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About the Author

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This paper is one in a series of essays on the natural law and natural rights foundations of internationally recognized human rights. The "First Principles of International Human Rights" essays propose reforms of the human rights movement for the increased protection of the fundamental and inalienable rights of all people.

Human Dignity and the Foundations of Human Rights

Paolo G. Carozza

Specifying the content of human dignity is a difficult challenge that needs the rich soil of practical experience, of seeing in practice what does and does not lead to free and flourishing human lives and communities. To till that ground, we should work constantly for a broader common understanding of basic human rights principles forged in the practical agreement among nations and peoples and respectful of legitimate pluralism among them. Our understanding and commitment to universal human rights will grow from a culture that is open to the ultimate questions of value and meaning in human life.

The place of human dignity as the cornerstone of the foundations of the modern human rights project is both self-evident and also highly ambiguous and contested. The Universal Declaration of Human Rights (UDHR) and subsequent international human rights instruments repeatedly invoke human dignity generically as the only consensually identifiable basis from which human rights are derived. And yet, nowhere in human rights law is there any more deeply fleshed-out understanding of what human dignity means, whence it comes, and in what it consists. At best, one could say that the development of the legal norms themselves constitutes a specification of the requirements of human dignity in practice, but even this is subject to significant divergences of understanding and judgment.

This role for human dignity—both essential and problematic at the same time—mirrors the virtues and vulnerabilities of the universal human rights project more generally. Deliberately grounded in a diverse practical consensus rather than in a unified and cohesive intellectual, historical, or cultural vision, human rights intentionally sideline any explicit engagement with natural law or any other philosophical framework.

Nevertheless, the overall legitimacy and long-term sustainability of the human rights project does depend strongly on its claim to correspond to widely universal truths about human flourishing, freedom, the individual, and the community, and the fundamental demands of justice. The claim that I aim to present and defend in this *Special Report* is that the thin intellectual foundations of human rights law require us to turn to more elemental aspects of human experience in order to test and evaluate the persuasiveness of human rights' claim to correspond to universal human needs and desires.

This appeal to the raw experience and practice of human dignity arises out of my perspective as a legal scholar and as a lawyer formed primarily in the common law tradition of practical reasoning—that is, someone whose central preoccupation is with facts and cases, with the raw material of human experience, and with drawing out of those concrete circumstances certain practical implications regarding the most reasonable way to order our relationships toward justice and the common good.

That methodological starting point is, in fact, an important one for my claim that in critical ways the foundation of law's preoccupation with the protection and promotion of human dignity needs to be forged in the crucible of human experience. It is an argument against treating human dignity as an abstraction, at least insofar as the concept has implications for the legal recognition of human rights. I will conclude by suggesting that relying methodologically on human experience as the touchstone for legal claims of human dignity has certain important implications for how we might structure the law of universal human rights and how we can give content to it.

The Multiplicity of Dignity Claims in Human Rights Law

The very concrete claims of human dignity that are the daily fare of international human rights bodies are as varied as can be imagined. In my own direct experience as a member of one such institution,[1] many dignity claims were powerful and moving: a Peruvian mother whose son had been "disappeared"; Jamaican men kept indefinitely in overcrowded, small, dark, and unventilated police holding cells amid garbage and urine; the leader of a Paraguayan indigenous community whose children were dying from diarrhea because they had no access to clean water. Some claims were far less compelling, such as the man who claimed that he had been subject to degrading treatment because his employer fired him for refusing to cut the long hair that was very important to his personal aesthetic preferences.[2]

Still other cases were neither easy nor clear: How does one assess the claims of dignity of an infertile woman who deeply desires to be a mother but was prohibited by law from using the *in vitro* fertilization technology that would have made it possible for her to bear children?

In each of these cases, and in many others very similar to them, the petitioners and their advocates not only made claims that their rights under the American Convention on Human Rights were infringed, but also that their human dignity was threatened or violated. When we examine how legal actors and institutions, using the language and artifacts of law, have responded to this array of different circumstances, we do not find a theoretical discourse on human dignity (at least, not one that is explicit or extended), but rather decisions that have tangible consequences stemming from the choice to recognize and protect certain kinds of claims, or to deny them.

As an extensive existing literature on human dignity and human rights has made abundantly clear, the pervasive invocation of the concept of human dignity today is accompanied by a wealth of different ideas about the meaning and scope of dignity within the plurality of moral and legal traditions of the human family. Those differences can be profound and can have dramatically different implications for how we understand and protect dignity in law, as even a very compressed comparative survey of contemporary law reveals.[3]

Interrelated Ideas. At a very high level of generality, one can find human dignity invoked across legal systems of widely divergent traditions to denote two interrelated ideas: (a) an ontological claim that all human beings have an equal and intrinsic moral worth; and (b) a normative principle that all human beings are entitled to have this status of equal worth respected by others and also have a duty to respect it in all others.

The normative principle includes within it the obligations of the state to respect human dignity in its law and policy as well. Based on this core common meaning of human dignity, there is broad consensus across legal systems that certain ways of treating other human beings ought always to be prohibited by law. Prohibitions on genocide, slavery, torture, forced disappearance, and systematic racial discrimination, for instance, represent some important examples of universal acceptance of the implications of the status and basic principle of human dignity. It is not surprising that in international human rights law, many of the clearest instantiations of the requirements of human dignity also coincide with the strongest and exceptionless norms of international law, found, for example, in the definitions of crimes against humanity or *jus cogens*.[4]

In the same way, the most widespread and evident use of dignity in human rights adjudication can be found in cases dealing with the protection of life itself and the integrity (physical or mental) of human persons. Cases are legion in which inhuman and degrading treatment is found to violate the inherent dignity of the victims, and references to the requirements of human dignity pervade the case law of virtually all systems in these areas.[5]

Beyond that core meaning of human dignity, legal experience reveals several areas in which the meaning and use of dignity has less universal resonance, but still fairly broad recognition and acceptance across several different legal traditions and systems. For instance, in many different jurisdictions, courts discuss dignity as a value central to the definition and protection of individuals' social status and social roles.

