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# Human Dignity as a Normative Standard or as a Value in Global Health Care Decisionmaking

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# Human Dignity as a Normative Standard or as a Value in Global Health Care Decisionmaking?

*George P. Smith, II<sup>†</sup>*

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My research of the topic of this Article began in Summer 2013, when I was a Visiting Fellow at The Lauterpacht Research Centre for International Law at Cambridge University and continued at The Hesburgh Center for Civil and Human Rights at the Notre Dame University Law School where I was a Visiting Scholar. To then-Professor James R. Crawford, Director Emeritus of The Lauterpacht Centre, and presently a judge on The International Court of Justice in The Netherlands, and to Professor Nell Jessup Newton, Dean of The Notre Dame Law School, I express my heartfelt gratitude for their friendship over the years and for their support of my Summer research affiliations.

In June-July, 2014, I was a Visiting Scholar at The Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics at Harvard Law School. During this time, I completed the research and the writing of a major draft of this Article. To Professor I. Glenn Cohen, the Director of the Center, I express my enduring appreciation to him and his colleagues for their generous support of my work.

## I. Introduction and Overview: Definitional and Structural Challenges to Human Dignity

“Human dignity—an international human right to well-being, to respect and deference, simply because we are human—seems wholly dependent upon our willing it to be so and our collective acceptance of some of the somber consequences in the exercise of that will.”<sup>1</sup>

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>2</sup> The degree to which law accommodates dignity is evolving,<sup>3</sup> as the precise means of human dignity can only be tested within the context of specific factual (*e.g.*, situational) settings.<sup>4</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 grouping.<sup>5</sup> Accordingly, no acceptable standard working definition of dignity is applicable uniformly.<sup>6</sup> At a minimum, dignity means “respect for the intrinsic worth of every

<sup>1</sup> Mary Ellen Caldwell, *Well-Being: Its Place Among Human Rights*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL 169, 196–97 (W. Michael Reisman & Burns H. Westin eds., 1976).

<sup>2</sup> Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 72 (2011) (quoting 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 & William A. Parent eds., 1992)).

<sup>3</sup> See IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES (Robert P. Kraynak & Glenn Tinder eds. 2013); see also Glensy, *supra* note 2, at 88 n.117.

<sup>4</sup> Glensy, *supra* note 2, at 67; Richard John Neuhas, *Human Dignity and Public Disclosure*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS 215, 216 (2008) [hereinafter HUMAN DIGNITY AND BIOETHICS] (discussing how the 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 and discussing that, for bioethical decision making, the goal is “to do the right thing,” or—in other words—the “moral thing” and to this end, then, conduct which “directs one’s will in accord with the human good” is the situational goal to be achieved in issues of human dignity).

<sup>5</sup> FIONA RANDALL & ROBIN DOWNIE, END OF LIFE CHOICES: CONSENSUS AND CONTROVERSY 178 (2010).

<sup>6</sup> *Id.* at 179.

person.”<sup>7</sup>

Grounded in the concept of autonomy by Kant, acknowledged as the father of the concept itself, dignity was cast as a normative legal ideal.<sup>8</sup> Nations have either chosen to relate human dignity to the status of a foundational right supporting all other rights, or alternatively paired it with rights to equality and of liberty.<sup>9</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 fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>10</sup>

The noble and lofty ideal of dignity allows easy acceptance and affirmation, but being nearly devoid of a substantive context, the application of it as a normative standard is much akin to the test Justice Potter Stewart set in 1964 for determining something was obscene.<sup>11</sup> Using a common sense subjective standard, Justice Stewart famously remarked that he knew obscenity when he saw it.<sup>12</sup> Indeed, Oscar Schachter 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>13</sup> Perhaps a similar common sense,

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<sup>7</sup> Glensy, *supra* note 2, at 73 (quoting Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 849 (1983)); *see generally* DIGNITY, CHARACTER, AND SELF RESPECT (Robert S. Dillon ed. 1995).

<sup>8</sup> Glensy, *supra* note 2, at 76; James Orbinski, *Justice and Global Health*, in 16 LAW AND GLOBAL HEALTH 11, 11 (Michael Freeman et al. eds., 2014) (discussing Kant’s notion of “humanity in dignity,” 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 humans” and the possibility of this normative ideal becoming a practical norm depends upon legal “formulation and prescription.”); *see* Joel Feinberg, *The Nature and Value of Human Rights*, 4 J. VALUE INQUIRY 243, 252-3 (1970).

<sup>9</sup> *See* GEORGE P. SMITH, II, HUMAN RIGHTS AND BIOMEDICINE (2000); Glensy, *supra* note 2, at 69; *see also* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151 (2004).

<sup>10</sup> Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOWARD L.J. 145, 151 (1984); U.N. Charter pmbl., ¶ 1.

<sup>11</sup> *Jacobellis v. Ohio*, 378 U.S. 185, 197 (1964) (Stewart, J. concurring).

<sup>12</sup> *See id.*

<sup>13</sup> Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 849 (1983).

intuitive approach or even a consensus morality<sup>14</sup> to assessing dignity—and practices of indignity—could be used in evaluating cases of misconduct in managing end-of-life care.

In an effort to quantify conduct which 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>15</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>16</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>17</sup>

It is within the very issue of death management that human dignity is tested—both as to parameters of personal dignity and to basic dignity.<sup>18</sup> Indeed, within end-of-life care, dignity can be seen

<sup>14</sup> David N. Weisstub, *Honor, Dignity, and The Framing of Multiculturalist Values*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 263, 274 (David Kretzmer & Eckart Klein eds., 2002) [hereinafter *CONCEPT OF HUMAN DIGNITY*].

<sup>15</sup> Schachter, *supra* note 13, at 852; Michael Stein, *We All Want Our Doctors to Be Kind. But Does Kindness Actually Help Get Us Well?*, WASH. POST (Aug. 11, 2016), [https://www.washingtonpost.com/opinions/we-all-want-our-doctors-to-be-kind-but-does-kindness-actually-help-us-get-well/2016/08/11/95306e06-1091-11e6-8967-7ac733c56f12\\_story.html?utm\\_term=.5a4b20d7991b](https://www.washingtonpost.com/opinions/we-all-want-our-doctors-to-be-kind-but-does-kindness-actually-help-us-get-well/2016/08/11/95306e06-1091-11e6-8967-7ac733c56f12_story.html?utm_term=.5a4b20d7991b) [https://perma.cc/U4H4-3NM6] (discussing how kindness in healthcare settings is seen as affecting patient outcomes and levels of satisfaction, it is now being “taught” in today’s medical schools and the closest medical researchers have come to promoting kindness as a basic health value is found in and through acts of empathy and although still unclear what the result of a “lack of a linear response to empathy” may be manifested, there is recognition that “kindness carries with it a commitment to a certain way of thinking and being rather than to a particular pre-defined endpoint.”).

<sup>16</sup> Schachter, *supra* note 13, at 852–53; see Nick Bostrom, *Dignity and Enhancement*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 4, at 201–02 (2008) (citing Aurel Kolnai, *Dignity*, 51 *PHIL.* 251, 263 (1976)).

<sup>17</sup> See Bostrom, *supra* note 16, at 201–02; Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 4, at 410 (discussing that although recognizing various types of dignity, it has been suggested, nevertheless, that there is a commonality among all notions of dignity—namely, the use of this word to reference “a property or properties’ . . . ‘that cause one to excel, and thus elicit or merit respect from other persons.”).

<sup>18</sup> See Daniel P. Sulmasy, *Dignity and Bioethics: History, Theory, and Selected Applications*, in *HUMAN DIGNITY AND BIOETHICS*, *supra* note 4, at 474; Paul Ramsey, *The*

correctly as a human rights issue.<sup>19</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>20</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>21</sup> In this sense, “an affirmation of human dignity, its strength and grandeur, is an affirmation of the eternity of life.”<sup>22</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.”<sup>23</sup> Inasmuch as death is a

*Identity of Death with Dignity*, 2 HASTINGS CENTER STUDIES 47 (May, 1974). See also Daniel P. Sulmasy, *Death and Dignity*, 61 LINACRE 27 (Winter 1994).

<sup>19</sup> RANDALL & DOWNIE, *supra* note 5, at 178.

