

2018

# “Dignity in Living and in Dying”: The Henry H. H. Remak Memorial Lecture

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## Recommended Citation

George P. Smith II, “Dignity in Living and in Dying”: The Henry H. H. Remak Memorial Lecture, 25 IND. J. GLOBAL LEGAL STUD. 413 (2018).

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**25 Ind. J. Global Legal Stud. 413**

Indiana Journal of Global Legal Studies  
Spring, 2018

Lecture

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## “DIGNITY IN LIVING AND IN DYING”: THE HENRY H. H. REMAK MEMORIAL LECTURE <sup>a1</sup>

### INTRODUCTION

On November 3, 2016, Aharon Barak, former President of the Supreme Court of Israel, was streamed from New York University to Indiana University and delivered thoughtful and perceptive comments on the topic of this seminar. Professor Barak's book, *Human Dignity: The Constitutional Value and the Constitutional Right* is an important voice in the international dialogue on Human Dignity.

Justice Barak's comments of November 3rd provide a rich background for today's lecture. The lack of a universal or constitutional value of Human Dignity has not prevented thirty-two of some forty-five European countries from recognizing it in some form or other.<sup>1</sup> In Germany, for example, although Human Dignity is recognized in the Constitution as “inviolable,” ongoing debate centers on whether Human Dignity is a constitutional value or should be regarded as a \*414 constitutional right or seen as an absolute right together with the extent to which safeguards against humiliation should be provided.<sup>2</sup>

Justice Barak sees Human Dignity as an absolute right.<sup>3</sup> Indeed, for the Justice, Human Dignity is a framework, core, or “mother right” in that it unites all values underlying express and implicit constitutional rights and guarantees.<sup>4</sup> The right to liberty in the U.S. Constitution is an example of a framework right.<sup>5</sup>

The extent of this international debate over the significance and the “utility” of Human Dignity as a normative value or as an absolute right guaranteed constitutionally sets the theme of this lecture today.

Interestingly, as illustrated in American case law, since World War II, Human Dignity has been embraced as a constitutional value and has played an important role in the interpretation of a number of rights set forth in our own Bill of Rights.<sup>6</sup>

Dignity is seen commonly as an ethical obligation owed to human persons. The dimensions of this obligation in today's post secular society are, however, subject to wide discussion and debate; for the term, *human dignity*, and its preservation, defies universal agreement. Yet, its preservation, together with the prevention of indignity, is a guiding principle or at

least a vector of force in a wide range of issues ranging from recognizing and protecting the civil rights of the citizen members of the LGBTQ community throughout the nation to the care of the disabled and to the dying.

In clinical medicine, safeguarding the dignity of the patient is a core responsibility of all physicians to respect patient autonomy and to act with beneficence in health care decisions. Similarly, in protecting the civil rights of free association for all Americans--without reference to gender or sexual lifestyle preferences--contemporary society must accord non-judgmental respect for the actions of its members so long as that conduct is neither harmful nor illegal.<sup>7</sup>

Foundational instruments such as The Universal Declaration of Human Rights; The International Covenant on Economic, Social and Cultural Rights; and The Covenant on Civil and Political Rights all codify a mandate to ensure human dignity within various contexts of \*415 international conduct.<sup>8</sup> The notion itself is stated normally in grandiloquent terminology without more, and always subject to progressive realization rather than absolute recognition. Ongoing international efforts must continue to be taken to guide the actions of states in seeking to set and to maintain levels of cultural and social conduct, which serve to safeguard human dignity throughout life and especially at its end-stage.

Within the United States, five states and the District of Columbia legislatively, and one, judicially, moved toward recognition of a right to die with dignity (when confronted with a diagnosis and a prognosis of medical futility is commendable);<sup>9</sup> for, such actions validate the very essence of autonomy and self-determination, which are correctly viewed as the bulwark of the social order of American society.

## I. HUMAN DIGNITY: DEFINITIONAL AND STRUCTURAL CHALLENGES

Acknowledged as a notion that neither exists in today's society nor is a proper description of the world, human dignity is nonetheless accepted as possibly “the premier value underlying the last two centuries of moral and political thought.”<sup>10</sup> The degree to which law accommodates dignity is evolving,<sup>11</sup> as the precise meaning of human \*416 dignity can only be tested within the context of specific factual (e.g., situational) settings.<sup>12</sup>

As a moral term, dignity suggests how individuals should or should not be treated individually or as a group within a given social and cultural context.<sup>13</sup> Accordingly, no acceptable standard working definition of dignity is uniformly applicable.<sup>14</sup> At a minimum, dignity means “respect for the intrinsic worth of every person.”<sup>15</sup>

Grounded in the concept of autonomy by Kant, who is acknowledged as the father of the concept itself, dignity was cast as a normative legal ideal.<sup>16</sup> Nations have either chosen to relate human dignity to the status of a foundational right supporting all other rights or, alternatively, have paired it with rights to equality and of liberty.<sup>17</sup> Within the second paragraph of the Preamble of the Charter of the United Nations, human dignity appears as an ideal that “the peoples of the United Nations” are “determined” to achieve--this, by reaffirmation of their “faith in \*417 fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small.”<sup>18</sup>

The noble and lofty ideal of dignity allows easy acceptance and affirmation, though it is nearly devoid of a substantive context. The application of dignity as a normative standard is much akin to the test Supreme Court Justice Potter Stewart set in 1964 for determining when something is obscene. Using a common sense subjective standard, Justice Stewart said,

famously, that he knew obscenity when he saw it.<sup>19</sup> Indeed, Oscar Schacter opined that while violations of human dignity were difficult to determine, they could nonetheless be assessed by using the epistemology of “I know it when I see it even if I cannot tell you what it is.”<sup>20</sup> Perhaps a similar common sense, intuitive approach or even a consensus morality<sup>21</sup> to assessing dignity--and practices of indignity--could be used, for example, in evaluating cases of misconduct in managing end-of-life care.

In an effort to quantify conduct that degrades human dignity, various lists have been compiled of conduct and ideas that are “implicitly incompatible with the basic ideas of the inherent dignity and worth of human persons.”<sup>22</sup> Among some twelve levels of conduct which challenge the notion of dignity are “degrading living conditions and deprivation of basic needs”; “statements that demean and humiliate individuals or groups because of their origins, status or belief”; and “medical treatment or hospital care insensitive to individual choice or the requirements of human personality.”<sup>23</sup> Central to the very ideal of human dignity, then, are modes of conduct and ideas antithetical or incompatible with respect for basic or inherent dignity.<sup>24</sup>

In Emily Smith's new book, *The Power of Meaning: Crafting a Life that Matters*, she comments on the extent to which elder abuse and neglect raise serious challenges to the whole notion of personal dignity. \*418 In one study of long-term care for the elderly, forty percent of nursing home staff members admitted to committing psychological abuse, such as swearing and yelling at residents; depriving them of food; or subjecting them to inappropriate isolation. In another study, four in ten nursing home residents reported that they had been abused or observed abuse.<sup>25</sup>

It is within the very issue of death management, however, that human dignity is tested rigorously, both as to parameters of personal dignity and to basic dignity.<sup>26</sup> Indeed, within end-of-life care, dignity can be characterized as a human rights issue.<sup>27</sup> In everyday conversation, dignity at death means the avoidance of “being helpless, incontinent, incoherent, dependent, drooling, a burden to others and of poor general deportment.”<sup>28</sup>

A powerful interface exists between the right to human dignity and the right to life; for, “many of the claims to a right to die with dignity actually reaffirm a more general commitment to life (including life shared, love, and humanity) and to the ending of one's life in dignity.”<sup>29</sup> In this sense, “an affirmation of human dignity, its strength and grandeur, is an affirmation of the eternity of life.”<sup>30</sup> These fundamental human rights reflect, plainly, the interrelated right to a basic quality of life and, additionally, “in the rights to adequate food, health care, and shelter recognized in Article 25 of the Universal Declaration [on Human Rights].”<sup>31</sup> Inasmuch as death is a part of life, “choice concerning life must necessarily include those concerning the end and ending of life.”<sup>32</sup>

\*419 Included within the right to human dignity must be “a right to live with dignity, and thus a right to end one's life without indignity-- indeed, a right not to be compelled to live the remainder of life in indignity.”<sup>33</sup> When remaining life has little quality and yields indignity, it is both humane and efficacious to respect “the dignity of personal choice” made to conclude it.<sup>34</sup>

