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DIGNITY—THE ENEMY FROM WITHIN: A THEORETICAL AND COMPARATIVE ANALYSIS OF HUMAN DIGNITY AS A FREE SPEECH JUSTIFICATION

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ABSTRACT

This Article challenges the use of human dignity as an independent free speech justification. The articulation of free speech in human dignity terms carries unwarranted potential consequences that may result in limiting free speech rather than protecting it. This possible outcome makes human dignity inadequate as a free speech justification.

This Article also demonstrates why articulations of the rationales behind the argument from dignity are either superfluous, since they are aptly covered by the argument from autonomy, or simply too broad and speech-restrictive to be considered free speech justifications. As a matter of principle, the nexus between freedom of speech and human dignity should be construed as inherently contentious.

This Article combines theoretical and comparative analyses to demonstrate why European and other Western democracies are more susceptible to the use of human dignity, both in their constitutional doctrines and as a speech-restrictive term. Current American scholarship regarding dignity as a free speech justification neglects to recognize the harms of such discourse in a non-American setting, as well as in the United States. Thus, unintentionally, advocates of free speech may actually promote a justification that eventually will lead to speech restriction. For these reasons, the Article warns that inserting human dignity into the realm of free speech justifications may be analogous to inserting a "Trojan Horse," with human dignity as "the enemy from within."

INTRODUCTION

In recent years, human dignity has increasingly become a prevailing justification both for the protection and limitation of human rights internationally.[1] At the same time, vagueness surrounds hu-

[1] Human dignity appears as a fundamental right and a constitutive principle in prominent international documents and treaties, as well as in an increasing number of foreign constitutions. *See* Jochen Abr. Frowein, *Human Dignity in International Law*, *in* THE CONCEPT OF HUMAN

man dignity and its different possible interpretations, even in context-specific legal settings. While human dignity plays a limited role in the American legal system, its potency, influence, and even its literal meaning are far greater in other democracies.[2] In those countries, human dignity often encompasses values such as equality and serves as a platform to promote progressive liberal or communitarian ideas.[3] Human dignity's increasing influence leads to a growing tendency to evaluate rights, including freedom of expression, through its lens.

The relationship between freedom of speech and human dignity is vague, ambiguous and has not been sufficiently explored to date. Often the two conflict, and a proper balance between them is difficult to reach, as human dignity may be used as a justification for both protecting speech and restricting it. The goals of this analysis are first to show the inadequacy of human dignity as an independent justification for free speech, and second, that human dignity and freedom of

DIGNITY IN HUMAN RIGHTS DISCOURSE 121, 121–22 (David Kretzmer & Eckart Klein eds., 2002) (commenting on the presence of human dignity ideas in early international law theory but remarking on the express reference to human dignity in more recent international texts); Georg Nolte, *European and US Constitutionalism: Comparing Essential Elements*, *in* EUROPEAN AND US CONSTITUTIONALISM 3, 10 (Georg Nolte ed., 2005) (noting that because human dignity is a "comparatively modern *legal* term . . . it is . . . not surprising that it is not mentioned in the U.S. Constitution" but is included in postwar European constitutions and other international human rights documents).

[2] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW 2 (1996) (advocating a moral reading of the Constitution, which proposes the invocation of principles of justice and political decency to protect individual rights); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at vii (1977) ("defin[ing] and defend[ing] a liberal theory of law" while criticizing what he describes as the ruling theory, which is based in legal positivism and utilitarianism); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 148–49 (1984) (noting that, although there has been recent use by the U.S. Supreme Court of the principle of human dignity, there has been more extensive use of the concept under international law); James Q. Whitman, *'Human Dignity' in Europe and the United States: The Social Foundations*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 1, at 108, 108–09 (drawing on "historical sociology" to explain the weakness of "human dignity, as Europeans conceive it" in the United States). *But see* Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 758 (1980) (concluding that "[t]he fundamental value that constitutionalism protects is human dignity").

[3] *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 359 (2d ed. 1997) ("[Human dignity] is *the* formative principle in terms of which all other constitutional values are defined and explained."); David Kretzmer, *Human Dignity in Israeli Jurisprudence*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 1, at 161, 168 ("The perception of human dignity as a general value has enabled the Court to resort to the concept in order to create rights in various situations. Thus, it has held that human dignity implies one's right to know the identity of one's parents, the right of a man to grow a beard, the right of a person not to be subject to sexual harassment, the right of a detained person that his family be informed of his whereabouts, the right of the family of a deceased person to hold a decent funeral and to determine the inscription on the tombstone, the right to parenthood, the right of a spouse to maintenance, and the right of an adult to be adopted by a family with whom he has a special relationship." (footnotes omitted)).

speech should be viewed as contending rather than harmonious values. This Article offers a theoretical analysis regarding the inadequacy of human dignity as an independent justification for freedom of expression and demonstrates how some Western legal systems' nearly exclusive focus on human dignity may prove unsatisfactory when dealing with free speech issues.

Part I reviews the evolution of freedom of expression in the United States in comparison with other Western democracies. Part II then briefly reviews common justifications for freedom of expression through the "classical model" for free speech. This serves as background for Part III, which assesses the appropriateness of human dignity as an independent free speech justification. This Part offers several parameters that assist in predicting whether a nation's human dignity focus is likely to justify protecting speech or restricting it. These parameters are then applied to the United States and other Western democracies to demonstrate why, in the United States, human dignity is likely to be construed as protecting free speech, whereas in other Western democracies, human dignity is likely to be construed as restricting speech. Finally, due to the problematic nexus of human dignity and freedom of expression from both theoretical and comparative standpoints, driving a wedge between the two is recommended.

I. THE EVOLUTION OF FREEDOM OF EXPRESSION IN THE UNITED STATES AS COMPARED WITH OTHER WESTERN DEMOCRACIES

Freedom of expression is one of the most universally prominent rights in all democratic legal systems. Although the protection of freedom of expression was not developed in most Western democracies fifty or even thirty years ago, most democracies have started developing protective freedom of expression jurisprudence in the past ten to twenty-five years.[4] Currently, freedom of expression is considered a prominent right among virtually all Western democracies, yet its scale and scope vary among different systems. The United States is probably the most protective of (most) speech rights among Western

[4] Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 1, at 49, 58 [hereinafter Schauer, *Freedom of Expression Adjudication*].

democracies[5]—a phenomenon that receives the label "American Exceptionalism."[6]

Free expression rights are initially structured in accordance with a nation's common conception of those rights, as well as the ability of a nation's derived rules to withstand change over time. In the United States, freedom of expression doctrines crystallized long before they did so in other Western democracies. The First Amendment was drafted and ratified more than two centuries ago, and although a small portion of its development happened in the nineteenth century,[7] most of its development by the Supreme Court began in the early twentieth century.[8] The roots of the First Amendment and its interpretations are planted in libertarianism and the Enlightenment.[9] These characteristics are also manifested in the "absolutist view" of the First Amendment—a view which still affects First Amendment understandings.[10] The Founding Fathers' Lockean influences and

[5] For an exception to this rule, see Roger Errera, *Freedom of Speech in Europe*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 1, at 23, 45–46, who observed that European law may be more favorable to journalists than American law because "the First Amendment may not be invoked by journalists who are called as witnesses or under a subpoena to refuse to disclose the source of their information."

[6] To be precise, "American Exceptionalism" describes a broader concept than one pertaining solely to freedom of expression; it refers to matters in which the United States diverges from most Western democracies, such as the death penalty and compliance with various international law norms. *See generally* Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005) [hereinafter Schauer, *The Exceptional First Amendment*].

[7] *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997) (describing the transformations that took place in American free speech law and liberalism between 1870 and 1920); JUHANI RUDANKO, THE FORGING OF FREEDOM OF SPEECH: ESSAYS ON ARGUMENTATION IN CONGRESSIONAL DEBATES ON THE BILL OF RIGHTS AND ON THE SEDITION ACT (2003) (discussing the development of free speech law during the late eighteenth and early nineteenth centuries).

[8] *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 58 n.21 ("The modern era of free-speech adjudication in the Supreme Court is commonly taken to begin with a series of important 1919 cases, including *Schenck v. United States*, . . . *Frohwerk v. United States*, . . . *Debs v. United States*, . . . [and] *Abrams v. United States*." (citations omitted)).

[9] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 44–45 (1998) ("The classical vision of free speech has antecedents stretching far back in time. The primary connection is with the period of the Enlightenment, in the eighteenth century, when the interest and faith in man's powers of reason flourished and when there occurred that enormously important revolution in the way people conceived of the relationship between the state and the individual members of society. Two cardinal premises about social organizations arose from this transformation in thought: first, that the government is possessed of only limited political powers, which it derives from the citizenry; second, that the people themselves, as the ultimate sovereign, are competent to determine their own destinies." (footnote omitted)).

[10] *See* Guy E. Carmi, *Comparative Notions of Fairness: Comparative Perspectives on the Fairness Doctrine with Special Emphasis on Israel and the United States*, 4 VA. SPORTS & ENT. L.J. 275, 291–92 (2005) (noting that "the absolutist marketplace conception has had a significant influence" on First Amendment jurisprudence and that the theory "plac[es] its faith in an unregulated marketplace as the best means of achieving the individual liberty and political discourse that the First Amendment promises").

their libertarian perception of rights have affected general perceptions of rights in the United States, particularly perceptions of freedom of expression.[11]

The formative years of Supreme Court First Amendment jurisprudence occurred during the *Lochner* era[12] and the early New Deal period.[13] The durability of the First Amendment rules formed during these years allowed them to withstand influences and trends that were incompatible with the Lochnerian paradigm.[14] Although the Court seemed to be more susceptible to progressive liberal notions toward the middle of the twentieth century, at least in certain free speech contexts,[15] these trends did not last.[16] For the most part, the few minor influences of this period were later overruled or lost much of

[11] This is somewhat of a generalization, since progressive liberal thought regarding the First Amendment existed in early periods. *See* RABBAN, *supra* note 7, at 211–47 (examining the writings of progressive intellectuals, especially John Dewey and Herbert Croly, who criticized traditional notions of American individualism and urged the application of principles of "'socialized democracy' to the specific issue of free speech"). *See generally* David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951 (1996) (discussing the philosophies of John Dewey, Herbert Croly and Roscoe Pound relating to individualism and free speech). Nonetheless, the claim that the foundations of the First Amendment are libertarian is an appropriate portrayal. It does not mean, however, that other nonlibertarian accounts of freedom of expression are incorrect, or that an originalist interpretation would yield only a libertarian outcome. *Cf.* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 575 (2001) (arguing that "[t]he Founders wanted comparativism to be . . . a part of constitutional interpretation").

[12] *See* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 31 n.4. ("The modern First Amendment begins in 1919 . . . ."); *cf.* ROBERT POST, CONSTITUTIONAL DOMAINS 8–10 (1995) (claiming that the Court has redefined its understandings of the First Amendment since the New Deal Era and that "as a consequence the First Amendment was fundamentally reinterpreted along democratic lines"). I agree with this observation, yet the libertarian instincts (as opposed to property-related instincts that also characterized the *Lochner* era) remain unchanged with regards to the First Amendment since the early free speech rulings in the *Lochner* era.

[13] The Court has continued its line of protective free speech rulings, even in the context of protecting labor unions' speech, especially in a series of rulings in 1937. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242, 258 (1937) (holding that states may not penalize attendance at a meeting when the meeting was "held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is . . . denounced as criminal" because doing so violates the freedom of speech); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("[P]eaceable assembly for lawful discussion cannot be made a crime.").

[14] The resilience of First Amendment jurisprudence in the United States derives in large part from its rule-based characterization. *Cf.* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 54–56 (characterizing American free speech law as rule-oriented, with free speech rights "defined narrowly" but with "enormous stringency").

[15] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969) (upholding the constitutionality of the fairness doctrine, which required broadcasters to present public issues and to allot equal time to each side of such issues); Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1952) (upholding group defamation legislation).

[16] *See, e.g.*, Carmi, *supra* note 10, at 287–90 (providing an overview of the erosion of the American fairness doctrine in telecommunications law).

their stamina. For instance, several nonlibertarian trends in the 1950s and 1960s that were articulated, for example, in *Chaplinsky*,[17] were later abandoned and marginalized by the Burger Court. Thus, in *Cohen*[18] and subsequent cases,[19] American free expression doctrines, such as the fighting words doctrine, became more libertarian.[20]

Current First Amendment jurisprudence may be generally characterized as derived from classical libertarian understandings of negative and "modest" rights.[21] The laissez-faire approach to freedom of expression in the United States still reigns, and a positive rights approach is rejected.[22] Because this basic jurisprudence evolved during a libertarian era, and since freedom of expression is a relatively old right, it is normally classified as a liberty kind of right, although a free speech principle must be distinct from a principle of general liberty.[23] In fact, freedom of expression is often referred to as "the liberty of speech."[24] Freedom of speech seems to receive heightened protection vis-à-vis other rights, and "[j]ustifications strong enough for the government to restrict other activities may not be sufficient to restrict speech."[25] This characteristic is universal, yet is more evident in the

[17] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (creating the "fighting words" doctrine, which allows the regulation of speech "likely to cause an average addressee to fight").

[18] Cohen v. California, 403 U.S. 15 (1971) (ruling that a shirt with the inscription "Fuck the Draft" is protected speech, and does not constitute "fighting words").

[19] *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 133–34 (1974) (holding unconstitutional a statute that prohibited "opprobrious words and abusive language" because, although the category includes "fighting words," it is vague and overbroad, covering more speech than can be constitutionally regulated); Brown v. Oklahoma, 408 U.S. 914 (1972) (vacating a criminal conviction for obscene language and remanding the case for reconsideration in light of *Cohen* and *Gooding v. Wilson*, 405 U.S. 518 (1922)); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (same); Gooding v. Wilson, 405 U.S. 518, 521–22 (1972) (holding unconstitutional for vagueness and overbreadth an "opprobrious and abusive" statute like the one in *Lewis*); *see also* Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 635 n.26 (1985) (listing similar cases).