<sup>20</sup> Lois Shepherd, *Dignity and Autonomy after Washington v. Glucksberg: An Essay about Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL’Y 431, 448 (1998); Emily B. Rubin et al., *States Worse Than Death Among Hospitalized Patients With Serious Illness*, 176 JAMA. INTERNAL MED. 1557, 1557 (Oct. 2016), <http://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2540535> [<https://perma.cc/WT6J-3KKW>] (discussing how new research, drawn from 180 hospital patients over the age of 60, either approaching or under imminent peril of death regarding their attitudes toward functional debility, found certain conditions more unbearable than death itself, whose ranking in descending order were bowel and bladder incontinence; reliance on breathing machines in order to live; immobility and confinement to bed; confusion and the need for constant care; dependence on feeding intubation; living permanently in a nursing home; confinement to home living; consistent moderate pain; confinement to a wheelchair); see A GOOD DEATH? LAW AND ETHICS IN PRACTICE, (Lynn Hagger & Simon Woods eds. 2013); see also ATUL GAWANDE, BEING MORTAL (2014) (forcefully arguing for greater acceptance of palliative care and hospice care as alternatives to seeking death with dignity by embracing assisted suicide or euthanasia).

<sup>21</sup> Jordan J. Paust, *The Human Right to Die with Dignity: A Policy-Oriented Essay*, 17 HUM. RTS. Q. 463, 480–81 (1995); see generally BRANDY SCHILLACE, DEATH’S SUMMER COAT: WHAT THE HISTORY OF DEATH AND DYING CAN TELL US ABOUT LIFE AND LIVING (2015) (discussing the way death is treated in modern society and the need for society to embrace dying in a manner akin to the treatment of living).

<sup>22</sup> Paust, *supra* note 21, at 481.

<sup>23</sup> *Id.*; see generally George P. Smith, II, *Global Health Law: Aspirational, Paradoxical, or Oxymoronic?*, in LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES, 452–64 (Michael Freeman et al. eds., 2014) (discussing the need for states to be “better equipped” in order to “work collectively toward accepting a shared level of responsibility for recognizing and providing heal commensurate with other fundamental civil, social, and political rights . . .”).

part of life, “choice concerning life must necessarily include choice concerning the end and ending of life.”<sup>24</sup>

Included within the right to human dignity must be “a right to live with dignity, and thus a right to end one’s life in indignity—indeed, a right not to be compelled to live the remainder of life in indignity.”<sup>25</sup> When remaining life has no quality and yields indignity, it is both humane and efficacious to respect “the dignity of personal choice.”<sup>26</sup>

Although no express right “to die with dignity” is to be found in definitive instruments on human rights,<sup>27</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>28</sup> “The inherent dignity . . . of all members of the human family” is recognized in the preamble of the Universal Declaration on Human Rights.<sup>29</sup> The Declaration states further that not only are “[a]ll human beings . . . born free and equal in dignity and rights,” but that each is entitled to have both respect and value, and a right to dignity.<sup>30</sup> An interrelated right of privacy is, furthermore, recognized in Article 12 of the Declaration.<sup>31</sup> Even though phrased as a qualified right, it is nonetheless viewed correctly as extending in scope to include all personal choices such as those regarding death and dying.<sup>32</sup>

## II. Human Dignity: Its Religious, Ethical, and Legal Provenance

Although not in the classical world regarded as inherent to all individuals, the notion of dignity or human worth was recognized in early history—but only for “virtuous persons.”<sup>33</sup> Consequently,

<sup>24</sup> Paust, *supra* note 21, at 481.

<sup>25</sup> *Id.* at 480.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 476.

<sup>28</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, ¶ 5 (Dec. 10, 1948).

<sup>29</sup> *Id.* ¶ 1.

<sup>30</sup> *Id.* art. I.

<sup>31</sup> *Id.* art. XII.

<sup>32</sup> Paust, *supra* note 21, at 477.

<sup>33</sup> C. Ben Mitchell, *The Audacity of The Imago Dei*, in *IMAGO DEI: HUMAN DIGNITY IN ECUMENICAL PERSPECTIVE* 79, 93 (Thomas A. Howard ed., 2013); see Courtney S. Campbell, *Principlism and Religion: The Law and The Prophets*, in *A MATTER OF PRINCIPLES?: FERMENT IN U.S. BIOETHICS* 182 (Edwin R. DuBose et al. eds., 1994) (discussing how Imago Dei invokes characteristics such as “human creativity, the capacity

orphans, slaves, and those with physical defects were excluded altogether from qualifying for an ascription of being entitled to dignity.<sup>34</sup>

The early views of the Jewish and the Christian faiths ascribed to the idea “that all human beings were created in the image [and likeness] of God.”<sup>35</sup> This concept subsequently grew into the acceptance of the premise that the body and the soul were to be seen as integrated.<sup>36</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>37</sup>

Interestingly, the word, “‘dignity’ comes from the Latin *dignitas* (‘worth’) and *dignus* (‘worthy’).”<sup>38</sup> “When applied to *Homo sapiens*, the etymology” implies that every individual must be acknowledged as imbued with an “inherent value” and, accordingly, be treated with “a special respect.”<sup>39</sup>

Much of a contemporary understanding of human dignity can be attributed to religion and to ancient civilizations.<sup>40</sup> Indeed, human rights—comparable to ones 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

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for relationships and community, and responsible compassionate stewardship for others”).

<sup>34</sup> GARY B. FERNGREN, *MEDICINE AND HEALTH CARE IN EARLY CHRISTIANITY* 95–96 (2009).

<sup>35</sup> See David Gelernter, *The Irreducibly Religious Character of Human Dignity*, in *HUMAN DIGNITY AND BIOETHICS* 387. See Yair Lorberbaum, *Blood and The Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth, and Ritual*, in *CONCEPT OF HUMAN DIGNITY*, *supra* note 14, at 55 (discussing how *Imago Dei* was not the sole basis for developing the conceptual value of human dignity in Western Cultures—this, because *Imago Dei* was found originally in Mesopotamia and possibly in Ancient Egypt); see also Mitchell, *supra* note 33, at 94. See generally Doron Shultziner, *A Jewish Conception of Human Dignity*, 34 *J. RELIGIOUS ETHICS* 663 (Dec. 2006) (discussing the meanings of human dignity as they unfold and evolve in the Bible and the Halakhah).

<sup>36</sup> Mitchell, *supra* note 33, at 94–95.

<sup>37</sup> *Id.* at 94; see John F. Crosby, *The Twofold Sources of The Divinity of Persons*, 18 *FAITH & PHIL.* 292 (2001).

<sup>38</sup> Mitchell, *supra* note 33, at 111.

<sup>39</sup> *Id.*; IV *OX ENGLISH DICTIONARY* 656 (1989) (defining dignity as the quality of being worthy and honorable, worthiness, worth, nobleness, exclusive, the quality of being worthy of something).

<sup>40</sup> STEPHEN JAMES, *UNIVERSAL HUMAN RIGHTS: ORIGINS AND DEVELOPMENT* 8 (2007).

to be found the very seeds of human rights and the dignity of man.<sup>41</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>42</sup> His Holiness Pope Benedict XVI, in remarks made on March 30, 2006, observed that today—as in the past—the principal focus of interventions by the Catholic Church have been to protect and to promote the dignity of the person, both from “moment of conception until natural death.”<sup>43</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 one’s neighbor, to have ‘compassion’ for that suffering and to give some help.”<sup>44</sup> The Pope urged the cultivation of a “sensitivity of heart” which—in turn—“bears witness to compassion toward a suffering person,”<sup>45</sup> and to an understanding that humans should be treated “as a *psychological and physical ‘whole’*”<sup>46</sup>

Previously in his encyclical, *Pacem in Terris*, issued in 1963, Pope John Paul XXIII declared:

Man has the right to live. He has the right to bodily integrity and to the means necessary for the proper development of life . . . [H]e has the right to be looked after in the event of

<sup>41</sup> *Id.*

<sup>42</sup> See generally GEORGE P. SMITH, II, *THE CHRISTIAN RELIGION AND BIOTECHNOLOGY: A SEARCH FOR PRINCIPLED DECISION-MAKING* (David N. Weisstub ed., 2006) (discussing the traditions and views of the Roman Catholic Church).

<sup>43</sup> Junno Arocho Esteves, *Holy Year is a Reminder to Put Mercy Before Judgment, Pope Says*, CATHOLICNEWS.COM (Dec. 8, 2015 8:20 AM), <http://www.catholicnews.com/services/englishnews/2015/holy-year-is-a-reminder-to-put-mercy-before-judgment-pope-says.cfm> [https://perma.cc/4TA8-NDNW]. See generally POPE FRANCIS’ YEAR OF MERCY: DECEMBER 8, 2015 – NOVEMBER 20, 2016, [www.dynamiccatholic.com/year-of-mercy](http://www.dynamiccatholic.com/year-of-mercy) [https://perma.cc/H3DF-NFZ9] (discussing the year of mercy).

