

# **Conceptions of Dignity in Moral and Legal Discourse**

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## **Abstract**

During the last two centuries, the term dignity has gained widespread currency in legal, religious, literary, political, and ethical contexts. Dignity's increasing presence in our lexicon, however, does not signal agreement about its meaning or usefulness. While some commentators claim that dignity is an essential ethical and legal norm, others are skeptical of dignity or against its use altogether. The critics challenge dignity's advocates to demonstrate that dignity is neither redundant nor rhetorical; that it has a distinct—perhaps even unique—meaning; and that it should retain its importance as an ethical and legal norm despite its alleged susceptibility to political and religious appropriation.

This dissertation takes up that challenge. It begins by setting forth the range of critiques that have been leveled against the concept of dignity, illustrating each one with examples from religion, bioethics, American case law, and human rights. Then, to discern dignity's various meanings and functions, the dissertation employs a three-part interdisciplinary methodology, which includes: (1) a historical examination of dignity's evolving use in philosophical, religious, and political texts from Classical Antiquity to the Modern era; (2) a Wittgensteinian study of dignity's invocation in nearly one thousand U.S. Supreme Court opinions; and (3) an inductive analysis of paradigmatic cases in which there is a collective intuition that dignity has been violated. Together, these three methodologies—and the central features of dignity that they elucidate—contribute to the development of a modest account of dignity, which is defended against the aforementioned critiques.

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## Table of Contents

<b>Acknowledgements</b>	iv
<b>Chapter 1: Dignity and its Discontents</b>	1
Introduction	1
The Modern Case Against Dignity	7
<i>Dignity is Rhetorical and Devoid of Meaning</i>	8
<i>Dignity is Redundant</i>	14
<i>Dignity is Normatively Useless Because it Can Support Opposing Moral Norms</i>	16
<i>Dignity is an Instrument of Religious and Political Tyranny</i>	23
<b>Chapter 2: Methodology</b>	31
The Problems of Content and Legitimacy	31
Method 1: A Genealogy of Dignity	34
Method 2: A Wittgensteinian Analysis of Dignity's Modern Use	38
<i>Reductionism and Essentialism: Deficiencies of the Standard Approach</i>	39
<i>Wittgenstein's Critique of Standard Linguistic Theories</i>	45
<i>Conceptualizing Dignity in U.S. Supreme Court Opinions</i>	47
Method 3: An Inductive Approach to Dignity	55
<b>Chapter 3: A Genealogy of Dignity</b>	58
Etymological Premises	58
The Classical Period	60
<i>Aristotle</i>	60
<i>Cicero</i>	63
The Medieval Period	74
<i>Early Christian Thinkers: Augustine, Leo the Great, and Boethius</i>	75
<i>Aquinas</i>	81
The Renaissance and Enlightenment	87
<i>Giovanni Pico della Mirandola</i>	88
<i>Immanuel Kant</i>	93
The Modern Era	102
<i>Catholic Church Doctrine</i>	102
<i>Human Rights Documents</i>	108
<b>Chapter 4: A Typology of Dignity from U.S. Supreme Court Opinions</b>	115
The Jurisprudence of Dignity	115
<i>The Court's Increasing Reliance on Dignity as a Legal Norm</i>	119
<i>A Wittgensteinian Approach</i>	124
Five Conceptions of Dignity	126

<i>Institutional Status as Dignity</i>	126
Aristocracy and the Recognition of Rank	126
Bestowing Respect on Government and its Accoutrements	129
<i>Equality as Dignity</i>	138
Egalitarianism and Universal Human Worth	138
Shielding People from Unequal Treatment	143
<i>Liberty as Dignity</i>	146
Liberalism and Individual Self-Determination	146
Securing the Conditions for Self-Realization	149
<i>Personal Integrity as Dignity</i>	154
Aristotelian Virtue and the Dignified, Whole Self	154
Protecting Individuals from Dis-Integration	159
<i>When the Self is Reduced to a Single Characteristic</i>	160
<i>When the Self Cannot Express its Wholeness</i>	163
<i>Civic Virtue as Dignity</i>	166
Communitarianism and Humanity's Collective Virtue	166
Advancing Notions of a Decent Society	170
<b>Chapter 5: Toward an Account of Dignity</b>	180
A Response to Dignity's Critics	181
An Inductive Approach to Dignity	188
<i>Paradigmatic Violation of Dignity</i>	189
Annihilation/Extermination	189
Torture	192
<i>Inductive Analysis and Conclusions</i>	195
<i>Connecting the Inductive Conclusions to the Genealogy and Typology</i>	200
A Modest Account of Dignity	205
<i>From Inductive Conclusions to a Negative Heuristic</i>	205
<i>Testing the Heuristic: Racial Discrimination and Prohibitions on</i>	
<i>Same-Sex Marriage</i>	207
<i>Revisiting the Case of Dwarf-Tossing</i>	211
<b>Conclusion</b>	215

## Chapter 1: Dignity and its Discontents

*“Here we are all talking about who’s got it and who hasn’t, and we’re none the wiser about what we’re talking about.”<sup>1</sup>*

### Introduction

During the last two centuries, the term dignity has gained widespread currency in legal, religious, literary, political and ethical contexts. It has been invoked in nearly one thousand U.S. Supreme Court opinions,<sup>2</sup> dozens of foreign constitutions,<sup>3</sup> and numerous human rights documents, including the Universal Declaration of Human Rights.<sup>4</sup> It has played a prominent role in Catholic encyclicals,<sup>5</sup> Protestant writings,<sup>6</sup> and Jewish responsa.<sup>7</sup> Dignity is a theme that animates novels, like Kazuo Ishiguro’s *The Remains of*

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<sup>1</sup> KAZUO ISHIGURO, *THE REMAINS OF THE DAY* 185 (Vintage Int’l ed. 1993) (1988).

<sup>2</sup> Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

<sup>3</sup> See, e.g., Germany’s Constitution: GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 1§ 1, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (“Human dignity shall be inviolable.”); Israel’s Constitution: Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 150, § 1A (“The purpose of the basic law is to protect human dignity and liberty.”).

<sup>4</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

<sup>5</sup> See, e.g., POPE JOHN PAUL II, *EVANGELIUM VITAE* [THE GOSPEL OF LIFE] (Mar. 25, 1995) (referring to “dignity” more than fifty times).

<sup>6</sup> See, e.g., Gilbert Meilaender, *Human Dignity and Public Bioethics*, 17 THE NEW ATLANTIS 33 (2007).

<sup>7</sup> See, e.g., ELLIOT N. DORFF, DANIEL S. NEVINS & AVRAM I. REISNER, *HOMOSEXUALITY, HUMAN DIGNITY & HALAKHAH: A COMBINED RESPONSUM FOR THE COMMITTEE ON JEWISH LAW AND STANDARDS* (Dec. 6, 2006), [http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/dorff\\_nevins\\_reisner\\_dignity.pdf](http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/dorff_nevins_reisner_dignity.pdf).



*the Day*<sup>8</sup>; an idea that columnists for major U.S. newspapers and magazines alternately ponder and promote<sup>9</sup>; and a value that American presidents of both political parties have publicly endorsed.<sup>10</sup> Dignity also permeates ethical discourse on topics ranging from the morality of torture to the morality of cloning.<sup>11</sup>

Dignity's increasing presence in our lexicon, however, does not signal agreement about what the term means. Instead, its importance, meaning, and function are commonly presupposed but rarely articulated. As a result, a plethora of contrasting views about dignity's definition, usefulness, and ultimate purpose have emerged.<sup>12</sup> For some commentators, dignity is nothing less than "the premier value underlying the last two

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<sup>8</sup> ISHIGURO, *supra* note 1.

<sup>9</sup> See, e.g., Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity,'* THE ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/> (exploring the implications of a right to dignity); David Brooks, *In Search of Dignity*, N.Y. TIMES (July 6, 2009), [http://www.nytimes.com/2009/07/07/opinion/07brooks.html?\\_r=0](http://www.nytimes.com/2009/07/07/opinion/07brooks.html?_r=0) (expressing disappointment over the loss of the "dignity code" in public life).

<sup>10</sup> President George W. Bush referred to "the non-negotiable demands of human dignity," in his second State of the Union Address. See Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 135 (Jan. 29, 2002). Former President Bill Clinton repeatedly emphasized the universal value of human dignity in his weekly radio addresses. See, e.g., The President's Radio Address, 1 PUB. PAPERS 556 (Mar. 26, 1994) ("[H]ealth care reform is about . . . bestowing dignity . . ."); The President's Radio Address, 2 PUB. PAPERS 2205 (Dec. 25, 1993) ("When we restore dignity and security of work for all people, we'll go a long way toward restoring the fabric of life in all our communities."); The President's Radio Address, 2 PUB. PAPERS 1348 (Aug. 7, 1993) ("We want to end welfare . . . [to] restore dignity to millions . . .").

<sup>11</sup> See, e.g., J.M. BERNSTEIN, TORTURE AND DIGNITY: AN ESSAY ON MORAL INJURY (2015) (explaining torture as an affront to moral dignity); THE PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY (2002) [hereinafter HUMAN CLONING], <https://bioethicsarchive.georgetown.edu/pcbe/reports/cloningreport/> (frequently invoking the term "dignity").

<sup>12</sup> Leslie A. Meltzer, *Human Dignity and Bioethics*, 359 NEW ENG. J. MED. 600 (2008).

centuries of moral and political thought,”<sup>13</sup> an essential “basis of human rights,”<sup>14</sup> and one of “the great political values that define our constitutional morality.”<sup>15</sup>

Other commentators, however, are either skeptical of dignity or “against” its use altogether.<sup>16</sup> Philosopher Ruth Macklin has suggested that dignity is “a useless concept” that does nothing more than offer “vague restatements of . . . more precise notions.”<sup>17</sup> Philosopher Gerhold Becker has called dignity “an empty formula without precise content,” “a rhetorical device,” and “a conversation stopper.”<sup>18</sup> Philosopher Helga Kuhse contends that dignity is “nothing more than a short-hand expression for people’s moral intuitions and feelings.”<sup>19</sup> Meanwhile, psychologist Steven Pinker, not only agrees with

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<sup>13</sup> Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 145 (Michael J. Meyer & W.A. Parent eds., 1992) [hereinafter THE CONSTITUTION OF RIGHTS].

<sup>14</sup> Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS, *supra* note 13, at 10, 28.

<sup>15</sup> William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS, *supra* note 13, at 47, 71.

<sup>16</sup> See, e.g., Michael Rosen, *Dignity: The Case Against*, in UNDERSTANDING HUMAN DIGNITY 123 (Christopher McCrudden ed., 2013) (opposing the use of dignity for a variety of reasons).

<sup>17</sup> Ruth Macklin, *Dignity is a Useless Concept*, 327 BMJ 1419, 1419–20 (2003). Cf. Suzy Kilmister, *Dignity: Not Such a Useless Concept*, 36 J. MED. ETHICS 160 (2010) (challenging Macklin’s claim and offering a thicker, relational conception of dignity).

<sup>18</sup> Gerhold Becker, *In Search of Humanity: Human Dignity as a Basic Moral Attitude*, in THE FUTURE OF VALUE INQUIRY 53, 53 (Matti Häyry & Tuija Takala eds., 2001). Cf. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that the rhetoric of equality ought to be abandoned because the principle of equality is empty of content).

<sup>19</sup> Helga Kuhse, *Is There a Tension Between Autonomy and Dignity?*, in 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds., 2000). Echoing a similar sentiment, South African law professor and judge, Dennis Davis, has remarked that dignity “is a piece of jurisprudential Legoland—to be used in whatever form and shape is required by the judicial designer.” D.M. Davis, *Equality: The Majesty of Legoland Jurisprudence*, 1999 S. AFR. L.J. 398, 413.

these assertions, he argues that appeals to dignity are employed by conservatives with “fervent religious impulses” to advance “a radical political agenda.”<sup>20</sup>

These views, and others proffered by “dignity skeptics” and “anti-dignitarians,” warrant serious consideration. They demand accountability from those who employ dignity as an ethical or legal norm. At the very least, they challenge dignity’s advocates to demonstrate that the concept is neither redundant nor rhetorical; that it has a distinct—perhaps even unique—meaning that is critical to moral theory; and that it should retain its importance as an ethical norm despite its alleged susceptibility to political and religious hijacking.

This dissertation takes up that challenge. The remainder of Chapter 1 sets forth the range of critiques that have been leveled against the concept of dignity. To ensure that these criticisms are presented on their strongest terms, I offer examples—from religion, bioethics, American case law, and human rights—in which the use of dignity illustrates the criticism at issue. This approach serves the dual purpose of demonstrating dignity’s interdisciplinary ubiquity, as well as the significant challenges its proponents face. Any defense of dignity will have to wrestle with these criticisms.

The remaining chapters, which collectively develop a modest defense of dignity, unfold as follows: Chapter 2 introduces the interdisciplinary methodology that will be used in subsequent chapters to gain an understanding of dignity’s meanings and functions. The methodology is three-pronged. First, it involves a historical examination of dignity’s evolving use and application in a variety of philosophical, religious, and political texts from Classical Antiquity to the Modern era. This approach offers insights

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<sup>20</sup> Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), <http://www.newrepublic.com/article/the-stupidity-dignity>.

into the intellectual history of dignity and demonstrates how the concept has functioned in—and been shaped by—various contexts. Second, drawing on philosopher Ludwig Wittgenstein’s view that “the meaning of a word is its use in the language,”<sup>21</sup> the dissertation undertakes a Wittgensteinian approach to conceptualizing the meaning of dignity in contemporary discourse. Although “dignity-talk” arises in variety of contexts, any number of which could be subject to this methodology, the dissertation focuses its analysis on the U.S. Supreme Court’s published opinions because they document how a politically and religiously diverse group of Justices have invoked dignity in a variety of circumstances over time. Third, the dissertation employs an inductive method as a mechanism for developing a preliminary account of dignity. Unlike top-down models of dignity, which ask what qualities all humans possess that make them bearers of dignity, this bottom-up methodology begins by considering practical situations in which reasonable people would agree that dignity has been violated.

Having set forth the methodology, Chapters 3 and 4 then apply them in earnest. Chapter 3 charts historical invocations and applications of dignity. As an etymological matter, dignity’s origins date to the ancient Greeks, but as a matter of Western intellectual history, dignity’s meaning evolved alongside the cultural and religious transformations that spanned Classical Antiquity, the Middle Ages, the Renaissance, and the Modern era. The historiography of dignity presented in this chapter cannot be fully comprehensive; instead, the chapter aims to highlight historical “inflection points,” where dignity’s meaning and use develop, shift, or gain greater currency. In particular, the chapter examines dignity as used by Aristotle, Cicero, Augustine, Aquinas, Pico della Mirandola,

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<sup>21</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 43 (G.E.M. Anscombe trans., 3d ed. 1968).

and Kant, among others. Catholic Church doctrine and modern human rights documents also receive attention in this chapter.

Chapter 4 takes a Wittgensteinian approach to conceptualizing dignity, based on my empirical analysis of nearly one thousand U.S. Supreme Court opinions that have invoked the term “dignity” during the last 225 years. Consistent with Wittgenstein’s theory, this research reveals that a single concept of dignity with fixed boundaries does not exist in the Court’s opinions. Instead, five different conceptions of dignity emerge, which I refer to as *institutional status as dignity*, *equality as dignity*, *liberty as dignity*, *personal integrity as dignity*, and *collective virtue as dignity*. Chapter 4 traces each of these conceptions of dignity to its epistemic origins and articulates its central features. Teasing out dignity’s different meanings permits us to see the normative work that each conception of dignity is performing.

Chapter 5 responds to the concerns of dignity-skeptics and anti-dignitarians, and offers a modest account of dignity derived from an inductive methodology. The chapter begins with the concession that dignity is too often overused and under-explained; that it sometimes operates as a rhetorical device or a moral trump card; and that it can function as an empty vessel into which people’s moral intuitions are poured. Despite these misuses of dignity, Chapter 5 contends that there are situations in which appeals to dignity as an ethical norm are essential to moral and legal reasoning. Relying on an inductive approach the chapter examines two situations—annihilation/extermination and torture—in which our collective intuition is that dignity has been violated. In these cases, eliminating dignity from our moral vocabulary risks mischaracterizing the situation at

hand as well as the dignitary harms that flow from it. Chapter 5 closes with a modest account of dignity derived from these paradigmatic cases.

### **The Modern Case Against Dignity**

The existence of what I call “dignity skeptics” and “anti-dignitarians” is a relatively modern phenomenon. Although the concept of dignity can be traced to antiquity—and the idea of *human* dignity has roots in the Middle Ages—doubts about dignity’s usefulness as an ethical or legal norm do not emerge with any force until after World War II, when several philosophers and jurists questioned the appearance of dignity in the 1948 Universal Declaration of Human Rights (a topic addressed in greater detail below). In recent years, however, the debate about dignity’s value as an ethical norm has intensified, at times becoming combative.<sup>22</sup> The remainder of this chapter details the range of arguments against dignity, and where possible, illustrates those criticisms with examples of how dignity has been invoked in a variety of religious, bioethical, legal, and human rights documents.

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<sup>22</sup> Steven Pinker’s article, titled “The Stupidity of Dignity,” is one example. *See supra* note 20. For one response to Pinker, see Peter Augustine Lawler, *The Human Dignity Conspiracy*, THE INTERCOLLEGIATE REV., Spring 2009, at 40.

## *Dignity is Rhetorical and Devoid of Meaning*

Michael Rosen, who provocatively titled one of his recent essays on the topic, *Dignity: The Case Against*, cites Schopenhauer's characteristically pessimistic view of the concept:

That expression, *dignity of man*, once uttered by Kant, afterward became the shibboleth of all the perplexed and empty-headed moralists who concealed behind that imposing expression their lack of any real basis in morals, or, at any rate, of one that had any meaning. They cunningly counted on the fact that their readers would be glad to see themselves invested with such a dignity and would accordingly be quite satisfied with it.<sup>23</sup>

Echoing Schopenhauer, and at times Nietzsche,<sup>24</sup> Rosen's primary objection to dignity is that there is nothing but empty space behind the façade of its purported significance. Instead of the substantial structure one would expect to find of a word that has been trumpeted as our moral foundation, there is not even a blueprint to guide us in constructing (or re-constructing) the word. We do not know what properties bestow

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<sup>23</sup> See Rosen, *supra* note 16, at 143. Rosen describes his objections to dignity in greater detail in an earlier published book. See MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012).

<sup>24</sup> See FRIEDRICH NIETZSCHE, *The Greek State*, in *EARLY GREEK PHILOSOPHY AND OTHER ESSAYS* 4–5 (M.A. Mügge trans., 1964) (1871).

Such phantoms as the dignity of man, the dignity of labour, are the needy products of slavery hiding itself from itself. Woful time, in which the slave requires such conceptions, in which he is incited to think about and beyond himself! Cursed seducers, who have destroyed the slave's state of innocence by the fruit of the tree of knowledge! Now the slave must vainly scrape through from one day to another with transparent lies recognisable to every one of deeper insight, such as the alleged "equal rights of all" or the so-called "fundamental rights of man," of man as such, or the "dignity of labour" . . . .

dignity, what types of entities have dignity, or what kinds of conduct might violate dignity. In fact, we do not even know whether dignity is violable.

Rosen is hardly alone in articulating this criticism. Philosopher John Harris has described dignity as “universally attractive...[only because it is] comprehensively vague”<sup>25</sup>; Peter Singer has claimed that invocations of dignity are simply a sign that philosophers “have run out of arguments”<sup>26</sup>; and Macklin famously referred to invocations of dignity as “mere slogans that add nothing to an understanding of the topic.”<sup>27</sup>

This criticism has been launched against a number of targets, perhaps most notably the 1948 *Universal Declaration of Human Rights* (UDHR).<sup>28</sup> Building on the use of dignity in the 1945 United Nations Charter,<sup>29</sup> the UDHR contains four references to dignity. The Preamble states that “recognition of the inherent *dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>30</sup> Article I of the UDHR affirms that “all humans are born equal and free in *dignity* and rights.” Dignity is also invoked in Article 22 (in

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<sup>25</sup> John Harris, *Cloning and Human Dignity*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 163 (1998).

<sup>26</sup> Peter Singer, *All Animals are Equal*, in APPLIED ETHICS 215–28 (Peter Singer ed., 1986).

<sup>27</sup> Macklin, *supra* note 17, at 1420. *See also* Udo Schüklenk & Anna Pacholczyk, *Dignity’s Woolly Uplift*, 24 BIOETHICS 1467 (2010) (stating that the moral basis of dignity is nebulous); Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257, 266 (2006) (referring to dignity as empty and unhelpful).

<sup>28</sup> UDHR, *supra* note 4, at 71.

<sup>29</sup> The Preamble to the Charter of the United Nations of 1946 Preamble reaffirms “faith in fundamental human rights, in the *dignity* and worth of the human person . . . .” U.N. Charter, preamble (emphasis added).

<sup>30</sup> UDHR, *supra* note 4.



connection with economic, social, and cultural rights)<sup>31</sup> and in Article 23 (in connection with the right to remuneration for work).<sup>32</sup> Despite the centrality of dignity in the UDHR, the document does not define the term.

As it turns out, this omission, and the decision to employ dignity as a rhetorical device, was intentional. The Declaration’s key architects—the Canadian Jurist John Humphrey; the French jurist René Cassin; and the two philosophers, P.C. Chang from China and Charles Malik from Lebanon—could not agree on the basis of human rights.<sup>33</sup> In discussing their predicament, Jacques Maritain, a Catholic philosopher and diplomat who was consulted in connection with drafting the UDHR, famously said: “We agree about the rights, but on condition that no one asks us why. It is with the why that all the disagreements begin.”<sup>34</sup> In that context, dignity appealed precisely because it was devoid of any particular meaning. Diplomats from a wide variety of cultural, political, spiritual, and philosophical worldviews agreed that human dignity was central to protecting human rights, even if they each had a different view of exactly what that meant.

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<sup>31</sup> *Id.* at art. 22 (providing “[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”).

<sup>32</sup> *Id.* at art. 23(3) (providing that “[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection”).

<sup>33</sup> The story of how agreement was reached during the drafting of the UDHR is told in MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002). Although some scholars contend that agreement on human rights emerged from universal condemnation of Nazi atrocities during the Holocaust, *see* MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Amy Gutmann ed., 2003), other scholars argue that human rights lacked prominence until the 1970s, *see* SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

<sup>34</sup> Jacques Maritain, *Introduction*, in *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 9 (1949), <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.

In short, the use of dignity in the UDHR represents what John Rawls called an “overlapping consensus”<sup>35</sup> and what legal scholar Cass Sunstein has termed an “incompletely theorized agreement.”<sup>36</sup> The intuition expressed in both theories is that when deep debates about moral theory cannot be resolved, the best way to break the impasse and make progress is by adopting a more abstract and less-specified, lower-level principle.<sup>37</sup> As Bertram Morris observed, “few expressions call forth the nod of assent and put an end to analysis as readily as ‘the dignity of man’. It sounds wholesome and real, and its utterance quiets our critical faculties.”<sup>38</sup>

Although the decision to invoke dignity in the UDHR created consensus in 1948, its ambiguous meaning has plagued the document ever since, an outcome predicted by some of its drafters.<sup>39</sup> The central difficulty is that without a substantive articulation of dignity, it is unclear how dignity and rights are related to each other in the UDHR. In some Articles of the UDHR, dignity is described as a right; in other Articles dignity is described as a value that grounds the protection of rights. In the first case, dignity may

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<sup>35</sup> John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); see also JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (developing the notion of overlapping consensus).

<sup>36</sup> Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1 (2007); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

<sup>37</sup> To put it another way, “when you cannot reach agreement at the deep end of the pool of ideas, head for the shallow end.” See Lawrence Solum, *Legal Theory Lexicon 037: Overlapping Consensus & Incompletely Theorized Agreements*, LEG. THEORY LEXICON (May 23, 2004), <http://legaltheorylexicon.blogspot.com/2004/05/legal-theory-lexicon-037-overlapping.html>.

<sup>38</sup> Bertram Morris, *The Dignity of Man*, 57 ETHICS 57, 57 (1946).

<sup>39</sup> John Humphrey, for example, expressed his uneasiness about whether the concept of dignity could carry the weight of the variety of convictions that different member states of the United Nations held. The UNESCO committee’s rapporteur, Richard McKeon, similarly warned that “different understandings of the meanings of rights usually reflect divergent concepts of man and of society.” Mary Ann Glendon, *Reflections on the UDHR*, 82 FIRST THINGS 23 (1998) (citing Richard P. McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 23 (1949)).

be a specific right on par with a right to equality, or it may be a basic right from which all other rights flow. In the second case—when dignity is described as a value that underpins other rights—it may be a prerequisite for possessing some rights, or it may be a condition of having all rights.

These issues afflict subsequent international human rights instruments as well, including the 1966 *International Covenant on Economic, Social, and Cultural Rights* (ICESCR),<sup>40</sup> and the 1966 *International Covenant on Civil and Political Rights* (ICCPR).<sup>41</sup> The ICESCR and the ICCPR repeat the reference to dignity found in the UDHR's preamble, and each document contains one additional reference to dignity. Article 13 of the ICESCR states that “education shall be directed to the full development of the human personality and the sense of its dignity,”<sup>42</sup> and Article 10 of the ICCPR states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>43</sup> In these documents, dignity operates at times as a foundation for human rights, at times as an inherent property of humans, and at times as a right to which human dignity can flourish.

Recent international bioethics policy documents have also fallen prey to the criticism that they are rhetorical and devoid of meaning. The three main targets have been the Council of Europe's 1997 *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine*

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<sup>40</sup> International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [hereinafter ICESCR].

<sup>41</sup> International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].

<sup>42</sup> ICESCR, *supra* note 40, at art. 13.

<sup>43</sup> ICCPR, *supra* note 41, at art. 10.

(hereafter *Convention*),<sup>44</sup> UNESCO's 1997 *Universal Declaration on the Human Genome and Human Rights*,<sup>45</sup> and the Council of Europe's 1998 *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being*.<sup>46</sup> The Preamble to the *Convention*, for example, resolves "to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine."<sup>47</sup> The Explanatory Report that accompanies the *Convention* explains that "human dignity...constitutes the essential value to be upheld...and is the basis of most of the values emphasized in the Convention."<sup>48</sup>

The *Convention* alternately employs dignity as the foundation of all other rights, as one of several fundamental rights, and as a right on par with other rights like freedom. Because the *Convention* does not offer a definition of human dignity to guide member states on what practices would violate human dignity, it is unclear "what types of biomedical practices to prohibit or rigorously control...what entities are bearers of human dignity, and how human dignity is at stake."<sup>49</sup> The aim of this dissertation is not to

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<sup>44</sup> ETS No. 164, open for signature Apr. 4, 1997, entered into force Jan. 12, 1999, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164> [hereinafter *Convention*].

<sup>45</sup> UNESCO, *Universal Declaration on the Human Genome and Human Rights*, Nov. 11, 1997, [http://portal.unesco.org/en/ev.php-URL\\_ID=13177&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html). The Preamble states that research on the human genome "should fully respect human dignity, freedom, and human rights."

<sup>46</sup> ETS No. 168, open for signature Dec. 1, 1998, entered into force Jan. 3, 2001, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/168>.

<sup>47</sup> *Convention*, *supra* note 44.

<sup>48</sup> Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine ¶ 9 (May 1997).

<sup>49</sup> Imaculada de Melo-Martín, *Human Dignity in International Policy Documents: A Useful Criterion for Public Policy?*, 25 *BIOETHICS* 37, 45 (2009).

resolve these conundrums, a task that others have undertaken,<sup>50</sup> but instead to illustrate the criticism (articulated by Rosen and others) that dignity is merely a rhetorical device devoid of meaning.

### ***Dignity is Redundant***

A second and closely related criticism of dignity is that, because its definition is not fixed, dignity often functions as a placeholder for other terms like autonomy and liberty.<sup>51</sup> As such, dignity is redundant. It adds nothing to moral or legal discourse that is not already represented by more precise norms. Critics who hold this position contend that dignity can be eliminated from discourse without any loss of moral content.

The strongest advocate of this view is arguably Macklin, who claims that dignity has nothing to offer bioethics and should therefore be jettisoned from the field. She offers several illustrations to support her thinking. Her first example is the Council of Europe's *Convention*.<sup>52</sup> Instead of arguing that dignity is rhetorical or contains multiple meanings in that document, she claims that dignity "seems to have no meaning beyond what is implied by the principle of medical ethics, respect for persons: the need to obtain

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<sup>50</sup> See JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012); Doris Schroeder, *Human Rights and Human Dignity: An Appeal to Separate the Conjoined Twins*, 15 ETHICAL THEORY MORAL PRAC. 323 (2012).

<sup>51</sup> See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 722 (2008).

<sup>52</sup> *Convention*, *supra* note 44.

voluntary, informed consent; the requirement to protect confidentiality; and the need to avoid discrimination and abusive practices.”<sup>53</sup>

Her second example, the Nuffield Council on Bioethics’ report entitled, “Genetics, and Human Behavior: The Ethical Context,”<sup>54</sup> fares only slightly better on her analysis. The Report suggests that responsibility is “an essential ingredient in the conception of human dignity” and highlights the importance of intrinsic respect for individuals’ thoughts and concerns. Macklin believes that this formulation gives some content to human dignity, but she again determines that “it is nothing more than a capacity for rational thought and action, the central features conveyed in the principle of respect for autonomy.”<sup>55</sup> Because Macklin views dignity as a placeholder for autonomy—a value already embedded in bioethics—she concludes that dignity can be discarded without any effect on moral discourse in the field.

Although Macklin’s work has drawn widespread attention to dignity’s use in bioethics, her critique could arguably apply with equal force to certain cases in American constitutional law. On numerous occasions, the U.S. Supreme Court has invoked dignity in a manner that suggests it might consider the term to be synonymous with liberty and/or autonomy. For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>56</sup> the Court justified its decision to strike down certain provisions of the Pennsylvania Abortion Control Act by explaining that that “few decisions are more

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<sup>53</sup> Macklin, *supra* note 17, at 1419.

<sup>54</sup> NUFFIELD COUNCIL ON BIOETHICS, GENETICS AND HUMAN BEHAVIOR: THE ETHICAL CONTEXT (2002), <http://nuffieldbioethics.org/wp-content/uploads/2014/07/Genetics-and-human-behaviour.pdf>.

<sup>55</sup> Macklin, *supra* note 17, at 1420.

<sup>56</sup> 476 U.S. 747 (1986), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."<sup>57</sup> The Court's opinion makes no distinction between dignity and autonomy.

Similarly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>58</sup> another case involving the constitutionality of state abortion restrictions, the plurality opinion concluded that "[t]hese matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], 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."<sup>59</sup> Again, dignity is not distinguished from autonomy or liberty, leaving the opinion open to criticism that dignity is redundant and adds no normative value to the decision.

### ***Dignity is Normatively Useless Because it Can Support Opposing Moral Norms***

Some critics of dignity further contend that the concept is normatively useless because in the absence of a thick description of dignity, people on opposite sides of the same debate can appropriate the term to advance their agenda. The most poignant

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<sup>57</sup> *Id.* at 772.

<sup>58</sup> 505 U.S. 833.

<sup>59</sup> *Id.* at 851.

example of this surrounds the discussion of physician-assisted suicide.<sup>60</sup> Proponents of the practice make two kinds of arguments: First, they claim that individuals with prolonged suffering at the end of life experience a loss of dignity that warrants physician-assisted suicide,<sup>61</sup> and second, they contend that physician-assisted suicide respects the dignity of competent persons to make deeply personal decisions.<sup>62</sup> The first argument focuses on a property that can be lost when pain and helplessness threaten rational agency (something we might call an indignity), while the second argument focuses on a property of rational agency that can be preserved through the act of physician-assisted suicide (something we might call autonomy or self-determination).<sup>63</sup>

Meanwhile, opponents of physician-assisted suicide generally make four arguments: First, the practice is “an offense against the dignity of the human person;”<sup>64</sup> second, there is dignity in accepting finitude and facing suffering;<sup>65</sup> third, the practice

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<sup>60</sup> See Daniel P. Sulmasy, *Dignity and Bioethics: History, Theory, and Selected Applications*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS 469, 469 (2008) (describing the different meanings of dignity in this context). See also Proceedings of the Third Session of the International Bioethics Committee of UNESCO, Vol. 1, at 144 (1995), <http://unesdoc.unesco.org/images/0010/001051/105160e.pdf> (noting that human dignity “is an expression which seems simple: one immediately apprehends its prospective import, if not its exact meaning. But, paradoxically, it is also an expression full of fragility, for in the name of the same argument of ‘human dignity’ some refute the legitimacy of euthanasia, whilst others claim it as the ultimate right of those who wish to ‘die in dignity’!”).

<sup>61</sup> See, e.g., Jyl Gentzler, *What is a Death with Dignity?*, 28 J. MED. & PHIL. 461 (2003) (exploring the variety of ways in which advocates of physician-assisted suicide invoke dignity).

<sup>62</sup> Ronald Dworkin et al., *Assisted Suicide: The Philosophers’ Brief*, N.Y. REV. BOOKS (Mar. 27, 1997), <http://www.nybooks.com/articles/archives/1997/mar/27/assisted-suicide-the-philosophers-brief/>.

<sup>63</sup> Gentzler, *supra* note 61.

<sup>64</sup> SACRED CONGREGATION FOR THE DOCTRINE OF FAITH, DECLARATION ON EUTHANASIA (May 5, 1980), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19800505\\_euthanasia\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html) [hereinafter DECLARATION ON EUTHANASIA].

<sup>65</sup> U.S. CONFERENCE OF CATHOLIC BISHOPS, TO LIVE EACH DAY WITH DIGNITY: A STATEMENT ON PHYSICIAN-ASSISTED SUICIDE (June 16, 2011), <http://www.usccb.org/issues-and->



threatens the dignity of people who are disabled, poor, or facing other hardships;<sup>66</sup> and finally, insofar as physician-assisted suicide can result in the “killing of the weakest and most innocent,” it denigrates the dignity of society as a whole.<sup>67</sup>

The Catholic Church has offered the most comprehensive articulation of these views. The first argument, as expressed in the Sacred Congregation of the Doctrine of Faith’s *Declaration on Euthanasia* and in Pope John Paul II’s *Evangelium Vitae*,<sup>68</sup> is an appeal to intrinsic dignity, a property that all humans have by virtue of being the kind of thing that they are.<sup>69</sup> In contrast to the uses of dignity articulated by proponents of physician-assisted suicide, Catholic Church teachings understand intrinsic dignity as something that can be degraded, but not eliminated.<sup>70</sup>

The second argument against physician-assisted suicide appeals to the value of being dignified in one’s suffering and death. It focuses on the manner with which people face death, for example with courage and acceptance. The *Declaration on Euthanasia* explains, for example, that “it is necessary...that we, without in any way hastening the hour of death, should be able to accept it with full responsibility and dignity.”<sup>71</sup> The United States Conference of Catholic Bishops praises Pope John Paul II for

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action/human-life-and-dignity/assisted-suicide/to-live-each-day/upload/bishops-statement-physician-assisted-suicide-to-live-each-day.pdf [hereinafter TO LIVE EACH DAY].

<sup>66</sup> *Id.* See also Leon R. Kass, *Defending Human Dignity*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 297, 305 (rejecting physician-assisted suicide because “every still-living human being, regardless of condition” has dignity).

<sup>67</sup> POPE JOHN PAUL II, *supra* note 5, at para. 20.

<sup>68</sup> See DECLARATION ON EUTHANASIA, *supra* note 64; POPE JOHN PAUL II, *supra* note 5.

<sup>69</sup> This notion of dignity, and its relationship to religious doctrine, is explored in greater depth in Chapter 3.

<sup>70</sup> See, e.g., POPE JOHN PAUL II, *supra* note 5, at para. 4 (dignity can be degraded); *id.* at para. 9 (“not even a murderer loses his personal dignity”).

<sup>71</sup> DECLARATION ON EUTHANASIA, *supra* note 64.

demonstrating dignity during his final illness by accepting suffering, which “need not be meaningless” and “can bring us closer to the mystery of Christ’s sacrifice for the salvation of others.”<sup>72</sup> The *Evangelium Vitae* similarly expresses the notion that there is dignity in accepting suffering because “the person who lives his suffering in the Lord grows more fully conformed to him.”<sup>73</sup>

The third argument against physician-assisted suicide appeals to the equal dignity owed to people who are dependent or disabled. This claim, articulated in the *Evangelium Vitae*, is that dignity is not just a property that humans possess; it is also an attitude of respect that is owed equally to all people because they possess the property known as dignity.<sup>74</sup> Physician-assisted suicide, according to the Church, “denie[s] that dignity” by permitting the “killing of the weakest and most innocent.”<sup>75</sup> On this objection, which assumes a slippery slope towards euthanizing disabled and dependent persons, physician-assisted suicide is wrong because it fails to treat all humans with the relevant attitude of dignity to which they are entitled as dignity-bearers.

The final objection to physician-assisted suicide is that it denigrates the dignity of society writ large. As the *Evangelium Vitae* states, when democracy “arrogates to itself the right to dispose of the life of the weakest and most defenceless [sic] members ... the criterion of personal dignity—which demands respect, generosity and service—is replaced by the criterion of efficiency, functionality and usefulness: others are considered

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<sup>72</sup> TO LIVE EACH DAY, *supra* note 65, at 5.

<sup>73</sup> POPE JOHN PAUL II, *supra* note 5, at para. 67.

<sup>74</sup> See also David Albert Jones, *Is Dignity Language Useful in Bioethical Discussion of Assisted Suicide and Abortion?*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 525, 530–31 (describing arguments against physician-assisted suicide that rest on equal dignity premises).

<sup>75</sup> POPE JOHN PAUL II, *supra* note 5, at para. 20.

not for what they “are,” but for what they “have, do and produce.””<sup>76</sup> This transition from what the Church calls the “culture of life” to what it calls “the culture of death,” ultimately “poison[s] society” and degrades “the dignity of those who practise [sic] it.”<sup>77</sup>

As this analysis demonstrates, the fact that dignity is invoked by both proponents and opponents of physician-assisted suicide to support their positions does not mean that the two sides are engaging each other’s arguments. To the contrary, as Figure 1 illustrates below, they are invoking dignity to talk about quite different things.

**Figure 1: Invocations of Dignity that Support Opposing Views on Physician-Assisted Suicide**

Use of Dignity by Proponents of Physician-Assisted Suicide	Use of Dignity by Opponents of Physician-Assisted Suicide
<ol style="list-style-type: none"> <li>1. Dignity as a quality that can be lost (e.g., suffering and pain as an indignity; undignified death)</li> <li>2. Dignity as a property of competent individuals that is rights-generating (e.g., right to self-determination)</li> </ol>	<ol style="list-style-type: none"> <li>1. Dignity as a property of all humans that can be degraded but not destroyed (e.g., intrinsic dignity)</li> <li>2. Dignity as a virtue that individuals can exhibit (e.g., dignified conduct)</li> <li>3. Dignity as an attitude of respect owed to dignity-bearers (e.g., treating someone with dignity)</li> <li>4. Dignity as a collective virtue (e.g., dignified or civilized societies)</li> </ol>

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<sup>76</sup> *Id.* at para. 20 & 23.

<sup>77</sup> *Id.* at para. 3–4.

Critics of dignity contend that, in the absence of a formula for evaluating these competing claims of dignity, the word is normatively useless. It functions as a moral trump card for both camps in the debate over physician-assisted suicide, but it lacks the capacity to perform real normative work.

The critique that dignity is normatively useless has also been raised in the context of legal cases in which dignity functions to advance arguments on opposing sides.<sup>78</sup> This is vividly depicted in the so-called French dwarf-tossing case.<sup>79</sup> The French Conseil d'État granted municipal police power to prevent any public activities that failed to respect human dignity. Accordingly, two municipalities banned the spectacle of dwarf-tossing in local clubs, an activity in which participants compete to throw dwarfism-affected individuals the farthest.

The ban was legally challenged by Manuel Wackenheim, one of the dwarfs, who argued that he voluntarily allowed himself to be tossed, that he received payment for the activity, and that if the municipal ban was upheld, he would have no income. The Conseil ruled against Wackenheim and upheld the ban on dwarf-tossing. In so holding, the Conseil said that the activity of dwarf-tossing not only compromised the dignity of dwarfs, who were treated as objects, but that it also degraded the dignity of humanity.

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<sup>78</sup> For example, a federal court in Germany upheld the prohibition on peep shows, holding that the ban protected the dignity of the women who were being exhibited. The women claimed, however, that the ban violated their dignity because they consented to the activity. *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] 1981, Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 64, 274 (Federal Administrative Court). Similarly, the South African Constitutional Court upheld a ban on prostitution because the activity commodifies the human body and therefore diminishes the dignity of the prostitutes. The prostitutes argued, however, that the court should safeguard their dignity in making free choices. *See Jordan v. State*, 2002 (11) BCLR 1117 (CC) (S. Afr.).

<sup>79</sup> CE Ass., Oct. 27, 1995, Rec. Lebon 372, <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/27-octobre-1995-Commune-de-Morsang-sur-Orge>, translation at <https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1024>.

The Conseil further concluded that respect for the principle of freedom of employment and trade was no impediment to the banning of an activity.<sup>80</sup> Wackenheim appealed the Conseil's decision to the United Nations' Human Rights and Anti-Discrimination Committee, arguing that his right to dignity was violated when his choice of employment was denied.<sup>81</sup> The Committee denied his claim, finding that the dwarf-tossing ban protected "public order [and] considerations of human dignity."<sup>82</sup>

The case vividly illustrates the way in which dignity can be invoked to support strikingly different claims. Deryck Beyleveld and Roger Brownsword have described the two contrasting uses of dignity by calling one "human dignity as empowerment" and the other "human dignity as constraint."<sup>83</sup> Wackenheim employed human dignity as empowerment to argue that his autonomy should be prioritized by the court. In rejecting that argument, both the Conseil and the Committee relied on human dignity as constraint to conclude that other social values outweighed Wackenheim's claim. Although the case was resolved, critics note that the invocations of dignity were normatively useless. There is nothing determinative about human dignity as constraint that should necessarily trump human dignity as empowerment.

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<sup>80</sup> U.N., CCPR, Human Rights Committee, CCPR/C/75/D/854/1999 (July 26, 2002), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/09d49050a9b34aaac1256c6e0031b919?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/09d49050a9b34aaac1256c6e0031b919?Opendocument).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW (2001).

## *Dignity is an Instrument of Religious and Political Tyranny*

In 2008, psychologist Steven Pinker published a contentious article entitled, “The Stupidity of Dignity,” in which he argued that dignity is not only a “squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it,” but that dignity is also dangerous because it veils a “radical political agenda, fed by fervent religious impulses.”<sup>84</sup> Although Pinker is far more vehement on the latter point than other critics, he is not alone in worrying that the language of dignity has been seized by those seeking to advance a distinctly religious or conservative ideology.<sup>85</sup> Gerhold Becker, for example, has suggested that “reference to the value of human dignity in moral discourse represents the vain attempt to salvage for contemporary ethics a key constituent of Christian theology that weaves a secular veil to hide a specific view of humanity.”<sup>86</sup> Philosopher Daniel Burdneý similarly concludes that appeals to dignity are “in practice, too often merely a forensic device, a weapon in the culture wars.”<sup>87</sup>

The most frequent target of this criticism has been the President’s Council on Bioethics, which was created by former President George W. Bush in 2001. The Council, which served until its charter expired in 2009, addressed topics ranging from newborn screening to stem cell research, but the two Council documents that attracted the most attention for their use of dignity were a 2002 report, entitled *Human Cloning and*

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<sup>84</sup> Pinker, *supra* note 20, at 28.

<sup>85</sup> See, e.g., Rosen, *supra* note 16, at 147 (claiming that dignity has functioned historically as “a Trojan horse for religiously inspired attacks on equality”).

<sup>86</sup> Becker, *supra* note 18, at 53.

<sup>87</sup> Daniel Brudneý, *Losing Dignity*, 52 PERSP. BIO & MED. 454, 456 (2009).

*Human Dignity: An Ethical Inquiry*,<sup>88</sup> and a 2008 volume, entitled *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics*.<sup>89</sup>

The *Human Cloning* report was the Council's first report, and commentators have noted that it was heavily influenced by the leadership of Leon Kass, who was Chairman of the Council and well-known for his strong conservative views on cloning. The Report invokes the word dignity twenty times, once in its title and an additional 19 times in the text that follows. Although the Report includes a section in the Executive Summary titled, "Fair and Accurate Terminology," as well as a "Glossary of Terms" at the end of the Report, dignity is left undefined.

In the absence of a thick definition of dignity, or any definition of dignity for that matter, the Council faced criticism that it employed the term in a "strangely underdeveloped" way, which at times shares premises with Roman Catholic teachings on cloning.<sup>90</sup> The concern that dignity might be camouflaging religious doctrine arises primarily from the Council's justifications for banning human reproductive cloning. First, the Council objects to reproductive cloning because children are begotten, not

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<sup>88</sup> HUMAN CLONING, *supra* note 11.

