# HERE, THERE, AND EVERYWHERE: HUMAN DIGNITY IN CONTEMPORARY LAW AND IN THE TRANSNATIONAL DISCOURSE

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**Abstract:** Over the past several decades, human dignity has become an omnipresent idea in contemporary law. This Article surveys the use of human dignity by domestic and international courts and describes the concept's growing role in the transnational discourse, with special attention paid to the case law of the U.S. Supreme Court. The Article examines the legal nature of human dignity, finding it to be a constitutional principle rather than a freestanding fundamental right, and develops a unifying and universal identity for the concept. At its core, human dignity contains three elements—intrinsic value, autonomy, and community value—and each element has unique legal implications. The Article considers how this elemental approach to the analysis of human dignity can assist in structuring legal reasoning and justifying judicial choices in hard cases, such as abortion, same-sex marriage, and assisted suicide.

## Introduction

In France, Mr. Wackeneim wanted to participate in a show known as "dwarf tossing," in which nightclub patrons would try to heave a dwarf the furthest distance possible. In the United Kingdom, Mrs. Evans, after losing her ovaries, wanted to insert into her uterus embryos fertilized with her eggs and semen from her ex-husband. In Italy, the family of Mrs. Englaro wanted to suspend medical treatment and let her die peacefully after seventeen years in a vegetative coma. In Brazil, Mr. Ellwanger wanted to publish books denying the existence of the Holocaust. In the United States, Mr. Lawrence wanted to have intimate relations with a same-sex partner without being considered a criminal.



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In Colombia, Mrs. Lais wanted official recognition of her right to work as a sex professional. In Germany, Mr. Gründgens wanted to prevent the republication of a book based on the life of his father because he considered it offensive to his father's honor. In South Africa, Mrs. Grootboom, living in extremely miserable conditions, wanted the state to provide shelter for her and her family. In France, the young Mr. Perruche wanted compensation for being born, or rather, for not being aborted, because a prenatal diagnostic error left unforeseen the severe risk of physical and mental lesions with which he was born.[1]

Each of these scenarios represents real cases decided by high courts throughout the world and share one common trait: the meaning and scope of the idea of human dignity. In recent decades, human dignity has become one of the Western world's greatest examples of ethical consensus, mentioned in countless international documents, national constitutions, legal statutes, and judicial decisions.[2] In theory at least, few ideas garner such spirited and unanimous concurrence. In practice, however, dignity as a legal concept frequently functions merely as a mirror onto which each person projects his or her own values. It is not by chance that human dignity is invoked throughout the world by opposing sides in such matters as abortion, euthanasia, assisted suicide, same-sex marriage, hate speech, cloning, genetic engineering, sex-change operations, prostitution, the decriminalization of drugs, the shooting down of hijacked aircrafts, protection against self-incrimin-ation, the death penalty, life imprisonment, the use of lie detectors, hunger strikes, and the enforcement of social rights. The list is endless.

In the United States, references to human dignity by the Supreme Court trace back to the 1940s.[3] The use of the concept in American law, however, is episodic and underdeveloped,[4] relatively incoherent and inconsistent,[5] and lacking in sufficient specificity and clarity.[6] De-

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[1] Each of these cases is discussed in turn below. *See infra* text accompanying notes 44, 58–59, 323, 356–357, 368, 422–429.

[2] *See* sources cited *infra* note 74.

[3] Vickie C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 16–17 (2004) (articulating the Supreme Court's early case law development concerning human dignity).

[4] *Id.* at 17.

[5] *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law,* 14 Colum. J. Eur. L. 201, 239 (2008).

[6] *See* Gerald L. Neuman, *Human Dignity in United States Constitutional Law, in* Zur Autonomie des Individuums [On the Autonomy of the Individual] 249, 249–50 (Dieter Simon & Manfred Weiss eds., 2000).

spite this history, in recent years a clear and noticeable trend emerged in which courts employ human dignity in cases involving fundamental rights, such as the rights to privacy and equal protection, the prevention of unconstitutional searches and seizures, the prevention of cruel and unusual punishment, and the "right to die."[7] Although an array of distinguished authors embrace as a qualitative leap the expanded idea of human dignity as the foundation for the U.S. Bill of Rights,[8] this view is not unanimous. In the courts and the Academy, voices such as those of Justice Antonin Scalia and Professor James Whitman fiercely dispute the role of human dignity in constitutional interpretation and in legal reasoning generally, challenging its necessity, convenience, and constitutionality.[9] Moreover, some look with distaste, and even horror, at the mere possibility of resorting to foreign materials on human dignity to establish a shared view of its meaning.[10]

The ideas that follow are based on the assumption that human dignity is a valuable concept with growing importance in constitutional interpretation, and that it can play a central role in the justification of decisions involving morally complex issues. It is past time to consider dignity to be a more substantive concept in legal discourse; too often, it serves merely as a rhetorical ornament, a vessel of convenience for unrelated cargo. With that in mind, this Article sets out to accomplish three main objectives. Part I discusses the importance of the notion of human dignity in domestic and international case law, and in the transnational discourse.[11] I argue that the United States has joined this trend, albeit timidly, and that there is no reason why it should not. Part

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[7] *See, e.g.*, Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740, 751, 753, 777, 784 (2006) (surveying the U.S. Supreme Court's application of human dignity in the context of fundamental rights).

[8] *See, e.g.*, Larry Tribe, *Larry Tribe on Liberty and Equality*, Balkinization (May 28, 2008), http://balkin.blogspot.com/2008/05/larry-tribe-on-liberty-and-equality.html ("The strategy that for me promises the greatest glimpse of the infinite is a strategy that resists rigid compartmentalization and that reaches across the liberty/equality boundary to recognize the ultimate grounding of both in an expanding idea of human dignity."); *see also* Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 Cardozo L. Rev. 1903, 1917–18 n.74 (2000); Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. Jefferson L. Rev. 1, 3 (2007).

[9] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 983 (1992); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty,* 113 Yale L.J. 1151, 1160, 1221 (2004).

[10] *See, e.g.*, Richard Posner, *No Thanks, We Already Have Our Own Laws,* Legal Aff., July/Aug. 2004, at 38, 40–42 (claiming that using foreign decisions even in a limited way undermines the court system and reduces judicial influence).

[11] By transnational discourse, I mean courts from one country making reference to decisions of courts of a different country.

II identifies the legal nature of human dignity— as a fundamental right, absolute value, or legal principle—and establishes its minimum content. This, I argue, is comprised of three elements: the intrinsic value of every human being, individual autonomy, and community value. My purpose is to determine the legal implications associated with each element; for example, the fundamental rights, responsibilities, and duties that they entail. Part III shows how establishing human dignity's legal nature and minimum content can be useful in structuring legal reasoning in difficult cases. To confirm my central argument, I use as examples the issues of abortion, same-sex marriage, and assisted suicide.

## I. Human Dignity in Contemporary Law

### A. *Origin and Evolution*

In one line of development stretching from classical Rome through the Middle Ages and into the advent of the liberal state, dignity— *dignitas*—was a concept associated with either the personal status of some individuals or the prominence of certain institutions.[12] As for personal status, dignity represented the political or social rank derived primarily from holding certain public offices, as well as from general recognition of personal achievements or moral integrity.[13] The term was also used to qualify prominent institutions, such as the sovereign, the crown, or the state, in reference to the supremacy of their powers.[14] In either case, dignity entailed a general duty of honor, respect, and deference owed to those individuals and institutions worthy of it; it was an obligation whose infringement could be sanctioned with criminal and civil remedies.[15] Thus, in Western culture, the first meaning attributed to dignity, as used to categorize individuals, presupposed a hierarchical society and was linked to a superior status, a higher rank, or position.[16] In many ways,

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[12] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int'l L. 655, 657 (2008).

[13] Englard, *supra* note 8, at 1904.

[14] *See generally* 4 Jean Bodin, Les Six Livres de la République (Christiane Frémont et al. eds., Librairie Arthème Fayard 1986) (1593) (describing the elements of a well-ordered commonwealth), *translated in Book IV: The Rise and Fall of Commonwealths*, Constitution.org, http://www.constitution.org/bodin/bodin_4.txt (last visited May 15, 2012).

[15] Charlotte Girard & Stéphanie Hennette-Vauchez, *Introduction* to La Dignité de la Personne Humaine: Recherche sur un Processus de Juridicisation [Human Dignity: Survey on a Judicialization Process] 17, 24 (Charlotte Girard & Stéphanie Hennette-Vauchez eds., 2005).

[16] Englard, *supra* note 8, at 1904; McCrudden, *supra* note 12, at 657.

dignity equaled nobility, implying special treatment and distinct rights and privileges.[17] Based on these premises, it is erroneous to understand the contemporary idea of human dignity as a historical development of the Roman concept of *dignitas hominis*. The current notion of human dignity did not supersede the old one; rather, it is the product of a different history that ran parallel to the origins discussed above.

As currently understood, human dignity relies on the assumption that every human being has intrinsic worth.[18] Multiple religious and philosophical theories and conceptions seek to justify this metaphysical view. Beginning with classical thought,[19] the long development of the contemporary view of human dignity is anchored in the Judeo-Christian tradition, the Age of Enlightenment, and the aftermath of World War II.[20] From a *religious* perspective, the core ideas of human dignity are found in the Hebrew Bible: God created mankind in his own image and likeness[21] and imposed on each person the duty to love his neighbor as himself.[22] Such concepts are repeated in the Christian New Testament.[23] As for the *philosophical* origins of human dignity, Roman statesman Marcus Tullius Cicero was the first author to associate the expression "dignity of man" with reason and the capacity for free moral decision.[24] By 1486, led in part by Pico della Mirandola, the *ratio philosophica* started to depart from its subordination to the *ratio theological*.[25] Spanish theologian Francisco de Vitoria[26] and German philoso-

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[17] *See* Michael J. Meyer, *Dignity as a (Modern) Virtue*, *in* The Concept of Human Dignity in Human Rights Discourse 195, 196 (David Kretzmer & Eckart Klein eds., 2002) (describing "social dignity" as a function of status or rank).

[18] *See id.*

[19] *See* Cicero, On Duties 41–42 (M.T. Griffin & E.M. Atkins eds., Margaret Atkins trans., Cambridge Univ. Press 1991) (ca. 44 BCE).

[20] *See* McCrudden, *supra* note 12, at 658–63.

[21] *See Genesis* 1:26–:27.

[22] *See Leviticus* 19:18.

[23] *See, e.g.*, *Matthew* 22:39; *Ephesians* 4:24. Due to its major influence in Western Civilization, many authors emphasize the role of Christianity in shaping what came to be identified as human dignity. *See, e.g.*, Christian Starck, *The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions*, *in* The Concept of Human Dignity in Human Rights Discourse, *supra* note 17, at 179, 180–81.

[24] *See* Cicero, *supra* note 19, at 41–42; Hubert Cancik, *"Dignity of Man" and "*Persona*" in Stoic Anthropology: Some Remarks on Cicero,* De Officis I *105–107*, *in* The Concept of Human Dignity in Human Rights Discourse, *supra* note 17, at 19, 20–21, 27.

[25] Mirandola's famous speech *Oratio de Hominis Dignity* (*Oration on the Dignity of Man*) is considered to be the founding manifesto of the humanist Renaissance. *See generally* Giovanni Pico della Mirandola, Oratio de Homnis Digantate (Eugenio Garin ed., Edizioni Studio Tesi 1994) (1486).

pher Samuel Pufendorf[27] made further significant contributions to the subject. It was the Enlightenment, however, that brought about the centrality of man, along with individualism, liberalism, the development of science, religious tolerance, and the advent of a culture of individual rights.[28] Only then was the quest for reason, knowledge, and freedom able to break through the thick wall of authoritarianism, superstition, and ignorance that the manipulation of faith and religion had built around medieval societies.[29] Immanuel Kant, one of the Enlightenment's foremost representatives, defined this as "mankind's exit from its self-imposed immaturity."[30]

In addition to these religious and philosophical landmarks, a striking *historical* landmark contributed to the current notion of human dignity: the reaction to the horrors of National Socialism and fascism in the aftermath of World War II. In the reconstruction of a world morally devastated by totalitarianism and genocide, human dignity was incorporated into the *political* discourse of the winners as the grounds for a long-awaited era of peace, democracy, and the protection of human rights.[31] Two main factors imported human dignity into the *legal* discourse. First, express language referring to human dignity was included in several international treaties and documents, as well as several national constitutions.[32] Second, a more subtle phenomenon became increasingly visible over time: the rise of a post-positivist legal culture that re-approximated law with moral and political philosophy, attenuating

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[26] Francisco de Vitoria (1492–1546) was known for his fierce defense of the rights of Indians against the colonists in the New World. *See* Edwin Williamson, The Penguin History of Latin America 64–65 (rev. ed. 2009).

[27] Samuel von Pufendorf (1632–1694) was a precursor to the Enlightenment and a pioneer in the secular conception of human dignity, which he founded on moral freedom. *See generally* Samuel Pufendorf, On the Duty of Man and Citizen According to Natural Law (James Tully ed., Michael Silverhorne trans., Cambridge Univ. Press 1991) (1673).

[28] *See* McCrudden, *supra* note 12, at 659–60.

[29] *See* Ernst Cassirer, The Philosophy of the Enlightenment 234 (Fritz C.A. Koelln & James P. Pettegrove trans., 1951) (stating that the Enlightenment "oppose[d] the power of convention, tradition, and authority" as a means of "removing the rubble of the ages in order to make visible the solid foundations of the structure of knowledge"). On the Enlightenment generally, see 2 Peter Gay, The Enlightenment: An Interpretation (1969); Paul Hazard, European Thought in the Eighteenth Century (J. Lewis May trans., 1954).

[30] Immanuel Kant, *An Answer to the Question: What Is Enlightenment?*, *in* What Is Enlightenment?: Eighteenth-Century Answers and Twentieth-Century Questions 58, 62–63 (James Schmidt ed. & trans., Univ. of Cal. Press 1996) (1784).

[31] *See, e.g.*, U.N. Charter pmbl.

[32] *See, e.g.*, Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG][Basic Law], May 23, 1949, BGBl. I art. 1(1) (Ger.); sources cited *infra* note 74.

the radical separation imposed by pre-World War II legal positivism.[33] Human dignity plays a prominent role in this renovated jurisprudence, where social facts and ethical values strongly influence the interpretation of legal norms. The following is a brief sketch of the religious, philosophical, political, and legal trajectory of human dignity toward its contemporary meaning.

### B. *Comparative Law, International Law, and the Transnational Discourse*

#### 1. Human Dignity in the Constitutions and Judicial Decisions of Different Countries

The concept of human dignity is found in most constitutions written after World War II.[34] It is generally recognized that the rise of human dignity as a legal concept owes its origins most directly to German constitutional law.[35] In fact, based on provisions of the German Basic Law of 1949, which declare that human dignity shall be "inviolable"[36] and establish a right to the "free development of one's personality,"[37] the German Constitutional Court (German Court) developed a body of law and doctrine that has influenced case law and scholarship through-

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[33] In Europe, and particularly in Germany, the reaction against positivism started with Gustav Radbruch's article *Fünf Minuten Rechtsphilosophie* [*Five Minutes of Legal Philosophy*], Rhein-Neckar-Zeitung (Heidelberg, Ger.), Sept. 12, 1945, *available at* http://www.humanistische-union.de/wir_ueber_uns/geschichte/geschichtedetail/back/geschichte/article/gustav-radbruch-fuenf-minuten-rechtsphilosophie/. The article was very influential in shaping the *jurisprudence of values* that enjoyed prestige in the aftermath of the War. In the Anglo-Saxon tradition, John Rawls's *A Theory of Justice* (1971) has been regarded as a milestone in bringing elements of ethics and political philosophy into jurisprudence. Ronald Dworkin's "general attack on positivism" in his article *The Model of Rules,* 35 U. Chicago L. Rev. 14 (1967), is another powerful example of this trend. In Latin America, Carlos Santiago Nino's book *The Ethics and Human Rights* (1991) is also very representative of the post-positivist culture.

[34] This includes, among others, the constitutions of Germany, Italy, Japan, Portugal, Spain, South Africa, Brazil, Israel, Hungary and Sweden. Some countries, such as Ireland, India, and Canada, reference human dignity in the preambles of their constitutions. *See, e.g.*, Neomi Rao, *American Dignity and Healthcare Reform*, 35 Harv. J.L. & Pub. Pol'y 171, 171 n.1 (2012).

[35] Dieter Grimm, Die Würde des Menschen ist unantastbar [Human Dignity Is Inviolable] 7 (2010). Dieter Grimm, former justice on the German Constitutional Court, delievered this speech at a ceremony celebrating the sixtieth anniversary of the Grundgesetz (Basic Law), on May 8, 2009, at the Stiftung Bundespräsident-Theodor-Heuss-Haus.

[36] Grundgesetz, BGBl. I art. 1(1) ("Die Würde des Menschen ist unantastbar.").

[37] *Id.* art. 2(1) ("Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit . . . .").

out the world.[38] According to the German Court, human dignity is at the very top of the constitutional system, representing a supreme value, an absolute good in light of which every provision must be interpreted.[39] Regarded as the foundation for all basic rights,[40] the dignity clause has both subjective and objective dimensions, empowering individuals with certain rights and imposing affirmative obligations on the state.[41] On various occasions, the German Court emphasizes that the image of man in the Basic Law involves a balance between the individual and the community.[42] Based on this understanding of human dignity, the German Court developed a broad and varied case law on many difficult subjects, such as: defining the scope of the right of privacy to include protection from both state[43] and private[44] interference; prohibiting Holocaust denial;[45] prohibiting shooting down aircrafts seized by terrorists;[46] and declaring it unconstitutional for the state to decriminalize abortion,[47] a decision that was subsequently revised to allow for more flexibility in the regulation of abortion.[48]

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[38] *See* GRIMM, *supra* note 35, Part II (discussing the German Constitutional Court's role in shaping the concept of human dignity.).

[39] *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] July 16, 1969, 27 BVERFGE 1 (6) (Ger.) [hereinafter Micro-Census Case]; *see also* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Feb. 24, 1971, 30 BVERFGE 173 (195–200) (Ger.) [hereinafter *Mephisto* Case] (holding that the human dignity clause in Article 1 of the Basic Law trumps Article 5, clause 3, which establishes the freedom of art). This "absolute" character of human dignity has been object of growing dispute, but is still the dominant view in the Court. *See* GRIMM, *supra* note 35, at 12.

[40] *See Mephisto* Case, 30 BVERFGE 173 (197).

[41] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 312 (1997).

[42] *See, e.g.*, Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] July 20, 1954, 4 BVERFGE 7 (15–16) (Ger.); *see also* KOMMERS, *supra* note 41, at 304–05 (providing an English translation of the Court's statements regarding the interaction between the individual and the community).

[43] Micro-Census Case, 27 BVERFGE 1 (4).

[44] *Mephisto* Case, 30 BVERFGE 173 (195–96).

[45] *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Apr. 13, 1994, 90 BVERFGE 241 (246) (Ger.); *see also* Winfried Brugger, *Ban on or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 5–7 (2002).

[46] Bundesverfassungsgeright [BVerfG][Federal Constitutional Court] Feb. 15, 2006, 15 BVERFGE 118 (Ger.).

[47] *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Feb. 25, 1975, 39 BVERFGE 1 (2) (Ger.). In this decision, the Court ruled that the right to life and the duty of the state to protect that right require the criminalization of abortion. Consequently, the Court declared unconstitutional a law decriminalizing first-trimester abortion. For an abridged English translation of this case, see KOMMERS, *supra* note 41, at 336–46.