[20] *See* Downs, *supra* note 19, at 635–36 ("Following *Cohen*, the Court applied this new libertarian approach to fighting words cases."). *See also infra* Part III.C.2.c.

[21] *See* Carmi, *supra* note 10, at 303 ("The notion of positive rights is inconsistent with libertarian approaches to constitutional law in the United States, which perceive constitutional rights . . . as 'relatively modest,' negating positive enforcement of rights by the state.").

[22] *See* Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 339 (1998) ("'[F]ree speech [is] the only area where laissez-faire is still respectable.'" (quoting Aaron Director, *The Parity of the Economic Marketplace*, 7 J.L. & ECON. 1, 5 (1964))).

[23] *Cf.* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 7–8 (1982) [hereinafter SCHAUER, PHILOSOPHICAL ENQUIRY] ("[T]he analysis of freedom of speech can and should be separated from questions about the limits of governmental authority in a broader sense."); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 121–23 (1989) (arguing that, "to be significant," a principle of free speech must go beyond a minimal liberty principle). Nonetheless, the core of classical understandings of freedom of expression is heavily linked to conceptions of liberty. For elaboration on classical negative rights, see discussion *infra* Part III.C.2.c.

[24] *See, e.g.*, HCJ 14/86 Laor v. Film Review Board [1987] IsrSC 41(1) 421, 426.

[25] KENT GREENAWALT, FIGHTING WORDS 3 (1995) [hereinafter GREENAWALT, FIGHTING WORDS]. *See, e.g.*, Brison, *supra* note 22, at 320 (citing Schauer and Greenawalt for the proposi-

American legal system, whose freedom of expression protection stands out from other Western democracies.[26] This core classical understanding of freedom of expression may require some nonliberty considerations to camouflage themselves as liberty-related so as to justify their use in this "liberty" kind of right. This may explain why considerations from another order—for example, human dignity—use liberty terminology such as "autonomy," or classify the use of human dignity as "dignity-based liberalism."[27]

Rule-based First Amendment jurisprudence has generally been successful in delimiting the types of arguments admissible when it comes to free speech. These rules stabilize constitutional discourse and applicable terminology in the realm of free speech.[28] The understandings that are attached to the First Amendment and its jurisprudence became rule-based, and to a great extent fixed,[29] at a time

tion that regulation of speech requires a more compelling justification than regulation of most non-speech activities); Greenawalt, *Free Speech Justifications*, *supra* note 23, at 120 (describing protection for free speech as implying protection beyond ordinary limits on governmental regulation of other activities).

[26] For elaboration on the phenomenon of American Exceptionalism in the realm of free speech, see Schauer, *The Exceptional First Amendment*, *supra* note 6. It should be noted that American constitutional law provides additional protections of individual liberties not found in other European countries. For example, criminal procedures such as the fruit of the poisonous tree doctrine do not exist in European countries, nor does a right to a jury trial or some other civil rights. *See generally* Mohammed Saif-Alden Wattad, *Did God Say, 'You Shall Not Eat of Any Tree of the Garden?' Rethinking the "Fruits of the Poisonous Tree" in Israeli Constitutional Law*, 2005 OXFORD U. COMP. L.F., http://ouclf.iuscomp.org/articles/wattad.shtml, at nn.29–46 and accompanying text (surveying approaches to "fruits of the poisonous tree" in Western legal systems). Therefore, since these rights are better protected in the United States, even if European countries provide a relatively robust protection to freedom of expression vis-à-vis other rights, American Exceptionalism in free speech protection most likely does not stem from a degradation of freedom of expression as opposed to other rights in other democracies. In other words, if we look at protection of other rights as a threshold from which the protection of freedom of expression should be elevated, then all Western democracies follow this line of free speech protection, at least to a certain extent.

[27] *Cf.* Donald P. Kommers, *Foreword* to EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES, at xi, xi–xii (2002) (noting the "blend[ing] together" of liberty and dignity in the constitutional jurisprudence of the United States and Germany).

[28] For elaboration on rule-based jurisprudence, see David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 841 (1993), which explains the benefits of explicitly stating standards: full explanation of the standards underlying constitutional decisions fosters "full, open and informed discussion" and Schauer, *The Exceptional First Amendment*, *supra* note 6, at 55–56, which notes that rule-based analysis may provide advantages over more open-ended inquiries in dealing with increasing volumes of free speech claims. *See also* Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1312–16 (2002) (arguing that clear rules "reduce the cost of decisionmaking, ... promote stability, ... [and] facilitate predictability and private planning").

[29] This rule-based characteristic of First Amendment jurisprudence is a "managerial argument" that may explain why doctrinal change in the United States occurs more slowly than in other Western democracies. *See* POST, *supra* note 12, at 4–6 (describing rule-based systems as

when other perceptions of rights, particularly human dignity,[30] either did not exist or were not substantiated enough to claim the lead.[31]

In contrast to the United States, freedom of expression jurisprudence in most Western democracies began evolving in the past ten to twenty-five years.[32] During this period, the more "fashionable" rights in Europe had a nonlibertarian character.[33] Social and positive rights were increasingly recognized in Western countries, many of which even defined themselves as welfare states. In addition, during the same period, scholarly writings reframed problematic speech, such as hate speech and pornography, in terms of inequality rather than regulation of civility and morality.[34] Therefore, when some non-

management tools that seek to create incentives and that are less responsive to shifting community values than other systems). Stare decisis serves as a buffer that moderates change and promotes stability. This relatively slow change in American constitutional jurisprudence vis-à-vis other Western democracies may be yet another explanation for American Exceptionalism. The non-rule-based constitutional jurisprudence that characterizes other Western democracies facilitates more frequent discussions regarding the balancing of different rights, although stare decisis plays a role in these systems as well. When compared to other legal systems, it seems the American system prefers stability to constant debate regarding its values. *See id.* at 4–6 (discussing the social order of "management"). For a claim that First Amendment jurisprudence is not rule-based, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2438–41 (1996), which describes and rejects arguments that strict scrutiny is really a balancing inquiry of the type seen in non-ruled-based jurisdictions. Nonetheless, when compared to other Western countries, the United States is clearly rule-based in its free speech jurisprudence.

[30] Human dignity emerged as a constitutional concept primarily at the end of World War II. *See supra* note 1. By then, much First Amendment jurisprudence had been outlined and crystallized. *See supra* note 8 and accompanying text.

[31] Some nonlibertarian, or dignity-based, justifications for speech regulation, for example, protecting group members from defamation, that were promoted by some scholars, *see, e.g.*, David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942), were initially adopted by the Supreme Court but were later rejected. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391–93 (1992) (holding that the ordinance prohibiting "fighting words" that invoke "race, color, creed, religion or gender" is unconstitutional viewpoint discrimination, thereby implicitly overruling *Beauharnais*); Beauharnais v. Illinois, 343 U.S. 250, 257–59 (1952) (holding constitutional an imposition of liability by a state for libel against a group); *see also* Robert M. O'Neil, *Rights in Conflict: The First Amendment's Third Century*, 65 LAW & CONTEMP. PROBS. 7, 23–27 (2002) (tracing the history of laws aimed at discriminatory speech or group libel).

[32] Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 58. Although the United Kingdom, for example, had relatively robust free speech protection earlier than the last ten to twenty-five years, its free speech doctrines were not as developed as their American counterparts. In particular, the lack of judicial review restricted the remedies in free speech cases. *See generally* HARRY STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 53–155 (1963) (summarizing various British protections for the freedom of expression).

[33] *Cf.* Winfried Brugger, *Comment*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 1, at 69, 72–74 (discussing differences in European and American values).

[34] The writings of Andrea Dworkin and Catharine MacKinnon support this proposition. *See, e.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148, 156 (1987); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equal-*

American courts dealt with these kinds of speech, they viewed them differently than American courts did in the 1960s. This may partially explain the substantial differences in free expression jurisprudence that divide the United States from the majority of Western democracies, including most European nations, Canada, New Zealand and Australia.[35]

Furthermore, post–World War II European human rights discourse, which introduced human dignity as a central constitutional value and pivotal right, is founded upon different philosophical heritages than the American rights discourse. These include Hegelian, Kantian and even theological Judeo-Christian perceptions of rights.[36] Although there is no consensus as to both the origins and the present conception of human dignity, its most prevalent understandings are nonlibertarian, as opposed to the libertarian understandings of the American Lockeian tradition.

Freedom of expression in Western democracies is viewed as an integral part of general constitutional law, whereas in the United States it is perceived as a more independent field.[37] Therefore, general constitutional doctrines affect freedom of expression doctrines in most Western democracies to a greater extent than in the United States. For example, in most Western democracies, freedom of expression may be considered to be a positive right, rather than merely a libertarian negative right, as in the United States.[38] Also, the distinction between the public and private spheres plays a significant role in determining some free speech doctrines, such as the regulation of media.[39]

ity, 8 HARV. WOMEN'S L.J. 1, 15–17 (1985); *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[35] It appears that the comparative argument, according to which the United States should align with the other Western democracies and restrict radical speech, is generally unpersuasive in the American context. *But see* Brison, *supra* note 22, at 339 (arguing that, in the balancing of liberty and equality, equality receives "priority" and that this priority should apply to issues surrounding hate speech); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238 (1999) (arguing that "looking elsewhere" to other countries' constitutional law might not "dramatically alter" the conclusions reached by American judges).

[36] *See, e.g.*, Brugger, *supra* note 33, at 79 (contrasting European reliance on Kant with American reliance on Locke); Winfried Brugger, *Communitarianism as the Social and Legal Theory Behind the German Constitution*, 2 INT'L J. CONST. L. 431 (2004) [hereinafter, Brugger, *Communitarianism*]; Dietrich Ritschl, *Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 1, at 87 & *passim* (exploring the relationships among theological systems, ethical principles and legal uses of "human dignity").

[37] *See supra* notes 23–26 and accompanying text.

[38] See Carmi, *supra* note 10, at 300–05, for a description of three different approaches to the fairness doctrine. The differences among these approaches can be seen to depend, in part, on whether a nation treats free speech as a positive right or as a bar to governmental interference.

[39] *See id.* at 286 & *passim* (describing the effect of the public/private distinction on an entity's obligations under Israeli law). *See generally* ERIC M. BARENDT, BROADCASTING LAW: A

Because of their relative youth, free expression doctrines in other Western democracies are still in the formative stage. Other Western democracies are less restrained by existing doctrine, and, unlike the United States, their free expression doctrines may be characterized as non-rule-based.[40] Instead of rules, these countries frequently utilize concepts of balancing and proportionality. In particular, freedom of speech is balanced with other values, rights and interests.[41] Among these values and rights, human dignity surfaces prominently in many Western democracies, particularly in Germany, where it receives heightened status vis-à-vis other rights.

Thus, as will be demonstrated later, while the United States views freedom of speech through the lens of "liberty," other Western democracies increasingly think of freedom of expression in dignity terms. The predominance of human dignity as a constitutional value in many Western democracies has caused an increasing number of them to redefine freedom of expression issues in dignity terms.[42] In these countries human dignity may serve as an internal limitation on free speech. At the very least, dignity concerns in these countries are presented when freedom of speech cases are adjudicated and balanced vis-à-vis free speech, creating an external limitation on freedom of expression.[43]

It is important to understand that the American libertarian free speech paradigm is not completely rejected by other democracies. Such democracies often utilize a similar approach when core and classical freedom of expression issues are involved.[44] This is true in particular in cases of governmental censorship and prior restraint.[45]

COMPARATIVE STUDY 50–95 (1995) (providing an overview of public and private broadcasting schemes).

[40] *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 49–51, 61–63 (noting the structural and substantive differences between American and European speech doctrines); Schauer, *The Exceptional First Amendment*, *supra* note 6, at 53–56 (describing American speech doctrine as more rigid and rule-bound than its European counterparts).

[41] On the distinction between these constitutional terms, see *infra* text accompanying notes 172–75.

[42] Among these countries are Germany, South Africa and Israel. *See* discussion *infra* Part III.C.1.

[43] These countries include virtually all other Western democracies. *See* discussion *supra* note 34 and accompanying text.

[44] *See, e.g.*, Fredrick Schauer, *The Ontology of Censorship*, *in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 147, 147 (Robert Post ed., 1998) (reviewing trends in and approaches toward censorship); Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of The Margin-of-Appreciation Doctrine*, 7 GERMAN L.J. 611, 615, 618 (2006) (noting that the European Court on Human Rights gives more latitude to restriction of speech that offends morality than to political censorship).

[45] *Compare* Errera, *supra* note 5, at 31–32 (referring to a relatively narrow "margin of appreciation" in the ECHR free expression jurisprudence when it comes to issues of political speech, as opposed to a wider margin when dealing with issues such as enforcement of morality), *with* Andrew Oliver, *The Proposed European Union Ban on Television Advertising Targeting Children:*

In these fields the libertarian perceptions that stem from the fear of excessive state control of speech are commonly shared by democracies, especially regarding political speech.[46] Nonetheless, as general attitudes about free expression move further away from core classical paradigms, other democracies increasingly recognize additional considerations that warrant limitations and restrictions on free speech. This is especially true regarding "problematic speech"[47] as well as media regulation.[48]

Although understanding freedom of expression as derived from the narrow principles of liberty in the classic liberal paradigm is very beneficial when thinking about free speech, it is an insufficient explanation on its own. It is therefore necessary to review briefly the theoretical justifications for free speech to demonstrate the inappropriateness of human dignity as a central justification for free speech.