The German and South African Constitutional Courts have fined authors and publishers or even banned books because, although presented as works of fiction, they shared too many details about a particular individual's private life, in violation of his or her dignity.[6] French courts frequently require newspapers to pay damages after they publish stories or photographs about individuals without respect for their dignity.[7] This conception of dignity is not quite universal, however, and seems to be primarily employed within European courts and associated with the distinctively European conceptions of privacy (which are often quite different from those prevalent in the U.S., for instance).

Another group of cases shows that certain courts employ dignity to address the sweeping conditions that shape the lives of entire communities living in poverty and extreme vulnerability. One sees this developed very clearly in the Inter-American human rights system's cases on the "right to a dignified life" of indigenous peoples[8] or in the Constitutional Court of South Africa's decision requiring the government to devote substantial resources to developing and carrying out a plan to progressively realize the right to adequate housing.[9]

Such situations involving the dignity of excluded groups are also related to the use of human dignity in cases invoking equality as necessary to the respect for human dignity in general. Based on the proposition that all people are inherently and equally entitled to human dignity, this view, especially developed in Canadian jurisprudence, has become common in South Africa and can be found in some other jurisdictions as well.[10]

Human Dignity and Individual Autonomy. The partial overlap of understandings of dignity in these several areas gives way to even greater disagreement as we approach those questions that touch on fundamentally contested visions of the meaning and destiny of human life—especially the

meaning and nature of individual freedom. At some level, almost all jurisdictions wrestle in complicated ways with the right relationship of dignity to autonomy, but there is no clear consensus in legal practice—even within single legal systems, let alone across different traditions. From one perspective, human dignity clearly demands protection of individual autonomy. For instance, many jurisdictions ground the autonomy of patients to make free and informed choices about their medical care in human dignity,[11] and a government that does not respect people's liberty and agency to direct their own lives in fundamental ways can thereby violate their dignity.[12]

Yet, in contrast to that use of dignity, which empowers people to make free choices, dignity also plays a role in empowering government to *limit* the personal choices of their citizens. The French prohibition on dwarf-throwing is the most famous example of this,[13] but others abound. In Germany, a prohibition on peep shows has been found to be a valid protection of the human dignity of the (consenting) women being exhibited,[14] while the South African Constitutional Court upheld a ban on prostitution because the commodification of one's body necessarily diminished the human dignity of the prostitutes.[15] At times, this internal contradiction in the relationship between dignity and autonomy manifests itself dramatically. Even when safeguarding the dignity of having free choices, law frequently tempers autonomy by placing some restrictions on those choices that may be necessary to safeguard the dignity of others.[16]

At, or even beyond, the furthest margins of consensus over dignity, we find cases in which different courts (and, indeed, different judges within the same court) rely on human dignity to come to two entirely different conclusions even when dealing with strongly similar situations. Some of the most obvious examples include cases surrounding the beginning and end of human life—abortion, euthanasia, or assisted suicide.

In short, there is a practical consensus around a core meaning of human dignity; lesser but discernible convergences of understanding around a cluster of key questions, values, and circumstances that are related to dignity; and some sharp disagreements (and even contradictions) that reflect not only the variety of intellectual and moral traditions in which the concept has its roots but also differences in the specific political, social, and cultural contexts in which the very broad principle becomes instantiated. Probably the most persistent tensions have to do with those cases that inescapably deal with the relationship between dignity and competing notions of individual freedom, as well as with arguments about who counts as a human being with equal and inherent moral worth (e.g., the unborn or the terminally ill).

The Essence of Dignity. A problem then arises from the fact that the label "dignity" gets used so broadly that it elides the differences between the core areas of practical agreement and the (sometimes intensely) disputed uses of dignity at or beyond the margins of practical consensus. That ambiguity is what allows use of the normative principle of human dignity to be so vulnerable to charges of inconsistency and incoherence—and even to ideological manipulation.

While for many people the term "dignity" might immediately evoke a classical natural law understanding of the nature and destiny of human life, in fact, in its many usages it does not necessarily carry that natural law context with it at all. Instead, it can tacitly reflect any one of a wide variety of particular views of human nature and human fulfilment that may even be incompatible with one another; say, the difference between a neo-Kantian emphasis on radical individual autonomy, a Judeo-Christian vision of human freedom as intrinsically oriented toward relationship with others, or a concept of dignity in which the individual is entirely subsumed into the value of the collective.

Thus, arguments based on an unelaborated assertion of "dignity" simply mask those underlying differences. In this way, whether intentionally or only passively, the language of dignity can become a vehicle for the surreptitious imposition of one profoundly contested vision of human nature and human destiny over another—and cannot automatically be assumed to be consonant with classical natural law concepts.

Practical Consensus and the Unfinished Business of Foundations. That dynamic, well-documented and extensively discussed for decades now, brings us to an impasse. How can we arrive at a more widely understood and shared conception of dignity, such that we can broaden the ways in which the law becomes a tool for protecting and realizing it, without running aground on the rocks of incommensurable moral and intellectual premises? We seem to be lacking the capacity to move forward.

