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The U.S. Supreme Court and constitutional courts around the world regularly use the term human dignity when deciding cases about freedom of speech, reproductive rights, racial equality, gay marriage, and bioethics. Judges and scholars treat dignity as an important legal value, but they usually do not explain what it means and often imply that it has one obvious core meaning. A close review of constitutional decisions, however, demonstrates that courts do not have a singular conception of dignity, but rather different conceptions based on how they balance individual rights with the demands of social policy and community values. Using the insights of political theory and philosophy, this Article identifies three concepts of dignity used by constitutional courts and demonstrates how these concepts are fundamentally different in ways that matter for constitutional law. In contentious cases, the concepts of dignity will often conflict. If constitutional courts continue to rely on human dignity, judges must choose between different understandings of dignity. This Article provides the groundwork for making these choices and defending a concept of dignity consistent with American constitutional traditions.

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INTRODUCTION

A person who wants to wear a jacket that says "F— the draft" can do so because of the individual dignity at the heart of the First Amendment.[1] A dwarf cannot make his living by being thrown for sport because to allow this spectacle offends the dignity of the dwarf and the community.[2] Gay couples have the constitutional right to marry, not just enter into civil unions, because exclusion from the institution of marriage fails to recognize the dignity of gay couples.[3] Different concepts of dignity played a role in each of these decisions and hundreds more around the world in the adjudication of civil rights and liberties. In the last Term alone, the Supreme Court referred to dignity in a number of cases touching on diverse issues such as gun rights under the Second Amendment, free speech and campaign finance rules, and the death penalty.[4]

As a fundamental precept of human rights and basic liberties, dignity really took hold after the Universal Declaration of Human Rights stated: "All human beings are born free and equal in dignity and rights."[5] But even in the Universal Declaration, the start of international efforts to protect human dignity, the drafters disagreed about the meaning of human dignity.[6]

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1 *See* Cohen v. California, 403 U.S. 15, 24 (1971).

2 *See* Wackenheim v. France, CE Ass., Oct. 27, 1995, Rec. Lebon 372, *aff'd* Commc'n No. 854/1999, Human Rights Comm., July 8–26, 2002, CCPR/C/75/D/854/1999 (2002).

3 *See In re* Marriage Cases, 183 P.3d 384, 400 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 466 (Conn. 2008).

4 *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (addressing dignity in the Second Amendment context); Citizens United v. FEC, 130 S. Ct. 876 (2010) (discussing whether restrictions on corporate expenditures impacted the dignity of free expression); Wellons v. Hall, 130 S. Ct. 727 (2010) (per curiam) (noting that judicial proceedings relating to a death penalty case must be conducted with "dignity and respect").

5 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. I (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

6 The world community chose dignity in the Universal Declaration of Human Rights precisely because the term was open enough to hedge controversial judgments between different cultural values. *See infra* Part I; *see also* MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 78 (Amy Gutmann ed. 2001) (recognizing that the Universal Declaration of Human Rights left a "[p]ragmatic silence on ultimate questions," refusing to provide any single justification for human rights and explaining that there is a "deliberate silence at the heart of human rights culture"); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L

Today, widespread adoption of dignity in modern constitutions and human rights documents has not led to any greater consensus—rather different conceptions of dignity remain. The fact that "dignity" is an important yet slippery concept has become commonplace. Relatively underappreciated, however, particularly in the legal literature,[7] is how the various concepts of dignity reflect different underlying conceptions of individual rights within a community. The differences are more than philosophical or semantic disagreements—different conceptions of dignity have important practical consequences for the understanding and adjudication of rights.

When courts rely upon dignity, they implicitly appeal to a particular understanding of dignity—judges invoke dignity to add *something*, even if that something is not always clear. Constitutional courts around the world, including the U.S. Supreme Court, regularly use the term dignity or human dignity *as if it matters*. Since these opinions decide important issues and serve as precedents for future cases, the meaning of dignity matters because it is an interpretive principle used to understand rights and liberties. Figuring out the "something" denoted by dignity is the project of this Article.

Following in the spirit of Isaiah Berlin's famous essay *Two Concepts of Liberty*,[8] this Article identifies three concepts of dignity used by constitutional courts and examines their foundations and applications.[9] As a general concept, dignity poses a fundamental question: what type of respect can a person demand from others and from the state? The

L. 655, 678 (2008) ("A theory of human rights was a necessary starting point for the enterprise that was being embarked upon. Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing.").

7 There is, however, a philosophical literature about the different means and values of dignity. *See, e.g.*, ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY (Dennis J. Schmidt trans., 1986); GABRIEL MARCEL, THE EXISTENTIAL BACKGROUND OF HUMAN DIGNITY (1963); B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971). The philosophical analysis of dignity has been especially relevant in the area of bioethics. *See infra* notes 186–87 and accompanying text. R

8 *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122–23, 131–32 (1969) (describing the philosophical origins and practical consequences of "negative" and "positive" freedom).

9 I provide a taxonomy of dignity based on how constitutional courts have used the term. These various legal uses reflect different philosophical understandings of the individual and his relationship to public authority and the community. Other scholars have proposed categories of dignity, which have been helpful for my understanding of this concept. *See* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 11 (2006); McCrudden, *supra* note 6, at 723–24; Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* ZUR AUTONOMIE DES INDIVIDUUMS 241, 271 (Dieter Simon & Manfred Weiss eds., 2000). R

three conceptions identified here each provide a different answer to what generates dignity or respect in the individual or in groups of individuals. By looking at specific cases, this Article will identify and demonstrate how constitutional courts have used different conceptions of dignity when adjudicating individual rights. Separating out and explaining the various meanings of dignity reveal their fundamental differences and should provide greater transparency about what courts are doing when they invoke dignity.

First, in its most universal and open sense, dignity focuses on the inherent worth of each individual.[10] Such dignity exists merely by virtue of a person's humanity and does not depend on intelligence, morality, or social status. Intrinsic dignity is a presumption of human equality—each person is born with the same quantum of dignity. Moreover, inherent human dignity does not establish an external measure for what counts as being dignified or worthy of respect. Rather, such dignity inheres in all individuals without appraisal by any other standard. Inherent dignity focuses on human potential—not the exercise of such potential. It does not judge whether a person's reasoning, choices or criteria for self-worth are "dignified." Accordingly, inherent dignity is pluralistic and remains neutral about different conceptions of the good life. In constitutional law decisions, particularly in the United States, intrinsic dignity is reflected in decisions about freedom from interference by the state in areas such as freedom of speech, privacy, and sexual relationships. This dignity encompasses the liberal notion of negative freedom—of creating a space for individual choice. On this view, restraint or removal of state interference maximizes dignity because it leaves the individual free to exercise his autonomy in whatever fashion he should choose consistent with the rights and freedoms of others.

Second, dignity can express and serve as the grounds for enforcing various substantive values.[11] Unlike intrinsic dignity, substantive forms of dignity require *living in a certain way*. Dignity may require behaving, for example, with self-control, courage, or modesty. This dignity embodies a particular view of what constitutes the good life for man, what makes human life flourish for the individual as well as the community. Accordingly, such dignity may take a number of different forms. For example, a government policy may enforce a particular conception of dignity on individuals, a conception that accords with the community's view of what is dignified. Dignity in this sense depends on specific ideals of appropriateness and deems a person

10 *See infra* Part II.

11 *See infra* Part III.

worthy or dignified to the extent that he conforms to such ideals. Constitutional courts have often upheld paternalistic policies that prevent individuals from choosing a vocation or a way of life that might be "undignified" in the view of the social and political community. For example, in France some cities banned the spectacle of dwarf throwing as detrimental to public morality and dignity, despite the willingness of some dwarves to earn their living this way.[12] Similarly, the French government has defended a ban on the burqa on the grounds that such a ban furthers the dignity of Muslim women, despite the fact that some Muslim women choose to wear the burqa as an expression of their faith.[13] Positive or substantive conceptions of dignity are also associated with social-welfare rights or protection by the state from poverty and violence. In this understanding, dignity demands that the government provide the basic conditions of well-being. Each of these positive or substantive forms of dignity requires living according to standards of rationality, morality, or material comfort that are shaped by the community. This dignity is not intrinsic or inherent in the individual, because it can be gained or lost and depends on whether a person measures up to a socially defined standard of dignity.

Finally, constitutional courts often associate dignity with recognition and respect.[14] This dignity is rooted in a conception of the self as constituted by the broader community—a person's identity and worth depend on his relationship to society. Accordingly, respect for a person's dignity requires recognizing and validating individuals *in their particularity*. This recognition requires individuals to demonstrate respect and concern for each other. What matters here is not just having a space of non-interference for one's inherent individual dignity or of living life with a particular dignity, but rather the *attitude* possessed by others and the state. Such dignity requires interpersonal respect, the respect of one's fellow citizens, as can be seen in laws against defamation and hate speech. The idea is that individuals need protection from insults and hateful speech in order to preserve their self-image as well as their standing in the community. Furthermore, this dignity requires the state adopt policies that express the equal worth of all individuals and their life choices, such as requiring gay marriage, not just legally equivalent civil unions, because of the

12 *See* Wackenheim v. France, CE Ass., Oct. 27, 1995, Rec. Lebon 372.

13 *See* Doreen Carvajal, *Sarkozy Backs Drive to Eliminate the Burqa*, N.Y. TIMES, June 23, 2009, at A4 ("'The issue of the burqa is not a religious issue. It is a question of freedom and of women's dignity,' Mr. Sarkozy said.").

14 *See infra* Part IV.

expressive and symbolic importance of marriage.[15] Recognition dignity focuses on the unique and subjective feelings of self-worth possessed by each individual and group.

It is perhaps in this last category where the modern concept of dignity does the most work. Dignity as recognition reflects a new political demand, not for freedom or liberty or a minimum standard of living, but rather for respect, sometimes referred to as third-generation "solidarity rights." Such rights are protected by modern human rights documents and some national constitutions. The demand for recognition, for the dignity of recognition, requires protection against the symbolic, expressive harms of policies that fail to respect the worth of each individual and group. In the first two concepts, dignity often overlaps with familiar political rights and ideals, but the dignity of recognition as a constitutional right is a new value for a new time.

These three concepts of dignity reflect different ways of thinking about what constitutes dignity as a legal matter. But the boundaries between these types of dignity are not impermeable, and constitutional courts will often use "dignity" in overlapping ways. Constitutional courts usually refer to dignity without elaborating its essential meaning and therefore overlook the very different meanings that dignity can have even within the context of particular legal disputes. In a single opinion a court may rely on multiple meanings of dignity, which sometimes will point in different directions or emphasize very different values.[16] A careful reading allows us to identify the different meanings of dignity used in constitutional decisions. Understanding these different concepts of dignity can thus help courts, lawyers, and scholars use the term dignity going forward. The lofty appeal of dignity suggests that it will not leave our jurisprudence any time soon, but may instead grow and develop in a common law fashion.[17] If the

15 *See infra* note 315 and accompanying text. R

16 For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court relies on several different concepts of dignity. *See id.* at 567, 574–75; *infra* notes 117–21 and accompanying text (discussing dignity as autonomy); *infra* notes 304–07 and accompanying text (discussing dignity as recognition). R

17 As a descriptive matter, American constitutional law sometimes develops this way. I leave aside the question of whether this process is normatively desirable. *Compare* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (discussing the advantages of a common law approach to constitutional interpretation), *with* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007) (criticizing the idea that "common law constitutionalism is a repository of latent wisdom, and enables judges to cope with the limits of human reason").

Court sometimes treats the term dignity as part of our public reason,[18] then we would do well to consider the power and meaning of the word in particular cases dealing with issues such as free speech, race and gender equality, privacy, religious freedom, criminal rights, and bioethics.

Despite the ubiquity and importance of human dignity in relation to individual rights and liberties, American lawyers are sometimes surprised to hear that dignity is a legal concept used by the U.S. Supreme Court as well as constitutional courts around the world. Skeptics may ask whether a philosophical concept such as dignity stands for anything on its own. Indeed, as the examples in this Article demonstrate, courts referring to dignity often couple it with other more familiar concepts, such as choice, autonomy, community, well-being, or respect. One might surmise from this that dignity simply amplifies these other terms or indicates such values are "good" by saying it furthers a person's dignity to have choice, autonomy, community, well-being, or respect. Dignity may seem like a placeholder at times, and I admit to my own doubt about whether dignity can be a useful legal term.[19] Such doubts and skepticism, however, have not prevented judges from invoking human dignity with increasing frequency to denote something of value or to indicate what should be considered of value. To understand the importance of this development in constitutional law, we must decode the different meanings of dignity.

Some have suggested that dignity poses no greater confusion than terms like "liberty" or "equality." I would disagree. Lawyers and judges have familiarity with different meanings of liberty and equality, values that are a part of our tradition, even if they remain contested ideals. By contrast, dignity presents a relatively new legal term; it has no firm footing and no established range of legal meanings.

Dignity may be appealing as a legal concept precisely because it obscures difficult choices about what we value and the type of freedom and rights we wish to protect. The obfuscation may allow judges to use dignity with the hope that it can mean a number of different things and that perhaps there need not be a tradeoff between the dignity of individual liberty and autonomy and the dignity of social belonging and equality. But the choices and tradeoffs between values are part of the human condition. These values do not become com-

18 *See* Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1465 (2006) ("[N]ormative legal theory should employ the resources of 'public legal reason,' understood as legal reasons that are accessible by all reasonable citizens.").

19 *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 208 (2008).

patible by calling them all dignity. The different understandings of dignity may sometimes run in the same direction, but they will more often conflict and require a choice by the Court, particularly in difficult or contentious cases.

Identifying the distinct meanings of dignity has particular relevance because dignity is often pushed as a big idea, one that can synthesize competing views or transcend political differences. Many scholars who focus on dignity treat it as a singular and universal grounding for human rights.[20] Some scholars suggest that dignity can synthesize different values.[21] Others have argued that human dignity reflects a value of natural law that can be applied across jurisdictions.[22] In each of these contexts, dignity is a concept for

20 *See* Louis Henkin, *Religion, Religions, and Human Rights*, 26 J. RELIGIOUS ETHICS 229, 231 (1998) ("The human rights idea and ideology begin with an *ur* value or principle (derived perhaps from Immanuel Kant), the principle of *human dignity*. Human rights discourse has rooted itself entirely in human dignity and finds its complete justification in that idea."); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under* Casey/Carhart, 117 YALE L.J. 1694, 1798 (2008) ("Dignity is a value that bridges communities. It is a value to which opponents and proponents of the abortion right are committed, in politics and in law. It is a value that connects cases concerning abortion to other bodies of constitutional law, and connects decisions concerned with liberty to decisions concerned with equality. It is a value that guides interpretation of other national constitutions and of human rights law."); Jeremy Waldron, *The Dignity of Groups* 2008 CILSA 66, 68 (S. Afr.) (discussing dignity as a "*foundational* right"); Siegfried Wiessner, *Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman*, 34 YALE J. INT'L L. 525, 530 (2009) (describing the works of Michael Reisman as "dedicated to the goals of a world order of human dignity").

21 *See, e.g.*, DWORKIN, *supra* note 9, at 11 ("I do not accept this supposed conflict between equality and liberty; I think instead that political communities must find an understanding of each of these virtues that shows them as compatible, indeed that shows each as an aspect of the other. That is my ambition for the two principles of human dignity as well." (footnote omitted)); STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 207 (2008) ("[L]iberty and dignity are not opposing values but integral elements of a unified conception of the person as a free being of intrinsic worth—a conception that forms the basis of a liberal democratic society. It follows that there is no inherent conflict between free speech and human dignity."). R

22 *See, e.g.*, Paolo G. Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global* Ius Commune *of Human Rights*, 81 TEX. L. REV. 1031, 1082 (2003) ("[T]he tendency of courts in the death penalty cases . . . to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of naturalist foundations at work. Despite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable.").

hedgehogs,[23] who find in dignity a defining ideal for modern human rights law.

But this Article will demonstrate that in constitutional adjudication there is no singular conception of dignity. We have different conceptions of dignity based on how we choose to think about the individual and his relationship to society, different conceptions of dignity based on other political and social values. Conflicts between various dignities inevitably mirror fundamental tensions in political theory. As Berlin demonstrated in the context of liberty, it remains a fact of human existence that goods are incommensurate.[24] Human values cannot be measured in the currency of dignity, or for that matter, liberty or equality or any other metric. Moreover, the goods human beings value are often irreconcilable. Dignity cannot create a synthesis of goods that essentially represent different things, further different goals, and reflect different values and conceptions of the good life.

Thus, moving forward with dignity as a legal concept requires choices.[25] This Article takes the first step, by identifying the choices that exist between different conceptions of dignity. Constitutional courts around the world have largely chosen various substantive dignities or the dignity of recognition—concepts related to familiar continental legal values centered on the community.[26] These strains exist in American constitutional law, but they do not reflect the primary tradition of individualism and freedom from interference of intrinsic human dignity. Yet the Supreme Court has sometimes borrowed other concepts of dignity from abroad. Articulating the three concepts of dignity can serve as part of the groundwork for choosing and defending a concept of dignity that is consistent with American constitutional traditions.

23 The dichotomy between foxes and hedgehogs is taken from a fragment of the Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing." ISAIAH BERLIN, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History*, *in* THE PROPER STUDY OF MANKIND 436, 436 (Farrar, Straus & Giroux 1998) (1953) (internal quotation marks omitted); *see also* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011) (arguing for the integration of values and against value pluralism or skepticism).

24 *See* BERLIN, *supra* note 8, at 167–69. R

25 *See id.* at 169 ("If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.").

26 I discuss this issue at greater length in a previous article. *See generally* Rao, *supra* note 19. R

I. The Origins of the Legal Concept of Dignity

Human dignity has long existed as a moral, philosophical, and religious concept. It has biblical roots in the Judeo-Christian tradition as well as in Stoic anthropology and the Roman concept of *dignitas*.[27] Other scholars have discussed this history of ideas[28] and I will not recount this genealogy here. Before proceeding to discuss the conceptions of dignity found in constitutional courts, it might be helpful to consider some of the *legal* origins of the term "dignity" in human rights and constitutional law.

My brief account draws upon Christopher McCrudden's helpful explanation of the historical development of dignity as a legal concept.[29] Dignity first appeared in national constitutions at the beginning of the twentieth century in Mexico, Weimar Germany, Finland, Portugal, Ireland, and Cuba.[30] The use of dignity was sporadic during this time. After World War II, the concept of human dignity really took hold when it appeared in the Preamble to the Charter of the United Nations[31] and then in five different provisions of the Universal Declaration of Human Rights.[32] After the Declaration, many national constitutions drafted in the post–World War II era included the term dignity. In particular, the German Basic Law protected dignity in Article 1[33] and treated dignity as an overarching value of the German constitutional order. This served as an important model for constitutions in Eastern Europe and other countries around the world. As McCrudden notes, "There appears to have been an injection of the concept of

27 *See* Hubert Cancik, *'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107*, *in* The Concept of Dignity in Human Rights Discourse 19, 19 (David Kretzmer & Eckart Klein eds., 2002).

28 *See generally id.* at 19–39 (tracing the concept of dignity of man from stoic anthropology through to the twentieth century); McCrudden, *supra* note 6, at 656–63. R

29 *See* McCrudden, *supra* note 6, at 664. R

30 *See id.*

31 *See* U.N. Charter pmbl. ("We the Peoples of the United Nations determined . . . to reaffirm faith . . . in the dignity and worth of the human person . . . .").

32 *See* Universal Declaration of Human Rights, *supra* note 5, pmbl., arts. 1, 22, 23; *see also* Mary Ann Glendon, A World Made New 173–74 (2001) ("With its emphasis on dignity, and its insistence on the link between freedom and solidarity, the document epitomized the spirit of the prolific constitution and treaty-making activity that followed World War II."). R

33 *See* Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, art. I (Ger.), *translated in* Arthur Chaskalson, *Human Dignity as a Constitutional Value*, *in* The Concept of Dignity in Human Rights Discourse, *supra* note 27, at 133, 136 ("The dignity of man shall be inviolable. To respect and protect it shall be the duty of all State authority."). R

dignity throughout the world at that time. . . . [T]he concept was so much in the political ether, as it were, that it tended to crop up all over the place."[34]

The Universal Declaration signaled the widespread international recognition of the importance of human dignity. Today, references to dignity often point back to the Universal Declaration. Accordingly, the drafting history of the Universal Declaration provides important lessons about the different meanings and values of human dignity brought to the table by the United Nations delegates. The history reveals how human dignity was chosen precisely because it could serve as a placeholder for many different and often competing values.

In drafting the Universal Declaration and trying to assemble a list of essential human rights, countries from a variety of perspectives found it difficult to agree on a theoretical basis for human rights. Delegates disagreed about whether the foundations should rest on religion, natural rights, liberal individualism, or communitarian ideals. Unable to agree on foundational principles, the delegates focused on particular practices that should be prohibited. Therefore, "[d]ignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing. Its utility was to enable those participating in the debate to insert their own theory."[35] Natural or theological foundations were excluded from the Universal Declaration because delegates could not reconcile their disagreements about these terms. Dignity remained, however, because it was a term that people of disparate beliefs and backgrounds could agree about, even if they failed to agree on its meaning.[36] Dignity meant something good, yet was plastic enough to satisfy a wide range of delegates.

Various conceptions of dignity existed during the time of the drafting of the Universal Declaration, and each one can be seen as influential in later developments of dignity as a legal concept. Jacques Maritain, a French Catholic philosopher, was a primary influence in

34 McCrudden, *supra* note 6, at 673. R

35 *Id.* at 678. John Humphrey, one of the primary drafters, objected to the insertion of philosophical terms such as dignity, which he considered inappropriate for the Universal Declaration of Human Rights and a source of "needless controversy and useless debate." JOHN P. HUMPHREY, HUMAN RIGHTS & THE UNITED NATIONS 44 (1984).

