HUMAN DIGNITY:

USELESS RHETORIC OR SUBSTANTIVE CONCEPT?

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ABSTRACT

Human dignity is typically understood as the intrinsic worth or value of all human beings, the possession of which entitles them to respect and fundamental rights. It is widely referenced in a variety of fields including human rights, international and constitutional law, bioethics, and political science. This thesis examines the question of whether human dignity is a substantive concept, with clear content and the ability to provide normative guidance, or merely useless rhetoric. The focus is primarily on the relationship between the state and the individual vis-à-vis human dignity and aims to answer the following questions: What does human dignity actually encompass, and what implications does this have for states' treatment of individuals? The historical and contemporary understandings of human dignity and their connection to one another are analysed, and the criticism that human dignity is too vague a notion to direct legal rulings and political legislation is challenged. Christopher McCrudden's 'core' idea of human dignity is expanded and utilised in regard to the German Aviation Security Case to demonstrate how human dignity is capable of informing such decision-making. The aim of this thesis is to show that human dignity is a substantive concept by responding to criticisms, elaborating on the core idea of human dignity and showing how this 'core' is robust enough to provide practical, normative guidance.

STATEMENT OF AUTHORSHIP

I state that this thesis entitled "Human Dignity: Useless Rhetoric or Substantive Concept?" is truly my original work. This work was done wholly while in candidature for the degree 'Masters of Research' at Macquarie University. Neither this thesis nor any part of it has been submitted for any other degree or to any other institution. All sources and materials consulted are clearly cited throughout the thesis and listed in the bibliography. Where I have quoted from the work of others, sources are always given. With the exception of these quotations, this thesis is entirely my own work.

9th October 2015

Elke Pierce

CHAPTER 1

INTRODUCTION TO HUMAN DIGNITY

> *Before Auschwitz….Dignity always made [man] appear above nature and stated his automatic supremacy. After Auschwitz, we know that man is also something that we can trample on until he is entirely disbanded, that we can reduce man to a matter, to a consumable good by violating him or we can reduce him to nothing: that we can deny until refusing him the honour of an individual death, treating him like magma, as a whole, mostly with one shot in order to burn him like pieces of wood.*
>
> *France Quéré*[1]

Human dignity has become an important, albeit controversial, concept in both the legal and political arenas. It is routinely employed by courts around the world as well as in the political sphere, particularly in regard to issues involving human rights. As it is protected by international law and embedded in the majority of democratic constitutions worldwide, the concept of human dignity can be a formidable tool when wielded by those in power. Yet there are numerous aspects of human dignity that are widely disparaged and the subject of ongoing debate. While human dignity's rhetorical power is unquestionable, some argue that it is an inherently empty concept. These critics believe human dignity is open to both misuse and manipulation; making it at best useless, and at worst dangerous. The purpose of this thesis is to defend the concept from its detractors as well as to outline a formulation of

1. F. Quéré, "Frères humains in Le défi bioéthique," *Autrement* no. 120 (1991): 178.

human dignity that can be applied for practical purposes. To accomplish this, common criticisms are addressed and Christopher McCrudden's 'core' idea of human dignity is expanded in order to show that human dignity does have defined core content and is capable of providing normative guidance.

The first chapter focuses on the history of human dignity as a term and a concept, contrasting this to the general idea of human dignity that emerged in international law and politics after World War II (WWII). Whilst there are numerous different conceptions of human dignity in the present day, they all stem from the general concept as outlined in several key United Nations (UN) documents: the UN Charter, the Universal Declaration of Human Rights (UDHR) and the two 1966 Covenants on Rights.

The second chapter is a defence of human dignity and addresses the most common criticisms levelled at it. One of the more complicated and roundly criticised aspects regards determining the 'origins' of human dignity (from whence it arises). Theories that attempt to determine the one characteristic that elevates humans above other animals and gives them dignity are known as 'capacities approaches'. Although denouncing any form of capacities approach, this thesis does not attempt to offer an alternative explanation for the origins of human dignity. As the focus of this paper is on the usefulness and utilisation of human dignity in a practical sense, it is sufficient to say that humans have dignity because people have agreed they do. Admittedly, this is an incomplete method of addressing the issue and it would benefit from further research.

The third chapter is an outline and examination of McCrudden's core idea of human dignity. This core encompasses those elements of human dignity that are common to most (if not all) of the more specific conceptions of the idea. However, while McCrudden admits this common core exists, he believes interpretations of it differ so greatly across cultures and

jurisdictions that it is left as somewhat of an 'empty shell'. This thesis attempts to ameliorate this problem by elaborating on an existing, implicitly understood element of human dignity: the prohibition against treating people as 'mere means'. The aim is to show that by explicitly outlining and expanding the core conception of human dignity, it can provide normative guidance and could facilitate greater inter-jurisdictional consistency in cases involving human dignity.

Chapter four examines the German Aviation Security Case to demonstrate how the expanded core conception can be utilised. In this case, the Court did employ this conception, however I argue they ultimately ruled incorrectly despite this. Had the Court fully understood the expanded core conception, they may have focussed their attention on the correct aspects of the issue, rather than obfuscating it by deliberating on tangential concerns. In discussing the case, more traditional arguments are canvassed to see whether a solution is possible without resorting to a discussion on dignity, however it is found that they are inadequate and that employing the concept of human dignity is both warranted and necessary. It is ultimately shown that the expanded core conception of human dignity can provide practical, normative guidance in this ethically convoluted case.

The conclusion summarises the key points and the position taken in this thesis. Some of the criticisms of human dignity can be put down to a misunderstanding of the concept and its history, while others are shown to be actually erroneous. However, the debate regarding the origins of human dignity is not entirely resolved. McCrudden's descriptive analysis of the core content of human dignity clearly refutes claims it is an empty concept, and an expanded core conception is certainly capable of providing practical direction in ethically complex situations and creating more jurisdictional consistency regarding the interpretation of human dignity.

THE HISTORY OF HUMAN DIGNITY

Generally speaking, human dignity is a Western construct with roots starting in Roman times and spreading throughout philosophical, religious and political history. The Roman concept of human dignity, *dignitas hominis,* centred on its usage in an aristocratic sense and was possessed by those occupying a high social or public rank.[2] *Dignitas* was thus an element of political life and associated with the status attached to certain public offices, making *dignitas* closely linked to one's social role, rank and reputation.[3] In other words, *dignitas* was a means of expressing the elevated rank of elites and could therefore be gained or lost.

Though less common, a second concept of dignity was also present in Roman times and was particularly prominent in the writings of Cicero (1st century BCE). His position was that *dignitas* referred to the dignity possessed by human beings simply because they were human, with no additional rank or status required. Cicero used *dignitas* to describe human beings' place in the universe, hence distinguishing and elevating them above animals.[4] He believed it was the capacity for reason and free moral decision that made humans superior and separated them from animals, who were governed only by instinct and the pursuit of pleasure.[5] Humans were differentiated from other classes of beings by virtue of the fact that

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2. Oliver Sensen, "Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms," *European Journal of Political Theory* 10, no. 1 (2011): 75.

3. Christopher McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," *The European Journal of International Law* 19, no. 4 (2008): 656.

4. Marcus Tullius Cicero, *De Officiis,* trans. Walter Miller (Cambridge: Harvard University Press, 1913), [105]-[107]. http://www.constitution.org/rom/de_officiis.htm

5. Luis Roberto Barroso, "Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse," *Boston College International and Comparative Law Review* 35, no. 2 (2012): 335.

they had minds “nurtured by study and meditation.”[6] It was therefore incumbent upon them to pursue lives beyond the hedonistic, as a self-indulgent life would be unworthy of and incongruent with human reason and dignity. As nature had provided humans with the capacity for reason, it was their duty to utilise that reason and keep their baser desires under good regulation.

After Roman times, human dignity separated into three branches along which it continued to evolve. McCrudden identifies the questions each branch wrestled with, as well as the strategies adopted for dealing with them.[7] Essentially, each branch dealt with the same fundamental questions: What is human dignity, why do we have it, where does it come from, and if we have it, what is the appropriate behaviour to express it? The religious branch answered these questions by linking human dignity to the supernatural; the historical one by reflecting on those actions considered to be a violation of human dignity; and the philosophical one through systematic thought, logic, and later reflective equilibrium. These branches did not exist in isolation however, and would often draw on or reimagine ideas from the others.

In the Middle Ages, discussion of human dignity primarily revolved around the relationship between God and man, and man and animals respectively; with the latter following in the tradition of Cicero.[8] Humanist conceptions of man were fused with Judeo-Christian thought, resulting in the notion that humans had dignity because they were made in the image of God and were distinguished from other animals because of this dignity. Pope Leo I (Leo the Great, reigning 440-461 CE) is thought to be the first Christian thinker to use

6. Cicero, *De Officiis,* [105].

7. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 658.

8. Ibid.

the Latin *dignitas.*[9] He espoused the belief that humans were elevated from the rest of nature because they were created in God's image and given a soul. The soul allowed humans to use reason to govern and control their baser instincts and desires. Despite differing in the relationship between dignity and God, one can see the similarities between Pope Leo I and Cicero in their belief that humans were elevated over the rest of nature by virtue of their capacity for reason and ability to overcome physical desires.

Writing in the 13th century, Thomas Aquinas stated his belief that dignity was inherent and likewise that it raised humans above other animals.[10] Although he was part of the Christian tradition and saw dignity as originating from people being created in the image of God, his theory was based more in nature than theology.[11] Aquinas was one of the first to begin secularising the notion of human dignity, which he believed lay in humans occupying their proper place in the order of creation.[12] Other beings also had dignity, but of a different kind that was either higher or lower than humans, depending on their position in that hierarchy; angels' dignity was greater, whereas animals' dignity was lesser. During the Renaissance period (14th to 17th centuries), the ideas of the Middle Ages, and particularly those of Aquinas, were expanded and human reason was incorporated into their conception of human dignity.[13] Reason was thought to be God's greatest gift to man, and thus the

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9. Sensen, "Human Dignity in Historical Perspective," 78.

10. Carlos Ruiz Miguel, "Human Dignity: History of an Idea," in *Jahrbuch des öffentlichen Rechts der Gegenwart,* ed. Gerhard Leibholz and Peter Häberle (Verlag: Mohr Siebeck, 2002), 285.

11. Ibid.

12. Charles R. Beitz, "Human Dignity in the Theory of Human Rights: Nothing But a Phrase?" *Philosophy & Public Affairs* 41, no. 3 (2013): 272.

13. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 659.

proper use of one's reason came to be connected with the proper expression of human dignity.

In *Discourse on the Dignity of Man* (1486), Pico Della Mirandola argued that man's dignity consisted of having no fixed place in the 'chain of being', instead having the capacity to choose his own position.[14] This chain extended from God, the highest being, down to the lowest animals. Humans were unique in having the freedom to choose their position in this chain and the reason to know how to progress toward the divine end of the spectrum.[15] Humans were able to shape their own natures and lives by utilising their capacity for choice and reason, unlike animals who could do naught but follow their given nature.[16] Mirandola considered the dignity of humans to be derived from this unique capacity. Humans thus had a duty to act accordingly and use their capacities to move upward in the chain of being.

During the Enlightenment (mid-17th through 18th century), conceptions of dignity retained their focus on the human capacity for reason, whilst relinquishing the religious elements prominent in the Renaissance.[17] It was during this time that development of the concept of human dignity primarily occurred in the philosophical sphere. Immanuel Kant (1724-1804) is perhaps the most famous thinker to discuss human dignity, and was certainly the greatest influence on the modern conception.[18] He describes two kinds of value: something that can be exchanged or replaced has a price value, whereas something that has

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14. Ibid.

15. Sensen, "Human Dignity in Historical Perspective," 79.

16. Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, Massachusetts: Harvard University Press, 2012), 15.

17. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 659.

18. Sensen, "Human Dignity in Historical Perspective," 80-81.

"no equivalent" has a dignity value.[19] Only one thing has a dignity value however, and that is the moral law, and by inference human beings insofar as they are capable of self-imposing that moral law. Dignity is also an absolute inner value possessed by all humans, making them worthy of respect.[20]

Humans are hence considered above the rest of nature by possessing autonomy and free will, and Kant's Categorical Imperative links this inextricably with the moral law. The Categorical Imperative, which has three formulations, yields normative requirements and is the supreme principle of morality. The simplified versions of the formulations are as follows: the first commands that people act only in accordance with those maxims that can be universalised without contradiction; the second to never treat humanity merely as a means and always as an end in itself; and the third that people should act only by maxims that would harmonise with a possible kingdom of ends (a hypothetical state of existence composed entirely of rational beings who are both authors and subjects of all laws).

Kantian philosophy is a highly specialised and contested field, but several of his uses of dignity have had a particularly significant influence. The first aspect of Kant's conception of human dignity that has endured and been incorporated into the contemporary understanding is that it is inherent. However, the second formulation of the Categorical Imperative is the most important: that people should never be treated as means, only as ends in themselves.[21] This is often restated as the prohibition against instrumentalising or objectifying people, or treating them as tools. Kant's conception and in particular his

19. Immanuel Kant, *Moral Law: Groundwork of the Metaphysics of Morals,* trans. H. J. Paton (Taylor & Francis, 2005), 71.

20. Sensen, "Human Dignity in Historical Perspective,"81.

21. Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. Allen W. Wood (New Haven: Yale University Press, 2002), 51.

prohibition against treating people as means has become the most oft-cited nonreligious element of human dignity. Due to this, he is often called 'the father of the modern concept of human dignity'.[22]

Whereas Catholic scholars and moral philosophers predominantly laid the foundations of human dignity, it was popularised by political philosophy.[23] The *Declaration of the Rights of Man and of the Citizen*, the foundational document of the 18th century French Revolution, played a major part in this, extending 'dignities' (aristocratic privileges) to every citizen. It was a further move away from dignity being associated with rank or status, and toward the more egalitarian conception we are familiar with today. This idea was developed further through the writing of prominent thinkers of the time, including Thomas Paine's *The Natural Dignity of Man,* Mary Wollstonecraft's *Vindication of the Rights of Man* and *Vindication of the Rights of Women,* William Wordsworth's 1805 *Prelude,* and Charles Renovier's *Manuel Républicain de l'homme et du citoyen.* Dignity was also given a communitarian slant by some, most notably Jean-Jacques Rousseau who had a significant influence on Latin America's approach to human rights.[24] In the 19th century, human dignity also became a rallying cry for various political and social movements, and particularly in Europe and Latin America it became associated with the abolition of slavery.[25]

22. Giovanni Bognetti, "The Concept of Human Dignity in European and U.S. Constitutionalism," in *European and US constitutionalism (Science and technique of democracy No. 37),* ed. Georg Nolte (New York: Cambridge University Press, 2005), 75, 79.

23. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 660.

24. Paolo Carozza, "From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights," *Human Rights Quarterly* 25, no. 2 (2003): 300.

25. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 660.

At the end of the 19th century, the Catholic Church adopted human dignity as the unifying concept behind its social doctrine.[26] Dignity became a significant aspect of numerous Popes' writings, starting with Pope Leo XIII and including Pope Pius XI, Pope John XXIII, Pope Paul VI and Pope John Paul II. The creation of man in God's image remained a key component, but it developed as a more communitarian conception of human dignity with the emphasis on encapsulating what was necessary for human wellbeing.

Moving into the 20th century, the French Catholic philosopher Jacques Maritain became prominent, with his focus on applying the theories of Aquinas to modern conditions. It was he who brought human dignity to the fore in international politics after WWII, greatly influencing the drafting of the UN Charter and UDHR.[27] For Maritain, dignity was an intrinsic element of human beings as well as a moral entitlement, and the rights derived from human dignity were not only essential for individual wellbeing but also for the common good. Additionally, Luís Barroso notes that human dignity became central to the many social movements and rights debates that emerged after WWII.[28] McCrudden's work reinforces this, highlighting areas where the concept of human dignity was of central importance: the civil rights and feminist movements in the United States (US) and Europe; the emerging field of bioethics and biomedical research; and critiques of communism, poverty and inequality in the international political arena.[29]

26. Ibid., 662.

27. Ibid.

28. Barroso, "Here, There, and Everywhere," 336.

29. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 663.

HUMAN DIGNITY AND WORLD WAR II

Although the concept of human dignity had been present in various forms throughout history, the experiences of WWII catalysed the process whereby it was brought into mainstream usage and it became increasingly prominent as a feature of international legal and political discourse. After the War, an almost universal condemnation of the Nazis' actions and a determination that such events should never happen again focused attention toward universalism and rights. Oliver Sensen argues for the importance of WWII with regards to shaping the present day conception of human dignity. He illustrates how it acted as a turning point by contrasting the respective understandings of the concept in both the traditional paradigm (pre-WWII) and the contemporary one (post-WWII).[30]

Sensen bases his comparison on three central aspects and elucidates these in both paradigms.[31] Firstly, in the traditional paradigm, dignity was generally based on the possession of certain capacities, such as rationality or free will, and referred to the elevated position of humans in the universe. Dignity was therefore relative to the possession of these capacities and not inherent. Secondly, the main emphasis was on duties; the possession of a certain capacity primarily yielded duties to the self and to others. Lastly, the duty to realise one's own dignity was of primary importance. In the contemporary paradigm however, dignity is largely seen as an inherent part of being human and not dependent on the possession of any capacity or characteristic. People have dignity by virtue of their being human, not because of any special achievement, status, rank or characteristic. Secondly in the contemporary paradigm, the main emphasis is on rights rather than duties; the rights

30. Sensen, "Human Dignity in Historical Perspective," 83-84.

31. Ibid., 75, 83.

one can claim from others due to one's inherent value as a human being. Lastly in this paradigm, duties toward the self are not widely recognised, with emphasis instead being on the rights derived from human dignity, and the duties one has towards others because of it.

Charles Beitz identifies three main driving factors for the international adoption of the concept of human dignity in the years immediately after the War.[32] Firstly, abhorrence of Nazi racial doctrines and policies; secondly, a renewed belief that international peace and security was threatened by regimes that did not adequately respect their own citizens and treat them accordingly; and finally, a rejection (predominantly by the West) of anti-democratic ideologies that put the good of the collective before the good of individuals.

There are a couple of other factors not touched on by Beitz that also had significant influence on the global uptake of human dignity. Catholic moral theory is one of these, with the efforts of Pope Pius XII during WWII to promote the idea of human dignity being of particular importance.[33] While the Pope was criticised by some for not sufficiently condemning the Nazi regime or doing enough to aid its victims, his rhetoric regarding human dignity and the inherent worth of all people became an important element of Catholic moral theory and influenced millions of adherents and countless organisations and movements worldwide. The various anti-colonial movements, and especially Mahatma Gandhi's efforts in India before and during WWII, also aided in the spread of the concept of human dignity. Gandhi was not only a great believer in the inherent dignity of all people, but also invoked the term as a motivating factor for national liberation.[34] His words and philosophy not only

32. Beitz, "Human Dignity in the Theory of Human Rights," 264.

33. Ibid., 265.

34. Chester Bowles, *A View from New Delhi; Selected Speeches and Writings, 1963-1969* (Bombay: Allied Publishers, 1969), 158-163.

impacted the people of India, but also the numerous anti-colonial movements across Asia and Africa.

Nevertheless, WWII remains the key turning point for human dignity in many respects. With the systematic persecution and execution of millions of innocent people, it clearly demonstrated the brutality humans are capable of and the horrors they can perpetrate against one another. When the conditions in the concentration camps, the true extent of the numbers that had been killed and the nature of the extreme experiments conducted on prisoners by Nazi doctors came to light, there was worldwide shock and revulsion. The need for legal protection of people's rights and dignity was widely acknowledged and international efforts to establish such safeguards increased.[35] The appeal to human dignity emphasised the belief in the necessity of respecting every human being, irrespective of racial, religious, social or other differences. In the aftermath of the War, the incorporation of human dignity into international political and legal discourse signalled the move toward a new era where peace, democracy and human rights were strongly emphasised.[36]

HUMAN DIGNITY IN INTERNATIONAL INSTRUMENTS AND NATIONAL CONSTITUTIONS

The first and perhaps most significant reference to human dignity after WWII was in the Preamble of the newly drafted UN Charter of June 26th 1945. The Preamble affirms the members' "faith in fundamental human rights, in the dignity and worth of the human

35. Beitz, "Human Dignity in the Theory of Human Rights," 263.

36. Barroso, "Here, There, and Everywhere," 336.

person." [37] The second significant inclusion of human dignity was in the UDHR, passed on December 10th 1948. The Preamble declares the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human being and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom."[38] Likewise, Article 1 states, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[39] The subsequent reference to human dignity in many human rights texts, both internationally and regionally, drew inspiration from the use of dignity in these two initial documents.

Even though human dignity had already been incorporated into the UN Charter, the inclusion of the concept in the UDHR was initially controversial as some believed it had little substantive worth. The first draft of the Declaration, written by John Humphrey, did not actually mention human dignity, and its eventual inclusion in a redraft is credited to René Cassin. Humphrey saw the inclusion as unnecessary, superfluous and merely rhetorical.[40] However, it was ultimately included in both the Preamble and in pride of place in Article 1. For its proponents it was considered vital for articulating the basis upon which human rights

37. United Nations, *Charter of the United Nations* (24 October, 1945), Preamble. http://www.un.org/en/documents/charter/

38. UN General Assembly, *Universal Declaration of Human Rights* (10 December, 1948), Preamble. http://www.un.org/en/documents/udhr/

39. Ibid., Article 1.

40. John T.P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (Transnational Publishers, 1984), 44.

could be said to exist. Mary Glendon recounts how Eleanor Roosevelt, who chaired the commission that drafted the Declaration, said it was included "in order to emphasise that every human being is worthy of respect…it was meant to explain why human beings have rights to begin with."[41] The concept of human dignity is now widespread throughout human rights discourse and provides the theoretical basis for the human rights movement.

The establishment of the UN embodied the new international political framework that emerged as a reaction to WWII. Similarly, the adoption of the UDHR by the international community was indicative of the new post-War ideological mindset.[42] The UDHR itself would become the cornerstone of the international human rights system, and human dignity the fundamental concept that both unified and justified that system. After the foundational documents of the UN Charter and the UDHR were written, the number of international instruments that referred to the notion of human dignity greatly multiplied.[43] 'Dignity-talk' in international human rights discourse further increased when the concept became central to the approach used in drafting the Geneva Conventions.[44] The proposed Preamble, which was to be the same for the four Geneva Conventions of 1949, started with: "Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking."[45] Although this

41. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 146.

42. Doron Shulztiner and Guy E. Carmi, "Human Dignity in National Constitutions: Functions, Promises and Dangers," *The American Journal of Comparative Law* 62 (2014): 461.

43. Izabela Bratiloveanu, "Human Dignity in International Law: Issues and Challenges," *European Integration – Realities and Perspectives* 7, no. 1 (2012): 155.

44. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 667.

45. International Committee of the Red Cross, *Remarks and Proposals* (Geneva, February, 1949), 8. http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Remarks-proposals.pdf

Preamble was not ultimately used, the text that was adopted included dignity in Common Article 3 and in Additional Protocol I.[46]

The two 1966 Covenants on Rights adopted by the UN expanded the role and importance of human dignity even further and acted as pillars of support for the UDHR. While the UN Charter and the UDHR linked human dignity to inherent worth, it was these two Covenants that made it explicit that human rights derive from human dignity. The Preambles of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights begin with the same words, recognising the equal and inalienable rights of all persons and "that these rights derive from the inherent dignity of the human person".[47]

The trend of incorporating human dignity in the Preambles of major international human rights instruments continued throughout the 20th century. It was included in numerous texts such as the Convention on the Elimination of All Forms of Discrimination against Women in 1979 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984.[48] In 1986 the UN General Assembly even promoted the idea that human rights derive from human beings' inherent dignity in their guidelines for the creation of new human rights instruments.[49] These guidelines were extensively utilised and we subsequently saw the Conventions on the Rights of the Child in 1989, on the Protection of the Rights of All Migrant Workers and Members of Their Families

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46. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 668.

47. United Nations, *International Covenants on Human Rights* (New York: United Nations Office of Public Information, 1967).

48. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 669.

49. Ibid.

in 1990, on the Rights of Persons with Disabilities in 2006, and the Protection of All Persons from Enforced Disappearance in 2007 all including references to human dignity.[50] The Vienna Declaration and Program of Action, adopted by consensus at the World Conference on Human Rights in 1993, also reaffirmed the universality of human rights and similarly referred to human dignity as 'inherent' and the foundation for human rights.[51] Thus, within international law, reference to human dignity has become standard. The UN Charter, UDHR and the two 1966 Covenants on Rights form the foundation for the contemporary conception of human dignity, the key elements of which are that human dignity is inherent to all people and entitles them to respect, and that human rights derive from human dignity.[52]

Prior to WWII and the widespread acknowledgement of human dignity, some countries such as Mexico, Weimar Germany, Finland, Portugal, Ireland and Cuba had been influenced by earlier Renaissance and Enlightenment developments and had already included human dignity in their constitutions.[53] However, constitutional inclusion of human dignity remained minimal until after the War when it began to be incorporated into the majority of new national constitutions. By the end of the 20th century the majority of countries were democratic, and this spread of democracy undoubtedly facilitated the

50. Ibid.

51. UN General Assembly, *Vienna Declaration and Programme of Action* (12 July, 1993), http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx

52. Sensen, "Human Dignity in Historical Perspective," 75.

53. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 664.

creation of more representative and modern constitutions that included the notion of human dignity.[54]

It would frequently occur that countries, particularly those new to democracy and/or the rule of law, would draw from the constitutions of more established and successful democracies.[55] It is perhaps unsurprising that in an effort to distance themselves from their immediate past, the former Axis powers of Japan, Italy and West Germany were the first countries after the War to include the concept in their national constitutions.[56] Decolonisation, the fall of the Greek, Spanish and Portuguese dictatorships in the 1970s, and the fall of the Berlin Wall in the 1990s allowed numerous countries to include human dignity in their new democratic constitutions.[57]

The incorporation of dignity into constitutions was not limited to European countries. Israel's Declaration of Independence of 1948 and their Basic Law on Human Dignity and Liberty of 1992, the 1950 Constitution of India, and the post-apartheid constitution of South Africa also utilised the concept.[58] In South America the emergence of democracy in Brazil, Chile and Argentina in the 1980s similarly allowed for the inclusion of human dignity.[59] There has also been a trend of former colonies adopting aspects of their previous rulers' constitutions. Shulztiner and Carmi note, for instance, that the former Portuguese colonies of Cape Verde, Angola and Mozambique all employ similar provisions in relation to human

54. Shulztiner and Carmi, "Human Dignity in National Constitutions," 467.

55. Barroso, "Here, There, and Everywhere," 343.

56. Shulztiner and Carmi, "Human Dignity in National Constitutions," 465.

57. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 673.

58. Ibid., 665.

59. Barroso, "Here, There, and Everywhere," 343.

dignity in their constitutions as Portugal.[60] Countries are also often likely to borrow concepts from their regional neighbours when constructing their constitutions. This occurred with Kuwait and Bahrain, as well as Uganda and Swaziland. Before 1945 only 5 countries mentioned human dignity in their constitutions, whereas by the end of 2012, 162 countries included it.[61] That is a significant 84% of the 193 states that comprise the UN. This number is only likely to increase, as human dignity is becoming an almost universally adopted feature of new constitutions.

West German Basic Law (nowadays German Basic Law), adopted in 1949, and its interpretation by the German Constitutional Court, heavily influenced the drafting of many of these new constitutions. German Basic Law was one of the first to include human dignity, and is still one of the most complete and utilised formulations of any constitution. Of all countries, none have embedded the concept as deeply into their legislature as Germany. Due to German Basic Law being heavily influenced by Catholic and social democratic thinking, as well as moral and rational philosophies (especially those of Kant), it prioritises human dignity.[62] Barroso actually believes that the rise of human dignity as a legal concept can be directly traced to German constitutional law, which has had substantial influence on case law and legal scholarship throughout the world.[63] This is particularly applicable in

60. Shulztiner and Carmi, "Human Dignity in National Constitutions," 468.

61. Ibid., 456, 461.

62. Edward J. Eberle, "Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview," *Liverpool Law Review* 33 (2012): 203.

63. Barroso, "Here, There, and Everywhere," 337-338.

Europe but also in other states including Afghanistan, Bolivia, the Dominican Republic, Eritrea, Ghana, Kazakhstan, Mali, Namibia, Poland, Serbia,[64] Israel and South Africa.[65]

The fact that many countries drew on the German model helps explain the extent to which dignity was included in new texts, and also the similarity among many of them regarding their approach to dignity. Hence, it is at least partially due to West Germany that human dignity in contemporary times generally tends to have a vaguely Kantian bent, particularly in regards to the prohibition against the state treating people as 'mere means'.[66] As translated by David Currie, regarding The German Constitutional Court's statement about a 1977 life imprisonment case, "It is contrary to human dignity to make the individual the mere tool of the state. The principle 'each person must always be an end in himself' applies unreservedly to all areas of the law."[67]

The Kantian assertion that individuals should never be treated as mere means is at the heart of the German social vision.[68] Embodied in this is the idea that the state must never sacrifice individuals for the 'exigencies of the day'.[69] Similarly, this prohibition against the instrumentalisation of people has either been explicitly or implicitly adopted into many other countries' conceptions of human dignity. Knoepffler and O'Malley also argue that the

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64. Shulztiner and Carmi, "Human Dignity in National Constitutions," 468.

65. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 673.

66. Mary Neal, ""Not Gods But Animals": Human Dignity and Vulnerable Subjecthood," *Liverpool Law Review* 33, no. 3 (2012): 181.

67. David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994), 314.

68. Eberle, "Observations on the Development of Human Dignity and Personality in German Constitutional Law," 207.

69. Ibid., 203.

reaction against totalitarianism and utilitarian approach of the Nazis and their allies enhanced the appeal of philosophies like Kant's that promoted the non-instrumentalisation of people.[70] This in turn led to the inclusion of human dignity in the UN charter and UDHR, as well as leading Germany to firmly entrench the idea of human dignity in their Basic Law. The subsequent spread of democracy and the borrowing of ideas from existing constitutions aided in the mass adoption of human dignity not only in international law but also in the constitutional law of the majority of countries.

CROSS JUDICIAL DISCOURSE AND REINVIGORATION OF THE DIGNITY DEBATE

Cross-judicial discourse about human dignity arose in the late 20th century, affording different judiciaries a sense of commonality and allowing judges to draw from decisions and interpretive methods of other courts. Carozza calls this the "emerging global *ius commune* of human rights". [71] This means that human dignity, with its claims to universality, acts as the "common currency of transnational judicial dialogue and borrowing" in the field of human rights.[72] Essentially, it allows courts to take into account foreign sources of law, despite the constraints of positive law. Carozza believes there is a 'common enterprise' across different jurisdictions in regard to dignity, whereby positive law is seen as accountable to the shared principle that all human beings have inherent worth.[73] It is the commonality of the

70. Nikolaus Knoepffler and Martin O'Malley, "Human Dignity: Regulative Principle and Absolute Value," *International Journal of Bioethics* 21, no. 3 (2010): 66-67.

71. Paolo G. Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply," *The European Journal of International Law* 19, no. 5 (2008): 932.

72. Ibid.

73. Paolo G. Carozza, ""My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights," *Texas Law Review* 81, no. 4 (2003): 1081.

foundational concept of human dignity that gives judges the ability to draw on rulings and interpretations from other judiciaries. This conclusion is borne out by judicial practice, as shown by the numerous examples provided by McCrudden.[74] Hungary and Israel, for instance, have been particularly influenced by the German Constitutional Court's interpretations and decisions. Similarly, rulings in Germany and Hungary have influenced jurisprudence in South Africa. Even judiciaries without a constitutional reference to dignity, such as the House of Lords in the United Kingdom, have drawn from the German Constitutional Court and begun utilising the concept in their common law.

Similarly, Shulztiner and Carmi point to "patterns of similarity in language, structures, geography and history" which allow for legal transplant and diffusion between countries.[75] In other words, countries that share certain characteristics are more likely to incorporate elements from each other's legal systems into their own. This is especially true regarding ways in which to interpret constitutional values or principles (such as human dignity) and the role and implications of international human rights law (such as the UDHR). Barroso believes this exchange of ideas is most common between democracies that face similar challenges.[76] The incorporation of foreign decisions not only aids in the acquisition of new ideas and perspectives, it also helps build consensus around those ideas by virtue of the fact that different countries are adopting the same approach. To illustrate this Barroso indicates many instances where it occurs: the Canadian Supreme Court references foreign and international courts' notions of dignity; the Supreme Court of India cites decisions by the US

74. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 694.

75. Shulztiner and Carmi, "Human Dignity in National Constitutions," 467-468.

76. Barroso, "Here, There, and Everywhere," 344.

Supreme Court; the Constitutional Court of South Africa cites the Supreme Court of Canada; and the Polish Supreme Court cites the Spanish and German Constitutional Courts.[77]

The debate surrounding the meaning, implications, and usefulness of human dignity in law and politics has been reinvigorated since September 11, 2001 and the subsequent introduction of numerous anti-terror laws in many countries. Some argue that these laws not only violate individuals' human rights, but also their human dignity. These laws cover areas such as censorship, privacy, free speech, the use of military force, imprisonment and torture. Being such an integral part of both international and domestic law, a lack of proper understanding of what is meant by human dignity can have far-reaching effects, especially when courts are able to invoke the concept in order to overturn contentious laws. This has occurred on numerous occasions, particularly in the areas of bioethics and anti-terror laws. One of the most notable examples of the latter is the German Aviation Security Case that has been chosen as the case study for this thesis.

Human dignity has undoubtedly become a widely utilised concept in both international law and national constitutions. However, the mere fact that countries appear to have adopted this value does not necessarily mean their actions or laws reflect it. Indeed, many of the countries that have ratified various human rights treaties or have incorporated human dignity into their constitutions, could be subsequently accused of significant human rights violations. It appears that human dignity has become 'all things to all people', being applied in a variety of ways and for any number of ideological purposes. Whether there is, in fact, any universal commonality between the different conceptions of human dignity and if so, whether this common core is of actual use as a guiding principle in politics and law, is still very much open to debate.

77. Ibid., 345.

CHAPTER 2

RESPONDING TO THE CRITICS

There is significant international agreement about the importance of human dignity as a value and guiding principle. Barroso believes the acknowledgement and acceptance of human dignity is one of the greatest examples of ethical consensus in the Western world.[78] However, even Barroso admits there is considerable difference between theoretical agreement and the practical implementation of human dignity as a legal concept. This difference is primarily due to the inherent vagueness of 'human dignity'. When the term was first used in the UN Charter and the UDHR, it was intentionally left vague in order for it to appeal to the greatest number of delegates.[79] As these people represented many different countries, cultures and religions, they were able to accept a loosely defined concept without needing to compromise their basic ideologies.

As previously mentioned, Maritain was the prominent French Catholic philosopher who greatly influenced the drafting of the UN Charter and UDHR and who spearheaded the approach that resulted in human dignity being left as a vague and ill-defined notion.[80] His approach was not to attempt to get any kind of agreement on a theoretical basis for human rights, but rather to focus on what practices and types of action delegates could agree should be prohibited. For example, they could agree that torture was morally wrong, but not on why it was wrong. In regards to human dignity, he believed that in order to gain

78. Ibid., 332.

79. Sensen, "Human Dignity in Historical Perspective," 73.

80. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 678.

agreement, no account of what was meant by the inherent worth of humans or what constituted proper recognition of this worth, could be included.[81] All delegates could agree that human dignity was essential, but not on why or how. As Maritain said, "we agree about the rights *but on condition that no one asks us why*. That 'why' is where argument begins" (emphasis in original).[82] Maritain was arguing for a loosely Rawlsian approach; that in an ideologically pluralistic world, an adequate justification of human rights should not appeal to any comprehensive doctrine, but should be justified by some kind of public reason. The drafters of the Charter and Declaration adopted this approach and attempted to reach an 'overlapping consensus'. Representatives from a variety of backgrounds and beliefs were hence able to agree on and support the same fundamental elements of human dignity, whilst differing in their reasons for doing so.

The fact that human dignity was not based on any one comprehensive doctrine does not mean the concept was stripped of moral content. Any political principle inevitably has moral content; denoting what is right or wrong and what ideals should be strived for. In the case of human dignity this is especially marked, as by definition it is to do with the fundamental moral worth of human beings and their correct treatment because of this worth. The avoidance of metaphysical notions simply ensured the concept could be affirmed by any number of comprehensive doctrines.

CRITICISMS OF HUMAN DIGNITY

The necessity of developing human dignity as a rather nebulous concept in the foundational UN documents has caused numerous problems that have become more

81. Sensen, "Human Dignity in Historical Perspective," 74.

82. Shulztiner and Carmi, "Human Dignity in National Constitutions," 472.

apparent as its prevalence as a legal concept has increased. For instance, we frequently see examples of people on opposing sides of contentious ethical debates appealing to human dignity to support their respective arguments. One prominent example is the ongoing abortion debate, where both sides regularly reference human dignity; that associated with the life of the unborn child against the human dignity implicit in a woman having control over her own body.

Due to its vagueness and often-contradictory usage, there are a number of people who condemn the notion of human dignity and deny its legitimacy in political, legal and ethical debate. Indeed, human dignity is often criticised as being merely a placeholder for which people substitute their own values (thus camouflaging their moral prejudices) and of being nothing more than a 'rhetorical ornament'; a conceptual label that can evoke great emotion and strong reactions in people, but one that is ultimately empty and devoid of true meaning.[83] Arthur Schopenhauer was one of the first to vigorously oppose the concept of human dignity in his 1837 critique of Kant, believing it nothing more than a deceptive façade behind which "empty-headed moralists" hid their lack of any true ethical base.[84] According to McCrudden, in 1847 Karl Marx also criticised the use of dignity by one of his fellow socialists, and in 1872 Nietzsche similarly opposed the ideas of the inherent 'dignity of man' and 'dignity of labour'.[85]

In a 2003 editorial entitled "Dignity is a useless concept", Ruth Macklin takes up Schopenhauer's mantle and continues the critical barrage. Admittedly her work is aimed at the use of human dignity in medical ethics, but it can be more widely applied to the concept

83. Barroso, "Here, There, and Everywhere," 332-334.

84. Arthur Schopenhauer, *On the Basis of Morality* (Indianapolis: Hackett, 1965), 100.

85. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 661.

in general and expresses some of the more common criticisms levelled against it. Her main argument is that dignity simply means 'respect for persons', by which she means respect for persons' autonomy. In other words, she believes dignity is merely a "vague re-statement" of the existing value of autonomy.[86] In her view, it is only religious sources that attempt to imbue dignity with additional meaning and such literature should be discounted in the secular realm of medical ethics (and by inference politics and law also). This argument is echoed by Doris Schroeder, who also believes human dignity is based on religious concepts and thus cannot justify anything in modern, secular society.[87] If one were to accept this view, dignity would indeed be redundant and the only reason for its employment would be due to its rhetorical power and aesthetic appeal.

Macklin's firm dismissal of the concept of dignity has been reiterated by a number of other authors, most notably Steven Pinker. In lamenting the rise of dignity-talk, his arguments in "The Stupidity of Dignity" closely echo Macklin's in many regards, though he clarifies that in his opinion autonomy means informed consent.[88] In addition to his wholehearted agreement with Macklin, Pinker lays other charges at the feet of dignity: that it is relative and fungible. For instance, he states that ideas of dignity have changed drastically over time; where the glimpse of a stocking was once scandalous and undignified, it is now entirely ordinary.[89] Similarly, he argues that while dignity is heralded as a sacred

86. Ruth Macklin, "Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy," *British Medical Journal* 327, no. 7429 (2003): 1419-1420.

87. Doris Schroeder, "Human Rights and Human Dignity: An Appeal to Separate the Conjoined Twins" *Ethical Theory and Moral Practice* 15 (2012).

88. Steven Pinker, "The Stupidity of Dignity: Conservative Bioethics Latest, Most Dangerous Ploy," *The New Republic* (2008): 28.

89. Ibid., 30.

value, it is commonly exchanged for other gains, such as relinquishing dignity when exiting from a small car or engaging in sexual intercourse; we readily engage in both acts despite them being 'undignified' in his estimation. He argues that these features of the concept of dignity undermine its use as the moral foundation of any system. Others share Pinker's view, believing that real human lives are not things of dignity, but rather are rife with indignity. Catherine Dupré states, "people are not all born in dignity. Many of them lead a life of abject poverty and indignity."[90] Similarly, David Feldman writes, "we are conceived and born, and most of us live and die, in circumstances of significant indignity".[91]

In response to these criticisms, it should first be noted that the gap between the universal concept and specific conceptions is not a problem unique to human dignity. Indeed, all complex ideas encounter the same difficulty, and disagreement on particulars does not necessarily mean the concepts are worthless and should be discarded altogether. For instance, the concept of democracy is open to manipulation by populists and it runs the additional risk of descending into demagoguery. Yet despite its faults and ability to be misused, it is still widely hailed as the ideal political system. Justice is an equally opaque concept. It is one of the core values of our society and the preeminent guiding principle of our judicial system, yet what justice demands in different cultures or in a given situation is often hotly contested. In debating whether to relinquish important principles or concepts because of disagreement about their meanings and implications, or their ability to be corrupted, Ronald Dworkin's conclusion seems valid when he declares, "it would be a shame

90. Catherine Dupré, "Unlocking Human Dignity: Towards a Theory for the 21st Century," *European Human Rights Law Review* 190 (2009): 193.

91. David Feldman, "Human Dignity as a Legal Value," *Public Law* (1999): 682.

to surrender an important idea or even a familiar name to this corruption".[92] Admittedly, human dignity is somewhat unique as it is the most widely recognised and utilised grounding principle of human rights. However, this only adds to the need for more philosophical investigation and discussion to illuminate and clarify the concept. Disparity of viewpoints or the openness of a concept to exploitation is not grounds for its dismissal, rather it is motivation for endeavouring to make it more robust in order for it to be genuinely useful and less open to abuse.

On a related note, while consensus regarding a concept is an admirable goal, it is not necessary for the validity of that concept. The fact that even the most basic definition of human dignity entails every person being ascribed equal worth is cause for much debate. There are many individuals as well as groups, particularly religious and political ones, who would disagree that all people have equal worth. Whether based on race, gender or sexual identity, huge swathes of the global population would argue that some types of people have decidedly less worth than others. However, the lack of agreement on humans' equal worth does not necessarily detract from the validity of equality as a value. Disagreement alone is not indicative of a faulty concept, as it can be equally indicative of faulty belief systems or logic. Likewise, the lack of agreement regarding human dignity should not necessarily detract from its legitimacy as a value.

The connection between human dignity and autonomy to which Macklin and Pinker refer also needs to be dissected further. The significant influence of Kant on the contemporary conception of human dignity is widely recognised, and there is a Kantian

92. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 2011), 204.

undercurrent that pervades most present day dignity-talk.[93] A literal reading of Kant would seem to support the claim that dignity is closely linked to autonomy. For instance, the meaning of "Autonomy is…the ground of the dignity of human nature" appears quite obvious.[94] However, Kant also prohibits numerous actions that one would think permissible if individuals gave the 'informed consent' that Pinker states is the essence of autonomy. Michael Rosen explains this seeming dichotomy thus: the meaning of autonomy in the sense that Kant uses it is quite different from the way it is customarily used in the contemporary world.

