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

Luis Roberto Barroso
“HERE, THERE AND EVERYWHERE”:
HUMAN DIGNITY IN CONTEMPORARY LAW AND IN THE TRANSNATIONAL
DISCOURSE

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ABSTRACT: Over the past several decades, human dignity has become an omnipresent idea in contemporary law. This Article surveys the use of human dignity by domestic and international courts and describes the concept’s growing role in 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.

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A. Origin and Evolution

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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, 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

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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, and that it 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

resists rigid compartmentalization and that reaches across the liberty/equality boundary to recognize the ultimate grounding of both in an expanding idea of human dignity).”


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. ORIGIN AND EVOLUTION

In one line of development, which dates back to classical Rome, crosses the Middle Ages and comes all the way to the advent of the liberal state, dignity – dignitas – was a concept associated with the personal status of some individuals or with the prominence of certain institutions.10 As for personal status, dignity represented the political or social rank derived primarily from the holding of some public offices, as well as from general recognition of personal achievements or moral integrity.11 The term was also used to qualify some institutions, such as the sovereign, the crown or the state, in reference to the supremacy of their powers.12 In either case, dignity entailed a general duty of honor, respect and deference owed to those individuals and institutions worthy of it, an obligation whose infringement could be sanctioned.

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12 See, e.g., Jean Bodin, LES SIX LIVRES DE LA REPUBLIQUE 144 (1593). There is an English version at http://www.constitution.org/bodin/bodin_4.txt.
with criminal and civil remedies. Thus, in Western culture, the first meaning attributed to dignity, as used to categorize individuals, pressuposed a hierarchical society and was linked to a superior status, a higher rank or position. In many ways, dignity was equivalent with nobility, implying special treatment and distinct rights and privileges. Based on these premises, it does not seem accurate to understand the contemporary idea of human dignity as a historical development of the Roman concept of *dignitas hominis*. The current notion of human dignity did not supersede the old one, but it is rather the product of a different history, which ran parallel to the origins discussed above.

As it is currently understood, human dignity relies on the assumption that every human being has intrinsic worth. Multiple religious and philosophical theories and conceptions seek to justify this metaphysical view. The long development of the contemporary view of human dignity, starting with classical thought, has as landmarks the Judeo-Christian tradition, the Age of Enlightenment and the aftermath of World War II. Under a *religious* perspective, the central ideas that are in the core of human dignity can be found in the Old Testament, the Hebrew Bible: God created mankind in his own image and likeness and imposed on each person the duty to love his neighbor as himself. These statements are repeated in the Christian New Testament. As for the *philosophical* origins of human dignity, Roman statesman

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15 *Genesis* 1:26 and 1:27.

16 *Leviticus* 19:18.

17 *Ephesus* 4:24 and *Mathew* 22:39. Due to its major influence over Western civilization, many authors emphasize the role of Christianity in the shaping of what came to be identified as human dignity. See, e.g., Christian Starck.
Marcus Tullius Cicero was the first author to employ the expression “dignity of man” associated with reason and the capacity for free moral decision. With Pico della Mirandola, in 1486, the ratio philosophica started to depart from its subordination to the ratio theologica. Spanish theologian Francisco de Vitoria and German philosopher Samuel Pufendorf added major contributions to the subject. It was with the Enlightenment, though, that came the centrality of man, along with individualism, liberalism, the development of science, religious tolerance and the advent of a culture of individual rights. Only then was the quest for reason, knowledge and freedom able to break through the thick wall of authoritarianism, superstition and ignorance that the manipulation of faith and religion had built around medieval societies. One of Enlightenment’s foremost representatives was Immanuel Kant, who defined it as mankind’s exit from its self-imposed immaturity.

“The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions”, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer and Eckart Klein) 181 (2002).

18 See supra note 14 and Hubert Cancik, “‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, De Officis I 105-107”, in David Kretzmer and Eckart Klein, THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 20-21(2002), at 27 [hereinafter Kretzmer & Klein].

19 His famous speech Oratio de Hominis Dignity (“Oration on the Dignity of Man”) is considered to be the founding manifesto of the humanist Renaissance. See Pico della Mirandola, Oratio de Hominis Dignitate (http://www.wsu.edu:8080/~wldciv/world_civ_reader/world_civ_reader_1/pico.html).

20 Francisco de Vitoria (1492-1546) was known for his fierce defense of the rights of Indians against the colonists in the New World. See EDWIN WILLIAMSON, THE PENGUIN HISTORY OF LATIN AMERICA 64-65 (2009).

21 Samuel von Pufendorf (1632-1694) was a precursor to the Enlightenment and a pioneer in the secular conception of human dignity, which he founded on moral freedom. See De officio hominis et civis juxta legem naturalem libri duo, of which an English version – On The Duty of Man and Citizen According to the Natural Law (1673) – can be found at http://www.lonang.com/exlibris/pufendorf/index.html.


Along with the religious and philosophical landmarks identified so far, there is a striking *historical* landmark that was decisive in the modeling of the current notion of human dignity: the horrors of national socialism and fascism, and the reaction they elicited in the aftermath of World War II. In the reconstruction of a world morally devastated by totalitarianism and genocide, human dignity was incorporated into the *political* discourse of the winners as the grounds for a long-awaited era of peace, democracy and protection of human rights. Human dignity was imported into the *legal* discourse due to two main factors. The first was the inclusion in several international treaties and documents, as well as in several national constitutions, of express language referring to human dignity. The second factor corresponds to a more subtle phenomenon, which became increasingly visible over time: the rise of a post-positivist legal culture that re-approximated law with moral and political philosophy, attenuating the radical separation imposed by pre-war legal positivism. In this renovated jurisprudence, where interpretation of legal norms is strongly influenced by social facts and ethical values, human dignity plays a prominent role. This is, thus, a very brief sketch of the religious, philosophical, political and legal trajectory of human dignity toward its contemporary meaning.

B. **COMPARATIVE LAW, INTERNATIONAL LAW AND TRANSNATIONAL DISCOURSE**

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

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24 In Europe, and particularly in Germany, the reaction against positivism started with Gustav Radbruch’s article *Fünf Minuten Rechtsphilosophie* [Five Minutes of Legal Philosophy] (1945), which was very influential in shaping the *jurisprudence of values* that enjoyed prestige in the aftermath of the war. In the Anglo-Saxon tradition, John Rawl’s *A Theory of Justice* (1971) has been regarded as a milestone in bringing elements of ethics and political philosophy into jurisprudence. Ronald Dworkin’s “general attack on positivism” in his article *The Model of Rules*, 35 U. CHICAGO L. REV. 14, 17 (1967) is another powerful example of this trend. In Latin America, Carlos Santiago Nino’s book *The Ethics and Human Rights* (1991) is also very representative of the post-positivist culture.
Human dignity is a concept found in most constitutions written after World War II.\textsuperscript{25} 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.\textsuperscript{26}

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.\textsuperscript{27} Regarded as the foundation for all basic rights,\textsuperscript{28} the dignity clause has both subjective and objective dimensions, empowering individuals with certain rights and imposing affirmative obligations on the state.\textsuperscript{29} On various occasions, the Court has emphasized that the image of man in the Fundamental Law involves a balance between the individual and the community.\textsuperscript{30} Based on this understanding of human dignity, the 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{31} and private\textsuperscript{32} interference; prohibition of holocaust denial;\textsuperscript{33}

\textsuperscript{25} 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.

\textsuperscript{26} See Dieter Grimm, Die Würde des Menschen ist unantastbar (The Human Dignity is Inviolable), in 24 KLEINE REH (2010) [hereinafter Grimm].

\textsuperscript{27} Bundesverfassungsgericht [BVerfG], [Federal Constitutional Court] 1969, 27 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 1 (Microsensus Case); and 30 BVerfGE 173 (1971) (Mephisto Case). This “absolute” character of human dignity has been object of growing dispute, but is still the dominant view in the Court. See Grimm, \textit{supra} note 26, at 5.

\textsuperscript{28} 30 BVerfGE 173 (1971) (Mephisto Case).

\textsuperscript{29} DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 312 (1997) [hereinafter Kommers].

\textsuperscript{30} 4 BVerfGE 7, 15-16 (1954). See the translation at Kommers, \textit{supra} note 29, at 305.

\textsuperscript{31} 27 BVerfGE 1 (1969) (Microsensus Case).

\textsuperscript{32} 30 BVerfGE 173 (1971) (Mephisto Case).
prohibition of the shooting down of aircrafts seized by terrorists; and a declaration that it is unconstitutional for the state to decriminalize abortion (“Abortion I case”), a decision that was subsequently revised to allow for more flexibility in the regulation of abortion (“Abortion II case”).

In France, it was not until 1994 that the Constitutional Council, combining different passages of the Preamble to the 1946 Constitution, proclaimed that dignity was a principle of constitutional status. French commentators, more or less enthusiastically, have referred to human dignity as a necessary underlying element to all of French positive law, as both a founding and normative concept and as the philosopher’s stone of fundamental rights. Since then, the principle of human dignity has been invoked in different contexts, from the declaration that decent housing for everyone is a constitutional value to the validation of statutes permitting abortion until twelve weeks of pregnancy. More recently, the Constitutional

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34 BVerfG, 1 BvR 357/05.

35 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.

36 88 BVerfGE 203 (1993). In this decision, the Court reiterated the state’s duty to protect the unborn, but admitted that some restrictions on abortion could violate women’s dignity. After the decision, the government enacted a new law which stated that abortion in the first trimester of pregnancy would not be punishable, provided the woman had undergone compulsory pro-life counseling. Excerpts drawn from Kimmers, *supra* note 29, at 353.