<sup>89</sup> HUMAN DIGNITY AND BIOETHICS, *supra* note 60

<sup>90</sup> James F. Childress, *Human Cloning and Human Dignity: The Report of the President's Council on Bioethics*, 33 HASTINGS CTR. REP. 15, 16 (2003). As Childress pointed out:

[H]uman dignity sometimes appears as one principle along with freedom and equality, but the report does not clarify the relationships among these three principles. As a result, human dignity seems to function sometimes as a deontological limit on actions and at other times as a value for assessing consequences and effects of actions. Sometimes human dignity appears as a general moral standard, but it also appears in the form of specific moral claims and constraints. Finally, human dignity functions to ground another human being's claims—with considerable debate about the moral status of embryos—but it also refers to the agent's own dignity, often expressed in terms of the agent's humanity. Either can be violated, and dehumanization can refer to either violation.

*Id.*

made,<sup>91</sup> and “a begotten child ... is ... equal in dignity and humanity”<sup>92</sup> to their parents, while a cloned individual is not. Second, the Council argues that human reproductive cloning conflicts with “the dignity of human procreation.”<sup>93</sup>

Both of these objections to cloning mirror those found in the 1997 Roman Catholic document, *Reflections on Cloning*.<sup>94</sup> In that document, the Church takes the position that human cloning “denies the dignity of the person subjected to cloning and the dignity of human procreation.”<sup>95</sup> A similar position is taken by the Sacred Congregation for the Doctrine of Faith in its 1987 *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation (Donum Vitae)*.<sup>96</sup> Although reproductive cloning technology was not yet on the radar screen, the *Donum Vitae* states that artificial reproduction “is contrary to ... the dignity of the procreation of the human person...[and] offends the dignity and the right of the child to be conceived.”<sup>97</sup> While the Council’s Report does not cite any religious views to substantiate its position, the influence of Roman Catholic doctrine on the Council’s reasoning is difficult to deny.

In the aftermath of the Council’s Report, the membership of the Council changed. Some critics have charged that Kass removed Council members who disagreed with his

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<sup>91</sup> HUMAN CLONING, *supra* note 11, at 99.

<sup>92</sup> *Id.* at 100.

<sup>93</sup> *Id.* at 16.

<sup>94</sup> PONTIFICIA ACADEMIA PRO VITA, REFLECTIONS ON CLONING (1997), [http://www.vatican.va/roman\\_curia/pontifical\\_academies/acdlife/documents/rc\\_pa\\_acdlife\\_doc\\_3\\_0091997\\_clon\\_en.html](http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_3_0091997_clon_en.html).

<sup>95</sup> *Id.*

<sup>96</sup> SACRED CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION [DONUM VITAE] (1987), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_1987022\\_2\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_1987022_2_respect-for-human-life_en.html).

<sup>97</sup> *Id.* at Part II.A.3.



views—like molecular biologist Elizabeth Blackburn and theologian William May—and replaced them with more conservative members, thereby “stacking the deck” in the conservative direction.<sup>98</sup> Bioethicists George Annas and Sherman Elias, for example, claim that Kass created a “neoconservative bioethics council” that pursued “a narrow, embryo-centric agenda.”<sup>99</sup> Other commentators have defended Kass’s prerogative, as a presidential appointee, to adjust the Council’s membership and set its agenda. Either way, the consequence of this membership debacle was that the Council was viewed with increasing suspicion, and when it released its 2008 volume on *Human Dignity and Bioethics*, the critics claimed that they had indisputable proof that the Council’s “theocon” bioethicists were using dignity to “impos[e] a Catholic agenda on a secular democracy.”<sup>100</sup>

*Human Dignity and Bioethics* was the first report issued under the Council’s new chairman, Edmund Pellegrino. The volume was prompted by a number of critics who claimed that the Council’s reports on caregiving, stem-cell research, cloning, assisted reproductive technology, and biomedical enhancement all invoked dignity without defining it. Macklin most famously took the Council to task for this omission, but others also argued that the Council was employing dignity as a trump card to reject policies that were at odds with the Bush administration’s perspective. *Human Dignity and Bioethics* was an attempt to respond to these critics. In the Letter of Transmittal to the President of the United States that accompanied the final volume, Pellegrino explains that “by putting

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<sup>98</sup> Ronald Bailey, *Tallying the New Bioethics Council*, REASON (Jan. 23, 2002), <https://reason.com/archives/2002/01/23/tallying-the-new-bioethics-cou>.

<sup>99</sup> George J. Annas & Sherman Elias, *Politics, Morals, and Embryos*, 431 NATURE 19 (2004).

<sup>100</sup> Pinker, *supra* note 20, at 31.

the question [of dignity’s meaning] to a diverse group of scholars,” the report provides “a sense of the breadth of opinions” on this subject.<sup>101</sup>

As I noted in a published review of the volume, “diversity and breadth come in many forms—political, religious, professional—but none are well represented in this volume.”<sup>102</sup> Of the anthology’s 28 essays and commentaries, more than half were penned by authors who either worked for Christian institutions or identified themselves as members of the Catholic Church. More than a third of the authors had published pieces in neoconservative journals or were members of neoconservative think tanks. The contributors were even less diverse professionally: They were overwhelmingly philosophers and political scientists, with a nod to lawyers and physicians, but not even a wink at bench scientists.

Although one’s credentials need not predict one’s viewpoint, in *Human Dignity and Bioethics*, there are few surprises. Human dignity is largely proffered as a touchstone for bioethical reflection, and more often than not, it has a theological source: Human beings have dignity because they are made in God’s image. With the exception of a few essays,<sup>103</sup> the volume neglects to explore whether one’s dignity can be violated without being diminished or destroyed; whether one can choose to be treated in ways others might consider undignified; whether dignity marks a floor of decency below which treatment of humans should not fall; or whether dignity signifies a degree of excellence

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<sup>101</sup> Edmund Pellegrino, *Letter of Transmittal to the President of the United States*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at xi.

<sup>102</sup> Meltzer, *supra* note 12, at 660.

<sup>103</sup> Gilbert Meilaender’s and Paul Weithman’s essays skillfully sort through the nuances of dignity. See Gilbert Meilaender, *Human Dignity: Exploring and Explicating the Council’s Vision*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 253; Paul Weithman, *Two Arguments from Human Dignity*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 435.

toward which all humans should strive. More often, dignity operates in the volume as a blunt instrument to constrain activities—such as abortion, embryo research, cloning, stem cell research, assisted suicide, and human enhancement—that have long been objectionable under traditional Judeo-Christian doctrine.<sup>104</sup>

One could imagine these authors, who believe that dignity is an attribute of all human beings, logically concluding that dignity also requires society to provide famine relief, education, and universal access to health care. Failure to make these resources available arguably violates the dignity of millions of people who face the dehumanizing consequences of hunger, illiteracy, and a lack of health care. That just one author, Martha Nussbaum, appeals to dignity to advocate for positive social entitlements,<sup>105</sup> arguably underscores the degree to which the volume is politically, theologically, and philosophically imbalanced.

Those defending the report's diversity may point to Nussbaum and the few others that deviate from the volume's central message. But authors who do not hew to the party line are subjected to withering criticism in commentaries that follow their essays. Consider Council member Gilbert Meilaender's response to atheist philosopher Patricia Churchland's essay. He closes by telling Churchland, who rejects theological grounds

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<sup>104</sup> So much of the volume is devoted to theological and metaphysical expositions of dignity that important discussions of dignity's role in medical practice are marginalized to the last two chapters. These essays, one written by Pellegrino and the other by council member Rebecca Dresser, thoughtfully describe dignity through the lens of patients' experiences. See Rebecca Dresser, *Human Dignity and the Seriously Ill Patient*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 505; Edmund D. Pellegrino, *The Lived Experience of Human Dignity*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 513.

<sup>105</sup> Martha Nussbaum, *Human Dignity and Political Entitlements*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 351.

for dignity, that if she cannot understand Catholic objections to certain biomedical practices, “the most dignified thing [for her] to do would be to remain silent.”<sup>106</sup>

Council member Diana Schaub’s commentary on Nussbaum’s essay is similarly disparaging. Nussbaum, who views dignity as a vehicle for expanding freedom, favors decriminalizing drug use, prostitution, and assisted suicide. She also advocates expanding access to resources that improve health, such as recreation. Rather than criticize Nussbaum on the merits, Schaub responds that Nussbaum’s proposal would create “repellant results” in which “heroin-addled ‘sex workers’ . . . have a political entitlement to bicycle paths” and people who are “brain-injured, or persistently vegetative from all those legal drugs,” could be “ease[d] off” by caregivers.<sup>107</sup> This mischaracterization of Nussbaum’s position leaves the reader with the impression that the Council is not willing to entertain opposing viewpoints.

The most glaring example of this tendency is the Council’s decision to silence its loudest critic. Despite the central role that Macklin continues to play in this debate, and the invective leveled against her (Pellegrino chastises her for making “rash assertions” in her “diatribe against the idea of human dignity”<sup>108</sup>), Macklin was not invited to contribute to the volume. Her absence from the dialogue undermined the Council’s promise to produce an even-handed exploration of human dignity, and it confirmed the view held by many of the Council’s critics, that the Council was committed to a conservative,

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<sup>106</sup> Gilbert Meilaender, *Commentary on Churchland*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 122, 124.

<sup>107</sup> Diana Schaub, *Commentary on Nussbaum, Shell, and Kass*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 60, at 381.

<sup>108</sup> Pellegrino, *supra* note 104, at 534.

theocentric understanding of dignity, with widespread implications for bioethics and scientific research.

The aforementioned criticisms of dignity largely focus on the consequences of starting with a conceptually thin understanding of dignity. In the absence of a substantive vision of dignity, the term can function rhetorically or redundantly; it can be appropriated to support opposing normative views; and it can be commandeered to advance specific political or religious agendas. In those circumstances, dignity frequently takes on a range of meanings and functions. Dignity operates not as a single concept, but as many conceptions. The remaining chapters are devoted to unraveling and exploring those conceptions.

## Chapter 2: Methodology

### The Problems of Content and Legitimacy

Dignity skeptics and anti-dignitarians raise a number of concerns about the role of dignity in modern discourse. Among their central arguments are that dignity operates as a rhetorical device, a redundancy, a legal fiction, a vehicle for secularizing religious dogma, and an instrument for advancing radical political agendas. Dignity's defenders deflect these criticisms in various ways, including by offering counterexamples in which the use of dignity is neither rhetorical nor redundant, or by showing that claims of dignity's religious or political appropriation are greatly exaggerated. The contentious dialogue between dignity's defenders and its critics has intensified, but it generally has not moved the pendulum in either direction: those who favor or oppose dignity have remained entrenched in their views.

In other contexts, rhetoric scholars have demonstrated that changing the “frame”—or narrative account—of the disagreement can force participants to renew their discourse and, in some cases, even alter their attitudes.<sup>1</sup> This is particularly true when the participants are trapped in argument cycles based on well-established and conflicting points of view in an existing narrative,<sup>2</sup> as is the case in the debate about dignity's

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<sup>1</sup> See, e.g., ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974) (suggesting that social frames effect how individuals process experiences).

<sup>2</sup> See, e.g., JIM A. KUYPERS, *BUSH'S WAR: MEDIA BIAS AND JUSTIFICATIONS FOR A WAR IN A TERRORIST AGE* (2006) (defining framing and explaining how communication is constructed in a particular manner).

normative value in moral and legal discourse. This chapter suggests a way to reframe the arguments against dignity, and then proposes a methodology for addressing them.

The principal arguments against dignity, explored in Chapter 1, can be reframed as articulating two different concerns about the use of dignity in contemporary ethical and legal discourse. The first concern is related to the *content* of dignity, and the second concern is related to the *legitimacy* of dignity.<sup>3</sup> When dignity skeptics and anti-dignitarians dispute dignity's normative value on the grounds that it is empty rhetoric, a redundant placeholder for other more precise moral norms, or a legal fiction created for consensus building, they are disputing dignity's content. When they assert that dignity functions as a vehicle for pressing particular religious and political ideologies into practice, they are contesting dignity's legitimacy.

Although the problems of content and legitimacy are distinct, they can at times overlap. There are at least two ways in which this may occur. First, some of dignity's detractors claim that because the foundations of dignity are historically theological, the word cannot serve as a moral norm in a secular democracy, much less as a universal moral norm in a globalized world. On this view, dignity's *pre-determined content* (e.g., religious metaphysics) *negates its legitimacy*. Second, some critics of dignity argue that it is precisely because dignity has no substantive meaning that it can so easily be filled with people's moral intuitions, religious beliefs, and political ideologies, any one of which may be antithetical to a liberal, secular democracy. On this view, dignity's *lack of content* invites suspicion that *threatens its legitimacy*.

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<sup>3</sup> This framing draws on the dichotomy between content and legitimacy articulated in Matthias Mahlmann, *The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law*, in UNDERSTANDING HUMAN DIGNITY 593, 594 (Christopher McCrudden ed., 2013).

Because dignity has content and legitimacy problems, any constructive account of the concept must address not just “what” dignity is, but “why” dignity is.<sup>4</sup> At this point, some dignity skeptics and anti-dignitarians may throw up their hands and exclaim: “There is no ‘what’ to discover. Dignity has no fixed content. It is like a Rorschach test; its meaning is simply a projection of the user’s intentions.” This claim is important, not because it suggests that dignity has no meaning, but to the contrary, because it serves as a reminder that dignity may have many meanings. Determining “what” those meanings are, and “why” they are, is the challenge.

The remainder of this chapter proposes a three-prong methodology for approaching the task at hand.<sup>5</sup> The first strategy involves examining what one might call dignity’s genealogy or historical antecedents.<sup>6</sup> By tracing dignity’s lineage through a variety of historical texts, one can map how the concept has evolved in different contexts over time. The second approach, which draws on Ludwig Wittgenstein’s philosophy of language, examines how dignity is used in modern language. This effort draws on a contemporary text—U.S. Supreme Court opinions—to conceptualize dignity’s modern meanings and functions. The final approach employs an inductive approach to develop a better understanding of dignity from the bottom-up. It examines paradigmatic cases of

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<sup>4</sup> See METTE LEBECH, *ON THE PROBLEM OF HUMAN DIGNITY: A HERMENEUTICAL AND PHENOMENOLOGICAL INVESTIGATION* 17 (2009).

<sup>5</sup> This approach roughly follows Husserl’s phenomenology, in which the three steps correspond to empirical investigation, eidetic reduction, and constitutive experience. EDMUND HUSSERL, *IDEAS PERTAINING TO A PURE PHENOMENOLOGY AND TO A PHENOMENOLOGICAL PHILOSOPHY—FIRST BOOK: GENERAL INTRODUCTION TO A PURE PHENOMENOLOGY* (F. Kersten trans., 1982) (1913). For a slightly different application in the context of dignity, see LEBECH, *supra* note 4 (approaching dignity with a phenomenology informed by the work of Husserl and Edith Stein).

<sup>6</sup> I borrow the phrase “genealogy” from Mahlmann, *supra* note 3, at 594.



dignity violations and asks what their central features can tell us about the meaning of dignity.

### **Method 1: A Genealogy of Dignity**

Inquiries into dignity frequently begin with questions about the word's origins.<sup>7</sup> Does the language of dignity date to the ancient Greeks, or does it have a more recent vintage? Are its roots deeply grounded in traditional theological sources, or is it influenced by modern notions of the nation-state? These questions are motivated not only by the desire to gain information about dignity's historical applications, which might explain its meaning(s), but also by the suspicion that there are "some darker secrets hidden in the corners of its history."<sup>8</sup> Like any genealogy project, one that maps dignity's pedigree may also reveal illegitimacy.

This dissertation begins its investigation of dignity by tracing its lineage. Chapter 3 charts dignity's evolution through a variety of Western religious, philosophical, and political texts from four historical periods: Classical Antiquity, the Middle Ages, the Renaissance, and the Modern era. It includes works by, among others, Cicero, Aquinas, Pico della Mirandola, and Kant. The chapter highlights historical "inflection points," where dignity's meaning and use develop, shift, or gain greater currency. This historical accounting of dignity, however, required decisions about which texts to gather, which uses of dignity to analyze, and how to interpret those uses.

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<sup>7</sup> Mahlmann, *supra* note 3.

<sup>8</sup> *Id.*

In a project like this, one is immediately confronted with the hermeneutic circle. The genealogist (or interpreter) cannot be removed from the process of interpretation, and the relationship between the genealogist, the text, and its meaning exist in a complex dialogical interplay that moves between the present and the past.<sup>9</sup> There are two paths forward. First, one must acknowledge the prejudicial character of understanding.<sup>10</sup> Interpretation, even of historical texts, is always “prejudgmental” in the sense that it is oriented toward present concerns that create dialogue with the text at issue.<sup>11</sup> The decision, for example, to interpret a specific use of dignity as holding a particular meaning is inescapably influenced by one’s current thoughts about the topic. Similarly, prejudicial expectations about what kinds of historical texts one expects to find,

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<sup>9</sup> HANS-GEORG GADAMER, *TRUTH AND METHOD* 269 (John Weinsheimer & Donald G. Marshall trans., Continuum 2d rev. ed. 2004) (1960):

[A] person trying to understand a text is prepared for it to tell him something. That is what a hermeneutically trained consciousness must be, from the start, sensitive to the text’s alterity. But this kind of sensitivity involved neither ‘neutrality’ with respect to content nor the extinction of one’s self, but the foregrounding and appropriation of one’s own fore-meanings and prejudices. The important thing is to be aware of one’s own bias, so that the text can present itself in all its otherness and thus assert its own truth against one’s own fore-meanings.

<sup>10</sup> See Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *HISTORY & THEORY* 3 (1969).

<sup>11</sup> See GADAMER, *supra* note 9, at 299–300:

We must here appeal from a badly understood historical thinking to one that can better perform the task of understanding. Real historical thinking must take account of its own historicity. Only then will it cease to chase the phantom of a historical object that is the object of progressive research, and learn to view the object as the counterpart of itself and hence understand both. The true historical object is not an object at all, but the unity of the one and the other, a relationship that constitutes both the reality of history and the reality of historical understanding. A hermeneutics adequate to the subject matter would have to demonstrate the reality and efficacy of history within understanding itself. I shall refer to this as ‘history of effect.’ Understanding is, essentially, a historically effected event.

undoubtedly contributes to the discovery of those texts, possibly to the exclusion of other equally appropriate ones.

Second, it is important to explicitly set forth the parameters that guide textual and interpretative decisions. The following criteria informed the genealogy of dignity that is presented in Chapter 3:

- The dissertation examines historical texts that explicitly use the expression “human dignity,” as well as texts that use the term “dignity.” Texts that use words with the same cognate, such as “dignified” and “dignitary,” and texts that use words that are etymologically related to dignity, such as the Latin *dignitas* and the German *würde*, are also included. The genealogical study does not cover texts in which the idea of dignity is present, but the term itself is not.
- There is no single reference source that systematically includes every text that mentions dignity, which means that choices have to be made about which kinds of texts to pursue, and which to omit. Because this study is concerned with tracing the contours of dignity as the concept historically developed, it concentrates on texts: (a) from four historical time periods; (b) that reflect the use of dignity by significant figures, (c) that illustrate inflection points in dignity’s use and meaning, and (d) that offer a variety of disciplinary perspectives. Through these criteria, the genealogy aims to be representative; it cannot claim to be fully comprehensive.

- Insofar as the genealogy emphasizes the use of dignity by notable theologians, philosophers, and political theorists, it is subject to the criticism that its account of dignity is elitist and patriarchal. To counter that claim, the genealogy incorporates, wherever possible, textual appeals to dignity that arose from broader constituencies, most notably evident in human rights documents.<sup>12</sup> These texts employ dignity to challenge hierarchy, privilege, and inequality.
- Although there is increasing attention in the literature to non-Christian religious uses and foundations of dignity,<sup>13</sup> this genealogy only examines Christian references to dignity, and in particular, it focuses on Catholic writings. Textual materials from other religions, including Judaism and Islam, pose translation problems and involve intra-tradition disputes about what words and/or doctrinal passages relate to dignity.<sup>14</sup>

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<sup>12</sup> Chapter 4, although not part of the genealogy, considers invocations of dignity in connection with post-colonial struggles, the abolition of slavery, and the women’s rights movement.

<sup>13</sup> For a discussion of dignity’s meanings and uses in the Jewish tradition, see Y. Michael Barilan, *From Imago Dei in the Jewish-Christian Traditions to Human Dignity in Contemporary Jewish Law*, 19 KENNEDY INST. ETHICS J. 231 (2009); Doron Shultziner, *A Jewish Conception of Human Dignity: Philosophy and Its Ethical Implications for Israeli Supreme Court Decisions*, 34 J. RELIGIOUS ETHICS 663 (2006). For an examination of dignity’s role in the Islamic tradition, see MOHAMMAD HASHIM KAMALI, *THE DIGNITY OF MAN: THE ISLAMIC PERSPECTIVE* (2004).

<sup>14</sup> In the Jewish tradition, for example, scholars have traced human dignity to biblical sources (including the Torah, Prophets, and Writings) as well as to halakhah (Jewish Law). The phrase “human dignity” (Kvod Ha’adam), however, is not found in these sources. Some scholars, therefore, draw on references to *Kavod*—meaning glory, honor, and respect—to conceptualize dignity, see, e.g., Shultziner, *supra* note 13, while others link textual references to *imago dei* to a Jewish conception of dignity, see, e.g., Barilan, *supra* note 13.

- The genealogy focuses on texts that are Western in origin and orientation.<sup>15</sup>

This decision is in part due to a limited ability to translate non-Western texts, and in part due to the fact that some non-Western languages and cultures do not have a term for dignity,<sup>16</sup> while others have a concept like dignity that rests on unique culture-specific foundations.<sup>17</sup>

## **Method 2: A Wittgensteinian Analysis of Dignity’s Modern Use**

Having traced dignity’s historical pedigree, the dissertation then applies a second methodological tool—grounded in Wittgenstein’s philosophy of language—to discover dignity’s modern uses, meanings and functions. This methodology, which unfolds in Chapter 4 and is described in greater depth below, starts from two premises. First, there have been very few attempts to conceptualize dignity that involve a single body of modern text.<sup>18</sup> Second, many of the scholars who have theorized about dignity take

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<sup>15</sup> For a discussion of non-Western perspectives, see Man Yee Karen Lee, *Universal Human Dignity: Some Reflections in the Asian Context*, 3 *ASIAN J. COMP. L.* 1 (2008); Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 *AM. POL. SCI. REV.* 303 (1982).

<sup>16</sup> See, e.g., Qianfan Zhang, *The Idea of Human Dignity in Classical Chinese Philosophy: A Reconstruction of Confucianism*, 27 *J. CHINESE PHIL.* 299, 301 (2000) (“[T]he concept of human dignity was neither explicitly mentioned in classical Confucian texts nor systematically explained by traditional interpretations.”).

<sup>17</sup> An example of this is the concept of *ubuntu* in African philosophy and culture. *Ubuntu* plays a role in African society and law similar to the role dignity plays in the West. There are, however, significant differences between the foundations and meanings of *ubuntu* and dignity. For a useful comparison, see Drucilla Cornell, *A Call for a Nuanced Constitutional Jurisprudence: South Africa, uBuntu, Dignity, and Reconciliation*, in *UBUNTU AND THE LAW: AFRICAN IDEALS AND POSTAPARTHEID JURISPRUDENCE* 324–32 (Drucilla Cornell & Nyoko Muvangua eds., 2012).

<sup>18</sup> The exception is the scholarly literature on the use of human dignity in human rights documents. See, e.g., Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT’L L.* 655 (2008); Oscar Schachter, *Human Dignity as a Normative*

approaches that are described below as reductionist or essentialist. These approaches fail to fully capture the meanings of dignity because they overlook the range of ways in which dignity operates in modern discourse.

### ***Reductionism and Essentialism: Deficiencies of the Standard Approach***

Much of the contemporary literature on dignity's conceptual meaning(s) can be described as either reductionist or essentialist. The reductionists contend that dignity's features are so well aligned with another concept that dignity is in fact reducible to that concept.<sup>19</sup> Ruth Macklin and Stephen Pinker's positions on dignity, described in Chapter 1, are examples of reductionism.<sup>20</sup> The crux of Macklin's argument is that dignity can be reduced to autonomy, and since the latter is already a respected societal value, the former can be eliminated from moral discourse without any loss of content. Pinker has similarly stated that, "[w]hen the concept of dignity is precisely specified... ultimately it's just

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*Concept*, 77 AM. J. INT'L L. 848 (1983).

<sup>19</sup> This form of reductionism is epistemic, not ontological or methodological. The reductive claim is that knowledge about dignity can be reduced to knowledge about another norm, such as autonomy. For a discussion of reductionism and its disadvantages, see Thomas Nagel, *Reductionism and Anti-Reductionism*, in *THE LIMITS OF REDUCTIONISM IN BIOLOGY* 3–10 (Gregory R. Bock & Jamie A. Goode eds., 1998).

<sup>20</sup> Ruth Macklin, *Dignity is a Useless Concept*, 327 *BMJ* 1419, 1419 (2003). *But see* Paul Weithman, *Two Arguments from Human Dignity*, in *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS* 435, 437 (2008) [hereinafter *HUMAN DIGNITY AND BIOETHICS*] (positing that "the fact that the notion of human dignity is at home in a number of moral traditions makes it an especially useful 'second-level concept,'" in that it serves to express moral agreement among "those who may differ about what first-order ethical vocabulary best explains *why* human beings merit respect").

another application of the principle of autonomy” because “it amounts to treating people in the way that they wish to be treated.”<sup>21</sup>

Essentialists, by contrast, begin by asking which features of dignity differentiate it from other concepts and are constitutive of its identity and function. They aim to distill dignity’s meaning down to its fundamental core by searching for the root or basic meaning of dignity. In this vein, philosopher William Parent has argued that the essential value of dignity is “a negative moral right not to be regarded or treated with unjust personal disparagement.”<sup>22</sup> Likewise, international law scholar Christopher McCrudden has proposed a “minimum core” of dignity, which recognizes that “every human being possesses an intrinsic worth . . . that this intrinsic worth should be recognized and respected by others, and [that] some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.”<sup>23</sup> Philosopher and legal scholar Jeremy Waldron similarly has distilled his conception of dignity from a historical interpretation of the Latin term *dignitas*, thus viewing it as inseparable from “inherently stratified and hierarchical” ideas of nobility and rank.<sup>24</sup> He has posited that human dignity refers not to

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<sup>21</sup> Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), <http://www.newrepublic.com/article/the-stupidity-dignity>.

<sup>22</sup> William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 62 (Michael J. Meyer & William A. Parent eds., 1992).

<sup>23</sup> McCrudden, *supra* note 18, at 679.

<sup>24</sup> Jeremy Waldron, *The Dignity of Groups*, 2008 ACTA JURIDICA 66, 70. *See also* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012) (presenting a conception of dignity that preserves its ancient association with rank, and applying it to all human beings).

inequality of different classes, but rather to the “very great privileges and responsibilities” that accompany the high rank of the human race.<sup>25</sup>

Though initially appealing for their apparent logic and coherency, the reductionist and essentialist approaches are problematic. First, they are unable to capture and explain the inconsistencies and nuances that pervade our thinking and speaking about dignity. Consider, for example, the following ways in which we employ the term:

- Dignity is inherent in every person<sup>26</sup>
- Some people are more dignified than others<sup>27</sup>
- Dignity is an inviolable trait that can be affronted, but not diminished or destroyed<sup>28</sup>
- Some acts can diminish or even destroy dignity<sup>29</sup>
- Dignity is a human trait<sup>30</sup>
- Dignity is possessed by non-human entities<sup>31</sup>

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<sup>25</sup> *Id.* Leon Kass also analyzes the aristocratic nature of the historic conception of *dignitas*, concluding that dignity “conveys the presence and active display of what is humanly best.” Leon R. Kass, *Defending Human Dignity*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 20, at 309.

<sup>26</sup> *See, e.g.*, Daniel P. Sulmasy, *Dignity and Bioethics: History, Theory, and Selected Applications*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 20, at 473 (“Intrinsic dignity is the value that human beings have simply by virtue of the fact that they are human beings.”).

<sup>27</sup> *Cf.* Holmes Rolston III, *Human Uniqueness and Human Dignity: Persons in Nature and the Nature of Persons*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 20, at 129, 147 (noting that dignity is a relative concept in that “[s]ome behaviors are more dignified than others”).

<sup>28</sup> *See* Peter Augustine Lawler, *Modern and American Dignity*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 20, at 229, 250 (positing that dignity “depends upon natural gifts, gifts that we can misuse or distort but not destroy”).

<sup>29</sup> *See* Richard E. Ashcroft, *Making Sense of Dignity*, 31 J. MED. ETHICS 679, 679 (2005) (noting that torture is often designed to destroy a torture victim’s dignity).

<sup>30</sup> Rolston, *supra* note 27, at 147 (stating that “[a]ll humans have [dignity]”).



- Dignity is a matter of self-respect<sup>32</sup>
- Dignity is dependent on respect by others<sup>33</sup>

Reductionist approaches cannot account for the range of ways in which dignity is invoked and applied. If dignity is reduced to autonomy, for example, the claim that dignity is inherent in all humans falls flat because some people, such as infants and mentally disabled persons, do not have rational capacities. This outcome does not cohere with our general view that although people may not have the capacity for autonomous choice, their dignity can still be violated if others disrespect, demean, or degrade them. Although the reductionist approach correctly recognizes that dignity overlaps with particular concepts, like autonomy, it ignores other aspects of human experience that a richer conception of dignity would arguably take into account.

Because essentialist approaches define dignity by its most basic and consistent elements, they also fail to explain dignity's more complicated and opposing features. For example, Parent's and McCrudden's theories of dignity do not shed light on why some people are considered more dignified than others or whether individuals can make choices to undermine their own dignity. Nor do these concepts of dignity explain whether disrespectful acts are dignity-destroying, dignity-diminishing, or dignity-offending.

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<sup>31</sup> Cf. Sara Elizabeth Gavrell Ortiz, *Beyond Welfare: Animal Integrity, Animal Dignity, and Genetic Engineering*, 9 ETHICS & ENV'T 94, 96 (2004) (acknowledging the argument that genetically reducing the capacities of animals is an infringement upon their dignity).

<sup>32</sup> See Martha Nussbaum, *Human Dignity and Political Entitlement*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 20, at 351, 378 (arguing that "having the social basis of self-respect and non-humiliation" is a "necessary condition of a life worthy of human dignity").

<sup>33</sup> See Sulmasy, *supra* note 26, at 473 (noting that dignity can be attributed to others by placing worth on particular characteristics or attributes).

Second, when one considers how dignity is used in modern language, reductionist and essentialist approaches tend to draw boundaries that are either too narrow or too broad. Consider the following activities and ideas that the U.S. Supreme Court has found are antithetical to, or incompatible with, dignity:

1. Subjecting states or state actors to lawsuits by private parties<sup>34</sup>
2. Voting statutes that discriminate on the basis of race<sup>35</sup>
3. Content-based restrictions on free speech<sup>36</sup>
4. Regulations that interfere with a woman's decision to end her pregnancy<sup>37</sup>
5. Permitting a mentally incapacitated defendant to represent himself at trial<sup>38</sup>
6. Forcefully pumping a person's stomach to collect evidence of illegal drug possession<sup>39</sup>
7. Executing juveniles or people who are mentally incapacitated<sup>40</sup>
8. Partial-birth abortion<sup>41</sup>
9. State laws that limit marriage to heterosexual couples<sup>42</sup>

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<sup>34</sup> Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002); Alden v. Maine, 527 U.S. 706, 750 (1999).

<sup>35</sup> Rice v. Cayetano, 528 U.S. 495, 517 (2000).

<sup>36</sup> Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

<sup>37</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

<sup>38</sup> Indiana v. Edwards, 554 U.S. 164, 176 (2008).

<sup>39</sup> Rochin v. California, 342 U.S. 165, 174 (1952).

<sup>40</sup> See Roper v. Simmons, 543 U.S. 551, 560 (2005) (juveniles); Ford v. Wainwright, 477 U.S. 399, 400 (1986) (mentally incapacitated individuals).

<sup>41</sup> Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

<sup>42</sup> Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

A reductionist view, like Macklin's or Pinker's, is too narrow to account for the range of ways in which dignity is invoked in the Court's decisions. If dignity is simply a placeholder for autonomy, for example, the reductionist view can only explain the Court's use of dignity in cases 3, 4, and 9. In those cases, the Court held that statutes restricting speech, burdening the right to abortion, and limiting access to marriage infringed on individuals' fundamental right to exercise their liberty to make certain personal decisions. In the remaining cases, however, autonomy and liberty do not animate the Court's decisions or its various uses of dignity.

Some essentialist approaches also draw the concept of dignity too narrowly. Even if we generously apply Parent's view—that people have a “right not to be regarded or treated with unjust personal disparagement”<sup>43</sup>—it does not cover case 1 (which involves the dignity of an institutional entity); case 3 (which involves the protection of a positive rather than a negative right); or case 5 (which involves an individual potentially disparaging himself). Like the reductionist concept of dignity, the essentialist approach applies only to certain persons or particular problems.

McCrudden's “minimum core” suffers from the opposite ailment. It is drawn with broad brushstrokes and could conceivably encompass all of the cases listed above (with the exception of case 1) and many more. Its protean quality renders it both overreaching and potentially unable to address the complexities of actual cases. Its requirement that people treat each other in a manner consistent with intrinsic human worth offers little direction in determining what is owed to persons as a matter of dignity, or when affronts to dignity have occurred.

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<sup>43</sup> Parent, *supra* note 22, at 62.

Standard approaches to conceptualizing dignity may be the very reason that some dignity skeptics and anti-dignitarians have long opposed the word. By suggesting either that dignity is a placeholder for other concepts, or a discrete and universal value across all contexts, reductionist and essentialist approaches may promise too much and deliver too little.

### ***Wittgenstein's Critique of Standard Linguistic Theories***

Typical approaches to conceptualizing dignity “come up short” in large part because they are overly bounded.<sup>44</sup> They draw clear lines around dignity to demonstrate either that it is the same as another concept (such as autonomy) or that it is distinct from all other concepts. In imposing such boundaries, dignity becomes either too exclusive or too inclusive. The result is that we may ignore relevant dignitary problems or lack the specific normative tools to recognize and resolve them.

Wittgenstein, considered by some to be the greatest philosopher of the twentieth century, devoted his later years to criticizing traditional approaches to linguistic meaning.<sup>45</sup> He argued that sharp definitions of words in natural languages, like English, often distort their meaning.<sup>46</sup> In purely referential languages, like geometry, words can

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<sup>44</sup> GADAMER, *supra* note 9, at 268.

<sup>45</sup> Wittgenstein's thought is commonly divided into two stages. The early Wittgenstein is exemplified by his *Tractatus Logico-Philosophicus*, which considered the application of modern logic to metaphysics. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1922). His later thoughts are compiled in his posthumously published work, LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1968) [hereinafter *INVESTIGATIONS*], which critiques his earlier views and sets forth his anti-systematic views of language.

<sup>46</sup> WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 45, ¶ 91.

have fixed, core meanings. A circle, for example, is a set of co-planar points equidistant from a single point. In natural languages, however, words do not have an essential meaning that applies to all of the ways in which that word is used. Wittgenstein warned that the uniform appearance of words can therefore be misleading when we theorize about their meaning, “Especially when we are doing philosophy!”<sup>47</sup> To counter that, he contended, we must acknowledge that the “functions of words are as diverse as the functions of [objects in a toolbox].”<sup>48</sup>

To ascertain a word’s meaning and function, Wittgenstein famously wrote, “Don’t think but look!”<sup>49</sup> A word’s meaning is not an abstract link between the word and what it signifies; rather, “the meaning of a word is its use in the language.”<sup>50</sup> Wittgenstein believed that once we abandon the purely referential notion that the meaning of a word is fixed and uniform, and turn to its actual use in the language, we can begin to see that the same word often has different meanings in different contexts. His primary heuristic device for illustrating this point is the concept of “language-games,” which exemplify his fluid, activity-oriented view of language.

As Wittgenstein explains, there is not a single definition that tells us what counts as a game and what does not. If you consider “board-games, card-games, ball-games, Olympic games, and so on ... you will not see something that is common to all, but similarities, relationships, and a whole series of them at that.”<sup>51</sup> There are “many

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<sup>47</sup> *Id.* ¶ 12 (exclamation in original text).

<sup>48</sup> *Id.* ¶ 11.

<sup>49</sup> *Id.* ¶ 66.

<sup>50</sup> *Id.* ¶ 43.

<sup>51</sup> *Id.* ¶ 66.

common features,”<sup>52</sup> for example, between chess and the children’s game, “Go Fish.” Both involve rules and include an element of winning or losing, but there are also key differences between them. Chess involves skill, while “Go Fish” arguably does not; “Go Fish” is amusing, while chess arguably is not.

Wittgenstein calls the similarities between different kinds of games a “family resemblance.”<sup>53</sup> Members of a family may share certain features, such as eye color or build, but the family is not defined by any single characteristic. The absence of a fixed, family-defining feature does not prevent us from observing that family members resemble each other. The same is true of words like “game,” which operate in a multiplicity of ways that nevertheless retain a resemblance to each other.

Wittgenstein’s understanding of language importantly demonstrates that standard approaches, which search only for a word’s “necessary and sufficient” features, risk distorting or circumscribing the word’s meaning. Rather than seeking exact definitions with clear and rigid boundaries, he implores us to conceptualize words by exploring the “overlapping and criss-crossing”<sup>54</sup> meanings they have in practice.

### ***Conceptualizing Dignity in U.S. Supreme Court Opinions***

Wittgenstein’s notion that the meaning of a word is located in its use, rather than in a priori knowledge, suggests that to conceptualize dignity, we must observe the ways in which the word is employed in language. This raises the question of which textual

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ¶ 67.

<sup>54</sup> *Id.* ¶ 66.

sources one should examine to access dignity’s modern meanings. Although a variety of textual options could serve that function (e.g., human rights documents, religious tracts, literature), this dissertation focuses on the use of dignity in U.S. Supreme Court opinions for several reasons.

First, Supreme Court justices have invoked the word “dignity” in nearly one thousand opinions over the last 225 years, creating a rare set of documents that illustrate how dignity has been invoked in a variety of circumstances over time. Second, the opinions are written by a politically and religiously diverse group of justices, enhancing the likelihood that a range of dignity’s meanings will appear in the text. Third, the number of available opinions is large enough to connect different meanings of dignity to particular factual circumstances, time periods, justices, and in some cases, legal rights. All of these factors make the Court’s published opinions ripe for this kind of analysis.

In addition, we are at a unique juncture in what I have elsewhere called the Court’s “jurisprudence of dignity.”<sup>55</sup> In June 2015, when the Supreme Court invoked the language of dignity to strike down state-level bans on same-sex marriage,<sup>56</sup> the *New York Times* ran an oversized front-page headline that declared: “Equal Dignity: Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide.”<sup>57</sup> While some media outlets printed articles before and after this decision claiming “Gay Marriage Ruling Safeguards

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<sup>55</sup> Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

<sup>56</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See id.* at 2599 (“there is *dignity* in the bond between two men or two women who seek to marry”); *id.* at 2597 (“certain personal choices central to individual *dignity* and autonomy”).

<sup>57</sup> Adam Liptak, *Equal Dignity: Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES, June 27, 2015, at A1.

Human Dignity,”<sup>58</sup> and “Human Dignity is a Constitutional Principle,”<sup>59</sup> other news sources declared that “Dignity Could be Dangerous at the Supreme Court,”<sup>60</sup> and warned about the “The Dangers of a Constitutional ‘Right to Dignity.’”<sup>61</sup>

Despite deep disagreements about the normative, practical, and jurisprudential value of dignity, its growing presence in Supreme Court decisions has received scant attention.<sup>62</sup> This leaves us without a comprehensive understanding as to why the Court has embraced dignity, what kinds of actions threaten dignity, and how the Court weighs dignity in relation to other values. Most importantly, we lack a systematic account of dignity’s varied meanings against which to ponder these questions.

The conceptualization of dignity set forth in Chapter 4 is the result of examining an original dataset that I created of every published Supreme Court opinion that has

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<sup>58</sup> Cass R. Sunstein, *Gay Marriage Ruling Safeguards Human Dignity*, BLOOMBERG VIEW (June 26, 2013), <http://www.bloombergtview.com/articles/2013-06-26/gay-marriage-ruling-safeguards-human-dignity>.

<sup>59</sup> Bruce Ackerman, *Dignity is a Constitutional Principle*, N.Y. TIMES (Mar. 29, 2014), <http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html>.

<sup>60</sup> Katherine Franke, *Dignity Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015), [http://www.slate.com/blogs/outward/2015/06/25/in\\_the\\_scotus\\_same\\_sex\\_marriage\\_case\\_a\\_dignity\\_rationale\\_could\\_be\\_dangerous.html](http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html).

<sup>61</sup> Jeffrey Rosen, *The Dangers of a Constitutional ‘Right to Dignity,’* THE ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>.

<sup>62</sup> The majority of scholarship on the Court’s use of dignity focuses on the doctrine of sovereign immunity. See Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245 (2000); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003). Three exceptions are Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS, *supra* note 22, at 10, 28 (examining whether there is a right to dignity in the United States), Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011), and Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) [hereinafter *Politics of Protection*] (illustrating the ways in which dignity bridges communities divided in the abortion debate).



invoked the word “dignity” in the last 225 years.<sup>63</sup> Nearly half of those opinions were issued after 1946, the year that the phrase “human dignity” first appeared in a Supreme Court opinion,<sup>64</sup> and more than one hundred of those opinions were authored in the last twenty-five years.<sup>65</sup> As Figure 2 illustrates, the percentage of Supreme Court opinions that invoke dignity per Supreme Court term is increasing at a statistically significant rate (two-tailed  $p$ -value = 0.002), and the Roberts Court (named for the current Chief Justice, John Roberts) appears prepared not only to continue, but to accelerate, this trend.<sup>66</sup>

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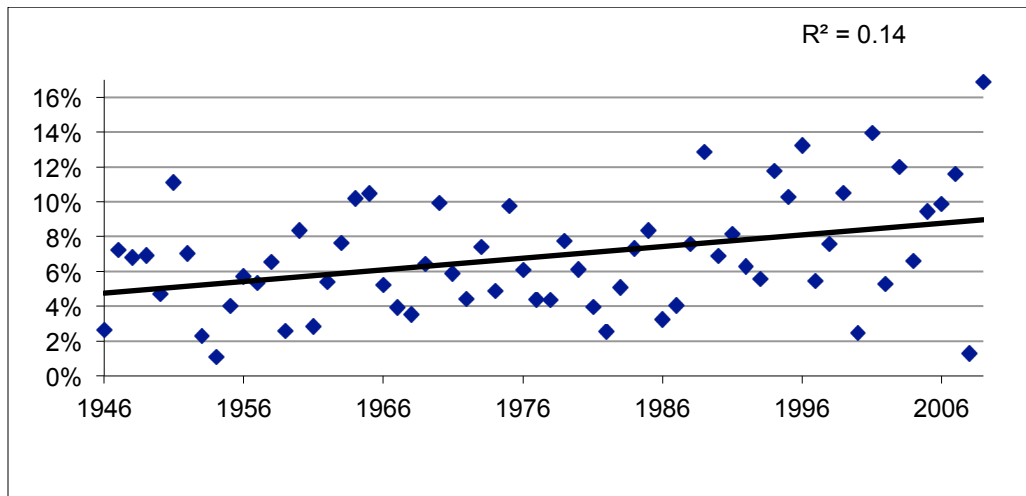
<sup>63</sup> Supreme Court Dignity Database, created by and on file with author. The database does not include opinions that use “dignified,” “undignified,” or “dignitary” unless they appear in an opinion that contains the word “dignity.”

<sup>64</sup> *In re Yamashita*, 327 U.S. 1 (1946). The Court rejected Yamashita’s challenge that his trial was unfairly conducted. Justice Murphy argued in dissent that “If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.” *Id.* at 29 (Murphy, J., dissenting).

<sup>65</sup> Supreme Court Dignity Database, created by and on file with author.

<sup>66</sup> Justices on the Roberts Court have issued nearly sixty opinions that invoke dignity, more than two-thirds of them in the last five years. Supreme Court Dignity Database, created by and on file with author.

