"Here, There and Everywhere": Human Dignity in Contemporary Law and in the Transnational Discourse

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

2. Human Dignity in International Documents and Case Law

3. Human Dignity in the Transnational Discourse

   B. Human Dignity in the United States

   C. Arguments Against the Use of Human Dignity as a Legal Concept

III. LEGAL NATURE AND MINIMUM CONTENT OF HUMAN DIGNITY

   A. Human Dignity as a Legal Principle

   B. The Influence of Kantian Thought

   C. Minimum Content of the Idea of Human Dignity

       1. Intrinsic Value

       2. Autonomy

       3. Community Value

IV. USING HUMAN DIGNITY TO STRUCTURE LEGAL REASONING IN HARD CASES

   A. Abortion

   B. Same Sex Marriage

   C. Assisted Suicide

V. CONCLUSION
I. INTRODUCTION

In France, Mr. Wackeneim wanted to participate in a show known as “dwarf tossing,” in which nightclub patrons would try to heave a dwarf the furthest distance possible. In the United Kingdom, Mrs. Evans, after losing her ovaries, wanted to insert into her uterus embryos fertilized with her own eggs and semen from her ex-husband, whom she had divorced. In Italy, the family of Mrs. Englaro wanted to suspend medical treatment and let her die peacefully after seven years in a vegetative coma. In Brazil, Mr. Ellwanger wanted to publish books denying the existence of the Holocaust. In the United States, Mr. Lawrence wanted to have intimate relations with a same-sex partner without being considered a criminal. In Colombia, Mrs. Lais wanted to have her right to work as a sex professional, also referred to as prostitution, officially recognized. In Germany, Mr. Gründgens wanted to prevent the republication of a book based on the life of his father, which he considered offensive to his father’s honor. In South Africa, Mrs. Gootboom, living in extremely miserable conditions, demanded from the state a shelter for her and her family. In France, the young Mr. Perruche sought compensation for having been born, that is, for not having been aborted, because a prenatal diagnostic error left unforeseen a severe risk of physical and mental lesions, and he was born with these impairments.

All of these real cases, decided by high courts throughout the world, have one trait in common: underlying the decision in each one of them, in express or implicit fashion, was the meaning and scope of the idea of human dignity. In recent decades, human dignity has become one of the Western World’s greatest examples of ethical consensus, mentioned in countless international documents, national constitutions, legal statutes and judicial decisions. On
the abstract level, few ideas have had the ability to garner so much spirited and unanimous concurrence. However, in practical terms, dignity as a legal concept frequently functions merely as a mirror in which each person projects his or her own values. It is not by chance that human dignity is invoked throughout the world by opposing sides in such matters as abortion, euthanasia, assisted suicide, same-sex marriage, hate speech, cloning, genetic engineering, sex-change operations, prostitution, decriminalization of drugs, the shooting down of hijacked aircrafts, protection against self-incrimination, the death penalty, life imprisonment, use of lie detectors, hunger strikes, and enforcement of social rights. The list is endless.

In the United States, references to human dignity in the Supreme Court’s case law trace back to the 1940’s. Use of the concept in American law, however, has been episodic and underdeveloped, relatively incoherent and inconsistent, and lacking in sufficient specificity and clarity. Regardless, there has been a clear and noticeable trend in recent years, in which courts have employed the idea of human dignity in cases involving fundamental rights such as the right to privacy and equal protection, the prevention of unconstitutional searches and seizures, or cruel and unusual punishment, and the “right to die.” Embracing an expanded idea of human dignity as the grounding for the United States’ Bill of Rights has been hailed as a qualitative leap by an array of distinguished authors, but this view is not unanimous. In the

---

6 See, e.g., Laurence Tribe, Larry Tribe on Liberty and Equality, http://balkin.blogspot.com/2008/05/larry-tribe-on-liberty-and-equality.html (“The strategy that for me promises the greatest glimpse of the infinite is a strategy that
Courts and the academy, voices such as those of Justice Antonin Scalia or Professor James Whitman have fiercely disputed the role of human dignity in constitutional interpretation and in legal reasoning generally, and have challenged its necessity, convenience and constitutionality. Moreover, some have looked with distaste, and even horror, at the mere possibility of resorting to foreign materials on human dignity to establish a shared common view on its meaning.

The ideas that follow are based on the assumption that human dignity is a valuable concept with growing importance in constitutional interpretation that can play a central role in the justification of decisions involving morally complex issues. It is past time to render dignity a more substantive concept in legal discourse, where it has often served merely as a rhetorical ornament, a vessel of convenience for unrelated cargo. With that in mind, this Article attempts to accomplish three main objectives. The first is to show the importance of the notion of human dignity in domestic and international case law, as well as in transnational discourse. I will argue that the United States, although still timidly, has joined this trend, and that there is no reason why it should not. The second objective is to identify the legal nature of human dignity – fundamental right, absolute value or legal principle? – and to establish its minimum content, which I argue is comprised of three elements: the intrinsic value of every human being, individual autonomy and community value. My purpose is to determine the legal implications

---


8 See, e.g., Richard Posner, No Thanks, We Already Have Our Own Laws, LEGAL AFFAIRS, July/August 2004 (claiming that using foreign decisions even in a limited way undermines the court system and reduces judicial influence).

9 By transnational discourse I mean courts from one country making reference to decisions of courts of a different country.
associated with each element, *i.e.*, the fundamental rights, responsibilities and duties that they entail. The third and last objective is to show how establishing human dignity’s legal nature and minimum content can be useful in structuring legal reasoning in hard cases. I use as examples to confirm my central argument the cases of abortion, gay marriage and assisted suicide.

II. HUMAN DIGNITY IN CONTEMPORARY LAW

A. COMPARATIVE LAW, INTERNATIONAL LAW AND TRANSNATIONAL DISCOURSE

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

Human dignity is a concept found in most constitutions written after World War II.\(^\text{10}\) It is generally recognized that the rise of dignity as a legal concept owes its origins most directly to German constitutional law. In fact, based on provisions of the Fundamental Law of 1949, which declare that human dignity shall be “inviolable” (Art. 1.1) and establish a right to the “free development of the personality” (Art. 2.1), the German Constitutional Court has developed a body of law and doctrine that have influenced case law and scholarship throughout the world.\(^\text{11}\) According to the Court, human dignity is at the very top of the constitutional system, representing a supreme value, an absolute good in light of which every provision must be interpreted.\(^\text{12}\) The

---

\(^{10}\) This includes, among others, the constitutions of Germany, Italy, Japan, Portugal, Spain, South Africa, Brazil, Israel, Hungary and Sweden. Some countries, such as Ireland, India and Canada, reference human dignity in the preambles of their constitutions.

\(^{11}\) See Dieter Grimm, *Die Würde des Menschen ist unantastbar* (The Human Dignity is Inviolable), *in* 24 KLEINE REIHE (2010) [hereinafter Grimm].

\(^{12}\) Bundesverfassungsgericht [BVerfG], [Federal Constitutional Court] 1969, 27 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 1 (Microsensus Case); and 30 BVerfGE 173 (1971) (Mephisto Case). This
German Constitutional Court has developed a broad and varied case law that includes: the definition of the scope of the right of privacy regarding protection from both state\textsuperscript{13} and private\textsuperscript{14} interference; prohibition of holocaust denial;\textsuperscript{15} prohibition of the shooting down of aircrafts seized by terrorists;\textsuperscript{16} and a declaration that it is unconstitutional for the state to decriminalize abortion (“Abortion I case”).\textsuperscript{17} Other countries, including France,\textsuperscript{18} Canada,\textsuperscript{19} South Africa,\textsuperscript{20} Israel,\textsuperscript{21} and Colombia,\textsuperscript{22} have also embraced the concept of human dignity as a fundamental value.

2. Human Dignity in International Documents and Case Law

“absolute” character of human dignity has been object of growing dispute, but is still the dominant view in the Court. See Grimm, supra note 11, at 5.