[48] *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] May 28, 1993, 88 BVERFGE 203 (208–13) (Ger.). In this decision, the Court reiterated the state's duty to protect the unborn, but admitted that some restrictions on abortion could violate a

In France, it was not until 1994 that the Constitutional Council, combining different passages of the Preamble to the 1946 Constitution, proclaimed that dignity was a principle of constitutional status.[49] French commentators, more or less enthusiastically, refer to human dignity as a necessary underlying element to all of French positive law,[50] as both a founding and normative concept,[51] and as the philosopher's stone of fundamental rights.[52] The principle of human dignity has been invoked in a variety of contexts, from the declaration that decent housing for everyone is a constitutional value,[53] to the validation of statutes permitting abortion until the twelfth week of pregnancy.[54] More recently, the Constitutional Council upheld two controversial laws enacted by the Parliament: one making it illegal to wear full face veils in public, including the Islamic burqa,[55] and the other banning same-sex marriage.[56] Although human dignity is not explicitly referenced in either of these decisions, it is clearly implicated to the extent that both matters concern religious freedom, equality, and personal existential choices. The State Council, in turn, ruled that the bar spectacle known as "dwarf tossing" should be prohibited, a decision discussed in Part II of this Article.[57] In 2000, the Court of Appeals issued an extremely controversial decision in the *Perruche Case*, recognizing a "right not to be

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woman's dignity. After the decision, the government enacted a new law, which stated that abortion in the first trimester of pregnancy would not be punishable, provided the woman had undergone compulsory pro-life counseling. For an abridged English translation of this case, see KOMMERS, *supra* note 41, at 349–55.

[49] Conseil constitutionnel [CC][Constitutional Court] decision No. 94–343/344DC, July 27, 1994, J.O. 11024 (Fr.).

[50] *See* Jacques Robert, *The Principle of Human Dignity*, *in* THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY 43, 43 (1999).

[51] Girard & Hennette-Vauchez, *supra* note 15, at 17.

[52] DOMINIQUE ROUSSEAU, LES LIBERTÉS INDIVIDUELLES ET LA DIGNITÉ DE LA PERSONNE HUMAINE [INDIVIDUAL FREEDOM AND HUMAN DIGNITY] 69 (1998).

[53] Conseil constitutionnel [CC][Constitutional Court] decision No. 94–359DC, Jan. 19, 1995, J.O. 1166 (Fr.).

[54] Conseil constitutionnel [CC][Constitutional Court] decision No. 2001–446DC, June 27, 2001, J.O. 10828 (Fr.); Conseil constitutionnel [CC][Constitutional Court] decision No. 74–54DC, Jan. 15, 1975, J.O. 671 (Fr.) (affirming the constitutionality of the Voluntary Interruption of Pregnancy Act).

[55] Conseil constitutionnel [CC][Constitutional Court] decision No. 2010–613DC, Oct. 7, 2010, J.O. 18345 (Fr.).

[56] *See Le Conseil constitutionnel dit non au marriage homosexual*, LE SOIR (Fr.) (Jan. 28, 2011), http://www.lesoir.be/actualite/france/2011–01–28/le-conseil-constitutionnel-dit-non-au-mariage-homosexuel-818228.php.

[57] Conseil d'État Assemblee [CE Ass.][Administrative Court Assembly] decision No. 136727, Oct. 27, 1995, Rec. Lebon (Fr.), *available at* http:/www.juricaf.org/arret/FRANCE-CONSEILDETAT-19951027-136727; *see infra* text accompanying notes 356–3357.

born," and granting a child, represented by his parents, compensation for the fact that he was born deaf, dumb, partially blind, and with severe mental deficiencies.[58] In another case that gained notoriety, the Court of Grand Instance of Créteil recognized Corinne Parpalaix's right to undergo artificial insemination using the sperm of her late husband, who had deposited the sperm at a sperm bank prior to undergoing a high-risk surgical procedure.[59]

The Supreme Court of Canada has recognized human dignity as a fundamental value underlying both the common law and the 1982 Charter of Rights and Freedoms,[60] a value that has a communitarian dimension and is accompanied by a number of responsibilities.[61] For example, the meaning and scope of human dignity was directly or indirectly involved in the opinions that struck down legislation against abortion,[62] the denial of a right to assisted suicide,[63] the validity of same-sex marriage,[64] and the decriminalization of the use of marijuana.[65] In Israel, human dignity became an express constitutional concept in 1992.[66] Respect for human dignity is at the center of several morally charged cases decided by the Israeli Supreme Court, including one decision in which the court ruled that it was unacceptable to use the prolonged detention of Lebanese prisoners as a bargaining chip to obtain the return of Israeli soldiers,[67] and another decision that reinstated Israel's absolute prohibition of torture, with no exceptions and no room for balancing, even for interrogations of suspected terrorists.[68] In South Africa, the Constitutional Court utilized human dignity

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[58] Cour de cassation [Cass.][Supreme Court for Judicial Matters] ass. plén., Nov. 17, 2000, Bull. civ., No. 526 (Fr.) (finding against defendant laboratory, which failed to detect that the mother had contracted rubella).

[59] T.G.I. Créteil, Aug. 1, 1984, Gaz. du Pal. 1984, 2, pan. jurisp., 560. *See generally* Gail A. Katz, Note, Parpalaix c. CECOS*: Protecting Intent in Reproductive Technology*, 11 HARV. J.L. & TECH. 683 (1998).

[60] *See* R. v. S. (R.J.), [1995] 1 S.C.R. 451, 605 (Can.).

[61] *See* R. v. Salituro, [1991] 3 S.C.R. 654, 676 (Can.).

[62] *See* R. v. Morgentaler, [1988] 1 S.C.R. 30, 164–66, 173–74 (Can.).

[63] *See* Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519, 521–22 (Can.).

[64] *See* Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paras. 53–54 (Can.).

[65] *See* R. v. Malmo-Levine, [2003] 3 S.C.R. 571, paras. 85–87 (Can.).

[66] In 1992, the Basic Law: Human Dignity and Liberty was enacted. *See* Basic Law: Human Dignity and Liberty, 2754-1994, SH No. 1454 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

[67] CrimA 7048/97 *Plonim v. Minister of Defense* 54(1) PD 721 [2000] (Irs.), *available at* http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf.

[68] HJC 5100/94 Pub. Comm. Against Torture v. Israel 53(4) PD 817 [1999] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf.

to hold the death penalty unconstitutional,[69] to permit abortion during the first trimester of a pregnancy,[70] and to protect homosexual relations.[71] The Constitutional Court of Colombia, diverging from its counterparts in other countries, held that voluntary prostitution is legitimate work.[72] There is no need to go on reciting examples, for the point is clear: Human dignity has become a central and recurrent concept in the reasoning of supreme courts and constitutional courts throughout the world.[73]

### 2. Human Dignity in International Documents and Case Law

Human dignity has also become an ubiquitous idea in international law. Indeed, the term is featured prominently in a wide range of declarations and treaties, several of which are enforced by international courts.[74] In fact, the European Court of Justice (ECJ) used the concept of human dignity to support its decisions in a variety of cases, holding, for example, that neither the human body nor any of its elements constitute patentable inventions,[75] and that an employer fails to respect human dignity by terminating an employee because of gender reassignment surgery.[76] A complex discussion of human dignity occurred in the *Omega Spielhallen* case, in which the ECJ decided that human

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[69] *See S. v. Makwanyane* 1995 (3) SA 391 (CC) at 451 para. 145 (S. Afr.).

[70] *See Christian Lawyers Ass'n v. Minister of Health* 1998 (4) SA 1113 (CC) at 1123 (S. Afr.).

[71] *See Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at 64 paras. 124–26, 69 para. 135 (S. Afr.).

[72] Corte Constitucional [C.C.][Constitutional Court], agosto 13, 2010, Sentencia T-629/10 (pp. 42, 81–88) (Colom.), *available at* http://www.corteconstitucional.gov.co/RELATORIA/2010/T-629–10.htm.

[73] The United States is discussed separately *infra* Part I.C.

[74] *See, e.g.*, U.N. Charter pmbl.; Charter of Fundamental Rights of the European Union art. 1, Dec. 18, 2000, 2000 O.J. (C 364); Convention on the Rights of the Child pmbl., Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl., Dec. 10, 1984, 1426 U.N.T.S. 85; African Charter on Human and Peoples' Rights pmbl., June 27, 1981, 1520 U.N.T.S. 217; International Convention on the Elimination of All Forms of Discrimination Against Women pmbl., Dec. 18, 1979, 1249 U.N.T.S 13; American Convention on Human Rights art. 5, July 18, 1978, 1144 U.N.T.S. 143; International Covenant on Civil and Political Rights pmbl., Dec. 16, 1966, 999 U.N.T.S. 1971; International Covenant on Economic, Social and Cultural Rights pmbl., Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination annex, Dec. 21, 1965, 660 U.N.T.S. 195; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *Arab Charter on Human Rights 2004*, 24 B.U. Int'l L.J. 147, 149–50 (2006) (translated by Mohammed Amin Al-Midani & Mathilde Cabanettes).

[75] Case C-377/98, Netherlands v. European Parliament, 2001 E.C.R. I-7149.

[76] Case 13/94, P. v. Cornwall Cnty. Council, 1996 E.C.R. I-2159.

dignity may have different meanings and scopes within the domestic jurisdictions of the European Union.[77] Likewise, the European Court of Human Rights (ECtHR) often employs human dignity as an important element in its interpretation of the 1950 European Convention on Human Rights.[78] In *Tyrer v. United Kingdom*, the ECtHR held that subjecting a fifteen-year-old to corporal punishment ("three strokes of the birch") was an assault on his dignity and constituted impermissible treatment of the boy as an object in the power of authorities.[79] The ECtHR also found dignity to be implicated in cases involving the abandonment of spousal immunity to the charge of rape,[80] the criminal prosecution of private homosexual behavior among consenting adults,[81] and the refusal to allow legal gender reassignment.[82] The Inter-American Court on Human Rights (IACHR) also cites human dignity in cases involving physical, sexual, and psychological violence against inmates in a prison,[83] solitary confinement or otherwise inhumane incarceration conditions,[84] forced disappearances,[85] and extra-

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[77] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9641. The dispute involved the prohibition of a game supplied by a British company, a "laserdrome" used for simulating acts of homicide. *Id.* at I-9644. A German Court had upheld the decision on grounds that the "killing game" was an affront to human dignity. *Id.* at I-9646.

[78] *See, e.g.*, S.W. v. United Kingdom, App. No. 21066/92, 21 Eur. H.R. Rep. 363, 402 (1995); Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, 11 (1978). The Convention, however, does not expressly incorporate the concept of human dignity in its text. *Cf.* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[79] *See Tyrer*, 2 Eur. H.R. Rep. at 11–12.

[80] *See S.W.*, 21 Eur. H.R. Rep. at 402.

[81] *See* Dudgeon v. United Kingdom, App. No. 7525/76, 3 Eur. H.R. Rep. 40, 60–61 (1981).

[82] *See* Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 447, 476–77 (2002).

[83] Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment, ¶¶ 203, 206, 259 (Inter-Am. Ct. H.R. Nov. 25, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf.

[84] *See, e.g.*, Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Judgment (Inter-Am. Ct. H.R. Nov. 20, 2007), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_169_ing.pdf; Caesar v. Trinidad & Tobago, Merits, Reparations and Costs, Judgment, ¶ 50 (Inter-Am. Ct. H.R. Mar. 11, 2005), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_123_ing.pdf; Juvenile Reeduc. Inst. v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, ¶ 167 (Inter-Am. Ct. H.R. Sept. 2, 2004), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_112_ing.pdf; Bámaca-Velásquez v. Guatamela, Merits, Judgment, ¶ 150 (Inter-Am. Ct. H.R. Nov. 25, 2000), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf.

[85] *See, e.g.*, Velásquez-Rodriguez v. Honduras, Merits, Judgment, ¶ 155 (Inter-Am. Ct. H.R. July 29, 1988), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_01_ing.pdf.

judicial executions.[86] At the end of 2010, the IACHR decided against granting amnesty for crimes perpetrated by state agents (murder, torture, and forced disappearances of persons) during the military dictatorship in Brazil.[87]

### 3. Human Dignity in the Transnational Discourse

In recent years, constitutional and supreme courts all over the world have begun engaging in a growing constitutional dialogue[88] involving mutual citation and academic interchange[89] in public forums like the Venice Commission.[90] Two factors contribute to the deepening of this dialogue. First, countries that are newcomers to the rule of law often draw upon the experience of more seasoned democracies. In the past several decades, waves of democratization have spread across the world, including Europe in the 1970s (Greece, Portugal, and Spain), Latin America in the 1980s (Brazil, Chile, and Argentina), and Eastern and Central Europe in the 1990s.[91] The U.S. Supreme Court, the German Constitutional Court, and other similar national courts serve as significant role models for these new democracies.[92] Even though the flow of ideas is primarily one directional, it is, as with any other exchange, a two-way street.

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[86] *See, e.g.*, Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, ¶ 216 (Inter-Am. Ct. H.R. May 26, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_213_ing.pdf.

[87] Lund v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, ¶ 325 (Inter-Am. Ct. H.R. Nov. 24, 2010), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf.

[88] Anne-Marie Slaughter, A New World Order 70 (2004).

[89] Former foreign court justices, such as Aaron Barak from the Supreme Court of Israel and Dieter Grimm from the Constitutional Court of Germany, are frequent visitors at American law schools, including Yale and Harvard. *See* Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 176 (2005). At Yale Law School, the *Global Constitutionalism Seminar,* directed by Robert Post, brings together a group of about fifteen Supreme Court and Constitutional Court judges from around the world. *See Global Constitutionalism Seminar*, Yale L. Sch., http://www.law.yale.edu/intellectuallife/globalconstitutionalismseminar.htm (last visited May 15, 2012).

[90] According to its website, the European Commission for Democracy Through Law, known as the Venice Commission, is an advisory body to the Council of Europe and a think-tank on constitutional law. *See Venice Commission*, Council of Eur., http://www.venice.coe.int/site/main/Presentation_E.asp (last visited May. 15, 2012).

[91] *See* Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 21–24 (1991).

[92] *See, e.g.*, Slaughter, *supra* note 88, at 70–71; Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 Law & Soc. Inquiry 763, 777 (2002).

The second factor involves the sharing of experiences among more mature and traditional democracies. Highly complex and plural societies face common challenges in areas ranging from national security to racial, religious, and sexual matters.[93] Foreign decisions may offer new information and perspectives, and can help build consensus.[94] This appears to be the case with the death penalty—with the exception of the United States[95]—and, to some extent, abortion—similar laws exist in the United States, Germany, France, and Canada, among others.[96] It goes without saying that foreign and international decisions are persuasive, but not binding, authorities. This fact alone should be sufficient to set aside any parochial fears.

It is not difficult to find examples of this dialogue between the courts of different countries. The Supreme Court of Canada, for example, frequently cites foreign and international courts' conceptions of dignity. In *Kindler v. Canada*, the dissenting justices cited abolition of the death penalty in the United Kingdom, France, Australia, New Zealand, Czechoslovakia, Hungary, and Romania.[97] In *R. v. Morgentaler*, the court referenced decisions of the German Constitutional Court and the U.S. Supreme Court on abortion.[98] In *R. v. Smith*, the dissent cited a number of U.S. Supreme Court cases on cruel and unusual punishment.[99] In *R. v. Keegstra*, a case upholding the prohibition of hate speech, the Supreme Court of Canada cited several related pronouncements by the European Commission of Human Rights.[100] The Canadian Supreme Court's decision in *Rodriguez v. British Columbia*, in which it failed to recognize a right to assisted suicide,[101] was cited by the ECtHR in *Pretty v. United Kingdom*, which addressed the same issue.[102] The Supreme Court of India often cites U.S. Supreme Court decisions in a variety of contexts. In one case, the American doctrine of prospective overruling was

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[93] *See* SLAUGHTER, *supra* note 88, at 119–20.

[94] *Id.* at 77, 78.

[95] *See id.* at 66.

[96] *See, e.g.*, Morgentaler, [1988] 1 S.C.R. at 46 (striking down provisions of the Criminal Code that prohibited abortion).

[97] *See* [1991] 2 S.C.R. 779, 806–07 (Can.) (Cory, J., dissenting) (allowing the extradition of an American capital murder defendant).

[98] *See* [1988] 1 S.C.R. at 46 (striking down provisions of the Criminal Code that prohibited abortion).

[99] R. v. Smith, [1987] 1 S.C.R. 1045, 1092–94 (Can.) (McIntyre, J., dissenting) (holding that a minimum mandatory prison term provided for by the Narcotic Control Act failed the proportionality test and constituted cruel and unusual punishment).

[100] *See* [1990] 3 S.C.R. 697, 753–54, 820 (Can.).

[101] *See generally* [1993] 3 S.C.R. 519 (Can.).

[102] Pretty v. United Kingdom, App. No. 2346/02, 35 Eur. H.R. Rep. 1, para. 23 (2002).

the object of intense debate.[103] In another judgment, the Indian Court applied the American standard of heightened scrutiny for gender discrimination and included a lengthy quote from an opinion authored by Justice Ruth Bader Ginsburg.[104] In South Africa, the Constitutional Court cited decisions from the Supreme Court of Canada in cases involving women's rights to equality,[105] as well as cases involving capital punishment.[106] In an abortion opinion by the Polish Supreme Court, Judge Lech Garlicki, writing in dissent, cited opinions by the Spanish and German Constitutional Courts.[107]

In the United States, however, references to foreign law and foreign decisions are relatively scarce.[108] By the end of the twentieth century, observers diagnosed a certain isolation and parochialism in the lawyers and courts of the United States.[109] At the turn of the century, however, a new wind started to blow, with foreign precedents cited in opinions by the U.S. Supreme Court in cases such as *Knight v. Florida*,[110] *Atkins v. Virginia*,[111] and *Grutter v. Bollinger*.[112] The landmark decision, however, came in 2003 with *Lawrence v. Texas*, in which Justice Anthony Kennedy,

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[103] *See* Golak Nath v. Punjab, (1967) 2 S.C.R. 762, 921–25 (India), *available at* http://www.liiofindia.org/in/cases/cen/INSC/1967/45.html.

[104] Anuj Garg & Ors v. Hotel Ass'n of India, (2007) 12 S.C.R. 991, 1016 (India), *available at* http://www.liiofindia.org/in/cases/cen/INSC/2007/1226.html.

[105] *See S. v. Jordan* 2002 (6) SA 642 (CC) at 41 para. 68 (S. Afr.).

[106] *Makwanyane* 1995 (3) SA at 423 para. 60.

[107] Trybunal Konstytucyjny 28.5.1997 [Decision of the Constitutional Tribunal of May 28, 1997], K 26/96 (Pol.).

[108] On this matter, see generally SLAUGHTER, *supra* note 88; and Diane Marie Amann, *"Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597 (2004) (analyzing the U.S. Supreme Court's changing use of foreign legal materials). For some precedent on citing foreign law, see, for example, Miranda v. Arizona, 348 U.S. 436, 486–90 (1966); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 651–52 (1952) (Jackson, J., concurring); Wickard v. Filburn, 317 U.S. 111, 126 n.27 (1942); Jacobson v. Massachusetts, 197 U.S. 11, 31–32 & n.1 (1905).

[109] *See* Bruce Ackerman, *The Rise of World Constitutionalism,* 83 VA. L. REV. 771, 772–73 ("[T]he global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of *learning* from an opinion by the German or French constitutional court. Nor would the typical scholar—assuming, contrary to fact, that she could follow the natives' reasoning in their alien tongues. If anything, American practice and theory have moved in the direction of emphatic provincialism." (footnote omitted)).