**Figure 2: Percentage of Supreme Court Opinions that Invoke Dignity per Term of Court<sup>67</sup>**

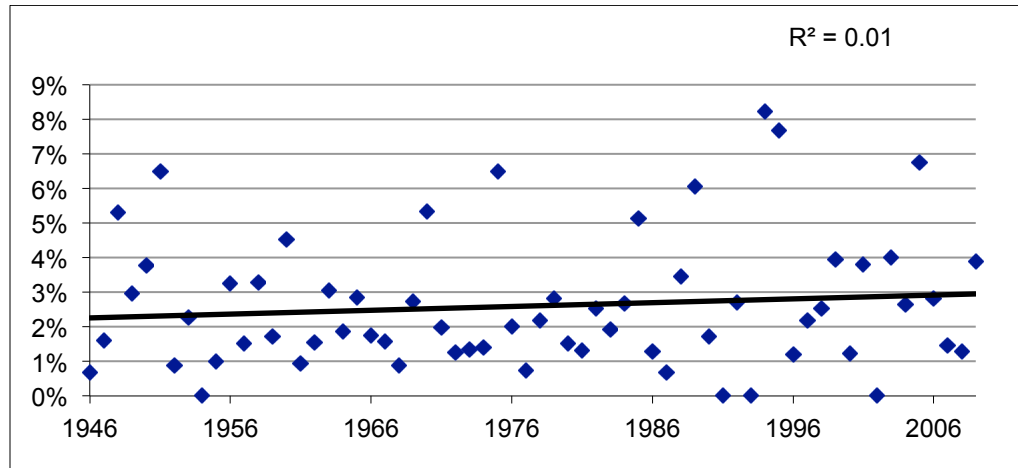


Notably, while the use of dignity in dissenting opinions has remained relatively stable during the last seventy years (Figure 3), the Court’s reliance on dignity in majority opinions is increasing at a statistically significant rate (two-tailed  $p$ -value = 0.05) (Figure 4).

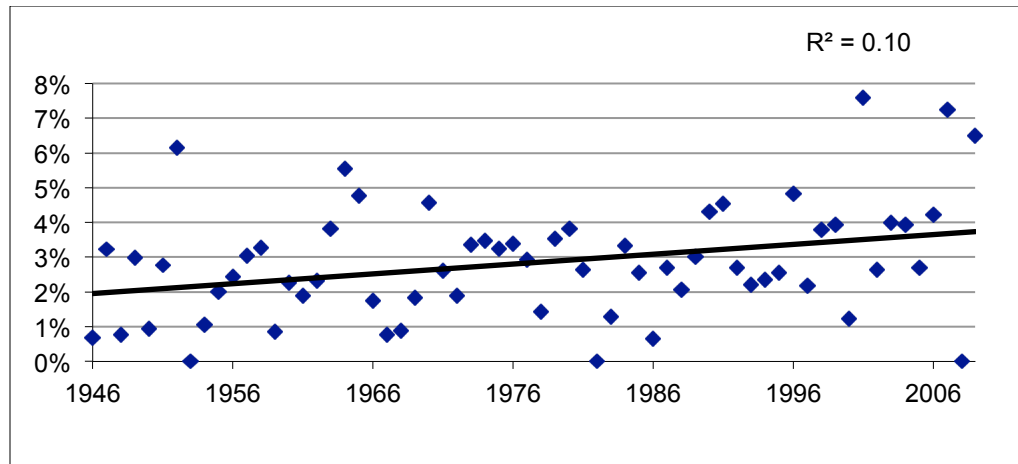
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<sup>67</sup> There is a statistically significant, positive relationship between Court term and the percentage of cases that use dignity,  $r=0.38$ ,  $p=.002$ . In other words, Court term explains approximately 14% of the variance in the percent of cases that use dignity, and there is less than a 2 in 1,000 chance that these results would have been obtained if there were no relationship between the Court term and the use of dignity. Figure 2 includes majority, concurring, and dissenting opinions.

**Figure 3: Percentage of Dissenting Opinions that Invoke Dignity per Term of Court<sup>68</sup>**



**Figure 4: Percentage of Majority Opinions that Invoke Dignity per Term of Court<sup>69</sup>**



<sup>68</sup> In contrast to Figures 2 and 4, there is not a statistically significant increase in the appearance of dignity in the Court's dissenting opinion,  $r=0.11$ ,  $p=.40$ . The use of dignity in the Court's dissenting opinions has remained fairly flat during the time measured. The results controlled for the number of cases in which the Court issued an opinion per term.

<sup>69</sup> There is a statistically significant, positive relationship between court term and the percentage of majority opinions that use dignity,  $r=0.32$ ,  $p=0.05$ . In other words, court term explains approximately 10% of the variance in the percent of majority opinions that use dignity, and there is less than a 5% chance that these results would have been obtained if there were no relationship between Court term and use of dignity. The results controlled for the number of cases in which the Court issued an opinion per term.

Although the Court’s frequent invocation of a word does not always signal increasing jurisprudential reliance on the underlying term, Chapter 4 suggests that in this instance, the correlation holds. The Court’s repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a normative value animating constitutional rights. The Court has declared, for example, that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State;”<sup>70</sup> that dignity is “the constitutional foundation underlying the [Fifth Amendment] privilege [against self-incrimination];”<sup>71</sup> that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man;”<sup>72</sup> and that “choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment.”<sup>73</sup>

These invocations of dignity preview and provide support for the Wittgensteinian claim in Chapter 4 that dignity is not a single concept, but many conceptions; it is not a fixed category, but rather a series of meanings that share a family resemblance. These meanings of dignity are as distinct as individual family members are unique, but like siblings, they have overlapping characteristics. In contrast to the standard approach to conceptualizing dignity, these types cannot be combined to form a Venn diagram with an unchanging central core. The spheres are context sensitive, and an overlap that appears in one situation may not appear in another.

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<sup>70</sup> *Winston v. Lee*, 470 U.S. 753, 760 (1985) (citing *Schmerber v. California*, 384 U.S. 757, 767 (1986)).

<sup>71</sup> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), *aff’d by Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>72</sup> *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

<sup>73</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

One can imagine an objection to the proposed approach on the ground that because it derives dignity's meanings from experience, context, and usage, its vision is too contingent to serve as a long-term template for addressing dignity issues. To the contrary, one advantage of the proposed approach lies in its flexibility. As law professor Daniel Solove explains in his ongoing efforts to conceptualize privacy, the theory I put forth here:

is but a snapshot of one point in an ongoing evolutionary process. Theories are not lifeless pristine abstractions but organic and dynamic beings. They are meant to live, breathe, and grow ... be tested, doubted, criticized, amended, supported, and reinterpreted. Theories, in short, are not meant to be the final word, but a new chapter in an ongoing conversation.<sup>74</sup>

A language-driven conceptualization of dignity develops with societal change; it does not hold society to static meanings. It is responsive to evolving attitudes, structures, and beliefs. It recognizes that understanding is, to use Hans-Georg Gadamer's phrase, "a historically effected event."<sup>75</sup> Temporal, cultural, political, and technological changes will produce new dignity issues and perhaps even erase old ones. Dignity, therefore, cannot be defined in a permanent way, but must instead remain open to revision.

Critics may argue that dignity's fluidity makes it incoherent; that because it applies in multiple contexts to address a plurality of problems, it lacks the consistency that makes unified, standard definitions of dignity so attractive. But, as noted previously, traditional approaches to conceptualizing dignity have been unable to address the distinct,

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<sup>74</sup> DANIEL SOLOVE, UNDERSTANDING PRIVACY (2008). See also Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107 (2010).

<sup>75</sup> GADAMER, *supra* note 9, at 302.

but related issues that we use dignity to describe. By jettisoning universal notions of dignity in favor of particularized types, we can speak about dignity more clearly. The conceptualization of dignity presented in Chapter 4, which emerges from the actual use of dignity in modern language, provides a more coherent framework against which to contemplate discrete normative issues precisely because it was created contextually, not abstractly.

### **Method 3: An Inductive Approach to Dignity**

The final methodological tool, which is employed in Chapter 5, involves taking an inductive approach to identifying dignity’s meaning(s) and functions.<sup>76</sup> Unlike most accounts of dignity, which are top-down and ask what quality all humans possess that make them bearers of dignity, this approach is bottom-up. It works from the premise that if dignity has normative value, its meaning will emerge from contexts in which reasonable people would agree that dignity has been violated. Instead of deriving dignity from any normative account of humanity—for example, humans’ capacity for rationality or their creation in the image of God<sup>77</sup>—the inductive method I propose examines situations in which our collective intuition is that dignity has been violated.

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<sup>76</sup> Cf. Adeno Adis, *Human Dignity in Comparative Constitutional Context: In Search of an Overlapping Consensus*, 2 J. INT’L & COMP. L. 1, 5 (2015) (calling his bottom-up approach “human dignity pragmatism”).

<sup>77</sup> See e.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 4:435 (Mary Gregor ed., 1997) (1785) (claiming that “morality, and humanity insofar as it is capable of morality, is that which alone has dignity”). See also POPE PAUL VI, *GAUDIUM ET SPES* 19 (Dec. 7, 1965) (explaining that “The root reason for human dignity lies in man’s call to communion with God”).

To be successful, the inductive method requires us to examine what I call “paradigmatic cases of dignitary injury.” These are cases in which a violation of dignity is the only way to describe the moral harm, or a violation of dignity more completely describes the moral harm than any other concept, such as a violation of liberty, equality, or bodily integrity. The paradigmatic cases that are examined in Chapter 5 are annihilation/extermination and torture. After examining these cases through the use of first-person narratives, I use an inductive method, combined with aspects of the genealogy of dignity from Chapter 3 and the typology of dignity from Chapter 4, to distill the features of a dignity violation. With that information, the conclusion offers a preliminary and modest account of dignity.

The proposed three-part methodology aims to discover “what” dignity is, and “why” it is. By examining dignity’s genealogy through historical texts, Chapter 3 highlights the complexity involved in determining dignity’s content and legitimacy. Importantly, it also provides a background against which to compare the modern uses of the word that are revealed in Chapter 4. That chapter, which maps the modern terrain of dignity through a Wittgensteinian analysis, will illustrate the variety of pluralistic values involved in contemporary articulations of dignity and provide some coherence to what otherwise might appear to be vague, imprecise, ambiguous, and even redundant uses of the term. Chapter 5 then employs an inductive methodology and examines paradigmatic cases of dignitary harms to determine the central features of a dignity violation. Collectively, the three methodologies applied in this dissertation—and the meanings and

functions of dignity that they elucidate—contribute, at the end of Chapter 5, to a modest defense of dignity.



## Chapter 3: A Genealogy of Dignity

### Etymological Premises

Like any genealogy, the process of discovering dignity's origins and lineage begins with what we currently know about its pedigree. The Oxford English Dictionary traces the etymology of dignity to the Old French *digneté*, which was derived from the Latin words *dignitas* and *dignus*, meaning worthy or the state of being worthy, respectively.<sup>1</sup> Other etymological sources suggest that dignity is related to the Latin words *decet*, meaning fitting or proper, and *decens*, meaning decent.<sup>2</sup> Most efforts to track the developmental trajectory of dignity therefore start with Latin texts from the Classical Period that use these words.<sup>3</sup> Based on that analysis, the long-held view is that the concept of “human dignity” originates in the second century B.C.E., in Panaetius of

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<sup>1</sup> OXFORD ENGLISH DICTIONARY (2d ed. 1989), <http://www.oed.com/view/Entry/52653?redirectedFrom=dignity#eid>. See also A COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE: VOL. I, 448 (Ernest Klein ed., 1966) (stating that dignity is derived from the Latin words, *dignitas*, meaning “worth, merit, desert, authority, rank, power;” *dignus*, meaning “suitable, fit, becoming, proper, worthy;” and *decere*, meaning “to be fitting or seemly”).

<sup>2</sup> THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 267–68 (C.T. Onions ed., Oxford 1978). The words condign, dainty, deign, disdain, and indignant are from the same base. *Id.* at 268. The words decorum and decorate also derive from *decet*. See ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH (Eric Partridge ed., 4th ed. 1966).

<sup>3</sup> See, e.g., SCOTT CUTLER SHERSHOW, DECONSTRUCTING DIGNITY: A CRITIQUE OF THE RIGHT TO DIE DEBATE 53–84 (2014) (tracing dignity's intellectual history from Cicero); MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012) (starting with Cicero).

Rhodes' principal work, *On Duties*, and that it enters mainstream discourse through his student Cicero's text of the same name a century later.<sup>4</sup>

This dissertation departs slightly from that origin story by highlighting linguistic predecessors to the Latin word *dignitas* that exist in ancient Greek texts.<sup>5</sup> Several etymological sources support this approach. E.A. Andrews' *Copious and Critical Latin-English Lexicon* states that the Latin word *dignus* is "most probably of kindred origin with the Greek δίκαιος [díkaios], whose primary meaning, like that of ἄξιος [áxios], is of like value, worth as much as."<sup>6</sup> This interpretation is consistent with Henry George Liddell and Robert Scott's lexical work, which notes that the Greek word *díkaios* was translated to *dignus* in later Latin prose,<sup>7</sup> and with Mette Lebech's hermeneutic work,

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<sup>4</sup> See, e.g., Hubert Cancik, 'Dignity of Man' and 'Persona' in *Stoic Anthropology: Some Remarks on Cicero, De Officiis, I, 105-107*, in CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 19 (David Kretzmer & Eckhart Klein eds., 2002) (demonstrating that the intellectual origins of human dignity originate with Panaetius of Rhodes and then were employed by Cicero); see also SHERSHOW, *supra* note 3 (following Cancik's view that human dignity enters Western discourse through Cicero). See also *infra* section on Cicero (noting that he was the primary translator of Greek terms into Latin words, many of which are the roots of words in modern Western languages).

<sup>5</sup> I thank Margaret Mohrmann for suggesting that I research the Greek words δίκαιος and ἄξιος to determine if they were precursors to the Latin word *dignus*.

<sup>6</sup> A COPIOUS AND CRITICAL LATIN-ENGLISH LEXICON 472 (E.A. Andrews ed., Harper & Bros., 1857).

<sup>7</sup> A GREEK-ENGLISH LEXICON (Henry Robert Liddell & Robert Scott eds., Henry Stuart Jones rev. ed. 1961) (citing an example of a Latin translation of the work of the Greek orator, Demosthenes). The Lexicon also highlights that δίκαιος was used by Greek writers to articulate a variety of meanings that parallel the uses of *dignus* in Latin and *dignity* in English. Early Greek writers, such as Homer, used δίκαιος to refer to people who were well-ordered and civilized; while later Greek writers, like Thucydides, employed δίκαιος to describe objects that were well-balanced and people who were fair, just, and lawful. *Id.*

which illustrates that the Greek word *áxios* was “more or less systematically” translated into Latin as *dignitas*.<sup>8</sup>

J.T. Pring’s *Oxford Dictionary of Modern Greek* adds additional support to this proposition. Pring translates the Greek word ἀξιοπρέπεια (*axioprépeia*), which is derived from the root *áxios*, into dignity in English.<sup>9</sup> As Liddell and Scott corroborate, the Greeks invoked *áxios* to convey a range of meanings, including dignity, dignified, worthy, deserving, rank, honorable, and fitting—all words associated with the Latin word *dignus* and the English word dignity.<sup>10</sup> The study of dignity’s lineage must, therefore, begin with ancient Greek texts.

## **The Classical Period**

### ***Aristotle***

The Greek philosopher Aristotle (384-322 B.C.E.) is perhaps best known for his *Nicomachean Ethics*, in which he sets forth a practical ethics that calls on humans to strive for excellence and virtuous character so that they may reach *eudaimonia* (happiness/flourishing).<sup>11</sup> Throughout the treatise, Aristotle invokes various forms of the Greek word *axia*, all of which are translated in Latin versions of Aristotle’s works as

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<sup>8</sup> METTE LEBECH, ON THE PROBLEM OF HUMAN DIGNITY: A HERMENEUTICAL AND PHENOMENOLOGICAL INVESTIGATION 30–31 (2009).

<sup>9</sup> THE OXFORD DICTIONARY OF MODERN GREEK: ENGLISH-GREEK 83 (J.T. Pring ed., Oxford Press 1982).

<sup>10</sup> A GREEK-ENGLISH LEXICON, *supra* note 7 (defining *áxios*).

<sup>11</sup> ARISTOTLE, NICOMACHEAN ETHICS (David Ross trans., Oxford World’s Classics 1998).

*dignus* or one of its derivatives.<sup>12</sup> For Aristotle, *axia* is a quality of worthiness possessed selectively by some, but not all, humans. He also invokes *axia* to denote the value of external goods like wealth.<sup>13</sup> Unlike later figures, Aristotle does not use a phrase that connotes *human* dignity.

Consider the following passages from *Nicomachean Ethics*, where the italicized words in English are translations of the Greek cognates *axia* and *axioma*:<sup>14</sup>

Now the man is thought to be proud who thinks himself *worthy* of great things, being *worthy* of them; for he who does so beyond his *deserts* is a fool, but no virtuous man is foolish or silly. The proud man then is the man we have described. For he who is *worthy* of little and thinks himself *worthy* of little is temperate but not proud.... On the other hand, he who thinks himself *worthy* of great things, being *unworthy* of them, is vain.... The proud man... claims what is in accordance with his *merits*...

If, then, he *deserves* and *claims* great things... he will be concerned with one thing in particular. *Desert* is relative to external goods; and the greatest of these, is that which we render to the gods, and which people of *position* most aim at, and which is the prize appointed for the noblest deeds; and this is *honour*; that is surely the greatest of external goods.<sup>15</sup>

In these passages *axia* is, first and foremost, a quality possessed by great men. As Aristotle explains at other points in the treatise, great men are those who are good, not

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<sup>12</sup> LEBECH, *supra* note 8, at 30–31 (citing translation from ARISTOTELES LATINUS XXVI, 1-3, 4: ETHICA NICOMACHEA TRANSLATIO GROSSETESTE (R.A. Gauthier ed., 1973)).

<sup>13</sup> MALCOLM SCHOFIELD, SAVING THE CITY PHILOSOPHER-KINGS AND OTHER CLASSICAL PARADIGMS 135-38 (1999).

<sup>14</sup> I rely on Lebech's translational work here, which compares the Greek, Latin, and English version of this text. LEBECH, *supra* note 8, at 30–31.

<sup>15</sup> ARISTOTLE, *supra* note 11, at IV.3; 1123a34–1123b27.

simply because of their natural goodness, but because they also have virtue (*aretê*). They possess intellectual virtue, which involves mental reasoning and can be enhanced with learning, and they have moral virtue, which entails particular dispositions or habits (*hexis*), such as having courage.<sup>16</sup> The moral virtue of a good man is always at the mean, not the extremes.<sup>17</sup> That is why the proud/good man described in the passage above possesses *axia*: His sense of worth corresponds to his relative merit or worth (he is neither too temperate nor too vain). As the passage demonstrates, however, not everyone has *axia*; it is a distinctive quality reserved for those who have virtue.

In addition to describing a quality of worthiness that virtuous men possess, the passage above also attributes *axia* to people in certain positions and people who perform noble deeds. This use of *axia* then triggers a third function of the word, which is the proper external response that other people should express toward those who possess *axia*, either as a consequence of their virtue or their status. The external form of *axia* is best characterized as honor or respect. In the passage above, Aristotle therefore claims that those who are worthy (by virtue, deed, or position) deserve to be treated with respect and honor.

There is one further meaning of *axia* in Aristotle's writings that is not adequately captured by the previous passage. In a later section of the *Nicomachean Ethics*, which sets forth Aristotle's views on distributive justice and the principle of geometrical proportion, he explains that "awards should be 'according to *merit*'; for all men agree that what is just in distribution must be according to *merit* in some sense, though they do not

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<sup>16</sup> *Id.* at II.1; 1103a1–10.

<sup>17</sup> *Id.* at II.6; 1106a26–b28.

all specify the same sort of *merit*.<sup>18</sup> Again, the italicized words in English are translations of the Greek cognates *axia* and *axioma*, as well as the Latin word *dignus* and its derivatives.

Here *axia*, like the Greek word *díkaios* discussed earlier,<sup>19</sup> is operating as a form of valuation to measure what is just. *Axia* functions to give greater goods to those with greater merit, and lesser goods to those with lesser merit. Aristotle seems to recognize that what constitutes “merit” will vary from one society to another. He therefore notes that democracies will find merit in the freeman; oligarchies in the nobleman; and aristocracies in men of excellence.<sup>20</sup> This final line reinforces that the Aristotelian notion of *axia* is not only a contingent quality; it is also a subjective one.

### *Cicero*

The Roman philosopher and statesman Marcus Tullius Cicero (106-43 B.C.E.) — who is often credited with ushering the term “dignity” into Western discourse,<sup>21</sup> — was strongly influenced by his Greek predecessors, including Aristotle.<sup>22</sup> Cicero not only incorporated literary models and theories from Greek philosophers into his own work, he

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<sup>18</sup> *Id.* at V.3; 1131a10–28.

<sup>19</sup> See, e.g., A GREEK-ENGLISH LEXICON, *supra* note 7 (noting that *δίκαιος* describes things that are well-balanced, just, fair, and equitable).

<sup>20</sup> ARISTOTLE, *supra* note 11, at V.3; 1131a27–30.

<sup>21</sup> See *supra* notes 3-4 and surrounding text.

<sup>22</sup> Eric Laughton, *Cicero and the Greek Orators*, 82 AM. J. PHILOLOGY 27, 32 (1961) (including Aristotle among the Greek scholars whose work Cicero knew well); see also Richard Leo Enos, *Speaking of Cicero...And His Mother: A Research Note on an Ancient Greek Inscription and the Study of Classical Rhetoric*, 24 RHETORIC REV. 457, 459 (2005) (describing Cicero’s strong interest in Greek philosophy and art).

also translated many Greek treatises into Latin, thereby creating a compendium of Greek classical thought that was accessible to a Roman audience.<sup>23</sup> Cicero's grounding in Greek philosophy was so complete, in fact, that it has been said that "to speak about Cicero and Greek philosophy is to speak about Cicero and philosophy, period."<sup>24</sup> There is, therefore, little room to doubt that Cicero was familiar with Aristotle's writings and had an understanding of the Greek words *dikaios* and *áxia*.

Cicero invokes the Latin word *dignitas* and its cognates on numerous occasions throughout his vast body of work. In almost every instance, his meanings parallel the ways in which Aristotle employed the word. Cicero's use of *dignitas* generally describes (1) social status or rank, (2) the quality of being impressive or worthy, (3) one's fitness for certain tasks, and (4) behavior that is virtuous or excellent. The only exception to these meanings comes in a passage from Cicero's famous *De Officiis*, where he invokes the terms for "human" and "dignity" in such close proximity that some interpreters claim he is the first philosopher to articulate the concept of "human dignity." After illustrating Cicero's more common invocations of *dignitas*, I address whether he articulates a notion of *human dignity*, and if so, what it entails.

Cicero employs dignity, in the first sense described above, to refer to the status or rank of institutions and people within a hierarchy. In describing the effect that a scholar's death had on the academy, for example, Cicero comments that "the dignity (*dignitatem*)

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<sup>23</sup> Enos, *supra* note 22, at 459 (noting that, among other translations, Cicero created a Latin translation of Demosthenes' "On the Crown" and Aeschines' "Against Ctesiphon"). When Greek language disappeared in Europe during the Dark Ages, Cicero's translations played a central role in demonstrating the influence of Greek philosophy on western thought. See ANTHONY EVERITT, *CICERO: THE LIFE AND TIMES OF ROME'S GREATEST POLITICIAN* (2003).

<sup>24</sup> Gisela Striker, *Cicero and Greek Philosophy*, in *GREECE IN ROME: INFLUENCE, INTEGRATION, RESISTANCE* 53, 53 (Charles Segal ed., Harvard Studies in Classical Philology no. 97, 1998).

of our college had suffered a loss.”<sup>25</sup> Dignity functions to describe the status of the academic institution, which Cicero believes was diminished as a consequence of the faculty member’s death. Cicero uses dignity in a similar way to refer to the eminent status of the Roman state. In *De Officiis*, he explains that the magistrate “represents the state and that it is his duty to uphold its honour and its dignity (*dignitatem*).”<sup>26</sup> Here, dignity conveys the elevated position of the state. As in the previous quote, dignity is a heightened status that can be lost or diminished within a hierarchy.

Cicero also invokes this first form of dignity to describe the stature of people who hold certain titles or positions.<sup>27</sup> It is no mistake that his famous treatise, *De Officiis*, translates to “offices” or “duties,” and accords dignity to those who hold positions of recognition. Throughout the treatise he addresses the status of certain roles. In bemoaning the loss of high respect accorded to the legal profession, for example, Cicero laments that “the prestige of legal learning has departed along with offices of honour and positions of dignity (*dignitatis*).”<sup>28</sup> This application of dignity also arises in Cicero’s discussion about the consulship of Marcus Regulus, in which Cicero mentions that Regulus hoped to “retain his rank and dignity (*dignitatis*) as an ex-consul” despite the

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<sup>25</sup> MARCUS TULLIUS CICERO, BRUTUS, 1 in CICERO VOL. 5 (G.L. Hendrickson & H.M. Hubbell trans., The Loeb Classical Library ed. 1939) (“*dignitatem nostri college deminutam dolebam*”).

<sup>26</sup> MARCUS TULLIUS CICERO, DE OFFICIIS, I.124, in CICERO VOL. 21 (Walter Miller trans., The Loeb Classical Library ed. 1913).

<sup>27</sup> This use of dignity was common at the time Cicero was writing. Julius Caesar (100-44 BCE) uses the term in the same sense to explain why he is fighting in the Civil War. He states that he did not “leave his province to do mischief [to any man], but to protect himself from the injuries of his enemies [and] to restore the dignity (*dignitatem*) of the tribunes of the people who had been driven out of this city on his account . . . .” See C. JULIUS CAESAR, DE BELLO CIVIL, I.22.5, in CAESAR VOL. I (H.L. Edwards trans., The Loeb Classical Library ed., 1917) (applying dignity to the tribunes).

<sup>28</sup> CICERO, DE OFFICIIS, *supra* note 26, at II.65 (“*ut omnes dignitatis gradus, sic huius scientiae splendor deletus est, idque eo indignius*”).



defeat he suffered.<sup>29</sup> Notably, Cicero does not limit this form of dignity to describing people in civil service positions—who we might refer to today as dignitaries<sup>30</sup>—but also applies it in *De Oratore* to excellent orators, who are “worthy of so dignified (*dignus*) a title.”<sup>31</sup> In all of these contexts, dignity refers to a conditional social status, position, or title, which can be gained or lost.

Cicero’s texts also reveal a second meaning of dignity, which relates to the quality of being impressive, worthy, or deserving. This form of dignity is reserved for individuals who reach the height of their abilities, who display excellence in what they do.<sup>32</sup> Cicero writes, for example, that “Pompeius alone is possessed of all the highest

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<sup>29</sup> *Id.* at III.99 (“consularis dignitatis gradum”).

<sup>30</sup> The Latin *dignitates* translates to dignitaries in English. See MARCUS TULLIUS CICERO, ORATOR, xxvi.89, in CICERO VOL. 5 (G.L. Hendrickson & H.M. Hubbell trans., The Loeb Classical Library ed. 1939) (stating that a good orator will “spare friends and dignitaries (*dignitatibus*)” from insult).

<sup>31</sup> MARCUS TULLIUS CICERO, DE ORATORE, I.64, in CICERO VOL. 8 (E.W. Sutton & H. Rackham trans., The Loeb Classical Library 1942) (“hoc tam gravi dignus nomine...”)

<sup>32</sup> This form of dignity both pre-dates and post-dates Cicero. In a play by Plautus (254-184 BCE), one character calls on the gods and goddesses for a blessing, but then comments that there is no one to bless because none of the characters in the play are deserving (*dignus*). See TITUS MACCIUS PLAUTUS, POENULUS, line 860, in PLAUTUS VOL. 4: THE LITTLE CARTHAGINIAN, PSEUDOLUS, THE ROPE (Wolfgang de Melo ed. & trans., The Loeb Classical Library 2012). This use of dignity is carried forward by Cicero’s followers, Ovid (43 BCE-17 CE) and Quintilian (c. 35-100 CE). In his *Tristia*, Ovid contends that “thou dost deserve (*dignus*) to finish life’s race with unstumbling foot, enjoying a fairer lot than mine.” See OVID, TRISTIA, III.iv.34, in OVID VOL. 6 (A.L. Wheeler trans., The Loeb Classical Library 1924). Quintilian more frequently employs dignity in this way. See, e.g., MARCUS FABIVS QUINTILLIAN, INSTITUTIO ORATORIA, X.i.96, in QUINTILLIAN: THE ORATOR’S EDUCATION, VOL. 4: BOOKS 9-10 (Donald A. Russell ed. & trans., The Loeb Classical Library 2002) (noting that “Horace is almost the sole poet worth (*dignus*) reading”); *id.* at XI.iii.46, in QUINTILLIAN: THE ORATOR’S EDUCATION, VOL. 5: BOOKS 11-12 (Donald A. Russell ed. & trans., The Loeb Classical Library 2002) (referring to the “dignity (*dignitas*) of the language”); *id.* at XII.x.11, in QUINTILLIAN: THE ORATOR’S EDUCATION, VOL. 5: BOOKS 11-12 (Donald A. Russell ed. & trans., The Loeb Classical Library 2002) (commenting on the “dignity (*dignitatem*) of Messala” as a particularly impressive orator of his age); *id.* at VIII.v.12-13, in QUINTILLIAN: THE ORATOR’S EDUCATION, VOL. 3: BOOKS 6-8 (Donald A. Russell ed. & trans., The Loeb Classical Library 2002) (explaining that a brother, who

qualifications.... If one man is to be put in supreme command, the right man (*dignissimum*) is Pompeius.”<sup>33</sup> Cicero’s argument on Pompeius’ behalf is that he is the only man worthy and deserving of the military post. Cicero also invokes this form of dignity to express the merit of certain orators. The greatest orators, he explains in *De Oratore*, speak “with knowledge, method, charm and retentive memory, combining with these qualifications a certain distinction (*dignitate*) of bearing.”<sup>34</sup> Their dignity, understood here as their excellence in oration, is what makes them deserving of a title, described above, as a dignity itself.<sup>35</sup>

Importantly, not everyone can achieve the level of excellence and worth denoted by this second form of dignity. In his *De Officiis*, Cicero writes that “there are two orders of beauty: in the one, loveliness predominates; in the other, dignity [*dignitas*]; of these, we ought to regard loveliness as the attribute of woman, and dignity [*dignitatem*] as the attribute of man.”<sup>36</sup> As this passage suggests, the hallmark signifiers of dignity—masculine excellence and worthiness—are simply unavailable to women. Women can be graceful, attractive, and charming, but they cannot possess or ever achieve the dignity reserved for men.

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suffered the loss of a finger at his sister’s hands “deserved (*dignus*)...to have all [of his] fingers...[he] deserved (*dignus*) to be a gladiator all of [his] days”.

<sup>33</sup> MARCUS TULLIUS CICERO, ON THE MANILIAN LAW, Ch. 17, section 52, in *CICERO VOL. 9* (H. Grose Hodge trans., The Loeb Classical Library 1927) (“*si\_uni\_omnia\_tribuenda\_sint, dignissimum\_esse\_Pompeium*”).

<sup>34</sup> MARCUS TULLIUS CICERO, DE ORATORE, I.64, in *CICERO VOL. 8* (E.W. Sutton & H. Rackham trans., The Loeb Classical Library 1942) (“*cum\_quadam\_etiam\_actionis\_dignitate*”).

<sup>35</sup> The two uses of dignity both appear in MARCUS TULLIUS CICERO, DE ORATORE, I.64, in *CICERO VOL. 8* (E.W. Sutton & H. Rackham trans., The Loeb Classical Library 1942).

<sup>36</sup> CICERO, DE OFFICIIS, *supra* note 26, at I.130.

The third type of dignity displayed in Cicero's texts is related to one's fitness, suitability, or worthiness for a task. This use of dignity was well-known in ancient Rome, even before Cicero, because it frequently arose in plays written by the Roman dramatist Plautus (254-184 B.C.E.). In his slapstick comedy *Pseudolus*, for example, one of Plautus' characters contends that it is fitting (*dignum*) to send letters of good wishes to people they befit (*dignis*), but concludes that because his interlocutor is not worthy (*dignum*) of such a letter, he will not be sending him one.<sup>37</sup> In a later play, one of Plautus' characters comments that the other character's form is fitting (*digna forma*) of his profession—that he looks like the beggar he is.<sup>38</sup> In both plays, which were performed during Cicero's lifetime, cognates of the Latin word *dignitas* are used to describe a person's fitness or suitability for certain activities.

Cicero employs this notion of dignity in discussions about what activities and behavior are fitting (*decus*) for certain people. He writes, for example, that it is unsuitable for men with dignity to enjoy sensual pleasures.<sup>39</sup> Sensual gratification, he explains, is unworthy (*dignam*) of them. Similarly, Cicero comments that only some kinds of humor are fitting or suitable for a gentleman:

There are, generally speaking, two sorts of jest: the one, coarse, rude, vicious, indecent; the other, refined, polite,

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<sup>37</sup> TITUS MACCIUS PLAUTUS, PSEUDOLUS, lines 1011-1014, in PLAUTUS VOL. 4 (Wolfgang de Melo ed. & trans., The Loeb Classical Library 2012) ("Qui epistulam istam fert; ab eo argentum accipi, cum eo simitu mulierem mitti volo salutem scriptam dignum est dignis mittere: te si arbitrarem dignum, misissem tibi").

<sup>38</sup> TITUS MACCIUS PLAUTUS, RUDENS, line 1305, in PLAUTUS VOL. 4: THE LITTLE CARTHAGINIAN, PSEUDOLUS, THE ROPE (Wolfgang de Melo ed. & trans., The Loeb Classical Library 2012) ("Videtur digna forma").

<sup>39</sup> CICERO, DE OFFICIIS, *supra* note 26, at I.106.

clever, witty. ... So the distinction between the elegant and the vulgar jest is an easy matter: the one kind, if well timed (for instance, in hours of mental relaxation), is becoming to the most dignified person; the other is unfit for any gentleman, if the subject is indecent and the words obscene.<sup>40</sup>

As other commentators have noted, Cicero's use of dignity to describe one's "fitness" or suitability for an activity or task is nearly a tautology: "worthy men must avoid behavior that is not worthy of a man, or not worthy of their own worthiness."<sup>41</sup>

The idea that dignity relates to one's suitability or fitness for a task is closely connected to the fourth sense in which Cicero employs the term: to describe behavior that is virtuous or excellent. This form of dignity corresponds to what we call, in the contemporary era, "dignified" behavior. According to Cicero, men can achieve this form of dignity by living in moderation and being guided by reason. In *De Officiis*, he writes that "we must keep ourselves free from every disturbing emotion, not only from desire and fear, but also from excessive pain and pleasure, and from anger, so that we may enjoy that calm of soul and freedom from care which bring both moral stability and dignity [*dignitatem*] of character."<sup>42</sup>

Having an even-temperament, repressing strong emotions, and avoiding hasty decisions are all attributes that, for Cicero, define the dignified man. He therefore notes that

the right course...even in our differences with our bitterest enemies, is to maintain our dignity [*gravitatem*] and to

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<sup>40</sup> *Id.* at I.104.

<sup>41</sup> SHERSHOW, *supra* note 3, at 58.

<sup>42</sup> CICERO, *DE OFFICIIS*, *supra* note 26, at I.69.

repress our anger, even though we are treated outrageously [*indigna*]. For what is done under some degree of excitement cannot be done with perfect self-respect or the approval of those who witness it.<sup>43</sup>

This form of dignity ebbs and flows depending on one's behavior. Thus, Cicero remarks that "it is customarily recognized as a great and admirable characteristic to have borne adversity wisely, not to have been crushed by misfortune, and not to have lost dignity [*dignitatem*] in a difficult situation."<sup>44</sup> Again, Cicero highlights the contingent nature of this type of dignity, which can be lost under certain unfortunate circumstances.

To maintain or reach a dignified status, Cicero recommends that men consider three principles before taking any course of action:

[F]irst, that impulse shall obey reason; for there is no better way than this to secure the observance of duties; second, that we estimate carefully the importance of the object that we wish to accomplish, so that neither more nor less care and attention may be expended upon it than the case requires; the third principle is that we be careful to observe moderation in all that is essential to the outward appearance and dignity [*dignitatem*] of a gentleman. Moreover, the best rule for securing this is strictly to observe that propriety [*decus*] which we have discussed above, and not to overstep it. Yet of these three principles, the one of prime importance is to keep impulse subservient to reason.<sup>45</sup>

As this passage notes, reason plays the most central role in the set of characteristics that make one dignified. It is certainly important to maintain the outward

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<sup>43</sup> *Id.* at I.137.

<sup>44</sup> MARCUS TULLIUS CICERO, DE ORATORE, II.346, in CICERO VOL. 8 (E.W. Sutton & H. Rackham trans., The Loeb Classical Library 1942).

<sup>45</sup> CICERO, DE OFFICIIS, *supra* note 26, at I.141.

appearance of a gentleman, as Cicero notes throughout his treatise.<sup>46</sup> A dignified man must also act with propriety (which is the Loeb library translation of *decus*, meaning decorum). Without reason, however, man is subject to impulses that will topple his efforts at moderation and render him undignified. As with the three previously described forms of dignity employed by Cicero, this fourth notion is, therefore, limited to certain human beings; contingent on their actions, behaviors, and capacities; and variable in the sense that it can be gained or lost.

This brings us to the famous passage from *De Officiis* that has frequently been referred to as the “ultimate source in Western thought for the idea of ‘human dignity.’”<sup>47</sup>

The relevant text is as follows:

From this we see that sensual pleasure is quite unworthy of the dignity of man [*non satis esse dignam hominis praestantia*] and that we ought to despise it and cast it from us; but if someone should be found who sets some value upon sensual gratification, he must keep strictly within the limits of moderate indulgence. One’s physical comforts and wants, therefore, should be ordered according to the demands of health and strength, not according to the calls of pleasure. And if we will only bear in mind the superiority and dignity of our nature [*quae sit in natura*

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<sup>46</sup> See, e.g., *id.* at I.130:

Therefore, let all finery not suitable to a man’s dignity [*dignus*] be kept off his person, and let him guard against the like fault in gesture and action. The manners taught in the palaestra, for example, are often rather objectionable, and the gestures of actors on the stage are not always free from affectation; but simple, unaffected manners are commendable in both instances. Now dignity of mien is also to be enhanced by a good complexion; the complexion is the result of physical exercise. We must besides present an appearance of neatness — not too punctilious or exquisite, but just enough to avoid boorish and ill-bred slovenliness. We must follow the same principle in regard to dress. In this, as in most things, the best rule is the golden mean.

<sup>47</sup> SHERSHOW, *supra* note 3, at 58 (citing Cancik, *supra* note 4).

*excellencia et dignitas*], we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right it is to live in thrift, self-denial, simplicity, and sobriety.<sup>48</sup>

As the passage illustrates, Cicero does not use the phrase human dignity (*dignitas humana*), but he does use terms for human (*hominis*) and dignity (*dignum* and *dignitas*) in close proximity to each other. This has led to considerable debate in the literature about whether any part of this passage refers to the single concept, human dignity. Hubert Cancik argues, for example, that the first sentence of this passage signals the “emergence of the formula ‘dignity of man’” in Stoic anthropology and morality,<sup>49</sup> and that it paves the way for a Western understanding and appropriation of human dignity.<sup>50</sup> Mette Lebech contends, however, that attributing the concept of human dignity to Cicero’s use of *dignam hominis praestantia* is mistaken.<sup>51</sup> She concludes that the words “dignity of man” are a translation of *hominis praestantia*, in which *praestantia* translates to excellence or superiority. The first sentence of this passage, according to Lebech, is nothing more than an articulation of Cicero’s belief that sensual pleasure is not sufficiently worthy of man’s excellence or superiority.

Leaving aside the debate between Cancik and Lebech about the presence or absence of human dignity in first sentence of the passage, one could claim that Cicero is referring to something we might call “human dignity” in the third sentence of the passage, where he refers to “the superiority and dignity of our nature [*quae sit in natura*

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<sup>48</sup> CICERO, DE OFFICIIS, *supra* note 26, at I.106.

<sup>49</sup> Cancik, *supra* note 4, at 21.

<sup>50</sup> *Id.* at 27.

<sup>51</sup> LEBECH, *supra* note 8, at 52.

*excellencia et dignitas*].” Importantly, though, this form of human dignity comes with notable exceptions and qualifications. In the paragraph that follows, Cicero writes:

We must realize also that we are invested by Nature with two characters, as it were: one of these is universal, arising from the fact of our being all alike endowed with reason and with that superiority which lifts us above the brute [*rationis praestantiaeque eius, qua antecellimus bestiis*]. From this all morality and propriety [*honestum decorumque*] are derived, and upon it depends the rational method of ascertaining our duty.<sup>52</sup>

For Cicero, the universal human characteristic that generates the “dignity of our nature” is the capacity for reason. He does not acknowledge that the capacity for reason is not possessed by all humans, or that it is a capacity that humans may possess to different degrees. Instead, he claims humans are “all alike endowed with” reason, which separates us from beasts. In this sense, Cicero’s use of dignity remains faithful to its hierarchical origins: Humans are superior to animals because they can use their rational powers to reject, among other things, sensual animalistic pleasures. That capacity gives humans a higher status than animals.

Notably, however, this dignity can be diminished, or even lost, if humans succumb to their sensual desires and fall to the level of beasts. As Cicero explains, if a man “is more than ordinarily inclined to sensual pleasures,” his dignity is diminished, but it is not destroyed, as long as he feels “shame” and “conceals his appetite.”<sup>53</sup> Those responses indicate that he still has the capacity for reason and is “not quite on a level with

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<sup>52</sup> CICERO, DE OFFICIIS, *supra* note 26, at I.107.

<sup>53</sup> *Id.* at I.105.



the beasts of the field.”<sup>54</sup> Cicero notes, however, that some people cannot control their desires or actions; they are “men only in name, not in fact.”<sup>55</sup> Their inability to use reason to control their desire ultimately renders them unhuman. Collectively, these passages suggest that *if* Cicero has an understanding of human dignity, it is “at once universal and exclusive...the definitive characteristic of all human beings except for those judged not to *be* human.”<sup>56</sup>

Just one year after Cicero published *De Officiis*, he was killed by his political opponents. His immense body of work later influenced medieval thinkers, such as Lactantius, Ambrose and Aquinas,<sup>57</sup> as well as Renaissance and Enlightenment thinkers, such as Giovanni Pico della Mirandola and Immanuel Kant.<sup>58</sup> Although there remains a debate about whether he was the first to articulate a concept of human dignity, his numerous invocations of different forms of dignity undoubtedly inform the development of dignity as a concept in later texts.

## **The Medieval Period**

The Roman Empire, as it was known to Cicero, was the most powerful military, economic, and cultural force during classical antiquity. From the first through fourth centuries, however, a combination of geographic expansion, population migration,

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> SHERSHOW, *supra* note 3, at 61.

<sup>57</sup> LEBECH, *supra* note 8, at 46.

<sup>58</sup> Cancik, *supra* note 4, at 36–37.

repeated civil wars, and external invasions, led to social and religious divisions. Against that background, Christians were an easy scapegoat for the failings of the Empire, and they frequently faced persecution for their beliefs. This began to change in 313 C.E., when Emperor Constantine issued the Edict of Milan, requiring tolerance of Christianity throughout the Roman Empire. A decade later, Christianity was the official religion of the Empire, and the invocation of dignity in Latin texts began to have a distinctively Christian meaning.

### ***Early Christian Thinkers: Augustine, Leo the Great, and Boethius***

The Latin Church Fathers, who invoke dignity in their writings, depart in significant ways from their Stoic predecessors. They reject the Roman Empire's hierarchical form, and with it, the Stoic understanding of dignity as an honor reserved for those of great worthiness, status, or rank.<sup>59</sup> This resistance to earthly titles connects with, and is reinforced by, the early Christians' view that all human beings are created in God's image (*imago dei*). On this understanding, dignity comes directly and only from God's creation, not from any externally bestowed, civil identity. Consequently, all humans deserve respect, and all humans must discharge the obligation of respect, not only to each other, but to themselves. Acting virtuously is no longer a matter of being dignified; it is a matter of being Christian.<sup>60</sup>

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<sup>59</sup> Despite this opposition to titles and rank, it later became customary to refer to members of the Holy Order by their "dignities," meaning titles. LEBECH, *supra* note 8, at 62–63.

<sup>60</sup> LEBECH, *supra* note 8, at 63.

Among the early Christians, Saint Augustine (354-430 C.E.) was one of the first thinkers to develop an understanding of dignity that is entirely distinct from the titular offices of the Greek or Roman state. His influential *City of God* critiques the Earthly City, a civil society not unlike Rome, in which worshipping political titles can lead humans to seek significance in the wrong places.<sup>61</sup> He instead encourages people to strive for the Heavenly City, where God’s mercy offers attention to each person’s individuality, immortality, transcendence, security, and perfection.<sup>62</sup> It is only in the Heavenly City, Augustine notes, that humans can achieve “unfailing titles of nobility [*dignitas*].”<sup>63</sup>

As Augustine explains, the dignity that humans possess in the natural world is given to them by God at first creation: “[I]t is not ‘poured out in our hearts’ by the powers of nature or the will which are found in us, but ‘by the Holy Spirit.’”<sup>64</sup> Insofar as this dignity comes as a gift from God, it is to be respected and measured equally in all humans.<sup>65</sup> For Augustine, this means rejecting conventional conceptions of dignity that focus on social worth, and instead modeling our understanding of dignity on Christ’s example. Augustine therefore observes that Christ did not think it was “beneath his

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<sup>61</sup> AUGUSTINE, *CITY OF GOD*, Books 5–8 (Henry Bettenson trans., Penguin Books 2003).