16 BVerfG, 1 BvR 357/05.
17 39 BVerfGE 1 (1975). In this decision, the Court ruled that the right to life and the duty of the state to protect that right require the criminalization of abortion. Consequently, the Court declared unconstitutional a law decriminalizing first-trimester abortion.
18 E.g., CC decision no. 94-359 DC, January 19, 1995.
20 E.g., S v Makwanyane and Another (CCT3/94) [1995] ZACC 3.
22 E.g., Corte Constitucional de Colombia [Constitutional Court of Colombia], Sentencia [Judgment] T-62910. LAIS v. Bar Discoteca PANDEMO.
Human dignity has also become a ubiquitous idea in International Law and has been prominently placed in a wide range of declarations and treaties. In fact, the European Court of Justice ("ECJ") has used the concept of human dignity to support a wide range of decisions, holding, for example, that neither the human body, nor any of its elements, could constitute patentable inventions, and that an employer fails to respect dignity by terminating an employee because of gender reassignment surgery. Likewise, the European Court of Human Rights ("ECtHR") has often employed human dignity as an important element in its interpretation of the European Convention on Human Rights (1950). The ECtHR found dignity to be implicated in a case involving the abandonment of spousal immunity to the charge of rape, in criminal prosecution for private homosexual behavior among consenting adults and in refusal to allow legal gender reassignment. The Inter-American Court on Human Rights has also cited human dignity in cases involving physical, sexual and psychological violence against inmates in a prison, solitary confinement or otherwise inhumane incarceration conditions, forced disappearances, and extrajudicial executions.


26 The convention, however, does not expressly incorporate the concept of human dignity in its text.


3. Human Dignity in the Transnational Discourse

In recent years, constitutional and supreme courts all over the world began to engage in a growing constitutional dialogue involving mutual citation, academic interchange and public fora such as the Venice Commission. Two factors have contributed to the deepening of this process. First, countries that are newcomers to the rule of law often draw from the experience of more seasoned democracies. In the past several decades we have watched waves of democratization across the world, including Europe in the 1970s (Greece, Portugal and Spain), Latin America in the 1980s (Brazil, Chile, Argentina) and Eastern and Central Europe in the 1990s. Courts like the U.S. Supreme Courts or the German Constitutional Court have served as a significant role model for these new democracies. The second factor involves the sharing of experiences among more mature and traditional democracies. Highly complex and plural societies face common challenges in areas that range from national security to racial, religious


34 See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 70 (2004) [hereinafter Slaughter].

35 Former foreign court justices, like Aaron Barak from the Supreme Court of Israel, and Dieter Grimm from the Constitutional Court of Germany, are frequent visitors at American Law Schools, such as Yale and Harvard. At Yale Law School, the Global Constitutionalism Seminar, directed by Robert Post, brings together a group of about fifteen Supreme Court and Constitutional Court judges from around the world. http://www.law.yale.edu/academics/globalconstitutionalismseminar.htm. See also MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 176 (2005).

36 According to its website, the European Commission for Democracy through Law, better known as the Venice Commission, is an advisory body of the Council of Europe and a think-tank on constitutional law. See http://www.venice.coe.int/site/main/Presentation_E.asp, last visited on April 13, 2011.
and sexual matters. Foreign decisions may offer new information and perspectives, and can also help build consensus.  

In the United States, references to foreign law and foreign decisions have historically been relatively scarce. However, at the turn of the century, the tide shifted and foreign precedents were cited in opinions by the United States Supreme Court in cases such as *Knight v. Florida*, 39 *Atkins v. Virginia* 40 and *Grutter v. Bollinger*. 41 The landmark decision came in 2003, with *Lawrence v. Texas*, 42 when Justice Kennedy’s majority opinion cited a decision of the European Court of Human Rights. 43 In their confirmation hearings, Chief Justice John Roberts and Justice Samuel Alito expressed disapproval of such references. Thus, two different approaches “uncomfortably coexist” 44 within the Supreme Court: the “nationalist jurisprudence” view that rejects any reference to foreign and international precedents and the “transnationalist

---

37 *SLAUGHTER, supra* note 34, at 77 and 78.


39 528 U.S. 990 (1999) (Breyer, J, dissenting). In a dissent from the denial of certiorari Justice Stephen Breyer cited cases from India, Zimbabwe, Canada, South Africa and from the European Court of Human Rights.

40 536 U.S. 304 (2002). Justice Stevenson, writing for the majority, asserted “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Id.* at 316 n. 21.

41 539 U.S. 306 (2003). In her separate opinion, Justice Ginsburg cited two international law conventions on discrimination. *Id.* at 344.


43 *Id.* at 576, citing the ECHR decision on Drudgeon v. United Kingdom. This reference prompted harsh dissent. See *Id.* at 598 (Scalia, J., joined by Rehnquist, C.J., and Thomas, dissenting).

jurisprudence” view, which allows such references. The second approach, which is more cosmopolitan, progressive and “venerable,” should prevail.

C. HUMAN DIGNITY IN THE UNITED STATES

Although there is no express reference to human dignity in the text of the United States Constitution, the Supreme Court has long employed the idea, particularly after the 1950s. Human dignity has never been regarded in the Justices’ reasoning as a stand-alone or autonomous fundamental right, but as a value underlying express and unenumerated rights, such as the rights to privacy and equal protection, economic assistance from the government and dignity at the end of life, and protection from self-incrimination, cruel and unusual punishment and unreasonable searches and seizures. Human dignity concerns are also present when freedom of expression and reputational issues clash. Thus, the role of human dignity has mostly been to inform the interpretation of particular constitutional rights.

D. ARGUMENTS AGAINST THE USE OF HUMAN DIGNITY AS A LEGAL CONCEPT

A number of authors have opposed the use of human dignity in law, if not

---

45 Id.
46 Within the states, the Montana Constitution has an explicit human dignity clause. Article II, section 4 provides: “Individual dignity. The dignity of man is inviolable . . .”. See Jackson, supra note 2, at 28, noting that the clause has played a secondary role.
48 Goodman supra note 5, at 757, has identified these eight categories of cases as the ones in which the Supreme Court has expressly related human dignity to specific constitutional claims, sometimes grounding its decisions on the need to advance human dignity, and sometimes rejecting it as a prevailing argument.
49 Neuman supra note 4, at 271.
its use altogether, using three basic lines of arguments. The first argument is formal in nature: when human dignity is not in the text of a state’s constitution – as it is the case in the United States and France – it cannot be used in legal reasoning. Faithful to textualism\(^50\) as his philosophy of constitutional interpretation, this is the point of view sustained by Justice Scalia.\(^51\) The second argument is more ideological: human dignity should not be used in legal discourse in countries in which it is not rooted in the legal tradition. James Q. Whitman has argued that privacy law in America is linked to the value of liberty, while in Europe it is oriented toward dignity, understood as personal honor.\(^52\) Whitman makes two highly controversial assertions in connection with his argument. In the first place, he links the idea of dignity in Europe with “the star of fascism”\(^53\) and “Nazi history.”\(^54\) Then, in the conclusion of his analysis, he declares that “the prospects for the kind of dignitary protections embodied in a law of gay marriage, we could say, are remote” and that “protecting people’s dignity is quite alien to the American tradition.”\(^55\) The third objection to the use of dignity as a legal concept is that human dignity lacks specific and substantive meaning. In a frequently cited editorial, Ruth Macklin wrote that dignity is a “useless concept” and a “vague restatement” of existing notions.\(^56\)

All of the above arguments can be countered and overcome. As for the textualist objection, it suffices to remember that all constitutions bear values and ideas that

\(^{50}\) ANTHONY SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

\(^{51}\) In a debate with the author of this Article at the University of Brasilia in 2009, Justice Antonin Scalia affirmed that there is no human dignity clause in the United States Constitution, and that for this reason it cannot be invoked by judges and the courts.

\(^{52}\) Id., at 1220.

\(^{53}\) Id., at 1166.

\(^{54}\) Id., at 1187.

\(^{55}\) Id., at 1221.

\(^{56}\) Ruth Macklin, Dignity Is a Useless Concept, 327 BRITISH MED. J. 1419 (2003).
inspire and underlie their provisions without express textual inclusion. In the United States Constitution, for example, there is no mention of democracy, rule of the law or judicial review and, nevertheless, these are omnipresent concepts in American jurisprudence and case law. The same holds true for human dignity, which is a fundamental value that nourishes the content of different written norms, at the same time that it informs the interpretation of the constitution generally, especially when fundamental rights are involved.\textsuperscript{57}

The political and philosophical objections to the use of human dignity are also rebuttable. Constitutional democracies everywhere strive to achieve a balance between individual rights and communitarian values. And even though it is up to the political process to set the boundaries of these (sometimes) competing spheres – meaning that the weight of one or the other may vary to some extent – concerns about human dignity can be found on both sides of the scale. Human dignity has to do, for example, with freedom of expression and with compulsory vaccination. A fundamental problem with Whitman’s views is that he does not make a clear distinction between dignity’s ancient connotation – rank, status, personal honor – and its contemporary meaning, based on the objective intrinsic value of the individual, as well as some subjective elements, such as personal autonomy. Dignity is part of the core content of both liberty and privacy, and not a concept (and much less a right) that could be contradictory to either.