In Rosen's words, the common meaning of autonomy today is that "the self is sovereign," and to be autonomous is "to be able to do as one chooses."[95] This is the sense in which Macklin and Pinker use the term and the connected notion of informed consent, yet it is not the definition Kant uses. To him, autonomy is something far more complex and deeply connected with the idea of being bound by no moral laws except the ones of our own making. However, that is not to say that self-imposed law is a matter of choice; Kant's formulation of autonomy concludes that rational agents are bound to the objective moral law by their own autonomous will. Hence suicide or adultery, despite being of one's own choosing and with informed consent, is a violation of that moral law and our duty towards ourselves. Macklin and Pinker's claim that human dignity is essentially equivalent to autonomy is either based on a serious misreading of Kantian ethics, or the fact that such ethics were never taken into account.

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93. Michael J. Meyer, "Kant's Concept of Dignity and Modern Political Thought," *History of European Ideas* 4, no. 3 (1987): 319.

94. Kant, *Groundwork for the Metaphysics of Morals*, 53-54.

95. Michael Rosen, "Dignity: The Case Against," in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 150.

However, even if Macklin and Pinker were disregarding Kantian ethics, their belief that autonomy is the exemplary human characteristic is difficult to justify. It is also somewhat contradictory that they want to discard the concept of dignity, but keep the benefits it has to offer by replacing it with autonomy. Human dignity denotes that people have an intrinsic value that merits a certain kind of respect. Therefore it could be possible for one to say that humans have dignity because they possess the unique capacity for autonomy. Macklin and Pinker want to simplify the matter to autonomy alone and respect for that autonomy. However, it should then be questioned why they have singled out autonomy as the 'special' characteristic of human beings. Autonomy is an important part of personhood, but it is by no means obvious or irrefutable that it is the most important part. Indeed, as they themselves acknowledge that autonomy flows from rationality, it seems more logical that rationality should be exulted as the preeminent trait.

CAPACITIES APPROACHES TO HUMAN DIGNITY

There seems to be a tendency in modern times to separate humans into their component parts; a trend that can be traced back to Descartes' dualism of the mind and body. In this tradition people seek to isolate the one characteristic or capacity unique to humans that elevates them above other life forms. Macklin and Pinker single out autonomy, which flows from rationality, as the capacity that makes humans 'special' and that should be respected. Many earlier theories of human dignity also relied on a capacities approach, usually denoting rationality, free will, self-determination or autonomy as the unique characteristic. However, a capacities approach is not congruent with the modern conception of human dignity. The capacities approach was abandoned in the formulation of dignity in the original UN documents because there is a fundamental problem with any attempt to

ascribe human dignity based on the possession of a particular characteristic: it will inevitably exclude those people who don't possess that capacity.

History clearly shows us why neglecting certain people when assigning moral worth is undesirable. Categorising any group of people as 'less than' or 'less human' can at best result in ostracisation, and at worst exploitation, oppression, subjugation and abuse. As Roberto Andorno states, "We know by historical experience that every time that society abandons the idea of inherent dignity it inevitably falls, soon[er] or late[r], into barbarism."[96] There is no greater example of what can happen to groups of people who are deemed sub-human than the events of WWII. Jews, Gypsies, homosexuals, Negroes, the disabled and others were deemed 'less than' and were grossly subjugated and abused. As mentioned, following the War the drafters of the UN Charter and UDHR forwent comprehensive doctrines altogether and any discussion of the 'origins' of human dignity and instead sought an overlapping consensus. As Maritain said, and as quoted by Andorno, "agreement between minds can be reached spontaneously, not on the basis of common speculative ideas, but on common practical ideas".[97]

Some would argue that, although it is undesirable to deny individuals' moral worth based on any kind of group membership, those who violate others' dignity should forfeit the right to have their own protected. The strongest case for this would be for people who have committed the worst of crimes, such as murder, rape, child abuse or torture. However, while it is true that people do forfeit many rights when they are convicted of such heinous acts, the right to human dignity is not one of them. Dignity is not a right but an inherent part of

96. Roberto Andorno, "Four Paradoxes of Human Dignity," in *Menschenwürde und moderne Medizintechnik*, ed. J. Joerden, E. Hilgendorf, N. Petrillo, and F. Thiele (Baden-Baden: Nomos Verlag, 2011), 134.

97. Ibid.

every human and hence cannot be affected by how that individual acts. This may sound overly generous to such people, but it is neither a new nor a controversial notion. A man who has been found guilty of torturing another loses many rights, predominantly the right to freedom of movement, but it does not mean others now gain the right to torture him. This is straying into a different debate regarding what is entailed in justice, which is no straightforward matter. Yet I believe we can agree that the justice system we subscribe to is not based on 'an eye for an eye' and that convicted criminals, whilst losing many rights and freedoms, are still entitled to some basic standard of treatment. Despite being criminals, they are still human and deserve to be treated as such. Additionally, I think faced with a society that believed prisoners forfeit the right to even basic protections, most people would be horrified and deem it, to use Andorno's word, 'barbaric'.

Without appealing to one special human capacity it is indeed very difficult to theoretically justify the existence of human dignity. Yet simply because we cannot pinpoint the aspect of humans that makes them unique does not preclude them from being so. Leon Kass states that we should not be so directly reductive as to try to find the 'one' exulted human trait. His assertion that there is something special about human beings, beyond any individual characteristic, that grounds dignity and that this 'something' is unlikely to be quantifiable, reflects the general modern position on human dignity.[98] That position, as reflected in the UN Charter, UDHR and 1966 Conventions, holds that dignity is not based on any one trait and is inherent to all people.

To put it another way, human dignity is often viewed as something whose existence is deduced through intuition rather than as something that can be defined. For instance,

98. Leon R. Kass, "The Right to Life and Human Dignity," *The New Atlantis*, no. 16 (2007).

Josef Seifert writes, “As life, and human life, this value called ‘dignity’ is an ultimate and irreducible phenomenon which cannot be defined properly speaking but can only be unfolded and brought to evidence.”[99] That is not to say that all proponents of human dignity subscribe to this belief, but it is the approach most commonly adopted for practical purposes. There is obviously much more to discuss on this issue, as ‘intuition’ is hardly a solid basis for advocating something as fact. However, the purpose of this paper is not to provide a comprehensive discussion of the ontological basis for humans’ possession of dignity. Rather, it is to focus on what aspects of human dignity can be agreed on, refute criticisms in relation to this and show how these features do form a conceptual ‘core’ that is capable of providing normative guidance in both political and legal contexts.

Although capacities approaches inevitably exclude certain people from the definition of those who possess dignity, a similar problem could also be said to exist regarding Kantian ethics. Schroeder makes this criticism, believing attempts to use Kantian ethics for the justification of human dignity will ultimately exclude significant portions of society.[100] As much of the present day discourse on dignity does have heavy Kantian undertones, this is a possible issue. Indeed, the original Kantian conception of dignity did take a capacities approach. To greatly simplify one of Kant’s arguments, he believed that humans have dignity because they are rational agents with the capacity for moral self-legislation. As Schroeder states, “This reasoning would exclude huge numbers of human beings from the relevant realm, small children to begin with”.[101] Apart from these children, predicating human dignity

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99. Josef Seifert, *What Is Life?: The Originality, Irreducibility, and Value of Life* (Amsterdam; Atlanta, GA: Rodopi, 1997), 98.

100. Peter Schaber, "Human Rights and Human Dignity: A Reply to Doris Schroeder," *Ethical Theory and Moral Practice* 17, no. 1 (2014): 157.

101. Doris Schroeder, “Human Rights and Human Dignity: An Appeal to Separate the

on the capacity for rational thought and action would also disadvantage many mentally disabled people. The same problem is encountered whichever unique human trait is selected; whether it be autonomy as Macklin and Pinker argue for, or the ability for abstract thought, free will or so on.

It is because of these inherent problems with assigning dignity on the basis of possessing a certain capacity that this element of Kant's philosophy is not usually carried through to the modern conception. Most contemporary conceptions of human dignity that are influenced by Kant have cherry-picked elements from his philosophy. As Meir Dan-Cohen writes, "The Kantianism absorbed into the liberal canon is a deracinated one".[102] The highly influential German model is an example of this. While they take to heart the maxim that people should always be treated as ends in themselves and never as mere means, they have adapted the theory to modern egalitarian notions and not predicated the possession of human dignity on any one capacity. In learning from their own tragic past, they see the necessity of affording all people equal moral worth, regardless of whether the basis of that worth can be objectively quantified.

While the basic contemporary conception of human dignity, as derived from the UN Charter, UDHR and 1966 Conventions, eschews a capacities approach, some modern authors do appeal to capacities to explain some of the more complex aspects of human dignity. In his book-length study, George Kateb adopts a form of capacities approach that explains the origins of human dignity and that he believes avoids the problem of exclusion. To Kateb, the capacity that sets the human species apart and gives it dignity is its partial discontinuity with

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Conjoined Twins" *Ethical Theory and Moral Practice* 15 (2012): 332.

102. Meir Dan-Cohen, "A Concept of Dignity," *Israel Law Review* 44, no. 1-2 (2011): 11.

nature. In some ways this is very similar to the much older idea espoused by Mirandola; that what distinguishes humanity is its ability to choose its own place in the 'chain of being', with this position being determined not merely by God or nature but by individual choice and actions. However, Kateb asserts that his theory is secular and not reliant on a divine being, yet he fails to clarify why or how this discontinuity with nature occurs. In other words, there must be something special about humans that enable them to break away from purely instinctual behaviour. Thus we are back to a routine capacities approach, whereby it is human reason, free will or some other such trait that facilitates this break with nature. Even if one were to refute this and say that divergence from natural instinct is the 'special' characteristic, such a classification would still exclude some groups of people, and hence it would encounter the same problem as all other capacities-based approaches.

As Kateb believes human dignity applies equally to all people, his capacities approach is somewhat contradictory. One could argue that some severely mentally disabled people and infants are incapable of higher thought and are thus still bound by their natural instincts and not capable of 'breaking with nature'. Furthermore, he points to the extraordinary achievements of humankind (great feats of construction for instance) to support the special standing of the human race. Once again this seems to indicate that only those people with the capacity for greatness and who possess these extraordinary qualities (or at least the potential for them) have dignity. In effect, highlighting humanity's great achievements only serves to illustrate the vast inequality among people and their abilities, rather than reinforcing that dignity is something possessed by all people. One feature of Kateb's argument that does resonate and corresponds with much other contemporary literature is that respect for human dignity prohibits treating people as less than human. To be treated as such means to be treated as a tool or infant as opposed to an agent in one's own right.

HUMAN DIGNITY: RELIGIOUS, FUNGIBLE AND A TOOL OF WESTERN CULTURAL IMPERIALISM?

Apart from many theories on the origins of human dignity using one form of capacities approach or another, there are other criticisms of the concept that need to be addressed. Macklin and Schroeder argue that it is only religious sources that imbue human dignity with additional meaning and hence it should not be used in secular fields. Human dignity does have a long history in the Judeo-Christian tradition, but it also has a long history in secular philosophy, and present day understandings have drawn from both. From just the brief overview of the conceptual and terminological history of human dignity provided at the beginning of this paper, it is evident that it is not only religious sources that have imbued human dignity with additional meaning. Present day conceptions are blended from religious and secular thought, as well as drawing from political texts and world events. The latter, in particular WWII, is perhaps of greatest importance because it shows that the modern conception of human dignity is a response to lived experience and not purely an abstract notion. It may be a theoretical construct that is difficult to prove in any objective sense, but the existence of the concept and its evolution is in response to actual events and serves a very tangible purpose.

Pinker also makes the claim that the concept of human dignity is relative and fungible and thus invalid as a means of objectively judging morality. It is not difficult to refute this claim. As Dan-Cohen rightly points out, the type of dignity to which Pinker alludes is not the moral but the colloquial one, or what Pinker himself describes as the

'psychological' one.[103] When discussing dignity in the sense it is used in contemporary legal and political discourse, it is the moral conception to which we refer; the colloquial meaning has no relevance. To further elucidate this point we can turn to Rosen, whose in-depth exploration of human dignity distinguishes four discrete strands, or types, of dignity.

The first strand is dignity as rank or status (dignity-as-rank).[104] This strand includes the Roman *dignitas* and refers to dignity as a social distinction derived from a person's rank or status. Historically, dignity-as-rank was intended to differentiate individuals only within the human species, but Rosen also includes the works of Cicero and Mirandola in this strand. These scholars universalised rank in order to have the high status apply to all human beings and used it as a means of justifying the elevated status of humans over other animals. In this way, the quintessential hierarchical nature of dignity-as-rank remains, but it is more in line with contemporary ideas of equality.

In his 2009 work "Dignity, Rank, and Rights" Jeremy Waldron proposed a contemporary dignity-as-rank conception that has gained some traction. Along the lines of Cicero and Mirandola he tries to connect modern notions of dignity and egalitarianism with its historical use as a term denoting rank. His central argument is that the modern idea of human dignity "involves the upward equalisation of rank" so that what was once only granted to the nobility is now conferred on every person.[105] Importantly, this means not simply bestowing the same status on all people, but the same high status. It attributes to all

103. Ibid., 10.

104. Rosen, *Dignity*, 11-15.

105. Jeremy Waldron, "Lecture 1: Dignity and Rank," in *Dignity, Rank and Rights,* ed. Meir Dan-Cohen (Oxford: Oxford University Press, 2012), 33.

human beings a "high-ranking legal, political, and social status".[106] As Beitz indicates, this formulation clearly has some normative force. At the most basic level it would preclude any caste-based system, and at a higher level could afford protection for people from such things as humiliating or degrading treatment, because this would constitute an affront to their high status.[107] It could also accord certain rights, such as the right to a trial and legal representation.

Rosen's second strand is dignity as a value (dignity-as-value) whereby to say something has dignity is to attribute a value to it.[108] This is perhaps the most common type of human dignity discussed today in morality and law. Rosen traces this strand back to Aquinas and the belief that dignity is the intrinsic value of something.[109] Being part of the Christian tradition, Aquinas saw dignity as originating from people being created in the image of God with free will and thus occupying a higher place in the order of creation than other living things. Kant, however, also falls within Rosen's dignity-as-value strand, arguably expanding and further secularising the ideas of Aquinas. The key element of any theory within this strand is that dignity relates to a kind of value or worth that is unique to human beings.

Rosen's third strand is related to dignity as denoting commendable conduct.[110] This is the strand of dignity to which Pinker refers when criticising the concept as being relative and

106. Jeremy Waldron, "Lecture 2: Law, Dignity and Self Control," in *Dignity, Rank and Rights,* ed. Meir Dan-Cohen (Oxford: Oxford University Press, 2012), 47.