41 CC decision no. 94-359 DC, January 19, 1995.

42 CC decision no. 74-54 DC, January 15, 1975, on the constitutionality of the Voluntary Interruption of Pregnancy Act; and CC decision no. 2001-446 DC, June 27, 2001.
Council upheld two controversial laws enacted by the Parliament: one making it illegal to wear full face veils in public, including the Islamic burqa;\(^{43}\) and the other banning of same-sex marriage.\(^{44}\) Although human dignity was not explicitly referenced in either of these decisions, it was clearly implicated to the extent that both matters concern religious freedom, equality and personal existential choices. The State Council (Conseil d’État), in turn, ruled that the bar attraction known as *dwarf tossing* should be prohibited, a decision discussed in Part III of this Article. In a 2000 opinion, the Court of Appeals (Cour de Cassation) issued an extremely controversial decision in the *Perruche Case*, recognizing a “right not to be born,” and granting a child, represented by his parents, compensation for the fact that he was born deaf, dumb, partially blind and with severe mental deficiency.\(^{45}\) In another case that gained notoriety, the Court of Grand Instance of Créteil recognized Corinne Parpalaix’s right to undergo artificial insemination using the sperm of her late husband, who had deposited the sperm at a sperm bank prior to submitting to a high-risk surgical procedure.\(^{46}\)

In the case law of the Supreme Court of Canada, the Court has recognized human dignity as a fundamental value underlying both the common law and the 1982 Charter of Rights and Freedoms,\(^{47}\) a value that has a communitarian dimension and is accompanied by a

\(^{43}\) CC decision no. 2010 - 613 DC, October 7, 2010.


\(^{45}\) Defendant was the laboratory that failed to detect that the mother had contracted rubella. Decision of 17 November 2000, Full Court. See http://www.courdecassation.fr/publications_cour_26/bulletin_information_cour_cassation_27/bulletins_information_2000_1245/no_526_1362/.


number of responsibilities.\textsuperscript{48} For example, the meaning and scope of human dignity was directly or indirectly involved in the discussion of cases that resulted in the striking down of legislation against abortion,\textsuperscript{49} the denial of a right to assisted suicide,\textsuperscript{50} the validity of gay marriage\textsuperscript{51} and decriminalization of the use of marijuana.\textsuperscript{52} In Israel, human dignity became an express constitutional concept in 1992.\textsuperscript{53} Over the years, respect for human dignity has been at the center of several morally charged cases decided by the Supreme Court, such as the case in which the Court ruled it was unacceptable to use prolonged detention of Lebanneses prisoners as bargaining chip to obtain the return of Israeli soldiers,\textsuperscript{54} and the decision that restated Israel’s absolute prohibition of torture, with no exceptions and no room for balancing, not even in the interrogation of suspected terrorists.\textsuperscript{55} In South Africa, the Constitutional Court utilized human dignity to hold the death penalty unconstitutional,\textsuperscript{56} to permit abortion during the first trimester of a pregnancy,\textsuperscript{57} and to protect homosexual relations.\textsuperscript{58} Diverging from its counterparts in other countries, the


\textsuperscript{53} In 1992, the Basic Law: Human Dignity and Liberty was enacted. \textit{See} http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm


\textsuperscript{56} S v Makwanyane and Another (CCT3/94) [1995] ZACC 3. \textit{Available at} http://www.constitutionalcourt.org.za/Archimages/2353.PDF.

\textsuperscript{57} \textit{Christian Lawyers Association of South Africa} & others v Minister of Health & others 1998 (4) SA 113 (T), 1998 (11) BCLR 1434 (T). Available at http://ss1.webkreator.com.mx/4_2/000/000/00b/ae7/8.%20Christian%20Lawyers%20Association%20v.%20Minister%20of%20Health.%201998.pdf.

\textsuperscript{58} \textit{National Coalition for Gay and Lesbian Equality and Another} v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (1) BCLR 1517 (9 October 1998). \textit{Available at} http://www.constitutionalcourt.org.za/Archimages/2076.PDF.
Constitutional Court of Colombia has decided that voluntary prostitution is legitimate work.\(^59\)

There is no need to go on reciting examples, for the point is clear: human dignity has become a central and recurrent concept in the reasoning of supreme courts and constitutional courts throughout the world. The case of the United States will be dealt with separately.

2. Human Dignity in International Documents and Case Law

Human dignity has also become a ubiquitous idea in International Law. Indeed, the term has been prominently placed in a wide range of declarations and treaties,\(^60\) several of which are enforced by International Courts. In fact, the European Court of Justice (“ECJ”) has used the concept of human dignity to support its decisions in a varied assortment of cases, holding, for example, that neither the human body, nor any of its elements, could constitute patentable inventions,\(^61\) and that an employer fails to respect dignity by terminating an employee because of gender reassignment surgery.\(^62\) A complex discussion of human dignity took place in the Omega case, in which the Court decided that human dignity may have different meanings and scopes within the domestic jurisdictions of the European Union.\(^63\)


\(^63\) Case C-36/02, Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt
of Human Rights (“ECrHR”) has often employed human dignity as an important element in its interpretation of the European Convention on Human Rights (1950). In the Tyrer case, the Court held that to subject a fifteen year old to corporal punishment (“three strokes of the birch”) was an assault on his dignity and constituted impermissible treatment of the youth as an object in the power of authorities. The ECrHR also 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 on many occasions, in relation, for example, to physical, sexual and psychological violence against inmates in a prison, solitary confinement or otherwise inhumane incarceration conditions, forced disappearances, and extrajudicial executions. At the end of 2010, the Court decided against granting amnesty to crimes perpetrated by state agents (murder, torture and forced disappearance of persons) during the military dictatorship in Brazil.

Bonn, 2004 E.C.R. I-09609. The dispute involved the prohibition of a game supplied by a British company, a “laserdrome” used for simulating acts of homicide. A German Court upheld the decision on grounds that the “killing game” was an affront to human dignity.

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


See, e.g., Velásquez Rodríguez Case, INTER-AM. C.H.R. SERIES C No. 4 (1988);


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. Although the flow of ideas is more intense in one direction, it is also true that, as with any other exchange, this is a two-way avenue. 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 and sexual matters. Foreign decisions may offer new information and perspectives, and can also help build consensus. This seems to be the case with the death penalty (except in the United States) and, to some extent, also abortion (the United States, Germany, France and Canada, among others, have similar laws). It goes without saying

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

75 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).

76 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.
that foreign and international decisions have only persuasive, but not binding, authority. This fact alone should be sufficient to put aside any parochial fears.

It is not difficult to find examples of this dialogue between courts from different countries. The Supreme Court of Canada, for example, frequently cites foreign or international courts’ conceptions of dignity. In *Kindler v. Canada*, the dissenting Justices cited the abolition of the death penalty in the United Kingdom, France, Australia, New Zealand, Czechoslovakia, Hungary, and Romania. In *R. v. Morgentaler*, the Court referenced decisions of the German Constitutional Court and the United States Supreme Court on abortion. In *R. v. Smith*, the dissent cited many United States Supreme Court cases on cruel and unusual punishment. In *R. v. Keegstra*, a case upholding the prohibition of hate speech, the Court cited several pronouncements by the European Commission of Human Rights on the matter. The Canadian Supreme Court’s decision in the *Rodriguez case*, in which it failed to recognize a right to assisted suicide, was cited by the European Court of Human Rights in *Pretty v. United Kingdom* when the Court addressed the same issue. In India, the Supreme Court often cites United States Supreme Court decisions, in a variety of contexts. In one case, the American

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77 *SLAUGHTER, supra* note 74, at 77 and 78.
80 *R. v. Smith* (Edward Dewey), [1987] 1 S.C.R. 1045 (held that a minimum mandatory prison term provided for by the Narcotic Control Act failed the proportionality test and constituted cruel and unusual punishment).
82 *See* supra, note 50.
doctrine of “prospective overruling” was object of intense debate. In another judgment, the Court applied the American standard of heightened scrutiny for gender discrimination, with a long quote from an opinion by Justice Ginsburg. In South Africa, the Constitutional Court has cited decisions from the Supreme Court of Canada in cases involving women’s right to equality, as well as capital punishment. In an abortion opinion by the Polish Supreme Court, Judge Lech Garlicki, writing in dissent, cited opinions by the Spanish and the German Constitutional Courts.