While no express right to die with dignity is found in definitive instruments on human rights,<sup>35</sup> the very Charter of the United Nations addresses the need to protect and safeguard the essential “dignity and worth of the human person.”<sup>36</sup> “The inherent dignity ... of all members of the human family” is recognized in the preamble of the Universal Declaration on Human Rights.<sup>37</sup> The Declaration states further that not only are “[a]ll human beings ... born free and equal in

dignity and rights” but each is entitled to have both respect and value, and to a right to dignity.<sup>38</sup> An interrelated right of privacy is, furthermore, recognized in Article 12 of the Declaration.<sup>39</sup> Even though phrased as a qualified right, it is nonetheless viewed correctly as extending in scope to include all personal associational choices as well as those regarding death and dying.<sup>40</sup>

## II. HUMAN DIGNITY: ITS RELIGIOUS, ETHICAL, AND LEGAL PROVENANCE

Although the classical world does not regard dignity as inherent to all individuals, the notion of dignity or human worth was recognized in early history--but only for virtuous persons.<sup>41</sup> Consequently, orphans, slaves, and those with physical defects were excluded altogether from qualifying for an ascription to dignity.<sup>42</sup>

The early views of the Jewish and the Christian faiths ascribed to the idea that all human beings were made in the image and likeness of \*420 God.<sup>43</sup> This concept subsequently grew into acceptance of the premise that the body and the soul were integrated.<sup>44</sup> This understanding of Imago Dei, or the image of God, in all of God's creations, provided the foundation for the belief that there was an intrinsic value in each of those who bore his image.<sup>45</sup>

Interestingly, the word, “dignity,” derives from the Latin *dignitas*, (i.e., worth) and *digness* (worthy). When applied to *homo sapiens*, this etymology implies that every individual must be acknowledged as imbued with an inherent value and, accordingly, be treated with proper respect.<sup>46</sup>

Much of the contemporary understanding of human dignity can be attributed to religion and to ancient civilizations.<sup>47</sup> Indeed, human rights, like those enumerated in modern international instruments, also have a clear provenance in history and biblical faith; for, within equality, concern for the poor and social justice are to be found the very seeds of human rights and the dignity of man.<sup>48</sup>

Within the community of world religions, a consistently strong leadership role in securing the dignity of personhood can be claimed properly by the Roman Catholic faith.<sup>49</sup> His Holiness Pope Benedict XVI, in remarks made on March 30, 2006, observed that today--as in the past--the principle focus of interventions by the Catholic Church has been to protect and to promote the dignity of the person, both from the “moment of conception until natural death.”<sup>50</sup>

Pope (now Saint) John Paul II, in his Apostolic Letter *Salvifica Doloris*, issued February 11, 1984, spoke eloquently of the essentiality of “every individual to ‘stop,’ as the Good Samaritan did, at the suffering of \*421 one's neighbor, to have ‘compassion’ for that suffering and to give some help.”<sup>51</sup> The Pope urged the cultivation of a “sensitivity of heart” which--in turn--“bears witness to compassion toward a suffering person,”<sup>52</sup> and to an understanding that humans should be treated “as a psychological and physical whole.”<sup>53</sup>

Previously in his encyclical, *Pacem in Terris*, issued in 1963, Pope John Paul XXIII declared: “Man has the right to life. He has the right to bodily integrity, and to the means necessary for the proper development of life ... he has the right to be looked after in the event of ill-health.”<sup>54</sup>

## III. CONTEMPORARY IMPRECISIONS AND PENUMBRIC HAZE

For some, the rise of human dignity as a normative value is seen as “awkward, clumsy, sloppy, instrumental, inflationary and open to judicial vagary,”<sup>55</sup> as well as “ad hoc, erratic, ‘muddled and inconsistent.’”<sup>56</sup> Since dignity is incapable of being “operationalized,”<sup>57</sup> it is argued that it cannot be recognized as a policy standard.<sup>58</sup> Indeed, in the United States, there has simply been “no coalescence ... around the rational possibilities that exist for a legal theory of human dignity.”<sup>59</sup> Thus, the legal ontology of dignity lies in obfuscation.<sup>60</sup>

Yet, even with these negative arguments against the recognition and the application of dignity as a normative value, America, contrary to some European countries, has nonetheless chosen to base its socio-legal and ethical understanding of dignity on the libertarian tradition of \*422 anchoring dignity to notions of paternalism or communitarism.<sup>61</sup> Dignity is acknowledged as the United States Constitution's fundamental value and the “cardinal principle for which the Constitution stands.”<sup>62</sup>

Further, it has been asserted that dignity can neither “be demanded or claimed” nor provided or owed.<sup>63</sup> Rather, it is either expected or found “in every living being,” for “in principle, it is autocratic.”<sup>64</sup> Others have opined that dignity “is a mindset formed by others who observed our courage, honesty, and perseverance in the face of dignity.”<sup>65</sup> The notion of a “right” to dignity for those holding this opinion is that there can be no right to dignity.<sup>66</sup> It remains an open question whether dignity is properly considered as an integral component of the very concept of personhood derived from autonomy, equality, or liberty or, whether it is an independent attribute of personhood.<sup>67</sup>

It was announced this past February, 2017, that former Vice President Joe Biden and his wife, Jill, have established the Biden Foundation whose purpose, as an educational foundation, is to explore “the ways that everyone--no matter their income level, race, gender, age, or sexuality--can expect to be treated with dignity and to receive a fair shot at achieving the American Dream.”<sup>68</sup> Commendable though this effort is, the task undertaken by the Foundation of securing “the American Dream” for everyone is truly formidable.

In addition to the Biden Foundation, two independent organizations have, for quite some time, been making slow, but positive, progress in working toward advancing and protecting human dignity.

Dignity and Respect, Inc., is a collaborative initiative inspiring people throughout the world to treat everyone with dignity and respect. Community organizations, youth programs, and schools are used as fora for educating and propagating the values of diversity and inclusion for this contemporary society.<sup>69</sup>

\*423 Freedom House, headquartered in Washington, D.C., leads the Dignity for All consortium of eight prominent human rights and LGBTQ organizations, which support the proposition of securing dignity for all. In particular, Freedom House supports legal assistance, funds medical expenses, supports dependents, and covers relocation costs when LGBTQ activists come under threats or attacks. LGBTQ persons face discrimination, persecution, and egregious human rights violations simply because of their sexual orientation or gender identity. Interestingly, and sadly, consensual same-sex conduct is still criminalized in seventy-six countries; and in five countries, this conduct is subject to the death penalty.<sup>70</sup>

These last two organizations have an important role to play in addressing the serious issues of teenage suicide. In a recent study published in the Journal of the American Medical Association, suicide was the second most common cause of death among adolescents age fifteen to twenty-four. Sexual minorities were found to be at increased risk for suicide. More

than 29% of gay, lesbian, and bisexual high school students reported attempting suicide within the past twelve months--relative to 6% for heterosexual students. After same-sex marriages became legal in the United States and some states recognized same-sex association, the percentage of gay, lesbian and bisexual teens attempting suicide dropped 14%.<sup>71</sup>

Reshaping moral and social perspectives and cultural stereotypes, which have all too often been encoded into the fabric of daily living over the years, is daunting. LGBTQ “rights” are still, for the most part, embryonic. The Civil Rights Commission, established in 1957 by Congress as a component of the Civil Rights Act of 1957, has been a watchdog (often toothless and slumbering) in investigating reporting of civil rights violations.<sup>72</sup>

Yet, the Commission was, to one degree or other, helpful in the passage of the Civil Rights Acts of 1960 and 1964, the Voting Rights Act \*424 of 1965, the Fair Housing Act of 1968, and the Americans with Disabilities Act of 1990.<sup>73</sup> Today, the Commission might well use its 1977 report on *Sex Bias in the U.S. Code*<sup>74</sup> as a starting point to undertake a serious assessment of today's discrimination of members of the LGBTQ community. Although lacking in a sustained level of power, the Commission still has a level of visibility. And visibility is central to messaging.

One of the most contentious medical, socio-legal issues of the day will soon be presented to the U.S. Supreme Court for resolution. That issue is whether transgender students may have access to school restrooms consistent with their personal gender views and preferences rather than being held to birth certificate biological identification for purposes of restroom use.<sup>75</sup>

It would be speculative to surmise what position the Court will take here as well as other transgender concerns regarding the scope of their “rights” as prison inmates to receive hormone therapy<sup>76</sup> and sexual reassignment surgery.<sup>77</sup>

Whatever decision the Court reaches on these issues will significantly impact the way in which society, as a whole, views and acts on the requisite values of liberty, the normative standards or values of dignity, and the consequences of indignity.