\textbf{As to the third objection, human dignity, no less than numerous other crucial concepts, needs good scholarship, public debate, overlapping consensus, accountable governments and prudent courts. The job to be done is to find a minimum content for human}

\textsuperscript{57} Neuman, \textit{supra} note 4, at 251.
dignity that can warrant its use as a meaningful and consequential concept, compatible with free will, democracy and secular values.

III. LEGAL NATURE AND MINIMUM CONTENT OF HUMAN DIGNITY

A. Human Dignity as a Legal Principle

Human dignity is a multi-faceted concept that is present in religion, philosophy, politics and law. In Germany, human dignity is considered an *absolute* value that prevails in any circumstance.\(^{58}\) That assertion has been pertinently challenged over the years.\(^ {59}\) As a general rule, law is not a space for absolutes. Human dignity, then, is a fundamental value, but it should not be regarded as an absolute. Values, either moral or political, enter the world of law commonly assuming the form of a principle.\(^ {60}\) And although constitutional principles and rights frequently overlap, this is not exactly the case here. The best way of categorizing human dignity is as a legal principle that has constitutional status, and not as an autonomous right, as demonstrated below.

As a fundamental value and a constitutional principle, human dignity serves both as a moral justification for and a normative foundation of fundamental rights. The conception adopted here is the one that became dominant in legal theory, based on Ronald

\(^{58}\) See 27 BVerfGE 1 (Microcensus case) and 30 BVerfGE 173 (1971) (Mephisto Case).

\(^{59}\) See Grimm, *supra* note 11, at 5.

\(^{60}\) Values, of course, also underly rules. But in that case, the value judgment has already been made by the legislature when enacting the rule, regarded as an objective norm that prescribes certain behavior. Principles, on the other hand, are more abstract norms that state reasons, leaving courts more leeway to determine their meaning in concrete cases.
Dworkin’s seminal writings on the subject\textsuperscript{61} and further developments provided by German legal philosopher Robert Alexy.\textsuperscript{62} According to Dworkin, principles are standards that contain “requirements of justice or fairness or some other dimension of morality.”\textsuperscript{63} Unlike rules, they are not applicable in “an all-or-nothing fashion,”\textsuperscript{64} and in certain circumstances they may not prevail due to the existence of other reasons or principles that argue in a different direction. Principles have a “dimension of weight”\textsuperscript{65} and when they intersect, it will be necessary to consider the specific importance of each principle in the concrete situation.\textsuperscript{66} For Alexy, principles are “optimization requirements”\textsuperscript{67} whose enforcement will vary in degree according to what is factually and legally possible.\textsuperscript{68} Thus, under Alexy’s theory, principles are subject to balancing and to proportionality, and, depending on context, they may give way to opposing elements.\textsuperscript{69} Principles provide arguments that must be considered by courts, and each principle requires a good faith commitment to its realization, to the extent such realization is possible.\textsuperscript{70}

Constitutional principles perform different roles in the legal system, and at the moment of their concrete application they always generate rules that will govern specific


\textsuperscript{62} See especially ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 87 (Julian Rivers, trans., Oxford Univ. Press 2004), at 44-69 [hereinafter Alexy].

\textsuperscript{63} Dworkin, supra note 61, at 22.

\textsuperscript{64} Id. at 24.

\textsuperscript{65} Id. at 26.

\textsuperscript{66} Id.

\textsuperscript{67} Alexy, supra note 62, at 47.

\textsuperscript{68} Id. at 48.

\textsuperscript{69} Id. See also generally, Robert Alexy, Balancing, Constitutional Review, and Representation, 3 INT’L J. CONST. L. 572-581 (2005).

\textsuperscript{70} See PATRICIA BIRNIE, ALAN BOYLE AND CATHERINE REDGWell, INTERNATIONAL LAW & THE ENVIRONMENT 34 (2009).
situations. One should think of a principle as two concentric circles. The inner circle, closer to the center, bears the principle’s core meaning and is a direct source of rights and duties. Of course, when a more specific rule already exists – meaning that the framers or the legislature detailed the principle in a more concrete fashion – there is no need to resort to the more abstract principle of human dignity. The first role of a principle like human dignity is to be a source of rights – and consequentially, duties – including non-enumerated rights, which are recognized as part of a mature democratic society.

The other major role played by the principle of human dignity is an interpretive role. Human dignity is part of the core content of fundamental rights, such as equality, freedom or privacy. In cases involving gaps in the legal system, ambiguities in the law, the intersection between constitutional rights and tensions between rights and collective goals, human dignity can be a good compass in the search for the best solution. Consistent with my assertion that human dignity is not an absolute value, it is not an absolute principle either. Human dignity, as fundamental value and principle, should have precedence in most situations, but not necessarily always.

B. THE INFLUENCE OF KANTIAN THOUGHT

Immanuel Kant (1724-1804), one of the most influential philosophers of the Enlightenment, is a central figure in Western modern moral and legal philosophy. Kantian ethics have become a crucial part of the grammar and the semantics of the study of human
dignity. For this reason, running the risk of oversimplification, I sketch below three of his central concepts: the categorical imperative, autonomy and dignity.

According to Kant, Ethics is the realm of moral law, comprised of commands that govern the will that is in conformity with reason. Such commands are called imperatives, which are either hypothetical or categorical. A *hypothetical* imperative identifies the action that is good as means to achieve an end. The *categorical* imperative corresponds to an action that is good in itself, regardless of whether it serves a determinate end. It is a standard of rationality and represents what is objectively necessary in a will that conforms itself to reason.

This categorical imperative, or imperative of morality, was enunciated by Kant in a synthetic and famous proposition: “Act only in accordance with that maxim through which you can at the same time will that it become a universal law.” Note that instead of presenting a catalogue of specific virtues, a list of “do’s and don’ts,” he conceived a formula of determining ethical action. Another formulation of the categorical imperative is the following: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as

---

72 Some authors have used the expression *kantische Wende* (“Kantian revival”) to refer to the renewed influence of Kant in the contemporary legal debate. *See Otfried Hoffe, Kategorische Rechtsprinzipien. Ein Kontrapunkt der Moderne, 135* (1990).


74 Id. at 25.

75 Id. at 31.

76 See Marilena Chauí, *Convite à Filosofia [Invitation to Philosophy]* 346 (1999).
As for autonomy, it is the property of free will. It identifies the individual’s capacity for self-determination, in accordance with the representation of certain laws, and it is a self-governing reason. The core idea is that individuals are subject only to the laws they give themselves. According to Kant, free will is governed by reason, and reason is the proper representation of moral laws. Dignity, in the Kantian view, is grounded in autonomy. Where all rational beings act according to the categorical imperative, i.e., as lawgivers whose maxims could become universal law – the “kingdom of ends,” as Kant wrote – everything has either a price or a dignity. Things that have a price can be replaced by other equivalent things. But something that is above all price and cannot be replaced by another equivalent item has dignity. Such is the unique nature of the human being. Condensed in a single proposition, this is the essence of Kantian thought regarding our subject: moral conduct consists of acting moved by a maxim that one could will to become universal law; every person is an end in him or herself and shall not be instrumentalized by other people’s will; human beings have no price and cannot be replaced, as they are endowed with an absolute inner worth called dignity.

77 Kant, supra note 73, at 38. Although Kant affirms that there is just a single categorical imperative he presents three different formulations of it (Id. at 43). The first one reproduced above is referred to as the formula of nature; the second, as the formula of humanity. The third one, the formula of autonomy, states: “[A]nd this is done in the present third formula of the principle, namely the idea of the will of every rational being as a will giving universal law.”

78 Id. at 47.

79 These ideas become more complex and somewhat counterfactual when we add other elements of Kant’s moral theory. For him, the supreme principle of morality consists of individuals giving themselves laws that they could will to become universal law, an objective law of reason with no concessions to subjective motivations. Id. at 24.

