

# **Utilizing Dignity Rights to Further Tribal Prerogatives: The Lenape Indian Tribe of Delaware**

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## **QUESTION PRESENTED**

What new rights or benefits does the recent state recognition of the Lenape Indian Tribe of Delaware (the “Lenape”) bestow upon the Lenape and how can the recent recognition of dignity rights in American jurisprudence help further tribal prerogatives?

## **BRIEF ANSWER**

State recognition of the Lenape has limited benefits such as access to federal and state funding, qualifying as an Indian Tribe under various statutes, and a recognition of the Lenape’s inherent dignity and longstanding presence within a state. Courts around the world along with local and national governments have found an inherent or implied right to dignity within the right to life and liberty. The Delaware Constitution expressly acknowledges a right to life and liberty. The right to dignity, which is implied in the Delaware Constitution, fills the gaps that state recognition fails to address. This paper will analyze how dignity can be used as a means of seeking redress for an infringed upon right to better the Lenape’s way of life.

## **INTRODUCTION**

The Lenape Indian Tribe of Delaware (the “Lenape”) resided in the coastal regions of Delaware and Pennsylvania for hundreds of years before European contact. The tribe, along with the other tribes of the present day United States, lived their lives free with dignity to move freely over the land and use the resources that the earth provided them. European contact had a profound impact on the Native’s way of life, not only individuals, but as a distinct group. With a decrease in the native population came a loss of dignity - the loss of the ability to live life as one chooses. Many natives were forced to relocated from their ancestral grounds. Some Lenape

remained in their homeland; however, many of the Lenape were dispersed across the country to Oklahoma and other western states and even to Canada. The forced migration was not only physically grueling, but the loss of sacred locations and an upheaval in their way of life caused many great Tribal Nations to lose their sense of self-worth and autonomy. The obstacles faced by the Lenape are similar to the obstacles encountered by tribes across the United States. Federal recognition, and recently state recognition, of Native Americans tribes is an attempt to rectify some of the harm that has occurred to the Native American Tribes' ways of life and standard of living through interactions with federal and state governments. The Lenape are not recognized by the federal government; however, the state of Delaware recognized the Lenape through the passage of a statute on August 4, 2016.

This paper provides an analysis of state recognition of Native American Tribes and how the Lenape's recent recognition by the State affects the Tribes' dignity and ability to bring about meaningful change in their community. While noble and unquestionably anchored in good intentions, the benefits that come with either state or federal recognition fall short of placing the Tribal Nations in the same place they were before European settlers exerted their will upon the continent. The question then becomes: So what do we turn to instead? This paper postulates an answer – utilize the legal system and the emerging acknowledgment of dignity as a substantive right across United States jurisprudence to enact meaningful and positive change in the indigenous communities.

Part one of this paper identifies the methods of state recognition and how the rights, benefits, or duties that the recognition confers work to improve the Lenape's dignity. Part two identifies what dignity encompasses – specifically the American understanding of dignity rights and the willingness of courts to allow dignity claims to proceed.



## **DISCUSSION**

### **Sovereignty of Tribal Nations through Recognition**

At the outset it is important to realize that state and federal recognition of a tribal nation does not bestow a sovereignty upon the nation that it did not already possess.<sup>1</sup> It is the correction of an error in the relationship between the United States and the tribal nation receiving the acknowledgement it was always due.<sup>2</sup> John Norwood, who traces his heritage to both the Nanticoke and Lenape Native Americans spoke of concern regarding the importance placed to recognition:

Increasingly, the words “indigenous” and “American Indian” are being redefined as “federally-recognized,” even while the administrative process for recognition is known to be hostile, unreasonable, unfair, racially biased, and demeaning to all American Indians. This increasing denial of identity equates to a process of administrative genocide in which non-federally recognized Tribal citizens are being systematically wiped from the political landscape.<sup>3</sup>

It is more important to focus on these innate rights and values instead of a title such as “federally recognized”; however, that is not to demean or downplay the benefits and remunerations possible through federal and state recognition.

#### ***Federal Recognition of Native American Tribes***

Initially, treaties were the main instrument by which a group of Native Americans became federally recognized; however, that practice is no longer followed.<sup>4</sup> In 1994, Congress authorized Public Law 103-454, the Federally Recognized Indian Tribe List Act of 1994<sup>5</sup> (the

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<sup>1</sup> See Statement Of John Norwood, Co-Chair, Hearing Before The Committee On Indian Affairs United States S. Hrg. 112-684, July 12, 2012.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See, generally, Andrew Keenan, *Restoring the Native American Trust*, Rutgers Race & L. Rev., 17 (2016) 221-244, 225.

<sup>5</sup> Federally Recognized Indian Tribe List Act of 1994, PL 103-454, November 2, 1994, 108 Stat 4791.