<sup>62</sup> Peter Augustine Lawler, *Modern and American Dignity*, in *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS* 229, 230–31 (2008) [hereinafter *HUMAN DIGNITY AND BIOETHICS*].

<sup>63</sup> Augustine, *Sermon 80*, in 3 *THE WORKS OF ST. AUGUSTINE* 355 (John E. Rotelle ed., 1997).

<sup>64</sup> Augustine, *On Nature and Grace*, in 1 *THE WORKS OF ST. AUGUSTINE* 270 (John E. Rotelle ed., 1997) (citing Rom. 5:5).

<sup>65</sup> Augustine’s conception of the image of God shifts over the course of his writing career in complicated and nuanced ways. See MATTHEW PUFFER, *AUGUSTINE ON THE IMAGE OF GOD: AN ETHICAL ANALYSIS* (unpublished Ph.D. Dissertation, on file at the University of Virginia library, 2014).

dignity to wash” the feet of his disciples.<sup>66</sup> Since all humans are part of the larger whole that is God’s creation, the failure to properly treat or recognize any single human, is an affront to God. Thus, Augustine writes: “The majesty of God cannot be propitiated by that which defiles the dignity of man.”<sup>67</sup>

Augustine’s work firmly grounded the idea of an innate human dignity in Christian theology. Several decades later, Pope Leo I (c. 400-461 C.E.) affirmed this universal human dignity and articulated the responsibilities attendant to it. For Leo, like Augustine before him, humans have dignity because of their “nature,” which has been created “according to the image of God.”<sup>68</sup> The rest of earthly creation does not share this dignity because only humans have a soul that, “as ruler of the body under the direction of the God, [can] retain the dignity of its mastery.”<sup>69</sup> Reason resides within the soul and allows humans to temper bodily desires to which animals succumb. Echoing an idea reminiscent of Cicero, Leo therefore exhorts Christians to use their soul to control their bodily desires, and cautions that if “the desires of the body are stronger, the soul will shamefully lose dignity proper to it.”<sup>70</sup>

It is unclear from Leo’s writings whether he believes human dignity can be fully destroyed—as it can in Cicero’s view—or merely diminished. Leo suggests that when bodily desires overcome reason, the soul can “lose dignity,” and he also contends that

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<sup>66</sup> Augustine, *Tractates on John 55.6*, in *A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH*, series 1, vol. 7, 301 (Philip Schaff ed., 1956).

<sup>67</sup> AUGUSTINE, *supra* note 61, at 2.29.

<sup>68</sup> ST. LEO THE GREAT, *SERMONS 27* (Jane Patricia Freeland & Agnes Josephine Conway eds., 1996).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 39.

“our race has this dignity of nature, *so long as* the figure of divine goodness continues to be reflected in us as in a kind of mirror.”<sup>71</sup> In both passages, the subtext is that human dignity is threatened by behavior that departs from God’s goodness; in some cases, dignity may even be lost. For that reason, Leo’s Christmas Day sermon urges believers to “acknowledge thy dignity...and become a partner in the divine nature, do not return to your former baseness by unworthy conduct.”<sup>72</sup> All humans are born in and share God’s dignity; maintaining that dignity appears to require behavior fitting the image of God.

The early Christian understanding of dignity, characterized by Augustine and Leo’s works, is also implicit in the writings of the Roman philosopher and statesman, Severinus Boethius (c. 480-524 C.E.). While imprisoned by King Theodoric the Great on charges of conspiracy, Boethius authored *The Consolation of Philosophy*, which although not specifically a religious tract, nevertheless has been interpreted as one of the most important Christian texts of the Medieval Period. In it, Boethius challenges the idea that “high offices [*dignitatem*] bring ... honour and respect” to those who acquire them.<sup>73</sup> Not only does he think these “shadowy dignities,”<sup>74</sup> as he refer to them, result from the “delusory opinion of men,” he also believes that official titles and ranks tend to corrupt men, which ultimately makes them “unworthy [*indignus*] of the offices themselves.”<sup>75</sup>

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<sup>71</sup> *Id.* at 12.

<sup>72</sup> *Id.* at 21.

<sup>73</sup> BOETHIUS, THE CONSOLATION OF PHILOSOPHY, III.IV, in BOETHIUS (H.F. Stewart et al., trans., The Loeb Classical Library 1973).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

In contrast to his predecessors from classical antiquity, Aristotle and Cicero, Boethius believes that dignity must precede official social status, not follow from it.<sup>76</sup> The only men worthy of high rank, according to Boethius, are those who already possess dignity, a characteristic he connects to virtue.<sup>77</sup> Virtue involves allowing one's mind to become "fully aware of its own nature, loosed from its earthly prison, [and] free to seek its own heavenly home."<sup>78</sup> Like Augustine, Boethius believes that when dignity is tied to rank or status, men are held captive in an "earthly prison" (analogous to Augustine's City of Man) where the state of nature is "upside-down."<sup>79</sup> Only through one's mind and self-knowledge can humans "preserve themselves in the contemplation of the divine mind" and reach true freedom in the heavenly home (analogous to Augustine's City of God).

Boethius' emphasis on the human mind, and the role it plays in achieving virtue and, ultimately dignity, cannot be understood apart from his definition of person. In his *Contra Eutychen et Nestorium*, Boethius proffers his influential definition:

Wherefore if person belongs to substances alone, and these rational, and if every substance is a nature, and exists not in universals but in individuals, we have found the definition of person: "The individual substance of a rational nature." Now by this definition we Latins have described what the Greeks call hypostasis [*ὑπόστασιν*].<sup>80</sup>

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<sup>76</sup> *Id.* at II.VI ("So it comes about not that virtues are honoured because of office, but office because of the virtue of the holders." *Ita fit ut non virtutibus ex dignitate sed ex virtute dignitatibus honor accedat.*).

<sup>77</sup> *Id.* at III.IV.

<sup>78</sup> *Id.* at II.VII.

<sup>79</sup> *Id.* at II.V.

<sup>80</sup> BOETHIUS, *CONTRA EUTYCHEN ET NESTORIUM*, III.1-5, in *BOETHIUS* (H.F. Stewart et al. trans., The Loeb Classical Library 1973).

For Boethius, a person exists as a member of a larger category of substance. Within that category, persons are individuated and possess a rational nature. Their individuation signals that they are unique and whole beings, each with a particular identity. Their rational nature distinguishes them from other substances that cannot reason and act. As Boethius explains, humans, angels, and God possess a rational nature; animals do not.<sup>81</sup> Persons, therefore, emerge from the universality of nature and substance with the capacity to act individually and rationally. This capacity, which Boethius equates with the Greek word *hypostasis* (*ὑπόστασις*), is the source of dignity that Boethius commends.

Interestingly, in a passage that follows the one in which Boethius connects his definition of person to the Greek word *hypostasis*, he clarifies that the Latin word *substantia* (substance) is ontologically different from the Greek word *hypostasis*. He explains that the Romans apply *substantia* to irrational animals, but that the Greeks do not apply *hypostasis* to those same animals.<sup>82</sup> As Boethius recognizes, this is because the Greeks apply *hypostasis* only “to things of higher value, in order that in some way what is more excellent might be distinguished.”<sup>83</sup> This description of *hypostasis*—which emphasizes concepts like rank and excellence that are already embedded in the etymology of dignity at this historical juncture—and Boethius’ intentional application of it to persons, play a significant role in shaping the meaning of dignity and person in the work of later thinkers, most notably Thomas Aquinas.

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<sup>81</sup> *Id.* at III.80–100.

<sup>82</sup> *Id.* at III.70–75.

<sup>83</sup> *Id.* at III.75–79.

## *Aquinas*

Centuries after Boethius' death and the fall of Rome, St. Thomas Aquinas (1225-1274 C.E.) authors several commentaries on Boethius' works, and firmly enters the theological and philosophical discourse about dignity. As other scholars have noted, Aquinas invokes the Latin word *dignitas* or its cognates at least 1,760 times in his writings.<sup>84</sup> While many of these references invoke understandings of dignity that are familiar from classical antiquity—for example, to describe political or ecclesiastical rank,<sup>85</sup> or worthiness<sup>86</sup>—Aquinas also advances a novel, and in many ways more complex, concept of dignity in his elaboration of Boethius' definition of person. As I demonstrate below, Aquinas' articulation of dignity functions as a bridge between early classical definitions of the term and modern theological ones.

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<sup>84</sup> James Hanvey, *Dignity, Person and Imago Trinitatis*, in UNDERSTANDING HUMAN DIGNITY 212 (Christopher McCrudden ed., 2013) (citing Servais Pinckaers, *Aquinas on the Dignity of the Human Person*, in THE PINCKAERS READER: RENEWING THOMISTIC MORAL THEOLOGY 144–63 (John Berkman & Craig Steven Titus eds., 2005).

<sup>85</sup> See, e.g., ST. THOMAS AQUINAS, SUMMA THEOLOGICA, II: Q. 131, A2 (Catholic Way Publishing 2014) (“Honor is due to those who are in a position of dignity [*dignitate*]...”); see also *id.*, at II: Q. 102, A2:

It belongs to persons in positions of dignity [*dignitate*] to govern subjects. Now to govern is to move certain ones to their due end: thus a sailor governs his ship by steering it to port. But every mover has a certain excellence and power over that which is moved. Wherefore, a person in a position of dignity [*dignitate*] is an object of twofold consideration: first, in so far as he obtains excellence of position, together with a certain power over subjects: secondly, as regards the exercise of his government.

<sup>86</sup> See, e.g., *id.* at II: Q. 63, A1 (“[T]he equality of distributive justice consists in allotting various things to various persons in proportion to their personal dignity [*dignitates*]...Persons are rendered proportionate to and worthy [*dignae*] of things which are distributed among them, by reason of certain things pertaining to circumstances of person...”)



In the first part of *Summa Theologiae*, Aquinas adopts Boethius' definition of person as a substance that is both individuated and rational,<sup>87</sup> and he defends Boethius' use of the Greek word *hypostasis* to signal that persons are the most excellent substances.<sup>88</sup> However, because Aquinas, like Boethius, includes humans, angels, and God in the category of persons, he is confronted with the objection that "God cannot be said to have a rational nature," and God cannot "be called an individual substance."<sup>89</sup> In response, Aquinas first contends that God "is the supreme self-subsisting being, and the most perfectly intelligent being," and therefore the name "person is fittingly applied to God."<sup>90</sup>

Aquinas then goes on to offer a lengthier and less straightforward explanation, which invokes the word dignity multiple times. He writes:

Although this name "person" may not belong to God as regards the origin of the term, nevertheless it excellently belongs to God in its objective meaning. For as famous men were represented in comedies and tragedies, the name "person" was given to signify those who held high dignity [*dignitatem*]. Hence those who held high rank [*dignitatem*] in the Church came to be called "persons." Thence by some the definition of person is given as "hypostasis distinct by reason of dignity [*dignitatem*]." And because subsistence in a rational nature is of high dignity [*dignitatis*], therefore every individual of the rational nature is called a "person." Now the dignity [*dignitas*] of the divine nature excels every other dignity

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<sup>87</sup> *Id.* at I. Q. 29, A3 ("Therefore also the individuals of the rational nature have a special name even among substances, and this name is person.").

<sup>88</sup> *Id.* at I: Q. 29, A3.

<sup>89</sup> *Id.* at I: Q. 29, A3, Obj. 4.

<sup>90</sup> *Id.* at I: Q. 29, A3.

[*dignitatem*]; and thus the name “person” pre-eminently belongs to God.<sup>91</sup>

In this passage, Aquinas offers two different understandings of dignity. The first is reminiscent of texts from classical antiquity that employ dignity as a quality that denotes high rank or status. Famous men—whether in politics, drama, or the Church—possess dignity as a consequence of their social distinction. These men traditionally were referred to as “persons,” a linguistic move that Aquinas says inextricably linked the concepts of high dignity (rank) and persons.

The second meaning of dignity in the passage relates to rational nature and hypostasis. Aquinas contends that “rational nature is of high dignity,” and so “every individual of the rational nature is called a person.” The word person, which Aquinas has already connected to rank and social worth, now comes to include individuals with a rational nature. Significantly, this rational nature does not apply to universal humanity, but rather to *individual* persons. For Aquinas, “person...signifies *this* flesh, *these* bones, and *this* soul.”<sup>92</sup> The excellence associated with hypostasis therefore relates to individuals whose dignity is grounded in their *particular* rational nature.

Rational nature allows persons to “have dominion over their own actions” so that they are not “made to act, like others.”<sup>93</sup> In this way, persons differ from non-persons because each individual person is *sui juris*, the master of his/her own reason and free will. Animals and plants, by contrast, cannot be called persons because they were not created

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (emphasis added).

<sup>93</sup> *Id.* at I: Q. 29, A1.

to possess the rational nature necessary to direct their actions. Only humans and angels were created *ad imaginem dei*, in or toward God's image.<sup>94</sup> Their rational nature represents the likeness of God's "image," whereas the qualities they share with the rest of creation represent "the image of God ... by way of a trace."<sup>95</sup> When Aquinas claims that rational nature is a "higher dignity," he is therefore commenting not only on the fact that rational nature elevates persons above the rest of creation (as a matter of hierarchical status), but he is also recognizing that insofar as rational nature is the "image" of God, it is itself a "high dignity."

Returning to the question of whether God belongs to the category of persons, Aquinas' response reflects his two-part understanding of dignity. The term "person" belongs preeminently to God because God has the greatest degree of both forms of "high dignity" described in the previously quoted passage—the dignity attached to status or rank, and the dignity associated with hypostasis, or individual rational nature. In God, these dignities are intrinsic and inalienable because there is no being more supreme or rational than God. Importantly, God's dignity is also incommunicable, meaning that its fullness does not transfer to others, including humans.

The dignity that humans possess is therefore fragile, both as a consequence of God's incommunicable dignity and man's original sin. Humans can lose their dignity through sin or irrational behavior.<sup>96</sup> When man sins, Aquinas says "he departs from the

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<sup>94</sup> *Id.* at I: Q. 93, A1. See also *id.* at I: Q. 93, A2 ("It is clear therefore that intellectual creatures alone, properly speaking are made to God's image [*ad imaginem Dei*].").

<sup>95</sup> *Id.* at I: Q. 93, A6.

<sup>96</sup> Aquinas says sinners lose two forms of dignity, one related to God and the other related to the Church:

order of reason, and consequently falls away from the dignity of his manhood [*dignitate humana*]. . . and he falls into the slavish state of the beasts.”<sup>97</sup> This is the only time Aquinas uses the term “human dignity” as such, and may be the only reference to *dignitas humana* in the entire medieval period.<sup>98</sup> His language reflects the leveling down, or loss of status, that accompanies sin. The sinner no longer enjoys the respect owed to humans on account of their high dignity. His sins lower him to the level of beasts, which can be disposed of as others see fit, including killing them for the preservation of the common good.<sup>99</sup> Aquinas describes the situation as follows:

[I]t is lawful to kill dumb animals, in so far as they are naturally directed to man’s use, as the imperfect is directed to the perfect. Now every part is directed to the whole, as imperfect to perfect, wherefore every part is naturally for the sake of the whole. For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away. Now every individual person is compared to the whole community, as part to whole. Therefore if a man be dangerous and infectious to the community, on account of

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In respect of God he again loses a twofold dignity [*dignitatem*]. [O]ne is his principal dignity [*dignitatem*], whereby he was counted among the children of God, and this [*dignitatem*] he recovers by Penance.... The other is his secondary dignity [*dignitatem*], viz. innocence ... and this dignity [*dignitatem*] the penitent cannot recover.... By sin man [also] loses his ecclesiastical dignity [*dignitatem*] because thereby he becomes unworthy [*indignum*] of those things which appertain to the exercise of the ecclesiastical dignity [*dignitate*].

*Id.* at III: Q. 89, A3.

<sup>97</sup> *Id.* at II: Q. 64, A2.

<sup>98</sup> Lebech draws this conclusion from her extremely thorough review of the relevant texts. See LEBECH, *supra* note 8, at 78.

<sup>99</sup> *Id.* at II: Q. 64, A2.

some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good....<sup>100</sup>

Aquinas conclusion that sinners can be killed leads to the objection that murder is evil and unlawful, especially against humans, to whom we always owe charity as part of God's creation. His response is that although "it be evil in itself to kill a man so long as he preserve his dignity, yet it may good to kill a man who has sinned, even as it is to kill a beast."<sup>101</sup> This characterization of man-as-beast is strongly reminiscent of Cicero's view that some humans are "men only in name, not in fact."<sup>102</sup> Those who sin, and therefore act against their rational nature, lose the very dignity that both elevates them above beasts and signifies them as entities worthy of respect.

Aquinas, and the early Christians that preceded him, convey a distinctively Christian notion of dignity that, although influenced by the Stoics' writings, departs in significant ways from the early classical understandings of the word. Humans have dignity because they are made in God's likeness and express His supreme creation. The medieval texts also theologically ground the view, posited earlier by Cicero, that reason is what gives human nature its dignity. God creates humans in his image with reason (or a rational nature) that distinguishes humans from irrational animals.

Because humans have dignity, both by virtue of being made in God's likeness and by possessing reason, there is an obligation to respect them, but also a responsibility for humans to act in ways consistent with their dignity. Notably, although the medieval notion

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

of dignity is generated from God's likeness and reason, it is not inalienable. When humans fail to "live up" to their dignity, or act in ways "beneath" their dignity, they can lose their dignity altogether. As the next section demonstrates, these medieval formulations of dignity influence humanist thinkers during the Renaissance and Enlightenment eras, but their lasting impact is most visible in the doctrines of the Catholic Church.

### **The Renaissance and Enlightenment**

The nature of man's dignity was a topic of central importance throughout the Renaissance and Enlightenment eras. During the Renaissance, humanists wrestled with the legacy of dignity left to them by the medieval Church Fathers. The medieval Christians had grounded man's dignity in his status as a creature made in God's image and endowed with reason, but they had also determined that man had lost much of God's full dignity as a consequence of original sin. Medieval dignity therefore carried a certain pessimism, which came to be known as *miseria hominis* (human misery), and which was most famously expressed in a treatise entitled, *De Miseria Humane Conditionis*, by Cardinal Lothario dei Conti (who later became Pope Innocent III).<sup>103</sup> Many (perhaps most) of the Renaissance humanists who entered the discourse on human dignity during the fourteenth and fifteenth centuries did so to offer an alternative to this account, one that highlighted human excellence and man's capacity for self-direction.<sup>104</sup> The best known of these

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<sup>103</sup> LOTHARIO DEI CONTI, *DE MISERIA HUMANE CONDITIONIS* (c. 1250).

<sup>104</sup> See, e.g., GIANNOZZO MAETTI, *DE DIGNITATE ET EXCELLENTIA HOMINES* (1452).

treatises, Pico della Mirandola's *De Hominis Dignitate*,<sup>105</sup> is examined in more depth below.

The Enlightenment, or Age of Reason, also marks an important developmental milestone in the intellectual history and development of dignity. Against the backdrop of the scientific revolution, the Reformation, and political upheavals in Europe, reason functions as a unifying mantra. Man's dignity derives from his ability to reason, not toward any teleological good (as in the classical and medieval periods), but rather toward his own chosen ends in civil society. During the Enlightenment, reason becomes a universal source of dignity; one that eventually accommodates women and other marginalized individuals in their quest for liberty. A number of philosophers explore the connection between reason and dignity during this period, but Immanuel Kant—who has been referred to as “the father of the modern concept of human dignity”<sup>106</sup>—will focus the discussion below.

### ***Giovanni Pico della Mirandola***

Like many of his peers during the Italian Renaissance, Giovanni Pico della Mirandola (1463-1494), was intensely concerned about man's excellence. Interestingly, his thoughts on the subject date to an oration he wrote in 1486, but never delivered. The *Oration*, as he titled it, was intended to serve as the introduction to his 900 theses, which

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<sup>105</sup> Pico della Mirandola, *Of the Dignity of Man*, in 3 J. HIST. IDEAS 347, 347 (Elizabeth Livermore Forbes trans., 1942).

<sup>106</sup> Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in EUROPEAN AND U.S. CONSTITUTIONALISM: SCIENCE AND TECHNIQUE OF DEMOCRACY 79 (G. Nolte ed., 2005).

disputed a variety of then-popular theological claims about mortal sin, God's omnipotence, and Christ's divinity, among other things.<sup>107</sup> Pico travelled to Rome in 1487 to defend his theses and deliver the *Oration*, but Pope Innocent VII quashed plans for the disputation on the grounds that the theses were heretical.<sup>108</sup> Pico responded by publishing his *Apologia*, an assertive defense of his theses, which included part of his *Oration*. The full text of the *Oration*, however, was not published until shortly after Pico's death.

The *Oration*, which is frequently called the "Manifesto of the Renaissance," and cited as articulating a universal, inalienable concept of dignity,<sup>109</sup> never invokes the phrase "dignity of man" or "human dignity." When it was published in a collection by Pico's nephew in 1496, it was simply titled *A Very Elegant Oration*.<sup>110</sup> In 1530, when it was republished separately, it carried the title, *On Man: Explaining the Loftier Mysteries of Sacred and Human Philosophy*.<sup>111</sup> This title gives some sense that the work is related

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<sup>107</sup> JONATHAN ARNOLD, *THE GREAT HUMANISTS: EUROPEAN THOUGHT ON THE EVE OF THE REFORMATION* 79 (2011).

<sup>108</sup> *Id.* at 77.

<sup>109</sup> This misreading of Pico appears to be widespread. See, e.g., CHARLES FOSTER, *HUMAN DIGNITY IN BIOETHICS AND LAW* (2011) (conflating dignity with the capacity for autonomy in Pico and noting that man's "status was dignity, its nature was reason, and its consequence was autonomy"); Nick Bostrom, *Dignity and Enhancement*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 62, at 173, 183–84 (quoting Pico and concluding that "our human dignity consists in our capacity for self-shaping and also that we gain in dignity as a quality through the exercise of this capacity"). Cf. John Milbank, *Dignity Rather than Rights*, in *UNDERSTANDING HUMAN DIGNITY*, *supra* note 84, at 201 (explaining that for Pico "human dignity lies finally in the divinely gracious gift...we do not possess dignity in ourselves or because of any inalienable property).

<sup>110</sup> The complete *Oration* appeared for the first time in a collection of works published by Pico's nephew, Gianfrancesco Pico in 1496. Brian Copenhaver, *Giovanni Pico della Mirandola*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Summer 2012 ed.), <http://plato.stanford.edu/entries/pico-della-mirandola/>.

<sup>111</sup> *Id.*



to man's excellence, and that it follows in the tradition of other humanists who were concerned with man's distinctive place in theology and philosophy. Later in the sixteenth century, Pico's *Oration* was published under two additional titles: *On the Dignity of Man*, in a Basel collection, and *A Very Elegant Oration on the High Nobility and Dignity of Man*, in a Venice volume.<sup>112</sup> The language of elegance, loftiness, nobility, and dignity that informs these titles, firmly grounds Pico's work in the genre of Renaissance humanism, with its focus on man's exalted place in the universe.

In the opening paragraphs of the *Oration*, Pico questions why man is the "most worthy" creature, and he dismisses the usual explanations as unsatisfactory, including that

man is the intermediary between creatures, the intimate of the gods, king of the lower beings, by the acuteness of his senses, by the discernment of his reason and the light of his intelligence the interpreter of nature, the interval between fixed eternity and fleeting time, and (as the Persians say), the bond, nay rather the marriage-song of the world, on David's testimony but little lower than the angels.<sup>113</sup>

Although Pico acknowledges that these qualities make humans great, he rejects them as the explanation for man's incomparable worth among the earthly creatures. Instead, Pico argues that man's superior nature is a consequence of his particular creation.

Departing from the *imago dei* narrative that dominated the medieval period, Pico explains that when God finished creation, and "all things had been assigned to the

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<sup>112</sup> *Id.*

<sup>113</sup> della Mirandola, *supra* note 105, at 347.

highest, the middle, and the lowest orders,”<sup>114</sup> He wished “that there were someone to ponder the rationality of so great a work, to love its beauty, and to wonder at its vastness.”<sup>115</sup> Because God had already given different, but singular properties to all of the other creatures, he had no particular property left to give man. God therefore gave man the properties common to every other creature, and in so doing, accorded man a place in “the middle of the world...neither of heaven nor of earth, neither mortal nor immortal.”<sup>116</sup>

In this central position, where man has no fixed position, no particular form, and no predetermined function, man can become “whatever shape” he chooses.<sup>117</sup> Man is not constrained by the laws that limit lower forms, because when man was created, God “conferred the seeds of all good and the germs of every form of life.”<sup>118</sup> Man can cultivate his free choice to become a plant, an animal, a heavenly being, an angel, or even God himself. Importantly, though, while this capacity for choice is the locus of man’s worth as compared to other creatures, it is not representative or indicative of what Pico refers to as dignity. Man’s dignity is only realized when he exercises this freedom to “strive for heavenly things” and “emulate both their *dignity* and their glory.”<sup>119</sup>

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<sup>114</sup> *Id.* at 348.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 350 (emphasis added).

This use of dignity—the only one in Pico’s *Oration*—is problematic for a text that is often acclaimed to be about a universal and inalienable *human* dignity.<sup>120</sup> On Pico’s view, man’s excellence or worth derives from his unique capacity among earthly creatures for free will. Contrary to the standard interpretation, however, Pico does not call this universal excellence “dignity.” Rather, dignity is attributed to heavenly creatures (angels) that man should strive to emulate, and when man exercises freedom of choice in this properly oriented direction (he allows “holy ambition to invade” his soul), he can attain dignity equal to theirs.<sup>121</sup>

Unlike the standard reading of Pico, which views the *Oration* as a pre-Kantian project, this analysis suggests that Pico’s thinking is still very much in line with that of the early Church Fathers. Like them, Pico claims that man is endowed with reason and can choose to act in ways that enhance or diminish his status. Pico arguably makes less of rationality, since he does not see it as a source of man’s dignity, as Aquinas does, for example. Still, Pico shares with the medieval Christians the notion that those who sin or make irrational choices sink to the level of beasts, while those who elevate themselves through reason can unite with God in God’s dignity. Like the Church Fathers, Pico

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<sup>120</sup> See *supra* note 109.

<sup>121</sup> *Id.* at 350 (“[L]et us incapable of yielding to them and intolerant of a lower place, emulate both their dignity and their glory. Since we have willed it, we shall be second to them in nothing.”). See also Thomas Heilke, *The Promised Time of Dignitas Humanae: A Radical Protestant Perspective*, in CATHOLICISM AND RELIGIOUS FREEDOM: CONTEMPORARY REFLECTIONS ON VATICAN II’S DECLARATION ON RELIGIOUS LIBERTY 90 (Kenneth L. Grasso & Robert P. Hunt eds., 2006) (“Pico does not locate human dignity merely in freedom as such but in a freedom properly exercised.”); Paul Oskar Kristeller, *The Dignity of Man*, in RENAISSANCE THOUGHT AND ITS SOURCES 176 (Michael Mooney ed., 1979) (“Man’s dignity consists in his freedom of choice because the different possibilities open to him include the highest; his dignity is fully realized only when this highest possibility is chosen.”).

understands dignity as a quality that comes through God,<sup>122</sup> and can be lost by man.

Although Pico's work arguably shares more with the writings of the Church Fathers than with Kant, his emphasis on man's capacity for self-direction nevertheless anticipates Kant, whose religiously decontextualized version of human dignity rests on man's freedom and autonomy.

### ***Immanuel Kant***

The ultimate proponent of the idea that rational autonomy is a source of human dignity was the eighteenth-century German philosopher, Immanuel Kant (1724-1804).

Kant employs the German words for dignity and human dignity, *würde* and *menschenwürde*,<sup>123</sup> 111 times in his published writings.<sup>124</sup> Although he is best-known for inspiring a contemporary conception of dignity that refers to the inherent value of all human beings as rational agents, Kant's writings also invoke dignity in its more traditional forms to refer to rank, hierarchy, status, and virtuous behavior.<sup>125</sup> This is not

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<sup>122</sup> The medieval theorists rely on the concept of *imago dei*, while Pico says that to achieve dignity, we must "let a holy ambition possess our souls." *Id.*

<sup>123</sup> LATEINISCHES ETYMOLOGISCHES WÖRTERBUCH 351 (A. Walde ed., Carl Winter 1965) (translating the Latin word *dignus* to *würde* in German).

<sup>124</sup> See OLIVER SENSEN, KANT ON HUMAN DIGNITY 144 (2011) (surveying Kant's references to dignity).

<sup>125</sup> See Oliver Sensen, *Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms*, 10 EUR. J. POL. THEORY 71 (2011) (contrasting contemporary and traditional paradigms of dignity). See also SENSEN, *supra* note 124, at 178 (describing Kant's use of dignity to refer to "kingly dignity" and "the dignity of the monarch"); Michael J. Meyer, *Kant's Concept of Dignity and Modern Political Thought*, 8 HIST. EUR. IDEAS 319, 328 (1987) (referring to Kant's statements that "authorities in the state are dignities;" civil servants can be "considered in their dignity;" and it would "be beneath the dignity of the chief of state to perform

surprising, given that Kant had personal experience with the rigid social hierarchy of eighteenth-century Prussia.<sup>126</sup> The following analysis, however, focuses exclusively on Kant's use of dignity to refer to an intrinsic quality of humans.

Kant's thinking on human dignity generally appears in *The Groundwork of the Metaphysics of Morals*,<sup>127</sup> and *The Metaphysical First Principles of the Doctrine of Virtue*.<sup>128</sup> In them, he contends that "morality, and humanity insofar as it is capable of morality, is that which alone has dignity."<sup>129</sup> Two ideas are embedded in this claim. One is that humans have greater dignity than other creatures in nature because humans are free, rational, autonomous beings.<sup>130</sup> Kant refers to this as humanity's "initial dignity."<sup>131</sup> The second idea is that humanity has "distinctive worth" (full dignity) by virtue of its capacity to exercise autonomy in a manner consistent with morality. Hence Kant says,

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the function of a judge") (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 315-18 (John Ladd trans., 1965) (1797)).

<sup>126</sup> His *Critique of Pure Reason* is dedicated to an "exalted patron," and he had been offered the honorific title of court counsellor. See Meyer, *supra* note 125, at 326–27. See also IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 328 (John Ladd trans., 1965) (1797):

Under positions of dignity, we must include not only those attached to a political office, but also those that made the holders into members of a higher class or rank without performing any particular political services—in other words the nobility as distinct from the class of common citizens who constitute the people.

<sup>127</sup> IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor ed., 1997) (1785) [hereinafter *GROUNDWORK*].

<sup>128</sup> Immanuel Kant, *The Metaphysical First Principles of the Doctrine of Virtue*, in IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed., 1996) (1797).

<sup>129</sup> *GROUNDWORK*, *supra* note 127, at 4:435.

<sup>130</sup> See, e.g., *id.* at 4:436 ("Autonomy is thus the ground of the dignity of the human and of every rational nature."). Autonomy is derived from the ancient Greek words, *auto* and *nomos*, meaning "self" and "law." Autonomy literally means to give the law to oneself. In other writings he specifically elevates man above animals. See IMMANUEL KANT, *LECTURE ON ETHICS* (1779) ("But so far as animals are concerned, we have no direct duties. Animals ... are there merely as means to an end. That end is man.")

<sup>131</sup> Sensen, *supra* note 125, at 81 (citing IMMANUEL KANT, *THE CONFLICT OF THE FACULTIES* 7:073 (1798)).

“humanity *insofar as it is capable of morality*, has dignity.” For him, human dignity rests on the ability of persons to use their autonomy to discern the moral law and live by it.<sup>132</sup>

Kant’s belief that reason and the moral law are inextricably intertwined leads him to posit a nuanced theory of morality. Kant contends that, unlike other creatures, humans can follow the supreme principle of morality, which he calls the Categorical Imperative (CI).<sup>133</sup> He offers several formulations of the CI, which other scholars have interpreted and reconstructed in a variety of ways. For our purposes, it is not necessary to choose among those interpretations, since our focus is on how Kant’s invocations of dignity fit in the broader genealogy of the term. It is therefore more important to understand the various formulations of the CI as pathways to the full dignity that Kant suggests persons should strive toward.

The first formulation (Formula of Universal Law) stipulates that persons should “act only in accordance with that maxim through which [one] can at the same time will that it become a universal law.”<sup>134</sup> On this formula, actions are morally appraised by whether the agent’s maxim (his or her action, plus its motivation) can be rationally universalized and followed. Kant’s second formulation (The Humanity Formula or the Formula of the End in Itself) states that persons should “act in such a way that you treat humanity, whether in your own person or the person of any other, never simply as a

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<sup>132</sup> Sensen, *supra* note 125, at 81 (emphasis added). See also GROUNDWORK, *supra* note 127, at 4:447 (“a free will and a will under moral laws are one and the same”); *id.* at 4:440:

Our own will, provided it were to act only under the condition of being able to make universal law by its maxims ... is the proper object ... and the dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the laws he makes.

<sup>133</sup> GROUNDWORK, *supra* note 127, at 4:392.

<sup>134</sup> *Id.* at 4:421.

means but always at the same time as an end.”<sup>135</sup> In other words, we ought to treat humanity not *merely* as a means to our own ends, but as an end in itself. More concretely, we owe persons proper respect (a concept I return to below).

The third formulation of the CI (The Autonomy Formula) posits “the idea of the will of every rational being as a will that legislates universal law.”<sup>136</sup> This formula expands the CI to suggest that rational agents are not only the subjects of the law (Formula of Universal Law), they are also its source. To support this view, Kant contends that people abide by the law “not for the sake of any other practical motive or any future advantage, but from the idea of the *dignity* of a rational being, who obeys no law other than that which he himself at the same time gives.”<sup>137</sup>

Kant’s final formulation (The Kingdom of Ends Formula) states that persons must “act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends.”<sup>138</sup> This formula brings the previous three together to culminate in a community of fully rational agents who are equal in morality. In the so-called kingdom of ends, traditional social ranks (or “dignities”) are replaced by the shared moral law and mutual respect demanded by the CI. Here, individuals live as rational agents in accordance with the moral law as set forth in the categorical imperative.

In the kingdom of ends, we find one of Kant’s most important passages on dignity. He states:

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<sup>135</sup> *Id.* at 4:429.

<sup>136</sup> *Id.* at 4:432.

<sup>137</sup> *Id.* at 4:434 (emphasis added).

<sup>138</sup> *Id.* at 4:439.

In the realm of ends everything has either a price or a dignity. What has a price is such that something else can also be put in its place as its equivalent; by contrast, that which is elevated above all price, and admits of no equivalent, has a dignity.<sup>139</sup>

Since “humanity, insofar as it is capable of morality, is that alone which has dignity,” then all other things only have “relative worth.” Persons alone have an “inner worth, i.e., dignity.”<sup>140</sup> They cannot be reduced to a comparative price, or exchanged for another value, because their value is absolute. This dignity—coupled with the second formulation of the CI (The Humanity Formula), which requires us to treat persons as ends in themselves—generates an obligation of respect. As Kant explains:

But just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others, as human beings, that is, he is under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being.<sup>141</sup>

Of particular note here is that Kant’s vision of respect for others starts with respect for self. Our duty to respect the dignity of others is simply a universalization of our primary duty to respect ourselves. Kant articulates a variety of actions that degrade, debase, or disavow one’s rational autonomy, but his best-known example is suicide. He contends that “to annihilate the subject of morality in one’s person is to root out the existence of morality itself...disposing of oneself as a mere means to some discretionary

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<sup>139</sup> *Id.* at 4:434.

<sup>140</sup> *Id.* at 4:435.

<sup>141</sup> KANT, THE METAPHYSICS OF MORALS, *supra* note 128, at 6:462.



end is debasing humanity in one's person."<sup>142</sup> Whether Kant's position on suicide is consistent with the emphasis he otherwise places on autonomy and non-interference is a matter of debate.<sup>143</sup> The more important point for our purposes is that respect for others begins with self-respect, which Kant views as our primary moral duty.

The Kantian obligation to "acknowledge...the dignity of humanity" in each person, which emanates from the duty of self-respect, is strikingly different from the type of respect owed to people of high social rank or virtue under the traditional conceptions of dignity. Kantian dignity requires what Stephen Darwall calls recognition respect, while traditional conceptions of dignity demand what Darwall calls appraisal respect.<sup>144</sup> Recognition respect involves giving due consideration (or appropriate recognition) to some feature of an entity in one's practical deliberations, and then acting accordingly, even when doing so constrains one's behavior.<sup>145</sup> By contrast, appraisal respect consists in positively appraising an entity, or feature(s) of an entity, that manifests a particular excellence, which may or may not bear on the excellence of the whole entity.

Recognition respect is precisely what Kant seems to have in mind when he says, "Such a being is thus an object of respect and, so far, restricts all (arbitrary) choice."<sup>146</sup> Kantian persons deserve recognition respect because they have dignity. That dignity is not conditional on who they are (e.g., a good or bad person), but on what they are (e.g., human beings with rational capacities to discern and live by the moral law). On Kant's

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<sup>142</sup> *Id.* at 6:423.

<sup>143</sup> See Michael Cholbi, *A Kantian Defense of Prudential Suicide* 7 *J. MORAL PHIL.* 489 (2010).

<sup>144</sup> Stephen L. Darwall, *Two Kinds of Respect*, 88 *ETHICS* 36, 38-39 (1977).

<sup>145</sup> *Id.*

<sup>146</sup> *GROUNDWORK*, *supra* note 127, at 4:428.

definition, even morally corrupt individuals have dignity and deserve respect as ends-in-themselves because dignity is a characteristic separate from action. This means that humans cannot gain or lose Kantian dignity. It is held equally by all rational persons, irrespective of any particular trait, title, or individual merit.

Appraisal respect, on the other hand, is both subjective and a matter of degree. It is subjective insofar as it depends on what standards are used to measure excellence, and it is a matter of degree insofar as an entity can be appraised along a spectrum of relative merit, both in comparison to others and within oneself. Put another way, appraisal respect allows us to respect one person more than another person, and also allows us to respect certain characteristics of a person, while disliking other characteristics.<sup>147</sup>

Appraisal respect is the kind of respect owed to people who possess dignity as understood in its more traditional forms, as a status reserved for people who possess certain excellent characteristics, such as virtuous behavior or high social rank.

Darwall's dichotomy between recognition and appraisal respect illustrates how the form of respect that Kant demands for people on the basis of their autonomy and capacity for morality is different from the kind of respect that Aristotle, for example, thinks is owed to people of high rank or virtuous behavior. Nevertheless, there are some similarities between Kantian dignity and more traditional forms of dignity that deserve attention. First, the Kantian emphasis on recognition respect does not preclude appraisal respect. In fact, as Kant's references to the dignity of the social nobility in eighteenth-century Prussia demonstrate, appraisal respect can co-exist with recognition respect, as

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<sup>147</sup> Darwall, *supra* note 144, at 44.

long as in any particular situation, appraisal respect is consistent with the demands of the CI.

Second, Kantian theory does not attribute “distinctive worth” or (full) dignity to human beings because they are *homo sapiens*, but rather, because they are entities who can exercise their rational autonomy in a manner consistent with morality. Human beings who lack rational autonomy do not have dignity under Kant’s definition, and therefore, are not owed respect.<sup>148</sup> Contrary to its usual depiction, Kant’s understanding of dignity is not universal, but in fact limited. His framework involves hierarchical definitions of dignity that require differential degrees of respect, an outcome that shares similarities with more traditional invocations of dignity from the classical and medieval periods.

The distinction that Kant makes—between those who have dignity on account of their rational capacity for moral thought and those who do not—is an extremely important one because dignity is the source of rights under Kant’s theory. As he explains:

Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate *equality*, that independence from being bound by others to more than one can in turn bind them; hence a human being’s quality of being *his own master (sui juris)*, as well as being a human

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<sup>148</sup> At the same time, it is possible that a non-*homo sapiens* species could possess rational autonomy and follow the moral law, in which case, Kant would have to call them persons with dignity deserving of respect.

being *beyond reproach (iusti)*, ...; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it ...<sup>149</sup>

For Kant, insofar as humanity has dignity (again, the rational capacity for moral thought), humanity possesses the foundational right of freedom, which encompasses rights of equality, self-determination, and independence. This constellation of rights has significant implications for civil society and civil law, which Kant tasks with protecting each person's freedom against that of another.<sup>150</sup>

Just how the state should protect the fundamental right of freedom under Kant's theory is a matter of some debate. For some modern theorists, the state's role is a minimal and negative one not to interfere with a person's autonomous capacity or decisions.<sup>151</sup> For others, the right to freedom imposes positive obligations on the state to facilitate individual autonomy. In the section below on the use of dignity in human rights documents, I revisit this distinction, while also illustrating the enormous impact Kantian theory had on the early development of human rights doctrine.

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<sup>149</sup> Immanuel Kant, *The Metaphysical First Principles of the Doctrine of Right*, in PRACTICAL PHILOSOPHY 6:237 (Mary Gregor trans., 1996).

<sup>150</sup> Charles Taylor, *Kant's Theory of Freedom*, in CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY 114 (Zbigniew Pelczynski & John Gray eds., 1984) (noting that the Kantian requirement to "harmonize" the freedom of each person "with the freedom of others" is "the ground for the existence and preservation of the state").

<sup>151</sup> See, e.g., *id.* at 118 (stating that the role of the state is limited to "guaranteeing negative liberty"); see also ROGER J. SULLIVAN, INTRODUCTION TO KANT'S ETHICS 10 (1994) ("Kant regarded the fundamental task of government as negative.").

## The Modern Era

### *Catholic Church Doctrine*

The modern era is often characterized by the events that it has witnessed: the rise of totalitarianism and the horrors of mass genocide, the abolition of slavery and the dawn of women's suffrage, the evolution of capitalism and the fall of feudalism, and the emergence of powerful technologies—ranging from the atomic bomb to cloning—that can destroy and create life. Throughout this era, the concept of dignity has played a central role in the social teachings of the Catholic Church, most prominently in Vatican II and post-Vatican II encyclicals and bishops' letters. This section examines and interprets the use of dignity in those documents.

Before considering the Church's use of dignity in Vatican II and post-Vatican II period, however, it is important to note that dignity played a significant, albeit slightly different, role in earlier twentieth century Catholic social thought. Until the late 1930s, dignity was employed in papal encyclicals primarily to describe a property of a category or group, not an individual. Pope Pius XI's *Casti Connubii* (1930), *Quadragesimo Anno* (1931), and *Ad Catholici Sacerdotii* (1935), for example, describe the “sacramental dignity of marriage,”<sup>152</sup> the “dignity of the state,”<sup>153</sup> the dignity of workers,<sup>154</sup> and the

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<sup>152</sup> POPE PIUS XI, *CASTI CONNUBII* (Dec. 31, 1930).

<sup>153</sup> *Id.*

<sup>154</sup> POPE PIUS XI, *QUADRAGESIMO ANNO* (May 15, 1931).

dignity of the priesthood.<sup>155</sup> Scholars have offered several explanations for this focus on the dignity of groups instead of individuals. Samuel Moyn has argued, for instance, that the “corporatist” framing of dignity in these encyclicals reflects the dominant strain of political Catholicism during the 1930s, which invoked dignity to refer to a person’s status in a hierarchical society.<sup>156</sup> John Milbank, who agrees with Moyn’s explanation, has further suggested that in the 1930s, Catholic social teaching did not understand human dignity as something singular and individually ascribed, but rather conceived of human *dignities* arising from one’s gender, talents, and social roles.<sup>157</sup>

Catholic social thought has never rejected the corporatist understanding of human dignity,<sup>158</sup> which can still be found in Vatican II and post-Vatican II writings,<sup>159</sup> but Pope Pius XI’s 1937 encyclical, titled *Divini Redemptoris*,<sup>160</sup> signaled a shift towards a more personalist approach to human dignity. The encyclical, which has been called “epoch-making” in its application of dignity to individuals,<sup>161</sup> is very much a product of its time. Frustrated by failed negotiations with the Germans, the encyclical is Pope Pius XI’s

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<sup>155</sup> POPE PIUS XI, AD CATHOLICI SACERDOTII (Dec. 20, 1935).

<sup>156</sup> Samuel Moyn, *The Secret History of Constitutional Dignity*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 84, at 95, 98-100; *see also* Samuel Moyn, *Dignity’s Due*, NATION 35 (Nov. 4, 2013) (explaining that during the 1930s, when “Catholic social thought profoundly informed the illiberal regimes on Austria, Spain and Portugal, “dignity” seemed to refer to man’s place in a divine order in which the high rank of humans still meant their subordination to one another...”).