In the United States, references to foreign law and foreign decisions have been relatively scarce. By the end of the twentieth century, observers had diagnosed a certain isolation and parochialism in the lawyers and courts of the United States. At the turn of the century, however, a new wind started to blow, with foreign precedents being cited in opinions by the United States Supreme Court in cases such as Knight v. Florida, Atkins v. Virginia and

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86 Polish Abortion Decision (1997), K 26/96 OTK ZU No. 2 (Constitutional Tribunal).
88 Bruce Ackerman, The Rise of World Constitutionalism, 83 VA. L. REV. 771, 772 (“[T]he global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of learning from an opinion by the German or French constitutional Court. Nor would the typical scholar – assuming contrary to fact, that she could follow the natives reasoning in their alien tongues. If anything, American practice and theory have moved in the direction of emphatic provincialism.”). 89 528 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.
90 536 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.
Grutter v. Bollinger. The landmark decision, however, came in 2003, with Lawrence v. Texas, when Justice Kennedy, writing for the majority, cited a decision of the European Court of Human Rights. This reference prompted a harsh dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas. In 2005, in Roper v. Simmons, Justice Kennedy once again cited international and foreign law as it pertained to the “international opinion against the juvenile death penalty,” adding that “the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation to our own conclusions.” In their confirmation hearings, Chief Justice John Roberts and Justice Samuel Alito expressed disapproval of such references. Legislative threats to ban the use of foreign legal authorities and even to make it an impeachable offense did not catch momentum. It is clear, thus, that two different approaches “uncomfortably coexist” within the Supreme Court: the “nationalist jurisprudence” view that rejects any reference to foreign and international precedents and the “transnationalist 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

91 539 U.S. 306 (2003). In her separate opinion, Justice Ginsburg cited two international law conventions on discrimination. Id. at 344.
93 Id. at 576, citing the ECHR decision on Drudgeon v. United Kingdom.
94 Id. at 598 (Scalia, J., joined by Rehnquist, C.J., and Thomas, dissenting), stating the foreign views are “meaningless data” and that the Court “should not impose foreign moods, fads, or fashions on Americans.”
95 543 U.S. 551 (2005).
96 Id.
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. However, it was not until the 1940s, and particularly after the 1950s, that the concept began to gain influence in American Constitutional jurisprudence. Some authors link this fact to the presence of Justice William Brennan on the Court and his view of human dignity as a basic value, a constitutional principle and source of individual rights and liberties. As seen in the case law discussed below, 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.

99 Id.
100 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.
102 Justice Murphy used the term dignity in his dissents in Screws v. United States, 325 U.S. 91 (1945) (Murphy, J., dissenting, at 135); In re Yamashita, 327 U.S. 1 (1946) (Murphy, J., dissenting at 29); Korematsu v. United States, 323 U.S. 214 (Murphy, J., dissenting).
103 The first appearance of the expression “human dignity” in a majority opinion was in Rochin v. California, 342 U.S. 165, 174 (1952). See Jackson supra note 2, at 16, n. 7.
105 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.
106 Neuman supra note 4, at 271.
It is in the context of the right to privacy that human dignity has probably played its most prominent role. It is true that dignity was not expressly invoked in the initial landmark cases, such as *Griswold v. Connecticut* and *Roe v. Wade*. Yet, the core ideas underlying human dignity – autonomy and freedom to make personal choices – were central to these decisions. In a subsequent abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, human dignity was explicitly mentioned by the plurality opinion and by the dissent. The same occurred in *Stenberg v. Carhart*, another abortion decision. However, it was in *Lawrence v. Texas*, the case finding that the right to privacy prohibits the criminalization of consensual intimate relations among same-sex partners, that human dignity

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107 381 U.S. 479 (1965) (striking down a law that prohibited the use of contraceptives by married couples). This decision created a new fundamental right – the right of privacy – emanating from the “penumbras” of the bill of rights that protects marital relations from state intrusions. According to the view expressed in this Article, human dignity is the true source of non-enumerated fundamental rights.

108 410 U.S. 113 (1973) (securing the right of a woman to have an abortion in the first and second trimesters of pregnancy).

109 Some authors even contend that privacy is a “misnomer” and that dignity is a better term for the right at issue. See Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. Jefferson L. Rev. 1, 4 (2007-2008).

110 505 U.S. 833 (1992), in which the Supreme Court partially overruled and revised the constitutional framework governing the right to abortion.

111 *Id.* at 851: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” (emphasis added). Human dignity was also mentioned in Justice Stevens’ separate opinion. *Id.* at 916 (Stevens J., concurring in part, dissenting in part). In another abortion decision – *Stenberg v. Carhart*, 530 U.S. 914 (2000) – Justice Breyer, writing for the Court, also cited the concept of dignity.

112 Justice Scalia reproduces several instances the word dignity was mentioned by his peers, along with others (as autonomy and body integrity), to conclude that “the best the Court can do to explain how it is that the word ‘liberty’ must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”

113 530 U.S. 914 (2000). Notably, although the Court in this case struck down a restriction on certain types of abortions, in a subsequent case, *Gonzales v. Cahart*, 550 U.S. 124 (2007), the Court upheld a similar restriction, although it did not explicitly overrule *Stenberg*.

played its most important role in a ruling by the Court.\textsuperscript{115}

In the \textit{equal protection} context, with regard to women’s rights, landmark cases such as \textit{Reed v. Reed}\textsuperscript{116} and \textit{Frontiero v. Richardson}\textsuperscript{117} did not mention human dignity in their rationales, but some other opinions dealing with sex discrimination have expressly referenced the concept.\textsuperscript{118} The idea of human dignity, however, became more important in the context of racial discrimination. In \textit{Brown v. Board of Education},\textsuperscript{119} although the Court’s opinion did not expressly refer to human dignity, it has been properly recognized that the concept clearly underlied the unanimous opinion against school segregation.\textsuperscript{120} In subsequent cases, majority opinions have expressly referenced dignity in relation to racial discrimination.\textsuperscript{121}

In cases involving the \textit{privilege against self-incrimination}, the Supreme Court asserted, in \textit{Miranda v. Arizona},\textsuperscript{122} that the interrogation environment, even absent physical

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\textsuperscript{115} 539 U.S. 558, 567, 574, 577 (2003). Writing for the majority, Justice Anthony M. Kennedy invoked human dignity in several different passages of his opinion.
\textsuperscript{116} 404 U.S. 71 (1971) (declaring unconstitutional a state law that established that males had preference over females in the appointment of estate administrators).
\textsuperscript{117} 411 U.S. 677 (1973) (declaring unconstitutional rules allowing male members of the armed forces to declare their wives as dependents while female military personnel could not do the same with respect to their husbands).
\textsuperscript{118} See e.g., J.E.B. v. Alabama ex rel., 511 U.S. 127, 141 (holding that challenging a juror solely on the basis of sex “denigrates the dignity of the excluded juror”); Robert v. United States Jaycees, 469 U.S. 609, 625 (upholding a state law that compelled associations to accept women as regular members).
\textsuperscript{119} 347 U.S. 483 (1954).
\textsuperscript{121} See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); and, particularly, Rice v. Cayetano, 528 U.S. 495, 517 (2000).
\textsuperscript{122} 384 U.S. 436 (1966).
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intimidation, is “destructive of human dignity.”"\(^{123}\) Despite this holding, over the years human dignity lost its thrust in Fifth Amendment cases.\(^{124}\) With regard to protection against unreasonable searches and seizures, *Rochin v. California*\(^{125}\) established a direct connection between the form by which evidence is obtained and human dignity. However, human dignity’s fate in the category of cases arising under Fourth Amendment became gloomier in the second half of the 1980s, after the commencement of the “war on drugs.”\(^{126}\) In relation to protection against cruel and unusual punishment, and particularly regarding the death penalty, the Court declared in *Furman v. Georgia*\(^{127}\) that capital punishment, as applied in some states\(^{128}\) – randomly, with unguided discretion for juries and, as noted in a concurrence by Justice Douglas,\(^{129}\) with disproportionate impact on minorities – was inadmissible. Four years later, however, in *Gregg v. Georgia*,\(^{130}\) the Court upheld Georgia’s redesigned death penalty statute. Yet, dignity was expressly invoked in *Atkins v. Virginia*\(^{131}\) and *Roper v. Simmons*,\(^{132}\) when the Court struck down as unconstitutional, respectively, the execution of mentally retarded individuals and offenders under age of eighteen.

\(^{123}\) *Id.* at 457. The majority added that “the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens.” *Id.* at 460.


\(^{125}\) 342 U.S. 165 (1952). (holding that involuntary pumping of the petitioner’s stomach to extract drug capsules “shocks the conscience” and violated the due process clause of the Fourteenth Amendment).


\(^{127}\) 408 U.S. 238 (1972).

\(^{128}\) 408 U.S. 238 (1972).

\(^{129}\) *Furman*, 408 U.S. at 240 (Douglas, J., conc.).


\(^{131}\) 536 U.S. 304 (2002).

\(^{132}\) 543 U.S. 551 (2005).
In the scenario of death with dignity, Chief Justice Warren referred to human dignity in his dissent in *Cruzan v. Director, Missouri Department of Health*, a case in which the Supreme Court affirmed a decision that refused to allow the withdrawal of life-sustaining treatment for a woman who had been in a vegetative coma for many years. In the years that followed, the Court denied the existence of a right to physician-assisted suicide in *Washington v. Glucksberg* and *Vacco v. Quill*. As for claims involving social and welfare rights, the closest the Supreme Court has come to the conception of the Constitution as creating positive entitlements was probably in *Goldberg v. Kelly*, a case in which the Court held that welfare recipients could not have their benefits terminated without fair hearings. Finally, in the Court’s case law, reputational interests have been traditionally outweighed by First Amendment protection in conflicts involving freedom of expression and the opposing right of an individual to protect his image, the latter of which the Court has not recognized as a constitutionally protected interest.

**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 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

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States and France – it cannot be used in legal reasoning. Faithful to textualism\textsuperscript{138} as his philosophy of constitutional interpretation, this is the point of view sustained by Justice Scalia.\textsuperscript{139} 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. This is the view, for example, of Neomi Rao, for whom human dignity is linked to European communitarian values that could weaken American constitutionalism, which is based on individual rights.\textsuperscript{140} Likewise, 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.\textsuperscript{141} 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”\textsuperscript{142} and “Nazi history.”\textsuperscript{143} 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.”\textsuperscript{144} 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.\textsuperscript{145} Along the same lines, Steven Pinker claimed that the concept of dignity “remains a


\textsuperscript{139} 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.

