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Human Dignity in Supreme Court Constitutional Jurisprudence

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I. INTRODUCTION

In *Lawrence v. Texas*,[1] human dignity played a prominent role in the Supreme Court's constitutional decision-making. In *Lawrence*, the Court struck down the Texas sodomy law based on petitioners' liberty interest[2] and the corresponding need to advance the petitioners' human dignity.[3] Justice Kennedy, writing for the Court, described the "stigma" of the Texas sodomy statute: "Still, it remains a criminal offense with all that imports for the dignity of the person charged."[4] Continuing to speak in terms of human dignity, the Court stated, "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[5] The Court described human dignity as "central" to petitioners' liberty interest: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[6] The *Lawrence* Court also spoke of petitioners' dignity as allowing petitioners choices regarding intimate relationships: "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[7]

The year before *Lawrence*, in *Atkins v. Virginia*,[8] the United States Supreme Court considered whether executing a mentally retarded defendant violated the Eighth Amendment's prohibition against cruel

1. 539 U.S. 558 (2003).
2. The Court relied specifically on petitioners' liberty interest under the Due Process Clause of the Fourteenth Amendment. *Id.* at 578. In discussing petitioners' liberty interest, Justice Kennedy referred to both freedom and autonomy: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* at 562.
3. Not only the holding but also the language of *Lawrence* preserved the dignity of homosexual persons. In the 1986 decision upholding the statute, the Court saw "[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity on the other." Bowers v. Hardwick, 478 U.S. 186, 191 (1986). In *Lawrence*, the Court explicitly recognized the connection between family, marriage, or procreation, and the intimate acts of homosexual and heterosexual people: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.
4. *Lawrence*, 539 U.S. at 575.
5. *Id.* at 578.
6. *Id.* at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).
7. *Id.* at 567.
8. 536 U.S. 304 (2002).

and unusual punishment. Justice Stevens, writing for the Court, recalled the language of Chief Justice Warren in *Trop v. Dulles*[9] in describing the dictates of the Eighth Amendment: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[10] The Court held that executing a mentally retarded defendant violates the prohibition in view of existing standards of decency.[11]

In March 2005, the Supreme Court decided the Eighth Amendment prohibits a state from executing a seventeen year old offender for a capital crime.[12] Justice Kennedy, writing for the Court, noted that the Eighth Amendment applies to the death penalty "with special force"[13] and protects "even those convicted of heinous crimes."[14] The Court analyzed the constitutionality of these executions in light of evolving standards of decency, describing "objective indicia" of the consensus that juvenile offenders are less culpable than their adult counterparts.[15] Based on this consensus, the Court concluded the death penalty is a disproportionate punishment for juvenile offenders.

In an earlier Eighth Amendment case, *Hope v. Pelzer*,[16] the Court considered whether an Alabama prison's treatment of inmate Larry Hope—specifically, tying him to a hitching post in the sun with little water and no opportunity to go to the bathroom for seven hours—violated the prohibition against cruel and unusual punishment. The Court held it did, repeatedly referring to the assault on Pope's dignity. Justice Stevens described the treatment as "antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous."[17] The Court held the Eighth Amendment prohibited the unnecessarily cruel and demeaning treatment.[18]

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9. 356 U.S. 86 (1958).
10. *Atkins*, 536 U.S. at 311 (quoting *Trop*, 356 U.S. at 100–01).
11. *Id.* at 321.
12. Roper v. Simmons, 125 S. Ct. 1183 (2005).
13. *Id.* at 1194 (citing Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring)).
14. *Id.* at 1190. Justice Kennedy described the Eighth Amendment as reaffirming the "duty of the government to respect the dignity of all persons." *Id.*
15. *Id.* at 1194. In explaining that juvenile offenders are less culpable, the Court referred to juvenile offenders as more deserving of forgiveness for failing to escape the negative forces in their environment than their older counterparts. *Id.* at 1195.
16. 536 U.S. 730 (2002). This case was heard and decided during the same term as *Atkins*.
17. *Id.* at 745.
18. The Court emphasized the lack of necessity of the punishment: "This punitive treatment amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Id.* at 738. "This wanton treatment was not done of necessity, but as punishment for prior conduct." *Id.* at 745.

As in *Hope*, the Court in *Lawrence* held unconstitutional a statute that demeaned homosexual persons by regulating their private, consensual conduct. The Eighth Amendment, based on the concept of human dignity, also prevented Virginia from executing a mentally retarded defendant. Recent Supreme Court decisions are replete with language and outcomes advancing human dignity.

More than twenty-five years before *Lawrence*, the Court, in *Gregg v. Georgia*,[19] analyzed whether the death penalty violated the Eighth Amendment prohibition against cruel and unusual punishment. Justice Stewart, writing for the Court, cited *Trop* for the notion that human dignity underlies the Eighth Amendment.[20] Yet, the Court held the punishment did not violate the Eighth Amendment, as the punishment was not meted out arbitrarily,[21] and the societal purposes of the statute, retribution and deterrence, outweighed the competing human dignity concerns.[22]

This Article examines whether, in view of our "evolved" standard of decency and the *Lawrence* Court's express recognition of human dignity as a value underlying the petitioner's constitutional rights, human dignity plays a substantial role in the Supreme Court's decision-making. This Article does not advocate establishing dignity as a new right or value, like the "penumbra" idea of Justice Douglas in *Griswold v. Connecticut*,[23] but rather shows that the Court has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees.

Part II of this Article defines human dignity as a constitutional value. This Part begins with definitions to provide a common understanding of what human dignity means. Next, the Article addresses whether the Court treats human dignity, so defined, as a constitutional value. The Article contends human dignity, as defined herein, is a core value underlying express and un-enumerated constitutional rights and guarantees.

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19. 428 U.S. 153 (1976).
20. *Id.* at 173 (plurality opinion).
21. *Id.* at 206.
22. The *Gregg* Court acknowledged it must balance the state objectives against human dignity: "As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court must also ask whether it comports with the basic concept of human dignity at the core of the Amendment." *Id.* at 182. The Court described the two "principal societal purposes" as retribution and deterrence. *Id.* at 183. Although not a principle purpose, incapacitating the dangerous criminal is another purpose. *Id.* at 183 n.28. Deterrence is presumably the dominant objective, as the Court stated that retribution is no longer the dominant goal. *Id.* at 183 (citing Williams v. New York, 337 U.S. 241, 248 (1949)).
23. 381 U.S. 479, 485 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

In Part III, after a brief history of human dignity in American constitutional jurisprudence, the Article analyzes cases in which human dignity has trumped over competing concerns, and cases in which competing concerns have prevailed over human dignity. This Part demonstrates inconsistences in the Court's reliance on human dignity as the foundation of certain rights and guarantees.

After setting forth these inconsistencies, Part IV recommends the Court consistently and expressly rely on human dignity when applying constitutional tests and standards. Part IV illustrates how these tests should apply with human dignity serving as an underlying precept.

Much has been written about the role of human dignity in other nations' constitutional jurisprudence[24] and legal systems.[25] My focus is on the role human dignity plays in only American jurisprudence under the United States Constitution. Again, this Article does not espouse creating a new right (i.e., the right to have one's human dignity preserved). Rather, the Article shows that the Court has recognized human dignity as that which gives meaning to existing rights. The Court should now establish a means of consistently applying human dignity as an underlying value.

II. WHAT IS HUMAN DIGNITY AS A CONSTITUTIONAL VALUE?

To some, human dignity is "the premier value underlying the last two centuries of moral and political thought."[26] During the War in

24. *See, e.g.*, Edward Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 968–72 (1997) (arguing that all of the fundamental rights under German Law—liberty, equality, freedom of faith, conscience, and creed, freedom of expression, assembly, and property—are subject to change by constitutional amendment, except for human dignity). Article 1 of the German Basic Law emphasizes the role of human dignity: "Human dignity is inviolable. To respect and protect it is the duty of all state authority." GRUNDGESETZ [GG] [Constitution] art. 1 (F.R.G.).

25. *See, e.g.*, Izhak Englard, *Uri and Caroline Bauer Memorial Lecture: Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1925 (2000). Englard, Justice of the Supreme Court of the State of Israel and Law Professor at Hebrew University, describes the ambit of the term "human dignity" within Israel's "Basic Law on Human Dignity and Liberty" enacted in 1992. Section 1A of the Basic Law reads: "The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state." *Id.* (citing The Basic Law: Human Dignity and Liberty, 1992, S.H. 1391). According to Englard, "the Israeli Supreme Court has derived from the Basic Law's notion of dignity the protection of some additional human rights, such as freedom of expression, freedom of religion and of conscience, and freedom of contract." *Id.* at 1926.

26. Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES 145–46 (Michael J. Meyer & William A. Parent eds., 1992). Bedau, at the time

Iraq,[27] human dignity has been in the forefront of the public's eye and mind. Abu Ghraib prison raised the specter of our country humiliating and torturing prisoners of war. The news media highlighted the indignity suffered by male prisoners at being made to undress and perform sexual acts in front of female officers.[28] The American public recoiled at the clear assault on these prisoners' dignity.[29]

Sixty years before these events, Swedish sociologist Gunner Myrdal referred to human dignity as a defining American principle.[30] Myrdal described the American Creed[31] as including dignity as an essential ideal: "These ideals of the essential dignity of the individual human being, of the fundamental equality of all men, and of certain inalienable rights to freedom, justice, and a fair opportunity represent to the American people the essential meaning of the nation's early struggle for independence."[32]

In recent times, American leaders have repeatedly touted human dignity as an American value. In his first *State of the Union Address*,

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his article was published, was Austin Fletcher Professor of Philosophy at Tufts University.

27. On March 19, 2003, President George W. Bush announced the beginning of armed conflict against Iraq. *Bush declares war*, CNN, Mar. 19, 2003, http://www.cnn.com/2003/US/03/19/sprj.irq.int.bush.transcript/index.html. The war is commonly referred to as the "War in Iraq."

28. Caryle Murphy, *Grappling with the Morals on Display in Abu Ghraib*, WASH. POST, May 29, 2004, at B09 ("Bishops of the United Methodist Church also addressed the prisoner abuse in a statement, saying that 'the cycle of violence in which the United States is engaged has created a context for the denigration of human dignity and gross violations of human rights of Iraqi prisoners of war.'"); David R. Sands, *ICC Seen as 'Forum' for Hits on U.S., Allies*, WASH. TIMES, May 18, 2004, at A01 ("The reality of torture and systematic abuses of the dignity of Iraqi prisoners, sometimes followed by murders, both by U.S. and British troops, is no longer in question . . . ."); *Countdown* (MSNBC television broadcast May 12, 2004) ("[I]n the moments before they killed Nicholas Berg, one [sic] the masked men in the video said that they were avenging the, quote, 'satanic degradation of Iraqi prisoners . . . the dignity of the Muslim men and women in Abu Ghraib and others is not redeemed except by blood and souls.'").

29. According to a *CNN/USA Today/Gallup* poll, seventy-three percent of Americans said the mistreatment of prisoners at Abu Ghraib prison was unjustified under any circumstances. *Poll: 73 percent say Iraqi abuse unjustified*, CNN, May 10, 2004, http://www.cnn.com/2004/ALLPOLITICS/05/10/poll.iraq.abuse/index.html. "71% [of Americans] said the mistreatment should be considered a serious offense rather than a harmless prank." *Id.* At the time of the poll, support for the war was at its lowest point since the war began. *Id.* Similarly, Bush's overall approval rating was at its lowest in his presidency. *Id.*

30. GUNNER MYRDAL, AN AMERICAN DILEMMA, THE NEGRO PROBLEM AND MODERN DEMOCRACY 4 (2d ed. 1944). The Court in *Brown v. Board of Education*, 347 U.S. 483, 495 n.11 (1954), cited *An American Dilemma* as authority for the notion that segregation negatively impacts African–American school children.

31. Myrdal refers to the American Creed as a pattern of ideals providing a standard by which a democracy can be judged. *See* MYRDAL, *supra* note 30, at 23.

32. *Id.* at 4.

President George W. Bush referred to "the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance."[33] In a 2003 radio address after President Bush's week long visit to Africa, President Bush stated: "The United States is committed to the success of Africa, because the peoples of Africa deserve to live in freedom and dignity, and to share in the progress of our times."[34] And when welcoming Sikh leaders to the White House, the President assured, "our common commitment to make sure that every American is treated with respect and dignity."[35]

This American commitment to protecting and advancing human dignity enjoys non-partisan support. President William J. Clinton, in a radio address in June 2000, reiterated our "responsibility" to assist "our older Americans live out their lives with quality and in dignity."[36] During Black History Month, as President Clinton described the contributions of the second squadron of African–American fighter pilots in Tuskegee, Alabama, Clinton referred to human dignity as a core American value: "Their belief in an America that would respect their courage and honor their service is the foundation of the America we all want to live in, one where every person is treated with dignity and respect and all of our children have the chance to live their dreams."[37]

Whether advancing human dignity[38] is a meaningful value in American constitutional jurisprudence is the subject of this Article. Asked differently, when the Court states that human dignity underlies the Eighth Amendment[39] and that the "overriding" function of the Fourth Amendment is to protect human dignity,[40] is the Court touting empty slogans? Do human dignity concerns govern the Court's constitutional decision-making? And, if the Constitution protects human

33. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html.
34. President George W. Bush, President's Radio Address (July 12, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/07/20030712-1.html.
35. President George W. Bush, Remarks by the President in Meeting with Sikh Community Leaders The Roosevelt Room (Sept. 26, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010926-1.html.
36. President William J. Clinton, President's Radio Address (June 24, 2000), *available at* http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=016142 3397+32+1+0&WAISaction=retrieve.
37. President William J. Clinton, President's Radio Address (Feb. 19, 2000), *available at* http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=016142 3397+38+1+0&WAISaction=retrieve.
38. As discussed in Part II, dignity is defined as a human attribute. The constitutional value is thus "protecting or advancing human dignity." At times, this Article will refer to human dignity as a constitutional value. However, the more precise question is whether the Constitution protects or advances human dignity as a core value.
39. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958).
40. *See* Schmerber v. California, 384 U.S. 757, 767 (1966).

dignity, what does the value mean—what exactly is the Constitution protecting?