“Act”). The Act formally established three ways by which an Indian Tribe may become federally recognized: “by Act of Congress, by the administrative procedures under 25 C.F.R. 83 (“Part 83”), ... *or* by decision of a United States court.”<sup>6</sup> Only Congress can restore federal status to a terminated tribe.<sup>7</sup> Presently, the most common way a tribe becomes federally recognized is through federal administrative procedures - Part 83. Part 83.11 includes seven elements that must be met to receive federal recognition. These include: Indian entity identification, community, political influence or authority, governing document, descent, unique membership, and no congressional termination.<sup>8</sup>

### *Benefits*

Federal recognition provides access to the benefits and privileges accorded to other federally recognized tribes pursuant to regulations formed by the Bureau of Indian Affairs as well as federal statutes.<sup>9</sup> A federally recognized tribe qualifies as an “Indian Tribe”, which is a defined term and a necessary status to receive benefits or assistance under most federal statutes.<sup>10</sup> Recognition “improves the ability of the Tribe to assert its own rights, preserve and protect its

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

<sup>7</sup> <https://www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-federal-recognition>.

<sup>8</sup> *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 174 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013); 25 C.F.R. § 83.11 (Indian identity requires that the petitioner has been identified as an American Indian on a “substantially continuous basis since 1900”; community requires that petitioner show that they are a distinct community that has existed from 1900 to the present; political influence or authority requires that the tribe have a governing body since 1990; to fulfill the governing document requirement, petitioner need provide “a copy of the entity’s present governing document ... or a written statement describing in full its membership criteria and current governing procedures; descent requires ancestry from a historical Indian tribe; unique membership requires that the principal body of members not be a member of a federally recognized tribe; and lastly the Tribe’s federal status cannot have been earlier terminated by Congress.). For a more fulsome discussion on the necessary requirements *see* 25 C.F.R. § 83.11.

<sup>9</sup> Andrew Keenan, *Restoring the Native American Trust*, Rutgers Race & L. Rev., 17 (2016) 221-244, 225.

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

culture, defend its identity, promote its heritage, and provide for its Tribal citizens.”<sup>11</sup> The tribe can create its own government, settle legal disputes within its territory, levy taxes within the territory, and choose its own future.<sup>12</sup> Most importantly, federal acknowledgment allows Tribal Nations to “maintain tribal culture and identity.”<sup>13</sup>

### ***State Recognition of Native American Tribes***

It would seem that the federal government has exclusive power over Indian Tribes.<sup>14</sup> Pursuant to the Indian Commerce clause, Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>15</sup> States, and courts alike have taken the position that states are free to recognize tribes so long as that recognition is not in direct conflict with federal recognition policies.<sup>16</sup> Although the process of federal recognition has been overhauled in recent years, the process remains cumbersome and many tribes will never achieve federal recognition.<sup>17</sup>

State recognition has reemerged in an attempt to acknowledge the inherent dignity of Native Americans.<sup>18</sup> There are four types of state recognition: state law recognition, administrative recognition, legislative recognition, and executive recognition.<sup>19</sup> The first form of state recognition, state law recognition, requires a new law to be passed for the Tribe to be

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<sup>11</sup> See Statement Of John Norwood, Co-Chair, Hearing Before The Committee On Indian Affairs United States S. Hrg. 112-684, July 12, 2012.

<sup>12</sup> Keenan, at 222.

<sup>13</sup> *Id* at 224.

<sup>14</sup> See U.S. Const. art. I, § 8, cl. 3.

<sup>15</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>16</sup> Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, Santa Clara Law Rev., 48 (2008): 79-153, 90.

<sup>17</sup> See, generally, *Id*.

<sup>18</sup> Vt. Stat. Ann. tit. 1, § 851.

<sup>19</sup> Alexa Koenig & Jonathan Stein, Santa Clara Law Rev., 48 (2008): 79-153, 102-103.

recognized by its respective state.<sup>20</sup> Initially, this requires that one house of the state legislature originate a bill; next the bill must pass through both houses before the governor signs the bill into law.<sup>21</sup> This method is unquestionably the most formal and binds the state and the tribe constituting a political act.<sup>22</sup> A government-to government relationship is formed through the force of law.<sup>23</sup> The exact dimensions of the government-to-government relationship are determined through state law and varies accordingly.<sup>24</sup>

Although state recognition does offer several benefits, “the powers granted through state recognition are quite limited.”<sup>25</sup> Federally recognized tribes are generally immune from state law; however, state recognized tribes are not.<sup>26</sup> The tribes “are endowed only with those sovereign characteristics recognized by that state's laws, legislative resolutions, administrative regulations and other documents that collectively define the government-to-government relationship.”<sup>27</sup> Because the rights and benefits afforded to a tribe are determined by state law, the rights and benefits “vary dramatically between states, ranging from powers of self-

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<sup>20</sup> *Id* at 103-104.

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

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

<sup>23</sup> *Id.*

<sup>24</sup> 2002 WL 735340 (S.C.A.G.) Office of the Attorney General, State of South Carolina (March 25, 2002) Janie A. Davis, Executive Director South Carolina Commission for Minority Affairs Re: “State Recognition” to Native American Organizations (Ms. Davis asked, “whether using the term ‘State Recognition’ obligates the State to anything other than a certificate acknowledging that they have met a specific criteria or threshold as a Native American entity in this State.” The reply was “In my research, I have uncovered no constitutional provision in South Carolina relative to the State recognition of Native American organizations. Therefore, it is left to the General Assembly, through its plenary powers, to decide whether Native American organizations should be recognized, the criteria for recognition and the benefits, responsibilities, authority, consequences, obligations, etc. that go along with such recognition.”).