<sup>157</sup> John Milbank, *Dignity Rather than Rights*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 84, at 189, 202.

<sup>158</sup> *Id.* at 202-03 (noting that subsidiarity is a hierarchical doctrine). *See also* BENEDICT XVI, CARITAS IN VERITATE 57 (June 29, 2009) (“Subsidiarity respects personal dignity by recognizing in the person a subject who is always capable of giving something to others.”).

<sup>159</sup> POPE PAUL VI, GAUDIUM ET SPES 170 (Dec. 7, 1965) (recognizing “the dignity proper to individuals and societies”).

<sup>160</sup> POPE PIUS XI, DIVINI REDMEPTORIS (March 19, 1937).

<sup>161</sup> Moyn, *The Secret History*, *supra* note 156, at 101.

rejection of communism, which he claims, “robs human personality of all its dignity.”<sup>162</sup> *Divini Redemptoris* calls on the state to provide “each individual man in the dignity of his personality” whatever is necessary for him to exercise his social functions.<sup>163</sup> Beginning with this encyclical, dignity is no longer restricted to collectives or groups, and its development as a concept attached to individuals begins to take shape. Later Catholic writings, such as the U.S. Catholic Bishops pastoral letter, *Economic Justice for All*, open with a commitment to “the dignity of the human person,” which serves as the moral claim warranting response to economic and social problems.<sup>164</sup>

There are at least three features of individual dignity that one can discern from its invocation in Vatican II and post-Vatican II papal encyclicals and bishops’ letters: Dignity is God-given, dignity is inalienable and inviolable, and dignity is a property that all persons equally possess. These aspects of dignity are discussed in turn. First, Catholic doctrine understands individual dignity to be a God-given gift. Papal encyclicals and bishops’ letters trace the origins of individual human dignity to the creation story, where man and woman are created in God’s image (Gen. 1:26-27).<sup>165</sup> As a result, “every human being possesses an inalienable dignity that stamps human

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<sup>162</sup> DIVINI REDEMPTORIS, *supra* note 160, at 10.

<sup>163</sup> *Id.* at 51.

<sup>164</sup> U.S. CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY, viii (1986) [hereinafter ECONOMIC JUSTICE FOR ALL] (“Every economic decision and institution must be judged in light of whether it protects or undermines the dignity of the human person.”).

<sup>165</sup> *Id.* at 32 (“At the summit of creation stands the creation of man and woman, made in God's image...As such every human being possesses an inalienable dignity...”). *See also* BENEDICT XVI, CARITAS IN VERITATE, *supra* note 158, at 45 (“On this subject the Church's social doctrine can make a specific contribution, since it is based on man's creation “in the image of God” (Gen 1:27), a datum which gives rise to the inviolable dignity of the human person and the transcendent value of natural moral norms”).

existence prior to any division into races or nations, and prior to human labor and human achievement.”<sup>166</sup> This God-given dignity is not contingent on recognition in the created world, nor is it dependent on any specific characteristic a human may possess. Its divine origins give humans “transcendent worth” because they are the creatures that God has chosen to enter into a divine relationship with.<sup>167</sup> As *Gaudium et Spes* says perhaps most clearly: “The root reason for human dignity lies in man’s call to communion with God.”<sup>168</sup>

As a consequence of being divinely given, human dignity is both inalienable and inviolable. This theme is present in most Vatican II and post-Vatican II writings. In *Justice in the World*, for example, the bishops call on Catholics to recognize that “international order is rooted in the inalienable rights and dignity of the human being.”<sup>169</sup> *Economic Justice for All* likewise declares that “every human being possesses an inalienable dignity.”<sup>170</sup> Using the language of inviolability, *Gaudem et Spes* similarly claims that “the exalted dignity proper to the human person . . . and his rights and duties are universal and inviolable.”<sup>171</sup> Importantly, the inalienable and inviolable quality of human dignity “reflects[s] the inviolability of the Creator himself.”<sup>172</sup> Consequently, human dignity cannot be harmed, lost, or destroyed by occurrences in the created

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<sup>166</sup> *Id.*

<sup>167</sup> ECONOMIC JUSTICE FOR ALL, *supra* note 164, at 31 (“The basis for all that the Church believes about the moral dimensions of economic life is its vision of the transcendent worth—the sacredness—of human beings”).

<sup>168</sup> GAUDIUM ET SPES, *supra* note 159, at 19.

<sup>169</sup> SYNOD OF BISHOPS, JUSTICE IN THE WORLD 63 (1971).

<sup>170</sup> ECONOMIC JUSTICE FOR ALL, *supra* note 164, at 32.

<sup>171</sup> GAUDIUM ET SPES, *supra* note 159, at 26.

<sup>172</sup> POPE JOHN PAUL II, EVANGELIUM VITAE 53 (March 25, 1995).



world.<sup>173</sup> Actions—by an individual, by other people, or by nature—can threaten or offend human dignity,<sup>174</sup> but never extinguish it. Thus, Pope John Paul II explains in *Evangelium Vitae* that “not even a murderer loses his personal dignity,”<sup>175</sup> and *Gaudem et Spes* notes that “even when [a person] is flawed,” he “never loses the dignity of being a person.”<sup>176</sup>

The God-given, inalienable, and inviolable dignity that humans possess is one that they possess equally and without distinction. As the Congregation for the Doctrine of Faith notes in its *Instruction Dignitas Personae on Certain Bioethical Questions*:

By virtue of the simple fact of existing, every human being must be fully respected. The introduction of discrimination with regard to human dignity based on biological, psychological, or educational development, or based on health-related criteria, must be excluded. At every stage of his existence, man, created in the image and likeness of God, reflects “the face of his Only-begotten Son... This boundless and almost incomprehensible love of God for the human being reveals the degree to which the human person deserves to be loved in himself, independently of any other consideration—intelligence, beauty, health, youth, integrity, and so forth...”<sup>177</sup>

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<sup>173</sup> *Id.* at 31 (calling human dignity “indestructible”).

<sup>174</sup> *See, e.g., id.* at 3 (describing, among other things, subhuman living conditions, slavery, and prostitution as “insults [to] human dignity”); *see also* CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY 3 (Feb. 22, 1987) (stating that surrogate motherhood “offends the dignity and the right of the child to be conceived...”).

<sup>175</sup> *Id.* at 9.

<sup>176</sup> GAUDIUM ET SPES, *supra* note 159, at 28.

<sup>177</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION *DIGNITAS PERSONAE* ON CERTAIN BIOETHICAL QUESTIONS 8 (June 20, 2008) [hereinafter *INSTRUCTION DIGNITAS PERSONAE*].

This emphasis on equal dignity, derived from each human’s creation in God’s image, is both descriptive and normative. As a descriptive matter, because all humans share the same divine origin and nature, their dignity does not vary based on characteristics such as “race, nationality, religion, political opinion or social class,”<sup>178</sup> nor is it affected by a person’s “social condition, educational formation or level of physical development.”<sup>179</sup> As a normative matter, this basic equality between all humans means that “humans cannot by nature be superior to others since all enjoy an equal dignity.”<sup>180</sup> On this ground, the Church has—among other things—decried racial discrimination,<sup>181</sup> authoritarian regimes,<sup>182</sup> and certain forms of assisted reproductive technology that grant prospective parents “domination” over the origins of their children.<sup>183</sup>

As this section has demonstrated, the use of dignity in Vatican II and post-Vatican II writings evinces several important features. Most notably, individual human dignity originates in the creation story, in which God creates humans in his image and endows them with a dignity that is absolute and non-contingent. Because that dignity reflects

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<sup>178</sup> EVANGELIUM VITAE, *supra* note 172, at 18.

<sup>179</sup> *Id.* at 22.

<sup>180</sup> POPE JOHN XXIII, PACEM IN TERRIS (April 11, 1963).

<sup>181</sup> *Id.* at 44 (“The conviction is widespread that all men are equal in natural dignity; and so, on the doctrinal and theoretical level, at least, no form of approval is being given to racial discrimination”).

<sup>182</sup> *Id.* at 48 (“But since all men are equal in natural dignity, no man has the capacity to force internal compliance on another”).

<sup>183</sup> INSTRUCTION *DIGNITAS PERSONAE*, *supra* note 177, at 17 (noting that some forms of assisted reproductive technology are “contrary to the dignity and equality that must be common to parents and children”).

God's own transcendence and inviolability, human dignity is indestructible. Certain actions by oneself, others, or nature can threaten one's dignity, but never destroy it. Finally, the vision of dignity espoused in modern Catholic social thought is grounded in the equality that exists between humans because they share the same divine origin and image. As the examples above illustrate, these characteristics of dignity carry normative weight as well, playing an important role in Catholic social teaching on a range of social, economic, and political issues.

### ***Human Rights Documents***

Until the early twentieth century, the language of dignity was not expressly incorporated into international or national legal charters. Although several countries invoked dignity in their national constitutions in the first few decades of the 1900s, dignity's meteoric rise in the international sphere dates to the end of World War II, when United Nations' member states crafted and ratified the first international instruments to articulate universal moral rights possessed by all people equally. As discussed at length in Chapter 1, the language of human dignity had widespread appeal to drafters of these instruments because it operated as an incompletely theorized agreement,<sup>184</sup> which allowed diplomats with a variety of world views to reach consensus about why humans have certain rights.

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<sup>184</sup> Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. INT'L Q. 1 (2007); Cass R. Sunstein, *Incompletely Theorized Agreements*, 105 HARV. L. REV. 1733 (1995). See also discussion in Chapter 1.

In recent decades, however, critics have questioned how dignity and human rights are related to each other in the Universal Declaration of Human Rights (UDHR) and successor documents. Two kinds of inquiries deserve our attention. The first inquiry involves dignity's normative valence in human rights documents, where the term sometimes functions as the foundation for human rights, and other times functions as a specific right itself. Stated differently, human dignity is alternately described as a status—the possession of which generates rights that individuals can claim as dignity-bearers—and as a right itself, on par with other rights.

The second inquiry involves what characteristic of humans is the source of human dignity, and hence human rights, in these international documents. The two strongest contenders, based on the preceding genealogy of dignity, are the Judeo-Christian theory of *imago dei* and Kant's theory of dignity as an intrinsic quality of rationally autonomous and self-legislating moral agents. These justifications for universal human dignity, however, raise questions of content and legitimacy, first set forth in Chapter 2 and described in more depth below.

In considering the first inquiry about dignity's normative function in human rights doctrine, it is useful to examine its invocation in the three major human rights documents drafted by the United Nations in the post-war period—the UDHR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). The Preambles of all three documents state that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the

world.”<sup>185</sup> As other commentators have noted, this language is consistent with the view that “human dignity is the rock on which the superstructure of human rights is built,”<sup>186</sup> and the “ground of rights.”<sup>187</sup>

In other Articles of these documents, however, dignity operates not as a value that grounds human rights, but rather as a right itself, or a right to a certain kind of existence. Article 22 of the UDHR, for example, provides that

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>188</sup>

Similarly, Article 23 of the UDHR contends that “[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”<sup>189</sup> In these two Articles, dignity functions as a measurement of human flourishing that states are obligated to provide humans because of the kind of entities that

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<sup>185</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [hereinafter ICESCR]; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].

<sup>186</sup> DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 13 (2001).

<sup>187</sup> JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 15 (2012).

<sup>188</sup> UDHR, *supra* note 185, at Art. 22.

<sup>189</sup> UDHR, *supra* note 185, at Art. 23.

humans are. The UDHR does not provide guidance as to what constitutes “an existence worthy of human dignity,” but it does create a positive right to whatever that existence is.

The consequence of this duality—in which dignity is both the ground of human rights and also the content of human rights—is confusion for nation-states, judicial courts, and individuals in determining the duties that states have to individuals. Although an analysis of international court cases involving dignitary claims is beyond the scope of this project, it is worth noting that the duality has created inconsistent rulings across international courts on dignitary claims. While some courts view dignity solely as the basis of other rights, but not as a justiciable legal claim right, other courts appear to have a preference for protecting dignity as a right, even over enumerated rights like housing, education, or health.<sup>190</sup>

The second inquiry warranting our attention involves the source of human dignity in human rights documents, that is, the characteristic of human beings that vests them equally with human dignity, and thus human rights. One view is that when human rights documents were drafted in the mid-twentieth century, the language of human dignity was inextricably intertwined with Judeo-Christian views of man’s dignity as derived from *imago dei*, and therefore, a religious conception of human dignity permeates the human rights documents of that time.<sup>191</sup> Yohoshua Arieli has argued, for example, that the main inspiration for the view of human dignity embodied in the human rights documents “lies

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<sup>190</sup> ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 3, 62, 130 (2012).

<sup>191</sup> Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. J. 39 (2014); Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 4, at 111, 113.

undoubtedly in the Jewish-Christian monotheistic view according to which the Creation of the world itself, and the course and purpose of history are bound up with the destiny of man and his I-thou relationship with God.”<sup>192</sup>

To support that proposition, commentators note that in the early 1940s, the U.S. Catholic Bishops proposed an International Bill of Rights, which drew on Aquinas and other medieval Christian thinkers, to ground universal human rights in a vision of human dignity, derived from man’s exceptional position in God’s creation.<sup>193</sup> During that time period, the American Jewish Committee circulated a similar conception of dignity as the basis of international human rights, which claimed that “[a]ll that we cherish must rest on the dignity and inviolability of the person, of his sacred right to live and to develop under God, in whose image he was created.”<sup>194</sup> These documents were well-known to the drafters of the UDHR, especially Jacques Maritain, a Catholic philosopher who served as a consultant and interpreter for the UDHR drafters. In fact, in an article in *Fortune* magazine in 1942, Maritain criticized people for thinking they could “claim human rights and dignity—without God.”<sup>195</sup> There is also emerging evidence that Pope Pius II’s emphasis on human dignity influenced the language of the U.N. Charter and later the UDHR.<sup>196</sup>

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<sup>192</sup> Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 4, at 1, 9.

<sup>193</sup> Dicke, *supra* note 191, at 113.

<sup>194</sup> AMERICAN JEWISH COMMITTEE, DECLARATION OF HUMAN RIGHTS (Oct. 1944).

<sup>195</sup> Jacques Maritain, *Christian Humanism*, FORTUNE, Apr. 1942, at 106.

<sup>196</sup> Moyn, *supra* note 191, at 58–59.

For some commentators, locating the source of human rights in a religious conception of human dignity creates a legitimacy problem for human rights. As Doris Schroeder has commented, religiously grounded justifications for universal human dignity, such as “because God has imbued human beings with dignity” are no longer able to “satisfy the majority of people,” especially in world where the number of religious believers of any faith has markedly declined.<sup>197</sup> Michael Ignatieff has also expressed concern that, although human rights doctrine inherited its moral grounding from Catholicism, a “cloak of silence” has been “thrown over the question of God” as the source of human dignity underpinning human rights.<sup>198</sup> He, too, raises concerns about the universality of a human dignity inescapably linked to religious thought.

One response to this conundrum is to argue, as Richard Rorty has in other contexts,<sup>199</sup> that as a practical matter, the source of human dignity in human rights documents is no longer relevant because the major human rights documents have all been ratified, signaling agreement among nation-states that human beings have equal human rights, as set forth in the documents.<sup>200</sup> Another response is to find a secular ground for human dignity, such as Kant’s notion that humans with rational autonomy have dignity insofar as they are capable of morality.

The difficulty with a Kantian explanation for human dignity in the context of human rights is that human rights are typically understood as rights that individuals have

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<sup>197</sup> Doris Schroeder, *Human Rights and Human Dignity: An Appeal to Separate the Conjoined Twins*, 15 ETHICAL THEORY & MORAL PRAC. 323, 328 (2012).

<sup>198</sup> Michael Ignatieff, *Human Rights: The Midlife Crisis*, N.Y. REV. BOOKS, May 20, 1999, at 58.

<sup>199</sup> Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 167–185 (1998)

<sup>200</sup> Schroeder, *supra* note 197, at 328 (describing Rorty’s pragmatic perspective).



equally and universally as humans.<sup>201</sup> The Kantian definition of dignity applies, however, only to humans who possess rational autonomy and the capacity to live by the moral law. As discussed in the previous section on Kant's use of dignity, this definition excludes large numbers of individuals, who for reason of disability, illness, dementia, or other reasons are not rationally autonomous. The result is what Schroeder calls the "Kantian cul-de-sac" in human rights: Kantian dignity provides a secular justification for human rights, but it does not justify rights for *all* human beings.<sup>202</sup> To use my earlier terms, Kantian dignity solves dignity's legitimacy problem, but at the expense of creating a content problem.

This chapter has traced the genealogy of dignity from the Classical Period to the Modern Era through a series of historic texts. For each time period, I have highlighted distinctive features of dignity, with a particular focus on "what" dignity is during that age, and "why" it is those things. This methodological approach illustrates not only the myriad ways in which philosophical, religious, and political context can affect a word's meaning and use; it also demonstrates that dignity is not a single concept, but rather many conceptions that function in a variety of ways. The next chapter continues the investigation of dignity by applying a Wittgensteinian analysis of language to dignity's use in a single body of contemporary text: U.S. Supreme Court opinions.

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<sup>201</sup> Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 282–83 (2007).

<sup>202</sup> Schroeder, *supra* note 197, at 331.

## Chapter 4:

### A Typology of Dignity from U.S. Supreme Court Opinions

The last chapter traced dignity’s genealogy from Classical Antiquity to the Modern Era by examining how key figures and institutions invoked the word “dignity” in written documents from those time periods. The chapter revealed that dignity has not evolved over time as a single concept, but rather as many conceptions that hold different meanings and serve a variety of functions. For example, in some writings, dignity signifies a status to be gained or lost; in other instances, dignity functions as an inherent quality that cannot be destroyed. With dignity’s historical development in mind, this chapter examines a single body of work—U.S. Supreme Court opinions—and offers a typology of dignity that both draws on the historical development of dignity discussed in Chapter 3, and demonstrates how dignity functions as a legal concept in modern American society.

#### The Jurisprudence of Dignity

Justice William J. Brennan, Jr. frequently emphasized that the fundamental value at the crux of American law is “the constitutional ideal of human dignity.”<sup>1</sup> He believed that the Constitution, and particularly the Bill of Rights, expressed a “bold commitment

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<sup>1</sup> Bernard Schwartz, *How Justice Brennan Changed America*, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 31, 41 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) [hereinafter REASON AND PASSION]. See also *In Search of the Constitution: Supreme Court Justice William Brennan* (PBS Apr. 1, 1987), <http://billmoyers.com/content/justice-william-brennan/> (highlighting the value of human dignity).

by a people to the ideal of dignity protected through law.”<sup>2</sup> Perhaps to give doctrinal heft to a word that appears nowhere in the Constitution, Justice Brennan invoked “dignity” in an astounding forty opinions during his tenure on the Court.<sup>3</sup> Despite the breadth of cases to which he applied the term,<sup>4</sup> Brennan’s tireless efforts to advance a legal notion of dignity often were discounted either because the word appeared in his dissenting opinions,<sup>5</sup> or because when dignity appeared in majority opinions Brennan authored, it represented the “liberal wing” of the Court’s jurisprudence.<sup>6</sup>

After a brief period of hibernation during the Burger and Rehnquist Courts, the use of dignity is once again on the rise. The Roberts Court has issued opinions that invoke dignity in more than sixty cases, two-thirds of them in the last five years alone.<sup>7</sup>

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<sup>2</sup> William J. Brennan, Jr., *My Life on the Court*, in REASON AND PASSION, *supra* note 1, at 17, 18.

<sup>3</sup> Supreme Court Dignity Database, on file with author. This database includes all Supreme Court opinions that invoke the word “dignity.” After analyzing the use of dignity in each opinion, I created the typology and categorized the use of dignity in each opinion accordingly. For each use of dignity, the database also tracks the Justice invoking the word; whether the opinion is a majority, dissent, or concurrence; the subject matter of the case; and the Court’s final vote.

<sup>4</sup> *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (finding that sex discrimination “deprives persons of their individual dignity”); *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (explaining that procedural due process expresses a national commitment to “the dignity and well-being of all persons”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (noting that the purpose of the Fourth Amendment “is to protect personal privacy and dignity”).

<sup>5</sup> Fewer than one-third of Justice Brennan’s invocations of dignity appear in majority opinions. Supreme Court Dignity Database, on file with author.

<sup>6</sup> Schwartz, *supra* note 1, at 31.

<sup>7</sup> *See* *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015); *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014); *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Woodward v. Alabama*, 134 S. Ct. 405 (2013); *Calhoun v. United States*, 133 S. Ct. 1136 (2013); *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *United States v. Alvarez*,

These cases span a wide range of issues including, but not limited to, prison overcrowding,<sup>8</sup> the death penalty,<sup>9</sup> voting law,<sup>10</sup> political-campaign spending limits,<sup>11</sup> handgun possession,<sup>12</sup> and most recently, same-sex marriage.<sup>13</sup> We would be mistaken, however, to view the increasing invocations of dignity as a re-ascendance of Justice Brennan’s “dignity.” To the contrary, dignity is now more likely to appear in majority

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132 S. Ct. 2537 (2012); *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *FAA v. Cooper*, 132 S. Ct. 1441 (2012); *Zivotofsky v. Clinton* 132 S. Ct. 1421 (2012); *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011); *Sossamon v. Texas*, 563 U.S. 277 (2011); *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Bond v. United States*, 131 S. Ct. 2355 (2011); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010); *South Carolina v. North Carolina*, 558 U.S. 256 (2010); *Wellons v. Hall*, 558 U.S. 220 (2010); *Hollingsworth v. Perry*, 558 U.S. 183 (2010); *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *City of Ontario v. Quon*, 560 U.S. 746 (2010); *Barber v. Thomas*, 560 U.S. 474 (2010); *Alabama v. North Carolina*, 560 U.S. 330 (2010); *Samantar v. Yousuf*, 560 U.S. 305 (2010); *Beard v. Kindler*, 558 U.S. 53 (2009).

<sup>8</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (“Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. ‘The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.’”) (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion))). *See also id.* (“A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”).

<sup>9</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2797 (2015) (Sotomayor, J., dissenting) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)).

<sup>10</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (“This ‘allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.’”) (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)); *see also id.* (“Over a hundred years ago, this Court explained that our Nation ‘was and is a union of States, equal in power, dignity and authority.’”) (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

<sup>11</sup> *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring part and dissenting in part) (noting the “freedom of speech ... respects [people’s] ‘dignity and choice’”) (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).

<sup>12</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 864 (2010) (Stevens, J., dissenting) (“It is the liberty clause that enacts the Constitution’s promise that a measure of dignity and self-rule will be afforded to all persons.”).

<sup>13</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (invoking the word “dignity” nine times in the majority decision holding that the right to marry is a fundamental right that cannot be denied to same-sex couples).

than dissenting opinions, and more likely to be invoked by the late Justice Scalia than Justice Ginsburg.<sup>14</sup>

Dignity's increasing popularity in opinions by the Court's justices, however, does not signal agreement about what the term means. As a result, a plethora of contrasting views about dignity's legal definition, usefulness, and ultimate purpose have emerged.<sup>15</sup> Some legal scholars and jurists view dignity's use in legal opinions as a conceptual and jurisprudential crisis. South African law professor and judge, Dennis Davis, has remarked, for example, that dignity "is a piece of jurisprudential Legoland—to be used in whatever form and shape is required by the judicial designer."<sup>16</sup> Yale law professor James Whitman has concluded that "protecting people's dignity is quite alien to the American tradition."<sup>17</sup>

Other commentators, however, view the expanding reliance on dignity in American constitutional jurisprudence positively. They refer to dignity as nothing less than "the premier value underlying the last two centuries of moral and political thought,"<sup>18</sup> an essential "basis of human rights,"<sup>19</sup> and one of "the great political values

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<sup>14</sup> Supreme Court Dignity Database, on file with author.

<sup>15</sup> Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

<sup>16</sup> Dennis Davis, *Equality: The Majesty of Legoland Jurisprudence*, 1999 S. AFR. L.J. 398, 413.

<sup>17</sup> James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1221 (2004).

<sup>18</sup> Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 145 (Michael J. Meyer & W.A. Parent eds., 1992) [hereinafter THE CONSTITUTION OF RIGHTS].

<sup>19</sup> Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS, *supra* note 18, at 10, 28.

that define our constitutional morality.”<sup>20</sup> Legal theorist Ronald Dworkin has even declared that “the principles of human dignity . . . embodied in the Constitution . . . are now common ground in America.”<sup>21</sup>

### ***The Court’s Increasing Reliance on Dignity as a Legal Norm***

Few concepts dominate modern constitutional jurisprudence more than dignity without appearing in the Constitution.<sup>22</sup> The Supreme Court has invoked dignity in connection with the First,<sup>23</sup> Fourth,<sup>24</sup> Fifth,<sup>25</sup> Sixth,<sup>26</sup> Eighth,<sup>27</sup> Ninth,<sup>28</sup> Eleventh,<sup>29</sup>

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<sup>20</sup> William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 18, at 47, 71.

<sup>21</sup> Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, <http://www.nybooks.com/articles/archives/2006/sep/21/three-questions-for-america/>. *See also* RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (exploring the meaning of dignity).

<sup>22</sup> The Court invokes privacy frequently, but unlike dignity, the Court has determined that the Constitution affirmatively protects a right of privacy. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965). The privacy right established in *Griswold* has been extended by numerous Supreme Court cases, including *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>23</sup> *See* *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”). *See also* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Leathers v. Medlock*, 499 U.S. 439, 449 (1991) (both quoting *Cohen* for the proposition that dignity is at the root of First Amendment protections). *Cf.* *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758 (1985) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (weighing First Amendment expression against the “essential dignity” of all persons to protect their reputation)).

<sup>24</sup> *See* *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (explaining that one purpose of the knock-and-announce rule is to protect “dignity that can be destroyed by a sudden entrance”); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 613–14 (1989) (stating that the Fourth Amendment “guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government”); *Winston v. Lee*, 470 U.S. 753, 760 (1985) (holding that a person cannot be compelled by the state to undergo surgery to remove a bullet linked to a crime because such an act would be an unwarranted intrusion on “personal . . . dignity”); *Rochin v. California*, 342 U.S. 165, 174 (1952) (overturning a drug conviction on the basis that the police’s decision to pump the defendant’s stomach against his will to acquire evidence was “so offensive

Fourteenth,<sup>30</sup> and Fifteenth Amendments.<sup>31</sup> In the last 225 years, Supreme Court justices have invoked the term in nearly one thousand opinions. Almost half of these opinions

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to human dignity” as to shock the conscience). *Cf.* *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (finding that the “dignity and privacy interests of the person being searched—simply do not carry over to vehicles”).

<sup>25</sup> *See* *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (finding that successive prosecutions by two states do not violate the Double Jeopardy Clause because the defendant violated the “‘peace and dignity’ of two sovereigns” in one act); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 (1976) (requiring, under the Due Process Clause, that foreign aliens be treated with the same “dignity and respect accorded to other persons”); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (explaining that “the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government . . . must accord to the dignity and integrity of its citizens”).

<sup>26</sup> *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (explaining that 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”); *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) (noting that “the right to appear *pro se* exists to affirm the dignity and autonomy of the accused”); *Faretta v. California*, 422 U.S. 806, 834 (1975) (affirming the right to appear *pro se* but stating that it “is not a license to abuse the dignity of the courtroom”).

<sup>27</sup> *See* *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (restricting the imposition of capital punishment to a narrow range of cases based on “[e]volving standards of decency . . . [that] express respect for the dignity of the person”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (setting aside the death sentence of a juvenile under age eighteen and noting that “the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons”); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding that handcuffing a prisoner to a hitching post in the sun violated the “basic concept underlying the Eighth Amendment [which] is nothing less than the dignity of man” (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (prohibiting the execution of mentally ill persons and explaining that the Eighth Amendment “protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance”); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (upholding the death penalty while noting that penalties must accord with the “dignity of man”); *Furman v. Georgia*, 408 U.S. 238, 285 (1972) (*per curiam*) (reversing a judgment that applied the death penalty selectively to minorities); *id.* at 285 (Brennan, J. concurring) (maintaining that “the State may not inflict punishments that do not comport with human dignity”).

<sup>28</sup> In *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965), the Court gave the “same dignity,” or status, to privacy as it had previously given to other “peripheral rights.”

<sup>29</sup> *See, e.g.,* *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (describing states as having “dignity that is consistent with their status as sovereign entities”); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (recognizing that states “retain the dignity, though not the full authority, of sovereignty”).

<sup>30</sup> *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (overturning Texas’s sodomy statute on the ground that “adults may choose to enter upon this relationship . . . and still retain their dignity as free persons”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (judging gender-based

were issued after 1946, the year that the phrase “human dignity” first appeared in a Supreme Court opinion,<sup>32</sup> and more than one hundred of these opinions were authored in the last twenty-five years.<sup>33</sup> As the figures in Chapter 2 illustrated, the percentage of Supreme Court opinions that invoke dignity per term of court is increasing at a statistically significant rate, and the Roberts court appears prepared not only to continue, but also to accelerate, this trend.

Although the Court’s frequent invocation of a word does not always signal increasing jurisprudential reliance on the underlying concept, in this instance, the correlation holds. The Court’s repeated appeals to dignity, particularly in majority opinions, parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights. The Court has declared, for example, that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity

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juror exclusion criteria unconstitutional and asserting that they “denigrate[] the dignity of the excluded juror”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (referring to decisions relating to marriage, contraception, family relationships, child-rearing, and education as “central to personal dignity and autonomy”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (determining that a minority set-aside program implicates the right “to be treated with equal dignity and respect”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (noting that “[f]ew decisions are . . . more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy”); *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (suggesting that “[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders”).

<sup>31</sup> *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (invalidating a Hawaiian race-based voting statute because “it demeans the dignity and worth of a person to be judged by ancestry”).

<sup>32</sup> *In re Yamashita*, 327 U.S. 1 (1946). The Court rejected Yamashita’s challenge that his trial was unfairly conducted. Justice Murphy argued in dissent that “If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.” *Id.* at 29 (Murphy, J., dissenting).

<sup>33</sup> Supreme Court Dignity Database, created by and on file with author.



against unwarranted intrusion by the State;”<sup>34</sup> that dignity is “the constitutional foundation underlying the [Fifth Amendment] privilege [against self-incrimination];”<sup>35</sup> that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man;”<sup>36</sup> and that “choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment.”<sup>37</sup>

Most notably, in two recent cases, *United States v. Windsor*<sup>38</sup> and *Obergefell v. Hodges*,<sup>39</sup> the Supreme Court invoked dignity to strike down, respectively, the federal Defense of Marriage Act (DOMA) and state-level bans on same-sex marriage. In each case, the majority opinion employed the word “dignity” nine times to support its position. In *Windsor*, the majority concluded that DOMA was unconstitutional because it interfered with “the equal *dignity* of same-sex marriages, a *dignity* conferred by the State”<sup>40</sup> ... “to protect [citizens] in personhood and *dignity*.”<sup>41</sup> In *Obergefell*, the majority wrote that “there is *dignity* in the bond between two men or two women who seek to marry,”<sup>42</sup> and that the Constitution protects “certain personal choices central to

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<sup>34</sup> *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1986)).

<sup>35</sup> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

<sup>36</sup> *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>38</sup> 133 S. Ct. 2675 (2013).

<sup>39</sup> 135 S. Ct. 2584 (2015).

<sup>40</sup> *Windsor*, 133 S. Ct. at 2693 (emphasis added).

<sup>41</sup> *Id.* at 2696 (emphasis added).

<sup>42</sup> *Obergefell*, 135 S. Ct. at 2599 (emphasis added)

individual *dignity* and autonomy.”<sup>43</sup> The use of dignity in these two cases is a strong signal that the Court’s invocations of dignity will continue.

Despite deep disagreement about its normative, practical, and jurisprudential value, dignity’s growing presence in Supreme Court decisions has received scant attention.<sup>44</sup> The literature on dignity is primarily written by philosophers<sup>45</sup> and theologians,<sup>46</sup> who discuss dignity as a moral value divorced from legal application, or by international and comparative law scholars,<sup>47</sup> who examine dignity’s role in human rights

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<sup>43</sup> *Id.* at 2597 (emphasis added).

<sup>44</sup> Most scholarship on the Court’s use of dignity focuses on the doctrine of sovereign immunity. See, e.g., Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245 (2000); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Sovereignty*, 55 STAN. L. REV. 1921 (2003); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003). Three exceptions are Gewirth, *supra* note 19, at 10, 28 (examining whether there is a right to dignity in the United States), Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1702 (2008) [hereinafter *Politics of Protection*] (illustrating the ways in which dignity bridges communities divided in the abortion debate), and Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1612–14 (2010) (defending group defamation laws for the role they play in affirming the equal dignity of persons).

<sup>45</sup> See, e.g., THOMAS E. HILL, *DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY* (1992); Aurel Kolnai, *Dignity*, 51 PHIL. 251 (1976); Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520 (1989); Michael J. Meyer, *Kant’s Concept of Dignity and Modern Political Thought*, 8 HIST. EUR. IDEAS 319 (1987); Michael Pritchard, *Human Dignity and Justice*, 82 ETHICS 299 (1972); Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, 9 PHIL. F. 39 (1971); Gloria Zuniga, *An Ontology of Dignity*, 5 METAPHYSICA 115 (2004).

<sup>46</sup> For works that consider dignity from a theological perspective, see, e.g., Y. Michael Barilan, *From Imago Dei in the Jewish Christian Traditions to Human Dignity in Contemporary Jewish Law*, 19 KENNEDY INST. ETHICS J. 231 (2009) (surveying the role of imago dei and human dignity as concepts in Judaism); Gilbert Meilaender, *Human Dignity and Public Bioethics*, 17 NEW ATLANTIS 33 (2007) (exploring the idea of dignity through Christian and secular texts); Doron Shultziner, *A Jewish Conception of Human Dignity*, 34 J. RELIGIOUS ETHICS 663 (2006) (describing the distinct features of a Jewish conception of dignity); THE CATECHISM OF THE CATHOLIC CHURCH, ¶¶ 1700-1715 (1994) (demonstrating the dignity of humans); Thomas F. Torrance, *The Goodness and Dignity of Man in the Christian Tradition*, 4 MOD. THEOLOGY 309 (1988) (offering a general view of how dignity is understood in Christianity).

<sup>47</sup> See, e.g., Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human*

declarations and foreign laws.<sup>48</sup> The prominence of dignity in American constitutional law has gone largely unanalyzed.<sup>49</sup> This leaves us without a comprehensive understanding of why the Court has embraced dignity, what types of actions threaten dignity, and how the Court weighs dignity in relation to other values. Most importantly, we lack a systematic account of dignity's varied meanings against which to ponder these questions.

### *A Wittgensteinian Approach*

This chapter has two related ambitions, both directed at clarifying the conceptual chaos surrounding dignity's complicated legal usage. The first goal is to provide an approach that captures the range of ways in which the Court invokes dignity and connect those uses to their epistemic origins. The second aim is to explore dignity's judicial function in contemporary constitutional jurisprudence. To carry out those objectives, I created an original dataset of every published Supreme Court opinion that has invoked the word "dignity" in the last 225 years.<sup>50</sup> Consistent with the Wittgensteinian methodology set forth in Chapter 2, I then examined how each opinion employs dignity, and developed a mechanism to categorize them accordingly.

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*Rights*, 19 EUR. J. INT'L L. 655 (2008); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

<sup>48</sup> See Whitman, *supra* note 17; James Q. Whitman, 'Human Dignity' in *Europe and the United States: The Social Foundations*, 25 HUM. RTS. L.J. 17 (2004).

<sup>49</sup> Cf. Henry, *supra* note 15; Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

<sup>50</sup> The dataset for this project includes signed and per curiam opinions. This is the first study to examine the use of dignity in every Supreme Court case from the last 225 years in which the word dignity appears in an opinion.

Standard accounts of dignity contend that dignity is either reducible to another concept, such as autonomy, or has a core meaning that is applicable across all contexts. Although these views are tidy and attractive, they tend to draw dignity's boundaries too narrowly or too broadly, often missing the possibility that dignity has multiple meanings which, in Wittgenstein's words, share "family resemblances" to each other.<sup>51</sup> While some dignitary harms can be completely described by one type of dignity, others admit of complementary meanings. Because this heterodox approach to conceptualizing dignity begins by exploring the use of dignity in practice, rather than in the abstract, it maintains a degree of coherence absent from the standard approaches.

The result of the Wittgensteinian analysis is a typology of dignity that reveals that a single concept of dignity with fixed boundaries does not exist in constitutional jurisprudence. Instead, five different conceptions of dignity emerge that, although distinct, admit of some similarities. The next section of this chapter considers these conceptions of dignity, which I refer to as *institutional status as dignity*, *equality as dignity*, *liberty as dignity*, *personal integrity as dignity*, and *collective virtue as dignity*. I first trace each type back to its epistemic origins in philosophy, theology, or political theory, and articulate its central features. Then, relying on the Court's opinions, I illustrate that each type of dignity has a particular judicial function oriented toward safeguarding substantive interests against dignitary harm.

Teasing out dignity's different threads permits us to see the work that each type of dignity is performing for the Court. It also demonstrates why viewing dignity as only a "liberal" or "egalitarian" value is cramped and stultifying. In contrast, the typology

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<sup>51</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 66 (1953).

illustrates the compendium of pluralistic values that the Court embraces when it speaks of dignity. Moreover, it provides the tools to evaluate what is normatively and doctrinally at stake in a variety of contexts, and equips us with a framework for future discussions.

## **Five Conceptions of Dignity**

### ***Institutional Status as Dignity***

#### **Aristocracy and the Recognition of Rank**

It is not coincidental that today the cognate *dignitary* applies to people who hold high-ranking positions in politics, government, and the judiciary. As the genealogy of dignity in Chapter 3 demonstrated, the Latin word *dignus* and its cognates were regularly invoked in ancient Rome to denote the honor attached to elevated social status, and as a consequence, the respect owed to people of high standing.<sup>52</sup> The Roman political aristocracy had *dignitas*, for example, while the lower-ranking plebeians did not.<sup>53</sup>

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<sup>52</sup> See Teresa Iglesias, *Bedrock Truths and the Dignity of the Individual*, 4 LOGOS: J. CATH. THOUGHT & CULTURE 114, 120–21 (2001):

The idea of *dignitas* was central to Roman political and social life and closely related to the meaning of honor. Political offices, and as a consequence the *persons holding them*, like that of a senator, or the emperor, had *dignitas*. . . . The office or rank related to *dignitas* carried with it the obligation to fulfill the duties proper to the rank.

Julius Caesar used this notion of *dignitas* to explain that one reason he fought the Roman Civil War was to restore men to their proper rank and title. He wrote that he aimed “to restore the dignity of the tribunes,” who were the titular leaders driven out of Rome during the war. JULIUS CAESAR, DE BELLO CIVILI I.22.5.

<sup>53</sup> *Id.* In ancient Rome, the term *dignitas* also was applied to exemplary poets, orators, or

Similarly, as Cicero famously noted, men could possess *dignitas* in classical antiquity, while women could not.<sup>54</sup>

When “dignity” entered the English language in 1225, it maintained its connection to rank and hierarchy,<sup>55</sup> most notably in reference to the British monarchy. Blackstone’s *Commentaries* explain, for example, that because the King is the titular head of state, “it is beneath the dignity of the king’s courts to be merely ancillary to other inferior jurisdictions . . . .”<sup>56</sup> All criminal offenses in England are “either against the king’s peace, or his crown and dignity; and are so laid in every indictment.”<sup>57</sup> Blackstone comments that even the “ancient jewels of the crown . . . are necessary to . . . support the dignity of the sovereign.”<sup>58</sup>

From the thirteenth century until the Enlightenment, the view that dignity is an attribute reserved for high-ranking positions and the people who occupy them was predominant in Great Britain. Thomas Hobbes wrote in 1651, for example, that “the public worth of man, which is the value set on him by the Common-wealth, is that which men commonly call dignity.”<sup>59</sup> Dictionaries in use during the eighteenth century further underscore the notion that a person’s dignity was merely a function of social status.

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politicians. *See, e.g.*, QUINTILLIAN, *INSTITUTIO ORATORIA*, XII.x.11 (commenting on “the dignity of Messala,” a particularly impressive orator); CICERO, *ON THE MANILIAN LAW* 52 (explaining that Pompeius alone has the dignity to be put in supreme command).

<sup>54</sup> In his famous *De Officiis*, Cicero writes that “[t]here are two orders of beauty: in the one, loveliness predominates; in the other, dignity; of these, we ought to regard loveliness as the attribute of woman, and dignity as the attribute of man.” CICERO, *DE OFFICIIS* I.130.

<sup>55</sup> OXFORD ENGLISH DICTIONARY (1989); *see also* OXFORD LATIN DICTIONARY (1982) (listing related meanings of *dignus*).

<sup>56</sup> 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*98.

<sup>57</sup> 1 *id.* at \*268.

<sup>58</sup> 2 *id.* at \*428.

<sup>59</sup> THOMAS HOBBS, *LEVIATHAN* 63 (1991).

Samuel Johnson's *A Dictionary of the English Language: 1746-55* and Nathan Bailey's 1736 *Dictionary Britannicum*, for example, both define dignity simply as "rank of elevation."<sup>60</sup> That linguistic understanding of dignity was brought to America during European colonization, as illustrated by the 1669 Fundamental Constitutions of Carolina, which state that "[n]o one person shall have more than one dignity," or public position.<sup>61</sup> In short, kings, bishops, noblemen, and office holders possessed dignity; commoners did not.<sup>62</sup>

This notion of dignity, which I call *institutional status as dignity*, has several defining characteristics. As a starting point, it is not intrinsic. Since it is grounded in, and depends on, the existence of social hierarchy, only select individuals or institutions will ever acquire it. Nor is institutional status as dignity a permanent trait. It is held only as long as a person or institution is deemed worthy of others' respect. Consequently, this form of dignity can be gained or lost.

By virtue of these defining qualities, institutional status as dignity is both inegalitarian and contingent. It presupposes, and indeed requires, a power differential, which in turn creates an obligation of vertical respect. People and institutions that have dignity are owed respect by those who rank below them. Because people only deserve respect in relation to their variable dignity or social worth, the respect that dignity garners

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<sup>60</sup> See SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE 1746-55* (1819); NATHAN BAILEY, *DICTIONARIUM BRITANNICUM* (1736) (both defining dignity as "rank of elevation").

<sup>61</sup> THE FUNDAMENTAL CONSTS. OF CAROLINA (1669), <http://www.yale.edu/lawweb/avalon/states/nc05.htm>. The document also made the "hereditary nobility of the province . . . by right of their dignity . . . members of parliament."

<sup>62</sup> See, e.g., EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 60 (1793) (ascribing dignity to the nobility and denying it to the common person); JOHNSON, *supra* note 60 (describing clergymen as possessing dignity).

is contingent, rather than necessary.<sup>63</sup> Simply stated, not all human beings or institutions deserve respect under this framework.

### **Bestowing Respect on Government and its Accoutrements**

Historically, the law has reinforced institutional status as dignity, taking steps where necessary to protect individuals whose dignity is associated with elevated political or social rank.<sup>64</sup> The Magna Carta, for example, exempted earls and barons from being tried by the jury system that governed commoners,<sup>65</sup> and the 1689 English Bill of Rights granted special legal respect to the “Crown and royal dignity.”<sup>66</sup> While defamation of a commoner was considered libel or slander under early English law, defamation of a member of the British nobility was punished as *scandalum magnatum*, both a crime and a tort, enforced by the King’s Council.<sup>67</sup> The early American colonies also took steps, in

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<sup>63</sup> Alan Gewirth makes this distinction between contingent and necessary respect in his *Dignity as the Basis of Rights*, *supra* note 19, at 17. This dichotomy is commonly drawn in ethics literature as well. See, e.g., Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977) (suggesting that there is a difference between appraisal respect and recognition respect). The difference between appraisal and recognition respect is discussed in greater depth in Chapter 3.

<sup>64</sup> See Jeremy Waldron, *Dignity, Rank, and Rights*, 2009 TANNER LECTURES ON HUMAN VALUES AT UC BERKELEY 209 (2009), [http://tannerlectures.utah.edu/\\_documents/a-to-z/w/Waldron\\_09.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf) [hereinafter *Dignity, Rank, and Rights*].

<sup>65</sup> MAGNA CARTA § 21 (1215).

<sup>66</sup> THE BILL OF RIGHTS 1689, <http://www.yale.edu/lawweb/avalon/england.htm>.