36 *See* GLENDON, *supra* note 32, at 147; *see also Drafting Committee of the Commission on Human Rights*, 1947 Y.B. on H.R. 484, U.N. Doc. E/CN.4/21 (providing a detailed drafting history); JACQUES MARITAIN, MAN AND THE STATE 77 (1988) (explaining that at a meeting of the French National Commission of UNESCO, proponents of such different ideologies could agree on a list of rights, because "we agree on these rights, *providing we are not asked why.* With the 'why,' the dispute begins."). R

bringing the concept of human dignity into international politics.[37] In *Man and the State*, Maritain argued that human dignity pertained not to liberal individualism, but rather to a communitarian view of the general good of society.[38] Facing skepticism about the use of dignity in the Universal Declaration, Eleanor Roosevelt explained that the Human Rights Commission carefully considered the word and included it "in order to emphasize that every human being is worthy of respect."[39] Rene Cassin, the French delegate who likely inserted the word "dignity" into Article 1 of the Declaration, explained that he had wanted to refute the horrors of Nazi Germany and stress "the fundamental principle of the unity of the human race."[40] Use of the term dignity thus captured some intuition about what was worthy of respect in each person—a "universal" value, but one with different meanings in different societies.[41]

With the Universal Declaration's emphasis on "dignity," it became an internationally recognized legal term of value, even if the precise meaning of dignity remained unspecified. The term acquired the imprimatur of the international community and continues to be an important concept in human rights adjudication.[42] Modern constitutions have also adopted human dignity in a variety of forms. Some treat human dignity as a fundamental right, as a paramount value to

37 *See* McCrudden, *supra* note 6, at 662. R

38 *See* MARITAIN, *supra* note 36, at 107. R

39 GLENDON, *supra* note 32, at 146. R

40 JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 38 (1999) (internal quotation marks omitted).

41 A similar debate occurred during the drafting of the German Basic Law. Initial drafts included reference to the dignity of man "founded upon eternal rights with which every person is endowed by nature." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 300 (2d ed. 1997) (internal quotation marks omitted). After disputes about the natural or God-given nature of such rights, the drafters agreed on: "The dignity of man is inviolable." *Id.* at 301 (internal quotation marks omitted). "The framers were thus successful in refusing to identify the concept of human dignity with a particular philosophical or religious school of thought." *Id.*; *see also* Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, *in* HUMAN DIGNITY 39, 62 (Rubin Gotesky & Ervin Laszlo eds., 1970) ("[H]uman dignity seems to be one of the few common values in our world of philosophical pluralism. But while our philosophies seem to agree on this conclusion, they display no agreement about its reasons.").

42 For example, the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179, provides that, in settling disputes, the court shall apply law from such sources as treaties and customary law. *Id.* art. 38.1. James Griffin notes that some legal scholars add to that list "considerations of humanity (e.g. especially basic principles that appear in the preambles to conventions, prominent among which would be 'the dignity of the human person')." JAMES GRIFFIN, ON HUMAN RIGHTS 205 (2008).

be respected, or as an essential component of other civil liberties and socioeconomic rights. In countries such as the United States, France, and Canada, where dignity does not appear in constitutional documents, constitutional courts have not hesitated to use the term in cases dealing with individual rights and liberties. Its introduction into the Universal Declaration served as a starting point for filtering the idea into domestic constitutional law.

The use of dignity has been far from consistent. The concepts of dignity in constitutional decisions do not seem to depend on the text of international documents or national constitutions, perhaps because rights documents that include dignity usually fail to specify its meaning or range of applications. Given a lofty, but unspecified value, constitutional courts work out the meaning of dignity case by case.

Protections for human dignity as a constitutional matter began as an abstraction with widespread agreement. But significant conflict about what dignity requires often emerges in the context of specific legal disputes about the protection and scope of individual rights. This Article now turns to identifying three different concepts of dignity, examining how they are used by constitutional courts, and demonstrating how such concepts are frequently at odds.

II. INHERENT DIGNITY

In its most fundamental and basic form, dignity attaches to the intrinsic worth of each individual by virtue of being human. This Part explains the concept of inherent human dignity and demonstrates through a number of examples how constitutional courts have linked inherent dignity to the protection of individual autonomy and negative liberties.

A. Dignity as Intrinsic Human Worth

Of the various conceptions of dignity, the dignity that arises from one's humanity is the most universal and open understanding of the term. This dignity indicates that worth and regard arise in each individual simply by virtue of being human. This stripped-down dignity does not confer any status or social standing—but simply identifies the individual as the bearer of human dignity. Human dignity "refers to the minimum dignity which belongs to every human being qua human. It does not admit of any degrees. It is equal for all humans. It cannot be gained or lost."[43] This form of dignity belongs to all individuals, regardless of their actual intelligence, achievement, capability,

43 Spiegelberg, *supra* note 41, at 56. R

or morality. As Alan Gewirth explains, this dignity "signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human. This is a necessary, not a contingent, feature of all humans . . . ."[44] This conception of dignity focuses on the individual and finds worth simply in being human.[45]

Intrinsic dignity reflects the idea that personhood requires a certain degree of respect.[46] The sources of this dignity vary. For example, it has roots in classical Greek and Roman thought. In *Antigone*, Sophocles's Chorus famously extolled the wonders of man.[47] Cicero's stoic conception of man reflected a dignity that derives from man's reason, a capacity he enjoys in contrast to other living things.[48] The Judeo-Christian tradition reflects these classical views and emphasizes the "godlike" nature of man who is made in the image of God.[49]

44 Alan Gewirth, *Human Dignity as the Basis of Rights*, *in* THE CONSTITUTION OF RIGHTS 10, 12 (Michael J. Meyer & William A. Parent eds., 1992); *see also* A.I. Melden, *Dignity, Worth, and Rights*, *in* THE CONSTITUTION OF RIGHTS, *supra*, at 29, 31 (describing Kant's understanding of dignity as "respect of our rational nature . . . that necessarily all of us *have*"); Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM 25, 41 (Amy Gutmann ed., 1994) ("The politics of equal dignity is based on the idea that all humans are equally worthy of respect. . . . For Kant, . . . what commanded respect in us was our status as rational agents, capable of directing our lives through principles.").

45 Kant explained, "[M]an regarded as a person . . . possesses, in other words, a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world." IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 41 (James W. Ellington trans., Hackett Publ'g Co., Inc. 3d ed. 1993) (1785). Similarly, Alan Gewirth explains that this universal dignity creates an obligation of "necessary respect" that "consists in an affirmative, rationally grounded recognition of and regard for a status that all human beings have by virtue of their inherent dignity." Gewirth, *supra* note 44, at 17. This form of "recognition" must be distinguished from the desire for recognition itself. *See infra* Part IV. R

46 *See* Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38 (1977) (discussing "recognition respect" as the type of respect given to a person by virtue of being human).

47 Sophocles, *Antigone* (Elizabeth Wyckoff trans.), *in* 2 THE COMPLETE GREEK TRAGEDIES 159, 170 (David Grene & Richmond Lattimore eds., Univ. of Chi. Press 1959) (c. 441 B.C.E.).

48 *See* Cancik, *supra* note 27, at 21. R

49 *See* Giovanni Bognetti, *The Conception of Human Dignity in European and US Constitutionalism*, *in* EUROPEAN AND US CONSTITUTIONALISM 85, 89 (Georg Nolte ed., 2005); *see also* Being Human 569 (Leon Kass ed., 2004) (explaining that in the Book of Genesis, God gives Noah the laws and according "to the Noahide code, every human life is equally to be requited, regardless of a person's special merit or social standing. Moreover, all human beings are equally charged with the duty of exacting justice for homicide").

Each person possesses dignity by virtue of his relation to the divine.[50]

As Renaissance thinker Pico della Mirandola explained, man's glory came from being created by God and being given the capacity to be anything he should choose. Pico explained that God said to Adam:

> All other things have a limited and fixed nature prescribed and bounded by our laws. You, with no limit or no bound, may choose for yourself the limits and bounds of your nature. We have placed you at the world's center so that you may survey everything else in the world. We have made you neither of heavenly nor of earthly stuff, neither mortal nor immortal, so that with free choice and dignity, you may fashion yourself into whatever form you choose.[51]

Pico's lofty conception rested on an understanding of man's unique place in God's creation.

David Hume similarly considered some of the unique capacities that give dignity to man,

> a creature, whose thoughts are not limited by any narrow bounds, either of place or time; who carries his researches into the most distant regions of this globe, and beyond this globe, to the planets

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In the House Report explaining the inclusion of "under God" in the Pledge of Allegiance in 1954, the Judiciary Committee explained:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge . . . would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual."

H.R. REP. No. 83-1693, at 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

50 Modern Catholic teachings frequently reflect themes of inherent human dignity, particularly in the context of protecting fetuses from abortion or opposing the death penalty. *See, e.g.*, Pope Benedict XVI, Encyclical Letter *Caritas in Veritate* para. 29 (June 29, 2009), *available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html ("God is *the guarantor of man's true development*, inasmuch as, having created him in his image, he also establishes the transcendent dignity of men and women . . . ."). Jewish leaders have also invoked human dignity in the context of contemporary problems. *See, e.g.*, JONATHAN SACKS, THE DIGNITY OF DIFFERENCE 195 (2002) ("The ultimate value we should be concerned to maximize is human dignity . . . .").

51 GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 7 (A. Robert Caponigri trans., Regnery Co. 1956) (1486). Pico thought this unique capacity for self-creation was the source of man's dignity, not simply his intelligence, closeness to God, or his mastery over other creatures. *See id.* at 8.

> and heavenly bodies; looks backward to consider the first origin, at least, the history of human race; casts his eye forward to see the influence of his actions upon posterity.[52]

These disparate thinkers connect the inherent dignity of man to his distinctly human qualities, illustrated by comparing man with other animals and distinguishing man as the highest of God's creatures.

Our human capabilities are many and complex, and so there is no agreement about what precisely constitutes our dignity. Francis Fukuyama has said that there is a "Factor X" that gives us our dignity and it

> cannot be reduced to the possession of moral choice, or reason, or language, or sociability, or sentience, or emotions, or consciousness, or any other quality that has been put forth as a ground for human dignity. It is all of these qualities coming together in a human whole that make up Factor X.[53]

Inherent dignity stems not from one particular quality, but rather the complex of factors that makes us uniquely human.

While inherent dignity may be complex and multifaceted, it has often been linked to man's capacity for rational thinking and self-awareness, the quality that distinguishes him from other animals. The idea of rationality and autonomy as the grounding of human dignity is often traced to Kant.[54] For instance, Kant connects dignity to being a self-legislating individual, and so "autonomy is the ground of the dignity of human nature and of every rational nature."[55] Kant also explained that dignity results from the self-consciousness that distin-

52 DAVID HUME, *Of the Dignity or Meanness of Human Nature*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY 80, 82 (Eugene F. Miller ed., Liberty Fund, Inc. rev. ed, 1987) (1758).

53 FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE 171 (2002).

54 A number of modern scholars trace this idea to Kant. *See, e.g.*, EDWARD J. EBERLE, DIGNITY AND LIBERTY 10 n.1 (2002); Gewirth, *supra* note 44, at 11; Melden, *supra* note 44, at 29. The regular attribution of this idea to Kant, however, is not without criticism. *See, e.g.*, McCrudden, *supra* note 6, at 659 (noting that Kant's conception of dignity is "notoriously contested territory"); Jeremy Waldron, *Dignity, Rank, and Rights*, *in* 29 THE TANNER LECTURES ON HUMAN VALUES (Suzan Young ed., forthcoming 2010), *available at* http://ssrn.com/abstract=1461220 (discussing the complicated nature of Kantian dignity). I do not take a position on these philosophical disputes, but simply observe the common attribution to Kant of the idea of dignity as rational autonomy. R R R

55 KANT, *supra* note 45, at 41. Such dignity inheres in the individual even if he cannot exercise this rationality because of some impediment. *See, e.g.*, Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 RATIO JURIS 173, 191 (2008) ("[P]ossession of full moral worth follows upon being a person (a distinct R

guishes humans from other beings.[56] Kant's categorical imperative expresses the universal ideal that each person is an end in himself and not the means to an end.[57] This imperative leads to a duty "to acknowledge, in a practical way, the dignity of humanity in every other man."[58]

Some have found the rationalistic Kantian account of dignity to be lacking,[59] but rationality is just one expression of the individualism behind inherent dignity. More generally, inherent dignity relates to human agency—the capacity to make choices and pursue one's conception of the good life.[60] Dignity as agency can have universal, or at least widespread, appeal because it does not require a specific concept of dignity.[61] Inherent dignity focuses on human *capacities*—the capacity for distinctly human traits such as individuality, rationality, autonomy, and self-respect. Inherent dignity does not, however, focus on the exercise of these capacities. It does not judge whether a person's reasoning, choices, or criteria for self-worth are "dignified."

Inherent dignity has (at least) two essential requirements that emerge from these different formulations. *First*, it is a presumption of

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substance with a rational nature) even though persons are unequal in many respects.").

56 *See* IMMANUEL KANT, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 9 (Hans H. Rudnick ed., Victor Lyle Dowdell trans., S. Ill. Univ. Press 1978) (1798) ("The fact that man is aware of an ego-concept raises him infinitely above all other creatures living on earth. Because of this, he is a person . . . ."); *see also* Robert E. Goodin, *The Political Theories of Choice and Dignity*, 18 AM. PHIL. Q. 91, 97 (1981) (explaining that the principle of dignity reflects "a fundamental axiom in our individualistic ethical system"); Spiegelberg, *supra* note 41, at 62 ("Saying 'I' to oneself may be the expression of an act of 'choosing oneself' and confronting the world into which one finds oneself born." (citation omitted)). R

57 *See* KANT, *supra* note 45, at 25 ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."). R

58 *Id.* at 41. The concept is also connected to the Kantian idea that man has no "price"—his worth does not have a particular value, but rather he bears an absolute dignity without relative valuation to anyone else. *Id.*

59 *See, e.g.*, LEON R. KASS, LIFE, LIBERTY AND THE DEFENSE OF DIGNITY 17 (2002) ("[T]he dignity of rational choice pays no respect at all to the dignity we have through our loves and longings—central aspects of human life understood as a grown togetherness of body and soul. Not all of human dignity consists in reason or freedom.").

60 *See* GRIFFIN, *supra* note 42, at 44 (discussing a conception of agency in the context of human rights). R

61 *See* IGNATIEFF, *supra* note 6, at 164–65 ("My suggestion was to link dignity to agency, on the assumption that cultures could then agree that what matters is the right of people to construe dignity as they wish, not the content they give to it. Dignity as agency is thus the most plural, the most open definition of the word I can think of."). R

human equality that each person has the same quantum of dignity by virtue of his humanity (whatever the grounding of such humanity may be). As such, it applies universally across all cultures and peoples. *Second*, inherent human dignity is not measured by an external goal of what counts as being dignified or worthy of respect. Rather, such dignity inheres in all individuals and expresses a universal quality of people everywhere. As a logical consequence, inherent dignity remains neutral between different conceptions of the good life—it recognizes and allows different human goals and aspirations. This is primarily a liberal, individualistic conception of dignity that depends on human agency or the ability to choose a good life, not any particular choice between good lives.[62] Because dignity belongs to every individual, no matter how depraved or irrational, it does not depend on moral judgments about how particular individuals live.

Inherent human dignity differs in important ways from other conceptions of dignity. For instance, inherent dignity must be distinguished from substantive conceptions of dignity that require living in a certain way.[63] Substantive conceptions of dignity supersede the equal, universal quality of inherent human dignity, with particular, socially defined ideals of dignity. Attempts to evaluate or judge a person's dignity are inconsistent with the idea of inherent human dignity. Similarly, inherent dignity is not concerned with a person's subjective mental state about whether he feels dignified.[64] Because this dignity does not depend on the good opinion of others or the community, it does not require policies to enforce how one is *respected*.[65] The next

62 Charles Taylor explains,

> [T]his [liberal] view understands human dignity to consist largely in autonomy, that is, in the ability of each person to determine for himself or herself a view of the good life. Dignity is associated less with any particular understanding of the good life . . . than with the power to consider and espouse for oneself some view or other.

Taylor, *supra* note 44, at 57. Similarly, Ronald Dworkin supports a form of equality that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life." Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978). R

63 *See infra* Part III.

64 *Compare* Lee & George, *supra* note 55, at 174 ("Something may harm one's *sense of* dignity without damaging or compromising one's real dignity."), *with* CHARLES TAYLOR, *What's Wrong with Negative Liberty*, *in* PHILOSOPHY AND THE HUMAN SCIENCES 211, 228 (1985) ("Freedom cannot just be the absence of external obstacles, for there may also be internal ones. And nor may the internal obstacles be just confined to those that the subject identifies as such, so that he is the final arbiter; for he may be profoundly mistaken about his purposes and about what he wants to repudiate."). R

65 *See infra* Part IV.

subpart will examine how concepts of inherent dignity have been translated into constitutional rights.

B. Inherent Dignity and Negative Liberty

Philosophers and theologians locate man's intrinsic dignity in his humanity, his myriad capacities for reason and self-awareness, and his ability to contemplate beauty, history, and science. Judges and lawyers, however, do not usually take up such lofty contemplations about man's higher nature. Constitutional courts sometimes rely upon intrinsic human dignity, but they do so in a legal context. Courts rarely focus on the meaning of dignity. Instead, they are concerned with what is required by human dignity—what types of rights, freedoms, or entitlements may flow from "dignity" as a legal concept.

Most international human rights documents have affirmed a view of inherent human dignity. For example, the Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights."[66] This is straightforward—each person is born with dignity. It does not develop over time or depend on a person's behavior, morality, wealth, social standing, race, or religion. Similarly, the Covenant on Civil and Political Rights requires states to recognize "the inherent dignity and . . . the equal and inalienable rights of all members of the human family."[67] The Covenant also states that "rights derive from the inherent dignity of the human person."[68] These documents focus on inherent human dignity and indicate "a connection between human dignity and human rights as well as setting out their universal nature: that both are possessed by all human beings."[69] Similarly, modern constitutions that consider dignity often explicitly or implicitly appeal to a notion of inherent human dignity.[70]

A commitment in international covenants and national constitutions to inherent dignity does not answer the question of how states and other individuals must respect inherent human dignity. It leaves

66 Universal Declaration of Human Rights, *supra* note 5, art. 1. R

67 International Covenant on Civil and Political Rights pmbl., Dec. 19, 1966, 999 U.N.T.S. 171.

68 *Id.*

69 PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW 107 (2009); *cf.* Jeremy Rabkin, *What We Can Learn About Human Dignity from International Law*, 27 HARV. J.L. & PUB. POL'Y 145, 165 (2003) (criticizing human rights documents like the Universal Declaration because they fail to provide any "real constraint on the prerogatives of human dignity").

70 *See, e.g.*, S. AFR. CONST., 1996, § 10 ("Everyone has inherent dignity . . . .").

open the question of what is required by such intrinsic dignity.[71] Identifying the specific rights that should follow from the fact of inherent human dignity poses difficult questions of political theory that are beyond the scope of this Article.[72]

Nonetheless, we can observe that inherent dignity appears in international human rights documents and modern constitutions primarily in connection with individual rights. Consider the documents cited above—nearly all of the provisions referring to dignity appear in the context of "dignity and rights." As discussed, dignity often serves as a foundation for asserting the equal human rights of individuals. The emergence of dignity in the 1940s focused on the universal rights of mankind—rights not confined to any particular culture or society.

The earliest "first-generation" rights stemming from inherent dignity relate to negative liberty. The scope and application of such rights are subject to dispute, but these basic liberties serve as the foundation for human rights. These rights and the dignity that accompanies them stem from a robust conception of individual agency.[73] Constitutional courts frequently invoke this type of dignity alongside negative liberties.[74] Dignity in this context supports individual autonomy and freedom from state interference. The basic idea is that a person's dignity is best respected or enabled when he can pursue his own ends in his own way.

Particularly in the United States, courts have associated human dignity with the classical liberal idea of freedom from interference—"the area within which a man can act unobstructed by others."[75] As John Stuart Mill explained, "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."[76] This freedom encompasses first-generation rights such as

71 *See generally* Darwall, *supra* note 46, at 38 ("[W]hat [respect] requires as appropriate is not a matter of general agreement, for this is just the question of what our moral obligations or duties to other persons consist in."). R

72 Identifying inherent human dignity may be simply the starting point for a discussion about the moral and political obligations we have to each other. For a helpful discussion of some of these themes, see GRIFFIN, *supra* note 42, at 192–93, describing a list of rights that emerges from his account of personhood as human agency. R

73 *See id.* at 152 ("To adopt the personhood account of human rights is to adopt normative agency as the interpretation of the 'the dignity of the human person' when that phrase is used of the ground of human rights.").

74 *See infra* Part II.C.

75 BERLIN, *supra* note 8, at 122. R

76 JOHN STUART MILL, ON LIBERTY 12 (Elizabeth Rapaport ed., Hackett Publ'g Co., Inc. 1978) (1859). The area of negative freedom may be subject to certain constraints of public authority both to promote security or other social ends, but "there

rights to life and property, freedom of speech and expression, freedom of religion, freedom from arbitrary arrest and detention, and the like.

Individual liberty and freedom from interference emphasize the primacy of the individual, a being who chooses his own life.[77] When courts invoke dignity in the context of holding off the government, they are invoking the idea that dignity rests in individual agency, the ability to choose without state interference.[78]

In constitutional decisions, dignity as agency usually pits the individual against the state—individual human dignity stakes a claim against relevant state interests. By contrast, other forms of human dignity often require choosing between the dignity of one person and another or between individual dignity and some socially defined concept of dignity. Individual rights associated with inherent dignity may yield in any particular case to state interests, but the dignity interests are on the side of the individual, as the examples below demonstrate.[79]

When courts refer to dignity in the context of protecting negative liberties, they highlight the human agency of intrinsic human dignity. The dignity of being left alone reflects the two requirements for

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ought to exist a certain minimum area of personal freedom which must on no account be violated." BERLIN, *supra* note 8, at 124. R

77 John Stuart Mill explained:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. . . . In the part which merely concerns himself, his independence is, of right, absolute.