[110] 528 U.S. 990 (1999). In a dissent from the denial of certiorari, Justice Breyer cited cases from India, Zimbabwe, Canada, South Africa, and the European Court of Human Rights. *See id.* at 995–96 (Breyer, J., dissenting).

[111] 536 U.S. 304 (2002). Justice Stevens, writing for the majority, asserted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.* at 316 n.21.

[112] 539 U.S. 306 (2003). In her separate opinion, Justice Ginsburg cited two international conventions on discrimination. *See id.* at 344 (Ginsburg, J., concurring).

writing for the majority, cited a decision of the ECtHR.[113] This reference prompted a harsh dissent by Justice Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas.[114] In 2005, in *Roper v. Simmons*, Justice Kennedy, writing for the majority, once again cited international and foreign law as it pertained to the "international opinion against the juvenile death penalty," adding that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[115] In their confirmation hearings, Chief Justice John Roberts and Justice Samuel Alito expressed disapproval of such references.[116] Legislative threats to ban the use of foreign legal authorities and even to make it an impeachable offense did not gain momentum.[117] It is therefore clear that two different approaches "uncomfortably coexist"[118] within the U.S. Supreme Court: the "nationalist jurisprudence" view that rejects any reference to foreign and international precedents, and the "transnationalist jurisprudence" view that allows such references.[119] The latter approach, which is more cosmopolitan, progressive, and "venerable,"[120] should prevail.

### C. *Human Dignity in the United States*

Although there is no express reference to human dignity in the text of the U.S. Constitution,[121] the Supreme Court has long employed

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[113] 539 U.S. 558, 576 (2003) (citing *Dudgeon*, 3 Eur. H.R. Rep. at 40).

[114] *See id.* at 598 (Scalia, J., dissenting) ("The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'" (quoting Foster v. Florida, 537 US. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari))).

[115] 543 U.S. 551, 578 (2005).

[116] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of John G. Roberts, Jr., nominee); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 370–71, 410, 471 (2006) (statement of Samuel A. Alito, Jr., nominee).

[117] *See* Charles Lane, *Scalia Tells Congress to Mind Its Own Business,* Wash. Post, May 19, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html.

[118] Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43, 52–53 (2004).

[119] *Id.* at 52.

[120] *Id.*

[121] *Cf.* U.S. Const. Among the states, the Montana Constitution has an explicit human dignity clause. Article II, section 4 provides: "Individual Dignity. The dignity of the human being is inviolable . . . ." Mont. Const. art. II, § 4; *see* Jackson, *supra* note 3, at 28 (noting

the idea.[122] It was not until the 1940s,[123] however, and particularly after 1950,[124] that the concept began to gain traction in American constitutional jurisprudence. Some authors associate this with the presence on the Court of Justice William Brennan and his view of human dignity as a basic value, a constitutional principle, and a source of individual rights and liberties.[125] As seen in the case law discussed below, the Justices have never considered human dignity to be a stand-alone or autonomous fundamental right, but rather a value underlying express and unenumerated rights—such as the rights to privacy, equal protection, economic assistance from the government, dignity at the end of life, as well as protection from self-incrimination, cruel and unusual punishment, and unreasonable searches and seizures.[126] Human dignity concerns also surface when freedom of expression clashes with reputational issues.[127] Thus, the role of human dignity has mostly been to inform the interpretation of particular constitutional rights.[128]

It is within the context of the right to privacy that human dignity arguably plays its most prominent role. It is true that dignity was not expressly invoked in the early landmark cases, such as *Griswold v. Connecticut*[129] and *Roe v. Wade*.[130] Yet, the core ideas underlying human dig-

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that the clause has played a secondary role to the next sentence of Article II, section 4, which secures equal protection).

[122] *See, e.g.*, Adamson v. California, 332 U.S. 46, 62 (1947) (Frankfurter J., concurring); Brown v. Walker, 161 U.S. 591, 632 (1896) (Field, J., dissenting); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 455 (1793).

[123] Justice Murphy used the term "dignity" in his dissents in the following cases: *In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting); Screws v. United States, 325 U.S. 91, 135 (1945) (Murphy, J., dissenting); Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

[124] The first appearance of the expression "human dignity" in a majority opinion of the Supreme Court was in *Rochin v. California*, 342 U.S. 165, 174 (1952). Jackson, *supra* note 3, at 16 n.7.

[125] *See, e.g.*, Seth Stern & Stephen Wermiel, Justice Brennan: Liberal Champion 409–33 (2010) (explaining Justice Brennan's objection to the death penalty on the ground that it violates basic principles of human dignity); Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan,* 7 Wm. & Mary Bill Rts. J. 223, 228, 233, 235 (1998).

[126] *See infra* text accompanying notes 130–156.

[127] *See* Goodman, *supra* note 7, at 757 (identifying eight categories of cases in which the Supreme Court has expressly related human dignity to specific constitutional claims, sometimes grounding its decisions in the need to advance human dignity, and sometimes rejecting it as a prevailing argument).

[128] Neuman, *supra* note 6, at 271.

[129] *Cf.* 381 U.S. 479 (1965) (striking down a law that prohibited the use of contraceptives by married couples). This decision created a new fundamental right—the right of privacy—emanating from the "penumbras" of the Bill of Rights that protect marital rela-

nity—autonomy and the freedom to make personal choices—were central to these decisions.[131] In a subsequent abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[132] human dignity was explicitly mentioned in both the plurality opinion[133] and the dissent.[134] The same occurred in *Stenberg v. Carhart*, another abortion decision.[135] In *Lawrence*, however, human dignity played its most important role in a ruling in which the Court held that the right to privacy prohibits the criminalization of consensual intimate relations among same-sex partners.[136]

In the equal protection context, with regard to women's rights, landmark cases such as *Reed v. Reed*[137] and *Frontiero v. Richardson*[138] did not mention human dignity in their rationales, but other opinions dealing with sex discrimination expressly reference the concept.[139] The

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tions from state intrusions. *See id.* at 482–85. According to this Article, human dignity is the true source of non-enumerated fundamental rights.

[130] *Cf.* 410 U.S. 113 (1973) (securing the right of a woman to have an abortion in the first and second trimesters of pregnancy).

[131] *See Roe*, 410 U.S. at 168; *Griswold*, 381 U.S. at 485, 495 (Goldberg, J., concurring). Some authors even contend that privacy is a "misnomer" and that dignity is a better term for the right at issue. *See, e.g.*, Miller, *supra* note 8, at 4.

[132] 505 U.S. 833 (1992) (overruling in part and revising the constitutional framework governing the right to abortion).

[133] *Id.* 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 Fourteenth Amendment." (emphasis added)). Human dignity was also mentioned in Justice Stevens' separate opinion. *See id.* at 916 (Stevens, J., concurring in part, dissenting in part). In *Stenberg v. Carhart*, 530 U.S. 914 (2000), another abortion decision, Justice Breyer, writing for the Court, also cited the concept of dignity.

[134] *See Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part, dissenting in part). Justice Scalia cites several instances in which his peers mentioned the word dignity, along with other concepts (such as autonomy and bodily integrity), to conclude that "the best the Court can do to explain how it is that the word 'liberty' *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice." *Id.*

[135] *See* 530 U.S. at 920; *see also id.* at 962 (Kennedy, J., dissenting). Notably, while the Court in this case struck down a restriction on certain types of abortions, *see id.* at 946 (majority opinion), the Court upheld a similar restriction in a subsequent decision, though it did not explicitly overrule *Stenberg*, *see* Gonzales v. Carhart, 550 U.S. 124, 153 (2007).

[136] *See* 539 U.S. at 558 (securing the right to sexual intimacy for same-sex couples). Writing for the majority, Justice Kennedy invoked human dignity in several passages of his opinion. *See id.* at 558, 567, 574, 577.

[137] 404 U.S. 71 (1971) (declaring unconstitutional a state law granting males preference over females in the appointment of estate administrators).

[138] 411 U.S. 677 (1973) (finding unconstitutional rules allowing male members of the armed forces to declare their wives as dependents, while female military personnel could not do the same with respect to their husbands).

[139] *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 142 (1994) ("[Challenging a juror solely on the basis of sex] denigrates the dignity of the excluded juror, and, for a

idea of human dignity, however, became more important in the context of racial discrimination. In *Brown v. Board of Education*, although the Court's opinion did not expressly refer to human dignity, it is properly recognized that the concept clearly underlies the unanimous opinion against school segregation.[140] In subsequent cases, majority opinions expressly reference dignity in relation to racial discrimination.[141]

In cases involving the privilege against self-incrimination, the Supreme Court held, in *Miranda v. Arizona* for example, that the interrogation environment, even absent physical intimidation, is "destructive of human dignity."[142] Despite this holding, human dignity gradually lost its thrust in Fifth Amendment cases.[143] With regard to protection against unreasonable searches and seizures, *Rochin v. California* established a direct connection between human dignity and the procedure by which evidence is obtained.[144] Following the commencement of the "war on drugs" in the 1980s, however, human dignity's fate in Fourth Amendment jurisprudence became gloomier.[145] In relation to protec-

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woman, reinvokes a history of exclusion from political participation."); Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (upholding a state law that compelled associations to accept women as regular members).

[140] *See* 347 U.S. 483, 494 (1954); William A. Parent, *Constitutional Values and Human Dignity*, *in* The Constitution of Rights: Human Dignity and American Values 47, 59 (Michael J. Meyer & William A. Parent eds., 1992).

[141] *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249–50 (1964).

[142] 384 U.S. at 457. The majority added that "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.* at 460.

[143] *See, e.g.*, United States v. Balsys, 524 U.S. 666, 713, 720 (1998) (Breyer, J., dissenting) (noting that one purpose of the Fifth Amendment is to protect human dignity and that the protection against self-incrimination should extend where threat of prosecution by a foreign government is real and substantial); Allen v. Illinois, 478 U.S. 364, 384 (1986) (Stevens, J., dissenting) (reasoning that a law allowing testimony by psychiatrists based on interviews with patients undermined the Fifth Amendment, and was thus in conflict with concepts of human dignity); Schmerber v. California, 384 U.S. 757, 767 (1966) (indicating that while the right against self-incrimination protects human dignity, drawing blood for a blood alcohol test does not violate the Fifth Amendment).

[144] 342 U.S. at 172–74 (holding that involuntary pumping of the petitioner's stomach to extract drug capsules "shocks the conscience" and violates the due process clause of the Fourteenth Amendment).

[145] *See, e.g.*, Nat'l Treasury Emps. Union v. von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (noting the disharmony inherent in the government's demonstration that it is serious about the war on drugs by violating the dignity of its employees); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 636 (1988) (Marshall, J., dissenting) ("The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."); United States v. de Hernandez, 473 U.S. 531, 556 (1985) (Brennan, J., dissenting) ("Although the Court previously has declined to require a warrant for border searches involving 'minor interference

tion against cruel and unusual punishment, and particularly regarding the death penalty, the Court declared in *Furman v. Georgia* that capital punishment, as applied in some states—randomly, with unguided discretion for juries and, as noted in a concurrence by Justice William Douglas, with disproportionate impact on minorities[146]—was cruel and unusual punishment.[147] Four years later, however, in *Gregg v. Georgia*, the Court upheld Georgia's redesigned death penalty statute.[148] That said, dignity was expressly invoked in *Atkins*[149] and *Roper*,[150] in which the Court struck down as unconstitutional the execution of mentally retarded individuals and offenders under the age of eighteen, respectively.[151]

In death with dignity cases, Justice Brennan referred to human dignity in his dissent in *Cruzan v. Director, Missouri Department of Health*, in which the Court affirmed a decision that refused to allow the withdrawal of life-sustaining treatment for a woman who had been in a vegetative coma for many years.[152] In the years that followed, the Court denied the existence of a right to physician-assisted suicide in *Washington v. Glucksberg*[153] and *Vacco v. Quill*.[154] As for claims involving social and welfare rights, the closest the Court has come to understanding the Constitution as creating positive entitlements is arguably *Goldberg v. Kelly*, in which the Court held that welfare recipients could not have their benefits terminated without fair hearings.[155] Finally, in the Court's case law, reputational interests are traditionally outweighed by First Amendment protection in conflicts between the freedom of expression and the opposing right of an individual to protect his image, the latter of which the Court does not recognize as constitutionally protected.[156]

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with privacy resulting from the mere stop for questioning,' . . . surely there is no parallel between such 'minor' intrusions and the extreme invasion of personal privacy and dignity that occurs in detentions and searches such as that before us today." (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976))).

[146] 408 U.S. 238, 240 (1972) (Douglas, J., concurring).

[147] *See id.* at 239–40 (per curiam).

[148] *See* 428 U.S. 153, 198, 206–07 (1976).

[149] *Atkins*, 536 U.S. 304.

[150] *Roper*, 543 U.S. 551.

[151] *See id.* at 560; *Atkins*, 536 U.S. at 311.

[152] 497 U.S. 261, 302 (1990) (Brennan, J., dissenting).

[153] *See* 521 U.S. 702, 728 (1997).

[154] *See* 521 U.S. 793, 807 (1997).

[155] *See* 397 U.S. 254, 266–71 (1970) (outlining the requisite procedure for such a "fair hearing").

[156] *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (noting that a tension exists between reputational interests and First Amendment rights); *see also* Paul v. Davis, 424 U.S.

### D. *Arguments Against the Use of Human Dignity as a Legal Concept*

Opponents of the use of human dignity in law, if not its use altogether, utilize three basic arguments. The first argument is formal in nature: When human dignity is not in the text of a state's constitution—as is the case in the United States and France—it *cannot* be used in legal reasoning.[157] Faithful to textualism as his philosophy of constitutional interpretation,[158] this is the point of view advocated by Justice Scalia.[159] The second argument is more ideological: Human dignity *should not* be used in legal discourse in countries where it is not rooted in the legal tradition.[160] This is the view, for example, of Neomi Rao, for whom human dignity is linked to European communitarian values that could weaken American constitutionalism, which is based on individual rights.[161] Likewise, James Whitman argues that privacy law in America is linked to the value of liberty, while in Europe it is oriented toward dignity, understood as personal honor.[162] Whitman makes two highly controversial assertions in connection with his argument. First, he links the idea of dignity in Europe with "the star of fascism"[163] and "Nazi history."[164] Then, in his conclusion, he declares that "[t]he prospects for the kind of dignitary protections embodied in a law of gay marriage, we could say, are remote" and that "protecting people's dignity is quite alien to the American tradition."[165] The third argument against the use of dignity as a legal concept is that human dignity lacks specific and substantive meaning.[166] In a frequently cited editorial, Ruth Macklin writes that dignity is a "useless concept" and a "vague restatement" of existing notions.[167] Along the same lines, Steven Pinker

693, 712–14 (1976) (denying petitioner the right to keep a criminal arrest from being publicized).

[157] *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 22–25 (1997).

[158] *See id.*

[159] In a debate with the author of this Article at the University of Brasilia in 2009, Justice Antonin Scalia affirmed that there is no human dignity clause in the U.S. Constitution, and that for this reason it cannot be invoked by judges and the courts. Antonin Scalia, Address at the University of Brasilia School of Law: Judges as Moral Arbiters (May 14, 2009).

[160] *See* Rao, *supra* note 5, at 244.

[161] *Id.* at 204.

[162] *See* Whitman, *supra* note 9, at 1161.

[163] *Id.* at 1166.

[164] *Id.* at 1169.

[165] *Id.* at 1121.

[166] *See* Ruth Macklin, *Dignity Is a Useless Concept,* 327 British Med. J. 1419, 1420 (2003).

[167] *Id.* at 1419–20.

claims that the concept of dignity "remains a mess" and serves a Catholic agenda of "obstructionist ethics."[168]

While these three arguments have merit, each argument can be countered and overcome. As for the textualist objection, it suffices to remember that all constitutions bear values and ideas that inspire and underlie their provisions without express textual inclusion. In the U.S. Constitution, for example, there is no mention of democracy, the rule of law, or judicial review; nevertheless, these are omnipresent concepts in American jurisprudence and case law. The same holds true for human dignity, which is a fundamental value that nourishes the content of different written norms, while simultaneously informing the interpretation of the Constitution generally, especially when fundamental rights are involved.[169] Significant evidence of this argument lies within the European Convention on Human Rights, the first binding international treaty approved after the Universal Declaration of Human Rights.[170] Despite the fact that it does not explicitly reference "human dignity," the treaty's organs, notably the ECtHR, utilize the concept in many decisions, as described above.[171]

The political and philosophical objections to the use of human dignity are also rebuttable. Constitutional democracies everywhere strive to achieve a balance between individual rights and communitarian values. Even though the political process must set the boundaries of these (sometimes) competing spheres—that is, the weight of one or the other may vary to some extent—concerns about human dignity exist on both sides of the scale. For example, human dignity implicates both freedom of expression and compulsory vaccination.[172] Further, there is a fundamental problem with Whitman's views. He does not make a clear and proper distinction between dignity's ancient connotation—rank, status, and personal honor—and its contemporary meaning which is based on the objective intrinsic value of the individual, as well as subjective elements such as personal autonomy.[173] This might

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[168] Steven Pinker, *The Stupidity of Dignity*, New Republic, May 28, 2008, *available at* http://www.tnr.com/article/the-stupidity-dignity.

[169] *See* Neuman, *supra* note 6, at 251–57.

[170] ECHR, *supra* note 78.

[171] *See supra* text accompanying notes 78–82.

[172] *See* Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. Legal Med. 155, 173, 175–76 (2005).

[173] *Compare* Whitman, *supra* note 9, at 1164 ("[In Europe, political and social ideals] revolve unmistakably around one's position in society, one's 'dignity' and 'honor.'"), *with* Ronald Dworkin, Is Democracy Possible Here?: Principles for a New Political Debate 11 (2006) [hereinafter Dworkin, Democracy] ("The first principle of human

explain why he links dignity to fascism and National Socialism—and their notions of personal honor—rather than the broad and generous conception of human rights that developed after the end of the World War II as a reaction to the abuses perpetrated by the Axis powers.[174] Another consequence of disregarding the necessary distinction between human dignity's ancient and current meanings is apparent in the opposition Whitman sees between privacy as liberty and privacy as dignity (that is, as "personal honor").[175] As I set out to demonstrate, dignity is part of the core content of both liberty and privacy, not a concept (much less a right) that can be contradictory to either. Lastly, prospects for same-sex marriage seem at this point less dim than Whitman anticipated.[176]

Finally, dignity has been condemned as a vague slogan, which can be co-opted by authoritarianism and paternalism.[177] As with any other high-profile, abstract term—such as the right to the free development of one's personality in German constitutional law[178] or the Due Process and Equal Protection clauses in the American constitution[179]—there are risks involved in the construction of a definition of human dignity. Any complex idea, in fact, is subject to abuse or misuse: Democracy can be manipulated by populists, federalism can degenerate into hegemony of the central government, and judicial review can be contaminated by politics. As Ronald Dworkin writes, "[I]t would be a shame to surrender an important idea or even a familiar name to this corruption."[180] Thus, human dignity, no less than numerous other crucial concepts, needs high quality scholarship, public debate, overlapping consensus, accountable governments, and prudent courts. The task is to find a minimum content for human dignity that warrants its use as a meaningful

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dignity . . . insists on the intrinsic and objective importance of how a human life is lived . . . .").

[174] *Compare* Whitman, *supra* note 9, at 1166 ("[S]ome of the fundamental institutions of the continental law of dignity experienced significant development under the star of fascism."), *with* Neuman, *supra* note 6, at 255 (describing the renewed respect for human dignity after World War II).

[175] *See* Whitman, *supra* note 9, at 1161.

[176] *See id.* at 1221.