We might be tempted to conclude that dignity as a legal concept is either trivial (in the sense of being so self-evident and undisputed that it adds nothing to the discussion—say, in the case of torture or slavery) or else so irreconcilably contested as to be useful only within very circumscribed and homogenous communities of discourse, if at all. If so, it might be better simply to reject it as vacuous, quite dangerous, or both.[17]

Human Dignity: Indispensable to Human Rights

If we take that road, though, in reality we are also rejecting the good and important functions of the status and principle of human dignity noted

earlier. The ontological claim of human dignity helps sustain the very possibility of human rights as global principles that can and should help us condition sovereignty and hold accountable those who abuse power, especially the power of the state.

Human dignity represents the ideal that there is a certain existential unity to each human being, as a subject of rights, in which conflicting claims of rights need to be balanced and reconciled. The recognition of the equal and inherent worth of all human beings is, today, the only widely shared supra-positive value by which positive law and legal systems worldwide are reasonably judged and critiqued. In short, without a commitment to the idea of human dignity, human rights law as it has been painstakingly constructed over the past 70 years would not exist.

This reminder of the connection of human dignity to the foundations of human rights law in general might also begin to suggest a way to step beyond the impasse. We find there a strong parallel between the problem of human dignity and a structural problem at the origin of international human rights law itself. To draw this out, we can first recapitulate very briefly two well-established premises about contemporary international human rights.

Premises of International Human Rights. First, at a conceptual level, universal human rights, in a way that is not dissimilar to what we see with human dignity, is not a single coherent idea, but represents the intersection of a variety of different traditions of thought, which in various degrees have overlapping commitments and in other ways have mutually incompatible premises—especially premises about the nature and destiny of the human person.[18] This deep divergence of foundational premises was, of course, recognized from the beginning of the attempt to forge an international agreement on human rights in the mid-twentieth century, but (and here is the second of the background features of human rights that needs to be highlighted) the whole international human rights project was constructed on the basis of a deliberate abstention from strong agreement about foundational principles.

The generation of jurists, scholars, and politicians who drafted and secured approval for the UDHR knew very well that they all came to the discussion with profoundly divergent first principles.[19] The basis for their consensus on a declaration of basic human rights was not a substantive agreement about their intellectual foundations nor the discovery of a new transcendent and transcultural global ethic that unified them. Rather, their project was based on a more modest and limited aim: to reach a practical consensus on the articulation of human rights while setting aside the goal of attaining any thicker consensus about where those rights come from and

why we should regard them as pertaining to human persons. The human rights enterprise is built on practical agreement, *tout court*.

When asked how it was possible that adherents of such radically opposed philosophies could reach agreement on a declaration of fundamental rights, Jacques Maritain—a Catholic, Thomist philosopher, and diplomat who was heavily involved in the adoption of the Universal Declaration of Human Rights—liked to say, "Yes, we agree about the rights, but on condition that no one asks us why. It is with the 'why' that all the disagreements begin."[20] Maritain and his colleagues did not regard this lack of consensus on foundations as fatal to the project. The fact that an agreement could be achieved across cultures on several practical principles was "enough," Maritain wrote, "to enable a great task to be undertaken."[21]

And, in fact, in the subsequent history of the human rights movement, that practical consensus has allowed for the construction of an impressive human rights edifice. Because we have broad agreement on a basic list of rights, the human rights movement has largely been able to focus on the practical work of "translating" those moral principles into positive legal norms, formal international and constitutional instruments, and an institutional system—and then to focus on the practical work of securing universal agreement to all of that among the community of nations.

Measures of Success. This approach has had enormous success by many important measures. The crisis of humanity represented by the totalitarian movements of the 20th century and their violation of the most fundamental principles of justice and dignity on a massive scale made clear the need to articulate certain universal basic principles of accountability. The genesis of the international human rights movement thus did respond to a genuine and profound human need and desire, and the strategy of practical agreement allowed a response to that need to emerge.

Today, in consequence, there exists a certain core of rights that are basically recognized and accepted across a broad array of different political, economic, religious, and cultural realities, regardless of concurrent differences in any theoretical justification of them. There are national, regional, and global institutions whose work is sincerely, sometimes influentially, directed toward promoting and protecting those fundamental rights, regardless of the divergent traditions to which they are being applied.

A Practical Consensus? What does all this imply for the possibility of moving forward in building a common understanding of human dignity? One immediately evident conclusion is that the arguments and difficulties about dignity are nothing other than the replication at a more general

level of the foundational questions that are at the heart of the human rights project.[22] Human rights instruments bracket foundational questions, but universally invoke human dignity as a generic placeholder for the something that gives human rights a deeper justificatory source.[23] But that only ensures that the underlying disagreement is semantically shifted from the foundation and meaning of human rights to the foundation and meaning of human dignity.

If it is true that we are facing the same structural problem, should we adopt a structurally analogous strategy to address it? Should there be (for purposes of law) a limited focus on whatever practical agreement can be identified around the principle of human dignity, abstaining from engaging and deploying more fully theorized accounts about the status of dignity, where it comes from, and in what it consists?

There is some merit in that proposal, and it begins to get at what I am trying to suggest in saying that we need to turn to concrete human experience in order to gain a fuller understanding of the meaning and implications of human dignity. One could even imagine that it might generate a great deal of constructive convergences in those areas in which there are already the conditions present for a fairly large overlap among various understandings of dignity—the relationship of the principle of dignity to the need to protect persons from all forms of cruel, inhuman, and degrading treatment, for example.

But it is not yet enough. The strategy of practical consensus of Maritain and his contemporaries, for all its outward success, also suffers from some serious weaknesses and limitations. In fact, we can point to a number of persistent problems with the international human rights project that are all traceable in some degree to the thinness of the practical agreement on which it rests.[24]

It contributes to the wide and enduring gap between the formal international legal norms and instruments of human rights law, on the one hand, and the local social, political, and cultural realities in which they are supposed to be operative in practice on the other. It also ignores the fact that positive law (that is, the laws made by human actions, including statutes, treaties, and judicial acts, all of which which may or may not reflect and embody higher principles of justice and natural law) alone, without deeper ethical and cultural sources within a society, is insufficient to sustain the relationships of justice and solidarity[25] and commitments to the common good to which we aspire. Both of these reasons contribute in some important degree to the very high degrees of non-compliance that we find in virtually all systems of international human rights law.