80 Id. at 43.

81 Id. at 42.
Given the complex nature of human dignity, one must settle for an open-ended, plastic and plural definition of human dignity. Under this minimalist conception, human dignity involves (1) the intrinsic value of all human beings, as well as (2) the autonomy of every individual, (3) limited by some legitimate constraints imposed on such autonomy on behalf of social values or state interests (community value).

1. Intrinsic Value

Intrinsic value is, on a philosophical level, the ontological element of human dignity, linked to the nature of being.\textsuperscript{82} The uniqueness of human kind is the product of a combination of inherent traits and features – which include intelligence, sensibility and the ability to communicate – that give humans a special status in the world, distinct from other species.\textsuperscript{83}

Intrinsic value is the opposite of attributed or instrumental value,\textsuperscript{84} because it is value that is good in itself and has no price.\textsuperscript{85} There is a growing awareness, however, that humankind’s special...
position does not warrant arrogance and indifference toward nature in general, including the non-rational animals, which have their own kind of dignity. The intrinsic value of all individuals results in two basic postulates, one anti-utilitarian and the other anti-authoritarian. The former consists of the formulation of Kant’s categorical imperative that every individual is an end in him or herself, and not a means for collective goals or for the purposes of others. The latter is synthetized in the idea that the state exists for the individual, and not the other way around.

Because it has the intrinsic value of every person at its core, human dignity is, in the first place, an objective value that does not depend on any event or experience, and thus needs not be granted and cannot be lost, even in the face of the most reprovable behavior. Also, as a consequence, human dignity does not depend on reason itself, being present in the newborn, in senile person or in incompetent people generally.

Intrinsic value is the origin of a set of fundamental rights. The first of them is the right to life, a basic pre-condition for the enjoyment of any other right. Human dignity fulfills almost entirely the content of the right to life, leaving space for only few specific controversial situations, such as abortion, assisted suicide and the death penalty. A second right

---

86 See Martha Nussbaum, Human Dignity and Political Entitlements, in HUMAN DIGNITY AND BIOETHICS 365 (Essays Commissioned by the President’s Council on Bioethics). See also MARTHA NUSSBAUM, FRONTIERS OF JUSTICE (2006); Philipp Balzer, Klaus Peter Rippe and Peter Schaber, Two Concepts of Dignity for Humans and Non-Human Organisms In the Context of Genetic Engineering, 13 J. AGRICULTURAL & ENVIRONMENTAL ETHICS 7 (2000).

87 The dignity of the state was part of the National-Socialist propaganda to discredit democratic institutions in Germany. See Jochen Abr. Frowein, Human Dignity in International Law, in Kretzmer & Klein, supra note 18, at 123. The 1977 Constitution of the former Soviet Union referred to the “dignity of Soviet citizenship” (Art. 59) and to “national dignity” (Art. 64). The Constitution of the People’s Republic of China establishes that the state shall uphold the “dignity of the socialist legal system” (Art. 5).

88 See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 9-10 (2006) (“[E]ach human life has a special kind of objective value. . . . The success or failure of any human life is important in itself. . . . (and) we should all regret a wasted life as something bad in itself, whether the life in question is our own or someone else’s.”).
directly related to the intrinsic value of each and every individual is equality before and under the law.\textsuperscript{90} All individuals are of equal value and, therefore, deserve equal respect and concern.\textsuperscript{91} This means not being discriminated against due to race, color, ethnic or national origin, sex, age or mental capacity (the right to non-discrimination) and respect for cultural, religious or linguistic diversity (the right to recognition).\textsuperscript{92} Human dignity fulfills only part of the content of the idea of equality, and in many situations it can be acceptable to differentiate among people. In the contemporary world, this is particularly at issue in cases involving affirmative action and rights of religious minorities. Intrinsic value also leads to another fundamental right, the right to integrity, physical and mental. The right to physical integrity\textsuperscript{93} includes the prohibition of torture, slave labor and degrading treatment or punishment.\textsuperscript{94} It is within the scope of this right that discussions on life imprisonment, interrogation techniques and prison conditions take place. And finally, the right to mental integrity,\textsuperscript{95} which in Europe and in many civil law countries comprises the right to personal honor and image, as well as to privacy.

\textsuperscript{90} This point of view departs from Kant’s assertion that human dignity is grounded on reason. See Kant, \textit{supra} note 73, at 43.

\textsuperscript{91} See UDHR, articles II and VII; UN Covenant, articles 26 and 27; American Convention, art. 24; European Charter, art. 20-23; and African Charter, art. 3. In the U.S. Constitution, the Equal Protection Clause is in the Fourteenth Amendment.

\textsuperscript{92} \textsc{Ronald Dworkin, The Sovereign Virtue: The Theory and Practice of Equality} 1-7 (2002).

\textsuperscript{93} On minority rights, multiculturalism and identity, \textit{see generally} for different perspectives, \textsc{Nancy Fraser, Redistribution or Recognition? A Political-Philosophical Exchange} (2003); \textsc{Axel Honneth, The Struggle for Recognition: The Moral Grammar of Social Conflicts} (1996).

\textsuperscript{94} In the U.S. Constitution, most of these matters are dealt with under the Eighth Amendment ban on “cruel and unusual punishments.”

\textsuperscript{95} See UDHR, articles VI and XII; UN Covenant, articles 16 and 17; American Convention, articles 11 and 18; European Charter, art. 3; African Charter, art. 4.
2. Autonomy

Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals, which entitles them to pursue in their own ways the ideal of living well and having a good life. The central notion is that of self-determination: an autonomous person lays down the rules that will govern his or her life.\footnote{Post, \textit{Dignity}, supra note 96, at 3.} We have previously discussed the Kantian conception of autonomy, which is the will governed by the moral law (\textit{moral autonomy}). We are now concerned with \textit{personal autonomy}, which is value-neutral and means the free exercise of will according to one’s own values, interests and desires.\footnote{The distinction is explored on Jeremy Waldron, \textit{Moral Autonomy and Personal Autonomy}, in Christman \& Anderson, supra note 96, at 307-29. Fallon, supra note 96, separates autonomy into descriptive autonomy (considering the effect of external causal factors on individual liberty) and ascriptive autonomy (representing each person’s sovereignty over his or her moral choices).} Autonomy requires the fulfillment of certain conditions, such as \textit{reason} (the mental capacity to make informed decisions), \textit{independence} (the absence of coercion, manipulation and severe want) and \textit{choice} (the actual existence of alternatives). Note that in the Kantian moral system, autonomy is the will that suffers no heteronomous influence, and corresponds to the idea of freedom.\footnote{Kant, supra note 73, at 52 (“[W]hat, then, can freedom of the will be other than autonomy?”).} However, in practical political and social life, individual will is constrained by the law and by social mores and norms.\footnote{Post, \textit{Domains}, supra note 96, at 1.} Thus, distinct from moral autonomy, personal autonomy, although at the origin of

freedom, only corresponds with its core content. Freedom has a larger scope that can be limited by legitimate external forces. But autonomy is the part of freedom that cannot be suppressed by state or social interference, involving basic personal decisions, such as choices related to religion, personal relationships and political beliefs.

Autonomy, thus, is the ability to make personal decisions and choices in life, based on one’s conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, comprehending basic freedoms (private autonomy) and the right of political participation (public autonomy). With the rise of the welfare state, many countries in the world would also consider in the equation that results in true and effective autonomy a fundamental social right to minimum living conditions (the existential minimum). We will thus discuss, briefly, each of these three ideas: private autonomy, public autonomy and existential minimum.

Private autonomy is the key concept behind individual freedom, including that which in the United States is usually protected under the label of privacy. This concept encompasses freedom of religion, speech, and association, as well as sexual and reproductive rights. There can be clashes between the autonomy of different individuals, as well as between autonomy, on the one hand, and intrinsic value or community value, on the other. So, private autonomy, as an essential element of human dignity, offers a good standard for defining the content and scope of freedom and rights, but does not free legal reasoning from weighing complex facts and taking

---

101 This distinction is the cornerstone of the “reconstructive approach to law” of Jurgen Habermas, German’s most prominent contemporary philosopher. See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 310 (1996) (hereinafter Habermas), at 84–104.

102 An example: the right to consume a legal product, such as cigarette, versus someone else’s right to not become an involuntary passive smoker.
into account apparently contrasting norms in order to strike a proper balance under the circumstances.