<sup>25</sup> Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, Santa Clara Law Rev., 48 (2008): 79-153 at 86.

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

<sup>27</sup> *Id* at 86-87.

government such as the right to operate a police force, to exemptions from paying state and local taxes, to primarily symbolic acknowledgment of a tribe's longstanding presence within a state.”<sup>28</sup>

#### *Delaware Recognition Procedure*

Delaware has no official administrative scheme for state recognition of Native Americans and there is no identified organization within the state dedicated to Indian affairs, such as a commission on Indian affairs.<sup>29</sup> There was a time when an office dedicated to Indian affairs existed; however, it was eventually closed due to financial reasons.<sup>30</sup> Although there is no regulatory scheme in place, Delaware utilizes a “state law” recognition process. Delaware has recognized two Indian tribes during the state’s existence. The first was the Nanticoke Indians in 1881 and the last was the Lenape Indian Tribe of Delaware in 2016.<sup>31</sup> Both times, albeit over the course of more than 130 years, the state utilized state law recognition, which bound the state in a government-to government relationship with the tribes.<sup>32</sup>

Other states have express statutes, regulations, or executive orders that identify what a government-to-government relationship entails. For example, Oregon’s executive order explains the relationship as “establish[ing] a process which can assist in resolving potential conflicts, maximize key inter-governmental relations and enhance an exchange of ideas and resources for the greater good of all of Oregon’s citizens, whether tribal members or not.”<sup>33</sup> Arizona’s Department of Economic Security also released a policy statement where its main initiative was to “ensure[] that DES engages in open, continuous, and meaningful consultation with the

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<sup>28</sup> *Id* at 87.

<sup>29</sup> *Id* at 117.

<sup>30</sup> *Id* at 118.

<sup>31</sup> See 29 *Del. C.* § 106 (Nanticoke); 29 *Del. C.* § 107 (Lenape), respectively.

<sup>32</sup> Koenig & Stein, *Federalism and the State Recognition* at \_\_\_.

<sup>33</sup> Oregon Executive Order No. EO - 96 – 30.



Arizona Tribal Nations consisting of information exchange and mutual understanding ...”<sup>34</sup> An examination of the above regulations reveals that one positive consequence of state recognition is a better right to information and notice when upcoming events may affect the tribe. This advanced notice may play a vital role in timely achieving injunctive orders to halt commercial projects that would likely have a negative impact on the Lenape’s way of life – namely through the environment. A Commission on Indian Affairs in Delaware could facilitate this government to government relationship and convey information between the Lenape and State.<sup>35</sup>

#### *Federal Legislative Benefits Because of State Recognition*

The Federal Indian Arts and Crafts Act (the “IACA”) establishes other benefits and protections for Native American arts and crafts made for sale.<sup>36</sup> Under the IACA, it is illegal under federal law to sell “any good in a manner that falsely suggests it is an Indian product, or the product of a particular Indian, or Indian tribe, or Indian arts and crafts organization resident within the United States.”<sup>37</sup> For an art or craft product to be sold with an “Indian made” or similar designation, the product must be made by an Indian.<sup>38</sup> State recognition allows Tribal members to be eligible to sell arts and crafts as “Indian made.” As the Lenape well know, artisans may be harassed by state and federal officials when their only crime was selling products they made as Indian made.<sup>39</sup> “This was the impetus for [the Lenape’s] state recognition

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<sup>34</sup> Arizona Department of Economic Security, Policy No. DES 1-92-03, Effective date 10/6/2014.

<sup>35</sup> See also Oregon Executive Order No. EO - 96 – 30.

<sup>36</sup> See 18 U.S.C. § 1159 (2015).

<sup>37</sup> *Id.*

<sup>38</sup> 25 C.F.R. § 309.2(a) defines an Indian as: “a person who is a member of an Indian tribe or for purposes of this part is certified by an Indian tribe as a non-member Indian artisan...” “Indian tribe” is defined as any Indian group which is recognized by either the federal government or a state legislature. See 25 C.F.R. § 309.2(e)(1) and (2).

<sup>39</sup> *Email with Dennis Coker*, Chief of the Lenape Indian Tribe of Delaware. February 17, 2017 (on file with author).

legislation.”<sup>40</sup> Not only does the IACA allow the Lenape to sell their goods as Indian made, but they can also bring suit in federal court for damages caused by a violator of the IACA.<sup>41</sup>

Some types of federal funding are available to tribes because of their state recognized status.<sup>42</sup> Several federal statutes and regulations allow the Department of Education to provide grants, either directly or indirectly, to Indian Tribes. For instance, 20 U.S.C.A. § 7422 allows the Department of Education to provide grants to local educational agencies if the number of Indian children “who were enrolled in the schools of the agency, and to whom the agency provided free public education, during the preceding fiscal year ... was at least 10; ... [or] constituted not less than 25 percent of the total number of individuals enrolled in the schools of such agency.”<sup>43</sup> Indian tribes may apply directly for the grant for the benefit of its members if the educational agency does not.<sup>44</sup>

Section 7441 of Title 20, Improvement of educational opportunities for Indian children and youth, allows the Secretary to award grants to the Department of Education who in turn allocates funding to eligible entities<sup>45</sup> for various educational purposes.<sup>46</sup> These purposes

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<sup>40</sup> *Id.*

<sup>41</sup> *Native Am. Arts, Inc. v. J.C. Penney Co.*, 5 F. Supp. 2d 599 (N.D. Ill. 1998) (Indian arts and crafts organization sufficiently alleged all three constitutional standing requirements in action alleging that defendant’s sale of, Indian products violated the IACA. It lost revenue and business opportunities as retailer’s direct retail competitor, that such injury was fairly traceable to retailer’s offending conduct, in that it was retailer’s sales of imitation Indian-style goods that caused organization to lose sales and business opportunities, and that organization sought compensatory damages, punitive damages, and injunctive relief.)