MILL, *supra* note 76, at 9. R

78 Michael Ignatieff connects dignity to individual human agency, which serves as a grounding and justification for human rights: "There seems no way around the individuality of dignity, however socially defined it may be." IGNATIEFF, *supra* note 6, at 166; *see also id.* at 165 (identifying the broad applicability and appeal of this concept across cultures). R

This view may be contrasted with socially defined or group-based theories of dignity. *See* Waldron, *supra* note 20, at 76 ("The dignity of a group—such as it is—may depend on how it serves the dignity of individuals."). R

79 In some contexts, the Supreme Court has recognized the dignity of government entities or states, and this dignity derived from sovereignty may sometimes trump the claims of individuals. *See, e.g.*, Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923 (2003) (identifying a "turn to dignity as a justification for or as an explanation of state power").

intrinsic dignity described above. First, it assumes equal and universal human dignity. Regardless of social position or economic wealth, each person is entitled to the same degree of negative liberty. Being left alone by the state to enjoy one's freedom respects the dignity that each person possesses by allowing space to pursue the distinctly human goals of self-fulfillment and flourishing. Second, negative liberty does not use an external standard for measuring dignity. For example, protecting freedom of speech does not require any judgment about whether a person's speech is "dignified." Indeed, speech protections often become relevant when pressed by individuals with unsympathetic or abhorrent views, such as the Nazis who marched in Skokie[80]—individuals who would not be considered "dignified" in any social or normative sense.

Negative liberty is pluralistic—it does not pick and choose among good ways of living, but rather leaves each individual to pursue his own good in a manner that leaves others free to do the same. Similarly, human dignity as individual agency does not require a particular commitment on ultimate questions of the good. Even if we cannot agree on ultimate values, we may be able to agree to allow others to pursue their various ends within society. The individualistic account of dignity leaves a space for such personal decisions. Because of its commitment to pluralism and universality, inherent dignity, which reflects our human agency, seems naturally and traditionally linked to liberal values and negative liberty.

I understand, however, that many proponents of dignity object to the association between inherent dignity and negative liberty. Some argue that a more comprehensive or communitarian conception of human flourishing best respects inherent dignity. Various positive conceptions of dignity reject pluralism in favor of particular forms of dignity.[81] For example, some argue that dignity is best promoted by living a life in accordance with a particular religion or in accordance with traditional social norms. Such conceptions are often not related to rights, but rather to policies aimed at a particular way of life. Such ideas do not emphasize individual human agency, but instead focus on ideal conceptions of human behavior and choice—ideals that may be imposed on individuals.

Others contend that inherent dignity requires more than negative liberties; that it requires, for instance, a minimum standard of social welfare goods. Indeed, many modern human rights documents

80 *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977) (per curiam).

81 *See infra* Part III.

and constitutions link dignity with such protections. Some scholars have argued that at least certain minimum forms of welfare are required in order to enjoy or to truly have autonomy. In this view, heteronomy can arise when a person lacks effective choices, due to poverty, hunger, or other social and economic circumstances.[82]

These arguments appeal to many pressing social concerns. Nonetheless, they mistakenly conflate inherent dignity and the conditions for achieving a particular type of dignified life. The dignity of individual agency linked to negative liberty requires being able to choose how one's life goes. This type of freedom provides opportunities for individuals to act according to their own purposes, but it does not require any particular exercise of the opportunities that are available.[83] Moreover, it does not focus on the *conditions* (social, material, psychological) of exercising one's inherent capacities.

Considerations for welfare and economic rights go to the *well-being* of individuals and relate to the conditions for being able to exercise one's purposes and freedoms.[84] Our human purposes may be better fulfilled in some circumstances than in others, but the *effectiveness* of our circumstances does not change our intrinsic dignity; instead it relates to practical issues of being able to exercise autonomy or other aspects of humanity. These practical questions of how we are able to exercise our agency and fulfill our dignity are intrinsically political and culturally contingent. How we answer these questions does not change the fact of our inherent dignity. Inherent dignity cannot turn on substantive evaluations of how effective our choices

82 *See, e.g.*, Alan Gewirth, The Community of Rights 110 (1996) ("One of the main ends projected by the community of rights is indeed the elimination of poverty . . . ."); GRIFFIN, *supra* note 42, at 47 (explaining that agency requires having both certain capacities and the means to exercise them, and therefore agency may require access to education and information about options). R

83 Charles Taylor explains that "negative theories [of liberty] can rely simply on an opportunity-concept, where being free is a matter of what we can do, of what it is open to us to do, whether or not we do anything to exercise these options." TAYLOR, *supra* note 64, at 213. He argues, however, that even negative conceptions of liberty can depend on an "exercise-concept" insofar as they focus on self-realization. *Id.* Similarly, Philip Pettit explains that autonomy requires more than negative liberty, that it requires a broader conception of freedom as "non-domination." PHILIP PETTIT, REPUBLICANISM 51 (1997). R

84 *See, e.g.*, ISAIAH BERLIN, *Introduction*, *in* FOUR ESSAYS ON LIBERTY, *supra* note 8, at ix, liii ("It is important to discriminate between liberty and the conditions of its exercise. If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated."); CAPPS, *supra* note 69, at 112–13 (explaining Alan Gewirth's distinction between freedom and well-being); GRIFFIN, *supra* note 42, at 160 ("Liberty guarantees not the realization of one's conception of a worthwhile life, but only its *pursuit*."). R R R

may be, because there is an inherent dignity in the self apart from the exercise of autonomy.

These disagreements about what constitutes "inherent" dignity mirror disputes between the different conceptions of dignity. These, in turn, reflect basic political disputes about the relationship between the individual and the community and the balance between individual liberties and other social or political goals. In these disputes I have my own predilections, as does anyone writing about this subject. For the reasons given above, it seems to me that inherent dignity naturally encompasses a view of human agency, and that such agency has an essential, even if not exclusive, connection to negative freedom. As the examples in the next subpart demonstrate, constitutional courts, particularly in the United States, have linked dignity as intrinsic human worth with negative freedoms.

C. Dignity as Intrinsic Worth in Judicial Decisions

Constitutional courts frequently suggest that dignity requires the right to a certain degree of individual autonomy, a space for freedom of action without interference by the state. These decisions suggest that providing a wide sphere of autonomy and ensuring a minimum of state interference with property, bodily integrity, and privacy enhances intrinsic dignity. The U.S. Supreme Court primarily connects dignity with freedom from interference, but examples can be found from abroad as well.

These decisions about freedom from interference and autonomy embrace a concept of inherent human dignity. In the following cases, courts do not appraise the dignity of a particular person. Rather they connect dignity with the idea that each person is equally entitled to a certain sphere of non-interference, freedom from intrusions by the state. These cases also associate intrinsic human dignity with autonomy, or the capacity for choice. These decisions do not evaluate how a person uses his or her freedom, but emphasize that human dignity requires some level of negative freedoms.

1. Privacy

In America, privacy interests are often characterized as being a form of negative freedom—freedom from interference by the government in one's home or over personal decisions. The Supreme Court's Fourth Amendment jurisprudence connects these negative freedoms with dignity. The Court implicitly appeals to intrinsic human dignity because the dignity of privacy applies to each person equally, and furthermore, the dignity of privacy does not have an external standard

for measuring what makes privacy dignified. For example, in cases dealing with drug or alcohol testing, the Court has stated that the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."[85] Similarly, the Court has noted, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[86] The dignity of privacy in Fourth Amendment cases requires being left alone by the state.[87] A right to privacy from unwarranted intrusions does not evaluate or judge what individuals do with their privacy, but simply maintains a space in which individuals can act without the prying of the state.

2. Sixth Amendment Right to Self-Representation

A similar understanding of intrinsic dignity emerges in cases evaluating the scope of the Sixth Amendment's right to self-representation. For example, the Supreme Court has explained that the Sixth Amendment protects personal rights and that defendants have the right to make choices about their defense.[88] When determining whether the involvement of standby counsel interfered with the right, the Court explained, "The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy."[89] In the context of self-representation, the Court has explained that dignity turns on the autonomy of the individual defendant who must be allowed to exercise free choice in his defense.[90] This reflects a kind of intrinsic dignity in each criminal defendant, because it exists regardless of whether or in what manner a person chooses to exercise this right. There is no appraisal of the individual—his personal dignity exists simply by virtue of having choices.

With the self-representation right, as with others, the Supreme Court often conflates different conceptions of dignity. In *Indiana v.*

85 *See id.*

86 Schmerber v. California, 384 U.S. 757, 767 (1966).

87 James Whitman explains the American privacy culture as being "oriented toward values of liberty, and especially liberty against the state." James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004). By contrast, Europeans focus on privacy as a matter of respect and personal dignity. *See id.*

88 *See* Faretta v. California, 422 U.S. 806, 820–21 (1975).

89 McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).

90 *See id.*

Edwards,[91] the Court held that a person with some mental incapacity may be prevented from representing himself without running afoul of the Sixth Amendment.[92] Edwards had a lengthy psychiatric history but was eventually judged competent to stand trial, but not competent to represent himself.[93] In upholding the trial court's decision, the Court considered that the defendant's "dignity" might be harmed by behaving inappropriately: "[G]iven that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling."[94] The majority adopted a positive, protective conception of dignity, judging whether a person acted in a dignified manner,[95] even though previous decisions had focused only on autonomy.

Dissenting in *Edwards*, Justice Scalia forcefully explained the inherent dignity of being self-directed:

> [T]here is equally little doubt that the loss of "dignity" the [Sixth Amendment] right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice. . . . [I]f the Court is to honor the particular conception of "dignity" that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.[96]

Allowing self-representation furthers inherent dignity because it allows a person to choose whether to speak for himself in court and thus respects his individual agency and autonomy.[97]

Edwards raises difficult questions about the scope of autonomy for those who might have impaired capacity—although Edwards was deemed fit to stand trial, the trial judge doubted Edwards's ability to defend himself. In this context, should a person retain the dignity of choice, or alternatively have the protection of the state in a criminal

91 554 U.S. 164 (2008).

92 *See id.* at 167.

93 *See id.* at 167–69.

94 *Id.* at 176.

95 *See infra* notes 174–75 and accompanying text.

96 *Edwards*, 554 U.S. at 186–87 (Scalia, J., dissenting).

97 *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) (explaining that the self-representation right serves the "dignity and autonomy of the accused"); Faretta v. California, 422 U.S. 806, 815 (1975) ("To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great constitutional safeguards by treating them as empty verbalisms." (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279–80 (1942))).

proceeding? The Court cannot resolve the question by reference to dignity—which merely reflects disagreement about the scope of the constitutional right and the appropriate role of the state in such circumstances.

3. Ordered Liberty

In debates over incorporation of fundamental liberties under the Fourteenth Amendment, the scope of such liberties is often referenced with respect to dignity. Most recently, in *McDonald v. City of Chicago*,[98] Justice Stevens discussed the concept of dignity in his opinion dissenting from the Court's decision to apply the Second Amendment to the States. Justice Stevens explained that the liberty protected by the Due Process Clause included autonomy, such as the right to make certain important decisions about one's destiny.[99] He noted that "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect—these are the central values we have found implicit in the concept of ordered liberty."[100] Dignity is featured alongside a number of other values, each of which relates strongly to negative liberty and individual rights. His dissent does not include a broad communitarian understanding of dignity.[101] Justice Stevens, however, did not find the individual right to own a handgun to be "critical to leading a life of autonomy, dignity, or political equality."[102] To which Justice Scalia responded, "Who says? Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment . . . ."[103] Even though both Justices expressed a concept of dignity as relating to autonomy and choice, they disagreed about the type of freedom such dignity required.

4. Sexual Autonomy

The right to sexual privacy is another area in which autonomy to make choices about one's sexual life and reproduction is often

98 130 S. Ct. 3020 (2010).

99 *See id.* 3091–93, 3100–01 (Stevens, J., dissenting).

100 *Id.* at 3101.

101 Indeed, Justice Stevens even cites to Justice Scalia's dissent in *Edwards* that human dignity is "'being master of one's fate rather than a ward of the State.'" *Id.* at 3104–05 (citing Indiana v. Edwards, 554 U.S. 164, 186 (2008) (Scalia, J., dissenting)).

102 *Id.* at 3109.

103 *Id.* at 3055 (Scalia, J., concurring).

defended in terms of dignity.[104] For example, the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[105] explicitly connected dignity, autonomy, and choice: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[106] The *Casey* plurality treated a woman's right to choose an abortion as part of her constitutionally protected liberty, because her choice implicated both dignity and autonomy. The plurality linked reproductive choices with the essential nature of the individual and emphasized the importance of the freedom to make such choices without compulsion from the state.[107] Justice Stevens's separate opinion similarly emphasized: "The authority to make such traumatic and yet empowering decisions is an element of basic human dignity . . . . [A] woman's decision to terminate her pregnancy is nothing less than a matter of conscience."[108]

In *Casey*, the plurality focused on the inherent dignity of a woman's freedom to choose an abortion, but minimized the competing inherent dignity of the fetus to life.[109] Weighing these dignities

104 There is another type of dignity in these cases as well, the dignity of having one's sexual decisions recognized by the state. *See infra* Part IV.

105 505 U.S. 833 (1992) (plurality opinion).

106 *Id.* at 851.

107 *See id.* ("Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); *see also* Lois Shepherd, *Dignity and Autonomy After* Washington v. Glucksberg*: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL'Y 431, 443 (1998) ("The overall effect of the language of the abortion cases is a strong statement of autonomy understood as self-determination, and an understanding of dignity as the moral status appropriate to persons who have the capacity for self-determination and who can thus form beliefs about intimate and personal matters. . . . Dignity in the abortion decisions is not considered separately from autonomy.").

108 *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part and dissenting in part). In dissent, Justice Scalia argued that the use of "dignity" was one of a number of empty adjectives that "simply decorate a value judgment and conceal a political choice." *Id.* at 983 (Scalia, J., concurring in the judgment in part and dissenting in part).

109 By contrast, the German Federal Constitutional Court has focused on the inherent dignity of the life of the fetus. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (252) (Ger.) (Second Abortion Case) (allowing for abortion in some circumstances but reaffirming that "[d]ignity attaches to the physical existence of every human being . . . before as well as after birth. . . . Unborn life is a constitutional value that the state is obligated to protect . . . ." (first and second alterations in translation)), *translated in* EBERLE, *supra* note 54, at 173; BVerfG Feb. 25, 1975, 39 BVERFGE 1 (41) (Ger.) (First Abortion Case) ("Developing life also partakes of the protection of human dignity."), *translated in* EBERLE, *supra* note 54, at 165, 167 ("In R R

has proved difficult for courts, which have often avoided the conflict by emphasizing the centrality of one of these dignities at the expense of the other.

The Supreme Court has advanced themes of personal dignity and autonomy into the area of other sexual freedoms. For example, in *Lawrence v. Texas*[110] the Court invalidated Texas' criminal sodomy law. While the Court in *Lawrence* focused on a number of concepts of dignity,[111] it explained that one important aspect of respecting individual dignity required allowing individuals the right to make choices about their sexuality without intervention by the government.[112] As the Court explained, "[A]dults may choose to enter upon this [homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[113]

According to the Court, part of the liberty protected by the Fourteenth Amendment includes the ability to make choices about sexual conduct. Protecting this liberty to choose serves the individual's dignity. The Court declined to pass judgment on the dignity of particular sexual practices and furthermore prohibited the community from expressing such disapproval through legislation. In this view, dignity stems from a significant degree of sexual freedom, not by following some particular conception of dignified sexual behavior. This dignity reflects an intrinsic quality of human beings as capable of formulating their own ends and therefore requiring a space of freedom for self-definition.

5. Free Speech

American free speech jurisprudence also links autonomy and negative liberty with the dignity of the individual. Speech rights protected by the First Amendment are related to the individual's self-expression as well as to the development of a vibrant public discourse.

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both *Abortion* cases the Constitutional Court recognized that fetal life must be preferred over women's self-determination as a matter of constitutional priorities."); *see also* Lee & George, *supra* note 55, at 191 ("[H]uman embryos and fetuses are subjects of rights, deserving full moral respect from individuals and from the political community."). R

110 539 U.S. 558 (2003).

111 *See infra* Part IV.B.2 (explaining how *Lawrence* links dignity to recognition by the state and freedom from stigma).

112 *Lawrence*, 539 U.S. at 567; *see also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 35–36 (arguing that *Lawrence* employs a "presumption of liberty" where liberty is associated with autonomy and freedom from government interference).

113 *Lawrence*, 539 U.S. at 567.

In *Cohen v. California*,[114] the Court upheld the right of an individual to wear a jacket printed with "F— the draft," on the grounds that even such profane, antigovernment language must be protected.[115] As the Supreme Court eloquently explained:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[116]

Cohen emphasized the importance of holding off the government in order to create space for personal expression, even where such expression may be offensive and run against the interests of the government. Dignity did not depend upon an externally defined conception of respectful or civil speech; rather dignity inhered simply in the human capacity for self-expression.[117] The Court passed no judgment on the actual expressions used.

Cohen is just one example of an American First Amendment tradition strongly focused on the liberty and autonomy of the individual. "Dignity is about choice, speaking is an aspect of choice, and restrictions on speaking are therefore deprivations of dignity."[118] In the area of speech, American jurisprudence remains a significant outlier, even exceptional, with regard to the amount of "uncivil" speech that receives constitutional protection.[119] The First Amendment protects the individual, even when the individual's speech offends community

114 403 U.S. 15 (1971).

115 *Id.* at 24.

116 *Id.*

117 *See also* Citizens United v. FEC, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part) (explaining that the dignity identified in *Cohen* applies to individuals, and that accordingly, in the context of limitations on corporate speech, "no one's autonomy, dignity, or political equality has been impinged upon in the least").

118 Frederick Schauer, *Speaking of Dignity*, *in* THE CONSTITUTION OF RIGHTS, *supra* note 44, at 178, 187 (comparing concepts of dignity as choice with dignity as inclusion in the community). R

119 Frederick Schauer explains America's liberty-oriented exceptionalism in speech matters:

> On a large number of other issues in which the preferences of individuals may be in tension with the needs of the collective, the United States, increasingly alone, stands as a symbol for a certain kind of preference for liberty

norms of civility. Imposing civility rules on public discourse, however, would undermine autonomy,[120] and therefore American First Amendment jurisprudence protects a wide scope of expressive activity. This is an area in which the dignity of autonomy often runs directly contrary to the dignity of social recognition, which often requires limitations on hateful speech.[121]

6. Race and Gender Equality

In Fourteenth Amendment equal protection jurisprudence, the Supreme Court sometimes associates dignity with formal equality or antidiscrimination, of treating each individual the same and being free of racial classifications. Equal protection jurisprudence, like that of sexual freedom, regularly relies upon both dignity as formal equality and dignity as recognition.[122] In the scholarly literature this is often juxtaposed as "antidiscrimination" and "antisubordination," following Owen Fiss's article on the subject.[123]

Since Fiss's article was written, the Supreme Court has favored an individualistic and antidiscrimination interpretation of the Equal Protection Clause, particularly in the context of affirmative action cases.[124] This recognizes the idea that "the government's use of race is frequently inconsistent with notions of human dignity."[125] In this view, even so-called "benign" classifications must be evaluated under

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even when it conflicts with values of equality and even when it conflicts with important community values.

Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 45 (Michael Ignatieff ed., 2005).

120 *See* Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 481 (1997) ("[A]utonomy would be fatally compromised if the state were to impose civility rules upon public discourse, for citizens would then be cast as already constrained and captured by one form of community rather than another.").

121 *See infra* notes 272–282 and accompanying text. R

122 *See infra* notes 328–340 and accompanying text. R

123 *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

124 *Compare* Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES IN LEGAL SCHOLARSHIP, 2002, art. 2, at 3, http://www.bepress.com/ils/iss2/art2 ("[I]n the years since Fiss wrote *Groups and the Equal Protection Clause*, the Court has, at every turn, chosen anti-discrimination over group-disadvantage."), *with* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, ISSUES IN LEGAL SCHOLARSHIP, 2003, art. 11, at 2, http://www.bepress.com/ils/iss2/art11 (challenging the common assumption that anticlassification triumphed over antisubordination and arguing that "American civil rights jurisprudence vindicates both anticlassification and antisburodination commitments").

125 Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 19 (2000).

the strict scrutiny standard because of the harm to the individual that can result from such classifications.[126] This dignity emphasizes formal equality, treating each person equally and refusing to classify along lines of race and gender. In practical terms, such a view treats "invidious" and "benign" discrimination with the same level of scrutiny because of the pernicious nature of any racial classification.[127]

In many cases, the Court has focused on treating individuals as individuals, rather than as members of particular groups: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[128] The Court has explained that the Equal Protection Clause "protect[s] *persons*, not *groups*."[129] In a recent case about the use of race in assignment for public schools, Justice Kennedy explained: "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change."[130]

Similarly, in *Rice v. Cayetano*,[131] the Court reviewed a constitutional challenge to a Hawaiian law stating that only people of Hawai-

126 *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003) ("'[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification' . . . ." (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting))); *see also* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We apply strict scrutiny to all racial classifications to '"smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" (alteration in original) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion))); Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding 'benign' state and federal racial classifications to different standards does not square with them." (citation omitted)).

127 *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 609–10 (1990) (O'Connor, J., dissenting) ("The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. . . . '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.").

128 Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting *Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting)) (internal quotation marks omitted).

129 *Adarand*, 515 U.S. at 227.