II. THE THEORETICAL JUSTIFICATIONS FOR FREEDOM OF EXPRESSION—AN OVERVIEW

Freedom of expression has several underlying justifications that are commonly used to explicate the strong defense afforded to speech.[49] Briefly reviewing the basic purposes behind the "rule" of free speech is important in order to evaluate human dignity as a justification for free speech. As this Article endeavors to show, human dignity is not suitable to justify freedom of expression. Human dignity fails as an overarching justification for freedom of expression because it does not appropriately cover some core protected speech. It

Would It Violate European Human Rights Law?, 20 N.Y.L. SCH. J. INT'L & COMP. L. 501, 517 (2000) (arguing that when States limit speech to protect morals, "the ECHR gives the states extremely wide latitude in determining exactly what morals are, and what is necessity [sic] to protect them").

[46] *Cf. infra* Part II.A.2 (regarding the increased popularity of the "arguments from democracy" as part of the general ontology of First Amendment jurisprudence, which relies heavily on this argument when dealing with all kinds of speech).

[47] "Problematic speech" refers to speech that democracies other than the United States limit (i.e., hate speech, Holocaust denial, and in some cases, pornography). Defamation may also fall under this category in certain respects. The term is a useful shorthand for the kinds of speech that are restricted by some or most other Western democracies. *See, e.g.*, BOLLINGER, *supra* note 9, at 185 (referring to obscenity as speech of problematic character).

[48] For a discussion of the difference between the non-American approach, which may be characterized as fitting into the "Madisonian" approach to free speech, as opposed to the American approach, which reflects a more "absolutist" viewpoint at its core, see Carmi, *supra* note 10, at 290–96, 300–05.

[49] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1054–60 (5th ed. 2005) (detailing three primary rationales for the protection of free speech, including the search for truth, self-governance, and self-fulfillment/autonomy rationales, and other less frequently cited rationales, which include the checking value, the tolerant society, free speech and character, and conformity and dissent).

also confers excessive protection on speech that is already adequately protected under current understandings.

Many legal scholars and philosophers have attempted to define the underlying justification for freedom of expression. These different accounts sometimes offer similar descriptions of the same rationales.[50] The subtleties these writings offer are not directly relevant in defining the rapport between freedom of expression and human dignity. Therefore there is no need to delve deeply into such nuances. Suffice it to say that the brief account offered below demonstrates how dignity concerns are far from the *core* of the common justifications for free speech and are, at best, in the *penumbra* of these justifications. Therefore, human dignity cannot stand as a primary prism through which freedom of expression is viewed.

A common and helpful way to distinguish among different free speech justifications is to divide them into consequential and nonconsequential arguments.[51] Consequential reasons for protecting free speech focus on the positive effects of liberty, whereas nonconsequential reasons claim that, independent of consequences, the restriction of speech denies a right or constitutes an injustice.[52]

A. The Classical Model

Three main free speech justifications (or clusters of justifications)—the arguments from truth, democracy and autonomy—are

[50] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 130–47 (counting the following consequentialist justifications for free speech: "truth discovery, interest accommodation and social stability, exposure and deterrence of abuses of authority, autonomy and personality development, . . . liberal democracy" and the "promot[ion] [of] tolerance"); *id.* at 147–54 (listing the following nonconsequentialist justifications: "social contract theory, ... respect for individual autonomy [and rationality,] . . . . [belief in] dignity and equality . . . . [and commitment to] the marketplace of ideas"); *cf.* Brison, *supra* note 22, at 321–22 (setting forth several consequentialist arguments for free speech, including "the argument from truth, the argument from diversity, the argument from democracy, the argument from distrust, the argument from tolerance, the pressure release argument, and the slippery slope argument," while noting that each justification is weak because it relies on a tenuous balancing between the "controversial empirical claims about the positive effects of free speech and the negative effects of restrictions" that leaves free speech vulnerable to a change in perception about the benefits of either (footnotes omitted)).

[51] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 127 (explaining that there is "no single correct way of presenting the justifications . . . of free speech," but the consequentialist/nonconsequentialist distinction is useful "because it differentiates claimed reasons that are to be viewed in light of factual evidence and claimed reasons that rest more purely on normative claims").

[52] *See* GREENAWALT, FIGHTING WORDS, *supra* note 25, at 3 (noting that consequentialist justifications for free speech, such as those used by John Stuart Mill, Oliver Wendell Holmes and Louis Brandeis, concentrate on the positive effects of liberty such as free speech's ability to aid in the discovery of truth).

widely referred to as "the classical model."[53] This model offers explanations regarding the "core" of free speech—the speech that is "truly value[d]" by society.[54] While "theorists disagree regarding which identifiable 'values' ought to be given precedence over others,"[55] the "truth" and "democratic" arguments are generally perceived as the most powerful free speech justifications, especially in the United States. This Article will first review these two justifications, later elaborating on the additional autonomy-related justification, since it is the only justification from the classical model that may be directly linked to human dignity.

1. *The Argument from Truth*

The "discovery of truth" rationale is probably the most familiar consequentialist argument.[56] It is most closely identified with the writings of John Stuart Mill and the "eloquent Supreme Court opinions of Oliver Wendell Holmes and Louis Brandeis."[57] At the core of this argument is the notion that free speech is the best tool to discover truth and prove falsehood.[58] According to this argument, the "marketplace of ideas"[59] is the best mechanism to reach truth; regulating speech may eventually stifle truth instead of promoting it.[60] While the argument from truth has been a prominent and popular justification for the protection of free speech, it is second to the cluster of ar-

[53] It is important to note that there are more theoretical justifications than the three presented. The classical model falls short of offering a satisfactory explanation for the level of protection that freedom of expression receives, especially in the United States. Several theorists have articulated other justifications, or dissected the justifications into sub-justifications. *See, e.g.*, Brison, *supra* note 22, at 320–21 (mentioning additional common defenses of free speech). But the three justifications I have chosen to briefly present are used by many as the major classifications, and are known as the classical model. *See generally* BOLLINGER, *supra* note 9, at 43–75 (discussing "the classical model and its limits"). Lee Bollinger's "fortress model" and Vince Blasi's "checking value" deserve a special mention among the additional alternative justifications referred to above. *See id.* at 76–103; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RES. J. 521.

[54] BOLLINGER, *supra* note 9, at 44.

[55] *Id.*

[56] GREENAWALT, FIGHTING WORDS, *supra* note 25, at 3.

[57] *Id.*; *see also* RAPHAEL COHEN-ALMAGOR, THE BOUNDARIES OF LIBERTY AND TOLERANCE: THE STRUGGLE AGAINST KAHANISM IN ISRAEL 145–47 (1994); JOHN STUART MILL, ON LIBERTY 15–52 (Elizabeth Rapaport ed., Hackett Publ'g. Co. 1978) (1859) (discussing the harm principle).

[58] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 130–31.

[59] For an elaboration on the sources of the "marketplace of ideas" metaphor, see Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1717–18 (1997).

[60] *See* MILL, *supra* note 57, at 19 (arguing that free discussion will root out error). *See generally* STONE, *supra* note 49, at 1054–56 (citing two enunciations of the marketplace of ideas: Justice Holmes' dissent in *Abrams v. United States* and John Stuart Mill's explanation of the rationale in *On Liberty*, while noting other observations about truth and in what conditions it will flourish).

guments relating to democracy and self-governance, especially in the American context.

2. *The Argument from Democracy*

The argument from democracy and self-governance is most closely identified with the work of Alexander Meiklejohn.[61] It is considered to be the most prominent justification for the protection of free speech. The argument focuses on the importance of free speech for enabling the citizenry to self-govern. The ethos of free expression in the United States is closely linked to this rationale, and the evolutionary development of free speech doctrines suggests that political speech stands at the core of First Amendment protection.[62] Historical events such as the McCarthy Era and the Vietnam War contributed to the American understanding of the First Amendment as a tool for protecting political speech.[63] Political speech normally receives the highest protection, but in the United States this protection exceeds that afforded in many other Western democracies, as demonstrated by such policies as the content neutrality doctrine and the clear-and-present-danger test.[64]

The popularity of the argument from democracy is unparalleled; it is considered the most influential justification in the development of twentieth-century free speech doctrines both in the United States and elsewhere.[65] Nonetheless, the centrality of the argument from democracy in the United States is greater than in other legal systems, and First Amendment doctrines and conceptions are primarily de-

[61] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Some scholars link the American ethos of free speech to the Founding Fathers' generation, particularly to Thomas Jefferson and James Madison. *See, e.g.*, ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 17–21 (1920) (discussing the history of the free speech clause in the Continental Congress, state constitutions and state ratifying conventions); *id.* at 30–31 (discussing free speech in relation to the Sedition Act of 1798); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 99–101 (1970) (same).

[62] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964) (describing the security of "freedom of expression upon public questions" as "long . . . settled" and noting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

[63] Schauer, *The Exceptional First Amendment*, *supra* note 6, at 47–49.

[64] *See id.* at 48.

[65] Greenawalt, *Free Speech Justifications*, *supra* note 23, at 145 (1989) ("Arguments from democracy have been said in a comparative study to be the 'most influential . . . in the development of twentieth-century free speech law.'" (quoting E. BARENDT, FREEDOM OF SPEECH 23 (1985)). *But see* ERIC BARENDT, FREEDOM OF SPEECH 20–23 (1985) (pointing out that the argument from democracy cannot be the sole explanation for free speech because it raises certain questions, such as "[i]f the maintenance of democracy is the foundation for free speech, how is one to argue against the regulation or suppression of that speech by the democracy acting through its elected representatives?").

rived from this justification.[66] The primacy of the argument from democracy in the American setting is exemplified by the classification of pornography as political speech,[67] and by the use of democratic rationales to protect commercial speech.[68] Other democracies, while recognizing the importance of this argument, seem less prone to use democracy rationales to justify free speech protection, instead favoring others from the plethora of existing free speech justifications.[69] America's reliance on the argument from democracy in forming its First Amendment jurisprudence, especially in non-political contexts, is quite unique. This legal-cultural aspect of American free expression jurisprudence may serve as yet another explanation for "American Exceptionalism."[70]

3. *The Argument from Autonomy*

Another cluster of justifications regarding the underlying purposes of free speech is the autonomy defense, which is also related to self-fulfillment. Many theorists have attempted to shed light on this argument, and "[t]he autonomy defense of free speech is arguably the one most commonly used by liberal legal and political theorists . . . ."[71] Brison counts as many as six different philosophical accounts of autonomy.[72] Principally, "the argument from autonomy . . . maintains that not to honor an individual's choice to speak—

[66] *See, e.g.*, MEIKLEJOHN, *supra* note 61, at 104–05 (arguing that the First Amendment does not guarantee "men freedom to say what some private interest pays them to say," but only freedom "to say what, as citizens, they think, what they believe, about the general welfare"); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992) (arguing that the original conception of the First Amendment was "principally about political deliberation"); *see also* Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 253–54 (2005) (discussing Meiklejohn's public right theory of freedom of expression, according to which political speech is the main object of free expression and free expression is "a Madisonian means to the end of democratic government").

[67] *See* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) (invalidating an Indianapolis ordinance that outlawed all speech meeting the ordinance's definition of "pornography," regardless of the "literary, artistic, or political qualities" of the speech), *aff'd*, 475 U.S. 1001 (1986); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1888 (1992) (noting the "judicial classification [of racist and pornographic speech] as political in nature"); *cf.* CATHARINE A. MACKINNON, ONLY WORDS 92–93 (1993) (criticizing Judge Easterbrook's opinion in *American Booksellers*, 771 F.2d 323, for "implicitly applying the political speech model" to pornography).

[68] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (referring to the public's right to be exposed to commercials through similar rationales for the exposure of the public to political speech).

[69] For a good account of prevalent free speech justifications, see Greenawalt, *Free Speech Justifications*, *supra* note 23. *See also* GREENAWALT, FIGHTING WORDS, *supra* note 25.

[70] Schauer, *supra* note 6 and accompanying text.

[71] Brison, *supra* note 22, at 312–13.

[72] *Id.* at 324–39 (discussing the merits of six accounts of autonomy and the extent to which these accounts provide robust justifications for free speech).

or to receive others' speech—would violate that person's right to autonomy."[73] Most accounts of the autonomy defense are nonconsequentialist and therefore, according to Brison, aim to show "why the right to free speech is immune to balancing."[74]

There is no need to dwell on all the different philosophical accounts Brison offers in order to realize that the vagueness of the term "autonomy," and its different philosophical meanings, renders a complex outcome. Most of the accounts Brison presents favor the protection of free speech even when hate speech and pornography are involved. Yet one of the six accounts Brison reviews justifies restricting these kinds of speech due to autonomy considerations.[75] Therefore, autonomy cannot serve as a silver bullet to solve the issue of problematic speech, and it may send mixed signals as to the propriety of restricting various kinds of speech. Nonetheless, as discussed below, autonomy's mainstream understandings are still far more speech protective than their human dignity counterparts.

Those who use the autonomy argument to protect all kinds of speech, including problematic speech, emphasize the notion that the state cannot paternalistically dictate to its citizenry which views are correct.[76] Dworkin, for example, argues that restricting people's speech, or limiting people's access to others' speech, out of contempt for their way of life or their view of good violates their right to autonomy or "moral independence."[77] Such restrictions unacceptably fail to treat these people with equal respect and concern.[78] Suppression of certain views represents a kind of contempt for citizens that is objectionable independent of its consequences. When suppression favors some points of view over others, it does not treat citizens equally.[79]

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[73] *Id.* at 322 (noting that this argument is "typically presented as a nonconsequentialist defense of free speech").