While private autonomy stands for individualized self-government and can be considered the “liberty of the moderns,” based on civil liberties, the rule of the law and freedom from abusive state interference, public autonomy has to do with the “liberty of the ancients,” a republican liberty associated with citizenship and participation in political life. Public autonomy entails the right to vote, to run for office, to be a member of political organizations, to be active in the social movement and, particularly, the right and the conditions to play a part in the public discourse. Ideally, thus, the law to which every individual needs to abide to will have been created with his participation, assuring him the status of an autonomous citizen, and not a heteronomous subject.

Finally, attached to the idea of human dignity is the concept of existential minimum, also referred to as social minimum or the basic right to the provision of adequate living conditions. Equality, in a substantive sense, and especially autonomy (private and

---

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


105 Id. at 9.

106 This is the literal translation of the term used by German authors and courts (Existenzminimum). See Alexy, supra note 62, at 290 (“[T]here can hardly be any doubt that the Federal Constitutional Court presupposes the existence of a constitutional court right to an existential minimum.”).

107 JOHN RAWLS, POLITICAL LIBERALISM 228-9 (2005) (“... [A] social minimum for the basic needs of all citizens is also an essential...”).

108 Habermas, supra note 101, at 123 (“Basic rights to provision of living conditions that are socially, technologically, and ecologically safeguarded...”).
public), are ideas dependent on the fact that individuals are “free from want.” This requires access to some essential utilities – such as basic education and health care services – as well as some elementary necessities, such as food, water, clothing and shelter. The idea of minimum social rights that can be protected by courts, and which are not entirely dependent on legislative action, has been accepted in several countries, including Germany, South Africa and Brazil.

3. Community value

The final element, human dignity as community value, also referred to as dignity as constraint or dignity as heteronomy, relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. Autonomy protects the person from becoming just a gear in the engine of society. However, “no man is an island, entire of itself,” as the English poet John Donne wrote in a famous quote. The term community value, which is quite ambiguous, is used

109 In his State of the Union address, on January 4, 1941, President Franklin D. Roosevelt proposed four freedoms that people “everywhere in the world” should enjoy, which included freedom of speech, freedom of worship, freedom from want and freedom from fear. See full text of the speech at http://americanrhetoric.com/speeches/PDFFiles/FDR%20-%20Four%20 Freedoms.pdf (last visited June 15, 2011).

110 See, e.g., 1 BVerfGE 97,104 e seq. (1951); 1 BVerwGE 159, 161 (1954); 25 BVerwGE 23, 27 (1966); 40 BVerfGE121, 134 (1975); and 45 BVerfGE 187 (229) (1977).

111 The Grootboom case involved access to adequate housing (The Government of the Republic of South Africa and others v. Irene Grootboom and others) (CCT38/00) [2000] ZACC 14; 2011 (7) BCLR 651 (CC) (21 September 2000); The Mazibuko case involved the access to sufficient water (Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC); 2011 (7) BCLR 651 (CC) (8 October 2009).

112 In Brazil, there is case law relating to access to education (STF, RE [Extraordinary Appeal] 410715, DJU February 3, 2006); to health care and medicines (STF, STA [Stay of Preliminary Order] 175/CE, DJe April 29, 2010; and to affirmative action in favor of disabled persons (STF, ADI [Direct Action of Unconstitutionality] 2649/DF, DJe October 16, 2008).

113 See JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS (1624), available at http://www.ccel.org/cecl/donne/devotions.iv.iii.xvii.i.html (Meditation XVII: “No man is an island, entire of itself;
here, by convention, to identify two different external forces that act on the individual: (1) the “shared beliefs, interests and commitments”\textsuperscript{114} of the social group and (2) state-imposed norms. The individual, thus, lives within himself, within a community and within a state. His personal autonomy is constrained by the values, rights and mores of people who are just as free and equal as him, as well as by coercive regulation. Autonomy, community and state. In an insightful book, Robert Post identified, in a similar fashion, three distinct forms of social order: community (a “shared world of common faith and fate”), management (the instrumental organization of social life through law to achieve specific objectives) and democracy (an arrangement that embodies the purpose of individual and collective self-determination).\textsuperscript{115} These three forms of social order presuppose and depend on each other, but are also in constant tension.\textsuperscript{116}

Dignity as a community value emphasizes the role of state and community in establishing collective goals and restrictions on individual freedom and rights, on behalf of a certain idea of the good life. The relevant question here is, in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a pluralist society\textsuperscript{117} is not incompatible, of course, with limitations resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however,

\textsuperscript{115} Post, Domains, supra note 96, at 2-3, 15.
\textsuperscript{116} Id. at 2.
\textsuperscript{117} See RONALD DWORKIN, A MATTER OF PRINCIPLE 183, 191 (1985).
must be justified on grounds of a legitimate idea of justice, an overlapping consensus\textsuperscript{118} that can be shared by most individuals and groups. Community value, as a constraint on personal autonomy, has sought legitimacy through the pursuit of three goals: (1) the protection of the rights and dignity of others; (2) the protection of the rights and dignity of oneself; and (3) the protection of shared social values. In their studies on bioethics and biolaw, Beyleveld and Brownsword explored in depth this conception of “human dignity as constraint,” centered around the ideas of duties and responsibilities, as opposed to “human dignity as empowerment,” which is essentially concerned with rights.\textsuperscript{119}

It is not difficult to understand and justify the existence of a concept such as community value giving content to and shaping the contours of human dignity, along with intrinsic value and autonomy. The goals it aims to achieve are legitimate and desirable, if the lines are properly drawn. The critical problem here is the risks involved. Regarding the first goal – protection of the rights and dignity of others – any civilized society imposes criminal and civil sanctions to safeguard values and interests relating to life, physical and emotional integrity and property, among others. It is beyond doubt, thus, that personal autonomy can be restricted to prevent wrongful behavior, be it on behalf of the idea of the harm principle developed by John Stuart Mill\textsuperscript{120} or on the broader concept of the offense principle defended by Joel Feinberg.\textsuperscript{121} To

\textsuperscript{118} “Overlapping consensus” is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political and moral comprehensive doctrines. \textit{See John Rawls, The Idea of Overlapping Consensus, 7 Oxford J. Legal Stud. 1 (1987).}

\textsuperscript{119} \textsc{Deryck Beyleveld and Roger Brownsword, Human Dignity in Bioethics and Biolaw} 29-46, 65 (2001); Deryck Beyleveld and Roger Brownsword, \textit{Human Dignity, Human Rights, and Human Genetics}, 61 Mod. L. Rev. 1998.

\textsuperscript{120} \textit{John Stuart Mill, On Liberty} 21-22 (1874) [hereinafter Mill], expresses the classical liberal view and founds the limit of the state’s legitimate authority on the notion of harm.

\textsuperscript{121} \textsc{Joel Feinberg, Offense to Others} 1 (1985). Feinberg argues that the harm principle is not sufficient to protect individuals against the wrongful behaviors of others, and has developed a more comprehensive concept of “offense
be true, the power to punish can be employed in an abusive or disproportional way, and it often is. But its necessity, even in the most liberal societies, is not contested. The other goals, however – protection of oneself and of shared social values – entail severe risks of paternalism and moralism. It is largely recognized that some degree of paternalism is acceptable, but the boundaries of such interference in order for it to be legitimate have to be settled with great restraint. As for moralism, it is also acceptable that a democratic society may employ its coercive power to enforce some moral values and collective goals. But here again, and for stronger reasons, the boundaries must be tightly maintained to protect against the grave risk of a moral majoritarianism or tyranny of the majority.

Dignity as community value, often inspired by paternalistic or moralistic motivations, has underlied decisions throughout the world. One of the most famous of such decisions was the holding in the Dwarf-tossing case. The Mayor of a town near Paris banned the bar attraction lancer de nain, by which a dwarf, wearing a protective gear, was thrown short distances by customers. The case reached the Conseil d’État (Council of the State), which held the prohibition to be legitimate, based on defense of the public order and protection of human principle,” maintaining that preventing shock, disgust, embarassment and other unpleasant mental states is also a relevant reason for legal prohibition.

122 Gerald Dworkin defines paternalism as "the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm", in Dworkin, Gerald, "Paternalism", The Stanford Encyclopedia of Philosophy (Summer 2010 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2010/entries/paternalism/>.