130 Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

131 528 U.S. 495 (2000).

ian or native Hawaiian ancestry could vote for the trustees of the Office of Hawaiian Affairs. The Supreme Court held that the voting qualification violated the Fifteenth Amendment by using ancestry as a proxy for race and in effect enacting a race-based voting qualification.[132] The Court emphasized:

> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[133]

Each of these cases focuses on equality for individuals, not groups, and requires government to refrain from dividing up people along racial lines. Dignity here attaches to each individual agent and conveys respect for individuality.

Since the 1970s, the Supreme Court has also invoked human dignity or dignitary themes when addressing equal protection challenges to policies that treat men and women differently based on gender stereotypes.[134] For example, in *J.E.B. v. Alabama*,[135] Justice Kennedy noted that being excluded from jury service based on a peremptory challenge exercised on the basis of gender injures "personal dignity and . . . the individual's right to participate in the political process."[136] Similarly, in *United States v. Virginia*,[137] the Court explained that the categorical exclusion of women from the Virginia Military Institute (VMI) undermined their equality and citizenship by failing to account for individual merit.[138] In the VMI case, the Court did not focus on whether women would want to attend VMI or could meet existing standards at the elite school. Rather, it emphasized the importance of

132 *See id.* at 517.

133 *Id.*

134 *See* Califano v. Goldfarb, 430 U.S. 199, 205–06, 210 (1977).

135 511 U.S. 127 (1994).

136 *Id.* at 153 (Kennedy, J., concurring in the judgment); *see also* Nguyen v. INS, 533 U.S. 53, 83 (2001) (O'Connor, J., dissenting) (noting the potential for injury to dignity "that inheres in or accompanies so many sex-based classifications").

137 518 U.S. 515 (1996).

138 *See id.* at 545–46; *see also* Ruth Bader Ginsburg, Remarks at City University of New York School of Law (Mar. 11, 2004), *in* 7 N.Y. CITY L. REV. 221, 238–39 (2004) ("But there is, I think, an underlying principle in all of the Court's equal protection jurisprudence. . . . It is the idea of essential human dignity, that we are all people entitled to respect from our Government as persons of full human stature, and must not be treated as lesser creatures. The idea of respect for the dignity of each human is, I think, essentially what the Equal Protection Clause is about.").

opening up the admissions process to women.[139] These cases and others emphasize the injury to personal dignity that results from classifying individuals by gender. Such classifications violate an individual's inherent dignity by failing to respect individuality and agency.

7. Inherent Dignity Abroad

Some European decisions also discuss the dignity associated with individual rights and negative freedoms, although this sense of dignity is not the predominant one in European constitutional and human rights discourse.[140] Often dissenting judges point out the association between dignity and formal equality or between dignity and individualism. For example, the European Court of Human Rights upheld the conviction of a Jehovah's Witness for proselytizing in violation of Greek criminal law.[141] In a partly dissenting opinion, Judge Martens explained the relationship between human dignity and individual autonomy:

> [S]ince respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best—there is no justification for the State to use its power "to protect" the proselytised . . . . [E]ven the "public order" argument cannot justify use of coercive State power in a field where tolerance demands that "free argument and debate" should be decisive.[142]

In Judge Martens's view, dignity required respect for an individual's capacity to make choices about intimate matters such as religion without interference by the state and also without the state's "protection" from undue influence.

Hungarian constitutional law has imported concepts of human dignity from Germany, but has considered dignity largely in terms of individual autonomy. As one commentator has explained, "human dignity is limited to the individual considered in his singularity. It empowers the individual to take control over his life without any interference, or indeed any help, from others or from the state."[143] Unlike

139 *See* Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053, 1062 (2009) (discussing the individual, opportunity-focused view of equality in Justice Ginsburg's opinion for the Court in the VMI case).

140 *See generally* Rao, *supra* note 19 (analyzing and contrasting European and American conceptions of dignity). R

141 Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 1 (1993).

142 *Id.* at 37 (Martens, J., partly dissenting).

143 CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS 125 (2003).

German constitutional law, which treats dignity primarily in the context of communitarian values,[144] in Hungary, dignity consists predominantly in resisting the state, which may be a reaction to its communist history.[145]

Although Canadian cases usually consider dignity in light of communitarian concerns, the Supreme Court occasionally invokes dignity as autonomy. For example, a Canadian welfare program that required those less than thirty years of age to work was upheld and found not to discriminate because there was no offense to a person's dignity: "The [work] participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity."[146] The Canadian Supreme Court emphasized the connection between individual autonomy and dignity—the dignity of self-determination even within a state welfare program.[147]

These examples, hardly exhaustive, demonstrate how constitutional courts have used inherent dignity. Because of its liberal and individualistic assumptions, this form of dignity can be found predominantly in American constitutional decisions that emphasize respect for the sovereignty and integrity of the individual. Honoring this conception of dignity often requires protections for negative liberty, for freedom from interference by the state. This conception of dignity relates to respect for the individual as a free and independent agent, able to make autonomous choices. Importantly, it does not pass judgment on the dignity or indignity of particular choices, but rather presses for keeping open the maximum space of freedom for individual action. Moreover, the cases demonstrate that this conception of dignity is universal and constant. It does not rely on the evaluations or preferences of others and it does not change with evolving

144 *See generally* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 10–17 (1994) (discussing the German conception of fundamental rights based on human dignity); EBERLE, *supra* note 54, at 256–57 (contrasting German and American constitutional values of freedom and how they relate to community). R

145 DUPRÉ, *supra* note 143, at 147 ("The insistence on the individual and on the inherent character of constitutional rights hammers home the fact that the Hungarian Court was deliberately turning away from the communist concept of rights which was not centred on the individual, but on society and on the achievement of social goals."). R

146 Gosselin v. Quebec, 2002 SCC 84, para. 65 (Can.).

147 The dissenting justices, however, took a very different view of dignity and found that the age distinction constituted discrimination and consequently violated human dignity. *See, e.g.*, *Gosselin*, 2002 SCC 84, para. 123 (L'Heureux-Dubé, J., dissenting).

social norms. Rather such dignity inheres in each person regardless of social norms and the preferences of others. This first type of dignity considers the intrinsic worth of each person and focuses on individual autonomy, rather than on any particular substantive requirements. As we shall see, this concept of dignity will often be in tension with substantive requirements of dignity or the demands of recognition associated with human dignity.

D. Dignity and Autonomy at Odds?

While dignity is regularly associated with individual rights and autonomy in American constitutional law, a number of scholars have argued that the individualist conception of autonomy is inconsistent with dignity or that dignity should not be limited to autonomy. They sharply demarcate autonomy from dignity and place these values in competing, or at least largely incompatible, traditions. The common use of "dignity" in modern constitutional law or human rights law often refers to a more communitarian form of dignity, the dignity of respect within a particular social and political community.[148]

Essentially, critics of the association between dignity and autonomy define dignity in a particular way to include the communitarian associations of dignity, but not the liberal and individualistic associations. As Guy Carmi explains:

> Autonomy is mainly (and intuitively) affiliated with libertarian values . . . , As opposed to autonomy, prevalent perceptions of human dignity, especially outside the United States, are communitarian. Although autonomy may be interpreted as accommodating communitarian concerns and human dignity may be interpreted as accommodating libertarian concerns, both instances are peripheral interpretations. The mainstream understandings of both terms lean on different heritages.[149]

148 *See* Rao, *supra* note 19, at 211. **R**

149 Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 1000 (2007) (footnotes omitted). Robert Post explains this common tension between dignity and autonomy:

> Autonomy refers to the ability of persons to create their own identity and in this way to define themselves. Dignity, by contrast, refers to "our sense of ourselves as commanding (attitudinal) respect." Unlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons. That is why modern legal systems so often set autonomy and dignity in opposition to each other . . . .

Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) (footnote omitted).

While this may describe the contemporary understanding of these terms, the "peripheral" meaning of dignity as autonomy has a lengthy history, especially in the United States.

As Parts III and IV will demonstrate, modern constitutional systems that explicitly protect and promote dignity tend to view dignity as something other than American-style autonomy and negative rights. In this view, the mutual respect and recognition that comes from dignity helps to define membership in a community. The inclination in Germany, France, or South Africa is to separate dignity from autonomy in order to expand the legal conception of dignity and give it a more positive, community-based meaning.[150] Modern constitutions and human rights documents that reflect positive forms of dignity often choose this term precisely because negative liberty is considered insufficient for human flourishing.[151] In modern constitutional systems, even if there is some dignity in protecting autonomy, the primary source of dignity stems from community and respect.

From a different (often American) standpoint, those who favor individualism, autonomy, and a minimum of state interference consider it important to separate autonomy from modern, largely communitarian, forms of dignity. In the speech context, this distinction is drawn because constitutional courts often use the rhetoric of dignity to support restrictions on speech, such as hate speech regulation or defamation law.[152] Dignity serves to protect reputation and will often do so at the expense of free speech. For example, Carmi argues that autonomy and dignity should remain separate to protect our First Amendment rights.[153]

While I am sympathetic to these differences in how autonomy and dignity are usually conceived, the language of dignity has already permeated American constitutional law. Sometimes it is the language of dignity and autonomy and other times it is the dignity of community and respect. In the existing confusion, it may be desirable for liberty (not to mention clarity) to take dignity talk out of our constitutional law. But if, as I suspect, dignity cannot be extricated, in part

150 *See* EBERLE, *supra* note 54, at 60–61. R

151 *See generally* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1393–94 (1984) (arguing that our constitutional culture of negative rights "obstructs the development of a more complete set of positive rights").

152 *See infra* Part IV.

153 Carmi, *supra* note 149, at 998 ("Using human dignity as a free speech justification is equivalent to introducing new vocabulary into free speech theory. Such introduction may even affect some of our most basic assumptions regarding free speech."); *see also* Schauer, *supra* note 119, at 42 (noting that the American value of freedom of expression can come into conflict with dignity). R R

because of the established pull of the word, then we need clarity about what dignity means.

Moreover, to the extent that "dignity" stands for what is worthy in human beings, American constitutional law has a long history of treating individual choice and autonomy as an integral and preeminent component of human worth. If dignity is about the type of regard that we can demand from others and from the state, or even if dignity simply indicates a value preference, there is no reason to exclude regard for the autonomous individual from conceptions of dignity. In fact, it may be important for individual rights to preserve and reinforce this link.

When the Supreme Court began referring to human dignity in constitutional cases in the 1940s, it had to fit the term into a preexisting framework of values—that framework of values in America strongly emphasizes the individual. It is not surprising then that American conceptions of dignity reflect themes of individual autonomy. But legal and social trends in Europe and other modern constitutional regimes run in a different direction, away from individual rights and toward a more communitarian view of dignity. These different understandings of dignity are often incompatible. The push to separate dignity and autonomy demonstrates how the dispute over the meaning of dignity is part of a broader debate about what rights we value and consider important in political and social life.

III. Substantive Conceptions of Dignity

Many accounts of human dignity in human rights and constitutional law begin with the intrinsic or inherent dignity of all individuals. As explained above, constitutional courts often associate inherent human dignity with the autonomy of the individual. This conception of dignity is basically pluralistic because it emphasizes the primacy of the individual, but takes no position about how individuals should live or what will contribute to their flourishing and happiness.

By contrast to inherent or intrinsic dignity, positive conceptions of dignity promote substantive judgments about the good life. Dignity here stands for what is valuable for individuals and society at large. Constitutional courts sometimes use this conception of dignity to justify political constraints and to promote values such as community or public morality. In this line of reasoning, a "proper" conception of dignity means guiding the individual and society toward particular dignified choices. These forms of dignity will often conflict with the dignity of the autonomous individual.

This Part will examine several substantive conceptions of dignity that reflect a judgment about what makes a person dignified. First, dignity may require the observance of certain social norms. Communities often adopt policies to further a particular sort of dignity—to protect what are thought to be valuable forms of human behavior and morality. The community may define dignity based on its particular values and the government may justify policies on the grounds that they promote the public good and improve the lives of individuals by requiring them to meet these standards. The examples discuss cases in which the state has prohibited behaviors that offend social norms of dignity on the grounds that the community may at times look after the individual's dignity better than the individual himself. Although private individuals often have judgments about what constitutes a good or dignified life, when such conceptions of dignity become *legal requirements* they can result in coercion. In this view, dignity is not inherent and universal; rather, a person can lack dignity when he fails to exhibit certain behaviors or qualities.

Second, in another common approach, modern constitutions and constitutional courts associate dignity with positive social and economic goods and so achieving dignity requires a certain minimum standard of living.

In each of these contexts, dignity is not a universal quality inherent in each person, but rather requires a person to measure up to an external standard. A person thus can lose dignity by behaving in a certain way, and some people will have more dignity than others. This type of dignity depends on conformity to social norms that will vary over time and in different communities. Moreover, such dignity will evolve as political and social preferences change. Courts that uphold or articulate such views of dignity choose the dignitary standards of the community over the dignity of the individual. These forms of dignity are not inherent, but socially constructed and politically enforced, often against the desires of affected individuals. The examples demonstrate how such specific norms of dignity implicitly conflict with the idea of inherent human dignity by making dignity turn on factors such as social norms and economic well-being that exist outside of the individual.

A. Communitarian Dignity or Dignity as Coercion

1. The Concept

Protections for dignity can often reflect community norms. In this context, dignity is a value invoked to hold the individual and the community to shared social values or to maintain some conception of

public order. Unlike intrinsic human dignity, positive conceptions of dignity choose a particular view of what constitutes the good life for man, what makes human life flourish for the individual and also for the community. Communities will have different understandings of dignity, but in each instance the content of dignity will depend on a particular understanding of what is valuable or good.[154] Positive conceptions of dignity seek to foster a type of dignified existence that requires maintaining community standards. I refer to these as "substantive" conceptions of dignity because they reflect a positive judgment about what is required for dignity.

For example, bans against pornography or prostitution usually reflect community norms about appropriate behavior and morality and are often justified as social policies that protect dignity. Similarly, the movement in France, Belgium, and elsewhere to ban the full veil or headscarf worn by some Muslim women assumes a particular view of individual dignity. These understandings of "human dignity draw on what is distinctively valued concerning human social existence in a particular community—indeed, on the values and vision that distinguish the community as the particular community that it is and relative to which the community's members take their collective and individual identity."[155] Policies based on this conception of dignity are contingent and evolve based on social values and judgments. They reflect public judgments about how to preserve the dignity of the community and individuals within the community.

The appeal of this view must be apparent to anyone who, for whatever reason, does not want to see public displays of nudity, or live in a community in which pornography or prostitution is readily available. The majority in each community will have its own views about what detracts from dignity. The question with regard to rights becomes the extent to which social conceptions of dignity can trump individual choices about what job to have, what media to consume, and how to express religious faith.

154 Ronald Dworkin explains that in this understanding the government does not remain neutral on questions about the good life. Rather, "[g]ood government consists in fostering or at least recognizing good lives; treatment as an equal consists in treating each person as if he were desirous of leading the life that is in fact good." Dworkin, *supra* note 62, at 127. Dworkin discusses this idea in the context of equality, but he notes that the question of what it means for the government to treat citizens as equals is "the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity." *Id.* R

155 Roger Brownsword, *Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the "Dignitarian Alliance,"* 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15, 28–29 (2003).

These substantive conceptions of dignity are related to the traditional understanding of dignity that requires judging the worth or honor of a person. For example, in the ordinary use of dignity,[156] we might say that a person is dignified if he possesses certain qualities, such as integrity or intelligence, or if he exhibits self-control, or otherwise demonstrates excellence in comparison with others. Dignity can be used as a social ideal to encourage certain types of behavior judged desirable by community norms. Although traditional conceptions of dignity as social rank are usually considered outmoded or even reactionary, some modern conceptions of dignity retain the evaluative and judgmental quality of traditional dignity.

This common social understanding of dignity requires comparisons of people as being more or less worthy or excellent by some community standard. Dignity may no longer be linked to a particular title or social class, but it may still require particular behavior or comportment. Dignity can have a strongly positive content and relates, in an almost atavistic way, to conformity with social norms. Once society adopts a particular concept of dignity, legal and social institutions may impose this conception on those who fail to conform.[157] Used in this way, human dignity can constrain individual action.[158]

This traditional and substantive conception of dignity relates, in part, to theories of self-realization.[159] Such theories often require the

156 Despite modern references to universal human dignity as discussed in Part I, a common understanding of dignity retains an aspect of rank, social worth, or honor. *See, e.g.*, 4 OXFORD ENGLISH DICTIONARY 656–57 (2d ed. 1989) (defining "dignity" as "1. The quality of being worthy or honourable; worthiness, worth, nobleness, excellence. . . . 2. Honourable or high estate, position, or estimation; honour; degree of estimation, rank."); *see also* Waldron, *supra* note 54 ("If our modern conception of human dignity retains any scintilla of its ancient and historical connection with rank[,] . . . we should look first at the bodies of law that relate status to rank (and to right and privilege) . . . ."). R

157 David Feldman, *Human Dignity as a Legal Value* (pt. 1), 16 PUB. L. 682, 685 (1999) ("If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole.").

158 *See* Roger Brownsword, *Freedom of Contract, Human Rights and Human Dignity*, *in* HUMAN RIGHTS IN PRIVATE LAW 181, 193–94 (Daniel Friedmann & Daphne Barak-Erez eds., 2001) (explaining two concepts of human dignity: human dignity as empowerment that supports individual autonomy and human dignity as constraint on individual autonomy).

159 Such conceptions of self-realization are often traced to Hegel. *See, e.g.*, BERLIN, *supra* note 8, at 142 (describing Hegel as a proponent of "enlightened rationalism" who advanced the idea of "rational necessity" by which once you understand the necessity of something "you cannot, while remaining rational, want to be otherwise"). R

individual to act in a specific way or according to certain principles to achieve a good life. For example, a person may realize himself by following "reason," or by adhering to a particular religion, or by being part of a state.[160] The idea is that a person becomes complete within one of these systems. Although self-realization uses the language of liberation and "true freedom," it may in fact require guidance or even coercion. As Berlin explains, the idea of self-realization postulates a gap between a person's higher and lower natures, between the self at its best with the self swept up with immediate pleasures and gratifications.[161] Realization thus requires following one's higher self and disciplining the lower self.[162] The trouble arises, however, because every individual may not be "reasonable" in the right way, may not properly perceive the higher good, and thus may need to be led or coerced into enlightenment by government policies.[163]

Achieving "dignity" can also be a form of self-realization, if dignity takes the form of a social standard that individuals and the community must follow. It is a short step from having substantive ideals of dignity to coercion of individuals in the name of these ideals. When social norms of dignity are legislated, they regulate the activities a person may pursue for economic gain or for pleasure. This goes beyond *social disapproval* of certain actions to *legal prohibitions* on activities deemed undignified.

Politicians or judges may explain paternalistic policies in light of community values such as public order. They may argue that true dignity requires conformity with social standard for the benefit of the individual and the community. Indeed, as the examples below

Untangling the complexity of Hegelian thought is beyond the scope of this Article. I gesture to Hegel here because Berlin and others consider Hegel to be an influential modern proponent of theories of the divided self.

160 Hegel argued the self must be guided by a universal rationality, a rationality that is fulfilled for Hegel through the state. In the state, the individual realizes a form of universal rationality. *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 153 (Allen W. Wood ed., H.B. Nisbet trans., 1991) ("The individual attains his right only by becoming the citizen of a good state."); *see also id.* § 75 (rejecting a contractarian theory of the state and explaining that "[i]t is the rational destiny [*Bestimmung*] of human beings to live within a state, and even if no state is yet present, reason requires that one be established" (translation in original)); Pierre Hasner, *Georg W. F. Hegel* (Allan Bloom trans.), *in* HISTORY OF POLITICAL PHILOSOPHY (Leo Strauss & Joseph Cropsey eds., 1987) ("The state is, in a sense, nothing less than the crown and the foundation of this labor of morals that raises the particular to the universal, teaching the individual to fulfill himself to a whole.").

161 BERLIN, *supra* note 8, at 132. R

162 *Id.* at 134.

163 *Id.* at 132–33; *see also* Dworkin, *supra* note 62, at 127 (distinguishing from the liberal theory of equality a theory in which equality requires an idea of the good). R

demonstrate, advocates of this view will often suggest that it best respects the inherent dignity of a person to prevent him from behaving in ways that are "undignified." Whether judged desirable or harmful, external measures of dignity bear a distant relationship to the dignity of each autonomous person.[164]

By requiring evaluations and conformity to social norms, substantive dignity is often in tension with inherent or universal dignity. The conflict arises because socially defined forms of dignity must be acquired and maintained through conformity with social norms that may conflict with individual desires and pursuits. Legal enforcement of social standards of dignity will often conflict with inherent or equal dignity and may impinge upon human agency by overriding individual free choice in favor of the dignity chosen by the community.

2. Examples of Dignity as Coercion

a. Dwarf Throwing

Consider the much-discussed French case about dwarf throwing.[165] Mr. Wackenheim, a dwarf, made his living by allowing himself to be thrown for sport. The French Ministry of the Interior issued a circular on the policing of public events with particular attention to dwarf tossing. In response to this, the mayors of Morsang-sur-Orge and Aix-en-Provence banned dwarf tossing events in their respective cities. Mr. Wackenheim challenged the orders on the grounds that they interfered with his economic liberty and right to earn a living. Eventually, the case went to the Conseil d'Etat (the supreme administrative court), which upheld the bans on dwarf tossing on the grounds that such activities affronted human dignity, which was part of the "public order" controlled by the municipal police.[166]

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164 As Berlin explains:

> It is one thing to say that I may be coerced for my own good which I am too blind to see: this may, on occasion, be for my benefit; indeed it may enlarge the scope of my liberty. It is another to say that if it is my good, then I am not being coerced, for I have willed it, whether I know this or not, and am free (or 'truly' free) even while my poor earthly body and foolish mind bitterly reject it, and struggle against those who seek however benevolently to impose it, with the greatest desperation.

