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ARTICLE

THE DIGNITY CLAUSE OF THE MONTANA CONSTITUTION: MAY FOREIGN JURISPRUDENCE LEAD THE WAY TO AN EXPANDED INTERPRETATION?

Heinz Klug*

INTRODUCTION

Constitutional language is rarely superfluous. While some clauses may temporarily lie dormant, it is only a matter of time before they will be pressed into service. Although there have been increasing attempts to use the explicit protection of human dignity in the Montana Constitution, thus far there is little authoritative guidance as to its scope or meaning.¹ A review of

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1. See Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 303 (2000) ("[T]he court has yet to develop the meaning of this clause in any of its opinions."). The clearest exposition of the meaning of individual dignity is in *Armstrong v. State*, in which the Montana Supreme Court applied the right of individual privacy but noted that the Montana Constitution's "Declaration of Rights encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government."

the comparative jurisprudence in this field provides a number of alternatives for the development of this clause with different implications for the scope of rights which may be claimed and secured in the future. Thus, inclusion of an explicit dignity clause provides a basis for renewed challenges to criminal sanctions. Further, it provides a basis for possible claims to a limited core of socio-economic rights, in addition to providing an underlying justification for the associated rights of equality, privacy, and self-determination or personal autonomy.

Before exploring the meaning of the Montana Constitution's dignity clause, however, it is useful to briefly consider its origins. Since there is no similar clause in the United States Constitution, the dignity clause represents a product of the often overlooked yet dynamic process of state constitution-making that continued through the nineteenth and twentieth centuries. These state constitution-making processes led to the adoption of more explicit and extensive guarantees of individual rights, such as the right to privacy in the Californian and other state constitutions, despite little development of the rights explicitly guaranteed in the federal Constitution.

While the record of Montana's 1972 constitutional convention indicates that the drafters may have drawn the language for the dignity clause from the Puerto Rican Constitution of 1952,² it is also important to recognize that the idea of a right to human dignity had become an explicit part of post-World War II human rights discourse.³ Thus, the preamble to the Charter of the United Nations reaffirmed the member nations' "faith in fundamental human rights, in the dignity and worth of the human person."⁴ In addition, dignity was incorporated as an inherent feature of a "rights bearing human

1999 MT 261, ¶ 71, 296 Mont. 361, ¶ 71, 989 P.2d 485, ¶ 71. The *Armstrong* court then proceeded to state that respect for the dignity of each individual "demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic values of life in general, answering to their own consciences and convictions." *Id.* ¶ 72. Subsequently applying *Armstrong* in *In re Mental Health of K.G.F.*, the court gave some concrete expression to the meaning of dignity in pointing to the statutory requirements that a person in an involuntary commitment hearing has a right to: (1) dress in his or her own clothes; (2) have a hearing held in court, not in a mental health facility; and (3) be present in any hearing or trial. 2001 MT 140, ¶ 46, 306 Mont. 1, ¶ 46, 29 P.3d 485, ¶ 46.

2. Clifford & Huff, *supra* note 1, at 320.

3. See generally THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002).

4. U.N. CHARTER pmb1.

subject” in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948.⁵ Subsequently, dignity was adopted as a fundamental right in the German Basic Law of 1949.⁶ This trend continued in Puerto Rico’s constitutional dignity provision in 1952,⁷ and most recently, in South Africa’s post-apartheid constitutions of 1994 and 1996.⁸

In contrast to the Montana experience, these other jurisdictions have developed an active “dignity” jurisprudence. Seeing Montana’s dignity clause in this perspective provides an opportunity to consider what potential this clause may have in addressing issues which will potentially come before the courts in Montana. At the same time, it is important to acknowledge that the scope of the constitutional right to dignity varies greatly between these different jurisdictions, and any future application in Montana will be driven as much by political, social, and even legal circumstances in the state as by the seemingly parallel words contained in clauses around the globe.

Significantly, while human dignity is recognized as the source of human rights in the preambles of both International Covenants⁹ adopted by the United Nations in 1966 to implement the Universal Declaration, there was no explicit recognition of an individual right to dignity. Rather, the Covenants and other international instruments, such as the American Convention on Human Rights of 1969¹⁰ and the African Charter on Human and

5. *Universal Declaration of Human Rights*, G.A. Res. 217(A)(III), U.N. GAOR, 3rd Sess., pmb., at 71, U.N. Doc. A/810 (1948).

6. GRUNDGESETZ [GG] [Constitution] art. 1, § 1 (F.R.G.), *reprinted in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 30-33 (2d ed. 1997).

7. P. R. CONST. art. II, § 1. Public Law 447, ch. 567, 66 Stat. 327 (July 3, 1952), *reprinted in* 1 P.R. LAWS ANN. 138-39 (1999).

8. S. AFR. CONST. ch. 3, § 10 [interim constitution, also known as Act 200 of 1993] (commenced Apr. 27, 1994) (“Every person shall have the right to respect for and protection of his or her dignity.”); S. AFR. CONST. ch. 2, § 10 [final constitution, also known as Act 108 of 1996] (adopted May 8, 1996) (“Everyone has inherent dignity and the right to have their dignity respected and protected.”).

9. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, art. 2(2), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (entered into force Jan. 3, 1976); *International Covenant on Civil and Political Rights*, G.A. Res. 2200, art. 2(1), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (entered into force Mar. 23, 1976).

10. American Convention on Human Rights, Nov. 22, 1969, art. 5, § 2, 9 I.L.M. 673 (entered into force July 18, 1978).

People's Rights of 1986,¹¹ treat human dignity as what has been described as the "ur-text" of human rights, as the source of all other rights.