<sup>67</sup> For an example of how *scandalum magnatum* operated in the seventeenth century, see Waldron, *Dignity, Rank, and Rights*, *supra* note 64, at 233, n.79 (citing The Earl of Lincoln against Roughton, 79 Eng. Rep. 171; Cro. Jac. 196 (1606)). The offense of *scandalum magnatum* was repealed by the Statute Law Revision Act of 1887.



the form of sumptuary laws, to maintain the divide between those who possessed dignity and those who did not.<sup>68</sup>

When George Washington addressed Congress in 1793, however, and suggested that the dignity of the nobility be replaced by the “dignity of the United States,”<sup>69</sup> he set the modern-day application of institutional status as dignity in motion. His decision to apply the language of dignity to the new government was derived not only from its earlier British use, but was also consistent with the *Federalist Papers*, which were written to promote the ratification of the U.S. Constitution. The *Federalist Papers* invoke dignity seventeen times to describe the heightened standing of the government, the nation, or the offices thereof.<sup>70</sup> Since almost the beginning of this country, Supreme Court justices have invoked this understanding of dignity to protect and vindicate the institutional status of government and its accoutrements.<sup>71</sup> Among other functions, the Court has employed dignity to describe the heightened respect owed to judges and courtrooms, foreign nations, and American states.

As anyone who has been to court, or even watched *Law and Order* knows, courtrooms are characterized as hallowed places governed by certain formalities, all of which emphasize the court’s authority and the respect it commands. Court sessions

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<sup>68</sup> The Colonial Laws of Massachusetts famously prohibited anyone but large landholders from wearing gold, silver, lace, silk, boots, ruffles, capes, or other signifiers of high social status. COLONIAL LAWS OF MASSACHUSETTS, SUMPTUARY LAWS REGARDING WHAT ONE MAY OR MAY NOT WEAR (1651).

<sup>69</sup> George Washington, *Fifth Annual Message to Congress* (Philadelphia, Dec. 3, 1793), [http://avalon.law.yale.edu/18th\\_century/washs05.asp](http://avalon.law.yale.edu/18th_century/washs05.asp).

<sup>70</sup> See THE FEDERALIST Nos. 17, 19, 30, 46, 58, 69, 81. See also Jeremy Rabkin, *What We Can Learn About Human Dignity from International Law*, 27 HARV. J.L. & PUB. POL’Y 145, 156–57 (2003) (explaining that every reference to dignity in the *Federalist Papers* emphasizes respect for the government).

<sup>71</sup> Supreme Court Dignity Database, created by and on file with author.

generally commence when the bailiff says, “All rise for the honorable. . . .” The judge then enters the room wearing judicial robes and takes his or her seat on an elevated platform; the gallery is seated; and the parties’ first words to the court or judge are, “May it please the court” or “Your honor.” In this setting, the aristocratic tradition of according dignity, and thus deference, to high-ranking institutions and officers, finds modern expression.<sup>72</sup>

When individuals fail to appropriately respect the dignity of the proceedings, judges may respond with contempt orders.<sup>73</sup> Approximately one-fourth of the Supreme

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<sup>72</sup> The Supreme Court also has invoked institutional status as dignity to express the respect owed to another symbol of democracy, the American flag. In *Texas v. Johnson*, the Court declined to condemn the burning of a U.S. flag, instead arguing that its dignity was venerated best by permitting individuals to act with the freedom the flag symbolizes. As Justice Brennan, writing for the Court, explained:

We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the *dignity* even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

491 U.S. 397, 420 (1989) (emphasis added). As in the judicial contempt cases, the Court’s invocation of dignity in *Texas v. Johnson* reinforces the typology’s claim that institutional status as dignity is contingent. The flag, like the courtroom, derives its status from the freedom and justice it represents, but if those values are undermined, its institutional status as dignity is threatened.

<sup>73</sup> In most cases, contempt orders—or the threat thereof—give judges sufficient power to curb improper courtroom behavior that could unfairly affect the outcome of a case. In rare cases, where serious misconduct takes place unchecked by the trial judge, the Supreme Court has vacated the decision and remanded the case on grounds that the procedures did not take place with proper dignity. For a particularly egregious example, see *Wellons v. Hall*, 558 U.S. 220 (2010) (per curiam), a recent federal habeas case in which the Court vacated the judgment below and remanded because, in addition to other potentially improper ex parte exchanges between the jurors and the judge, “some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts.” *Id.* at 221. Explaining that “judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect,” *id.* at 220, the Court held that the Eleventh Circuit should “consider, on the merits, whether petitioner’s allegations, together with the undisputed facts, warrant discovery and an evidentiary hearing.” *Id.* at 226.

Court decisions that invoke institutional status as dignity do so in this context.<sup>74</sup> Chief Justice Taft explained in *Cooke v. United States* that “[t]he power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and *dignity* of the court, is most important and indispensable.”<sup>75</sup> Throughout the last century, the Court repeatedly has articulated its view that contempt orders are proper when offense is made “against [a judge’s] dignity and authority.”<sup>76</sup> Even when the judge’s dignity is not at issue, the Court has upheld contempt orders issued to individuals who engage in conduct considered contemptuous, discourteous, or disruptive to the dignity of judicial proceedings.<sup>77</sup>

The Supreme Court also has a long history of employing the language of institutional status as dignity to describe the heightened level of respect owed to foreign nations. In the classic 1812 case, *The Schooner Exchange v. McFaddon*, the Court considered “whether an American citizen can assert, in an American court, a title to an armed [French] national vessel found within the waters of the United States.”<sup>78</sup> Drawing on principles of the law of nations, Chief Justice Marshall concluded that it would be incompatible with the “dignity” of the foreign sovereign to submit to the authority of the

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<sup>74</sup> Supreme Court Dignity Database, created by and on file with author.

<sup>75</sup> 267 U.S. 517, 539 (1925) (emphasis added); *see also* *Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971) (citing *Cooke* approvingly); *United States v. Barnett*, 376 U.S. 681, 696–97 (1964) (citing *Eilenbecker v. Dist. Court*, 134 U.S. 31, 36 (1890) for the proposition that “[i]t has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult. . . .”); *Sacher v. United States*, 343 U.S. 1, 29 (1952) (Frankfurter, J., dissenting) (noting that *Cooke* states the proper justification for contempt orders).

<sup>76</sup> *Sacher*, 343 U.S. at 12.

<sup>77</sup> *United States v. Wilson*, 421 U.S. 309, 316 n.8 (1975) (explaining that “[i]n order to constitute an affront to the dignity of the court the judge himself need not be personally insulted”).

<sup>78</sup> 11 U.S. (7 Cranch) 116, 135 (1812).

United States because doing so would undermine the foreign state's own rank and authority.<sup>79</sup> Since deciding *The Schooner Exchange*, the Supreme Court consistently has invoked dignity to protect the institutional status of other nations in foreign sovereign immunity cases,<sup>80</sup> including other nation's diplomats.<sup>81</sup>

The most noteworthy judicial function of institutional status as dignity, however, has been to dramatically expand the doctrine of *state* sovereign immunity. Institutional status as dignity has long played a part in state sovereign immunity cases, as it has in foreign sovereign immunity cases, but in recent decades the Court has thrust dignity into the spotlight and relied on it as the central reason to grant states immunity from suit. In *Federal Maritime Commission v. South Carolina State Ports Authority*, the Court went as far as to say that “the *preeminent* purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>82</sup>

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<sup>79</sup> *Id.* at 137. See also Smith, *supra* note 44 (offering a detailed discussion of dignity in the context of foreign state sovereign immunity).

<sup>80</sup> See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972) (explaining that after *The Schooner Exchange*, the law “is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its ‘exclusive and absolute’ jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the ‘power and *dignity*’ of the foreign sovereign” (emphasis added) (quoting *National City Bank v. Rep. of China*, 348 U.S. 356, 361-62 (1955)); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (noting that the “judicial seizure of a vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune”).

<sup>81</sup> The dignity afforded to foreign sovereigns also has been extended by international law to their diplomats. In *Boos v. Barry*, 485 U.S. 312 (1988), the Court assumed, without deciding, that protecting the dignity of foreign diplomats by shielding them from criticism of their governments is a “compelling” interest for First Amendment purposes. The Court noted in relevant part that “since the dignity of foreign officials will be affronted by signs critical of their governments or governmental policies [the Court assumes] these foreign diplomats must be shielded from such insults in order to fulfill our country’s obligations under international law. *Id.* at 322.

<sup>82</sup> 535 U.S. 743, 760 (2002) (emphasis added).

The effect has been a considerable expansion of the doctrine.<sup>83</sup> Significantly, the now-dominant view that it is an “indignity” to subject “a State to the coercive process of judicial tribunals at the instance of private parties,”<sup>84</sup> has not always been the Court’s position. For the first seventy years of its tenure, the Court held the opposite perspective, and recognized the superior dignity of the sovereign people as the primary reason for allowing citizen suits.

Just five years after the Constitution was ratified, the Court in *Chisholm v. Georgia* considered whether a citizen of one state could bring suit against another state in the United States Supreme Court.<sup>85</sup> The plaintiff was a merchant from South Carolina who had entered a contract to purchase war supplies from the State of Georgia. In a 4-1 decision, the Court decided that although a full sovereign nation like the United States might enjoy immunity, the same accommodation was not available to Georgia.

The opinion is replete with invocations of dignity, almost all of which refer to the dignity of the American people, not the status of the state or nation.<sup>86</sup> Expressing his view of popular sovereignty, Justice Wilson wrote that “a State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all of its acquired importance.”<sup>87</sup> He concluded that because “a State ... [is] subordinate

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<sup>83</sup> For a discussion of how sovereign immunity doctrine has evolved, see Resnik & Chi-hye Suk, *supra* note 44; Smith, *supra* note 44.

<sup>84</sup> *Ex parte Ayers*, 123 U.S. 443, 505 (1887).

<sup>85</sup> 2 U.S. (2 Dall.) 419.

<sup>86</sup> An exception is Justice Blair’s opinion, which noted that it would be “incompatible with the dignity of a State” to issue a default judgment against Georgia for its refusal to appear in this case. *Id.* at 452–53.

<sup>87</sup> *Chisholm*, 2 U.S. (2 Dall.) at 455 (Wilson, J.).

to the people,<sup>88</sup> it is susceptible to citizen suits. In agreement, Chief Justice Jay explained that because the people established the Constitution “with becoming dignity” and “proper sovereignty ... a State may be sued.”<sup>89</sup> In distinguishing the American principle of popular sovereignty from the English common law, which granted impenetrable power and jurisdiction in the office of the King,<sup>90</sup> the Court in *Chisholm* firmly rejected the view that states have institutional status as dignity.

The states responded to *Chisholm* with outrage, and within a day of the Court’s decision, Congress considered the proposal that led to the Eleventh Amendment’s adoption.<sup>91</sup> The Court has subsequently demonstrated both in its commentary and through its holdings that the Eleventh Amendment, which largely grants immunity to states from suits, is the correct interpretation of constitutional design, and that the decision in *Chisholm* deviated from the founders’ view that “immunity from private suits is central to sovereign dignity.”<sup>92</sup>

In the last decade, the Court has referred to institutional status as dignity as the “‘central,’ ‘preeminent,’ and ‘primary’ justification” for expanding states’ immunity from suit.<sup>93</sup> In *Seminole Tribe of Fla. v. Florida*,<sup>94</sup> the Court overruled its earlier holding in

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 471, 473 (Jay, C.J.).

<sup>90</sup> The opinions of Justices Iredell, Wilson, and Jay go to particular lengths to contrast the American and English views of sovereign immunity. *See id.* at 444 (opinion of Iredell, J.); *id.* at 458 (opinion of Wilson, J.); *id.* at 471 (opinion of Jay, J.).

<sup>91</sup> *See, e.g., Alden v. Maine*, 527 U.S. 706, 720 (1999) (describing the aftermath of the decision in *Chisholm*).

<sup>92</sup> *Id.* at 715. *See generally id.* at 715–27 (explaining why the Eleventh Amendment better reflects the Framers’ intentions with regard to state sovereignty than the decision in *Chisholm*).

<sup>93</sup> Smith, *supra* note 44, at 5 (citing *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, (2002)).

*Pennsylvania v. Union Gas Co.*,<sup>95</sup> which had acknowledged congressional authority under the commerce clause to abrogate states' Eleventh Amendment immunity.

Explaining that the Eleventh Amendment “serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,’” the Court in *Seminole* held that Congress lacks power under Article I to abrogate states' sovereign immunity from suit in federal courts.<sup>96</sup>

In *Alden v. Maine*,<sup>97</sup> the Court expanded its jurisprudence to hold that Article I legislation cannot abrogate states' immunity from suit in state courts. Again invoking the language of dignity to justify its decision, the Court noted that “[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”<sup>98</sup> Compelling a state to appear in its own courts is “offensive” to its stature and “denigrates” its sovereignty.<sup>99</sup>

The Court's subsequent decision in *Federal Maritime Commission v. South Carolina State Ports Authority* is arguably its most brazen use of dignity in this context.<sup>100</sup> In concluding that state sovereign immunity bars a federal agency from adjudicating a claim against a state, the Court did not consider anything other than the state's dignitary interest. The Court justified its finding as follows:

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<sup>94</sup> 517 U.S. 44 (1996).

<sup>95</sup> 491 U.S. 1 (1989).

<sup>96</sup> *Seminole*, 517 U.S. at 58.

<sup>97</sup> 527 U.S. 706.

<sup>98</sup> *Id.* at 715.

<sup>99</sup> *Id.* at 749.

<sup>100</sup> 535 U.S. 743 (2002).

[I]f the Framers thought it an impermissible affront to a State's *dignity* to be required to answer the complaints of private parties in federal courts, . . . they would [not] have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. The affront to a State's *dignity* does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.<sup>101</sup>

The Court's efforts to safeguard states from what seems like disrespectful behavior by citizens is further elucidated by the majority's suggestion that

[o]ne, in fact, could argue that allowing a private party to *haul* a State in front of such an administrative tribunal constitutes a greater insult to a State's *dignity* than requiring a State to *appear* in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.<sup>102</sup>

For many scholars, the re-emergence of institutional status as dignity to describe states "as if they were natural persons that could experience hurt feelings beyond those of their residents"<sup>103</sup> is enough to "strain credulity."<sup>104</sup> The Court's dissenting justices would not disagree. In rejecting the holdings in *Seminole* and *Alden*, Justice Stevens and Justice Souter, respectively, called the Court's reliance on dignity "embarrassingly

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<sup>101</sup> *Id.* at 760 (emphasis added) (citations omitted).

<sup>102</sup> *Id.* at 760 n.11 (emphasis added).

<sup>103</sup> Michael C. Dorf, *The Supreme Court, 1997 Term – Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998).

<sup>104</sup> Henry Paul Monaghan, *The Supreme Court, 1995 Term – Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 132 (1996).



insufficient,”<sup>105</sup> and noted that “[w]hatever justification there may be for an American government’s immunity from private suit, it is not dignity.”<sup>106</sup> Just how far the Court will go in expanding its state sovereign immunity jurisprudence remains to be seen, but its increasing reliance on institutional status as dignity to do so will not be uncontroversial.

### *Equality as Dignity*

#### **Egalitarianism and Universal Human Worth**

As a theoretical and practical matter, institutional status as dignity met its earliest and harshest critics during the Enlightenment. Pro-revolutionary activists sought to supplant aristocracy with democracy, and as discussed in Chapter 3, a new and more egalitarian dignity surfaced. Edmund Burke’s view that man’s dignity was simply a function of his place in the social hierarchy was forcefully countered by Thomas Paine’s call for the recognition of “the natural dignity of man.”<sup>107</sup>

In America, this shift coincided with the ratification of the Constitution, which banned titles of nobility.<sup>108</sup> Thomas Jefferson held the view that “the dignity of man is lost in arbitrary distinctions [of “birth or badge”],”<sup>109</sup> and Alexander Hamilton agreed,

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<sup>105</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 97 (1996) (Stevens, J., dissenting).

<sup>106</sup> 527 U.S. 706, 802–03 (1999) (Souter, J., dissenting).

<sup>107</sup> THOMAS PAINE, *RIGHTS OF MAN* (1791).

<sup>108</sup> U.S. CONST. art. I, § 9, cl. 8, sec. 10, cl. 1.

<sup>109</sup> Thomas Jefferson, *Answers and Observations from Demeunier’s Article on the United States*

arguing that a constitutional democracy was the “safest course for your liberty, your dignity, and your happiness.”<sup>110</sup> Change was afoot, and the rallying cry was one that recognized the equal worth of human beings.

Of course, most calls for equal dignity in the eighteenth and nineteenth centuries were not concerned with dignity for all people, but rather dignity for all white men. As Thurgood Marshall, the first African-American justice on the U.S. Supreme Court noted on the occasion of the bicentennial of the U.S. Constitution:

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document’s preamble: ‘We the People.’ When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America’s citizens. ‘We the People’ included, in the words of the framers, ‘the whole Number of free Persons.’ On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.<sup>111</sup>

Although the most vociferous calls for equal dignity ignored women and racial minorities, marginalized voices appealing to political equality for all gained some ground during the eighteenth and nineteenth centuries. Women’s rights advocate Mary Wollstonecraft, best known for *A Vindication of the Rights of Woman* (1792), argued, for example, that women and men have equal “native dignity” because as rational humans

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*in the Encyclopedie Methodique, 1786, in THOMAS JEFFERSON: WRITINGS 587 (1984), cited in Michael J. Meyer, Introduction, in THE CONSTITUTION OF RIGHTS, supra note 18, at 1, 6.*

<sup>110</sup> THE FEDERALIST No. 84.

<sup>111</sup> Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

both “were raised above the brute creation by their improvable [rational] faculties.”<sup>112</sup>

She implored women to seek out educational opportunities so that they could fully realize their rationality and “native dignity.”<sup>113</sup> During this time, the movement for racial equality also made strides, largely through slave narratives and abolitionist literature published in the nineteenth century, arguing that all humans have equal worth.<sup>114</sup>

Following the Civil War, Congress ratified the Thirteenth Amendment in 1865, which outlaws slavery, and the Fourteenth Amendment in 1868, which grants due process of law and equal protection of the laws to every American.<sup>115</sup>

Just what characteristics imbue all human beings with dignity is less often articulated in legal and political spheres. Based on the genealogy of dignity described in Chapter 3, however, we can confidently posit that most arguments for universal human dignity are derived either from a theological belief that “the dignity of the human person is rooted in his creation in the image and likeness of God,”<sup>116</sup> or from a philosophical approach that all humans have dignity because they possess a common trait worthy of recognition.

As Chapter 3 illustrates, the theological claim has been interpreted in different ways, but the central premise is that humans were created by God and have a unique

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<sup>112</sup> MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF MEN* 103 (Scholars Facsimiles and Reprints, 1960) (1790).

<sup>113</sup> MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* Ch. II-IV (1792).

<sup>114</sup> The best-known slave narrative was authored by Frederick Douglass. See *NARRATIVE OF THE LIFE OF FREDERICK DOUGLAS* (Dover ed. 1995) (1845).

<sup>115</sup> See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* (2001) (describing the social and political factors that led to the ratification of the Thirteenth Amendment).

<sup>116</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 1700. See also Barilan, *supra* note 46, at 233 (noting that “all humans are equal in terms of their *imago Dei*” and thus dignity).

worth because they share God's image and excellence.<sup>117</sup> Since all people are made in God's image, "there is no Greek or Jew, circumcised or uncircumcised, barbarian, Scythian, slave or free."<sup>118</sup> The community of humans under God is not divided by differences; it is united by virtue of its creation in God's image. This view of dignity's origins may not appeal to those who deny God's existence or otherwise reject the creation story. They may instead opt to anchor human dignity in a philosophical theory.

The metaphysical conundrum for philosophy is determining which human characteristic denotes human dignity. While most philosophers have attempted to ground dignity in humans' unique ability to reason, others have emphasized humans' ability to experience pain, form culture, teach collaboratively, have meaningful life projects, and engage in self-reflection.<sup>119</sup> The challenge posed by pinning dignity to any of these qualities, however, is that some humans may not be able to express the dignity-denoting trait. People with some mental disabilities, for example, may not have the capacity to engage most of these characteristics, but as a matter of legal equality, we include them in a vision of dignity based on universal human worth.<sup>120</sup>

One response to this problem is to claim that despite inter- and intra-human variability, all humans have dignity because, as a class, humans have the capacity to

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<sup>117</sup> Leon Kass, *Death with Dignity and the Sanctity of Life*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 323–24 (2008) [hereinafter HUMAN DIGNITY AND BIOETHICS] (explaining that "[h]uman life is to be respected more than animal life . . . because man is more than animal; man is said to be god-like").

<sup>118</sup> *Colossians* 3.

<sup>119</sup> For a discussion of which distinctively human characteristics might be considered dignity-denoting, see Holmes Rolston III, *Human Uniqueness and Human Dignity: Persons in Nature and the Nature of Persons*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 117, at 129.

<sup>120</sup> If we place those humans who do not have the particular quality that defines one as a dignity-bearer outside of the moral community, the result would be an inegalitarian view of human dignity that is inconsistent with equality as dignity.

express the relevant characteristic. An alternative response is to argue that “the human trait that provides justification for according respect to each and every human being is that each and every human being can stand in iconic relation to all humans.”<sup>121</sup> All people equally possess dignity on this view because they are representatives of humanity.<sup>122</sup> Some advocates of equal dignity may find these answers unpersuasive and prefer the theological approach, in which all humans have dignity as icons of God rather than as icons of humanity.<sup>123</sup> Still others may find neither explanation for universal human dignity compelling.

Though they differ in significant ways, both the theological and philosophical explanations can ground what I term *equality as dignity*. This type of dignity is defined by three central elements. First, the view that dignity is universal. It is an intrinsic quality of all human beings, bestowed on individuals not by social rank, but simply by nature of their humanness. A particular feature of human existence—whether it is being made in God’s image or being an icon of humanity—confers dignity. Second, dignity is permanent. Unlike institutional status as dignity, equality as dignity does not wax and

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<sup>121</sup> Avishai Margalit, *Human Dignity Between Kitsch and Deification*, 9 HEDGEHOG REV. 7 (2007).

<sup>122</sup> This appears to be the position articulated in the United Nations Declaration of Human Rights. Historical accounts of the Declaration’s drafting suggest that while the relevant delegates all agreed that equal human dignity was important, they disagreed as to what substantively made it so. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

<sup>123</sup> Both approaches, however, share an evolutionary outlook. They understand humans as the highest life form, either as God’s chosen creatures or as creatures with superior characteristics to plants and other animals. Importantly, this is a dignity as equality for humans, which by its very nature relies on the inferior status of non-humans for survival. For this reason, well-known philosopher and animal rights activist Peter Singer has claimed that the idea of according special dignity to humans is “speciesist” because it discriminates on the basis of whether a being belongs to a certain species. See PETER SINGER, *ANIMAL LIBERATION* (1975). For a different, but related perspective, see Waldron, *Dignity, Rank, and Rights*, *supra* note 64.

wane, but is instead constant. Third, as a consequence of these two features, dignity functions as a horizontal and relational value. Guided by the idea of reciprocity, all humans owe respect to, and deserve respect from each other as beings of equal worth. Whether young or old, Nobel laureate or mentally disabled, sinner or saint, all people deserve the same basic respect.

### **Shielding People from Unequal Treatment**

In the 1940s, the Supreme Court's use of dignity began to shift from its nearly exclusive focus on institutional status as dignity to a broader vision that included personal and collective types of dignity.<sup>124</sup> The Civil Rights era further cemented this change by focusing the Court's attention on equality as dignity in anti-discrimination cases. Today, the Court's equal protection jurisprudence continues to rely on equality as dignity to give substance to its egalitarian mandate.<sup>125</sup>

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<sup>124</sup> This change coincides with the end of World War II, which prompted several nations that had committed wartime atrocities to incorporate respect for human dignity into their constitutions. *See, e.g.*, Germany's Constitution: GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 1§ 1, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) ("Human dignity shall be inviolable."). It also overlaps chronologically with the adoption of the Universal Declaration of Human Rights, which gave a central place to the equal dignity of human beings G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] (stating that "all humans are born free and equal in dignity and rights"). Although one can only speculate that these events inclined the Court to pay greater attention to individual and collective dignity, its shift in that direction is unmistakable. For a more detailed discussion of the incorporation of dignity into foreign constitutions and the Universal Declaration of Human Rights, see McCrudden, *supra* note 47, at 664–67.

<sup>125</sup> *Cf.* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (exploring the evolving role of "liberty-based dignity" in equal protection law).

The first Civil Rights-era case in which the Court employed equality as dignity was *Heart of Atlanta Motel, Inc. v. United States*.<sup>126</sup> The case involved a motel operator who, in violation of Title II of the Civil Rights Act of 1964, refused service to African Americans on the basis of their race. In rejecting the motel operator’s constitutional challenge to the Act’s public accommodations provision, the Court noted that the purpose of the Act was to “vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”<sup>127</sup> In upholding Congress’ power to prohibit racial discrimination in public accommodations, the Court accepted the view that all motel patrons should receive the same service because regardless of skin color, all patrons share equality as dignity.

The Court repeated this language in upholding a Minnesota statute that prohibited gender discrimination in public accommodations.<sup>128</sup> Writing for the majority in *Roberts v. U.S. Jaycees*, Justice Brennan explained that gender discrimination similarly “deprives persons of their individual dignity,” an injury that “is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”<sup>129</sup> As in *Heart of Atlanta*, the Court recognized that people suffer dignitary harms when they are categorized in such a way as to ignore that they share equality as dignity with others.<sup>130</sup>

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<sup>126</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>127</sup> *Id.* at 250.

<sup>128</sup> 468 U.S. 609 (1984).

<sup>129</sup> *Id.* at 625.

<sup>130</sup> The Court reiterated the nature of this harm in *Rice v. Cayetano*, 528 U.S. 495 (2000), a case involving Hawaii’s voting statute. A citizen of Hawaii challenged the law, which barred him from voting because he was neither a “native Hawaiian” nor a descendant of inhabitants of the

More recently, the Court has extended its use of equality as dignity to prohibit jury selection based on race or gender. In *Powers v. Ohio*,<sup>131</sup> the Court considered whether a prosecutor's use of peremptory challenges to exclude otherwise qualified jurors on the basis of race violated the Equal Protection Clause. It concluded that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."<sup>132</sup> The Court warned that by actively engaging in racial discrimination, the prosecutor's behavior may even cast "doubt upon the credibility or dignity of a witness" merely because of the color of their skin.<sup>133</sup> In articulating its use of equality as dignity, the Court rejected the suggestion that

no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence.<sup>134</sup>

Similar reasoning animates the Court's decision in *J.E.B. v. Alabama ex rel. T.B.*,<sup>135</sup> which held that gender, like race, is an unconstitutional basis for juror selection. Invoking the notion of equality as dignity, the Court explained that eliminating jurors

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Hawaiian Islands. In holding that the statute violated the Fifteenth Amendment because it used ancestry as a proxy for race, the Court explained that "[o]ne 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." *Id.* at 517.

<sup>131</sup> 499 U.S. 400 (1991).

<sup>132</sup> *Id.* at 402. *Accord* *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

<sup>133</sup> *Powers*, 499 U.S. at 412.

<sup>134</sup> *Id.* at 410.

<sup>135</sup> 511 U.S. 127 (1994).



solely because of their gender “is ‘practically a brand upon them, affixed by the law, an assertion of their inferiority.’ It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation.”<sup>136</sup> In each of these decisions, the Court relies on equality as dignity to direct attention to the nature of the harm that marginalized individuals or groups experience as the result of differential treatment.

### *Liberty as Dignity*

#### **Liberalism and Individual Self-Determination**

The notion that humans deserve respect as free, autonomous, sovereign, and self-determined agents is so entrenched in modern American thought as to appear self-evident, but the idea draws its strength from a long tradition of political liberalism.<sup>137</sup> Its origins can be traced back to ancient Greece and Rome, where the Stoics were among the first thinkers to connect humans’ unique capacity for moral reasoning with their

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<sup>136</sup> *Id.* at 142 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

<sup>137</sup> Although liberalism can encompass a variety of positions—e.g., “new,” “old,” “revisionist,” “welfare state,” or “social justice” liberalism, to name a few—it is only relevant for the purposes of this project that liberty is at the crux of all liberal theory. Gerald F. Gaus, *The Diversity of Comprehensive Liberalisms*, in *THE HANDBOOK OF POLITICAL THEORY* 100–14 (Gerald F. Gaus & Chandran Kukathas eds., 2004). The central belief that freedom is normatively basic and restrictions on freedom therefore require justification is found in the work of modern liberal theorists, such as Joel Feinberg and John Rawls, and in the work of their predecessors, John Stuart Mill and John Locke. Compare JOEL FEINBERG, *HARM TO OTHERS* 9 (1984), and JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 44, 112 (2001), with JOHN STUART MILL, *COLLECTED WORKS OF JOHN STUART MILL* 262 (J.M. Robson ed., University of Toronto Press 1963), and JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689).

dignity.<sup>138</sup> This view was subsequently taken by Pico della Mirandola during the Renaissance,<sup>139</sup> and Immanuel Kant and John Locke during the Enlightenment,<sup>140</sup> all of whom maintained that humans' dignity was derived from a natural freedom that should not be infringed without appropriate justification.<sup>141</sup>

The ultimate advocate of the connection between human liberty and human dignity was Kant. As discussed in detail in Chapter 3, Kant claimed that human dignity derives from autonomy, the distinctively human ability to discern the moral law and live by it.<sup>142</sup> In his view, people deserve respect because their capacity for moral direction makes them ends in themselves.<sup>143</sup> The well-known Kantian maxim that people ought to

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<sup>138</sup> WESTERN CIVILIZATION: IDEAS, POLITICS, AND SOCIETY 113 (Marvin Perry et al. eds., 2009).

<sup>139</sup> See Pico della Mirandola, *Of the Dignity of Man*, in 3 J. HIST. IDEAS 347–54 (Elizabeth Livermore Forbes trans., 1942) (claiming that man's dignity rested in his ability to direct his future).

<sup>140</sup> See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed., 1997) (1785) [hereinafter GROUNDWORK]; LOCKE, *supra* note 137.

<sup>141</sup> The notion that one's liberty should not be disturbed without proper political authority and justification appears in social contract theory as well. See JEAN-JACQUES ROSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole trans., Dutton Books 1973) (1762); THOMAS HOBBS, LEVIATHAN (Michael Oakeshott ed., Blackwell Press 1948) (1651).

<sup>142</sup> See KANT, GROUNDWORK, *supra* note 140, at 4:436 (“Autonomy is thus the ground of the dignity of the human and of every rational nature.”). *But cf.* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971). Skinner denies that people have the capacity to be morally responsible in their decisions. He contends, from a behaviorist perspective, that because human action is determined by factors beyond individual control, it cannot be the basis of human dignity.

<sup>143</sup> This justification for liberty can also ground claims for equality. Some philosophers, for example, have argued that Kant's maxim is as much about equality as liberty, citing as evidence the fact that he was influenced by Pufendorf's *De Officio*. See John Laird, *The Ethics of Dignity*, 15 PHIL. 131, 131–32 (1940). Pufendorf wrote that

Even the word *man* is thought to contain a certain dignity, so that the last and most effective argument in repelling the insolent contempt of others is this: “I am certainly not a dog, but a man as well as you.” Every man, therefore, should esteem and treat every other as naturally his equal, that is, as a man even as he is.

PUFENDORF, DE OFFICIO, at I, vii. For a modern view of the connection between equality and liberty, see, e.g., MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 5 (1999) (explaining that

be treated as ends and not simply as means demonstrates the kind of respect that Kant believed dignity warranted.<sup>144</sup> For Kant, dignity generated not only an obligation to respect people's free will, but the concomitant obligation not to abrogate it by treating them as an instrument of another's free will.<sup>145</sup> Although Kant's work continues to be dissected, contested, and reconfigured by contemporary philosophers,<sup>146</sup> he is nevertheless considered by many to be "the father of the modern concept of human dignity."<sup>147</sup>

Not surprisingly, in the United States—where freedom, individualism, and autonomy are deeply held values—a type of dignity I call *liberty as dignity* resonates powerfully. Unlike equality as dignity, this form of dignity is neither intrinsic nor universal. A person has liberty as dignity only insofar as he can make autonomous choices. Because it is capacity-driven, dignity of this kind is contingent; one can gain or

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"this idea of equal worth is connected to an idea of liberty: to respect the equal worth of persons is, among other things, to promote their ability to fashion a life in accordance with their own view of what is deepest and most important").

<sup>144</sup> See KANT, *GROUNDWORK*, *supra* note 140, at 4:429.

<sup>145</sup> Isaiah Berlin's notion of "positive liberty" is analogous. He describes a person's "wish to be a subject, not an object . . . deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them." Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY: INCORPORATING 'FOUR ESSAYS ON LIBERTY'* 166 (Henry Hardy ed., Oxford University Press 2002).

<sup>146</sup> Kant's influence is evident in the work of many of his strongest critics. See, e.g., ROBERT PIPPIN, *HEGEL'S IDEALISM* (1989) (explaining that Hegel's concerns about Kant's philosophy shaped Hegel's own account of morality); ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND REPRESENTATION* (E.F.J. Payne trans., Dover Publications 1966) (1958) (rejecting rationalistic, Kantian conceptions of the world in favor of the "Will"); Ayn Rand, *Brief Summary*, *THE OBJECTIVIST*, Sept. 1971, at 4 (opposing Kantian liberalism in favor of her own theory of objectivism).

<sup>147</sup> Giovanni Boggetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in *EUROPEAN AND U.S. CONSTITUTIONALISM: SCIENCE AND TECHNIQUE OF DEMOCRACY* 85 (Georg Nolte ed., 2005).

lose it over a lifetime. Young children and mentally incapacitated individuals, for example, do not qualify for liberty as dignity, but it is not foreclosed to them if and when they gain mental competence.

Liberty as dignity commands respect at two levels: First, respect for individual choice, and second, respect for individuals because they have the capacity for choice. These two forms of respect are mutually reinforcing. Since exercising our free will is the mechanism by which we express our liberty as dignity, it is especially important that we encourage and support autonomous decisions. At the same time, because people have the unique ability to shape their future through their actions, they must not be treated as objects of others' desires. Unlike equality as dignity, liberty as dignity can be violated, diminished, or even destroyed by actions that fail to appropriately respect human self-determination.

### **Securing the Conditions for Self-Realization**

The Court's application of liberty as dignity appears most prominently in cases involving personal decisions, such as the choice to have an abortion, engage in same-sex intimacy, or enter a same-sex marriage. In these contexts, liberty as dignity has played a critical role in securing "choices, decisions and preferences that enable humans to shape their lives,"<sup>148</sup> and it appears poised to have an even greater influence in the future.

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<sup>148</sup> F. James Frye, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, 70 SASKATCHEWAN L. REV. 1, 3 (2007).

The Court first invoked the language of liberty as dignity in the abortion context in the 1986 case, *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>149</sup> *Thornburgh* involved a challenge to certain provisions of the Pennsylvania Abortion Control Act that related to informed consent, dissemination of material about abortion, physician reporting, and post-viability abortions. After reviewing the range of individual decisions that the Court had previously cordoned off from government interference,<sup>150</sup> the Court placed liberty as dignity at the crux of its decision striking down the provisions as unconstitutional.

Justice Blackmun, writing for the Court, maintained that “few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy. A woman’s right to make that choice freely is fundamental.”<sup>151</sup> In so holding, the Court highlighted that “measures seemingly designed to prevent a woman . . . from exercising her freedom of choice,” were inconsistent with liberty as dignity.<sup>152</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>153</sup> a plurality of the Court again employed liberty as dignity in the abortion context. At issue in *Casey* was again the constitutionality of provisions of the Pennsylvania Abortion Control Act.

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<sup>149</sup> 476 U.S. 747 (1986).

<sup>150</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried couples to access contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to access contraception); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct the education and upbringing of one’s children).

<sup>151</sup> 476 U.S. 747, 772 (1986), *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

<sup>152</sup> *Id.* at 759.

<sup>153</sup> 505 U.S. 833 (1992).

As amended in 1988 and 1989, the Act in relevant part stipulated a twenty-four-hour waiting period before an abortion procedure; parental consent with the option of judicial bypass for minors; spousal notification for married women; and physician reporting requirements.<sup>154</sup> Unlike in *Thornburgh*, the Court upheld as constitutional all of the statutory provisions except the spousal notification requirement, which violated the Court's newly proffered undue burden standard.

In so holding, the Court's plurality was careful to note that although the undue burden test was a step away from *Roe v. Wade*'s more permissive abortion framework, the Court's interest in protecting liberty as dignity was unwavering. As in *Thornburgh*, the opinion placed abortion on the same legal plane as "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"<sup>155</sup> but then it took a significant step in a new direction. In the now-famous "mystery of life" passage, the plurality opinion by Justice O'Connor announced that

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. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>156</sup>

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<sup>154</sup> 18 PA. CONS. STAT. §§ 3203-3220 (1990).

<sup>155</sup> *Casey*, 505 U.S. 833, 851.

<sup>156</sup> *Id.*

Just how far the Court is willing to press liberty as dignity into the service of safeguarding individual's life choices remains to be seen, but the Court's opinions in the landmark cases of *Lawrence v. Texas* and *Obergefell v. Hodges* hint at an answer.<sup>157</sup> In *Lawrence*, a decision invalidating Texas's anti-sodomy statute, the Court defended "choices central to personal dignity and autonomy."<sup>158</sup> Writing for the majority, Justice Kennedy explained that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.... The liberty protected by the Constitution allows homosexual persons the right to make this choice."<sup>159</sup>

The most telling use of dignity in *Lawrence*, however, appears in the Court's recitation of the so-called "mystery of life" passage from *Casey*. Confirming that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"<sup>160</sup> the Court went on to restate its view that "choices central to personal dignity [such as] ... the right to define one's own concept of existence, of meaning, of the

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<sup>157</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>158</sup> *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). Though the Court mentions privacy, it is clear that liberty as dignity "is doing all the work." Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 34.

<sup>159</sup> 539 U.S. at 567. Importantly, the Court also invokes personal integrity as dignity in its claims that individuals have a right to be free from the demeaning nature of a law that condemns their homosexual activity. I discuss this aspect of *Lawrence* in the section on personal integrity as dignity, below.

<sup>160</sup> *Id.* at 574.

universe, and of the mystery of human life”<sup>161</sup> are protected by the substantive due process prong of the Fourteenth Amendment.

As some commentators have noted in analyzing *Lawrence*, the Court’s use of liberty as dignity takes “it further than in any previous decision”<sup>162</sup> and “may presage a new jurisprudence”<sup>163</sup> that forbids states from restricting any activity that is “somehow connected with efforts ‘to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’”<sup>164</sup> This possibility was not lost on Justice Scalia, who observed in his dissent in *Lawrence* that the Court’s reasoning would “have far-reaching implications.”<sup>165</sup>

Indeed, in June 2015, the Court invoked dignity nine times in the majority opinion in *Obergefell v. Hodges*, the landmark case that held that state bans on same-sex marriage are unconstitutional. While not all of these appeals to dignity can be categorized under the rubric of *liberty as dignity*—as I discuss in the section below on personal integrity and then again in Chapter 5—a central thrust of the Court’s opinion was that the Constitution’s liberty guarantee extends “to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and

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<sup>161</sup> *Id.* (quoting *Casey*, 505 U.S. at 851).

<sup>162</sup> Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 241 (2008).

<sup>163</sup> Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1583 (2004) (“[I]t appears that *Lawrence* may have created a constitutional right, not just to engage in sodomy, but to enjoy the government’s respect for engaging in sodomy.”). See also Yoshino, *supra* note 125, at 778–81 (arguing that the Court’s decision reveals a hybrid liberty-equality claim that may have force in future cases),

<sup>164</sup> Lund & McGinnis, *supra* note 163, at 1583.

<sup>165</sup> *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).



beliefs,” such as marriage.<sup>166</sup> As the Court explained, marriage is a choice that “shapes an individual’s destiny,” and because “it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”<sup>167</sup> For better or worse, the Court’s reliance on dignity in *Obergefell*, has indelibly marked dignity as a linchpin of individual rights in modern American constitutional jurisprudence.

### *Personal Integrity as Dignity*

#### **Aristotelian Virtue and the Dignified, Whole Self**

In a pluralistic, liberal democracy that values equality and liberty as dignity, it may seem anachronistic to suggest that humans are more or less dignified on the basis of how they conduct themselves and how they are treated. Nevertheless, we say that people who persevere in the face of adversity, maintain composure in spite of fear, and display self-control despite great suffering are *dignified*, while people who become vulnerable to their circumstances, express unharnessed appetites, and expose their bodily nakedness or

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<sup>166</sup> *Obergefell*, 135 S. Ct. 2584, 2597 (2015) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)). *See also id.* at 2599 (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”). *But see id.* at 2616 (Roberts, J., dissenting) (“There is, after all, no . . . “Nobility and Dignity” Clause in the Constitution.”); *id.* at 2639 (“[T]he Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity.”) (Thomas, J., dissenting).

<sup>167</sup> *Id.* at 2599 (citing *Goodridge v. Dept. Pub. Health*, 798 N.E. 2d 941, 955 (Mass. 2003)).

mental fragility are *undignified*. Most people, however, live at a baseline between the two extremes, with few achieving the highest level of human virtue,<sup>168</sup> and some falling intermittently into disrepute.

As Chapter 3 illustrates, this notion of dignity is part of a discourse on excellence and virtue that dates back to the ancient Greek and Roman philosophers. Aristotle, and the moral theorists before him,<sup>169</sup> employed the Greek word *arête*—meaning virtue or excellence—to describe a natural or artificial object that has become the best example of the thing that is.<sup>170</sup> The *arête* of a knife, for example, is its sharpness; the *arête* of a race horse is its speed. While the Athenian statesmen or the Homeric warrior could be examples of human *arête*,<sup>171</sup> Aristotle understood that a variety of human characteristics—deliberation, wisdom, self-respect, courage, and self-control, among others—could make humans fitting, or excellent, examples of their kind.

Drawing on this view of *arête*, as well as Aristotle's uses of the Greek words *dikaios* and *axia*, the Roman philosopher Cicero subsequently adopted the language of dignity to describe the quality of achieving human excellence. In his famous work, *De*

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<sup>168</sup> As a matter of law, most states do not require individuals to engage in supererogatory behavior. For example, the vast majority of states do not compel bystanders to provide emergency aid to people in need, or even call 911. *See, e.g.*, MASS. GEN. LAWS ch. 112, §12 (2009); N.Y. PUB. HEALTH LAW §§ 3000-3013 (2009) (providing legal immunity to people who provide emergency medical services, but not requiring such behavior). Exceptions to that general standard include Minnesota and Vermont, both of which have Good Samaritan laws that require any person at the scene of an emergency to provide reasonable assistance to another person in need. *See* MINN. STAT. § 604A.01 (2009); VT. STAT. ANN. tit. 12, § 519 (2009).

<sup>169</sup> Socrates, for example, suggests that wisdom is the most important human virtue because it allows man to make the best use of his other assets, such as health, wealth, justice, and courage. PLATO, *Euthydemus*, in LACHES; PROTAGORAS; MENO; EUTHYDEMUS §§ 281b-c (W.R.M. Lamb trans., Harvard Univ. Press 1977).

<sup>170</sup> Richard Parry, *Ancient Ethical Theory*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. Aug. 2009), <http://plato.stanford.edu/entries/ethics-ancient/>.

<sup>171</sup> *Id.*

*Officiis*, discussed in Chapter 3, Cicero explains that “[w]e must keep ourselves from every disturbing emotion ... so that we may enjoy ... both moral stability and dignity (*dignitatem*) of character.”<sup>172</sup> In another passage from the same treatise, he explains that if humans “wish to reflect on the excellence and worthiness (*dignitas*) of our nature, then we shall realize how dishonorable it is to sink into luxury and to live a soft and effeminate lifestyle, but how honorable to live thriftily, strictly, with self-restraint, and soberly.”<sup>173</sup> Together, these and other excerpts noted in Chapter 3, exemplify Cicero’s view that humans should strive to express those characteristics befitting the excellence of human nature.<sup>174</sup>

Importantly, Aristotle and his philosophical progeny believed that people’s personal circumstances may affect, or even limit, their ability to express the dignity associated with human excellence and virtue. For instance, to display perseverance, one must face adversity; to exhibit courage, one must confront fear; and to express fortitude, one must resist fatigue.<sup>175</sup> Conversely, some lives are so disintegrated that individuals do

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<sup>172</sup> CICERO, ON DUTIES § I.69 (M.T. Griffin & E.M. Atkins eds., Cambridge Univ. Press 1991).

<sup>173</sup> *Id.* at 41.