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

124 Examples often cited are compulsory education for children, use of seat-belts and motorcicle helmets, as well as mandatory vaccination. See Dworkin, Hedgehogs, supra note 96, at 336.

125 To mention some fairly indisputable examples, consider the ban on hard drugs, a fair degree of environmental protection and the prohibition of animal cruelty.

126 Mill, supra note 120, at 13.
dignity. The dwarf opposed the ban on all instances and took the case to the Human Rights Committee (United Nations), which did not find the measure to be abusive. A second well-known decision involves the Peep Show case, handed down by the German Federal Administrative Court. The Court upheld the denial of license to conduct the attraction, in which a woman performs a striptease before an individual placed in a one-person cabin. With payment, the stage would become visible to the patron, but the woman could not see him. The license was refused on grounds of violation of good morals, since such a performance violated the human dignity of the women displayed, who would be degraded to the level of an object. A third case involved the prosecution of a group of people in the United Kingdom accused of assault and wounding during sadomasochistic encounters. Although the activities were consensual and conducted in private, the House of Lords held that the existence of consent was not a satisfactory defense where actual body harm had occurred. The ECHR found no violation of the Convention.

The coercive imposition of external values, exceptioning the plain exercise of autonomy in the name of a communitarian dimension of human dignity, is never trivial. It requires adequate justification, which must take into account three elements: (a) the existence of a

---


128 Human Rights Committee, Wackenheim v. France, CCPR/C/75/D/854/1999, July 15 2002. The decision has been criticized worldwide with the argument that dignity as autonomy should have prevailed. See Rousseau, supra note 41, at 66-68; and Stéphanie Hennette-Vauchez, When Ambivalent Principles Prevail: Leads for Explaining Western Legal Orders’ Infatuation with the Human Dignity Principle, 10 LEGAL ETHICS 193, 207, 208 (2007), at 206.


130 In an outright rejection of the argument of autonomy, the Court stated that the fact that the woman acted voluntarily did not exclude the violation. Id.
fundamental right being affected; (b) the potential harm to others and to oneself; and (c) the level of societal consensus on the matter. As for the verification of the presence of a fundamental right, it is appropriate to make a distinction between two different views and respective terminology. Some authors acknowledge the existence of a general right to freedom (or liberty), along with specific and express freedoms, such as freedom of expression, religion and others.\textsuperscript{132} The general right to liberty means a general freedom of action that can, however, be limited by any legal norm that is compatible with the constitution. Restrictions on such a general right requires just a rational basis, a legitimate state interest or collective goal. Some other authors, particularly Ronald Dworkin, employ a narrower concept of basic – not general – freedoms, which correspond with “moral rights;” they are the true substantive fundamental rights. Basic freedoms are to be treated as \textit{trumps}\textsuperscript{133} against majority rule, and restrictions on them must pass strict scrutiny. Thus, general freedom can be broadly limited, but basic freedoms should usually prevail over collective goals, in all other than exceptional circumstances.\textsuperscript{134}

The risk of harm to others is usually a reasonable ground to limit personal autonomy. It is broadly accepted today that Mill’s formulation of the harm principle as the only justification for state interference with individual freedom “may well be too simple”\textsuperscript{135} and that

\textsuperscript{131} Laskey, Jaggard, and Brown v. The United Kingdom. [1997] Case No. 109/1995/615/703-705. Available at http://worldlii.org/eu/cases/ECHR/1997/4.html. The dissent countered that the “adults were able to consent to acts done in private which did not result in serious bodily harm” and criticized the Court’s “paternalism.”

\textsuperscript{132} See Alexy, \textit{supra} note 62, at 224. Alexy draws from the idea of \textit{legality} that is dominant in most civil law countries, meaning that everyone can do anything that is not prohibited by valid norms.

\textsuperscript{133} Ronald Dworkin, \textit{Rights as Trumps, in THEORIES OF RIGHTS} 153 (Jeremy Waldron, ed. 1984).

\textsuperscript{134} Dworkin, \textit{supra} note 61, at 92. For an insightful discussion on the views of general right to liberty and basic freedoms, see – sorry, it is in Portuguese – \textit{LETÍCIA MARTEL DE CAMPOS VELHO, DIREITOS FUNDAMENTAIS INDISPONÍVEIS [INDISPONIBLE,FUNDAMENTAL RIGHTS]} 94 et seq. (2011).

“multiple criteria”136 will determine when liberty can be restricted. But harm to others enjoys a fair presumption as to the legitimacy of the restriction. Finally, the limitation of personal autonomy on grounds of public morals requires strong societal consensus. In a pluralist and democratic society, there will always be moral disagreements and issues like capital punishment, abortion or gay marriage will always be disputed. A brief reflection on this subject is called for before closing this section.137

Despite their different conceptions, citizens must coexist and cooperate, bound together by a framework of basic freedoms and rights. The role of the state when interpreting community values is to uphold those that are genuinely shared by the people and avoid, whenever possible, choosing sides in morally divisive disputes.138 There are certainly disputed political issues that will have to be settled by the majority, such as choices involving environmental protection and economic development, the use of nuclear energy or limits on affirmative action. But truly moral issues should not be decided by majorities. Whenever a significant moral issue can be identified, the best thing for the state to do is to lay down a framework that allows individuals on both sides to exercise personal autonomy. The battlefield in such cases should remain within the realm of ideas and rational persuasion.

IV. USING HUMAN DIGNITY TO STRUCTURE LEGAL REASONING IN HARD CASES

136 Id.


138 See Post, Domains, supra note 96, at 4.
A. ABORTION

Voluntary termination of pregnancy is a highly controversial moral issue all over the world. The legislation of different countries ranges from total prohibition and criminalization to practically unrestricted access to abortion. Strikingly, abortion rates in countries where the procedure is legal are very similar to the rates in countries where it is illegal. Indeed, the main difference between countries that have chosen criminalization versus decriminalization is the incidence of unsafe abortion.\footnote{See Susan A. Cohen, New Data on Abortion Incidence, Safety Illuminate Key Aspects of Worldwide Abortion Debate, 10 GUTTMACHER POLICY REVIEW, available at http://www.guttmacher.org/pubs/gpr/10/4/gpr100402.html.} Criminalization has also been found to result in \textit{de facto} discrimination against poor women, who must resort to primitive methods of ending pregnancy due to lack of access to either private or public medical assistance. Abortion, usually in the first trimester, has been broadly removed from criminal codes, starting with Canada, in 1969, the United States, in 1973,\footnote{In the United States, the plurality decision in \textit{Casey} (1992) revised the \textit{Roe} rule of priority for the woman’s interest during the first trimester and replaced the strict scrutiny test, which was the standard in matters of fundamental rights, with the less rigorous “undue burden” test.} and France, in 1975. Several other countries followed this trend over the years, including Austria (1975), New Zealand (1977), Italy (1978), the Netherlands (1980) and Belgium (1990). In Germany, a rather ambiguous judicial decision in 1993 led to the non-punishment of abortion in the first trimester, provided certain conditions are met. In fact, almost all countries in the richer North Atlantic world have decriminalized abortion in early stages of pregnancy, rendering total prohibition a policy that prevails only in the countries of the developing world. Even many people who personally believe that abortion is morally wrong still favor its decriminalization for philosophical or pragmatic reasons.
At the *intrinsic value* level, the abortion debate represents a clash between fundamental values and rights. For those who believe that a fetus should be treated as human life beginning at fertilization – and this premise must be assumed here for the sake of the argument – abortion clearly is a violation of the fetus’ *right to live*. This is the main ground underlying the pro-life movement, and supports its conclusion that abortion is morally wrong. On the other hand, pregnancy and the right to terminate it implicate the *physical and mental integrity* of the woman, her power to control her own body. Moreover, abortion must also be considered an *equal protection* issue, because only women bear the full burden of pregnancy and the right to terminate it puts them on a level playing field with men. Therefore, with regard to human dignity viewed as intrinsic value, there is one fundamental right favoring the anti-abortion position – the right to life – countered by two fundamental rights favoring the position of the woman’s right of choice – physical and mental integrity and equal protection of the law.

As far as *autonomy* is concerned, we must consider what role self-determination plays in the context of abortion. Individuals must be free to make basic personal decisions and choices regarding their lives. Reproductive rights and child rearing are certainly among these decisions and choices. The *right to privacy*, as established by the United States Supreme Court decisions about abortion, has been described as “the principle of public toleration

---

141 As Robin West wrote, the “preferred moral foundation of the abortion right” shifts from “marital and medical privacy, to women’s equality, to individual liberty or dignity, and back.” See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1396 (2009).