[74] *Id.*

[75] *See id.* at 338 (arguing that a failure to restrict hate speech can sometimes cause "autonomy-undermining harms" by "restrict[ing] individuals' employment options, limit[ing] their political potential, and even undermin[ing] their ability to take advantage of those options that are available to them").

[76] *See id.* at 316–17 (asserting that liberal theorists agree with libertarians regarding the importance of free speech to individual autonomy).

[77] RONALD DWORKIN, A MATTER OF PRINCIPLE 353 (1985).

[78] *See* Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 58 (reviewing ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991)) ("[W]e are a liberal society committed to individual moral responsibility, and *any* censorship on grounds of content is inconsistent with that commitment."). *But see* Brison, *supra* note 22, at 339 (arguing that autonomy concerns do not prevent regulation of some kinds of speech and that a failure to regulate certain speech violates the principle of equality).

[79] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 152–53 (arguing that "as a matter of basic human respect . . . . the government should treat people with dignity and equality").

Such aspects of the autonomy defense of free speech can be articulated in terms of "dignity," "equality" and "liberty."[80] Yet this account may be somewhat misleading, since it depends on the content one ascribes to these terms. The autonomy defense is more compatible with the meanings of these constitutional terms as they are commonly viewed in the United States, but the same terms tend to receive other emphases in other Western countries.[81] The autonomy defense focuses more heavily on the speaker than on his listeners and is, in fact, closely related to general concepts of "liberty."[82]

The autonomy defense is often linked with artistic speech or speech that defines personality (for example, speech relating to our sexual identities or personal appearances) since these kinds of speech lie close to how people conceive of themselves.[83] Such speech is more closely connected to the autonomy argument, and therefore its protection primarily depends on the importance this justification is given in a specific legal system.

The autonomy defense of free speech is of special interest for the purposes of this analysis, since some versions of the autonomy defense may overlap with some versions of a defense rooted in human dignity. Therefore, when referring to human dignity as an argument for protecting free speech, one must refer to the autonomy argument. Yet focusing solely on the autonomy argument for the protection of freedom of expression, while abandoning the other primary classical justifications (particularly, truth and democracy), offers only a partial foundation for this freedom. The other arguments are at least as important as the autonomy argument, if not more important.

III. THE "ARGUMENT" FROM DIGNITY

The nexus between human dignity and freedom of expression is problematic in nature.[84] The inadequacy of human dignity as a prin-

[80] *See id.* at 153 (noting that "[t]he concerns about dignity and equality may seem not to be specially related to speech but to be arguments, perhaps rather weak ones, in favor of liberty generally").

[81] *See infra* Part III.C.2.

[82] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 153 ("How to take this argument depends on whether any infringement of liberty impairs dignity and any infringement that is significantly selective impairs equality. . . . The concerns about dignity and equality may seem not to be specially related to speech but to be arguments, perhaps rather weak ones, in favor of liberty generally.").

[83] *See* CrimA 4463/94 Golan v. The Penitentiary Service [1996] IsrSC 50(5) 136 (Dorner, J.) (placing high importance on such speech as protected under the Human Dignity Clause within Basic Law: Human Dignity and Liberty); Greenawalt, *Free Speech Justifications*, *supra* note 23, at 153 ("Expressions of beliefs and feelings lie closer to the core of our persons than do most actions we perform . . . .").

[84] Historically, dignity was used to restrict freedom of expression in several ways, primarily as a defense against harm to reputation. *See generally* Robert C. Post, *The Social Foundations of Defa-*

ciple justification for freedom of speech is reviewed by Frederick Schauer, who remarks that "there is little to be gained by thinking of the right to freedom of speech as but the instantiation of a more general right to dignity,"[85] leading to the declaration that "[s]peaking about dignity thus appears not to take us very far in thinking about the protection of freedom of speech."[86]

Nonetheless, human dignity is articulated by some scholars as a free speech justification. Human dignity is even considered a possible source for the incorporation of freedom of expression as an unenumerated right.[87] Unfortunately, it is unclear what exactly the argument from dignity encompasses. A deeper look into the relationship between human dignity and freedom of expression reveals that the argument from dignity is perceived differently by different scholars.

Should the argument from dignity be recognized as an independent theoretical free speech justification? This Article claims that such a view would be mistaken primarily because it is either not sufficiently distinguishable from the argument from autonomy, or because it is too general to constitute a free speech justification per se. The following analysis is devoted to demonstrating why human dignity and freedom of expression are more appropriately conceived of as separate rather than as connected.

A. Two Accounts of the Argument from Dignity

What exactly do we mean when considering the argument from dignity? When someone argues that her right to free speech is de-

mation Law: Reputation and the Constitution, 74 CAL. L. REV. 691, 707–19 (1986) (discussing the "dignity theory" of reputation); Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 63 MD. L. REV. 401 (2004) (demonstrating the role of dignity in the protection of chastity and morals in nineteenth-century defamation laws).

[85] Frederick Schauer, *Speaking of Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178, 179 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter Schauer, *Speaking of Dignity*]; *cf.* Daniel Statman, *Two Concepts of Dignity*, 24 IUNAI MISHPAT 541, 576–77 (2001) (noting that freedom of expression has little to gain from affiliation with dignity).

[86] Schauer, *Speaking of Dignity*, *supra* note 85, at 190.

[87] For example, in a fashion similar to the incorporation of the unenumerated right to privacy into the Fourteenth Amendment in the United States, the Israeli Supreme Court has considered incorporating the unenumerated right of free speech into the Human Dignity Clause of Israeli Basic Law. *See Golan*, IsrSC 50(5) 136 (plurality opinion by the Israeli Supreme Court that dealt with the possibility of incorporating freedom of expression into the Israeli Basic Laws via the Human Dignity Clause). Recently, the Israeli Supreme Court chose partial incorporation of freedom of expression via the Human Dignity Clause. *See* HCJ 2557/05 Matee Harov v. Israeli Police [2006] (handed down on 12/12/2006, paragraphs 12–13 of Barak, C.J.) (arguing that freedom of expression is partially incorporated into the Israeli Basic Laws via the Human Dignity Clause).

rived from her entitlement to dignity (or alternatively, that certain speech should be curtailed due to infringement on her dignity), what does this justification encompass? The vagueness surrounding the term "human dignity" clutters one's ability to clearly define and demarcate the boundaries of this justification. In order to restore the rationales behind this so-called free speech justification, this Article offers two possible accounts for the scope and meaning of the argument from dignity.

1. *A Minimalist Account*

The first account of the argument from dignity relies on a minimalist version of human dignity, as it purports to focus solely on the rights of speakers. It is intended to serve exclusively as a justification for protecting free speech and not as a justification for restricting it. Both Kent Greenawalt and Ronald Dworkin articulate similar justifications, relying on dignity and equality as independent free speech justifications.

Greenawalt's brief account of dignity (and equality) strikingly resembles an argument presented earlier as part of the argument from autonomy. According to this view, "suppression [of certain views] represents a kind of contempt for citizens that is objectionable independent of its consequences,"[88] because it fails to treat citizens equally and with the dignity they deserve.[89]

Greenawalt also briefly mentions human dignity as stifling a person from expressing her views or beliefs,[90] thereby hurting that person's sense of dignity and self-respect. Yet he concedes that "[a]n argument based on the value of liberty as an emotional outlet and means of personal development is not restricted to speech alone."[91] He also fails to recognize that restricting specific speech in particular circumstances rarely stifles a person from expressing her views in alternative permissible ways, and thus can hardly be said to infringe substantially upon the right of self-expression.[92]

Greenawalt himself acknowledges that what he calls the dignity and equality justification is "closely related" to the recognition of

[88] Greenawalt, *Free Speech Justifications*, *supra* note 23, at 153; *see also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 27–28, 33–34 (1989) [hereinafter GREENAWALT, SPEECH, CRIME] (arguing that restraint of free speech is an affront to dignity).

[89] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 153 (arguing for freedom of speech "[a]s a matter of basic human respect").

[90] *See id.* (arguing that "restrictions of expressions may offend dignity to a greater degree than most other restrictions").

[91] GREENAWALT, SPEECH, CRIME, *supra* note 88, at 28.

[92] *See* Statman, *supra* note 85, at 576–77 (arguing that since there are usually alternative ways to express certain views, the limitation of free speech in certain contexts does not carry catastrophic consequences).

autonomy and rationality.[93] He also questions whether "concerns about dignity and equality may seem not to be specially related to speech but to be arguments, perhaps rather weak ones, in favor of liberty generally."[94] Nonetheless, although Greenawalt raises some of the difficulties in recognizing dignity as an independent free speech justification, he fails to persuade as to why dignity *should* be considered as a justification, as well as to explain how exactly this justification is sufficiently distinguishable from other free speech justifications, particularly the argument from autonomy.

It appears that Greenawalt's attempt to present a detailed and distinguishable taxonomy of free speech justifications goes one step too far. Greenawalt describes his analysis of free speech justifications as an attempt to "provide some antidote for confusion and for oversimplification, the main disease of legal and philosophical scholarship."[95] This ambitious endeavor suffers from over-complication.[96] There is no real merit in distinguishing the argument from dignity from the argument from autonomy, even if one attempts thoroughly to dissect and distinguish the different free speech justifications.

Although Greenawalt refrains from referring to any specific theorist who endorses the arguments from dignity and equality, one may assume he is primarily referring to Ronald Dworkin.[97] Dworkin's works emphasize an account of a dignity-based free speech justification that is parallel to Greenawalt's account. For the sake of a fair analysis of Dworkin's view of dignity and equality as free speech justifications, it is important to relate this view to the broader context of his works. Dworkin, probably the most esteemed legal philosopher alive, generally uses the values of equality and dignity as the primary basis for a moral reading of the American Constitution.[98] Although

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[93] *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 152 (comparing the dignity and equality justification to the limits that rational, autonomous persons might want to put on government action).

[94] *Id.* at 153.

[95] *Id.* at 119.

[96] *Cf.* Brison, *supra* note 22, at 313 (describing Robert Post's simplifying observation that many free speech justifications are ultimately based on the ideal of autonomy (citing Robert C. Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 ETHICS 654, 666 (1993))).

[97] In Greenawalt's brief account of the dignity and equality justifications, he does not offer even one footnote to support his analysis nor reference other scholars who hold this view. *See* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 152–53 (refraining from offering support in the discussion of the argument from dignity and equality).

[98] *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 272–78 (arguing that "government must treat people . . . with equal concern and respect"). For criticism of Dworkin's views on the moral reading of the Constitution, see, for example, Catharine A. MacKinnon, *"Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation*, 65 FORDHAM L. REV. 1773, 1773 (1997), which attempts to provide an alternative reading of the Constitution that is, like Dworkin's, "centered on the equality question, but more descriptively accurate of constitutional process and less elitist and exclusionary in method and content." *Id.*

his writings over the years have offered more than one version of justifications for rights in general and free speech in particular,[99] it is fair to say that he views dignity and equality as the primary moral justifications for rights.

Dworkin's free speech justification that relies on dignity and equality is, in fact, a version of an autonomy justification (or of a general non-discrimination justification). Dworkin views all kinds of speech as protected under this justification, not only political speech.[100] Thus, his argument for the protection of free speech implies a principled objection towards the limitation of any kind of speech. This is a nonconsequentialist justification (or, in Dworkin's words, a "constitutive justification"[101]) that exists side-by-side with the instrumental justifications to free speech (such as the truth and democracy arguments).[102]

Dworkin believes that the government cannot discriminate among citizens by permitting some views and denying other views. Such conduct is discriminatory not only to the speaker but also to the society as a whole (or potential individual listeners).[103] The paternalism applied by government when censoring certain opinions prevents the citizenry from exercising autonomy and choosing from all available views, including those that the government dislikes or finds distasteful or dangerous. As Dworkin puts it, "[w]e retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold opinion from us on the ground that we are not fit to hear and consider it."[104] In other places, Dworkin emphasizes the egalitarian role of the First Amendment by saying that "First

[99] *Cf.* Brison, *supra* note 22, at 324–25 (describing two different speech justifications based on Dworkin's work). Dworkin's writings on these issues spread over several decades and evolved over time. The portrayal I focus on relates to his later works, in which the focus on dignity and equality is more evident and fully developed.

[100] *Compare* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 195–213 (arguing for broad free speech protection using dignity as a justification), *with* SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 23, at 65 (claiming that a restriction of political speech that limits the ability to meaningfully participate in the political process harms equality, and would be more appropriately categorized under the argument from democracy).

[101] Dworkin, *The Coming Battles over Free Speech*, *supra* note 78, *passim*.

[102] *See* DWORKIN, FREEDOM'S LAW, *supra* note 2, at 209.

[103] *Id.* at 200.

[104] Dworkin, *The Coming Battles over Free Speech*, *supra* note 78, at 57; *see also* Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Oct. 21, 1993, at 36, 41 ("Only one answer is consistent with the ideals of political equality: that no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and example, just because these tastes or opinions disgust those who have the power to shut him up or lock him up." (reviewing CATHARINE A. MACKINNON, ONLY WORDS (1993))).

Amendment liberty is not equality's enemy, but the other side of equality's coin."[105]

Although Dworkin's powerful writing is thought-provoking, it is hard to distinguish, for example, Dworkin's earlier accounts of the justification of free speech protection as a negative right from newer accounts of dignity and equality.[106] It seems as if Dworkin is simply trying to rearticulate these two leading values as more appropriate justifications for free speech than autonomy or liberty concerns. In any case, he fails to articulate why it is doctrinally correct to view these issues through the lens of dignity rather than autonomy, and why dignity concerns should always work in favor of the speaker, even when they infringe upon others' dignity.[107]

The question is whether one can develop a free speech *theory* that is based in a *particular* conception of what human dignity entails and whether the contours one chooses will be upheld by others. The employment of human dignity as a touchstone for doctrine on speech is problematic if its base is manipulable. As shown below, since a human-dignity-based regime may be more prone to suppress speech, the mere use of human dignity as a free speech justification is a cause for concern.