107. Beitz, "Human Dignity in the Theory of Human Rights," 284.

108. Rosen, *Dignity*, 15-17.

109. Beitz, "Human Dignity in the Theory of Human Rights," 272.

110. Rosen, *Dignity*, 30-38.

fungible. It is also the most irrelevant when discussing human dignity as it is used in the legal and political spheres. In essence it simply refers to the common usage of the word dignity in relation to behaviour and whether it is thought to be dignified or appropriate in a given context.[111] The voluntary 'indignity' or loss of dignity involved in extricating oneself from a small car, as Pinker puts it, is very different from the violation of dignity one experiences if tortured or raped; hence this form of dignity has no place in the discussion of the legal concept of human dignity.

The fourth strand, designated as 'dignity-as-deservingness', relates to the idea that humans should be treated with dignity.[112] This strand can be somewhat inferred from any of the previous three, in that due to either their rank, status or commendable conduct, humans are deserving of and should be treated with respect. This includes both what Rosen calls 'respect-as-observance' and 'respect-as-respectfulness'. The former relates to respect for another's rights, and the latter to respect for others as agents in their own right.[113] In essence, most status or value theories of human dignity entail a 'respect' element, whereby dignity yields either duties toward others, the self or both.

Whilst Rosen's four strands are helpful in arguing against Pinker's criticism that human dignity is relative and fungible, their usefulness is limited. Rosen suggests that what is needed to avoid confusion and misinterpretation of human dignity in the present day is for those who invoke it to specify the sense in which they are doing so. Unfortunately, merely identifying which strand one is referring to is not sufficient for solving all problems associated with the notion of human dignity; something Rosen himself acknowledges when

111. Beitz, "Human Dignity in the Theory of Human Rights," 272.

112. Rosen, *Dignity*, 57-62.

113. Beitz, "Human Dignity in the Theory of Human Rights," 273.

he concedes that much more work is required to properly elucidate the concept. Even his representation of the four strands of dignity is somewhat misleading and incomplete. It gives the impression, as Clifton Mark indicates, that each strand is discrete and has its own history.[114] This is not strictly the case however, as can be seen by looking at the conceptual and terminological history of human dignity. The 'strands' would perhaps be more accurately described as different facets of the same phenomenon, with some intersecting and interrelated features. Much like a tree with different branches, each strand shares some common history and is connected to the others, sometimes even overlapping or intertwining. Yet despite this, in terms of categorisation, Rosen's strands are a useful tool in the analysis and clarification of human dignity.

Although not noted by Macklin or Pinker, one of the most common criticisms of human dignity is that it is the product of liberal Western individualism and that trying to impose it is considered by some to be tantamount to cultural imperialism.[115] David Mattson and Susan Clark are two such people, believing that as a predominantly Western construct, human dignity can only be embraced by individualistic cultures (such as those found in Europe and North America) and not by more communitarian ones (such as Islamic, Asian or African cultures).[116] There are a few responses to this however. Firstly, as Andorno indicates, simply having its most obvious conceptual roots in European Enlightenment philosophies and Catholic Social Doctrine is insufficient reason to negate the validity of the concept of

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114. D. Clifton Mark, "Dignity, Dwarfs, and Duties to the Dead," *Res Publica* 19 (2013): 295.

115. Roberto Andorno, "International Policy and a Universal Conception of Human Dignity," in *Human Dignity in Bioethics: From Worldviews to the Public Square*, ed. Nathan J. Palpant and Stephan Dilley (New York: Routledge, 2013), 133.

116. David Mattson and J. Clark, "Human Dignity in Concept and Practice," *Policy Sciences* 44, no. 4 (2011): 306.

human dignity.[117] The origins of the idea are not as relevant as the idea itself, and cultural relativism is neither a philosophical justification nor an adequate argument against the universal applicability of human dignity.[118]

Andorno also points out that although human dignity is primarily a Western construct, it is not entirely foreign to other cultures.[119] In China, associated concepts can be found in Confucianism, including some writings by Xunzi (3rd century BCE) and Mencius (4th century BCE). Similarities can also be seen in the Islamic tradition in the text of the Qur'an. The particular terminology used is obviously different, but Andorno argues that each culture has some conception of the special worth, or dignity, of human beings.[120] Additionally, non-Western opposition to the incorporation and promotion of human dignity is somewhat overestimated. Amartya Sen makes this point, stating that it is often Western scholars who criticise the universality of human dignity based on misconceptions of non-Western societies.[121] According to Sen, this is particularly true of Western scholars speaking of Asian societies when they imply these societies have little interest in individual rights and are only concerned with broader social order, discipline and community values. Interestingly, Andorno points out that in the 2005 UNESCO Declaration, Asian bioethicists were prominent

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117. Andorno, "International Policy and a Universal Conception of Human Dignity," 133.

118. Roberto Andorno, "Human Dignity and Human Rights," in *Handbook of Global Bioethics,* ed. H. ten Have and B. Gordijn (Dordrecht: Springer, 2014), 54.

119. Ibid., 48.

120. Ibid., 54.

121. Amartya Sen, "Universal Truths: Human Rights and Westernizing Illusion," *Harvard International Review* 20, no. 3 (1998): 40-43.

among those who wanted the universality of human dignity and human rights to be emphasised more strongly.[122]

122. Andorno, "International Policy and a Universal Conception of Human Dignity," 133.

CHAPTER 3

THE MINIMUM CORE OF HUMAN DIGNITY

The most robust criticism of the concept of human dignity is that it is too vague to practically direct decision-making in politics and law. McCrudden describes how the different understandings of dignity and what it entails substantively mean the notion is unable to provide a universal basis for legal decision-making.[123] He believes the meaning of dignity is influenced by both jurisdiction and time period, and that this vagueness of definition leaves it open to manipulation. However, he does maintain that there is remarkable agreement on the 'core' idea of human dignity and that this alone is capable of providing clear normative guidance in some instances.

This core includes the ontological claim that all human beings have equal moral worth, and the relational claim that they are entitled to have this worth respected by others.[124] He points out that international human rights texts have added a third element: that the state should exist for the good of individual persons. Yet he asserts there is no political or philosophical consensus on how these three elements are best understood. There are vastly differing viewpoints regarding what the worth of human beings derives from, what form of treatment is consistent with 'respect' and what specific obligations the state has toward individuals.[125] He does acknowledge that this core, although nebulous, is widely employed by judges in interpreting the law and has the requisite power to contest

123. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 655-724.

124. Ibid., 679.

125. Ibid., 679-680, 723.

the legitimacy of many political and economic systems as well as catalyse political action for the recognition of human rights.[126] Nevertheless, having conceded this point, McCrudden goes on to describe the concept as an "empty shell" and provides numerous examples of different applications of human dignity across jurisdictions on a range of contentious issues.[127]

NOT JUST AN EMPTY SHELL

Carozza disagrees that human dignity is an 'empty shell', arguing that disagreement at the periphery does not undermine the concept's overall validity.[128] Whereas competing and sometimes incompatible conceptions of human dignity may emerge in highly contentious cases, the same cannot be said for less controversial ones. As previously stated, even McCrudden admits there is remarkable agreement on the core idea of human dignity and that even this core is able to provide unambiguous direction in many circumstances. Additionally, it is also relevant to reiterate the point that any complex idea such as human dignity will be exposed to a wide range of interpretations, especially in controversial cases.

When considering equality for instance, the general idea is simple enough to understand, but once we start talking about the equitable distribution of resources for instance, what 'equality' entails becomes far more convoluted. Is it merely equal access to resources, equal opportunity to earn the money to buy those resources, the equal distribution of physical resources, or something else entirely? Carozza also points out that where judges have made decisions regarding human dignity that diverge from what other

126. Carozza, "Human Dignity and Judicial Interpretation of Human Rights," 935.

127. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 698.

128. Carozza, "Human Dignity and Judicial Interpretation of Human Rights," 938.

courts have ruled, they often explain why their jurisdiction has different requirements.[129] These differences can be due to the demands of positive law, social necessity or some other external force that constrains or alters the interpretation or implementation of human dignity.

Ongoing disagreement and debate regarding the implications of important ideals does not necessarily undermine the legitimacy of those ideals. Rather, continual re-evaluation in light of theoretical and practical developments allows for an ever-closer approximation of the 'truth'; meaning the best, most useful interpretation possible of the concept. Indeed, it would be more worrying if the definition of any of these important ideals, such as justice, equality and dignity were to remain static, for then they truly would end up being anachronisms and not reflective of reality. Having said this however, there are aspects of each of these values, essentially the 'core' to use McCrudden's term, which will remain constant. McCrudden believes this core exists for human dignity and even that there is considerable agreement about its content and implications, but that it is ultimately too minimalistic to help in all but the most obvious cases involving dignity abuses.

If one considers the intense disagreement surrounding many significant societal values, it seems unjustified to deem any of them useless in a practical sense. There actually appears to be more accord on the specifics of human dignity than about many other values. Justice is mentioned along with dignity in the Preamble of the UN Charter and also in Article 1, but there has always been considerable debate about what 'justice' actually entails.[130] In

129. Ibid., 933.

130. United Nations, *Charter of the United Nations*.

its legal sense, justice is action in accordance with the requirements of law.[131] However, there are many facets to justice (distributive, retributive or restorative, and social justice to name a few) and all come with multiple and competing theories. Human dignity is not alone in being a contested concept. Notwithstanding this disparity of theories and opinions on both human dignity and justice, both are still highly relevant and inextricably involved in political and judicial decisions. Comparatively speaking, human dignity actually seems the simpler concept and one that enjoys more widespread consensus.

In light of this, McCrudden is perhaps too hasty in describing the core understanding of human dignity unhelpful. In the cases that emerge in First World courts regarding human dignity (especially in the realm of bioethics) Carozza admits the core definition appears to provide little practical direction, but in the vast majority of countries there are countless issues on which even this minimum core can provide guidance. These issues include such things as "extrajudicial killings, arbitrary detentions, systematic discrimination, disappearances, torture, or unspeakably inhuman prison conditions".[132] Indeed, these issues are not merely limited to the developing world, as the institutionalised use of torture, unlawful detainment, and extraordinary rendition in the US provide ample evidence of. The minimum core of human dignity would seem to have much to contribute to discourse on these issues.

In regard to Carozza's statement that human dignity seems to have little to contribute to most bioethics cases, it is necessary to acknowledge that many of these cases first need to have issues of personhood clarified before any discussion of human dignity can

131. James. W. Vice, "Neutrality, Justice, and Fairness," June, 2005. Accessed August 15, 2015. http://www.beyondintractability.org/essay/principles-of-justice

132. Carozza, "Human Dignity and Judicial Interpretation of Human Rights," 936.

occur. In regards to abortion for example, discussion of human dignity is complicated by the fact that the personhood of a foetus is not a straightforward matter. Cloning and the genetic manipulation of embryos also involve questions of personhood (or potential for personhood) that obfuscates any discussion of dignity. It is those bioethical issues that primarily deal with human beings who are already living or have lived, such as euthanasia or organ donation, to which concepts of human dignity are most easily applied.

ADDING TO THE MINIMUM CORE

The possibility of adding to the minimum core of human dignity in order for it to be more useful in the legal and political realms, whilst still leaving it general enough to be universally applicable, should also be considered. This minimum core conception comprises the currently prevalent, universal concept upon which more complex and judiciary-specific conceptions of human dignity are built. The key element of this core is the ontological claim regarding the inherent value of human beings.[133] This inner value of human dignity denotes a kind of worth that is unique to humans, is derived from some aspect of their common humanity and is absolute. Being intrinsic and absolute, nothing can remove the dignity of a person.

Mattson and Clark believe the intrinsic nature of human dignity is actually one of its major shortcomings. They maintain that if there is nothing anyone can do to take away a person's dignity, there is no logical basis for requiring a certain kind of behavior or prohibiting certain kinds of actions to protect that dignity.[134] Their criticism seems to be

133. Manuel Toscano and Daniel Marc Weinstock, "Human Dignity as High Moral Status," *Les Ateliers De L'Éthique* 6, no. 2 (2011): 11.

134. Mattson and Clark, "Human Dignity in Concept and Practice," 306.

based on a misinterpretation of the intrinsic nature of human dignity and how it connects to appropriate behaviour. It is true that the intrinsic quality means nothing done to a person can detract from their inherent dignity, but that does not imply behavioral prohibitions and requirements are unnecessary. It is not that people require to be treated a certain way to preserve their dignity, but that they deserve this treatment because of their dignity.

The difficulty of identifying the one common aspect of human beings that makes them unique and gives them their special status, and thus human dignity, has been discussed previously. In a practical sense, the drafters of the major UN documents adopted a Rawlsian approach as prompted by Maritain, focusing on what they could agree on, rather than on those comprehensive doctrines that would divide them. The ontological claim is generally understood as a kind of 'bedrock truth', as Teresa Iglesias calls it.[135] This kind of truth cannot be objectively proven, but can be inferred through intuition and acknowledged accordingly. So the answer to the question 'from whence does dignity derive?' is in the bedrock truth about the intrinsic worth of all human beings.

Even if one disagrees that human dignity is something that can be inferred through intuition, or that intuition is a legitimate basis for such a concept, the answer to this question can be provided by individual belief systems; whether they be religious, philosophical or otherwise. Hence, it matters not how the intrinsic worth of human beings is affirmed, only that it is. A thorough discussion of this issue regarding the 'origins' of human dignity is thus not presented in this paper, as apart from refuting attempts to forward any form of capacities approach, it is not of primary relevance. However it is an avenue that needs further exploration and is a possible direction for future research.

135. Toscano and Weinstock, "Human Dignity as High Moral Status," 11.

The other element of the core concept of human dignity is far more complex, and is concerned with the relational claim that the dignity of humans should be respected. Or as Marcus Düwell says, "we should interpret the proposition 'human beings have human dignity' as 'we are categorically obligated to treat human beings with respect'." [136] McCrudden himself does not elaborate specifically on what he believes is entailed in 'respect', but it is this element of the core conception that is able to be bolstered, especially in relation to how the state should respect individuals.

Numerous authors have put forward their own notions of what respect for human dignity involves. Joel Feinberg, for instance, believes respect is shown when a person is treated "as a potential maker of claims."[137] To treat someone as a potential maker of claims is to recognise that person's parity of status with yourself and that their interests are of equal importance to your own. Whilst this is an excellent philosophy to live by, it is not a particularly helpful formulation in a broader political or legal context. It is difficult to see how it could help in contentious ethical debates or help resolve an issue where both parties have legitimate claims. Hence I believe Feinberg does not go far enough with his formulation.