To throw light on the Montana Constitution's dignity clause, I will first reflect on what we understand by the idea of "human dignity." Second, this paper will consider the notion of a constitutional right to dignity and how this may be distinguished from the general notion of human dignity as a source of human rights. This second part of the article will discuss five different ways in which to understand how the right to dignity is given constitutional form: as an individual right; as a background condition of other individually recognized rights; as a foundational constitutional concept; as a substantive constitutional right; or finally, as a combination of a substantive right and an interpretative guide flowing from its foundational status. I will then focus specifically on the two major ways in which human dignity has been given constitutional form - as a foundational guide or an individual substantive right. On one hand, it is treated as a founding principle, not just as an "ur-text" but as the basic principle through which all other rights are interpreted. On the other hand, human dignity has in some circumstances been framed as an individual right which may be directly upheld in the courts. Finally, these perspectives will be used to briefly reflect on the Montana Constitution's clause and the opportunities it represents.

UNDERSTANDING THE IDEA OF "HUMAN DIGNITY"

Human dignity may simply be described as a sense of self worth, and as such, it is commonly understood as the core principle of the idea of human rights. It is in this sense that human dignity is claimed to be the "source" of human rights, the common core that as Kant argued, obligates each of us to "acknowledge . . . the dignity of humanity in every other [person]."¹² Less simple is the idea of a constitutionally protected right to dignity which may be asserted in specific factual circumstances and may give rise to specific legal

11. African Charter on Human and Peoples' Rights, June 26, 1981, art. 5, 21 I.L.M. 59 (1982) (entered into force Oct. 21, 1986).

12. IMMANUEL KANT, *Doctrine of Virtue*, in Part II of THE METAPHYSICS OF MORALS 132 (Mary J. Gregor trans., Harper Torchbooks 1964) (1797), cited in Alan Gerwith, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Meyer & William A. Parent eds., 1992).

remedies. In the context of United States Constitutional interpretation, there is little explicit discussion of human dignity as a legal right.¹³ Instead, it is implicitly assumed that human dignity is guaranteed by the protections already contained in the Bill of Rights or implicit in the very nature of the constitutional order.¹⁴ This situation stands in marked contrast to other constitutions, such as the German and South African constitutions. In those countries, the right to dignity is explicitly protected and a jurisprudence of dignity has led to definitions of rights and conclusions about issues such as the death penalty¹⁵ and life imprisonment¹⁶ which are quite different from those reached in the United States.

As a prelude to exploring this jurisprudence, I will briefly discuss some of the dominant assumptions and tendencies which pervade our discussions of human dignity as a sense of self-worth or equal worth. First is the assumption, implicit in the idea that human rights are primarily individual rights, that human dignity is a purely individual trait. Second is the tendency to define dignity in mainly negative terms — as a right the state may not violate rather than as a positive right of the individual or community which must be upheld or supported. It is in this latter sense, as a positive right, that a broader conception of human dignity may be understood as being located in specific relationships: between individuals; between individuals and institutions; and especially in relation to the

13. See Raoul Berger, *Justice Brennan, "Human Dignity," and Constitutional Interpretation*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 296 (Michael J. Meyer & W. A. Parent eds., 1992) (citing Chief Justice Warren's argument that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man" from *Trop v. Dulles*, 356 U.S. 86, 100 (1958), and Justice Brennan's rejection of the death penalty because it "treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded . . . [and is] thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause, that even the vilest criminal remains a human being possessed of common human dignity" in *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., conc.)).

14. See *Chisholm v. Georgia*, in which Justice James Wilson stated, "A State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance." 2 U.S. (2 Dall.) 419, 455 (1793) (emphasis added). See generally William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer & W. A. Parent eds., 1992).

15. See *S v. Makwanyane*, 1995 (3) SA 391 (CC), 1995 BCLR 665 (CC). See generally Heinz Klug, *Striking Down Death: S v Makwanyane*, 12 S. AFR. J. ON HUM. RTS. 61 (1996).

16. Life Imprisonment, 45 BverfGE 187 (1977). See KOMMERS, *supra* note 6, at 306-311.

exercise of power, whether it be public or private. This conception relies on the assumption of a basic interconnectedness, that humans essentially exist at all times as both individuals and members of communities. An important element of this approach is the notion that individual dignity is not only dependent upon membership in a community but also on the right of access to a minimum level of socio-economic resources which will allow for the possibility of a dignified existence.

As much of the jurisprudence is dominated by a negative definition of individual dignity, I will begin by describing two examples which exemplify a positive definition of individual dignity. In this way, I hope to provide an initial sense of meaning to what are often rather abstract and vague notions incorporated into the claim of human dignity. Thereafter, I will discuss the consequences of recognizing the relational or collective aspects of the idea of human dignity, especially as a basis for claims to socio-economic and cultural rights.

An exemplary display of individual dignity may be recognized in Nelson Mandela's speeches from the dock.¹⁷ These speeches were given at a time before it could be seriously imagined that he would serve as South Africa's first democratically-elected President. Acquitted of treason in March 1961 after a trial lasting over four years, Mandela was back in the dock just over a year later, this time accused and convicted of inciting people to strike and of leaving the country without a passport. When first asked to plead, Mandela, who was representing himself, explained that he hoped to "be able to indicate . . . that this case is a trial of the aspirations of the African people."¹⁸ Making a subsequent application for the recusal of the magistrate, Mandela, who had previously practiced law before this same court, now dressed in a traditional Xhosa leopard-skin kaross instead of a suit and tie, asked:

Why is it that in this courtroom I am facing a white magistrate, confronted by a white prosecutor, escorted by white orderlies? Can anybody honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced? Why is it that no African in the history of this country has ever had the honor of being tried by his own kith and kin, by his own flesh and

17. "Dock" is the term used in South Africa to describe the place in a criminal court where the accused stands or sits during trial.