#### IV. DIGNITY INTERESTS AND THE SUPREME COURT

The United States Supreme Court has largely acknowledged the concept of dignity interests as a background norm--yet accepts it, in Eighth Amendment inquiries, as a primary force.<sup>78</sup> In fact, when interpreting the 8th Amendment's imposition of affirmative obligations \*425 on the states, the Court often links liberty and dignity and thereby implies--if not states specifically--that from recognizing human dignity comes the imposition of a state duty to care for its citizens.<sup>79</sup>

Domestically, the phrase, “human dignity,” was first used in the United States Supreme Court by Justice Frank W. Murphy in a dissenting opinion in the case of *In re Yamashita* in 1946.<sup>80</sup> Subsequently, the Court has employed this term or referenced the “dignity of man”<sup>81</sup> in a considerable number of cases.<sup>82</sup>

More recently, on June 28, 2015, writing for the majority in *Obergefell v. Hodges et al.*<sup>83</sup> Justice Anthony M. Kennedy articulated--repeatedly--the need to acknowledge and to embrace the realization that “certain personal choices [are] central to individual dignity and autonomy” and are inherent liberties protected by Due Process guarantees of the 14th Amendment.<sup>84</sup> These expanded liberties are, as such, not enumerated within the Bill of Rights but must be accepted as within the scope of individual autonomy.<sup>85</sup> When “a claim of dignity” conflicts “with both law and wide spread social

conventions,”<sup>86</sup> as well as “substantial cultural and political developments,” the conflicts must be resolved in favor of safeguarding the dignity of personhood.<sup>87</sup>

In the landmark 2003 case of *Lawrence v. Texas*,<sup>88</sup> which legitimized consensual same-sex relations between adults, Justice Kennedy's powerful and eloquent reasoning was dominant in the majority opinion that he wrote for the Court. Stating that the right to personal liberty under the Due Process Clauses confers a full right to engage in personal consensual conduct, Kennedy drew upon shared values of a wider civilization and, specifically, the European Court of Human Rights, where intimate (consensual) conduct has been affirmed as a protected right.<sup>89</sup> For Kennedy, the “components of liberty in its manifold possibilities,”<sup>90</sup> were not set out or anticipated when the Due Process Clauses of the 5th Amendment or the 14th Amendment were drawn and ratified.<sup>91</sup> Consequently, “as the Constitution endures, persons in every \*426 generation can invoke its principles in their own search for greater freedom.”<sup>92</sup>

In an equally eloquent concurring opinion, Justice Sandra Day O'Connor observed that “moral disapproval is not a legitimate state interest to justify state regulation.”<sup>93</sup>

The positions taken by Justice Kennedy in *Obergefell*<sup>94</sup> and *Lawrence*<sup>95</sup> illustrate clearly, by analogy, that the dignity of personhood is as important in its associational freedoms as it is in health care decision-making at the end-stage of life where personal autonomy, liberty, and well-being, humanness, and compassion are vital components to assure a dignified death.

## V. DOMESTIC OR NATIONAL PRECEDENTS

The concurrence of Justice Sandra Day O'Connor in the 1989 case of *Cruzan v. Director, Missouri Dept. of Health*, is pertinent<sup>96</sup> to issues of end-of-life care.

Holding that the refusal of food and water delivered artificially is an act within a protected liberty interest as unwanted medical treatment, Justice O'Connor observed that “[O]ur notions of liberty are inextricably entwined with an idea of physical freedom and self-determination,” and, furthermore, a state that forces “a competent adult to endure such procedures against her will burdens the patients liberty, dignity, and freedom to determine the course of her own treatment.”<sup>97</sup> Stressing the compromise of the “integrity of personhood” by forcible intrusions of this nature, the Justice asserted, “[t]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment including the \*427 artificial delivery of good and water.”<sup>98</sup> The very same “minimal conditions necessary for a life in dignity,”<sup>99</sup> (e.g., autonomy, respect, self-determination, compassion, humaneness, and decency) then are the very same conditions and values that should prevail in the management of the end-stage of life.

The *Cruzan* case was pivotal in developing a constitutional jurisprudence for end-of-life management. The notion of a recognized liberty interest in dying without refractory pain and suffering--both for competent and, arguably, incompetent patients<sup>100</sup>--was validated by the *Cruzan* holding.<sup>101</sup> As a consequence of this liberty interest in dying without pain, with as much dignity as possible, when challenges to its exercise are raised, courts should proceed to balance this liberty against competing state interests to protect vulnerables (e.g., the aged and infirm and the unhealthy).<sup>102</sup> State interest in preserving a terminally ill person's life would obviously be weaker than preserving life that is not in its terminal phase.<sup>103</sup>



The *Cruzan* construct for decision-making--anchored, as such, in the common law right to refuse treatment--is a more reasonable approach to analysis than validating a fundamental right to die with dignity.<sup>104</sup>

Were a right to death to be recognized as a fundamental right, a vexatious dilemma would follow: namely, should the state be charged, correspondingly, with an equal obligation to both bestow, as well as guarantee, a life with dignity?<sup>105</sup> “If ensuring dignity at death is the government's responsibility, dignity during life is an equal, if not greater, responsibility.”<sup>106</sup>

Under circumstances of this nature, it would follow that dignity would be denominated an entitlement.<sup>107</sup> Although set as a responsibility within modern state institutions,<sup>108</sup> dignity in life is not a precise and integral value in the U.S. Constitution.<sup>109</sup> It is better to view the Constitution as providing negative rights rather than affirmative \*428 ones.<sup>110</sup> Consequently, citizens are granted liberty to access-- without government power--their individual consciences and the visions for attaining happiness.<sup>111</sup>

The relationship between the U.S. Constitution and death is difficult for courts to determine.<sup>112</sup> The legislatures are far better equipped to enact statutes which draw lines of distinction--for example, between physician-assisted suicide and euthanasia.<sup>113</sup>

When presented with issues of physician-assisted suicide and the states' right to prohibit it, the Supreme Court has held in two pathbreaking cases, *Vaco v. Quill*<sup>114</sup> and *Washington v. Glucksberg*,<sup>115</sup> that it was valid, constitutionally, to prohibit suicide in part because the idea of physician-assisted suicide was not part of the Nation's history or its traditions<sup>116</sup> and laws prohibiting such conduct were not in contravention of the Equal Protection Clause of the 14th Amendment.<sup>117</sup>

In the concurring opinions in both *Quill* and *Glucksberg*, Justice O'Connor implies that a constitutional liberty exists, when a terminal or futile medical condition is diagnosed for one, to be free from the refractory pain experienced from such a condition.<sup>118</sup> But, without “great suffering,” there can be no constitutional claim.<sup>119</sup> In these two cases, there was adequate pain relief legally available to the moving parties.<sup>120</sup> Accordingly, the “liberty” found in the Due Process Clause, which could arguably embrace a coordinate liberty to use assistance in and out of suicide, motivated solely to avoid a painful and undignified death, was not an “operable” fact in these cases.<sup>121</sup> There was a direct implication, however, in Justice O'Connor's concurrence that in situations where no intractable pain was present and no state legislation was in play, a different judicial result might occur.<sup>122</sup>

Justice John Paul Stevens, in his concurrence in *Glucksberg*, recognizes Justice O'Connor's notion of a liberty interest as central to \*429 any action to avoid intolerable pain “and the indignity of living one's final days incapacitated and in agony.”<sup>123</sup> When statutory mandates are either vague and indeterminate or lacking altogether, this formulation should be seen as more judicially palpable than seeking precise limits to a “right” to die with dignity.<sup>124</sup>

## VI. LEGISLATIVE RESPONSES

As observed, five states and the District of Columbia have enacted laws that allow those with a terminal medical condition to seek pharmacologic assistance from a physician to end their own lives.<sup>125</sup> One state supreme court, Montana, concluded that while there was no constitutional right to die with dignity in the state, physician assistance for those in

the end-stage of life did not violate state legislation designed to protect the terminally ill, nor was such assistance against state public policy to protect vulnerable individuals.<sup>126</sup>

Similarly, in parts of Europe--notably, the Netherlands, Belgium, and Switzerland--a legislative right of the terminally ill to have assistance in ending their lives has been recognized.<sup>127</sup>

## VII. FUNDAMENTAL OR COMPETING HUMAN RIGHTS?

The modern genesis of human rights is to be found in the United Nations 1948 Universal Declaration of Human Rights,<sup>128</sup> together with the 1966 International Covenant on Civil and Political Rights,<sup>129</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>130</sup>