According to some, the Supreme Court has "changed the content of U.S. constitutional law to name dignity as a distinct and core value."[41] Dignity is an "increasingly vital and vibrant constitutional precept."[42] William A. Parent, in opining that human dignity "enjoys constitutional protection," points to both Ronald Dworkin and Justice Brennan as having "endorsed the idea that dignity is the fundamental value underlying the U.S. Constitution."[43] The Court itself has referred to a "constitutional guarantee" of human dignity.[44]

Others commentators believe the Court has not recognized human dignity as a constitutional value.[45] James Q. Whitman in his 2004 article contrasting the notions of privacy in American and European constitutional jurisprudence describes privacy protections in France and Germany as "at their core, a form of protection of a right to *respect* and *personal dignity*."[46] America, according to Whitman, "is much more oriented toward values of liberty, and especially liberty against the state."[47] Accordingly, human dignity lacks meaning as a constitutional value.[48] Another commentator describes the role of human dignity in our constitutional jurisprudence as "episodic and underdeveloped."[49]

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41. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1941 (2003). These commentators contend the Supreme Court has "embedded the term dignity into the U.S. Constitution." *Id.* at 1926.
42. Jordan Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 148 (1984).
43. William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 26, at 47.
44. N.Y. Times v. Sullivan, 376 U.S. 254, 256 (1964) (describing the "right to live in human dignity as guaranteed by the U.S. Constitution and Bill of Rights"); Screws v. United States, 325 U.S. 91, 135 (1945) (stating that a citizen "was entitled to all the respect and fair treatment that befits the dignity of a man, a dignity that is recognized and guaranteed by the Constitution").
45. Jeremy Rabkin, *Law and Human Dignity: What We Can Learn About Human Dignity From International Law*, 27 HARV. J.L. & PUB. POL'Y 145, 146 ("The Founders embraced this more limited conception of international law because they understood that human dignity was not something that could be assured by government, let alone by international understandings.").
46. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151, 1161 (2004).
47. *Id.*
48. *See id.* at 1214 ("There is *language* about respect in *Lawrence*, but there is little that can be said to count in any certain way as law."). Ultimately, Whitman concludes that protecting human dignity is "quite alien to the American tradition." *Id.* at 1221.
49. Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Discourse*, 65 MONT. L. REV. 15, 17 (2004).

This Article does not address the Founding Fathers' intentions[50] or the legitimacy from a constitutional law standpoint of the Court interpreting the Constitution to include human dignity as a value. Instead, this Article demonstrates that from the mid-1940s to the present, the Court has treated human dignity as a constitutional value. In some instances, the Court has decided cases based on the notion that human dignity underlies express and un-enumerated constitutional guarantees; only by advancing human dignity do these Courts' decisions fulfill a particular constitutional right or guarantee. In other cases, while acknowledging human dignity concerns, the Court has failed to heed these concerns in light of competing interests. Ultimately, this Article disagrees with both sides of the existing literature, as human dignity is a well-developed and robust core value but only in certain types of cases, typically those where public opinion favors advancing human dignity interests above competing state interests.[51]

Immanuel Kant is generally thought responsible for our understanding of human dignity.[52] Though he was not the first to use the term, Kant added "a new, important dimension to the notion of human

50. Scholars differ on how to ask the relevant questions. Many ask whether the Founding Fathers intended dignity to serve as a value underlying the Constitution. Jeremy Rabkin notes how the international law concept of human dignity differs from the notion of our Founding Fathers. *See* Rabkin, *supra* note 45, at 146. William Parent suggests that the Founding Fathers endorsed the concept of human dignity as a constitutional value. *See* Parent, *supra* note 43, at 69 (noting that Alexander Hamilton, in the *Federalist Papers*, stated: "[Y]es, my countrymen, I own to you, that, that after having given in my attentive consideration, I am clearly of the opinion, it is your interest to adopt it. I am convinced, that this is the safest course for your liberty, your dignity, and your happiness."). Louis Henkin opines that the Founding Fathers conceived human dignity as tied to rights:

> Individual rights are the basic, irreducible, political conception and political 'good.' But if the Framers did not derive rights from dignity, the political theory that made rights the 'atomic' good reflected a conception of the human being as worthy, has having essential dignity; the source of the individual's rights give evidence to his (her) dignity; the rights that the individual has speak to his (her) dignity.

Louis Henkin, *Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 26, at 213).

51. This Article is not about the role public opinion plays in the Court's decision-making regarding human dignity. For a discussion of that issue, see James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037 (1993). Rather, this Article describes how differently the Court treats human dignity in different categories of cases and posits the Court should treat human dignity as a constant value, regardless of the type of case and despite popular opinion supporting a competing interest.

52. Bedau, *supra* note 26, at 152 (positing that the concept of human dignity "abruptly comes on stage in moral theory two centuries ago in the philosophy of Immanuel Kant").

dignity."[53] Kant defined dignity as "a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence."[54] Kant contrasted human dignity from (with) something having a price. Something with a price can be substituted for or replaced by something else of equal value. Value signifies the worth of the thing relative to a person's desires. Dignity, in contrast to something with a price, cannot be replaced by anything else, and it is not relative to anyone's desires.[55]

Kant's "categorical imperative" or "formula of ends" required that people "[a]ct in such a way that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means."[56]

Adam Bedau described Kant's view of human dignity as a series of interrelated attributes.[57] First, Bedau reiterated the Kantian view that "referring to a person's dignity is another way of referring to a person's worth."[58] Second, Kant considered that men and women possessed this worth equally: "[P]ersons vary from one to another and from situation to situation in their merit, value, and usefulness. . . . Their dignity or *worth* is a kind of value that all human beings have *equally* and *essentially*."[59] "Hence human worth or dignity is invariably described as 'intrinsic' or 'inherent,' to contrast it with value that is instrumental, contingent, extrinsic, or circumstantial."[60] Next, human dignity arises from our autonomy and rationality. "[H]uman dignity is intimately related to human *autonomy*. An autonomous creature is a self-activating, self-directing, self-criticizing, self-correcting, self-understanding creature."[61] Fourth, "our dignity is inseparably connected to our *self-conscious rationality*, our capacities to evaluate, calculate, organize, predict, explain, conjecture, justify and

53. Englard, *supra* note 25, at 1918.

54. *Id.*

55. Alan Gewirth, *Dignity as the Basis of Rights*, *in* THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 26, at 10, 13.

56. Englard, *supra* note 25, at 1918–20.

57. Bedau, *supra* note 26, at 153–56.

58. *Id.* at 153. "Dignity" is defined as "[t]he quality of being worthy or honourable; true worth, excellence." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 671 (1993). "Dignified" means "showing or expressing dignity." *Id.* For this Article, dignity is used to mean "the quality of being worthy" or "worth" rather than nobleness or excellence. The term "human dignity" is at times used interchangeably with "dignity" to describe a quality human beings, rather than states or causes of action, possess.

59. Bedau, *supra* note 26, at 153.

60. *Id.* at 154.

61. *Id.*

so forth."[62] Finally, "human dignity provides the basis for equal human *rights*."[63]

International legal texts adopt this concept of human dignity, connecting human dignity to the provision of human rights. Both the United Nations Charter and the Universal Declaration of Human Rights proclaim the equal dignity of all men and women. The first line of the Declaration's Preamble recognizes "the inherent dignity and . . . the equal and inalienable rights of all members of the human family."[64] Article one of the Declaration 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."[65]

These proclamations, arising out of the horrors of fascism and Naziism during World War II,[66] were aimed at protecting all men and women against humiliation by the state and at ensuring their equal access to human rights.[67] Dignity and rights, though separate, are interwoven in both the United Nations Charter and Universal Declaration of Human Rights. Dignity is "the tuning fork" or key according to which rights are harmonized; human dignity is the "ultimate value" that gives coherence to human rights.[68] As implied in the Preamble, "human rights somehow follow from human dignity and human dignity follows from human rationality and conscience. Something about human intellect and conscience creates a duty to treat people in a certain way: in a spirit of brotherhood."[69] According to Mary Ann Glen-

62. *Id.*
63. *Id.*
64. Universal Declaration of Human Rights, G.A. Res. 217, at 71, U.N. Doc. A/810 (Dec. 12, 1948). The Preamble goes on to describe the inherent dignity and equal rights of all members of the human family as "the foundation of freedom, justice and peace in the world." *Id.*
65. *Id.* at 72.
66. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS xv–xvi (2001); Resnik & Chi-hye Suk, *supra* note 41, at 1932.
67. Commentators explain the introduction of the term dignity as a result of World War II, "when legal and political commentary around the world turned to the term dignity to identify rights of personhood . . . . [D]ignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents." Resnik & Chi-hye Suk, *supra* note 41, at 1926.
68. Mary Ann Glendon, *Procter Honoria Respectful: Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1172 (1998) (stating human dignity is the "obvious candidate" for the Declaration's ultimate value: "[D]ignity enjoys pride of place in the Declaration: it is affirmed ahead of rights at the very beginning of the Preamble; it is accorded priority again in Article 1; and it is woven into the text at three key points . . . ."); Kevin J. Hanson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J.L. & PUB. POL'Y 81, 84 (2003).
69. Hanson, *supra* note 68, at 84.

don, Rene' Cassin[70] viewed the Declaration as the portico of a temple. "The general principles of dignity, liberty, equality and fraternity, proclaimed in Articles 1 and 2, are the portico's four foundation blocks."[71] Thus, human dignity is the "ultimate value" in these international legal texts.[72]

William A. Parent[73] adds one final and essential dimension to our emerging notion of human dignity as a constitutional value. Parent posits that human dignity is "constituted by a particular, especially important moral right."[74] Parent defines moral dignity as a "negative moral right not to be regarded or treated with unjust personal disparagement" and "not to be subject to or victimized by unjust attitudes or acts of contempt."[75] Human dignity provides each of us equal moral standing under the law: "It furnishes each one of us, whether strong or weak, politically powerful or disenfranchised, competent or retarded, and whatever our race, religion, sex, or sexual orientation, with an indefeasible moral standing to protest (or to have protested on our behalf) all insidious attempts to degrade our persons."[76]

Thus, moral dignity gives each of us equal standing against arbitrary government action that demeans, humiliates, and degrades. Parent believes human dignity enjoys constitutional protection flowing from the Due Process Clause. "To have moral dignity is to possess the right not to be arbitrarily and therefore unjustly disparaged as a person."[77] Our constitutional rights, including our rights to privacy, liberty, and protection against unreasonable search and seizure, stem from our human dignity.

Drawing from the philosophies of Immanuel Kant and William Parent, and from the United Nations Charter and Universal Declaration of Human Rights, protecting or advancing human dignity as a

70. Rene' Cassin, General Charles de Gaulle's principal legal advisor during World War II, was the French delegate to the United Nations Commission on Human Rights. Glendon describes Cassin as one of the most distinguished jurists of the twentieth century. Glendon, *supra* note 68, at 1158.

71. *Id.* at 1163.

72. Common Article 3 of the Geneva Conventions (called "Common Article 3" because it is common to all four of the 1949 Geneva Conventions) provides that in the case of armed conflict, each Party to the conflict will apply certain provisions. These provisions include that persons taking no active part in the hostilities will be treated humanely. Specifically, "outrages upon personal dignity, in particular, humiliating and degrading treatment," are prohibited "at any time and in any place whatsoever." Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 973, 288–90.

73. William A. Parent is an Associate Professor of Philosophy at Santa Clara University. Much of my understanding of human dignity as a value comes from his article *Constitutional Values and Human Dignity*. *See* Parent, *supra* note 43.

74. *Id.* at 48.

75. *Id.*

76. *Id.*

77. *Id.* at 66.

constitutional value means protecting the moral status of every man and woman—a status which allows each person equal access to legal rights and equal protection against state action that demeans, humiliates, or offends. Unlike a notion of human dignity that involves only how the public perceives an individual, this notion of human dignity also concerns how the state treats an individual.

Before finalizing our definition of human dignity, we must also examine James Q. Whitman's notion of human dignity, which differs from the Court's usual conception of the term.[78] Whitman compares European and American notions of privacy and concludes that the American notion of privacy is not grounded in a concern for human dignity.[79] According to Whitman, the American notion of privacy is more akin to a liberty interest[80] while the European notion is closer to a concern for dignity. Whitman defines the European concept of privacy as a right to one's image, name, and reputation:

> Continental privacy protections are, at their core, a form of protection of a right to *respect* and *personal dignity*. The core continental privacy rights are *rights to one's image, name, and reputation*, and what Germans call the *right to informational self-determination*—the right to control the sorts of information disclosed about oneself. These are closely linked forms of the same basic right: They are all rights to control your public image—rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure—to be spared embarrassment or humiliation.[81]

Whitman concludes that "protecting people's dignity is quite alien to the American tradition."[82] American constitutional jurisprudence does not, according to Whitman, "endorse the general norm of personal dignity found in Europe."[83]

While I agree that our constitutional notion of privacy differs from the European notion of privacy as a right to control one's public image, I disagree that American constitutional jurisprudence fails to protect human dignity. Human dignity under the United States Constitution subsumes that which Whitman describes. The cases cited herein demonstrate that the Court has, at times, been guided in its decision-making by concerns for individuals' sense of self-worth and self-respect (i.e., ensuring the state does not treat individuals in a way that

78. To avoid confusing the various notions of human dignity, I first want to discard a common meaning of human dignity that arises when comparing American jurisprudence to European notions of human dignity. This alternative notion of dignity will come into play later in the Article.

79. Whitman, *supra* note 46, at 1161.

80. Whitman describes this liberty interest as protecting against the state: "America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. . . . It is the right to freedom from intrusions by the state, especially in one's own home." *Id.*

81. *Id.*

82. *Id.* at 1221.

83. *Id.*

arbitrarily or unnecessarily offends or demeans them as well as protecting an individual's reputation). In *Brown v. Board of Education*,[84] for example, often described as motivated by the Court's interest in protecting the human dignity of black school children,[85] the Court did not seek to merely advance the "public image" and reputational interest of the children. Rather the Court sought to protect the children from feeling inferior and discouraged at having to attend a separate, inferior school. Thus, the concept of human dignity in *Brown* has aspects other than just the notion of reputational self-interest. As shown, human dignity for purposes of this Article concerns how the state treats an individual as well as how the state or public perceives an individual.

At times these human dignity concerns are deeply personal and at times they are not: a married couple's decision regarding contraception; an employee's protection against overly intrusive drug testing; a woman's ability to choose whether to abort a fetus; a prisoner's right to protection against unnecessarily demeaning punishment; and a person's ability to engage in consensual intimate acts with a partner. As demonstrated herein, human dignity, so conceived, underlies our constitutional rights to privacy, liberty, protection against unreasonable search and seizure, protection against cruel and unusual punishment, and other express rights and guarantees.

III. DIGNITY AS A CONSTITUTIONAL VALUE

A. Background

Justice Frank Murphy[86] used the term "dignity" in his dissent from the 1944 case of *Korematsu v. United States*.[87] In that case, Korematsu was convicted of remaining in a designated military area (Korematsu's residence was in San Leandro, California, one of the areas from where all persons of Japanese ancestry were excluded) in vio-

84. 347 U.S. 483 (1954).

85. *See* Parent, *supra* note 43, at 59; Paust, *supra* note 42, at 172.

86. Justice Murphy was considered a "civil libertarian." During his tenure on the Court from February 5, 1940 until July 19, 1949, he wrote 217 opinions, about seventy of which involved civil liberties. HAROLD NORRIS, MR. JUSTICE MURPHY AND THE BILL OF RIGHTS 1, 3 (1965).