18. NELSON MANDELA, *LONG WALK TO FREEDOM* 283 (1994).

blood? I will tell your Worship why: the real purpose of this rigid color bar is to ensure that the justice dispensed by the courts should conform to the policy of the country, however much that policy might be in conflict with the norms of justice accepted in judiciaries throughout the civilized world Your Worship, I hate racial discrimination most intensely and in all its manifestations. I have fought it all my life. I will fight it now, and I will do so until the end of my days. I detest most intensely the set-up that surrounds me here. It makes me feel that I am a black man in a white man's court. This should not be.¹⁹

Mandela was again brought into the dock while serving the five-year prison sentence he had previously received, and once again, he faced the death penalty.²⁰ This time, the charges were sabotage and conspiracy. Mandela opened the case for the defense with a statement from the dock in which he conceded that he was one of the persons who helped to form Umkhonto we Sizwe (the spear of the nation) and had planned sabotage as the state alleged. In justifying the decision to organize armed resistance against the apartheid state, Mandela detailed the "terrible disparities between black and white life in South Africa [i]n education, health, income, every aspect of life . . ." and explained to the court that:

the lack of human dignity experienced by Africans is the direct result of the policy of white supremacy. White supremacy implies black inferiority. Legislation designed to preserve white supremacy entrenches this notion. Menial tasks in South Africa are invariably performed by Africans. When anything has to be carried or cleaned the white man looks around for an African to do it for him, whether the African is employed by him or not.²¹

Completing his speech to the court Mandela displayed a degree of personal dignity in stark contrast to the official denial of dignity inherent in apartheid law and institutions. Speaking directly to the judge, Mandela spoke what would be his last public words for nearly twenty-seven years:

During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.²²

19. *Id.* at 283-84.

20. Mandela first faced the death penalty during the treason trial.

21. MANDELA, *supra* note 17, at 321.

22. *Id.* at 322.

Reaching beyond the boundaries of the nation state, this same sense of individual dignity is captured in the claims made by President Franklin D. Roosevelt in his "Four Freedoms" speech in January 1941. In his speech, Roosevelt committed the United States to the task of securing a future, not just in the United States, but everywhere in the world, "founded upon four essential human freedoms:"

The first is freedom of speech and expression — everywhere in the world. The second is freedom of every person to worship God in his own way — everywhere in the world. The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants — everywhere in the world. The fourth is freedom from fear, which translated into world terms, means a world-wide reduction of armaments to such a point and in such a through fashion that no nation will be in a position to commit an act of aggression against any neighbor — anywhere in the world.²³

Although Roosevelt phrased these rights as attributes of individual freedom, these claims clearly embrace a second, more collective notion of human dignity. It is in this sense, then, that it is possible to see the interaction of an individual notion of human dignity and the idea of a broader notion of communal or collective idea of equal worth that requires a more positive conception of the right.

An example of collective or communal dignity and its relation to socio-economic and cultural rights²⁴ is the story of the creation of the Freedom Charter,²⁵ the document which embodied the aspirations of the majority of South Africans during the struggle against apartheid. Launched in the aftermath of the Defiance Campaign, in which thousands of volunteers across South Africa publically disobeyed unjust apartheid laws, "the campaign to create the Freedom Charter raised the positive vision of an alternative, apartheid-free South Africa."²⁶ After the 1953 annual congress of the African National Congress and the creation of a National Action Council in March 1954, over 10,000 volunteers were mobilized to prepare

23. President Franklin D. Roosevelt, The Four Freedoms, Message to Congress (Jan. 6, 1941), available at <http://www.libertynet.org/~edcivic/fdr.html>

24. See generally DIGNITY AND HUMAN RIGHTS: THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Berma K. Goldewijk, Adalid C. Baspineiro, & Paulo C. Carbonari eds. 2002).

25. See generally MARY BENSON, THE AFRICAN PATRIOTS 204-16 (1964).

26. RAYMOND SUTTNER & JEREMY CRONIN, 30 YEARS OF THE FREEDOM CHARTER at x (1986).

for a Congress of the People to be held in mid-1955. The year-long campaign was a series of events, "held in huge rallies, small houses, flats [apartments], street and factory meetings, gatherings in kraals and on farms,"²⁷ and produced over one thousand demands—some written on mere scraps of paper, others formally presented.²⁸

Held over two days on a soccer ground in Kliptown outside Johannesburg, the Congress of the People was described by one of the delegates as "all rather primitive and very simple, but the people gave it dignity, the mass of people coming together to spell out their own freedom charter."²⁹ There, despite being surrounded and searched by armed police, over 3,000 delegates discussed and endorsed their collective vision of the future. The preamble of the Freedom Charter declares that "South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people."³⁰ In addition to the assertion of democratic values and promises of equality, the delegates included a series of socio-economic guarantees — including access to food, health, employment, education, land and housing — that make it clear that their vision of human dignity included the basic necessities of a decent life. It is this collective vision of human dignity that has now been incorporated into South Africa's post-apartheid constitution, which includes a broad range of human rights protections including the promise of justiciable socio-economic rights.