[177] *Cf.* Goodman, *supra* note 7, at 746–47 (questioning what, exactly, can be protected when invoking human dignity).

[178] Grundgesetz, BGBl. I art. 2(1).

[179] U.S. Const. amend. V (due process clause); U.S. Const. amend. XIV, § 1 (equal protection clause).

[180] *See* Ronald Dworkin, Justice for Hedgehogs 204 (2011) [hereinafter Dworkin, Hedgehogs].

and consequential concept, compatible with free will, democracy, and secular values.

## II. The Legal Nature and Minimum Content of Human Dignity

### A. *Human Dignity as a Legal Principle*

Human dignity is a multi-faceted concept utilized in religion, philosophy, politics, and law. There is a reasonable consensus that it constitutes a fundamental value that underlies constitutional democracies generally, even when not expressly written in constitutions.[181] In Germany, the dominant view is that human dignity is an *absolute* value that prevails in any circumstance.[182] This assertion, however, has been pertinently challenged over the years.[183] As a general rule, law is not a space for absolutes. Even if it is reasonable to assert that human dignity usually prevails, there are unavoidable situations in which it will be at least partially defeated.[184] An obvious example is the case of an individual who, after due process of law, is convicted and sent to prison: An important part of his or her dignity—entrenched in the freedom of movement—is affected. There is a clear sacrifice of one aspect of dignity in favor of another value. Human dignity, then, is a fundamental value, but it should not be regarded as an absolute. Values, either moral or political, enter the world of law commonly assuming the form of a principle.[185] Although constitutional principles and rights frequently overlap, this is not the case here. As demonstrated below, the best way of categorizing human dignity is not as an autonomous right, but instead as a legal principle with constitutional status.

As a fundamental value and a constitutional principle, human dignity serves both as a moral justification for and a normative foundation

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[181] *See* Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 Metaphilosophy 464, 466, 470 (2010).

[182] *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Feb. 24, 1971, 30 BVerfGE 173 (195–200) (Ger.) [hereinafter *Mephisto* Case]; Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] July 16, 1969, 27 BVerfGE 1 (6) (Ger.) [hereinafter Micro-Census Case].

[183] *See* Grimm, *supra* note 35, at 12.

[184] *See* Habermas, *supra* note 181, at 476–77.

[185] *See* Humberto Ávila, Theory of Legal Principles 29–30 (Jorge Todeschini trans., 2007). Values, of course, also underlie rules. But in that case, the value judgment has already been made by the legislature when enacting the rule, regarded as an objective norm that prescribes certain behavior. Principles, on the other hand, are more abstract norms that state reasons, leaving courts more leeway to determine their meaning in concrete cases. *See id.* at 67–68, 93.

of fundamental rights.[186] It is not necessary to elaborate in more depth and detail on the qualitative distinction between principles and rules. The conception adopted here is the dominant one in legal theory, based on Ronald Dworkin's seminal writings on the subject[187] and further developed by the German legal philosopher Robert Alexy.[188] According to Dworkin, principles are standards that contain "requirement[s] of justice or fairness or some other dimension of morality."[189] Unlike rules, they are not applicable in "an all-or-nothing fashion,"[190] and in certain circumstances they may not prevail due to the existence of other reasons or principles that argue in a different direction.[191] Principles have a "dimension of weight," and when they intersect, it will be necessary to consider the specific importance of each principle in the specific context.[192] For Alexy, principles are "*optimization requirements*"[193] whose enforcement will vary in degree according to what is factually and legally possible.[194] Thus, under Alexy's theory, principles are subject to balancing and to proportionality, and, depending on context, they may give way to opposing elements.[195] These views are not immune to controversies,[196] but such a discussion is outside the scope of this Article. My predicament is that legal principles are norms that have more or less weight in different circumstances. In any case, principles provide arguments that must be considered by courts, and each principle requires a good faith commitment to its realization, to the extent such realization is possible.[197]

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[186] *See* Habermas, *supra* note 181, at 470.

[187] *See generally* Ronald Dworkin, Taking Rights Seriously 14–45 (1977) [hereinafter Dworkin, Rights]. The book republishes Dworkin's article *The Model of Rules,* from 1967, originally published at 35 U. Chi. L. Rev. 14 (1967).

[188] *See* Robert Alexy, A Theory of Constitutional Rights 44–69, 87 (Julian Rivers, trans., 2004).

[189] Dworkin, Rights, *supra* note 187, at 22.

[190] *Id.* at 24.

[191] *Id.* at 26.

[192] *Id.*

[193] Alexy, *supra* note 188, at 47.

[194] *Id.* at 47–48.

[195] *See id*; Robert Alexy, *Balancing, Constitutional Review, and Representation,* 3 Int'l J. Const. L. 572–81 (2005).

[196] *See, e.g.,* Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik, in* Staat, Verfassung, Demokratie [State, Constitution, Democracy] 159, 185 (1991), *cited and rebutted in* Alexy, *supra* note 188, at 577; Jürgen Habermas, Between Facts and Norms 310–11 (1996). *See generally* Ávila, *supra* note 185 (addressing the relationship among principles, rules, and norms).

[197] *See* Patricia Birnie et al., International Law & the Environment 34 (2009) (discussing the need for a "good faith commitment" to non-binding documents in international environmental law).

Constitutional principles have different roles in the legal system, and at the moment of their concrete application they always generate rules that will govern specific situations. To distinguish the two main roles, one should think of a principle as two concentric circles.[198] The inner circle, closer to the center, bears the principle's core meaning and is a direct source of rights and duties.[199] For example, the core meaning of human dignity requires a ban on torture, even in a legal system with no particular rules prohibiting such conduct.[200] Of course, when a more specific rule already exists—meaning that the framers or the legislature detailed the principle in a more concrete fashion—there is no need to resort to the more abstract principle of human dignity. To take another example, consider countries where the right to privacy is not expressly stated in the constitution—as in the United States—or the general right against self-incrimination is not explicit—as in Brazil— where these rights can be harvested from the core meaning of dignity.[201] This is the first role of a principle like human dignity: to be a source of rights—and, consequently, duties—including non-enumerated rights that are recognized as part of a mature democratic society.

The other major role played by the principle of human dignity is interpretive.[202] Human dignity is part of the core content of fundamental rights, such as equality, freedom, or privacy.[203] Therefore, it necessarily informs the interpretation of such constitutional rights, helping to define their meaning in particular cases. Furthermore, in cases involving gaps in the legal system, ambiguities in the law, the intersection between constitutional rights, and tensions between rights and collective goals, human dignity can be a good compass in the search for the best solution. Moreover, in its most basic application, any statute found to violate human dignity, on its face or as applied, would be void.[204]

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[198] Other scholars have used the image of two concentric circles. *See, e.g.*, Ana Paula de Barcellos, A Eficácia Jurídica dos Princípios Constitucionais: O Princípio da Dignidade da Pessoa Humana [The Legal Efficacy of Principles: The Principle of Dignity of the Human Person] 122–23 (2011).

[199] *See id.* at 69–72.

[200] *See id.*

[201] *Cf.* U.S. Const.; Constituição Federal [C.F.][Constitution] (Braz.).

[202] *See, e.g.*, Habermas, *supra* note 181, at 464–65 (noting that in 2006 the German Constitutional Court invalidated a statute on constitutional grounds, emphasizing human dignity in its reasoning).

[203] *See* András Jakab, *Breaching Constitutional Law on Moral Grounds in the Fight Against Terrorism: Implied Presuppositions and Proposed Solutions in the Discourse on 'The Rule of Law vs. Terrorism,'* 9 Int'l J. Const. L. 58, 68 (2011).

[204] A statute is unconstitutional on its face when it is contrary to the constitution in the abstract—that is, in any circumstance—and is thus void. A statute is unconstituional as

Consistent with my assertion that human dignity is not an absolute value, it is also true that human dignity is not an absolute principle either. Indeed, if a constitutional principle underlies both a fundamental right and a collective goal,[205] and if rights collide against themselves or with collective goals, a logical deadlock occurs. A shock of absolutes is insolvable. What can be said is that human dignity, as a fundamental value and principle, should take precedence in most, but not all, situations. Furthermore, when true (not just rhetorical) aspects of human dignity are present on both sides of the argument, the discussion becomes more complex. In such circumstances, cultural and political background may affect a court's choice of reasoning—a good example being the clash between privacy (in the sense of reputation) and freedom of the press.[206]

Finally, a few words on why human dignity should not be characterized as a freestanding constitutional right. It is true that principles and rights are closely linked concepts.[207] Both constitutional principles and constitutional rights represent an opening of the legal system to the system of morality.[208] It would be contradictory to make human dignity a right in its own, however, because it is regarded as the foundation for all truly fundamental rights and the source of at least part of their core content.[209] Furthermore, if human dignity were to be considered a constitutional right in itself, it would need to be balanced against other constitutional rights, placing it in a weaker position than if it were to be used as an external parameter for permissible solutions when rights clash. As a constitutional principle, however, human dignity may need to be balanced against other principles or collective

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applied when it is consistent with the constitution generally, but produces an unacceptable consequence in a particular circumstance. *See* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 360–61 (1998).

[205] *See* Alexy, *supra* note 188, at 65 ("Principles can be related both to individual rights and to collective interests.").

[206] *See id.* at 101–06.

[207] *See* Dworkin, Rights, *supra* note 187, at 90 ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.").

[208] Alexy, *supra* note 188, at 4.

[209] *See* Habermas, *supra* note 181, at 473–76 (describing the evolution of human dignity from a vertical concept to a horizontal, universalistic, and individualistic concept, from which human rights derive their moral content as spelled out in the language of positive laws); Jackson, *supra* note 3, at 15–16 (explaining that although the U.S. Constitution does not enshrine human dignity expressly, several constitutional protections—including due process protections and the ban on cruel and unusual punishment—are "cognate concepts").

goals.[210] Again, it should usually prevail, but that will not always be the case. It is better to recognize this fact than attempt to deny it with circular arguments.[211]

### B. *The Influence of Kantian Thought*

Immanuel Kant, one of the most influential philosophers of the Enlightenment, is a central figure in contemporary Western moral and legal philosophy. Many of his reflections are directly connected with the idea of human dignity, and it is not surprising that he is one of the most frequently cited authors in works on the subject.[212] Notwithstanding the occasional challenges to his system of morality,[213] Kantian ethics have become a crucial part of the grammar and semantics of the study of human dignity.[214] For this reason, though at the risk of oversimplification, I sketch below three of his central concepts: the categorical imperative, autonomy, and dignity.[215]

According to Kant, ethics is the realm of moral law, comprised of commands that govern the will in conformity with reason.[216] Such commands are called imperatives, which are either hypothetical or

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[210] On the tension between individual rights and collective goals, Ronald Dworkin has coined a phrase that has become emblematic in the eternal clash between the individual and the reasons of state: "Individual rights are political trumps held by individuals." *See* Dworkin, Rights, *supra* note 187, at xi. He added, as a possible mode of organizing rights in a political hierarchy: "[I]t follows from the definition of a right that it cannot be . . . defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency." *See id.* at 92.

[211] This seems to be the case with Alexy's theory that the human dignity *principle* can be balanced and not take preference, but that there is a human dignity *rule* that is the product of such balancing that will always prevail. *See* Alexy, *supra* note 188, at 64.

[212] *See* McCrudden, *supra* note 12, at 659.

[213] *See, e.g.*, G.W.F. Hegel, Philosophy of Right 159 (S.W. Dyde trans., Prometheus Books 1996) (1821). *See generally* David Hume, *Book III: Of Morals*, *in* A Treatise of Human Nature (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739) (explaining a contrasting view of morality).

[214] Some authors have used the expression *Kantische Wende* ("Kantian revival") to refer to the renewed influence of Kant in contemporary legal debate. *See, e.g.*, Otfried Höffe, Kategorische Rechtsprinzipien: Ein Kontrapunkt der Moderne [Categorical Principles of Law: A Counterpoint to Modernity] 351 (1990).

[215] The concepts discussed here were drawn mostly from Kant's *Groundwork of the Metaphysics of Morals*, which concentrates most of his thoughts on ethics. *See* Immanuel Kant, Groundwork of the Metaphysics of Morals (Mary Gregor ed. & trans., 1998) (ca. 1770); *see also* 6 Frederick Copleston, A History of Philosophy 340–48 (1960) (discussing Kant's views of morality and religion); Roger Scruton, Kant: A Very Short Introduction 73–95 (2001) (discussing Kant's views on the categorical imperative). *See generally* Jens Timmermann, Kant's *Groundwork of the Metaphysics of Morals:* A Commentary (2007).

[216] *See* Kant, *supra* note 215, at 1–5.

categorical. A *hypothetical* imperative identifies the action that is good as the means to achieve an end.[217] The *categorical* imperative corresponds to an action that is good in itself, regardless of whether it serves a determinate end.[218] It is a standard of rationality and represents what is objectively necessary in a will that conforms itself to reason.[219] Kant enunciated this categorical imperative, or imperative of morality, in a synthetic and famous proposition: "[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law."[220] Note that instead of presenting a catalogue of specific virtues, a list of "do's and don'ts," Kant conceived a formula of determining ethical action.[221] Another formulation of the categorical imperative is the following: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."[222]

Autonomy is the property of a will that is free.[223] It identifies the individual's capacity for self-determination, in accordance with the representation of certain laws, and it is a self-governing reason.[224] The core idea is that individuals are subject only to the laws they give themselves.[225] An autonomous person is one bound by his or her own will and not by the will of someone else.[226] According to Kant, free will is governed by reason, and reason is the proper representation of moral laws.[227]

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[217] *Id.* at 25.

[218] *Id.*

[219] *See id.*

[220] *Id.* at 31 (emphasis omitted).

[221] *See* Marilena Chauí, Convite à Filosofia [Invitation to Philosophy] 346 (2000).

[222] Kant, *supra* note 215, at 38 (emphasis omitted). Although Kant affirms that there is just a single categorical imperative, he presents three different formulations of it. *See id.* at 43. The first one, reproduced above, is referred to as *the formula of nature*; the second, as the *formula of humanity*. *See id.* at 37–38. The third, *the formula of autonomy*, states: "[A]nd this is done in the present third formula of the principle, namely the idea of the will of every rational being as a *will giving universal law*." *See id.* at 40.

[223] *See id.* at 52.

[224] *See id.* at 40–41, 47, 62.

[225] *See id.* at 47.

[226] *See id.* at 40–41.

[227] *See id.* at 19, 24, 53. These ideas become more complex and somewhat counterfactual when we add other elements of Kant's moral theory. For him, the supreme principle of morality consists of individuals giving themselves laws that they could will to become universal law, an objective law of reason with no concessions to subjective motivations. *See id.* at 24, 31.

Dignity, in the Kantian view, is grounded in autonomy.[228] Where all rational beings act according to the categorical imperative, for example as lawgivers in the "kingdom of ends" whose maxims could become universal law, "everything has either a *price* or a *dignity*."[229] Things that have a price can be replaced by other equivalent things.[230] Something that is priceless, and that cannot be replaced by another equivalent item, however, has *dignity*.[231] Such is the unique nature of the human being. Condensed into a set of propositions, the essence of Kantian thought regarding our subject is as follows: Moral conduct consists of acting according to a maxim that one could will to become universal law; every person is an end in him- or herself and shall not be instrumentalized by other people's will; human beings have no price and cannot be replaced because they are endowed with an absolute inner worth called dignity.

### C. *The Minimum Content of the Idea of Human Dignity*

It is not easy to elaborate a transnational concept of human dignity that properly takes into account the varied political, historical, and religious circumstances that are present in different countries. For this purpose, one must settle for an open-ended, plastic, and plural notion of human dignity. Roughly stated, human dignity, in my minimalist conception, identifies (1) the intrinsic value of all human beings, as well as (2) the autonomy of every individual, (3) limited by some legitimate constraints imposed upon such autonomy on behalf of social values or state interests (community value). I analyze these three elements based on a philosophical perspective that is secular, neutral, and universalist. *Secularism*[232] means that church and state must be separate, that religion is a matter private to each individual, and that a humanist rational view must prevail over religious conceptions in political and public affairs.[233] *Neutrality* is a central concept in contemporary liberal thought, commanding that the state must not take sides when different

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[228] KANT, *supra* note 215, at 43.

[229] *Id.* at 42.

[230] *Id.*

[231] *Id.*

[232] George Holyoake was the first to use the term *secularism*. *See* GEORGE JACOB HOLYOAKE, THE ORIGIN AND NATURE OF SECULARISM 50 (London, Watts & Co. 1896).

[233] This view, of course, does not affect freedom of religion, and religious belief is indeed a legitimate option for millions of people. *See* CHARLES TAYLOR, A SECULAR AGE 3 (2007). Regarding the desirable balance and mutual tolerance between secularists and those whose religious values shape their political beliefs, see NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 251 (2005).

reasonable conceptions of the good life are in question.[234] These notions of secularism and neutrality represent an effort to free human dignity from any comprehensive religious or political doctrine, incorporating it into the idea of *public reason*, insightfully developed by John Rawls.[235]

Finally, a few words on *universalism* and its companion idea, multiculturalism. Multiculturalism denotes respect and appreciation for ethnic, religious, or cultural diversity.[236] Since the late twentieth century, it has become widely accepted that multiculturalism is based on values that are not only consistent with but also required by liberal democracies.[237] Minorities have a right to their identities and differences, as well as the right to be recognized.[238] Further, human dignity no doubt supports such views. Human dignity, at its core, however, also possesses a universalist ambition, representing the fabric that binds together the human family.[239] Some degree of enlightened idealism is necessary in this domain in order to confront entrenched practices and customs of violence, sexual oppression, and tyranny. To be sure, this is a battle of

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[234] *See, e.g.*, JOHN RAWLS, COLLECTED PAPERS 457 (Samuel Freeman ed., 1999). This argument, though, is far from universally accepted. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 117–21 (1986) (claiming that neutrality is "chimerical" and maybe "impossible"). For a defense of liberal neutrality as a valid idea, see generally Will Kymlicka, *Liberal Individualism and Liberal Neutrality,* 99 ETHICS 883 (1989); and Wojciech Sadurski, *Joseph Raz on Liberal Neutrality and the Harm Principle,* 10 OXFORD J. LEGAL STUD. 122 (1990).

[235] *See* RAWLS, *supra* note 234, at 547–83. Kant first used the term *public reason* in *What Is Enlightenment?*, originally published in 1784; the idea was further developed by John Rawls. *See generally* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? (Lewis White Beck trans., MacMillan Publ'g Co. 2d ed. 1990) (1784); JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. Public reason is an essential notion in a pluralist liberal democracy, in which people are free to adhere to conflicting reasonable comprehensive doctrines. *See* RAWLS, POLITICAL LIBERALISM, *supra,* at 217. In such a scenario, discussions, and deliberations in the *public political forum* by judges, government officials, and even candidates for public office must be based on political conceptions that can be shared by free and equal citizens. *See* JOHN RAWLS, LAW OF PEOPLES 131–80 (1999). I should add that Rawls distinguishes public reason from secular reason, since he sees the latter as a comprehensive nonreligious doctrine. *Id.* at 143.

[236] *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) (presenting a discussion of multiculturalism and arguing that certain collective rights of minority cultures are consistent with liberal democratic principles).

[237] *See id.* at 11–26 (discussing the politics of multiculturalism in multinational states).

[238] *See id.* at 15.

