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The Right to Dignity

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By

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ABSTRACT

What is “the right to dignity”? Even though the role of human dignity within the framework of legal rules has attracted scholarly attention for some time, it is only relatively recently that courts in the U.S. have shown a similar interest in exploring the existence and extent of dignity rights. Unfortunately, these judicial legal pronouncements that have explicitly or implicitly evoked the idea of a right to dignity have done so in an ad hoc manner and have not explained what the contours of such dignity rights should be. This Article presents four possibilities of what U.S. courts should be intending when they invoke references to the dignity of the person. It notes that each of these possibilities is founded in a very different theoretical understanding of dignity rights. The Article then concludes by exhorting that courts coalesce around one of these possibilities (and offers a suggestion as to which of these it should be) so that a more secure legal foundation can be built for the development of dignity rights in the U.S.

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I. INTRODUCTION

Human dignity is a concept that has captured the attention of philosophers, scholars, and jurists alike. Since the ancient era, thinkers from a wide variety of non-legal disciplines have

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explored the notion of human dignity, its ramifications, and its effect on civilized society.\textsuperscript{3} Even though legal scholars in the U.S. have also participated in this exploration with the discourse increasing in output in recent times, the notion of the role of human dignity within law is still an underexplored topic.\textsuperscript{4} The judiciary in the U.S. has similarly undertaken from time to time analyses that have touched upon the concept of dignity rights; however, these legal pronouncements have been quite dissatisfying in that most of these allusions seem haphazard and lacking in theoretical grounding.\textsuperscript{5} Moreover, the contexts of these references to human dignity are extremely varied, ranging for example from constitutional theory, to criminal law, to free speech law, to intellectual property law, and to entertainment law, and thus suffer from an inherent absence of coherence. What has therefore emerged from the domestic legal framework is a dense but very confused picture of the role and meaning of human dignity within the ambit of legal rights.

Nevertheless, given the increasing frequency in which courts and legal commentators in the U.S. are invoking or criticizing a notion of the right to dignity, and the fact that dignity is seemingly becoming a more “vital and vibrant” precept,\textsuperscript{6} the time has arrived to explore what is meant by human dignity and, more significantly, whether and/or how this meaning can be imported into the domestic legal structure. Given this background, it is essential to bring some theoretical consistency to dignity rights and offer some perspective as to what the possible contours of these rights could be. This goal is normatively desirable because the “conceptual unity [of the law] is not only fulfilling in itself, however; it is also an instrument of legal development.”\textsuperscript{7} The task of creating some dependable parameters for the use of dignity rights has an added layer of importance because it has been often remarked that the use of dignity

\begin{itemize}
\item \textsuperscript{2} See e.g. David A. Hyman, Does Technology Spell Trouble with a Capital “T”?: Human Dignity and Public Policy, 27 HARV. J. L. & PUB. POL’Y 3, 3 (2003) (noting that “human dignity has attracted considerable attention as a policy standard in a variety of differing fields such as bioethics, constitutional law, torts, and the Internet).
\item \textsuperscript{3} But see Denise G. Réaume, Indignities: Making a Place for Dignity in Modern Legal Thought, 28 QUEENS L.J. 61, 62 (2002) (“[D]ignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers”); see also John D. Castiglione, Human Dignity Under the Fourth Amendment, 2008 WIS. L. REV. 655, 710 (indicating that the concept of human dignity has been “underanalyzed”).
\item \textsuperscript{4} See GEORGE W. HARRIS, DIGNITY AND VULNERABILITY 1 (1997).
\item \textsuperscript{5} See e.g. Jordan J. Paust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content, 27 HOW. L.J. 145, 148-49 (1984) (noting the scattered nature of the use of the concept of human dignity by the U.S. Supreme Court); Vicki Jackson, Constitutional Dialogue and Human Dignity: States and Transnational Discourse, 65 MONT. L. REV. 15, 17, (2004) (describing U.S. constitutional jurisprudence as “episodic and underdeveloped.”) This criticism is not unique to the U.S. Supreme Court. See R. James Fyne, Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada, 70 SASK. L. REV. 1, 8, 13 (2007) (characterizing the Canadian Supreme Court’s use of dignity within its constitutional framework as “unfocused and inconsistent,” and “a haphazard amalgamation.”)
\item \textsuperscript{6} See Paust, supra note 5, at 148.
\item \textsuperscript{7} Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962, 1004 (1964). Others have noted this need for a consensus when it comes to figuring out the import of dignity within a legal framework. See e.g. Ernst Benda, The Protection of Human Dignity (Article 1 of the Basic Law), 53 S.M.U. L. REV. 443, 454 (2000).
\end{itemize}
within a judicial opinion functions as “a hollow rhetorical device” and thus is worthy of little if any consequence. A response to such accusations thus seems appropriate.

Dignity is “admittedly [an] ethereal concept” which “can mean many things” and therefore suffers from an inherent vagueness at its core. In fact, “[s]ince human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting.” The basis of dignity can be said to lie in the autonomy of self and self-worth that is reflected in every human being’s right to individual self-determination. It is thus universal and un infringeable by the state or private parties. Moreover, the “dignity of the human person as a basic ideal is so generally recognized as to require no independent support.” This suggests that even though there is agreement as to what dignity might mean at its core, there does not really appear to be a consensus as to what the effect of this meaning might be, especially within the legal sphere. Without a certain specification of how the fostering of human dignity is to play out within a legal framework, we would be left with an empty vessel of not much use to anyone.

As it pertains to the contemporary state, the centrality of dignity in a democratic society cannot be underestimated. In fact, “[h]uman dignity is … bound up with forms of governance,” and a central feature of a significant amount of modern constitutional states. Indeed, “democracy serve[s] as a core value of state formation because it is accorded with fundamental notions of fair governance and gave expression to the values of human dignity and equality.” One of the key facets of 21st century democracies is the primary importance they

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8 See Fyfe, supra note 5, at 11.
9 See Castiglione, supra note 3, at 662, 679 (indicating that the concept of human dignity is “to some extent, inherently ethereal” and applying it Fourth Amendment law); see also Hyman, supra note 2 (characterizing human dignity as “a slippery concept.”)
11 The European Court of Human Rights, which nonetheless uses dignity as a yardstick within its jurisprudence, noted that dignity is “a particularly vague concept, and one subject to random interpretation.” Siliadin v. France, no. 73316/01, § 101, ECHR (26th July 2005).
12 Edward Eberle, Human Dignity, Privacy, and Personality in German and American Constitutional Law, 1997 UTAH L. REV. 963, 976.
13 In other words, “[h]uman dignity means the specific value status of human beings derived from their humanity as such.” Matthias Mahlmann, The Basic Law at 60 – Human Dignity and the Culture of Republicanism, 11 GERMAN L.J. 9, 30 (2010); see also AVISHAI MARGALIT, THE DECENT SOCIETY 67-68 (Naomi Goldblum trans., 1996) (stating that dignity inheres in personhood); GERALD L. NEUMAN, Human Dignity in United States Constitutional Law, in ZUR AUTONOMIE DES INDIVIDUUMS, 249, 250-51 (Dieter Simon & Manfred Weiss eds., 2000) (same).
14 See e.g. Figueroa Ferrer v. Commonwealth, 107 P.R. Dec. 250, 301 (1978) (opining that the notion of dignity is “based on principles which aspire to universality.”)
18 Larry Catá Backer, God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century, 27 MISS. C. L. REV. 57 (2008); see also Address of Benedict XVI to the U.N. General Assembly (Apr. 18, 2008), available at
give to the protection of human rights. From this perspective, dignity is the “expression of a basic value accepted in a broad sense by all peoples,” and thus “constitutes the first cornerstone in the edifice of … human rights.” Therefore, there is a certain fundamental value to the notion of human dignity that, to some, is considered a “pivotal right” deeply rooted in any notion of justice, fairness, and a society based on basic rights.

Some nations and international organizations have elevated human dignity to the foundational right underpinning all other rights. Other nations have paired dignity with other fundamental rights such as liberty and equality in their jurisprudential treatment. But what about the U.S.? In the U.S. there is some disagreement as to the importance of human dignity within the domestic legal framework. From the perspective of dignity as a constitutional value, some support its inclusion within the panoply of principles espoused by the foundational document, while others do not see it emerging as a right to be protected. Indeed, some have concluded that “protecting people’s dignity is quite alien to the American tradition,” and that

http://www.vatica.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe-salvi_20080418_un-visit_en.html (referring to the “respect for the dignity of the person” as one of the founding principles of the UN).

See Schachter, supra note 15.


22 See Eberle, supra note 12, at 968-72 (noting that alone among rights enumerated in the German Constitution, dignity is not subject to change through constitutional amendment); see also gen. D. KREITZMER & E. KLEIN, THE CONCEPT FO HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (2002) (underlining the centrality of human dignity within the contemporary international human rights conversation).


its use is akin to that of the “Trojan Horse:” a benign exterior masking a horrific interior.\(^{27}\) Therefore, these critics have argued that because “[i]ntangibles such as the promotion of human dignity … are too nebulous for progress toward achieving them to be measured,” they are best left alone.\(^{28}\)

Despite the exhortations by skeptics not to resort to human dignity within the framework of American legal rules, such advice is going unheeded. Jurists at all levels, state, federal, trial, and appellate are referencing the right to dignity in resolving disputes and announcing legal rules. And these references not always involve constitutional values; sometimes the issue of human dignity arises in the context of private disputes involving common law or statutory rules. Therefore it is important to stress that the concept of dignity in the U.S. should not be bound to the constitutional text. Because dignity rights eschew from an easy definitional formula, this overly obsessive and yet narrow focus on the U.S. Constitution by both advocates and critics of the role of dignity as the sole possible architect for dignity rights is inapoposite. Any useful proposal for the use of dignity rights within the ambit of domestic law must certainly encompass all law, and not just that which stems from the U.S. Constitution.

Nevertheless, prudence in the use of dignity should be counseled given its extremely broad possible connotations that, if left unharnessed, would inevitably lead to confusion, unpredictability, and weak reasoning. As noted by Christopher McCrudden in his seminal article on the role of dignity in human rights law, “there are several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time.”\(^{29}\) It follows that the concept of dignity within a legal framework “acquits itself of no immediate[\_] definitional parameters,” which might provide to jurists the incentive “to act instrumentally” when bringing dignity into the framework of a legal decision.\(^{30}\) It is this perceived incoherence as well as the fear that judges will be turned loose to do as they will under the dignity umbrella that animates the critics argument and it is for this reason that this Article presents possible theories that would provide a unified network under which the concept of the right to dignity could flourish in the U.S.

In that light, Part II of this Article takes a brief look at what has been written about the concept of human dignity and at the references to the right to dignity that have occurred both in the U.S. and abroad. It also examines how this concept is used within the ambit of international law. This part demonstrates that the notion of human dignity indeed forms the basis of several legal doctrines both domestically and around the world. However, the treatment of those rights traceable to human dignity is very uneven and the different contexts in which it occurs leads to the conclusion that (with very few notable exceptions) no unified coherent jurisprudence has been developed around this core concept. Part III then explores the possibilities of what the usage of dignity rights might signify within the confines of a contemporary U.S. legal framework. It posits that at least four different options exist for what the right to dignity could

\(^{27}\) See Peter Schneider, *Die Menschenrechte in staalicher Ordnung*, in PHILOSOPHIE DER MENSCHENRECHTE UND DER GRUNDRECHTE DES STAATSBÜRBERGS, 77, 83 (1964).


\(^{30}\) See Castiglione, *supra* note 3, at 697.
mean in the U.S. based on how its contours have been so far framed by relevant courts throughout the country. Those four theories are referred to as follows: the positive rights approach, where dignity becomes an actionable substantive legal right; the negative rights approach, where dignity functions as a background norm; the proxy approach, where dignity is used as a heuristic for other enumerated rights; and the expressive approach, where dignity is referred to dialogically. The Article concludes by noting that coalescence behind any one of these four possibilities should be encouraged lest the use of dignity rights succumb to the accusation that at best “it can mean many things,” or at worst, “it means nothing.”

II. USES OF DIGNITY

It has been noted that “[d]ignity does not exist in the world, nor does it describe the world.” Nevertheless, human dignity is believed to be “the premier value underlying the last two centuries of moral and political thought.” Indeed, dignity has “carried an enormous amount of content, but different content for different people,” so that it has been subjected to the vagaries of time and opinion. As a starting point, dignity has been considered to be an elemental part of human personality that “defines man’s essence as a unique and self-determining being.” This means that at a minimum, dignity means the “[r]espect for the intrinsic worth of every person,” which entails that “individuals are not to be perceived or treated merely as … objects of the will of others.” Notwithstanding these representations of the meaning of human dignity, there is no accord as what the import of these definitions might be,

31 Such accusation might take the form of characterizing dignity as “an empty … vessel into which any variety of normative ingredients can be placed.” Fyfe, supra note 5, at 9.
32 Fyfe, supra note 5, at 16.
34 See McCrudden, supra note 29, at 678, 698 (also noting that human dignity is “culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions.”)
35 See Bloustein, supra note 7, at 971. This notion has been expressed by other scholars in slightly different ways. See e.g. Yehoshua Arieli, On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of Dignity of Man and His Rights, in KRETZMER, supra note 22, at 12 (indicating that dignity is a central claim of modern man’s autonomy and involved man’s “capacity to be lord of his fate and the shaper of his future”; Charles Taylor, The Politics of Recognition, in MULTICULTURALISM AND THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1992) (expressing the notion that dignity inures in every human being as a result of self-awareness); AVISHAL MARGALIT, THE DECENT SOCIETY 51-68 (Naomi Goldblum trans., 1996) (claiming dignity as the ability of humans to make decisions about their own lives); Alan Gewirth, Human Dignity as the Basis of Rights, in THE CONSTITUTION OF RIGHTS, supra note 33 (grounding in dignity that worth, value, esteem, and deference owed to all humans).
36 Schachter, supra note 15, at 849; see also C. Edwin Baker, The scope of the First Amendment Freedom of Speech, 25 UCLA L. REV. 964, 992 (1978) (noting that dignity also entails that “people’s … definition of themselves, must be respected,” so that people are not treated as instrumentalities).
i.e., what the content of dignity might involve. In fact, because “there has been no systematic re-
elaboration on the concept of human dignity which has been able to command … at least widespread acceptance,” this concept “has been used to express underlying philosophical beliefs of quite different kinds for the purpose of reinforcing them with its powerful appeal.” These different philosophies constitute contrasting material on which it is very difficult to base a coherent legal theory that pertains to referencing and incorporating human dignity into legal doctrines and rules. Thus, agreement on this notion is a desirable goal so that such references can obtain added substance and precision.

A. The Idea of Dignity

The notion that the concept of human dignity has a role to play in the formulation and interpretation of legal rules is receiving renewed attention. Several works have focused on the primacy of human dignity within legal discourse with books and compilations of essays being published on this topic. Thus, for example, Myers McDougal focused on human dignity as a basis for ordering human rights around the world under the aegis of international law. Michael Meyer and W.A. Parent edited a compilation of essays from scholars such as Martha Minow, Owen Fiss, and Louis Henkin that devoted its attention to the place of dignity within the constitutional structuring of fundamental rights. And David Luban has constructed a theoretical approach to legal ethics that focuses on human dignity. Conferences and symposia have also been organized to discuss the merits and demerits of “Law and Human Dignity” such as that presented by the Federalist Society in 2003 and reported in the Harvard Journal of Law and Public Policy in that year.

But the notion that there is such a thing as human dignity that the law must account for is not a new one having it origins in antiquity. Cicero endowed human beings with dignitas being a notion that all mankind is worthy of respect for the sole fact of its existence. The reason that the mere fact of being human entitled all people with this attribute was, according to Cicero, because human beings were possessed with “superior minds,” i.e., they had the capacity to think and be self-aware. But Cicero’s view of this pervasive notion of dignitas in Roman society was a minority one; the more traditional view was that dignitas was not an inherent quality of humans, but rather it was an indication of high social or political status and thus was an acquired trait. Hence, Roman dignity was “a manifestation of personal autonomy” which symbolized

38 See MYERS S. MCDougAL, HAROLD D. LASSELL, LUNG-CHU GREEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).
39 See THE CONSTITUTION OF RIGHTS, supra note 33.
40 See DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007).
42 See CICERO, DE OFFICIIS, I, at 30.
43 See id.
44 See Englard, supra note 23, at 1904 (“In Rome, the original meaning of dignity (dignitas) referred to an acquired social and political status”) (italics in original).
“majesty, greatness … decorum, and moral qualities.”\textsuperscript{45} It was a characteristic typically ascribed to those in high office.\textsuperscript{46}

Apart from the theories of Cicero, dignity did not move from a feature of the privileged to an aspect inborn to everyone until the Renaissance. It was then that notion of human dignity was characterized as being derived from a “transcendent source,” which inevitably was to be found in God.\textsuperscript{47} Philosophers such as Pico della Mirandola de-coupled human dignity from the hierarchy and deemed that it was mankind’s free will, a gift from God to all without regard to rank, that was the staple of the inherent dignity of individual humans.\textsuperscript{48} Thomas Aquinas went further by noting that the intrinsic dignity of humans is related to the fact that humans, being made in the image of God, reflect the values of the divine.\textsuperscript{49} This impetus from theological thought did not confine itself to religion: Hugo Grotius, in contemplating the appropriate disposal of human remains slain in battle, counseled that these should be buried and not left to the elements for beasts to prey upon because the dignity of man demanded such treatment.\textsuperscript{50}

Even to this day, “[w]orld religions are important sources for the conception of human dignity.”\textsuperscript{51} The 2\textsuperscript{nd} Vatican Council made human dignity, defined as being “endowed with reason and free will,” the staple of the inherent need for human beings to seek the truth and abide by it; most importantly, this conforming to the truth (which Vatican II understood as being primarily religious) could not be achieved “from external coercion” but rather from a place of free religious choice.\textsuperscript{52} In other words, Vatican II began translating a possibly esoteric religious postulate into a firm legal exhortation; that individuals be free from government interference when it came to freedom of religion on account of their inherent human dignity. Pope Benedict XVI has reiterated how this concept is to be translated into legal rules. He expressed his skepticism that the modern state can fulfill “the aspirations of persons, communities and entire peoples,” and therefore noted that it is not well equipped to create “a social order respectful of the dignity and rights of the person.”\textsuperscript{53} He then stated that the dignity of man is were human rights are located but that these owe their source not to some positivistic notion of the state and law, but to a higher dimension “based on the natural law inscribed on human hearts” to which the

\textsuperscript{45} Id.
\textsuperscript{46} See Ernest Cancik, ‘Dignity of Man’ and ‘Personal’ in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107, in KRETZMER, supra note 22, at 19. Interestingly, this elitist definition of dignity was that used by the writers of The Federalist Papers, see infra Part II, B, i.
\textsuperscript{47} See Mahlmann, supra note 13, at 18.
\textsuperscript{49} See THOMAS G. WEINANDY, AQUINAS ON DOCTRINE 233 (2004) (“Aquinas maintains the God-given dignity of individual persons.”); see also Catechism of the Catholic Church 424 (2\textsuperscript{nd} ed. 1997) (“The dignity of the human person is rooted in his creation in the image and likeness of God …”)
\textsuperscript{50} See HUGO GROTIIUS, DE JURE BELLII (trans. A.C. Campbell, London, 1814), Bk. II, ch. 19.
\textsuperscript{51} Mahlmann, supra note 13, at 14 (stating that this dignity was to be found within the very nature of man) (1625).
\textsuperscript{52} See VATICAN COUNCIL, supra note 48.
\textsuperscript{53} See Benedict XVI, supra note 18, at ¶10.
law must yield. This notion is similarly reflected in the Catholic Catechism that teaches that in God was man created “and this is the fundamental reason for his dignity.” That is not to say that the concept of human dignity must, per force, be tied to a religious dimension, but merely that the notion that everyone (and not only the upper echelons of society) is granted dignity seems to have its origins in theological precepts.