BERLIN, *supra* note 8, at 134. R

165 Wackenheim v. France, Conseil d'Etat [CE Ass.] [highest administrative court], Oct. 27, 1995, Rec. Lebon 372 (Fr.). Recognizing disagreement over whether the term "dwarf" is derogatory, I use this term because it is the one chosen by the courts and commentators evaluating the case.

166 France further argued that that the International Covenant on Civil and Political Rights does not cover "an individual's right to respect as a human being" and even

Although the facts are unusual, the Wackenheim case demonstrates how concepts of dignity can be used to coerce individuals by forcing upon them a particular understanding of dignity. French policymakers determined that the throwing of a human being was "undignified." Rather than give Mr. Wackenheim the freedom to behave in an undignified manner, the law determined that it would be in the best interest of his dignity to prevent him from earning his living in this way. The ban aimed to preserve *l'ordre publique*[167] by protecting individuals from their misguided choices. The ban prevented dwarves from earning their living this way and also constrained members of the public from paying to watch the spectacle. The government insisted on maintaining a certain standard of morals both for Mr. Wackenheim and, perhaps more importantly, for the broader community. It was of little consequence to the French courts or to the UN Human Rights Committee that Mr. Wackenheim protested vehemently against this infringement of his livelihood and economic freedom.

This is a paradigmatic example of substantive dignity in which a social norm of dignity becomes a requirement of law and acts to constrain individual choices. There is an obvious tension here with conceptions of dignity that emphasize agency and leave individuals free to pursue their own ends. The courts in the Wackenheim case chose the public definition of dignity over the individual's realization of his own economic and personal good.

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if it did the ban on dwarf throwing was a classic instance of "reconciling the exercise of economic freedoms with the desire to uphold public order, one element of which is public morals." Wackenheim v. France, CCPR/c/75/D/854/1999 (July 26, 2002) ¶ 4.5. That France can argue against the individual right to respect in favor of public order provides a perfect example of freedom as coercion. On appeal to the United Nations Human Rights Committee, Mr. Wackenheim argued that the Council had added a component of public morals and human dignity to the concept of public order, and that the ban had deprived him of his economic liberty and right to earn a living. The Human Rights Committee held that France had demonstrated the ban on dwarf throwing was necessary to protect public order, "which brings into play considerations of human dignity." *Id.* ¶ 7.4.

167 *See, e.g.*, Feldman, *supra* note 157, at 700 (discussing the *ordre publique* rationale and explaining that "[a] government, court or tribunal concerned with dignity need not defer to the subjective judgment of an individual as to what is good for him or her. Instead, it is open to public authorities to make their own assessments of the demands of dignity and the kinds of existence or activity which are conducive to it. If dignity is a fundamental constitutional value, it will then be constitutionally permissible to interfere with people's freedoms in order to preserve what the decision-maker regards as their dignity."). R

b. Bans on the Full Veil or Headscarves

Another area of contemporary controversy, particularly in France, has been whether Muslim women should be banned from wearing the burqa, or full veil. French President Nicolas Sarkozy has supported the ban and has said that it should be outlawed in part because it "'runs counter to women's dignity.'"[168] Other French politicians have defended the ban on the grounds that it supports French values. Similarly, in Catalonia, Spain, a legislator called the burqa a "degrading prison" related to male domination.[169] Many of the arguments made in favor of banning the burqa suggest that observant Muslim women who choose to wear the veil are being forced to do so by male members of their family and that they need protection from this coercion.

The debate, however, focuses little on what Muslim women think about the full veil or why they wear it in public. Respecting their human agency would require understanding more about the reasons for their observance. As Martha Nussbaum recently wrote, "Respecting their equal human dignity and equal human rights means giving them space to carry out their conscientious observances, even if we think that those are silly or even disgusting."[170] Those who would ban the veil, however, treat dignity as a different social ideal—one that measures up to majority standards of individual self-expression and exposure. This is not respect for the equal human dignity of each woman as an individual agent, but rather a paternalistic (at best, and at worst, intolerant) decision about what makes women dignified. This debate about balancing religious expression with social norms continues to be waged across Europe, both with regard to the burqa and also with regard to the headscarf that some Muslim women wear.

c. Prostitution and Pornography

In Canada, dignity has also been invoked in the context of protecting individuals from undignified behavior. In a case involving prostitution, the Canadian Supreme Court explained, "Prostitution, in

168 Peter Berkowitz, Op-Ed., *Can Sarkozy Justify Banning the Veil?*, WALL ST. J., Apr. 5, 2010, at A19 (statement of President Sarkozy).

169 *See* Martha Nussbaum, *Veiled Threats?*, N.Y. TIMES OPINIONATOR (July 11, 2010; 5:35 PM), http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats (discussing and rejecting many of the common arguments made in favor of banning the burqa).

170 Martha Nussbaum, *Beyond the Veil: A Response*, N.Y. TIMES OPINIONATOR (July 15, 2010; 9:56 PM), http://opinionator.blogs.nytimes.com/2010/07/15/beyond-the-veil-a-response.

short, becomes an activity that is degrading to the individual dignity of the prostitute and which is a vehicle for pimps and customers to exploit the disadvantaged position of women in our society."[171] In a case dealing with regulations of obscenity and pornography, the Court similarly explained that degrading and dehumanizing material could be judged without reference to the consent of the participants: "Consent cannot save materials that otherwise contain degrading or dehumanizing scenes."[172] The Court implied that a person consenting to activities such as prostitution or making pornography may relinquish her dignity and be degraded in the eyes of the law. Or, put another way, to maintain her dignity, an individual cannot consent to economic activities that the legislature and the courts determine to be degrading.

These types of social policies reflect the idea that the law should prohibit immoral behavior for the benefit of the individual and society. This assumes that a choice of a degrading profession is either not a good choice or is not a true choice, in that the decision may be based on economic necessity or coercion by others. The regulations thus protect the individual from bad choices. The consent of individuals making pornography or engaging in prostitution is irrelevant because such persons misperceive the harms to their dignity or else are judged to be making such choices only under duress. Such reasoning is familiar and underlies a great part of the regulatory state.

The issue here is not whether laws prohibiting prostitution or pornography may be desirable as social policy. Rather these examples demonstrate that the conception of dignity used to defend such policies is not that of human agency and freedom of choice, but rather represents a particular moral view of what dignity requires. These laws do not purport to maximize individual freedom, but instead regulate how individuals must behave in order to maintain dignity (and in the case of criminal prohibitions, stay out of jail). In choosing to uphold a particular social conception of dignity, the Court allows community norms to override the choices of the individual regarding his own dignity.[173]

171 *In re* The Constitutional Questions Act, [1990] 1 S.C.R. 1123, 1194 (Can.).

172 R. v. Butler, [1992] 1 S.C.R. 452, 479 (Can.); *see also* Brownsword, *supra* note 155, at 30 (discussing Canadian cases about pornography and prostitution). R

173 The Canadian Supreme Court used a similar rationale for upholding criminal prohibitions on marijuana in part because such prohibition protected "[v]ulnerable groups . . . including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases." R. v. Malmo-Levine, [2003] 3 S.C.R. 571, para. 135 (Can.).

d. Self-representation

Constitutional courts sometimes express concern for the "dignity" of individuals with reduced mental capacity and in such contexts define dignity as requiring behavior in conformity with social norms. For example, as discussed in Part II, in *Indiana v. Edwards*, the U.S. Supreme Court espoused a positive conception of dignity and held that a person with some mental incapacity could be prevented from representing himself in a criminal case. Writing for the majority, Justice Breyer argued for the dignity of living in a certain way:

> [A] right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. . . . To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.[174]

Concern for helping a person avoid humiliation reflects a social norm or judgment of what behavior would embarrass a person or cause him to appear "undignified." Although Justice Breyer gives a nod to the dignity and autonomy in earlier self-representation cases, he concludes that such autonomy does not befit a person with an "uncertain mental state" such as Edwards, whom the trial judge considered fit to stand trial, but unable to represent himself.[175]

This reasoning reflects the same type of understanding found in the dwarf-throwing case and others—the state may limit an individual's choices when it determines that this will be in his best interest and will prevent degradation and embarrassment. The Court also justified this result with reference to social goals—explaining that it wished to avoid humiliation for Edwards, but also to prevent loss of dignity to the criminal process. *Edwards* demonstrates clearly the conflict between concepts of dignity—on the one hand, the majority wishes to protect the defendant from a specific type of undignified behavior, whereas the dissent would allow the defendant the ultimate human dignity of choosing how to represent himself.

174 Indiana v. Edwards, 554 U.S. 164, 176 (2008) (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984)).

175 The majority and dissent disagreed, in part, about how to characterize Edwards's mental capability at the time of trial. In dissent, Justice Scalia noted that Edwards willingly and knowingly made the choice to represent himself and admonished that the dignity at stake was "the dignity of individual choice." *See id.* at 2393 (Scalia, J., dissenting); *see also supra* text accompanying note 96. R

e. Abortion

Reva Siegel has argued that a paternalistic conception of dignity underscores *Gonzales v. Carhart*,[176] in which the U.S. Supreme Court recognized that the ban on partial-birth abortion "expresses respect for the dignity of human life."[177] The Court considered Congress' finding that "'[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life.'"[178] Siegel classifies the reasoning of *Carhart* majority as providing "gender-paternalist justification[s] for abortion restrictions."[179] She contrasts this to the decisional autonomy reasoning found in *Planned Parenthood v. Casey*.[180] Siegel considers this to be a conflict between paternalistic dignity and autonomy dignity.

Similarly, she argues that the anti-abortion movement, for example in South Dakota, has claimed that "banning abortions will protect women's health and freedom of choice."[181] Siegel explains that such reasoning takes a particular view of harm to women, i.e., abortion harms women who are, by nature, mothers.[182] "Women who seek abortions must have been confused, misled, or coerced into the decision to abort a pregnancy. . . . Using law to restrict abortion protects women from such pressures and confusions—and frees women to be true women."[183] She argues that this is a paternalistic move, based on stereotypes that "violate[ ] forms of dignity and decisional autonomy guaranteed to women."[184] The rationale of protecting women from misinformed and ultimately bad choices contains a substantive judgment about what the dignity of womanhood requires. On Siegel's implicit view that in the abortion context the pregnant woman is the only actor with dignity, restrictions justified to "protect" women from an abortion are paternalistic.[185]

176 550 U.S. 124 (2007).

177 *Id.* at 157; *see* Siegel, *supra* note 20, at 1699 ("Gender paternalist reasoning in *Carhart* is no accident. The passage reflects the spread of abortion restrictions that are women-protective as well as fetal-protective, in form and justification."). R

178 *Carhart*, 550 U.S. at 157 (quoting Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, § 2(14)(N), 117 Stat. 1201, 1206 (codified at 18 U.S.C. § 1531 (2006))).

179 Siegel, *supra* note 20, at 1768. R

180 *See supra* notes 105–108 and accompanying text. R

181 Reva. B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1686 (2008).

182 *Id.* at 1687.

183 *Id.*

184 *Id.* at 1689.

185 In this context, however, the autonomy/paternalism divide is complicated by the competing dignities implicated by abortion, which terminates the fetal life. Siegel

f. Bioethics

In the area of bioethics, competing conceptions of dignity are frequently invoked during debates over euthanasia, abortion, and stem-cell research. Many prominent philosophers and social thinkers have invoked dignity in the context of trying to sort through these difficult questions about the value and meaning of human life at different stages of development and health.[186] In assessing the difficult choices in these areas, intrinsic human dignity has been sometimes associated with the autonomy to make one's own end-of-life decisions, including access to assisted suicide.[187] Similarly, human dignity has been associated with the sanctity of life and not affirmatively acting to end life, no matter how debilitated.[188]

On the other hand, in the debate about euthanasia, dignity often refers to a specific ideal of living (and dying) in a particular way. As one scholar explains, the right-to-die movement appeals to a "content-based definition of dignity"[189] that has a "strong normative content."[190] This positive conception of dignity implies dying in a certain way, for example, quietly, peacefully, competently, and consequently avoiding a certain type of life without the dignity of independence and self-control. In state court decisions dignity often refers "to con-

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does not address the idea that a fetus may also be considered to have inherent human dignity. *See supra* note 109 (discussing the German abortion decisions that hold the state is obliged to protect the dignity of the fetus). R

186 *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 30–31 (Vintage Books 1994) (1993) (discussing common arguments for and against the morality of abortion); FUKUYAMA, *supra* note 53, at 149 (discussing the related issues of human dignity and the desire for recognition and the implications they have on a democracy); KASS, *supra* note 59 (discussing dignity at all stages of life and death); MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 102–04 (2007) (discussing President Bush's stance against stem-cell research). R R

187 *See, e.g.*, DWORKIN, *supra* note 186, at 238–39 (explaining that although we may care intensely about what others do with regard to abortion and euthanasia "[a] true appreciation of dignity argues decisively . . . for individual freedom, not coercion, for a régime of law and attitude that encourages each of us to make mortal decisions for himself"); *cf.* Brownsword, *supra* note 155, at 27–28 (explaining that human dignity as constraint condemns euthanasia and assisted suicide). R R

188 *See* KASS, *supra* note 59, at 249 ("Death with dignity requires absolutely that the survivors treat the human being at all times as if full godlikeness remains, up to the very end."). R

189 Shepherd, *supra* note 107, at 448. R

190 *Id.*; *see id.* at 449 ("To the extent that dignity embodies a notion of what is worthy, noble, and honorable, almost no one would choose a life, or death, describable by terms meaning the opposite of dignity.").

temporary attitudes of how one should live an independent life."[191] In this context, dignity requires giving individuals the choice to end life not simply to further autonomy but in order to avoid a life without certain forms of dignity.

Opponents of assisted suicide have a different view of substantive dignity. For example, Leon Kass has argued that human dignity at the end of life requires courage and fortitude—"What humanity needs most in the face of evils is courage, the ability to stand against fear and pain and thoughts of nothingness."[192] These are conflicting positive understandings of what human dignity requires in the face of ill-health and death—both reflect social understandings of what makes us dignified.

Similarly, the highly influential *Belmont Report* seeks to identify the basic ethical principle for conducting biomedical research involving human subjects.[193] The *Report* begins by detailing "respect for persons"[194] which means both that individuals should be "treated as autonomous agents"[195] and that "persons with diminished autonomy are entitled to protection."[196] The *Report* makes evident that respect for individual autonomy will often have to yield to professional judgments about protecting a patient's best interests.[197]

Constitutional courts have used dignity in the context of euthanasia and other bioethics cases, but have shed little light on the appropriate understanding of dignity. For example, in *Cruzan v. Director, Missouri Department of Health*,[198] the U.S. Supreme Court held that a state may require clear and convincing evidence of an incompetent

191 *Id.* at 450 (citing People v. Kevorkian, No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd sub nom.* Hobbins v. Att'y Gen., 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part, rev'd in part sub nom.* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994)).

192 KASS, *supra* note 59, at 253. R

193 *See* NAT'L COMM'N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL & BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 2 (1979), *available at* http://ohsr.od.nih.gov/guidelines/belmont.html.

194 *Id.* at 4.

195 *Id.*

196 *Id.*

197 *See, e.g.*, Larry R. Churchill, *Toward a More Robust Autonomy: Revising the* Belmont Report, *in* BELMONT REVISITED 111, 111–12 (James F. Childress et al. eds., 2005) (explaining the flawed notion of autonomy in the *Belmont Report*); Richard A. Epstein, *The Erosion of Individual Autonomy in Medical Decisionmaking: Of the FEDA and IRBs*, 96 GEO. L.J. 559, 580–81 (2008) (explaining that the *Report* begins by highlighting individual autonomy only to allow "for the creation of centralized planning boards with complete authority").

198 497 U.S. 261 (1990).

individual's wishes with respect to withholding nutrition and hydration.[199] Justice O'Connor explained in her concurrence that individuals have a right to refuse food and water because restriction on such rights "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment."[200] She expressed a view of dignity as autonomy or freedom for each person to decide how to live and die. In dissent, Justice Brennan argued that Cruzan should be allowed to "die with dignity"[201] and explained that "[d]ying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence."[202] Because Nancy Cruzan was in a vegetative state and could not choose to withhold treatment, Brennan's conception of dignity was not simply the dignity of autonomy, but rather an assumption that being allowed to die in such circumstances protected dignity more than being kept alive through medical intervention.[203]

The foregoing examples demonstrate how constitutional courts sometimes assign a positive meaning to dignity in which dignity requires certain behavior or actions. In many of these cases, policies require limiting individual freedom to make "undignified" choices. They coerce individuals in the name of dignity to further social and community values. These decisions express a particular substantive conception of dignity that will often conflict with individual choices that are at the heart of inherent human dignity and agency.

199 *Id.* at 280.

200 *Id.* at 289 (O'Connor, J., concurring).

201 *Id.* at 302 (Brennan, J., dissenting).

202 *Id.* at 310–11; *see also* Rodriguez v. British Columbia, [1993] 3 S.C.R. 519 (Can.) (Cory, J., dissenting) ("[T]he right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.").

203 *See also* Washington v. Glucksberg, 521 U.S. 702, 727–28 (1997) (rejecting calls to recognize a constitutional liberty interest in assisted suicide and glossing over the arguments about dignity and autonomy). In *Glucksberg*, the Supreme Court implicitly rejected the arguments advanced by the "Philosopher's Brief," which argued for a recognition of assisted suicide in part based upon dignity and autonomy. *See* Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, Washington v. Glucksberg, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110); Neomi Rao, Comment, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1371 (1998) (noting the Supreme Court's failure to engage the "Philosopher's Brief"); *see also Rodriguez*, 3 S.C.R. 519 (upholding a law that protected disabled persons from assisted suicide and treating dignity as a substantive social ideal that governs quality of life considerations).

B. Dignity and Social-Welfare Goods

Another aspect of substantive dignity emphasizes the material conditions required for living with dignity. A number of modern constitutions explicitly protect dignity and associate this value with social and economic rights, such as rights to housing, healthcare, education, and a minimum standard of living.[204] Accordingly, constitutional courts have sometimes invoked respect for dignity as a justification for requiring the state to provide such goods.

Some argue that it is part of inherent human dignity to have food and shelter and other minimum requirements to support one's humanity and agency. For example, James Griffin explains:

> There are forms of welfare that are empirically necessary conditions of a person's being autonomous and free, but there are also forms that are logically necessary—part of what we mean in saying that a person has these rights. . . . The value resides not simply in one's having the undeveloped, unused capacities for autonomy and liberty but also in exercising them—not just in being able to be autonomous but also in actually being so.[205]

Griffin argues that these forms of welfare should be treated as human rights[206] and, as discussed below, many modern constitutions include them as rights.

This defense, not just of welfare policy, but welfare *rights*, turns on many of the same arguments presented for negative liberty, i.e., that such welfare is an essential prerequisite for respecting human agency and autonomy, and as a consequence also human dignity. One can understand the appeal of this view because it expresses a fundamental truth about our humanity that we need to meet certain basic needs for food, shelter, and the like. At times, realizing our higher human capabilities may depend on such goods, because once we have them we are free to pursue other goals. Constitutional courts that connect material goods with dignity refer to the importance of well-being and safety.

Nonetheless, in the context of rights to welfare goods, dignity refers to a condition that goes beyond inherent human worth. Dignity as material equality or improvement requires a particular substantive conception of dignity. If a certain standard of living is essential to maintaining dignity, this suggests that dignity is not inherent in the individual, but rather depends on external factors. Without assistance from the state are the poor or uneducated undignified? Does dignity

204 *See, e.g.*, INDIA CONST. pmbl.; S. AFR. CONST., 1996.

205 GRIFFIN, *supra* note 42, at 180–81. R

206 *Id.* at 181.

depend on having an adequate standard of living? While having such goods may improve well-being and further a person's ability to exercise freedom and choice, they do not bolster a person's intrinsic worth. [207] A certain level of well-being may be one of the *conditions* for dignity, but it is not dignity itself.[208]

Rather, the connection between dignity and material goods refers to an external standard about what is necessary for a good life, a standard like other social conceptions of dignity that will vary over time and in different communities. That such goods are highly variable and negotiable in the political process suggests that they are one step removed from inherent human dignity connected with individual rights.

Most of the connection made between dignity and positive rights occurs in non-American courts, but the U.S. Supreme Court at times has hinted that there might be a dignitary interest in receiving welfare. In *Goldberg v. Kelly*,[209] the Court, in an opinion by Justice Brennan, held that welfare recipients were entitled to a hearing before termination of their benefits because such benefits involve "important rights"[210] and welfare entitlements are more realistically regarded as "property,"[211] not a "gratuity."[212] The Court further explained that "[f]rom its founding the Nation's basic commitment has been to fos-

207 Ronald Dworkin draws a similar distinction between dignity as the intrinsic value of human life and the concept of "beneficence" and explains that these are different. "We can acknowledge that it is important how someone's life goes without accepting any general positive obligation to make it go better. The distinction is necessary to explain the pervasiveness of our concern with dignity—why we insist, as I said, on the dignity even of prisoners." DWORKIN, *supra* note 186, at 236. *But see* KASS, *supra* note 59, at 17–19 (arguing that part of our inherent human dignity comes from our lower needs as well as our higher ones "the worthiness of embodied human life, and therewith of our natural desires and passions, our natural origins and attachments, our sentiments and aversions, our loves and longings"). R R

208 *See* BERLIN, *supra* note 84, at liii ("[L]iberty is one thing, and the conditions for it are another."). Michael Walzer, a proponent of the social-welfare state, similarly recognizes that while such goods are important, one cannot fix the abstract requirements of such goods. Rather they must be "decided politically: that is what democratic political arrangements are for. Any philosophical effort to stipulate in detail the rights or the entitlements of individuals would radically constrain the scope of democratic decision making." MICHAEL WALZER, SPHERES OF JUSTICE 67 n.* (1983). He recognizes that any specific welfare arrangements "are not arguments about individual rights; they are arguments about the character of a particular political community." *Id.* at 78. R

209 397 U.S. 254 (1970).