\textsuperscript{140} Rao, supra note 3, at 204.

\textsuperscript{141} Id., at 1220.

\textsuperscript{142} Id., at 1166.

\textsuperscript{143} Id., at 1187.

\textsuperscript{144} Id., at 1221.

“mess” and serves a Catholic agenda of “obstructionist ethics.” 146

Although none of the above arguments are irrelevant, they all can be countered and overcome. As for the textualist objection, it suffices to remember that all constitutions bear values and ideas that inspire and underlie their provisions without express textual inclusion. In the 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. 147 Significant evidence of this argument lies within the European Convention on Human Rights, the first binding international treaty approved after the Universal Declaration of Human Rights. Despite the fact that it does not make reference to “human dignity,” the treaty’s Organs, and noticeably the European Court of Human Rights, have used the concept in several of their decisions, as described above.

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

146 Id.
147 Neuman, supra note 4, at 251.
compulsory vaccination. As for Whitman’s views, there is a fundamental problem with them. Whitman does not make a clear and proper 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. This might explain why he links dignity to Fascism and National Socialism – and their notions of personal honor – and not with a broad and generous conception of human rights that was developed after the end of the World War II as a reaction to the abuses perpetrated by the axis powers. Another consequence of not making a necessary differentiation between human dignity’s ancient and current meanings can be detected in the opposition Whitman sees between privacy as liberty and privacy as dignity (that is, as “personal honor”). As I have intended to demonstrate, 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. Lastly, prospects for gay marriage seem at this point less dim than Whitman had anticipated.

Finally, there is the condemnation that dignity is a vague slogan, which can be co-opted by authoritarianism and paternalism. As with any other high profile abstract term – such as the right to the free development of one’s personality in German constitutional law, or the Due Process and Equal Protection clauses in the American Constitution – there are risks involved in the construction of what human dignity means. Any complex idea, in fact, is subject to abuse or misuse: democracy can be manipulated by populists, federalism can degenerate into hegemony of the central government, and judicial review can be contaminated by politics. As Ronald Dworkin said, “it would be a shame to surrender an important idea or even a familiar name to this
corruption.” Thus, 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 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

From what we have seen so far, human dignity is a multi-facetted concept that is present in religion, philosophy, politics and law. There is a reasonable consensus that it constitutes a fundamental value that underlies constitutional democracies generally, even when not expressly written in constitutions. In Germany, the dominant view is that human dignity is an absolute value that prevails in any circumstance. That assertion has been pertinently challenged over the years. As a general rule, law is not a space for absolutes. Even if it is reasonable to assert that human dignity usually prevails, there are unavoidable situations in which it will be at least partially defeated. An obvious example is the case of someone who after due process of law is convicted to prison: an important part of his or her dignity – which is entrenched in freedom of movement – is affected. So, there is a clear sacrifice of one aspect of dignity in favor of another value. Human dignity, then, is a fundamental value, but it should not be regarded as an absolute. Values, either moral or political, enter the world of law commonly

\footnote{148} RONALD DWORINKIN, JUSTICE FOR HEDGEHOGS 204 (2011) [hereinafter Dworkin, Hedgehogs].

\footnote{149} See 27 BVerfGE 1 (Microcensus case) and 30 BVerfGE 173 (1971) (Mephisto Case).

\footnote{150} See Grimm, supra note 26, at 5.
assuming the form of a principle. 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. It is not necessary to elaborate in more depth and detail on the qualitative distinction between principles and rules. The conception adopted here is the one that became dominant in legal theory, based on Ronald Dworkin’s seminal writings on the subject and further developments provided by German legal philosopher Robert Alexy. According to Dworkin, principles are standards that contain “requirements of justice or fairness or some other dimension of morality.” Unlike rules, they are not applicable in “an all-or-nothing fashion,” 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” and when they intersect, it will be necessary to consider the specific importance of each principle in the concrete situation. For Alexy, principles are “optimization requirements” whose enforcement will vary in degree according to

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151 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.


154 Dworkin, supra note 152, at 22.

155 Id. at 24.

156 Id. at 26.

157 Id.

158 Alexy, supra note 153, at 47.
what is factually and legally possible.\textsuperscript{159} 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{160} These views are not immune to controversies.\textsuperscript{161} But it will not be possible here to expand this debate. My predicament is that legal principles are norms that have more or less weight in different circumstances. But, in any case, principles provide arguments that must be considered by courts, and each principle requires a good faith commitment to its realization, to the extent such realization is possible.\textsuperscript{162}

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 situations. To distinguish two of its main roles, one should think of a principle as two concentric circles.\textsuperscript{163} The inner circle, closer to the center, bears the principle’s core meaning and is a direct source of rights and duties. For example, the core meaning of human dignity requires the ban of torture, even in a legal system that has no particular rules prohibiting such conduct. 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. But, in another example, in countries where the right to privacy is not express in

\textsuperscript{159} Id. at 48.
\textsuperscript{160} Id. See also generally, Robert Alexy, Balancing, Constitutional Review, and Representation, 3 INT’L J. CONST. L. 572-581 (2005).
\textsuperscript{161} See e.g., JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 310 (1996) (hereinafter Habermas); and Ernst-Wolfgang Böckenförde, Grundrechte als Grundatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik, in STAAT, VERFASSUNG, DEMOKRATIE 185 (1991), cited and rebutted by Alexy, supra note 155, at 577. See also HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES (2007).
\textsuperscript{162} See PATRICIA BIRNIE, ALAN BOYLE AND CATHERINE REDGWELL, INTERNATIONAL LAW & THE ENVIRONMENT 34 (2009).
the constitution – as in the United States – or the general right to non self-incrimination is not explicit – as in Brazil – these rights can be harvested from the core meaning of dignity. This is the first role of a principle like human dignity: 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. Therefore, it will necessarily inform the interpretation of such constitutional rights, helping define their meaning in particular cases. Furthermore, in cases involving gaps in the legal system, ambiguities in the law, the intersection between constitutional rights and tensions between rights and collective goals, human dignity can be a good compass in the search for the best solution. Moreover, in its most basic application, any statute found to violate human dignity, on its face or as applied, would be void. Consistent with my assertion that human dignity is not an absolute value, it is not an absolute principle either. Indeed, if a constitutional principle can underly both a fundamental right and a collective goal, and if rights collide against themselves or with collective goals, a logical deadlock occurs. A shock of absolutes is insolvable. What can be said is that human dignity, as fundamental value and principle, should have precedence in most situations, but not necessarily always. Furthermore, when true (not just rhetorical) aspects of human dignity are present on both sides of the argument,


164 A statute is unconstitutional on its face when it is contrary to the constitution in the abstract, that is, in any circumstance, and is thus void. A statute is unconstituional as applied when it is consistent with the constitution generally, but produces an unacceptable consequence in a particular circumstance.
the discussion becomes more complex. In such circumstances, cultural and political background may affect the court’s choice of reasoning, a good example being the clash between privacy (in the sense of reputation) and freedom of the press.

A few final words why the characterization of human dignity as a freestanding constitutional right is not the best approach. It is true that principles and rights are closely linked ideas.\textsuperscript{166} Both constitutional principles and constitutional rights represent an opening of the legal system to the system of morality.\textsuperscript{167} However, since human dignity is regarded as the foundation for all truly fundamental rights and as the source of part of their core content, it would be contradictory to make it a right in its own. Furthermore, if human dignity were to be considered a constitutional right in itself, it would need to be balanced against other constitutional rights, which would place it in a weaker position than if it were to be used as an external parameter for permissible solutions when rights clash. As a constitutional principle, however, human dignity may need to be balanced against other principles or collective goals.\textsuperscript{168} Again, it should usually prevail, but that will not be always the case. It is better to recognize this fact than attempt to deny it with circular arguments.\textsuperscript{169}

\textsuperscript{165} See Alexy, supra note 153, at 65 ("Principles can be related both to individual rights and to collective interests.").

\textsuperscript{166} Dworkin, supra note 152, at 90 (“Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.”).

\textsuperscript{167} Alexy, supra note 153, at 4.

\textsuperscript{168} On this tension between individual rights and collective goals, Ronald Dworkin has coined a phrase that became emblematic in the eternal clash between the individual and the reasons of state: “Individual rights are trumps held by individuals.” He added, “It follows from the definition of a right that it cannot be . . . defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency.” See Dworkin, supra note 152, at xi and 92
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. Many of his reflections are directly connected with the idea of human dignity and it is no surprise that he is the most frequently cited author in works on the subject. Notwithstanding the occasional challenges to his system of morality, 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

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169 This seems to be the case with Alexy’s theory that the human dignity principle can be balanced and not take preference, but that there is a human dignity rule that is the product of such balancing that will always prevail. See Alexy, supra note 153, at 64.

170 See McCrudden, supra note 10, at 659.

171 See e.g., DAVID HUME, A TREATISE OF HUMAN NATURE (1738) (Book II, III, iv); and G.W.F. HEGEL, PHILOSOPHY OF RIGHT 159 (Par. 150) (trans. S.W. Dyde, 1996).

172 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).