Immanuel Kant, regarded as “the father of the modern concept of dignity,” secularized this concept and presented it front and center from a normative legal ideal. He posited that individuals ought never to be treated instrumentally by the state because “man regarded as a person … possesses … a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.” In other words, humanity is an end in itself and bears no price. This dignity is grounded in a concept of autonomy that holds at its core a valued moral center that is equal for everyone (men and women). Thus, that autonomy and the consequent dignity that it entails are primarily derived from sentience, i.e., the ability of humans to form a reasoned thought. What this means is that human dignity does not have any equivalence and thus cannot be traded, substituted, or replaced. The value to law of Kantian thought is to use as a legal baseline the notion that individuals should always be protected from any instrumentalization by the state.

While Kant was certainly fundamental to the shaping of European legal precepts and modern international law, it is arguable that his influence on the U.S. was (and is) not quite so large. Nevertheless, a notion of the dignity of humans and how this should impact the role of individuals and the state did occupy the thoughts of prominent thinkers at the dawn of the new republic. Thomas Paine eloquently invoked the “natural dignity of man” as the reason to have individual rights that transcended authoritative rule. This marked a distinct break from the British rule where dignity had more of an ancient Roman connotation and was reserved for the nobility or aristocracy. Thomas Jefferson and Alexander Hamilton shared this notion of dignity as an attribute belonging to all men.

54 See id., at ¶6.
57 See Bognetti, supra note 37, at 75, 79.
58 Gewirth, supra note 35, at 17.
59 IMMANUEL KANT, GRUNDELNLEGUNG ZUR METAPHYSICK DER SITTEN 434 (Akadmie Ausgabe Bd. IV, 1911) (1785).
60 See id., at 435; see also Christina E. Wells, Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence, 32 HARV. C.R.-C.L. L. REV. 159, 165 n.30 (1997) (describing Kantian notions of dignity and autonomy).
62 Of course their purported sharing of this notion did not quite translate in a government structure that followed through on this idea. Others, close to the time, have noted this incongruity. See e.g. Simón
The idea of dignity does appear in *The Federalist Papers*, and seems initially to have a central position in the minds of its authors seeing that, in the very first paper authored, not coincidentally, by Hamilton, they urge the adoption of the new Constitution because this would be the best course to ensure the “liberty,” “dignity,” and “happiness” of the citizenry. Following this Kantian notion, the concept of dignity as used in *The Federalist Papers* then morphs into the ancient Roman connotation. Although referred to slightly more than a dozen times, the authors of *The Federalist Papers* following the reference in the first paper, then use the term to denote the status of an office holder, or his inherent authority, implying that dignity is not an inherent attribute, but one than is acquired. Thus, for example, the authors argued that it was important to have a single chief executive because if more than one “was clothed with equal dignity and authority,” it would lead to institutional breakdown, and it was vital to have the federal judiciary serve life terms so that it would not fall “into hand less able and less qualified to conduct [the role of judging] with utility and dignity.” Moreover, *The Federalist Papers* construe dignity as a facet of nationhood. The authors note that the ineffectiveness of the old Articles of Confederation was in part due to the state legislatures’ failure to respect the dignity of the Confederation. Furthermore, they also note that it is “the dignity of their country in the eyes of other nations,” that U.S. representatives will be tasked to serve. Thus, somewhere along the way, dignity as an inherent quality of individuals was lost to a more acquired notion as a result of holding an official position. Regardless, it is noteworthy that the turbulent times immediately preceding and following the American Revolution precipitated a process where human dignity played a visible role.

The founding of the U.S. was not the only event that caused many of its participants to think about the role of human dignity in the shaping of a future (better) society—the aftermath of WWII also provoked such considerations. Hannah Arendt claimed that the horrors witnessed in the war called for giving human dignity “a new guarantee” where there would be “a new political principle” formed in which “a new law on earth” would take into account “the whole of humanity.” Jacques Maritain, the modern Aquinas, sublimated Arendt’s exhortation and thus

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Bolivar, *Message to the Congress of Bolivia* (Lima, 25th May 1826) (calling slavery a “shameless violation of human dignity.”)

63 See *The Federalist* No. 1, at 4 (Hamilton) (Clinton Rossiter, ed., 1999). Two of these three values survive into the preamble of the Constitution, “dignity” being the one left out.

64 Of course, contrary to ancient Rome, the dignity of the office can be generally achieved through achievement rather than through birthright.

65 See *The Federalist* No. 70, at 394 (Hamilton), and No. 78, at 439-40 (Clinton Rossiter, ed., 1999).


67 See *The Federalist* No. 58, at 327 (Madison) (Clinton Rossiter, ed., 1999). This notion of institutional dignity in the form of state sovereignty has formed the cornerstone of a theory of sovereignty based on dignity. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921, 1927, 1962 (2003) (positing that dignity is not solely the province of individuals and that it has a role, albeit narrow, in state-federal relations, and noting that the role-dignity claims of institutions (similar to those alluded to in *The Federalist Papers*), have become more limited because of the rise of the notion of individual dignity).

68 HANNAH ARENDT, *The Origins of Totalitarianism* ix., (2nd ed. 1968). Others have taken up this refrain. See e.g. Michael S. Pritchard, *Human Dignity and Justice*, 82 ETHICS 299, 300-01 (1972) (“[T]hose who try to formulate substantive principles of justice should reserve a prominent place for
resorted heavily to the concept of human dignity in his philosophy and political thinking, and placed the notion front and center in the Universal Declaration of Human Rights (“UDHR”) of which he was a primary drafter. Thus, the protection of the human dignity of all individuals became a focal point to elevate above all other considerations as a way of remedying the colossal failures of all previous systems that had obviously been derelict in valuing this basic characteristic of human beings.

Social, political, and legal developments since the immediate aftermath of WWII have caused scholars and academics to delve deeper into the analysis of the appropriate role to grant human dignity within a legal framework. Oscar Schachter explained that respect for dignity had to be given substance by reference to its “psychological significance.” The effect of this definition according to Schachter is rather broad where “high priority” should be accorded to individual choices and beliefs and any infringement of these in a way that demeans, degrades, or humiliates both the individual and/or a group or community to which that individual is affiliated should be prohibited. Schachter’s contours for the legal role of dignity rights are clearly Kantian seeing that he notes that dignity “includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility.” Notwithstanding his urgings, Schachter acknowledged that “the far reaching implications” of his theory had “not yet been given substantial specific content,” and thus offered a list of twelve modes of conduct that he considered to be both denigrating to the dignity of individuals and “incompatible with the basic ideas of the inherent dignity and worth of human persons.” The import of this list is that all violations, whether by an official act or statement by the government, or by private actors, should be included within the ambit of a legal framework that protects dignity rights. Schachter’s key point in forcefully arguing in favor of an explicit protection by the law of the right to dignity is that “the idea of dignity reflects sociohistorical conceptions of basic rights and freedoms, not that it generated them.” This is an important summation because even though Schachter gives credit to the Aquinian notion that rights, such as dignity, “are not derived from the state or any other external authority,” he grounds the notion of the right to dignity in historical fact, thus attempting to marry dignity rights with a more positive notion of the source of rights.

This reframing of dignity rights as something more than mere natural rights is a common refrain among those that advocate a role for human dignity in law. Thus, advocates for the promotion of a general right to dignity have to navigate between the attractive, but frowned upon, notion that this right is derived from a “natural” source and the less attractive, but more accepted, idea that the right to dignity is rooted in positive law. Therefore, contemporary

human dignity. If this is not done, the distinctively moral aspects of justice will be absent; and the claims of justice will be at best legalistic and at worst arbitrary.”

70 See Schachter, supra note 15, at 850.
71 See id., at 849-50 (“The use of coercion, physical or psychological, to change personal beliefs is as striking an affront to the dignity of the person as physical abuse or mental torture.”)
72 Id., at 851.
73 Id., at 852.
74 See id. (including conduct from demeining the status, beliefs, or origins of people, to denying them educational opportunities as negatively impacting the dignity of individuals).
75 Id., at 853.
scholars have noted that human dignity encompasses both the empowerment of the individual’s autonomy as well as the constraint of the state to impinge on that autonomy. In that vein, they argue that human dignity is not an abstract concept, but a right with a substantive body of law already devoted to it. They similarly attach the right to dignity to other rights that might appear to have a more substantive root such as the right to work, which, per force, encompasses the dignity of work.

Contemporary commentators have been active in promoting dignity rights in the international human rights discourse even though, even here, the conversation seems to suffer from the lack of agreement on a common point of reference. For example, Christopher McCrudden argues “there is no common substantive conception of dignity, although there appears to be an acceptance of the concept of dignity.” He goes on to state that beyond a certain minimal common understanding of what constitutes the right to dignity, opinions on the matter diverge to the point that they do not provide a universally principled basis for judicial decision-making. He notes that dignity has become something that is context specific, varying from issue to issue, and from jurisdiction to jurisdiction, resulting in widely divergent opinions. Nevertheless, McCrudden does not advocate abrogating dignity from the human rights discourse, but rather, he sees its value as a concept that can channel particular methods of human rights adjudication.

It is not clear what concept of dignity has percolated into the U.S. legal collective psyche both as recounted by commentators as well as in actual legislative hearings and judicial opinions. In the U.S. dignity seems to be more about self-confidence where “to treat everybody with dignity means to help them and to respect them but not to undermine their self-confidence.” Nevertheless, several commentators have offered thoughts as to the interaction of the idea of human dignity with various aspects of the U.S. Constitution and other American law. Some see dignity as the fundamental value of the U.S. Constitution and thus imply that its meaning should be infused within the interpretation of all relevant provisions. For example, Ronald Dworkin states that it is the values of equality and dignity that animate the moral foundation of the U.S.

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76 See D. Byleveld & R. Brownsword, Human Dignity in Bioethics and Biolaw 1 (2001). Some have challenged the general orthodoxy that dignity is one way ratchet that trends solely towards autonomy. See Eichner, supra note 25, at 1617 (“A more appropriate theory [of defining dignity] would conceptualize citizens as existing somewhere on a spectrum between complete autonomy and complete dependence, with their exact position changing over the course of their lives, and depending on their individual situation.”)
79 McCrudden, supra note 29, at 712.
80 See gen. McCrudden, supra note 29.
82 See Murphy, supra note 24, at 758; see also gen. Goodman, supra note 24.
Constitution. Others, however, counsel either against its use in its entirety, or for a more circumspect attitude because of the consequences that the successful assertion of dignity rights might have upon other rights held high in the U.S.

Thus, commentators have warned that dignity rights might operate to curtail free speech rights. In this vein, the contours of the right to dignity are deemed not to add anything to the free speech discourse, indeed, “[s]peaking about dignity … appears not to take us very far in thinking about the protection of freedom of speech.” Within the context of free speech, it is the dignity of the speaker, regardless of the objectionable content of her speech that gets suppressed if proscriptions are made on such speech on the grounds of protecting the dignity of the target of that speech. Moreover, the dignity of the listener is also diminished by a condescending notion that the state knows better than the individual what she should and should not be able to hear. Thus, the role of the right to dignity within the context of free speech is seen to be dangerous.

On the other end of the spectrum, commentators have also urged for a role for the protection of human dignity as a way of shoring up the protections already enshrined within the U.S. Constitution, or else as a way of better framing certain common law or statutory rights. Thus, in the area of Fourth Amendment jurisprudence, advocates counsel that courts should examine whether the accused governmental action is offensive to the targeted individual’s inherent dignity. Under this reading, the right to dignity guards against degradation or humiliation by the state from a psychological, rather than physical, standpoint. And both the procedural and substantive due process clauses of the Fourteenth Amendment have similarly been identified as capturing a dignity interest. In the non-constitutional realm, some have noted the relevance of dignity within the context of torts such as the misappropriation of the right

83 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-78 (1977) (“[w]e retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold opinion from us on the ground that we are not fit to hear and consider it
84 See Carmi, supra note 21, at 958, 969 (arguing that “human dignity cannot stand as a primary prism through which freedom of expression is viewed;”) see also gen. Frederick Schauer, Speaking of Dignity, in THE CONSTITUTION OF RIGHTS, supra note 33.
85 Frederick Schauer, Speaking of Dignity, in THE CONSTITUTION OF RIGHTS, supra note 33, 179, 190.
86 See Kent Greenawalt, Free Speech Justifications, 89 COLUM. L. REV. 119, 153 (1989) (expressing the idea that dignity, in the context of free speech, works in favor of the speaker).
87 See Ronald Dworkin, The Coming Battles over Free Speech, N.Y. REV. BOOKS, June 11, 1992, at 57; see also Schauer, supra note 84, at 179 (noting that the “conflation of dignity and speech … is mistaken [because] although speaking is sometimes a manifestation of the dignity of the speaker, speech is also often the instrument through which the dignity of others is deprived.”)
88 See gen. Castiglione, supra note 3 (explaining that the current benchmark of Fourth Amendment jurisprudence, being to guard against privacy violations, is insufficient protect citizens from violations of their dignity because privacy and dignity encompass different interests, the latter of which goes much deeper than the former); see also Lawrence E. Rothstein, Privacy or Dignity?: Electronic Monitoring in the Workplace, 19 N.Y.L. SCH. J. INT’L & COMP. L. 379, 383 (2000) (“The concept of human dignity is a social one that promotes a humane and civilized life. The protection of human dignity allows a broader scope [than privacy] against treating people in intrusive ways.”
89 See Wright, supra note 10, at 535.
to publicity and intentional infliction of emotional distress. While, for others, the idea of
dignity, being seen as the fundamental commitment of the modern democratic state, is seen as
the source for deeming that the state has affirmative obligations towards providing certain
services to its citizens, such as to support the family-care needs of individuals.

Critics attack the notion that there might be a transcendent truth about the meaning of
dignity by positing that “[t]he subjectivity of human dignity as a policy standard is compounded
by the variability between first and third-party assessments of dignity,” and therefore it “is not an
effective policy tool.” In other words, dignity is accused as being merely a pretty concept that
varies according to the eye of the beholder. A further accusation under this framework is that the
third-party assessment is privileged over the first-party one as external values are imposed onto
the individual, even though that individual might not be in accord with the state’s particular
import of dignity. However, these critics make overblown claims that the adoption of dignity
as a policy standard to be protected and enforced through law would “certainly” lead to the
following, among others, as being “threats” to human dignity: microwave popcorn and Twinkies
on the ground that they lead to obesity, as well as pagers and cell phones on the ground that they
isolate human beings and force them into longing working hours. The problem with these
assertions is that no notion of dignity is needed to restrict or prohibit the consumption and use of
the above listed food products and technological gadgets. In other words, whether society
decides to adopt food standards to guard against an over-obese population is dignity-neutral and
thus offers nothing on either side of the argument.

When it boils down to its essence, modern scholarship is deeply divided as to the
propriety and ability to integrate the protection of human dignity within a functioning legal
system. On the one side there are those who believe the task to be hopeless because
“[a]ssessments of human dignity are quite subjective, with considerable variation temporally,
chronologically, geographically, and culturally.” On the other side are those who posit that
“[t]he idea of human being as ends-in-themselves forms the foundation for the unfolding of
human dignity as a workable legal concept.” The reality is that the truth probably lies closer to
the latter statement seeing that other nations have been perfectly able to subsume the protection
of dignity rights within their systems and have not seen the parade of horrors identified in the
paragraph above. What should be of great interest to civil libertarians who tend to oppose the
use of the right to dignity is that “the inherent worth of the human person may be all that one has
left, the only thing untouchable by power.” It thus might act as the final bulwark against an
ever-intruding state.