<sup>174</sup> A humorous exposition of this use of dignity can be found in the works of the ancient Roman dramatist Plautus (254 B.C.E. – 184 B.C.E.), who applied this form of dignity in a number of his slapstick comedies. *See, e.g.*, PLAUTUS, *Pseudolus*, in THE POT OF GOLD AND OTHER PLAYS § 1013 (E.F. Watling ed., Penguin Books 1965) (explaining that it is fitting, “*dignum*,” to send letters of good wishes to people they befit, “*dignis*,” but concluding that because his interlocutor is not worthy, “*dignum*,” of such a letter, he will not bother sending him one); PLAUTUS, *Rudens*, in THREE PLAYS OF PLAUTUS: THE SLIP-KNOT (RUDENS), THE CROCK OF GOLD (AULULARIA), THE TRICKSTER (PSEUDOLUS) § 1306 (F.A. Wright trans., Rutledge & Sons 1925) (commenting that one character’s form is fitting, “*digna forma*,” of his profession—that he looks like the beggar he is).

<sup>175</sup> Cicero explained that it is “a great and admirable distinction to have borne adversity wisely, not to have been crushed by misfortune, and not to have lost dignity in a difficult situation.” CICERO, DE ORATORE § II.346 (E.W. Sutton trans., Harvard Univ. Press 1960). Accordingly, actions that are extraordinary in one context may be unremarkable in others. The fact that Nelson

not have the opportunity to exercise or develop the capacities for human excellence or dignity.<sup>176</sup> In these latter cases, people cannot become virtuous or dignified examples of humanity because, to quote Aristotle, they lack the basic “wholeness” that one needs as a baseline from which to excel.<sup>177</sup>

I refer to the type of dignity that applies both to people who convey a constellation of virtuous characteristics, and to those who are prevented by circumstance from expressing such characteristics, as *personal integrity as dignity*. This form of dignity has several features. First, personal integrity as dignity starts with the Aristotelian notion that humans cannot express this form of dignity unless they are integrated, whole selves. I use the word integrity to define this form of dignity because it is derived from the Latin word *integritās*, meaning “whole,”<sup>178</sup> “undivided . . . unbroken completeness or totality.”<sup>179</sup> A person who has personal integrity as dignity can excel

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Mandela completed his law degree from the University of London while he was a political prisoner in South Africa suggests he possesses an extraordinary amount of mental strength, courage, and perseverance. We would not say the same thing about his fellow graduates who completed their degrees in residence.

<sup>176</sup> Martha Nussbaum’s excellent work on human capabilities expresses this Aristotelian view. See MARTHA CRAVEN NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2007); MARTHA CRAVEN NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); NUSSBAUM, *supra* note 143; Martha Nussbaum, *Human Dignity and Political Entitlements*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 117, at 351–80.

<sup>177</sup> See MICHAEL A. SMITH, *HUMAN DIGNITY AND THE COMMON GOOD IN THE ARISTOTELIAN-THOMISTIC TRADITION* 6–15 (1995) (describing Aristotle’s theory of the “one” or “whole” person).

<sup>178</sup> *Integrity*, WORDNET, <http://wordnetweb.princeton.edu/perl/webwn?s=integrity> (last visited Nov. 17, 2015).

<sup>179</sup> *Id.* See also Margaret E. Mohrmann, *On Being True to Form*, in *HEALTH AND HUMAN FLOURISHING: RELIGION, MEDICINE, AND MORAL ANTHROPOLOGY* 89 (Carol R. Taylor & Robert Dell’Oro eds., 2006) (defining integrity from a Christian theological perspective and considering its role in bioethics, medicine, and health); Margaret E. Mohrmann, *Integrity: Integritas, Innocentia, Simplicitas*, 24 *J. SOC’Y CHRISTIAN ETHICS* 25 (2004) (exploring the evolution of the term “integrity” and its place in Christian ethics).

because he is morally, mentally, and physically intact, whereas a person who has fallen below a certain human baseline is “in pieces.” To use common colloquialisms, we might say that the former is “put together”, while the latter has “fallen apart,” “broken down,” or “dis-integrated.”

Second, personal integrity as dignity commands internal and external respect. It can be destroyed or diminished by one’s own actions—as when a person acts “beneath his dignity”—or it can be destroyed or diminished by the actions of others—as when a person is “robbed of his dignity.” In either sense, a person can be rendered undignified by acts that degrade, debase, and diminish the individual’s appearance as a collected, unified self.

Third, the language that we use to describe dignified and undignified states of being, illustrate that personal integrity as dignity is presentational and expressive. How a person conducts himself publicly matters; whether a person speaks, walks, and carries himself with a sense of dignity counts. A slave, who has been denied equality and liberty, can nevertheless possess personal integrity as dignity by expressing his sense of moral worth and self-respect in the face of oppression. In so doing, the slave is expressing that despite what his owner has taken from him, he remains whole, complete, and dignified.

By contrast, how a person is treated by others also has expressive implications for personal integrity as dignity. Recall the internationally televised capture of Saddam Hussein by U.S. forces in Iraq. Stripped of his military uniform and subjected to a public delousing, Hussein was reduced to a pale specter of his former self. The expressive and public function of the televised photos was to demonstrate that American military forced

had “broken” Hussein. They had destroyed his personal integrity as dignity by “dressing him down”—both literally and figuratively—and demonstrating that the undignified, debased, and degraded sub-human on television no longer posed a world threat.

Fourth, as the presentational and expressive nature of personal integrity as dignity suggests, there is often an aesthetic element to this form of dignity. People who appear poised, graceful, polished, and stately are said to have “an air of dignity about them.” They can present themselves as a strong, unified whole. By contrast, people who look unsightly, unseemly, uncomely, inelegant, disgraceful, or even revolting are viewed as undignified. The latter have often lost their self-respect—in many cases, it has been taken from them—and they have “fallen apart”<sup>180</sup> under conditions that are aesthetically unsettling, embarrassing, humiliating, shameful, disgraceful, demeaning, and self-destructive.<sup>181</sup>

### **Protecting Individuals from Dis-integration**

Personal integrity as dignity can be threatened in two contexts. The first circumstance occurs when people are judged on the basis of single, personal trait that

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<sup>180</sup> See, e.g., Michael S. Pritchard, *Human Dignity in Justice*, 82 ETHICS 299, 301 (1972) (explaining that “whether one can ‘hold himself’ together” is central to the notion of personal integrity).

<sup>181</sup> For discussions about the use and implications of shaming and humiliation in a variety of settings, see, for example, DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2008) (demonstrating the individual and social costs of unconstrained gossip, slander, and rumor in cyberspace); Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006) (concluding that shaming punishments are not acceptable to a significant segment of society and therefore recanting his previous argument that shaming sanctions are expressively equal to imprisonment); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004) (criticizing the use of stigmatization, shame, and humiliation as a cure for criminal wrongdoing and perceived social degeneracy).

others deem inconsistent with human virtue. The second case arises when people are unable to present themselves as composed, dignified, whole selves capable of human virtue. The Supreme Court has invoked personal integrity as dignity in both situations to protect individuals from views or activities that are damaging to the integrated self.

### *When the Self is Reduced to a Single Characteristic*

Society frequently judges people on the basis of a single, personal trait. In some cases, attention is drawn to a trait because possessing it is what makes someone a particularly virtuous or excellent (*arête*) example of that which they do.<sup>182</sup> For example, an opera singer is commended for a strong voice; a surgeon for steady hands; and a ballet dancer for graceful feet. In other cases, however, a particular characteristic is singled out to suggest that people who possess it are not (or cannot become) exemplars of humanity. Alcoholics, drug addicts, and thieves, for instance, are frequently described on the basis of a trait that others believe prevent them from achieving human excellence. The defining trait or characteristic at issue is viewed as so shameful as to disqualify the people who possess or express it from a trajectory of human excellence or virtue.

The Court has relied on personal integrity as dignity to describe and prevent the harm that results when—through one’s own or others’ actions—a personal trait of this kind is thrust into the public arena, causing all other personal features to fade into the background. Examples can be found in the Court’s First Amendment defamation and

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<sup>182</sup> It is not accidental that we call people who are technically gifted in the fine arts, virtuosos.

Sixth Amendment self-representation cases, as well as in the Court's *Obergefell* decision on same-sex marriage.

In defamation suits, the Court has opined that when one alleged negative fact about a person (whether true or false) becomes all that a person's social group sees and knows of that person, his personal integrity as dignity is at risk. In *Milkovich v. Lorain Journal Co.*,<sup>183</sup> the Court explored whether a newspaper article, which implied that the petitioner had lied under oath during a judicial proceeding, was constitutionally protected speech. The article, in relevant part, suggested that Milkovich, a high-school wrestling coach, had knowingly committed perjury during a hearing to investigate an altercation between his team and a team from another high school that resulted in injuries to several people. Milkovich maintained that the attack on his veracity damaged his reputation and his life-time occupation as a coach and teacher.<sup>184</sup>

Although the Court had previously recognized the First Amendment's "vital guarantee of free and uninhibited discussion of public issues" for defendants in defamation actions,<sup>185</sup> it chose instead to recognize another side to the equation; namely, a strong interest in protecting people against affronts to their personal integrity as dignity. Quoting an earlier opinion by Justice Stewart, the Court explained that "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt

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<sup>183</sup> 497 U.S. 1 (1990).

<sup>184</sup> *Id.* at 7.

<sup>185</sup> *Id.* at 22. *Cf.* *Cohen v. California*, 403 U.S. 15 (1971) (rejecting the notion that the petitioner's decision to display a vulgar four-letter word on his jacket amounted to "fighting words" likely to incite violence). In contrast to the Court in *Milkovich*, the majority in *Cohen* focused on the speaker's interest in liberty as dignity. Justice Harlan, writing for the Court, reasoned that although freedom of expression can create "verbal tumult, discord, and even offensive utterance . . . no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* at 24–25.



reflects no more than our basic concept of the essential *dignity* and worth of every human being.”<sup>186</sup> In restricting the newspaper’s speech, the Court gave greater weight to Milkovich’s interest in protecting his personal integrity as dignity than the journalist’s or public’s interest in liberty as dignity.

The Court similarly has invoked personal integrity as dignity to prevent an individual from ruining his own reputation. The decision in *Indiana v. Edwards* is a rare case in which the Court limits individual autonomy to protect personal integrity as dignity.<sup>187</sup> The case involved a mentally ill man who was judged competent to stand trial and who invoked his constitutional right to self-representation. In a 7-2 decision, the Court held that the Sixth Amendment right to self-representation can be abrogated when exercising that right will not “affirm the dignity” of the defendant.<sup>188</sup>

In the Court’s view, although liberty as dignity underlies the self-representation right,<sup>189</sup> the “spectacle that could well result from [the defendant’s] self-representation at trial is at least as likely to prove humiliating as ennobling.”<sup>190</sup> Whether the attack on a person’s reputation is external or inadvertently internal, the Court’s opinions in *Milkovich* and *Edwards* suggest that when a single negative attribute is permitted to overshadow an entire persona, personal integrity as dignity is diminished.

This view of personal integrity as dignity also animates the Court’s opinion in *Obergfell*. Although the Court in that case grounds its substantive due process analysis in

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<sup>186</sup> *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

<sup>187</sup> 554 U.S. 164 (2008).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) for the proposition that “‘Dignity’ and ‘autonomy’ of individual[s] underlie [the] self-representation right”).

<sup>190</sup> *Id.*

a notion of liberty as dignity, as discussed above, the Court also invokes personal integrity as dignity to describe the dignitary harm that bans on same-sex marriage impose on homosexual couples. Using both the language of dignity and integrity, the Court explains that “[e]ven when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions,” which made same-sex intimacy a crime in many states.<sup>191</sup> As the Court explains, anti-sodomy laws, as well as the American Psychological Association’s decision to treat homosexuality as a mental illness,<sup>192</sup> reduced people who did not fit heteronormative definitions of sexuality to a part of their whole being, namely their sexual orientation.

### *When the Self Cannot Express its Wholeness*

Justices on the Court also have invoked personal integrity as dignity to describe situations in which a person is only able to present himself as a part or function of his full self, rather than a unified, composed, or collected whole. In this respect, the *Obergefell* decision is also important, because it recognizes dignitary harm to individuals’ personal integrity when a prohibition on same-sex marriage prevents them from expressing their wholeness, both as individuals and a married unit. In particular, the Court comments that

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<sup>191</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

<sup>192</sup> *Id.*

“there is dignity in the bond between two men or two women who seek to marry,”<sup>193</sup> insofar as it connects couples to “rights as a unified whole.”<sup>194</sup> When same-sex couples are denied the right to marry, the Court explains, they frequently are also disconnected from rights to establish a home and raise children, both of which are expressions of their unity and wholeness.<sup>195</sup>

The dignitary harm they suffer to their personal integrity, also negatively affects their children’s ability to holistic self-expression. Hence, the Court notes, same-sex marriage is important because it allows children to “understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>196</sup> In the absence of same-sex marriage, same-sex couples and their children suffer stigma and humiliation of being lesser selves than heterosexually-formed families. In short, the Court concludes, laws that deny “homosexuals...dignity in their own distinct identity” are unconstitutional.<sup>197</sup>

Even before *Obergefell*, the Court employed personal integrity as dignity to invalidate laws that impede the ability of individuals to protect or express their wholeness. Justice Scalia proffers such a notion of personal integrity as dignity four times in his dissenting opinion in *National Treasury Employees Union v. Von Raab*.<sup>198</sup> In that case, the Court held that the U.S. Customs Service’s drug-screening program, which

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<sup>193</sup> *Id.* at 2599.

<sup>194</sup> *Id.* at 2600.

<sup>195</sup> *Id.*

<sup>196</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

<sup>197</sup> *Obergefell*, 135 S. Ct. at 2596.

<sup>198</sup> 489 U.S. 656 (1989).

compelled employees to submit to urinalysis, was reasonable as applied to certain employees because the testing furthered a compelling government interest in safeguarding the nation's borders.

Rejecting the Court's reasoning, Justice Scalia asserted that demanding an employee "perform 'an excretory function traditionally shielded by great privacy' while 'a monitor of the same sex . . . remains close at hand to listen for the normal sounds' . . . [is] offensive to personal dignity."<sup>199</sup> What makes it an "affront to [the employees'] dignity" is not just that the drug test is involuntary,<sup>200</sup> but that it is intrusive, embarrassing, and undignified.<sup>201</sup> Justice Scalia depicts the drug testing in the way he does to illustrate that it is "an immolation of . . . human dignity"<sup>202</sup> tied to the "coarsening of our national manners"<sup>203</sup> and our failure to respect people's desire to present themselves as dignified, composed, and complete.

The idea that personal integrity as dignity is implicated when the state observes individuals engaged in less than savory activities before they have a chance to collect themselves is not an opinion held by Justice Scalia alone. Writing for the full Court in

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<sup>199</sup> *Id.* at 680 (Scalia, J., dissenting) (citation omitted) (first alteration in the original).

<sup>200</sup> *Id.* at 686.

<sup>201</sup> In his dissent in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), a drug-testing case decided the same day as *Von Raab*, Justice Marshall, joined by Justice Brennan, concluded that compelled drug testing "significantly intrudes on the 'personal privacy and dignity against unwarranted intrusion by the State' against which the Fourth Amendment protects." *Id.* at 644 (Marshall, J., dissenting) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)). He noted that in "[o]ur culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as distracting from one's dignity and self-esteem." *Id.* at 646 (quoting Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 487 (1968)).

<sup>202</sup> *Von Raab*, at 681 (emphasis added).

<sup>203</sup> *Id.* at 687.

*Hudson v. Michigan*,<sup>204</sup> a case involving the failure of the police to announce their presence before conducting a warrantless search, Justice Scalia explained that the purpose of the knock-and-announce rule is to protect

those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the “opportunity to prepare themselves for” the entry of the police. . . . “The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.” . . . In other words, it assures the opportunity to collect oneself before answering the door.<sup>205</sup>

In *Hudson*, as in Scalia’s dissenting opinion in *Von Raab*, the search that affronted personal integrity as dignity involved exposing an individual to others when he was indecent, improper, undressed, ungraceful, or uncollected; in short, undignified. Like circumstances in which a whole individual is reduced to a solitary trait, situations that prevent individuals from expressing their wholeness, are dis-integrating and an affront to personal integrity as dignity.

### ***Civic Virtue as Dignity***

## **Communitarianism and Humanity’s Collective Virtue**

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<sup>204</sup> 547 U.S. 586 (2006).

<sup>205</sup> *Id.* at 594 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 (1993)).

Thus far we have traced institutional status as dignity to aristocracy, equality as dignity to egalitarianism, liberty as dignity to political liberalism, and integrity as dignity to Aristotelian virtue theory. The final sphere of dignity, which I call *civic virtue as dignity*, is rooted in communitarianism.<sup>206</sup> It addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity. It is less concerned with individual dignity per se than with how a society values the totality of human life.

Civic virtue as dignity has several defining characteristics. Notably, it extends the Aristotelian notion of personal excellence to the entire human community. Instead of distinguishing one person from another on the basis of individual virtue, civic virtue as dignity refers to the excellence of the human species. This excellence recognizes humans as the best example of the animal kingdom.<sup>207</sup> Accordingly, civic virtue as dignity is expressed when people behave and are treated in ways worthy of humans, not beasts.<sup>208</sup> When society treats people in ways that are *in*-humane, or when people engage in activities that are *de*-humanizing, civic virtue as dignity is diminished.

Civic virtue as dignity is therefore iconographic and expressive. Treating a person in a sub-human manner is wrong not only for the effect it has on that individual, but also for the consequences it has on collective humanity and society. Critics of

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<sup>206</sup> MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

<sup>207</sup> For a variety of perspectives on what renders humanity unique among creatures, see Rolston, *supra* note 119, at 129–54; Nick Bostrom, *Dignity and Enhancement*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 117, at 173–206; Gilbert Meilaender, *Human Dignity: Exploring and Explicating the Council's Vision*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 117, at 253–77.

<sup>208</sup> President's Council on Bioethics, *Human Dignity*, in *BEING HUMAN: CORE READINGS IN THE HUMANITIES* 568 (Leon Kass ed., 2004).

torture, for example, believe that it ought to be prohibited not simply because it violates the autonomy and integrity of the tortured individual and subjects them to extreme pain and suffering, but also because torture is anathema to civilized societies that ought to rule with laws meant for people, rather than brutality and savagery unfitting even for beasts.<sup>209</sup> Torture, on that view, undermines civic virtue as dignity.

Conversely, when individuals engage in undignified conduct, their acts may threaten humanity's shared civic virtue as dignity. Consider the famous French dwarf-tossing case mentioned in Chapter 1. In that case, the French Conseil d'État granted police power to prevent any public activities that failed to respect human dignity. Accordingly, two municipalities banned the spectacle of dwarf-tossing in local clubs.<sup>210</sup> The ban was challenged by Manuel Wackenheim, one of the dwarfs, who argued that he freely participated in the activity, for which he was paid, and that the ban would result in his unemployment. The Conseil d'État ruled that using humans as projectiles was

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<sup>209</sup> Several international laws prohibit torture. *See* International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (stating in article 7 that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (requiring states to “ensure that all acts of torture are offences under its criminal law”). For further discussion of the view that participating in torture harms liberal institutions, see David Luban, *Liberalism and the Unpleasant Question of Torture*, 91 VA. L. REV. 1425 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005). *See also* *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (explaining other governments may use torture methods like “[t]he rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning,” but that our laws prevent such “ancient evils”).

<sup>210</sup> CE Ass., Oct. 27, 1995, Rec. Lebon 372 (req. nos. 136-727 (Commune de Morsang-sur-Orge) and 143-578 (Ville d’Aix-en-Provence)), <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/27-octobre-1995-Commune-de-Morsang-sur-Orge>, *translation at* <https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1024>.

degrading to all members of society because it violated an overriding sense of human dignity (which I have called civic virtue as dignity).

As the dwarf-tossing case demonstrates, another important feature of civic virtue as dignity is that it is unmoved by arguments from autonomy and often serves to constrain individual behavior for the good of society. In a community that believes prostitution is an affront to women's collective dignity, it is irrelevant that individual women find the practice empowering or view it as an exercise of their liberty as dignity. Similarly, "slavery is a wrong even if it is not experienced as a negative by the slave and even if the slave maintains a substantial amount of de facto autonomy" because the practice offends the dignity of human life.<sup>211</sup>

Whether we are discussing the legality of torture, dwarf-tossing, or prostitution, civic virtue as dignity is defined within a community. This is consistent with the communitarian view—espoused by theorists Alasdair MacIntyre, Charles Taylor, and Michael Walzer—that moral judgment depends on the actual beliefs, practices, and institutions that create communities at specific times and places.<sup>212</sup> Conduct that is prohibited as offensive and degrading in one society may not be in another.

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<sup>211</sup> Kent Greenawalt, *Dignity and Victimhood*, 88 CAL. L. REV. 779, 781 (2000).

<sup>212</sup> ALASDAIR C. MACINTYRE, *WHOSE JUSTICE, WHICH RATIONALITY?* (1988); CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 2* (1985); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983). The communitarian ethic is a critique of traditional liberal universalism as found, for example, in John Rawls's groundbreaking book, *A Theory of Justice* (1971). Rawls attempted to respond to the communitarian critique in his later works. See JOHN RAWLS, *THE LAW OF PEOPLES* (1999); JOHN RAWLS, *POLITICAL LIBERALISM* (1993).



## Advancing Notions of a Decent Society

When the Supreme Court invokes civic virtue as dignity, it does so to prohibit or limit activities that it concludes do not comport with how a decent society demonstrates its respect for the dignity of human life. This approach is evident in the Court’s Eighth Amendment jurisprudence—which limits the death penalty to mentally competent adults<sup>213</sup> and precludes certain forms of punishment<sup>214</sup>—and in the Court’s search and seizure cases, which exclude from evidence material that was obtained in a manner that would “shock the conscience.”<sup>215</sup> The Court’s use of civic virtue as dignity is also powerfully evident in its recent abortion jurisprudence.

In limiting the reach of the death penalty to mentally competent adults, the Court looked beyond its standard tests to conclude that civilized societies do not execute mentally insane,<sup>216</sup> mentally retarded,<sup>217</sup> or juvenile convicts.<sup>218</sup> The Court in *Ford v. Wainwright* considered whether inflicting the death penalty on a prisoner who is mentally insane violates the Eighth Amendment.<sup>219</sup> Observing the “natural abhorrence civilized societies feel” at executing an insane prisoner, as well as the national “intuition that such

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<sup>213</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>214</sup> *Hope v. Pelzer*, 536 U.S. 730 (2002).

<sup>215</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>216</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>217</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>218</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>219</sup> 477 U.S. 399 (1986).

an execution simply offends humanity,” the Court ruled the practice unconstitutional.<sup>220</sup> In so holding, the Court aimed “to protect the *dignity* of society itself from the barbarity of exacting mindless vengeance.”<sup>221</sup>

Confronted with the impending execution of a mentally retarded prisoner, the Court in *Atkins v. Virginia* similarly invoked civic virtue as dignity.<sup>222</sup> Emphasizing that the Eighth Amendment draws on “the evolving standards of decency that mark the progress of a maturing society,”<sup>223</sup> the Court explained that whether the execution of a mentally retarded person violates the Amendment “is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”<sup>224</sup> After observing widespread condemnation of the practice by state legislatures, the Court held that executing mentally retarded prisoners violates the “dignity of man” at the root of the Eighth Amendment.<sup>225</sup>

In *Roper v. Simmons*, the Court went one step further, asking not only whether the execution of juveniles offended national opinion, but also whether it faced international condemnation.<sup>226</sup> Drawing attention to the fact that the United States is the only country that sanctioned the death penalty for juveniles, the Court noted that although foreign laws and attitudes do not control the Court’s decision to bar juvenile executions, they confirm

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<sup>220</sup> *Id.* at 409.

<sup>221</sup> *Id.* at 410.

<sup>222</sup> 536 U.S. 304 (2002).

<sup>223</sup> *Id.* at 311–12 (citing *Trop v. Dulles*, 356 U.S. 86, 110–11 (1958)).

<sup>224</sup> *Id.* at 311.

<sup>225</sup> *Id.*

<sup>226</sup> 543 U.S. 551.

the Court's view that certain acts must be prohibited to "secure individual freedom and preserve human dignity."<sup>227</sup> These values, the Court explained "are central to the American experience and remain essential to our present-day self-definition and national identity."<sup>228</sup> To permit states to execute juveniles not only would be out of step with international consensus; it would implicate the nation's civic virtue as dignity as well.

The Court's invocation of civic virtue as dignity is not limited, however, to its death penalty jurisprudence. In *Hope v. Pelzer*, the Court concluded that state prison guards violated an inmate's Eighth Amendment rights when, as punishment for disruptive conduct, they handcuffed him to a hitching post for seven hours in the sun, shirtless, and with no access to a bathroom.<sup>229</sup> Describing Hope's treatment as "antithetical to human dignity" and reiterating that the "basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man,"<sup>230</sup> the Court concluded that modern understandings of civic decency and human dignity preclude the use of hitching posts:

Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons. In . . . regard to 'handcuffing inmates to the fence and to cells for long periods of time' and other such punishments, we stated that '[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary

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<sup>227</sup> *Id.* at 578.

<sup>228</sup> *Id.*

<sup>229</sup> 536 U.S. 730 (2002). The court noted in particular that the punishment "subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs . . . to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." *Id.* at 745.

<sup>230</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

concepts of decency, human *dignity*, and precepts of civilization which we profess to possess.’<sup>231</sup>

As in *Atkins* and *Roper*, the Court in *Hope* examined societal standards to determine the degree to which the punishment at issue is out of sync with “contemporary concepts of decency.” Its determination that “the obvious cruelty inherent in this practice” is impermissible “under precepts of civilization which we profess to possess” demonstrates that civic virtue as dignity is at the crux of the Court’s decision.<sup>232</sup>

The Court’s reasoning in so-called “shock-the-conscience” cases illustrates its commitment to civic virtue as dignity in yet another context. In *Rochin v. California*,<sup>233</sup> the Court held unconstitutional a search that involved police officers directing a physician to forcibly pump a suspect’s stomach to collect evidence that the suspect was a narcotics dealer who had swallowed his stash to avoid arrest. Justice Frankfurter, delivering the Court’s opinion, described the police conduct in securing the evidence as “so brutal and so offensive to human dignity”<sup>234</sup> that it goes beyond

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<sup>231</sup> *Hope*, 536 U.S. at 737 n.7 (quoting *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974)).

<sup>232</sup> *Id.* at 745. The Court’s decision relies heavily on its earlier opinion in *Trop v. Dulles*, 356 U.S. 86 (1958), in which it held that revoking a U.S. soldier’s citizenship as punishment for wartime desertion would drastically alter our collective conception of appropriate punishment and our civic virtue as dignity. Writing for the majority, Chief Justice Warren explained that

[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

*Id.* at 100.

<sup>233</sup> 342 U.S. 165 (1952).

<sup>234</sup> *Id.* at 174.

some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.<sup>235</sup>

At first, Justice Frankfurter appears primarily concerned with the suspect's liberty as dignity, which was violated when his home was intruded and his body manipulated without his consent. But this gives way to a deeper concern about the implications of the State's actions for civic virtue as dignity.<sup>236</sup> As the opinion continues, Frankfurter famously says that there is little difference between forcing a confession from a suspect's lips and forcing evidence from his stomach. Both methods, he says, are "too close to the rack and the screw to permit of constitutional differentiation."<sup>237</sup> In comparing the State's actions to torture, Frankfurter takes care to point out that the brutality inflicted on Rochin violated "the general requirement that States in their prosecutions respect certain

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<sup>235</sup> *Id.* at 172.

<sup>236</sup> *Cf. Winston v. Lee*, 470 U.S. 753 (1984). In *Winston*, the Court prohibited a search that would have forced a robbery suspect to undergo surgery requiring general anesthesia to remove a bullet that might have implicated him in a crime. Writing for the majority, Justice Brennan noted that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* at 760 (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)). In explaining the Court's position that the suspect's "dignitary interests in personal privacy and bodily integrity," *id.* at 761, outweighed the state's interest in collecting evidence, Justice Brennan wrote that to "drug this citizen . . . with narcotics and barbiturates into a state of unconsciousness . . . and then to search beneath his skin for evidence of a crime . . . involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin. *Id.* at 765. In contrast to Justice Frankfurter's concern in *Rochin* that the extraction of evidence violated both liberty as dignity *and* civic virtue as dignity, Justice Brennan relies only on liberty as dignity to deem the search in *Winston* unconstitutional.

<sup>237</sup> 342 U.S. at 172.

decencies of civilized conduct.”<sup>238</sup> In short, forcibly pumping Rochin’s stomach, like handcuffing Hope to a hitching post, threatens civic virtue as dignity by suggesting that the civility we associate with our society and its members is unwarranted.

As I noted at the outset of this section, however, the Court’s most striking and recent use of civic virtue as dignity appears in *Gonzalez v. Carhart*.<sup>239</sup> There, the Court upheld the constitutionality of the federal Partial-Birth Abortion Ban Act on the ground that it shows “respect for the dignity of human life” without unduly burdening a woman’s choice to seek abortion.<sup>240</sup> Dignity has long played a role in abortion jurisprudence, but the Court’s position in *Carhart* shifted the conversation from one focused on pregnant women’s liberty as dignity to one centered on how a particular abortion method “devalue[s] human life” and society.<sup>241</sup>

At issue in *Carhart* was whether the Partial-Birth Abortion Ban Act,<sup>242</sup> which prohibits a certain method of performing late-term abortions,<sup>243</sup> is constitutional. In upholding the Act, the Court not only conferred unprecedented and controlling influence on civic virtue as dignity, it also employed paternalistic arguments to further negate women’s claims to liberty as dignity. The Court, en route to the conclusion that the Act

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<sup>238</sup> *Id.* at 173.

<sup>239</sup> 550 U.S. 124 (2007).

<sup>240</sup> *Id.* at 157; Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012).

<sup>241</sup> 550 U.S. at 158.

<sup>242</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003).

<sup>243</sup> The term “partial-birth abortion” is not a medical term, but a political one crafted by anti-abortion advocates with the intent to incite opposition to abortion generally. *See* Siegel, *supra* note 44, at 1707–08 (explaining that the phrase “partial-birth abortion” was invented to serve the purposes of an anti-abortion movement aiming to incrementally narrow the right to abortion). The medical term for the procedure banned by the Act is intact D&E (dilation and extraction). *See Carhart*, 550 U.S. at 137.

appropriately expresses “respect for the dignity of human life,”<sup>244</sup> detours through an extensive and graphic depiction of the abortion procedure at issue. The opinion describes the procedure both as having “disturbing similarity to the killing of a newborn infant”<sup>245</sup> and as “gruesome and inhumane.”<sup>246</sup> To defend its view that the banned procedure “devalue[s] human life,”<sup>247</sup> the Court approvingly cites congressional findings that “such a brutal and inhumane procedure . . . will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life. . . .”<sup>248</sup>

As in the Court’s death penalty jurisprudence, *Carhart* invokes civic virtue as dignity to prohibit an activity that it concludes is out of sync with how a decent society demonstrates what it calls “respect for the dignity of human life.” Unlike the *Casey* plurality, the *Carhart* majority does not weigh the woman’s liberty as dignity against the respect owed to the potential life of the fetus to determine whether the Act is constitutional. Instead, the Court embraces a strategy—familiar to it from its Eighth Amendment jurisprudence<sup>249</sup>—that gives first priority to claims on our collective human dignity.

The Court’s separate, paternalistic discussion of whether pregnant women can make rational decisions about abortion only further subordinates the value of liberty as dignity. From the outset, *Carhart* has a different focus than the Court’s prior decisions in

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<sup>244</sup> *Carhart*, 550 U.S. at 157.

<sup>245</sup> *Id.* at 158 (quoting 18 U.S.C. § 1531 note (Supp. IV 2000)).

<sup>246</sup> *Id.* at 141 (quoting 18 U.S.C. § 1531 note (Supp. IV 2000)).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> See discussion *supra* Part II.E.2.

abortion cases. References to women do not appear until the fourth page of the *Carhart* opinion,<sup>250</sup> and then only as passive actors in medical procedures. Not until well over ten pages into the opinion do women become participants in their medical care.<sup>251</sup>

When the Court does turn to the woman's decision, it concludes (after admitting that it has no reliable data) that women may "come to regret their choice to abort the infant life they once created and sustained" and may suffer "severe depression and loss of esteem."<sup>252</sup> As Professor Reva Siegel has powerfully argued in her recent work,<sup>253</sup> there are good reasons to question why the Court cites affidavits suggesting that the State ought to protect women from making uninformed decisions about abortion, particularly when those considerations did not weigh into Congress' decision to enact the ban.

In the meantime, liberty as dignity—and the women who possess it—are playing an ever smaller role in the Court's abortion jurisprudence. In their place, civic virtue as dignity purports to vindicate our collective decency and moral worth. This shift in the Court's emphasis serves as a reminder that "the content of human dignity is a corollary of ... cultural, political, constitutional, and other conditions, which can evolve and change in the course of history."<sup>254</sup> Having a typology of dignity that can track these nuances offers the opportunity to better understand the doctrinal changes they produce.

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<sup>250</sup> *Carhart*, 550 U.S. at 135–36.

<sup>251</sup> *Id.* at 144.

<sup>252</sup> *Id.* at 159.

<sup>253</sup> Siegel, *supra* note 44, at 1698–99.

<sup>254</sup> Doron Shultziner, *Human Dignity – Functions and Meanings*, 3 GLOBAL JURIST TOPICS 1, 5 (2003) (examining the function of dignity in international human rights documents).



The framework described in this chapter highlights the epistemic origins of each form of dignity and the substantive work it performs for the Court. The typology of dignity set forth, however, is not, to quote Wittgenstein, a “final analysis of our forms of language.”<sup>255</sup> In contrast to standard approaches to defining dignity, the proposed typology does not offer a core, fixed, or lasting concept of dignity. Instead, it recognizes—with the help of empirical data—that dignity’s conceptions and functions are dynamic and context-driven. Because the typology is derived from an understanding of how dignity is invoked in practice, rather than in the abstract, it maintains the flexibility to respond to evolutions and changes in dignity’s usage.

In mapping the terrain of our current dignity discourse, the typology brings dignity’s judicial functions into greater relief. It reveals the contexts in which the Court employs dignity to protect substantive interests, and conversely, it highlights the ways in which the Court’s view of dignitary harms reshapes certain legal doctrines. By illustrating that a set of pluralistic values often stand behind the Court’s use of dignity, it gives coherence to what might otherwise appear to be vague, imprecise, and even ambiguous uses of the word. Most importantly, however, the typology provides us with the tools to evaluate what is at stake, normatively and doctrinally, in a variety of contexts; it allows us to detect dignity’s role in doctrinally transformative moments; and it equips us with a framework for future discussions.

The next chapter offers a final methodology for examining dignity’s meaning(s) and function(s). It applies an inductive approach to distill the central features of dignitary harms in two paradigmatic cases, annihilation/extermination and torture. Together with

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<sup>255</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 91 (1953).

the genealogy of dignity set forth in Chapter 3, and the typology of dignity set forth here, the inductive approach moves us closer to responding to dignity-skeptics and anti-dignitarians, and allows us to articulate a preliminary and modest account of dignity.

## Chapter 5: Toward an Account of Dignity

Human dignity has a long history that traverses not only time, but also context. Its genealogy reveals that its meaning and use is not fixed across centuries and situations, but rather fluid and responsive to the changing world(views) in which it is articulated. That is not say that dignity has no meaning, but instead to view its meaning—as Wittgenstein’s language theory suggests—as contextually, linguistically, and temporally determined.

Critics who contend that this understanding of dignity is too contingent to serve as a long-term template for addressing dignity-related issues miss its advantages. When we acknowledge that dignity, like any being, is always historically effected and currently evolving, then dignity’s meaning is a rich product of both its genealogical pedigree and its ongoing development in a particular time and context. From this perspective, dignity is never an abstract or static concept unable to address dignity-related issues because—in addition to being imbued with historical meaning—its content is continually subject to criticism, support, revision, and reinterpretation based on its encounter with concrete situations that raise dignity-related concerns.

If I am correct that dignity’s greatest normative appeal lies in the meaning that is generated from the dialectic between dignity’s past and present uses, then any account of dignity must draw on this dialectic for its content. In contrast to most accounts of dignity, which are top-down and ask what quality all humans possess that make them bearers of dignity, the approach I suggest in this chapter is bottom-up. If dignity has normative value, it must be the case that its meaning emerges from the contexts in which

reasonable people would agree that dignity has been violated. Instead of deriving dignity from any normative account of humanity, the inductive method I adopt in this chapter examines situations in which our collective intuition is that dignity has been violated.<sup>1</sup>

To be successful in capturing dignity's meaning, the inductive approach requires us to examine what I call "paradigm cases of dignitary injury." These are cases in which dignity is either the only way to describe the moral harm, or dignity more completely describes the moral harm than any other moral concept, such as autonomy, bodily integrity, or equality. The paradigm cases that I examine in this chapter are annihilation/extermination and torture. From these cases, I suggest that we can distill the features of a dignity violation, and in combination with a historical understanding of dignity, begin to craft an account of dignity.

### **A Response to Dignity's Critics**

Before offering an account of dignity, however, we must first wrestle with the criticisms leveled against the concept by dignity skeptics and anti-dignitarians. Their critiques, set forth in Chapter 1, challenge us to offer an understanding of dignity that is neither rhetorical nor redundant, has sufficient normative heft to elucidate and mediate ethical conundrums, and does not function as an instrument of religious or political

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<sup>1</sup> A variety of scholars undertaking conceptual analysis of moral terms have relied on this approach. *See* DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 98–103 (2008) (examining invasions of privacy in order to conceptualize the term); AVISHAI MARGALIT, THE DECENT SOCIETY 1 (Naomi Goldblum trans., 1996) (defining a decent society as one whose institutions do not humiliate the people who live under its auspices); ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY (Dennis J. Schmidt trans., 1996) (1961) (exploring violations of the natural law to access its meaning).

tyranny. In addressing their critiques, it is useful to “frame” their concerns as ones about *content* and *legitimacy*.<sup>2</sup> As I suggested in Chapter 2, when dignity skeptics and anti-dignitarians dispute dignity’s normative value on the grounds that it is empty rhetoric, a redundant placeholder for other more precise moral norms, or a legal fiction created for consensus building, they are disputing dignity’s content. When they assert that dignity functions as a vehicle for pressing particular religious and political ideologies into practice, they are contesting dignity’s legitimacy.<sup>3</sup> With that in mind, we can examine the four arguments against dignity, described in Chapter 1, and offer a brief response to each.

The first argument against dignity—articulated by Michael Rosen,<sup>4</sup> Steven Pinker,<sup>5</sup> and Gerhold Becker,<sup>6</sup> among others—is that dignity is rhetorical and devoid of meaning. I concede that invocations of dignity too often suffer from this deficit, as the invocations of dignity in the Universal Declaration of Human Rights (UDHR) illustrate.<sup>7</sup> The UDHR invokes dignity four times, but intentionally leaves the term undefined. As history reveals, the diplomats who incorporated dignity into the UDHR did so precisely because it lacked particular meaning and could operate as an incompletely theorized

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<sup>2</sup> See Matthias Mahlmann, *The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law*, in UNDERSTANDING HUMAN DIGNITY 593, 594 (Christopher McCrudden ed., 2013).

<sup>3</sup> They may also be making a claim about dignity’s content, for example, when it is argued that dignity’s religious content negates its legitimacy.

<sup>4</sup> Michael Rosen, *Dignity: The Case Against*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 2, at 123; MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012).

<sup>5</sup> Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), <http://www.newrepublic.com/article/the-stupidity-dignity>.

<sup>6</sup> Gerhold Becker, *In Search of Humanity: Human Dignity as a Basic Moral Attitude*, in THE FUTURE OF VALUE INQUIRY 53, 53 (Matti Häyry & Tuija Takala eds., 2001).

<sup>7</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

agreement,<sup>8</sup> or a point of overlapping consensus,<sup>9</sup> for people who held diverse and conflicting cultural, political, philosophical, and spiritual worldviews. The decision to link human rights to dignity, we are told, was essential to creating a document with global legitimacy.

The price of legitimacy, however, came at the expense of content. Although the adoption of an abstract notion of dignity avoided an impasse in the articulation of universal human rights, the failure to specify dignity's content means we do not know what properties bestow universal human dignity, whether dignity is a foundation of human rights or itself a specific right, or what kinds of conduct might violate human dignity. This lack of content would be less problematic if the UDHR was viewed merely as an expressive document, but insofar as it is read to be rights-generating and rights-protective, the lack of content is problematic. This example not only demonstrates that dignity is only as normatively useful as its content, but it also reminds us that there may be trade-offs in the effort to imbue dignity with both content and legitimacy.

The second criticism of dignity, most commonly associated with Ruth Macklin's views,<sup>10</sup> is that dignity is a redundant placeholder for other ideas like respect for persons or their autonomy, and therefore adds nothing to moral discourse that is not already represented by more precise norms. This claim falls short at several levels. Although dignity and autonomy share some of the same properties—just as air and water do—to say that they are equivalent, misses the important features that make them distinct. If

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<sup>8</sup> Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES: 1 (2007).

<sup>9</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (developing the notion of overlapping consensus).

<sup>10</sup> Ruth Macklin, *Dignity is a Useless Concept*, 327 BMJ 1419, 1419–20 (2003).

dignity is simply a placeholder for autonomy, then we could not injure the dignity of humans who lack rational capacities, an outcome that is inconsistent with a universal account of human dignity. Similarly, if dignity simply means respect for persons, then we arguably have the same content dilemma that we have with unspecified appeals to dignity, namely we need a way of discerning which aspect(s) of humanity warrant respect. Instead, as the editorial letters responding to Macklin's article attest, the concept of dignity is more capacious than either autonomy or respect for persons.<sup>11</sup> Limiting it to those meanings jeopardizes its legitimacy (insofar as it may not apply to all humans) and further complicates its content (insofar as respect for persons still requires specification).

The third argument against dignity contends that the word is normatively useless because it can be invoked to support opposing moral norms. This dilemma is well illustrated in several publications by Deryck Beyleveld and Roger Brownsword, who contrast two different uses of dignity, one of which they call "human dignity as empowerment," and the other which they refer to as "human dignity as constraint."<sup>12</sup> The central idea behind their contribution is that when dignity is invoked in conflicting ways

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<sup>11</sup> The *British Medical Journal* has printed thirty-five responses to Macklin's article, many of which highlight that dignity is not only about how others respect you, but whether you have any respect for yourself. See, e.g., Ronald F. Ingle, *Nuts and Bolts of Dignity?*, *BMJ* (Mar. 1, 2004), <http://www.bmj.com/content/327/7429/1419/rapid-responses>:

Assuming that "medical ethics" and "ethical analysis" are rooted in reality, I find no other word deals so necessarily, through its derivative indignity, with being chronically incontinent of urine and feces, slobbery, and smelly; with uncontrollable laughing or crying, with being unable to remember loved ones and friends, with being imbecilic; with losing ones' hard-won personage, by which you achieved some sort of lovable identity.

<sup>12</sup> See DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 11, 25–27 (2001); Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights and the Human Genome*, in 2 BASIC ETHICAL PRINCIPLES IN EUROPEAN BIOETHICS AND BIOLAW 15–44 (Jacob Rendtorff & Peter Kemp eds., 2000).

by people on opposite sides of a given issue—for example, physician assisted suicide or dwarf-tossing—the competing uses of dignity reflect disagreement about whether “various choices should be treated as off limits (legally and morally),”<sup>13</sup> or whether those choices should be respected so long as they are made by rational and informed agents. In the first case, the language of dignity operates as a constraint on individual choice; in the second case, dignity functions to empower individual choice.

The fact that dignity has both an empowering and a constraining form does not necessarily deem dignity morally useless. After all, the same could be said about liberty, which in the absence of a grander theory, can be employed in conflicting ways. Instead, dignity’s duality highlights the importance of articulating an account of dignity that can guide us in assessing competing moral claims. Beyleveld and Brownsword, for example, resolve the tensions between competing notions of dignity by applying Alan Gewirth’s Principle of Generic Consistency.<sup>14</sup> As with any moral norm, dignity claims will compete with each other and with other moral norms. This fact should not cause us to jettison dignity altogether, but should instead prompt us to further specify its content, a task taken up below.

The final criticism of dignity, articulated most vehemently by Steven Pinker,<sup>15</sup> is that dignity is dangerous because it can veil political and religious ideologies and function as an instrumental of tyranny. This criticism of dignity has two formulations.

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<sup>13</sup> BEYLEVELD & BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW, *supra* note 12, at 4.

<sup>14</sup> The Principle of Generic Consistency requires agents to act in accord with the generic rights of all agents. Gewirth contends that because some generic needs are more pressing than others, they should be ordered according to how necessary they are. *Id.* at 70.

<sup>15</sup> Pinker, *supra* note 5.



The first is that the content and source of human dignity is historically grounded in Judeo-Christian theology and the notion of *imago dei*. On this view, because human dignity has an inescapably religious content, it is an illegitimate moral norm for non-religious, pluralistic societies. The second formulation of the critique emphasizes dignity's lack of content, and argues that this emptiness allows religious radicals to co-opt dignity's perceived legitimacy to disguise their religiously-motivated agendas.