\*430 By their very nature, human rights are inherent to all individuals and not dependent upon the state for either their existence or their enjoyment.<sup>131</sup> The Universal Declaration of Human Rights proclaims this basic principle when it acknowledges, “[a]ll human beings are born free and equal in dignity and rights.”<sup>132</sup> The function of human rights is to create state obligations, not to create general ethics.<sup>133</sup> Human rights are seen properly as setting not only minimum standards for governance but as a means for safeguarding against state oppression.<sup>134</sup> Indeed, these rights “are at the heart of a free and democratic society.”<sup>135</sup>

While the Universal Declaration is non-binding, significant parts have attained the status of binding--by rules of customary international law or, alternatively, are acknowledged as part of those general principles of law subscribed to by civilized nations.<sup>136</sup> It has been said, in fact, that the enumerated rights set forth within the Declaration are “made whole by dignity.”<sup>137</sup> In and of themselves, the principles enumerated within the Declaration are not human rights. Respect for human dignity is the catalyst for a human rights policy whenever freedom and equality are jeopardized.<sup>138</sup>

## VIII. HUMAN RIGHTS AND THE RIGHTS OF MAN

The provenance of The Universal Declaration of Human Rights is to be found within the ideas and philosophies of the eighteenth century \*431 Enlightenment, the American and French revolutions, and the movement toward democracy and of liberalism.<sup>139</sup> “On the surface, they reflect the democratization and universalization of values and norms which have always been held as a supreme, existential importance by men, tribes, nations, the world over and by the ruling classes at least in the West.”<sup>140</sup> Central to the notion of citizenship, for the Greeks through the ideal of the *Politeia* and for the Romans in the *civis romanus*, were the core values of liberty, dignity, and self-determination;<sup>141</sup> just as in the same fashion that it was asserted by European societies, and the nobility.<sup>142</sup>

The theory of the “Rights of Man” was drawn from past beliefs, as well as traditions and experiences by the intellectual leaders of the West.<sup>143</sup> In fact, this bold contention was the basis for proclaiming the inalienable rights of citizens in the U.S. Declaration of Independence<sup>144</sup> and, to a degree, the substance of the American national identity<sup>145</sup> and value system.<sup>146</sup>

Recognized since the end of World War II as not only legal norms but also as legitimate criteria for asserting, establishing, and maintaining political legitimacy,<sup>147</sup> human rights have now achieved such a universal pre-eminence that a modern state is seen as neither legitimate nor complete without an accounting of a human rights record.<sup>148</sup>

Human dignity, quite simply goes to the very heart of what being a person embraces in a value system. Yet, as a theorized concept, dignity has often been seen as “incomplete” because, to be an adequate normative account, it lacks a “well-specified counterpart obligation.”<sup>149</sup> Even with a “charge” of incompleteness, a fundamental assertion may be made: namely, that there is an overlapping consensus, which exists \*432 regarding the values that underlie the acceptance of dignity as a human right where worth must be secured and protected by the states.<sup>150</sup>

Over succeeding years, as in the past, the focus of the “human rights debate” will be the extent to which economic, social, and cultural rights are as cognizable and equal as civil and political rights.<sup>151</sup> Arguments will seek to either prioritize rights--placing differing moral rights on them-- or, alternatively, asserting that fundamental rights cannot be ranked, but must be equally honored.<sup>152</sup> The perception of the inferiority of economic, social, and cultural rights to civil and political rights raises a serious concern that endowing such rights with “human rights status” would have the end result of “weakening traditional human rights” and thus playing havoc with the notion of allowing violations of economic, social, and cultural rights to be justifiable.<sup>153</sup>

“A common ground of moral understanding” must be reached before minimum standards of behavior can be negotiated and, ideally, morphed by all states into a standard of universality for the uniform application of human rights.<sup>154</sup> Once a basic acceptance of “performance” standards is attained, adjustments can be allowed--tied as such to differing legal, moral and cultural value systems within each state.<sup>155</sup> Yet, even with the attainment of this ideal model scenario, where by treaty, acquiesce, or custom states rise to a “universal” acceptance and enforcement of human rights, one overpowering geopolitical policy consideration must be understood: the core determinants of the level of respect, protection, and enforcement of those rights is tied, unalterably, to the level of economic development and self-sufficiency of each state.<sup>156</sup>

## IX. ADVANCING A GLOBAL FRAMEWORK FOR A NEW CONSTITUTIONALISM?

Pivotal to a global initiative to structure a framework in order to advance a new human rights constitutionalism<sup>157</sup> are three instruments: \*433 The Universal Declaration on Human Genome and Human Rights<sup>158</sup> of 1998, the 2003 International Declaration on Human Genetic Data<sup>159</sup> and the Universal Bioethics Declaration of 2005.<sup>160</sup> In addition to these Declarations, the Universal Declaration of Human Rights,<sup>161</sup> the International Covenant on Civil and Political Rights<sup>162</sup> and the International Covenant on Economic, Cultural and Social Rights<sup>163</sup> set forth working principles and imposed obligations which bear a direct, rather than a tangential, relationship to normative medical ethics.<sup>164</sup>

Human rights, bioethics, and medical ethics are linked together, inextricably, by provisions in these United Nations Declarations, which require respect for human dignity and equality, the right to life, and the realization of a standard of living, which promotes health and assures medical care together with the right to be free from inhumane and degrading treatment.<sup>165</sup>

The Universal Declaration on Bioethics and Human Rights was adopted, on October 19, 2005, by the member states of UNESCO.<sup>166</sup> The Declaration in Article 1 enunciates a Principle of Social Responsibility, which directs decisions and practices in science and technology to promote “the common good” by providing “access to adequate nutrition and water,” eliminating the marginalization of persons, and reducing poverty and illiteracy.<sup>167</sup> Article 15 strengthens the very notion of social responsibility by directing the benefits of scientific research to advance “access to quality health care” and “support for health services.”<sup>168</sup>

\*434 Articles 21 through 24 of the Bioethics and Human Rights Declaration deal with transnational practices,<sup>169</sup> the role of states,<sup>170</sup> in bioethics education,<sup>171</sup> together with standards of international cooperation needed to promote not only the advancement of life sciences and technologies while, at the same time, respecting and promoting human dignity, human rights and fundamental freedoms.<sup>172</sup> The Declaration can be properly seen as a creative effort to recognize, and thus validate, an inextricable symbiotic relationship between human dignity and human rights with “access” to health care. Indeed, in this regard, if not accepted as an independent human right, dignity must be accepted as, at a minimum, an integral part of the human right to health care.

The European Convention on Human Rights and Biomedicine, although of marginal impact because of its limited ratification, should nonetheless be recognized as a creative illustration of linkage with bioethics, medical ethics, and the norms of international human rights.<sup>173</sup> This linkage is found through policies regulating equitable access to healthcare and informed consent, together with restrictions on the uses of the human genome and other regulations on scientific research.<sup>174</sup>

Although all of these U.N. Conventions and Declarations are significant in their effect to structure an international policy framework for this new age of biotechnology, one central flaw to their permanence and their effectiveness exists: the fact that principles, covenants, statutes, protocols, declarations, and conventions bind *only* states which either accede or ratify them.<sup>175</sup>

Another flaw is found within the so-called standards of progressivity that shape any and all political efforts to design and then enforce a right to health as either a social or a cultural right.<sup>176</sup> This fragile, if not fatally flawed enforcement mechanism, grants immunity to all states from human rights violations *so long as* they present evidence of their \*435 progressive (or at least measurable) actions toward the realization of human rights.<sup>177</sup>

Economic self-interest and political survival determine, in the final analysis, the level of the recognition, the enforcement of health-care protections, and the extent to which they are accepted or rejected as an integral part of social, cultural, political, or human rights. A strong civil society, operating freely, is essential in order to secure sustainable human rights nationally.<sup>178</sup>

## CONCLUSION

As a concept, principle, normative standard, or value, human dignity may be viewed correctly as predating human rights because human rights are, in contemporary society, seen as “judicial concretization” of but a generalized notion of human dignity.<sup>179</sup> Owing to the capacious nature of human rights, clarity of application for human dignity as a normative standard is understandably elusive. Indeed, attempting to define limits to dignity is especially perplexing since respecting

dignity not only implies respect for individual autonomy but “the right of everyone not to be devalued as a human being” or be degraded and humiliated.<sup>180</sup>

Standing alone, the virtue of dignity should not be acknowledged as single and distinct as, for example, courage. Rather, dignity should be understood as “a collection of loosely related traits like self-respect, self-<sup>\*436</sup> control, and self-discipline.”<sup>181</sup> The very taxonomy of human dignity is set within a “context of respect for persons and the value of autonomy.”<sup>182</sup>