90 See gen Roberta Rosenthal Kwall, A Perspective on Human Dignity, The First Amendment, and the
Right of Publicity, 50 Bos. Col. L. REV. 1345 (2009) (misappropriation of the right of publicity);
Reaume, supra note 3 (intentional infliction of emotional distress).
91 See gen. Eichner, supra note 24.
92 Hyman, supra note 2, at 8, 18.
93 See Hyman, supra note 2, at 10. Hyman also offers the theories of behavioral economics as a reason to
be skeptical about the importation of dignity standards into legal doctrines. See id., at 10-11.
94 See Hyman, supra note 2, at 12.
95 Hyman, supra note 2, at 4.
96 Mahlmann, supra note 13, at 30.
97 Carozza, supra note 77, at 938.
B. Legal Pronouncements

Scholars and commentators are not alone in pondering the role of human dignity within the legal framework. Jurists around the world have similarly partaken in this exploration, either under specific constitutional mandate, or else when this concept might be implicated by the specific problem presented. Christopher McCrudden has remarked that that a survey of decisions that invoke the concept of a right to dignity reveals that “human dignity … is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions.”\footnote{McCrudden, \textit{supra} note 29, at 698. McCrudden makes this evaluation in an attempt to answer the question of whether dignity can be a basis for human rights, a synonym for the same, or a right in itself. \textit{See id.}, at 656.} While this summation can seemingly be applied to other concepts such as liberty, equality, or due process, it seems to negate the notion that there are cognate contours to these rights that are recognized as ideals, even if the courts treat them clumsily or differently. What is more important to gleam from a survey of courts that invoke the right to dignity is whether there are certain themes being developed, from which a coherent theory can be constructed.

Dignity is not mentioned in the U.S. Constitution, nevertheless it is a concept found in some U.S. Supreme Court opinions. Gerald Neuman has noted that, at least as it pertains to the U.S. Constitution, the U.S. Supreme Court has developed (albeit scantily) certain narratives based on human dignity as it pertains to both Eighth Amendment and Fifth Amendment jurisprudence.\footnote{See gen. Neuman, \textit{supra} note 13.} Other national constitutions, such as that of Germany, however do have explicit clauses dealing with the right to dignity. Major international legal instruments also give importance to the right to dignity enumerating it as one of those foundational blocks of a global regime based on human rights. Nevertheless, this is only the tip of the iceberg seeing that, at least in the last 60 years, the right to dignity has entered the legal discourse in a wide variety of other ways in many different jurisdictions.

i. U.S. Law

The U.S. Supreme Court has referenced human dignity when tasked with interpreting certain provisions of the Constitution.\footnote{See \textit{e.g.} Paust, \textit{supra} note 5, at 158 (stating that between 1925 and 1982 the U.S. Supreme Court used the term human dignity or its equivalent in 187 opinions); Goodman, \textit{supra} note 24, at 756 (declaring that from 1980 to 2000, the U.S. Supreme Court used the same terms in 91 opinions).} These references have been steady, although not consistent, so that there is a partially developed body of constitutional law in the U.S. that deals with some semblance of the right to dignity. One commentator has identified eight broad categories of constitutional claims where the U.S. Supreme Court has invoked dignity in more than just a random fashion.\footnote{These eight categories are: Fourteenth Amendment substantive due process claims, Fourteenth Amendment equal protection claims, Fifth Amendment self-incrimination claims, Fourth Amendment search and seizure claims, Eighth Amendment cruel and unusual punishment claims, Fourteenth} As demonstrated below, it is the Kantian vision of...
dignity that seemingly animates those justices that find in the concept of human dignity a value that relates to certain constitutional clauses. That is, it is a person’s inherent autonomy, integrity, and right to be respected by the government that motivates references to dignity by the U.S. Supreme Court.

What is eye opening regarding the concept of human dignity as having some sort of constitutional value is the fact that one of the first times that the term appears in a U.S. Supreme Court opinion is in Justice Frank Murphy’s dissent in Korematsu v. U.S.\(^\text{102}\) Korematsu of course is an infamous case where the Court rejected a challenge by a Japanese-American who claimed that his forcible relocation and detention during WWII on the sole grounds of his ancestry was unconstitutional.\(^\text{103}\) Justice Murphy rejected the contention that the Court had to defer to what the military thought was necessary because “[t]o give constitutional sanction [to the action of the military] is to adopt one of the cruelest of rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups.”\(^\text{104}\) Justice Murphy returned to this theme in Yamashita v. Styer,\(^\text{105}\) a case where the Court denied certiorari to a Japanese general who was challenging his detention by American authorities. In dissenting from the denial of certiorari Justice Murphy again opined that the Court was sanctioning activity that only people who do not share an American belief in the values of “due process and the dignity of the individual” would engage in and that if the U.S. was “ever to develop an orderly international community based upon a recognition of human dignity,” it would be best to hear the case at hand.\(^\text{106}\)

From these two examples it can be seen that Justice Murphy equates the destruction of dignity as the basest of human activities by making reference to the fact that this would be an action deign of the U.S.’s enemies during WWII, a fact with which Justice Murphy must have been well acquainted by the time Korematsu and Yamashita were decided. Interestingly, Justice Murphy makes a secondary point: that the actions of the U.S. would have international repercussions that could cause the U.S.’s global status to be questioned if not diminished. Thus Justice Murphy, although applying the concept of dignity in its purest Kantian meaning, also resorts to using it instrumentally as something that is reputation enhancing for the U.S. In doing so, Justice Murphy seemingly makes the claim that the U.S. Constitution does protect against actions that offend human dignity.

Ever since Justice Murphy’s exposition on the right to dignity under the U.S. Constitution, other cases have provided an opportunity to expand on this reading of certain constitutional provisions. Probably the most important of these is Trop v. Dulles where the Supreme Court declared that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”\(^\text{107}\) Trop, of course, is more famous as the case that announced the

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\(^{102}\) 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

\(^{103}\) See Korematsu, 323 U.S. at 319.

\(^{104}\) Id., at 240.

\(^{105}\) 327 U.S. 1 (1946).

\(^{106}\) See Yamashita, 327 U.S. at 29, 41 (Murphy J., dissenting from the denial of a petition for certiorari).

\(^{107}\) 356 U.S. 86, 100 (1958).
modern Eighth Amendment standard as mandating that a particular punishment must conform with “the evolving standard of decency that mark the progress of a maturing society.”

Fascinatingly, while courts interpreting the Eighth Amendment have readily quoted the “evolving standard of decency” refrain, they are much more reticent to reiterate what Chief Justice Warren declared as “the basic concept underlying” the amendment. Nevertheless, this concept does appear explicitly every now and then; the most noteworthy example occurred in Hope v. Pelzer where the Court ruled that tying a prisoner to a hitching post in the sun for more than seven hours, feeding him little water, and preventing him from going to the toilet during that time was a violation of the Eighth Amendment. The Court noted that the punishment was “antithetical to human dignity” because it was “degrading and dangerous.”

It focused on the demeaning aspect of the punishment, which included taunting and wanton humiliation inflicted on the prisoner. Thus, the use of “dignity” in Hope reflects the same notion as that offered in the Korematsu dissent: a background principle that mandates a minimum standard of conduct from government officials regardless of the constitutional principle being invoked—that, in the most neo-Kantian sense, people not be treated as objects. Unfortunately, even though this reading seems to enunciate a stable principle, the fact that its reference is comparatively rare partially negates its intrinsic value and calls into question whether there actually is a methodological underpinning to the reliance on the right to dignity. After all, if the Eighth Amendment really is the ultimate embodiment of an inherent right to dignity, then why does the Court refer to this underlying value so rarely and, apparently, so randomly?

A similar question can be asked pertaining to the Fourth Amendment’s prohibition against unreasonable search and seizure seeing that the Court characterized its “overriding function” as being “to protect privacy and dignity against unwarranted intrusion by the State.” In the Fourth Amendment context, however, the Court’s explicit resort to the dignity rights of the

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108 Id., at 101.
110 Id., at 745.
111 This is the exact notion evoked by Justice Brennan in his opinions rejecting the constitutionality of the death penalty. In Furman v. Georgia, Justice Brennan declared that the death penalty was unconstitutional because “it does not comport with human dignity” because it fails to respect people “for their intrinsic worth as human beings.” 408 U.S. 238, 270 (1972) (Brennan, J., concurring). In probably the most explicit neo-Kantian rendition of the right to dignity, when the Supreme Court reinstated the death penalty four years after Furman, Justice Brennan declaimed that putting people to death treats “members of the human race as nonhumans, as object to be toyed with and discarded,” and is thus “inconsistent with the fundamental premise” of the Eighth Amendment “that even the vilest criminal remains a human being possessed of common human dignity.” Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting). See also Roper v. Simmons, 125 S. Ct. 1183, 1199 (2005) (holding that the execution of those who were underage at the time that they committed their crime was unconstitutional under the Eighth Amendment because that clause rests on the principles of securing individual freedom and preserving human dignity that “are central to the American experience and remain essential to our present-day self-definition and national identity,” and were violated by the laws under consideration); Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (stating that one could not biological conduct experiments on convicted criminals because this would come “at the expense of the dignity and personality and natural powers” of the individuals involved.)
112 Schmerber v. California, 384 U.S. 757, 767, 769-70 (“The interests in human dignity and privacy which the Fourth Amendment protects forbid” invasive behavior by the state.”)
individual are slightly more frequent. Thus, the Court has readily characterized police behavior as “offensive to human dignity” when it rose to the level of shocking even those of “hardened sensibilities.”113 Similarly, the Court found that “the extent of intrusion upon the individual’s dignitary interests” accounted for an unconstitutional search and seizure when officials forced that individual to undergo surgery to remove a bullet that might have implicated him in a crime.114 What links all of these cases is the fact that dignitary interests were adduced to by the majority opinion when the actions complained of actually invaded the physical body of the individual—indeed, in all cases the actions encompassed forcibly going inside the body of the person. Thus, dignity in this context is paired with physical integrity, which is a step beyond the Fourth Amendment’s privacy interest in that the latter concept generally involves the expectation of seclusion within the confines of a home. In this sense, the dignity interest is used similarly to the Eighth Amendment examples: an alarm bell to signal a standard of conduct so reprehensible as to violate the core precept of what it means to be human.115

Quite a different import to the reference to the right to dignity is found in the Court’s invocation of this concept within the framework of its substantive due process jurisprudence under the Fourteenth Amendment. In this context, the Court equates dignity with the respect owed for the core characteristics of an individual’s personality, and the right to be free from government interference as it pertains to the expression of those characteristics. The most prominent example of this came in Lawrence v. Texas where the court invalidated an anti-sodomy statute of the basis that it violated individuals’ due process rights.116 The majority opinion, rather than focusing on a possibly narrower ruling by linking the violation to an intrusion on one’s privacy, opted for a broader statement by declaring that the accused statute infringed upon a liberty interest that involved “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” which were key to the protections afforded by the Fourteenth Amendment.117 The Court noted that the criminal penalties to which people running afoul of this law would be subject would result in a sort of “scarlet letter” “with all that imports for the dignity of the person charged.”118 Thus, to the Lawrence Court, dignity was used differently than in the Eighth and Fourth Amendment contexts. Under the liberty rubric identified in Lawrence dignity was called upon as a marker of

113 Rochin v. California, 342 U.S. 165, 172, 174 (1952) (ruling unconstitutionally invasive a search that consisted in opening the petitioner’s mouth and extracting contents from his stomach).
114 See Winston v. Lee, 470 U.S. 753, 761 (1984). See also Osborn v. U.S., 385 U.S. 323, 341, 343 (1966) (Douglas, J., dissenting) (“We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times … the privacy and dignity of our citizens [are] being whittled away by sometimes imperceptible steps.”)
115 Dignity interests within the Fourth Amendment context are not merely referenced in majority opinions. Indeed, on several occasions, Court dissenters have stated that certain law-enforcement practices are “offensive to personal dignity,” or are an “immolation of privacy and human dignity,” and reaffirmed that the protections of the Fourth Amendment are “indispensable to individual dignity and self-respect.” See NTEU v. Von Raab, 489 U.S. 656, 680, 681, 687 (1989) (Scalia, J., dissenting); Segura v. U.S., 468 U.S. 796, 839 n.31 (Stevens, J., dissenting).
117 See id., at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)). The Court also characterized these intimate choices as being instrumental allowing individuals to “retain their dignity as free persons.” Lawrence, 539 U.S. at 567.
118 Id., at 575.
value granted to individuals on the ground of their status as a human being. In other words, humans command respect for their dignity rights for no reason other than their existence. It seems as if the Court in this instance located the right to dignity outside of the constitutional sphere while at the same time finding clauses, such as the liberty interest of the Fourteenth Amendment, that embody this extra-positive source of law.

This connection was expressed more clearly in Planned Parenthood v. Casey where Justice Stevens noted that “[p]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled.” 119 Indeed, abortion-rights cases raise a similar use of dignity to that encountered in Lawrence. In Casey both the plurality opinion and Justice Stevens’ concurrence connected the right to dignity to the right of women to control their own reproductive health. Thus, the Court stated that the choices confronting women faced with the decision to terminate a pregnancy are “central to personal dignity and autonomy,” and the authority to make that decision “is an element of basic human dignity.” 120 In Sternberg v. Carhart, the Court struck down a statute criminalizing certain forms of late-term abortions noting “a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty.” 121 Interestingly, not only do these opinions hearken to the idea of dignity as respect in the form of governmental non-interference, but they also introduce an element of equal treatment into the mix by coining the phrase “equal liberty.” Thus dignity also encompasses, at least in words, an anti-discrimination component.

In the context of the Court’s Fourteenth Amendment equal protection jurisprudence, the reliance on dignity rights is mostly implied rather than expressed outright. So, for example, in Brown v. Board of Education, the Court does explicitly note that separating the races was a proxy for communicating to the world that one race was superior to the other (which certainly underscores a dignity interest being at play) but does not invoke human dignity or a closely akin word to make that point. 122 This underscores one of the basic premises of the critics: that there seems to be no consistent rationale for the use or nonuse of the concept of human dignity as a reference point for certain rights. In fact, what is apparent from this brief survey is that from a constitutional standpoint, not only is the use of dignity inconsistent from amendment to amendment, 123 but it is similarly erratic within the self-contained doctrine of a single

119 Casey, 505 U.S. at 920 (Stevens, J., concurring in part).
120 Id., at 851 (plurality opinion) and 916 (Stevens, J., concurring in part).
121 530 U.S. 914, 920 (2000). The right to dignity has not only been employed to safeguard the rights of the mother. See e.g. Gonzales v. Carhart, 127 S. Ct. 1610, 1637 (2007) (writing about the “respect for the dignity of human life” in reference to the foetus).
122 See Brown v. Board of Education, 347 U.S. 483, 494 (1954) (citations omitted). Commentators have noted that this case “displayed a genuine concern for the value of human dignity” even though the might not have “articulated their opinions in the language of dignity.” William A. Parent, Constitutional Values and Human Dignity, in THE CONSTITUTION OF RIGHTS, supra note 33, at 59.
123 Other clauses within particular constitutional amendments have offered the Court the opportunity to refer to dignity rights: (1) First Amendment freedom of speech—freedom of expression “will ultimately produce a more capable citizenry and more perfect polity and … no other approach would comport with the premise of individual dignity and choice upon which our political system rests,” Cohen v. California, 403 U.S. 15, 24 (1971); (2) Fourteenth Amendment procedural due process—holding that a pre-termination hearing for welfare recipients is a constitutional right because of America’s “basic commitment … to foster the dignity and well-being of all persons within its border,” Goldberg v. Kelly,
amendment. Nevertheless, dignity is routinely invoked to make extremely foundational points that range from the notion that the right to dignity is the underlying source of some of the most important rights in the Bill of Rights and the Reconstruction Amendments, to statements that dignity is the motivating force behind the whole Constitution itself: “[t]he essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty.”

Thus, under the rubric of dignity rights we have observed dignity as a barrier to illicit state behavior, dignity as autonomy, dignity as liberty, dignity as respect, and dignity as basic decency. From all of these different strands it emerges that the right to dignity forms an ideational core that is synonymous with a certain purity of purpose that breathes life into the constitutional text. And while it might sometimes be understated or not stated at all, it is undeniably present within the judicial interpretation of some of the Constitution’s most vital provisions.

The federal constitution is not the only impetus behind the judicial conversation pertaining to the right to dignity. Some state constitutions, such as those of Illinois, Louisiana, and Montana actually enumerate dignity as one of those rights their constitution is designed to protect. Of these states, only Montana has developed a body of law that pertains to the right to dignity, even though this is usually paired with another right, such as equal protection or privacy, to boost its effect or to give it more emphasis. Thus, in Oberg v. Billings, the Montana Supreme court noted that “subjecting one to a lie detector test is an affront to one’s dignity,” and a violation of Montana’s equal protection clause, in Armstrong v. State a statute prohibiting certified physician assistants from performing abortions was deemed to violate Montana’s privacy clause as well as its dignity clause, in Albinger v. Harris the court ruled...
that an engagement ring was an irrevocable gift because regarding it as being conditional on marriage was contrary to Montana’s dignity clause and conducive to gender discrimination,\textsuperscript{130} and in \textit{Walker v. State} the Montana Supreme Court ruled that its cruel and unusual punishment clause had to be coupled with its dignity clause in providing a higher standard of inquiry than its federal equivalent when such challenges were raised in court.\textsuperscript{131} What these cases demonstrate is that even though there is some inkling that the right to dignity can function as an independent right, in actuality, it functions more as paper weight, giving heft to other rights being upheld by the court.\textsuperscript{132}

 Probably the most important state case to refer to an individual’s right to dignity is \textit{In re Marriage Cases}, the decision by the California Supreme Court that established the right of same-sex couples to marry under the California Constitution.\textsuperscript{133} California is not one of those states that enshrines the right to dignity within its constitutional text, nevertheless the Court found that “the core set of basic substantive legal rights and attributes traditionally associated with marriage … are so integral to an individual's liberty and personal autonomy” that these “core substantive rights include … the opportunity of an individual to establish - with the person with whom the individual has chosen to share his or her life - an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.”\textsuperscript{134} Following this cornerstone statement on the role of dignity as a substantive right, the court elaborated:

\begin{quote}
One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of “marriage” exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.\textsuperscript{135}
\end{quote}

The use of dignity by the California Supreme Court has two elements, equally forceful, and equally fundamental to an understanding of what the contours of dignity rights might entail in the U.S. The first element equates dignity with validation—the respect due by virtue of having a certain status—in this case, that status of being married. The second element couples dignity with equal opportunity, i.e., that everyone ought to have the right to achieve that status adduced by the first element. Thus, in this context, dignity is not only something that the state should be prevented from denigrating, but it is something that the state should actively foster. Marriage,

\textsuperscript{130} See gen. \textit{Albinger v. Harris}, 310 Mont. 27 (2002).
\textsuperscript{133} See gen. \textit{In re Marriage Cases}, 43 Cal. 4\textsuperscript{th} 757 (2008).
\textsuperscript{134} \textit{Id.}, at 781 (emphasis in original).
\textsuperscript{135} \textit{Id.}, at 782-83.
with its indicia or respectability and stability is thus integral to a dignified expression of a common humanity. The California Supreme Court’s use of dignity is thus a fusion of the meanings used by the authors of *The Federalist Papers* on the one hand and the neo-Kantians on the other, and represents a novel way, for the U.S., to give shape to dignity rights.