This notion of an intrinsic link between economic security and human dignity is reflected too in the idea of a "second bill of rights" claimed by President Franklin D. Roosevelt in his 1944 State of the Union address. Arguing that the inalienable political rights which formed the basis of the American Republic had "proved inadequate to assure us equality in the pursuit of happiness," he asserted that "true individual freedom cannot exist without economic security and independence." To make this possible, he advocated the acceptance of a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed. Among these are: The right to a useful and remunerative job . . . ;

27. *Id.* at 12.

28. HELEN JOSEPH, *SIDE BY SIDE: THE AUTOBIOGRAPHY OF HELEN JOSEPH* 46 (1986).

29. *Id.* at 45.

30. FREEDOM CHARTER, pmbi. (adopted June 26, 1955).

The right to earn enough to provide adequate food and clothing and recreation; The right of every farmer to raise and sell his products at a return which will given him and his family a decent living; The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; The right of every family to a decent home; The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; The right to a good education.³¹

As these examples demonstrate, human dignity is not merely a general philosophical concept or even an individual attribute, but rather an expression of a sense of being that is simultaneously personified and imbedded in the relationship between individuals and their community, as epitomized by Roosevelt's "four freedoms." In these examples, there are both explicit references to the dignity of the individual and the collective — "African people" or "mass of people" — as well as an inherent dignity in either the speaker or the product of the event — Mandela in the dock or the Freedom Charter itself. Finally, there is the notion of a dignified human existence with the prerequisite guarantee of economic security and independence as suggested by the idea of a "second bill of rights" in the United States context. Thus, while one aspect of human dignity may be a sense of individual self worth, expressions of dignity may be located in a wide variety of situations. The challenge for any legal protection of dignity is to determine under what conditions these different elements of human dignity may be recognized, with an aim, over time, to encompass them all.

A Constitutional Right to Dignity?

Given these different but overlapping notions of human dignity, there are a number of ways to think about the role an explicit constitutional right to dignity might play. To clarify these interrelated notions I will discuss them as five distinct forms of a rights that might be constitutionally recognized: (1) a classic individual right; (2) a background to other rights; (3) a foundational right; (4) a distinctly separate and substantive

31. President Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), available at http://www.polsci.ucsb.edu/projects/presproject/idgrant/sou_pages/froosevelt11su.html.

right; and (5) a combination of a substantive right and foundational right.

First, we might treat dignity as a classic individual right. But what does it mean to constitutionally guarantee the right to individual dignity? Take the example of Nelson Mandela. Is there any need, or way, to protect the dignity of such an individual, who despite extreme adversity insisted upon and expressed his own inherent dignity? Yet we are not all Mandelas. While each individual clearly possesses inherent dignity, many may be demeaned or have their individual dignity impaired by the actions of others, whether individuals or institutions, public or private. Thus there is clearly scope for the negative protection of individual dignity. However, this is largely evident in the protection of an individual's reputation, bodily integrity and right to self-expression, individual rights protected most commonly through common law torts or other existing constitutional rights.

While there is a clear connection and at times an overlap of the rights to individual dignity and privacy, the most important distinction between the two is the claim that an individual right to dignity protects the intrinsic worth of the individual and not merely an inner sphere of autonomous decision-making or private intimacy. A most dramatic example of this exercise of the right to individual dignity arose in a German case, in which it was argued that even if a women stripper in a peep show was participating voluntarily, the act of stripping before an audience which she could not see, engage, or interact with amounted to a violation of her dignity.³² The court in that case, the Federal Administrative Tribunal, distinguished regular strip shows on the grounds that the stripper in such cases could be thought of as being in a similar position to a dancer or actor who engages their audience directly. From that perspective, striptease acts may be seen as a form of self-expression. In contrast, the peep show stripper was not able to see her audience and thus the act of exposing herself was purely degrading and could therefore be outlawed as a violation of individual dignity. Although it is unusual in the United States context to imagine an individual right which may be imposed on an individual against her will, in the German context the state has an independent constitutional

32. Peep Show Case (1), 64 BVerfGE 274 (1981) (F.R.G.). See SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 105-07 (1999).

duty to advance and protect the rights guaranteed in the Basic Law.³³ Thus, the state is compelled to enforce the right to individual dignity, even against the objections of those whom the right is designed to protect. The closest analogy in the United States context would be prohibitions against voluntary enslavement, euthanasia, or even assisted suicide.

Second, in contrast to the case of a violation of personal dignity, we may simply conceive of the right to human dignity as a general expression, background condition, or source of all the particular human rights that may be constitutionally recognized. This seems to be the premise of the notion that the Freedom Charter was an expression of collective human dignity in its promise and claim for the recognition of specific human rights in a future South Africa. This perspective may be discerned also in the relationship between statements and claims of human dignity in constitutional conflicts in the United States and the jurisprudence of rights specifically guaranteed in the United States Constitution. In its jurisprudence, the United States Supreme Court has relegated human dignity "to a background of extra-constitutional principles."³⁴ From this perspective, any particular reference to human dignity merely describes the general goal to be achieved through the recognition and upholding of specific rights, whether they be rights to equality, privacy, or even minimal living conditions. As Clifford and Huff have shown, in the cases in which the U.S. Supreme court has invoked "dignity," the Court does not view it as a constitutional right but rather "assumes that the dignity of persons is a central, foundational ideal of our political tradition closely allied to our ideals of liberty and autonomy."³⁵