Third, the absence of greater substantive agreement about the sources and meaning of human rights has left a vacuum that has often been filled by bureaucracy and proceduralism.

Finally, and most importantly, in the end it is impossible to avoid, at least passively, making judgments and decisions on the basis of the deeper and more contested premises about the nature of the human person and the meaning of human life. Acknowledging practical agreement alone only obscures the deeper differences that, in fact, persist. Whenever we are faced with difficult judgments about the existence or recognition of a human right, its extension into new spheres, its relationship to other rights, its permissible limitations, etc., we are implicitly relying on any number of prior assumptions about the person, society, the state, freedom, law, and so on. Bracketing the underlying assumptions does not make them disappear; it only makes them less transparent, and therefore less subject to reasoned discussion and debate.

Maritain and his contemporaries knew this, and, in fact, acknowledged clearly that consensus around a limited set of practical principles did not obviate the more difficult task of seeking greater common understanding of the underlying reasons and foundations of human rights. The strategy of practical agreement, the philosopher Richard McKeon stressed, would merely provide a "framework within which divergent philosophical, religious, and even economic, social and political theories might be entertained and developed."[26]

In other words, for the drafters and intellectual supporters of the Universal Declaration, the focus on practical agreement on principles and institutions was merely a method for moving beyond the roadblock of incommensurable premises. It was not presumed to be a sufficient permanent basis for the recognition and protection of universal human rights. Instead, it was to be a provisional and partial overlap of commitments on the basis of which we would need to work (hard!) toward a deeper understanding of the basis of that practice. At best, the effort to reach practical agreement was a method to provoke, to force open a more vital debate about the foundations too.

Turning back to the present predicament of human dignity, then, what can we conclude on the basis of seven decades of experience pursuing a strategy of limited practical consensus on universal human rights? Focusing on our concrete human experiences of human dignity and the convergences that we can find there might be a very fruitful way forward; not, however, merely as a way of seeking practical agreement while setting aside the deeper and more difficult task of seeking a common substantive understanding of the meaning and requirements of human dignity. Focusing on our human

experience of dignity cannot be the end point of our efforts but must rather be the *beginning* of a sustained and critical method of reasoning together, about which understanding of dignity, among the many deeply divergent approaches, corresponds best—which is to say most completely, most universally, most reasonably—to the reality of human life in all its complexity.

Appealing to Elementary Human Experience. What is needed, then, is not only a focus on our shared concrete human experience of dignity but a focus that opens up the possibility of critical reasoning about how that experience of dignity deepens our understanding of what it is to be human, to have value, or, most to the point, to have a common, irreducible, and universal value as human persons. Taking up the suggestion of Luigi Giussani, founder of the international Catholic movement Communion and Liberation, this sort of shared and critical experience could be called "elementary experience."[27]

As Giussani explains:

> What constitutes this original, elementary experience? It can be described as a complex of needs and "evidences" which accompany us as we come face to face with all that exists. Nature thrusts man into a universal comparison with himself, with others, with things, and furnishes him with a complex of original needs and "evidences" which are tools for that encounter. So original are these needs or these "evidences" that everything man does or says depends on them....
>
> The need for goodness, justice, truth, and happiness constitutes man's ultimate identity, the profound energy with which men in all ages and of all races approach everything, enabling them to an exchange, of not only things, but also ideas, and transmit riches to each other over the distance of centuries. We are stirred as we read passages written thousands of years ago by ancient poets, and we sense that their works apply to the present in a way that our day-to-day relations do not. If there is an experience of human maturity, it is precisely this possibility of placing ourselves in the past, of approaching the past as if it were near, a part of ourselves. Why is this possible? Because this elementary experience, as we stated, is substantially the same in everyone, even if it will then be determined, translated, and realized in very different ways—so different, in fact, that they may seem opposed.[28]

This "complex of needs and evidences" characterizes what is irreducibly human in all of us, what moves us to act, and what propels us into a dynamic relationship with all of reality. It is something more basic, more

fundamentally constitutive of our humanity than any of the multitude of specific cultural artifacts (including law) could be. It is part of what we presuppose, even unconsciously, whenever we say "I" in a serious, self-aware way.[29]

Elementary Experience. There is much more to be said to develop and unpack that concept than I could do justice to here, but let me be quick to say what the appeal to elementary experience is *not*. It is not a new anthropological theory or a new theory of law or natural law; it is not a set of moral precepts to order human affairs; it is not a generic idea of humanity. It is something distinct from (even if inevitably related to) both theory and culture, and it inheres in the human being as a fact. It is a form of experience of what is human in which the evidence that we run up against thrusts us into a comparison with our own needs and desires, our own nature, our "I."[30]

This is not to suggest, of course, that elementary experience is not translated inevitably into judgments, theories, and values—and together with other persons translated also into cultural projects, including law. But the connection to law must not be "short-circuited," as Carmine Di Martino, professor of Philosophy at the University of Milan, has written: "We have to avoid the short circuit between the list of fundamental rights and the universal structure of experience. The irreducibility of the latter, continuously sought after by reason in an indomitable attentiveness to experience, necessarily demands a critical vigilance, even in the face of so-called universal rights."[31]

Or to put this point in another way, despite the way that we talk about the universality of human rights, it is not really the *rights* that are universal so much as the *human* that is, and the universality of rights follows from the prior universality of the human.[32] But the meaning of human here is not based on the abstract definition or some *a priori* anthropological or metaphysical claim. It is not, therefore, derived from a prior theory of natural law (although the observation of the universality of elementary human experience might very well be the basis on which to begin to construct and to verify the existence of natural law). Our awareness of what is human emerges in experience, an experience capable of a critical judgment of what corresponds to what is irreducibly human—that is, in elementary experience.