### ii. Foreign Law

As noted above, scholars began renewing their attention to dignity rights in the aftermath of WWII where the unmitigated horrors of the Holocaust were laid bare for the entire world to see. However, this impetus was not confined to the halls of academia, but it spilled over into the legal world in a very concrete manner. Thus, in the postwar world, human dignity became the central building block of the constitutional framework of not an insignificant number of nations, particularly those that reformed their government structure as a result of the conflict.\(^{136}\) Thus Germany, Italy, Japan, Israel, and South Africa all have explicit clauses in their constitutions protecting the right to dignity of every individual. It is not surprising that the nations that went through indescribable trauma as a result of the policies of their outgoing regimes (or, in the case of Israel, at its creation) were very quick to adopt a key uncompromising value that is the right to dignity. Similar to some of the Eighth Amendment cases seen above, the right to dignity in this context is synonymous with the right not to be treated as an object—a minimum standard of conduct.\(^{137}\) But most of these countries have not stopped at this baseline, but have developed dignity rights within their jurisdictions of considerable substantive import.

Probably the most important and influential nation to give a real essence to its dignity jurisprudence is Germany. Article 1, section 1 of the German Basic Law states: “The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.”\(^{138}\) This short pair of sentences packs with it an extremely powerful punch that ripples all through German law. Aside from the clear Kantian overtones of the concept given to dignity as being “inviolable,”\(^{139}\) there are several other notions of dignity that emerge from this constitutional mandate: the first is that the “respecting” and “protecting” language obliges the state to stand as a

\(^{136}\) See Eckart Klein & David Kretzmer, *Forward to KRETZMER*, supra note 22, at v, v-vii (describing the law of dignity in several European countries).

\(^{137}\) Indeed, the German Constitutional Court when confronted with interpreting the right to dignity often refers to the atrocities committed by the Nazis “as a basis for illustrating and classifying examples of the negation of human dignity.” Weinrib, *supra* note 33, at 339.

\(^{138}\) GERMANY CONST. ART. 1, SEC. 1. (GRUNDGESETZ). The next two articles read as follows: “The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.” Id., at ARTS. 2, 3.

\(^{139}\) The German Constitutional Court has confirmed this vision of the right to dignity. *See e.g. Polygraph Case*, 30 BVerfGE 173, reprinted in DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 305 (2nd ed., 1997) (“To elicit the truth by attaching a person to a machine … is to regard him as an object, and not as a human being capable of telling the truth through ordering questioning”). This is a similar reasoning to that which led the Supreme Court of Puerto Rico to hold unconstitutional a private employer’s use of a polygraph test. *See Arroyo v. Rattan Specialities, Inc.*, 117 P.R. Dec. 35, 56-57 (1985) (holding that the Puerto Rico Constitution “is the safekeeper” of “the most previous thing in the lives of all human beings in a democratic society: dignity, integrity and privacy.”)
guardian for the dignity interests of its citizens, a guardianship that includes a supervision of its own actions; the second is that the “duty” language imposes an affirmative mandate on the state to ensure that no one fall below a “dignified” level of existence even though such a fall might not be caused by the state in the first place; and third, and maybe most important, the “inviolable” language aside from connoting its Kantian heritage, places the right to dignity at the pinnacle of all enumerated rights, the consequence being that not only does it function as the ultimate trump in issues where it can be invoked, but it is not subject to constitutional amendment, the not-so-subtle implication being that the right to dignity is not derived from the German Basic Law, but rather from a higher moral order that transcends law altogether.140

The German Constitutional Court has had numerous opportunities to elucidate on the contours of the Basic Law’s enunciation of the right to dignity and it has repeatedly confirmed that such right functions as the supreme law of the land. Thus, in Germany the right to dignity has operated to restrict abortion rights (although not completely) because the constitutional mandate “demands the unconditional respect for every life” and “whether the subject of this dignity is conscious of it and knows how to safeguard it” is not dispositive of the issue.141 It has also worked to invalidate life sentences without parole as well as mandated that the state provide its citizens with a certain level of subsistence. One commentator has noted that individual dignity’s supremacy is perpetually absolute in that there is “no way to balance other legal interests … with the dignity of a person,” so that all else must fall in the interest of sustaining human dignity.142 And yet this absoluteness is not frozen in time, but rather “[n]ew insights can influence and even change the evaluation” of claims made under the right to dignity because the “understanding of the content, function, and effect” of this right can, and does, deepen.143

Thus, dignity in German law is both a positive right, imposing affirmative obligations on the state, and a negative right, preventing the state from acting in a way that violates “the highest value” of the German Basic Law which encompasses “all guaranteed rights” and “also includes a morality of duty that may limit the exercise of [another] fundamental right.”144 In fact, the German Basic Law provides for exactly that kind of conflict between rights and specifically directs that “[i]n no case may the essential content of a basic right [(such as the right to dignity)] be encroached upon.”145 However, it appears that the resolution of these conflicts in favor of dignity would be difficult to translate into the U.S. where dignity, even though present in proto form, does not exist as an enumerated right. It is therefore not difficult to see how dignity rights

140 See Weinrib, supra note 33, at 338 (noting that dignity, unlike other German core constitutional principles stands “prior to state power.”)
141 See Abortion Case, 39 BVerfGE 1, reprinted in KOMMERS, supra note 139, at 336.
142 See E. Klein, Human Dignity in German Law, in KRETZMER, supra note 22, at 145, 147 (also noting that “[t]he principle of proportionality does not come into play as long as an intrusion upon human dignity has been established.”) The perpetuity of the right even transcends an individual’s death as the German Constitutional Court has held that the German constitution “imposes on all state authority to afford the individual protection from attacks on his dignity” “even after his death” because “the constitutional commandment [states] that human dignity is inviolate” and it does not include a temporal limitation. See Defamation Case, 30 BVerfGE 173, reprinted in KOMMERS, supra note 139, at 302-03.
143 See Life Imprisonment Case, 45 BVerfGE 187 (1977) reprinted in KOMMERS, supra note 139, at 307.
144 KOMMERS, supra note 139, at 298.
145 GERMAN CONST. ART. 19, SEC. 2.
promote a communitarian viewpoint of society that some might consider antithetical to the U.S. libertarian ethos.

South Africa is another country that enshrines dignity rights in its constitution. Thus, Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected,” 146 while no less than four other sections also reference the right to dignity that all people possess in South Africa. 147 Of particular importance is section 36 that has been held to mean that the right to dignity is not subject to abrogation or subordination to another right. This has led commentators to proclaim that the right to dignity is the most important under the new South African legal structure. 148 The South African Constitutional Court has echoed this sentiment by noting that “a right to dignity is an acknowledgment of the intrinsic worth of human beings” who are entitled to “respect and concern” thus making the right to dignity “the foundation of many of the other rights that are specifically entrenched in” the South African Bill of Rights. 149

Like in Germany, the right to dignity often clashes with other rights and usually emerges the victor particularly because Section 39 of the constitution directs the Constitutional Court “[w]hen interpreting the Bill of Rights,” to “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.” 150 Similarly, the legislature, acting under color of the constitutional right to dignity, has passed legislation restricting the reach of other rights. An example of the latter occurs in the South African Equality Act that prohibits hate speech against a long list of protected categories in a manner that “undermines human dignity,” thus curtailing another enumerated constitutional right: the right to free expression. 151 The Constitutional Court has summed up the import that dignity rights are meant to have within the architecture of South African law:

“Human dignity … informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. The court has already acknowledged that importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis [and] is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases … where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the

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147 See id., Arts. 1, 7, 36 & 39.
148 See CENTRE FOR APPLIED LEGAL STUDIES, INTRODUCTION TO THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 1 (Cathi Albertyn et al. eds., Witswatersrand University Press 2001).
151 See THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT § 1 (1) (xxii) (ii).
right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”

Thus the right to dignity has been invoked to strike down the death penalty, to declare unconstitutional anti-sodomy laws, and to impose on the state a mandatory duty to provide a minimum standard of living for its citizens. All combined, the right to dignity in South Africa is the right that underlies all other rights in their Constitution and provides both redress against unlawful state action as well as a safety net to prevent the weakest members of society from falling through the cracks.

Closer to home, the Canadian system also takes into account the right to dignity, especially when the Canadian Supreme Court is tasked with interpreting its Charter of Rights and Freedoms even though, like in the U.S., the Canadian Constitution does not reference “dignity.” The use of the idea of human dignity in the Canadian system has been characterized as “unfocused and inconsistent” ranging from a notion of Kantian dimensions to mere verbiage without much, if any, legal substance. Indeed, the invocation of dignity rights has permeated Canadian constitutional jurisprudence and several Charter provisions such as the protection of liberty, the definition of fundamental freedoms, the prohibition against cruel and unusual punishment, and the fostering of equality. Moreover, the Canadian Supreme Court has

153 *See South Africa v. Makwanyane*, 3 S.A. 328, ¶95 (1995) (declaring that the death penalty “annihilates human dignity.”)
154 *See National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 12 BCLR 1517, ¶28 (1998) (stating that criminalizing sexual expression “is a palpable invasion of … dignity.”)
155 *See South Africa v. Grootboom*, 10 BHRC 84, ¶23 (2000) (holding that “[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”)
156 *See R. v. Morgentaler*, 1 S.C.R. 30, 171 (1988) (stating that is was human dignity that protected a person as being treated as “a means to an end which she does not desire but over which she has no control” and rhetorically asking “[c]an there be anything that comports less with human dignity and self-respect?”)
157 *See Fyfe, supra* note 5, at 8, 12 (characterizing the use of dignity as “an awkward medley of quotes,” and “a hodge podge of … nebulous terminology.”)
158 *See Reference Re Section 94(2) of the Motor Vehicles Act (B.C.*), 2 S.C.R. 486, 519 (1985) (equating dignity with the moral imperative that innocent people should not be punished—a notion “founded upon a belief in the dignity and worth of the human person”).
159 *See R. v. Big M Drug Mart*, 1 S.C.R. 295, 346 (1985) (noting that fundamental freedoms are united by the centrality to individual conscience and that the relationship between the respect for that conscience “and the valuation of human dignity that motivates such unremitting protection” was easy to see); *Reference Re Public Service Employee Relations Act (Alta.*), 1 S.C.R. 313, 368 (1987) (tying dignity to “identity, self-worth, and emotional well-being”).
160 *See Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779, 812, 816 (Cory, J., dissenting) (proposing that it is the concept of dignity that “lies at the heart” of the prohibition against cruel and unusual punishment and that such punishments are “indignities” that are “the ultimate attack on human dignity.”)
emphatically noted that “the idea of human dignity” is reflected in every single Charter provision and thus is to be regarded as “the basic theory underlying the Charter,” even though it has admitted that as a legal test “human dignity is an abstract and subjective notion that … [can be] confusing and difficult to apply.” When combining these two statements by the Canadian Supreme Court what emerges is that dignity in Canada provides an underlying ground for other enumerated rights—a sort of background norm, or negative right—rather than a per se legal right standing on its own. As noted below, this reading of the right to dignity fits squarely as one possibility that could be normatively desirable and jurisprudentially possible in the U.S.

iii. International Law

Much of international law today began to take shape in the shadow of WWII and thus reflects a similar ethos to that described as pertaining to the shaping of modern Germany. Thus, many multi-lateral treaties, declarations, proclamations and agreements promulgated in the late 1940s and thereafter promote the centrality of human dignity as being a paramount value shared by all societies in the world. The reason for this centrality was that “it became necessary to defend, not merely some rights, some truths, or some moral principles, but the very existence of human rights, truth, and of morality.” The protection of human dignity therefore became something that could be promoted because it encapsulated a common principle that was sufficiently vague that each country could see in it a value worthy of global focus.

It is therefore no coincidence that the preamble of the founding charter of the United Nations affirms that “the peoples of the United Nations” have “faith in fundamental human rights” that includes, among others, “the dignity and worth of the human person.” Similarly, the Universal Declaration of Human Rights (“UDHR”), an aspirational document passed by the UN General Assembly mentions the right to dignity in several places. First, the preamble takes note of the statement pertaining to human dignity contained in the UN Charter preamble and goes on to state that the recognition “of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.” Several articles give more contours to this notion: Article 1 states that “[a]ll human beings are born free and equal in dignity and rights,” and as such “are endowed with reason and

(holding that an individual’s freedom to form a family relationship of choice “touches on matters so intrinsically human, personal and relational that a distinction … on this [basis] must often violate a person’s dignity.”)

162 See Morgentaler, 1 S.C.R. at 166.
164 Some have expressed skepticism that such legal transplants are possible or desirable. See e.g. Robert Leckey, Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights, 40 COLUM. HUM. RTS. L. REV. 425, 455 (2008) (stating that in Canada, the prohibition against same-sex marriage was deemed a violation of human dignity but wondering whether “the conception of dignity and its place in constitutional discourse [is] the same in Canada and the United States.”)
166 See MARITAIN, supra note 69, at 78-79.
167 UN Charter preamble.
conscience and should act towards one another in a spirit of brotherhood;” Article 22 provides that “[e]veryone … has the right to social security and is entitled to realization … of the economic, social and cultural rights indispensable for his dignity and free development of his personality;” and Article 23(3) specifies that “[e]veryone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity.”

In combination the UN Charter and the UDHR make a clear statement about the declamatory significance of marking the protection of human dignity and the consequent right to dignity as the ultimate value to be enshrined in the premier documents for the modern society. While it is true that the contours of this right are left somewhat airy (although not as shapeless as some would have it), the resorting to dignity makes these documents cohere and provides an internal tuning key to which all the other rights would have to be harmonized.169 These prominent placements of human dignity within the UDHR are of great significance because even though the document carries no binding effect at its inception, over time, its precepts can be seen as being the crystallized consensus of state practice and thus create a binding norm of customary international law.170 Moreover, the import of dignity within the UDHR is very broad and advises the creation of both negative rights based on the right to dignity (that would prohibit the state from violating this right) as well as positive rights (that would both mandate that the state undertake affirmative actions to ensure that the promise of such rights were fulfilled as well as grant to private parties the ability to press an action based upon the violation of the right to dignity against other private parties).171

Other international and regional agreements reflect these overarching ideals presented in both the UN Charter and the UDHR. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination all have provisions that hearken back to the concept of human dignity as their common germinating force.172 Preambles of many regional agreements such as the American Declaration of the Rights and Duties of Man

169 Id., at arts. 1, 22, and 23(3).

170 See Mary Ann Glendon, Reflections on the UDHR, 82 FIRST THINGS 23, 24 (1998); see also Hyman, supra note 2, at 13 (noting that “[h]uman dignity is an abstract concept, but policy decision are necessarily concrete,” and doubting that those tasked with “actually [using] human dignity as a decision rule” have the expertise to do so).


172 See e.g. UDHR, arts. 9-11 (creating negative rights pertaining to the protection against arbitrary arrest) and arts. 22-26 (creating positive rights such as the right to social security, the right to work in safe conditions, and the right to education).

(which declares that “[a]ll men are born free and equal, in dignity and in rights.”) the African Charter on Human and Peoples’ Rights, and the Revised Arab Charter on Human Rights all reference the right to dignity. In all of these instances the reference to dignity seems to serve a similar purpose as that observed for the UN Charter and the UDHR: to provide a unifying creed unto which most nations can agree even though the exact contours of that creed might not be specifically described.

Of the international regimes that have developed not only statements pertaining to dignity rights in the formation treaties but a body of law pertaining to those statements, the European Union stands as an example. The original European Convention on Human Rights (“European Convention”) does not contain a reference to human dignity however other European treaties, such as the Revised European Social Charter, the Convention on Human Rights and Biomedicine, and, most importantly, the European Union Charter of Fundamental Rights (“European Charter”) incorporated into the Lisbon Treaty all have references to both an underlying framework that is based on the allocation of dignity rights and to specific substantive provisions that contain the right to dignity in some form or another. This has led the European Committee of Social Rights to declare that “[h]uman dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention on Human Rights.”