Another way to consider the relationship between a constitutionalized notion of dignity and other constitutionally protected rights is to view the notion of human dignity as a foundational principle. Distinct from the idea of dignity being a purely background principle or political ideal, in this view the idea of individual and collective dignity, captured so clearly in the Freedom Charter, may be seen as informing our understanding of how all the other protected rights must be

33. DAVID M. BEATTY, *HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE* 276 (1994).

34. Luis Anibal Aviles Pagan, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JUR. U.P.R. 343, 360 (1998).

35. Clifford & Huff, *supra* note 1, at 312-313.

interpreted. Here dignity is not merely the general goal served by the protection of human rights but rather the lens through which all protected rights should be interpreted. As former President of the German Constitutional Court, Ernst Benda, has noted: "Article 1 [the dignity clause] of the Basic Law . . . is both 'the supreme constitutional principle' and a fundamental right."³⁶

A fourth approach is to treat the right to dignity as a separate constitutionally protected right with a substantive content distinct from other individual or collective rights. The challenge of this approach is to define those situations in which the assertion of the right to dignity would serve to guarantee particular realms of action or inaction or to secure the protection of, or access to, particular resources. In the German context, this task is accomplished by recognizing that the right to dignity in Article 1 exists in a symbiotic relationship with the "general liberty interests secured by the personality, inviolability, and right-to-life clauses of Article 2."³⁷

Deciding whether a particular claim enjoys constitutional protection under this rubric requires the courts to distinguish fundamental rights from the rules and remedies of ordinary law. In the Forest Law case, which considered whether the constitutional right to develop one's personality encompasses a right to ride a bicycle in the forest, Judge Grimm reasoned in his dissent that:

[b]asic rights distinguish themselves from the multitude of other rights by the fact that they protect the integrity, autonomy and communication of the individual in his basic relations. It is because of this fundamental importance of the subject matter of their protection for an order which is founded on human dignity that they are elevated above the mass of rights.³⁸

This principle enables the court to identify, according to Judge Grimm, a realm of protected activity lying in a zone "between the inviolable kernel of the personality on the one hand and the general freedom of activity on the other,"³⁹ which is not protected by any enumerated right, yet is "nevertheless of

36. Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443 (2000).

37. KOMMERS, *supra* note 6, at 299.

38. Forest Law Case (a.k.a. Rider in the Woods Case), 80 BverfGE 137, 164 (June 6, 1989) (F.R.G.) (Grimm, J., dissenting) (trans. Raymond Youngs) accessed at www.iuscomp.org/gla/judgments/tgcm/v890606.htm, also available at http://www.ucl.ac.uk/laws/global_law/cases/german/bverfg/bverfg_6june1989.html.

39. *Id.* at 166.

considerable importance for the development of the personality."⁴⁰ Applying this analysis to the question of the right to ride a bicycle in the forest, Judge Grimm stated that the "development of the personality of the individual does not depend on the possibility of riding in the forest"⁴¹ and thus he rejected the constitutional complaint, not on the grounds that the majority chose, but rather because the restrictions on riding in the forest "do not affect the protected area of this basic right at all."⁴² The effect of this approach is to carve out, on a case by case basis, the specific situations in which a new activity will be constitutionally protected because the activity falls within the realm of human dignity but is not protected by other enumerated rights.

Finally, we may combine two of the above approaches and argue that the right to dignity is best secured through an approach that seeks to both identify a particular substantive content as well as view dignity as the foundational principle for the interpretation and implementation of the broader human rights project. While this approach is inherent in the jurisprudence of the Federal Constitutional Court in Germany,⁴³ it may also be witnessed more broadly in the legal and political practices of other jurisdictions, including at times the United States. It was, after all, in the face of human suffering brought on by the great depression and in the name of human dignity that President Franklin D. Roosevelt advanced the program for the New Deal and in time the notion of a second bill of rights. Similarly, in *Goldberg v. Kelly*,⁴⁴ the United States Supreme Court reached the outer limits of its procedural due process jurisprudence. The Court asserted a substantive notion of dignity in deciding that government welfare benefits reflected a new form of property without which the recipients could not sustain a dignified existence. As such, these benefits could not be removed without due process, including a full evidentiary hearing.

40. *Id.*

41. *Id.* at 169.

42. *Id.*

43. See generally KOMMERS, *supra* note 6, at 298-359; EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002).

44. 397 U.S. 254 (1970). See generally Owen M. Fiss, *The Other Goldberg*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer ed., 1992).

DIGNITY AS A FOUNDING PRINCIPLE

Article 1(1) of the German Basic Law (German Constitution, 1949) states that the “dignity of the human person is inviolable” and places a duty on all public authority to respect it. The foundational character of this provision is evident in two ways: (1) from a consideration of the genesis of the Basic Law which was drafted and continues to be interpreted in direct response to the history of National Socialism;⁴⁵ and (2) in the prohibition against any future legal amendment of this provision or other key sections of the Basic Law guaranteeing the democratic and federal character of post-war Germany.⁴⁶ As the federal Constitutional Court stated in the Microcensus Case: “Human dignity is at the very top of the value order of the Basic Law. This commitment to the dignity of man dominates the spirit of Article 2 (1), as it does all other provisions of the Basic Law.”⁴⁷