Rainer Forst proposes a somewhat more ambitious theory, suggesting "dignity means that a person is to be respected as someone who is worthy of being given adequate reasons for actions or norms that affect him or her in a relevant way."[138] This essentially means that

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136. Marcus Düwell, "Human dignity: concepts, discussions, philosophical perspectives," in *The Cambridge Handbook of Human Dignity*, ed. Marcus Düwell et al. (Cambridge: Cambridge University Press, 2014), 43.

137. Joel Feinberg and Jan Narveson, "The Nature and Value of Rights," *The Journal of Value Inquiry* 4, no. 4 (1970): 252.

138. Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach," *Ethics* 120, no. 4 (2010): 734.

people have the 'right to justification'. However, this formulation encounters an entirely different set of problems from those presented by Feinberg's definition. Requiring only that actions be justified allows for a potential descent into utilitarian reasoning whereby any action could theoretically be justified and permissible if it benefits more people than it harms. This is exactly the kind of reasoning, especially by states, that the introduction of human dignity was designed to protect against. Human dignity was intended to protect individuals from being harmed, exploited or oppressed for any reason including the 'greater good'. If we were to formulate 'respect' as simply meaning the 'right to justification' then any number of actions could potentially be allowed provided adequate justification is given. This could theoretically include such things as torture, which is generally considered one of the most unambiguous violations of human dignity.

Beitz also attempts to clarify what is meant by respect for human dignity. He believes there are two dimensions to showing respect.[139] Firstly, people must be allowed to accomplish their own ends, thus need to have the necessary conditions provided to allow them to effectively exercise self-direction. The second element primarily involves not taking any action that would prevent others from exercising this self-direction. It is clear that this formulation of what is involved in respect is aimed at the social world, both in terms of public norms and institutions. It is about allowing people to pursue the life they choose and ensuring they exist in a society that allows this to occur. The usefulness of this definition is once again limited however, as a problem arises when people are not in a position to express the capacity for self-direction to begin with. This is very similar to the general problem associated with any capacities approach to human dignity, whereby it is extremely unclear how it could be applied to the mentally ill and infants.

139. Beitz, "Human Dignity in the Theory of Human Rights," 286-287.

Apart from those people with limited capabilities, there are also instances where there is no possible course of action available that would allow even fully competent people to express their capacity for self-direction. Such is the case in any situation where the state must make a decision that will affect a group of people who are not in a position to self-direct or to communicate their thoughts or desires. The most obvious example is an emergency situation where lives are in danger and decisions need to be made quickly, for instance a hostage scenario. Human dignity is relevant to such an occurrence, as it needs to be determined what actions do not violate the dignity of the people involved and hence are viable options to consider. In these situations, there is generally no action that could create an environment conducive to the hostages' expression of their capacity for self-direction, nor is there the possibility of asking them which course of action they would prefer. Consequently, if we formulate respect for human dignity as simply allowing people to exercise self-direction and providing the circumstances to allow them to do so, then human dignity is of little to no use in these types of situations.

The formulation of respect that I posit should be added to the minimum core of human dignity is merely a formalisation of an already-accepted part of the concept: that people should never be treated as mere means, and always as ends in themselves. Although this prohibition against treating people as means is already an accepted part of human dignity, it is often framed in alternative terms. This thesis does not propose that a particular interpretation of human dignity be universalised, rather that an existing aspect of the concept be formalised. Theorists, courts and politicians will often refer to the immorality of treating people as instruments, tools or objects, and this aligns with Kant's second formulation of the Categorical Imperative that people should never be treated as mere means.

This ‘mere means’ formulation of what constitutes respect for human dignity also has a number of advantages over other theories, especially in terms of guiding state action. It is an absolute injunction against any action that treats people as mere means and thus fulfills its intended function of protecting individuals against state actions aimed at the ‘greater good’. Likewise it cannot descend into utilitarianism and does not encounter the same problems as Forst’s model regarding the ‘right to justification’, as it does not require that people be in a position to receive justification of upcoming actions that will affect them. In Forst’s formulation, if people are not in a position to receive this justification, what then constitutes ‘respect’ is unclear. This ‘mere means’ formulation is also capable of guiding action with or without the input or presence of those individuals the action affects. This is an extremely important aspect with regards to guiding state action, and is necessary for practical implementation.

It also avoids the problems associated with Beitz’s formulation, as it is capable of guiding action even when there is no possibility of self-direction by those involved. Equating respect for human dignity with refraining from treating people as mere means circumvents the need to consider the abilities of individuals, whether that ability is for self-direction or otherwise. It is in no way related to a capacities approach and thus can be unreservedly applied to all human beings. The fact that this definition of respect for human dignity is a negative one is also highly advantageous. A positive definition requires that certain actions be taken to ensure a particular kind of environment, such as one that allows for self-direction, but this creates problems when such an outcome is not one of the possibilities. A negative definition simply requires that certain actions be abstained from. It is a far easier requirement to meet, and one that is possible in most, if not all, circumstances.

That the ‘mere means’ formulation only stipulates a minimum standard of behaviour is actually one of its most positive features. While it provides a minimum standard that must be met, it proscribes nothing above that and thus can be customised to the individual requirements of each situation, including the more complex and specific requirements of the positive law of each jurisdiction. This reinforced formulation is still minimal enough not to interfere with the requirements of positive law whilst providing a uniform basis for a concept of human dignity that can reach across borders and be applied universally. In effect, it allows for varying comprehensive conceptions of human dignity in different jurisdictions while maintaining a common foundation; thus allowing for diverse conceptions that are still entirely compatible with the general principle.

It is important not to be misled by the colloquial meanings of terms referenced in this thesis. For instance, according to this formulation, a person who abstained from participating in the oppression of Jewish people during WWII but did nothing to prevent it would still be respecting their human dignity. This may seem counterintuitive, but that is primarily due to the everyday understanding of ‘respect’ that we usually associate with a higher standard of behaviour. Importantly, this does not imply that the individual who does not personally oppress Jewish people is acting morally, simply that he is not violating their human dignity. It is entirely possible for an act to be immoral without it violating human dignity. An important distinction here is between direct and indirect dehumanisation and the behaviour that is appropriate for each.

By definition, human dignity as envisioned in the pivotal UN texts is about the moral worth of human beings and the treatment they are due because of this worth. As such, any behaviour towards people that causes them to be treated in ways not commensurate with their moral worth as human beings can be referred to as ‘dehumanising’. In the ‘mere

means' formulation, instrumentalising people is equivalent to direct dehumanisation, whereas violating their human rights is equivalent to indirect dehumanisation. Direct dehumanisation (treating people as mere means) is an absolute prohibition as it is a violation of human dignity and is not subject to 'balancing'. Some courts have encountered problems in the past when trying to weigh or balance human dignity against other interests and rights. In this formulation, human dignity would not be subject to such weighing and would thus avoid these conflicts. Rights, on the other hand, are not absolute and may be subject to balancing. This means indirect dehumanisation may be permissible (though not necessarily moral) in certain circumstances if the action involved passes the test of proportionality. It is worth noting that these two are not mutually exclusive; one can directly and indirectly dehumanise a person simultaneously.

Whilst the individual who refrains from doing anything to aid Jewish people during WWII is not engaging in direct dehumanisation, as he is not treating them as mere means and thus violating their dignity, he could be accused of indirect dehumanisation and therefore could still be said to be acting immorally. This is entirely dependent of course on what rights are determined to be 'human rights', but such a discussion is beyond the scope of this paper. The salient point here is that merely refraining from violating another's dignity does not necessarily imply moral behaviour, whereas actively violating another's dignity will always be immoral. It is important to bear in mind that the core conception of human dignity is, by design, only a minimum requirement. While indirect dehumanisation may not be absolutely prohibited, it is still something that should be avoided whenever possible.

What constitutes treating people as means will differ depending on the situation, and this thesis does not advocate the universal adoption of one interpretation. Rather, it clarifies the expanded content of the core conception of human dignity, including the prohibition

against treating people as means. As will be shown in the Aviation Security Case, problems arise when courts attempt to utilise human dignity but are not entirely cognisant of its main components. Had the Court understood that the key aspect was determining whether people had been treated as means, they may have had a different and more accurate focus.

Additionally, while the prohibition against treating people as means is Kantian in origin, this thesis is not arguing for a strictly Kantian interpretation of human dignity. Rather, it identifies an already accepted facet of human dignity, formalises it by stating its content, and shows how being aware of this feature and utilising it in ethical debates can provide normative guidance. Additionally, the expanded core should be used in conjunction with the requirements of each jurisdiction's positive law to frame and focus discussion of dignity cases. An example of this is provided in the proceeding chapter using the German Aviation Security Case.

CHAPTER 4

THE AVIATION SECURITY CASE

The German Aviation Security Case has been chosen because of the central role German law plays regarding other states' conceptions of human dignity, as well as the highly contentious and internationally relevant subject matter of the case itself. After the events of September 11, 2001 in New York, numerous countries introduced laws to deal with the threat of terrorism and terrorist acts. One class of these laws relates to government action in the event of a similar aircraft hijacking. The German Parliament introduced such legislation when they passed the Aviation Security Act (*Luftsicherheitsgesetz*) in 2005. The Act's purpose was to protect against attacks on aviation security, primarily in the form of hijacked aircraft, sabotage and terrorist attacks.[140] It gave the Minister of Defence the authority to shoot down a passenger aircraft if it threatened civilian lives on the ground and there was no other means of effectively countering the threat. However, the German Constitutional Court deemed the Act unconstitutional and overturned it. Their reasons related to both the distribution of defence powers and human rights. In regards to the latter, they found the Act to be incompatible with provisions of the Basic Law, including the right to life as found in Article 2(2) in conjunction with the guarantee of human dignity under Article 1(1).[141] They argued that to shoot down an aircraft in such a situation would be to treat the passengers on board as objects and 'mere means', thus violating their human dignity.

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140. Tatjana Hörnle, "Hijacked Airplanes: May They Be Shot Down?" *New Criminal Law Review* 10, no. 4 (2007): 582.

141. Aviation Security Case (BverfG), 1 BvR 357/05 (Federal Constitutional Court, February 15, 2006).http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html

While the Court does address some important moral and legal issues in the case, a number of their arguments in regard to human dignity are flawed. This is true regardless of whether one takes the comprehensive German understanding of human dignity, or the more limited core understanding as outlined in this paper. If the situation of a hijacked aircraft threatening civilian lives on the ground were to eventuate, I argue that the human dignity of the passengers would not be violated if the aircraft were to be shot down. To elucidate this conclusion, the Court's arguments will be dissected, the traditional ethical perspectives relating to such a case will be canvassed and the role of human dignity will be addressed. Ultimately, it will be shown that the concept of human dignity does have something substantive to add to the discussion of this case and that the expanded minimum core conception of human dignity is capable of practically guiding legal and political action. While the Court did unknowingly utilise an expanded core conception in addressing the case, other concerns (such as the right to life and prohibition against weighing human lives) confused the issue. Had the Court been aware that the key issue when utilising the expanded core was whether the passengers were being used as means, they may have ruled differently.

In addition to the right to life and guarantee of human dignity, the Court appealed to other justifications for their decision that either supported their core argument or presented additional factors needing consideration. They dismissed the argument that as the remaining lifespan of those on the hijacked plane is extremely short, regardless of whether the plane is shot down or not, their right to life is less than those on the ground.[142] They maintained that the duration of remaining life does not alter the right to it nor to human dignity and as such the passengers' lives must be afforded equal protection. They also dismiss the argument

142. Ibid., [132].

that the state has a positive duty to protect the potential victims on the ground.[143] Although such a duty does exist, they believe it cannot be carried out as to do so would violate the human dignity of the passengers. The Court also appeals to the practical difficulties of determining the true intentions of the hijackers. Considering that such a situation as depicted in the Aviation Security Case would likely occur over a short time period, ensuring the hijackers actually intend to use the plane as a weapon against civilians on the ground is problematic.[144] Significantly, the Court states that in a situation where there were only hijackers on board it would be justifiable to shoot down the plane.[145] This is because it would be treating the hijackers as autonomous agents being held accountable for their own actions and also because they can prevent being shot down by aborting their mission.

Whilst not necessarily directly related to human dignity, these other justifications presented by the Court need to be addressed and discussed. Firstly, it needs to be ascertained whether the concept of human dignity has something to add to the discussion; hence it must be established which of the Court's arguments are unrelated to human dignity, what the reasoning and conclusions of these arguments are, and if they are sound. Only then can it be determined what human dignity has to add to the discussion of such an ethically convoluted case that differs from existing arguments. Secondly, if these other arguments are found wanting, yet the human dignity of the passengers is still violated by shooting down the aircraft, there is good reason to believe the Aviation Security Act and similar acts in other countries are immoral and in contradiction to the UDHR. However, if the other arguments are flawed but it is found that the passengers' human dignity would not be

143. Ibid., [137]-[139].

144. Ibid., [125]-[129].

145. Ibid., [141].

violated, there is little reason to oppose such laws. Indeed, it is concluded that the Court's additional arguments are flawed and the passengers' human dignity would not be violated by the aircraft being shot down. Therefore, there is little reason to object to the introduction of such laws.

The Court claimed that shooting down the aircraft in such a situation as outlined in the Aviation Security Case would violate the innocent passengers' right to life in conjunction with their human dignity. However, whether any human or constitutional right is actually absolute is always in question. If a right is said to be absolute, then under no circumstance can it be interfered with. However, a more common approach to constitutional rights is to use proportionality. Robert Alexy provides one such model in which rights are principles that have to be balanced against conflicting principles.[146] In German Basic Law, the right to life is not an absolute right and can be interfered with if the interference is consistent with law and proportional. This means it must have a legitimate goal, be appropriate for achieving this goal, be the least restrictive means of reaching the goal, and the costs must not noticeably exceed the benefits.[147]

If one applies the test of proportionality to the Aviation Security Case, it would seem to indicate that to shoot down the aircraft would be justified if the number killed on the aircraft was fewer than the number threatened on the ground. However, within German criminal law it is an established principle that the proportionality test cannot be applied in relation to the killing of innocent people; lives are not a commodity that can or should be balanced against one another. Indeed, in forming their arguments, the Court shows a

146. Robert Alexy, *A Theory of Constitutional Rights,* trans. Julian Rivers *(*Oxford: Oxford University Press, 2002).

147. Kai Möller, "The Right to Life Between Absolute and Proportional Protection," *LSE Law, Society and Economy Working Papers* 13, 2010: 3.

distinct aversion to any form of utilitarian reasoning. They maintain, in congruence with German Basic law, that human lives cannot be weighed against one another. In essence, this creates a prohibition against using any form of utilitarian reasoning based on 'sacrificing the few to save the many'.