87. 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Justice Frankfurter actually used the term "dignity" regarding constitutional jurisprudence in the early 1940s. In *Glasser v. United States*, 315 U.S. 60 (1942), the defendant alleged ineffective assistance of counsel because the court appointed defendant's counsel to also represent a co-defendant. Justice Frankfurter stated: "Whether [the Bill of Rights] safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances." *Id.* at 87 (Frankfurter, J., dissenting). However, Justice Murphy was the first to use phrases such as "dignity of man," "human dignity," and "dignity of the individual." *See* Paust, *supra* note 42, at 154.

lation of the military requirement that persons of Japanese ancestry be excluded from that area.[88] The Court, in an opinion by Justice Black, upheld the exclusion program based on military necessity. Justice Black stated the Court "could not reject the finding of the military authorities" that the exclusion was necessary.[89]

In opposing the race-based classification, Justice Murphy stated as follows:

> To give constitutional sanction to that inference[90] in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the *dignity* of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.[91]

Justice Murphy described the military orders as falling "into the ugly abyss of racism"[92] and as going beyond the brink of constitutional power.[93]

Two years later in *Yamashita v. Styer*,[94] Tomoyuki Yamashita, a general of the Japanese army who was convicted by a military commission of violating laws of war, sought a writ of habeas corpus challenging the jurisdiction and legal authority of the military commission which convicted him.[95] The Court denied the petition for certiorari.

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88. Justice Murphy was criticized for his concurrence in *Hirabayahsi v. United States*, 320 U.S. 81 (1943), in which the Court sustained Hirabayashi's conviction for violating a military curfew order. Justice Murphy described the holding as a breach of personal liberty: "Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based on the accident of race or ancestry." *Id.* at 111 (Murphy, J., concurring). While not using the term dignity, Justice Murphy stated that "[t]heir status of citizens . . . should at all times be accorded the fullest consideration and respect." *Id.* at 113–14.

89. *Korematsu*, 323 U.S. at 219.

90. The inference is that examples of individual disloyalty prove group disloyalty. *Id.* at 240 (Murphy, J., dissenting).

91. *Id.* at 240 (emphasis added).

92. *Id.* at 233.

93. *Id.* A year and a half before *Korematsu*, in *Hirabayashi* the Court affirmed Hirabayashi's conviction for violating a curfew order imposed by the military commander. The order required that all persons of Japanese ancestry residing in certain areas be within their place of residence daily between 8:00 p.m. and 6:00 a.m. Justice Murphy concurred in *Hirabayashi*. In *Hirabayashi*, Justice Murphy compared the American government's military order to how the Nazis treated the Jews living in Germany. "The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry." *Hirabayashi*, 320 U.S. at 111 (Murphy, J., concurring).

94. 327 U.S. 1 (1946).

95. According to Justice Murphy's account, despite the absence of military necessity, "petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged." *Id.* at 27–28 (Murphy, J., dissenting).

In his dissent, Justice Murphy again called forth the notion of dignity, this time "human dignity," stating: "If we are ever to develop an orderly international community based upon a recognition of *human dignity*, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."[96] Justice Murphy ended his lengthy dissent with another reference to dignity: "While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others."[97]

Justice Robert H. Jackson, Justice Murphy's contemporary, also referred to human or individual dignity in constitutional jurisprudence during the mid-1940s and early 1950s.[98] In a case involving a petitioner's unreasonable search and seizure claim based on an allegedly illegal search of petitioner's apartment, Justice Jackson wrote this dramatic dissent: "[T]he forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual *dignity* and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught."[99] In another case of constitutional interpretation, Justice Jackson described arrest and detention, of any length, as "indignities upon the person."[100]

More recently, prisoners alleging mistreatment by prison guards have sought constitutional protection of their human dignity;[101] in "right to die" lawsuits, patient advocates stress human dignity concerns;[102] in *Bush v. Gore*,[103] the infamous voting rights case, the Court referred to "the equal dignity owed to each voter;"[104] and, in

96. *Id.* at 29 (emphasis added).
97. *Id.* at 41.
98. *See* Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting) ("[O]ne need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by police."); Skinner v. Oklahoma, 316 U.S. 535, 546 (1946) (Jackson, J., concurring) ("There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority . . . .").
99. Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) (emphasis added).
100. Ashcraft v. Tennessee, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting).
101. Hope v. Pelzer, 536 U.S. 730 (2002).
102. *See* Washington v. Glucksberg, 421 U.S. 702 (1997); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).
103. 531 U.S. 98 (2000).
104. *Id.* at 104 ("The right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."). This language comes from

2004, the Court expressly advanced the human dignity of homosexual men and women by striking down the Texas anti-sodomy statute.[105]

In his comprehensive study of the term "human dignity" in Supreme Court jurisprudence, Jordan Paust reported that from 1925 through 1982, the Supreme Court used the term human dignity or an equivalent phrase in one hundred eighty-seven opinions (often in dissenting opinions).[106] From 1980 until 2000, the Court included the word dignity, as it relates to human dignity or individual dignity, in ninety-one opinions (whether majority, concurring, or dissenting).[107]

Though the Court's use of the term dignity has increased (if you average the number of times the Court used the term during each ten year period), frequency of use does not necessarily indicate the Court's increased reliance on the value. Often the term human dignity is used in dissenting opinions.[108] Presumably, the Court may also have relied on human dignity concerns in its jurisprudence without actually using the term human dignity.[109] In *Brown*, for example, the Court never used the term human dignity but rather spoke of the demeaning effect on African–American school children of requiring them to attend separate schools from white children. As demonstrated herein, the Court's use of the term and concept of human dignity is sporadic, depending more on the type of case than the time period.[110]

Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1972), in which Justice Stevens stated in his dissenting opinion: "The members of each [ethnic, economic, or social groups] go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." *Id.* at 852 (Stevens, J., dissenting).

105. Lawrence v. Texas, 539 U.S. 558 (2003).

106. Paust, *supra* note 42, at 158. By equivalent phrase, Paust means terms such as "dignity of man," "dignity of the individual," and "personal dignity."

107. A LEXIS database search revealed 143 cases in which the Court used the term "dignity" in an opinion. Often the term was used regarding the dignity of a state or cause of action. A LEXIS database search revealed that from January 1, 2000 through October 15, 2005, the Court has used the term dignity, as it relates to the dignity of persons, in twelve opinions.

108. Paust, *supra* note 42, at 160–62.

109. Presumably, judges seek to avoid having their language criticized by academics and other judges and seek to build consensus through their language. As noted herein, Justice Scalia in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, condemned the Court's description of rights as "central to personal dignity and autonomy," as improper value judgments. *Id.* at 983 (Scalia, J., dissenting). Judge Posner criticized Justice Blackmun's writing style as melodramatic and emotional. *See* Richard A. Posner, *Judicial Opinion Writing: Judge's Writing Styles (And Do They Matter)*, 62 U. CHI. L. REV. 1421, 1434–35, 1447 (1995). One commentator defended, as rational and well-reasoned, Justice Stewart's "I know it when I see it" statement. Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023 (1996).

110. Looking at the cases by time periods or dates did not reveal any trends concerning the Court's reliance on human dignity as a constitutional value. *Lawrence*

B. Human Dignity as a Value Underlying Particular Constitutional Claims

The Court has expressly linked human dignity to certain constitutional claims, either by grounding the Court's decision in the need to advance human dignity or by expressly rejecting human dignity concerns in favor of competing state interests. These cases fall into approximately eight categories. While the Court may certainly mention dignity concerns (not always expressed using the words human dignity) in other cases,[111] the categories of cases contain an express reference to the value of human dignity.

1. Fourteenth Amendment liberty interest, and corresponding right to privacy, regarding marriage, contraception, intimate acts, and procreation;
2. Fourteenth Amendment equal protection under the law regarding equal access to education and accommodations;
3. Fifth Amendment protection against a person in a criminal case serving as a witness against himself;
4. Fourth Amendment protection against unreasonable searches and seizures;
5. Eighth Amendment protection against cruel and unusual punishment;
6. An individual's ability under the Fourteenth Amendment Due Process or Equal Protection Clause to choose how and when to die when death is imminent;
7. Fourteenth Amendment due process or equal protection right to economic assistance from the government;
8. First Amendment freedom of expression and the opposing right of an individual to protect his public image, as against another's First Amendment freedom of speech.

In the first three categories of cases, the Court recognized human dignity as a constitutional value and grounded its decision, at least in part, on this recognition. In the next two types of cases, involving the Fourth and Eighth Amendments, the Court's treatment of human dignity of a value has been inconsistent and sporadic. These decisions are inconsistent with the Court's strong rhetoric regarding human dignity and sporadic in that the Court appeared to follow public opinion and/or the executive branch's agenda in deciding the strength to give human dignity as a value in its decision-making, rather than treating dignity as invariant, an independent constitutional precept that should be factored into its decision-making regardless of public

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certainly marked a shift in the Court's openness concerning its reliance on the value.

111. The voting rights opinions are surprisingly silent as to human dignity concerns. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); Cousins v. City Council of Chicago, 466 F.2d 830, 852 (7th Cir. 1972) (Stevens, J., dissenting) ("The members of each [ethnic, economic, or social groups] go to the polls with equal dignity and with an equal right to be protected from invidious discrimination.").

opinion. In category 6 cases, which involve the right-to-die and physician assisted suicide, the Court acknowledged human dignity concerns, yet determined that state interests outweighed these interests.

The seventh type of case does not involve state interference but rather the state's unwillingness to interfere.[112] Thus, the petitioners in these cases are not challenging state involvement but rather the state's failure to provide economic assistance. These cases typically arise under the Fourteenth Amendment Due Process or Equal Protection Clause; petitioners claim the state should waive an administrative fee[113] or provide financial assistance equally.[114] The nature of the alleged injury differs in these cases, as, again, the state is not interfering but rather failing to get involved. Human dignity has routinely failed to defeat competing state concerns in these cases.

The eighth type of case, involving the First Amendment, differs from the others in three respects. First, this type of case presents two competing constitutional claims: (i) freedom of expression under the First Amendment and the human dignity flowing therefrom; and (ii) the interest in preserving one's dignity—here reputation—against another's right to speak publicly. The eighth category of cases demonstrates that human dignity concerns can permeate opposing sides of a constitutional issue.[115] The notion of human dignity as protecting one's reputation is more akin to the dignity described by Whitman in his article comparing the American and European concepts of privacy.[116] Human dignity in the eighth type of case concerns both one's public image and reputation as well as one's treatment by the state in restraining or allowing speech. The eighth type of case involves conduct that demeans or humiliates as a result of private, rather than state, action.[117]

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112. Arguably, these cases involve state action if state action leads to an absence of economic opportunity. There are two strands of welfare rights cases. First, decisions like *United States v. Kras*, 409 U.S. 434 (1973), and *Harris v. McRae*, 448 U.S. 297 (1980), reflect the Court's Lochner-era assumption "that individuals possess economic options and are free to exercise them." Dennis D. Hirsch, *The Right to Economic Opportunity: Making Sense of the Supreme Court's Welfare Rights Decisions*, 58 U. PITT. L. REV. 109, 130 (1996). Cases like *Goldberg v. Kelly*, 397 U.S. 254 (1970), on the other hand, "share the New Deal assumption that the poor are victims of external circumstances that constrain their economic opportunities." Hirsch, *supra*, at 129. As an example, Hirsch notes that the Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), assumed that poor people had no employment opportunities to earn the money for the filing fee. Hirsch, *supra*, at 129.

113. *See Kras*, 409 U.S. 434.

114. Dandridge v. Williams, 397 U.S. 471 (1970).

115. Certainly this can be said of the death penalty cases as well where the dignity of society or the victim is at stake.

116. *See* Whitman, *supra* note 46.

117. Rather than the *state* interfering with relations between husband and wife and thereby humiliating and degrading them, for example, these cases involve an *in-*

The First Amendment cases show that advancing human dignity also preserves our political system. As Justice Harlan stated in *Cohen v. California*,[118] our democratic government depends on our ability to speak in opposition to or support of government action.

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of *individual dignity* and choice upon which our political system rests.[119]

Advancing human dignity through freedom of expression thus creates a more "capable citizenry and more perfect polity."[120]

Categorizing the cases as such shows that human dignity is, in certain types of cases, the strongest of constitutional values. In other categories of cases, and, more specifically, when the executive branch and/or popular opinion support a competing state interest, human dignity becomes frail. This Article posits that human dignity should have independent standing as a value, factoring into the Court's decision-making as that which underlies our constitutional guarantees and holding that status even if public opinion or the executive branch supports a competing interest.

1. *Fourteenth Amendment Liberty Interest and Corresponding Right to Privacy Regarding Marriage, Contraception, Intimate Acts, and Procreation*

Human dignity is robust and well-developed in cases involving the right to privacy regarding marriage, contraception, and procreation.[121] The right to privacy in these cases flows from the liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[122] In the early privacy cases, *Griswold v. Connecti-*

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dividual or *organization* speaking out in a way that humiliates or degrades another person.

118. 403 U.S. 15 (1971).

119. *Id.* at 24 (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) (emphasis added).

120. *Id.*

121. The Court often groups *Carey v. Population Services International*, 431 U.S. 678 (1977), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Loving v. Virginia*, 388 U.S. 1 (1967), into cases involving "a person's most basic decisions about family and parenthood." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992).

122. *See Griswold*, 381 U.S. at 485 (describing "penumbras" arising out of express guarantees: "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

cut,[123] *Carey v. Population Services International*,[124] and *Eisenstadt v. Baird*,[125] the Court spoke of the sacredness of marriage and of decisions that are private, personal, and sensitive. In *Roe v. Wade*,[126] the Court held this right to privacy extended to a woman's right to choose whether to have an abortion.[127]

In 1992, the Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[128] revisited *Roe* in a case involving a Pennsylvania statute requiring a woman to sign a statement indicating she had notified her husband of her decision to abort and requiring that she receive certain information at least twenty-four hours before the abortion. In the joint opinion, the Court described a woman's right to terminate her pregnancy as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. According to the Court, central to this liberty are "choices central to personal *dignity* and autonomy."[129]

Justice Stevens, concurring in part and dissenting in part, referred to the personal nature of a woman's right to choose to have an abortion.[130] "The authority to make such traumatic and yet empowering decisions is an element of basic human *dignity*."[131] Justice Stevens connected human dignity to liberty as follows: "Part of the constitu-

123. 381 U.S. 479 (1965). The Court first recognized the right to personal privacy in *Griswold*. In *Griswold*, the Court, in an opinion by Justice Douglas, found a right to privacy in the Fourth and Fifth Amendments, made applicable to the states by the Fourteenth Amendment. The Court held unconstitutional a Connecticut statute prohibiting the dispensing or use of birth control devices to or by married couples. The Court relied on "penumbras" emanating from the specific guarantees of the Bill of Rights. The Court based its decision on the sanctity of the marriage institution. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 486.

124. 431 U.S. 678 (1977). The Court again extolled personal privacy as a constitutional right. The New York statute at issue prohibited the sale of contraceptives to minors and prohibited advertisements or displays of contraceptives. Justice Brennan relied on the right of personal privacy guaranteed by the Fourteenth Amendment. "This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.'" *Id.* at 684 (citing Whalen v. Roe, 429 U.S. 589 (1977)). This right includes, but is not limited to, personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 685.

125. 405 U.S. 438 (1972).

126. 410 U.S. 113 (1973).

127. *Id.* at 152. In *Roe*, the Court, in an opinion by Justice Blackmun, cited the 1891 decision of *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891), as the first time the Court recognized a constitutional right to privacy.