The essence of this idea is that the basic principles of the constitutional order are not subject to change, not even to formal amendment. As the Constitutional Court declared in the Elfes case, “laws are not constitutional merely because they have been passed in conformity with procedural provisions. They must be substantively compatible with the highest values of a free and democratic order . . . and must also conform to unwritten fundamental constitutional principles.”⁴⁸ This gives rise to the idea that rights guaranteed in the Basic Law constitute an “objective system of values”⁴⁹ guaranteeing the “independence, self-determination, and dignity of man within the political community. . . . [a]bove all, laws must not violate a person’s dignity, which represents the highest value of the Basic Law. . . .”⁵⁰ Dignity in this context serves as a “counterweight”⁵¹ when the court is called upon to balance conflicting rights, and in this objective sense “sets the boundary to liberties flowing from the rights of personal autonomy.”⁵²

45. See Benda, *supra* note 36, at 445-447.

46. Art 79 (3) of the Basic Law. See KOMMERS, *supra* note 6, at 31.

47. Microcensus Case, 27 BVerfGE 1 (1969) (F.R.G.), *cited in* KOMMERS, *supra* note 6, at 299.

48. Elfes Case, 6 BVerfGE 32 (1957) (F.R.G.), *cited in* KOMMERS, *supra* note 6, at 317-18.

49. Luth Case, 7 BVerfGE 198 (1958) (F.R.G.), *cited in* KOMMERS, *supra* note 6, at 48.

50. Elfes Case, 6 BVerfGE 32, *cited in* KOMMERS, *supra* note 6, at 318.

51. Pagan, *supra* note 34, at 351.

52. KOMMERS, *supra* note 6, at 359.

Human dignity also plays a foundational role in South Africa's post-apartheid constitution. As the South African Constitutional Court has noted, the "Constitution asserts dignity to contradict our past . . . [i]t asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings."⁵³ There are in fact no less than five specific references to human dignity in the 1996 Constitution. First, human dignity, together with "equality and the advancement of human rights and freedoms" is one of the founding provisions contained in section 1. This section may only be amended by a seventy-five percent majority of the National Assembly (the legislature) supported by six of the nine provinces — making it virtually unchangeable. Second, there are four separate references to human dignity within the bill of rights: as a key democratic value which the state is obliged to uphold,⁵⁴ as an explicit substantive right;⁵⁵ and most significantly from a foundational perspective, as both a non-derogable right in the event of a state of emergency⁵⁶ and as a factor for the courts to consider in deciding whether a limitation of a right is reasonable and justifiable.⁵⁷ It is the latter role that is the key, in practice, to the idea of human dignity serving as a foundational principle.

The boundaries of constitutional rights are "set by the rights of others and by the legitimate needs of society."⁵⁸ The United States Supreme Court is often called upon to balance conflicting rights and uses an increasingly varied range of standards of review — from rationality review to strict scrutiny — to decide whether the government may infringe upon a particular right in furtherance of legitimate public goals. In South Africa, the "limitations clause" directs that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . ."⁵⁹ Human dignity in this context defines the type of society against which any infringement of a constitutional right must be compared. To satisfy this test the

53. *Dawood v. Minister of Home Affairs*, 2000 (3) SA 936 (CC), ¶ 35.

54. S. AFR. CONST. ch. 2, § 7(1) (1996).

55. *Id.* ch. 2, § 10.

56. *Id.* ch. 2, § 37(5)(c) & tbl. of Non-Derogable Rights.

57. *Id.* ch. 2, § 36(1).

58. JOHAN DE WAAL ET AL., *THE BILL OF RIGHTS HANDBOOK* 140 (2d ed. 1999).

59. S. AFR. CONST. ch. 2, § 36(1) (1996).

government must show that the "law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law and the benefits it is designed to achieve."⁶⁰ Describing this process, the Constitutional Court in *S v. Bhulwana* states that "the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."⁶¹

The foundational status of human dignity means that it serves also as a background principle in the interpretation and development of other rights. In this sense there is a close link between the foundational aspects of human dignity and the specific right to dignity in both South African and German jurisprudence. Arguing that the death penalty violates the right to dignity, Justice O'Regan of the South African Constitutional Court argued that "the importance of dignity as a founding value of the new Constitution cannot be overemphasised . . . [t]his right therefore is the foundation of many of the other rights that are specifically entrenched in [the bill of rights]."⁶²

APPLYING A SUBSTANTIVE RIGHT TO DIGNITY

It is precisely this link between the foundational and/or background role of the notion of human dignity and the recognition of a specific constitutional right to dignity that makes it difficult to disentangle a right to dignity from the protection of various associated rights. In order to explore the parameters of the right I will divide the jurisprudence into four general categories: first, how the right has shaped the outer limits of acceptable criminal sanctions; second, how the right is interconnected with the rights to personhood and equality; third, how the right interacts with the control of information and speech rights; and finally, whether the right provides a basis for a claim of access to a core set of social and economic resources necessary to sustain a dignified existence.

First, in the area of criminal sanctions, the right to dignity has had its most profound impact. Both in South Africa and Germany, the right to dignity has been relied upon by the

60. DE WAAL, *supra* note 55, at 150.

61. 1996 (2) SALR 388 ¶ 18 (CC).