Furthermore, even if Germany did not have a prohibition against balancing lives, there is an important distinction in German Basic Law between those rights that are 'inviolable' (*unverletzlich*) and those that are 'untouchable' (*unantastbar*); in other words between those rights that are not absolute and those that are. The right to life is inviolable, meaning it can be interfered with if there is sufficiently strong justification. This means the right to life is able to be limited if it can be legally justified using the proportionality principle.[148] Human dignity on the other hand is 'untouchable'; despite the seemingly contradictory fact that the phrase in German Basic Law, "Die Menschenwuerde ist unantastbar," is frequently translated as "human dignity is inviolable."[149] Human dignity does not contain a limitation clause and any interference is an automatic violation.[150] Despite using different words to describe it, the 'untouchable' nature of human dignity is congruent with the minimum core conception. Although conceding that the right to life can be interfered with pursuant to law, the Court states this must be interpreted in light of the guarantee of human dignity.[151] Linking the right to life to human dignity in this way allows

148. Oliver Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act," *German Law Journal* 7, no. 9 (2006): 768.

149. Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, trans. Daniel Kayros (Cambridge: Cambridge University Press, 2015), 227.

150. Möller, "The Right to Life Between Absolute and Proportional Protection," 4.

151. Aviation Security Case, [117].

them to frame their argument purely in terms of the latter. Although the Aviation Security Act might be permissible if only constitutional rights are taken into account, it may not be if the concept of human dignity is utilised. That is, even though the right to life could be justifiably interfered with by shooting down the hijacked aircraft, it is the 'untouchable' nature of human dignity that presents the problem.

KANTIAN VS UTILITARIAN APPROACHES: IS DIGNITY NEEDED TO RESOLVE THE CONFLICT?

While not specifically stated, it is clear from the use of the words 'mere objects' that the Court uses a Kantian approach to human dignity when overturning the Act. Germany has incorporated Kant's second Categorical Imperative into their conception of human dignity, linking the treatment of people as objects rather than subjects (or as mere means as opposed to ends in themselves) to a violation of their human dignity. Again, in this respect the German interpretation of human dignity is in line with the expanded minimum core, as the prohibition against the instrumentalisation of people is essential. In contrast to the Court's marked Kantian bent, the Parliament endorses utilitarian reasoning in passing the Act. This is evident as they advocate the course of action that ensures the best outcome for the greatest number of people; that is, the action that maximises utility. As shooting down the aircraft would save more people than it would kill, they believe that it is the correct and moral course of action.

In contrast to utilitarianism and other forms of consequentialism, deontological ethics involves adhering to certain rules regardless of the consequences. Kantian ethics is deontological as it specifies principles such as people never being used as mere means to others' ends. The Court adheres to this kind of ethic in arguing that human dignity can never

be violated, regardless of the potential devastating outcomes of allowing the aircraft to be piloted into civilians on the ground. As previously mentioned, the contemporary conception of human dignity is considered a form of defence against governments employing strictly utilitarian strategies. Therefore, it is no surprise the debate has emerged in this form, with the Court utilising human dignity against the Parliament's cost-benefit analysis of what is morally right.

Although the Court dismisses any form of utilitarian reasoning, it would seem that the extreme circumstances surrounding such an incident are not fully accounted for in their purely deontological stance, nor is the concept of necessity adequately discussed. Additionally, despite maintaining that human lives cannot be weighed against one other, they neglect to address the circumstances in which this regularly occurs: most notably in war and police shootings. Yet a straight utilitarian perspective is also not satisfactory in adequately capturing the dilemma. To simply look at the numbers and state it is right and moral to shoot down the aircraft seems callous in regard to the innocent passengers. A traditional argument against utilitarianism is illustrated by the organ transplant analogy. Straight utilitarianism would seem to justify the killing of one person if their harvested organs could save many people; a conclusion most would agree is unjustifiable.[152] Nevertheless, to say it is right and moral to refrain from shooting down the plane purely out of respect for the passengers' right to life and dignity seems to ignore the magnitude of the disaster that could result when the plane is used against civilians on the ground; it seems to ignore the larger context. Utilitarianism does not capture the unease associated with knowingly taking human life, and deontology seems counter-intuitive when applied to extreme circumstances.

152. Hörnle, "Hijacked Airplanes," 591.

The issue of whether political leaders are justified in breaching conventional moral norms in specific circumstances for the 'greater good' has become known to philosophers as the problem of 'dirty hands'. The Aviation Security Case is such a situation, where the action necessary to avert disaster (shooting down the hijacked aircraft) requires the apparent breaching of certain moral norms (the right to life and respect for human dignity). There are many different perspectives regarding the problem of dirty hands, but all revolve around the idea that sometimes the correct political action will come into direct conflict with moral norms. The dirty hands tradition can be traced back to the work of Machiavelli in *The Prince.* Machiavelli advocated that rulers could not be bound by the same moral code as normal civilians if they were to be effective. He famously argued that rulers must learn how 'not to be good' if they were to govern successfully. Irrespective of whether Machiavelli truly believed this advice or not, the tradition continued and was built on by Max Weber in the late 19th and early 20th century. He believed that politics was a unique field that necessitated consequentialist as opposed to deontological ethics. He believed an 'ethic of ultimate ends', meaning a deontological ethic with absolute moral prohibitions, was untenable in a political context as it would prevent leaders from making necessary decisions.[153]

In the modern era, it is the work of Michael Walzer and his concept of 'supreme emergency' that has been most influential in the field of dirty hands.[154] Walzer's concept is loosely built on what is referred to as 'threshold deontology'. This approach attempts to resolve the counter-intuitive nature of traditional deontological ethics when applied to extreme situations. Threshold deontology holds that moral duties are *prima facie* as

153. Max Weber, "Politics as a Vocation," in *From Max Weber: Essays in Sociology*, ed. H.H. Gerth and C. Wright Mills (London: Routledge and Kegan Paul, 1977), 120.

154. Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs* 2, no. 2 (1973).

opposed to absolute. This is much like Alexy's model in which rights are principles to be balanced (as opposed to absolutes that can never be breached). As such, the *prima facie* duty not to kill innocent people may occasionally come into conflict with other *prima facie* duties, in which case a weighing of the respective duties needs to occur. Certain actions, such as killing innocent people, require a high threshold to be met in terms of the countering weight of the conflicting *prima facie* duty. Essentially, it is a form of deontology that yields to utilitarianism in extreme situations.

Threshold deontology does face the inevitable problem of identifying when the threshold has been reached, at which point utilitarian reasoning can usurp deontology. Although in his earlier work Walzer placed this threshold quite low, arguing for the permissibility of dirty hands justifications in relatively minor situations, it is his later interpretation that is more easily justified and has been more widely accepted. In this later work on cases of supreme emergency, he places this threshold at the survival and freedom of a political community.[155] The example he gives to illustrate this is the bombing of German cities by the British during WWII, when the threat posed by Germany and the Nazi regime to the survival of Britain as a nation state was so great that it justified the Allies intentionally targeting civilians.[156] Superficially, if one were to accept Walzer's argument for instances of supreme emergency justifying the overriding of traditional moral norms, it would seem to support the shooting down of the hijacked aircraft. However, despite the threat posed by a hijacked aircraft being great, it is by no means on the scale of the threat posed by the Nazis to the lives of their enemies and the continued existence of the Allied states.

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155. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations,* 3rd ed. (New York: Basic Books, 2000), 254.

156. Ibid., 253.

Another problem with using Walzer's notion of supreme emergency to resolve the conflict between deontological and utilitarian ethics in this case, is the same problem the Court finds: that of using people as means. Warren Quinn's analogy of the strategic and terrorist bombers is useful and adds to Walzer's illustration.[157] In the example of the strategic bomber, a pilot targets and bombs an enemy munitions factory, even though he is aware it will kill civilians living in the area. In the terrorist bomber example, civilians are intentionally targeted in order to force the enemy to acquiesce to his demands. Intuitively, the example of the strategic bomber is morally acceptable to most people but the one of the terrorist bomber is not. Indeed, that the terrorist bomber acts impermissibly and the strategic bomber acts permissibly is widely affirmed.[158] This is due to the fact that the primary purpose of the terrorist cannot be achieved without harming the civilians, whereas the primary purpose of the strategic bomber could be equally well achieved without the death of the civilians; their deaths are neither sufficient nor necessary for the achievement of his goal. The terrorist is using the people as a means to his end, while the civilian deaths caused by the strategic bomber are merely incidental.

Applying the perspective of Quinn's analogy to Walzer's example of the bombing during WWII would seem to indicate that the intentional bombing of civilian German cities was morally impermissible. This is due to the fact that the civilian deaths were the primary purpose of the attacks; they were using the civilians as means. It should be noted that intuitively people often feel there is a difference between the actions of a state such as

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157. Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18, no. 4 (1989): 334–351.

158. Alison McIntyre, "Doctrine of Double Effect," Fall 2011 ed. *The Stanford Encyclopedia of Philosophy,* ed. Edward N. Zalta. http://plato.stanford.edu/archives/fall2011/entries/double-effect/.

Britain bombing a civilian population, and the actions of a terrorist group doing the same thing. Yet the perceived difference may be in the value-laden term 'terrorist' and not to do with the actual morality of the action. Therefore, while Walzer's notion of supreme emergency may be an attractive means of attempting to justify a utilitarian conclusion in the Aviation Security Case, it is not a supportable argument for shooting down the aircraft as it attempts to justify the using of people as means.

There is also the additional problem in applying Walzer's WWII example, and in truth Quinn's also, to the Aviation Security Case: they both refer to actions taken during wartime. Whilst Quinn's example does serve to show that civilian casualties are generally accepted as permissible during times of war, this raises the question as to whether defence against a terrorist event such as the one described in the Aviation Security Case can be considered in the same ethical framework as war. In other words, whether a terrorist attack from a hijacked plane is considered an act of war or not is an important consideration. The Court maintains that human lives are not something that can be balanced; yet instances of war are an obvious exception to this. Taking necessary action, such as the bombing of German civilians during WWII, may be considered acceptable under the wider auspices of just war theory. The concept of *jus ad bellum* maintains the justice of going to war if in self-defence, and *jus in bellum* allows for collateral damage and civilian death, provided it meets the test of proportionality and is not gratuitous.

Unless one advocates pacifism, the fact that modern warfare involves some necessary and unavoidable civilian casualties is a fairly uncontroversial notion. Yet, it is debatable whether terrorism and defence against it justifies application of traditional just war principles in order to prevent a greater evil. Certainly President George W. Bush took the September 11 attacks as an act of war, and retaliated by starting a war of his own;

though his moral justification in doing so is somewhat ambiguous. However, even the September 11 attacks were not an act of war in the traditional sense, as the attack did not originate from another country's government, but from a terrorist organisation. Despite the rhetoric surrounding the 'War on Terror', the term 'war' officially applies only to conflict between states. As such, the US only entered into a state of war when they invaded Iraq and Afghanistan in 2003.

The seemingly irreconcilable conflict between utilitarian and deontological ethics is central to the debate surrounding the Aviation Security Case. Yet neither seems wholly satisfactory in dealing with the complex moral issues involved. Threshold deontology, and specifically Walzer's concept of 'supreme emergency' seem to provide a possible means of reconciliation. However, closer analysis shows the situation of a hijacked aircraft falls short of being 'extreme' enough to warrant deontological ethics being usurped by utilitarian. With Quinn's analogy of the strategic and terrorist bombers and the widespread consensus on the permissibility of the former and impermissibility of the latter, Walzer's attempts to justify using people as means are questionable. Thus, while Walzer's notion of supreme emergency may seem like an effective means of addressing the ethical conflict without needing to discuss dignity, inevitably it cannot avoid examining the issue. That Walzer's account is not a means of resolving the Aviation Security Case is reinforced when the difference between acts of war and terrorist acts is acknowledged. In short, Walzer's account falls short of resolving the ethical conflict involved in the Aviation Security Case, adding weight to the conclusion that a discussion of human dignity needs to occur in order to properly address the issue. Nevertheless, there are other arguments the Court puts forward that must be evaluated before any conclusion can be reached regarding whether shooting down the aircraft would or would not violate the passengers' dignity.

THE COURT'S SECONDARY ARGUMENTS: CAN THEY HELP RESOLVE THE DILEMMA?

One of the Court's arguments against shooting down the aircraft revolves around their assertion that the length of a person's remaining life does not affect either their right to that life or their right to have their dignity respected. While the Court seems to accept this unreservedly, it is by no means self-evident. To illustrate this point, it is useful to consider the classic legal and philosophical analogy of the 'mountaineer dilemma'.[159] In this scenario two mountaineers are climbing a steep slope when one slips and falls off a ledge. As a rope connects them, the man that falls begins to drag the other mountaineer off the ledge also. To avoid this happening the top mountaineer cuts the rope connecting them and the one who slipped falls to his death. While the cutting of the rope did cause the mountaineer who slipped to die, he would have done so regardless only a short while later. This is similar to the passengers on the hijacked aircraft who will die regardless of whether the plane is shot down or not. Just as it would be absurd for the mountaineer to doom himself to death simply so his friend could have a few more seconds of life, it could be argued it is equally absurd to doom a great number of innocents to die purely so the passengers on a hijacked plane can survive a few more minutes.

There are those who would object to the relevance of the mountaineer dilemma to the Aviation Security Case. One could argue that as it was the fault of the one mountaineer who slipped, he has a moral obligation to submit to being sacrificed in order to save his friend who was not responsible for the predicament. As it is not the fault of the passengers

159. Robert Bradshaw, "Hijacked Planes and the Doctrine of Necessity," *The Student Journal of Law* 6 (2014). Accessed April 20, 2015. http://www.sjol.co.uk/issue-6/hijacked-planes-and-the-doctrine-of-necessity

that the aircraft is being used as a weapon, the situations are not entirely analogous. However, one can imagine a slightly different scenario from the traditional mountaineer dilemma in which the ice suddenly cracks beneath one mountaineer and he falls into a crevasse, threatening again to inadvertently pull his comrade with him to his death. This time it is through no fault of his own that he fell, yet I believe most people would accept that the mountaineer still clinging to the ice is justified in cutting the rope. While he may feel incredibly guilty for such an act, his feelings of guilt should not be mistaken for actual guilt. As his friend was going to die regardless, his intent was not to kill him, but rather to save himself. It is a situation in which necessity and self-preservation directed his actions, rather than adherence to any particular ethic. We do not expect the potential victim to adhere to either deontological or utilitarian frameworks of reasoning, but rather be guided by necessity to take any action to prevent his own demise.