[239] *See* Habermas, *supra* note 181, at 469–70.

ideas to be won with patience and perseverance. Troops will not do it.[240]

Before moving on, I will restate a previous comment in a slightly more analytic fashion. Human dignity and human (or fundamental) rights are closely connected, like the two sides of a coin—or to use a common image, the two faces of Janus.[241] One is turned toward philosophy, reflecting the moral values by which every person is unique and deserves equal respect and concern;[242] the other is turned toward law, reflecting individual rights.[243] This represents morality in the form of law or, as Jürgen Habermas states, a "fusion of moral contents with coercive law."[244] For this reason, in the following sections I will break down each element within the core meaning of human dignity, identifying its moral content and legal implications with respect to individual rights.

1. Intrinsic Value

Intrinsic value is, on a philosophical level, the ontological element of human dignity linked to the nature of being.[245] The uniqueness of human kind is the product of a combination of inherent traits and features—including intelligence, sensibility, and the ability to communicate—that give humans a special status in the world, distinct from other species.[246] Intrinsic value is the opposite of attributed or instrumental value,[247] because it is value that is good in itself and has no price.[248] There is a growing awareness, however, that humankind's special position does not warrant arrogance and indifference toward nature in general, including non-rational animals that have their own kind of

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[240] In a inspired passage in which he cites Holmes, Louis Mendand writes: "Of course civilizations are aggressive, Holmes says, but when they take up arms in order to impose their conception of civility on others, they sacrifice their moral advantage." Louis Menand, The Metaphysical Club: A Story of Ideas in America 45 (2002).

[241] *See* Habermas, *supra* note 181, at 470.

[242] *See id.* at 471.

[243] *See id.*

[244] *Id.* at 479.

[245] Ontology is a branch of metaphysics that studies the fundamental characteristics of all things and subjects, including what every human being has and cannot fail to have. It includes questions such as the nature of the existence and structure of reality. *See* Nicola Abbagnano, Dicionário de filosofia [Dictionary of Philosophy] 661–62 (1988); Ted Honderich, The Oxford Companion to Philosophy 634 (1995).

[246] *See* George Kateb, Human Dignity 5 (2011) ("[W]e can distinguish between the dignity of every human individual and the dignity of the human species as a whole.").

[247] *See* Daniel P. Sulmasy, *Human Dignity and Human Worth*, *in* Perspectives on Human Dignity: A Conversation 9, 15 (Jeff Malpas & Norelle Lickiss eds., 2007).

[248] *See* Kant, *supra* note 215, at 42.

dignity.[249] The intrinsic value of all individuals results in two basic postulates: anti-utilitarian and anti-authoritarian. The former consists of the formulation of Kant's categorical imperative that every individual is an end in him- or herself, not a means for collective goals or the purposes of others.[250] The latter is synthesized in the idea that the state exists for the individual, not the other way around.[251] Because it has the intrinsic value of every person at its core, human dignity is, in the first place, an objective value[252] that does not depend on any event or experience, and thus need not be granted and cannot be lost, even in the face of the most reprehensible behavior.[253] Consequently, human dignity does not depend on reason itself, as it is present in newborns, the senile people, and the incompetent.[254]

As for its legal implications, intrinsic value is the origin of a set of fundamental rights.[255] The first of these rights is the *right to life*, a basic pre-condition for the enjoyment of any other right.[256] Human dignity fulfills almost entirely the content of the right to life, leaving space for only a few specific controversial situations, such as abortion, assisted suicide, and the death penalty.[257] A second right directly related to the intrinsic value of each and every individual is *equality before and under the*

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[249] *See* Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics 351, 365 (2008) [hereinafter Nussbaum, *Human Dignity*]; *see also* Martha Nussbaum, Frontiers of Justice 325–27 (2006); Philipp Balzer et al., *Two Concepts of Dignity for Humans and Non-Human Organisms in the Context of Genetic Engineering*, 13 J. Agric. & Envtl. Ethics 7, 14 (2000).

[250] *See* Kant, *supra* note 215, at 37.

[251] The *dignity of the state* was part of the National Socialist propaganda to discredit democratic institutions in Germany. *See* Jochen Abr. Frowein, *Human Dingity in International Law*, *in* The Concept of Human Dignity in Human Rights Discourse, *supra* note 17, at 121, 123. The former Soviet Union also developed this concept by referring to the "dignity of Soviet citizenship" and "national dignity" in its 1977 Constitution. Konstitutsiia SSSR (1977) [Konst. SSSR][USSR Constitution] arts. 59, 67. As another example, the Constitution of the People's Republic of China establishes that the state shall uphold the "dignity of the socialist legal system." Xianfa art. 5 (1982) (China).

[252] *See* Dworkin, Democracy, *supra* note 173, at 9–10 ("[E]ach human life has a special kind of objective value . . . . The success or failure of any human life is important in itself . . . . [W]e should all regret a wasted life as something bad in itself, whether the life in question is our own or someone else's.").

[253] *See id.* at 16.

[254] *See id.* This point of view departs from Kant's assertion that human dignity is grounded in reason. *See* Kant, *supra* note 215, at 43.

[255] *See* Dworkin, Democracy, *supra* note 173, at 35.

[256] *See id.*

[257] *See* discussion *infra* Part III.

*law*.[258] All individuals are of equal value and, therefore, deserve equal respect and concern.[259] This means not being discriminated against due to race, color, ethnic or national origin, sex, age, or mental capacity (the right to non-discrimination), as well as respect for cultural, religious, or linguistic diversity (the right to recognition).[260] Human dignity fulfills only part of the content of the idea of equality, and in many situations it may be acceptable to differentiate among people. In the contemporary world, this is particularly at issue in cases involving affirmative action and the rights of religious minorities.[261]

Intrinsic value also leads to another fundamental right, the *right to integrity*, both physical and mental. The right to *physical* integrity[262] includes the prohibition of torture, slave labor, and degrading treatment or punishment.[263] Discussions on life imprisonment, interrogation techniques, and prison conditions take place within the scope of this right.[264] Finally, the right to *mental* integrity,[265] which in Europe and

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[258] *See* Charter of Fundamental Rights of the European Union, *supra* note 74, arts. 20–23; African Charter on Human and Peoples' Rights, *supra* note 74, art. 3; American Convention on Human Rights, *supra* note 74, art. 24; International Covenant on Civil and Political Rights, *supra* note 74, arts. 26–27; Universal Declaration of Human Rights, *supra* note 74, arts. 2, 7. In the U.S. Constitution, the Equal Protection Clause is in the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 1.

[259] *See* Ronald Dworkin, The Sovereign Virtue: The Theory and Practice of Equality 128 (2000).

[260] For different perspectives on minority rights, multiculturalism, and identity, see generally Nancy Fraser, Redistribution or Recognition? A Political-Philosophical Exchange (2003); Axel Honneth, The Struggle for Recognition: The Moral Grammar of Social Conflicts (1996).

[261] *See* Dworkin, *supra* note 259, at 121, 415.

[262] *See* Charter of Fundamental Rights of the European Union, *supra* note 74, arts. 3–5; African Charter on Human and People's Rights, *supra* note 74, arts. 4–5; American Convention on Human Rights, *supra* note 74, arts. 5–6; International Covenant on Civil and Political Rights, *supra* note 74, arts. 7–8; Universal Declaration of Human Rights, *supra* note 74, arts. 4–5.

[263] *See, e.g.*, African Charter on Human and Peoples' Rights, *supra* note 74, art. 5 ("All forms of exploitation and degredation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.") In the U.S. Constitution, most of these matters are dealt with under the Eighth Amendment ban on "cruel and unusual punishments." *See* U.S. Const. amend. VIII.

[264] *See, e.g.*, Michael W. Lewis, *A Dark Dissent into Reality: Making the Case for an Objective Definition of Torture*, 67 Wash. & Lee L. Rev. 77, 129 (2010) (advocating definitions of torture that safeguard prisoners' physical integrity); Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 Am. U. Int'l L. Rev. 71, 82–84 (2005) (discussing international prison standards in the context of physical integrity).

[265] *See* Charter of Fundamental Rights of the European Union, *supra* note 74, art. 3; African Charter on Human and Peoples' Rights, *supra* note 74, art. 4; American Convention on Human Rights, *supra* note 74, arts. 11, 18; International Covenant on Civil and

many civil law countries comprises the right to personal honor and image, includes the right to privacy.[266] The idea of privacy in the United States, however, is somewhat unique.[267]

Throughout the world, there is a fair amount of case law involving fundamental rights that stem from human dignity as an intrinsic value. Regarding the *right to life*, abortion is permitted in the early stages of pregnancy by most democracies in the North Atlantic world, including the United States, Canada, France, the United Kingdom and Germany.[268] Human dignity, in these countries, is not interpreted to reinforce the right to life of the fetus against the will of its mother.[269] Assisted suicide is illegal in most countries, with the exception of Holland, Belgium, Colombia, Luxembourg, and just a few others.[270] In the United States, assisted suicide is permitted in Oregon, Washington, and Montana.[271] The main concern with respect to assisted suicide is not the termination of life by the will of patients who are terminally ill, in persistent vegetative states, or under unbearable and insurmountable pain, but the fear of abuse of vulnerable people.[272] Capital punishment

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Political Rights, *supra* note 74, art. 17; Universal Declaration of Human Rights, *supra* note 74, arts. 6, 12.

[266] *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 74, art. 17, para. 1 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.").

[267] In the U.S. Constitution, there is no express reference to privacy. In one sense, aspects of privacy are protected by the Fourth Amendment ban on unreasonable searches and seizures. *See* U.S. Const. amend. IV. In another sense, personal honor and image rights do not have the status of constitutional rights, as in many countries and in the European Charter of Fundamental Rights. *See* Charter of Fundamental Rights of the European Union, *supra* note 74, arts. 1, 7, 8. Finally, U.S. case law treats as privacy those rights that in other countries fall under the category of freedom or equality under the law, such as the right to use contraception and the right to intimate acts between adults. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (noting that other nations consider the right to intimate acts between adults to be part of "human freedom"); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[268] *See* Ctr. for Reprod. Rights, Fact Sheet: The World's Abortion Laws 2 (2009), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_abortionlaws2009_WEB.pdf.

[269] *See* Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, *in* European and U.S. Constitutionalism 85, 99 (Georg Nolte ed., 2005). I will return to the discussion of abortion in Part III.A. of this Article.

[270] For a survey of world laws on the matter, see *World Laws on Assisted Suicide*, Euthanasia Res. & Guidance Org., http://www.finalexit.org/assisted_suicide_world_laws.html (last updated Aug. 28, 2010).

[271] *See Assisted Suicide Laws in the United States*, Euthanasia Res. & Guidance Org., http://www.finalexit.org/assisted_suicide_laws_united_states.html (last updated Aug. 28, 2010).

[272] *See, e.g.*, Nussbaum, *Human Dignity*, *supra* note 249, at 373.

has been banned in Europe and most countries in the world; the United States is a striking exception among democracies.[273] Although grounded in American historical tradition, it is difficult to argue that the death penalty is compatible with respect for human dignity, as it is a complete objectification of the individual, whose life and humanity succumb to the highly questionable public interest in retribution.

As for *equality*, the practice of affirmative action, for example, has been upheld in countries such as the United States,[274] Canada,[275] and Brazil,[276] and it is expressly permitted by the International Convention on the Elimination of All Forms of Racial Discrimination.[277] On the other hand, the rights of religious minorities suffered a setback, especially in Europe, where the full Islamic veil is either banned in public[278] or is the subject of serious discussions by various member states.[279] In such countries, courts and legislators failed to uphold dignitarian concerns involving minority groups' right to identity by finding this right outweighed by alleged public interest concerns relating to security, cultural preservation, and women's rights.[280] With regard to physical integrity—or, using American terminology, cruel and unusual punishment—courts and authors repeatedly proclaim torture to be unacceptable.[281] More recently, the U.S. Supreme Court held that prison overcrowding in the state of California violated the Eighth Amendment.[282] The major-

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[273] According to Amnesty International, more than two-thirds of the world's countries have abolished the death penalty in law or in practice, and 96 have abolished it for all crimes. *See Figures on the Death Penalty*, Amnesty Int'l, http://www.amnesty.org/en/death-penalty/numbers (last visited May 15, 2012).

[274] *See* Grutter v. Bollinger, 539 U.S. 306, 307 (2003).

[275] *See* R. v. Kapp, [2008] 2 S.C.R. 483, para. 3 (Can.).

[276] In Brazil, some public universities have created a quota for racial minorities in their admissions processes. Even though the Supreme Court has not issued its final decision, a preliminary injunction against the norms that permitted such practice was not granted. The case is pending. *See* Argüição de Descumprimento de Preceito Fundamental [Claim of Breach of Fundamental Precept], S.T.F. No. 186-2, 31.07.2009 (Braz.), *available at* http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStfArquivo/anexo/ADPF186.pdf.

[277] *See* International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 74, art. 2.2.

[278] This is the situation in France, for example, where the Constitutional Council validated the law that established the ban. *See* Conseil constitutionnel [CC][Constitutional Court] decision No. 2010–613DC, Oct. 7, 2010, J.O. 18345 (Fr.).

[279] *See* Honor Mahony, *EU Leaders Dodge Islamic Veil Ban Issue*, EUObserver.com (July 19, 2010), http://euobserver.com/9/30502.

[280] *See id.*

[281] *See S. v. Makwanyane*, 1995 (3) SA 391 (CC) at 434 para. 97 (S. Afr.); *see also* Grimm, *supra* note 35, at 20 ("A society committed to human dignity could never defend itself through the denial of other people's dignity.").

[282] Brown v. Plata, 131 S. Ct. 1910, 1929 (2011).

ity opinion, written by Justice Kennedy, references "dignity," the "dignity of man," and "human dignity."[283]

Finally, concerning mental integrity, the typical challenge in the contemporary world involves the conflict between the right to privacy (as personal honor or image) and freedom of expression, particularly for the press.[284] Aspects of human dignity are present on both sides—dignity as intrinsic value versus dignity as autonomy—and the outcomes in such cases are influenced by different cultural perceptions.[285] A recent example of this clash of legal cultures occurred when New York police officers arrested a French public figure, who was then exposed to the press in handcuffs and required to make a "perp walk."[286] Although this is a common practice in the United States, the episode was regarded by many as an unnecessary and abusive violation of privacy.[287]

### 2. Autonomy

Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals,[288] which entitles them to pursue

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[283] *Id.*

[284] *See* JILL MARSHALL, PERSONAL FREEDOM THROUGH HUMAN RIGHTS LAW?: AUTONOMY, IDENTITY AND INTEGRITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 54–55 (2009).

[285] *See id.*

[286] *See* Sam Roberts, *An American Rite: Suspects on Parade (Bring a Raincoat)*, N.Y. TIMES, May 20, 2011, at A17 ("After Mr. Strauss-Kahn was paraded before a crowd of photographers . . . a former French justice minister expressed outrage at 'a brutality, a violence, of an incredible cruelty.'").

[287] *See id.*

[288] The concept of autonomy in democracies is widely discussed in scholarly writings. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 1–10 (1995) [hereinafter POST, DOMAINS] (stating that the law must consider the importance of autonomy (democracy) when establishing legal social order); RAZ, *supra* note 234, at 155–56, 204–05, 369–81, 400–15 (arguing that an autonomous person is a part author of his own life, but that autonomy is a matter of degree subject to societal constraints and options available to the person); John Christman & Joel Anderson, *Introduction* to AUTONOMY AND THE CHALLENGES TO LIBERALISM 1, 1–19 (John Christman & Joel Anderson eds., 2005) (discussing the role autonomy plays in debates about political liberalism); Jack Crittenden, *The Social Nature of Autonomy*, 55 REV. POL. 35, 36 (1993) (stating that autonomy captures the aspects of living considered essential to a good life); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876–78 (1994) (identifying autonomy as both descriptive—referring to the extent to which a person is self-governing—and ascriptive—reflecting what is morally troubling about paternalism); Beate Rössler, *Problems with Autonomy*, 17 HYPATIA 143, 144 (2002) (explaining that the concept of autonomy is based on the idea that people are independently free and able to choose a life that would be good for them); Robert Post, *Dignity, Autonomy, and Democracy* (Inst. of Governmental Studies, Working Paper No. 2000–11) [hereinafter Post, *Dignity*], *available at*

the ideals of living well and having a good life in their own ways.[289] The central notion is that of self-determination: An autonomous person establishes the rules that will govern his or her life.[290] We have previously discussed the Kantian conception of autonomy, which is the will governed by the moral law (*moral autonomy*). We are now concerned with *personal autonomy*, which is value neutral and means the free exercise of the will according to one's own values, interests, and desires.[291] Autonomy requires the fulfillment of certain conditions, such as reason (the mental capacity to make informed decisions), independence (the absence of coercion, manipulation, and severe want), and choice (the actual existence of alternatives).[292] Note that in the Kantian moral system, autonomy is the will that suffers no heteronomous influence and corresponds to the idea of freedom.[293] In practical political and social life, however, individual will is constrained by the law and by social mores and norms.[294] Thus, distinct from moral autonomy, personal autonomy, although at the origin of freedom, only corresponds with its core content. Freedom has a larger scope that can be limited by legitimate external forces.[295] Autonomy, however, is the part of freedom that cannot be suppressed by state or social interference, involving basic personal decisions, such as choices related to religion, personal relationships, and political beliefs.[296]

Autonomy, thus, is the ability to make personal decisions and choices in life based on one's conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political

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http://igs.berkeley.edu/publications/working_papers/WP2000–11.pdf (arguing that collective self-determination requires collective autonomy).

[289] Raz, *supra* note 234, at 204–05; Crittenden, *supra* note 288, at 36.

[290] Post, *Dignity, supra* note 288, at 6–8.

[291] The distinction is explored in Jeremy Waldron, *Moral Autonomy and Personal Autonomy*, *in* Autonomy and the Challenges to Liberalism, *supra* note 288, at 307, 307–29. Richard Fallon separates autonomy into descriptive autonomy, considering the effect of external causal factors on individual liberty, and ascriptive autonomy, representing each person's sovereignty over his or her moral choices. *See* Fallon, *supra* note 288, at 846–78.

[292] *See* Waldron, *supra* note 291, at 307–29.

[293] *See* Kant, *supra* note 215, at 52 ("[W]hat, then, can freedom of the will be other than autonomy . . . ?").

[294] *See* Post, Domains, *supra* note 288, at 1.

[295] *See* Raz, *supra* note 234, at 1.

[296] *See id.*

participation (public autonomy).[297] With the rise of the welfare state, many countries in the world also consider a fundamental social right to minimum living conditions (the existential minimum) in the balancing that results in true and effective autonomy.[298] We will thus discuss, briefly, each of these three ideas: private autonomy, public autonomy, and the existential minimum.

Private autonomy is the key concept behind individual freedom, including that which in the United States is usually protected under the label of privacy.[299] Therefore, the freedoms of religion, speech, and association, as well as of sexual and reproductive rights, are important expressions of private autonomy.[300] Of course, private autonomy does not entail absolute rights.[301] It is worth re-emphasizing that autonomy exists only at the core of different freedoms and rights; it does not occupy the entire range. For example, as a result of freedom of movement, a free individual can choose where she is going to establish her home, a major personal choice; similarly, she will usually decide where to spend her next vacation. If a valid law or regulation, however, prohibits her from visiting a particular country, perhaps North Korea or Afghanistan, no one would think, at least in principle, that the restriction is a violation of her human dignity. Finally, there can be clashes between the autonomy of different individuals,[302] as well as between autonomy, on the one hand, and intrinsic value or community value, on the other.[303] Thus, private autonomy, as an essential element of human dignity, offers a good standard for defining the content and scope of freedom and rights, but does not free legal reasoning from weighing complex facts and taking into account apparently contrasting norms in order to strike a proper balance under the circumstances.

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[297] This distinction is the cornerstone of the "reconstructive approach to law" of Jürgen Habermas, Germany's most prominent contemporary philosopher. *See* HABERMAS, *supra* note 196, at 84–104.