In interpreting the European Convention, the European Court of Human Rights (“ECHR”) and the European Commission of Human Rights (“European Commission”) have called upon the right to dignity numerous times even though, as mentioned in the paragraph

174 See American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V/II.82 doc.6 rev.1, preamble (1948). The Inter-American Court of Human Rights has interpreted the right to life as incorporating a right to dignity by noting that the right to life “includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.” Case of the ’Street Children’ (Villagran-Morales v. Guatemala), Judgment of Nov. 1999 (merits), at ¶144. See African Charter on Human and Peoples’ Rights, 21 ILM 58 (1982). See League of Arab States, Revised Arab Charter on Human Rights, 22 May 2004, 12 Int’l Human Rights Rep 893 (2005).


above, the European Convention (like the U.S. Constitution) does not actually mention the word “dignity” even once. Thus, in *East African Asians v. U.K.* the European Commission held that Article 3 of the European Convention prohibiting torture prevents “publicly to single out a group of persons for differential treatment on the basis of race” because this would “constitute a special form of affront to human dignity.” 182 Similarly, that same article’s main purpose has been interpreted “to protect … a person’s dignity,” 183 meaning that it is intended primarily to prevent behavior that is “seriously humiliating [and] lowering as to human dignity,” 184 i.e., activity that “debas[es] an individual showing a lack of respect for, or diminishing, his or her human dignity.” 185 But dignity is not only pertinent to Article 3 of the European Convention; the apposite interpretative bodies have deemed that due process rights, criminal procedure protections, prohibitions against cruel punishments, and privacy interests are all supported by an underlying right to dignity. 186 This infusion of the right to dignity throughout the European Convention has led the ECHR to proclaim that human dignity underpins the entirety of the document as a general principle of law. 187

What is apparent from surveying international materials is that dignity rights pervade the particular legal instruments they inhabit both explicitly when referenced directly in the texts, and implicitly when not specifically enumerated. Human dignity’s main purpose in international law appears to be to act as a magnet—a precept seemingly so uncontroversial as to attract the entirety of the world community notwithstanding the diversity of morals, cultures, ethnicities, and religions that exist within the broad spectrum of nations. In particular, in the international human rights arena, dignity rights provide the focused theoretical basis of the whole movement. 188 But the main question that arises from this fact is most profound and has deep and possibly long-lasting consequences for the effect of dignity rights on law: if the right to dignity is indeed so universally accepted as an abstract concept, then why shouldn’t it be given a more definite substance so that such acceptance can be translated into tangible legal doctrine? 189 It is not enough to give the canned answer that “dignity rights are in the eye of the beholder” and

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184 *Ireland v. U.K.*, 2 EHRR 25, ¶27 (1972) (Fitzmaurice, J.) (giving examples of such treatment “like having one’s head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one’s sovereign or head of State, or dress in a way calculated to provoke ridicule or contempt.”)
188 See Carozza, *supra* note 77, at 932 (“the idea of human dignity serves as the single most widely recognized and invoked basis for grounding the idea of human rights generally.”)
189 Or, to put it another way, “[c]an the dignity-conscience logic lead toward a theory of rights?” Hasson, *supra* note 165, at 84.
therefore inherently not subject to any legal coherence whatsoever.\footnote{See Goodman, \textit{supra} note 24, at 773 (characterizing the Supreme Court’s use of dignity within Eighth Amendment jurisprudence as “weak and meaningless”); see also Law \textit{v.} Canada, 1 S.C.R. 497, ¶ 53 (1999) (“[t]here can be different conceptions of what human dignity means”); Hyman, \textit{supra} note 2, at 6 (“it is unlikely that we, as a nation, will be able to settle on a single notion of human dignity.”)} A similar answer could conceivably be given to the concepts of “liberty,” or “privacy,” or, indeed, “equality,” and we nevertheless construct ample legal rules around these ideals. The answer to the above question therefore must lie in the ability to build a plausible legal theory that would translate the idea of the right to dignity into a consistent jurisprudential practice.

III. POSSIBLE APPROACHES TO HUMAN DIGNITY

As illustrated above, the main criticisms of the current use of dignity rights are that it is awkward, clumsy, sloppy, instrumental, inflationary and open to judicial vagary.\footnote{See \textit{e.g.} \textit{Oscar Schachter lamented this “throwing up your hands” attitude writing “it is not … satisfying to accept the idea that human dignity cannot be defined or analyzed in general terms.” Schachter, \textit{supra} note 15, at 849.} \textit{Raoul Berger, \textit{Justice Brennan, ‘Human Dignity,’ and Constitutional Interpretation}, in \textit{AMERICAN VALUES}}, \textit{supra} note 33, at 130 n.2. Judge Easterbrook sets up a false dichotomy as if the right to dignity cannot exist within a framework of legal rules when the reality is that both of these concepts are not mutually exclusive.} This stems from the supposed amorphous, elusive, metaphysical, and intangible nature of the very concept of human dignity that leads some to speculate that it would be near impossible to create a dignity jurisprudence that is internally consistent and that can provide the citizenry with clear rules to follow.\footnote{See \textit{e.g.} \textit{Hyman, \textit{supra} note 2, at 17.} \textit{Kwall, \textit{supra} note 90; Castiglione, \textit{supra} note 3, at 661, 662.} \textit{See \textit{e.g.} \textit{Kamir, \textit{Honor and Dignity Cultures: the Case of Kavod (Honor) and Kvod ha-Adam (Dignity) in Israeli Society and Law}}, in \textit{KRETZMER}, \textit{supra} note 22, at 231 (analyzing the Israeli system); C. DUPRÉ, \textit{IMPORTING THE LAW IN POST-COMMUNIST TRADITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY} 108 (2003) (analyzing the Hungarian system).} One commentator has indeed stated that because “dignity cannot be quantified, it cannot be operationalized, no matter how appealing as a policy standard it might otherwise appear to academics.”\footnote{\textit{Christian Walter, Menschegewürde im nationalen Recht, Europarecht und Völkerrecht, MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG}} Similarly, Judge Easterbrook has dramatically remarked that “[w]hen we observe that the Constitution … stands for ‘human dignity’ but not rules, we have destroyed the basis for judicial review.”\footnote{\textit{See e.g. MATTHIAS MAHLMANN, ELEMENTE EINER ETHISCHEN GRUNDRECHTSTHEORIE} 100 (2008); \textit{Christian Walter, Mensegebürde im nationalen Recht, Europarecht und Völkerrecht, MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG} 127 (Bahr & Heinig eds., 2006).} The reality, however, is somewhat different. It is not that the right to dignity has to be shapeless by its very nature and thus subject to inconsistent use, but rather that so far there has been no coalescence (particularly in the U.S.) around the rational possibilities that exist for a coherent legal theory of human dignity. That is why, in a variety of contexts, commentators are advocating making exhortations to the right to dignity more explicit so that regularity first, and then consistency, can become an achievable goal.\footnote{\textit{See e.g. Christian Walter, Menschegewürde im nationalen Recht, Europarecht und Völkerrecht, MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG}}

Detailed studies of the import of dignity in legal discourse have been undertaken in other countries,\footnote{\textit{See e.g. Kamir, \textit{Honor and Dignity Cultures: the Case of Kavod (Honor) and Kvod ha-Adam (Dignity) in Israeli Society and Law}}, in \textit{KRETZMER}, \textit{supra} note 22, at 231 (analyzing the Israeli system); C. DUPRÉ, \textit{IMPORTING THE LAW IN POST-COMMUNIST TRADITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY}} but much less so in the U.S. What comes across is that dignity rights seem to be
grounded in a paternalistic or communitarian concept of society, rather than in the libertarian tradition that is thought to be the undercurrent of most rights and liberties in the U.S. Yet the U.S. has absorbed concepts of rights from the English common law that recognize torts such as defamation or intentional infliction of emotional distress that, in part, seem to be motivated by the desire to preserve human dignity in the form of one’s reputation or one’s emotional wellbeing. And from the constitutional standpoint, some in the U.S. have “endorsed the idea that dignity is the fundamental value underlying the U.S. Constitution.” It is therefore quite inaccurate both historically and analytically to state that the right to dignity, or at least, the concept of dignity rights, is alien or foreign to U.S. legal thinking.

The task is then to delineate the parameters of what a feasible right to dignity might look like in the U.S. Some have observed that the possible pervasiveness of dignity could affect so many different legal rules that it would be hard to count them all. In fact, the most hallowed of those rights enumerated in the U.S. Constitution could be easily thought of as having their germinating root in the idea of the right to dignity. It is undeniable that the adaptability of democracies to different systems of governance that nonetheless can and do accommodate a role for human dignity within their spatial sphere counsels in favor of the use of dignity rights in some fashion. Given the examples illustrated in Part II above, it is clear that there are several options for the use of human dignity within the full corpus of a legal system: one can treat dignity as a right in and of itself, or as a general principle, or moreover, as a value underlying other rights. What seems to be a unifying theme however is that any definition of dignity rights must, at a minimum, entail that to every individual is ascribed the ability to maintain specific

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197 See e.g. Winfried Brugger, Communitarianism as the Social and Legal Theory Behind the German Constitution, 2 INT’L J. CONST. 431 (2004); see also ROBERT POST, CONSTITUTIONAL DOMAINS 23-116 (1995).
198 See e.g. Marc Chase McAllister, Human Dignity and Individual Liberty in Germany and the United States as Examined through each Country’s Leading Abortion Case, 11 TULSA J. COMP. & INT’L L. 491, 491 (2004) (footnote omitted).
199 Parent, supra note 122, at 47 (referring to both Ronald Dworkin and Justice Brennan); see also Resnik & Suk, supra note 67, at 1941 (stating that the Supreme Court has “changed the content of U.S. constitutional law to name dignity as a distinct and core value.”) Although this proposition might be controversial as applied to the U.S., it certainly is not when it comes to the German Basic Law or the new South African Constitution. See e.g. Bruno Walter, Human Dignity in German Constitutional Law, in European Commission for Democracy Through Law (“European Commission”), The Principle of Respect for Human Dignity, (Proceedings of the UniDem Seminar, Montpellier, 2-6 July 1998), available at www.venice.coe.int/docs/1998/CDL-STD(1998)026-e.asp, at 24, 26 (Germany); Dawood, 3 S.A. at ¶35 (“dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected”) (South Africa).
200 Andrew Clapham has identified four aspects of what could constitute a jurisprudence of human dignity: (1) proscriptions on degrading treatment of individuals; (2) guarantees pertaining to personal autonomy; (3) protections on group identity; and (4) creation of conditions to meet an individual’s basic needs. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 545-46 (2006). Each of these aspects could have a corollary legal rule associated with it within the purview of U.S. law.
201 See e.g. Hyman, supra note 2, at 5 (listing blue laws, capital punishment, cloning, decriminalization of drug possession, gay marriage, genetically-modified food, gun control, legalized prostitution, partial-birth abortion, physician-assisted suicide, prohibition of hate speech, school prayer, school vouchers, state lotteries, and three-strikes laws as all having the potential of affecting, either positively, or negatively, human dignity).
inner attributes such as thoughts and feelings, as well as possessing the independence to choose one’s own course in life unfettered by interference from the state or other people—in other words, dignity embodies the principle of an individual’s entitlement to exercise her free will.

Because of the variety of ways in which rules about human dignity can manifest themselves, a coherent jurisprudence of human dignity will reflect a consistent value judgment that will be based on certain normative choices. One of these choices will be to determine whether dignity rights will be protected negatively (through proscriptions on government activity) or positively (through mandates on government). The same rights can have both positive and negative dimensions—for example, even though free speech in the U.S. is treated as a negative right, other democracies that protect this right see it as more positive. This distinction has implications for other rights such as the right to have an abortion, that, when viewed through a positivist dignity lens, might be construed in a more limited way than it is currently in the U.S. Another value choice would be whether the right to dignity is to be referred to at a high level of abstraction to avoid conflicts about its possible meaning that could occur if it is discussed at lower or more specific levels. The key to these sets of choices is that in most circumstances they are normatively neutral—in other words, there is no overriding reason to prefer one to the other so long as all alternative solutions are equally workable. And while it might be of interest to the academy to explore what philosophical impulses one wishes to gratify through dignity jurisprudence, the reality is that different philosophical underpinnings of the right to dignity can nevertheless give rise to coherent legal doctrines. Therefore, the important notion to keep in mind when constructing a jurisprudence of dignity is that whatever rules are constructed have sufficient viability without being too narrow or too broad. McCrudden summarizes the task by asking whether dignity “can … be the basis for … rights, a right in itself, or … simply a synonym for … rights?” The answer is that it can be all, but for the sake of clarity, coherence, cogency, and predictability, a choice should be made in favor of one of these options.

A. Substantive Legal Right – The Positive Rights Approach

The most sweeping impact that one could give to the right to dignity would be to view it as a separate independent right upon which individuals could assert a private action against both the government and other private parties, and upon which the government would be mandated to provide a minimum set of standards to ensure that each person’s human dignity is protected. The premise for this view of human dignity would come from an understanding that in a democracy, state authority is actually derived from individuals freely expressing their personal preferences without interference from the state—the ultimate consequence of respect for human dignity. This notion implies that respect for human dignity is not merely a vague goal but a normative abstraction given substance through both general principles of law (that will be

204 McCrudden, supra note 29, at 656.
interpreted to fill in the gaps that naturally exist when general principles are expressed in words in consonance with the dictate to honor human dignity) and more specific legal rules.

In giving the right to dignity a positive connotation the first consideration is that the right of action that would flow to individuals would stem from injuries that could be independent of any other injury to another right. This is a consequence of the positive thrust of human dignity that is meant to instill a culture of respect through social norms and law. In other words, a positive jurisprudence based on a fundamental right to dignity not only operates to prevent infraction upon this right, but also fosters its appreciation and respect. It thus embodies an objective element that is grounded in ethical precepts of the value of human beings. That objective component instructs the state that everyone within its jurisdiction must be given the opportunity to be able to exercise their free choice—and anything that prevents this would be a violation of one’s dignity. This inevitably leads to the idea that the freedom to participate in this free exercise only can take place if some minimum standards of care exist. Rhetorically speaking, how can someone exercise their free choices if they have no food on the table, or if they are unable to treat their sickness? Thus positive dignity mandates the state to alleviate these conditions.

The placement on the state of the duty to provide for the basic necessities of life so that each individual can live a life of dignity plays out in many places around the world including presently in the U.S. So whereas other countries, such as Germany or South Africa, have textual direction to respect, promote, and protect the right to dignity, and have developed legal rules to do so, the U.S., in certain contexts, has also developed these rules without a specific textual directive specifically mentioning dignity. Thus, in the context of the duties owed to prisoners under the Eighth Amendment, the Supreme Court has stated that the government has affirmative obligations to provide medical care, to ensure safety, to supply adequate nutrition, to maintain standards of sanitation, and to furnish appropriate climactic conditions for inmates. Certainly this milieu in the U.S. is more limited than the general applicability of the mandate to secure dignity for all people that has led the Inter-American Court of Human Rights to hold that the state of Guatemala had to ensure that all people “not be prevented from having access to the conditions that guarantee a dignified existence,” the German Constitutional Court to note that the right to dignity “imposes an obligation on the state to provide at least minimal subsistence to

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205 This notion is reflected, for example, in the substantive meaning given to Article 3 of the European Convention on Human Rights that prohibits torture, as well as other inhuman or degrading treatment. In interpreting this provision the House of Lords has noted that actionable conduct results when “treatment humiliates or debases an individual showing a lack of respect for, or diminishing his or her human dignity or arouses feelings of fear [or] anguish.” Regina v. Secretary of State for the Home Dept., ex parte Limbuela, 2005 UKHL 66, ¶76.

206 Oscar Schachter put this another way: “[f]ew will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth.” Schachter, supra note 15, at 851.


208 Case of the ‘Street Children’ (Villagran-Morales v. Guatemala), Inter-American Court of Human Rights, Judgment of Nov. 1999, ¶144.
every individual,” the South African Constitutional Court to decide that dignity rights compelled the state to provide social security benefits to its permanent residents, the Hungarian Constitutional Court to deem that the right to social security “entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realization of the right to human dignity,” the Italian Constitutional Court to opine that “human dignity requires that decent housing be secured for all citizens as a constitutional ‘social right,’” and the Indian Supreme Court to state that “the right to live with human dignity [goes] with … the bare necessities of life such as adequate nutrition, clothing and shelter … and facilities for reading, writing, and expressing oneself … , freely moving about and mixing … with fellow human beings.” The consequence of a positive right to dignity thus encompasses a broad swath of socio-economic rights that includes the basic entitlements of the welfare state that are already present in the U.S. whether mandated or not (such as the ability to collect social security or the right to a publicly-funded education) and probably some that are not yet considered as “rights” in the U.S. such as the right to basic health care.

Advocates of incorporating the right to dignity in U.S. law as a positive right have used the notion that “[h]uman dignity … also implies a duty of care for individuals,” to push for nationalized universal health care in some form or another. However, the affirmative view of dignity rights would not stop at this government obligation. Maxine Eichner, for example, compellingly emphasizes “it is a fundamental responsibility of the state … to support families’ care-taking efforts” because this “responsibility stems directly from the commitment to human

209 Bognetti, supra note 37, at 75, 83; see also Ernst Benda, Die Menschenwurde, in HANDBUCH DES VERFASSUNGRECHTS DE BUNDES-REPUBLIC DEUTSCHLAND 113, 115 (1983) (advocating for this reading of Article 1 of the German Basic Law).
210 See Khosa v. Minister of Social Development, 6 SA 505 (2004); see also Rail Commuters Action Group v. Transnet Ltd t/a Metrorail, 2 SA 359 (2005) (holding that dignity rights compelled the state transportation authority to provide safe transport for people).
211 Decision 32/1998 (VI.25) AB, ABH 1998, 251, at 254; see also Decision 42/2000 (XI.8) AB, Constitutional Court file no.:5/G/1998, published in the Official Gazette MK 2000/109, at §IV (“the benefits to be offered in the framework of social institutions should secure a minimum level guaranteeing the enforcement of the right to human dignity.”)
212 Bognetti, supra note 37, at 75, 85.
213 Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SCR (2) 516, at 518.
214 This is not only a facet of U.S. law. See International Covenant on Economic, Social, and Cultural Rights, art. 13 (“education shall be directed to the full development of the human personality and the sense of its dignity.”) It would interesting to research whether old-standing entitlements in the U.S., such as social security, Medicare, or public education can be “constitutionalized” as rights, particularly under the rubric of dignity.
215 Other countries and regimes have included this right under an objective reading of the right to dignity. See e.g. Schumpf v. Switzerland, no. 29002/96 (2009) (where the European Court of Human Rights held that restrictions on the ability to obtain health insurance were an infringement on a person’s ability to exercise control over their own lives and thus a violation of their dignity).
216 Aart Hendriks, Personal Autonomy, Good Care, Informed Consent and Human Dignity—Some Reflections From a European Perspective, 28 MED. & L. 469, 473, 477 (2009) (also noting that “in many European countries health providers are obliged to provide necessary care, independent of the financial position of the person in need, and forbidden to leave a person in a desperate position” and advocating that the state should offer “active support and protection to individuals to strengthen their personal autonomy, to maximally respect the (freedom) rights and dignity of the individual concerned.”)
dignity that underlies the liberal democratic form of government.”