As discussed below, the minimalist account of the argument from dignity is compatible with American understandings of rights and of human dignity. Therefore, it is not surprising that it was articulated in the above manner by American scholars. In addition, the minimalist account for the argument from dignity is actually not distinct enough to justify separating it from the argument from autonomy.

2. *An Expansive Account*

A broader view of the possible relationship between human dignity and freedom of expression attributes more meaning to human dignity and acknowledges the potential for conflict between the two—a conflict that the first account disregards. The principal scholar who points out the problematic theoretical nexus between dignity and speech is Fredrick Schauer.

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[105] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 238. Dworkin also claims that "equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections," and that "[e]quality demands that everyone's opinion be given a chance for influence, not that anyone's opinion will triumph or even be represented in what government eventually does." *Id.* at 237.

[106] *See, e.g.*, Ronald Dworkin, *Liberty and Pornography*, N.Y. REV. BOOKS, Aug. 15, 1991, at 12 (describing free speech as a negative liberty).

[107] *Cf.* Greenawalt, *Free Speech Justifications*, *supra* note 23, at 151 (asking why government protects speech promoting irrational actions, rather than protecting the victims of those actions); SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 23, at 60–66 (considering free speech in terms of the dignity of the speaker and the recipient).

Schauer questions the merits of using human dignity as a foundation for the protection of speech and raises several objections to this approach. His most important contribution questions the implicit premise behind the minimalist account that human dignity serves only as a justification for protection of speech. He demonstrates how some accounts of human dignity can serve as rationales for restricting speech, and he therefore questions the suitability of human dignity as a free speech justification.[108]

From a theoretical standpoint, it is hard to see how human dignity can cover *all* types of speech when it patently stands at odds with *some* types of speech. Human dignity is most effective and relevant for protecting self-regarding speech.[109] "But if this is the case, then the argument from dignity is not an argument for protecting speech *simpliciter*, or even an argument for protecting the kind of speech now commonly protected [in the United States], but is rather an argument only for protecting substantially self-regarding speech."[110]

A focus on dignity as a free speech justification falls short of satisfactorily covering many kinds of speech. Unlike the arguments from truth and democracy, which clearly relate directly to free speech, it is unclear what work is being done by the "dignity" component of the free speech equation. It seems that human dignity is generally applicable to nonspeech settings,[111] since the "[p]rotection of dignity as protection of self-regarding choice would protect self-regarding

[108] *See generally* Schauer, *Speaking of Dignity*, *supra* note 85.

[109] *Id.* at 189 ("The use of a dignity-based conception of protecting choice as a way of protecting speech thus hinges on the assumption that the decision to speak is either in general or in particular cases not a choice that will infringe on the rights or the dignity of others. But we have seen that the assumption that speech in general cannot and does not infringe on the dignity or the rights of others is untrue. Consequently, it must be only *some* linguistic and pictorial acts that would be protected under this conception of freedom of speech as instantiating a choice-based protection of dignity."). "Self-regarding speech," is a term used by Schauer to describe speech that has no potential of conflicting with the dignity of others. *See, e.g.*, SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 23, at 64. Speech that is aimed solely at ourselves (or that regards solely ourselves) falls within this category, since it does not have the potential of harming the dignity of others. *Id.*

[110] Schauer, *Speaking of Dignity*, *supra* note 85, at 189. This view is compatible with Justice Dorner's dicta in *Golan v. Penitentiary Service*, CA 4463/94 Golan v. Penitentiary Service [1996] IsrSC 50(5) 136, as well as her article on the subject. Dalia Dorner, *The Constitutional Protection of Human Dignity*, *in* HUMAN DIGNITY OR ITS DEGRADATION? THE TENSION OF HUMAN DIGNITY IN ISRAEL 16, 23–25 (Aluf Hareven & Hen Baram eds., 2000). Justice Dorner argues that there is special significance to self-regarding speech, such as artistic speech that relates to human dignity.

[111] Dworkin's writings also apply a similar rationale in other settings, such as private homosexuality, contraception and pornography. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 275–76 (arguing that the public's moral disapproval should not necessarily burden those in the minority); *cf.* SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 23, at 65 (responding to Dworkin's argument).

choices, whether linguistic or not."[112] It is apparent, therefore, that "trying to tailor a speech-protective conception of dignity as choice to the need to avoid protecting harmful choices leads to a dropping of speech qua speech from the analysis."[113]

Human dignity and freedom of expression do not share a common grounding in their theoretical justifications. While freedom of expression has several classical justifications, just some of them overlap with human dignity rationales.[114] The "democratic" and "truth" arguments that stand at the base of freedom of expression, and that normally receive the highest level of constitutional protection, are not covered by the blanket of human dignity.[115] The terrain that the human-dignity blanket covers is limited; it does not even cover some core expression, such as political speech. Thus, because of its formative role in self-conception, artistic speech may receive greater protection than political speech under human dignity rationales, deviating from the current paradigm under which political speech receives the highest protection.[116]

Although human dignity and freedom of expression are not necessarily contradictory, and in some cases may even be compatible, it would be wrong to assume that the two are always compatible and should be analyzed through the seemingly unifying lens of human dignity. Framing freedom of expression in terms of human dignity reduces freedom of expression from its existing parameters according to current predominant free speech understandings.[117] In addition, human dignity is problematic as a supplemental free speech justification because its expansive account conflicts with speech protected under other justifications. In these cases, human dignity—a purported free speech justification—would serve as a reason for limiting speech, and this result is unacceptable. No other free speech justification serves as a reason to restrict speech, and any "justifica-

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[112] Schauer, *Speaking of Dignity*, *supra* note 85, at 189.

[113] *Id.*

[114] *See supra* Part II.A.

[115] *See, e.g.*, WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY 23 (3d ed. 2002) (depicting the centrality of political advocacy to First Amendment jurisprudence).

[116] *See infra* notes 119–22 and accompanying text.

[117] If the principle of freedom of speech is not the instantiation of a more general principle of dignity, then it should not be surprising that the two will frequently diverge in extension, with freedom of speech often producing deprivations of dignity, and the desire to promote dignity often suggesting restrictions on speech. If this is so, then resolving many hard issues by reference to dignity will be question-begging, and consequently it may be necessary at times to consider directly which of the values of free speech and dignity is more important.

Schauer, *Speaking of Dignity*, *supra* note 85, at 179 (discussing free speech justifications).

tion" that may have this effect should not be considered as an independent free speech justification.

Obviously, not every limitation on freedom of expression involves harm to human dignity. Regulation of commercial speech, for example, "can hardly be seen as violations of the human dignity of the commercial enterprise."[118] But when a free speech limitation "relates to the essence of the individual's rights to express . . . herself it involves degrading treatment that violates human dignity."[119] The paradigmatic cases in which human dignity and freedom of expression conflict involve what we may refer to as problematic speech, such as hate speech, libel and pornography.[120] In these cases, speech is used to deprive individuals or group members of human dignity based on considerations of race or gender.[121] In applying these concepts to hate speech, it may seem more appropriate to apply autonomy as self-fulfillment and human dignity to the victims of the speech rather than the racist speakers.[122]

In fact, the expansive account of the argument for dignity gives a consequentialist twist to Dworkin's and Greenawalt's nonconsequentialist formulations. It challenges the premise that dignity can serve as a categorical justification for protecting speech without ever looking at the consequences of that speech and its possible infringements on the dignity of others. Because the expansive account has consequentialist traits, it is no longer immune to balancing[123] and may lead to speech restriction.

B. Dignity or Autonomy? Avoiding Term Confusion

As shown above, the distinction between autonomy and human dignity is sometimes unclear. This primarily stems from the ambiguity surrounding human dignity:

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[118] Kretzmer, *supra* note 3, at 174. Even under First Amendment doctrines, commercial speech is considered to be low value speech that is subjected to heightened regulation. *See, e.g.*, VAN ALSTYNE, *supra* note 115, at 637.

[119] Kretzmer, *supra* note 3, at 174 (citing Justice Dorner's holding in CrimA 4463/94 Golan v. The Penitentiary Service [1996] IsrSC 50(5) 136).

[120] *See supra* note 47 (defining "problematic speech").

[121] *See* Brison, *supra* note 22, at 314 (classifying most pornography as hate speech); Matsuda, *supra* note 34, at 2323 (arguing that hate speech "has the effect of perpetuating racism"); Statman, *supra* note 85, at 577 (arguing that speech is often used to silence minorities, including women).

[122] *See* Statman, *supra* note 85, at 577 (arguing that using dignity to protect the vilified sounds more natural than applying it to the vilifier); *cf.* Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 1, at 85, 91 ("In contrast, in private law the appeal to the dignity of the individual is frequently made in order to justify restrictions of the private rights of others.").

[123] *See, e.g.*, Brison, *supra* note 22, at 338–39 (calling for balancing the harms of censoring speech against the harms of allowing hate speech).

> The truth is that, so far, there has been no systematic re-elaboration of the concept of human dignity which has been able to command if not universal, then at least widespread, acceptance. Human dignity has been used to express underlying philosophical beliefs of quite different kinds for the purpose of reinforcing them with its powerful appeal.[124]

But autonomy is also partly to blame, as it is frequently used as a synonym for dignity. For example, Kant uses autonomy and dignity interchangeably in his writings, where autonomy is meant to preserve human dignity.[125] Yet autonomy and dignity are in fact different concepts.[126]

Autonomy is mostly seen in the United States as focusing on the rights of the individual speaker.[127] As Wells rightly notes, "[a]utonomy in this sense translates into individual freedom from government interference. Moreover, once conceived as a negative liberty, autonomy becomes closely associated with speakers; as the debate is framed, autonomy in the Court's free speech jurisprudence means freedom of the speaker to say whatever she wants."[128] This is what I call dignity in its "narrow sense," and what Wells calls a "meager conception" of autonomy.[129]

In contrast, dignity generally presupposes a broader meaning for autonomy that entails a communitarian base and that legitimizes, and even requires, restrictions on free speech.[130] This is primarily true regarding the Kantian concepts of autonomy and dignity, because Kantian ethics tend to conflate autonomy and dignity,[131] giving them a communitarian twist.

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[124] Bognetti, *supra* note 122, at 90.

[125] *Cf.* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 165 n.30 (1997) (explaining the concepts of autonomy and dignity in Kantian philosophy).

[126] *Cf.* Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) ("Unlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons. That is why modern legal systems so often set autonomy and dignity in opposition to each other . . . . 'Autonomy contra dignity, dignity contra autonomy, antinomies linked in an uneasy seesaw, with neither tradition totally eliminating what the other valorizing.'" (quoting PAUL RABINOW, FRENCH DNA: TROUBLE IN PURGATORY 93 (1999))).

[127] *See* Wells, *supra* note 125, at 162–65 (detailing scholarly debate on the subjects of autonomy, censorship and the Court).

[128] *Id.* at 163.

[129] *Id.* at 195. Wells contrasts the "impoverished concept of autonomy" with a "richer, Kantian notion of autonomy." *Id.* at 193–95. This is also why I claim that dignity in its narrow sense is not sufficiently distinguishable from the argument from autonomy.

[130] *Cf. id.* at 167 (analyzing Kantian notions of governmental authority to limit an individual's rights only when those rights infringe on the rights of others).

[131] *See id.* at 167 n.30 (discussing interchangeability of freedom, dignity and autonomy in Kantian analysis).

Although human dignity is sometimes used as a synonym for autonomy,[132] and vice versa,[133] the core meaning of each term is quite clear. Thus, for example, Brison reviews six different meanings for the argument from autonomy, but only one of them favors speech regulation.[134] Brison's account, as well as the mainstream American scholarly perception of autonomy as a free speech justification, demonstrates that at least intuitively, autonomy rarely conflicts with freedom of expression.

Similarly, human dignity is a central term in European constitutionalism, where the Kantian-communitarian perception is dominant.[135] Issues that relate to autonomy and privacy are viewed by German law through the prism of human dignity, whereas the same issues are discussed in the United States as pertaining to the principles of liberty and due process.[136] This is yet another example of the same issues being framed as matters of either autonomy or human dignity. Yet it also demonstrates that, at least on the surface, human dignity will be used in some legal systems outside the United States, where the American system would use autonomy. Therefore, in Europe, human dignity is much more likely to be perceived as conflicting with freedom of expression rather than autonomy and, as a result, may consequently lead to more speech limitation than autonomy.[137]

Human dignity also serves as a robust constitutional right in Germany and in an increasing number of other Western democracies such as South Africa and Israel. The constitutional jurisprudence of these countries includes a well-developed emphasis on human dignity. Normally this focus recognizes and implements Kantian ethics, which leads to the restriction of speech. In the United States, however, human dignity is seldom used in free speech discourse, where it

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[132] *See, e.g.*, Dworkin, *Liberty and Pornography*, *supra* note 106 (giving an example of a speech-protective use of "dignity").

[133] *See, e.g.*, Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV 291, 307 (1989) (using autonomy as a justification to restrict freedom of expression); Wells, *supra* note 125, at 165 n.30 (referring to Kant's use of human dignity and autonomy).

[134] Brison, *supra* note 22, at 336–39.

[135] *See generally* EBERLE, *supra* note 27; KOMMERS, *supra* note 3.

[136] *See* EBERLE, *supra* note 27, at 127–33 (contrasting German and American autonomy law); *see also id.* at 127 ("German autonomy law . . . is animated by dignity, the core principle of the German legal order, not [by] privacy.").