<sup>42</sup> U.S. Government Accountability Office. (2012, April). *Indian Issues: Federal Funding for Non-Federally Recognized Tribes* (Publication No. GAO-12-34b). Retrieved from GAO Reports, <http://www.gao.gov/assets/600/590102.pdf>.

<sup>43</sup> 20 U.S.C.A. § 7422 Grants to local educational agencies and tribes.

<sup>44</sup> *Id.* (20 U.S.C.A. § 7491 defines and “Indian Tribe” for purposes of this part as “any tribe or band recognized by the State in which the tribe or band resides”).

<sup>45</sup> 20 U.S.C.A. § 7441(b) includes Indian Tribe as an eligible entity, Indian Tribe is defined by § 7491 as, *inter alia*, a state recognized tribe.

<sup>46</sup> 20 U.S.C.A. 7441.

include: innovative programs related to the educational needs of educationally disadvantaged Indian children and youth; “educational services that are not available to such children and youth in sufficient quantity or quality, including remedial instruction, to raise the achievement of Indian children in one or more of the subjects of English, mathematics, science, foreign languages, art, history, and geography”; bilingual and bicultural programs and projects; special health and nutrition services; family literacy services; and more.<sup>47</sup> The term of the grant cannot exceed five years and applicants are given priority when applications present a plan for combining two or more of the activities described above for a period of more than one year.<sup>48</sup>

Section 7452 of title 20, Grants to tribes for education administrative planning, development, and coordination, allocates funding to state recognized tribes for promoting “tribal self-determination in education”; improving the “academic achievement of Indian children and youth”; and promoting the “coordination and collaboration of tribal educational agencies with State educational agencies and local educational agencies to meet the unique educational and culturally related academic needs of Indian students.”<sup>49</sup> Proper education is a key to realizing one’s dignity.<sup>50</sup> A basic component or value of dignity is the ability to pursue life in the way one so chooses – a proper education is essential to achieve such a life.<sup>51</sup>

Under title 29, the Department of Health and Human Services is able to award grants to state recognized tribes. Section 718, Traditionally underserved populations, specifically, subsection (d) allows state recognized tribes to receive grants for the purpose of regulating

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<sup>47</sup> See 20 U.S.C.A. § 7441(a) for a complete list of services under the section.

<sup>48</sup> 20 U.S.C.A. § 7441(a)

<sup>49</sup> 20 U.S.C.A. § 7452; see § 7452(c) Grant program for information on the scope of the grant; see § 7452(d) Grant requirements and applications, for information on how to apply for the grant.

<sup>50</sup> The United Nations General Assembly. 2007. *Declaration on the Rights of Indigenous People* (Art. 15).

<sup>51</sup> *Id.*

environmental quality.<sup>52</sup> “The Commissioner shall award grants to Indian tribes for the purpose of funding 80 percent of the costs of planning, developing, and implementing programs designed to improve the capability of the governing body of the Indian tribe to regulate environmental quality pursuant to Federal and tribal environmental laws.”<sup>53</sup> The importance of the environment on one’s dignity, especially an indigenous population, is discussed *infra*. Pursuant to 42 U.S.C.A. § 9911, a tribe may apply for grants directly from the Department of Health and Human services that would otherwise be awarded through the state if a plan is submitted “that meets such criteria as the Secretary may prescribe by regulation” because of its status as a state recognized tribe.<sup>54</sup>

The Department of Housing and Urban Development awards grants to state recognized tribes that meet certain criteria under 25 U.S.C.A. § 4111 to carry out affordable housing activities and self-determined housing activities for tribal communities programs.<sup>55</sup> The Lenape are eligible to receive these grants because of their state recognized tribal status. The applicable

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<sup>52</sup> 29 U.S.C.A § 718.

<sup>53</sup> 29 U.S.C.A. § 718 (the grant may be used for “the training and education of employees responsible for enforcing, or monitoring compliance with, environmental quality laws, ... the development of tribal laws on environmental quality, and ... the enforcement and monitoring of environmental quality laws.” For a project to be approved, “the Commissioner is [must be] satisfied that the activities to be carried out under such project will be in addition to, and not in substitution for, comparable activities previously carried out without Federal assistance, except that the Commissioner may waive this requirement in any case in which the Commissioner determines, in accordance with regulations establishing objective criteria, that application of the requirement would result in unnecessary hardship or otherwise be inconsistent with the purposes of this subchapter.... No project may be disapproved for assistance under this subchapter solely because the agency requesting such assistance is an Indian organization in a nonreservation area or serves Indians in a nonreservation area...Grants shall be awarded [] on the basis of applications that are submitted by Indian tribes to the Commissioner in such form as the Commissioner shall prescribe.”).