128. 505 U.S. 833 (1992).

129. *Id.* at 851 (emphasis added).

130. *Id.* at 915 (Stevens, J., concurring in part, dissenting in part).

131. *Id.* at 916 (emphasis added).

tional liberty to choose is the equal dignity to which each of us is entitled."[132]

Justice Scalia, in dissent, chastised the Court's reliance on the "undue burden" standard for deciding the constitutionality of the Pennsylvania abortion statute. The joint opinion's reference to the abortion decision as "central to personal dignity and autonomy," was, according to Justice Scalia, "a collection of adjectives that simply decorate a value judgment and conceal a political choice."[133]

By criticizing the Court for a "value judgment," Justice Scalia highlighted that the Court did, in *Planned Parenthood*, rely on a "value" for its decision-making. Arguably, however, preserving the dignity of women by allowing them to make a deeply personal decision did not reflect the Justices' *personal* value, though it may have coincided with this value, but rather a value which underlies the Constitution. Justice Scalia himself relied on human dignity as a value underlying the Constitution in a Fourth Amendment drug-testing case.[134] *Planned Parenthood* differs from the earlier abortion decisions in that the Court's decision-making was expressly informed by human dignity, as part of a woman's liberty interest.

In another abortion decision, *Stenberg v. Carhart*,[135] the Court, in an opinion by Justice Breyer, again connected liberty to human dignity. In *Carhart*, the Court struck down a Nebraska statute criminalizing partial birth abortions, stating, "[o]ther millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty."[136]

In the most recent privacy/liberty case, *Lawrence v. Texas*,[137] human dignity played its most explicit role thus far in American constitutional jurisprudence.[138] The Court in *Lawrence* again tied human dignity to liberty in striking down the Texas anti-sodomy stat-

132. *Id.* at 920. In the next sentence of his opinion, Justice Stevens equates dignity with respect: "A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term." *Id.*

133. *Id.* at 983 (Scalia, J., dissenting).

134. *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) ("I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity."). Justice Scalia described the drug tests at issue in *Von Raab* as "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681.

135. 530 U.S. 914 (2000).

136. *Id.* at 920.

137. 539 U.S. 558 (2003).

138. *See* Whitman, *supra* note 46, at 1162 ("This is notably true of Justice Kennedy, whose opinion for the Court in *Lawrence v. Texas* expresses admiration for European approaches, and who tries energetically to found his opinion on ideals of both liberty and dignity."); *see also* Tobin A. Sparling, Lawrence v. Texas *Symposium: Judicial Bias Claims of Homosexual Persons in the Wake of* Lawrence v. Texas, 46 S. TEX. L. REV. 255, 256 (2004).

ute. Justice Kennedy, writing for the Court, spoke of dignity three times. He noted the indignity of a conviction under the Texas law:

> The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports *for the dignity* of the persons charged. The petitioners will bear on their record the history of their criminal convictions.[139]

In a similar vein, Justice Kennedy wrote that upholding *Bowers v. Hardwick*[140] as law, "demeans the lives of homosexual persons."[141] In discussing the privacy interest at stake, Justice Kennedy wrote of dignity as follows: "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[142]

Lawrence, to some, marked a shift from a privacy to a liberty interest: "*Lawrence* may be taking a significant step toward subsuming the textually questionable 'right of privacy' into a textually respectable 'right of liberty.'"[143] Yet, while *Lawrence* may mark a shift in how the Justices referred to the right at stake, the decision marks a more substantial shift. Looking beneath what the Court called Lawrence's constitutional claim, we find the Court advancing human dignity as part of affording liberty.[144] Thus, as in *Planned Parenthood* where dignity was part of a woman's liberty interest, human dignity was part of the liberty interest of the men and women whose constitutional rights were impacted by the Texas anti-sodomy statute in *Lawrence*.

2. *Fourteenth Amendment Equal Protection Under the Law Regarding Access to Education and Accommodations*

The Court again tied human dignity to the Fourteenth Amendment, this time the Equal Protection Clause, in *Brown v. Board of Education*[145] and subsequent cases involving discrimination in education and accommodations. In *Brown*, the Court preserved the dignity of black school children by striking down the "separate but equal" doctrine.[146] Though the Court never used the term dignity, the Court emphasized the demeaning impact on African–American children of

139. *Lawrence*, 539 U.S. at 575 (emphasis added).
140. 478 U.S. 186 (1986).
141. *Lawrence*, 539 U.S. at 575 (citing *Bowers*, 478 U.S. 186).
142. *Id.* at 567.
143. James W. Paulsen, *The Significance of* Lawrence v. Texas, HOUS. LAW., Feb. 2004, at 33, 38.
144. Both the outcome and the language of the opinion reflect the concern for human dignity. *See* Sparling, *supra* note 138, at 256.
145. 347 U.S. 483 (1954).
146. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (establishing the "separate but equal" doctrine).

having to attend a separate school from their white counterparts. "[F]or the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[147] The Court described the impact on African–American children as follows: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[148]

The Court based its decision on the notion of a negative moral right, the right to be free from the unnecessary humiliation and degradation of a race-based classification.[149] William Parent put it best:

> [I]n these segregation cases members of our highest court displayed a genuine concern for the value of human dignity. They many not have articulated their opinions in the language of dignity, but their expressed outrage at the insidious government-sponsored disparagement of blacks is most clearly and persuasively formulated by direct appeal to this powerful concept.[150]

Similarly, in *Heart of Atlanta Motel, Inc. v. United States*,[151] the Court acted to preserve the dignity of African–Americans by striking down racial discrimination in access to accommodations. The Court, in an opinion by Justice Clark, upheld the constitutionality of the Civil Rights Act of 1964, twice reciting the legislative history of the Act: "The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal *dignity* that surely accompanies denials of public access to public establishments.'"[152]

In *Heart of Atlanta Motel*, as in *Brown*, the Court sought to eliminate the indignity caused by racial discrimination. These opinions reflect a Court reacting to and seeking to rectify past indignities and humiliations through its constitutional jurisprudence.[153] Both the

147. *Brown*, 347 U.S. at 494 (citing Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. (1951)).

148. *Id.*

149. Some commentators have criticized *Brown* on grounds that a moral value governed the Court's decision. *See* Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 562 (1988).

150. Parent, *supra* note 43, at 59.

151. 379 U.S. 241 (1964).

152. *Id.* at 250 (emphasis added).

153. In *Rice v. Cayetano*, 528 U.S. 495 (2000), a Fifteenth Amendment voting rights case, the Court reiterated the connection between human dignity, the Constitution, and eliminating race-based classifications:

> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Id. at 517.

language[154] and outcome of *Brown* and *Heart of Atlanta Motel* demonstrate the Court's concern for preserving human dignity as part of the express equal protection guarantee.[155]

The Court in *Roberts v. United States Jaycees*,[156] a case involving gender discrimination, relied on *Heart of Atlanta Motel* to recall the "stigmatizing injury" flowing from race discrimination. The Court adopted the reasoning of *Heart of Atlanta Motel*, specifically noting "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[157] In upholding a statute prohibiting gender discrimination, the Court stated that the "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[158]

In *Brown* and *Heart of Atlanta Motel*, despite strong national security concerns regarding the repercussions of court-ordered school integration,[159] the Court ruled to advance the dignity of African–American school children. Public opinion was certainly split on this issue; the southern states vehemently opposed segregating the schools, while northern states supported integrated schools.[160] The

154. In *Plessy*, the Court's opinion, by Justice Brown, is replete with references to the separateness of the "white and colored races" and the superiority of the white race. Plessy v. Ferguson, 163 U.S. 537, 540 (1896). "It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property . . . ." *Id.* at 549 (emphasis omitted). "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Id.* at 552 (Harlan, J., dissenting). *Brown* lacks any reference to the separateness of races or dominance of one race.

155. *See* Parent, *supra* note 43, at 59 ("I choose, as my last case reflecting judicial sensitivity to the kind of injustice constitutive of human dignity violations and as such effectively protested by civil rights activists, Heart of Atlanta Motel v. U.S." "I am suggesting that in these segregation cases members of our highest court displayed a genuine concern for the value of human dignity."); Resnik & Chi-hye Suk, *supra* note 41, at 1936–37 (noting that the Court, in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), "described discriminatory stereotyping of women as denigrating an individual's dignity").

156. 468 U.S. 609 (1984).

157. *Id.* at 625 (quoting *Heart of Atlanta Motel*, 379 U.S. at 250).

158. *Id.*

159. Obviously, the Court was well aware of the potential racial tension and violence a ruling in favor of desegregation would bring about. *See* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037 (1993).

160. These are generalities; yet, few would argue that *Brown* flowed from a public outcry against segregated schools. Chief Justice Rehnquist, dissenting in *Planned Parenthood*, noted the absence of public opinion in the *Brown* decision: "The rule of Brown is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segrega-

Court ruled to desegregate, given the express need to halt the degradation to black school children resulting from attending segregated schools and despite grave national security concerns. In these cases, human dignity retained its strength as a constitutional value, despite competing public opinion.

3. Fifth Amendment Protection Against Self-Incrimination

The well-known *Miranda v. Arizona*[161] decision is rooted in concerns for the human dignity of the criminally accused. In *Miranda*, the Court, in an opinion by Justice Warren, held that if an individual is questioned while in custody, the privilege against self-incrimination is jeopardized, and procedural safeguards must be in place to protect the privilege. Justice Warren described the "interrogation environment" as serving no purpose other than to "subjugate the individual to the will of his examiner."[162] Though not physical intimidation, the Court stated this environment is "equally destructive of human dignity."[163] After outlining the policies underlying the privilege against self-incrimination, the Court concluded with this "overriding" thought: "[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[164]

The dissenting Justices challenged the Court's focus on the human dignity of the accused. "More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight."[165]

In another Fifth Amendment case, the Court held that compelling the target of a federal grand jury investigation to sign a form authorizing a foreign bank to provide account records did not violate the individual's Fifth Amendment right against self incrimination.[166] Petitioner, the target of the investigation, invoked his Fifth Amendment privilege against self-incrimination when questioned about bank records from foreign banks. The Court, in an opinion by Justice Blackmun, reasoned the consent directive to the bank would not have

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tion, no matter whether the public might come to believe that it is beneficial." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 962 (1992) (Rehnquist, C.J., concurring in part, dissenting in part).

161. 384 U.S. 436 (1966).

162. *Id.* at 457.

163. *Id.*

164. *Id.* at 460.

165. *Id.* at 537 (White, J., dissenting). The dissenting Justices went on to say "it is idle to talk about human dignity and civilized values" if the government cannot provide for the security of the society. *Id.* at 539.

166. Doe v. United States, 487 U.S. 201 (1988).

testimonial significance; therefore, compelling an individual to sign the consent directive would not violate the individual's Fifth Amendment rights.[167] In his dissenting opinion, Justice Stevens distinguished the forced production of physical evidence[168] from intrusions "upon the contents of the mind of the accused."[169] Justice Stevens called the forced intrusions into the mind of the accused "an even greater violation of human dignity."[170] Both the majority opinion and the dissenting opinion talked at length about the principles underlying the Fifth Amendment.[171] According to Justice Stevens, the Fifth Amendment privilege is satisfied "only when the person is guaranteed the right 'to remain silent unless he chooses to speak in an unfettered exercise of his own will.'"[172] Deviating from this principle, according to Justice Stevens, "can only lead to mischievous abuse of the dignity the Fifth Amendment commands the Government afford its citizens."[173]

In *United States v. Balysis*,[174] the Court held the privilege does not apply to an individual who may be subject to criminal proceedings by a foreign government. The dissenting Justices, linking human dignity to the Fifth Amendment, described the privilege as follows:

> This Court has often found, for example, that the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth . . . . The privilege can reflect this value, and help protect against this indignity, even if other considerations produce only partial protection—protection that can be overcome by other needs.[175]

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167. *Id.* at 219.
168. Justice Stevens cited cases including *Schmerber v. California*, 384 U.S. 757 (1966), in which the Court affirmed the constitutionality of a forced blood test, for the notion the Court has condoned forced intrusions for physical evidence.
169. *Doe*, 487 U.S. at 219 n.1 (Stevens, J., dissenting). One commentator described the judicial philosophy of Justice Stevens as requiring the Court to protect individual dignity: "Justice Stevens' practice of judicial restraint coexists with a deep commitment to individual dignity values." William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1110 (1989). Popkin states that Justice Stevens' concept of the Fifth Amendment is "explicitly linked to individual dignity." *Id.* at 1123.
170. *Doe*, 487 U.S. at 219 n.1 (Stevens, J., dissenting) ("Indeed, that the assertions petitioner is forced to utter by executing the document are false, causes an even greater violation of human dignity.").
171. Both opinions in *Doe* cited *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), for the notion that "our respect for the inviolability of the human personality" is one of the principles underlying the privilege. In the later case of *United States v. Balysis*, 524 U.S. 666 (1998), the Court wrestled with the meaning of this principle, which resembles the notion of "reputational interest" under German constitutional law. The Court in *Balysis* essentially rejected the principle as one underlying the Fifth Amendment. *Id.* at 691–94.
172. *Doe*, 487 U.S. at 219 n.1 (Stevens, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 460 (1966)).
173. *Id.*
174. 524 U.S. 666 (1998).
175. *Id.* at 713 (Breyer, J., dissenting).

The Court disagreed, stating that fear of foreign prosecution is beyond the scope of the privilege.[176]

Since *Miranda*, which the Court affirmed as a "constitutional rule" in 2000,[177] human dignity has continued to play a role in the Court's decision-making in the Fifth Amendment cases.

4. *Fourth Amendment Protection Against Unreasonable Searches and Seizures*

The Court has interpreted the Fourth Amendment right of people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," as protecting against physical intrusions of the home or domicile and against physical intrusions of the body.[178] In the Fourth Amendment cases, the Court acted to preserve human dignity from the 1950s until the mid-1980s when the "War on Drugs"[179] gained notoriety. Then the Court, generally speaking, followed the executive branch's lead[180] in according the human dignity of the accused in these cases little weight (if any) against the competing state interest in deterring and lessening drug trafficking within our nation and at our borders.

In *Rochin v. California*,[181] the well known "shocks the conscience" decision, the Court held evidence was inadmissible when obtained by the involuntary pumping of Rochin's stomach as part of a criminal investigation. The Court, in an opinion by Justice Frankfurter, described the police conduct in securing evidence from the suspect as "brutal" and "offensive to human dignity."[182] Justice Frankfurter described the coerced confession as offending "even hardened sensibilities."[183] Justice Frankfurter drew from what he believed to be "canons of decency and fairness which express the notions of justice of English-speaking peoples."[184]

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176. *Id.* at 698 (majority opinion).
177. *See* Dickerson v. United States, 530 U.S. 428 (2000).
178. *See* Rochin v. California, 342 U.S. 165 (1952); Winston v. Lee, 470 U.S. 753 (1984).
179. In October of 1986, President Reagan signed the Anti-Drug Abuse Act of 1986, which appropriated $1.7 billion to fight the drug crisis. The bill created mandatory minimum penalties for drug offenses. Frontline, PBS, *Thirty Years of America's Drug War: a Chronology*, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ (last visited Feb. 14, 2006) [hereinafter PBS Frontline].
180. The drug "crack," a potent form of smokeable cocaine, gained public attention in November 1985, when a *New York Times* cover story detailed the expanding use of the drug in the New York region. *Id.*
181. 342 U.S. 165 (1952).
182. *Id.* at 174.
183. *Id.* at 172 (referring to "the struggle to open [petitioner's] mouth and remove what was there, the forcible extraction of his stomach's contents").
184. *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 417 (1945)).