142 For a thoughtful analysis of the use of dignity in the context of abortion, see generally Reva Siegel, *Dignity and Politics of Protection: Abortion Restriction Under Casey/Carhart*, 117 YALE L.J. 1694, 1736-1745 (2008). The author compares the decision in *Casey*, in which dignity was invoked as a reason for protecting women’s right to choose an abortion, and the decision in *Carhart*, in which dignity was invoked as a reason for woman-protective abortion restrictions. The Article criticizes the latter for “gender paternalism” and “unconstitutional stereotypes about women’s roles and capacities”. *Id.* at 1773 and 1796.
of autonomous, self-regarding choice.” It is within the autonomy of a woman and, thus, at the core of her basic freedoms, to decide for herself whether or not to have an abortion. The will of the mother to terminate her pregnancy could be countered by a hypothetical will of the fetus to be born. One could speculate, hence, that there would be a clash of autonomies between the woman and the fetus. Two objections could be made to this line of thinking. The first objection is that, although the intrinsic value of the fetus has been assumed in the previous paragraph, it might be more difficult to acknowledge its autonomy, due to the fact that he does not have any degree of self-consciousness. But even if this argument could be superseded, there remains another. Because the fetus depends on the woman, but not the other way around, if the “will” of the fetus prevailed she would be totally instrumentalized by its project. In other words, if a woman were to be forced to keep a fetus she did not want, she would have been transformed into a means for the satisfaction of someone else’s will, and not treated as an end in herself.

Finally, at the community value level, it is necessary to determine whether autonomy can be curtailed on behalf of (1) shared values by the social group or by (2) state interests imposed by legal norms. Abortion is arguably the most divisive moral issue in public life today. As mentioned above, most countries in North America and in Europe have decriminalized abortion in the early stages of pregnancy. On the other hand, most countries in Africa (excluding South Africa) and Latin America impose dramatic restrictions on abortions at any stage. The fact that important and respectable religious groups oppose abortion, based on their faith and dogmas, does not overcome the objection that those are not arguments that fit

within the realm of public reason. Such being the case, one cannot find a significant societal consensus on the matter. In fact, the only clearly perceivable conclusion is that abortion is a point of major moral disagreement in contemporary society. In such circumstances, the proper role for the state is not to take sides and impose one view, but allow individuals to make autonomous choices. As the United States Supreme Court stated in Roe, the state’s interest in protecting prenatal life and protecting the mother’s health does not outweigh the fundamental right of a woman to have an abortion. There are two other strong arguments in favor of legalization. The first is the difficulty of enforcing the prohibition, as statistics show. The second is the discriminatory impact that a ban on abortion has on poor women. Decriminalization does not preclude social forces that oppose abortion from advocating their views and treating abortion as a social taboo.

B. SAME-SEX MARRIAGE

---

144 Public reason is a term that was first used by Kant in WHAT IS ENLIGHTENMENT (1784) and that was developed by John Rawls, especially in his books A THEORY OF JUSTICE (1971) and POLITICAL LIBERALISM (1993). Public reason stands for an essential notion in a pluralist liberal democracy, in which people are free to adhere to conflicting reasonable comprehensive doctrines. In such scenario, discussions and deliberations on the public political forum by judges, government officials and even candidates for public office must be based on political conceptions that can be shared by free and equal citizens. See JOHN RAWLS, THE LAW OF PEOPLES 131-180 (1999). I should add that Rawls distinguishes public reason from secular reason, since he sees the latter as a comprehensive nonreligious doctrine. Id., at 143.


146 Indeed, even in countries where abortion is legal, politicians who oppose it have enacted laws that restrict public funding, as has occurred in the United States and Canada. See e.g. Heather D. Boonstra, The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States, 10 GUTTMACHER POLICY REVIEW (2007), available at http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.html; Joanna N. Erdman, In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada, 56 EMORY L. J. 1093 (2007).

Legal recognition of same-sex marriage is another highly controversial moral issue throughout the world. Notwithstanding this controversy, the evolution of public opinion on the matter has been rapid, and resistance to change less effective, in comparison with the relatively static stalemate on abortion. To be sure, discrimination against homosexual conduct and homosexual partners was intensely present in legal and social practices until the beginning of the twenty-first century. In 1971, homosexual sodomy was a crime in all but two American states.\footnote{WILLIAM N. ESKRIDGE & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER AND FOR WORSE: WHAT WE’VE LEARNED FROM THE EVIDENCE 23 (2006) [hereinafter Eskridge]. The two states were Illinois and Connecticut.} As late as 1986, the Supreme Court upheld state laws criminalizing intimate sexual behavior among homosexuals,\footnote{Bowers v. Hardwick, 478 U.S. 186 (1986).} a decision that was only overruled in 2003.\footnote{Lawrence v. Texas, 539 U.S. 558 (2003). Before Lawrence, in Romer v. Evans, 517 U.S. 620 (1996), the Supreme Court struck down Amendment 2 to the Constitution of Colorado, which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”} A major development came in 1993, when the Supreme Court of Hawaii ruled that a statute limiting marriage to opposite-sex couples constituted sex discrimination.\footnote{Baehr v. Lewin 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993).} As a reaction against the court’s ruling, from 1995 to 2005, 43 states adopted legislation prohibiting same-sex marriage.\footnote{Eskridge, supra note 148, at 20.} In 2004, the state of Massachusetts was the first to legalize same-sex marriage, following a decision by the state’s Supreme Judicial Court.\footnote{Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).} In recent years, homosexuality has increasingly become an accepted lifestyle and there is a growing belief that its causes are predominantly biological.
In this evolving context, it is no surprise that a number of countries have legalized same-sex marriage, including Argentina, Belgium, Brazil, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa and Sweden. In several other countries, legislation in the same direction has been proposed and discussions have advanced. It is true that some countries have passed laws prohibiting same-sex marriage, as (surprisingly) did France. In the United States, as well, a 1996 federal statute known as Defense of Marriage Act (DOMA) defines marriage as “a legal union between one man and one woman as husband and wife.” The Obama administration, however, has announced that it will no longer defend the constitutionality of DOMA, which has been challenged in several different lawsuits. Moreover, several states have passed legislation recognizing same-sex marriage, including Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and New York, as well as the District of Columbia. As with abortion, there is fierce religious opposition to homosexual conduct and same-sex marriage.

Analysis of same-sex marriage in light of the idea of human dignity is much less complex than such analysis as applied to abortion. Indeed, at the intrinsic value level, there is a fundamental right in favor of legalizing same-sex marriage: equality under the law. To deny same-sex couples access to marriage – and all the social and legal consequences that it entails – represents a form of discrimination based on sexual orientation. There is no other argument stemming from intrinsic value that could be reasonably employed to counter the right of equal protection and respect to which homosexuals are entitled. As for autonomy, same-sex marriage involves two consenting adults who choose, without coercion or manipulation, how to

---


exercise their affection and sexuality. There is neither violation of anyone else’s autonomy nor harm to anyone that could justify a prohibition. Finally, at the level of community value, one cannot fail to acknowledge that numerous segments of civil society, and particularly religious groups, disapprove of homosexual behavior and same-sex marriage. But to deny the right of gay couples to get married would be an unwarranted restriction of their autonomy on behalf of either improper moralism or tyranny of the majority. First, there is a fundamental right involved, whether the right to equality or to privacy (freedom of choice). If this were not the case, the undeniable fact is that there is no harm to third parties or to one’s self in question here. And finally, one can no longer find a strong level of societal consensus against same-sex marriage in a world where, at least in most Western societies, homosexuality is largely accepted. Of course, anyone has the right to advocate against same-sex marriage and try to convince people to abstain from participation. But that is different than asking the state not to recognize a legitimate exercise of personal autonomy by free and equal citizens.