All of the international instruments on human rights, at one level or other, have human dignity as their *raison d'être* and end goal.<sup>183</sup> Consequently, the optimum value of maximizing human dignity is codified when laws and policies, which administer justice, are guided by the central, modern virtue of human dignity.<sup>184</sup> If human dignity is acknowledged as the ultimate value, or even as a foundational value, it assumes the function of a social ideal rather than that of a value having any directive utility.<sup>185</sup>

It is important to remember that the very ends of medicine are devoted to preserving human dignity and preventing indignity.<sup>186</sup> It remains for the physician to recognize a duty of beneficence to safeguard the patient from losing dignity and thereby despairing<sup>187</sup> and be ever mindful that-- independent of bodily pain--extreme abasement and humiliation, as well as loss of hope and demoralization, may result in acute emotional pain and that this must be dealt with in an appropriate manner.<sup>188</sup>

John Keats, in his 1819 poem, “Ode to a Nightingale” contemplated an “easeful death.”<sup>189</sup> Sylvia Plath, in her 1962 poem, “Lady Lazarus” declared that “[d]ying is an Art.”<sup>190</sup> Today, most individuals, at one time or other, find themselves pondering whether they will achieve the Keatsian goal or acquire the artistic ability to ensure an artful death for themselves. To be allowed to die with dignity and free of pain or, <sup>\*437</sup> alternatively, be forced to accept the “least worst death”<sup>191</sup> or even a “bad death”<sup>192</sup> is the modern day dilemma. Indeed, refractory physical pain and existential suffering are all too often an integral part of a prolonged process of dying; all of which led to Henry Fielding's observation that it is not Death, itself, which is “terrible,” but rather, “[d]ying.”<sup>193</sup>

At the end-stage of life, health care management decision-making should be guided by a situation ethic, which is shaped by common sense, beneficence, compassion, and love<sup>194</sup> and seeks to assure dignity in dying. Consistent with the principle of medical futility, physicians should be emboldened to take reasonable and sound professional measures to alleviate pain and existential suffering.<sup>195</sup> When deemed appropriate to a particular case--and consistent with patient values and life experiences--deep or palliative sedation should, for example, be seen as not only efficacious but compassionate care that preserves human dignity.<sup>196</sup>

The importance of preserving human dignity at the end-of-life should be recognized as a human right.<sup>197</sup> Imprecise as the term is and conditioned, as such, by economic, cultural, social, and political forces with each member state of the United Nations,<sup>198</sup> having human dignity nonetheless *codified* in international policy documents is significant.<sup>199</sup> Although admittedly symbolic, the importance of human dignity, alternatively, as a normative *catalyst* for on-going dialogue and for <sup>\*438</sup> implementation in action programs for the attainment and safeguarding of human rights by the United Nations ECOSOC and the Committee on Economic, Social and Cultural Rights cannot be overstated. The eloquent words in the Preamble to the U.N. Charter which came into force in 1945 remain a clarion call to establish and

secure “the dignity and the worth of the human person”<sup>200</sup> by recognizing the right to die with dignity as an inviolable human right. The right to dignity reflects, most appropriately, more than any other right can or does, the very essence of what being a human being means.<sup>201</sup> Dignity should be viewed rightly as nothing less than “an expression of the unity of mankind.”<sup>202</sup>

Planning end-of-life management decisions or death induction plans, within the framework of human rights protections, is as important for individuals as it is for the democratic society in which they live. The reason for this linkage is that these decisions are seen simply as “important in lives.”<sup>203</sup> Even though no right to die is recognized domestically and internationally, the very right to self-determination, to dignity, and to life--itself--should be acknowledged and respected especially at the end-stage of life. In the final analysis, “the fundamental questions in law and ethics will be shaped by what we think it means to be human and what we understand to be ethical obligations owed to the human person,”<sup>204</sup> as well as whether human dignity can be realized as the fundamental vector of force in shaping standards of equality and social justice.<sup>205</sup>

#### Footnotes

- a1 This Article derives from the Henry H.H. Remak Memorial Lecture given at the Maurer School of Law, Indiana University on March 22, 2017. Parts of this Lecture are drawn from my book, HUMAN RIGHTS AND BIOMEDICINE (2000) and from three articles that I authored: *Human Dignity as a Normative Standard or as a Value in Global Health Care Decisionmaking?* 42 N.C.J. INT'L L. 275 (2017); *Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being*, 20 CORNELL J. L. & PUB. POL'Y 469 (2011); and *Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?*, 38 VANDERBILT J. TRANSNAT'L L. 1295 (2005).
- aa1 B.S. '61, J.D. '64. Indiana University; LL.M. '75, Columbia University; LL.D. 98, Indiana University; Professor Emeritus of Law, The Catholic University of America, Washington, D.C.; Residential Fellow, The Institute for Advanced Study, Indiana University. I acknowledge the steadfast support and friendship of Professor Alfred C. Aman, Jr. of the Maurer School of Law over the years, and honor him as a former Director of The Institute for Advanced Study and as Founding Faculty Editor of *The Indiana Journal of Global Legal Studies*.
- 1 See AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 183-306 (2015) [hereinafter BARAK, Book]; Aharon Barak, Justice, Remak Seminar: Dignity, Equality, and Social Justice (Nov. 3, 2016) [hereinafter Barak, Speech].
- 2 See BARAK, Book, *supra* note 1, at 225-227.
- 3 See *id.* at 287.
- 4 *Id.* at 285.
- 5 See *id.* at 157.
- 6 See *id.* at 205.
- 7 See generally Alan K. Simpson, *How a Trump Turnabout on Gay Rights Hurts Republicans*, N.Y. TIMES, Mar. 22, 2017, at A27 (arguing the president must place a higher emphasis on protecting LGBT rights in the United States).
- 8 See International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (the United States is a party, subject to several reservations, understandings and declarations) [hereinafter International Covenant on Civil and Political Rights]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10,

1948) [hereinafter Declaration of Human Rights]; JOHN GRIFFITHS ET AL., EUTHANASIA AND LAW IN EUROPE 29, 275, 463 (2008); *see also* BARAK, Book, *supra* note 1, at 185-307 (providing an extensive analysis of the comparative law features of the “right” to dignity).

- 9 *See* George P. Smith, II, *Gently into the Good Night: Toward a Compassionate Response to End-Stage Illness*, 22 TEMP. POL. & C.R. L. REV. 475, 488-89 (2013) (asserting that the common law right to refuse treatment is a more realistic option for attaining dignity at death than seeking to establish a constitutional right to die with dignity and with assistance); CAL. HEALTH & SAFETY CODE § 443 (West 2016); COLO. REV. STAT. ANN. § 25-48-101 (West 2016); D.C. CODE ANN. §§ 7-661.01-.17 (West 2012) (effective Feb. 18, 2017); OR. REV. STAT. ANN. §§ 127.800-.805 (West 2017); VT. STAT. ANN. tit. 18 § 5281 (West 2013); WASH. REV. CODE ANN. § 70.245 (West 2009). Presently, some 20 states are considering similar legislative proposals. *Doctor-assisted Dying: The Right to Die*, ECONOMIST, June 27, 2015 at 9.
- 10 *See* IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES (Robert P. Kraynack & Glenn Tinder eds., 2013); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 72 nn. 32-33 (2011).
- 11 *See* Glensy, *supra* note 10.
- 12 *See* Edward Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 997 UTAH L. REV. 963, 975 (1997). A perennial clash over the issue of whether there is a difference between ethics and morality often finds common understanding in accepting the assertion that the former tests the rightness or wrongness of conduct while morality deals with the degree of evil accompanying conduct. For bioethical decision-making, the goal is “to do the right thing,” or--in other words--the “moral thing.” To that end, then, conduct that “directs one's will in accord with the human good” is the situational goal to be achieved in issues of human dignity. Richard John Neuhaus, *Human Dignity and Public Discourse*, in HUMAN DIGNITY AND BIOETHICS 216 (Edmund D. Pellegrino, Adam Schulman & Thomas W. Merrill eds., 2009).
- 13 *See* FIONA RANDALL & R. S. DOWNIE, END OF LIFE CHOICES: CONSENSUS AND CONTROVERSY 178 (2010).
- 14 *See id.* at 179.
- 15 Glensy, *supra* note 10, at 73. *See generally* DIGNITY, CHARACTER, AND SELF RESPECT (Robert S. Dillon ed. 1998) (discussing the significance of several topics such as dignity and self-respect).
- 16 *See* Glensy, *supra* note 10, at 76. Kant's notion of dignity, “humanity in his person,” which belies the very basis of all conceptions of human rights, does not however hold true--*ipso facto*--in practice “that all human beings have certain rights simply by virtue of being human.” James Orbinski, *Keynote Address: Justice and Global Health*, in 16 LAW AND GLOBAL HEALTH 11 (Michael Freeman, Sarah Hawkes & Belinda Bennett eds., 2014). The possibility of this normative ideal becoming a practical norm depends upon legal “formulation and prescription.” *Id.*; *see* Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 252-53 (1970) (holding dignity as a normative value); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOWARD L. J. 145 (1984) (exploring past trends in Supreme Court use of the concept of human dignity and addressing the current perspectives regarding human dignity while making human rights decisions).
- 17 *See, e.g.*, GEORGE P. SMITH, II, HUMAN RIGHTS AND BIOMEDICINE (2000); *see also* Glensy, *supra* note 10, at 69. *See generally* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151 (2004) (discussing alternative theories of protecting human dignity through the law).
- 18 U.N. Charter pmbl., ¶ 2; *see* Paust, *supra* note 16.
- 19 *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1969) (Stewart, J., concurring).
- 20 Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INTL. L. 848, 849 (1983). *See generally* PETER T. STRUCK, DIVINATION AND HUMAN NATURE: A COGNITIVE HISTORY OF INTUITION IN CLASSICAL ANTIQUITY (2016) (showing that “surplus knowledge” - or intuition - allows knowledge of certain things without understanding how a judgment is made).