The Court reached the opposite result in *Schmerber v. California*,[185] a case involving the mandatory testing of a criminally accused's blood for alcohol content. The Court, in an opinion by Justice Brennan, upheld the constitutionality of a blood test taken without petitioner's consent. Petitioner was arrested at a hospital while being treated for injuries from an automobile accident. A police officer directed a physician at the hospital to take a blood sample to check petitioner's alcohol level. The sample indicated intoxication, and the report of the analysis was admitted into evidence. The Court held the test chosen was reasonable, and the physician performed the test in a reasonable manner, thus satisfying the Fourth Amendment.[186]

Despite ruling the state interests outweighed petitioner's Fourth Amendment rights, Justice Brennan described the "overriding function of the Fourth Amendment [as] to protect personal privacy and dignity against unwanted intrusion by the State."[187] With regard to "intrusions beyond the body's surface," Justice Brennan wrote that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."[188] The blood test passed muster because the test chosen to measure blood-alcohol was reasonable, the officer might reasonably have believed he had an emergency, and the test was performed in a reasonable manner.[189]

More than thirty years after *Schmerber* and *Rochin*, in *Winston v. Lee*,[190] Justice Brennan again tied human dignity to the Fourth Amendment. In *Winston*, the Court struck down as unconstitutional forcing an individual to undergo a surgery to remove a bullet which might then implicate the individual in a crime. The Court concluded that the operation, which would go beneath the skin and require general anesthesia, was a substantial intrusion not outweighed by state interests in obtaining the evidence.[191] The Court described "the extent of intrusion upon the individual's *dignitary* interests in personal privacy and bodily integrity" as one factor for determining the reasonableness of the search.[192] The Court cited *Schmerber* for the notion that the overriding function of the Fourth Amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State."[193]

185. 384 U.S. 757 (1966).
186. The record revealed that the test was performed by a physician in a hospital using accepted medical practices. *Id.* at 770–72.
187. *Id.* at 767.
188. *Id.* at 769–70.
189. *Id.* at 770–72.
190. 470 U.S. 753 (1984).
191. *Id.* at 766.
192. *Id.* at 761 (emphasis added).
193. *Id.* at 760.

The Court became more likely to permit state-sanctioned bodily intrusions in the late 1980s, as the government's "War on Drugs" gained increased media attention.[194] In *Skinner v. Railway Labor Executives' Ass'n*,[195] the Court affirmed the constitutionality under the Fourth Amendment of mandatory blood and urine tests for railroad employees under regulations promulgated by the Federal Railroad Administration. The Court held no warrants or reasonable suspicion were required before the testing. According to the Court, in the balance, the government had a strong interest in obtaining the test results to ensure public safety; the employees had a diminished expectation to privacy because the industry was highly regulated, and the intrusiveness of the test was minimal.[196]

Justices Marshall and Brennan, dissenting in *Skinner*, noted the indignity and humiliation suffered by employees at having the sample taken. "Compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the 'personal privacy and dignity against unwarranted intrusion by the State' against which the Fourth Amendment protects."[197] The dissenting Justices described urination as "among the most private of activities," highlighting the humiliation at having to do so with a monitor listening at the door.[198]

Justice Marshall likened the assault on personal dignity in *Skinner* to the World War II relocation-camp and McCarthy-era cases in terms of the denials of liberty in times of perceived necessity.[199] He wrote of the danger of sacrificing "fundamental freedoms" in the name of exigency: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[200]

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194. According to *PBS Frontline*, Nancy Reagan's 1984 "Just Say No" anti-drug campaign became "a centerpiece" of the Reagan administration's anti-drug campaign. PBS Frontline, *supra* note 179. Crack cocaine became widespread in New York in 1985. *Id.* In October 1986, President Reagan signed an omnibus drug bill, appropriating $1.7 billion to fight the drug crisis. *Id.* The bill created mandatory minimum penalties for drug offenses. *Id.*

195. 489 U.S. 602 (1988).

196. *Id.* at 627–33.

197. *Id.* at 644 (Marshall, J., dissenting) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)).

198. *Id.* at 645. The dissent quoted Charles Fried's statement that "excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem." *Id.* at 646 (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

199. *Id.* at 635.

200. *Id.*

Similarly, in *National Treasury Employees Union v. Von Raab*,[201] the Court upheld the constitutionality of drug testing of United States customs officials employees directly involved in drug interdiction, required to carry a firearm, or who handled classified material. The program required drug-testing by urinating in private with a monitor of the same gender on hand to listen for the sound of urination. The Court upheld the testing of employees directly involved in drug interdiction or required to carry a firearm. The Court held the program was not motivated by a perceived drug problem within the service but rather by "the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances."[202]

Justices Brennan, Scalia, Stevens, and Marshall dissented. Justice Scalia mentioned personal dignity three times in his dissenting opinion. He described the drug testing as "particularly destructive of privacy and offensive to personal dignity."[203] "I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[204] Justice Scalia concluded his dissent with a powerful statement regarding the role of human dignity in Fourth Amendment jurisprudence: "Those who lose . . . are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content . . . ."[205] In the late 1980s, human dignity failed to prevail over competing government concerns in the Court's Fourth Amendment decisions regarding employee drug testing.

Similarly, during this time, human dignity failed to govern the Court's decision-making involving suspected drug trafficking at international borders and in homes.[206] In *Segura v. United States*,[207] decided in 1984, petitioners challenged a suppression ruling on grounds police made an illegal entry into their apartment. Specifically, the officers arrested Segura, an alleged drug trafficker, outside his apartment building, then led him upstairs, entered the apartment without

201. 489 U.S. 656 (1989). The Court decided *Von Raab* and *Skinner* on the same day.
202. *Id.* at 674.
203. *Id.* at 680 (Scalia, J., dissenting).
204. *Id.* at 681.
205. *Id.* at 687.
206. *See* United States v. Montoya de Hernandez, 473 U.S. 531 (1985); United States v. Leon, 468 U.S. 897 (1984) (holding the exclusionary rule should be modified, allowing for admission of evidence seized in good faith reliance on a search warrant, even if the search warrant was defective); Segura v. United States, 468 U.S. 796 (1984).
207. 468 U.S. 796 (1984).

permission or consent, and made a cursory search, seeing drug paraphernalia. The police left the "pre-warrant evidence" and took those arrested (Segura and the others who were inside at the time the officers entered the apartment) to headquarters. Two Drug Task Force agents remained in the apartment awaiting a warrant. Approximately twenty hours later, the officers obtained a search warrant and conducted a thorough search of the apartment. The Court held the seizure was reasonable under the totality of the circumstances.[208]

The dissenting Justices described the agents' occupation of the apartment as both an unreasonable "search" and an unreasonable "seizure" in violation of the Fourth Amendment.[209] Justice Stevens ended the dissenting opinion with the language of *Harris v. United States*[210] linking human dignity to the Fourth Amendment: "The forefathers thought this was not too great a price to pay [for the exclusionary rule] for the decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect."[211]

A year later in *United States v. Montoya de Hernandez*,[212] the Court, in an opinion by Justice Rehnquist, upheld the conviction of de Hernandez for federal narcotics offenses after she was arrested for smuggling eighty-eight cocaine-filled balloons in her alimentary canal[213] into the country. Customs officials at Los Angeles International Airport detained de Hernandez for approximately sixteen hours before seeking a court order for an x-ray and rectal examination.[214] Officials refused her request to make a phone call, and she refused to go to the bathroom during her detention. Approximately twenty-four hours after her flight had landed at the Los Angeles airport,[215] a federal magistrate issued an order authorizing a rectal examination and involuntary x-ray. De Hernandez was taken to a hospital where a physician conducted a rectal examination and removed a balloon containing cocaine. She was then placed under arrest.

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208. *Id.* at 814–15.

209. *Id.* at 820–22 (Stevens, J., dissenting). Justices Blackmun, Brennan, and Marshall joined in Justice Stevens' dissent.

210. 331 U.S. 145 (1947).

211. *Segura*, 468 U.S. at 839 n.31 (Stevens, J., dissenting).

212. 473 U.S. 531 (1985).

213. Alimentary canal is defined as "the whole passage through the body, from mouth to anus, by which food is received, digested, etc." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 51 (1993).

214. The dissenting opinion stated she remained locked in the room for almost twenty-four hours. She was formally placed under arrest "almost 27 hours after her initial detention." *Montoya de Hernandez*, 473 U.S. at 548 (Brennan, J., dissenting) (emphasis omitted).

215. The dissenting opinion explained that not until sixteen hours had passed did the supervisor seek a magistrate's order. Another eight hours passed before the supervisor contacted a magistrate, who issued a telephone order to proceed with the examination. *Id.* at 547 n.13.

Justice Rehnquist, while describing her ordeal as "long, uncomfortable, indeed humiliating,"[216] stated, essentially, that she had made her bed: "[B]oth [the detention's] length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country."[217] Nowhere did the majority mention a human dignity concern arising from the sixteen hour delay preceding the supervising officer seeking a magistrate's order for a search.

The Court found the search and seizure "reasonable" under the Fourth Amendment. Remarking on the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics,"[218] Justice Rehnquist stated, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border."[219] Here, Justice Rehnquist expressly noted the sliding balance of interests (human dignity becomes so frail the majority fails to even mention it) given the administrative imperative of protecting the nation's borders.

Thus, despite the Court stating that the "overriding" function of the Fourth Amendment is to "protect personal privacy and dignity against unwanted intrusions by the State," human dignity lost its bite as a value in Fourth Amendment bodily intrusion cases during the War on Drugs. In the 1951 *Rochin* case, the Court expressed shock at the involuntary pumping of defendant's stomach to obtain evidence in a criminal investigation; in *Montoya de Hernandez,* decided in 1985, the Court expressed mild concern at lengthy, uncomfortable delay preceding the examination of defendant's rectum. Surveying these cases demonstrates that the Court should treat human dignity as a constant value, despite public opinion and an executive branch agenda advancing the competing state concern. Though dignity may not always prevail against competing state concerns, it should retain its strength as a factor in the Court's constitutional decision-making.[220]

5. *Eighth Amendment Protection Against Cruel and Unusual Punishment*

The role of human dignity is most troubling in the Eighth Amendment jurisprudence because, while the Court expresses an unwaver-

216. *Id.* at 544 (majority opinion).

217. *Id.*

218. *Id.* at 539.

219. *Id.* at 540.

220. As Justice O'Connor noted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion), "[i]t is during our most challenging and uncertain moments . . . that we must preserve our commitment at home to the principles for which we fight abroad." Certainly, and as demonstrated in Part II, advancing human dignity is one the principles (or underlies the principles) for which we fight abroad.

ing commitment to advancing human dignity in these cases,[221] the Court's analysis of human dignity in most death penalty cases is weak and meaningless. These cases raise the complex and unsettling question of whether inmates on death row have the same inherent dignity interest as individuals who are not on death row (or the rest of us).

In Eighth Amendment cases, the Court has repeatedly proclaimed that human dignity underlies the prohibition against cruel and unusual punishment. In *Trop v. Dulles*,[222] a case involving forfeiture of citizenship, the Court stated: "[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[223] This language is repeated in eight Supreme Court opinions.[224] In *Trop*, the Petitioner, born in America, had his citizenship forfeited after being convicted by a court-martial for wartime desertion. In holding the forfeiture unconstitutional, the Court focused on the "demoralizing" nature of the punishment:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . In short, the expatriate has lost the right to have rights.[225]

Justice Brennan, in his concurring opinion, described expatriation as "an especially demoralizing sanction."[226]

In *Trop*, Chief Justice Warren wrote that the Eighth Amendment is not static but must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[227] This notion of an evolving standard of decency repeats in several Eighth Amendment prisoner rights and death penalty cases.[228]

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221. As discussed herein, in *Atkins v. Virginia*, 536 U.S. 304 (2002), which involved a mentally retarded death row inmate, human dignity concerns appeared to inform the Court's analysis.
222. 356 U.S. 86 (1958).
223. *Id.* at 100.
224. A LEXIS search revealed eight Supreme Court opinions and forty-four federal trial and appellate court opinions containing this phrase.
225. *Trop*, 356 U.S. at 101–02.
226. *Id.* at 111 (Brennan, J., concurring).
227. *Id.* at 101 (majority opinion). Justice Warren adopted this notion from *Weems v. United States*, 217 U.S. 349 (1910), in which the Court held unconstitutional the punishment of twelve years of *cadena temporal*, working at hard labor with iron on the ankles, for falsifying public records. In *Weems*, the Court repeatedly referred to the Eighth Amendment mandate that punishment must be humane according to existing standards of decency. The *Weems* Court stated that the Eighth Amendment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." *Id.* at 378.
228. Glass v. Louisiana, 471 U.S. 1080, 1083 (1985) (Brennan, J., dissenting) (noting that Eighth Amendment claims must be evaluated in light of "contemporary human knowledge" (citing Robinson v. California, 370 U.S. 660 (1962))); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) ("[A]n assessment of contem-

In *Hope v. Pelzer*,[229] forty-four years after *Trop*, the Court again relied on human dignity as the grounds for the Eighth Amendment in striking down an Alabama prison's use of a hitching post as punishment for disruptive conduct. Guards from the Alabama prison system handcuffed prisoners to hitching posts if they either refused to work or disrupted their work squads. In holding the practice unconstitutional,[230] the Court cited *Trop* for the idea that what underlies the Eighth Amendment "is nothing less than the dignity of man."[231] Justice Stevens described Hope's treatment on the hitching post as "antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both *degrading* and dangerous."[232]

The Court's analysis of Hope's Eighth Amendment claim is brief, as the Court focused primarily on the qualified immunity claims of the prison guards sued by plaintiff. Yet, in analyzing his constitutional claim, the Court emphasized the lack of necessity of the punishment and the humiliation flowing the prison guard's handling of Hope:

> Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs . . . to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.[233]

In evaluating the pattern of treatment at the prison, the Court noted that an inmate had been denied bathroom breaks and defecated on himself, and corrections officers had taunted prisoners (including Hope) while refusing their requests for water. The Court in *Hope* emphasized the humiliating nature of this treatment.[234]

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porary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."); Furman v. Georgia, 408 U.S. 238, 242 (1972) (citing *Weems* and *Trop* for the notion that the Eighth Amendment must draw its meaning from an evolving and enlightened standard of decency).

229. 536 U.S. 730 (2002).

230. *Id.* at 745–46 (rejecting the defendants' qualified immunity claims in Hope's civil rights action).

231. *Id.* at 738.

232. *Id.* at 745 (emphasis added).

233. *Id.* at 738.