[137] *Cf.* Susan Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT 582 (Catharine MacKinnon & Reva Siegal eds., 2004) (demonstrating how sexual harassment is perceived in Europe as an infringement on women's dignity, whereas in the United States, it is viewed as infringement on women's equality).

usually holds different (autonomy-related) meanings than in most other legal systems.

The common interpretation of human dignity is closer to the Kantian perception of autonomy and dignity. It is clear, however, that Dworkin rejects the Kantian perception of autonomy with regard to free speech. Therefore, if Dworkin uses dignity to describe what is actually a libertarian perception of autonomy, term conflation is more likely to occur. Therefore, Dworkin's choice of words is somewhat puzzling.[138] For these reasons, it is *strategically* wrong to use human dignity as a free speech justification, especially when autonomy adequately serves the same purpose.

An example for the use of autonomy as both a justification for free speech and its restriction can be found in Joseph Raz's work.[139] Raz renders an interesting perspective regarding the role of autonomy as a justification for free speech in his articulation of the nexus between free expression, pluralism and autonomy. Autonomy, according to Raz, entails choice. Choice is facilitated by diversity, since only the existence (and the awareness) of real alternatives gives autonomy its true meaning. A lack of different options therefore hinders autonomous choice. Therefore, Raz views the portrayal of different lifestyles by the media as an important societal tool for legitimacy and validation of different groups in Western societies.[140] Thus, he believes that people "depend on finding themselves reflected in the public media for a sense of their own legitimacy, for a feeling that their problems and experiences are not freak deviations."[141]

Much like Dworkin, Raz views censorship as an insult the government imposes on its citizens, and also views the exposure of citizens to many views and lifestyles as important.[142] Yet, unlike Dworkin, Raz believes that not all "bad speech" deserves protection.[143] Thus, an ar-

[138] As mentioned earlier, Dworkin likely chose to use human dignity when articulating this argument due to his use of human dignity throughout his writings as a central justification for rights in general. He probably did not foresee the possible negative implications of using human dignity in this context. Both Dworkin and I share the same passions, and I know how right he is about his general approach towards freedom of speech. What I am doubting is that he is right to summon dignity (and equality) in defense of free speech. *Cf.* Frank I. Michelman, *Must a Constitutional Democracy Be "Responsive"?*, 107 ETHICS 706, 723 (1994) (agreeing with Robert Post's approach regarding the importance of free speech protection, but doubting whether his use of "democracy" as a justification for speech protection is warranted).

[139] Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303 (1991).

[140] *Id.* at 309–10.

[141] *Id.* at 312.

[142] *Id.*

[143] Raz does not specify what speech ought not receive protection; instead, he leaves the issue somewhat vague. He suggests that speech that is illegal should enter this category, yet some speech may be legal in some countries and illegal in others (such as is the case of hate speech in

gument that is similar in nature to Dworkin's articulation of the argument from dignity yields speech-restricting results.

Raz's viewpoint is more compatible with European conceptions of rights that promote balancing of free speech with other rights. Raz uses rationales similar to Dworkin's yet renders opposite results. He demonstrates that, without a First Amendment framework, an emphasis on dignity (and even autonomy) works against freedom of expression.

Therefore, term conflation is best avoided by referring to autonomy when protecting speech and to dignity when restricting it. This understanding of autonomy and dignity is compatible with the common understandings and interpretations of the two. It will result in a better theoretical discourse, since in the current debates, quite often dignity is referred to as autonomy, and vice versa. Theoretical clarity will be easily reached by this suggestion, avoiding the danger of confusion this Article warns against.

C. The Relevance of Human Dignity from a Comparative Perspective

1. *The Two Accounts from a Comparative Perspective*

The two accounts offered above for the argument from dignity are parallel to comparative understandings of what human dignity is, both in general and in relation to freedom of expression in particular. The minimalist account characterizes the American approach, whereas the expansive account characterizes the approach of most other Western democracies to these issues. Thus intuitively, for an American, human dignity may seem like a justification for protecting speech whereas for a European, human dignity may seem like a justification for limiting it.

In the American system, the debate concerning the nature of the nexus between human dignity and freedom of expression may seem insignificant. Indeed, although some scholars and jurists argue that human dignity is a central value in American constitutional jurisprudence,[144] it does not arise as a prominent or central *value* under common American legal understanding, and it is certainly not a recognized *right*.[145] In addition, as discussed above, the arguments from

Europe and the United States). *Cf. id.* at 319 (describing why not all bad speech is protected, and giving examples).

[144] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW, *supra* note 2, at 1–38 (arguing that the clauses of the American Constitution embody abstract moral principles, including human dignity); *see also* Murphy, *supra* note 2 (offering a comparative analysis of the fundamental values enshrined in different constitutions).

[145] *See generally* THE CONSTITUTION OF RIGHTS, *supra* note 85 (collecting several perspectives on the intersection between human dignity and American constitutional interpretation); Paust,

autonomy and human dignity are more influential abroad than in the United States, especially in relation to nonpolitical speech.[146] Therefore, the effect of human dignity on freedom of expression in the United States cannot be far-reaching. This is also true due to the rule-based First Amendment jurisprudence that serves as a "buffer" against "irrelevant considerations" affecting its contours and content.[147] The minimalist account is also compatible with current First Amendment jurisprudence and with key doctrines like content neutrality, which is unique to the American setting. Also, more general constitutional doctrines, such as the Fourteenth Amendment's focus on discriminatory intent rather than disparate impact,[148] reflect differences between the United States and other countries in the application of human dignity. Nonetheless, the effects of human dignity on freedom of expression in other constitutional settings may reach further.

Human dignity is a central right and a leading value in many Western constitutional regimes, especially those formed in the second half of the twentieth century.[149] In some cases, the right to human dignity is at the focal point of national constitutional schemes.[150] These systems are also characterized by non-rule-based free expression jurisprudence, which makes them more susceptible to having the

supra note 2, at 146–84 (noting that despite a trend towards invoking human dignity concepts more often, the Supreme Court's references to human dignity have been, at best, scattered). It is noteworthy that some state constitutions explicitly enumerate human dignity as a right. *See, e.g.*, MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable."). But the Federal Constitution prevails when it comes to freedom of expression, so the likelihood that state courts would balance human dignity and freedom of expression as rights is minuscule. *See* Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 301–02 (2000) (contending that, at present, the Montana Supreme Court has not yet found substantive meaning in Montana's dignity clause); *see also* Heinz Klug, *The Dignity Clause of the Montana Constitution*, 64 MONT. L. REV. 133, 133–34 (2003) (arguing for development of Montana's dignity clause, given its current dormancy).

[146] *See, e.g.*, *supra* notes 61–70 and accompanying text.

[147] *Cf.* GREENAWALT, FIGHTING WORDS, *supra* note 25, at 151 (arguing that Canadians are less restrained than Americans in their free speech adjudication, because they lack "the baggage of much prior adjudication"); Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 54–56 (noting the rigid and rule-bound nature of American speech doctrine as compared to doctrines in other countries).

[148] *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny to an intentionally discriminatory affirmative action program), *with* Washington v. Davis, 426 U.S. 229, 242 (1976) (noting "[d]isproportionate impact . . . . [s]tanding alone . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations" (citation omitted)).

[149] *See, e.g.*, Eckart Klein & David Kretzmer, *Foreword* to THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 1, at v, v–vii (describing the role of human dignity in several legal regimes).

[150] Germany is a good example of such a system. *See generally* EBERLE, *supra* note 27, at 41–45 (describing human dignity's role in the Basic Law of the Federal Republic of Germany).

irrelevant considerations of human dignity *balanced* into their free expression doctrines.[151] In addition, as discussed below, most other Western democracies hold different constitutional ideals than the United States does regarding enforcing community values and morals in speech regulation, framing free speech as a positive right, and recognizing the rights of the audience. These differences may lead those legal systems to adopt an expansive account of dignity and, therefore, be more prone to limit free speech due to dignity concerns than to protect it. In any case, in most Western democracies the debate about the interrelationship between human dignity and freedom of expression is far more substantial than it is in the United States and carries greater consequences.

German constitutional jurisprudence gives human dignity precedence over all other rights and interests, including free speech. The Federal Constitutional Court of Germany has developed a well-established body of law that reflects this priority. Thus, although freedom of speech is enumerated in Article 5 of the Basic Law of the Federal Republic of Germany, it is subordinate to the human dignity guarantee of Article 1. As the German Court put it, human dignity is "the supreme value [that] dominates the whole value system of fundamental rights."[152] The German approach to freedom of speech applies even when core political speech is involved and creates an imbalanced, speech-restrictive legal regime.[153]

Although Germany offers an extreme model for balancing human dignity and freedom of expression, most other Western democracies are closer to the German model than to America's robust free speech protection. Many, such as South Africa and Israel, have human dignity clauses in their constitutional documents, which receive great importance in their constitutional schemes.[154] Even countries that do

[151] *Cf.* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 49–51 (arguing that European free speech adjudication is characterized by balancing).

[152] Mephisto, BVerfGE 30, 173 (1971) (F.R.G.), *translated in* 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC (1958) OF GERMANY (pt. 1), at 156 (1998); *see also* Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1562–63 (2004) (noting that, in Germany, other values, such as freedom of speech, are subordinate to human dignity).

[153] *See, e.g.*, Staubeta Caricature, BVerfGE 75, 369 (1987) (F.R.G.), *translated in* 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC (1958) OF GERMANY (pt. 2), at 420, 420–21 (1998) (protecting politicians from harsh parody that portrays them as animals).

[154] *See* S. AFR. CONST. 1996, ch. 2, § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected."); Basic Law: Human Dignity and Liberty, 1994, S.H. 90 arts. 2, 4 ("There shall be no violation of the life, body or dignity of any person as such. . . . All persons are entitled to protection of their life, body and dignity."). Please note that Israel does not have an enumerated free speech clause. This may lead to a further weakening of free speech vis-à-vis the enumerated right to human dignity.

not utilize human dignity as a central constitutional right, such as the United Kingdom, limit free speech in ways that are compatible with human-dignity rationales.[155] Therefore, it is more than plausible that outside the United States, the mere use of human dignity will bring about speech-restrictive outcomes.

Using human dignity as a free speech justification legitimizes the discourse in this field and blunts the tension between the two. A horizontal balancing between freedom of speech and human dignity is facilitated by this discourse, resulting in yet another danger threatening freedom of expression: the further restriction of speech. Since human dignity has become such a robust right in some Western democracies and is so prevalent in the constitutional discourse of countries such as Germany, Israel, and South Africa, it is not surprising that many judges in those nations frame freedom of expression issues in human dignity terms. But few justices have observed that to prevent speech restriction, human dignity and freedom of expression should be viewed as conflicting rights.[156]

2. *The Extent to Which Human Dignity and Autonomy Concerns Affect Different Legal Systems—Three Parameters*

As mentioned earlier, most Western democracies construe the nexus between human dignity and freedom of expression such that they adopt the "expansive account" of human dignity, whereas in the United States the "minimalist account" may seem more appropriate. In order to demonstrate why this proposition is correct, I will now set forth a framework for predicting whether a specific legal system is more prone to limiting free speech due to human dignity concerns or to protecting it.

Although several variables may be relevant for this kind of prediction, three are particularly valuable in determining whether a human dignity focus will result in the limitation or protection of free speech in a specific legal system. These are: (a) individualism versus communitarianism and paternalism; (b) speaker versus audience focus; and (c) negative- versus positive-rights perceptions. The combination of these factors may offer a good predictor of how a specific legal system will treat human dignity concerns in its freedom of expression jurisprudence.

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[155] *See, e.g.*, Race Relations Act, 1976, c. 74, § 29 (U.K.) (forbidding publication of advertisements that, inter alia, indicate an individual's intent to engage in an act of discrimination).

[156] *See* Statman, *supra* note 85 (referring to the Supreme Court rulings both in Israel and South Africa).

a. Individualism Versus Communitarianism and Paternalism

Constitutional instincts in the United States are far more libertarian than they are in most Western democracies, especially when First Amendment doctrine is involved. Thus, America's perception of autonomy and freedom of speech is very individualistic.[157] For instance, the content-neutrality doctrine, which prohibits censorship on grounds of content, can be explained as a commitment to this kind of individualism and individual moral responsibility.[158] Consequently, any censorship on grounds of content is inconsistent with America's libertarian commitment.[159]

As opposed to America's libertarian origins, European communitarian perceptions of fraternity (*fraternité*), solidarity, and paternalism characterize most other Western democracies.[160] In such paternalistic societies, valuing certain thoughts above others is essentially limiting speech because of its content.

Even when European courts deal with individual rights, they are usually contextualized within "community surroundings."[161] Differences between Europe and the United States concerning community and individualism in the context of free speech are articulated nicely by Sionaidh Douglas-Scott, who says that:

> European case law rejects a conception of individuals as beings who merely should be left to their own devices to make up their own minds about the value of expression in the public domain, to be free to ignore it, or to counter it with more speech. Such an approach isolates human

[157] *See* POST, *supra* note 12, at 9–10 (noting that an infusion of individualism and autonomy has transformed people's sense of community identity, shaping American conceptions of freedom of speech); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 297 (1988) (arguing that individualist considerations, not pluralist ones, shape American First Amendment doctrine); *cf.* Brison, *supra* note 22, at 313 (arguing that autonomy-based justifications for free speech do not preclude imposing restrictions on hate speech). Kent Greenawalt, who plays with the themes of individuals and communities when comparing Canadian and American freedom of expression, states a broader comparative perspective, according to which "[a]ny country's dominant culture will place more or less emphasis on individuals or communities, and this will affect the kind of latitude the political branches and courts will afford to speech." GREENAWALT, FIGHTING WORDS, *supra* note 25, at 8–9.