<sup>44</sup> *Salvific Doloris*, Apostolic Lecture, *On the Christian Meaning of Suffering* 24 (Feb. 11, 1984) [hereinafter *On the Christian Meaning of Suffering*]. See generally Laurie Goodstein & Elizabeth Povoledo, *Amid Splits, Catholic Bishops Crank Open Door on Divorce*, N.Y. TIMES, Oct. 24, 2015, at A1 (quoting Gerard O’Connell) (discussing Pope Francis’ approach to a more merciful Catholic Church).

<sup>45</sup> *On the Christian Meaning of Suffering*, *supra* note 44, at 3.

<sup>46</sup> *Id.* at 22; see also 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, 314 (2014).

illhealth . . . .<sup>47</sup>

### A. *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>48</sup> as well as “ad hoc, erratic, ‘muddled and inconsistent.’”<sup>49</sup> Since dignity is incapable of being “operationalized,”<sup>50</sup> it is argued that it cannot be recognized as a policy standard. Indeed, in the United States, there has simply been “no coalescence . . . around the rational possibilities that exist for a coherent legal theory of human dignity.”<sup>51</sup> Thus, the legal ontology of dignity lies in obfuscation.<sup>52</sup>

Yet, even with these negative arguments against the recognition and the application of dignity as a normative value, America has nonetheless chosen to base its socio-legal and ethical understanding of dignity on a libertarian tradition—this being contrary to some European countries that anchor dignity to notions of paternalism or communitarianism.<sup>53</sup> Dignity is acknowledged as the United States Constitution’s fundamental value and the “cardinal principles for which the Constitution stands.”<sup>54</sup>

Further, it has been asserted that dignity “cannot be demanded or claimed [because] . . . it cannot be provided and it is not owed.”<sup>55</sup> Rather, it “is to be expected or found in every living human being.”

<sup>47</sup> *Pacem in Terris: Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*, HOLY SEE (Apr. 11, 1963), [http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem.html](http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html) [<https://perma.cc/U8PX-H4R3>].

<sup>48</sup> Glensy, *supra* note 2, at 107 n.202.

<sup>49</sup> *Id.* at 142 (citing R. James Fyle, *Dignity as Theory: Competing Conceptions of Human Dignity at The Supreme Court of Canada*, 70 SASK. L. REV. 1, 8, 13 (2007)).

<sup>50</sup> 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).

<sup>51</sup> Glensy, *supra* note 2, at 108; see Ruth Macklin, *Dignity is a Useless Concept*, 327 BRIT. MED. J. 1419 (2003) (holding that dignity could well be eliminated in medical ethics altogether and concluding that, in actuality, appeals to dignity are used to promote patient autonomy in end-of-life treatment decisions).

<sup>52</sup> David N. Weisstub, *Honor, Dignity, and The Framing of Multiculturalist Values*, in CONCEPT OF HUMAN DIGNITY, *supra* note 14, at 271 (David Kratzmer & Eckart Klein eds., 2002).

<sup>53</sup> Glensy, *supra* note 2, at 108.

<sup>54</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1998); see Glensy, *supra* note 2, at 108.

<sup>55</sup> LEON KASS, *LIFE, LIBERTY AND THE DEFENSE OF DIGNITY* 247 (2002).

since it is “aristocratic” in principle.<sup>56</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>57</sup> The notion of a “right” to dignity for those holding this opinion is that there can be no right to dignity.<sup>58</sup> It remains an open question “whether ‘dignity [is] an independent attribute of personhood’ or an integral component of the very concept of personhood derived, as such, from autonomy, equality, or liberty.”<sup>59</sup>

While the United States Supreme Court has largely acknowledged the concept of dignity interests as a background norm, it has done so, in Eighth Amendment inquiries, as a primary force.<sup>60</sup> In fact, when interpreting the Eighth Amendment’s imposition of affirmative obligations 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>61</sup>

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>62</sup> Subsequently, the Court has employed this term or references the “dignity of man”<sup>63</sup> in a considerable number of cases.<sup>64</sup>

More contemporaneously, on June 26, 2015, writing for the majority in *Obergefell et al., v. Hodges et al.*,<sup>65</sup> Justice Anthony M. Kennedy repeatedly articulated the need to acknowledge and to embrace the realization that “certain personal choices [are] central to individual dignity and autonomy” and are inherent liberties

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<sup>56</sup> See *id.* at 246–47 (“One has no more *right* to dignity[—]and hence to dignity in death[—]than one has to beauty or courage or wisdom, desirable though these may be.”); see also *id.* at 247 (inferring that when the principle of dignity is democratized, however, “one can argue that ‘excellence,’ ‘being worthy’ is a property of all human beings.”).

<sup>57</sup> ELIZABETH FOLEY, *THE LAW OF LIFE AND DEATH* 183 (2011).

<sup>58</sup> KASS, *supra* note 55.

<sup>59</sup> Glensy, *supra* note 2, at 127 n.282.

<sup>60</sup> *Id.* at 123.

<sup>61</sup> *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976); see Glensy, *supra* note 2, at 88–90.

<sup>62</sup> *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J. dissenting).

<sup>63</sup> Paust, *supra* note 10, at 150 *passim*.

<sup>64</sup> *Id.* at 153.

<sup>65</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

protected by Due Process guarantees of the 14<sup>th</sup> Amendment.<sup>66</sup> While these expanded liberties are, as such, not enumerated within the Bill of Rights, they must nevertheless be accepted as within the “concept of individual autonomy.”<sup>67</sup> When “a claim of dignity” conflicts “with both law and widespread social conventions,”<sup>68</sup> as well as “substantial cultural and political developments,” the conflicts must be resolved in favor of safeguarding the dignity of personhood.<sup>69</sup>

By way of analogy, Justice Kennedy’s positions in *Obergefell*,<sup>70</sup> clearly illustrate that the dignity of personhood is as important in its formation as it is in health care decision-making at the end-stage of life where personal autonomy and wellbeing, humanness, and compassion are vital components to assure a dignified death.

### B. *International Law Sources*

The extent to which the U.S. Supreme Court utilizes international law norms in substantive constitutional interpretations has been a volatile issue of debate.<sup>71</sup> While considered proper for the use of such norms for expository or empirical purposes, the fact that foreign or international bodies have adopted a particular rule as reason to constitutionalize and thereby afford substantive meaning

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<sup>66</sup> *Id.* at 2597.

<sup>67</sup> *Id.* at 2621.

<sup>68</sup> *Id.* at 2596.

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

<sup>70</sup> See generally *id.* (discussing Justice Kennedy’s position on the dignity of personhood); William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, CATO SUP. CT. REV. 111 (2015) (analyzing the role of precedent in *Obergefell* and Chief Justice Robert’s concern, in his dissent, of Justice Kennedy’s “recharacterization” of prior decisions by the Court).

<sup>71</sup> See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015) (asserting U.S. laws should be harmonized with foreign treaties and laws). But see Note, *Constitutional Courts and International Law: Revisiting the Transatlantic Divide*, 129 HARV. L. REV. 1362 (2016) (analyzing the supremacy of constitutional law over international law in Europe and the procedural difficulties incorporating international law into domestic law in America—concluding, as such, both transatlantic partners have developed mechanisms to prevent domestic law from being compromised by international law). See generally Joan L. Larsen, *Importing Control Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (discussing the extent to which SCOTUS uses international law norms in substantive constitutional interpretations).

to the U.S. Constitution is thought to be without justification.<sup>72</sup> This type of moral fact-finding has been soundly denounced by Justice Antonin Scalia as improper; this is simply because American law has different moral and legal frameworks.<sup>73</sup>

Surely, however, there are universally shared common values such as human dignity, compassion, and humaneness which are important core values, or, even “norms” of conduct in some cases. These values form a part of the civilized conscience of mankind and should never be excluded from being vectors of force in judicial decision-making much as in the same way equity is ever present in all systems of both domestic and international law.<sup>74</sup>

### III. Transnational Standards of Equity: A Template for Decisionmaking?

Equity is popularly understood as signifying “natural justice or whatever is right and just as between man and man . . . .”<sup>75</sup> The antecedents of equity are acknowledged as “a system of jurisprudence which originated and developed outside the common law courts of England to supply to suitors remedial relief not obtainable in the common law courts.”<sup>76</sup>

Although equity originally protected only property rather than personal or individual rights,<sup>77</sup> the modern trend has been to extend

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<sup>72</sup> See Larsen, *supra* note 71, at 1287; see also *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (referencing the holdings of the European Court of Human Rights); see also *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>73</sup> *Roper*, 543 U.S. at 608, 622 *passim* (Scalia, J., dissenting); see Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004). But see Ian M. Kysel, *Domesticating Human Rights Norms in the United States: Considering the Role and Obligations of the Federal Government as Litigant*, 46 GEO. J. INT'L L. 1009 (2015); Ralph G. Steinhardt, *Determining Which Human Rights Claims “Touch and Concern” the United States: Justice Kennedy’s Filartiga*, 89 NOTRE DAME L. REV. 1695 (2014); Penny M. Venetis, *Enforcing Human Rights in the United States: Which Tribunals are Best Suited to Adjudicate Treaty-based Human Rights Claims?*, 23 S. CAL. REV. L. & SOC. JUST. 121 (2014).