210 *Id.* at 262.

211 *Id.* at 262 n.8.

212 *Id.*

ter the dignity and well-being of all persons within its borders."[213] Although *Goldberg* was limited to its procedural holding, [214] the decision associates welfare with the dignity of material well-being.[215] Similarly, in *Plyler v. Doe*,[216] the Supreme Court held that Texas could not withhold public education from children who were illegally within the country.[217] Although the Court did not specifically use the term "dignity," Justice Brennan made clear that providing education to all children was required in order to ensure the well-being of the children and to prevent the development of a sub-class of uneducated, illegal aliens. [218]

Cases like *Goldberg* and *Plyler* lie at the periphery of American constitutional law.[219] American courts are restrained, if not outright hostile, to inferring and imposing positive constitutional rights.[220] But American constitutional law is exceptional in this regard.

Many post–World War II constitutions explicitly protect social and economic rights, often as a component of human dignity. For example, in South Africa, section 26 of the Constitution provides: "Everyone has the right to have access to adequate housing," and "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[221] In *South Africa v. Grootboom*,[222] a group of squatters were

213 *Id.* at 264–65; *see also* Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 214 (2005) ("By the late 1960s, respected constitutional thinkers could conclude that the Court was on the verge of recognizing a right to be free from desperate conditions . . . .").

214 *See* Dandridge v. Williams, 397 U.S. 471, 487 (1970).

215 *See Goldberg*, 397 U.S. at 264–65.

216 457 U.S. 202 (1982).

217 *Id.* at 230.

218 *See id.* at 229–30.

219 *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317–18 (1980) (upholding federal restrictions on Medicaid funding for abortions, because although "the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution."); *see also* Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS 7, 52 (Jeffrey Goldsworthy ed., 2006) (explaining that "a pervasive ideology of individualism" limits certain constitutional interpretations, as illustrated by "the hostility to even the recognition of social and economic rights by most US constitutional theorists").

220 *See* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 859 (2001); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872 (1986); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205–06 (2008).

221 S. AFR. CONST., 1996, § 26, cls. 1–2.

evicted from private land in a manner the court describes as "prematurely and inhumanely: reminiscent of apartheid-style evictions."[223] Mrs. Grootboom and others sought a court order directing the government to provide them with adequate temporary shelter. The court made clear that the Constitution's protections for dignity and adequate living conditions were connected: "There 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."[224] Nonetheless, the remedy provided by the court did not guarantee housing for the plaintiffs, it only ordered that the state must "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing."[225]

In Hungary, the Constitution includes a right to social security.[226] In assessing the contours of that right, the Hungarian Constitutional Court explained, "[T]he right to social security contained in Article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity."[227] In a later case, the court emphasized that provision of certain social services, like access to emergency shelter, was a minimum requisite for the state in fulfilling its obligation to dignity.[228] The court conceived of welfare benefits as part of the conditions for dignity.[229] If dignity requires certain material goods, however, it is not inherent dignity, but rather a particular dignity of well-being—of having adequate goods or being provided adequate goods by the state.

In India, only the preamble to the Indian Constitution refers to dignity,[230] but the Indian Supreme Court has interpreted the guaran-

222 2001 (1) SA 46 (CC) (S. Afr.).

223 *Id.* at para. 10.

224 *Id.* at para. 23; *see also id.* at para. 44 ("A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.").

225 *Id.* at para. 99.

226 A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 70/E, cl. 1.

227 Alkotmánybíróság (AB) [Constitutional Court] 32/1998 (Hung.), *quoted in* McCrudden, *supra* note 6, at 693 & n.270. R

228 *See* AB MK.2000/109 (Hung.), *cited in* McCrudden, *supra* note 6, at 693 n.271. R

229 *See id.*

230 INDIA CONST. pmbl. ("We, The People Of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote

tee of life and personal liberty to include "the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."[231] The Indian Supreme Court took a wide-ranging substantive view of what goes along with a life of human dignity, suggesting that the fulfillment of dignity requires certain material ends.[232]

Many more examples could be provided, but modern constitutions and constitutional courts outside of the United States have not hesitated to link dignity to the provision of social and economic goods.[233] Dignity talk gives courts another angle for trying to get legislative compliance with positive constitutional rights. But there are limitations and difficulties to the judicial enforcement of social rights.[234] Requiring legislatures to allocate funding for these needs is difficult for courts, in part because such allocations involve complex political tradeoffs over state budgets. The levels of welfare entitlements or rights are not universal and will vary from community to community. They depend on social and political standards of what people may expect in particular communities and such standards may well change over time. The contingent and variable nature of these welfare rights suggests that they pertain not to an intrinsic dignity, but rather to a substantive conception of dignity that specifies what individuals must have in order to lead dignified lives.

Related to the concept of social welfare goods, constitutional courts have also connected dignity to receiving protection from the state. In this line of reasoning, the dignity of the individual requires

among them all Fraternity assuring the dignity of the individual and the unity and integrity of the nation . . . .").

231 Mullin v. Adm'r, Union Territory of Delhi, (1981) 2 S.C.R. 516, 518 (India).

232 *See id.*

233 *See, e.g.*, Art. 3 Costituzione [Cost.] (It.) ("It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all markers in the political, economic and social organization of the country."); REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.) ("Public power shall be exercised with respect for the equal worth of all and for the freedom and dignity of the individual. The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity.").

234 Whether such positive rights can be adequately enforced by constitutional courts is a question of significant importance that is outside the scope of this Article. For useful discussions of this topic, see Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004). *See also supra* note 220 (discussing the difficulty of enforcing positive welfare rights). R

that the state ensure the basic safety and security of all individuals within its boundaries. This includes special protections for vulnerable or disadvantaged individuals. For instance, international documents refer to the preservation of safety as part of dignity. The United Nations Declaration of Common Values states: "Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice."[235] Here the right to live in dignity implies a government duty to protect individuals from violence and injustice.[236] This type of protection requires affirmative steps to protect individuals from the harms of others and often goes beyond a government's obligation to punish criminal wrongdoers.

Constitutional courts outside the United States have been willing to find such protections and ground their existence in human dignity. The extent to which the government must provide such protections will vary with social norms—for instance, does spanking a child violate his or her human dignity? A number of constitutional courts have required prohibitions on child spanking in order to preserve the dignity of the child.[237] Some courts have also required protection of women from violence.[238] For example, after a gang rape of a social

235 United Nations Millenium Declaration, G.A. Res. 55/2, ¶ 6, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

236 In the context of refugees the UN Declaration explicitly connects safety and dignity: "We resolve therefore . . . to help all refugees and displaced persons to return voluntarily to their homes, in safety and dignity and to be smoothly reintegrated into their societies." *Id.* ¶ 26. This relates to a larger question outside the scope of this Article about international duties to protect. *See generally* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007) (discussing the concept of responsibility to protect in relation to existing principles of international law).

237 *See, e.g.*, CrimA 4596/98 Plonit v. A.G. 54(1) PD 145 [2000] (Isr.) (prohibiting all forms of corporal punishment against children), *cited in* Marvin M. Bernstein, *The Decision of the Supreme Court of Canada Upholding the Constitutionality of Section 43 of the* Criminal Code of Canada*: What This Decision Means to the Child Welfare Sector*, 44 FAM. CT. REV. 104, 111 (2006); Republic of Italy v. Cambria, translated decision of the Supreme Court of Cassation, March 18, 1996 (declaring violence for educational purposes of children to be unlawful in part because of "the overriding importance, which the [Italian] legal system attributes to protecting the dignity of the individual. This includes 'minors' who now hold rights and are no longer simply objects to be protected by their parents or, worse still, objects at the disposal of their parents"), *cited in* Bernstein, *supra*, at 110; World Org. Against Torture v. Belgium, Compl. No. 21/2003, 42 Eur. H.R. Rep. SE20 at 252 (Eur. Comm'n on S.R. 2006) (challenging Belgian law because it does not explicitly prohibit corporal punishment against children).

238 *See, e.g.*, Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV. 57, 128–29

worker in Northern India, various groups brought a class action suit to enforce the constitutional rights of working women.[239] The Indian Supreme Court held, "Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right."[240]

By contrast, the U.S. Supreme Court has repeatedly refused to impose such positive duties to protect on dignity or any other grounds. It has held steadfast in this refusal even in the face of egregious neglect by the state to protect the vulnerable:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[241]

In this regard, the United States remains an outlier amongst modern democracies because it maintains a very limited conception of what the state must affirmatively do to protect its citizens.

In all of these examples, dignity depends on receiving something from the state such as welfare, housing, or protection from violence. In this context, the state can promote one's dignity by providing goods that will help one achieve a life with decent material standards and safety from certain external harms. The idea that dignity requires external conditions suggests a positive conception of dignity. In these cases, dignity does not reflect a universal human quality but rather a contingent and variable one. It requires certain conditions for the achievement of dignity and recognizes that dignity can be lost or diminished by poverty or physical harm. The exact scope of these requirements will vary with social norms, but they measure dignity against an external standard.

(2007) ("Recent international law recognizes the endemic proportions of domestic violence and as such specifically names violence against women as a human rights violation.").

239 *See* Vishaka v. Rajasthan, (1997) 3 S.C.R. 404, 405 (India).

240 *Id.* at 405.

241 DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189, 195 (1989).

C. Substantive Dignity at Odds with Inherent Dignity

The positive conceptions of dignity discussed in this Part bring us quite a ways from the dignity of individual autonomy with which we started. The concept of inherent dignity focuses on a universal and equal quantum of dignity in each person and leaves open the question of what constitutes a good or dignified life. In constitutional law, concepts of inherent dignity relate, in part, to freedom from interference and maximizing the space for individual autonomy. By contrast, positive conceptions of dignity require following a particular understanding of dignity defined by social norms and enforced by the community or the state. Positive conceptions of dignity may be defined politically or judicially with specific moral, social, and economic requirements. Such requirements may then be imposed on individuals to preserve the dignity of the individual and the community, ostensibly in their best interests. Positive notions of dignity focus on specific views of the good life and, in practice, will lead to policies that reflect community norms of dignity. Such norms are justified on the grounds that they provide an authentic or enlightened conception of dignity, of what is required for a person to lead a dignified life. Substantive views of dignity, however, may constrain choices and thereby fail to respect the individual agency of those who have a different view of the good.

Yet inherent dignity and positive conceptions of dignity share one important characteristic—they can be identified and apply equally to all individuals. Inherent human dignity is a part of each individual, regardless of his or her position, talents, abilities, or moral standing (it belongs to the dwarf and the prostitute as well as to the legislators who would ban their livelihoods). Positive conceptions of dignity establish external standards of what it means to be dignified—such as behaving with a certain level of decorum or comporting oneself in a particular way. In modern society, this external standard of dignity applies to everyone in the name of public order or the greater good of society. The standard of dignity does not turn on the particular individual, but rather on a broader, social definition of what dignity requires. Although, as discussed throughout this Part, inherent dignity and socially defined norms of dignity differ in important respects, they share this *universal or widespread applicability*, a characteristic that, as the next Part will demonstrate, does not belong to dignity as recognition.

IV. DIGNITY AS RECOGNITION

The final conception of dignity, dignity as recognition, requires esteem and respect for the particularity of each individual. This dignity stands for modern demands that go beyond first-generation civil liberties and even second-generation social-welfare rights to require a certain attitude by the state and by other people. This desire to be recognized, to have the political and social community acknowledge and respect one's personality and dignity, derives from the idea that individuals are constituted by their communities and therefore their self-conception depends on their relationship to the greater social whole. Dignity as recognition focuses on ideals of self-realization as well as third-generation "solidarity rights."[242] It creates a political demand for the state and other individuals to accept and approve of one's lifestyle and personal choices.

This is not the inherent dignity of having freedom to live one's life without unnecessary interference, nor is it a specific substantive concept of dignity imposed by the state. Rather, it is the demand that others respect one's choices, a demand that state policies demonstrate the proper regard for individual differences.

At the outset, it may be helpful to specify the meaning of "recognition" in this context. Charles Taylor suggests a useful distinction between two strains of recognition—the "politics of universalism"[243] and the "politics of difference."[244] The "politics of universalism" emphasizes the equality of all human beings and focuses on the conception of inherent human dignity. As discussed in Part II, all individuals possess this dignity simply by virtue of their humanity or their human agency.[245] In this context, human rights law sometimes calls for "recognition" of universal human dignity,[246] which means count-

242 *See, e.g.*, GRIFFIN, *supra* note 42, at 256 ("The third generation, the rights of our time, of the last twenty-five years or so, consists of 'solidarity' rights, including, most prominently, group rights."). R

243 Taylor, *supra* note 44, at 37. R

244 *Id.* at 38. In a similar vein, Jürgen Habermas explains that there are three types of recognition: "Each and every person should receive a three-fold recognition: they should receive equal protection and equal respect in their integrity as irreplaceable individuals, as members of ethnic or cultural groups, and as citizens, that is, as members of the political community." JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 496 (William Rehg trans., 1996). The recognition of equal protection and respect as individuals relates to Taylor's recognition of universalism and the recognition as members of ethnic or cultural groups maps onto Taylor's recognition of differences.

245 *See supra* Part II.A.

246 What Taylor calls the "politics of universalism . . . emphasiz[es] the equal dignity of all citizens, and the content of this politics has been the equalization of rights and entitlements." Taylor, *supra* note 44, at 37; *see also* Arvind Sharma, *The Religious* R

ing as a human being and consequently enjoying certain basic rights, particularly universal first-generation civil liberties.[247] "Recognition" of inherent dignity, however, does not affect the underlying dignity of the individual, which persists whether or not it is recognized. Therefore, recognition is not essential to a conception of intrinsic human dignity.

It is in Taylor's second category of recognition, the "politics of difference," where recognition really matters. The "politics of difference" relates to individuals in their particularity and, sometimes, to the racial, ethnic, religious, or cultural groups to which they belong. Accordingly, this type of recognition is often connected to multiculturalism, nationalism, and group identity generally. Recognition of difference depends upon a conception of the person as an essential part of a community. In this view, one can have dignity and a sense of self *only through* recognition by the broader society. Accordingly, recognition matters tremendously and is important in itself. Many constitutional courts have associated dignity with this form of recognition.[248] Dignity as recognition focuses on how a community values and validates the unique personality and choices of individuals and groups within society.

This Part will first explain the essential attributes of the recognition of difference and its close relation to a particular conception of human dignity and then will examine how constitutional courts have used dignity as recognition to address issues such as hate speech, defamation, and equality issues in the context of race and sexual orientation.

A. Recognition and the Socially Constituted Self

Inherent dignity often results in a legal demand for freedom from interference and positive conceptions of dignity sometimes result in paternalistic regulation or welfare from the state. The dignity of recognition demands something altogether different—that is *respect* from the social and political community for "the unique iden-

Perspective: Dignity as a Foundation for Human Rights Discourse, *in* HUMAN RIGHTS AND RESPONSIBILITIES IN THE WORLD RELIGIONS 67, 71 (Nancy M. Martin et al. eds., 2003) ("Thus human dignity has to do with dignity which inheres in oneself as a human being and possesses a dimension as interiority as it relates to one's self-perception. The external recognition of this dignity by another constitutes the basis of human rights.").

247 *See* IGNATIEFF, *supra* note 6, at 165. R

248 *See* R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).

tity of this individual or group, their distinctness from everyone else."[249]

Recognition as a political demand elevates the idea of self-realization or the development of one's personality. Rather than focus on outward freedom from restraint, self-realization focuses on inward development.[250] The legal recognition of this process of self-creation imposes certain obligations on the state as well as on other individuals to respect self-creation and to validate and support the unfolding of personality. Many modern constitutions, such as the German Basic Law,[251] protect rights of personality and associate such protections with regard for human dignity.[252] Personality rights and recognition have a natural cultural association. Those societies that emphasize the importance of community in developing identity also strongly enforce the recognition of personality rights by other individuals and the state.

The importance of recognition relates to the idea that the individual can be complete only within a community. As with positive conceptions of dignity, the emphasis on recognition has roots in

249 Taylor, *supra* note 44, at 38. By contrast, "[w]ith the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities." *Id.* R

250 *See* Whitman, *supra* note 87, at 1183–84. R

251 *See* GRUNDGESETZ art. 2, para. 1 (Ger.) ("Everyone shall have the right to the free development of his personality, in so far as he does not infringe the rights of others."); *see also* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 14–16 (explaining that every individual has the right to be legally recognized as a person to receive personal and family privacy, and is entitled to free personal development); CONST. OF THE PORTUGUESE REPUBLIC art. 26 para. 1, para. 3 ("Everyone shall possess the right to a personal identity . . . . The law shall guarantee the personal dignity and genetic identity of the human person . . . .").

252 These personality rights refer to inner well-being and development of the individual as a unique person. For example, the German Constitutional Court explained that personality rights relate to undefined freedoms and that "[t]heir function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional concrete guarantees." Eppler, 54 BVerfGE 148, 153 (1980) (Ger.); *see also* EBERLE, *supra* note 54, at 61 (explaining that Article 2 of the German Basic Law actually refers to "unfolding" rather than "development" as it is usually translated and this relates to the German conception of personality rights as related to well-being, rather than to autonomy or liberty as in America). R

The concept of "personality rights" is much more familiar in European law and rarely mentioned in American cases, although some similar concepts arise in substantive due process jurisprudence. *See* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 978–79.

Hegelian thought.[253] The community consists of more than just the political contract; it is the focus of a higher obligation and membership.[254] This idea received wide currency in the mid-twentieth century. Social critics such as George Herbert Mead argued that a person's self-conception and self-respect depend on his relationship to and within the community. "A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct. . . . [O]ne has to be a member of a community to be a self."[255]

Individual identity and worth depend on membership in the community and recognition from others within the community. Recognition of personality rights means protecting personality from destruction or harm by others. This impulse for recognition is "bound up wholly with the relation that I have with others; I am nothing if I am unrecognized."[256] The desire for recognition may be a deeply felt need for both individuals and groups—a person may demand recognition of his particularity and also recognition of various groups (racial, ethnic, religious, etc.) to which he may belong.[257]

253 *See, e.g.*, AXEL HONNETH, THE STRUGGLE FOR RECOGNITION 107–08 (Joel Anderson trans., 1995); PAUL RICOEUR, THE COURSE OF RECOGNITION 17–19 (David Pellauer trans., 2005); ROBERT R. WILLIAMS, HEGEL'S ETHICS OF RECOGNITION 10 (1997).

254 *See* Charles Taylor, *Hegel: History and Politics*, *in* LIBERALISM AND ITS CRITICS 180 (Michael Sandel ed., 1984) ("The idea that our highest and most complete moral existence is one we can only attain to as members of a community obviously takes us beyond the contract theory of modern natural law, or the utilitarian conception of society as an instrument of the general happiness. For these societies are not the focus of independent obligations, let alone the highest claims which can be made on us . . . . The doctrine which puts *Sittlichkeit* at the apex of moral life requires a notion of society as a larger community life, to recall the expression used above, in which man participates as a member.").

255 GEORGE H. MEAD, MIND, SELF, AND SOCIETY 162 (Charles W. Morris ed., 1962).

256 BERLIN, *supra* note 8, at 156 n.1. Berlin further noted: R

> I cannot ignore the attitude of others with Byronic disdain . . . for I am in my own eyes as others see me. I identify myself with the point of view of my milieu: I feel myself to be somebody or nobody in terms of my position and function in the social whole; this is the most 'heteronomous' condition imaginable.

Id. Berlin explains that this ideal of attitudinal respect is the opposite of Kantian freedom in which the free man does not need public recognition for his inner freedom. *Id.*

257 The idea of group membership and group rights is reflected in a number of modern constitutions that explicitly recognize the demands of particular minority ethnic, religious, or linguistic groups. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 16–23 (U.K.) (providing for English and French as official languages and for explicit minority language educational rights).

This goes beyond recognition of everyone in the same way to recognition of each person in a particular way.

Communitarian political theorists have also expressed this idea. For example, Michael Sandel describes individual identity as constituted in part by community: "[C]ommunity describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity."[258] Joseph Raz also articulates a strongly communitarian view of the self, explaining that "[p]eople's relations to the society in which they live is a major component in their personal well-being. It is normally vital for personal prosperity that one will be able to identify with one's society, will not be alienated from it, will feel a full member of it."[259]

The importance of community in constituting the self has gone beyond social science or philosophy and has at times become a political and legal demand for *recognition itself*.[260] At the heart of many legal claims for human dignity is an assertion of *misrecognition* or *lack of recognition*.

Such recognition goes beyond acknowledging the inherent human dignity of each person and may lead to policies that undermine individual liberty and autonomy.[261] This demand is something

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Often, demands for dignity are couched in terms of respect for groups, such as hate speech legislation, which prohibits hateful speech based on a person's membership in a particular type of group. *See infra* Part IV.B.1. Whether such group dignities have meaning apart from the dignity of the individual is a separate question. Jeremy Waldron argues that group dignity may have meaning only in the context of individual dignity: "It is not clear, in other words, that we are getting to any idea of a foundational or inherent dignity of groups when we talk of the dignity of the nation-state or the dignity of this or that institution or community." Waldron, *supra* note 20, at 75; **R** *see also* GRIFFIN, *supra* note 42, at 256–57 (analyzing the justification for such rights **R** and questioning whether we would be better off without the third generation of "solidarity" rights).

258 MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (2d ed. 1998).

259 Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 313 (1991).

260 Taylor, *supra* note 44, at 64 ("We could say that . . . misrecognition has now **R** graduated to the rank of a harm that can be hardheadedly enumerated along with [inequality, exploitation, and injustice]."); *see also* RICOEUR, *supra* note 253, at 19 **R** ("[T]he demand for recognition expresses an expectation that can be satisfied only by mutual recognition, where this mutual recognition either remains an unfulfilled dream or requires procedures and institutions that elevate recognition to the political plane.").