And so it is with dignity, then: The meaning of dignity, if not consigned to the fragmented and incoherent babel of approaches that we see about us, if not reduced to whatever the conventional mentalities of the day impress upon us, if not blocked by the schematic opposition of conflicting theories and ideological prescriptions, has to emerge first from an encounter with what is most elementary to our humanity, an encounter that educates us to see in ourselves and in the other what is the worth, the value, the dignity of the human.

To bring this back to concrete cases, let me illustrate the method of elementary experience for a few moments by reference to some of the same real-life examples of dignity claims mentioned in passing at the outset of this chapter, and by reference to the way that I, as a human subject, related to them. All of those cases—the mother of the disappeared, the indigenous leader, the infertile woman seeking help—presented me with the challenge of trying to grasp and enter into not just the technical questions of how the treaty norms might or might not apply to the case in question. More than that, they posed the challenge of how to enter into the human dimensions of the problem. What was I supposed to say to a woman whose son had disappeared, whose heart was crying out for justice, or to the woman who came to us out of the anguish of not being able to satisfy her desire to bear a child?

Clearly, I could not pretend to be able to satisfy their needs in any real or comprehensive sense. How could I even begin to understand the dimensions of the problem of the indigenous people of the Chaco, deprived of the basis of their cultural integrity and reduced to raising their children in a narrow strip of dry earth between the highway and the barbed wire that kept them out of their ancestral lands? Before being legal problems, these were all problems that demanded a deep sympathy, not in a trite, sentimental sense, but in the sense of recognizing in the suffering of these people the authenticity of their desires and seeing in it the evidence of a universal need in which one becomes aware of the constitutive factors of one's own self as well as of the humanity of the other.

In other words, the recognition of their human dignity emerged as elementary experience. Even more illustrative of this dynamic was the stark contrast elicited by a visit to the Jamaican police holding cell (to which I referred earlier) that was immediately followed by a visit to a residential community run by the Missionaries of the Poor, a religious order. In this residential community, the brothers care for some of the most despised and outcast members of Jamaican society: people suffering from AIDS (typically in advanced stages of the syndrome's development) and acutely disabled children.

The first group are rejected by society not only for the virus they carry but also because they are automatically presumed to be gay in a society rife with hatred and violence against homosexuals. In fact, we documented instances in which the police stood by and watched as gays were beaten and their homes destroyed. The second group consisted of children whose physical deformities and mental handicaps were so severe that it was difficult not to avert one's eyes. What made a simple gaze on the lives of all these residents possible for me was seeing the exceptional love, care, attentiveness, and

even joy that the brothers, the volunteer doctors, the AIDS patients, and the children so evidently shared with one another.

The contrast with the environment in the jail, which we had visited just an hour earlier, was staggering: There, men were herded together, standing in garbage and urine. Here, everything was treated with care, with attentiveness to beauty, with tranquillity. Both, in vividly contrasting ways, constituted the awareness of the meaning of human dignity for me: the first, in which I could not fail to be struck by the blatant denial of the most elemental humanity of these ordinary men; the second, in which I could not help but be moved by the human love that affirmed the inestimable value of each and every single one of the lives in the brothers' care, even those widely despised and rejected by the larger society around them.

Lessons of Elementary Experience. What lessons can be drawn from all that? First of all, human dignity, as the fruit of the method of elementary experience, is primarily something that is discovered, not something deduced from a theory or from an intellectual or ontological premise. It is something concretely encountered in an Other, a You, and recognized in oneself. And it emerges in particular in relationships of solidarity, of compassion (in the etymological sense), of gratuitousness. It is subjective, in the sense of inhering always in an embodied "I" rather than in a disembodied discourse, yet it is in no way a relativistic thing: It is a hard fact. It is given, not made.

Can that elementary experience of the dignity of another (and of myself), with its inherently intimate relation to the particular human subject, also form the basis of a broader approach to dignity in law? In a way, focusing on the roots of our experience of dignity has moved us back toward the origins of law rather than removing us from relevance to law. Law, as a cultural practice that addresses and helps to realize certain basic human goods, draws on and responds to something that comes before it. Thus, the method of elementary experience, as a way to comprehend and verify the meaning and implications of human dignity, certainly has relevance to the way that law ought to be structured to reflect and protect human dignity and gives us a possible way to evaluate the law's effectiveness in securing that dignity. But, remembering Di Martino's cautionary observation cited earlier, we must not short-circuit the path from human experience to law, still less to specific rights and responsibilities.

Even in the cases cited, the clear recognition of the ways in which the *status* of human dignity is indeed at stake, which allows us to enter into an important reflection on the right way to instantiate the *moral principle* of respect for human dignity, does not take us so far as to determine in any

clear and unambiguous way how those cases ought to be decided as a matter of positive law. What kind of reparations should be due to the mother of the disappeared? Should the state be held directly responsible for the material conditions of the indigenous communities of the Chaco and the deaths of the children there? Does a recognition of the authentic expression of human dignity in the desire for biological motherhood necessarily mean that access to new reproductive technologies is the right response, even when other human lives in embryonic form may be put at grave risk of instrumentalization and destruction?