<sup>74</sup> See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 53–66 (3rd ed. 1999) (discussing that perhaps human dignity and well-being could be advocated as being part of *jus cogens*—a fundamental or pre-empting norm of the violation of which invalidates rules consented to by states in treaties or accepted as customs); see also WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 1–10 (2nd ed. 1956).

<sup>75</sup> DE FUNIAK, *supra* note 74, at 1.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 10.

equitable relief to protect personal rights that are “existent and judicially cognizable to warrant the interposition of equity . . . .”<sup>78</sup> This especially includes the ever-strengthening rights of privacy.<sup>79</sup> Equally, equity has shown its outreach to protect civil rights.<sup>80</sup> Arguably, the “right” to protect well-being is within the zone of privacy and protectable as a civil right. The inherent hope (and promise) of equity, then, is that it “corrects inequalities.”<sup>81</sup>

Hugo Grotius, in his 1625 classic *De Jure Belli ac Pacis Libri Tres*, or, *The Law of War and Peace*,<sup>82</sup> found that Aristotle championed the notion that all treaties should be interpreted using principles of equity.<sup>83</sup> In international law, equity is recognized as a “nonconsensual” source used either to supplement or modify the law’s conventional rules and customary usages.<sup>84</sup> Early nineteenth and twentieth century arbitration treaties provided explicitly for the application of principles of equity to be applied in international law in interpreting treaties.<sup>85</sup> Equity has always been seen as a form of judicial discretion<sup>86</sup> as well as a form of distributive justice.<sup>87</sup> In modern times, it has been especially inclusive of issues of maritime delimitations and The Law of the Sea.<sup>88</sup>

The “universal law of society” is presumed to include customary

<sup>78</sup> *Id.* at 125.

<sup>79</sup> *Id.* at 129–34.

<sup>80</sup> *Id.* at 140–43.

<sup>81</sup> MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 127 (1979).

<sup>82</sup> See generally HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (Francis W. Kelsey trans. 1925) (discussing how treaties should be interpreted using notions of equity).

<sup>83</sup> See JANIS, *supra* note 74, at 74–75.

<sup>84</sup> *Id.* at 54–55.

<sup>85</sup> *Id.* at 52.

<sup>86</sup> *Id.* at 69–70 (Janis recognizes three forms of equity: equity *intra legem*, *praeter legem*, and *contra legem*. Equity *intra legem* (“within the law”) is applicable to “specific cases in such a way as to achieve the law’s intent, but without exceeding the law’s formal language.” Equity *praeter legem* (“beyond the law”) is seen as a bold application by a judge to essentially “fill in gaps and supplement the law with equitable rules necessary to decide the case at hand.” Lastly, equity *contra legem* (“against the law”) is “where the rules of the law are disregarded and the equitable result [is] achieved despite the law’s explicit injunction.”).

<sup>87</sup> *Id.* at 75–79.

<sup>88</sup> See *id.* at 212–24; see also KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW 205–20 (1998).

law.<sup>89</sup> As a result of this recognition, international lawyers are in general agreement that it is appropriate, and indeed proper, for outreach to be made beyond treaties and custom and to general principles of law, natural law, and to equity<sup>90</sup> in order to find and to establish and protect the parameters of the bases of this universal law.<sup>91</sup>

Interestingly, equitable principles, which form a part of the corpus of International Law, are seen as separate—in application—from adjudicating cases *ex aequo et bono* (or, what is good and fair).<sup>92</sup> Seen as a vital integrative force within International Law, equity is not restricted in its application and utilization as the principle of *ex aequo et bono*. Specifically, under Article 38 of the Permanent Court of International Justice, the power of the Court to use *ex aequo et bono* is granted to the court “if the parties agree thereto.”<sup>93</sup> Even with these distinctions between equitable principles and the use of *ex aequo et bono*, their very acknowledgement alone goes far to establish a template—if not a construct—for evidencing and applying the transnational standard of equity.

Security, human dignity and well-being, compassion and humanism, are values which the courts must—domestically and internationally—secure through simply applying equity to judicial decision-making, which for purposes of analysis in this Article, apply to managing futile medical conditions at the end-stage of life in such a manner to assure whatever degree of kindness and compassion that can be given under the facts of any given situation.

#### IV. Domestic or National Precedents

For purposes of this Article, and the issue of end-of-life care, the concurrence for Justice Sandra Day O'Connor in the 1989 case of *Cruzan v. Director, Missouri Dept. of Health, et al.*,<sup>94</sup> is pertinent.

Holding that the refusal of food and water delivered artificially

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<sup>89</sup> United States. v. Smith, 18 U.S. 153, 161 (1820).

<sup>90</sup> See *supra* note 86, for the three types of equity.

<sup>91</sup> JANIS, *supra* note 74, at 5–9.

<sup>92</sup> Netherlands v. Belgium (1937), Judge Hudson's Opinion, 1937 P.C.I.J. Reports, sec. A/B, no. 70, at 73, 76.

<sup>93</sup> Statute of the International Court of Justice, art. 38.2.

<sup>94</sup> *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 287–92 (1990) (O'Connor, J. concurring).

was to be viewed as an act within a protected liberty interest and properly refused as unwanted medical treatment, Justice O'Connor observed that "our notions of liberty are inextricably entwined with our 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 patient's liberty, dignity, and freedom to determine the course of her own treatment."<sup>95</sup> Stressing the compromise of the "integrity of personhood" by forcible intrusions of this nature, the Justice asserted, "the 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 artificial delivery of food and water."<sup>96</sup> The very same "minimal conditions necessary for a life in dignity,"<sup>97</sup> then, (*e.g.*, autonomy, respect, self-determination, compassion, humaneness, decency) are the very same conditions and values which 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 incompetent patients<sup>98</sup>—was validated by the *Cruzan* holding.<sup>99</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 would proceed to balance this liberty against competing state interests to protect the vulnerable (*e.g.*, the aged and infirm, unhealthy).<sup>100</sup> State interest in preserving a terminally ill person's life would obviously be weaker than preserving life which is not in its terminal phase.<sup>101</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>102</sup>

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<sup>95</sup> *Id.* at 289.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; see WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 303 (2004); see also Paust, *supra* note 10.

<sup>98</sup> FOLEY, *supra* note 57, at 185 (stating that while a majority of the Court appeared "to assume that a right to refuse life-sustaining medical treatment survived incompetency", the Rehnquist "official" majority would limit its holding only to competent patients).

<sup>99</sup> *Cruzan*, 497 U.S. at 280–287.

<sup>100</sup> See FOLEY, *supra* note 57, at 184–85.

<sup>101</sup> *Id.* at 184.