[158] *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 205 (discussing the relationship between majority enforcement of rights and respect for the minority).

[159] *See* Dworkin, *Liberty and Pornography*, *supra* note 106, at 12–13 (arguing that content-based regulations are inconsistent with the First Amendment).

[160] *See* KOMMERS, *supra* note 3, at 694 ("Thus, the political system as seen through the eyes of the Federal Constitutional Court is marked indelibly by fraternity as by liberty and equality."); *see also* SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 23, at 65 ("Many countries recognize a strong Free Speech Principle but regulate [speech] on the basis of moral and paternalistic principles."); Brugger, *Communitarianism*, *supra* note 36, at 433 (arguing that communitarian values have a role in the interpretation of the German Constitution).

[161] KOMMERS, *supra* note 3, at 694 ("In the German view, human dignity can exist only when persons are allowed to develop themselves as rational beings in community with others.").

> beings by forcing them to take the consequences of painful conduct and ignores the particular susceptibility of certain groups to injury, especially when the offense of the speech seems to be targeted at such groups because of their identity. Under the American model, the individual will be left to his or her less communal and somewhat atomistic existence.[162]

These differences have many reasons. Most European countries have more homogeneous societies than the United States does, making societal common ground seemingly easier to define and reach. The law in these countries is meant to facilitate maintaining this collective identity, even at the expense of regulating certain speech due to its content.[163]

In addition, the European experience during World War II was a formative experience not only for Germany, but for the Continent as a whole. Though the United States does not have a positive history when it comes to racial relations (for example, slavery, the Civil War and Jim Crow), American democracy never produced a totalitarian regime as some European countries did, nor did it experience the traumatic reaction Europe shared from the War. One of the reactions to these experiences was the adoption of human dignity as a leading constitutional value.[164]

The restriction of some problematic speech, especially group libel and hate speech, may be justified from a communitarian viewpoint. A restriction of such speech is desirable "not only in order to protect certain groups but for the well-being of the society as a whole."[165] Maintaining a minimum of civility in public discourse may be viewed as the ultimate goal of such restrictions since permitting vilification harms the society as a whole.[166] The legal basis that legitimizes these restrictions "can be found in the central constitutional principles of equality, *human dignity* and non-discrimination."[167]

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[162] Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 343 (1999).

[163] *See, e.g.*, KOMMERS, *supra* note 3, at 695 ("In Germany, however, speech is juridically valued for its capacity to create community. The German view holds that free speech requires persons participating in the forum of public discussion to speak the truth and to do so with respect for other persons' personal honor and dignity. In short, the purpose of political discourse in German theory is to create a tradition of civility and a polity of responsible citizens.").

[164] *See, e.g.*, Klein & Kretzmer, *supra* note 149, at v–vi (discussing the increased prominence of human dignity in both international covenants and modern constitutions).

[165] Errera, *supra* note 5, at 37. Slight exceptions may be seen in the United States in specific contexts, such as cross burning, *see* Virginia v. Black, 538 U.S. 343 (2003), possibly anti-abortion speech, *see* Hill v. Colorado, 530 U.S. 703, 742 (2000) (Scalia, J., dissenting), and gays and lesbians in the Boy Scouts, *see* Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000). *See generally* O'Neil, *supra* note 31, at 29–30 (commenting on various examples of the Supreme Court's hate speech jurisprudence, including *Dale*).

[166] *See* Errera, *supra* note 5, at 37 (discussing the ills of group libel and hate speech).

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

European sensitivity regarding racist speech has not been applied, so far, to speech that some say impinges upon gender equality (for example, pornography). Canada is the only Western democracy so far that has seriously attempted to restrict pornography due to communitarian concerns that relate to dignity and equality.[168] Nonetheless, Europeans are more susceptible to such a possible restriction than Americans are.[169]

Therefore, while autonomy focuses on the individual in the American context, it tends to be an argument that protects all speech.[170] Contrary to the American emphasis on individualism, the communitarian conceptualization of autonomy and rights in other Western democracies may well lead to autonomy and dignity concerns being used to limit speech.

b. Speaker Focus Versus Audience Focus

In addition to or, in fact, as a result of the different emphases on individual and communitarian perceptions of rights in the United States and Europe, there are also different emphases on the holders of rights in those societies. In the American system, many leading commentators put an emphasis on the rights of the speaker, and the potential harm to members of the audience is usually categorized as infringement on their interests rather than their rights.[171]

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[168] *See, e.g.*, R. v. Butler, [1992] S.C.R. 452, 479 (Can.) ("This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.").

[169] *See, e.g.*, HCJ 5432/03 Shin v. The Cable & Satellite Council [2004] IsrSC 58(3) 65; HCJ 4804/94 Station Film Co. v. The Film Review Bd. [1997] IsrSC 50(5) 661, ¶ 11, *translation available at* http://elyon1.court.gov.il/files_eng/94/040/048/z01/94048040.z01.htm (commenting on the treatment of pornography in Israeli jurisprudence).

[170] *See, e.g.*, Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1535 (2003) ("As originally conceived, the justification from autonomy seemed exclusively concerned with the self-expression needs of speakers. . . . Under a less individualistic—or at least less atomistic—conception of autonomy and self-respect, however, focusing exclusively on the standpoint of the speaker would seem insufficient.").

[171] *See* Brison, *supra* note 22, at 316–17 (critiquing Ronald Dworkin's position that "restrictions on hate speech would violate individuals' right to autonomy" (footnote omitted)); Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978 (distinguishing between First Amendment claims based on principle, which require vindication of moral rights, from claims based on policy, which require a balancing of interests and must yield to claims of principle when the two conflict); Frederick F. Schauer, *The Rights of M.A. Farber: An Exchange*, N.Y. REV. BOOKS, Dec. 7, 1978, at 39 ("If the only free speech claims that can under Professor Dworkin's analysis prevail automatically over considerations of policy are those that are based on the moral rights of the speaker, then it is hard to see why there is such a strong presumption in favor of allowing the publication of [sensitive government information].").

Normally, rights in general, and the right of free speech in particular, are beneficial to the speaker, not to the audience.[172] This classic perception of rights usually classifies harms to a hypothetical audience that are caused by the fulfillment of a person's speech rights as societal interests, and balances these interests as inferior to the individual rights. Without some compelling legal justification, the societal interests are trumped by the individual rights.[173] Therefore, using human dignity to defend victims of speech (such as in cases of hate speech or pornography) is arguably a confusion between rights and interests.[174]

The determination of whether a certain violation infringes upon rights or interests carries great significance. According to the Dworkinian perception applied by many Western democracies, only a substantial harm to an interest may trump a certain right. This balancing between rights and interests is called vertical balancing, and interests rarely win this battle. An example of such balancing is the Clear and Present Danger Test, which balances the right to free speech with society's interest in security. The test prescribes that the prior restraint of speech is permissible only when there is actual or imminent danger, such as violence or injuries to others.[175] But if the harm infringes upon a right, then two rights are conflicting (for example, the speaker's right to free speech and the addressee's right to human dignity). In such a case a horizontal balancing is applied, with no inherent strength given to either right vis-à-vis the competing right.[176] While in the United States the harms racial and porno-

[172] *See* Michael Dan Birenhak, *Constitutional Engineering—The Supreme Court's Methodology in Value-Based Decisions*, 19 MECHKARI MISHPAT 591, 608–12 (2003) (demonstrating how the Israeli Supreme Court manipulates some interests as rights); *cf.* CrimA 3750/94 Ploni v. Israel [1994] IsrSC 48(4) 621, 630 (claiming, in the opinion of Chief Justice Shamgar, that human dignity defends the rights of the victims, and not only the rights of perpetrators).

[173] *See* Ronald M. Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153–67 (Jeremy Waldron ed., 1984) (arguing that rights of speakers should trump the desires of the community majority).

[174] *But see* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 198–203 (framing the conflict between speakers and the victims of their speech as an example of competing rights). Another possible construction of this conflict is defining these harms as infringing upon group rights. *See, e.g.*, Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1962*, 66 BROOK. L. REV. 71, 75–76 (2000) (summarizing attempts by American Jews to justify group libel laws based on their rights as a group rather than the rights of the individuals in the group).

[175] *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) ("[A] State [cannot] forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Nadine Strossen, *Hate Speech and Pornography*, 46 CASE W. RES. L. REV. 449, 455 (1996) ("[A] restriction on speech can be justified only when necessary to prevent actual or imminent harm, such as violence or injury to others.").

[176] *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 184–205.

graphic speech may cause are perceived as harms to interests, they may be perceived in other legal systems as infringement of rights.[177]

"[A]rguments from dignity seem much more plausibly to generate arguments for restricting various kinds of speech than for protecting it."[178] When a person is vilified because of his race, for example, the harm to his dignity is quite evident. Yet it is harder to articulate the harm to the vilifier's own dignity if he is prohibited from saying racial slurs. It seems more plausible to view human dignity as protecting the rights of minorities than of racists. A similar example may be pornography, where many claim that human dignity naturally leads to protecting the victims of this speech rather than the publishers.[179]

As Michel Rosenfeld rightly remarked, the justification from autonomy "goes hand in hand with a ban against hate speech so long as the autonomy of speakers and listeners is given equal weight. . . . If autonomy is taken as requiring dignity and reciprocity, then it demands banning hate speech as an affront against the basic rights of its targets."[180]

The rights discourse in most Western democracies recognizes the rights of the audience or the victims and rejects an exclusive focus on the rights of the speaker or perpetrator. Thus, for example, the rights of victims are balanced vis-à-vis the rights of criminals, and the rights of speakers are balanced vis-à-vis the rights of addressees. For instance, the right to human dignity in Germany is interpreted as protecting the rights of both speakers and addresses.[181] The Israeli Supreme Court has also interpreted the right to human dignity as

[177] *See* R. v. Butler, [1992] 1 S.C.R. 452, 455 (Can.) (holding that a statute restricting degrading or dehumanizing pornography was justified because it protects the community from harm and promotes the equality of women); HCJ 4804/94 Station Film Co. v. Film Review Bd. [1997] IsrSC 50(5) 661, *translation available at* http://elyon1.court.gov.il/files_eng/94/040/048/z01/94048040.z01.HTM (discussing in dicta the possibility that pornographic expression can be restricted when it is likely to harm the equal status of women); *Ploni*, IsrSC 48(4) at 630.

[178] Schauer, *Speaking of Dignity*, *supra* note 85, at 184; *see also* Statman, *supra* note 85, at 576–80.

[179] Statman, *supra* note 85, at 577–78; *see also* literature on "silencing," such as CENSORSHIP AND SILENCING (Robert Post ed., 1988) (exploring the various ways speech is restricted from explicit legal control to regulation through subsidies and property rights and to state intervention in private constraints of expression). The writings of Catharine MacKinnon focus on equality and human dignity as primary justifications for the restriction of pornography. *See, e.g.*, MACKINNON, ONLY WORDS, *supra* note 67, at 71–110 (arguing that absolute free speech rights for pornographers undermine the equality of women).

[180] Rosenfeld, *supra* note 170, at 1562.

[181] Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 19 & n.45 (2002).

applying to victims as well as perpetrators.[182] Canada's pornography rulings share a similar rationale.[183]

Some of the approach toward recognition of audiences' rights may also be attributed to the third factor, which relates to the recognition of positive and negative rights.

c. Negative Rights Versus Positive Rights

Whether freedom of expression is construed as a negative right[184] or as a positive right[185] has a potential effect on the way human dignity may limit freedom of expression.

The First Amendment is distinctly perceived as protecting a negative right. The negative perception of rights is characteristic to American constitutional law, but is probably most evident in First Amendment doctrines.[186] There are slight exceptions to this rule such as the Public Forum Doctrine, but by and large, this is a fair characterization of American free speech law.[187] Thus, the courts have explicated the First Amendment as guaranteeing "the negative liberty of free speech."[188] Dworkin characterizes this choice of framing freedom of expression as a negative right as "the core of the choice modern democracies have made."[189]

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[182] *See Ploni*, IsrSC 48(4) at 630 (noting that human dignity defends the rights of the victims, and not only the rights of the perpetrators, according to Chief Justice Shamgar).

[183] *See* R. v. Butler, [1992] S.C.R. 452, 454 (Can.) (applying the "degrading or dehumanizing test" for restricting pornography on the basis that it harms the community).

[184] Negative liberty can be briefly characterized as "not being obstructed by others in doing [what] one might wish to do." Dworkin, *Liberty and Pornography*, *supra* note 106, at 12.

[185] In a nutshell, positive liberty can be characterized as "the power to control or participate in public decisions, including the decision how far to curtail negative liberty." *Id.* Dworkin summarizes the concept of positive liberty by saying that "in an ideal democracy—whatever that is—the people govern themselves. Each is master to the same degree, and positive liberty is secured for all." *Id. See generally* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY 166 (Henry Hardy ed., 2002) (providing elaboration on negative and positive rights).

[186] *See* Brison, *supra* note 22, at 338–39 (questioning the extreme emphasis on autonomy in free speech discourse compared to other topics).

[187] For elaboration on the Public Forum Doctrine see, for example, VAN ALSTYNE, *supra* note 115, at 373–548. California law treats privately-owned shopping centers as quasi-public forums. The Supreme Court of California has ruled that the California Constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (1979)*; see also* Waremart Foods v. NLRB, 354 F.3d 870, 872 (D.C. Cir. 2004).

[188] Dworkin, *Liberty and Pornography*, *supra* note 106, at 13 n.4; *see, e.g.*, Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 327 (1985), *aff'd*, 475 U.S. 1001 (1986) ("[T]he government must leave to the people the evaluation of ideas.").