234. *Id.* at 745. Under Jewish Biblical law, punishment can be no more severe than is necessary to achieve the punitive purpose without unnecessarily humiliating the offender. Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1204 (2004). Regarding flogging, the *Torah* mandates strict limits on the number of lashes:

> [I]f the guilty one is to be flogged, the magistrate shall have him lie down and be given lashes in his presence, by count, as his guilt warrants. He may be given up to forty lashes, but not more, lest being flogged further, to excess, your brother be degraded before your eyes.

Deuteronomy 25:2–3. Talmudic law limits the number to thirty-nine to avoid exceeding forty by accident. The commentary states that because the flogging itself

Relying again on "evolving standards of decency," the Court in *Atkins v. Virginia,*[235] struck down as unconstitutional the execution of a mentally retarded convicted felon. Quoting *Trop*, the Court expressly acknowledged the role of human dignity in Eighth Amendment decision-making.[236] In *Atkins* the Court noted the "national consensus" against executing mentally retarded defendants, describing the "evolving standards of decency" and changing attitudes since the time of *Penry v. Lynaugh*.[237] Justice Stevens, writing for the Court in *Atkins*, hearkened back to the "Bloody Assizes" to illustrate that our standard for permissible punishment has changed: "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."[238] Although the Court mentioned the term dignity only when quoting from *Trop*, the notion of an "evolving standard of decency" informed the *Atkins* Court's decision.

The Court reached a similar conclusion in *Roper v. Simmons*,[239] a recent case involving executing juvenile offenders. The Court's analysis emphasized the national consensus against executing these offenders as well as the differences between the culpability of juvenile and adult offenders.[240] Justice Kennedy, writing for the Court in *Roper*, concluded that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . by reason of youth and immaturity."[241] Accordingly, the Court overturned *Stanford v. Kentucky,*[242] in which the Court had held that executing juvenile offenders comported with the Eighth Amendment.

Generally, human dignity has not prevailed in outweighing government interests in death penalty cases.[243] In *Gregg v. Georgia*,[244]

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is degrading, the concern must be that excessive flogging would lead to something even more degrading. ETZ HAYIM, TORAH AND COMMENTARY 1132 (David L. Lieber ed., Rabbinical Assembly, 2001).

235. 536 U.S. 304 (2002).

236. *Id.* at 311 (citing Trop v. Dulles, 356 U.S. 86 (1958)).

237. *Id.* at 316, 321 (citing Penry v. Lynaugh, 492 U.S. 302 (1989)).

238. *Id.* at 311.

239. 125 S. Ct. 1183 (2005).

240. *See id.* at 1192–98. The Court noted three general differences between juveniles under the age of eighteen and adults regarding culpability: (1) juveniles are immature and irresponsible; (2) juveniles are more vulnerable to negative outside influences like peer pressure; and (3) juveniles' characters are not well formed. *Id.* at 1195–96. According to the Court, these qualities render juveniles less culpable. *Id.*

241. *Id.* at 1196.

242. 492 U.S. 361 (1989), *overruled by Roper*, 125 S. Ct. at 1198.

243. The Court has upheld death penalty statutes as constitutional in cases involving murder. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). The Justices have never

the Court held the Eighth Amendment bars punishments that are "barbaric" or "excessive" relative to the crime. Justice Stewart, writing for the plurality, noted that a penalty must accord with the dignity of man pursuant to the Eighth Amendment.[245] This means, Justice Stewart stated, "the punishment must not be 'excessive.'"[246] The Court outlined the following test for determining whether a punishment is excessive: "A punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[247] The plurality in *Gregg* concluded the punishment of death for deliberate murder was not the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. Generally, human dignity concerns fail to govern the Court's decision-making in the death penalty cases.

The role of human dignity is troubling in the death penalty cases. The Court's opinion in *Atkins* focused on human dignity concerns arising from an evolved moral standard, a national consensus that it is morally wrong to impose the death penalty on mentally retarded. Yet, nowhere in *Atkins* does the Court discuss or describe the particular indignity suffered by the mentally retarded death row inmate on being executed. Certainly the Court does not compare the indignity suffered by the death row inmate who is mentally retarded to the indignity suffered by the inmate who is not mentally retarded. Rather, despite couching the decision in terms of human dignity, Justice Stevens wrote that the mentally retarded defendant is somehow less culpable; the purposes behind the penalty are not served with the mentally retarded defendant, and the procedural protections are suspect with the mentally retarded inmate.[248]

Presumably, however, executing a death row inmate results in the same assault on human dignity for the mentally retarded inmate as

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held a particular method of capital punishment unconstitutional. *See* Rosenberg & Rosenberg, *supra* note 234, at 1204. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down certain death penalty statutes on grounds the statutes, as applied, were unconstitutionally discretionary and discriminatory. In *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), the Court held the death penalty was a grossly disproportionate and excessive punishment for the crime of rape.

244. 428 U.S. 153 (1976).

245. *Id.* at 173 (plurality opinion).

246. *Id.*

247. *Id.*

248. Atkins v. Virginia, 536 U.S. 304, 317 (2002). The objectives underlying the death penalty are retribution, incapacitation, and deterrence. *See Gregg*, 428 U.S. at 183 (plurality opinion).

for the death row inmate who is not mentally retarded.[249] Yet, in death penalty cases, human dignity underlying the Eighth Amendment has faltered except with regard to the mentally retarded inmate and the inmate under the age of eighteen. According to Kant we possess human dignity because of our ability to reason;[250] yet, the Court has advanced the dignity of only the death row inmates who lack the ability or maturity to reason.

To further complicate the question, and as discussed more fully below, in the "right to die" cases,[251] the Court has explicitly recognized human dignity concerns. Given these concerns, the Court has suggested that *competent* patients have a right to choose whether to refuse unwanted medical treatment when death is imminent.[252] Yet, the Court rejected the comparable human dignity concerns with regard to the incompetent patient.[253] Thus, the Court has expressed a willingness to advance the human dignity of the competent patient but not of the incompetent patient.

Many scholars have noted the tension between the Court's language regarding the Eighth Amendment and the Court's decisions in these cases.[254] In an article concerning Biblical methods of punishment, Irene and Yale Rosenberg describe this tension as resulting from the inconsistency between the Court's language and its actions.[255] The Court requires that the Eighth Amendment gain its meaning from "evolving standards of decency" and that the punishment accord with the "dignity of man." Yet, if a substantial number of states allow a certain punishment, the Court will typically uphold the

249. Arguably, the assault on the dignity of the non-mentally retarded inmate may be stronger because of an increased mental awareness.

250. *See* Bedau, *supra* note 26, at 153–54.

251. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), which involved a constitutional claim by the parents of an incompetent woman to end her artificial feeding and hydration, Justice Rehnquist described the question as "whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'" *Id.* at 277.

252. *Id.* at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

253. *Id.* at 283–85.

254. *See* Bedau, *supra* note 26, at 148–49 (making a compelling argument that we cannot understand the Eighth Amendment prohibition without "tacitly embracing the values it protects"). Bedau asks regarding the Eighth Amendment: "[I]s it possible that our Constitution prohibits cruel and unusual punishments as a matter of fundamental rights but without regard to whether doing so protects or respects human dignity?" *Id.* at 151. Ultimately, Bedau resolves the tension by concluding that human dignity, which underlies the Eighth Amendment, is inconsistent with the death penalty. "A society that understands and respects the dignity of persons will not pretend that it can empower other human beings in their official roles as agents of the criminal justice system to exact such a forfeiture [one's very status as a person]." *Id.* at 177.

255. Rosenberg & Rosenberg, *supra* note 234, at 1202–03.

state law.[256] Thus, though the Court requires that the penalty not be excessive and that it preserve human dignity, the state is not required to choose the least severe punishment.[257]

The Supreme Court's death penalty jurisprudence is also troubling because, more so than in other constitutional jurisprudence, the Court's language regarding the Eighth Amendment belies the outcome. The Court, while expressly describing human dignity as underlying the Eighth Amendment, has upheld most death penalty statutes, stating that public morality questions should be left to the legislature.[258] Twice in *Gregg*, Justice Stewart reminded the reader that public perception of the death penalty is not the sole consideration: "The court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment."[259] Yet the Court contemplated the role of human dignity, this guiding precept, in words only, as nowhere in its analysis does the Court weigh human dignity concerns against the state's interests in deterrence, retribution, and incapacitation.[260]

The Eighth Amendment jurisprudence demonstrates the need for the Court to develop a test or standard for consistent decision-making with regard to human dignity. Specifically, the Court must decide whether human dignity concerns should apply, regardless of public opinion concerning whether human dignity should be advanced. At present, the Court's language regarding human dignity underlying the Eighth Amendment is meaningless. The Court needs a cogent method for determining whether human dignity concerns should prevail in death penalty and other Eighth Amendment cases.

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256. *Id.*

257. *Id.* at 1202.

258. Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."). The Court is thus adhering to the public opinion concerning the need to advance the dignity of the death row inmate.

259. *Id.* at 182. Earlier in the opinion, Justice Stewart wrote that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Id.* at 173.

260. In *Gregg*, the Court made clear that the death penalty is to serve "two principal purposes: retribution and deterrence of capital crimes by prospective offenders." *Id.* at 183. Retribution, according to the Court, "is no longer the dominant objective of the criminal law." *Id.* The Court in *Gregg* refered to the evidence on deterrence as inconclusive: "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive." *Id.* at 184–85.

6. *Fourteenth Amendment Due Process or Equal Protection Claims Involving an Individual's Ability to Choose How and When to Die When Death Is Imminent*

The Court has repeatedly acknowledged human dignity concerns regarding constitutional claims in "right to die"[261] and physician-assisted suicide cases. The Court has framed the human dignity concerns as involving privacy and autonomy against unwanted bodily intrusions and as allowing terminally ill patients to die without unnecessary pain and suffering. However, in the cases to date, the Court has yet to decide these human dignity concerns outweigh government interests in the cases involving a patient's "right to die" or to assistance in dying.[262]

In *Cruzan v. Director, Missouri Department of Health*,[263] which involved a parents' request to withdraw life-sustaining measures from their incompetent daughter, the Court, in a five to four decision, concluded that the State of Missouri could require clear and convincing evidence of an incompetent patient's wish concerning the withdrawal of life-sustaining treatment. By doing so, the Court rejected the "right to die" of Nancy Cruzan, who was rendered incompetent by injuries sustained in an automobile accident. While acknowledging Cruzan's liberty interest in refusing unwanted medical treatment, the Court held that government interests[264] outweighed Cruzan's liberty concerns. "In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state."[265] Thus, the Court required the continued feeding of Nancy Cruzan. Despite ruling for the state with regard to Nancy Cruzan, the Court, in an opinion by Justice Rehnquist, recognized that a *competent* person has a constitutionally protected liberty interest under the Fourteenth Amendment to refuse unwanted

261. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1990) (regarding the term "right to die").

262. The public debate concerning Theresa Schiavo has certainly demonstrated the need for guidance from the Court on these issues. *See* Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U. L. REV. 971 (2004); Barbara A. Noah, *Politicizing the End of Life: Lessons from the Schiavo Controversy*, 59 U. MIAMI L. REV. 107 (2004).

263. 497 U.S. 261 (1990).

264. The Court cited the following governmental interests regarding the Missouri statute: (1) the state's interest in safeguarding the personal element of choosing to die; (2) the state's interest in guarding against potential abuses; and (3) the state's interest in preserving life. *Id.* at 281–83.

265. *Id.* at 284.

medical treatment.[266] "But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[267] Because of the absence of an informed and voluntary choice, however, an incompetent person lacks the same right.[268]

Justice Brennan, in his dissent, rejected the majority's "clear and convincing" evidence standard in light of what Justice Brennan described as Cruzan's "fundamental right to be free of unwanted nutrition and hydration."[269] Justice Brennan detailed what he described as the indignity of Cruzan's circumstances.[270] Justice Brennan phrased his concern in terms of human dignity: "Nancy Cruzan is entitled to choose to die with dignity."[271] "For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence."[272]

Similarly, Justice Stevens, dissenting, began his constitutional inquiry by stating, "we have construed the Due Process Clause to preclude physically invasive recoveries of evidence not only because such procedures are 'brutal' but also because they are 'offensive to human dignity.'"[273] Justice Stevens went on to describe the sanctity and privacy of the human body as "fundamental to liberty." Accordingly, Justice Stevens concluded Missouri's treatment of Cruzan was unjust and unconstitutional.[274]

Seven years after the Court acknowledged the right of competent persons to refuse unwanted treatment, in companion cases involving physician-assisted suicide, *Washington v. Glucksberg*[275] and *Vacco v.*

266. *Id.* at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from prior decisions.").

267. *Id.* at 279.

268. *Id.* at 286–87. Nancy Cruzan died five months after the Court's decision. After the Court's decision, Cruzan's family brought new evidence of her wishes to die to a state trial court. In light of this new evidence (testimony from friends who had not come forward sooner because they knew Cruzan only by her married name), the state did not oppose removing the feeding tube. The court ruled in favor of the family. *See* MARK A. HALL ET AL., BIOETHICS AND PUBLIC HEALTH LAW 269 n.1 (2005).

269. *Cruzan*, 497 U.S. at 302 (Brennan, J., dissenting).

270. *Id.* at 301. Justice Brennan described Cruzan's physical condition in detail, including how she was fed through a tube in her stomach.

271. *Id.* at 302.

272. *Id.* at 311 (citing Brophy v. New Eng. Sinai Hosp., Inc., 497 N.E.2d 626, 635–36 (Mass. 1986), for the notion that a state's duty to preserve life must recognize an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity).

273. *Id.* at 342 (Stevens, J., dissenting) (citing Rochin v. California, 342 U.S. 165 (1952)).

274. *Id.* at 344.

275. 421 U.S. 702 (1997).

Quill,[276] the Court held there is no constitutional right to physician-assisted suicide. The statute at issue in *Glucksberg*, Washington's Natural Death Act, prohibited "aiding another person to attempt suicide."[277] The New York statute, cited in *Vacco*, prohibited "intentionally causing or aiding another person to commit suicide."[278] In *Glucksberg*, the plaintiffs sued under the Due Process Clause of the Fourteenth Amendment; the plaintiffs in *Vacco* pursued the case under the Equal Protection Clause. Justice Rehnquist described the constitutional issue in both cases as whether liberty includes a right to commit suicide and, if so, whether the right includes a right to assistance in doing so.[279]

The Court held against the plaintiffs in both cases, finding no right to physician-assisted suicide.[280] The Court weighed the patient's liberty interest against the competing state interests in preserving life, protecting the "integrity and ethics of the medical profession,"[281] protecting vulnerable groups from abuse and mistakes, and ensuring that permitting suicide does not lead to involuntary euthanasia.[282] The Court distinguished the issue in *Cruzan*, which the Court described as involving a liberty interest in refusing unwanted medical treatment, from the issue regarding the right to assistance in hastening death.[283]

Justice Stevens, whose strong dissent in *Cruzan* focused on human dignity concerns and the related assault on Cruzan's liberty,[284] concurred in *Glucksberg* and *Vacco*. Justice Stevens again tied a person's constitutional right to refuse treatment to human dignity. He disagreed with Justice Rehnquist's notion of a common law right to refuse treatment.[285] Justice Stevens viewed petitioners' claims as protecting matters "central to personal dignity and autonomy."[286] Justice Stevens described the right to refuse treatment as "an aspect of a far broader and more basic concept of freedom that is even older

276. 521 U.S. 793 (1997).