261 *See* Goodin, *supra* note 56, at 100 ("Respecting people's dignity does seem to **R** be a more fundamental premise of our individualistic ethic than that of respecting choices . . . . And respecting people's dignity has strikingly different practical implications than respecting their choices *simpliciter*.").

very different from a demand for autonomy or freedom.[262] Recognition requires the community to validate and to have a good opinion of each person. In this way, recognition places demands not only on the state to enforce equality and basic rights, but on members of the community to provide respect and recognition of their fellow citizens. Being left alone to pursue one's vision of the good life is not sufficient; rather the demand for recognition requires cooperation and respect between individuals within the broader community.

B. Dignity as Recognition

Constitutional courts regularly consider recognition to be an essential component of respect for human dignity. In this view, a person's dignity vitally depends on recognition by others in the political and social community. Maintaining dignity depends on the *attitude* possessed by both the state and other individuals.[263] An individual's personality, and therefore his dignity, is constituted and confirmed by society.[264] This is not the "equal human dignity" of all citizens. Rather it is a dignity of difference, of recognition for individual and group differences. Describing dignity in this way focuses on how we appear to others and emphasizes the importance of *subjective* feelings about dignity, whether a person feels respected. Unlike inherent or intrinsic dignity, such dignity depends on external affirmation to validate and confirm a person's worth.[265]

262 *See* BERLIN, *supra* note 8, at 158 ("[The desire for recognition] is more closely related to solidarity, fraternity, mutual understanding, need for association on equal terms, all of which are sometimes—but misleadingly—called social freedom.") Although recognition by others may be a deep human need, nonetheless, achieving recognition should not be confused with negative liberty or individual autonomy. *See id.* at 159. R

263 Charles Taylor identifies this as a desire for "attitudinal" respect, not respect for individual rights, but "rather of thinking well of someone." CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 15 (1989) ("The very way we walk, move, gesture, speak is shaped from the earliest moments by our awareness that we appear before others, that we stand in public space, and that this space is potentially one of respect or contempt, or pride or shame."). Similarly, Ronald Dworkin explains that governments may differ in how they respect human dignity, but "[t]he fundamental human right, we should say, is the right to be treated with a certain *attitude*: an attitude that expresses the understanding that each person is a human being whose dignity matters." DWORKIN, *supra* note 9, at 35. R

264 For example, Robert Post explains, "[i]f others act in ways that persistently violate the norms that define my dignity, I find myself threatened, demeaned, perhaps even deranged." Post, *supra* note 120, at 476. R

265 *See* Spiegelberg, *supra* note 41, at 56 (explaining this is the "dignity of being worthy *of* something else, to which what is worthy has something like a claim, e.g., to attention, to approval or to support. Such dignity is in this sense outward bound, R

Dignity as recognition depends on individuals receiving respect and recognition both from other individuals, who must recognize each other as citizens and community members, and also from the state, as the embodiment of the community's legal and social norms. To respect this type of dignity, first the state must require and enforce "interpersonal *respect*"[266] between citizens through, for example, prohibitions on defamation and hate speech.[267] In addition, the state must adopt policies that confer not equal treatment, but treatment that *expresses* the equal worth of all individuals and their life choices. Policies may need to respect each person or group in a manner particular to its needs and interests.

As with positive conceptions of dignity, the dignity of recognition will depend on evolving social norms. Unlike positive dignity, however, the demands likely will be driven not by community norms, but rather by individuals or groups who claim to be unrecognized or misrecognized. If a person or group alleges lack of respect or exclusion, there is unlikely to be an objective standard for assessing whether this is unreasonable. One might say that courts should recognize only those interests that society is willing to recognize on some objective level. A community standard, however, will not work here precisely because the point of asserting the harm of misrecognition is to claim that society's existing standards are inadequate to self-fulfillment and development. If recognition is treated as an individual constitutional right, claims of misrecognition may well be countermajoritarian. Human dignity as recognition, as respect for personality rights, will often turn on the subjective perceptions of each individual or group. In some cases, however, there will be plausible and even pressing claims to respect on both sides of a dispute, as the examples below will demonstrate. This makes judicial enforcement of such claims contentious because of the difficulty of finding a legal metric for respect.

The politics of recognition makes a claim that essential human dignity requires recognition of individual uniqueness in order to be fully respected. Unlike the dignity of being left alone to make one's own choices, the dignity of recognition is the demand of being *accepted* by the political, social, and moral community.[268] It may

extrinsic, demands a complement. . . . [This dignity] calls for action, the fulfillment of a claim.").

266 Whitman, *supra* note 87, at 1164. R

267 *See id.* at 1164–65 (explaining some of the areas in which norms of respect are enforced in France and Germany including protections for personal honor and prohibitions against disrespectful treatment of workers, women, and prison inmates).

268 Membership within the community may require protection for one's dignity and mutual recognition by community members. *See, e.g.*, HEYMAN, *supra* note 21, at R

impose affirmative duties on non-state actors to protect human dignity and encourage the development of other individuals.[269]

Especially outside of the United States, constitutional courts closely associate dignity with recognition and respect for the unfolding of personality. For example, the Germany Federal Constitutional Court often reads the protection for human dignity with the constitutional protection for the free development of personality.[270] It has explained in a variety of contexts that the state "must leave the individual with an inner space for the purpose of the free and responsible development of his personality. Within this space the individual is his own master."[271]

Recognition can also be related to one's reputation or standing within the community. For example, on an interpersonal level, defamatory or hateful speech can undermine dignity by damaging reputation or causing fear and distress. Similarly, failures by the state to confer full legal status or recognize a particular lifestyle may undermine dignity, both by failing to recognize private choices and also by treating individuals unequally. As part of the desire for recognition, individuals and groups often demand more than formal equality—they want a particular expression of respect from others and the state. The following examples demonstrate how dignity as recognition is invoked in the context of maintaining one's reputation, being free from humiliation and fear, and being acknowledged as a full member of the social and political community.

62 (explaining that being a free person within the social realm, "[f]irst, and most fundamentally . . . means *to be a citizen or member of the community* and to be treated as such by others and by the community as a whole. In addition to the tangible rights and benefits that it confers, citizenship has an important dignitary dimension."). "[T]he requirement that individuals recognize one another as human beings and community members is not simply a contingent or conventional one but is inherent in the very idea of a community." *Id.* at 176.

269 *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 546 (2006) (refuting the idea that nonstate actors have only negative obligations and arguing that "[n]on-state actors must also have obligations to protect human rights and to allow for the full-realization of the human potential"); Gewirth, *supra* note 82, at 32 (explaining that "positive rights serve to relate persons to one another through mutual awareness of important needs and, as a consequence, affirmative ties of equality and mutual aid"). R

270 *See* GRUNDGESETZ art. 1–2 (Ger.).

271 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1969, 27 BVerfGE I (Ger.), *reprinted in* KOMMERS, *supra* note 41, at 299. R

1. Recognition by Others

a. Hate Speech

The regulation of hate speech occurs at the intersection of equality, dignity, and the right of recognition. Most European countries, as well as Canada, prohibit speech or publications that vilify or significantly disrespect groups based on race, ethnicity, religion, or gender. Hateful speech is prohibited because it undermines equality and places certain groups outside of the social community. Steven Heyman explains that hate speech impacts the "right to recognition":

> Recognition is the most fundamental right that individuals have, a right that lies at the basis of all their other rights. At the same time, mutual recognition is the bond that constitutes the political community. For these reasons, individuals have a duty to recognize one another as human beings and citizens. Hate speech violates this duty in a way that profoundly affects both the targets themselves and the society as a whole.[272]

Hateful speech expresses the idea that some groups are unworthy of equal citizenship[273] and thereby denies membership to individuals within the community.

The Canadian Supreme Court has clearly articulated this principle in the context of upholding hate speech regulations:

> A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. . . . Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.[274]

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272 HEYMAN, *supra* note 21, at 171. R

273 Jeremy Waldron, *Free Speech & the Menace of Hysteria*, 55 N.Y. REV. BOOKS, May 29, 2008, *available at* http://www.nybooks.com/articles/21452 ("The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and semi-permanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship."); *see also* Schauer, *supra* note 118, at 186 ("If the fact of exclusion is itself a loss of dignity, as it is virtually by definition under this conception of dignity, then a concern with dignity will incline toward minimizing the use of those weapons, including but not limited to speech, by which some people are involuntarily dehumanized."). R

274 R. v. Keegstra, [1990] 3 S.C.R. 697, 746–47 (Can.).

The court reasoned that such speech might also result in discrimination or violence against members of targeted groups, but the primary concern was how hate speech could damage a person's sense of dignity by undermining membership within the community for the targeted individuals and groups.[275]

In the United States, hate speech is generally protected by the First Amendment.[276] Most other modern democracies have followed a different course—they protect freedom of speech, but prohibit hateful speech in general, or specific forms of hateful speech, such as Nazi propaganda or Holocaust denial.[277] A number of international conventions prohibit hateful speech.[278] In general, "the incitement to racial hatred and other verbal manifestations of race-based animosity are widely accepted as lying outside the boundaries of what a properly conceived freedom of expression encompasses."[279]

The dignity of recognition lies at the heart of widespread prohibitions on hate speech. Such regulations are justified on the grounds that full inclusion of minority groups requires the government to prohibit the dissemination of hateful speech, because such speech undermines public respect for targeted groups and thus may lead to feelings of marginalization or alienation from the wider community.

Yet the dignity of recognition protected by hate speech regulations runs headlong into the dignity of the speaker, a dignity protected by allowing the maximum degree of freedom of speech.[280] The dignity of not being insulted and being brought within the legal community thus conflicts with the inherent dignity of each person to express his views, however hateful they may be. These values must

275 *See id.*

276 In the United States, hate speech is generally considered a protected category of speech, so long as the speech does not contain fighting words. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

277 *See, e.g.*, Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 874 (1998) (noting that other Western democracies which have enacted hate-speech laws "have scarcely suffered a diminution of respect for free speech"); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341–42 (1989) (noting the international community's choice to outlaw racist hate propoganda).

278 *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI), at art. 20(2) (Dec. 16, 1966) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106(XX), at art. 4 (Dec. 21, 1965) (similar provisions).

279 Schauer, *supra* note 119, at 33–34. R

280 *See supra* notes 114–21 and accompanying text. R

compete in the political process and in constitutional adjudication, but such disputes cannot be resolved merely by invoking dignity.

b. Defamation: Dignity and Reputation

Defamation and libel laws protect the dignity of a person's good reputation. Deciding whose dignity will be protected is one way to define the boundaries of the community. In most European countries, defamation law carves out a substantial exception to free speech in order to protect an individual's reputation and good name, which are linked to one's standing in the community.[281] Harm to reputation is thought to undermine a person's dignity within the community and to damage the person's self-conception. As Robert Post explains, "The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society. Rules of civility are the means by which society defines and maintains this dignity."[282] Defamation law, as Post argues, articulates and enforces boundaries of civility.[283]

Generally, American libel law protects individual reputation, although not the reputations of public officials and public figures.[284] Libel, a dignitary tort, protects the target's reputation and compensates for harm to "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[285] Such protections are not considered to violate the First Amendment, even though they limit speech. As Justice Stewart explained,

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[286]

281 *See, e.g.*, Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 3–4 (1980).

282 Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 711 (1986).

283 *See id.*

284 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).

285 *Id.* at 350; *see also* Post, *supra* note 282, at 720 (examining the three types of reputation implicated in American defamation and libel law). R

286 Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

The dignitary interests in personal reputation continue to be balanced against important First Amendment interests. In general, ordinary individuals, but not politicians or public figures, can often recover under state law for defamation and libel. Localized community standards determine what type of speech impermissibly impairs a person's reputation and standing in the community.

In Europe, personal reputation and dignity receive even more robust protections. The German Federal Constitutional Court has stated in a number of decisions that free speech rights must be balanced against protections for an individual's reputation or unfolding of personality. The Court has explained, "The individual's right to societal respect and esteem does not have precedence over artistic freedom any more than the arts may disregard a person's general right to respect."[287] The balance between the two values will vary depending on the facts of each individual case, but in the seminal *Lüth* decision the German Court suggested that the balance would often be in favor of freedom of speech, particularly when the speech at issue "contributes to the intellectual struggle of opinions."[288]

Elsewhere in Europe, reputation may prove to be a more robust interest against free speech claims, as can be seen in the application of defamation-type laws on behalf of well-known public figures who would likely not receive such protection in the United States. For example, in *Tammer v. Estonia*,[289] a journalist referred to the mistress of the former Estonian Prime Minister as an "unfit mother" and as a "homewrecker."[290] The Estonian courts convicted the journalist of the criminal offense of "degradation of another person's honour and dignity"[291] and fined him because the Estonian words used by the journalist were deemed particularly derogatory.[292] The European Court of Human Rights upheld the conviction and found that the criminal penalty did not disproportionately interfere with the journalist's right to freedom of expression because he "could have formulated his criticism of Ms Laanaru's actions without resorting to such insulting expressions."[293]

287 BVerfG 1971, 30 BVerfGE I73 (Ger.), *reprinted in* KOMMERS, *supra* note 41, at 303. R

288 BVerfG 1958, 7 BVerfGE I98 (Ger.), *reprinted in* KOMMERS, *supra* note 41, at 366. R

289 Tammer v. Estonia, App. No. 41205/98, 37 Eur. H.R. Rep. 43, at 857 (2003).

290 *See id.* at 860.

291 *Id.* at 865.

292 *See id.* at 862.

293 *Id.* at 871.

The decision might seem remarkable to American lawyers, especially since Ms. Laanaru was a government official, an active social figure, and editor of a popular magazine.[294] Moreover, the details of Ms. Laanaru's affair with the former Prime Minister were well known in Estonian society and Ms. Laanaru had discussed some of the details in her own published memoirs.[295] The case demonstrates the extent of protection for reputation—the dignity of a public figure trumped the free-expression rights of a journalist writing about well-known events.

In *Lindon v. France*,[296] Lindon wrote *Jean-Marie Le Pen on Trial*, a novel inspired by real events and murders carried out by members of the Front National, a right-wing nationalist party led by Le Pen.[297] The Front National and Le Pen prosecuted the author as well as his publisher for public defamation against a private individual. The author and the publisher were convicted and fined in Paris Criminal Court.[298] The European Court of Human Rights held that the prosecution did not violate freedom of expression rights under Article 10 of the European Convention on Human Rights[299] because the state had a legitimate interest in protecting the reputation of individuals.[300]

Although Le Pen is a well-known and controversial political figure, the court allowed him to be treated as a private individual. The court explained, "[R]egardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety, especially as the reputation of a politician, even a controversial one, must benefit from the protection

294 *See id.* at 867.

295 *See id.* at 687–68.

296 Lindon v. France, App. Nos. 21279/02 36448/02, 46 Eur. H.R. Rep. 35, at 761 (2008).

297 *See id.* at 761.

298 *See id.* at 786.

299 Article 10 of the European Convention on Human rights provides:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others . . . .

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 10; *see also* Rao, *supra* note 19, at 227 (discussing the consequence of limitations clauses on fundamental rights). R

300 *See* Lindon, 46 Eur. H.R. Rep. 35, at 794.

afforded by the Convention."[301] The European Court of Human Rights paid little attention to the fact that the alleged defamation occurred in the context of a work of fiction or that Le Pen was a provocative political figure.

These decisions demonstrate how defamation law protects the dignity and reputation of individuals and in so doing recognizes and affirms that those individuals are part of the community.[302] The European Court of Human Rights affirmed that both the "homewrecker" and the right-wing nationalist are entitled to have their reputations protected against insult, thereby confirming their individual dignity and membership in the community.

In both Europe and the United States individuals can recover against harms to reputation, but in Europe such harms are treated expansively and the corresponding free speech interests are given less weight. The priority of values varies significantly when personal reputation is at stake. Perception of harms to reputation and dignity are inherently subjective and depend on the reaction of an individual to community norms. Robust protections for the reputational harms reflect concern for a certain type of dignity that depends upon a person's self-image. It protects a person, not from physical harm or violence (which are separate crimes), but from the psychological harm of the onslaught of bad words. Constitutional courts focused on the dignity of reputation often minimize or overlook the strong and competing dignity of free speech. For example, the European Court of Human Rights chose the reputational dignity of the Estonian politician over the freedom of expression of the journalist and the unidentified interest in the public to be informed about matters of public concern.[303] Here, as elsewhere, dignity in constitutional adjudication masks the value choice—it does not solve it.

Dignity as reputation has little to do with the dignity of being left alone, because reputation by definition depends on the viewpoints of other individuals. Reputation matters precisely because individuals

301 *Id.* at 791.

302 *See* Post, *supra* note 282, at 712, 715. R

> From the perspective of the individual [dignity's] essence is inclusion, for under its regime defamation law functions to protect the ability of individuals to be integrated into community membership. From the perspective of society, however, its essence is constitutive, for under the concept of dignity defamation law defines the boundaries and nature of the general community.

Id. at 715.

303 *See* Tammer v. Estonia, App. No. 40215/98, 37 Eur. H.R. Rep., at 857 (Eur. Ct. H.R. 2003).

are thought to care how others perceive them and whether the state provides recourse against insults. Moreover, this is not a substantive concept of dignity—courts do not consider whether the insulted person has behaved with dignity or in fact enjoys a good reputation, but determines only whether they are legally entitled to a certain type of public respect (or at least silence). There is an important sense in which the law cannot mandate actual respect, but it can prohibit speech that expresses disrespect.

2. Public Recognition and Respect

a. Sexuality and Gender: Dignity of Social Inclusion

The desire for recognition also relates to demands for equality, not just of treatment, but symbolic and expressive equality, for ensuring that state policies express the right attitude and respect for different groups. For example, in cases challenging the rights of homosexuals and transsexuals, courts have often appealed to notions of dignity in order to achieve wider social acceptance and respect.

In *Lawrence v. Texas*, discussed in Part II, the Supreme Court invalidated Texas' criminal law prohibiting sodomy.[304] The Court focused in part on the autonomy to choose one's sexual partners, but also expressed a further point about dignity as respect for the choices made by individuals.[305] Justice Kennedy explained, "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[306] The Court also asserted that criminalizing sodomy attaches a "stigma" to homosexuals that might be "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[307] The Court explained that the Texas law was invalid not only because it restricted the autonomy and sexual freedom of homosexuals, but also because it inflicted dignitary harm by stigmatizing a type of sexual conduct and demeaning the lifestyle of homosexuals. The harm identified by the Court concerned both state and private discrimination and connected the legal prohibition on sodomy with a lack of acceptance and tolerance by the community.[308]

304 Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

305 *See id.* at 578.

306 *Id.*

307 *Id.* at 575.

308 Similarly, in *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court held that a Colorado constitutional amendment that prohibited all legislative, executive, and judicial actions to protect homosexuals from discrimination violated the Equal Pro-

Addressing the issue of gay marriage, the California and Connecticut Supreme Courts have also invoked dignity as recognition when upholding the right of gay couples to marry under state constitutional law. For example, the California Supreme Court held that the state's separate domestic partnership provisions for gay couples denied these individuals the right to marry and the right to equality under California law. The court explained that having separate designations for essentially the same relationship denied homosexual couples the respect and dignity afforded to heterosexual couples:

> 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.[309]

The California Supreme Court rejected the state interest in retaining separate designations for the unions of same-sex couples and heterosexual couples. The court explained that limiting the designation "marriage" to heterosexual couples raises doubts about the dignity of same-sex relationships and reflects an official view that such relationships are of "lesser stature."[310] Such laws perpetuate a general premise that homosexuals are "second-class citizens."[311] The court repeatedly referred to the importance under the California Constitution of providing equal dignity and respect to the relationships of same-sex couples. According to the court, such dignity could not be afforded by giving the same bundle of legal rights and benefits under

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tection Clause of the Fourteenth Amendment. *See id.* at 635. The Court did not refer to dignity specifically, but sounded the related themes of inclusion and belonging within the community: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634; *cf. id.* at 646 (Scalia, J., dissenting) ("Quite understandably, [homosexuals] devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.").

309 *In re* Marriage Cases, 183 P.3d 384, 400 (Cal. 2008).

310 *Id.* at 402.

311 *Id.* ("[R]etaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.").

a different name, but also required allowing same-sex couples to use the historic term "marriage."

Similarly, the Connecticut Supreme Court also relied upon dignity interests when it held that civil unions for same-sex couples are not equal to marriage.[312] In reaching this conclusion, the court relied heavily on the historical significance of marriage and its symbolic value, as well as the fact of pervasive social and legal discrimination against homosexuals. The court recognized that the Connecticut civil union law gave same-sex couples all of the same benefits, protections, and responsibilities of marriage.[313] Nonetheless, civil unions maintained a "second-class citizen status for same-sex couples by excluding them from the institution of civil marriage," and such exclusion "*is* the constitutional infirmity."[314]

The reasoning in these cases epitomizes the idea of dignity as recognition—dignity does not necessarily turn on tangible rights or freedoms. Strict equality of legal benefits are viewed as inadequate standing alone, because dignity as recognition depends essentially on how one's choices and relationships are viewed by the broader social and political community, by the *attitude* expressed about one's relationships by the law.

As the Connecticut Supreme Court noted:

> Even though the classifications created under our statutory scheme result in a type of differential treatment that generally may be characterized as symbolic or intangible[,] . . . it is no less real than more tangible forms of discrimination, at least when, as in the present case, the statute singles out a group that historically has been the object of scorn, intolerance, ridicule or worse.[315]

This represents an example of how dignitary harms standing apart from any tangible discrimination may constitute a constitutional harm. Such discrimination may be "symbolic", yet nonetheless impinge on a person's dignity by failing to recognize his or her life as worthwhile.