62. *S v. Makwanyane*, 1995 (3) SA 391 ¶ 328 (CC).

respective constitutional courts to guide the courts' imposition of limits on the state's ability to punish criminals. While the death penalty was explicitly precluded in the German Basic Law,⁶³ in South Africa the constitution-making process failed to resolve this issue and thus it was left to the Constitutional Court to address the fate of the nearly 400 prisoners on death row at the time the constitution was adopted. In *S v. Makwanyane and Another*,⁶⁴ the new Constitutional Court's second decision, the court struck down the death penalty on a number of grounds including human dignity. The Court's decision addressed the relationship between dignity and capital punishment in a number of different ways. While President of the Court Chaskalson based his decision on the prohibition of cruel and unusual punishment, he cited both Justice Brennan's argument that "the punishment of death . . . treats members of the human race as nonhumans,"⁶⁵ and the Canadian Supreme Court's decision in *Kindler v. Canada*⁶⁶ in which a minority of judges described the death penalty as "the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration . . . the ultimate desecration of human dignity."⁶⁷ The South African court subsequently struck down the sentence of juvenile whipping as cruel, inhuman and degrading, arguing in part that it is reasonable to expect the state to be "foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that . . . even the vilest criminal remains a human being possessed of common human dignity."⁶⁸

The German Constitutional Court has imposed even greater restraints on the imposition of criminal sanctions, including the length of prison terms, by holding in the Life Imprisonment Case that "the state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his

63. GRUNDGESETZ [GG] [Constitution] art. 102 (F.R.G.).

64. 1995 (3) SA 391 (CC).

65. *Id.* ¶ 57 (quoting *Gregg v. Georgia*, 428 U.S. 227, 230 (1976) (Brennan, J., dissenting)).

66. [1991] 2 S.C.R. 779.

67. *Makwanyane*, 1995 (3) SA 391, ¶ 60 (quoting *Kindler*, 2 S.C.R. 779, at ¶¶ 162-63).

68. *S v. Williams*, 1995 (3) SA 632, ¶ 77 (CC), 1995 (6) BCLR 665, ¶ 77 (CC) (quoting *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring)).

personality and strips him of all hope of ever earning his freedom."⁶⁹ While this decision did not strike down life imprisonment as a sentence, it did require the state to "consider the particular situation of each prisoner in terms of his or her capacity for rehabilitation and resocialization."⁷⁰

Most recently, the South African Constitutional Court relied upon its dignity clause, as well as the right to life and the freedom and security of persons clauses, to strike down an old apartheid era law which allowed the police and even civilians to use lethal force in an attempt to arrest someone suspected of a variety of offenses, including many non-violent offenses.⁷¹ Emphasizing the country's recent history in which the "value of life and human dignity have been demeaned,"⁷² the court emphasized that the "rights to human dignity and life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."⁷³

Second, the right to dignity is closely associated (one could argue symbiotic) with the development of the rights of personhood and equality. In Germany, the dignity clause has been closely associated with ideas about the "nature of the human person and the polity."⁷⁴ Faced with a conflict between the artist's right to free expression and the dignity of the artist's subject, the court in the *Mephisto* case argued that "[l]ike all basic rights, the guarantee of liberty [in this case artistic freedom] . . . is based on the Basic Law's image of man as an autonomous person who develops freely within the social community."⁷⁵ The consequence of this approach is that it is necessary to distinguish simple freedom of action (liberty) from the "limited protection of human freedom without which man cannot exist as a spiritual and moral person."⁷⁶

While German jurisprudence has emphasized the socially embedded nature of personhood and its implications for

69. 45 BVerfGE 187 (1977), cited in KOMMERS, *supra* note 6, at 309.

70. KOMMERS, *supra* note 6, at 311.

71. See *S v. Walters*, 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), 2002 (28) SALR 01 (CC).

72. *Id.* ¶ 6 (quoting *Makwanyane*, 1995 (3) SA 391, ¶ 218 (Langa, J.)).

73. *Id.* ¶ 5 (quoting *Makwanyane*, 1995 (3) SA 391, ¶¶ 326-27 (O'Regan, J.)).

74. KOMMERS, *supra* note 6, at 304.

75. 30 BVerfGE 173 (1971), cited in KOMMERS, *supra* note 6, at 302.

76. *Investment Aid I*, 4 BVerfGE 7 (1954), cited in KOMMERS, *supra* note 6, at 244.

freedom, Justice Ackerman of the South African Constitutional Court has drawn on the link between dignity and personhood to emphasize the importance of freedom. In *Ferreira v. Levin*, he argued that "human dignity cannot be fully valued or respected unless individuals are able to develop their humanity . . . to develop his or her unique talents optimally," and concluded that "[h]uman dignity has little value without freedom . . . to deny people freedom is to deny them their dignity."⁷⁷

While Ackerman's position was rejected by the majority, who argued that the right to human dignity will flourish in the context of the "multiplicity of rights with which it is associated" in the Bill of Rights, this strain of dignity jurisprudence (in which the right exists in a symbiotic relationship to other rights) has really flourished in Germany where the courts have: defined an intimate sphere of personality allowing an individual to control the portrayal of one's own image and spoken word;⁷⁸ imposed duties on the state to protect the developing life in the context of allowing restricted access to abortion;⁷⁹ and guaranteed the right to travel outside the country, although not an unconditional right to a passport.⁸⁰

The right to equality has also been enriched through its interaction with the right to dignity, despite its clearly independent jurisprudential status. In striking down the common law criminalization of sodomy, the South African Constitutional Court noted that the case illustrated how, "in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy."⁸¹ Applying this analysis, the court argued that "[j]ust as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men."⁸² Finally, the court held that, "[t]here can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such

77. *Ferreira v. Levin*, 1996 (1) SA 984, ¶ 49 (CC), 1996 BCLR 1, ¶ 49 (CC), 1996 (1) SALR 984, ¶ 49 (CC).

78. See *Eppler Case*, 54 BVerfGE 148 (1980).

79. See *Abortion I Case*, 39 BVerfGE 1 (1975).

80. See *Elfes Case*, 6 BVerfGE 32 (1957).

81. *Nat'l Coalition for Gay & Lesbian Equal. v Minister of Justice*, 1999 (1) SA 6, ¶ 30 (CC), 1998 (1) BCLR 1517, ¶ 30 (CC).