277. WASH. REV. CODE § 9A.36.060(1) (1994).

278. N.Y. PENAL LAW § 125.15 (McKinney 1987).

279. *Glucksberg*, 521 U.S. at 723.

280. Justice Rehnquist described the state interests in the Washington statute as follows: (1) preserving life; (2) protecting the integrity and ethics of the medical profession; (3) protecting vulnerable groups from abuse, neglect, and mistakes; and (4) ensuring that assisted suicide will not start it down a path toward voluntary and perhaps involuntary euthanasia. *Id.* at 729–33.

281. *Id.* at 731.

282. *Id.* at 732.

283. *Id.* at 725–26.

284. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 344 (1990) (Stevens, J., dissenting) ("Choices about death touch the core of liberty . . . . The decision we review thereby interferes with constitutional interests of the highest order.").

285. *Glucksberg*, 521 U.S. at 742 (Stevens, J., dissenting).

286. *Id.* at 744 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

than the common law."[287] Justice Stevens, like Justice Brennan, viewed preserving human dignity as central to constitutional decision-making.

Despite ruling for the government in these "right to die" and physician-assisted suicide cases, the Court has acknowledged a constitutional right to die with dignity in terms of avoiding suffering at the time of death.[288] Justices O'Connor and Breyer specifically noted that the laws of New York and Washington do not prevent the provision of palliative care, stating the statutes "do not prohibit doctors from providing patients with drugs sufficient to control pain."[289] According to one commentator, "a majority of the Court . . . clearly accepted that dying individuals have a right to be free of unnecessary pain and suffering at the end of life."[290]

In *Cruzan*, *Glucksberg*, and *Vacco*, the Court suggested that a competent person has a constitutionally protected liberty interest under the Fourteenth Amendment to refuse unwanted medical treatment. This liberty interest arises out of human dignity concerns—a person's ability to control decisions involving his body, and a person's right to freedom from unnecessary pain and suffering.

From a human dignity perspective, the Court's distinction between the liberty interests of the incompetent person whose death is imminent and the competent person in like circumstances is more sound than in the death penalty cases. If, as Kant posited, our human dignity flows from our ability to reason,[291] the Court's opinions may demonstrate that the Court has less concern for the dignity of an incompetent person whose death is imminent than for a competent person in the same circumstances. In the death penalty cases, the situation is reversed; the Court demonstrates more concern for the human dignity of the incompetent death row inmate than for the competent one. Yet if, as William Parent posits, every individual's human dignity provides his moral status to challenge state action that demeans or humiliates regardless of his competency, human dignity

287. *Id.* at 743.

288. *See id.* at 738 (O'Connor, J., dissenting) ("There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths."). Justice Breyer stated the Court would need to revisit its conclusions in the physician-assisted suicide cases if the state law prevented provision of palliative care, "including the administration of drugs as needed to avoid pain at the end of life." *Id.* at 792 (Breyer, J., concurring). Justice Breyer, in his concurrence, suggested that dying with dignity means avoiding severe physical pain at the time of death. *See id.* at 790.

289. *Id.* at 791.

290. David A. Pratt, *Too Many Physicians: Physician-Assisted Suicide After* Glucksberg/Quill, 9 ALB. L.J. SCI. & TECH. 161, 223 (1999).

291. *See* Bedau, *supra* note 26, at 148–49.

should either prevail or not in the death penalty or right to die cases.[292]

7. *Fourteenth Amendment Due Process or Equal Protection Right to Economic Assistance*

In 1970, four years after Justice Brennan wrote the opinion upholding the constitutionality of a mandatory blood test for a criminally accused, Justice Brennan wrote the Court's decision in *Goldberg v. Kelly*,[293] a case involving welfare recipients whose benefits were being terminated.[294] In a suit brought by the commissioner of social services, the Court ruled that a prior evidentiary hearing must be held before terminating benefits of welfare recipients. The Court agreed with the lower court that only a fair hearing prior to terminating welfare benefits satisfied due process. Terminating benefits while the commission was determining eligibility deprives recipients "of the very means necessary to live while he waits."[295]

In the Court's opinion, Justice Brennan linked the petitioner's constitutional claim to living with human dignity. "From its founding the Nation's basic commitment has been to foster the *dignity* and well-being of all persons within its border."[296] Justice Brennan went on to describe the impact of the state's failure to provide public assistance:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'[297]

According to some, Justice Brennan established a new concept of dignity in *Goldberg*: "[H]e was harnessing the power of the moral vision of vindicating human dignity and putting it to work to drive the constitutional engine in the decisions of the Supreme Court. . . . The *Goldberg* holding moved the human dignity focus to a realm beyond

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292. Obviously, other factors, such as the competing government interests, impact the Court's decision. Yet it is hard to see how these interests differ in the right to die and death penalty cases depending on the competency of the individual at issue.

293. 397 U.S. 254 (1970).

294. In a string of welfare rights cases, lawyers sought to establish a "right to live," requiring the federal government to guarantee a minimum standard of living to all citizens. *See* Hirsch, *supra* note 112, at 110 n.9. The welfare rights movement is often compared to the civil rights movement in terms of legal process used to fight for welfare reform. Hirsch posits that the Supreme Court's pattern of accepting and rejecting these constitutional claims reflects differences in how the Justices view whether economic opportunities are available to the poor.

295. *Goldberg*, 397 U.S. at 266.

296. *Id.* at 264–65 (emphasis added).

297. *Id.* at 265.

the criminal justice system."[298] Yet, by 1970, the Court had repeatedly identified human dignity as the grounds for constitutional rights to privacy and Fourth Amendment protections. *Goldberg* fell in line with these holdings.

After *Goldberg*, the Court's willingness to advance human dignity in welfare rights cases faltered. In *Dandridge v. Williams*,[299] the Court rejected the notion that the "maximum grant" provision of Maryland's Aid to Families With Dependent Children, by which families, no matter the number of children, could receive only a certain amount of benefits,[300] violated the Equal Protection Clause. The Court applied a rational basis test to the constitutional analysis rather than treating the classification (families with greater numbers of children) as requiring a compelling state interest. In their dissent, Justices Brennan and Marshall chided the majority for using the same constitutional test used for business regulations for "the literally vital interests of a powerless minority—poor families without breadwinners."[301]

In *United States v. Kras*,[302] a case strikingly similar to *Boddie v. Connecticut*,[303] the Court upheld the fee provisions of the Bankruptcy Act in a challenge by an indigent petitioner in bankruptcy. The Court held that *Boddie* did not extend to no-asset bankruptcy proceedings, as no fundamental interest (marriage in *Boddie*) depended on availability of a discharge in bankruptcy.[304] The Court also rejected the equal protection argument, holding that bankruptcy was not a fundamental right, and the legislation did not "touch upon . . . the suspect criteria of race, nationality, or alienage."[305]

The most startling rejection of human dignity as a value in the welfare rights cases occurred in *Harris v. McRae*.[306] In *Harris*, a class of pregnant women sued, claiming the Hyde Amendment of the Medicaid

298. Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223, 231–32 (1998).

299. 397 U.S. 471 (1970).

300. Certain dependent children would thus receive no aid if the other dependents had received the benefits of the maximum amount.

301. *Id.* at 520 (Marshall, J., dissenting). Rather than explicitly defining the benefits sought as a "fundamental right," the dissenters urged that the Court should have decided the proper test based on the character of the classification of those involved; the relative importance to individuals in the discriminated class of the benefits they do not receive; and the asserted state interests. "At the same time, the Court's insistence that equal protection analysis turns on the basis of a closed category of 'fundamental rights' involves a curious value judgment." *Id.* at 521 n.14. The dissenting Justices cited the Universal Declaration of Human Rights as a source for the notion that there is a "right" to welfare assistance. *Id.*

302. 409 U.S. 434 (1973).

303. 401 U.S. 371 (1971).

304. *Kras*, 409 U.S. at 446 ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.").

305. *Id.*

306. 448 U.S. 297 (1980).

program violated the equal protection guarantees of the Due Process Clause by denying them funding for medically necessary abortions. At issue was whether the Medicaid program, which subsidizes a woman's medically necessary services, could fail to subsidize a medically necessary abortion.

The Court rejected the plaintiffs' constitutional claim, holding that due process does not confer entitlement to federal funds for the *protected* right to have an abortion. The Court held as follows:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.[307]

While human dignity prevailed in allowing women freedom to choose whether to terminate a pregnancy, human dignity was outweighed when the government had to get involved by paying for that freedom.[308]

Justice Marshall, dissenting in *McRae*, referred to the Hyde Amendment as "the product of an effort to deny to the poor the constitutional right recognized in *Roe v. Wade*."[309] Justice Marshall linked the outcome to the Court's "unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds."[310] While not using the term human dignity, Justice Marshall reflected on a welfare recipient's dilemma to either have the child or obtain a "back-alley" abortion.[311] Justice Blackmun, in his dissent, described as "condescension" the Court's statement that a medicare recipient faced with needing a medically necessary abortion "may go elsewhere for her abortion."[312]

The welfare rights decisions are troubling with regard to the role of human dignity. While human dignity underlying a woman's right to choose prevailed in cases like *Roe*, *Carey*, and *Carhart*, the majority failed to even mention the word dignity in *McRae*, which involved the state's need to subsidize this protection. The dissenting Justices in

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307. *Id.* at 316.

308. *Id.* at 347 (Marshall, J., dissenting) ("Ultimately, the result today may be traced to the Court's unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of funds."). Again, these case are distinct in that a petitioner is seeking the state's interference, to provide financial assistance, rather than objecting to state interference as unconstitutional. With regard to the original definition of human dignity, these cases do not comfortably fit, as there is no state action that demeans or humiliates (although arguably state action may lead to economic dependence). Petitioners in these cases are seeking state action to advance their human dignity.

309. *Id.* at 338.

310. *Id.* at 347.

311. *Id.* at 337.

312. *Id.* at 348 (Blackmun, J., dissenting).

McRae described the unfairness, "condescension," and demeaning nature of the statute at issue.[313]

As shown, human dignity has proven frail as a constitutional value in cases involving the government's provision of economic assistance. In *Goldberg*, Justice Brennan commenced a path in which the Court, looking through the due process lens, relied on a national "commitment" to assure the human dignity of all citizens by providing a minimum standard of life. Yet, dignity as a constitutional value has not succeeded in outweighing competing state economic interests, particularly where the state must take steps to interfere. During the past thirty-five years, the Court has typically reversed lower court decisions favoring the poor.[314] These rulings reflect that, constitutionally speaking, the state need not take affirmative steps to protect and preserve human dignity.

8. *First Amendment Right to Free Speech and Protection of an Individual's Public Image, as Against Another's First Amendment Right to Free Speech*

In *Cohen v. California*,[315] the infamous four-letter word on petitioner's jacket case, Justice Harlan emphasized the purpose of preserving human dignity. According to Justice Harlan, open debate, and the "verbal tumult, discord, and even offensive utterance" sometimes associated with such debate, signifies the nation's strength.[316] Citing the concurring opinion by Justice Brandeis in *Whitney v. California*,[317] Justice Harlan noted that freedom of expression "will ultimately produce a more capable citizenry and more perfect polity and . . . no other approach would comport with the premise of individual

313. Justice Blackmun joined the dissenting opinion of Justices Brennan and Stevens. In his separate dissenting opinion, he referred to the Court's holding that a woman "may go elsewhere for her abortion" as "condescension," "disingenuous," and "alarming." *Id.*

314. *See* Matthew Diller, *Law and Equality: Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1421 n.96 (1995) ("For the past fifteen years, Supreme Court decisions on public benefits issues have mostly taken the form of reversals of lower court decisions in favor of poor people." (citing Sullivan v. Stroop, 496 U.S. 478 (1990); Lyng v. Int'l Union, UAW, 485 U.S. 360 (1988); Bowen v. Gilliard, 483 U.S. 587 (1987); Bowen v. Yuckert, 482 U.S. 137 (1987); Lukhard v. Reed, 481 U.S. 368 (1987))). In general, the Court has failed to heed human dignity concerns in the welfare rights decisions. The exception is *Boddie v. Connecticut*, 401 U.S. 371 (1971), decided soon after *Goldberg*, in which the Court held due process prohibited Connecticut from denying access to state courts based solely on inability to pay.

315. 403 U.S. 15 (1971).

316. *Id.* at 24–25.

317. 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.").

dignity and choice upon which our political system rests."[318] The Court in *Cohen* held that petitioner's conviction for engaging in offensive conduct through vulgar language should be reversed, as petitioner's speech was not "fighting words" likely to promote violence.[319]

Similarly, in *Bose Corp. v. Consumers Union of United States, Inc.*,[320] Justice Stevens highlighted the two objectives of preserving human dignity through First Amendment freedom of expression: "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[321] Bose filed a disparagement action based on an evaluation of its loudspeaker by Consumer Reports. The Court held the language did not fall outside the scope of the "majestic protection"[322] afforded by the First Amendment.

On the opposing side of freedom of expression, in libel/reputational injury decisions, the dignity described by the Court differs somewhat from the human dignity described in the privacy/liberty interest, Fourth, Fifth, and Eighth Amendment jurisprudence. In the libel cases, the Court emphasizes the reputational aspect of human dignity, an aspect similar to the right to the free unfolding of personality under the German constitutional system.[323] In these cases, the Court weighs human dignity concerns arising out of an alleged libel against competing First Amendment concerns.[324]

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318. *Cohen*, 403 U.S. at 24.

319. *Id.* at 20. The Court also noted that those who were offended by the conduct could simply look away. *Id.* at 22.

320. 466 U.S. 485 (1984). In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), Justice Brennan, in his dissent, cited *Bose* for the notion that "freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth." *Id.* at 787 (Brennan, J., dissenting).

321. *Bose*, 466 U.S. at 503.

322. *Id.* at 504. The Court spent much of the opinion analyzing the actual malice standard and the need for independent appellate review of the language at issue in the case.

323. *See* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 971 (discussing the notion of outward focused human dignity in contrast to inward focused dignity in German and American jurisprudence). In the German constitutional system, "[h]uman dignity is the central value." *Id.* Article 1(1) of the Basic Law states that "'the dignity of man shall be inviolable.'" *Id.* German personality law has two components: freedom of action (which includes protecting activities like freedom to travel or to pursue a sport or occupation) and protection of a personal sphere (which includes protecting privacy, informational self-determination, and control over one's portrayal in society).

324. These cases also differ from the remaining types because the state does not inflict the alleged injury.

In *Rosenblatt v. Baer*,[325] a journalist challenged a judgment awarding damages to a county building supervisor based on an allegedly libelous story in which the journalist alleged the supervisor overspent public funds on a public facility. Having recently adopted the *New York Times v. Sullivan*[326] test, the Court held the building supervisor was a public figure and thus could not recover damages based on the proof adduced at trial. The Court remanded the case for retrial on the actual malice issue.