173 The concepts discussed here were drawn mostly from IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor, trans., Cambridge University Press 1998) [hereinafter Kant], which concentrates most of Kant’s thought on ethics. See generally JENS TIMMERMANN, KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS: A COMMENTARY (2007); ROGER SCRUTON, KANT: A VERY SHORT INTRODUCTION 73-95 (2001); and FREDERICK COPESTON, 6 A HISTORY OF PHILOSOPHY 394 (1960), at 308-348 [hereinafter Copleston].
rationality and represents what is objectively necessary in a will that conforms itself to reason.\(^{174}\)

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.”\(^{175}\) 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.\(^{176}\) Another formulation of the categorical imperative is the following: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”\(^{177}\)

As for autonomy, it is the property of a will that is free. 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.\(^{178}\) An autonomous person is one bound by his or her own will and not by the will of someone else. According to Kant, free will is governed by reason, and reason is the proper representation of moral laws.\(^{179}\) Dignity, in the Kantian view, is grounded in autonomy.\(^{180}\) Where all rational beings act according to the categorical imperative, i.e., as lawgivers whose

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\(^{174}\) Id. at 25.

\(^{175}\) Id. at 31.

\(^{176}\) See Marilena Chauí, Convite à Filosofia [Invitation to Philosophy] 346 (1999).

\(^{177}\) Kant, supra note 173, 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.”

\(^{178}\) Id. at 47.

\(^{179}\) 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.

\(^{180}\) Id. at 43.
maxims could become universal law – the “kingdom of ends,” as Kant wrote – everything has either a price or a dignity.\textsuperscript{181} 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.

\textit{C. Minimum Content of the Idea of Human Dignity}

It is not easy to elaborate a transnational concept of human dignity that will properly take into account the varied political, historical and religious circumstances that are present in different countries. For this purpose, one must settle with an open-ended, plastic and plural notion of human dignity. Roughly stated, this is my minimalist conception: human dignity identifies (1) the intrinsic value of all human beings, as well as (2) the autonomy of every individual, (3) limited by some legitimate constraints imposed on such autonomy on behalf of social values or state interests (community value). These three elements will be analyzed in the next section based on a philosophical perspective that is secular, neutral and universalist. \textit{Secularism}\textsuperscript{182} means that church and state must be separate, that religion is a private matter of each individual and that in political and public affairs a humanist rational view must prevail over

\textsuperscript{181} Id. at 42.

\textsuperscript{182} The term \textit{secularism} was first used in GEORGE JACOB HOLYOAKE, \textit{THE ORIGIN AND NATURE OF SECULARISM} 50 (1896).
religious conceptions. Neutrality is a central argument in contemporary liberal thought, meaning that the state must not take sides when different reasonable conceptions of the good life are in question. These notions of secularism and neutrality represent an effort to free human dignity from any comprehensive religious or political doctrine, incorporating it into the idea of public reason, which John Rawls has insightfully developed.

Finally, a few words on universalism, and its companion idea – multiculturalism. Multiculturalism means respect and appreciation for ethnic, religious or cultural diversity. Since the final years of the twentieth century, it has become widely accepted that multiculturalism is based on values not only consistent with but also required by liberal democracies. Minorities have the rights to their identities and differences, as well as the right to be recognized. And human dignity no doubt supports such views. However, human dignity, in its core meaning, also has a universalist ambition, representing the fabric that binds together the human family. Some degree of enlightened idealism is necessary in this domain in order to confront entrenched practices and customs of violence, sexual oppression and tyranny. To be

\[183\] This view, of course, does not affect freedom of religion, and religious belief is indeed a legitimate option for millions of people. See Charles Taylor, A Secular Age 3 (2007). Regarding the desirable balance and mutual tolerance, see Noah Feldman, Divided by God: America’s Church-State Problem – And What We Should Do About It 251 (2005)

\[184\] See, e.g., John Rawls, Collected Papers 457 (1999). This argument, though, is far from universally accepted. See, e.g., Joseph Raz, The Morality of Freedom 117-121 (1986) [hereinafter Raz], claiming that neutrality is “impossible” and “chimerical.” For a defense of liberal neutrality as a valid idea, see generally see Wojciech Sadurski, Joseph Raz on Liberal Neutrality and the Harm Principle, 10 Oxford J. Legal Stud. 125 (1990); Will Kymlicka, Liberal Individualism and Liberal Neutrality, 99 Ethics 883.

\[185\] 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.
sure, that is a battle of ideas, to be won with patience and perseverance. Troops will not do it.¹⁸⁷

Before moving on, I will restate in a slightly more analytic fashion a previous comment. Human dignity and human (or fundamental) rights are closely connected, like the two sides of a coin or, to use a common image, the two faces of Janus.¹⁸⁸ One is turned toward philosophy, containing the moral values by which every person is unique and deserves equal respect and concern; and the other is turned toward law, containing the individual rights. This represents morals in the form of law or, as Jurgen Habermas put it, a “fusion of moral content with coercive law.”¹⁸⁹ For this reason, in the next section, I try to identify for each element within the core meaning of human dignity its moral content and its legal implications regarding individual rights.

1. Intrinsic Value

Intrinsic value is, on a philosophical level, the ontological element of human dignity, linked to the nature of being.¹⁹⁰ The uniqueness of human kind is the product of a combination of inherent traits and features – which include intelligence, sensibility and the ability

¹⁸⁷ In a inspired passage in which he cites Holmes, LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 45 (2002) wrote:

> Of course civilizations are aggressive, Holmes says, but when they take up arms in order to impose their conception of civility on others, they sacrifice their moral advantage.

¹⁸⁹ Id. at 479.
¹⁹⁰ Ontology is a branch of metaphysics that studies the fundamental characteristics of all things and subjects, including what every human being has and cannot fail to have. It includes questions such as the nature of the existence and structure of reality. See NICOLA ABBAGNANO, DICIONÁRIO DE FILOSOFIA [DICTIONARY OF PHILOSOPHY] 662 (1988); and TED HONDERICH, THE OXFORD COMPANION TO PHILOSOPHY 634 (1995).
to communicate – that give humans a special status in the world, distinct from other species.\textsuperscript{191} Intrinsic value is the opposite of attributed or instrumental value,\textsuperscript{192} because it is value that is good in itself and has no price.\textsuperscript{193} 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.\textsuperscript{194} 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.\textsuperscript{195} Because it has the intrinsic value of every person at its core, human dignity is, in the first place, an objective value\textsuperscript{196} 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

\textsuperscript{191}GEORGE KATEB, HUMAN DIGNITY 5 (2011) (“[W]e can distinguish between the dignity of every human individual and the dignity of the human species as a whole.”).

\textsuperscript{192}See Daniel P. Sulmasy, Human Dignity and Human Worth, in PERSPECTIVES ON HUMAN DIGNITY: A CONVERSATION 15 (Jeff Malpas and Norelle Lickiss, eds. 2007).

\textsuperscript{193}Kant, supra note 173, at 42.

\textsuperscript{194}See Martha Nussbaum, Human Dignity and Political Entitlements, in HUMAN DIGNITY AND BIOETHICS 365 (Essays Commissioned by the President’s Council on Bioethics) [hereinafter Nussbaum]. See also MARTHA NUSBAUM, 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).

\textsuperscript{195}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).

\textsuperscript{196}See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE: PRINCIPLES FOR A NEW POLITICAL DEBATE 9-10 (2006) [hereinafter Dworkin, Democracy] (“[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.”).
As for its legal implications, 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 directly related to the intrinsic value of each and every individual is equality before and under the law. All individuals are of equal value and, therefore, deserve equal respect and concern. 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). 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 includes the prohibition of torture, slave labor and degrading treatment or

197 This point of view departs from Kant’s assertion that human dignity is grounded on reason. See Kant, supra note 173, at 43.

198 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.


201 See UDHR articles IV and V; UN Covenant, articles 7 and 8; American Convention, articles 5 and 6; European Charter, articles 3 to 5º; African Charter, articles 4 and 5.
punishment.\textsuperscript{202} It is within the scope of this right that discussions on life imprisonment, interrogation techniques and prison conditions take place. And finally, the \textit{right to mental integrity},\textsuperscript{203} which in Europe and in many civil law countries comprises the right to personal honor and image, as well as to privacy. The idea of privacy in the United States, however, is somewhat unique.\textsuperscript{204}

Throughout the world, there is a fair amount of case law involving the fundamental rights that stem from human dignity as an intrinsic value. Regarding the \textit{right to life}, abortion is permitted in the early stages of pregnancy by most democracies in the North Atlantic world, including the United States, Canada, France, United Kingdom and Germany. Human dignity, in these countries, has not been interpreted as a reinforcement of the right to life of the fetus against the will of its mother.\textsuperscript{205} I will return to this in the final section of this Article. Assisted suicide is illegal in most countries of the world, although the number of exceptions has grown to include Holland, Belgium, Colombia and Luxembourg, among few others.\textsuperscript{206} In the United States it is allowed in the states of Oregon, Washington and Montana. The main concern here is not the termination of life by the will of patients who are terminally ill, in persistent vegetative states or under unbearable and unsurmountable pain, but the fear of abuse of

\textsuperscript{202} In the U.S. Constitution, most of these matters are dealt with under the Eighth Amendment ban on “cruel and unusual punishments.”

\textsuperscript{203} 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.

\textsuperscript{204} In the United States Constitution, there is no express reference to privacy. In one sense, aspects of privacy are protected by the Fourth Amendment ban on unreasonable searches and seizures. On the other hand, personal honor and image rights do not have the status of constitutional rights, as in many countries and in the European Charter of Fundamental Rights. Finally, United States case law treats under the label of privacy rights that in other countries fall under the category of freedom or equality under the law, such as the right to use contraception and the right to intimate acts between adults.

\textsuperscript{205} See Giovanni Bognetti, The concept of human dignity in European and U.S. constitutionalism, in EUROPEAN AND U.S. CONSTITUTIONALISM (George Nolte, ed. 2005), at 99.
vulnerable people.  