Members of the community, however, disagree about the symbolic message that the state should adopt. Opponents of gay marriage argue that marriage must retain its traditional definition as between a man and woman, for both social and religious reasons.[316] They want

312 *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008).

313 *See id.* at 415.

314 *Id.* at 418 (quoting *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004)).

315 *Id.*

316 *See, e.g.*, Same-Sex Marriage: Answering the Toughest Questions, NAT'L ORG. FOR MARRIAGE, http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475

the marriage label to apply only to heterosexual relationships. They allege, in effect, that if the state expands the definition of marriage, heterosexual relationships will lose their unique and longstanding recognition by the state.[317] As a legal matter, they find no constitutional grounds for requiring an extension of the "marriage" relationship to same-sex couples.[318] From a different perspective, others have argued that gays and lesbians would better promote their dignity by developing their own family law traditions rather than being subsumed "into an institution of marriage which has been built (however awkwardly) for and by heterosexuals."[319]

The issue of who gets to use the official designation of "marriage" cannot be resolved by appeals to dignity. This dispute continues to be worked out in the courts and also the political process—but both sides raise claims for recognition and dignity. It is likely that in the United States, the Supreme Court will eventually decide whether allowing same-sex couples the choice to marry is a stronger claim than the interest opponents have in keeping the marriage label for heterosexual relationships. But if the issue turns not on specific legal rights, but on highly favored (some might say traditional or sacred) words—who gets to define the term "marriage"? Are the arguments for inclusion to a favored designation stronger than the arguments for exclusion? Is this an issue that courts should be deciding as a matter of constitutional law? Such questions are beyond the scope of this Article, but these examples demonstrate the very different type of claims raised by dignity as recognition and some of the difficulties of adjudicating such claims.

In a similar vein, the European Court of Human Rights has decided several cases involving the rights of transsexuals who have been denied certain forms of legal recognition of their chosen gender. In *I v. United Kingdom*,[320] the applicant was a transsexual who had undergone surgery to live as a woman. The United Kingdom failed to allow her to amend her birth certificate to reflect her new gender. The European Court of Human Rights held unanimously that there was a violation of the right to respect for private life and the right to

595/k.566A/Marriage_Talking_Points.htm (last visited Jan. 28, 2011) (providing talking points regarding the issue for opponents).

317 *See id.* ("Gays and Lesbians have a right to live as they choose, they don't have the right to redefine marriage for the rest of us.").

318 *See* Defendant-Intervenors' Trial Memorandum at 2–5, Perry v. Schwarzenegger, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (No. 09-CV-2292).

319 Jeffrey A. Redding, *Proposition 8 and the Future of American Same-Sex Marriage Activism*, 14 NEXUS 113, 122 (2009).

320 I v. United Kingdom, App. No. 25680/94, 36 Eur. H.R. Rep. 53, at 967 (2003).

marry. The court emphasized that there could be a "serious interference with private life" when legal formalities did not match social realities:

> The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by a law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.[321]

I was not about having the legal autonomy or even the economic means to make choices about physical and social gender, because the state had authorized treatment and surgery for the transsexual, financed the operation, and permitted the artificial insemination of a woman living with a female-to-male transsexual. The case turned on whether such choices would be given complete legal recognition.[322] The court determined that such recognition was essential to bringing transsexuals fully within the social and legal community.[323] Furthermore, respect for human dignity required that "protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."[324]

The German Federal Constitutional Court has similarly emphasized that "[h]uman dignity and the constitutional right to the free development of personality demand, therefore, that one's civil status be governed by the sex with which [a person] is psychologically and

321 *Id.* at 988.

322 *See id.* at 989 (noting that in such circumstances, "it appears illogical to refuse to recognise the legal implication of the result to which the treatment leads").

323 *Id.* at 992 ("In the 21st century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy . . . .").

324 *Id.* In part, the European Court of Human Rights's decision is based on the language of Article 8 of the European Convention on Human Rights, which protects the "right to respect for private life." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 222, art. 8. The court recognized that the contours of the positive obligations inherent in the right to respect for private life are "not clear cut." *See I*, 36 Eur. H.R. Rep. 53, at 986. By using the word "respect," the Article 8 right is phrased in the language of recognition. Article 8 protects something more than just the negative freedom of retaining privacy or being free from government control over private actions. Rather, Article 8 requires some degree of affirmative *respect* for the choices that are made within the private sphere.

physically identified."[325] Personality rights allow self-creation and also require society to support and validate the development of personality.

In decisions dealing with the rights of homosexuals and transsexuals, dignity is in part about recognizing who belongs within community institutions. The expansive concept of dignity requires more than toleration or equal benefits in order to recognize belonging. The state must not only preserve sexual autonomy and freedom, but must also ensure "respect for . . . private lives."[326] Inherent in this conception of dignity is the idea that public respect and recognition are necessary to lead a full private life. An individual's private choices gain meaning and validation in part through their recognition by the social and political community. Under this view of dignity, the freedom to make personal decisions must also include full public acceptance of those choices.

b. Racial Equality: Separate Is Not Equal

Issues of racial equality frequently turn on considerations of dignity. As discussed in Part II, this dignity may rest upon the intrinsic worth of the individual, the idea that each person must be treated as an individual, rather than as a member of a group based on immutable characteristics such as race or gender. Racial equality cases, however, also sometimes focus on the dignity of recognition, on the necessity of full inclusion in the social and political community. In this view, minority groups may lack opportunities and remain socially marginalized even in the absence of legal discrimination.[327] Indeed, many judicial decisions about racial equality turn not on formal equality or whether everyone has access to the same goods, but rather on concerns about the inclusion and acceptance of various groups. In Owen Fiss's distinction, this is a focus on "antisubordination"—the idea that laws should not perpetuate the "subordinate position of a specially disadvantaged group."[328] The principle suggests that we should "think of racial equality as a substantive societal condition

325 Transsexual Case, 49 BVerfGE 286 (1979), *reprinted in* KOMMERS, *supra* note 41, at 331. R

326 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

327 *See, e.g.*, Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 702 (2005) ("There is, I believe, an important relationship between dignity and substantive racial justice. . . . A crucial aspect of those harsh truths is that slavery, segregation, and modern forms of so-called societal discrimination involve extensive efforts to degrade, dishonor, isolate, and ostracize.").

328 Fiss, *supra* note 123, at 157. R

rather than as an individual right."[329] The emphasis here is on group disadvantage and how policies may perpetuate the subordination of a particular (usually racial) group.

U.S. equal protection jurisprudence has at times emphasized the social conditions of inequality. For example, in *Brown v. Board of Education*,[330] the Supreme Court explained, "To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[331] Similarly, in *Loving v. Virginia*[332] the Court held Virginia's miscegenation laws unconstitutional. Chief Justice Warren noted, "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justifications, as measures designed to maintain White Supremacy."[333] These are classic expressions of antisubordination concerns.

Opening up public accommodations to all racial groups was similarly linked to removing stigma and recognizing the membership of all individuals within the community. From an earlier time, dissenting in the *Civil Rights Cases*,[334] Justice Harlan explained that legislation providing access to public accommodations was important because it "secure[s] the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained."[335] Access to public accommodations would improve the sense of "belonging" under the law.

Belonging is about something in addition to equality or access—it relates to respect and recognition. In *Heart of Atlanta Motel, Inc. v. United States*,[336] Justice Goldberg explained that the primary purpose of the Civil Rights Act was

> the vindication of human dignity and not mere economics. The Senate Commerce Committee made this quite clear:
>
> > The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that

329 Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824 (1995).

330 347 U.S. 483 (1954).

331 *Id.* at 494.

332 388 U.S. 1 (1967).

333 *Id.* at 11.

334 109 U.S. 3 (1883).

335 *Id.* at 61 (Harlan, J., dissenting).

336 379 U.S. 241 (1964) (upholding the public accommodations portions of the Civil Rights Act of 1964).

> surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.[337]

Such statements stressed the demeaning aspect of discrimination to a society that countenanced it all too often.

These cases invalidated racial discrimination to improve formal equality, but also to promote inclusion and belonging. In *Brown*, the Court stated that "[s]eparate educational facilities are inherently unequal."[338] This brought out the stigmatic harm of separating the races. The concerns of stigma and inferiority emphasize the underlying harms of racial discrimination and exhibit sensitivity to the social effects of a long history of legally enforced discrimination and segregation.[339] As Jack Balkin and Reva Siegel explain, "Equality . . . is not just the Aristotelian insistence that like cases be treated like. It is about the struggle against subordination in societies with entrenched social hierarchies. It is about the lived experience of people on the bottom who strive for dignity and self-respect."[340] In this context, dignity is about recognition of historical or social struggles of members of disadvantaged groups and promoting dignity will often require more than formal equality.

In early cases establishing basic equality rights, dignity as recognition and the inherent dignity of being treated equally by the state pointed in the same direction—the dignity of recognition bolstered or explained the underlying harm of classifying an individual by race. As formal legal equality has become well established, however, more recent cases reveal a tension and often conflict between the two concepts of dignity. For example, in affirmative action cases that divide sharply in the Supreme Court, the majority has often invoked dignity of the individual in the course of striking down affirmative action programs that discriminate in favor of racial minorities.[341] By contrast, dissenting justices have argued for upholding affirmative action programs, based in part on the recognition of the need for special treat-

337 *Id.* at 291–92 (Goldberg, J., concurring) (quoting S. REP NO. 88-872 (1964)).

338 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

339 *See* Bracey, *supra* note 327, at 703–05 (discussing how dignitary concerns contextualize discussions about race and focus on themes of inclusion and community). R

340 Balkin & Siegel, *supra* note 124, at 16. R

341 *See* Adarand Constructors v. Pena, 515 U.S. 200, 218 (1995); Miller v. Johnson, 515 U.S. 900, 911 (1995); *supra* notes 129–30 and accompanying text. R

ment designed to remedy historic discrimination and its effects.[342] In these affirmative action cases the inherent dignity of being treated as an individual agent runs against the dignity of recognition for disadvantaged racial groups. Appeals to dignity do not solve the contentious constitutional and social issues surrounding racial equality.

c. Socioeconomic or Material Equality

In *Grootboom*, discussed in Part III, the South African Constitutional Court connected the provision of adequate housing to the promotion of human dignity.[343] Ensuring that the government provided such goods meant recognizing those most in need.[344] Such recognition stems from the requirement in the South African Constitution "that everyone must be treated with care and concern."[345] The discussion in *Grootboom* relates the ideal of dignity and equality with the themes of respect and concern. Part of basing a society on human dignity means respecting the needs of the most disadvantaged members of society. Providing for these needs gives recognition to individuals and thus bolsters their dignity.

Canadian equality jurisprudence has embraced similar principles. For instance, in *Eaton v. Brant County Board of Education*,[346] the Canadian Supreme Court criticized the failure to make provisions for disabled individuals. The court noted that this failure need not result from discrimination to constitute a violation of the Canadian Charter of Rights and Freedoms, rather it could be simply "the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."[347] As one commentator noted, "The argument depends on the idea that there are some benefits or opportunities,

342 *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 298–300 (2003) (Ginsburg, J., dissenting) (arguing that the University of Michigan's affirmative action program passed constitutional muster in part because of the history of discrimination and racial oppression targeted against African-Americans and Hispanics that made such affirmative measures constitutionally appropriate). I discuss this issue in greater detail in Rao, *supra* note 139, at 1070–80. R

343 South Africa v. Grootboom, 2001 (1) SA 46 (CCC) at 62 (S. Afr.) (emphasizing that social and economic rights were "key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential").

344 *See id.* at 69.

345 *Id.*

346 [1997] 1 S.C.R. 241 (Can.).

347 *Id.* at 272.

some institutions or enterprises, which are so important that denying participation in them implies the lesser worth of those excluded."[348] The accommodation is important not only as a practical matter, but also as an expressive one, because it provides recognition of the particular needs of the disabled.

In instances in which courts have not recognized social and economic rights they have often been criticized for excluding the affected individuals from full citizenship or membership in society. For example, Canadian courts have upheld the denial of public funding for abortions.[349] One scholar has argued that such denial undermined the equality of women and also eroded their dignity by denying them a fundamental aspect of membership in Canadian society, namely fully funded health care.[350]

The denial of dignity in these cases occurs through the failure to provide certain goods judged to be fundamental by prevailing community standards. While this overlaps with the positive dignity of receiving social-welfare goods, this adds an additional focus on how individuals *perceive* being excluded from such goods. The harm is more than being hungry or lacking adequate housing, but also inheres in the lack of recognition by the state of the impoverishment and its consequences. The state recognizes individuals by providing them with social welfare or protection and confirms their membership in the political and social community.[351] This is particularly true in countries with extensive social-welfare systems in which there is an expectation of certain government funded goods and exclusion from these goods may explicitly place one outside of the community.

Constitutional courts requiring the provision of social and economic goods emphasize themes of dignity and community membership. If adequate housing or health care funding is considered part of one's membership in the community, then a person without such

348 Denise G. Réaume, *Discrimination and Dignity*, 63 LA. L. REV. 645, 688 (2002).

349 *See* Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1100 (2006) (discussing the Canadian case law).

350 *Id.* at 1099 ("Human dignity is demeaned when individuals and groups are marginalized, ignored, or devalued as less capable, less deserving, or less worthy of recognition as members of Canadian society. Human dignity, as defined under Canadian equality rights, thus encompasses a sense of community; a mutual commitment to treat individuals and groups as capable, deserving, and worthy of full and equal membership in Canadian society.").

351 This is a different rationale than the positive conception of dignity linked with providing minimum standards of social welfare. *See supra* Part III. In those cases, courts have considered that there exists some external standard of dignity that cannot be met in the absence of certain goods, such as adequate housing.

goods exists at the margin of the community and cannot participate fully within it. Moreover, from this perspective, if the state ignores relevant differences, such as poverty, disability, or gender, in the provision of material goods, it may undermine dignity by failing to recognize the particular needs of certain groups.[352]

C. The Difficulty of Dignity as Recognition

The harm to dignity by failing to be recognized is a familiar one—such harms exist when we feel misunderstood, insulted, or demeaned. Within the American constitutional law tradition, a number of decisions express concern for dignity as recognition. Most of these opinions, however, address the harms of stigma and respect alongside traditional claims to the dignity of individual rights and being left alone by the state. In many of these cases, the harm of stigma is a consequence of a more fundamental deprivation of equality and individual rights. For example, in *Loving*, Virginia's miscegenation law was undoubtedly insulting to non-whites, but surely the greater harm was restricting the fundamental freedom to marry a person of one's choice based on racial classifications.

These early civil rights era cases demonstrate why recognition dignity and inherent dignity are sometimes associated or conflated. Both concepts of dignity focus on the individual, and when they appear together in a case such as *Lawrence* or *Loving*, the Court easily moves between securing individual liberty rights to concern for how a person might *feel* when denied these rights by the state. The deprivation of individual rights may result in a person feeling unrecognized by the state.

In more recent cases, however, the demand for recognition sometimes stands on its own, for example in claims for hate speech regulation or in the constitutional push for same-sex marriage. Claims of dignity as recognition argue that feelings of being stigmatized and marginalized deserve legal, even constitutional, protection. They seek protection against insults or symbolic harms in the absence of a violation of traditional rights.

Asserted on its own as a constitutional right, dignity as recognition is essentially distinct from inherent dignity. These two types of dignity emphasize different aspects of personhood. Inherent dignity

352 Dignity may also be associated with one's "status" in society. *See* Feldman, *supra* note 157, at 695. "Questions of status of all kinds give rise to issues many of which are related to discrimination. A group's identity may be infringed by discriminatory treatment or legislation, and an individual's dignity may be hurt by being treated as an inferior under family law, employment law or any other area." *Id.* R

focuses on the universal attribute of individuals as human agents, able to choose and direct their own lives. Recognition dignity focuses on the individual, but finds that the dignity of a person exists not only in making choices, but also in having those choices validated and accepted by the state and other members of the community. These forms of dignity, both focused on the individual, will sometimes run in the same direction. But they can just as easily conflict, for example when recognition and respect for one person requires constraints on another person's speech or expression, or when recognition and preferences for some racial groups means exclusion of particular individuals from selective opportunities.

Assessing dignity as recognition also poses problems for adjudication, because recognition claims invariably turn on perceptions of insult and harm. For example, if equal protection is in part about dignity, does it offend the dignity of racial minorities to be given preferences based on race? Or alternatively, does it offend the dignity of racial minorities to be treated with formal equality as if persistent social and historical inequalities did not exist? Americans—Supreme Court justices, scholars, and citizens—disagree strenuously over this question. Individuals and groups perceive these harms differently.

By its very nature, recognition dignity is subjective and depends on perceptions of individuals and their feelings—therefore the requirements of such dignity will be personal, shifting, and contingent. Recognition dignity establishes an individualized standard for what constitutes constitutional injury.[353] As such, dignity as recognition poses difficulties for constitutional law in the United States where we have a concept of courts as establishing generalizable rules that apply to all individuals.

Moreover, recognition of subjective harms is often limited by constitutional doctrines favoring freedom of expression, or individual autonomy, or formal equality. When individuals raise constitutional claims that amount primarily to a lack of recognition, courts must struggle to fit such claims into the American constitutional structure that emphasizes negative liberties. Courts are ill-suited to choose between competing claims for respect and recognition, between litigants with different views of what impacts their personal dignity. Claims for respect and recognition are most likely to succeed when

353 I explain elsewhere that concerns of recognition and stigma require an evaluation of how affected groups view contested policies and these views might change over time. This raises the question of whether the constitutionality of a program such as affirmative action depends on whether the beneficiaries like the program. *See* Rao, *supra* note 139, at 1076–77. R

coupled with an underlying deprivation of individual rights. Adopting a freestanding conception of recognition dignity would require a very significant shift from our current understanding of constitutional rights.

CONCLUSION: CHOOSING DIGNITY

This Article has sought to demonstrate three different concepts of dignity: the dignity of the individual associated with autonomy and negative freedom; the positive dignity of maintaining a particular type of life; and the dignity of recognition of individual and group differences. Each of these forms of dignity expresses different values about the individual and his relationship to society, values that have important consequences when dignity is used as a justification for social policy and constitutional rights.[354]

Constitutional courts, however, often elide the different conceptions of dignity and fail to identify the conflicts between them. This conflation of concepts no longer works for values we know to be distinct, even if sometimes overlapping, like liberty and equality.[355] But dignity as a political and constitutional ideal is a relative newcomer, and so it may still seem possible that dignity can include a little bit of liberty, equality and fraternity, as the circumstances require. Nonetheless, despite the seeming openness of dignity, neither scholars nor constitutional judges have found a unifying understanding of this value—and it is unlikely that they will find one.[356]

Instead, as the examples demonstrate, courts use different conceptions of dignity to support particular conceptions of what is worthy of regard in the individual. These conceptions of value mirror familiar debates about negative and positive freedom, liberty and equality, and the relationship between the individual and the community—the conflicts do not disappear simply by appealing to "dignity." While

354 BERLIN, *supra* note 8, at 134 ("This demonstrates (if demonstration of so obvious a truth is needed) that conceptions of freedom directly derive from views of what constitutes a self, a person, a man. Enough manipulation with the definition of man, and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that the issue is not merely academic."). R

355 A significant amount of modern political philosophy has struggled with these distinct values. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press rev. ed. 1999) (1971); WALZER, *supra* note 208. R

356 Berlin argued strenuously against the idea that one principle or ideal could unify all the different and competing values of mankind. *See* BERLIN, *supra* note 8, at 169 ("[T]he belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized is demonstrably false."); *id.* at 171. R

some forms of dignity may coexist or overlap, the demands of different forms of dignity cannot be simultaneously maximized.

But dignity in constitutional law and political life cannot simply be brushed aside. In modern constitutional systems, dignity is already a preeminent value. Even in the United States, it is increasingly a part of our discourse in thinking about individual rights and government action. So it makes sense to think about what conceptions of dignity we want to promote in our political and social community. The type of dignity that a society protects is part of how a community defines itself—how individuals belong to the community and how the state must act to respect human dignity. An appeal to dignity cannot solve conflicts between competing visions of the good life, but it gives us an opportunity to discuss what we value and why.

If different conceptions of dignity are irreconcilable, then perhaps, for the sake of conceptual clarity in constitutional discourse, we should choose a particular conception of dignity. A grand philosophical definition of dignity being unavailable, we can evaluate what dignity means and what it should mean in American constitutional law. I hope that by identifying three different conceptions of dignity, this Article will be a precursor to further work in this direction.

Although more research is necessary, I will offer a few thoughts on this subject. The American constitutional law tradition has primarily emphasized intrinsic human dignity that promotes liberty and autonomy—it is the dignity of the individual demanding a certain freedom and space from government interference. This form of dignity accords with our constitution of negative rights and with an awareness of judicial limitations in articulating and protecting social norms and values of dignity. Moreover, it fits with our liberal, pluralistic society and allows individuals to pursue various conceptions of the good life.

Nonetheless, the Supreme Court has, at times, appealed to other conceptions of dignity—finding that concerns for recognition and relief from subordination and humiliation may also be appropriate and necessary. In some cases, such as *Lawrence* or *Loving*, autonomy and recognition point in the same direction. But as the examples of hate speech or affirmative action have demonstrated, the various conceptions of dignity will often diverge. When that happens, the Court cannot simply appeal to dignity, but will have to choose which dignity to protect and advance. While dignity as recognition compels a certain sympathy, it is problematic to protect such dignity at a constitutional level when it conflicts with fundamental individual rights. The subjectivity of recognition dignity pits the personal dignity of persons

against each other. American courts are on firmer ground when they protect the rights of individuals against the state.

With the choices placed in greater contrast, it may become apparent that the structure of our Constitution and our long history of protecting individual liberty points in the direction of intrinsic human dignity and the autonomy and liberty that it requires.