<sup>54</sup> 42 U.S.C.A. § 9911.

<sup>55</sup> 25 U.S.C.A. § 4111.

status describes the eligible entities, *inter alia*, as an Indian Tribe, which is defined, *inter alia*, as a state recognized tribe.<sup>56</sup>

Some statutes require a tribe to have a “reservation” to be eligible for federal grants. In response to a congressional report, the Department of Education released a statement stating it has been the department’s long-standing interpretation of the definition of “reservation to include a defined and contiguous area of land where there is a concentration of tribal members and in which the tribe is providing structured activities and services.”<sup>57</sup> These are commonly referred to as state designated tribal statistical areas.<sup>58</sup>

#### *State Legislative Benefits Because of State Recognition*

The Delaware Human Remains Act, 7 *Del. C.* § 5406 (“DHRA”)<sup>59</sup> acts as an analogous state statute to the federal Native American Grave Protection and Repatriation Act (“NAGPRA”). Pursuant to DHRA “[t]he Committee shall be notified of all skeletal remains determined to be Native American within 5 days of discovery" and provide a plan detailing how to handle the remains within 60 days.<sup>60</sup> Previously excavated skeletal remains of Native Americans are to be reinterred and the direction of “remains discovered after enactment shall be determined by the Committee or, if direct descent can be determined, by the next-of-kin.”<sup>61</sup>

Medical benefits are eligible to Native Americans under the Delaware Code for cancer treatment. To receive benefits an applicant must, *inter alia*: Need treatment for cancer, be a Delaware resident; have no health insurance; and be eligible for a waiver under the Patient

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<sup>56</sup> *See, e.g.*, 20 U.S.C.A. § 7491.

<sup>57</sup> Response Letter from Alexa Posny Assistant Secretary for the Department of Education to the U.S. Government Accountability Office March 23, 2012.

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

<sup>59</sup> 7 *Del. C.* § 5406.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Protection and Affordable Care Act, such as be a member of an Indian tribe.<sup>62</sup> These possible benefits help to bolster dignity as having one's health is a basic component to dignity.<sup>63</sup>

The ability to qualify as an Indian Tribe to receive grants for projects related to the environment and the education of Lenape children help reinforce the dignity of the tribe. Education and a healthy environment are two key components to living with dignity.<sup>64</sup> When Vermont recognized the Western Abenaki tribes, the statute described state recognition as the “official acknowledgment of the long-standing existence in Vermont of Native American Indians who predated European settlement and *enhances dignity and pride in their heritage and community.*”<sup>65</sup> The ability to use the right to dignity in a legal setting to bring about meaningful change in the community helps fill the gaps that grants alone cannot fill.

### **What is Dignity?**

Dignity as we know it today is not understood in the same way it was hundreds of years ago. Originally, dignity was reserved for the upper-class nobility.<sup>66</sup> Dignity was not universal; it was something earned or perhaps something that a select few were born with.<sup>67</sup> Today's understanding of dignity is much broader, it applies to everyone and is inherent at birth.<sup>68</sup> There is no social requirement or monetary net worth threshold that one must achieve before they

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<sup>62</sup> Code Del. Regs. 16 4000 4203.

<sup>63</sup> *Juan Antonio Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*, Makati, Branch 66, (G.R. No. 101083. July 30, 1993).

<sup>64</sup> *Indians of the Midwest: Federal and State Recognition*. National Endowment of the Humanities, 2011. <http://publications.newberry.org/indiansofthemidwest/identities/legal-identity/federal-and-state-recognition/>.

<sup>65</sup> Vt. Stat. Ann. tit. 1, § 851; *see also* State v. Oxendine, 775 S.E.2d 19, 22 (N.C. Ct. App. 2015) (pursuant to state statute, members of state recognized tribes are allowed to hunt on designated lands within securing a license). Hunting and securing one's own food is a vital exercise of their right to dignity and can only be recognized through a healthy environment.

<sup>66</sup> *See* Cambridge Handbook. Pg. XIX.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

possess dignity.<sup>69</sup> Human dignity can be understood as “the humanity of each person as a human being; it is the freedom of choice of human beings and the autonomy of their will. It is their human identify. It is the freedom of each individual to write the story of his or her life.”<sup>70</sup> One of the most important components to dignity is autonomy, the ability to live life as one chooses.<sup>71</sup>

Dignity rights and other rights, commonly known as human rights or natural rights are related yet separate.<sup>72</sup> Because these rights are so interrelated, many have questioned which came first?<sup>73</sup> Are the rights interdependent at all or have they and do they stand independent? One answer to that question looks to the origin of the rights. Dignity is inherent – something every human being possesses at birth and as such it is this inherent dignity that human rights as we know them today are advanced.<sup>74</sup>

Each and Every Human Being has inherent dignity; that it is this inherent dignity that grounds (or accounts for) the possession of human rights; that these are inalienable rights; and that, because all humans have dignity, they hold these rights equally. So understood, human dignity is the foundation on which the superstructure of human rights is built.<sup>75</sup>

Dignity is the foundation of human rights, “perhaps even as their exclusive normative basis.”<sup>76</sup>

Another question that comes from formulating an understanding the origin of human rights and dignity rights is whether dignity rights should it be viewed as a positive legal value – a theory on which a claim can rest; or, whether dignity rights should be understood as a supporting

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<sup>69</sup> *Id.*

<sup>70</sup> Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, pg. 363.