[298] *See* International Convention on Economic, Social, and Cultural Rights, *supra* note 74, art. 11.

[299] *See* HABERMAS, *supra* note 196, at 122–26.

[300] *See id.* at 125–26.

[301] Indeed, freedom of religion may be limited in the public sphere. S*ee* Reynolds v. United States, 98 U.S. 145, 166–67 (1878). Freedom of speech may also be regulated when the target is commercial speech. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). Likewise, freedom to terminate pregnancy may be restricted after a certain point in the development of the fetus. *See* Roe v. Wade, 410 U.S. 113, 162–64 (1973).

[302] An example: the right to consume a legal product, such as cigarettes, versus someone else's right not to become an involuntary secondhand smoker.

[303] As when, for example, the will of the patient to terminate his own life is thwarted by the duty of the physician to protect life or by the social/legal perception that this is an unacceptable decision.

Private autonomy, as we have seen, stands for individualized self-government.[304] This is what Benjamin Constant called the "liberty of the moderns," based on civil liberties, the rule of the law, and freedom from abusive state interference.[305] Public autonomy, on the other hand, concerns the "liberty of the ancients," a *republican* liberty associated with citizenship and participation in political life.[306] Ancient Greeks felt a moral obligation toward citizenship and invested substantial time and energy in public affairs, which was facilitated by the fact that slaves did most of the work.[307] As democracy is a partnership in self-government,[308] it requires an interrelation between individual citizens and the collective will.[309] This means that every citizen has the right to participate directly or indirectly in government.[310] Along these lines, public autonomy entails the right to vote, to run for office, to be a member of political organizations, to be active in social movements, and, particularly, the right and the conditions to participate in public discourse. Ideally, the law to which every individual needs to abide would be created with his participation, assuring him the status of an autonomous citizen, and not a heteronomous subject.[311] Regarding public autonomy, an important decision by the ECtHR held that the United Kingdom's law denying prisoners the right to vote was in violation of the European Convention on Human Rights.[312] Although the decision has been strongly questioned by Members of the British Parliament,[313] the ECtHR properly established that "prisoners in general continue to enjoy all the funda-

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[304] Christman & Anderson, *supra* note 288, at 14 ("Many of the alleged tensions between liberalism and traditional republican conceptions of justice also turn on the contested meaning of political *freedom* or *liberty* and its relationship to an understanding of citizen autonomy, especially insofar as that understanding assumes a division (and political opposition) between autonomy as individualized self-government and autonomy as collective, socially instituted self-legislation.").

[305] *See* Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns*, *in* Political Writings 307, 310–11 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988) (1819).

[306] *Id.* at 311.

[307] *Id.* at 314.

[308] Dworkin, *supra* note173, at 5.

[309] Post, *Dignity*, *supra* note 288, at 8.

[310] *See id.*

[311] *Id.* at 9.

[312] *See* Hirst v. United Kingdom (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 849, 869–70 (2006).

[313] *See* Molly M. Hofsomme, *The UK Defies European Court of Human Rights by Denying All Prisoners the Right to Vote*, Hum. Rts. Brief (Apr. 23, 2011), http://hrbrief.org/2011/04/the-uk-defies-european-court-of-human-rights-by-denying-all-prisoners-the-right-to-vote.

mental rights and freedoms guaranteed under the Convention [including the right to vote] save for the right to liberty . . . ."[314]

Finally, attached to the idea of human dignity is the concept of *existential minimum*,[315] also referred to as social minimum[316] or the basic right to the provision of adequate living conditions.[317] Equality, in a substantive sense, and especially autonomy (both private and public), are dependent on the fact that individuals are "free[] from want,"[318] meaning that their essential needs are satisfied. To be free, equal, and capable of exercising responsible citizenship, individuals must pass minimum thresholds of well-being, without which autonomy is a mere fiction.[319] This requires access to some essential utilities, such as basic education and health care services, as well as some elementary necessities, such as food, water, clothing, and shelter. The existential minimum, therefore, is the core content of social and economic rights, whose existence as actual fundamental rights—not mere privileges dependent on the political process—is rather controversial in some countries.[320] Its enforceability is complex and cumbersome everywhere.[321] Notwithstanding these challenges, the concept of minimum social rights that can be protected by courts, and that are not entirely dependent on legislative action, has been accepted by case law in several countries, including Germany,[322] South Africa,[323] and Brazil.[324]

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[314] *See Hirst*, 42 Eur. H.R. Rep. at 866.

[315] This is the literal translation of the term used by German authors and courts, *Existenzminimum*. *See* Alexy, *supra* note 188, at 290 ("[T]here can hardly be any doubt that the Federal Constitutional Court presupposes the existence of a constitutional right to an existential minimum.").

[316] *See* Rawls, Political Liberalism, *supra* note 235, at 228–29 ("[A] social minimum providing for the basic needs of all citizens is also an essential . . . .").

[317] Habermas, *supra* note 196, at 123 ("Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded . . . .").

[318] In his State of the Union address, now known as the Four Freedoms Speech, given on January 6, 1941, President Franklin D. Roosevelt proposed four freedoms that people "everywhere in the world" should enjoy, which included freedom of speech, freedom of worship, *freedom from want* and freedom from fear. *See* Franklin Delano Roosevelt, U.S. President, Message to Congress (Jan. 6, 1941), *available at* http://americanrhetoric.com/speeches/PDFFiles/FDR%20-%20Four%20Freedoms.pdf.

[319] *See* Joel Anderson & Axel Honneth, *Autonomy, Vulnerability, Recognition, and Justice*, *in* Autonomy and The Challenges to Liberalism, *supra* note 288, at 127–29.

[320] *See* Alexy, *supra* note 188, at 284–85.

[321] *See id.* at 290–92.

[322] *See, e.g.*, Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] June 21, 1977, 45 BVerfGE 184 (229); Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] June 18, 1975, 40 BVerfGE 121 (134–36); Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Dec. 19, 1951, 1 BVerfGE 97 (104–05); Bundes-

In the United States, President Franklin Delano Roosevelt raised the issue for the first time in a famous speech[325] and subsequently proposed legislation for "The Second Bill of Rights," presented on January 11, 1944, with express references to the rights to adequate food, clothing, a decent home, medical care, and education.[326] Although Roosevelt thought that the implementation of these second generation rights was a duty of Congress, but not of the courts, Cass Sunstein convincingly argues that a string of Supreme Court decisions decided between the early 1940s and early 1970s came very close to acknowledging certain social and economic rights as true constitutional rights.[327] According to Sunstein, a counterrevolution occurred after Richard Nixon was elected president in 1968, particularly through his appointees to the Supreme Court.[328] Consequently, the Court's case law became more aligned with the traditional and dominant view in American law that fundamental rights do not entitle individuals to positive state action.[329] More recently, the 2010 health reform law reignited this debate.[330] My

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verwaltungsgericht [BVerwG][Federal Administrative Court] June 24, 1954, 1 BVerwGE 159 (161).

[323] *See Mazibuko v. Johannesburg* 2010 (4) SA 1 (CC) at 16–17 (involving access to sufficient water); *South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 60–61 para. 20 (involving access to adequate housing).

[324] In Brazil, there is case law relating to health care and medicines, S.T.F., STA 175/CE, Relator: Ministro Presidente, 18.09.2009, 210, Revista Trimestral de Jurisprudência [R.T.J.], 29.04.2010, 1227 (Braz.); to affirmative action in favor of disabled persons, S.T.F., ADI 2649/DF, Relator: A Sra. Ministra Cármen Lúcia, 08.05.2008, 207, Revista Trimestral de Jurisprudência [R.T.J.], 16.10.2008, 583 (Braz.); and to access to education, S.T.F., RE 410715, Relator: Min. Celso de Mello, 27.10.2005 (Braz.), *available at* Revista Trimestral de Jurisprudência [R.T.J.].

[325] *See* Roosevelt, *supra* note 318.

[326] *See* Franklin D. Roosevelt, U.S. President, State of the Union Address to Congress (Jan. 11, 1944), *available at* http://fdrlibrary.marist.edu/archives/address_text.html (announcing a plan for a bill of social and economic rights).

[327] *See* Cass Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever 154–68 (2004) (citing Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that the termination of welfare benefits without a hearing violated the due process clause); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a state law that imposed a one-year waiting period before a new arrival to the state could apply for welfare benefits); Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent must be provided with counsel on his first appeal of a criminal conviction); Gideon v. Wainright, 372 U.S. 335 (1963) (holding that states are required to provide defense lawyers in criminal cases for defendants who cannot afford one); and Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the equal protection clause requires states to provide trial transcripts at no cost to poor people appealing their criminal convictions)).

[328] *See* Sunstein, *supra* note 327, at 163.

[329] *Id.* at 165–67.

[330] *See, e.g.*, Lance Gable, *The Patient Protection and Affordable Care Act, Public Health, and the Elusive Target of Human Rights*, 39 J.L. Med. & Ethics 340, 347–51 (2011) (discussing

argument here is that the existential minimum is at the core of human dignity, and that autonomy cannot exist where choices are dictated solely by personal needs.[331] Accordingly, the very poor must be granted constitutional protection.[332]

### 3. Community Value

The third and final element, human dignity as *community value*, also referred to as dignity as *constraint* or dignity as *heteronomy*, relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him.[333] Autonomy protects the person from becoming merely a gear in the engine of society.[334] Despite this, in the words of English poet John Donne, "[n]o man is an island, entire of itself."[335] The term community value, which is quite ambiguous, is used here, by convention, to identify two different external forces that act on the individual: (1) the "shared beliefs, interests, and commitments"[336] of the social group and (2) state-imposed norms. The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and mores of people who are just as free and equal as him, as well as by coercive regulation. In an insightful book, Robert Post similarly identified three distinct forms of social order: community (a "shared world of common faith and fate"), management (the instrumental organization of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determina-

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how the Affordable Care Act fulfills the right to public health while avoiding its recognition).

[331] Raz, *supra* note 234, at 155 ("[The agents'] choices must not be dictated by personal needs.").

[332] *See* Dworkin, Democracy, *supra* note 173, at 8 ("[T]he very poor should be regarded, like a minority and disadvantaged race, as a class entitled to special constitutional protection.").

[333] *See* Post, Domains, *supra* note 288, at 182.

[334] *Id.*

[335] *See* John Donne, *XVII. Meditation*, *in* Devotions upon Emergent Occasions 107, 108–09 (Univ. of Mich. Press 1959) (1624), *available at* http://www.ccel.org/ccel/donne/devotions.iv.iii.xvii.i.html ( "No man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . . [A]ny man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee.").

[336] Philip Selznick, The Moral Commonwealth: Social Theory and the Promise of Community 358 (1992).

tion).[337] These three forms of social order presuppose and depend on each other, but are also in constant tension.[338]

Dignity as a community value, therefore, emphasizes the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life.[339] The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society[340] is not incompatible, of course, with limitations resulting from the necessary coexistence of different views and potentially conflicting rights.[341] Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus"[342] that can be shared by most individuals and groups.[343] Community value, as a constraint on personal autonomy, seeks legitimacy through the pursuit of three goals: (1) the protection of the rights and dignity of others, (2) the protection of the rights and dignity of oneself, and (3) the protection of shared social values.[344] In their studies on bioethics and biolaw, Deryck Beyleveld and Roger Brownsword explored in depth this conception of "human dignity as constraint," centered around the ideas of duties and responsibilities, as opposed to "human dignity as empowerment," which is essentially concerned with rights.[345]

It is not difficult to understand and justify the existence of a concept of community value giving content to and shaping the contours of human dignity, alongside intrinsic value and autonomy. If the lines are properly drawn, its goals are legitimate and desirable. The critical problem here is the risk involved. Regarding the first goal—protection of the rights and dignity of others—any civilized society imposes criminal

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[337] *See* POST, DOMAINS, *supra* note 288, at 3, 5, 15.

[338] *Id.* at 2.

[339] *Id.* at 128.

[340] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

[341] *See* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 9 (1987).

[342] "Overlapping consensus" is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political, and moral comprehensive doctrines. *See id.* at 1.

[343] *See id.* at 24.

[344] *See* DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 29–38, 63–66 (2001); SELZNICK, *supra* note 336, at 126.

[345] *See* BEYLEVELD & BROWNSWORD, *supra* note 344, at 29–46, 65; Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights, and Human Genetics*, 61 MOD. L. REV. 661, 667 (1998).

and civil sanctions to safeguard values and interests relating to life, physical and emotional integrity, and property, among others.[346] It is thus beyond doubt that personal autonomy can be restricted to prevent wrongful behavior, be it based on the harm principle developed by John Stuart Mill[347] or on the broader concept of the offense principle defended by Joel Feinberg.[348] To be sure, the power to punish can be, and often is, employed in an abusive or disproportional way. Its necessity, however, even in the most liberal societies, is not contested.[349] On the other hand, the additional goals—protection of both individual and shared social values—run the severe risk of paternalism[350] and moralism.[351] It is largely recognized that some degree of paternalism is acceptable,[352] but in order for such interference to be legitimate, its boundaries must be established with great restraint. As for moralism, it is also acceptable that a democratic society may employ its coercive power to enforce some moral values and collective goals.[353] Here again, however, and for stronger reasons, the boundaries must be tightly maintained in order to protect against the grave risk of moral majoritarianism, or the tyranny of the majority.[354] The legitimacy and limits

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[346] *See infra* text accompanying notes 347–348.

[347] *See* JOHN STUART MILL, ON LIBERTY 21–22 (Elizabeth Rapaport ed. 1978) (1874) (expressing the classical liberal view and finding the limit of the state's legitimate authority on the notion of harm).

[348] *See* JOEL FEINBERG, OFFENSE TO OTHERS 1 (1985). Feinberg argues that the harm principle is not sufficient to protect individuals against the wrongful behaviors of others, and has developed a more comprehensive concept of "the offense principle," maintaining that preventing shock, disgust, embarrassment and other unpleasant mental states is also a relevant reason for legal prohibition. *Id.*

[349] *See, e.g.*, *id.*; *see also* MILL, *supra* note 347, at 21–22.

[350] Gerald Dworkin defines paternalism as "the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm." Gerald Dworkin, *Paternalism*, STAN. ENCYCLOPEDIA PHIL. (Nov. 6, 2002), http://plato.stanford.edu/archives/sum2010/entries/paternalism/ (revised June 1, 2010).

[351] The most well-known defense of legal moralism was made by Patrick Devlin. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 10 (1965).

[352] Examples often cited are compulsory education for children and requiring the use of seatbelts and motorcycle helmets. *See* DWORKIN, HEDGEHOGS, *supra* note 180, at 336.

[353] To mention some fairly indisputable examples, consider the ban on hard drugs, a fair degree of environmental protection, and the prohibition of animal cruelty. *See* Luis E. Chiesa, *Why Is It a Crime to Stomp on Goldfish?: Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 35 (2008); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 3–5 (2009–2010); Robin West, *Rights, Harms and Duties: A Response to* Justice for Hedgehogs, 90 B.U. L. REV. 819, 824, 835 (2010).

[354] *See* MILL, *supra* note 347, at 13.

associated with protection of "shared morality" are the object of an important exchange between Patrick Devlin and H.L.A. Hart.[355]

Dignity as community value, often inspired by paternalistic or moralistic motivations, underlies judicial decisions throughout the world. One of the most famous of such decisions is the holding in the "dwarf-tossing" case. The mayor of a town near Paris banned the bar spectacle *lancer de nain*, in which a dwarf, wearing protective gear, was thrown short distances by customers. The case reached the Council of the State, which held the prohibition to be legitimate, based on defense of the public order and protection of human dignity.[356] The dwarf opposed the ban on all instances and took the case to the United Nations Human Rights Committee, which did not find the measure to be abusive.[357] A second well-known decision involves the *Peep Show Case*, handed down by the German Federal Administrative Court.[358] The court upheld the denial of a license to conduct an attraction in which a woman performs a striptease for an individual in a small booth.[359] With payment, the stage would become visible to the patron, but the woman could not see him.[360] The license was refused on the ground that it violated good morals because such a performance violated the human dignity of the women displayed, who would be degraded to the level of an object.[361] A third case involved the prosecution of a group of people in the United Kingdom accused of assault and wounding during sadomasochistic encounters.[362] Although the activities were consensual and

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[355] *See* Devlin, *supra* note 351, at 10; H.L.A. Hart, Law, Liberty and Morality 5, 50 (1963).

[356] Conseil d'État Assemblee [CE Ass.][Administrative Court Assembly] decision No. 136727, Oct. 27, 1995, Rec. Lebon (Fr.), *available at* http:/www.juricaf.org/arret/FRANCE-CONSEILDETAT-19951027-136727; *see also* Marceau Long et al., Les grands arrêts de la jurisprudence administrative [The Great Decisions of Administrative Case Law] 790 (1996).

[357] Human Rights Comm., Communication No. 854/1999: France, CCPR/C/75/D/854/1999 (July 26, 2002). The decision has been criticized worldwide with the argument that dignity as autonomy should have prevailed. *See* Rousseau, *supra* note 52, at 66–68; Stéphanie Hennette-Vauchez, *When Ambivalent Principles Prevail: Leads for Explaining Western Legal Orders' Infatuation with the Human Dignity Principle,* 10 Legal Ethics 193, 206 (2007).

[358] Bundesverwaltungsgericht [BVerwG][Federal Administrative Court] Dec. 15, 1981, 4 BVerwGE 274 (Ger.).

[359] *Id.*

[360] *Id.*

[361] In an outright rejection of the argument of autonomy, the Court stated that the fact that the women acted voluntarily did not excuse the violation. *Id.*

[362] Laskey v. United Kingdom, App. No. 21627/93, 24 Eur. H.R. Rep. 39, 39 (1997). The dissent countered that the "adults were able to consent to acts done in private which did not result in serious bodily harm" and criticized the Court's "paternalism." *Id.* at 45, 54–56 (Loncaides, J., dissenting).

conducted in private, the House of Lords held that the existence of consent was not a satisfactory defense where actual bodily harm occurred.[363] The ECtHR found no violation of the European Convention on Human Rights.[364]

There are several morally and legally controversial issues relating to community values. One of them is prostitution. In South Africa, a divided Constitutional Court upheld the constitutionality of a law that made "carnal intercourse . . . for reward" a crime.[365] The Supreme Court of Canada upheld a provision of the Criminal Code that prohibited communications in public for the purpose of prostitution, a distinct but related issue.[366] Both courts have upheld bans on brothels and bawdy houses.[367] Taking a different perspective, the Constitutional Court of Colombia held that prostitution is a tolerated social phenomenon, that prostitutes are a historically discriminated-against group deserving of special protection, and that voluntary sex work, under subordination to and payment from a bar owner, constitutes a *de facto* labor contract.[368] Another polemical matter that challenges the proper boundaries between dignity as autonomy and dignity as shaped by heteronomous forces is the decriminalization of drugs. The Supreme Court of Canada discussed the matter extensively in a 2003 divided decision which held that Parliament could validly criminalize the possession of marijuana and punish offenders with imprisonment.[369] A number of countries have adopted,[370] and several world leaders have

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[363] *Id.* at 43.

[364] *Id.* at 52.

[365] *Jordan v. State* 2002 (11) BCLR 1117 (CC) (S. Afr.). The minority pointed out, however, that the law constituted unfair discrimination against women by making the prostitute the primary offender and the patron at most as an accomplice.

[366] *See* Gindin v. Manitoba (A.G.), [1990] 1 S.C.R. 1123, 1139–40.