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

Were a right to death be recognized as a fundamental right, a vexatious dilemma would follow: namely, whether the state would be charged, correspondingly, with an equal obligation to both bestow, as well as guarantee, a life with dignity?<sup>103</sup> “If ensuring dignity at death is the government’s responsibility, dignity during life is an equal, if not greater, responsibility.”<sup>104</sup>

Under circumstances of this nature, it would follow that dignity would be denominated an entitlement.<sup>105</sup> Although set as a responsibility “in the modern, socialistic sense,”<sup>106</sup> dignity in life is not a precise integral value in the U.S. Constitution.<sup>107</sup> It is better to view the Constitution as providing negative rights rather than affirmative ones.<sup>108</sup> Consequently, citizens are granted liberty to access—without government power—their individual consciences and visions for attaining happiness.<sup>109</sup>

The relationship between the U.S. Constitution and death is difficult for courts to determine.<sup>110</sup> The legislatures are far better equipped to enact statutes which draw lines of distinction<sup>111</sup> for example, between physician-assisted suicide and euthanasia.<sup>112</sup>

When presented with issues of physician-assisted suicide and the states’ right to prohibit it, the Supreme Court has held in two path-breaking cases—*Vacco v. Quill*<sup>113</sup> and *Washington v. Glucksberg*<sup>114</sup>—that it was valid, constitutionally, to prohibit suicide, especially since the idea of physician-assisted suicide was neither a part of the Nation’s history nor its traditions,<sup>115</sup> and laws prohibiting such conduct were not in contravention of the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>116</sup>

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<sup>103</sup> *Id.* at 183.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 183–84.

<sup>106</sup> FOLEY, *supra* note 57, at 184.

<sup>107</sup> *Id.*

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

<sup>109</sup> *Id.* at 184, 199.

<sup>110</sup> *Id.* at 180, 184, 199.

<sup>111</sup> *Id.* at 199.

<sup>112</sup> FOLEY, *supra* note 57, at 177.

<sup>113</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>114</sup> *Wash. v. Glucksberg*, 521 U.S. 702 (1997).

<sup>115</sup> FOLEY, *supra* note 57, at 177.

<sup>116</sup> *Id.*; see also DAVID NAGEL, *NEEDLESS SUFFERING: HOW SOCIETY FAILS THOSE*

In the concurring opinions in both *Quill* and *Glucksberg*, Justice O'Connor implies that a constitutional liberty may exist, when a terminal medical condition is diagnosed, in order to be free from the refractory pain experienced from such a condition.<sup>117</sup> But she intimates that without "great suffering," there can be no constitutional claim.<sup>118</sup> In these two cases, there was adequate pain relief available legally to the moving parties.<sup>119</sup> Accordingly, the "liberty" found in the Due Process Clause—which could arguably embrace a coordinate liberty to use assistance in an out of suicide, motivated solely to avoid a painful and undignified death—was not an "operable" fact in these cases.<sup>120</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 result.<sup>121</sup>

Justice John Paul Stevens, in his concurrence in *Glucksberg*, recognizes Justice O'Connor's notion of a liberty interest as central to any action to avoid intolerable pain "and the indignity of living one's final days incapacitated and in agony."<sup>122</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>123</sup>

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WITH CHRONIC PAIN (2016). See generally George P. Smith, II, *Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being*, 20 CORNELL J.L. & PUB. POL'Y 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 suffering in end-stage illness).

<sup>117</sup> *Id.* at 180.

<sup>118</sup> FOLEY, *supra* note 57, at 179.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Washington v. Glucksberg*, 521 U.S. 702, 745 (Stevens, J., concurring); see Rubin et al., *supra* note 20.

<sup>123</sup> See George P. Smith, II, *Gently into the Good Night: Toward a Compassionate Response to End-Stage Illness*, 22 TEMP. POL. & CIV. RTS. 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). See generally *Final Certainty*, ECONOMIST (June 27, 2015), <http://www.economist.com/news/briefing/21656122-campaigns-let-doctors-help-suffering-and-terminally-ill-die-are-gathering-momentum> [https://perma.cc/8XBQ-PENT] (discussing campaigns advocating for the legality of physician assisted suicide).

### A. Legislative Responses

Legislatively, five states and the District of Columbia, have enacted laws which allow those with a terminal medical condition to seek pharmacologic assistance from a physician to end their own lives.<sup>124</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 was not violative of state legislation designed to protect the terminally ill, nor was such assistance against state public policy to protect vulnerable individuals.<sup>125</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>126</sup>

<sup>124</sup> Colorado End-of-Life Options Act, COLO. REV. STAT. § 25-48-101 (2016); End of Life Option Act, CAL. HEALTH & SAFETY CODE §§ 443.1–22. (West 2015); The Oregon Death With Dignity Act, OR. REV. STAT. §§ 127.800–.897 (2005); VT. STAT. ANN. tit. 18 §§ 5281–93 (2013); The Washington Death with Dignity Act, WASH. REV. CODE § 70.245 (2009); 63 D.C. Reg. 15697 (Dec. 23, 2016); *see also The Right to Die*, ECONOMIST (June 27, 2015), <http://www.economist.com/news/leaders/21656182-doctors-should-be-allowed-help-suffering-and-terminally-ill-die-when-they-choose> [<https://perma.cc/L9TY-FX74>].

<sup>125</sup> *Baxter v. Montana*, 354 Mont. 234 (2009).

<sup>126</sup> *See* JOHN GRIFFITHS, HELEN WEYERS & MAURICE ADAMS, EUTHANASIA AND LAW IN EUROPE (2008); *see Attitudes Towards Assisted Dying*, ECONOMIST (June 27, 2015), <http://www.economist.com/news/briefing/21656121-idea-whose-time-has-come-attitudes-towards-assisted-dying> [<https://perma.cc/J4DB-KYE3>] (survey of attitudes regarding physician assistance from fifteen countries); *see also* Charles Lane, *Where the Prescription for Autism Can Be Death*, WASH. POST (Feb. 24, 2016), [https://www.washingtonpost.com/opinions/where-the-prescription-for-autism-can-be-death/2016/02/24/8a00ec4c-d980-11e5-81ae-7491b9b9e7df\\_story.html?utm\\_term=.d34d0face161](https://www.washingtonpost.com/opinions/where-the-prescription-for-autism-can-be-death/2016/02/24/8a00ec4c-d980-11e5-81ae-7491b9b9e7df_story.html?utm_term=.d34d0face161) [<https://perma.cc/T7X9-QBL5>] (reporting primarily on a Dutch psychiatric patient known as 2014-77, who at age 10, was diagnosed with autism and some 30 years later was euthanized at his request because under Dutch law, he suffered from an incurable mental illness); *see also* Ezekiel J. Emanuel et al., *Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe*, JAMA 79 (July 5, 2016), <http://jamanetwork.com/journals/jama/fullarticle/2532018> [<https://perma.cc/RP3J-Z4QN>] (discussing a new study that has found that although euthanasia and physician suicide are becoming more accepted legally, their active use is rare and not subject to excessive abuse—confined primarily, as such, to patients with cancer). In *Carter v. Canada*, the Supreme Court of Canada reached a unanimous decision on February 6, 2015, which reversed a previous holding prohibiting laws allowing for physician assistance for patients in a terminal medical condition. *Carter v. Canada* (Attorney General) [2015], 1 S.C.R. 331 (Can.) (overruling *Rodriguez v. British Columbia* (Attorney General), [1993] 3 S.C.R. 519 (Can.)). In *Carter*, the High Court held that any such prohibitions of this nature and

## V. 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>127</sup> together with the 1966 International Covenant on Civil and Political Rights<sup>128</sup> and International Covenant on Economic, Social and Cultural Rights.<sup>129</sup>

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>130</sup> This Universal Declaration of Human Rights proclaims this basic principle when it acknowledges, “All human beings are born free and equal in dignity and rights.”<sup>131</sup> The function of human rights, then, is to create state obligations, and not to create

the very notion that “grievous and unremediable medical conditions” can exist which—for humane and compassionate medical reasons are not subject to relief—not only infringe on the right to life, liberty and dignity and security, but are in contravention to fundamental principles of justice. *Id.* See also Ian Austen, *Canada Court Strikes Down Ban on Aiding Patient Suicide*, N.Y. TIMES (Feb. 6, 2015), [http://www.nytimes.com/2015/02/07/world/americas/supreme-court-of-canada-overturms-bans-on-doctor-assisted-suicide.html?\\_r=0](http://www.nytimes.com/2015/02/07/world/americas/supreme-court-of-canada-overturms-bans-on-doctor-assisted-suicide.html?_r=0) [https://perma.cc/LMT8-NZDJ] (discussing that in *Carter*, the principal case overruling *Rodriguez*, the High Court held that any such prohibitions of this nature and the very notion that “grievous and irremediable medical conditions” can exist which—for humane and compassionate medical reasons are not subject to relief—not only infringe on the right to life, liberty and dignity and security, but are in contravention to fundamental principles of justice). See generally Josh Sanburn, *How Canada’s Right-to-Die Ruling Could Boost Movement in U.S.*, TIME (Feb. 6, 2015), <http://time.com/3699464,feb62015> [https://perma.cc/V6MN-2PTS] (discussing effect the Canada Court’s ruling could have on the United States). But see Scott Y. H., Kim et al., *Euthanasia and Assisted Suicide of Patients With Psychiatric Disorders in the Netherlands 2011-2014*, JAMA PSYCHIATRY (Apr. 2016), <http://jamanetwork.com/journals/jamapsychiatry/fullarticle/2491354> [https://perma.cc/5VWV-UVQK] (challenging the notion that an informed judgment can ever be given by an emotionally or cognitively impaired person).