There are obviously several steps of reasoning and many prudential judgments that must be undertaken before getting from the experience of an authentic claim of human dignity to the formal way in which human rights law should recognize and protect it. For this reason, I emphasized earlier that the method of elementary experience does not itself propose, or even lead directly to, any specific theory of law, old or new.

Recommendations

At a macro level, the method of drawing from human experience could have at least a few fairly direct implications for how we treat human dignity in law.

- **The international law of universal human rights ought to seek, foster, and build on the existence of a practical consensus around the status and principle of human dignity.** This should be undertaken just as Maritain and the generation of 1948 did in the forging of the Universal Declaration of Human Rights. That consensus would look to the concrete experience of human dignity shared across broadly diverse expressions of human culture—political, historical, linguistic, religious, etc. Policymakers should seek to anchor international norms on the solid basis of those good aspects of human communities that are widely held in common. In this way, international human rights would tend overall toward advancing a real and universal human good, rather than an abstract and particular ideological agenda. This would also tend to generate a stronger and more effective law due to greater social legitimacy across a range of different social contexts. Human rights would be, and would be perceived to be, less tied to one culturally specific language and practice of dignity and rights.

That is not to downplay the role that dignity should play in grounding human rights. It is worth reiterating a point made earlier in this essay: The core universally recognized meaning of human dignity is still a powerful and important instrument, even if that core is relatively small. It is enough to enable us to justify and pursue the protection of an essential range of fundamental human rights, including those rights whose violation afflicts the great majority of the billions of individuals currently living under conditions of oppression and violence.

- **Policymakers should be very cautious and restrained in the use of the concept of dignity in the law in ways that generate new rights or aggressively new understandings of rights.** The risk is high that these are not reflections of shared experience, but instead assertions of contested, culturally contingent, and often ideologically charged theories of dignity. I do not mean that our collective understandings of human dignity and its requirements are static and will not or should not change. On the contrary, an openness to the universality of human experience will be likely, over time, to continue to generate new ways of thinking about and addressing human rights violations, especially as new threats to human dignity arise—just as humanity's experience of grave violations of human dignity in the past (the international slave trade, the Holocaust, the gulags) has led to important new developments in the recognition and protection of human rights. But the dynamic expansion of rights is a delicate matter and ought not outstrip our reflective capacity to ensure that there is indeed a broadly and deeply shared understanding of the underlying dignity claims at stake. We need to develop clear and broadly consensual criteria for when new claims of human rights make sense, and when they stretch beyond the boundaries of our best collective reflections on the meaning and scope of human dignity.

- **When there are significant and passionately held disagreements over the meaning and implications of dignity among the peoples of the world, that is good reason to pause, assess, reflect, and debate.** Rather than ignoring and closing off further discussion of the disagreement, policymakers should instead use disagreement as a provocation to break open the discussion about the meaning and consequences of dignity. In other words, it is entirely good and right that public discourse, national and global, should engage in serious and sustained debate about dignity, seeking always to ground it in fact and experience, and asking what most genuinely corresponds to

the most original needs and evidence of our common human nature. This, however, is activity more proper to the realms of education and of democratic politics—where debate and persuasion are key—than to the law's binding obligations and coercion.[33]

- **As a matter of *law* in such circumstances, when there is not a strong practical agreement on the requirements of human dignity grounded in concrete experience, policymakers should adopt a generous pluralism of understandings across cultures and legal systems.** In judicial contexts, this could include a healthy "margin of appreciation" given to states in many contexts. But pluralism has to extend beyond courts and judges to the structure of the international order as a whole. Otherwise, the danger of a hegemonic imposition through global institutions of one idea of dignity (invariably that of the richer and more powerful actors and elites in the international space) is great. We should protect the conditions for a rich and pluralistic discourse on questions of human dignity, thus protecting the integrity of diverse ways of life and forms of human culture and community.

  A variety of practices of contemporary international human rights institutions could be called into question on those grounds of legitimate pluralism among states. Consider, just to provide one among many examples, some of the work of the United Nations Human Rights Committee, the supervisory organ created by the International Covenant on Civil and Political Rights. According to the committee's (non-binding, but influential) interpretations of the covenant, international human rights law requires Poland to provide more sexual education to schoolchildren, requires the United States to abolish the political tradition of many states that require judges to be elected rather than appointed, requires Chile to end the state's special relationship with the Roman Catholic and Orthodox Christian churches, and requires many states worldwide to loosen their restrictions on abortion.

  Any of these neuralgic issues certainly merits serious democratic debate and decision-making within the countries in question. But that does *not* mean that international law should override the freedom and integrity of local communities to make certain fundamental choices about the way they understand proper relationships of political morality.

- **Policymakers should advocate for a proper regard for the relationship between national sovereignty and human rights.** This respects pluralism in the practical realization of the idea of dignity at the broadest level. Rightly understood, sovereignty is not inconsistent with the idea of universal human rights. On the contrary, as emphasized in the recent report of the U.S. State Department's Commission on Unalienable Rights:

> [N]ational sovereignty serves as the condition for human rights because it is typically at the level of the national political community that a people can best protect human rights. Human rights…require nation-state actors with the independence, capacity, and authority that allows them to take responsibility for defending human rights. Through their laws and political decisions, nation-states are the main guarantors of human rights. State sovereignty is not an alibi for neglecting or abusing human rights. Rather, sovereignty underlines the dependence of human rights on political order. When a state asserts sovereignty as an excuse for committing or failing to address rights violations, the problem is not with the idea of sovereignty but with flawed exercises of it.[34]

- **Similarly, respect for legitimate pluralism in the realization of universal human rights entails a strong normative preference for democracy.** Policymakers should pursue policies and reforms that favour the emergence and stability of democratic polities. And when decisions about the scope and details of rights—especially in those circumstances involving the complex harmonization and reconciliation of a variety of competing rights claims in a constitutional system overall—are made through institutions that have high degrees of democratic legitimacy, that is an important factor to take into account in considering where to defer to local authority and local decisions.