As for capital punishment, it has been banned in Europe and in most countries in the world, the United States being a striking exception among democracies.  

Although grounded in American historical tradition, it is difficult to argue that the death penalty is compatible with respect for human dignity, as it is a complete objectification of the individual, whose life and humanity succumb to the highly questionable public interest in retribution.

As for equality, the practice of affirmative action, for example, has been upheld in countries such as the United States, Canada and Brazil, and it is expressly permitted by the Convention on the Elimination of All Forms of Racial Discrimination. On the other hand, the rights of religious minorities have suffered a setback, especially in Europe, where the use of the full Islamic veil in public has been banned or is object of serious discussions by various member states. In such countries, courts and legislators have failed to uphold dignitarian concerns involving the right to identity with a minority group by finding this right to be outweighed by alleged public interest concerns relating to security, cultural preservation and

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206 For a survey of world laws on the matter, see http://www.finalexit.org/assisted_suicide_world_laws.html.

207 See e.g., Nussbaum, supra note 194, at 373.


211 In Brazil, some public universities have created a quota for racial minorities in their admissions processes. Even though the Supreme Court has not issued its final decision, a preliminary injunction against the norms that permitted such practice was not granted. The case is pending judgment. See STF, ADPF 186. http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStfArquivo/anexo/ADPF186.pdf.

212 See Art. 2.2. The convention entered into force on January 4, 1969

213 This is the case in France. The Constitutional Council validated the law that established the ban. See Decision n. 2010 – 613 DC of 7 October 2010.

woman’s rights. With regard to physical integrity – or, using American terminology, cruel and unusual punishment – courts and authors have repeatedly proclaimed torture to be completely inadmissible. More recently, in the United States, the Supreme Court held that prison overcrowding in the state of California violated the Eighth Amendment. The majority opinion, written by Justice Kennedy, made references to “dignity,” the “dignity of man” and “human dignity.” Finally, concerning mental integrity, the typical challenge in the contemporary world involves the conflict between the right to privacy (as personal honor or image) and freedom of expression, particularly for the press. Aspects of human dignity are present on both sides – dignity as intrinsic value versus dignity as autonomy – and the outcomes in such cases are influenced by different cultural perceptions. A recent example of this clash of legal cultures occurred when New York police arrested a French public figure, who was then exposed to the press handcuffed and required to make the “perp walk.” Although this is a common practice in the United States, the episode was regarded by many as an unnecessary and abusive violation of privacy.

2. Autonomy

See supra, note 56, See also Grimm, supra note 27, at 10-11 (“A society committed to human dignity could never defend itself through the denial of other people’s dignity.”).

Brown v. Plata, 563 U.S. ____.

Id. at 12 (slip opinion).

See Sam Roberts, An American Rite: Suspects on Parade (Bring a Raincoat), N.Y. TIMES, May 20, 2011 at A17, where a “former French justice minister” is quoted as having said that the behavior of the police was “a brutality, a violence, of an incredible cruelty.”

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.\textsuperscript{220} 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.\textsuperscript{221} 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.\textsuperscript{222} However, in practical political and social life, individual will is constrained by the law and by social mores and norms.\textsuperscript{223} 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.

\textsuperscript{220} Post, \textit{Dignity}, supra note 219, at 3.

\textsuperscript{221} The distinction is explored on Jeremy Waldron, \textit{Moral Autonomy and Personal Autonomy}, in Christman & Anderson, supra note 219, at 307-29. Fallon, \textit{supra} note 219, 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).

\textsuperscript{222} Kant, \textit{supra} note 173, at 52 (“[W]hat, then, can freedom of the will be other than autonomy?”).

\textsuperscript{223} Post, \textit{Domains}, supra note 219, at 1.
Autonomy, thus, is the ability to make personal decisions and choices in life, based on one’s conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political 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. Therefore, freedom of religion, speech, and association, as well as sexual and reproductive rights, are important expressions of private autonomy. Of course, private autonomy does not entail absolute rights. It is worth re-emphasizing that autonomy is only at the core of different freedoms and rights; it does not occupy the entire range. For example, as a result of freedom of movement, a free individual can choose where she is going to establish her home, a major personal choice; just as well, she will usually decide where to spend her next vacation. But if a valid law or regulation prohibits her from visiting a particular country — say, North Korea or Afghanistan — no one would think, at least in principle, that the restriction is a violation of her human dignity. Finally, there can be

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224 This distinction is the cornerstone of the “reconstructive approach to law” of Jurgen Habermas, German’s most prominent contemporary philosopher. See Habermas, supra note 161, at 84-104.

225 Indeed, freedom of religion may be limited in the public sphere; freedom of speech may be regulated when the target is commercial speech, and freedom to terminate pregnancy may be restricted after a certain point in the fetus’ development.
clashes between the autonomy of different individuals,\(^2\) as well as between autonomy, on the one hand, and intrinsic value or community value, on the other.\(^3\) 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 into account apparently contrasting norms in order to strike a proper balance under the circumstances.

Private autonomy, as we have seen, stands for individualized self-government.\(^4\) This is what Benjamin Constant has called the “liberty of the moderns,” based on civil liberties, the rule of the law and freedom from abusive state interference.\(^5\) Public autonomy, on its turn, has to do with the “liberty of the ancients,” a republican liberty associated with citizenship and participation in political life. Ancient Greeks felt a moral obligation toward citizenship and invested a substantial part of their time and energy in public affairs, which was facilitated by the fact that slaves did most part of the work.\(^6\) As democracy is a partnership in self-government,\(^7\) it requires an interrelation between individual citizens and the collective will.\(^8\) This means that every citizen has the right to participate directly or indirectly in government. Along these lines, public autonomy entails the right to vote, to run for office, to be a

\(^2\) An example: the right to consume a legal product, such as cigarette, versus someone else’s right to not become an involuntary passive smoker.

\(^3\) 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.

\(^4\) Christman & Anderson, supra note 219, at 14 (comparing liberal and republican approaches as a division “between autonomy as individualized self-government and autonomy as collective, socially instituted self-legislation”).


\(^6\) Id.

\(^7\) Dworkin, Democracy, supra note 196, at xii.
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.\textsuperscript{233} Regarding public autonomy, an important decision by the European Court of Human Rights has ruled that the United Kingdom’s law denying prisoners the right to vote was in violation of the European Convention on Human Rights.\textsuperscript{234} Although the decision has been strongly questioned by Members of the British Parliament,\textsuperscript{235} the Court has properly established that “prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention [including the right to vote], except for the right to liberty.”\textsuperscript{236}  

Finally, attached to the idea of human dignity is the concept of \textit{existential minimum},\textsuperscript{237} also referred to as social minimum\textsuperscript{238} or the basic right to the provision of adequate living conditions.\textsuperscript{239} Equality, in a substantive sense, and especially autonomy (private and private).

\begin{footnotesize}

\begin{enumerate}
\item \textsuperscript{232} Post, \textit{Dignity}, supra note 219, at 8.
\item \textsuperscript{233} \textit{Id.} at 9.
\item \textsuperscript{237} This is the literal translation of the term used by German authors and courts (Existenzminimum). \textit{See} Alexy, \textit{supra} note 153, at 290 (“[T]here can hardly be any doubt that the Federal Constitutional Court pressuposes the existence of a constitutional court right to an existential minimum.”).
\item \textsuperscript{238} \textit{JOHN RAWLS, POLITICAL LIBERALISM} 228-9 (2005) (“. . . [A] social minimum for the basic needs of all citizens is also an essential . . .”).
\item \textsuperscript{239} Habermas, \textit{supra} note 163, at 123 (“Basic rights to provision of living conditions that are socially, technologically, and ecologically safeguarded. . .”).

\end{enumerate}
\end{footnotesize}
public), are ideas dependent on the fact that individuals are “free from want,” meaning that their essential vital needs are satisfied. To be free, equal and capable of exercising responsible citizenship, individuals need to pass minimum thresholds of well being, without which autonomy is a mere fiction. This requires access to some essential utilities – such as basic education and health care services – as well as some elementary necessities, such as food, water, clothing and shelter. The existential minimum, thus, is the core content of social and economic rights, whose existence as actual fundamental rights – and not mere privileges dependent on the political process – is rather controversial in some countries. Its enforceability is complex and cumbersome everywhere. Notwithstanding these challenges, the idea of minimum social rights that can be protected by courts, and which are not entirely dependent on legislative action, has been accepted by case law in several countries, including Germany, South Africa and Brazil.

In the United States, the issue was raised for the first time in a famous speech by President Franklin Delano Roosevelt and in his subsequent proposal for “The Second Bill of Rights,” presented on January 11, 1944 with express references to the rights to

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240 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).

241 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).

242 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).

243 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).

244 See supra note 240.
adequate food, clothing, a decent home, medical care and education. Although Roosevelt thought that the implementation of these second generation rights was a duty of Congress, not of the courts, Cass Sunstein has convincingly argued that a string of Supreme Court decisions came very close to acknowledge some social and economic rights as true constitutional rights, in cases decided between the early 1940s and the early 1970s. According to Sunstein, a counterrevolution occurred after Richard Nixon was elected president in 1968, especially through President Nixon’s appointees to the Supreme Court. As a consequence, the Court’s case law became more aligned with the traditional and dominant view in American law that fundamental rights do not entitle individuals to positive state action. More recently, the 2010 health reform law reignited this debate. My argument here is that the existential minimum is at the core of human dignity, and that autonomy cannot exist where choices are dictated solely by personal needs. And, thus, that the very poor must be granted constitutional protection.