<sup>127</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>128</sup> G.A. Res. 2200A (XXI) (Mar. 23, 1976) [hereinafter Civil and Political Rights Covenant] (the United States is not a party).

<sup>129</sup> G.A. Res. 2200A (XXI) (Jan. 3, 1976) [hereinafter Economic, Social, and Cultural Rights Covenant] (the United States is a party, subject to several reservations, understandings and declarations). Collectively, these three dignitarian instruments are seen as the “International Bill of Rights”. JAMES, *supra* note 40.

<sup>130</sup> See George P. Smith, II, *Human Rights and Bioethics: Formulating a Universal Right to Health Care, or Health Protection?*, 38 VAND. J. TRANSNAT’L. L. 1295, 1298 (2005).

<sup>131</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); see also Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in CONCEPT OF HUMAN DIGNITY, *supra* note 14, at 111.

general ethics.<sup>132</sup> Human rights are seen properly as setting not only minimum standards for governance but as a means for safeguarding against state oppression.<sup>133</sup> Indeed, these rights “are at the heart of a free and democratic society.”<sup>134</sup>

While the Universal Declaration is non-binding, significant parts have attained the status of binding—rules of customary international law or—alternatively—are acknowledge as part of those general principles of law subscribed to by civilized nations.<sup>135</sup> It has been said, in fact, that the enumerated rights set forth within the Declaration are “made whole by dignity.”<sup>136</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>137</sup>

#### A. *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 18<sup>th</sup> century Enlightenment, the American and French revolutions, together with the movement toward democracy and of liberalism.<sup>138</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>139</sup> Central to the notion

<sup>132</sup> See Adam McBeth, *Privatising Human Rights: What Happens to the State’s Human Rights Duties When Services are Privatized?*, 5 MELB. J. INT’L. L. 133, 143 (2004).

<sup>133</sup> *Id.* Today, many human rights no longer limit state powers, alone, but have been privatized. HOLGER HESTERMEYER, *HUMAN RIGHTS AND THE WTO* (2007).

<sup>134</sup> Gerard Brennan, *Foreword* to CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT, at viii (H. P. Lee & P. Gerangelos eds., 2009).

<sup>135</sup> THERESE MURPHY, *HEALTH AND HUMAN RIGHTS* 25 (2013).

<sup>136</sup> *Id.* at 17.

<sup>137</sup> Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in CONCEPT OF HUMAN DIGNITY, *supra* note 14, at 111.

<sup>138</sup> 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, *supra* note 14, at 5. See generally Seth Mohny, *The Great Power Origins of Human Rights*, 35 MICH. J. INT’L. L. 828 (2014) (tracking some of the history of human rights).

<sup>139</sup> Hubert Canick, *Dignity Of Man’ And Persona’ in Stoic Anthropology: Some Remarks On Cicero, De Officiis I 105–07*, in CONCEPT OF HUMAN DIGNITY, *supra* note 14, at 27; Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in CONCEPT OF HUMAN DIGNITY, *supra* note 14, at 133.

of citizenship, for the Greeks through the ideal of the *Politeia* and by the Romans in the *civis romanus*, were the core values of liberty, dignity and self-determination;<sup>140</sup> just as in the same fashion that it was asserted by European societies, the nobility, and the Buerger.<sup>141</sup>

The theory of the “Rights of Man” was, then, drawn from past beliefs, as well as traditions and experiences by the intellectual leaders of the West.<sup>142</sup> In fact, this bold contention was the basis for proclaiming the inalienable rights of citizens in the U.S. Declaration of Independence<sup>143</sup> and, largely, the American national identity<sup>144</sup> and value system.<sup>145</sup>

Recognized, since the end of World War II, as not only legal norms but also as legitimate criteria for not only asserting, establishing and maintaining political legitimacy, 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>146</sup>

Human dignity, quite simply, then, 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 observed—as “incomplete;” because, to be an adequate normative account, it lacks a “well-specified counterpart obligation.”<sup>147</sup> Even with a “charge” of incompleteness, a fundamental assertion may be made: namely, that there is an overlapping, consensus which exists regarding the value which underlie the acceptance of dignity as a human right where worth must be secured and protected by the states.<sup>148</sup>

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<sup>140</sup> Arieli, *supra* note 138, at 5.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Weisstub, *supra* note 52, at 263.

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

<sup>146</sup> Eric Heinze, *Even-Handedness and The Politics of Human Rights*, 21 HARV. HUM. RTS. J. 7, 7 (2008). See generally Carrie Booth Walling, *Human Rights Norms, State Sovereignty, and Humanitarian Interventions*, 37 HUM. RTS. Q. 383 (2015) (analyzing the changing meanings of state sovereignty to legitimize and protect human rights norms).

<sup>147</sup> JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 11 (2012).

<sup>148</sup> *Id.* at 375; see also JONATHAN HERRING, *CARING AND THE LAW*, 88–151 (2013) (stressing the obligation of the state to support care and promote Social Justice); George P. Smith, II, *Social Justice and Health Care Management: An Elusive Quest?*, 9 HOUS. J. HEALTH L. & POL'Y 1 (2008).

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>149</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>150</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 play into the notion that allowing violations of economic, social, and cultural rights is justifiable.<sup>151</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>152</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>153</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: namely, that 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>154</sup>

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<sup>149</sup> See HESTEMEYER, *supra* note 133, at 93.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Belinda J. Bennett, *Globalization Rights? Constructing Health Rights in a Shrinking World*, in BRAVE NEW WORLD OF HEALTH 20 (Belinda J. Bennett et al. eds., 2008); see generally Michael J. Perry, *The Morality of Human Rights*, 50 SAN DIEGO L. REV. 775 (2013) (discussing the “fundamental moral imperative” that underpins universal human rights).

<sup>153</sup> See Leonard Hoffmann, *The Universality of Human Rights*, 125 L. Q. REV. 416 (2009) (discussing the dichotomy between the universality of human rights in their abstraction and their national nature of their application). See generally Smith, *supra* note 23.

<sup>154</sup> See Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L. L.J. 51, 70 (2010) (discussing the power of local social conditions over human rights). See generally KALIN & KÜNZLI, *supra* note 97, at 319 (discussing the right to health and international assistance).

*B. Subsidiarity and The Law of International Human Rights*

As a structural principle of international human rights law and as an ideal, subsidiarity is quite directly a model of social organization.<sup>155</sup> It became a part of the political lexicon in the twentieth century, but traces its provenance to classical Greece.<sup>156</sup>

The efficacy of subsidiarity is not found from it as being a force for social efficiency or even as a template for political compromise. Rather, its etiology is “personalistic rather than contractual or utilitarian.”<sup>157</sup> At bottom, subsidiarity—then—is to be acknowledged as “a conviction that each human individual is endowed with an inherent and inalienable worth, or dignity, and thus that the value of the individual human person is ontologically and morally prior to the state or other social groupings.”<sup>158</sup>

Both subsidiarity and human rights seek to advance and to secure the common dignity of the human person.<sup>159</sup> Noble though the principle of subsidiarity is, in reality, procedures for safeguarding its implementation through human rights guarantees and protections remain illusionary—this, because the law of human rights, itself, is subject to long-standing incoherence and inconsistencies.<sup>160</sup> The instability of subsidiarity may be understood further when law is accepted as being more than a “system of rules” set within one “normative universe” and instead seen correctly as being comprised of plural communities which have countless “narratives that locate [law] and give it meaning” within those communities.<sup>161</sup>

Norms—and, here dignity—develop from behaviorism<sup>162</sup>

<sup>155</sup> Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L. L. 38, 38 n.1 (2003).

<sup>156</sup> *Id.* at 40–41.

<sup>157</sup> *Id.* at 42; see also Glensy, *supra* note 2, at 142 (discussing the right of dignity).