- **Policymakers should respect the principle of subsidiarity.**[35] Subsidiarity structurally recognizes and protects legitimate forms of pluralism by making international human rights law strictly subsidiary to the primary responsibility of each state to realize and protect the human rights of all those subject to its authority. That is, the aim of international human rights systems is to assist the realization of the common good in national and other *smaller, primary* communities

by addressing those problems that cannot reasonably be fulfilled by the several states acting on their own. Subsidiarity should guide the allocation of responsibility or guaranteeing of human rights among national law and international law.[36]

- **Policymakers should have a special regard for the role that religious freedom, religious pluralism, and interreligious dialogue play in generating the necessary conditions for the emergence of common understanding.** This will contribute to the building up of a thicker and more genuinely shared experience of human dignity among all parts of the human family.

Conclusion

All human beings share in common a fundamental, inherent, and equal value as human beings, solely by virtue of being human and not because of any contingent positive laws or consensual agreements or political commitments and compromises. That core human dignity is the foundation without which the idea universal human rights is just an illusion, subject to every change of political winds.

But specifying the content of human dignity is a difficult challenge that cannot be achieved just on the basis of theoretical speculation. It needs also the rich soil of practical experience, of seeing in practice what does and does not lead to free and flourishing human lives and communities. To till that ground, we should work constantly for a broader common understanding of basic human rights principles forged in the practical agreement among nations and peoples and respectful of legitimate pluralism among them. Our understanding and commitment to universal human rights will grow from a culture that is open to the ultimate questions of value and meaning in human life.

Endnotes

1. The author served as a member of the Inter-American Commission on Human Rights (the principal organ responsible for the protection and promotion of international human rights obligations in the Americas) from 2006 to 2010, and as its president from 2008 to 2009.
2. Of course, there are many other circumstances in which the cutting of hair can be the basis for a very serious claim that human dignity is threatened—as in the shaving of a detainee's head for purposes of humiliation, or a requirement that a Sikh cut his hair in violation of his religious obligations—but no such deeply rooted dignity claims were presented here.
3. The material in the following paragraphs is drawn largely from more extended discussions in Paolo G. Carozza, "Human Dignity in Constitutional Adjudication," in Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing Limited, 2011), pp. 459–472, and Paolo G. Carozza, "Human Dignity," in Dinah Shelton, ed., *Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) (forthcoming).
4. *Jus cogens* refers to the small set of overriding, peremptory norms of international law from which no state may exempt itself, such as the prohibitions of genocide, slavery, and human trafficking, as well as crimes against humanity.
5. For just two among innumerable examples, see *Public Committee Against Torture v. Government of Israel*, HC 5100/94, 1999, https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-israel (accessed December 16, 2020), and *Napier v. The Scottish Ministers*, 2004, S.L.T. 555 [U.K.] (February 10, 2020), https://www.scotcourts.gov.uk/search-judgments/judgment?id=6b2c87a6-8980-69d2-b500-ff0000d74aa7 (accessed December 16, 2020).
6. *Beschluss vom 13. Juni 2007*, 1 BvR 1783/05 (June 13, 2007) [German Federal Constitutional Court], https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2007/06/rs20070613_1bvr178305.pdf;jsessionid=F2937AB37CFC1A96BFB3F57D9F6622FB.2_cid377?__blob=publicationFile&v=2 (accessed December 16, 2020), and *NM v. State*, (5) SA 250 (CC) [Constitutional Court of South Africa], 2007, https://medicolegal.org.za/uploads/interesting_cases/ICL_NM_AND_OTHERS_v_SMITH_AND_OTHERS_56deac748da57.pdf (accessed December 16, 2020).
7. For example, *F. c/Sté Hachette Filipacchi Associés*., Cour de Cassation, Première Chambre Civile [French Appellate Court, 1st Civil Chamber], March 7, 2006.
8. See, for example, *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, Inter-Am. Ct. H.R. [Inter-American Court of Human Rights] (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed December 16, 2020).
9. *South Africa v. Grootboom*, SA 46 (CC) [Constitutional Court of South Africa] (2001).
10. For example, *Law v. Canada (Minister of Employment and Immigration)*, 1 SCR [Canadian Supreme Court] (1999), 497.
11. *A. C. c/C. et al.,* Cour de Cassation, Première Chambre Civile [French Appellate Court, 1st Civil Chamber] (2001).
12. For example, the Hungarian Constitutional Court held that dignity includes an inalienable right to bear a name reflecting one's self-identity. See Alkotmánybíróság [Hungarian Constitutional Court] 58/2001 (XII. 7), http://public.mkab.hu/dev/dontesek.nsf/0/645f7e824cc1ce49c1257ada0052a748/$FILE/en_0058_2001.pdf (accessed December 16, 2020). And dignity's role in guaranteeing personal autonomy can also extend beyond questions of shaping one's self-identity. For instance, the Indian Supreme Court struck down a law limiting donations of land to charitable organizations on the grounds that treating people with dignity requires allowing them to will their land to whomever they choose. See *John Vallamattom and Anr. v. Union of India*, 2003, https://indiankanoon.org/doc/1983314/ (accessed December 16, 2020).
13. Conseil D'Etat [Supreme Administrative Court, France], October 27, 1995, Commune de Morsang-sur-Orge, http://www.rajf.org/article.php3?id_article=245 (accessed December 16, 2020). See also the opinion of the Human Richts Committee in *Wackenheim v. France*, Comm. 854/1999, U.N. Doc. A/57/40, Vol. II, at 179 (HRC 2002), https://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Manuel%20Wackenheim%20v.%20Fr.pdf (accessed December 16, 2020).
14. BVerwGE [German Federal Administrative Court] 64, 274-Peep Show (1981).
15. *Jordan v. State*, (6) SA [Constitutional Court of South Africa] 642 (2002), http://www.saflii.org/za/cases/ZACC/2002/22.html (accessed December 16, 2020).
16. In most instances, when the conflict between dignity-as-liberty and dignity-as-constraint appears, the issue is not necessarily two competing definitions of dignity but rather the competing dignities of two different people whose interests may collide. This helps unravel the otherwise puzzling ability of courts to rely on dignity in support of either side of the abortion divide.
17. See, for example, Mirko Bagaric and James Allan, "The Vacuous Concept of Dignity," *Journal of Human Rights*, Vol. 5 (2006),[OKAY?] pp. 257–270, and Justin Bates, "Human Dignity: An Empty Phrase in Search of Meaning?" *Judicial Review*, Vol. 10 (2005), pp. 165–168.
18. See, for example, Patrick Hayden, ed., *The Philosophy of Human Rights: Readings in Context* (St Paul, MN: Paragon House, 2001).
19. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002).
20. Jacques Maritain, "Introduction," in UNESCO, ed., *Human Rights Comments and Interpretations*, (London: Wingate, 1949), p. 9.
21. Ibid.