82. *Id.* ¶ 28.

it is a palpable invasion of their dignity. . . .”⁸³ In another context the court argued that “unfair discrimination . . . principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”⁸⁴

Third, the right to dignity has intersected quite dramatically with rights to information and freedom of expression in both the South African and German cases. In Germany the court went so far as to suspend a census in order to decide whether the government has the right to collect detailed information about the habits of individuals. While recognizing the government’s right to gather certain information, the court held that the right to personality in tandem with the right to dignity creates a right to “informational self-determination,” guaranteeing “the right of the individual to determine for himself whether [the state] may divulge or use his personal data.”⁸⁵ This right is, however, not unlimited, as “[e]ven personal information is a reflection of social reality and cannot be associated purely with the individual concerned.” Thus the “individual must in principle [according to the court] accept certain limits on his right to informational self-determination for reasons of compelling public interest.”⁸⁶

If the interaction of dignity and personhood produced a new right to control personal information in Germany, in South Africa the right to dignity has rewritten the long established common law of defamation. The defendants in a defamation suit — a popular Sunday newspaper — argued for the adoption of the rule in *New York Times v. Sullivan*,⁸⁷ which limits the ability of public figures to claim defamation unless the publisher acted with ‘actual malice.’⁸⁸ Acknowledging that “[f]reedom of expression is integral to a democratic society” as it is “constitutive of the dignity and autonomy of human beings,” the court reasoned that the right to free speech must be “construed

83. *Id.*

84. *Prinsloo v. Van der Linde*, 1997 (3) SA 1012, ¶ 31 (CC), 1997 (6) BCLR 759, ¶ 31 (CC), 1997 (3) SALR 1012 ¶ 31 (CC).

85. *Census Act Case*, 65 BVerfGE 1 (1983), *cited in* KOMMERS, *supra* note 6, at 325.

86. *Id.*

87. 376 U.S. 254, 279-80 (1964). *See generally* ANTHONY LEWIS, *MAKE NO LAW* (1991).

88. *Khumalo v. Holomisa*, 2002 (5) SA 401, ¶ 40 (CC), 2002 (8) BCLR 771, ¶ 40 (CC), 2002 (53) SALR 01, ¶ 40 (CC).

in the context of the other values enshrined . . . [i]n particular, the values of human dignity, freedom and equality.”⁸⁹ Noting that the “value of human dignity . . . values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual,” the court rejected the *Sullivan* approach and instead asked “whether an appropriate balance [had been] struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.”⁹⁰ The court found this balance in a rule adopted by the Supreme Court of Appeals, which developed the common law to allow a defamation case to be brought by a public official in order to protect the individual’s dignity, but also to allow a defense of reasonable publication, in which the publisher only needs to demonstrate that either the statement was true and in the public interest (an existing common law defense) or that even if it was false that “publication was reasonable in all the circumstances.”⁹¹

Finally, it may be argued that the right to dignity provides a basis for claiming access to a minimal amount of socio-economic resources, at least adequate to ensure a dignified existence. In Germany this claim has been sustained in the case of institutionalized persons. While the German court has reasoned that the Basic Law “imposes an obligation on the state to ensure at least minimal living conditions for every individual,” it was in the case of a prison cell being repeatedly flooded with feces from a blocked waste pipe that the court held that: “it is a duty of all state authority to respect and protect human dignity . . . [which] means that the fundamental prerequisites of the individual and social human existence must be guaranteed for the prisoner while in prison.”⁹² Although this is possibly the weakest area of specific dignity jurisprudence, it offers the largest scope for further development. While the South African Constitutional Court has relied directly on the socio-economic rights explicitly guaranteed in the 1996 Constitution to demand changes in government housing policy and most recently, to require the distribution of a particular drug to prevent Mother-to-Child-Transmission of HIV/AIDS in public hospitals, the constitutional value of human dignity will remain an important value

89. *Id.* ¶¶ 21, 25.

90. *Id.* ¶ 27-28.

91. *Id.* ¶ 44.

92. MICHALOWSKI & WOODS, *supra* note 31, at 104 (citing BVerfG NJW 1993, 3190 [Prison Living Conditions Case]).

underpinning this jurisprudence.

CONCLUSION

WHAT IMPLICATIONS FOR MONTANA'S CONSTITUTIONAL CLAUSE?

In conclusion, I wish to point out a number of ways in which this comparative jurisprudence may interact with any future development of the Montana dignity clause. Given the paucity of U.S. jurisprudence on an explicit right to dignity and the Montana clause's roots in the Puerto Rican Constitution of 1952, it seems only reasonable for the Montana Supreme Court to consider comparative experiences. This will, however, also bring some inherent limitations. As is clear from the brief sketch of dignity jurisprudence above, many of the interpretations in Germany and South Africa are premised on particular legal forms inherent to those countries' legal systems. At the same time, it is also clear that foreign jurisdictions have drawn on earlier discussions of dignity in the U.S. Supreme Court and applied these ideas in contexts from which the U.S. Court has itself shied. Of course, it is also important to consider the particular impact of federalism and the supremacy of the U.S. Constitution when thinking about those cases in which a right to dignity has helped to transform other rights, especially in the area of freedom of expression. Despite these complexities, I believe that Montana may be able to profitably mine foreign dignity jurisprudence in its efforts to define the content and scope of its own clause.

