So why did it all end, slowly at first but quite completely? The "puzzle" is that claims for legal recognition of dignity have grown more intense even as the dignitary torts have waned. Demands for the recognition of same-sex marriage, and for the recognition of equal rights for LGBT people more generally, are claims to have equal dignity recognized. Abraham and White offer two answers. One sounds more in logical inevitability; the other in historical accident and contingency. The "logically inevitable" answer is that the common law as an institution and method just is hostile to the systematic articulation of general legal conceptions. Even after the writs system is abolished, the forms of action rule us from the grave because they survive in the elements of causes of action. Courts must proceed by reworking those elements, tort by tort; the common law does not permit courts to start with a clean slate and extract (or, if you prefer, "deduce") particular causes of action from general principles.

There is surely something to this description of the common law (and its implicit contrast with European Civil Code systems), but as an explanation for historical change within the common law it is suspect. For one thing, the explanation points to a property of the common law that it presents—correctly—as a constant. Consequently, the common law had the very same characteristics when the dignitary torts were on their slow march towards revision and expansion. Insofar as the case method of the common law does have implications for the path and the character of legal change, it seems to imply that the pace of common law change must be slow, and even piecemeal, but it doesn't seem to require that change ever end. If anything, continuous change seems inevitable. The common law cannot help but be an object in motion, reworking itself constantly under the pressure of new cases. Moreover, the common law of torts has been the scene of astonishing reconstructions over the course of the past hundred and fifty years. In the latter half of the nineteenth century, negligence was transformed from the state of mind with which certain nominate torts could be performed, into a general principle of responsibility for accidental harm, around which the modern law of torts was organized.[4] In the middle of the twentieth century, the law of torts gave birth to products liability, reconstructing a domain of social interaction which had been previously dominated by the law of contract and rules of "no duty". The dignitary torts may well be more hostile terrain for the development of general principles but, if so, the difference must lie their particular subject matter(s); or in the complexity of the interests they implicate; or in the elusiveness of dignity

as a concept. Common law method does not distinguish the domain of the dignitary torts from areas of tort law that have seen far greater generalization and reconstruction.

The second explanation that *The Puzzle of the Dignitary Torts* offers for the silencing of the dignitary torts is historical and particular. *New York Times v. Sullivan* changed everything. It opened the floodgates to the constitutionalization of these torts and that constitutionalization caused the dignitary torts to wither. American constitutional law gives wide latitude to speech which is vicious, and calculated to make its targets objects of public contempt. Freedom of speech has important roots in ideas of dignity and self-governance, but American free speech doctrine extends broad protection to speech which simply *is* an assault on the equal dignity of some people.[5] Once the line between constitutional law and private wrongs was breached, constitutional law choked off evolving efforts to delineate the bounds of permissible attacks on the equality, worth, and high standing of one's fellow citizens. This is a truly contingent development: pathologies of law and politics in the American South prompted a legal intervention which set the dignitary torts on an entirely different course, diminishing both their possibilities and their significance. And there is a larger lesson here, too, the diminution of the dignitary torts and the protections they provide to persons in civil society against humiliation, degradation, embarrassment and exploitation is yet another cost of the American legal system's distinctively broad protection of speech. If free speech continues to emerge as the new *Lochner*, these costs will only rise. That is a sobering thought.

The Puzzle of the Dignitary Torts is, as its authors rightly say, the first article to reckon with this corner of the law in a comprehensive way in more than a generation. It does so with depth, sophistication, and moral seriousness. Dismayingly, *The Puzzle of the Dignitary Torts* is also a swan song to a dying field. Looking back on fifty plus years of retreat, it's hard not to be moved by that sad song. But the tale that Abraham and White tell does not have a single moral. There is at least an echo of a jeremiad in their story and the warning they give is one that has been gathering force. Free speech is surely an important value, but the evidence is steadily building that American law protects speech to the point where it can be wielded as weapon and used to destroy other values of equal importance. The time may have come to correct our course.

1. The list in the text is Abraham and White's. As they note, the inclusion of "false imprisonment" in the list is heterodox. Conversely, assault might be included in the list, though Abraham and White do not mention it. Assault protects "emotional tranquility" albeit only insofar as it is disrupted by intentional infliction of apprehension of imminent bodily contact. In protecting "emotional tranquility" as a distinct interest which may be violated independent of any violation of the physical integrity of the person, assault is something of precursor to IIED.
2. "It is sometimes said that butlers only truly exist in England. Other countries, whatever title is actually used, have only manservants. I tend to believe this is true. Continentals are unable to be butlers because they are . . . as a rule unable to control themselves in moments of strong emotion, and are thus unable to maintain a professional demeanor other than in the least challenging of situations. If I may return to my earlier metaphor—you will excuse my putting it so coarsely—they are like a man who will, at the slightest provocation, tear off his suit and shirt and run about screaming. In a word, 'dignity' is beyond such persons."
3. "In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity." Immanuel Kant, **Groundwork for the Metaphysic of Morals** 33 (1785). All human beings are "ends in themselves" by virtue of their own rational natures. In his Tanner Lectures, "Dignity, Rank and Rights," delivered at Berkeley in April 2009, Jeremy Waldron perceptively discusses the democratization of dignity as a "leveling up". See the text accompanying n. 184, and the sources cited therein.
4. For a compelling and sophisticated telling of this story see Thomas C. Grey, *Accidental Torts*, 54 **Vand. L. Rev.** 1225 (2001).
5. See e.g., Snyder v. Phelps, 562 U.S. 443 (2011) (ruling that picketing condemning the sexual orientation of a military servicemen at the serviceman's was "speech on a matter of public concern" in a "public form" so that the First Amendment barred any claim for Intentional Infliction of Emotional Distress). Abraham & White discuss

the case at n. 149 of their article.

Cite as: Gregory Keating, *What Ever Happened to Dignity?*, JOTWELL (October 12, 2018) (reviewing Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell L. Rev.__ (forthcoming 2018), available at SSRN), https://torts.jotwell.com/what-ever-happened-to-dignity/.