22. The phrase "unfinished business" is borrowed from Mary Ann Glendon, "Foundations of Human Rights: The Unfinished Business," *American Journal of Jurisprudence*, Vol. 44 (1999), p. 1.
23. For discussion of human dignity as a placeholder, see Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal International Law*, Vol. 19 (2008), p. 655.
24. I have tried to describe these difficulties in more detail in, for example, Paolo G. Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply," *European Journal International Law*, Vol. 19 (2008), pp. 931–944, and Paolo G. Carozza, "Il Traffico dei Diritti Umani nell'età Post-Moderna," in Luca Antonini, ed., *Il Traffico dei Diritti Insaziabili* (Rubbettino, 2007), pp. 81–105.
25. I use the term "solidarity" here in the way that it was defined by Pope John Paul II, as "a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all." See John Paul II, "Sollicitudo Rei Socialis," December 30, 1987, para. 3, http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html (accessed December 16, 2020). However, the term can be and has been used in many other different ways as well. See generally, Paolo G. Carozza and Luigi Crema, "On Solidarity in International Law," Caritatis in Veritate Foundation, http://www.fciv.org/downloads/Carozza%20Crema.pdf (2014) (last accessed December 28, 2020).
26. UNESCO, *Human Rights: Comments and Interpretations*, p. 35.
27. Luigi Giussani was a prominent 20th century Italian intellectual and religious leader and founder of the Catholic movement Communion and Liberation. See "Looking for Beauty, He Found Christ," Communion and Liberation, https://english.clonline.org/fr-giussani (accessed December 16, 2020).
28. Luigi Giussani, *The Religious Sense* (Montreal: McGill-Queen's University Press, 1997), pp. 7–10. The idea of elementary experience and its relationship to law has been developed in Andrea Simoncini, Lorenza Violini, Paolo Carozza, and Marta Cartabia, *Esperienza Elementare e Diritto* (Milano: Guerini e Associati, 2011).
29. Andrea Simoncini, "Esperienza Elementare e Diritto: Una Questione 'Persistente,'" in Simoncin et al., *Esperienza Elementare e Diritto*, p. 17.
30. Ibid., p. 19.
31. Carmine Di Martino, "L'incontro e l'emergenza dell'umano," in Javier Prades, ed., *All'origine della Diversità. Le Sfide del Multiculturalismo* (Milano: Guerini e Associati, 2008), p. 95.
32. Simoncini et al., *Esperienza Elementare e Diritto*, p. 22.
33. It is worth reminding ourselves that the success of the Universal Declaration of Human Rights has largely been because of its function as a pedagogical and persuasive tool. Both in the process of its formulation and in its aspiration as a "common standard for humanity," it is has contributed significantly to the transformation of hearts and minds in the service of a universal common good. Not without cause did Pope John Paul II refer to it as "one of the highest expressions of the human conscience of our time." ("World Marks U.N. Human Rights Day," BBC, December 9, 2008.) But in 1948 it was deliberately kept as a non-binding, educative instrument, without formal juridical authority. Had it been presumed to be a fully binding legal instrument, one can only imagine how quickly it would have failed (unless backed by massive coercive force, in which case one can only imagine how surely it would have contributed to imperialism and oppression). While it is helpful to translate the general moral principles of human rights into the positive law of international treaties, that positivization does not resolve the underlying differences, nor does it obviate the need for debate and discussion.
34. U.S. State Department, *Report of the Commission on Unalienable Rights*, August 26, 2020, https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf (accessed December 21, 2020).
35. Subsidiarity, in general, requires that decisions and actions should presumptively be taken within the "primary" communities closest to the persons most directly affered by them (for example, in the family or at the local level), and larger or more distant social groups (like the state or international bodies) have both a subsidiary responsibility to help those primary communities achieve their ends *and* also a negative obligation not to replace or usurp them. In an international context, a subsidiarity-oriented perspective would favor allowing national and other more local associations the greatest possible freedom to realize their ends for themselves—while international law would only intervene to assist them when they are incapable (because of corrupt or authoritarian regimes, for example)—but would not aim to replace or supplant the primary roles of national and local communities. This relationship of subsidiarity necessarily helps to foster a robust pluralism, as states will inevitably give expression to understandings of human dignity and rights that are reflective of their particular histories and distinctive social realities.
36. See Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law*, Vol. 97, No. 1 (2003), p. 38.

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