<sup>158</sup> Carozza, *supra* note 155, at 42.

<sup>159</sup> *Id.* at 79. See generally GLOBAL PERSPECTIVES ON SUBSIDIARITY (Michelle Evans & Augusto Zimmerman eds., 2014).

<sup>160</sup> See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 1 (2d ed. 2005); Carozza, *supra* note 155, at 69. See generally LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? (Alicia Ely Yamin & Siri Gloppen eds., 2011) (exploring health rights litigation and its consequences); Venetis, *supra* note 73 (discussing the pros and cons of adjudicating human rights cases in Article III courts).

<sup>161</sup> Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

<sup>162</sup> See Woods, *supra* note 154, at 105 (“Certainly culture has the power to create or

which, in turn, focuses on those social conditions which either enable or disable various life actions. Normative environments must—of necessity—be seen as being composed of economic, social, cultural, civil and political actions or vectors of force.<sup>163</sup>

International human rights treaties which endeavor to structure regulatory regimes are generally ineffective because they ignore the realities of individual state behavioralism and seek to have human rights enforced by treaty and/or universal declarations.<sup>164</sup> Since there is no central enforcement mechanism for violations of human rights, the whole corpus of international human rights law must be acknowledged as “hopelessly weak” because of this failure.<sup>165</sup> Ultimately, whether state actions comply with a particular treaty or allow a state to first recognize, and then endeavor to realize, provisions of universal declarations, depend upon the social conditions within each state.<sup>166</sup>

It is encouraging to observe that over the last decade, the justiciability of economic, social, and cultural rights has been evolving.<sup>167</sup> The effect of this recognition for human rights is that they are now open to interpretation by judicial or quasi-judicial bodies and, furthermore, determinations may be made regarding the sufficiency of a complaint before these bodies for violations of these rights.<sup>168</sup>

### *C. Advancing a Global Framework for a New Constitutionalism?*

Pivotal to a global initiative to structure a framework for advancing a new human rights constitutionalism<sup>169</sup> are three

undermine human rights norms.”).

<sup>163</sup> *Id.* at 70–87; see also Martti Koskenniemi, *The Fate of International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 29 (2007) (discussing the notion that international law should be reconceived as a political right).

<sup>164</sup> Woods, *supra* note 154, at 70.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 81, 87, 105. See generally JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (putting forth the theory that international law springs from the rational choices of states).

<sup>167</sup> MAITE SAN GIORGI, *THE HUMAN RIGHT TO EQUAL ACCESS TO HEALTH CARE* 94–95, 118–20 (2012). See generally Heinze, *supra* note 146 (discussing the importance of human rights to legitimacy).

<sup>168</sup> SAN GIORGI, *supra* note 167, at 120.

<sup>169</sup> See Smith, *supra* note 130. But see Koskenniemi, *supra* note 163, at 20–24

instruments: the Universal Declaration on Human Genome and Human Rights<sup>170</sup> of 1998, the 2003 International Declaration on Human Genetic Data,<sup>171</sup> and the Universal Bioethics Declaration of 2005.<sup>172</sup> In addition to these Declarations, the Universal Declaration of Human Rights,<sup>173</sup> the International Covenant on Civil and Political Rights,<sup>174</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)<sup>175</sup> collectively set forth working principles and impose obligations that bear a direct relationship to normative medical ethics.<sup>176</sup>

Human rights, bioethics and medical ethics are inextricably linked together 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.<sup>177</sup> These provisions also promote health and assure medical care along with the right to be free from inhumane and degrading treatment.<sup>178</sup>

UNESCO’s member states adopted the Universal Declaration on Bioethics and Human Rights on October 19, 2005.<sup>179</sup> The Declaration in Article 14 enunciates a Principle of Social Responsibility which directs decisions and practices in science and technology to advance the human good by providing “access to adequate nutrition and water,” “eliminat[ing] . . . the marginali[z]ation and exclusion of persons,” and “reduc[ing] of

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(discussing legal pluralism as an alternative to constitutionalism).

<sup>170</sup> UNESCO, Universal Declaration on the Human Genome and Human Rights, 29th Sess., Resolution 29C/17 (1997).

<sup>171</sup> UNESCO, International Declaration on Human Genetic Data (2003).

<sup>172</sup> UNESCO, Universal Declaration on Bioethics and Human Rights (2005).

<sup>173</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>174</sup> Civil and Political Rights Covenant, *supra* note 128.

<sup>175</sup> Economic, Social, and Cultural Rights Covenant, *supra* note 129.

<sup>176</sup> *See* SMITH, *supra* note 9, at 1-5; *see also* Smith, *supra* note 130.

<sup>177</sup> *See* Smith, *supra* note 130, at 1300–01.

<sup>178</sup> *See* LOUIS HENKIN, THE RIGHTS OF MAN TODAY 11, 31–88 (1978) (interpreting various constitutions from around the world, and stating that the U.S. Constitution “was not essentially a charter of rights and liberties, but a blueprint of government” that, thus, did not provide any specific formulae of rights); *see also* Smith, *supra* note 130, at 1300–01.

<sup>179</sup> *See* Michael D. Kirby, *Human Rights and Bioethics: The Universal Declaration of Human Rights and UNESCO Universal Declaration of Bioethics and Human Rights*, 25 J. CONTEMP. HEALTH L. & POL’Y 309, 321 (2009).

poverty and illiteracy.”<sup>180</sup> Article 14 strengthens the very notion of social responsibility by directing the benefits of scientific research to advance, among other interests, “access to quality health care” and support for health services.<sup>181</sup>

Article 23 of the Bioethics and Human Rights Declaration underscores state responsibilities to safeguard public health standards by using proportionate measures designed to not only accord respect for ‘human dignity, human rights and fundamental freedoms’ be undertaken pro-actively when “threats of serious irreversible damage to public health or human welfare” exist.<sup>182</sup> The Declaration can be properly seen, then, 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.<sup>183</sup>

In spite of its limited ratification and marginal impact, the European Convention on Human Rights and Biomedicine should nonetheless be recognized as a creative illustration of how bioethics, medical ethics and the norms of international human rights can operate together.<sup>184</sup> This linkage is created through policies regulating equitable access to healthcare and informed consent, along with restrictions on the uses of the human genome and other regulations on scientific research.<sup>185</sup>

Although all of these UN conventions and declarations are influential in structuring an international policy framework in this new age of biotechnology, their permanence and effectiveness are hindered by the fact that principles, covenants, statutes, protocols, declarations and conventions bind *only* states which either accede or ratify them.<sup>186</sup>

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<sup>180</sup> *Id.* at 327.

<sup>181</sup> *Id.*

<sup>182</sup> LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES 462 (Michael Freeman et al. eds., 2014).

<sup>183</sup> *Id.* at 322–35.

<sup>184</sup> Thomas A. Faunce, *Will International Human Rights Subsume Medical Ethics? Intersections in the UNESCO Universal Bioethics Declaration*, 31 J. MED. ETHICS 173, 174 (2005).

<sup>185</sup> *Id.*

<sup>186</sup> See Smith, *supra* note 130, at 25–26.

Progressivity standards shape political efforts to design and then enforce a right to health as either a social, political, or a cultural right.<sup>187</sup> This fragile—if not fatally flawed—enforcement mechanism immunizes all states from human rights violations *so long as* they present evidence of their progressive (or at least measurable) actions toward the realization of human rights.<sup>188</sup>

The Committee on Economic, Social and Cultural Rights acts as a strong counter influence to mediate the Standard of Progressivity's negative impact realizing human rights.<sup>189</sup> As part of an action plan for promoting and realizing human rights, the Committee has held that core minimum obligations must be satisfied by all state parties who have ratified the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights, “[e]ven where non-compliance is excused” under the standards of progressivity.<sup>190</sup>

In the final analysis and application, economic self-interest and political survival determine the level of both the recognition and 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>191</sup>

## VI. Conclusion

As a concept, principle, normative standard, or value, human dignity may be viewed correctly as predating human rights—this, because human rights are, in contemporary society, seen as “juridical concretization” of but a generalized notion of human dignity.<sup>192</sup> Owing to the capacious nature of human rights, clarity of application or human dignity as a normative standard is

<sup>187</sup> MURPHY, *supra* note 135, at 41–42.

<sup>188</sup> See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 192–94 (1996).

<sup>189</sup> HESTERMEYER, *supra* note 133, at 110–11.