Justice Stewart, in his concurring opinion, championed "the right of a man to the protection of his own reputation."[327] This right, according to Justice Stewart, "reflects no more than our basic concept of the essential *dignity* and worth of every human being—a concept at the root of any decent system of ordered liberty."[328] Justice Stewart acknowledged that the protection of private personality is left primarily to the individual states. "But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."[329] Although the First Amendment prevailed in governing the outcome in *Rosenblatt*, Justice Stewart described dignity, meaning the protection of an individual's reputation, as a constitutional value.

Ten years after *Rosenblatt*, Justice Brennan reaffirmed the notion of dignity underlying the right to protection of one's reputation. In *Paul v. Davis*,[330] the Court held a criminally accused could not sustain a § 1983 action against a police chief who circulated a flier on which the accused's mug shot was displayed. The photo was taken at the time of the accused's arrest for a prior offense. The accused included a libel action in his civil rights suit, claiming the police department injured his reputation by publishing the photo.

The Court rejected the defamation claim. Without injury to tangible interests or state provided rights, the alleged libel did not suffice to invoke the accused's due process right. Justice Brennan dissented, referring to the right to enjoy one's good name and reputation, falling within the concept of personal "liberty."[331] Justice Brennan recalled the words of Justice Stewart that an individual's right to protect her name reflects "no more than the basic concept of the essential worth and dignity of every human being."[332]

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325. 383 U.S. 75 (1966).

326. 376 U.S. 254 (1964).

327. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

328. *Id.* (emphasis added).

329. *Id.*

330. 424 U.S. 693 (1976).

331. *Id.* at 723 (Brennan, J., dissenting).

332. *Id.*

This notion of dignity, which underlies the right to protection of personality, is like the notion of dignity in German constitutional jurisprudence. This dignity lacks the fortitude of the dignity underlying our right to privacy and the Fourth Amendment, as, to date, human dignity as a reputational interest has not prevailed against the countervailing interest in First Amendment freedom of expression.

The interesting flip side of the failure of human dignity concerns to prevail in *Rosenblatt* and *Paul* is William Parent's notion that dignity underlies the First Amendment right to free speech. "[I]t serves to prohibit unjust personal denigration in the form of coerced silence imposed on despised minorities. The government may not distribute free speech in ways that are arbitrarily contemptuous of individual citizens."[333]

IV. CONSTITUTIONAL STANDARDS FOR DETERMINING WHETHER HUMAN DIGNITY CONCERNS SHOULD PREVAIL

Rather than following public opinion and executive branch imperatives, the Court should consistently and expressly recognize human dignity as that which underlies certain constitutional rights.[334] Returning to the definition in Part II, human dignity as a constitutional value is a moral status affording individuals rights and standing against state action that demeans, offends, or humiliates. My goal in this Article is to underscore the need for the Court to persist in relying on human dignity as part of existing constitutional standards by treating human dignity as a value of constant strength. By doing so, the Court will guide lower courts in their decision-making,[335] ease the

333. Parent, *supra* note 43, at 69.

334. Some may contend the Court does not include human dignity in constitutional standards because the value is so subjective that the Justices will forever disagree on whether human dignity is even at issue in a case. Yet, the same could be said for every constitutional guarantee. The Justices have certainly disagreed on whether a person's liberty interest/right to privacy is at stake or whether a case even touches on equal protection concerns. In every case of constitutional interpretation, the Justices must decide whether constitutional rights or interests are implicated. The Justices can decide, and repeatedly have decided, whether a constitutional claim involves a petitioner's human dignity.

335. According to commentators, "[t]here are three main functions that a judicial opinion serves: first, to give guidance to other judges, lawyers, and the general public about what the law is; second, to discipline the judge's deliberative process with a public account of the decision . . . and, third, to persuade the court's audiences that the court did the right thing." Gewirtz, *supra* note 109, at 1039. My review of circuit court decisions shows substantial inconsistency in the role of human dignity in constitutional jurisprudence among the circuit courts. A LEXIS search of the term human dignity along with constitution revealed many more uses in the Ninth Circuit than in the Fifth Circuit. Specifically, the Ninth Circuit search yielded thirteen decisions. An identical search in the Fifth Circuit produced two decisions. In the Seventh Circuit, the search revealed one case. Though not sci-

tension in existing constitutional jurisprudence, and advance the goal of consistency and sound reasoning in its decision-making.[336]

In *Hope*, the prison inmate tied to the hitching post case, and in *Atkins*, which involved executing the mentally retarded, human dignity played an express role in the Court's Eighth Amendment decision-making. Under the constitutional test in *Atkins* and *Hope*, the Court recognized human dignity as that which gives content to the Eighth Amendment, factoring human dignity into its analysis of the excessiveness of the punishment. In weighing the interests at stake, Justice Stevens included Hope's human dignity: "Despite the clear lack of an emergency situation, the respondents knowingly subjected him to . . . unnecessary pain caused by the handcuffs . . . and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation."[337]

Yet, in death penalty cases such as *Gregg*, the Court adhered to popular opinion in deciding whether the punishment was excessive only in light of fulfilling the government objectives of deterrence and retribution.[338] Nowhere in *Gregg* did the Court view excessiveness as it relates to human dignity by considering whether a less demeaning and offensive punishment (presumably, life imprisonment) would satisfy the government's goals.

The Eighth Amendment requires a punishment "accord with the dignity of man."[339] Under this standard, the Court should strike down a punishment as excessive when it causes pain, demeans, humil-

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entific, these search results show an uncertainty on the part of the circuit courts concerning whether to afford the value weight in constitutional decision-making.

336. I am not joining the debate about whether the Court engages in (or should engage in) "principled" decision-making. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1151 (1995) (arguing that for a decision to succeed in justifying the result for which it is offered, "it must appear principled"); Peller, *supra* note 149, at 562 ("The passage I have quoted is the culmination of Wechsler's argument that *Brown v. Board of Education* and other decisions outlawing racial segregation were illegitimate because the controversy lacked a 'principled' resolution."); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 9 (1983) ("Decision according to principle, then, is decision according to a publicly stated ground that is consistent with the grounds the judge uses to decide other cases."). I mean to argue only that the Court's decision regarding a particular constitutional claim should be intellectually sound when compared to another decision regarding the same constitutional claim.

337. Hope v. Pelzer, 536 U.S. 730, 738 (2002).

338. The primary government objectives of the death penalty are retribution and deterrence. Incapacitation is also a stated objective, though not a primary one. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

339. *Hope*, 536 U.S. at 737 ("The unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986))); Atkins v. Pelzer, 536 U.S. 304, 311 (2002); *Gregg*, 428 U.S. at 173 (plurality opinion) (holding "excessiveness" has two components: first, the punishment cannot involve the unnecessary

iates, or offends a defendant either arbitrarily or more than is necessary to satisfy the stated purpose of the punishment. Accordingly, the Court would strike down a death penalty statute unless the government could show that a less demeaning or humiliating punishment would not serve the intended purposes of the statute.[340] The Court would also consider whether the statute arbitrarily impacted a particular group under this test. If life imprisonment, presumably less demeaning than death, would the serve the statute's goals of deterrence and retribution as effectively as the death penalty, the death penalty would not survive constitutional muster. If life imprisonment would not satisfy these purposes, the death penalty statute would survive.

Ultimately this standard may not lead to different results. In *Atkins*, the government would have been required to show that life imprisonment—presumably less humiliating and demeaning than death—would not serve the statute's purposes for the statute to survive. The Court would thus consider the effectiveness of deterrence and retribution with regard to the mentally retarded offender in light of the punishment's assault on his dignity. If these purposes would be served as effectively with life imprisonment, the less demeaning punishment, the Court would find the statute unconstitutional. Such a test would reconcile the Court's Eighth Amendment language with its decisions by making human dignity a part of the constitutional standard. Presumably, the Court in *Atkins* would reach the same result.[341]

In *Gregg*, the government would have had to make the same showing for the statute to pass muster with regard to the non-mentally retarded inmate. The government would again try to convince the Court that life imprisonment would not produce the same societal results as the death penalty. Applying this test, the Court would consider the societal interests in the death penalty in light of the impact

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and wanton infliction of pain, and second, the punishment must not be grossly disproportionate to the crime).

340. The Court currently does not require the least severe penalty. *Gregg*, 428 U.S. at 175 (plurality opinion). Further, the evidence concerning the effectiveness of the death penalty as a deterrent is, according to the Court, inconclusive. *Id.* at 184 ("Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive."). Of course, considering the human dignity of the death row inmate is ludicrous to some. Yet, the Court has certainly considered the dignity of the mentally retarded death row inmate in its decision-making. The very notion at the heart of the Eighth Amendment is, according to the Court, the dignity of man. Thus, consistent with this notion, the Court should include human dignity in its analysis.

341. Arguably, the Court's analysis was very similar to that proposed here. The Court determined that with the mentally retarded offender, the purposes were not effectively served.

on the human dignity of the offender. Accordingly, rather than determining the constitutionality of death penalty statutes based on the number of states allowing the practice, the Court would decide based on whether a punishment taking less of a toll on the dignity of the offender could still serve the statute's purposes. This analysis would give meaning to the Court's often-repeated statement that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[342]

Similarly, with regard to the First, Fourth, Fifth, and Fourteenth Amendments, the Court should not only formulate but also apply its constitutional standard to include human dignity. With regard to Fourth Amendment search and seizure jurisprudence, the Court should use its current "reasonableness" test, while explicitly including in reasonableness the impact of government action on the defendant's dignity. In *Montoya de Hernandez*, for example, the Fourth Amendment case involving the woman suspected of smuggling drugs whom authorities detained at the Los Angeles airport for approximately twenty-four hours before having her examined for drugs, the government would have been required to show the lengthy detention was reasonable *in view of the humiliation and degradation she suffered.* In all likelihood, the outcome in *Montoya de Hernandez* would differ using this standard, as evidence revealed that the airport officials failed to even seek a warrant until approximately sixteen hours after she was detained.[343] She was not examined until approximately twenty-seven hours after her ordeal began. Thus, the search was unreasonable, as it should have been (and could have been) conducted without humiliating and demeaning de Hernandez by detaining her incommunicado in a room at the Los Angeles airport for twenty-four hours before she was searched.

Rather than recommending new constitutional tests, this Article urges the Court to recognize and rely on human dignity within existing constitutional standards. Human dignity is unique in that the Court has repeatedly described it as that which gives meaning to our constitutional rights. If, as the Court has repeatedly stated, the "overriding" function of the Fourth Amendment is to protect human dignity, the "basic concept underlying the Eighth Amendment" is human dignity, "part of the constitutional liberty to choose" is human dignity, and human dignity is the "constitutional foundation" underlying the

342. Stanford v. Kentucky, 492 U.S. 361, 392 (1989); *Gregg*, 428 U.S. at 180 (plurality opinion).

343. United States v. Montoya de Hernandez, 473 U.S. 531, 532–35, 547–49 (1985). Justice Rehnquist, writing for the Court, stated that customs officials sought a court order from a magistrate sixteen hours after her flight had landed. Justice Brennan stated that after almost twenty-four hours had passed, "someone finally had the presence of mind to consult a Magistrate and to obtain a court order for an x-ray and a body-cavity search." *Id.* at 547 (Brennan, J., dissenting).

Fifth Amendment, the Court must nurture human dignity as part of the standards for these amendments.

Two recent cases, *Lawrence* and *Hamdi v. Rumsfeld*,[344] demonstrate the Court moving in this direction of treating human dignity as a value having invariant strength in its decision-making. In *Lawrence*, the Court treated human dignity as an integral part of the liberty interest at stake. What is novel about *Lawrence* is not the Court's reliance on human dignity, but the Court's explicit reference to human dignity as a guiding precept. Rather than speaking of only a liberty interest, the Court explicitly referred to preserving human dignity as part of that liberty.[345] American constitutional jurisprudence has thus advanced to a point where the Court will speak openly about the role of human dignity.[346]

Hamdi also signifies a shift. In *Hamdi*, Justice O'Connor, writing for the plurality, failed to speak in terms of human dignity. Yet, the outcome, requiring that citizen-detainees receive fair notice of the factual basis for their classification as enemy combatants and a fair hearing before a neutral decision-maker, demonstrates that human dignity partially shaped the decision. In sharp contrast to *Korematsu*[347] and *Hirabayashi*,[348] the Court in *Hamdi* did not end its analysis by granting unlimited discretion to the military in detaining American citizens suspected of enemy activity. Rather, the Court imbued Hamdi's constitutional liberty interest with value—the need to preserve Hamdi's human dignity, despite the ongoing military conflict.

Justice O'Connor described Hamdi's liberty interest as "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[349] She wrote of the "values that this country holds dear" and the "privilege that is American citizenship."[350] In contrast, nowhere in *Korematsu* and *Hirabayahsi* did the Court even acknowledge the petitioners' constitutional rights and guarantees.[351]

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344. 542 U.S. 507 (2004).

345. *See supra* section III.B in which the *Lawrence* Court's statements regarding dignity are detailed.

346. Presumably, the Court has at times failed to speak of human dignity because the term sounds "emotional" or too "personal."

347. Korematsu v. United States, 323 U.S. 214 (1944). *See supra* section III.A for a detailed discussion of the case.

348. Hirabayashi v. United States, 320 U.S. 81 (1943).

349. *Hamdi*, 542 U.S. at 529 (plurality opinion).

350. *Id.* at 532.

351. In *Hirabayashi*, the Court, in an opinion by Chief Justice Stone, described the solidarity of Japanese citizens and their failure to assimilate. The Court described Japanese language schools in the United States as "sources of Japanese propaganda, cultivating allegiance to Japan." *Hirabayashi*, 320 U.S. at 97.

V. CONCLUSION

The role of human dignity cannot be discerned in the Court's decision-making in the economic assistance decisions. Likewise, the Eighth Amendment death penalty jurisprudence is troubling because the Court speaks of human dignity as that which underlies the Eighth Amendment, weighing human dignity against the competing state concerns in words only. Nowhere in the Court's excessiveness analysis does the Court weigh the toll on human dignity against the stated objectives.

Presumably, however, our standard of decency continues to evolve.[352] If the evolution is slow, but steady, human dignity will routinely weigh into the Court's constitutional analysis as a value having a constant strength (rather than varying in strength according to popular opinion) during the next fifty years. Our legal landscape will thus reflect increasing concern for the human dignity of all individuals who seek the Constitution's protection.

352. The reason the Court is only beginning to speak openly of human dignity may lie in the notion of "evolving standards of decency that mark the progress of a maturing society." Regarding human rights and civil liberties, our constitutional jurisprudence is barely beyond infancy. As Justice O'Connor wrote in her book *The Majesty of Law*, the Supreme Court, which first sat in 1790, did not assume its role with regard to creating and defending individual liberties until "more than 150 years after the adoption of the Bill of Rights and more than 75 years after Congress enacted the Civil War Amendments." Beginning in the 1940s, the Court undertook handling cases involving civil liberties. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 263–64 (Craig Joyce ed., 2003). Today, the Supreme Court considers cases involving civil liberties in constitutional jurisprudence during every term.