- 21 See David N. Weissstub, *Honor, Dignity, and The Framing of Multiculturalist Values*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 244, 263 (David Kratzmer & Eckart Klein eds., 2002).
- 22 Schachter, *supra* note 20, at 852.
- 23 *Id.* See generally Aurel Kolnai, *Dignity*, 51 *PHIL.* 251 (1976) (providing a philosophical discussion on the concept of human dignity).
- 24 See Kolnai, *supra* note 23, at 258.
- 25 See EMILY SMITH, *THE POWER OF MEANING: CRAFTING A LIFE THAT MATTERS* 202 (2017).
- 26 See David C. Thomasma, *The Principle of Dominion*, in *THE HEALTH CARE PROFESSIONAL AS FRIEND AND HEALER: BUILDING ON THE WORK OF EDMUND D. PELLEGRINO* 13, 138 (David C. Thomasma & Judith Lee Kissell eds., 2000).
- 27 See RANDALL & DOWNIE, *supra* note 13, at 178. See generally Jordan J. Paust, *The Human Right to Die with Dignity: A Policy-Oriented Essay*, 17 *HUM. RTS. Q.* 463 (1995) (discussing “death with dignity” within the context of human rights law).
- 28 JANET L. DOLGIN & LOIS L. SHEPHERD, *BIOETHICS AND THE LAW* 484 (3d ed. 2013).
- 29 Paust, *supra* note 27, at 480-81. See generally BRANDY SCHILLACE, *DEATH'S SUMMER COAT: WHAT THE HISTORY OF DEATH AND DYING CAN TELL US ABOUT LIFE AND LIVING* (2015) (detailing the history of human's perception of death and mortality throughout time and changing cultures).
- 30 *Id.* at 481.
- 31 *Id.* at 486. See generally George P. Smith, II, *Global Health Law: Aspirational, Paradoxical, or Oxymoronic?*, in 16 *LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES* 453 (Michael Freeman, Sarah Hawkes & Belinda Bennett eds., 2014) (discussing the state of global health law and the impact of the Universal Declaration on Human Genome and Human Rights).
- 32 Paust, *supra* note 27, at 481.
- 33 *Id.* at 480.
- 34 *Id.*
- 35 *Id.* at 476.
- 36 Declaration of Human Rights, *supra* note 8.
- 37 *Id.*
- 38 *Id.*
- 39 *Id.*
- 40 See Paust, *supra* note 27, at 477; See generally, PATRICK CAPPAS, *HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW* (2009) (acknowledging the structure of human dignity in international law).
- 41 See C. Ben Mitchell, *The Audacity of The Imago Dei*, in *IMAGO DEI: HUMAN DIGNITY IN ECUMENICAL PERSPECTIVE* 79, 93 (Thomas A. Howard ed. 2013).
- 42 See GARY B. FERNGREN, *MEDICINE & HEALTH CARE IN EARLY CHRISTIANITY* 96 (2009).
- 43 See Mitchell, *supra* note 41, at 94.



- 44 *See id.* at 95.
- 45 *See id.* at 94; John F. Crosby, *The Twofold Source of The Dignity of Persons*, 18 FAITH & PHIL. 292 (2001).
- 46 *See* Mitchell, *supra* note 41, at 111.
- 47 *See* STEPHEN JAMES, UNIVERSAL HUMAN RIGHTS 8 (Melvin I. Urofsky ed., 2007).
- 48 *See id.*
- 49 *See generally* GEORGE P. SMITH, II, THE CHRISTIAN RELIGION AND BIOTECHNOLOGY: A SEARCH FOR PRINCIPLED DECISION-MAKING (David N. Weisstub et. al. eds., 2005) (showing how religion, law and medical science interact in shaping, directing, and informing the political processes).
- 50 Pope Benedict XVI, Address of His Holiness Benedict XVI to the Members of the European People's Party on the Occasion of the Study Days on Europe 2 (Mar. 30, 2006). Interestingly, Pope Francis declared a Holy Year of Mercy from December 8, 2015-November 20, 2016, declaring that in all actions, mercy should be considered before judgment, because “everything in our lives is a gift, everything is mercy.” Junno Arocho Esteves, *Holy Year is a Reminder to Put Mercy Before Judgment, Pope Says*, CATHOLIC NEWS SERVICE, Dec. 8, 2015, at 2. *See also Beautiful Mercy Reflections*, DYNAMIC CATHOLIC, www.dynamiccatholic.com/year-of-mercy (last visited Oct. 29, 2017).
- 51 Letter from Pope John Paul II to the Bishops, Priests, the Religious Families, and the Faithful of the Catholic Church on The Christian Meaning of Human Suffering 26 (Feb. 11, 1984).
- 52 *Id.* at 24.
- 53 *Id.* at 3. *See generally* George P. Smith II, *Cura Personalis: A Healthcare Delivery Quandary at the End of Life*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 311 (2014) (discussing the role of healing and medicine in the Catholic culture).
- 54 Letter from Pope John Paul XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty 2 (Apr. 11, 1963).
- 55 Glensy, *supra* note 10, at 107.
- 56 *Id.* at 142 (citing R. James Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, 70 SASKATCHEWAN L. REV. 1, 2 (2007)).
- 57 *See* David A. Hyman, *Does Technology Spell Trouble With a Capital “T”? Human Dignity and Public Policy*, 27 HARV. J. L. & PUB. POL'Y 3, 17 (2003).
- 58 *See id.*
- 59 Glensy, *supra* note 10, at 108; *see also* Ruth Macklin, *Dignity Is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy*, 327 BRIT. MED. J. 1419 (2003) (holding that dignity could well be eliminated in medical ethics altogether, because appeals to dignity are actually just promoting patient autonomy in end-of-life treatment decisions).
- 60 *See* Weisstub, *supra* note 21, at 271.
- 61 *See* Glensy, *supra* note 10, at 108.
- 62 *See* Glensy, *supra* note 10, at 109; *see also* *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (illustrating this concept in a military court context).
- 63 *See* LEON R. KASS, LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS 247 (2002).
- 64 *Id.* at 246.