3. Community value

The third and final element, human dignity as community value, also

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245 The proposal was also presented in a State of the Union Address, when he announced a plan for a bill of social and economic rights.

246 CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER, 154 et seq. (2004), citing cases such as Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the equal protection clause requires states to provide trial transcripts at no cost to poor people appealing their criminal convictions), Gideon v. Wainright, 372 U.S. 335 (1963) (holding that states are required to provide defense lawyers in criminal cases for defendants that cannot afford one), Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent must be provided with counsel on his first appeal of a criminal conviction), Shapiro v. Thompson, 394 U.S. 618 (1969) (the Court struck down a state law that imposed a one-year waiting period before a new arrival to the state could apply for welfare benefits) and Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that the termination of welfare benefits without a hearing violated the due process clause).

247 Id. at 163.

248 Raz, supra note 184, at 155 (“Their [the agents] choices must not be dictated by personal needs”).
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 here, by convention, to identify two different external forces that act on the individual: (1) the “shared beliefs, interests and commitments” 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). These three forms of social order presuppose and depend on each other, but are also in constant tension.

Dignity as a community value, therefore, emphasizes the role of state and

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249 Dworkin, *Democracy*, supra note 196, at 8 (“[T]he very poor should be regarded, like a minority and disadvantaged race, as a class entitled to special constitutional protection.”).

250 See John Donne, *Devotions Upon Emergent Occasions* (1624), available at http://www.ccel.org/ccel/donne/devotions.iv.iii.xvii.i.html (Meditation XVII: “No man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . any man’s death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee.”).


253 Id. at 2.
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\(^{254}\) is not incompatible, of course, with limitations resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an overlapping consensus\(^{255}\) 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.\(^{256}\)

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


\(^{255}\) “Overlapping consensus” is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political and moral comprehensive doctrines. See John Rawls, The Idea of Overlapping Consensus, 7 OXFORD J. LEGAL STUD. 1 (1987).
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 Mill257 or on the broader concept of the offense principle defended by Joel Feinberg.258 To 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’s and of shared social values – entail severe risks of paternalism259 and moralism.260 It is largely recognized that some degree of paternalism is acceptable,261 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.262 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.263 The legitimacy and limits associated with


257 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.

258 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 principle,” maintaining that preventing shock, disgust, embarrassment and other unpleasant mental states is also a relevant reason for legal prohibition.

259 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/>.

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

261 Examples often cited are compulsory education for children, use of seat-belts and motorcicle helmets. See Dworkin, Hedgehogs, supra note 219, at 336.

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

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 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.

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264 See H.L.A. HART, LAW, LIBERTY AND MORALITY 5, 50 (1963) [hereinafter Hart]; and Devlin, supra note 260, at 10.


266 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.


268 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.
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.\(^{269}\) The ECrHR found no violation of the Convention.

There are several morally and legally controversial issues relating to community value. One of them is prostitution. In South Africa, a divided Constitutional Court held that a law that made “carnal intercourse for reward” a crime is constitutional.\(^{270}\) In Canada, the Supreme Court upheld a provision of the Criminal Code that prohibited communications in public for the purpose of prostitution, a distinct but related issue.\(^{271}\) Both courts upheld bans on brothels and bawdy houses. Taking a different perspective, the Constitutional Court of Colombia has held that prostitution is a tolerated social phenomenon, that prostitutes are a historically discriminated-against group deserving of special protection and that voluntary sex work, under subordination to and payment by a bar owner, constitutes a *de facto* labor contract.\(^{272}\)

\(^{269}\) 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.”

\(^{270}\) Jordan and Others v. State (CCT 31/01) [2002] ZACC. Available at http://www.constitutionalcourt.org.za/Archimages/661.PDF. The minority pointed out, however, that the law constituted unfair discrimination against women by making the prostitute the primary offender and the patron at most as an accomplice.


\(^{272}\) Corte Constitucional de Colombia [Constitutional Court of Colombia]. *Sentencia* [Judgment] T-629/10. LAIS v. Bar Discoteca PANDEMO. Available at http://www.corteconstitucional.gov.co/RELATORIA/2010/T-629-10.htm. At the bottom line, the main discussion is whether individual prostitution is a matter of personal autonomy, and thus constitutionally protected, or whether, on the other hand, it is a matter that is primarily to be governed by the legislature.
shaped by heteronomous forces is the *decriminalization of drugs*. The matter was extensively discussed in a 2003 divided decision by the Supreme Court of Canada, which held that Parliament could validly criminalize and punish with imprisonment the possession of marijuana.\textsuperscript{273} A number of countries have adopted,\textsuperscript{274} and several world leaders have advocated for, the decriminalization of drugs, particularly so-called “light” drugs.\textsuperscript{275} Another complex and sensitive issue involves *hate speech*. In most democratic countries, speech aimed at the depreciation of vulnerable groups or individuals, based on ethnicity, race, color, religion, gender and sexual orientation, among other characteristics, is not acceptable and is not within the range of protection for freedom of expression. The United States, in this particular instance, is a solitary exception.\textsuperscript{276}

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 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,

\textsuperscript{273} R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571, 2003 SCC 74. Three justices dissented, stressing that the harm posed to others by marijuana consumption is not significant and does not justify imprisonment, that harm to self should not be criminally punished, and that the harm of prohibiting marijuana far outweighed its benefits.

\textsuperscript{274} E.g., The Netherlands, Portugal and Australia. See Brian Vastag, 5 years after: Portugal’s Drug Decriminalization Policy Shows Positive Results, AMERICAN SCIENTIFIC, April 7, 2009. Available at http://www.sciencemag.org/content/103/15/524.full. For a survey of other countries, see Drug Liberalization, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Drug_liberalization.

\textsuperscript{275} As the former Presidents of Brazil, Colombia, Mexico, Switzerland, the Prime-Minister of Greece, former UN Secretary-General Kofi Annan, Geroge Shultz and Paul Volcker among others. See Global Commission on Drug Policy at www.globalcommissionondrugs.org.

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. 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 trumps 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.

The risk of harm to others is usually a reasonable ground to limit personal autonomy. It is broadly accepted today that Mill’s formulation of the harm principle as the only justification for state interference with individual freedom “may well be too simple” and that “multiple criteria” will determine when liberty can be restricted. But harm to others enjoys a fair presumption as to the legitimacy of the restriction. Harm to oneself may also be an acceptable ground for limiting personal autonomy, as mentioned before, but in this case the burden of demonstrating its legitimacy will usually be on the state, since paternalism should normally raise

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277 See Alexy, supra note 153, at 224. Alexy draws from the idea of legality that is dominant in most civil law countries, meaning that everyone can do anything that is not prohibited by valid norms.

278 Ronald Dworkin, Rights as Trumps, in Theories of Rights 153 (Jeremy Waldron, ed. 1984).

279 Dworkin, supra note 152, at 92. For an insightful discussion on the views of general right to liberty and basic freedoms, see – sorry, it is in Portuguese – Letícia de Campos Velho Martel, Direitos Fundamentais Indisponíveis [Indisposable Fundamental Rights] 94 et seq. (2011).

suspicion. Finally, the limitation of personal autonomy on grounds of public morals requires strong societal consensus. The ban on child pornography – even in case of graphic depiction, without an actual child involved – or the prohibition of incest, are serious candidates for this consensus. But in a pluralist and democratic society, there will always be moral disagreements. Questions like capital punishment, abortion or gay marriage will always be disputed. A brief reflection on this subject is called for before closing this section. 282

Not even the moral realists, who believe that moral claims can be true or false – a highly contested issue in the philosophical debate – fail to acknowledge that their belief is not applicable to all moral truths. 283 Thus, there will always be moral disagreement, meaning that in many situations there is no objective moral truth. 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. 284 One good reason for this abstention is that letting one group impose its moral view over others poses a challenge to the ideal that all individuals are equal and free. There are certainly disputed political issues that will have to be settled by the majority, such as choices involving environmental protection and economic development, the use of nuclear energy or limits on affirmative action. But truly moral issues should not be decided by majorities. The majority, for example, has no right to say that gay sex is a crime, as was once held by the United

281 Id.
283 Enoch, supra note 282, at 16.
States Supreme Court in *Bowers v. Hardwick*.285 Of course there will be cases in which it will not be easy to draw the line between what is political and what is truly moral, and, indeed, many times the two domains will overlap. But 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. In the next section some of these ideas will be applied to a set of controversial cases.

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

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.286 Criminalization has also been found to result in *de facto* discrimination against poor women, who must resort to primitive methods of ending pregnancy due to lack of access to either private or public medical assistance. Abortion,

usually in the first trimester, was broadly removed from criminal codes, starting with Canada, in 1969, the United States, in 1973, and France, in 1975. Several other countries then followed this trend, 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. The Catholic Church and many Evangelical Churches strongly oppose abortion, based on the belief that life begins at conception and should be inviolable beginning at that point. Yet, many people who personally believe that abortion is morally wrong still favor its decriminalization for philosophical or pragmatic reasons. The next paragraphs discuss the relationship between abortion and human dignity, taking into account intrinsic value, autonomy and community value, and the rights and duties associated with each of these elements.

At the intrinsic value level, the abortion debate represents a clash between fundamental values and rights. 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


287 In the United States, the plurality decision in Casey (1992) revised the 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
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 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

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288 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).

289 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.