She traces the role of human dignity from its traditional roots in the autonomy of the individual (and thus tinged with a slightly libertarian bent) to a more modern reading that envisions the right to dignity as a support for those who are unable to exercise their autonomy due to external circumstances (such as young age, old age, or illness) that causes them to lapse into a state of dependency. She notes:

“Once we adjust the image of citizens to account for dependency in the human life cycle, respect for human dignity entails more than just protecting citizens’ individual rights: It entails a commitment to meeting dependency needs through supporting caretaking and human development so that citizens can live dignified lives. [Thus, the state] has a basic responsibility to support caretaking and human development.”

This reading of the right to dignity is certainly more expansive that most theorists would advocate for the U.S., but in a changing society, where the years of dependency at the end of one’s life are increasing, it is certainly something that ought to be considered. After all, it certainly is in the state’s interest not to have a huge underclass of destitute or quasi-destitute children, mothers, aged, or sick people.

But the positive reading of the right to dignity does not merely play out as a matter of public law. Private rights of action against other private parties are also a staple of a robust right to dignity. This “indicates that every individual … should be recognized as having the capacity to assert claims to protect their essential dignity.” These are not new to the American system per se, however, they would have to be slightly retooled so that specific and definite injuries to a person’s dignity be recognized as trigger points that could give rise to actionable conduct. The causes of action that thus would relate to a violation of one’s dignity are defamation, publication of private facts, intrusion into seclusion, misappropriation of the right to publicity, and, quite possibly, copyright and trademark infringement. Broadly speaking, what links all of these rights of action is the nature of the injury that they cause: this can be characterized, through such concepts as reputation, image, privacy, and name, as being all tied to human dignity.

The key difference with the affirmative mandate explored above that is one facet of a positive version of the right to dignity is that here the dignity norm places upon private parties

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217 Eichner, supra note 24, at 1595.
218 Id., at 1617.
219 Even people not generally prone to accepting that state should provide a supporting role in these circumstances do concede that there is some element of state responsibility in this area. See e.g. Mary Ann Case, How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted, 76 CHI.-KENT L. REV. 1753, 1785 (2001) (acknowledging some collective responsibility for child care issues).
220 See Schachter, supra note 15, at 851; see also Hendriks, supra note 216, at 472 (“Dignity … is also sometimes interpreted as imposing duties on individuals towards other members of the community, to ensure that everyone can lead a dignified life.”)
221 For example, in the copyright context, the fair use doctrine is used to determine when someone is entitled to use copyrighted material without seeking permission of the copyright owner. While the fair use doctrine essentially focuses on the economic harms suffered by the copyright owner, it is not difficult to see how dignitary interests can be affected by an improper use of a copyrighted work and thus, under a positive view of dignity rights, these ought to be taken account of in a fair use analysis.
the duty not to violate such interest in others. In other words, the affirmative mandate is translated into a specific code of conduct applicable to the private individual that then can be acted upon by another private party. Roberta Rosenthal Kwall argues for this very notion of dignity. In linking dignitary interests to the action for misappropriation of the right of publicity, Kwall persuasively points out that injuries to human dignity are different to those traditionally associated with violations of privacy (hurt feelings)\(^{222}\) and thus the standard remedies offered to those who have their right to publicity violated are ineffective in addressing the violence done to one’s human dignity.\(^{223}\) Kwall also draws the parallel between dignity rights and defamation by noting that there appears to be “a trend in defamation law to include protection against ‘aspects of personal humiliation and degradation’” that link directly to dignity rights.\(^{224}\) Most importantly, the tort of misappropriation of the right of publicity grants to a person the right of control over one’s image that is an integral part of one’s identity that, in turn, is bound up in an individual’s human dignity.\(^{225}\) Thus to grant control over this image through a private right of action is a corollary to preserving each individual’s right to human dignity.

So what would be the consequences for U.S. law to adopt a positive notion of dignity rights? Fortunately, the answer to this question is not speculative because, as illustrated above, some countries already adopt this reading of dignity rights, while the U.S. incorporates presently some elements of this concept of the right to dignity—in other words, the solution would be not operating in a vacuum. Probably, the best example of this approach in the U.S. is to be found in the case *Goldberg v. Kelly*.\(^{226}\) In *Goldberg*, the U.S. Supreme Court mandated that the government had to provide a pre-termination hearing for welfare recipients under the procedural due process right of the Constitution which, according to the Court, assumes a “basic commitment … to foster the dignity and well-being of all persons within its border.”\(^{227}\) Justice Brennan, the author of the majority opinion, noted that “[p]ublic assistance is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’”\(^{228}\) Although the Supreme Court has since cut back on the holding of *Goldberg*,\(^{229}\) from a normative standpoint, the affirmative mandate on the state as a constitutional right linked to the right to dignity is easy to see. To wit, Justice Brennan in *Goldberg* “was harnessing the power of the moral vision of vindicating human dignity and putting it to work to drive the constitutional engine in the decisions of the Supreme Court.”\(^{230}\) It is therefore the right to dignity that effectuates the procedural due process clause and gives it life.


\(^{223}\) See Kwall, *supra* note 90, at 1346, 1366-67 (giving examples of how dignity is affected by misappropriation of one’s name or image).

\(^{224}\) *Id.*, at 1349 (quoting Bloustein, *supra* note 7, at 993).


\(^{227}\) *Id.*, at 264-65.

\(^{228}\) *Id.*, at 265.

\(^{229}\) For example, the Court has held that the government does not have an affirmative constitutional obligation under the Due Process clause to protect people from private acts of violence). *See DeShaney v. Winnebago Co. Dep’t Soc. Serv.*, 489 U.S. 189 (1989).

In this light, it seems as if states would have to create a program of action based on the objective component of human dignity. Such a program would probably entail such things as biomedical ethics rules, a right to education (up to and including a college degree), a right to universal “womb-to-tomb” health care, a right to welfare, and the abolition of chronic poverty. Indeed, “[t]here can be no doubt that human dignity, freedom and equality, the foundational values of … society, are denied those who have no food, clothing, or shelter.” But dignity as a foundational element, seemingly inviolable, does not mean that its understanding or interpretation be frozen in time. “New insights can influence and even change the evaluation … in terms of human dignity and the principles of a constitutional state.” Thus, this approach to dignity fits squarely with the inherent evolutionary aspect of common law and the principle of a living U.S. Constitution.

One of the major criticisms levied at the right to dignity (in all of its possible iterations but especially in its positivistic vein) is that there seems little to counterbalance it. Thus the accusation is that “human dignity has an absolute effect,” and therefore there is no way for the courts “to balance other legal interests, be they of other individuals or of the community.” Or else it might appear that the elevation of a positive right to dignity to the pinnacle of all rights might have the effect of curtailing or severely limiting other rights held in high esteem in the U.S. legal system such as free speech because “arguments from dignity seem much more plausibly to generate arguments for restricting various kinds of speech than for protecting it.” There is no doubt that this strongest version of the right to dignity will conflict with some well-established rights in the U.S. But this is not unfamiliar to the U.S. legal system: several cases pit important rights one against another such as the religious free exercise right with the equal

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231 This was the goal of the drafters of the Universal Declaration of Human Rights. See Maritain, supra note 69, at 78-79 (referring the “common principles of action” of the UDHR).

232 Some of these precepts were advocated in the Declaration and Program of Action adopted by the Vienna World Conference on Human Rights in 1993. See Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF 157/24 (Pt 1), at 20, art. 25 (1993) (identifying “human dignity” as the foundational cornerstone of human rights and proposing, among other things, that human dignity be promoted through the elimination of poverty). McCrudden lists several other aspects of a positive jurisprudence of dignity including “rights to reputation,” and “the right to control access and use of personal data.” See McCrudden, supra note 29, at 670-72.

233 South Africa v. Grootboom, 10 BHRC 84, ¶23 (2000). It could be said that the mantra of a positive rights view of dignity rights be that the government be tasked to “improve the situation of the lower classes, who had fallen into poverty and starvation, and thus provide a true human existence for everyone.” Wilhelm Eckert, Legal Roots of Human Dignity in German Law, in Kretzmer, supra note 21, at 41, 47 (quoting Ferdinand Lassalle).

234 See Klein, supra note 142, at 149; see also D.M. Davis, Equality: The Majesty of Legoland Jurisprudence, 116 S. Afr. L.J. 398, 413 (1999) (stating that the right to dignity could swallow up all other rights).


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protection right, or the free speech right with the defamation right. Courts are well equipped to deal with this balancing act and there is no reason to believe that this would change with a heightened view of the right to dignity.

The second major criticism is that the right to dignity in this affirmative context is antithetical to the libertarian thrust that is embodied not only in the U.S Constitution, but also in all of U.S. jurisprudence both at the federal and state levels. The evidence of this can be seen both in the vast body of interpretative law that exists vis-à-vis the U.S. Constitution and that rejects that this contains notions of positive rights, but also in traditional common law rules such as that which imposes no liability on someone who had the opportunity to offer help to a person in need but refused to do so. In other words, the communitarian, society-building ethos inherent in the objective right to dignity does not seem to have developed firm roots within the fabric of U.S. law. Generally speaking, this criticism is factually and descriptively accurate, but ignores the normative dimension of the issue. Rather than preemptively shutting the door on the conversation pertaining to dignity rights with the axiomatic “we’ve never done it this way,” it would be more advisable to let the developments in this direction take place organically and then reevaluate their viability. After all, legal experimentation is a staple of U.S. jurisprudence and this would fit squarely within the parameters of past and present U.S. legal rules.

One last criticism involves the claim that a positive right to dignity will fling wide open the courthouse doors to all flimsy and dubious claims that can perceivably, if not improbably, be linked to the right to dignity. The first answer to this is that courts already deal with abusive claims on a daily basis as to other rights and the same process would play out in the context of the right to dignity as well so that ridiculous or farcical claims would be dealt with early and decisively. A second answer would be to observe what has happened in countries that have already embarked on this jurisprudential journey. The German Constitutional Court (with the strongest dignity jurisprudence probably in the world along with South Africa) has had to contend with these kinds of claims and has uniformly rejected them. Thus that court has found that the changing of the title of certain judges, the obligation to attend traffic school, and the requirement to bury the ashes of the dead in a cemetery did not violate the right to dignity. Courts will always be tasked to integrate the abstract concept with concrete representations of the same and with respect to positive dignity rights, have been able to do so without the parade of horribles that critics seem to fear taking place.

Nevertheless, it is true that the right to dignity as a substantive legal right would certainly represent a major change in perspective, at least as it comes to reading the Constitution as merely an array of negative rights. This type of change has already been advocated for some time as commentators have argued for a more affirmative read of constitutional rights. However, as for the second dimension of positive dignity rights, that which grants a private right of action to

\[237\] See e.g. *Harris v. McRae*, 448 U.S. 297, 316 (1980) (“it simply does not follow that a woman’s freedom of choice [to have an abortion] carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”)

\[238\] See *BVerGE* 1, 38 (judges’ title); *BVerfGE* 22, 21 (traffic school); *BVerfGE* 50, 256 (urns).

dignitary injuries, the change, as demonstrated above, would only be marginal. Regardless of how little or much of change the U.S. system would undergo through this kind of recognition of dignitary rights, any change always counsels caution and adopting this view of a right to dignity is something that could only occur through the passage of a somewhat long period of time. Indeed, the abstract solidarity between people expressed by the positive rights approach to dignity “mediated by law, arises only when the principles of justice have penetrated more deeply into the complex of ethical orientations in a given culture.”

Thus, the most probable outcome would be that even if there were a concerted movement towards recognition of an explicit right to dignity, it would most likely take the form of one of the three approaches discussed below.

B. Background Norm – The Negative Rights Approach

The vast majority of rights delineated by the U.S. Constitution are understood as being negative. This concept embodies a non-interference norm whereby the government is required “to abstain from denigrating (rather than requiring governments to intervene on behalf of) human dignity.” In practice what this means is that one arm of the state will take it upon itself to make sure that another arm of the state is not infringing upon those rights to which individuals are deemed entitled. In the U.S., this is how jurisprudence pertaining to its constitutional rights has developed and applies across the board to such mainstays of American rights as equal protection, due process, free speech, and cruel and unusual punishment. A negative rights approach to the right to dignity would add dignitary interests to those rights that the state would be unable to impinge. It would become a de facto background norm and an independent consideration to contend with when a claimant alleges a violation that would impact human dignity.

In speaking of human dignity, Eleanor Roosevelt remarked that it reflected the notion that “every human is worthy of respect,” and thus explains “why human beings have rights to begin with.” This means “human dignity or a similar understanding of universal humanity underlies all human rights.” In other words, the negative rights approach is based on the understanding that human dignity is the source of human rights and hence is anterior or above the state and to which it does not belong conceptually. What follows consequently is that in the right to dignity is embodied the notion that it is beyond the reach of the state. In this guise, the right to dignity becomes a metric against which other rights can be measured. Because as an ideal, dignity is

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241 It is important to note that adopting the positive rights approach to the right to dignity would also most likely result in the adoption of the negative rights approach explained below although the reverse is unlikely to be true. See D. BYLEVALD & R. BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 68 (2001) (stating that because human dignity can be said to underlie most rights and obligations, it naturally follows that the right to dignity must contain both positive strands as well as negative ones).
“clearly accepted as universal,”\(^{245}\) it is reflected in this role as a standard bearer lying just below the surface of enumerated rights.

The main idea behind incorporating the right to dignity as a background norm is the notion that human dignity itself is a quality closely associated to a liberal concept of governance.\(^{246}\) Indeed, dignity has been described as one of “the cardinal principles for which the [U.S.] Constitution stands.”\(^{247}\) In other words, it could be defined as the Constitution’s “tuning fork,” that to which all elements of the orchestra need to be harmonized.\(^{248}\) The notion of giving the right to dignity a negative dimension is thus to give substance to this theoretical underpinning to which numerous commentators and jurists (some on the U.S. Supreme Court) have persistently referred. Therefore, under this reading, what begins as a foundational aspiration (that all people be treated with dignity by their government) is transformed into a basis for justice as a normative goal to effectuate through legal process. The right to dignity thus viewed would be given a constant force that is consciously present in those situations where it is adduced and provide an internally coherent common standard of guidance as an interpretative principle. Consequently, there will be a certain synonymy between dignity and human rights,\(^{249}\) but it is important to stress that this would not merely play out on a constitutional level, but rather, as explained above for the positive rights approach, other rights protected through common law or statute could easily be infused with this dignity component. In sum, and in a semantic irony, the negative right to dignity acts as a suprapositive principle.\(^{250}\)

The practical implications for this application of the right to dignity is, overtime and through the development of legal rules and doctrine, to enunciate some minimal standards of conduct to which the government in the U.S. has to adhere. The granting of this right to the citizenry then provides the not only the moral justification to challenge government behavior that debases, degrades, or humiliates, but the legal imperative to have that behavior curtailed absent extenuating circumstances. This reflects the Kantian notion of human dignity by giving the right to dignity “a very strong negative sense, viz., independence from the determining causes of the sensible world,” that is regarded as a “purely rational” property of being human.\(^{251}\) Thus, a “democratic society, in which respect for the dignity of all men is central, naturally guards

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\(^{245}\) Schachter, supra note 15


\(^{247}\) Trop v. Dulles, 356 U.S. 86, 101-02 (1958) (noting that stripping an individual of his citizenship was “offensive” to this principle); see also Goodman, supra note 24, at 761 (dignity posited as “a value which underlies the Constitution.”)

\(^{248}\) See Mary Ann Glendon, Procter Honoria Respectful: Knowing the Universal Declaration of Human Rights, 73 NOTRE DAME L. REV. 1153, 1172 (1998) (using this metaphor in suggesting that the right to dignity is the ultimate value captured by the Universal Declaration of Human Rights).

\(^{249}\) See gen. e.g. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE (2008) (equating dignity with human rights); MARTHA NUSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006) (same).


against the misuse of the law enforcement process.”252 What is important to note here is that the right to dignity would not be a trump card, but rather an element to be balanced against competing interests that would arise on a case-by-case basis, something that is not foreign to U.S. law.