[189] *Cf.* Dworkin, *Liberty and Pornography*, *supra* note 106, at 15. ("Freedom of speech, conceived and protected as a fundamental negative liberty, is the core of the choice modern democracies have made, a choice we must now honor in finding our own ways to combat the shaming inequalities women still suffer.").

Yet it appears that Dworkin's premise is inaccurate, since most modern democracies recognize, to certain degrees, some positive-rights aspects of their free speech doctrines. Germany is the clearest example of the application of rights as positive rights, including when it comes to free expression.[190] Nonetheless, as in the examples given earlier, Germany does not stand alone in this trend. It is followed, usually to a lesser extent, by other Western democracies such as Canada,[191] Israel,[192] and France.[193]

The distinction between the public and private spheres is also affected by positive and negative rights perceptions. Basically, if freedom of expression is merely a negative right, the government is not allowed to censor its citizens. But if rights are construed in a positive manner, the government can regulate harm that is caused by private actors. Indeed, some of the debate regarding the restriction of pornography revolves around the classification of rights as positive or negative.[194]

As we can see, the parameters reviewed above align with American and European free speech perceptions. The United States is clearly individualistic, speaker-focused and based on negative rights. Most other Western democracies are quite clearly on the opposite side due to their recognition and application of community values, audience rights, and positive rights. These differences set the United States apart from the rest of the Western democracies. This may serve as yet another explanation for American Exceptionalism and explain why, in America, human dignity is perceived as having different implications for free speech than elsewhere.

IV. DRIVING A WEDGE BETWEEN FREEDOM OF SPEECH AND HUMAN DIGNITY

Speaking of speech in human dignity terms may be a double-edged sword. As Schauer notes, the "conflation of dignity and

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[190] *See* Dieter Grimm, *Human Rights and Judicial Review in Germany*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW 267, 283 (David Beatty ed., 1994) (referring to the German jurisprudential perception of the "protective duties" (*Schutzpflicht*) of government).

[191] *See, e.g.*, Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1506 n.271 (noting that Canadian political culture sees government more positively than American culture).

[192] *See, e.g.*, Carmi, *supra* note 10, at 284–87 (describing the principles of public access that govern the Israeli press).

[193] *See, e.g.*, Eric Barendt, BROADCASTING LAW: A COMPARATIVE STUDY 13–19 (1993) (describing the evolving role of government in French broadcasting).

[194] *See, e.g.*, Dworkin, *Liberty and Pornography*, *supra* note 106, at 14 ("But the most imaginative feminist literature for censorship makes a further and different argument: that negative liberty for pornographers conflicts not just with equality but with positive liberty as well, because pornography leads to women's *political* as well as economic or social subordination.").

speech, as a general proposition, is mistaken, for although speaking is sometimes a manifestation of the dignity of the speaker, speech is also often the instrument through use of which the dignity of others is deprived."[195] Both freedom of expression and human dignity may gain by untying this "Gordian knot." From a theoretical perspective, a construction of conflict rather than unity between these two constitutional concepts[196] is preferable.[197] As Schauer notes:

> To drive a wedge between the principles of dignity and free speech is not to suggest that dignity is not a primary human good. Nor is it to suggest that free speech, as a constraint on the ability of some agent in control to limit the communication of some agent under control, is not also a good thing. But noting that dignity and speech are not necessarily conjoined leads to the conclusion that the values of free speech and preservation of dignity will often collide. When that is the case, considering the instances in which an act of speech is an expression of dignity will be of little assistance. Consequently, thinking seriously about dignity may cause us either to recognize its irrelevance to free speech theory or to re-evaluate some of that theory itself.[198]

This wedge between the principles of dignity and free speech exists in the American setting, inter alia, in the form of the rule-based First Amendment jurisprudence.[199] It is lacking in most European systems, which are non-rule-based and deploy constitutional "balancing" in cases that involve freedom of expression.[200]

A prime justification for this wedge is the potential for misapplication of the term "human dignity." Ronald Dworkin, throughout his writings, warns of the confusion of terms. For example, he repeatedly cautions against the conflation of interests, values, and rights.[201] Framing a free speech justification in human dignity terms leads to such a possible confusion, so the connection between freedom of ex-

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[195] Schauer, *Speaking of Dignity*, *supra* note 85, at 179.

[196] I deliberately use the term "constitutional concepts," and not rights or values, since, as I show in this Paper, the term "human dignity" may be regarded as either a right or a value (or even both), but this determination may vary among different legal systems and different circumstances, and may carry practical consequences.

[197] *Cf.* Statman, *supra* note 85, at 578–79 (arguing that construing the conflict between human dignity and freedom of expression in terms of conflicting rights, rather than viewing human dignity as part of the justification for freedom of expression, offers a clearer conceptualization of this tension).

[198] Schauer, *Speaking of Dignity*, *supra* note 85, at 179.

[199] *See* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 53–56 (describing the rule-based nature of First Amendment jurisprudence in comparison to the European balancing discourse).

[200] *See* O'Neil, *supra* note 31, at 30; Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 49–53.

[201] *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2; *cf.* BERLIN, *supra* note 185, at 200–01 ("[C]onfounding liberty with her sisters, equality and fraternity, leads to similarly illiberal conclusions.").

pression and human dignity (or equality) may be construed as legitimizing the limitation of speech. This confusion may be avoided by keeping human dignity and free speech doctrinally separated.

The choice to separate dignity and speech does not require prioritization of one over the other.[202] Rather, it merely recognizes dignity's irrelevance as a free speech justification and properly places dignity as an external constraint on free speech rather than an internal justification.

The current free speech discourse in the United States reflects the traditional language of the First Amendment. It lacks representation of more contemporary concerns which are reflected in the human dignity discourse prevailing in other Western countries.[203] Using human dignity as a free speech justification is equivalent to introducing new vocabulary into free speech theory. Such introduction may even affect some of our most basic assumptions regarding free speech.[204]

Mayo Moran's observation that the choice of certain terminology influences outcomes should not be taken lightly, since such influence may be far-reaching.[205] Acknowledging the rhetoric of human dignity in freedom of expression contexts may prove to be harmful; the manipulable basis of human dignity, as well as its ambiguity, make this especially true. It was the existing legal discourse and ruling paradigms that preserved the stability of First Amendment doctrine against the newly discovered insights regarding the effects of speech. The existing doctrines blocked any significant effect of the new understandings, since the phenomenon did not quite fit the old categories.[206]

There is merit in claiming that a more transparent discourse recognizing the complexity of the conflict between human dignity and free speech is valuable. And indeed, in some respects, attempting to

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[202] *Cf.* Schauer, *Speaking of Dignity*, *supra* note 85, at 190–91 (arguing that in certain circumstances, "freedom of speech is different in dramatic ways from most other individual rights, and thus the idea of dignity, which is highly relevant to thinking about many other rights, may be much less relevant in thinking about freedom of speech").

[203] Canada is a good example of a country that reflects such a discourse. *See generally* Moran, *supra* note 191 (offering a thorough discussion of contemporary concerns in Canadian free speech discourse).

[204] *See id.* at 1426–27 ("So each of us must struggle to revivify our language, to adapt it to the changing nuances of our communal life. In so doing, we not only come to better understand our world, we also help to remake it.").

[205] *See id.* at 1435 ("The choice of context is significant in hate speech cases as well, for once the issue is situated in a particular way, certain understandings appear far more plausible than others. Certain facts immediately become relevant and thus susceptible to being found, while others appear irrelevant, and thus are more easily lost.").

[206] *Cf.* GREENAWALT, FIGHTING WORDS, *supra* note 25, at 151 ("Perhaps one reason why the Canadian Supreme Court has been so much more receptive to recent theories of this sort is because it is unrestrained by the baggage of much prior adjudication under the Charter that is committed to more traditional theories.").

reconcile human dignity concerns with free speech concerns can bring greater transparency, which is lacking from the existing U.S. free speech discourse.[207] In this sense, introducing human dignity into free speech vocabulary may seem desirable regardless of its possible effects, even among supporters of the outcomes the current legal regime and theory produces.[208]

Nonetheless, we should be very suspicious of introducing new vocabulary that might sweep free speech further away than initially intended. After all, the "rhetorical choices" we make directly affect the perception of the intricate interrelationship between human dignity and freedom of expression.[209] Even if we were to recognize that there should be an argument from dignity, and that the insights it brings to the free speech arena are valuable, there is still a major caveat. As Robert Post aptly noted, "[t]he challenge is thus how to preserve the analytic force of the new scholarship without sacrificing the values and concerns of more traditional accounts."[210]

CONCLUSION

The nature of human dignity suggests that once human dignity considerations are balanced vis-à-vis freedom of expression concerns, it almost automatically leads to speech-restrictive results. Therefore, the introduction of human dignity into freedom of expression theory and rulings is detrimental to free speech, even without an absolutist approach to human dignity. European constitutionalism and practice suggest that the Europeans are not up to the challenge, whereas current American law is probably immune from human dignity's effects.

Labels matter. If freedom of expression is articulated in human dignity terms, it will not be long before someone who has neglected to fully understand the delicate nature of this connection would mistakenly interpret it in a very different way than Dworkin and Greenawalt understand it. Furthermore, the minimalist account of human dignity does not reflect many Western legal systems' understandings of rights and human dignity. In these cases human dignity sends mixed signals as to the protection or limitation of speech. Therefore, the possible harm of juxtaposing freedom of expression

[207] *See* Schaeur, *Freedom of Expression Adjudication*, *supra* note 4, at 52–53 (presenting claims that the non-American constitutional discourse of balancing, which also applies to free speech, is more honest and transparent than the American discourse under the First Amendment).

[208] Moran, *supra* note 191, at 1474–75 ("Even if one thinks that there are reasons to support the official narrative's result, it is still inadequate for several reasons.").

[209] *See id.* at 1498.

[210] Robert C. Post, *Censorship and Silencing*, *in* CENSORSHIP AND SILENCING, *supra* note 44, at 4.

with dignity and equality may well exceed the benefits of distinguishing the argument from dignity from the argument from autonomy.

Autonomy is not affiliated with the same values as dignity and is perceived in a more libertarian way than dignity or equality both in Europe and the United States. Keeping an emphasis on autonomy (or liberty) does not carry the same risks or at least significantly decreases the chances for possible term confusion and its undesirable consequences.[211]

Autonomy is mainly (and intuitively) affiliated with libertarian values and is therefore more compatible with the American paradigm of free speech. As opposed to autonomy, prevalent perceptions of human dignity, especially outside the United States, are communitarian.[212] Although autonomy may be interpreted as accommodating communitarian concerns[213] and human dignity may be interpreted as accommodating libertarian concerns,[214] both instances are peripheral interpretations. The mainstream understandings of both terms lean on different heritages.[215] When it comes to free speech justifications, it is more appropriate to lean on classic liberal perceptions than communitarian perceptions. Therefore, although autonomy is not the silver bullet to the problems human dignity presents, it is still preferable, because the human-dignity-based regime is more prone to suppressing speech.

The argument from dignity, in its narrow sense, is not sufficiently distinguishable from the argument from autonomy. The latter actually captures and conceptualizes the minimalist view of the argument from dignity quite adequately and does not carry similar potential misunderstandings as does the former. This "slippery slope" argument may seem unsubstantiated to the American reader because, in the American context, human dignity (and equality) carry different meanings than in most other Western democracies. Yet, as demonstrated above, this is a genuine concern in other legal settings. When Greenawalt and Dworkin articulated their view as to the argument from dignity, they did so from an American perspective and may have

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[211] *Compare* Dworkin, *Liberty and Pornography*, *supra* note 106, (giving an example of a speech-protective use of "dignity"), *with* Michelman, *supra* note 133, at 307 (giving an example of a speech-restrictive use of "autonomy").

[212] *Cf.* POST, *supra* note 12, at 23–116 (affiliating human dignity with community); Brugger, *supra* note 33, at 72–74 (describing the importance of protecting community values in judging freedom of expression).

[213] *See* Brison, *supra* note 22, at 336–38 (discussing the relationship between autonomy and community); Michelman, *supra* note 133, at 303–04; Rosenfeld, *supra* note 170, at 1535, 1562 (noting that if autonomy is taken as requiring dignity and reciprocity, it may lead to speech restriction).

[214] *See* discussion on Dworkin and Greenawalt *supra* Part III.A.1.

[215] *See* discussion *supra* Part I (regarding the communitarian sources of human dignity and libertarian sources of American rights discourse).

overlooked the non-American approach that sheds a different light on their arguments.

The multiplicity of theoretical writings on free speech lead to constant discoveries of new free speech "justifications." Freedom of speech supports many acts and ideologies by nature. Therefore, if one wants, many rationales can be articulated in support of free speech. But we have to ask ourselves whether the automatic espousal of such rationales is always beneficial and what may be at stake. In the case of dignity, as shown above, the disadvantages clearly surpass the benefits. Therefore a skeptical approach towards the argument from dignity is warranted.

Free speech justifications must be aimed at protecting speech—not restricting it. Recognition of human dignity among these justifications, with all its above-mentioned potential interpretations that are speech-restricting, is simply a bad idea. On one hand, speech-protecting features of the argument from dignity, namely the minimalist account, are not sufficiently discernable from existing justifications. On the other hand, the more expansive argument from dignity is not a justification for protecting free speech since it is also a potential justification for the limitation of speech. Moreover, it is doubtful how exactly these arguments are free speech justifications as opposed to general principles for the protection of all rights. Therefore, free speech protection and theory have very little to gain from affiliation with human dignity, and discourse that aligns the two might prove a "Trojan Horse" with dignity as "the enemy from within."