Taking action to prevent a hijacked plane from being used as a weapon against civilians on the ground can be seen as an extension of this necessity argument; the death of the passengers is unfortunate but those on the ground have a right to protect themselves. However there is a problem with attempting to appeal to the notion of self-defence in order to justify the government shooting down the aircraft: it is the state, and specifically the Minister of Defence, who would be ordering the shooting. Barring the possibility that the Minister is among the people whose lives would be lost should the plane crash, it would not be a case of direct self-defence; it would be self-defence by proxy. This muddies the waters for any argument regarding self-defence, but does not rule out the argument that it is still necessity that dictates the proper course of action.

Necessity has many definitions in both philosophy and law, but as we are dealing with a German case we shall take it from a German perspective. Tatjana Hörnle explains the

difference between aggressive and defensive necessity in German criminal law.[160] In the case of defensive necessity, the person to be killed is the source of the threat, whereas with aggressive necessity, a sacrifice is demanded of a person who is uninvolved in the situation. An example of the latter would be a criminal taking hostages and demanding the death of a certain politician before he will let the hostages go. To kill the uninvolved politician is clearly an impermissible act. Conversely, the mountaineer example is a case of defensive necessity, as the fallen mountaineer is the source of the threat to the man still hanging onto the ice; therefore there is a reasonably strong justification for him cutting the rope. However, this is where the Aviation Security Case and the mountaineer dilemma differ: the passengers in the aircraft are not the source of the threat to the civilians on the ground; the aircraft and the hijackers are. The passengers are uninvolved in either the hijackers' plot or the danger the physical aircraft poses. Were the craft solely filled with hijackers the threat to those on the ground would remain the same. Therefore the situation is one of aggressive self-defence, where the sacrifice of the uninvolved passengers is required in order to save the lives of the civilians on the ground. It is thus not appropriate to advocate the shooting down of the aircraft from the perspective of necessity, as it requires the sacrifice of people who are not the direct source of the threat.

Necessity also seems to imply a kind of determinism that some are not comfortable with, as was pointed out by the Court when it stated it would be practically impossible to know the hijackers' intentions with absolute certainty. They alleged that for the state to kill so many innocents based on an educated guess would be unacceptable. Nevertheless, while it would be a rare case where the intentions of the hijackers were known, it is not inconceivable. Looking at the actual events on September 11, 2001 shows that such

160. Hörnle, "Hijacked Airplanes," 587.

instances do arise. On that day, four aircraft were hijacked in a short period of time; the first three were crashed into high value targets and the fourth plane was approaching a similar target. That the fourth plane did not reach its destination is immaterial, as it was clear what the hijackers' intent was. To take a more hypothetical situation, it is not difficult to imagine an instance where a plane is hijacked and the hijackers broadcast their intentions, in the form of a boast or threat, in order to instil fear, panic or merely show their superiority. Despite hijackers' intentions not always being known, situations in which they are, or can be assumed beyond reasonable doubt, are neither unheard of nor inconceivable.

Additionally, the Court seems to actually undermine their own 'uncertainty of intention' argument by stating that if only hijackers were on board the aircraft, it would be justifiable to shoot it down provided there was an adequate level of certainty about the situation and the threat posed. This seems to imply that they could have the requisite certainty if only hijackers were on board, yet not have the same certainty with innocent passengers on board also. Furthermore, human dignity as envisioned in the German conception and also in the minimum core is an inherent feature of all human beings. As such, the hijackers retain their human dignity despite committing such a dreadful act and are entitled to have that dignity respected. Thus, it should make little difference if only hijackers peopled the aircraft, as it would still be impermissible to violate their human dignity. The Court is thus contradictory in regard to its argument concerning the practicality of knowing the hijackers' intentions.

There are further implications of advocating shooting down an aircraft with only hijackers on board that the Court does not address. Regarding the Court's claim that shooting down the plane would not be a violation of the hijackers' human dignity as it would simply be holding them accountable as the aggressors responsible, Kai Möller notes how the

Court's ruling implicitly endorses other violations of criminally guilty persons' dignity. For instance, as their interpretation of human dignity has it applying differently to the innocent and guilty, this could be used to justify the use of torture against persons deemed guilty of some crime.[161] As Moller suggests, they could have avoided this implicit endorsement of torture by drawing a distinction between violence perpetrated against individuals where the intention is to cause pain, and where pain is merely an incidental side effect.[162] In the case of torture, the intent is to inflict pain, whereas in shooting down the aircraft any pain caused is merely a by-product and not necessary for the primary goal of downing the aircraft. However, had this distinction been made it would have undermined the Court's own argument that shooting down the aircraft violated the dignity of the passengers because their deaths would then have been viewed as an unavoidable side effect rather than the aim of the action.

The Court's secondary arguments are flawed and do not provide adequate support for the conclusion that the aircraft should not be shot down. Combined with the fact that there is no clear means of reconciling the utilitarian and deontological reasoning of the Parliament and Court respectively, this indicates that the burden of determining the permissibility and morality of shooting down the hijacked aircraft rests largely on a discussion of human dignity. In this instance, ascertaining whether the dignity of the passengers would be violated is of vital importance for determining the correct course of action. To do this it must be determined whether the passengers are being used as 'mere means' or not.

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161. Möller, "The Right to Life Between Absolute and Proportional Protection," 17-18.

162. Ibid.

DIGNITY AND TREATING THE PASSENGERS AS MERE MEANS

The Court's primary argument for overturning the Aviation Security Act is in regard to its violation of the passengers' human dignity, as they are treated as objects and as means to the end of preventing the terror attack. What treating people as mere means actually entails is different in each situation, and the specifics of each case must be assessed accordingly. The salient aspects of this case are that the innocent passengers have no input into the decision-making involved and if action is taken to shoot down the plane, it will result in their deaths.

When discussing loss of life, it is useful to return to Quinn's analogy of the strategic and terrorist bombers to elucidate what is meant by treating people as 'means' in this circumstance. Both bombers' actions result in the loss of life yet the strategic bombers' are seen as permissible whereas the terrorist bombers' are not. They differ in one key aspect: whether the loss of life is necessary for achieving the primary goal or purely incidental. The terrorist bomber is using the people as a means to an end, while the strategic bombing deaths are a by-product.

A similar ethical dilemma is posed in the classic 'trolley problem' where a trolleybus is out of control and heading towards five people who are unable to move off the track. In the first variation, called the 'switch problem', a bystander has the ability to flip a switch and divert the trolley onto another track where only one person is standing. In the second variation, called the 'footbridge problem', a bystander is on a bridge over the track standing next to a large man. If he pushes the large man off the bridge onto the track, his body mass would stop the trolley before reaching the five people but the man would be killed. From a strictly utilitarian perspective, in each case it is not only morally permissible, but morally

obligatory for the bystander to sacrifice the one to save the five, as he is maximising utility by saving more people than are killed. From a deontological perspective, following the principle that it is always wrong to take innocent life, the bystander would take no action in either case. However, intuitively most people see a difference between the two scenarios. According to one study, in the switch problem 85% of people thought it was morally permissible to sacrifice the one, compared to only 12% who thought so in the footbridge problem.[163]

A possible means of reconciling people's differing intuitions in regard to the trolley problem may be found in Aquinas' doctrine of double effect.[164] Essentially, it states that an action that produces both a good and bad outcome is permissible if the good outweighs the bad and the bad was not a means of achieving the good. Applying this to the trolley problem, in both cases the good of saving five outweighs the bad of one being killed. In the switch case however, although the bystander foresees the harm to the one person on the other track, his death is just an unfortunate by-product and in no way contributes to the saving of the five people. To use Kantian phrasing, as the death of the person in the switch case does not contribute to saving the five, he is not being used as a means, whereas in the footbridge case the death of the one is necessary to save the five, thus he is being used as a means. Both the doctrine of double effect and Kant's second formulation of the Categorical Imperative thus emphasise intention and causality as key factors regarding the permissibility or otherwise of an act.

In relation to the Aviation Security Case, it is clear that it bears far more resemblance

163. Marc Hauser et al., "A Dissociation Between Moral Judgments and Justifications," *Mind & Language* 22, no. 1 (2007): 6.

164. McIntyre, "Doctrine of Double Effect."

to the switch problem than the footbridge one. While it is true that shooting down the plane entails the death of the passengers and results in the saving of the civilians on the ground, there is no causal relationship between the two. The Court actually endorses this conclusion, albeit indirectly, by stating that if there were only hijackers on board they would agree that shooting down the plane was the best course of action. The presence of the passengers in no way contributes to saving the people on the ground; the sole contributing factor is the destruction of the aircraft itself. That is, the primary purpose and aim is to destroy the aircraft in order to avert the attack, and the death of the passengers is merely incidental and an unfortunate side effect. The two outcomes resulting from the plane being shot down (the deaths of the passengers and saving the lives of the civilians on the ground) are independent of one another. Therefore, because the passengers' deaths are not causally related to the saving of the people on the ground, they are not being used as 'mere means'. Thus, contrary to the Court's declaration, to shoot down the plane would not be to treat the passengers as objects and would not violate their human dignity.

The Court's primary argument against the Aviation Security Act is that to shoot down a hijacked aircraft about to be used as a weapon against civilians on the ground would be to violate the innocent passengers' right to life in conjunction with their human dignity. The Court also appeals to additional, lesser reasons including the prohibition against balancing human lives, the practical difficulties of knowing the intentions of the hijackers, that the length of remaining life does not affect individuals' right to it and that had there been only hijackers on the aircraft their decision would have been different. Arguments to support a utilitarian approach to the Aviation Security Case in the form of 'supreme emergency' and necessity fall short of being convincing. In terms of necessity, as the sacrifice of the uninvolved passengers is required to save the civilians on the ground, it is a case of

aggressive as opposed to defensive necessity, and hence something not easily defended morally or legally. Additionally, with terrorist acts not falling under the purview of just war theory, arguments related to that are not relevant or able to be justified.

There are also major flaws in the Court's other arguments for refraining from shooting down the aircraft. Firstly, while instances in which the intentions of hijackers could be known or presumed with a high degree of certainty would be rare, they are possible. The Court even undermines their own argument in this respect by stating they would shoot down the aircraft if only hijackers were on board. Additionally, while the mountaineer example may not entirely resolve the issue of whether the length of remaining life affects one's right to it, it does lend weight to the conclusion that the aircraft should be shot down. The Court's main argument regarding human dignity is also fatally flawed. They rely on a Kantian interpretation of dignity that is compatible with the expanded core conception, whereby a violation of human dignity amounts to treating people as objects and means. Yet, as the passengers' deaths are purely incidental and not the means by which the civilians on the ground are saved, they are not used as means; their deaths are simply an unfortunate by-product of the downing of the aircraft. Therefore, as both the primary and additional arguments provided by the Court are found to be flawed and the passengers' human dignity would not be violated by the aircraft being shot down, there is ample reason to believe the Court was wrong in overturning the Aviation Security Act.

CHAPTER 5

CONCLUSION

Human dignity is undoubtedly an important concept in international as well as domestic law, yet its critics argue it is at best useless and at worst dangerous. They assert that its inherent vagueness provides little practical guidance for resolving issues in either politics or law and leaves the concept open to misuse and manipulation, often obfuscating the true motives or beliefs of those who invoke it as a rhetorical tool. Some would also argue that the best course of action is to disregard the concept of human dignity altogether and frame arguments in more concrete, easily understood terms instead. However, I do not believe the concept of human dignity is nearly as vague nor as useless as critics would have us believe, and that it is misguided to maintain we can do away with the concept altogether. Human dignity is already deeply entrenched in both moral and legal discourse and despite what some may wish, in the words of Rosen, "it is not going anywhere any time soon."[165]

Due to it being deeply embedded in politics and law it is imperative that more rigorous academic investigation and deliberation on the topic take place in order to clarify the meaning and implications of human dignity. Rather than 'throwing the baby out with the bath water' it is the responsibility of academics, politicians and jurists alike to continue engaging in substantive dialogue about the concept. Human dignity is somewhat unique among the values and principles of human rights discourse, as it is not only the grounding principle for human rights but also a legal tool used to interpret their content and scope.[166]

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165. Rosen, "Dignity: The Case Against," 153.

166. Carozza, "Human Dignity and Judicial Interpretation of Human Rights," 932.

The use of human dignity as a source of guidance in this way adds significantly to the need for more rigorous academic discussion. It provides added justification for continued discourse on the subject in order to more fully articulate what human dignity means and what the ramifications of this are for state responsibilities and the law.

The expanded minimum core conception outlined and defended in this paper aims to address some of the common criticisms and shortcomings of the concept of human dignity. Most significantly, it presents a solid, clearly defined foundation capable of providing direction in contentious cases, whilst not being so prescriptive as to be incompatible with individual jurisdictions' positive law. The greatest benefit of, and the guiding principle behind, the minimum core conception is that it can be instantiated and realised in various ways depending on cultural, legal and political differences, but each way can remain entirely consistent with the general principle of human dignity. Carozza addresses this relationship between the general, universal core, and the more specific formulations of human dignity: "The universal value of human dignity remains in a complex and concrete relationship with the particular positive law of any given, specific legal context". [167]

The aim here has not been to identify and clarify the 'best' understanding of human dignity and promote its universal adoption. Indeed, a comprehensive, all-encompassing conception of human dignity could never be practically universalised, nor necessarily should it be. McCrudden describes this kind of endeavour as 'overly optimistic', while I am sure others would describe it as cultural imperialism. [168] Rather, in providing a common, somewhat abstract minimum core that can be universally understood, it can then be given practical expression through marrying it with the use of human reason and the contextual

167. Ibid., 933.

168. McCrudden, "Human Dignity And Judicial Interpretation Of Human Rights," 698.

specifics of whatever problem it is employed to assist with. Thus, while the practical implications and instantiations of human dignity may vary somewhat in differing circumstances, they will remain consistent with the general principle of human dignity due to the stable minimum core.

While by no means covering the entire breadth of the issue of human dignity, this thesis has attempted to defend its utilisation in legal and political proceedings. It demonstrates how an augmented version of the minimum core conception avoids many of the pitfalls of other formulations and can be used in a practical sense to guide state action in contentious ethical cases. Human dignity was primarily introduced in both international law and the domestic constitutional law of many countries for the express purpose of protecting individuals from being unduly used or exploited by their government. Despite the great strides that have been made in terms of peace and security across the globe, this need is still very real, even for supposed 'first world' states.

Human dignity is a powerful legal as well as rhetorical tool and if used correctly is capable of fulfilling its original purpose. It is the hope that this thesis has provided a clear model of how human dignity can be conceived; a model that allows for both its universalistic aspirations as well as context-specific exigencies. However, there is always more work to be done and the findings presented here should be taken as merely the beginning of a more thorough study.

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