Importantly, both of these criticisms are focused on the use of dignity in the public context.<sup>16</sup> Their core concern is one of legitimacy; specifically, whether religious conceptions of moral norms are permissible justifications for state action in a secular democracy. It is impossible to adequately address this complex question here, and fortunately others have thoughtfully engaged with it at length.<sup>17</sup> For our purposes, let us assume that dignity's current meaning has been shaped by its religious lineage, and that dignity is sometimes co-opted to advance a religiously-motivated agenda, in the guise of a secular norm. Do these cases necessarily present a problem in non-religious or secular societies?

With regard to the first claim, it cannot be the case that dignity is an illegitimate norm in secular society simply because its meaning is historically infused with religious content. As we know, ancestry is not fully determinative of being. The fact that religious thinkers and ideas contributed to dignity's development does not mean that dignity is a religious concept. Moreover, like most moral norms in Western ethical thought, dignity's

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<sup>16</sup> There is no dispute about whether theologically infused notions of dignity are permissible in the religious sphere, of course they are.

<sup>17</sup> See RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013); Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

pedigree includes religious and non-religious influences. There is no reason to believe that dignity's religious lineage makes it any more objectionable than the philosophical convictions that equally influenced its modern meaning and function.

The second critique of dignity, which contends that dignity has been appropriated by religious conservatives to advance their agenda, is harder to dismiss. Setting aside the unnecessary and inflammatory descriptors that Pinker uses in his commentary,<sup>18</sup> much of what he says is factually correct. As discussed in depth in Chapter 1, the President's Council on Bioethics issued several reports that invoke dignity as a blunt instrument to constrain a variety of activities that have long-been objectionable under traditional Judeo-Christian doctrine. These invocations of dignity are generally portrayed as secular, despite the undeniably similar language they share with relevant Roman Catholic teachings.

The problem here is twofold. First, as both a matter of public reason<sup>19</sup> and prohibitions on the state establishment of religion,<sup>20</sup> there is an expectation that state institutions will refrain from appealing to religious justifications, about which reasonable person disagree, to support their positions. This requirement cannot be sidestepped by cloaking a religious argument in secular garb. Even among theorists who object to this understanding of public reason on the grounds that it undemocratically excludes religious viewpoints,<sup>21</sup> the protection they suggest for religious ideas is only available for ideas

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<sup>18</sup> Pinker, *supra* note 5.

<sup>19</sup> RAWLS, *supra* note 9.

<sup>20</sup> U.S. CONST., amend. I.

<sup>21</sup> SELYA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 108 (2002).

that announce themselves as religious. It is not clear that the use of dignity as a neutral vessel to advance a religious idea qualifies under this rubric. Second, although I do not think Pinker articulates this concern completely, I read him to be worried about the tyranny that can result when religious views are intentionally hidden from public view. Certainly, as a matter of transparency, dignity loses value and legitimacy when it is used to conceal religious justifications from the public. As these concerns suggest, a more complete articulation of dignity's content may function as a limit on its religious appropriation.

### **An Inductive Approach to Dignity**

In responding to the critiques leveled against dignity, I noted that any account of the concept must be attentive to dignity's content and legitimacy. In particular, dignity must have the capacity to function in a way that is neither rhetorical nor redundant; it must have sufficient normative depth to address concrete ethical problems; and its religious content, if any, must be transparent. Moreover, as I noted at the outset of this chapter, any account of dignity must conceptualize it in terms that recognize the dialectic between its historical pedigree and its evolving use and development. The genealogy of dignity presented in Chapter 3, and the Wittgensteinian typology of dignity offered in Chapter 4, are important to this task.

In this section, I rely on a bottom-up approach as a starting point for deriving a normative account of dignity. Unlike top-down models of dignity, which ask which quality all humans possess that make them bearers of dignity, the inductive approach

begins by considering practical situations in which reasonable people would agree that dignity has been violated. To capture dignity's meaning, the inductive approach relies on paradigm cases of dignitary harm, in which dignity is either the only way to describe the moral harm, or dignity more completely describes the moral harm than any other moral concept. The paradigm cases examined in this section are annihilation/extermination and torture.<sup>22</sup> After describing these through first-person narratives, I use an inductive method, in conjunction with aspects of the genealogy and typology of dignity from Chapters 3 and 4, to distill features of a dignity violation. With that information, we can begin to articulate a modest account of dignity.

### ***Paradigmatic Violations of Dignity***

#### **Annihilation/Extermination**

One of the best-known accounts of life as a concentration camp prisoner during the Holocaust was written by the Austrian essayist Jean Améry.<sup>23</sup> Améry describes the

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<sup>22</sup> In the aftermath of World War II, annihilation/extermination and torture were considered paradigmatic cases of dignity violations that the UDHR was intended to prevent in the future. See, e.g., Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 *METAPHILOSOPHY* 464, 465 (2010) (“Certainly the founding documents of the United Nations, which drew an explicit connection between human rights and human dignity, were clearly a response to the mass crimes committed under the Nazi regime . . .”).

<sup>23</sup> JEAN AMÉRY, *AT THE MIND'S LIMITS: CONTEMPLATION BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1980). Améry's account is frequently cited in contemporary works about torture. See, e.g., J.M. BERNSTEIN, *TORTURE AND DIGNITY: AN ESSAY ON MORAL INJURY* (2015) (using Améry's experience to explain why torture is a paradigmatic moral injury); David Luban, *Human Dignity, Humiliation, and Torture*, 19 *KENNEDY INST. ETHICS J.* 211, 224 (2009) (relying on Améry's narrative to explain that the relationship “between the torturer and the victim is one of absolute domination and absolute

moment, in a Vienna coffeehouse in 1935, when he first reads the Nuremberg Laws in the newspaper. He realizes that although “I was no more Jewish than a half hour before...the sentence that society had passed on me had a tangible meaning, [which] could only be that henceforth I was a quarry of Death.”<sup>24</sup> From that point on, Améry writes, his identity was forever changed:

To be a Jew, that meant for me, from this moment on, to be a dead man on leave, someone to be murdered, who only by chance was not yet where he properly belonged; and so it has remained, in many variations, in various degrees of intensity, until today. The death threat ... included what is commonly referred to as the methodic “degradation” of the Jews by the Nazis. Formulated differently: the denial of human dignity sounded the death threat.<sup>25</sup>

The denial of dignity, from Améry’s perspective, involved not only an externally imposed identity, but also one that was despised, degraded, excluded, and fit only for elimination. Améry recounts that every day for years he would read or hear that Jews were lazy, scheming, hideous, disgusting, and depraved; that their “very presence” polluted public spaces. It became clear to Améry that “[w]e were not worthy of love and thus also not of life. Our sole right, our sole duty was to disappear from the face of the earth.”<sup>26</sup>

What is notable about this account is that Améry does not connect the denial of dignity with a loss of autonomy, even though the Nuremberg Laws drastically limited the

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subordination”). For another well-known account of life in a concentration camp, *see* PRIMO LEVI, *IF THIS IS A MAN* (2014) (1969).

<sup>24</sup> AMÉRY, *supra* note 23, at 85.

<sup>25</sup> *Id.* at 86.

<sup>26</sup> *Id.* at 86.

freedom of Jews. Instead he relates the denial of dignity to the artificial and inauthentic identity he was compelled to assume, and his awareness that his fellow citizens viewed him as disgusting, evil, and worthless. As Améry describes it, his externally imposed identity was (and remains) at once alien to him and a sign that he is foreign to others.<sup>27</sup> His pre-1935 identity has been erased, and in its place resides a foreign, and yet inalienable, personality.<sup>28</sup> This denial of dignity is compounded for Améry by the judgment of others who have deemed that he no longer has social standing or moral status, and is therefore not worthy of respect. He perceives their annihilation of his moral status as a denial of his dignity, and the precursor to his final extermination.

When Améry recounts the moment he arrived at Auschwitz, he observes that he “was alone with his intellect ... and there was no social reality that could support and confirm it.”<sup>29</sup> Unacknowledged by society, his existence was only as good as his own efforts to rationalize it. He “could *be* hungry, *be* tired, *be* sick,” but in the absence of any response to these mental signs of being, Améry could not confirm his existence.<sup>30</sup> In a setting bent on his mental and physical elimination, Améry ultimately had “to declare [his mind’s] impotence” and admit that it had “lost its basic quality: its transcendence.”<sup>31</sup> Significantly, the title of his book, *At The Mind’s Limits*, speaks both to the unimaginably brutal and inhumane treatment that concentration camp prisoners endured at the hands of

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<sup>27</sup> *Id.* at 95.

<sup>28</sup> *Id.* at 95–96.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 18–19.

<sup>31</sup> *Id.* at 7.

their captors, and also the mental limits that prisoners faced in attempting to reconcile their apparent existence with that treatment.

Not long after Améry enters the camp, he confronts the fact that his final duty in the camp is death.<sup>32</sup> He is defenseless against its omnipresence, just as he was helpless to address his hunger, exhaustion, and illness. Améry states that he “did not live next door to, but in the same room with death,” because “all of us were too weak or too indifferent even to drag the dead out of the barracks into the open.”<sup>33</sup> The consequence of this is what Améry describes as “the total collapse of the esthetic view of death.”<sup>34</sup> The esthetic view, which is part of the prisoner’s former life, allows a person to have a spiritual approach to death that is intellectually separated from the act of dying. The prisoner’s experiences, however, leave him in “agonizing fear of certain kinds of dying, but scarcely an actual fear of death.”<sup>35</sup> Améry does not fear death because he is perpetually dying; a final death is a welcome freedom in a world where existence is only an “empty concept.”<sup>36</sup>

## **Torture**

After learning about the promulgation of the Nuremberg Laws, Améry had no misconceptions about his ultimate fate. When he was arrested by the Gestapo in 1943 for

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<sup>32</sup> *Id.* at 16.

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.* at 18–19.

<sup>36</sup> *Id.* at 19.

distributing anti-Nazi fliers on behalf of the Belgian resistance movement, he knew what would come next: “Prison, interrogation, blows, torture; in the end, most probably death.”<sup>37</sup> The Gestapo interrogated Améry about the Belgian resistance. His captors demanded to know the names of his accomplices and the location of their hiding places. Améry knew almost nothing, and his explanations were met with contemptuous laughter followed by what he calls “the first blow.”

The first blow is the one that “brings home to the prisoner that he is helpless, and thus it already contains in the bud everything that is to come.... [T]hey will do with me what they want. Whoever would rush to the prisoner's aid—a wife, a mother, a brother, or friend—he won't get this far.”<sup>38</sup> As the blows continued, Améry became aware that the “boundaries of my body are also the boundaries of my self. . . . I can exist only as long as he does not touch my skin surface as border.”<sup>39</sup> Améry compares the uninvited corporeal intrusion to rape: both involve “the border violation of my self by the other, which can be neither neutralized by the expectation of help nor rectified through resistance.” Torture “destroys me.”<sup>40</sup>

For Améry, however, torture involved more than an uninvited physical violation. When the Gestapo failed to extract information from Améry, they took him to the “business room,” and more specifically, a windowless, sound-proof vault where a chain, connected to a hook, hung from the ceiling. Améry was made to hang from it, his arms

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<sup>37</sup> *Id.* at 24–25.

<sup>38</sup> *Id.* at 27.

<sup>39</sup> *Id.* at 28.

<sup>40</sup> *Id.*



held together behind his back by a shackle, and his feet held a meter off the floor. He recounts that:

[d]uring these few minutes, when you are already expending your utmost strength, when sweat has already appeared on your forehead and lips, and you are breathing in gasps, you will not answer any questions. Accomplices? Addresses? Meeting places? You hardly hear it. All your life is gathered in a single, limited area of the body, the shoulder joints, and it does not react; for it exhausts itself completely in the expenditure of energy. But this cannot last long, even with people who have a strong physical constitution. As for me, I had to give up rather quickly. And now there was a crackling and splintering in my shoulders that my body has not forgotten until this hour. The balls sprang from their sockets. My own body weight caused luxation; I fell into a void and now hung by my dislocated arms, which had been torn high from behind and were now twisted over my head...At the same time, the blows from the horsewhip showered down on my body.<sup>41</sup>

The pain that Améry experienced overwhelmed every aspect of his being. In that moment, he explained, “the transformation of the person into flesh becomes complete. . . . [T]he tortured person is only a body, and nothing else beside that.”<sup>42</sup> He was no longer human, but a “shrilly squeaking piglet at slaughter.”<sup>43</sup> He lost the ability to communicate through language; his only sounds were animalistic, reflexive yelps and cries.<sup>44</sup> His linguistic paralysis served as further evidence that he was not human.<sup>45</sup> His efforts to

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<sup>41</sup> *Id.* at 32–33.

<sup>42</sup> *Id.* at 33.

<sup>43</sup> *Id.* at 35.

<sup>44</sup> Jay Bernstein calls this the “grammar of pain.” See BERNSTEIN, *supra* note 23.

<sup>45</sup> *Id.* at 91–92.

communicate were ignored by his torturers who, as sovereign of his body and mind, alone determine when the torture would end.

Not only was Améry's body under the control of another, his body betrayed him at every juncture.<sup>46</sup> His body's weight was the force that broke and dislocated his shoulders. His infantilizing cry for help emerged instinctively, reflexively, and without mental intention. When subject to torture, he explains, all that is corporeally interior becomes exterior. As Elaine Scarry has noted, torture turns the victim's body into a weapon and "bestows visibility on the structure and enormity of what is usually private and incommunicable, contained within the boundaries of the sufferer's body."<sup>47</sup> Améry's body negates his privacy; reveals his vulnerability; and shames, humiliates, and invalidates him.

### ***Inductive Analysis and Conclusions***

From Améry's narrative, we can inductively draw several preliminary conclusions about dignity. First, dignity is a status concept. Améry traces his denial of dignity to the Nuremberg Laws, which simultaneously raised the status of Aryans, who were described as virtuous, excellent specimens of humanity, and lowered the status of Jews, who were described as depraved animals or worse. As Améry explains, "You [were] a human

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<sup>46</sup> For some commentators, this self-betrayal is at the core of what makes torture morally wrong. See David Sussman, *What's Wrong with Torture?*, 33 PHIL & PUB. AFF. 1 (2005). Sussman argues that torture leads to self-betrayal even in humans without rational agency because torture wields one's primal sensations against oneself.

<sup>47</sup> ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

being only if you [were] a German, a Frenchman, [or] a Christian.”<sup>48</sup> Forced to wear a yellow star on his shirtsleeve, and later a tattooed number on his arm, his inferior status was unmistakable.

In addition to highlighting that dignity is status-oriented, Améry’s narrative also illustrates that dignity is dialogical.<sup>49</sup> By dialogical, I mean that dignity is constituted, negotiated, preserved, and threatened in social relationships, interactions, and experiences with the other.<sup>50</sup> When a person is not recognized by others as having value as a human being, that person’s dignity is violated.

Insofar as recognition of an individual depends on a prior determination that the individual has value, the dialogical and status-oriented aspects of dignity are mutually reinforcing. The Nuremberg Laws marked Jews as socially inferior, and in so doing, signaled that they did not warrant recognition as a member of society, or even as a human being. Although Améry is biologically alive, he has suffered what Judith Butler calls a

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<sup>48</sup> AMÉRY, *supra* note 24, at 84.

<sup>49</sup> One might respond that dignity is also monological because a person can preserve his dignity by acting dignified in the face of adversity, or conversely, he can threaten his dignity by acting in an undignified manner. These examples only make sense, however, in an interpersonal, social context in which an “other” causes the adversity or is present to witness the undignified behavior. *See also* AMÉRY, *supra* note 24, at 89:

It is certainly true that dignity can be bestowed only by society, whether it be the dignity of some office, a professional or, very generally speaking, civil dignity; and the merely individual, subjective claim (“I am a human being and as such I have my dignity, no matter what you may do or say!”) is an empty academic game, or madness.

<sup>50</sup> The “other” can be God. As the genealogy of dignity in Chapter 3 illustrates, some theological traditions understand human dignity as constituted and negotiated in one’s relationship with and to God.

“social death.”<sup>51</sup> His status has been so diminished that he has fallen out of the social frame of existence; his life is not acknowledged, and his death will not be grieved.

This denial of Améry’s human dignity is compounded by the “active non-recognition” that he experiences at the hands of his torturers.<sup>52</sup> Again, this non-recognition is integrally related to his social status. The SS officers who torture him have already excluded him from the moral community of human beings, and Améry’s animalistic response to his torture—he becomes “a shrilly squeaking piglet at slaughter”—only buttresses the torturers’ claim that Améry is not a human being.<sup>53</sup> The torture transforms his status, first into animal flesh and then “beyond the border of death into Nothingness.”<sup>54</sup> Although Améry’s pain is “hugely objectified, everywhere visible, and . . . incontestably present, . . . it is categorically ignored” by the torturer.<sup>55</sup> Améry equates this repeated non-recognition of his “physical . . . and . . . metaphysical being” with the denial of his dignity.<sup>56</sup>

Thus far, I have noted that dignity is both status-oriented and dialogical. The paradigmatic cases of annihilation/extermination and torture also suggest a third inductive conclusion: Dignity is intersubjective. By intersubjective, I mean that an

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<sup>51</sup> JUDITH BUTLER, *ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH* 73–74 (2000). Butler borrows this phrase from ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982). See also JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 146–47 (2004) (describing what the “precarious” existence of lives that are subject to “non-intelligibility”).

<sup>52</sup> BERNSTEIN, *supra* note 23, at 104.

<sup>53</sup> See AMÉRY, *supra* note 24, at 35 (noting that torture involves the “radical negation of the other”).

<sup>54</sup> SCARRY, *supra* note 47, at 35.

<sup>55</sup> *Id.* at 56.

<sup>56</sup> AMÉRY, *supra* note 24, at 27–28.

individual can only understand himself as possessing *full* dignity when he is recognized as such by others. This notion is similar to Charles Taylor's view that "people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves."<sup>57</sup> Améry is told that as a Jew he is dirty, hideous, and evil. He is excluded from public places and marked as degenerate. These humiliations, and the shame and embarrassment that accompany them, signal to Améry that he is beneath dignity; he is "not worthy of love and thus also not of life."<sup>58</sup>

Later, in the concentration camps, his unanswered hunger, thirst, and pain are reminders that his existence is only as good as his own efforts to rationalize it, which he is unable to do. The fact that his mind, at its limits, cannot conceive his existence confirms Hegel's intersubjective claim that "a self-consciousness exists in and for itself by way of existing in and for itself for an other, i.e., it exists only as a recognized being."<sup>59</sup> Ultimately, the non-recognition that Améry suffers under the Nazis has lasting

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<sup>57</sup> Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM* 25 (Amy Guttmann ed., 1994). See also *id.* at 36 ("The projection of an inferior or demeaning image on another can actually distort an oppressor, to the extent that the image is internalized.").

<sup>58</sup> AMÉRY, *supra* note 24, at 86. See also MARGALIT, *supra* note 1, at 9 ("Humiliation is any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured.").

<sup>59</sup> G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* § 178 (A.V. Miller trans., 1977). The importance of recognition is often traced to Hegel's master-slave dialectic, which was influenced by JOHANN FICHTE, *FOUNDATION OF NATURAL RIGHT* (1796). See ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* (1992). In Hegel's master-slave dialectic, mutual recognition is a necessary condition for freedom. Receiving recognition from a person who one does not view as deserving recognition is worthless.

intersubjective effects on his dignity. Even after his liberation from Bergen-Belsen in 1945, Améry remains “in the battle to regain [his] dignity.”<sup>60</sup>

The final inductive conclusion we can draw about dignity from Améry’s narrative is that dignity is inextricably intertwined with what I termed personal integrity in Chapter 4. As I noted in that chapter, personal integrity is related to the Latin word, *integritās*, meaning whole undivided, complete, and total. A person who has personal integrity fully exists because she is morally, mentally, and physically intact; she is not “in pieces” or dis-integrating. She is able to express her full identity and not be reduced to a single characteristic.<sup>61</sup> By contrast, Améry is forced to assume an externally imposed and inauthentic identity, one that erases who he was and makes him foreign to himself and others. At the same time, he is reduced to a single aspect of his being: He is a Jew and nothing else. He is no longer an individual distinct from others in his entirety, but rather the same as every other Jew who, reduced to his Jewishness alone, is a pale specter of his former self.

Améry’s account of torture also allows us to say more about dignity’s connection to personal integrity. In inflicting torture on his victim, the torturer delivers pain that is so all-encompassing that it challenges, and ultimately negates, personal integrity. As Scarry explains, pain

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<sup>60</sup> AMÉRY, *supra* note 24, at 98. *See also id.* at 40 (“The shame of destruction cannot be erased.”).

<sup>61</sup> Dignity shares some moral ground with autonomy. Améry’s loss of self-determination—his inability to choose what will happen to him, when, and where—is a central part of his story. Relying on a Kantian notion of dignity, we can describe Améry’s torture as an example of others treating Améry only as a means and not as an end in himself. But to stop at this analysis, or to contend that dignity and autonomy are redundant of each other, is to ignore the full scope of the moral injury that torture victims sustain. The active non-recognition of the torture victim more completely.

occupies the entire body and spills out into the realm beyond the body, takes over all that is inside and outside, makes the two obscenely indistinguishable, and systematically destroys ... [it] exhausts and displaces all else until it seems to be the single broad and omnipresent fact of existence.<sup>62</sup>

This pain, which “displaces all else” and becomes the sole “fact of existence,” is also intended by the torturer to “break” the victim. As Améry’s account illustrates, the victim of torture and his dignity cannot remain intact. As his mind fragments, he loses the ability to exhibit courage, resist fatigue, or display perseverance. And when his body breaks, he is literally in pieces. He has lost his personal integrity, and his dignity is damaged, if not destroyed.<sup>63</sup>

### *Connecting the Inductive Conclusions to the Genealogy and Typology*

An inductive analysis of the two paradigmatic cases highlights that the concept of dignity is status-oriented, dialogical, intersubjective, and intertwined with one’s personal integrity. These four features of dignity are consistent with the genealogy of dignity developed in Chapter 3 and the typology of dignity advanced in Chapter 4. Drawing on material from those chapters, this section demonstrates that each of the four inductive

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<sup>62</sup> *Id.* at 55.

<sup>63</sup> In Améry’s narrative, it is difficult to determine if he views his dignity as diminished or destroyed by his experiences. He describes his need to “regain” his dignity, but seems to fluctuate as to whether it has been damaged or completely lost.

conclusions about dignity is well grounded in the concept's historical trajectory and modern use.

First, the genealogy and the typology support the notion that dignity has always been a status-oriented, dialogical concept. In Classical Antiquity, one's dignity was largely determined by one's social rank. As Aristotle and Cicero's writings illustrate, dignity (*axia, dignitas*) was reserved for men who were virtuous or who held public office.<sup>64</sup> Those who possessed dignity as a consequence of their social status were owed a certain kind of dialogical response from others, which was usually referred to as honor.<sup>65</sup>

Although later thinkers generally define human dignity independently of a person's particular social position,<sup>66</sup> the close connection between dignity and social status remains. When early and modern Christian thinkers,<sup>67</sup> Renaissance and Enlightenment philosophers,<sup>68</sup> and twentieth-century human rights documents

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<sup>64</sup> See ARISTOTLE, NICOMACHEAN ETHICS, IV.3; 1123a34–1123b27 (David Ross trans., Oxford World's Classics 1998); MARCUS TULLIUS CICERO, DE ORATORE, I.64, in CICERO VOL. 8 (E.W. Sutton & H. Rackham trans., The Loeb Classical Library 1942).

<sup>65</sup> Honor was "a direct expression of status, a source of solidarity among social equals and a demarcation line against social inferiors." Peter Berger, *On the Obsolescence of the Concept of Honor*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 174 (1983).

<sup>66</sup> An exception is what I termed institutional status as dignity in Chapter 4. See, e.g., *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002) (noting that states must be accorded sovereign immunity because it is consistent with their dignity as sovereign entities).

<sup>67</sup> Early and modern Christian thinkers locate the source of universal human dignity in the relationship humans have with God as a matter of their creation. See, e.g., ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I: Q. 29, A3 (Catholic Way Publishing 2014) (describing humans as having a "high dignity [*dignitatis*]" because their nature represents the likeness of God); POPE PAUL VI, GAUDIUM ET SPES 19 (Dec. 7, 1965) ("The root reason for human dignity lies in man's call to communion with God.").

<sup>68</sup> Kant locates the dignity of human beings in their capacity to exercise autonomy in a manner consistent with morality. See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF



universalize the concept of dignity to apply to all human beings,<sup>69</sup> they express the view that human beings are uniformly of high and equal social status.<sup>70</sup> Insofar as this status accords “to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility,” it is also dialogical.<sup>71</sup> It expands and reinforces the traditional obligation to recognize those who possess dignity, which now encompasses all human beings. Acts that treat some individuals as having lesser status than others—exemplified by the anti-discrimination cases I refer to in the typology as invoking *equality as dignity*—violate human dignity.<sup>72</sup>

In addition to demonstrating that dignity has always been status-oriented and dialogical, the genealogy and typology also support the inductive conclusion that dignity is intersubjective. Modern Catholic social doctrine, for example, cautions against physician-assisted suicide in part because of its intersubjective dignitary harms. In particular, the U.S. Conference of Catholic Bishops has expressed concern that the practice threatens the dignity of people who are disabled, poor, or facing other hardships

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MORALS 4:436 (Mary Gregor ed., 1997) (1785) [hereinafter GROUNDWORK]. Insofar as the categorical imperative (CI) requires each person to determine if his maxims should become the universal law (first formulation of the CI), and also requires each person to treat others as an end in themselves (second formulation of the CI), Kant’s CI is dialogical. It requires recognition of the other.

<sup>69</sup> As noted in Chapter 3, the preamble of the Universal Declaration of Human Rights invokes the “inherent dignity of all members of the human family,” but does not trace that inherent dignity to any specific source. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>70</sup> See JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 14 (2012). Waldron refers to dignity as “nobility for the common man.” See *id.* at 22.

<sup>71</sup> *Id.* at 33.

<sup>72</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

by suggesting to them that their lives are not worth living.<sup>73</sup> The U.S. Supreme Court has also voiced concerns about intersubjective dignitary harms. In *Brown v. Board of Education*, which held that racial segregation in public schools is unconstitutional, the Court explained that “to separate [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 to ever be undone.”<sup>74</sup> In so noting, the Court recognized that segregation is unjust not only because it excludes children from school on the basis of their race, but also because it harms those children’s appraisal of their own worth, which is intersubjectively developed.<sup>75</sup>

Our final inductive conclusion—that dignity is inextricably connected to personal integrity—also finds support in the genealogy and typology. As described in Chapter 4, individuals who have personal integrity exist and are recognized as whole, integrated selves. They are able to express their complete identity and not be reduced by others to a single defining trait or characteristic. Notably, the genealogy suggests that the connection between personal integrity and dignity is a relatively modern one. Before the collapse of social hierarchies, individuals acquired dignity and were owed honor on the basis of a single characteristic (e.g., their virtue, social title, or excellent oratory skills).

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<sup>73</sup> U.S. CONFERENCE OF CATHOLIC BISHOPS, *TO LIVE EACH DAY WITH DIGNITY: A STATEMENT ON PHYSICIAN-ASSISTED SUICIDE* (June 16, 2011), <http://www.usccb.org/issues-and-action/human-life-and-dignity/assisted-suicide/to-live-each-day/upload/bishops-statement-physician-assisted-suicide-to-live-each-day.pdf> [hereinafter *TO LIVE EACH DAY*].

<sup>74</sup> 347 U.S. 483, 494 (1954). *See also id.* (“Segregation . . . has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy . . . is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.”).

<sup>75</sup> *See* ALEX HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (1995) (theorizing about the intersubjective conditions that are necessary for a person’s self-realization).

The idea that individuals develop identities apart from their socially derived dignity, or that individuals warrant recognition on the basis of those more complete identities, was anathema for much of Western history.

By contrast, contemporary human rights documents grant all people dignity and the right to recognition, and they stipulate that individuals should not be denied rights on the basis of a single characteristic, such as religion, race, or gender.<sup>76</sup> The UDHR further imposes a positive obligation on nation-states to support (within their resources) the full realization of each individual's "personality" through provision of "economic, social and cultural rights indispensable for his dignity."<sup>77</sup> As the typology from Chapter 4 demonstrates, the U.S. Supreme Court has similarly invoked dignity to protect individuals from being reduced to a single characteristic,<sup>78</sup> and to invalidate laws that limit individuals' ability to express their wholeness or full identity.<sup>79</sup> In so doing, the Court has signaled its view, captured by our inductive conclusion, that individuals suffer dignitary harms when their personal integrity is discounted, cannot be expressed, or is not recognized.

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<sup>76</sup> UDHR, *supra* note 7, at Art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

<sup>77</sup> *Id.* at Art. 22.

<sup>78</sup> *See, e.g.,* *Indiana v. Edwards*, 554 U.S. 164 (2008) (abrogating a defendant's right to self-representation because the representation would create a spectacle around a single attribute—the defendant's mental illness—and would therefore not "affirm [his] dignity").

<sup>79</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (invalidating bans on same-sex marriage because they impede choices central to personal integrity and dignity).

## **A Modest Account of Dignity**

### *From Inductive Conclusions to a Negative Heuristic*

The inductive approach undertaken in this chapter aims to derive a normative account of dignity from an examination of paradigmatic cases of dignitary harm. In analyzing how dignity is invoked in the context of annihilation/extermination and torture, I inductively concluded that the concept of dignity is status-based, dialogical, intersubjective, and intertwined with personal integrity. I then employed the genealogy and typology of dignity to vet the reliability of those inductive conclusions, and determined that those four features of dignity are consistent with dignity's historical trajectory and modern use. The normative challenge for any account of dignity, and the one taken up below, is to determine—based on dignity's central features—what constitutes an appropriate moral response between persons.

This section begins to address that challenge by offering a negative heuristic of dignity grounded in our inductive conclusions. The claim is as follows: Violations of dignity occur:

- (1) When person *A* is not recognized by others, *B*, as having equal status as a human being, or
- (2) When person *A* is either prevented by others, *B*, from existing as an integrated, complete self, or when *A* is reduced to a single aspect of being by *B*.

Cases (1) and (2) are both grounded in the idea that dignity is dialogical and intersubjective. Person *A*'s dignity is constituted, negotiated, preserved, and threatened in relationships, interactions, and experiences with *B*. When *A*'s status as a human being is not recognized (case 1), or when *A*'s personal integrity is not respected (case 2), *A* can suffer intersubjective harms, including an internalized sense of unworthiness and irrelevance.<sup>80</sup>

A society that safeguards human dignity, must therefore, at a minimum, refrain from engaging in practices that (1) fail to recognize individuals' equal moral standing as human beings or (2) disrespect individuals' personal integrity by either preventing them from existing as unified, whole selves, or by reducing them to a single aspect of their being. Because the paradigmatic cases illustrate extreme dignitary violations, it is useful to consider whether there are other examples in which the understanding of dignity modestly sketched here can uniquely explain the moral harm at issue, or explain it better than a competing moral concept. For these purposes, I briefly examine two practices—racial discrimination and prohibitions on same-sex marriage—and consider whether an account of dignity that attends to equal recognition and personal integrity better captures the nature of the moral (and often legal) harm at issue than another concept.

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<sup>80</sup> Whether person *A* must experience intersubjective harm for there to be a dignitary violation is a matter for future inquiry. My inclination, however, is that while most dignitary violations will involve intersubjective harms that leave person *A* feeling inferior or unworthy, intersubjective harms are not a necessary condition for a dignitary violation (e.g., the dignity of mentally incompetent individuals can be violated even though they cannot manifest an intersubjective harm).

## *Testing the Heuristic: Racial Discrimination and Prohibitions on Same-Sex Marriage*

As a matter of law, racial discrimination is analyzed under the Equal Protection clause of the Fourteenth Amendment, which suggests that what makes racial discrimination wrong is that it treats individuals or groups unequally on the basis of race. While it is certainly true that racial discrimination imposes inequality—for example, in the form of separate and inferior schools, bathrooms, water fountains, transportation, and public accommodations—a strict equality-based analysis does not fully capture the harms that result from racial discrimination. The negative heuristic, by contrast, shines light on the fact that racial discrimination imposes dignitary harms both because it fails to recognize individuals' equal moral status to other human beings, and because it reduces individuals to a single personal characteristic, their skin color. Moreover, the negative heuristic underscores that the intersubjective effects of racial discrimination can have lasting impacts to one's sense of self-worth.

These dignitary harms of racial discrimination were not lost on Senator Hubert Humphrey, who proposed the Civil Rights Act of 1964 as an antidote to racism and differential treatment of racial minorities. In describing the purpose of the Act, he emphasized that civil rights are not just a matter of equality. He also intended for the Act to address:

the deprivation of personal dignity that 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. It is equally the inability to

explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.<sup>81</sup>

Humphrey's statement draws attention to the fact that racial discrimination not only creates tangible inequalities, it also involves intangible, intersubjective moral harms like humiliation, frustration, embarrassment, and a sense of inferiority.<sup>82</sup> These dignitary harms were the focus of Martin Luther King Jr.'s *Letter from Birmingham City Jail*:

Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But...when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky...; when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading

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<sup>81</sup> S. REP. No. 872, at 16 (1964).

<sup>82</sup> Notably, Rosa Parks described her decision not to give up her seat on the bus to a white passenger as an act of self-preservation, not a rejection of state-mandated inequality. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 135 (2014) ("[I]t was the very last time that I would ever ride in humiliation"). See also Brad Evans & George Yancy, *The Perils of Being a Black Philosopher*, N.Y. TIMES, April 18, 2016, in which Yancy describes his intersubjective response to hate speech:

So, when I was called a "nigger," I was subject to that. I felt violated, injured; a part of me felt broken. Only now have I really begun to recognize how discourse designed to hurt can actually leave its mark. I recall after reading so many of these messages I began to feel sick, literally. So, words can debilitate, violate, injure; they can hit with the force of a stick or a stone and leave marks on the body. In this case, I began to feel the posture of my body folding inward, as it were, under the attacks.

“white” and “colored”; when your first name becomes “nigger,” your middle name becomes “boy” (however old you are)...; when you are forever fighting a degenerating sense of “nobodiness”—then you will understand why we find it difficult to wait.<sup>83</sup>

A strict equality analysis overlooks these consequences or considers them secondary, while the account of dignity suggested above understands them as the primary experience one has upon being segregated from other human beings and reduced to one’s skin color. When one is excluded from a hotel that accepts dogs, but not African Americans;<sup>84</sup> when one’s proper name is replaced with derogatory forms of address; and when one is powerless to protect one’s children from the sting of exclusion, then the moral harm is not simply a denial of formal equality; it is a denial of human dignity.

The negative heuristic similarly explains why prohibitions on same-sex marriage burden more than autonomy or equality. It is certainly true that when a person cannot marry whom she chooses, her autonomy is limited; and that insofar as others can make that choice, and she cannot, her equality is undermined. The better description of the moral harm that flows from prohibitions on same-sex marriage, however, comes from an account of dignity that attends to recognition of equal social status and personal integrity. Bans on same-sex marriage treat people in same-sex relationships as second-class citizens and fail to respect individuals in their entirety.

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<sup>83</sup> Martin Luther King Jr., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE* 292–93 (James Washington ed., 1986).

<sup>84</sup> Bruce Ackerman, *Dignity as a Constitutional Principle*, *N.Y. TIMES*, Mar. 30, 2014, at SR5 (citing this example as a dignitary harm).



The Supreme Court considered these dignitary harms in its recent decisions striking down state and federal bans on same-sex marriage.<sup>85</sup> In *United States v. Windsor*, the Court notes that when the state fails to grant legal status to the committed unions of same-sex couples, it treats those couples and their relationships as “second-class.”<sup>86</sup> In *Obergefell v. Hodges*, the Court reiterates that point and also emphasizes that prohibitions on same-sex marriage impede “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>87</sup> When the state excludes some people from participating in what the Court calls one of “life’s momentous acts of self-definition,”<sup>88</sup> the state denies individuals their full identity and thus their personal integrity.<sup>89</sup> Finally, the Court’s opinions in these two cases acknowledge that deprivations of equal status and full personal integrity result in humiliation and stigmatization, not only for members of the same-sex couple, but also for “tens of thousands of children now being raised by same-sex couples.”<sup>90</sup> These harms, which concepts like autonomy or equality would likely miss or mis-describe, are accurately captured by the negative heuristic.

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<sup>85</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>86</sup> 133 S. Ct. at 2693–94.

<sup>87</sup> *Obergefell*, 135 S. Ct. at 2597 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)). *See also id.* at 2599 (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”).

<sup>88</sup> *Id.* at 2599 (citing *Goodridge v. Dept. Public Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

<sup>89</sup> *Id.* at 2596 (noting that historically “many persons did not deem homosexuals to have dignity in their own distinct identity”).

<sup>90</sup> *Id.* at 2694.

Any account of dignity must, of course, wrestle with the critiques of dignity proffered by dignity skeptics and anti-dignitarians. Even in the modest and preliminary form presented here, however, the negative heuristic can generally refute the standard criticisms. It has sufficient content to avoid rhetorical appropriation, and as the examples of racial discrimination and same-sex marriage bans illustrate, it also has a particular normative valence that cannot be replaced by another concept. Moreover, because the negative heuristic was generated inductively from paradigmatic cases of dignity violations, instead of deductively from a metaphysical characteristic of humans, it also avoids the legitimacy problems commonly associated with traditional accounts of dignity.

The only remaining question is whether the negative heuristic has sufficient normative depth to address concrete ethical problems, especially those in which the language of dignity is invoked by individuals or groups on opposite sides of the same issue. To address this question, it is helpful to return to the dispute about the permissibility of dwarf-tossing, and consider whether the negative heuristic adds anything normatively useful to our assessment of that situation.

### ***Revisiting the Case of Dwarf-Tossing***

Recall that Manuel Wackenheim argued that when the French government banned dwarf-tossing, it violated his dignity because he voluntarily participated in that activity as a form of employment. The French government, by contrast, claimed that dwarf-tossing not only compromised the dignity of the dwarfs, who were treated as objects, but also degraded the dignity of humanity. Although the Conseil ruled against Wackenheim and

upheld the ban on dwarf-tossing,<sup>91</sup> critics have noted that the invocations of dignity on both sides of the case were normatively useless.

The negative heuristic, however, offers an alternative mechanism for conceptualizing the dignitary claims at issue in this case. It asks whether the social practices, conduct, or behavior of others (1) fails to recognize an individual as having equal moral status to other human beings, or (2) disrespects an individual's personal integrity, either by preventing him from existing as an integrated self or by reducing him to a single personal characteristic. Dwarf-tossing meets both of these provisions. Rather than regarding the dwarf as a person with equal moral status, the activity treats the dwarf as an object, a projectile for other's amusement. Furthermore, dwarf-tossing reduces the dwarf to a single trait (his size). Reasoning from the negative heuristic, dwarf-tossing violates Wackenheim's dignity because it involves his objectification and fragmentation.

The question is whether these dignitary harms are negated by the fact that Wackenheim not only consented to being used as a projectile in the sport of dwarf-tossing, he sued for the right to be treated in this way. Stated differently, does Wackenheim have a liberty or autonomy interest that trumps any societal efforts to protect him from dignitary harms? The negative heuristic does not specifically address this issue, but its attention to the intersubjectivity of persons suggests an answer consistent with the heuristic's central premises.

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<sup>91</sup> Both the French Conseil and the United Nations' Human Rights and Anti-Discrimination Committee rejected Wackenheim's claim. *See* U.N., CCPR, Human Rights Committee, CCPR/C/75/D/854/1999 (July 26, 2002), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/09d49050a9b34aaac1256c6e0031b919?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/09d49050a9b34aaac1256c6e0031b919?Opendocument); CE Ass., Oct. 27, 1995, Rec. Lebon 372, <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/27-octobre-1995-Commune-de-Morsang-sur-Orge>, *translation at* <https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1024>.

Intersubjectivity posits that individuals' sense of self-worth is shaped by their interactions, relationships, and experiences with others. As many feminists and some economists have argued, however, when individuals are subjected to demeaning or confining depictions of themselves, they can internalize and adopt those views, ultimately seeing themselves only in a limited, denigrated, and destructive way.<sup>92</sup> In such cases, their preferences are not autonomous choices, but rather adaptations to what they understand as possible, given the conditions in which they find themselves.<sup>93</sup> On this view, Wackenheim is arguably not making an autonomous decision to participate in dwarf-tossing because his preference is distorted by societal conditions that stigmatize dwarfs and limit their employment opportunities.<sup>94</sup>

One might respond that insofar as choice is a central feature of liberal society, Wackenheim should be left alone to pursue his own conception of the good. The

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<sup>92</sup> See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 112 (2001) (describing that a woman who has been denied an education and indoctrinated to believe that men are heads of households and women raise children, may stay in an abusive marriage because it is “part of women’s lot in life, just something women have to put up with as part of being women dependent on men”); Amartya Sen, *Gender Inequality and Theories of Justice*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 259, 266-70 (Martha Nussbaum & Jonathan Glover eds., 1995) (explaining that in the context of limited freedom, women can come to accept gender inequality as acceptable); Sandra Lee Bartky, *Narcissism, Femininity and Alienation*, 8 *SOC. THEORY & PRAC.* 127, 138-39 (1982) (arguing that women’s enthusiastic embrace of unachievable levels of beauty is an adaptive preference informed by the “fashion-beauty complex” and the patriarchal society in which they live).

<sup>93</sup> Adaptive preferences are sometimes called “false needs,” “deformed desires,” or “distorted preferences.” See MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 150-53 (1999); Anita Superson, *Deformed Desires and Informed Desires Tests*, 20 *HYPATIA* 109 (2005). See also JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 24 (1985) (describing the “sour grapes” phenomenon by which the fox’s belief that he is prevented from eating grapes that are beyond his reach causes him to believe that those grapes are sour and that he therefore does not want to eat them).

<sup>94</sup> ELSTER, *supra* note 93, at (“Autonomy will have to be understood as a mere residual, as what is left after we have eliminated the desires that have been shaped by one of the mechanisms on the short list for irrational preference formation.”).

problem with this answer is twofold. First, as Wackenheim explains to the court, he participates in dwarf-tossing because he has been unable to find other work due to discrimination on the basis of his size. His decision is formed (one could say compelled) in response to an unjust social situation. Insofar as it does not reflect his authentic preferences in a just environment—which would be for other employment—it is not a voluntary choice.<sup>95</sup> Second, Wackenheim’s decision both perpetuates society’s discriminatory treatment of dwarfs and co-opts him in an act that legitimizes his further oppression. It normalizes the sport of dwarf-tossing and absolves society for the unjust background conditions that created Wackenheim’s adaptive preference in the first instance.

On this analysis, the Conseil made the correct decision when it upheld the law prohibiting dwarf -tossing. As the negative heuristic demonstrates, dwarf tossing not only treats dwarfs as objects rather than as persons with equal human status, it also reduces dwarfs to a single trait, effectively fragmenting their personal integrity. Wackenheim’s claim that he consents to dwarf-tossing cannot negate these dignitary harms because, as an intersubjective approach reveals, his decision to participate is distorted by his limited choice set, which is itself the result of society’s unjust treatment of dwarfs.

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<sup>95</sup> See Donald W. Bruckner, *In Defense of Adaptive Preferences*, 142 PHIL. STUD. 307, 316-20 (2007) (contending that adaptive preferences can be rational and autonomous if the agent would reflectively endorse them under just social conditions).

## Conclusion

In both law and ethics, we often emphasize—perhaps even celebrate—individuals as independent, rationally autonomous, and self-defining. In so doing, we sometimes neglect to appreciate the extent to which individuals measure their worth and express their identity through dialogical and intersubjective experiences with others. This dissertation has demonstrated through the use of three different methodologies—a genealogy, a typology, and an inductive approach—that the concept of dignity has always been established, mediated, preserved, and threatened in interactions between the self and other.

As Jay Bernstein has written, “To be human is to be recognized as human.”<sup>96</sup> When a person is not recognized by others as having the status of a human being, is prevented from existing as a complete self, or is reduced to a single aspect of being, the concept of dignity better describes the resulting harm than other moral language. That conclusion, drawn from an inductive analysis of two paradigmatic cases of dignitary injury, is consistent with dignity’s historical trajectory, as illustrated by the genealogy, and with the dignity’s modern use, as demonstrated by the Wittgensteinian typology.

No doubt, anti-dignitarians and dignity-skeptics remain, as they should. Too often, dignity’s importance, meaning, and function are presupposed and unarticulated. The negative heuristic proposed in this dissertation is a first step in meeting the dignity critics’ demand for accountability from those who employ the term as an ethical or legal

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<sup>96</sup> BERNSTEIN, *supra* note 23, at 311.

norm, but more work remains. In a world in which “the demands of human dignity will never cease to evolve,”<sup>97</sup> the task of conceptualizing the term must continue.

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<sup>97</sup> William J. Brennan, Jr., *Addresses: Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 12 (1985).