In fact, the U.S. Supreme Court has deployed the concept of dignitary interests as a background norm on many occasions.253 As noted in Part II above, dignity has been described as the primary focus of the Eighth Amendment inquiry. Thus, the Court has characterized that any punishment being scrutinized under cruel and unusual punishment jurisprudence must comport “with the basic concept of human dignity” that animates the “core” of the Eighth Amendment. This relationship between the amendment and human dignity would be examined in every cruel and unusual punishment case and the court would therefore openly discuss a squaring of the accused state practice with the individual’s dignitary interest. Some cases have intimated at this analysis when the Court was tasked to decide whether, for example, executing the insane constituted a violation of the Eighth Amendment. The Court ruled that the “execution of an insane person simply offends humanity,”254 and that a “person under shadow of death should have the opportunity to make the few choices that remain available,” under those circumstances.255 The court hinged its opinion on the notion that one’s awareness of one’s own surroundings was a necessary component to humane punishment and that the absence of this component negated an individual’s dignitary interest. It can be summarized that, according to the Court, “a cruel punishment is one that treats the offender as though he or she were not a human person with a claim to our concern as fellow persons, but as a mere animal or thing lacking in basic human dignity.”256

The Court has similarly deployed dignity as a background norm in cases presenting other issues as well. As described in detail above prisoner treatment cases exhibit much of the positive rights approach but also include significant negative component that also has dignity as its

253 Because U.S. courts have been grappling with the right to dignity as a background norm for some time now, and because this has been explored in detail in Part II, it is not necessary to illustrate all the examples that show how foreign states and international regimes are doing the same thing. Suffice it to note that many such examples exist, the following being an representative sample: Halpern v. Attorney General, 65 OR 3d 161, ¶79 (2003) (explaining how the negative dignity evaluation should be conducted, to wit, “the assessment of whether a law has the effect of demeaning a claimant’s dignity should be undertaken” from the point of view of “a reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member”) (Canada); State v. Makwanyane, 6 BCLR 665, ¶144 (1995) (the right to dignity in the South African Constitution was “the most important of all human rights, and the source for other personal rights”) (South Africa); Station Film Co. v. Public Council for Film Censorship, 50 PD 661 (1994) (stating that the artistic value of a movie had to balanced against the need to safeguard human dignity) (Israel).
motivating seed.\textsuperscript{257} Search and seizure law also follows this example.\textsuperscript{258} Similarly, “the constitutional foundation underlying the privilege [against self-incrimination embodied by the Fifth Amendment] is the respect a government—state or federal—must accord to the dignity … of its citizens.”\textsuperscript{259} The Court added that physical intimidation was not necessary to trigger a constitutional violation because non-physical threats were “equally destructive of human dignity.”\textsuperscript{260} Straying away from the \textit{Miranda} approach to the Fifth Amendment “can only lead to mischievous abuse of the dignity the Fifth Amendment commands the Government afford its citizens.”\textsuperscript{261} In other words, the ultimate guardian against abuse by the government, i.e., that with which the government cannot interfere, is the right to dignity.\textsuperscript{262}

First Amendment cases probably present the most nuanced version of the negative rights approach when it comes to the right to dignity. According to Ronald Dworkin it is human dignity that is the justification for the negative rights view of free speech.\textsuperscript{263} The Supreme Court has seemingly agreed with him by noting that “the right to live in human dignity” that is a basic guarantee of the U.S. Constitution is a key principle embodied by the First Amendment.\textsuperscript{264} In challenges to free speech it is quite possible that there might be dual dignity interests at play: that of the utterer of the speech and that of the target or targets of that speech. That scenario would be especially true in the realm of the First Amendment being raised as a defense against a defamation suit for example. In such circumstances, the negative right, i.e., the proscription on the government to adversely impact the dignitary interests of a speaker would probably be a tipping point in the analysis and usual favor such speaker.\textsuperscript{265} Nevertheless, not all limitations on speech might trigger a negative analysis of dignitary interests: commercial speech, for example, might seem immune from this kind of framework (although given the \textit{Citizen United} case it is quite difficult to predict how far the Court would construe commercial speech), but certainly any speech that would relate “to the essence of the individual’s right to express … herself” would likely involve some version of “degrading treatment that violates human dignity.”\textsuperscript{266}

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\textsuperscript{258} See Mette Lebech, \textit{What is Human Dignity?}, 1 \textit{MAYNOOTH PHIL. PAPERS} 3, 10 (2004).


\textsuperscript{260} \textit{Id.}, at 457.


\textsuperscript{262} Similarly, racial discrimination has been characterized as a deprivation of personal dignity and thus a violation of the equal protection clause, see \textit{Heart of Atlanta Motel v. U.S.}, 379 U.S. 241, 291 (1965) (Goldberg, J., concurring), as has gender discrimination because the inherent stereotyping involved denigrates the individual’s dignity. \textit{See J.E.B. v. Alabama}, 511 U.S. 127, 142 (1994) (holding that striking potential jurors on the basis of gender was an unconstitutional violation of the Equal Protection Clause).


\textsuperscript{265} Another scenario pitting competing dignitary interests is situations impacting the right to abortion. Here it is more uncertain which side of the equation the right to dignity is more likely to help. \textit{See e.g. Gonzalez v. Carhart}, 127 S. Ct. 1610, 1629 (2007) (where dignity interests operated to curtail the rights of others in the prohibition of certain late-term abortion procedures that were deemed to be constitutional in part out of “respect for the dignity of human life.”)

\textsuperscript{266} David Kretzmer, \textit{Human Dignity in Israeli Jurisprudence}, in \textit{KRETZMER, supra} note 22, at 174.
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What these examples go to show is that the negative treatment of the right to dignity has been present in U.S. law for some time now, particularly in U.S. Supreme Court jurisprudence with respect to a whole of host of different constitutional rights. Thus, the possible criticisms that could come to employing the right to dignity in this way would differ from those illustrated in the section above. Such criticisms would probably take the form of admonishments not to add “new rights” to the constitutional panoply or else exhortations not to embark down a road that is unclear and open to suggestion. The response to the criticisms would be: (1) courts in the U.S. have already referenced the right to dignity enough times so that nothing about developing a specific dignity jurisprudence would be totally “new;” and (2) it is the current state of use of dignity rights that is unclear given the ad hoc nature in which it is being deployed and therefore the proposal for a negative rights approach to dignity rights is merely trying to bring order to this area, something the critics should welcome. Indeed, the decisions illustrated in this section reflect how it is possible for the dignity of humanity to be expressed in its most universal form. Through the operation of law the right to dignity becomes both the right being fostered and protected, as well as the justification for protecting it. It serves to reinforce those rights that we are most familiar with; to provide a grounding root that reaches beyond the state to a realm where rights are considered inherent rather than granted. “The value of legal norms often lies in what a legal system takes for granted, and thus what may stand beyond the immediate purview of political and judicial actors, and other participants in and observers of the system.”

The negative approach to the right to dignity fits neatly into this definition. As aptly and synthetically summarized by a commentator, the negative right to dignity, i.e., its role as a background normative principle of law, is simply the “right to have rights.”

C. Heuristic – The Proxy Approach

The first two ways of approaching a right to dignity within U.S. jurisprudence treat dignitary rights as existing independently of other rights, duties, and responsibilities that are already granted within the legal sphere. Thus, under those approaches, an injury to an individual’s human dignity could, in theory, without affecting another cognizable right, give rise to a cause of action either against a private party or the government (depending, of course, on who caused the injury in the first place). Under the proxy approach to the right to dignity, the invocation of a dignitary interest in a particular circumstance does not impute something independent of another enumerated right, but rather acts as a proxy for that right (be that right related to a liberty or an equality interest for example). In this context, the use of dignity functions as a heuristic—a cognitive device that serves as an aid to solve a complex problem that can act either through conscious application or else from a subconsciously auto-programmed source. Therefore, if the question asked is whether “dignity [is] an independent attribute of personhood, or … a part of personhood to, derived from, and/or a party of autonomy, liberty, equality,” the answer to which the proxy approach responds is “the latter.”

267 Carozza, supra note 77, at 939.
268 See Stinneford, supra note 256, at 592.
269 Resnik & Suk, supra note 67, at 1929; see also McAllister, supra note 198, at 503 (“[c]ertainly, notions of equality and liberty are intimately linked to human dignity.”)
The proxy approach feeds on the natural affinity between human dignity and other rights that are associated with valuing personhood and that, perhaps, are more familiar within U.S. legal culture. This familiarity in turn should elicit more comfort to the actors in the U.S. legal system because the solicitation of dignitary interests would always be subsumed within rights or causes of action that are deeply rooted within U.S. tradition, such as equal protection and due process on the rights side, or defamation and trademark infringement on the rights of action side. Another motivation for the proxy approach is related to the general unease that exists pertain to the right to dignity exhibiting a certain metamorphic character that causes it to take many different shapes in those occasions when it is deployed. Clearly, cultural inputs have in large extent gone into the attempt to better understand the concept of human dignity that has inevitably led to the significant divergence of opinion illustrated in Part II above. Therefore, a solution that lends itself a better assimilation with currently existent U.S. jurisprudence would seem ideal if one accepts the premise of a jurisprudential role for the right to dignity in some form. In this light, the heuristically sensitive approach to the right to dignity might better comport with the traditional understanding of rights as theorized since the very beginning of U.S. legal thought. For example, Thomas Hobbes and John Locke envisioned society as being comprised of autonomous individuals left free to lead their lives to the best of their abilities. It then follows that “[w]hat citizens modeled on this image need to be accorded on account of their dignity is protection of their individual right to liberty and some basis measure of equality.”

A further reason for this approach relates to the fact that certain rights (including the right to dignity) could be motivated by policy concerns that are not easily circumscribed to one specific normative thrust. What this means is that there are inseparable or extremely closely related attributes of dignity that can encompass aspects of equality, autonomy, rationality, liberty, as well as other things. In other words, “[t]he term dignity describes the protection of objectives of dignity and privacy, of respect and trust, of autonomy and non-discrimination.” A multi-faceted paradigmatic norm that interlocks and overlaps with several other values should therefore be treated as part of one of those values whenever the latter are invoked within a specific situation. As extensively quoted above, the South African Constitutional Court has

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271 Eichner, supra note 24, at 1615-1616.

272 See e.g. Centre for Applied Legal Studies, Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 89 (2001) (noting that “freedom of expression … is held up as central to democratic freedom, equality, and dignity”) (emphasis added); see also

273 See Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119, 152 (1989) (comparing justifications for free speech law and characterizing as “closely related” those pertaining to dignity and equality with those concerning imposing limits on the government when state intervention would curtail the autonomy and rationality of an individual).

summarized the essential ethos of the proxy approach to the right to dignity as follows: “dignity … is a justiciable and enforceable right that must be respected and protected … however, where the value of human dignity is offended, the primary … breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality, or the right not to be subjected to slavery, servitude, or forced labour.”

One established right in the U.S. that can integrate specific references to the right to dignity is the right to liberty engraved into the U.S. Constitution as well as all state constitutions. “Admittedly, liberty and dignity are ancient bedfellows,” so it should come as no surprise that these two legal rights have been placed side by side in a variety of different circumstances. First, the concepts of dignity and liberty have been linked together by the Supreme Court in its ongoing interpretations of various constitutional provisions. Thus, the Court has characterized the “overriding function of the Fourth Amendment [to be to] protect personal privacy and dignity against unwarranted intrusion by the State.” Similarly, within the context of abortion, the Court has stated “[t]he authority to make such traumatic and yet empowering decision is an element of basic human dignity,” and thus fundamental to the privacy rights and liberty interests of every individual. Related to this concept, and as a continuing discourse within its substantive due process jurisprudence, when it comes to same-sex sexual relationships, the Court deemed “that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” As such, the government could not reach this act of intimacy that was integral to the liberty of the individual. Such coupling of privacy and dignity within the context of liberty strongly suggests if not an identity between the two, then at least a very strong correlation that is sufficiently bonded not to warrant a separate discussion of the two.

Even outside the sphere of constitutional rights, the combination of liberty and dignity carries significant weight. For example, within the context of the privacy tort of false light, an infringement (being the untrue communication of a fact about a person) impacts an individual’s ability to control of his or her own identity that translates into a dignitary interest. Similarly, when an infraction occurs that rises to the level of a misappropriation of the right to publicity (be it of name or likeness), the injury is “to the sense of personal dignity,” but the effect of this injury is to curtail the victim’s personal liberty. Daniel Solove has characterized the policy rationale behind protecting privacy in such a way as being related to personhood that is a “unified and coherent concept protecting against conduct that is ‘demeaning to individuality,’ ‘an

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276 Fyfe, supra note 5, at 11.
277 Schmerber v. California, 384 U.S. 757, 767 (1966); see also Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (discussing “the degree of intrusiveness upon personal privacy and indeed even upon personal dignity” of certain government searches); Winston v. Lee, 470 U.S. 753, 761-62 (1985) (phrasing the inquiry under the Fourth Amendment as necessitating and analysis of “the extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity.”)
278 See Planned Parenthood v. Casey, 505 U.S. 833, 916, 920 (1992) (Stevens, J., concurring in part and dissenting in part) (also linking dignity to liberty by stating that “[p]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled.”)
280 See Bloustein, supra note 7, at 991-93.
281 Id., at 988.
affront to personal dignity,’ or an ‘assault on human personality.’”282 Evidently, the facility that U.S. law has when it comes to discussing liberty interests includes corollary discussions of human dignity in way that is organic and complementary to both concepts.

Another established right in the U.S. that fits naturally with the right to dignity is the right of equality that encompasses the right to be free from invidious discrimination. “[H]uman dignity provides the basis for equal human rights.”283 Thus, “equality goes hand in hand with acknowledging the freedom and dignity of every individual,”284 because dignity has become “a quintessentially personal trait of all human beings and a marker of equality.”285 It therefore follows from these policy axioms that any jurisprudence of dignity should have as its foundational points that human dignity implies “a social order [that] reflects recognition of the equality of humankind.”286 In the context of equality, human dignity operates as a leveling factor—that characteristic that every individual shares with everybody else and that functions as the universal unifying element upon which the mandate not to discriminate rests. This normative basis for creating a level playing field for all individuals is thus the primary operative motivator for all anti-discrimination law and it should be explicitly acknowledged in cases when the issue is raised.287

In that vein, the major equal protection cases within U.S. law, such as Brown v. Board of Education and Heart of Atlanta v. U.S., can be seen as an affirmation of the dignity of the individual whereby African-American school children and patrons of public accommodations could not have the essence of their personhood stripped away with government imprimatur or, at the minimum, government acquiescence. It was the inherent indignity of having to be placed in substandard schools or being turned away at the inn that motivated the equal protection analysis in both of these seminal cases.288 Not all U.S. law is cryptic in its tying the right to equal treatment with the right to dignity. In fact, some U.S. law expressly codifies the notion of human dignity as equal protection. The constitutions of Montana,289 Louisiana,290 Illinois,291 and Puerto

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283 Bedau, supra note 33, at 153.
284 Martha Minow, Equality and the Bill of Rights, in THE CONSTITUTION OF RIGHTS, supra note 33, at 128 (quoting Elizabeth Cady Stanton).
285 Resnik & Suk, supra note 67, at 1293.
286 Eberle, supra note 12, at 976.
288 William Parent makes the same thesis: “I am suggesting that in these segregation cases members of our highest court displayed a genuine concern for the value of human dignity.” Parent, supra note 122, at 59.
289 “Individual Dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.” MONT. CONST. art. II, sec. 4.
290 “Right to Individual Dignity. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs or affiliations.” LA. CONST. art. I, sec. 3.
291 “Individual Dignity. To promote individual dignity, communications that portray criminality,
Rico, all in slight different ways, link their own equal protection clauses (or a sub-section of their equal protection clause) to dignity.

While U.S. courts have been more reticent to openly draw the parallel between equality and dignity, other courts have been less reticent to point out the connection. The Inter-American Court of Human Rights has stated that the “notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual,” and that therefore not all acts of unequal treatment will per force rise to a viable anti-discrimination claim because “not all differences in treatment are in themselves offensive to human dignity.” Thus, to the Inter-American Court of Human Rights, the violation of the right to dignity is the test for equal treatment under law. Similarly, the right to dignity informs the equality jurisprudence of the Constitutional Court of South Africa. And in Canada, the Supreme Court has referred to the right to dignity as prohibiting stereotyping and prejudice when interpreting its own equal protection clause. What appears evident is that the dignity heuristic is extremely active in equality jurisprudence all over the world proving that the coexistence between these concepts is a happy and productive one.

There are of course legitimate criticisms that can be lobbed at treating the right to dignity as merely a subservient right fully ensconced within other rights. The first line of criticism is that the specific injuries protected by enshrining an independent right to dignity might not always overlap with those already protected under other rights and that therefore there might be violations of human dignity that could inflict considerable harm that might go unprotected. Put in the context of certain rights, for example the right to privacy, “there are ways to offend dignity and personality that have nothing to do with privacy.” Similarly, it can be argued both from a semantic and a logical vantage point that dignity is not equality, and equality is not dignity.

depriavty or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.” I.L.L. CONST. art. 1, sec. 20. The intersection between equality, dignity, and the prohibition of hate speech is interesting. It is quite probable that the proscriptions on hate speech rely on an intersection of protecting human dignity and equality seeing that the categories of people protected from such vilification are those traditionally associated with anti-discrimination safeguards such as race and gender. See Mary J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320, 2323 (1989) (tying the targeting of hate speech to anti-discrimination norms); Daniel Statman, Two Concepts of Dignity, 24 IUNAI MISHPAT 541, 577 (2001) (linking dignity and gender discrimination).

292 The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas.” PUERTO RICO CONST. art. 11, sec. 1.
While both of those sentiments have an attractive simplicity about them, a little inquiry under the surface reveals them to be somewhat lacking. As to the separate injury argument, while there are ways that can offend dignity that do not offend privacy, because privacy in many respects is itself subsumed within the concept of liberty, those actions that might not offend privacy but do offend dignity, now might be brought within the purview of an injury to liberty. And if these same actions do not offend liberty either, a valid argument could then be presented that they should not constitute imputable actions in the first place. The reply to the second argument is that while it is clearly true that dignity and equality are not coterminous as a matter of vocabulary, they do overlap significantly and it is that overlap that constitutes the basis for the proxy approach and not a search for perfect congruence.

Another line of attack posits that if the right to dignity is simply viewed as another way of expressing another right, then its invocation adds very little if anything to the analysis and thus does not help in interpreting the underlying act for which it is being invoked as a proxy. Some critics bolster this theoretical attack with examples drawn from actual jurisprudence. Thus, in the case of the German Constitutional Court’s references to dignitary interests, it has been noted that when a violation of human dignity was alleged it always “went along with the alleged violation of other individual rights so that access to the Court never depended on the qualification of human dignity as an individual right.” From the opposite angle of this same line of thought, Robert Post has a foundational critique of the proxy approach to the use of dignity, at least vis-à-vis the linkage between human dignity and equality. He argues that anti-discrimination law should not be envisaged as being concerned with the protection of human dignity, but rather as a legal enterprise akin to a norm entrepreneur that is designed to change a harmful social order that has oppressed traditionally disadvantaged categories of people. Ronald Dworkin takes a similar view but expands this notion to caution against the conflation of interests, rights, and values because of the inevitable confusion that he predicts would occur as a result of such conflation.