<sup>71</sup> *Id.*

<sup>72</sup> Roger Brownsword, *Human Dignity From a Legal Perspective*, pg. 3.

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

<sup>74</sup> *Id.*

<sup>75</sup> Roger Brownsword, *Human Dignity From a Legal Perspective*, pg. 3.

<sup>76</sup> John Tasioulas, *Human Dignity and the Foundations of Human Rights*, pg. 292, *Understanding Human Dignity 2013* Edited by Christopher McCrudden Published for The British Academy by Oxford University Press, Oxford.

member to an enumerated and express cognizable right?<sup>77</sup> The opposition to dignity being viewed as a positive legal value is that the concept is too vague.<sup>78</sup> How would one know the limits of dignity, where does it stop?<sup>79</sup> The fear of a slippery slope is unfounded. Liberty is alike in many ways to dignity and both are an amorphous concept with vague boundaries outlined by penumbras – expanding to protect the values that society values deeply.<sup>80</sup> Notwithstanding this inherent undefined nature, American Courts and courts around the world recognize an express and implied right to dignity along with other rights found necessary to fulfill the full promise of dignity.<sup>81</sup> Finding dignity as a positive legal value follows from the fact that it is inherent in every human being and incorporates other rights that we have come to understand as fundamental.

#### *International Sources of Support*

The Universal Declaration on Human Rights is an international compilation of human rights ideals and principles founded on the recognition of human dignity and the equal and inalienable rights of all human beings.<sup>82</sup> The Declaration on Human Rights is often cited in international law court opinions as it is a persuasive source in support of the right to dignity in its unequivocal express language in Articles 1 and 22 and the right to a healthy environment, which

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<sup>77</sup> Pauline C. Westerman, *Natural Rights Versus Human Dignity: Two Conflicting Traditions*, pg. 108.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

<sup>81</sup> See, e.g., *Walker v. State*, 68 P.3d 872, 883 (Mont. 2003); *Juan Antonio Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*, Makati, Branch 66, (G.R. No. 101083. July 30, 1993).

<sup>82</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Preamble (1948).



is implied in Article 25.<sup>83</sup> United Nations Declarations are not legally binding, yet they represent a robust advance of international legal norms and reflect the desire of states to move in progressive directions. “The Declaration [of Human Rights] is expected to have a major effect on the rights of indigenous peoples worldwide. If adopted, it will establish an important standard for the treatment of indigenous peoples and will undoubtedly be a significant tool towards eliminating human rights violations...”<sup>84</sup> When the Declaration of Human Rights was first promulgated, the United States was not among the initial group of countries to ratify it; however, they did a short time after. And although other nations are ahead of the United States regarding dignity jurisprudence, American citizens have brought successful claims asserting a violation to their dignity.

Even more specific to the focus of the Lenape, the United Nations released its Declaration on the Rights of Indigenous Peoples (the “Declaration”) in 2007, which the United States endorsed in 2010.<sup>85</sup> The Declaration starts by echoing and adopting the provisions of the

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<sup>83</sup> *Id.*: *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.* (article 1)

*Everyone, as a member of society, has the right to social security and is entitled to ... the economic, social and cultural rights indispensable for his dignity and the free development of his personality.* (article 22)

*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...* (article 25)

<sup>84</sup> Declaration On The Rights Of Indigenous Peoples, Frequently asked questions, [http://www.un.org/esa/socdev/unpfii/documents/dec\\_faq.pdf](http://www.un.org/esa/socdev/unpfii/documents/dec_faq.pdf).

<sup>85</sup> The United Nations General Assembly. 2007. *Declaration on the Rights of Indigenous People*.

Declaration of Human Rights,<sup>86</sup> but goes further and specifically addresses issues that predominately affect indigenous peoples.<sup>87</sup>

Article 29 addresses the environment, “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”<sup>88</sup> The Declaration goes even further preventing certain actions: “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.”<sup>89</sup> Care for the environment is a major concern of the Declaration.

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<sup>86</sup> “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” The United Nations General Assembly. 2007. *Declaration on the Rights of Indigenous People*.

<sup>87</sup> See *Id.* at art. 7, art. 15, art. 18 Article 26 (“1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”),

<sup>88</sup> The United Nations General Assembly. 2007. *Declaration on the Rights of Indigenous People* (Art. 29).

<sup>89</sup> The United Nations General Assembly. 2007. *Declaration on the Rights of Indigenous People* (“States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.”); see also *Id.* at art. 31 (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”); see also *Id.* at art. 43 (“The rights recognized

### *Dignity in Present Day American Jurisprudence*

While the right to dignity is a fairly new concept in America, some state constitutions identify a right to dignity, either express or implied.<sup>90</sup> For example, the Montana Constitution guarantees certain inalienable rights including “the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.”<sup>91</sup> Many of these rights include a dignity aspect; however, it goes further to expressly establish the right to dignity “[t]he dignity of the human being is inviolable.”<sup>92</sup> Rights are not without duties and all people must “recognize corresponding responsibilities” to ensure that the expression of one’s own rights do not impede onto the rights of others.<sup>93</sup> Realizing this helps illustrate how dignity rights function on an individual level as well as a societal level.