<sup>190</sup> *Id.*

<sup>191</sup> See generally George P. Smith, II, *Accessing Health Care Resources: Economic, Medical, Ethical and Socio-Legal Challenges*, in AUTONOMY AND HUMAN RIGHTS IN HEALTH CARE: AN INTERNATIONAL PERSPECTIVE 291–307, 292 (David N. Weisstub & Guillermo Diaz Pinto eds., 2008) (examining the “economic, medical, ethical and socio-legal underpinnings of the [healthcare] frameworks”).

<sup>192</sup> Dietrich Ritschl, *Can Ethical Maxims Be Derived from Theological Concepts of Human Dignity*, in CONCEPT OF HUMAN DIGNITY, *supra* note 14, at 92.

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 in a degrading or humiliating manner.”<sup>193</sup>

Standing alone, the virtue of dignity should be not acknowledged as a single and distinct as, for example, courage. Rather, dignity should be understood as “a collection of loosely related traits like self-respect, self-control, and self-discipline.”<sup>194</sup> The very taxonomy of human dignity, then, is set with a “context of respect for persons and the value of autonomy.”<sup>195</sup>

All of the international instruments on human rights, at one level or other, have human dignity as their “first and last resort.”<sup>196</sup> Consequently, the optimum value of maximizing human dignity is codified, then, when laws and policies administering justice are guided by the central, modern virtue of human dignity.<sup>197</sup> If human dignity is acknowledged as the ultimate value, or even as a foundational value, it assumes the function of a social ideal.<sup>198</sup>

Therefore, it has been suggested that because of the ambiguities in definition and application, the essential worth of human dignity as a concept is “limited,”<sup>199</sup> problematic and open to question in reality.<sup>200</sup> If not applied as a catalyst for normative conduct, human dignity must nonetheless be evaluated and applied as a “common

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<sup>193</sup> Chaskalson, *supra* note 139, at 134.

<sup>194</sup> Michael J. Meyer, *Dignity as a (Modern) Virtue*, in CONCEPT OF HUMAN DIGNITY 195, 201.

<sup>195</sup> Weisstub, *supra* note 14, at 269. *See generally* Mitchell, *supra* note 33 (examining, among other things, the impact of history, Christianity, and biotechnology and their relations to how ‘dignity’ is understood).

<sup>196</sup> Weisstub, *supra* note 14, at 269.

<sup>197</sup> *Id.*

<sup>198</sup> *See generally* ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 169–209 (1981) (discussing the nature of virtues, the unity of human life, and the concept of tradition).

<sup>199</sup> Weisstub, *supra* note 14, at 264.

<sup>200</sup> Edmund Pellegrino, *Letter of Transmittal to The President of The United States & The Lived Experience of Human Dignity*, in PRESIDENT’S COUNCIL ON BIOETHICS, *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS* xi–xii, 513 (2008).

ground for moral understanding”,<sup>201</sup> a tool for consensus morality,<sup>202</sup> or, at a minimum, a template for safeguarding international equity.<sup>203</sup>

It is important to remember that the very ends of medicine are devoted to preserving human dignity and preventing “dehumanization.”<sup>204</sup> It remains for the physician to recognize a duty of beneficence to safeguard the patient from losing dignity and thereby despairing.<sup>205</sup> The physician must also be ever mindful that (independent of bodily pain) extreme abasement and humiliation, loss of hope, and demoralization may result in acute emotional pain which must be dealt with appropriately.<sup>206</sup>

At the end-stage of life, health care management decision-making should be guided by situational ethics, which are shaped not only by common sense, but also by beneficence, compassion and love,<sup>207</sup> thus seeking 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>208</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 also compassionate care that preserves

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201 See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 3 (5th ed. 2001). See generally Bennett, *supra* note 152 (assessing the notion of a common morality is seen as compromising those norms that all morally serious persons accept as authoritative).

202 See Weisstub, *supra* note 14, at 263–94 (assessing dignity as a heuristic or “cognitive device” to aid in and resolving human rights issues); see also Glensy, *supra* note 2, at 126.

203 Glensy *supra* note 2, at 135–36.

204 Pellegrino, *supra* note 200, at 532.

205 See *id.*; see also Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. CONTEMP. HEALTH L. & POL’Y 47, 55 (1994).

206 Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 9 CORNELL L. REV. 801, 825 n.93 (2012).

207 See George P. Smith, II, *Applying Bioethics in the 21st Century: Principlism or Situationism?*, 30 J. CONTEMP. HEALTH L. & POL’Y 37, 44 (2013). See generally HARRY G. FRANKFURT, *THE REASONS OF LOVE* (2004) (discussing how love is the most authoritative form of caring).

208 See Amir Halevy, *Medical Futility, Patient Autonomy, and Professional Integrity: Finding the Appropriate Balance*, 18 HEALTH MATRIX 261, 286–87 (2008).

human dignity.<sup>209</sup>

Ideally, the importance of preserving human dignity at the end-of-life stage should be recognized as a human right.<sup>210</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>211</sup> having human dignity nonetheless *codified* in international policy documents is significant.<sup>212</sup> Although admittedly symbolic, the importance of human dignity alternatively, as a normative *catalyst* for on-going dialogue and for 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 of the Preamble to the UN 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>213</sup> by recognizing the right to die with dignity as an inviolable human right—for, 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>214</sup> Dignity should be viewed rightly as nothing less than “an expression of the unity of mankind.”<sup>215</sup>

Planning end-of-life management decisions or death induction

<sup>209</sup> See generally Kass, *supra* note 55, at 231–56 (discussing “[d]eath with [d]ignity and the [s]carcity of [l]ife”); GEORGE P. SMITH, II, PALLIATIVE CARE AND END-OF-LIFE DECISIONS 1 (2013) (discussing the merits of palliative sedative medications in alleviating “intractable physical and existential suffering.”).

<sup>210</sup> RANDALL & DOWNIE, *supra* note 5, at 19.

<sup>211</sup> See MURPHY, *supra* note 135, at 41–42; see also Inmaculada De Melo-Martin, *Human Dignity in International Policy Documents: A Useful Criterion for Public Policy?*, 25 *BIOETHICS* 37, 39 (2011). See generally I. GLENN COHEN, *THE GLOBALIZATION OF HEALTH CARE: LEGAL AND ETHICAL ISSUES* (2013) (providing a “comprehensive legal and ethical analysis” of the globalization in health care).

<sup>212</sup> See HENKIN, *supra* note 178, at 116 (“The commitment of the U.S. government to international human rights . . . has been less than wholehearted . . . .”); see also Bill Richards, *A New Human Rights Agenda for the United States: New Realism, Human Rights, and the Rule of Law*, 21 *HARV. HUM. RTS. J.* 1, 2 (2008) (discussing how former UN Ambassador Bill Richards has observed that before America seeks to promote human dignity worldwide, it must first re-establish itself as a Nation “that honors human dignity”). See generally SMITH, *supra* note 9 (examining the fundamental issues concerning the field of biomedical human rights).

<sup>213</sup> Paust, *supra* note 10, at 151.

<sup>214</sup> Glensy, *supra* note 2, at 142.

<sup>215</sup> Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *CONCEPT OF HUMAN DIGNITY*, *supra* note 14, at 114.

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 simply seen as “important for both the individual and the democratic society in which he or she lives.”<sup>216</sup> Even though no right to die is recognized domestically and internationally, the very “right to life not only as a civil and political right but also as a part of economic, social and cultural rights plays a major role in safeguarding human existence.”<sup>217</sup> 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 the ethical obligations owed to the human person”,<sup>218</sup> as well as whether human dignity can be realized as the fundamental vector of force in shaping standards of social justice.<sup>219</sup>

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<sup>216</sup> ELIZABETH WICKS, *HUMAN RIGHTS AND HEALTHCARE* 273 (2007).

<sup>217</sup> KÄLIN & KÜNZLI, *supra* note 97, at 303. Indeed, the same “minimal conditions necessary for a life in dignity” (*e.g.*, autonomy, respect, compassion, humanness, decency, wellbeing) are the very same conditions that are in play in managing death.

<sup>218</sup> Pellegrino, *supra* note 200, at xii; *see* MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 440 (1980) (acknowledging that society needs perspectives in order to achieve and advance “an optimum public order of human dignity”); *see also* KASS, *supra* note 55, at 246 (concluding that dying with dignity “requires a dignity of soul in the human being who faces it”).

<sup>219</sup> *See* Smith, *supra* note 148, at 8.