These criticisms suffer slightly because of the artificial edifice they are attempting to construct. Even though it would be comfortable to think about each legal doctrine as nicely compartmentalized in a separate box, all only to be opened one by one as need arises, the reality is that the factual scenarios that will give rise to claims in which dignity interests will be a factor rarely exhibit such a neat environment. Indeed, the proxy approach to the right to dignity tries to resolve one of the main criticisms found about human dignity, i.e., that it is too difficult to define to make it of any use within the confines of a jurisprudential system. Because of the difficulties of narrowing down a precise meaning to the right to dignity outside of a factual setting, the proxy

298 See Joel Feinberg, The Nature and Value of Rights, J. Value Inquiry 243, 252 (1970) (“what is called ‘human dignity’ may simply be the recognizable capacity to assert claims.”)

299 Walter, surpa note 199, at 27.


301 See gen. DWORKIN, supra note 83; see also Fyfe, supra note 5, at 11, 12, 15, 18 (lamenting the Canadian Supreme Court’s use of dignity as a marker without giving the term any “independent meaning from its surrounding words;” caustically declaring that “[l]iberty needs neither Kant nor dignity;” decrying the conflation of dignity with liberty, and concluding that the weaving of dignity into the fabric of other rights are “well-meaning sentiments, but they have no concrete relation to people’s lives.”)
approach might seem as the ideal method to integrate dignitary rights within a legal framework because the linkage between dignity and something else will always be made within the context of a specific factual scenario. Indeed, using dignity as a heuristic gives effect to the Kantian notion of dignity because to the philosopher, the concept of human dignity was subsumed within his concept of autonomy that is closely related to our modern concept of liberty. In sum, the proxy approach would allow U.S. courts to express through the invocation of the right to dignity a certain moral viewpoint, centered upon the fundamental notions of freedom and equality that have been and continue to be, the main focal points of individual rights discourse in the U.S.

D. Hortatory Language – The Expressive Approach

As seen above, the concept of the role of human dignity within modern democratic governance has attracted a wide variety of adjectives, many ranging from the superlative to the grandiose. Indeed, it is not rare to have prominent commentators refer to the dignity of the individual as being the core element, the basic building block, on which all of society (legal and not) rests. Thus, human dignity is said to function as an all-encompassing pervasive value that forms the fabric of modern democracy, even though it is not necessarily explained what that actually means. In this framework, the right to dignity is widely invoked as both a legal ground and a moral basis for redress of certain violations by the government or by private individuals. But reliance on human dignity as one of our most basic human values is not merely confined the legal texts and judicial pronouncements. The political class often links policy goals to dignitary interests in pitching or touting legislative initiatives. These statements, and others that pertain to the immutability of dignity or its presumed high value in the minds and hearts of all people, probably stem from the fact that they are comfortably general and they are also quite difficult both to disagree with and to prove wrong. The effect of this is the impression that “[m]oralists of various sorts use the term[[]] ‘human dignity’ … often, but frequently these words have little more than rhetorical effect.”

It is upon this “rhetorical effect” to which the fourth possible approach to the right to dignity depends. Legal statements of all shapes and sizes are intended to have the effect of inducing compliance (if legislative) or of redressing past wrongdoing (if judicial)—thus there is a clear practical consequence of what gets said within these legal structures. However, there is another level of communication that is served through observation of legal pronouncements: that such statements represent the societal representation of either the descriptive (what is) or the normative (what should be). In other words, statements of law have an inherent worth that is

302 See Bernard Shultziner, Human Dignity—Function and Meanings, 3(3) GLOBAL JURIST TOPICS 5, at n. 24 (2003) (describing that the use of the right to dignity reflects “a whole moral world view.”)
303 See e.g. Martti Koskenniemi, Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization, 8 THEORETICAL INQUIRIES L. 9, 18-19 (2003) (referring to this as a “constitutional mindset.”)
305 See e.g. William J. Clinton, President’s Radio Address (June 24, 2000), available at http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=0161423397+38+1+0&WAISaction=retrieve (“our older Americans live out their lives with quality and in dignity.”)
detachable from the instrumental purposes that they serve—they are expressive. Thus, all the representations of the right to dignity that have been detailed in this Article are not merely resolving a case, or setting forth a legislative, constitutional, or international imperative, but they provide something more—a statement of collective aspirations to be sought by all participating members of society. Nowhere is this more clearly seen than in human rights declarations that are templates that proclaim human rights and as a result might have more value in what they say rather than what they do or what they are supposed to do.\textsuperscript{307} This expressive approach is the main reason why these declarations presuppose “that the assignment of the right has meaning without provision for a judicial office to adjudicate its violation.”\textsuperscript{308} It is also the reason why the most important of all rights are left in their most abstract and non-specific form. The lack of specificity is in many instances a self-reinforcing value—as if the persistent repetition of a certain theme inscribes “in the very nature of reality” the obvious truth of what is being repeated.\textsuperscript{309}

The clearest example of the expressive approach to the right to dignity occurs in the preamble of the UDHR, whose very title goes a long way in emphasizing the expressive import wanted by those who drafted it. Its rhetoric is all-inclusive and mentions its application to “all members of the human family,” who are, according to the document, endowed with “inherent dignity.”\textsuperscript{310} Even though the declaration was passed as a non-binding resolution and therefore contains neither actionable conduct nor proscriptions on government behavior, the expressive language is meant to represent a “crystallized consensus”\textsuperscript{311} of the international community that indicates its intended hierarchy of values of which dignity is one of the highest. While it is true that “a proclamation of a right is not the fulfillment of a right … [and] may or may not be an initial step toward the fulfillment of the rights listed,”\textsuperscript{312} it is nevertheless an important signal that will, over the course of time, first affect the reputation of those that disregard its exhortations, and later operate a change in the behavior in consonance with its desired goals.

One of the facets of the expressive approach to the right to dignity is that the hortatory language can be found both in legislative materials and in judicial opinions that interpret provisions which themselves might not have a significant expressive element. As to the first category, hortatory clauses are not a novelty in U.S. jurisprudence; both the U.S. Constitution (see the “well-regulated militia” language of the Second Amendment) and state constitutions (see the dignity clause of the Illinois Constitution)\textsuperscript{313} have them. As to the second category, there are

\textsuperscript{307} There are those who disagree with this statement. See \textbf{DAVID HOLLENBACH, CLAIMS IN CONFLICT: RETRIEVING AND RENEWING THE CATHOLIC HUMAN RIGHTS TRADITION} 4 (1979) (claiming that the value of these sorts of legal instruments is extremely limited because of their inability to integrate with the particular history and culture of a state being affected).


\textsuperscript{310} \textit{See UDHR}, preamble.

\textsuperscript{311} \textit{See Aggelen, supra} note 171, at 143.

\textsuperscript{312} \textbf{HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY} 15-16 (1980).

\textsuperscript{313} \textit{See AIDA v. Time Warner Entm’t Co.}, 772 N.E.2d 953, 957, 961 (Ill. 2002) (construing the dignity clause of the Illinois Constitution to be “purely hortatory” and thus comprising neither a cause of action nor a curtailment of government conduct).
numerous judicial pronouncements that have occurred concerning the right to dignity that stem from private rights of action or constitutional clauses that do not have a purely linguistically inherent expressive content. Nevertheless the right to dignity is invoked to signal the weight to be given the pronouncement being delivered by the court in those circumstances. Thus, for example, in the Eighth Amendment context the right to dignity language appears when the Court wants to make the moorings of its cruel and unusual punishment jurisprudence abundantly clear. The power of the rhetoric is such that the underlining statement that the very purpose of the Eighth Amendment “is nothing less than the dignity of man” comes from Trop v. Dulles, the very case that enunciated over 50 years ago the modern Eighth Amendment interpretative standard and that has been adhered to ever since. But these rhetorical flourishes are not only confined to the Eighth Amendment context and reveal themselves at regular intervals whenever the judge deploying them seeks to emphasize the importance of his point. It bears repeating, Justice Murphy’s exhortation in his dissent in Yamashita that “[w]hile peoples in other lands may not share our beliefs as to … the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others.” To Justice Murphy the rhetorical resort to “the dignity of the individual” signaled something quintessentially American that served as reminder to the majority that they were abandoning this cardinal principle of U.S. law.

Matthias Mahlmann warns us not to be seduced by the attractive pathos of dignity rights because of its malleability that causes normative danger when it is deployed. Similarly, Justice Scalia has chimed in by declaring that the use of the concept of human dignity is merely “a collection of adjectives that simply decorate a value judgment and conceal a political choice.” The thrust of these criticisms of the expressive approach to the use of dignity rights is that a reference to human dignity really constitutes an empty rhetorical shell because it is so subject to the vagaries of local history and culture. Indeed, even some of those people who drafted portions of the UDHR considered that the dignity references added nothing of substance to the document and thus were to be considered nothing more than just words. In other words, the right to dignity is used to disguise an absence of a plausible reason or theoretical basis for which it would be justified to obtain the result being delivered by the deliberative body (legislative, judicial, or otherwise). Thus, the right to dignity obfuscates the decision rule rather than clarifying it and while it may convey some expressive messages, it actually does not add anything to the legal norms being litigated. The sum of this line of criticism is that such an unhinged use of the right to dignity is ill advised because even though it is just meant to be rhetoric, it is nonetheless subject to considerable manipulation by the unscrupulous jurist given the inherent vagueness and ambiguity of the term. Judges engaging in some sort of deception

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314 See e.g. Roper v. Simmons, 543 U.S. 551, 587 (O'Connor, J., dissenting) (referring to “this Nation’s evolving standards of human dignity” within the context of the Eighth Amendment).
315 See Yamashita, 327 U.S. at 29, 41 (Murphy J., dissenting from the denial of a petition for certiorari).
316 See Mahlmann, supra note 13, at 11 (footnote omitted).
318 See Fyfe, supra note 5, at 9 (“Dignity appears to have become at times an empty but rhetorically powerful vessel into which any variety of normative ingredients can be placed.”) Fyfe also refers to the Canadian Supreme Court’s references to the right to dignity as an “awkward medley of quotes.” Id.
therefore are said to be deploying the right to dignity merely as a rhetorical ruse to disguise some other policy goal.

A corollary to the criticism described in the preceding paragraph is that even though an expressive use of dignity can be empty from a legal standpoint, added danger is encountered because particular rhetorical choices have a profound impact and over the course of time (that sometimes could be rather short), they might change perception and thus perpetrate unintended consequences. This means that dignity as an expressive tool risks functioning as a 50 ton weight placed on scale designed to calibrate ounces: it destroys the machinery. 320 Arthur Schopenhauer’s critique of Kantian dignity resembles in many ways this sort of critique of the expressive approach to dignity rights. Schopenhauer lamented the weightless nature of the expression “human dignity” that, once uttered, “became the shibboleth of all perplexed and empty-headed moralists” because “behind that imposing formula they concealed their lack … of any basis at all which was possessed of an intelligible meaning.” 321 From this perspective “[d]ignity is indeed a feeling … but … law is a discipline of reason [and] [t]he problem with feelings is that no one can argue against them.” 322

A lot of what has been identified as criticism of the expressive approach to the right to dignity can also be termed as strength. Thus, the very use of the right to dignity in a judicial opinion will highlight the importance the court is giving to what is being discussed and therefore have all the more normative power rather than be viewed as empty words. In fact, many of the past uses of the right to dignity as an interpretative standard cannot be dismissed as mere “throwaway” lines, 323 but rather should be seen as a deliberately calculated deployment of the vocabulary designed to bring attention to the concept being discussed. Indeed, the expressive approach captures an “added dimension” of the problem being discussed in terms of human dignity that might not exist in other cases and that possibly could be underappreciated should the hortatory language be omitted. 324 In this way, the reference to the right to dignity helps judges provide context in cases that might present significant interpretative or semantic difficulties.

It is absolutely true that any expressive model requires an added attention to detail in the language being used because terminology choices can easily influence the outcome, and in the case of the right to dignity, this idea is enhanced even further because of the power that the term elicits. In fact, even general claims that are couched within the right to dignity can gain adherents following a persuasive use of the concept. Therefore, the right to dignity’s “centrality and attractiveness … may be … its malleability rather than the tightness of its logic” that

322 Donna Greschner, Does Law Advance the Cause of Equality, 27 QUEEN’S L.J. 299, 313 (2001); see also Helga Kuhse, Is there a Tension between Autonomy and Dignity?, in PETER KEMP EDS., BIOETHICS AND BIOLAW VOLUME II: FOUR ETHICAL PRINCIPLES 61, 74 (2000) (“[T]he notion of human dignity plays a very dubious role in contemporary bioethical discourse [because] it has a tendency to stifle argument and debate and encourages the drawing of moral boundaries in the wrong places.”)
323 See Hasson, supra note 165, at 84 (arguing that the rhetorical use of the right to dignity served important purposes).
324 See Resnik & Suk, supra note 67, at 1938.
reinforces “the rhetorical value or even the constitutional attractiveness of the claims or projections” to which it pertains. But this shapelessness while a possible disadvantage under the first two approaches explained above, and possibly even for the third approach, can be transformed into an asset if what one is seeking is merely an effective rhetorical deployment.

History has repeatedly handed down the lesson that the power of the word is almost supreme, both positively and negatively, and this is especially true within the law. What all commentators on the appropriate use of the right to dignity have similarly taught is that whether one agrees or disagrees with the notion that dignity rights should play an important law in modern jurisprudence, invoking the right to dignity in a case or other legal instrument makes a powerful statement. Law relies on language to communicate its dictates and decisions. Indeed, the Anglo-American tradition of law does not merely rely on cold soulless pronouncements of decisions that could easily be spat out by a computer, but rather is very much dependent on textual constructions that have a distinct literary, if not elegant, quality. If one believes that there is a point to text, language, and phraseology in law, then the expressive approach fits squarely within this view.

IV. CONCLUSION

So which approach to pick? All four approaches presented in Part III above contain attractive characteristics, and all four have certain shortfalls that can be addressed (as done above) but that, even when addressed, still do not make for a perfect solution. The key to the answer should probably be found in the ease in which each proposed approach could be integrated within already existing U.S. jurisprudence. Such a guide for the answer is premised on the notion not only to give the right to dignity its maximum realistic effect upon U.S. law, but also on the practical reality that law rarely proceeds with major jolts, but rather is more adept to the cautious baby-step method of change. While a detailed research agenda should be structured to answer the question posed (whose scope exceeds that of this Article), preliminarily, my choice would rest on the proxy approach.

The positive rights approach, while probably the most robust and impactful use of the right to dignity, is relatively uncommon in the U.S. and its implementation would necessitate the most radical rethink not only of dignity rights, but also of constitutional rights and rights of action in general. The negative rights approach is rather tempting if one believes in the propriety of protecting dignitary interests however the problem would be that the ubiquity of dignity would render its impact almost meaningless. The expressive approach in many ways is subsumed within each of the other three approaches because one cannot detach the hortatory value from the use of the term without actually using the term, so it will always play a role regardless of which

325 See Gordon Weisstub, Honor, Dignity, and the Framing of Multiculturalist Values, in KRETZMER, supra note 22, at 265.
326 This is the main problem with the thesis presented by Maxine Goodman. She lists a litany of doctrines that would be impacted by having dignity as an underlying norm, and by the end of that list, one is left wondering if there is anything left. See Goodman, supra note 24, at 753 (stating that “human dignity … underlies our constitutional rights to privacy, liberty, protection against unreasonable search and seizure, protection against cruel and unusual punishment, and other express rights and guarantees,” and giving examples).
approach is chosen. Nevertheless the weakness with having an approach that is solely expressive is just that—in a strictly legal sense it has little impact and in the non-legal sense it would be difficult to predict what its influence eventually would be. The proxy approach is that with which the use of dignity best fits within presently framed constitutional, statutory, and common law standards. It requires the least amount of adjustment with current doctrine and gives the right to dignity its appropriate role within the constellation of rights that are already protected in the U.S. A question could be raised as to why choose one approach at all, and instead proceed with the use of human dignity under whichever approach appears best suited for the particular circumstance at hand. The problem with such a methodology is that it would lead to the present situation: an ad hoc, erratic, “muddled and inconsistent” approach filled with minefields and pitfalls that cannot be identified in advance. In other words, that kind of solution would actually be the problem itself.

Christopher McCrudden counsels that “we should not underestimate” the importance of the right to dignity. This importance suggests that there are both pragmatic and normative reasons for welcoming the right to dignity into the U.S. jurisprudential family. From the pragmatic side, as demonstrated in part II above, courts in the U.S. have already employed the right to dignity in many guises, but they are doing so randomly and unpredictably. One of the most important tasks when dealing with the right to dignity is to work out “its practical implications, in different concrete contexts.” The adoption of a sound normative theory to guide the use of dignitary interests will lead to more consistent and practical rules of law that are more likely to appear principled, and thus have an increased probability of being respected and followed. From the normative side, adoption of a consistent theory for the utilization of the right to human dignity is an acknowledgment that such right “is the affirmation of the moral principle of democracy; the principle that the human being and his dignity constitute the raison d’être and justification of political organization.” A plausible theoretical grounding for dignity rights also recognizes that dignitary interests, being referenced over and over again by courts and theorists alike, must mean something in U.S. law. Therefore, “even where there is not a … consensus on some aspect of the minimum requirements of human dignity, there may be good reason to affirm its validity.” Probably the paramount reason to so affirm is also the simplest: that the right to dignity best reflects more than any other right the essence of being human.

327 See Fyfe, supra note 5, at 2.
328 See McCrudden, supra note 29, at 679.
332 Carozza, supra note 77, at 937.