It is not surprising that given the Montana Constitution’s express fundamental right to dignity Montana Courts have entertained successful dignity claims. Montana Courts “have repeatedly recognized the rights found in Montana's Declaration of Rights as being ‘*fundamental*,’ meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.”<sup>94</sup> In *Walker v. State*, claimant brought a cruel and unusual punishment claim under the

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herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”)

<sup>90</sup> The Montana and Louisiana constitutions both contain an explicit reference to the right to dignity while others mention dignity.

<sup>91</sup> Mont. Const. art. II, § 3.

<sup>92</sup> Mont. Const. art. II, § 4; *see also* La. Const. Ann. art. I, § 3 (titled “Right to Individual Dignity”).

<sup>93</sup> Mont. Const. art. II, § 3.

<sup>94</sup> *Walker v. State*, 68 P.3d 872, 883 (Mont. 2003).

Montana Constitution.<sup>95</sup> The cruel and unusual punishment claim was bolstered by an assertion that the treatment complained of violated Montana’s fundamental constitutional right to dignity as well.<sup>96</sup> The court noted that when coupled with a dignity claim, a claim of cruel and unusual punishment may prevail where a claim brought under solely a cruel and unusual punishment theory might lose.<sup>97</sup> This is because dignity protects more than a prohibition against cruel and unusual punishment.<sup>98</sup> There, the Court held “reading Article II, Sections 4 [right to dignity] and 22 [prohibition against cruel and unusual punishment] together, [behavior modification programs] and the living conditions on A-block constitute an affront to the inviolable right of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate's mental health condition.”<sup>99</sup> The treatment exacerbated the inmate’s condition, resulting in a violation of his fundamental right to dignity.<sup>100</sup>

Recent constitutional amendments or complete overhauls in other countries are the main reasons that other nations have express claims to dignity, while dignity in American jurisprudence is generally invoked to bolster another express right.<sup>101</sup> “Indeed, appeals to dignity are widespread in American law, though not as a first-order enforceable principle. Human dignity is instead invoked rhetorically to bolster the normative force of other recognized juridical concepts – for example liberty, equality, and due process.”<sup>102</sup> *Walker v. State supra*, is a clear indication of the American approach to dignity. There is no express right to dignity in federal

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 885.

<sup>101</sup> Carter Snead, *Human Dignity in US Law*, pg. 386. CAM.

<sup>102</sup> Carter Snead, *Human Dignity in US Law*, pg. 388. CAM.

American legislation; however, the Bill of Rights to the United States Constitution has an implied concept of dignity,<sup>103</sup> as do many laws enacted to protect individual rights and values.<sup>104</sup>

### ***Dignity Claims in Delaware State or Federal Court***

The Constitution of Delaware and the Constitution of the United States do not declare an express right to dignity, nor an express right to a healthy environment. The Constitution of the Lenape Indian Tribe of Delaware states in its Preamble that a purpose of the Tribe is to, *inter alia*, promote the interests of its people, affirm its tribal identity, and to protect its environmental, cultural, and human resources. The Lenape and their Constitution were officially recognized by the Delaware Legislator on August 4, 2016, pursuant to an addition to the Delaware Code, § 106. titled Lenape Indian Tribe of Delaware; recognition.<sup>105</sup> One solution to Delaware’s lack of an express right to dignity or a healthy environment is to propose an amendment to the Delaware Constitution with a relaxed standing requirement.<sup>106</sup> That would be helpful; however, it is an unnecessary and arduous task because such rights can be implied in various other clauses of the Constitution.

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<sup>103</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Erin Daly, *Dignity Rights: Courts, Constitutions and the Worth of the Human Person* (Philadelphia, PA, University of Pennsylvania Press, 2013).

<sup>104</sup> See Carter Snead, *Human Dignity in US Law*, at 390 (“The primary purpose of [the Civil Rights Act] ... is to solve ... the deprivation of personal dignity that surely accompanies denial to equal access to public establishments.”) (quotations and citations omitted). CAM

<sup>105</sup> Del. Code Ann. tit. 29, § 106 (West).

<sup>106</sup> Anil S. Karia, *A Right to A Clean and Healthy Environment: A Proposed Amendment to Oregon's Constitution*, 14 U. Balt. J. Env'tl. L. 37, 67 (2006) (Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island all have an express constitutional right to a healthy environment. A Hawaiian plaintiff has standing to bring suit if there is a “need for justice” a lax and plaintiff friendly standard. Pursuant to the Constitution of Rhode Island, the state is “to adopt all means necessary and proper by law to protect the natural environment. ...”).