[367] *See id.* at 1126; *Jordan* 2002 (11) BCLR 1117 at para. 29; *see also* Giuseppe Valiante, *Court Ruling About Touching in Strip Clubs Leaves 'Gray Zone,'* CNews: Across Can. (Mar. 4, 2011), http://cnews.canoe.ca/CNEWS/Canada/2011/03/04/17500131.html.

[368] Corte Constitucional [C.C.][Constitutional Court], agosto 13, 2010, Sentencia T-629/10 (Colom.), *available at* http://www.corteconstitucional.gov.co/RELATORIA/2010/T-629–10.htm. At bottom, the main discussion is whether individual prostitution is a matter of personal autonomy, and thus constitutionally protected, or whether, on the other hand, it is a matter that is primarily to be governed by the legislature.

[369] *See* R. v. Malmo-Levine, [2003] 3 S.C.R. 571, paras. 86–87 (Can.). Three justices dissented, stressing that the harm posed to others by marijuana consumption is not significant and does not justify imprisonment, *see id.* paras. 244, 276 (Arbour, J., dissenting), that harm to self should not be criminally punished, *see id.* para. 280 (LeBel, J., dissenting), and that the harm of prohibiting marijuana far outweighed its benefits, *see id.* para. 283 (Deschamps, J., dissenting).

[370] For example, the Netherlands, Portugal, and Australia have all adopted laws decriminalizing certain drugs. *See, e.g.*, Caitlin Elizabeth Hughes & Alex Stevens, *What Can We*

advocated for, the decriminalization of drugs, particularly so-called "light" drugs.[371] Another complex and sensitive issue involves hate speech. In most democratic countries, speech aimed at the depreciation of vulnerable groups or individuals, based on ethnicity, race, color, religion, gender, or sexual orientation, among other characteristics, is not acceptable and is not within the range of protection for freedom of expression.[372] The United States, in this particular instance, is a solitary exception.[373]

The coercive imposition of external values, with the exception of the plain exercise of autonomy in the name of a communitarian dimension of human dignity, is never trivial. It requires adequate justification, which must take into account three elements: (1) the existence of a fundamental right that is affected, (2) the potential harm to oneself and to others, and (3) the level of societal consensus on the matter.[374] As for the verification of the presence of a fundamental right, it is appropriate to make a distinction between two different views and respective terminology. Some authors acknowledge the existence of a "general right to liberty" (or freedom), along with specific and express freedoms, such as freedom of expression, religion, and others.[375] The general right to liberty means a general freedom of action that can, however, be limited by any legal norm that is compatible with the constitution.[376] Restrictions on such a general right require only a rational

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*Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 Brit. J. Criminology 999, 1000 (2010) (noting that Australia and the Netherlands, alongside other countries, have decriminalized some drugs); Brian Vastag, *5 Years After: Portugal's Drug Decriminalization Policy Shows Positive Results*, Sci. Am. (Apr. 7, 2009), http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization.

[371] World leaders including former presidents of Brazil, Colombia, Mexico, and Switzerland, a former prime minister of Greece, a U.S. Secretary of State and former Chairman of the U.S. Fedral Reserve, and many others, are members of the Global Commission on Drug Policy. *See Commissioners*, Global Commission on Drug Pol'y, http://www.globalcommissionondrugs.org/bios (last visited May 15, 2012). The Commission advocates for revised drug policies based on "informed, science-based discussions." *See What We Do*, Global Commission on Drug Pol'y, http://www.globalcommissionondrugs.org/what-we-do (last visited May 15, 2012).

[372] *See* Frederick Schauer, *The Exceptional First Amendment*, *in* American Exceptionalism and Human Rights 29, 34 (Michael Ignatieff ed., 2005).

[373] For a reflection on the clash between free speech and equality, see Martha Minow, *Equality Under the Bill of Rights*, *in* The Constitution of Rights, *supra* note 140, at 124; *see also* Schauer, *supra* note 372, at 35–38.

[374] *See Malmo-Levine*, [2003] 3 S.C.R. para. 113.

[375] *See, e.g.*, Alexy, *supra* note 188, at 224–25. Alexy draws from the idea of *legality* that is dominant in most civil law countries, meaning that everyone can do anything that is not prohibited by valid norms.

[376] *See id.* at 225.

basis and a legitimate state interest or collective goal.[377] Other authors, particularly Ronald Dworkin, employ a narrower concept of "basic liberties," as opposed to general liberty, that correspond with "moral right[s]"—they are the true, substantive fundamental rights.[378] Basic freedoms are to be treated as "trumps" against majority rule,[379] and restrictions on them must pass strict scrutiny.[380] Thus, general freedom may be broadly limited, but basic freedoms should usually prevail over collective goals in all but exceptional circumstances.[381]

The risk of harm to others is usually a reasonable ground to limit personal autonomy. It is broadly accepted today that Mill's formulation of the harm principle as the only justification for state interference with individual freedom "may well be too simple" and that "multiple criteria" will determine when liberty can be restricted.[382] Harm to others, however, enjoys a fair presumption as to the legitimacy of the restriction.[383] Harm to oneself may also be an acceptable ground for limiting personal autonomy, as mentioned before, but in this case the burden of demonstrating its legitimacy will usually be on the state, since paternalism should raise suspicion.[384] Finally, the limitation of personal autonomy on grounds of public morals requires strong societal consensus.[385] The ban on child pornography—even in cases of graphic depiction, without an actual child involved—or the prohibition of incest, are serious candidates for this consensus. In a plural and democratic society, however, there will always be moral disagreements. Issues of capital punishment, abortion, and same-sex marriage will always be disputed. A brief reflection on this subject is called for before closing this Part.[386]

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[377] *See id.*

[378] *See* Dworkin, Rights, *supra* note 187, at 217–18, 271–74.

[379] Ronald Dworkin, *Rights as Trumps*, *in* Theories of Rights 153, 153–54 (Jeremy Waldron ed., 1985).

[380] *See* Dworkin, Rights, *supra* note 187, at 274.

[381] *See id.* at 92–93. For an insightful discussion on the views of general right to liberty and basic freedoms, see—sorry, it is in Portuguese—Letícia de Campos Velho Martel, Direitos Fundamentais Indisponíveis [Indisposable Fundamental Rights] (forthcoming) (manuscript at 94–109) (on file with author).

[382] H.L.A. Hart, *Immortality and Treason*, *in* Morality and the Law, 49, 51 (Richard A. Wasserstrom ed., 1971).

[383] *See* Mill, *supra* note 347, at 77–78.

[384] *See id.* at 76–77.

[385] *See* Hart, *supra* note 382, at 52.

[386] For discussions of moral realism and moral disagreement, see generally Folke Tersman, Moral Disagreement (2006); David Enoch, *How Is Moral Disagreement a Problem for Realism?*, 13 J. Ethics 15 (2009); Arthur Kuflik, *Liberalism, Legal Moralism and Moral Disagreement*, 22 J. Applied Phil. 185 (2005).

Even moral realists who believe that moral claims can be true or false—a highly contested issue in philosophical debate—acknowledge that their belief is not applicable to all moral truths.[387] There will always be moral disagreement, and thus in many situations no objective moral truth.[388] Despite their different conceptions, citizens must coexist and cooperate, bound together by a framework of basic freedoms and rights. The role of the state when interpreting community values is to uphold those values that are genuinely shared by the people and to avoid, whenever possible, choosing sides in morally divisive disputes.[389] One good reason for this abstention is that allowing one group to impose its moral view over others poses a challenge to the ideal that all individuals are equal and free. There are certainly disputed *political* issues that will have to be settled by the majority, such as choices involving environmental protection, economic development, the use of nuclear energy, or limits on affirmative action. *Truly moral issues*, however, should not be decided by majorities. The majority, for example, has no right to say that homosexual sex is a crime, as the Supreme Court held in *Bowers v. Hardwick*.[390] Of course, there will be cases in which it is difficult to draw the line between the political and the truly moral; indeed, the two domains often overlap.[391] Whenever a significant moral issue can be identified, however, the best thing for the state to do is to lay out a framework that allows individuals on both sides of the issue to exercise personal autonomy. The battlefield in such cases should remain within the realm of ideas and rational persuasion. In the next Part, I will apply these ideas to a set of controversial cases.

## III. Using Human Dignity to Structure Legal Reasoning in Hard Cases

### A. *Abortion*

The voluntary termination of a pregnancy is a highly controversial moral issue throughout the world. In different countries, legislation

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[387] *See* Enoch, *supra* note 386, at 16.

[388] *Id.* at 22.

[389] *See* Post, Domains, *supra* note 288, at 4.

[390] *See* 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558. Frank Michelman critiqued this decision in his insightful article *Law's Republic*, 97 Yale L.J. 1943 (1998), which is viewed as a canonical text on "the second wave of republican legal scholarship." *See* David Kennedy & William W. Fisher III, *Frank Michelman*, *in* The Canon of American Legal Thought 779, 781 (David Kennedy & William W. Fisher III eds., 2006).

[391] *See Introduction* to Morality and the Law, *supra* note 382, at 1.

ranges from total prohibition and criminalization to practically unrestricted access to abortion.[392] Strikingly, abortion rates in countries where the procedure is legal are very similar to the rates in countries where it is illegal.[393] Indeed, the main difference between countries that criminalize abortion and those that decriminalize it is the incidence of unsafe abortion.[394] Criminalization also can result in *de facto* discrimination against poor women, who must resort to primitive methods of ending pregnancy due to lack of access to either private or public medical assistance.[395] Starting with Canada in 1969,[396] the United States in 1973,[397] and France in 1975,[398] abortion, usually in the first trimester, was broadly removed from criminal codes. Several other countries followed this trend, including Austria (1975), New Zealand (1977), Italy (1978), the Netherlands (1980), and Belgium (1990).[399] In Germany, a rather ambiguous judicial decision in 1993 led to the non-punishment of abortion in the first trimester provided that certain conditions are met.[400] In fact, almost all countries in the richer North Atlantic world decriminalize abortion in the early stages of pregnancy, thus rendering the total prohibition of abortion a policy that prevails only in the developing world.[401] The Catholic Church and many evangelical churches strongly oppose abortion based on the belief that life

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[392] *See* Susan A. Cohen, *New Data on Abortion Incidence, Safety Illuminate Key Aspects of Worldwide Abortion Debate*, Guttmacher Pol'y Rev., Fall 2007, at 2, 3–4.

[393] *See id.* at 2.

[394] *See id.* at 3–4.

[395] *See id.*

[396] Criminal Law Amendment Act, S.C. 1968–1969, c. 38 (creating an exception for abortions performed in a hospital where, in the opinion of a three-doctor hospital committee, the life or death of the mother is in danger).

[397] In the United States, the plurality decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), revised the *Roe v. Wade*, 410 U.S. 113 (1973), rule of priority for the woman's interest during the first trimester and replaced the strict scrutiny test, which was the standard in matters of fundamental rights, with the less rigorous "undue burden" test. *See Casey*, 505 U.S. at 869–79.

[398] Loi 75-17 du 18 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75-17 of Jan. 18, 1975, on the voluntary termination of pregnancy], Journal Officiel de la République Française [J.O.][Official Gazette of France], Jan. 1, 1980, p. 3, *available at* http://admi.net/jo/loi75-17.html. For summary of the law, in English, see About French Abortion Laws, Berkman Center Internet & Soc'y, http://cyber.law.harvard.edu/population/abortion/France.abo.htm (last visited May 15, 2012).

[399] For an overview of abortion policies in countries throughout the world, see UN Population Div., *Abortion Policies*, Dep't Econ. & Soc. Aff., http://www.un.org/esa/population/publications/abortion/ (click on "Country Profiles" to view individual countries' policies) (last visited May 15, 2012).

[400] *See* Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] May 28, 1993, 88 BVerfGE 203 (Ger.).

[401] *See* Cohen, *supra* note 392, at 2–3.

begins at conception and is inviolable at that point.[402] Yet, many who personally believe that abortion is morally wrong still favor its decriminalization for philosophical or pragmatic reasons.[403] The next paragraphs discuss the relationship between abortion and human dignity, taking into account intrinsic value, autonomy, and community value, as well as the rights and duties associated with each of these elements.

At the *intrinsic value* level, the abortion debate represents a clash between fundamental values and rights.[404] For those who believe that a fetus should be treated as human life beginning at fertilization—and this premise must be assumed here for the sake of argument—abortion clearly is a violation of the fetus' *right to live*. This is the foundation underlying the pro-life movement, supporting its conclusion that abortion is morally wrong.[405] On the other hand, pregnancy and the right to terminate it implicate the *physical and mental integrity* of the woman, her power to control her own body. Moreover, abortion must also be considered an *equal protection* issue, because only women bear the full burden of pregnancy and the right to terminate it puts them on a level playing field with men.[406] Therefore, with regard to human dignity viewed as intrinsic value, there is one fundamental right favoring the anti-abortion position—the right to life—countered by two fundamental rights favoring the position of the woman's right of choice—physical and mental integrity, and equal protection of the law.[407]

As for *autonomy*, we must consider what role self-determination plays in the context of abortion.[408] Individuals must be free to make

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[402] *See generally* Brenda D. Hofman, *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, 28 J. Church & St. 225 (1986) (discussing the theological underpinnings of Catholic and evangelical opposition to abortion).

[403] *See* Adam Sonfield, *Delineating the Obligations That Come with Conscientious Refusal: A Question of Balance*, Guttmacher Pol'y Rev., Summer 2009, at 6, 6.

[404] *Cf.* discussion *supra* Part II.B.1.

[405] *See* Reva B. Siegel, *Dignity and Politics of Protection: Abortion Restriction Under* Casey/Carhart, 117 Yale L.J. 1694, 1706, 1713 (2008).

[406] *See* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1401–02. As West wrote, "[t]he preferred moral foundations of the abortion right . . . continue to shift, from marital and medical privacy, to women's equality, to individual liberty or dignity, and back . . . ." *Id.* at 1396.

[407] For a thoughtful analysis of the use of dignity in the context of abortion, see Siegel, *supra* note 405, at 1736–45. Siegel compares the decision in *Casey*, 505 U.S. 833, in which dignity was invoked as a reason for protecting women's right to choose an abortion, and the decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), in which dignity was invoked as a reason for woman-protective abortion restrictions. Siegel criticizes the latter for "gender-paternalist" and "unconstitutional stereotypes about women's roles and capacities." *See* Siegel, *supra* note 405, at 1773, 1796.

[408] *Cf.* discussion *supra* Part II.B.2.

basic personal choices regarding their lives.[409] Reproductive rights and child rearing are certainly among these decisions and choices. The *right to privacy*, as established by U.S. Supreme Court decisions regarding abortion, is described as "the principle of public toleration of autonomous, self-regarding choice."[410] It is within the autonomy of a woman and, therefore, at the core of her basic freedoms, to decide for herself whether or not to have an abortion. The will of the mother to terminate her pregnancy could be countered by a hypothetical will of the fetus to be born. One could speculate then that there would be a clash of autonomies between the woman and the fetus. Two objections can be made to this line of reasoning. The first objection is that, although the intrinsic value of the fetus has been assumed in the previous paragraph, it might be more difficult to acknowledge its autonomy due to the fact that it does not have any degree of self-consciousness. Further, even if this argument could be overcome, there remains another argument. Because the fetus depends on the woman, but not the other way around, if the "will" of the fetus prevailed, the woman would be completely instrumentalized by its project. In other words, if a woman were to be forced to keep a fetus she did not want, she would be transformed into a means for the satisfaction of someone else's will, and not treated as an end in herself.

Finally, at the *community value* level, it is necessary to determine whether autonomy can be curtailed either by values shared by the social group or state interests imposed by legal norms.[411] Abortion is arguably the most divisive moral issue in public life today. As mentioned above, most countries in North America and in Europe have decriminalized early stage abortion.[412] On the other hand, most countries in Africa (excluding South Africa) and Latin America impose dramatic restrictions on abortions at any stage of pregnancy.[413] The fact that important and respectable religious groups oppose abortion on the basis of their faith and dogmas does not overcome the objection that such arguments do not fall within the realm of public reason.[414] Such being the case, one cannot find a significant societal consensus on the matter.

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[409] Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. Rev. 683, 688–89 (1992).

[410] *Id.* at 690.

[411] *Cf.* discussion *supra* Part II.B.3.

[412] *See supra* text accompanying notes 392–401.

[413] *See* World Health Org. [WHO], *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008*, at 5, 7–9 (6th ed. 2008).

[414] *Cf. supra* text accompanying note 235.

In fact, the only clearly perceivable conclusion is that abortion is a point of major moral disagreement in contemporary society. In such circumstances, the proper role for the state is not to take sides and impose one view, but instead to allow individuals to make autonomous choices. In other words, the state must value individual autonomy, not legal moralism. As the U.S. Supreme Court stated in *Roe v. Wade*, the state's interest in protecting prenatal life and the mother's health does not outweigh the fundamental right of a woman to have an abortion.[415] There are two other strong arguments in favor of legalization. The first, as statistics show, is the difficulty of enforcing the prohibition.[416] The second is the discriminatory impact that a ban on abortion has on poor women.[417] Decriminalization does not preclude those who oppose abortion from advocating their views. In fact, many communities in countries with legalized abortion treat it as a social taboo and use strong social pressure to discourage women from terminating their pregnancies.[418]

### B. *Same-Sex Marriage*

Legal recognition of same-sex marriage is another highly controversial moral issue throughout the world. Notwithstanding this controversy, the evolution of public opinion on the matter is evolving rapidly and resistance to change is less effective in comparison to the relatively static stalemate on abortion.[419] To be sure, discrimination against homosexual conduct and homosexual partners clearly existed in legal and social practices until the beginning of the twenty-first century.[420] In the United States, for example, prior to the 1970s, the American Psychiatric Association categorized homosexuality as a mental disorder.[421] In 1971,

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[415] *See* 410 U.S. at 154.

[416] *See* WHO, *supra* note 413, at 1 & fig.1, 5 & fig.2 (showing that approximately 21.6 million unsafe abortions took place in 2008, almost all in developing countries where the practice is illegal).

[417] *See id.* at 9, 10. Indeed, even in countries where abortion is legal, politicians who oppose it have enacted laws that restrict public funding, as has occurred in the United States and Canada. *See, e.g.*, Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1097 (2007); Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, GUTTMACHER POL'Y REV., Winter 2007, at 12, 12.

[418] *See* Erdman, *supra* note 417, at 1097; Boonstra, *supra* note 417, at 12.

[419] *See* MICHAEL J. ROSENFELD, THE AGE OF INDEPENDENCE: INTERRACIAL UNIONS, SAME-SEX UNIONS, AND THE CHANGING AMERICAN FAMILY 143 (2007).

[420] *See infra* text accompanying notes 421–424.

[421] *See* ROSENFELD, *supra* note 419, at 176. ("Until the 1950s, the consensus of psychiatrists and psychologists was that homosexuals were deeply disturbed people.").

all but two American states criminalized homosexual sodomy.[422] As late as 1986, the Supreme Court upheld state laws criminalizing intimate homosexual sexual behavior,[423] a decision ultimately overruled in 2003.[424] In 1993, a major development occurred when the Supreme Court of Hawaii ruled that a statute limiting marriage to opposite-sex couples constituted sex discrimination.[425] As a reaction to the court's ruling, from 1995 to 2005, forty-three states adopted legislation prohibiting same-sex marriage.[426] Ironically, this backlash unified the Lesbian, Gay, Bisexual, and Transgender community in favor of same-sex marriage, which was opposed by radical militants who considered it a concession by sexual minorities to conventional rites.[427] In 2004, in response to a decision by its highest court, Massachusetts became the first state to legalize same-sex marriage.[428] In recent years, homosexuality has increasingly become an accepted lifestyle and there is a growing belief that its causes are predominantly biological.[429] If this is indeed the case, discriminating on the basis of sexual orientation is the same as discriminating against Asians for their eyes, Africans for their color, or Latin Americans for being the product of miscegenation.