C. ASSISTED SUICIDE

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

156 The fact that there is not a prohibition or a potential use of state coercion does not oblige people with a moral divergence to remain silent. See H.L.A. HART, LAW, LIBERTY AND MORALITY 5, 50 (1963), at 76.
religions, and particularly by the Catholic Church. However, there are some subtleties that provide unusual nuance to this debate. For one, the Hippocratic Oath, still taken by doctors in many countries, directly addresses the matter by stating unambiguously: “I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan.” Furthermore, there is always the concern that pressure from family or health plans could compromise the free and informed consent of the patient. Thus, unlike abortion and same-sex marriage (or some recognized form of gay partnership), which are allowed in most developed countries, physician-assisted suicide is still generally illegal. In Europe, as mentioned earlier, the European Court of Human Rights decided, in Pretty v. United Kingdom, that there is no fundamental right to assisted suicide. Similarly, the Supreme Court of Canada has held that (1) the state interest in protecting life and the vulnerable should prevail over claims of personal autonomy, physical and psychological integrity and human dignity; (2) the cruel and unusual punishment clause did not apply; and (3) the prohibition of assisted suicide, even if an infringement of equality rights, was justified by substantial legislative objective and met the proportionality test.

A handful of countries have legalized physician-assisted suicide, including Belgium, Colombia, Luxembourg, the Netherlands and Switzerland. In the United States, where state bans on physician-assisted suicide have been upheld by the Supreme Court, three states have legalized assisted suicide for people who have a very limited amount of time to live.

Oregon’s Death with Dignity Act requires the diagnosis of a terminal illness that will, “within reasonable medical judgment, produce death within six months.” The Washington Death with Dignity Act, enacted in 2009, also has a provision that requires patients to “have less than six months to live” in order to fall within the act. The most recent American jurisdiction to adopt an assisted suicide regime was Montana, which acted through its state supreme court to find immunity from prosecution for doctors who helped terminally ill patients die. The state legislature, however, has declined to pass a bill that fully describes the limits of any right to die and has instead left the issue in “legal limbo.” The rules of these American states are stricter than those of other countries. In the Netherlands, for example, the standard is more relaxed, and people facing the prospect of “unbearable suffering with no prospect of improvement” may perform assisted suicide, regardless of the exact time diagnosis. Similarly, under Belgian law, patients suffering from “constant and unbearable physical or psychological pains resulting from an accident or incurable illness” are legally allowed to request assisted suicide from their physicians.

Finally, it is necessary to examine the relationship between assisted suicide and each of the three components of the concept of human dignity described in this article. As for intrinsic value, the fundamental right to life would naturally be an obstacle for legalization of

assisted suicide. It is difficult to find a right to die that could be invoked to counter the right to life. Death is inevitability and not a choice. But there certainly is a right to physical and mental integrity, which is also associated with the inherent value of every human being. Medical technology has the capacity to transform the process of dying into a journey that can last longer than would naturally occur and be more painful than necessary. Each individual, thus, should have the right to die with dignity, and should not be compelled to suffer for an extended period of time without the ability to function normally. In a rather paradoxical way, at the intrinsic value level, the right to life and the right to integrity can oppose each other.

Regarding autonomy, preserving it is one of the “integral values” surrounding the debate about physician-assisted suicide, along with alleviating suffering and maintaining community. Autonomy generally supports the idea that a competent person has the right to choose to die, under certain circumstances, if after thoughtful reflection she finds that “unrelieved suffering outweighs the value of continued life.” And provided the physician agrees to do the procedure, no one else’s autonomy is in question.

Community value, is the most complex discussion in this analysis. The community and state do not have the right to impose their moralist or paternalist conceptions on someone who is hopelessly suffering and close to the end of life. However, they do have the


167 I do not think equal protection plays a role in this scenario.


authority and the duty to establish some safeguards in order to make sure that each patient’s autonomy is properly exercised. For these reasons, individuals who are terminally ill and enduring great suffering, as well as those who are in persistent vegetative states, should have the right to assisted suicide, but legislation must be cautiously crafted to ensure that the morally acceptable idea of dying with dignity does not become a “recipe for elder abuse.” These pertinent concerns regarding the protection of vulnerable people, however, do not affect the central idea defended in this topic: when two fundamental rights of the same individual are in conflict, it is reasonable and desirable for the state to value personal autonomy.

V. CONCLUSION

A. THE ONE AND THE MANY

Early Greek philosophy was centered around the quest for an ultimate principle – a common substratum to all things and a unity underlying diversity – a problem known as “the one and the many.” If such a concept were to be applied to democratic societies, human dignity would be a leading candidate for the greatest principle that is in the essence of all

170 The issue of consent when there is an incompetent person involved creates a great deal of complexity relating to proof of the patient’s actual wish, the determination of what patient would have wanted and what her or his best interests are. Some of these issues were dealt with in Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990), which affirmed a decision that did not permit the patient’s parents to refuse life-supporting treatment on behalf of their daughter, absent a “clear and convincing” evidence of her desire. For a criticism of this decision, see Dworkin, RONALD DWORIN, LIFE’S DOMINION 190 (1994) [hereinafter Dworkin, Dominion], at 196-98. For a deeper discussion on consent, see generally DERICK BEYLEVELD AND ROGER BROWSWORD, CONSENT IN THE LAW (2007).


172 Advocating an attitude of restraint from the state and community, see Dworkin, Dominion, supra note 170, at 239.

things. It is true, however, that historical and cultural circumstances in distinct parts of the world decisively affect the meaning and scope of human dignity. Intuitively, an idea that varies with politics and geography is too elusive to become a workable domestic and transnational legal concept. The ambitious and risky purpose of this paper was to identify the legal nature of the idea of human dignity and to give it a minimum content, from which predictable legal consequences can be deduced, applicable throughout the world. It is an effort to find common ground and, at the least, common terminology. With that in mind, human dignity is characterized as a fundamental value that is at the foundation of human rights, as well as a legal principle that (1) provides part of the core meaning of fundamental rights and (2) functions as an interpretive principle, particularly when there are gaps, ambiguities, and clashes among rights – or among rights and collective goals – as well as moral disagreements.

After establishing that human dignity should be regarded as a legal principle – and not as a freestanding fundamental right – I propose three elements as its minimum content and derive a set of rights and implications from each. For legal purposes, human dignity can be divided in three components: intrinsic value, which identifies the special status of human beings in the world; autonomy, which expresses the right of every person, as a moral being and as a free and equal individual, to make decisions and pursue his own idea of good life; and community value, conventionally defined as the legitimate state and social interference in the determination of the boundaries of personal autonomy. In structuring legal reasoning in more complex, divisive cases, it is useful to identify and discuss the relevant questions that arise in

\[134\] \textit{Id.} at 76.
each of the three levels of analysis, and therefore provide more transparency and accountability to the justification and choices made by courts or other interpreters.

B. EPILOGUE: EQUALS, NOBLES AND GODS

Dignity, in one line of development that goes far back in time, was a concept associated with rank: the personal status of certain political or social positions. Dignity, thus, was tied up with honor, and entitled some individuals to special treatment and privileges. In this sense, dignity presupposed a hierarchical society and denoted nobility, aristocracy, and the superior condition of some persons over others. Over the centuries, however, with the impulse of religion, philosophy and sound politics, a different idea of dignity has developed – human dignity – which protects the equal intrinsic worth of all human beings and the special place of humanity in the universe. Such is the concept explored in this article, which is at the foundation of human rights, and particularly the rights of freedom and equal protection. These ideas are now consolidated in constitutional democracies, and some higher aspirations have been cultivated. In a time to come, with a few drops of idealism and political determination, human dignity may become the source of a high rank and distinction that is accorded to everyone: the maximum attainable level of rights, respect and personal achievement. All persons will be nobles.175 Or better yet, as in the lyrics of Les Miserables, “everyone will be a king”.176 And some time in the

---


176 See Alain Boublil and Herbert Kretzmer, One Day More:

One day to a new beginning
Raise the flag of freedom high!
Every man will be a king
future, given that desire and ambition are unlimited, men will seek to become Gods.\textsuperscript{177}

\begin{verse}
Every man will be a king
There's a new world for the winning
There's a new world to be won
Do you hear the people sing?
\end{verse}

\textsuperscript{177} This idea is in Jean-Paul Sartre, The Being and the Nothingness, 735, 764 (Hazel E. Barnes, trans. 1956); and also in Jean-Paul Sartre, Existentialism as Humanism 63 (1973) ("The best way to conceive of the fundamental project of human reality is to say that man is the being whose project is to be God"). The subject is further explored in Roberto Mangabeira Unger, The Self Awakened: Pragmatism Unbound 256 (2007). For Unger, the divinization project is impossible, but there are ways by which “we can become more godlike”.

45