- 65 ELIZABETH PRICE FOLEY, *THE LAW OF LIFE AND DEATH* 183 (2011).
- 66 *See id.* (citing KASS, *supra* note 63, at 246-47).
- 67 *See* Glensy, *supra* note 10, at 127.
- 68 Aidan Quigley, *Biden Foundation Established to Push for Equal Rights*, POLITICO, Feb. 1, 2017, at 2.
- 69 *See, e.g.*, DIGNITY & RESPECT CAMPAIGN, <http://dignityandrespect.org> (last visited Nov. 1, 2017) (providing an online forum for individuals and organizations to commit to creating environments for all to work, live, and play).
- 70 *See* FREEDOM HOUSE, <http://freedomhouse.org/our-work> (last visited Nov. 1, 2017); Arne Duncan & Catherine Lhamon, *Protecting Transgender Students Is a Federal Responsibility*, WASH. POST, Feb. 24, 2017, at 2; *An Evangelical Struggle with Sexual Identity*, WASH. POST, Feb. 24, 2017, at A17.
- 71 *See* Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA Pediatrics 350, 353 (2017).
- 72 *See* Jocelyn C. Frye et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. CIV. RTS. HBV6271 CIV. LIBERTIES L. REV. 450, 454 (1987). *See generally* MARY FRANCES BERRY, AND JUSTICE FOR ALL: THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND THE CONTINUING STRUGGLE FOR FREEDOM IN AMERICA (Alfred A. Knopf ed., 2009) (discussing shortcomings of the United States Commission on Civil Rights).
- 73 *See* BERRY, *supra* note 72.
- 74 U.S. COMM'N. ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE (1977).
- 75 *See* Greg Stohr, *U.S. Supreme Court Cancels Transgender Bathroom Showdown*, BLOOMBERG NEWS, Mar. 6, 2017, at 1. *See generally* Stephanie Markowitz, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J. L. & GENDER 705 (2008) (providing background information on the process of changing sex designation as well as legal and policy implications).
- 76 *See* Matt Apuzzo, *Transgender Inmate's Hormone Treatment Lawsuit Gets Justice Dept. Backing*, N.Y. TIMES, Apr. 3, 2015, at 1. *See generally* Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J. L. & PUB. POL'Y 807 (2017) (discussing the legal arguments for providing hormone therapy to transgender inmates).
- 77 *See* PAISLEY CURRAH, RICHARD M. JUANG & SHANNON PRICE MINTER, *TRANSGENDER RIGHTS* 229-33 (Paisley Currah et al. eds., 2006). *See generally* Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, TIME MAG., Mar. 16, 2017 (discussing the complexities of gender and sexuality).
- 78 *See* Glensy, *supra* note 10, at 123.
- 79 *See* *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976); Glensy, *supra* note 10, at 123.
- 80 *In Re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting).
- 81 Paust, *supra* note 16, at 153.
- 82 *Id.*
- 83 135 S. Ct. 2584 (2015).
- 84 *Id.* at 2597.
- 85 *See id.* at 2604-05.

- 86 *Id.* at 2596.
- 87 *Id.*
- 88 539 U.S. 558 (2003).
- 89 *See id.* at 576.
- 90 *Id.* at 578.
- 91 *Id.* at 578-79.
- 92 *Id.* at 579; *see also* Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3077, 3082 (2014). *See generally* BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 3 (2014) (positing an Anti-Humiliation Principle that acknowledges a link between human dignity and this Principle and includes that this has relevance in civil litigation for abridgment of gay rights).
- 93 *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).
- 94 *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also* Ryan T. Anderson, *Marriage, The Court, and the Future*, HARV. J.L. & PUB. POL'Y 361 (2017) (analyzing the socio-legal consequences of redefining marriage and the impact of *Obergefell* on this new interpretation); William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, CATO SUP. CT. REV. 111 (2014-15) (analyzing the role of precedent in *Obergefell* and Chief Justice Robert's concern, in his dissent, of Kennedy's "recharacterization" of prior discussions by the Court).
- 95 *See Lawrence*, 539 U.S. at 558.
- 96 *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287-89 (1989) (O'Connor, J., concurring).
- 97 *Id.* at 287.
- 98 *Id.*
- 99 *Id.* at 289; *see also* Paust, *supra* note 27.
- 100 While a majority of the Court appeared to assume that a right to refuse life-sustaining treatment survived incompetency, the Rehnquist "official" majority would limit its holding only to competent patients. FOLEY, *supra* note 65, at 185.
- 101 *See Cruzan*, 497 U.S. at 261, 287-89.
- 102 *See FOLEY*, *supra* note 65, at 184-85.
- 103 *See id.* at 184.
- 104 *See id.*
- 105 *See id.* at 183.
- 106 *Id.* at 183-84.
- 107 *See id.* at 184.
- 108 *See id.*
- 109 *See id.*; Kelly Dineen, *Symposium, Dying Fast and Slow: Improving Quality of Dying and Preventing Untimely Deaths*, 10 J. HEALTH L. & POL'Y 1, 2-4 (2016).

- 110 See FOLEY, *supra* note 65, at 184.
- 111 See *id.* at 184, 199.
- 112 See *id.* at 180, 184, 199.
- 113 *Id.* at 177.
- 114 [Vaco v. Quill](#), 521 U.S. 793 (1997).
- 115 [Washington v. Glucksberg](#), 521 U.S. 702 (1997).
- 116 See FOLEY, *supra* note 65, at 177.
- 117 See *id.* See generally, George P. Smith, II, [Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being](#), 20 CORNELL J.L. & PUB. POLY 469 (2011) (analyzing the extent to which the state should act to establish and then implement a human right to avoid refractory pain and existential in end-state illness).
- 118 See FOLEY, *supra* note 65, at 180.
- 119 See FOLEY, *supra* note 65, at 179.
- 120 See *id.* at 177.
- 121 *Id.*
- 122 See *id.*
- 123 [Glucksberg](#), 521 U.S. at 745 (Stevens, J., concurring).
- 124 See Smith, *supra* note 9.
- 125 See references cited *supra* note 9.
- 126 See [Baxter v. State](#), 2009 MT 449, 354 Mont. 234, 224 P.3d 1211. On January 13, 2014, Judge Nan G. Nash, of the Second Judicial District Court, Bernalillo County, New Mexico, ruled terminally ill, mentally competent individuals have a constitutional right to request prescribed medication to shorten their suffering. See [Morris v. Brandenburg](#), No. D-202-CV-2012-02909, 2014 WL 106772977 (N.M.2d Dist. Jan. 31, 2014). And the Supreme Court of New Mexico has ruled on this case and held that physician aid in dying was not a fundamental right. [Morris v. Brandenburg](#), 2016-NMSC-027, 376 P.3d 836. See generally CATHERINE DUPRÉ, THE AGE OF DIGNITY: HUMAN RIGHTS AND CONSTITUTIONALISM IN EUROPE (2015) (providing a comparative analysis of European constitutions).
- 127 See GRIFFITHS ET AL., *supra* note 8, at 275, 463; see also BARAK, Book, *supra* note 1, at 185-307 (providing an extensive analysis of the comparative law features of the “right” to dignity).
- 128 See Declaration of Human Rights, *supra* note 8.
- 129 International Covenant on Civil and Political Rights, *supra* note 8.
- 130 International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (the United States is not a party). Collectively, these three dignitarian instruments are seen as the International Bill of Rights. See JAMES, *supra* note 47, at 9.
- 131 See Adam McBeth, [Privatising Human Rights: What Happens to the State's Human Rights Duties When Services are Privatised?](#), 5 MELB. J. INT'L L. 133, 143 (2004).

- 132 GA Res 217A (III), at 71, UN GAOR, 3d Sess. 1st plen mtg UNDOC A/810 (12 December 1948).
- 133 Rolf Künnemann, *A Coherent Approach to Human Rights*, 17 *HUM.RTS. Q.* 323, 339 (1995); *see also* George P. Smith, II, *Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?*, 38 *VAND. J. TRANSNAT'L L.* 1295, 1308 (2005) (discussing the roadblocks to codifying and implementing and international right to health, healthcare, or protection).
- 134 *See* Smith, *supra* note 133.
- 135 Gerard Brennan, *Foreword* to *CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT*, at viii (HP Lee & Peter Gerangelos eds., 2009).
- 136 *See* THÉRÈSE MURPHY, *HEALTH AND HUMAN RIGHTS* 24-25 (2013).
- 137 *Id.* at 17.
- 138 *See* Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *CONCEPT OF HUMAN DIGNITY RIGHTS DISCOURSE* 111 (David Kratzmer & Eckart Klein eds., 2002). The Declaration refers to dignity in five places: twice in the Preamble, in Art. 1 and twice in the contexts of social and economic rights in Arts. 22 and 23 para. 3. *See id.* at 114.
- 139 *See* Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in *CONCEPT OF HUMAN DIGNITY*, 1, 5 (David Kratzmer & Eckart Klein eds., 2002).
- 140 *Id.*
- 141 *See id.*
- 142 *See id.*
- 143 *See id.*
- 144 *See id.*
- 145 *See id.*
- 146 *See* Weisstub, *supra* note 21, at 263, 268.
- 147 *See* Eric Heinze, *Even-handedness and the Politics of Human Rights*, 21 *HARV. HUM. RTS. J.* 7, 7 (2008).
- 148 *See id.*
- 149 JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 11 (2012).
- 150 *See id.* at 372, 375; *see also* George P. Smith, II, *Social Justice and Health Care Management: An Elusive Quest*, 9 *HOUS. J. HEALTH L. & POL'Y* 1, 6 (2008) (discussing the interactions between social justice and the issues facing the health care system).
- 151 *See* HOLGER HESTERMAYER, *HUMAN RIGHTS AND THE WTO* 93 (2007).
- 152 *See id.*
- 153 *Id.*
- 154 Belinda Bennett, *Globalising Rights? Constructing Health Rights in a Shrinking World*, in *BRAVE NEW WORLD OF HEALTH* 8, 19 (Belinda Bennett et al. eds., 2008).