In this evolving context, it is no surprise that a number of countries have legalized same-sex marriage, including Argentina, Belgium, Brazil, Canada, Iceland, the Netherlands, Norway, Portugal, South Af-

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[422] The two states that had not criminalized sodomy were Illinois and Connecticut. William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse: What We've Learned from the Evidence 23 (2006).

[423] *See* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[424] *See Lawrence*, 539 U.S. 558. Prior to *Lawrence*, in *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court struck down Amendment 2 to the Constitution of Colorado, which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."

[425] *See* Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993), *reconsidered and clarified in part*, 852 P.2d 74 (Haw. 1993).

[426] *See* Eskridge & Spedale, *supra* note 422, at 20.

[427] *See id.*; *see also* Man Yee Karen Lee, Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies 11 (2010); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 Va. L. Rev. 1535, 1549 (1993).

[428] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

[429] *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009) (finding same-sex marriage legal and reasoning in part that sexual orientation is defined at birth and is thus immutable).

rica, and Sweden.[430] In several other countries, similar legislation has been proposed and discussions are underway.[431] It is true that some countries, including (surprisingly) France, prohibit same-sex marriage.[432] In the United States as well, a 1996 federal statute known as the Defense of Marriage Act (DOMA) defines marriage as "a legal union between one man and one woman as husband and wife."[433] The administration of President Barack Obama, however, announced that it will no longer defend the constitutionality of DOMA, which has been challenged in several different lawsuits.[434] Moreover, several states have passed legislation recognizing same-sex marriage, including Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and New York, as well as the District of Columbia.[435] As with abortion, there is fierce religious opposition to homosexual conduct and same-sex marriage.[436] Based on biblical passages read as condemnations of homosexual conduct,[437] many evangelical groups have expressed strong disapproval; within the Catholic Church, Popes John Paul II and Benedict XVI have criticized countries for passing legislation protective of homosexuality.[438]

Analyzing same-sex marriage in light of the idea of human dignity presented in this Article is much less complicated than analyzing abortion under the same rubric. Indeed, at the *intrinsic value* level, there is a fundamental right in favor of legalizing same-sex marriage: *equality under the law.*[439] To deny same-sex couples access to marriage— and all the social and legal consequences that it entails—represents a form of discrimination based on sexual orientation. There is no other argument stemming from intrinsic value that could reasonably be employed to

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[430] *See Timeline: Same-Sex Marriage Around the World*, CBC News: World (May 29, 2009), http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html (last updated Feb. 7, 2012).

[431] *See id.*

[432] *Le Conseil Constitutionnel dit non au Mariage Homosexuel*, *supra* note 56.

[433] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996), 28 U.S.C. § 1738C (Supp. II 1996)).

[434] Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights,* N.Y. Times, Feb. 24, 2011, at A1.

[435] *See, e.g., Timeline: Same-Sex Marriage Around the World*, *supra* note 430.

[436] *See, e.g.*, Michael Paulson, *Pope Says Gay Unions are False*, Bos. Globe, June 7, 2005, *available at* http://www.boston.com/news/specials/gay_marriage/articles/2005/06/07/pope_says_gay_unions_are_false/.

[437] *See Leviticus* 18:22; *Romans* 1:26–27.

[438] Paulson, *supra* note 436*; U.S. Bishops Urge Constitutional Amendment to Protect Marriage*, Am. Catholic: News Feature, http://www.americancatholic.org/News/Homosexuality/default.asp (last visited May 15, 2012).

[439] *See* discussion *supra* Part II.B.1.

counter the right of equal protection and respect to which homosexuals are entitled. As for *autonomy*, same-sex marriage involves two consenting adults who choose, without coercion or manipulation, how to exercise their affection and sexuality.[440] There is neither violation of another's autonomy nor harm to another that could justify a prohibition. Finally, at the level of *community value*, one must acknowledge that numerous segments of civil society, particularly religious groups, disapprove of homosexual behavior and same-sex marriage.[441] To deny the right of same-sex couples to get married, however, would be an unwarranted restriction of their autonomy on behalf of either improper moralism or the tyranny of the majority. First, there is a fundamental right involved, whether it is the right to equality or to privacy (freedom of choice). Even if this were not the case, the undeniable fact is that no risk of harm to third parties or to oneself is presented here. Finally, one can no longer find a strong level of societal consensus against same-sex marriage in a world where, at least in most Western societies, homosexuality is largely accepted.[442] Of course, anyone has the right to advocate against same-sex marriage and to try to convince people to abstain from participation.[443] This is different, however, than asking the state not to recognize a legitimate exercise of personal autonomy by free and equal citizens.

### C. *Assisted Suicide*

Assisted suicide is the act by which an individual brings about his or her own death with the assistance of someone else.[444] As a general rule, the debate on this matter involves physician-assisted suicide, which occurs when a doctor provides the necessary information and means, such as drugs or equipment, but the patient performs the act.[445] Discussion of assisted suicide usually assumes—as will be assumed here—that the relevant individuals are terminally ill and enduring great pain and suffering.[446] There is strong opposition to assisted suicide by most religions, particularly the Catholic Church, which considers suicide to

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[440] *Cf.* discussion *supra* Part II.B.2.

[441] *Cf.* discussion *supra* Part II.B.3.

[442] *See supra* text accompanying notes 424–435.

[443] The fact that there is not a prohibition or a potential use of state coercion does not oblige people with a moral divergence to remain silent. *See* HART, *supra* note 355, at 76.

[444] *See* Washington v. Glucksberg, 521 U.S. 702, 706–07 (1997).

[445] *See* Vacco v. Quill, 521 U.S. 793, 797 (1997); *Glucksberg*, 521 U.S. at 707.

[446] *See Vacco*, 521 U.S. at 797; *Glucksberg*, 521 U.S. at 707.

be morally wrong.[447] Although the typical conflict between secular humanists and religious believers is also present here, there are some subtleties that provide unusual nuance to this debate. For one, the Hippocratic Oath, still taken by doctors in many countries, directly addresses the matter by stating unambiguously: "I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan . . . ."[448] Furthermore, there is always the concern that pressure from family or health plans could compromise the free and informed consent of the patient.[449] Thus, unlike abortion and same-sex marriage (or some recognized form of same-sex partnership) which are allowed in most developed countries, physician-assisted suicide is still generally illegal.[450] In Europe, as mentioned earlier, the ECtHR decided in *Pretty v. United Kingdom* that there is no fundamental right to assisted suicide.[451]

The Supreme Court of Canada adopted the same outcome when it declared Section 241(b) of the Criminal Code, which criminalized the assistance of suicide, constitutional.[452] In a 5-to-4 decision, the court held: (1) the state interest in protecting life and the vulnerable should prevail over claims of personal autonomy, physical and psychological integrity, and human dignity; (2) the cruel and unusual punishment clause did not apply; and (3) the prohibition of assisted suicide, even if an infringement of equality rights, was justified by substantial legislative objective and met the proportionality test.[453] In addition, the majority asserted that it was the role of Parliament—and not of the court—to deal with the question of assisted suicide.[454] The dissenting justices strongly argued that forcing an incapacitated terminally ill patient to have a "dreadful, painful death" was "an affront to human dignity" and, further, that there was no difference between refusing treatment and assisted suicide,[455] that there was an infringement of the right to equality in preventing persons physically unable to end their lives,[456] and that

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[447] *See* Pretty v. United Kingdom, App. No. 2346/02, 35 Eur. H.R. Rep. 1, 26 (2002).

[448] For an English translation by Michael North of the National Library of Medicine, see *The Hippocratic Oath*, U.S. Nat'l Library of Med.: Nat'l Insts. of Health, http://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited May 15, 2012).

[449] *See Pretty*, 35 Eur. H.R. Rep. at 17.

[450] *See Glucksberg*, 521 U.S. at 774–75.

[451] *See Pretty*, 35 Eur. H.R. rep. at 41.

[452] Rodriguez v. British Columbia, (A.G.) [1993] 3 S.C.R. 519, 521–22 (Can.).

[453] *See id.* at 522–23.

[454] *See id.* at 523.

[455] *See id.* at 526 (Cory, J., dissenting).

[456] *See id.* at 524–25 (Lamer, C.J., dissenting).

fear of abuse was not sufficient to override the appellant's entitlement to end her life.[457]

A handful of countries legalize physician-assisted suicide, including Belgium, Colombia, Luxembourg, the Netherlands, and Switzerland.[458] In the United States, where the Supreme Court upheld state bans on physician-assisted suicide,[459] three states legalized assisted suicide for people who have a very limited amount of time to live. Oregon's Death with Dignity Act requires the diagnosis of a terminal illness that will, "within reasonable medical judgment, produce death within six months."[460] The Washington Death with Dignity Act, enacted in 2009, mirrors this language by requiring a diagnosis of an illness that will "within reasonable medical judgment, produce death within six months."[461] The most recent state to adopt an assisted suicide regime is Montana, which acted through its state supreme court to find immunity from prosecution for doctors who assisted in the deaths of terminally ill patients.[462] The state legislature, however, declined to pass a bill that fully describes the limits of any right to die and instead left the issue in "legal limbo."[463] The rules of these American states are stricter than those of other countries. In the Netherlands, for example, the standard is more relaxed, and people facing the prospect of "unbearable suffering with no prospect of improvement" may perform assisted suicide, regardless of the exact time of diagnosis.[464] Similarly, under Belgian law, patients suffering from "constant and unbearable physical or psychological pain resulting from an accident or incurable illness" are legally allowed to request assisted suicide from their physicians.[465]

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[457] *See id.* at 523 (L'Hereux & McLachlin, JJ., dissenting).

[458] Andrew Clark, *Will Massachusetts Legalize Physician-Assisted Suicide?*, Atlantic, Dec. 1, 2011, *available at* http://www.theatlantic.com/national/archive/2011/12/will-massachusetts-legalize-physician-assisted-suicide/249346/ ("There are currently six nations that permit physician-assisted suicide: Luxembourg, Belgium, the Netherlands, Albania, Colombia, and Switzerland.").

[459] *See Vacco*, 521 U.S. at 797; *Glucksberg*, 521 U.S. at 705–06.

[460] *See* Or. Rev. Stat. § 127.800 (2008).

[461] *See* Wash. Rev. Code § 70.245.010 (2009).

[462] *See* Kirk Johnson, *Ruling by Montana Supreme Court Bolsters Physician-Assisted Suicide,* N.Y. Times, Jan 1, 2010, at A17.

[463] *See Montana Lawmakers Put Physician-Assisted Suicide Issue on Hold*, Billings Gazette, Feb. 20, 2011, *available at* http://billingsgazette.com/news/state-and-regional/montana/article_a35791fe-3d00–11e0-bff3–001cc4c002e0.html.

[464] Ian Ireland, *The Netherlands Euthanasia Legislation*, Parliament Austl. (May 21, 2001), http://www.aph.gov.au/library/pubs/rn/2000–01/01rn31.htm.

[465] *Belgium Legalizes Euthanasia,* BBC News (May 16, 2002), http://news.bbc.co.uk/2/hi/europe/1992018.stm (internal quotations omitted).

Finally, it is necessary to examine the relationship between assisted suicide and each of the components of the concept of human dignity described in this Article.[466] As for *intrinsic value*, the fundamental *right to life* would naturally be an obstacle to legalizing assisted suicide.[467] It is difficult to find a right to die that could be invoked to counter the right to life. Death is inevitable and not a choice. There certainly is a *right to physical and mental integrity*, however, which is also associated with the inherent value of every human being. The fact is that contemporary medical technology has the capacity to transform the process of dying into a journey that can last longer than would otherwise occur and be more painful than necessary.[468] Each individual, thus, should have the right to die with dignity, and should not be compelled to suffer for an extended period of time without the ability to function normally. In a rather paradoxical way, at the level of intrinsic value, the right to life and the right to integrity can oppose each other.

Preserving *autonomy* is one of the "integral values" in the debate over physician-assisted suicide, along with alleviating suffering and maintaining community.[469] Autonomy generally supports the idea that a competent person has the right to choose to die, under certain circumstances, if after thoughtful reflection she finds that "unrelieved suffering outweighs the value of continued life."[470] In addition, provided the physician agrees to do the procedure, no one else's autonomy is in question. *Community value*, however, is the most complex discussion in this analysis.[471] To be clear, I do not think the community and state should have the right to impose their moralist or paternalist conceptions on someone who is hopelessly suffering and close to the end of life. They do, however, have the authority and the duty to establish some safeguards in order to make sure that each patient's autonomy is properly exercised. In fact, there is a real risk that legalization of assisted suicide could put pressure on the elderly and those with terminal illness to choose death in order to reduce the burden on their families. In such scenarios, instead of the choice to die being an embodiment of

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[466] Since I do not think equal protection plays a role in this scenario, it will not be addressed here.

[467] *Cf.* discussion *supra* Part II.B.1.

[468] *See generally* DeWitt C. Baldwin, Jr., *The Role of the Physician in End of Life Care: What More Can We Do?*, 2 J. Health Care L. & Pol'y 258 (1999) (discussing use of advanced medical technologies during end-of-life care and their impact on patients).

[469] *See* Peter Rogatz, *The Positive Virtues of Physician-Assisted Suicide*, Humanist, Nov./Dec. 2001, at 31, 31; *cf.* discussion *supra* Part II.B.2.

[470] *See* Rogatz, *supra* note 469, at 31.

[471] *Cf.* discussion *supra* Part II.B.3.

autonomy, it becomes a product of the coercion of vulnerable and marginalized individuals, reducing the value of their lives and dignity.[472] For these reasons, individuals who are terminally ill and enduring great suffering, as well as those who are in persistent vegetative states,[473] should have the right to assisted suicide, but legislation must be cautiously crafted to ensure that the morally acceptable idea of dying with dignity does not become a "recipe for elder abuse."[474] These pertinent concerns regarding the protection of vulnerable people, however, do not affect the central idea defended here: When two fundamental rights of the same individual are in conflict, it is reasonable and desirable for the state to value personal autonomy.[475] The bottom line is that the state should respect a person's choices when it is her own tragedy that is at stake.[476]

## Conclusion

### *The One and the Many*

Early Greek philosophy centered on the quest for an ultimate principle—a common substratum to all things and a unity underlying diversity.[477] This problem is known as "the One and the Many."[478] If such a concept were to be applied to democratic societies, human dignity would be a leading candidate for the greatest principle that is in the essence of all things. It is true, however, that historical and cultural circumstances in distinct parts of the world decisively affect the meaning and scope of human dignity. Intuitively, an idea that varies with pol-

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[472] The same concerns are present in Nussbaum, *Human Dignity*, *supra* note 249, at 373. *See also* Ronald Dworkin, Life's Dominion 190 (1994) [hereinafter Dworkin, Dominion].

[473] The issue of consent when there is an incompetent person involved entails a great deal of complexity related to the proof of the patient's actual wish, the determination of what the patient would have wanted, and identification of what is in the person's best interests. Some of these issues were dealt with in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), which affirmed a decision that did not permit the patient's parents to refuse life-supporting treatment on behalf of their daughter, absent a "clear and convincing" evidence of her desire. For a criticism of the decision, see Dworkin, Dominion, *supra* note 472, at 196–98. For a deeper discussion of consent, see generally Deryck Beyleveld & Roger Brownsword, Consent in the Law (2007).

[474] *See* Margaret K. Dore, *Physician-Assisted Suicide: A Recipe for Elder Abuse and the Illusion of Personal Choice*, 36 Vt. B. J. 53, 55 (2011).

[475] *See* Dworkin, Dominion, *supra* note 472, at 239 (advocating an attitude of restraint from the state and community).

[476] *See* Lorenzo Zucca, Constitutional Dilemmas 169 (2007).

[477] *See* 1 Copleston, *supra* note 215, at 76.

[478] *Id.*

itics and geography is too elusive to become a workable domestic and transnational legal concept. The ambitious and risky purpose of this Article is to identify the legal nature of the idea of human dignity and to give it a minimum content, from which predictable legal consequences can be deduced, applicable throughout the world. It is an effort to find common ground and, at the very least, common terminology. With that in mind, human dignity is characterized as a *fundamental value* that is at the foundation of human rights, as well as a *legal principle* that (1) provides part of the core meaning of fundamental rights and (2) functions as an interpretive principle, particularly when there are gaps, ambiguities, and clashes among rights—or among rights and collective goals—as well as moral disagreements. To be sure, the principle of human dignity, as elaborated here, attempts to supply a roadmap to structure legal reasoning in hard cases, but it does not, of course, solve or suppress moral disagreements. That is an impossible task.

After establishing that human dignity should be regarded as a legal principle—and not as a freestanding fundamental right—I propose three elements as its minimum content and derive a set of rights and implications from each. For legal purposes, human dignity can be divided into three components: *intrinsic value*, which identifies the special status of human beings in the world; *autonomy*, which expresses the right of every person, as a moral being and as a free and equal individual, to make decisions and pursue his own idea of the good life; and *community value*, conventionally defined as the legitimate state and social interference in the determination of the boundaries of personal autonomy. This communitarian dimension of human dignity must be under permanent and close scrutiny due to the risks of paternalism and moralism affecting legitimate personal choices and rights. In structuring legal reasoning in more complex, divisive cases, it is useful to identify and discuss the relevant questions that arise in each of the three levels of analysis, and therefore provide more transparency and accountability to the justification and choices made by courts or other interpreters.

### *Equals, Nobles, and Gods*

As we have seen, dignity, in a line of development stretching far back in time, was a concept associated with rank: the personal status of certain political or social positions. Dignity, thus, was tied up with honor and entitled some individuals to special treatment and privileges. In this sense, dignity presupposed a hierarchical society and denoted nobility, aristocracy, and the superior condition of some persons over oth-

ers. Over the centuries, however, with the impulse of religion, philosophy, and sound politics, a different idea of dignity developed—*human dignity*—which protects the equal intrinsic worth of all human beings and the special place of humanity in the universe. Such is the concept explored in this Article; a concept that is at the foundation of human rights, particularly the rights of freedom and equal protection. These ideas are now consolidated in constitutional democracies, and some higher aspirations have been cultivated. In a time to come, with a few drops of idealism and political determination, human dignity may become the source of a high rank and distinction that is accorded to everyone: the maximum attainable level of rights, respect, and personal achievement. All persons will be nobles.[479] Or, better yet, as in the lyrics of *Les Miserables*, "[e]v'ry man will be a king."[480] And, some time in the future, given that desire and ambition are unlimited, men will seek to become Gods.[481]

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[479] This idea is defended in Jeremy Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkley* 28–29, 30 (N.Y. Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09–50, 2009) (crediting Gregory Vlastos, *Justice and Equality*, *in* Theories of Rights, *supra* note 379, at 41, for the idea).

[480] *See* Alain Boublil and Herbert Kretzmer, *One Day More:*

> One day to a new beginning
> Raise the flag of freedom high!
> Every man will be a king
> Every man will be a king
> There's a new world for the winning
> There's a new world to be won
> Do you hear the people sing?

Les Misérables (TriStar Pictures 1998).

[481] *See* Jean-Paul Sartre, Being and Nothingness 566 (Hazel E. Barnes, trans., 1956) ("[T]he best way to conceive of the fundamental project of human reality is to say that man is the being whose project is to be God."); Jean-Paul Sartre, Existentialism as Humanism 56 (Philip Mairet trans., 1973); *see also* Roberto Mangabeira Unger, The Self Awakened: Pragmatism Unbound 256 (2007). For Unger, the divinization project is impossible, but there are ways by which "we can become more godlike."