Although neither Constitution provides an express right to dignity, each guarantees a right to life and liberty.<sup>107</sup> Inherent in the right to life and liberty is the right to dignity.<sup>108</sup> The Supreme Court of the United States, in an opinion authored by Justice Kennedy in *Obergefell v. Hodges*, utilized the concept of dignity to find that differentiating between a heterosexual marriage and a homosexual marriage offended the basic notion of human dignity.<sup>109</sup> The opinion in *Obergefell* stands as a pillar for dignity in American jurisprudence and is not limited to the marriage. “The fundamental liberties protected by this [the Due Process Clause of the Fourteenth Amendment] include most of the rights enumerated in the Bill of Rights. In addition *these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.*”<sup>110</sup>

The Supreme Court of India has interpreted the right to life in such way a that it includes a dignified life in the case of *Olga Tellis v. Bombay Municipal Corporation*.<sup>111</sup> The scope of the right to life has been expanded so that the right to life includes anything which is essential to live life with dignity.<sup>112</sup> In the case of *Oposa v. Factoran*, Petitioners, members of the Indian community brought suit to halt the deforestation in Indian, claiming the deforestation violated their constitutional rights to a balanced and healthful ecology and to health.<sup>113</sup> The court found

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<sup>107</sup> See generally, U.S. Const.; Del. Const.

<sup>108</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *supra*; see also Dr. Giancarlo Panagia, *Tot Capita Tot Sententiae: An Extension (Fn2) or Misapplication of Rawlsian Justice*, 110 Penn St. L. Rev. 283, 309 (2005).

<sup>109</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also Carter Snead, *Human Dignity in US Law*, at 390 (“[T]he first order juridical principle affirmed by [*Obergefell*] was liberty or autonomy. But in advancing the case for liberty, the Court appeal to the equal dignity of all persons.”)

<sup>110</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

<sup>111</sup> AIR 1986 SC 180.

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

<sup>113</sup> *Juan Antonio Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*, Makati, Branch 66, (G.R. No. 101083. July 30, 1993).

for Petitioners finding that such a right is the right is interconnected to the constitutional right to health, because it is “fundamental”, “constitutionalized”, “self-executing” and “judicially enforceable”.<sup>114</sup> Such strong language advocates that the right to protect and enjoy a healthy environment is a fiercely protected right and its enforcement is of the utmost importance.

Members of the community have called on America to recognize that “environmental rights are essential to human dignity, either as an aspect of the right to life or as an independent, natural right”<sup>115</sup> or as a component to the right to liberty.<sup>116</sup> Many of the world’s nations have adopted some type of environmental aspect to their Constitutions.<sup>117</sup> Most of the constitutions that have a dignity component also have an environmental component because “[h]uman dignity is inextricably linked to a quality environment, and vice versa.”<sup>118</sup>

A poor environment can cause problems detrimental to the maintenance of a healthy life through ways such as: lead exposure in water leading to restricted intellectual growth, air pollution leading to respiratory disease which in turn reduces life expectancy,<sup>119</sup> and a poor diet leading to malnutrition that itself causes a range of problems. The Lahore High Court Green Bench of Pakistan recently held that the right to life “includes the right to a health and clean environment and right to human dignity.”<sup>120</sup>

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

<sup>115</sup> Inara K. Scott, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?* 19 Va. Env'tl. L.J. 197, 236 (2000).

<sup>116</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>117</sup> See, e.g., Argentina Constitution, Sec. 41; Viet Nam Constitution, Art. 63(2); Ecuador Constitution, Arts. 71-74.

<sup>118</sup> Erin Daly & James May, *Journal of Human Rights and the Environment: Bridging Constitutional Dignity and Environmental Rights Jurisprudence*. Vol. 7 No. 2 Sep. 2016, pp. 218-242.

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

<sup>120</sup> *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015) Lahore High Court Green Bench para 7); see also HCY 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* 60(3) PD 464 [2005] (Isr.), 2617 (finding that “[h]uman dignity is violated if a person

Analysis of a claim brought under a violation of a dignity right would mirror that of a substantive due process claim under the 14<sup>th</sup> amendment to the United States Constitution. As the Montana Courts have held and courts have held around the world, the right to dignity is a fundamental right.<sup>121</sup> When a fundamental right is alleged to be infringed under the 14<sup>th</sup> Amendment, strict scrutiny is triggered.<sup>122</sup> Pursuant to the strict scrutiny analysis, there must be a *compelling* government interest where the means to achieve that interest are *narrowly tailored* with the least restrictive means possible.<sup>123</sup>

Although all these concepts are true, courts may be reluctant, at least at this time, to award monetary damages to tribes because their right to dignity has been infringed. Injunctive relief is more widely accepted and provides a more likely avenue to relief than suing for monetary damages.<sup>124</sup> The Lenape's recent state recognition is important here. With the recognition comes an easy of access to information regarding projects that will affect the Lenape.<sup>125</sup> By receiving this information early, the Tribe can preemptively challenge actions that would negatively impact them, especially impacts on the environment. With these concepts in mind, the Lenape can use the right to life and liberty found in the Constitutions of the United States and Delaware, bolstered by the right to dignity to advance environmental claims to make the environment more amenable to maintaining a healthy and dignified life. "Water is life."<sup>126</sup>

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wishes to maintain his life as a human being within the society to which he belongs, but finds that his means are poor and his strength is too weak to do so").

<sup>121</sup> *Walker v. State, supra.*

<sup>122</sup> *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997).

<sup>123</sup> *Id.*

<sup>124</sup> *See, e.g., Oposa v. Factoran, supra; Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir. 2006) (NEPA claim granting an injunction).

<sup>125</sup> *See Oregon Executive Order No. EO - 96 - 30; Arizona Department of Economic Security, Policy No. DES 1-92-03, Effective date 10/6/2014.*

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