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.291 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. In other words, the state must value individual autonomy and not legal moralism. 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

291 See note 185.
abortion. There are two other strong arguments in favor of legalization. The first is the difficulty of enforcing the prohibition, as statistics show.\textsuperscript{292} The second is the discriminatory impact that a ban on abortion has on poor women.\textsuperscript{293} Decriminalization does not preclude social forces that oppose abortion from advocating their views. In fact, many communities within countries that have legalized abortion treat it as a social taboo and use strong social pressure to discourage women from terminating their pregnancies.\textsuperscript{294}

\textbf{B. SAME-SEX MARRIAGE}

Legal recognition of same-sex marriage is another highly controversial moral issue throughout the world. Notwithstanding this controversy, the evolution of public opinion on the matter 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 the United States, for example, prior to the 1970s, the American Psychiatric Association categorized homosexuality as a mental disorder.\textsuperscript{295} In 1971, homosexual

\textsuperscript{292} According to the World Health Organization, 21.6 million unsafe abortions took place worldwide in 2008, almost all in developing countries where the practice is illegal. See http://www.who.int/reproductivehealth/topics/unsafe_abortion/en/index.html.

\textsuperscript{293} 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).


\textsuperscript{295} See MICHAEL J. ROSENFIELD, THE AGE OF INDEPENDENCE: INTERRACIAL UNIONS, SAME-SEX UNIONS, AND THE CHANGING AMERICAN FAMILY 176-177 (2007) ("Until the 1950s, the consensus of psychiatrists and psychologists was that homosexuals were deeply disturbed people.").
sodomy was a crime in all but two American states. As late as 1986, the Supreme Court upheld state laws criminalizing intimate sexual behavior among homosexuals, a decision that was only overruled in 2003. 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. As a reaction against the court’s ruling, from 1995 to 2005, 43 states adopted legislation prohibiting same-sex marriage. Ironically, this backlash had the consequence of unifying the LGBT community in favor of same-sex marriage, which was opposed by radical militants who considered it a concession by sexual minorities to conventional rites. In 2004, the state of Massachusetts was the first to legalize same-sex marriage, following a decision by the state’s Supreme Judicial Court. In recent years, homosexuality has increasingly become an accepted lifestyle and there is a growing belief that its causes are predominantly biological. Such being the case, to discriminate solely on grounds of sexual orientation would be the same as discriminating Asians for their eyes, Africans for their color or Latin Americans for being misciginated.

296 William N. Eskridge & Darren R. Pedale, 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.


298 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.”


300 Eskridge, supra note 296, at 20.


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.\(^{303}\) 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.\(^{304}\) 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. Based on biblical passages read as condemnations of homosexual conduct,\(^{305}\) many evangelical groups have expressed strong disapproval and, within the Catholic Church, Popes John Paul II\(^{306}\) and Benedict XVI\(^{307}\) have criticized countries for passing legislation protective of homosexuality.

Analysis of same-sex marriage in light of the idea of human dignity presented in this paper 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:


\(^{305}\) *Leviticus* 18:22; *Romans* 1:26; and *Romans* 1:27.

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


308 The fact that there is not a prohibition or a potential use of state coercion does not oblige people with a moral divergence to remain silent. See Hart, supra note 264, at 76.
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 religions, and particularly by the Catholic Church, which considers suicide to be morally wrong. However, although the typical conflict between secular humanists and religious believers is also present here, there are some subtleties that provide unusual nuance to this debate. For one, the Hippocratic Oath, still taken by doctors in many countries, directly addresses the matter by stating unambiguously: “I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan.”\textsuperscript{309} 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 \textit{Pretty v. United Kingdom},\textsuperscript{310} that there is no fundamental right to assisted suicide.

The Supreme Court of Canada adopted the same outcome in declaring the constitutionality of Section 241 (b) of the Criminal Code, which criminalized assistance of suicide.\textsuperscript{311} In a 5 to 4 decision, the Court held: (1) the state interest in protecting life and the


\textsuperscript{310} See supra, note 83.

\textsuperscript{311} See supra, note 50.
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.\textsuperscript{312} In addition, the majority asserted that it was the role of Parliament – and not of the Court – to deal with the question of assisted suicide.\textsuperscript{313} The dissenting Justices strongly argued that forcing an incapacitated terminally-ill patient to have a “dreadful, painful death” was an affront to human dignity and that there was no difference between refusing treatment and assisted suicide,\textsuperscript{314} that there was an infringement of the right to equality in preventing persons physically unable to end their lives,\textsuperscript{315} and that fear of abuse was not sufficient to override appellant’s entitlement to end her life.\textsuperscript{316}

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,\textsuperscript{317} 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.”\textsuperscript{318} The Washington Death with Dignity Act, enacted in 2009, also has a provision that requires patients to “have less than six

\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} Id. (Cory, J., dissenting).
\textsuperscript{315} Id. (Lamer, C.J., dissenting).
\textsuperscript{316} Id. (L’Hereux-Dubé and McLachlin, JJ., dissenting).
\textsuperscript{318} ORS 127.505. Available at http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx.
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. The fact is

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324 I do not think equal protection plays a role in this scenario.
that contemporary medical technology has the capacity to transform the process of dying into a journey that can last longer than would otherwise occur and be more painful than necessary. Each individual, thus, should have the right to die with dignity, and should not be compelled to suffer for an extended period of time without the ability to function normally. In a rather paradoxical way, at the level of intrinsic value, the right to life and the right to integrity can oppose each other.

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, however, is the most complex discussion in this analysis. To be clear, I do not think the community and state should have the right to impose their moralist or paternalist conceptions on someone who is hopelessly suffering and close to the end of life. However, they do have the authority and the duty to establish some safeguards in order to make sure that each patient’s autonomy is properly exercised. In fact, there is a real risk that legalization of assisted suicide could put pressure on the elderly and those with terminal illness to choose death in order to reduce the burden on their families. In such scenarios, instead of the choice to die being an embodiment of autonomy, it becomes a product of the coercion of vulnerable and marginalized individuals, reducing the value


of their lives and dignity. 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. At the bottom line, the state should respect a person’s choices when it is her own tragedy that is at stake.

V. CONCLUSION

A. THE ONE AND THE MANY

Early Greek philosophy was centered round the quest for an ultimate principle – a common substratum to all things and a unity underlying diversity – a problem

327 The same concerns are present in Nussbaum, supra note 194, at 373, as well as note 373 and accompanying text. See also RONALD DWORKIN, LIFE’S DOMINION 190 (1994) [hereinafter Dworkin, Dominion].

328 The issue of consent when there is an incompetent person involved entails a great deal of complexity related to the proof of the patient’s actual wish, the determination of what patient would have wanted and identification of what is in the person’s best interests. Some of these issues were dealt with in Cruzan v. Director, Missouri 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 her behalf of their daughter, absent a “clear and convincing” evidence of her desire. For a criticism of this decision, see Dworkin, Dominion, supra note 504, at 196-98. For a deeper discussion on consent, see generally DERYCK BEYLEVELD AND ROGER BROWNSWORD, CONSENT IN THE LAW (2007).


330 Advocating an attitude of restraint from the state and community, see Dworkin, Dominion, supra note 327, at 239.


known as “the one and the many.”\textsuperscript{333} If such a concept were to be applied to democratic societies, human dignity would be a leading candidate for the greatest principle that is in the essence of all things. It is true, however, that historical and cultural circumstances in distinct parts of the world decisively affect the meaning and scope of human dignity. Intuitively, an idea that varies with 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 \textit{fundamental value} that is at the foundation of human rights, as well as a \textit{legal principle} that (1) provides part of the core meaning of fundamental rights and (2) functions as an interpretive principle, particularly when there are gaps, ambiguities, and clashes among rights – or among rights and collective goals – as well as moral disagreements. To be true, the principle of human dignity, as elaborated here, attempts to supply a roadmap to structure legal reasoning in hard cases, but it does not, of course, solve or suppress moral disagreements, an unattainable task.

After establishing that human dignity should be regarded as a legal principle – and not as a freestanding fundamental right – I propose three elements as its minimum content and derive a set of rights and implications from each. For legal purposes, human dignity can be divided in three components: \textit{intrinsic value}, which identifies the special status of human beings in the world; \textit{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

\textsuperscript{333} \textit{Id.} at 76.
community value, conventionally defined as the legitimate state and social interference in the determination of the boundaries of personal autonomy. This communitarian dimension of human dignity must be under permanent and close scrutiny, due to the risks of paternalism and moralism affecting legitimate personal choices and rights. In structuring legal reasoning in more complex, divisive cases, it is useful to identify and discuss the relevant questions that arise in each of the three levels of analysis, and therefore provide more transparency and accountability to the justification and choices made by courts or other interpreters.

B. EPILOGUE: EQUALS, NOBLES AND GODS

As we have seen, 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.\textsuperscript{334} Or better yet, as in the lyrics of Les Miserables, “everyone will be a king”\textsuperscript{335}

And some time in the future, given that desire and ambition are unlimited, men will seek to become Gods.\textsuperscript{336}

\begin{itemize}
\item \textsuperscript{335} See Alain Boublil and Herbert Kretzmer, \textit{One Day More}:
\begin{verbatim}
    One day to a new beginning
    Raise the flag of freedom high!
    Every man will be a king
    Every man will be a king
    There’s a new world for the winning
    There’s a new world to be won
    Do you hear the people sing?
\end{verbatim}
\item \textsuperscript{336} This idea is in Jean-Paul Sartre, \textit{The Being and the Nothingness}, 735, 764 (Hazel E. Barnes, trans. 1956); and also in Jean-Paul Sartre, \textit{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, \textit{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”.
\end{itemize}