- 155 See Lord Hoffman, *The Universality of Human Rights*, 125 *L.Q. REV.* 416 (2009). See generally SMITH, *supra* note 17 (analyzing a right to health from ethical, political, and legal perspectives).
- 156 See Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 *HARV. INT'L L. J.* 51, 70-71 (2010).
- 157 See SMITH, *supra* note 17, at 2.
- 158 UNESCO, Final Report, BIO-97 CONF 201/9 C22-25 (July, 1997).
- 159 UNESCO Gen. Conf. Res. 32 C/Res. 22, International Declaration on Human Genetic Data (Oct. 16, 2003).
- 160 UNESCO Gen. Conf. Res. 33 C/Res. 36, Universal Declaration on Bioethics and Human Rights (Oct. 19, 2005).
- 161 Declaration of Human Rights, *supra* note 8.
- 162 International Covenant on Civil and Political Rights, *supra* note 8.
- 163 International Covenant on Economic, Social and Cultural Rights, *supra* note 130.
- 164 See SMITH, *supra* note 17, at 8-17; Smith, *supra* note 9.
- 165 See SMITH, *supra* note 17, at 8-17.
- 166 See Universal Declaration on Bioethics and Human Rights, UNESCO 33 Gen. Conference Res. 15 (Oct. 19, 2005), [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html); see also *United Nations Educational, Scientific and Cultural Organisation*, (Dec. 15, 2004). U.N. Educational, Scientific and Cultural Organization, *UNESCO Committee of Governmental Experts for the Finalization of a Declaration on the Human Genome*, BIO-97/CONF.201/9 (July, 1997) [hereinafter *UNESCO Human Genome*]; see also Michael Kirby, *Human Rights and Bioethics: The Universal Declaration of Human Rights and UNESCO Declaration of Bioethics and Human Rights*, 25 *J. CONTEMP. HEALTH L. & POL'Y* 309, 321 (2009).
- 167 Kirby, *supra* note 166, at 323.
- 168 Universal Declaration on Bioethics and Human Rights, *supra* note 166, art. 15; *UNESCO Human Genome*, *supra* note 166 at art. 15.
- 169 Universal Declaration on Bioethics and Human Rights, *supra* note 166, art. 21.
- 170 *Id.* art 22.
- 171 *Id.* art 23.
- 172 See generally *THE UNIVERSAL DECLARATION ON BIOETHICS AND HUMAN RIGHTS: BACKGROUND, PRINCIPLES AND APPLICATION* (Henk A.M. J. ten Have & Michele S. Jean eds., 2009) (providing a detailed analysis and new understanding of the Universal Declaration on Bioethics and Human Rights).
- 173 See T. A. Faunce, *Will International Human Rights Subsume Medical Ethics? Intersections in the UNESCO Universal Bioethics Declaration*, 31 *J. MED. ETHICS* 173, 174-75 (2005).
- 174 See *id.* at 177.
- 175 See Smith, *supra* note 9.
- 176 See MURPHY, *supra* note 136, at 41-42.

- 177 *See generally* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 192-94 (1996) (discussing the universal or relative characteristics of Human Rights norms). The U.N.'s Economic and Social Council (ECOSOC) acts as a strong counter influence to mediate the Standard of Progressivity's negative impact realizing human rights. HESTERMEYER, *supra* note 151, at 106-7, 111 (2007).
- 178 *See* George P. Smith, II, *Accessing Health Care Resources: Economic, Medical Ethical and Socio-Legal Challenges*, in 36 AUTONOMY AND HUMAN RIGHTS IN HEALTH CARE 291, 294 (David N. Weisstub & Guillermo Diaz Pintos eds., 2008) [hereinafter Smith, *Accessing Health Care Resources*]. *See generally* George P. Smith, II, *Human Dignity as a Normative Standard or as a Value in Global Health Care Decisionmaking?*, 42 *N.C.J. INT'L L.* 275 (2017) [hereinafter Smith, *Human Dignity as a Normative Standard*] (discussing dignity as an important human right).
- 179 *See* Dietrich Ritschl, *Can Ethical Maxims Be Derived from Theological Concepts of Human Dignity*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 87, 92 (David Kretzmer & Eckart Klein eds., 2002).
- 180 Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 133, 134 (David Kretzmer & Eckart Klein eds., 2002).
- 181 Michael J. Meyer, *Dignity as a (Modern) Virtue*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 195, 206 (David Kretzmer & Eckart Klein eds., 2002).
- 182 Weisstub, *supra* note 21, at 269.
- 183 *See id.*
- 184 *See id.*
- 185 *See* Chaskalson, *supra* note 180.
- 186 *See* Edmund D. Pellegrino, *The Lived Experience of Human Dignity*, in HUMAN DIGNITY AND BIOETHICS 513, 530 (President's Council on Bioethics, 2008).
- 187 *See id.* at 532; *see also* EDMUND D. PELLEGRINO & DAVID C. THOMASMA, FOR THE PATIENT'S GOOD: THE RESTORATION OF BENEFICENCE IN HEALTH CARE 27 (1988) (explaining that beneficence acts to promote the best interests of the patient).
- 188 *See* Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 *Cornell L. Rev.* 801, 825 n.93 (2012).
- 189 *See* JOHN KEATS, *Ode to a Nightingale*, in THE POETICAL WORKS OF JOHN KEATS 225, 227 (Francis Palgrave ed., 1884).
- 190 SYLVIA PLATH, *Lady Lazarus*, in THE COLLECTED POEMS OF SYLVIA PLATH 244 (Ted Hughes ed., 1981).
- 191 *See generally* MARGARET PABST BATTIN, THE LEAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE (1994) (discussing the desire for less bad deaths).
- 192 DANIEL CALLAHAN, THE TROUBLED DREAM OF LIFE 200-02 (2000).
- 193 HENRY FIELDING, AMELIA 109 (Martin C. Battestin ed., 1983).
- 194 *See* George P. Smith, II, *Applying Bioethics in the 21st Century: Principlism or Situationism?*, 30 *J. CONTEMP. HEALTH L. & POL'Y* 37, 57 (2013); *see also* HARRY G. FRANKFURT, THE REASONS OF LOVE (2004) (discussing how love is the most authoritative form of caring).

- 195 See Amir Halevy, *Medical Futility, Patient Autonomy, and Professional Integrity: Finding the Appropriate Balance*, 18 *HEALTH MATRIX* 261, 286 (2008).
- 196 See PAUL KALANITHI, *WHEN BREATH BECOMES AIR* 160 (2016) (observing that during an illness values are changing constantly; “You try to figure out what matters to you, and then you keep figuring it out.”); Dineen, *supra* note 109. See generally GEORGE P. SMITH, II, *PALLIATIVE CARE AND END-OF-LIFE DECISIONS* (2013) (discussing the use of sedation as end-of-life treatment); KASS, *supra* note 63 (discussing the intricacies of bioethics).
- 197 See RANDALL & DOWNIE, *supra* note 13; see also CAPPS, *supra* note 40.
- 198 See MURPHY, *supra* note 136, at 41-42; Inmaculada de Melo-Martin, *Human Dignity in International Policy Documents: A Useful Criterion for Public Policy?*, 25 *Bioethics* 37, 39 (2011); see also I. Glenn Cohen, *Medical Tourism and Global Justice*, in *THE GLOBALIZATION OF HEALTH CARE: LEGAL AND ETHICAL ISSUES* 104, 114 (I. Glenn Cohen ed., 2013).
- 199 See SMITH, *supra* note 17.
- 200 Paust, *supra* note 16, at 151.
- 201 See Glensy, *supra* note 10, at 68-69.
- 202 Dicke, *supra* note 138, at 114.
- 203 See ELIZABETH WICKS, *HUMAN RIGHTS AND HEALTHCARE* 273 (2007).
- 204 PELLEGRINO, *supra* note 186, at xii.
- 205 See Smith, *supra* note 150 at 10. See generally ROBERT MCCRUM, *EVERY THIRD THOUGHT: ON LIFE, DEATH AND THE ENDGAME* (2017) (providing perspectives on life, and what it means to be human).