Uncertain Dignity: Judging Human Dignity As a Constitutional Value

By

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Graduate Department of Political Science
University of Toronto

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Abstract
This dissertation examines what is the practical meaning of the idea of human dignity in the context of constitutional judgment. Against the commonly held view in political theory and legal scholarship that applying the idea of human dignity in law involves applying a single conception determinatively, my argument is that the way we think about the limit human dignity places on constitutional arrangements, involves a process of reflective judgment that oscillates between two conceptions. The first conception of human dignity is a deontological abstract idea that posits dignity as an inviolable, universal, formal property of all human beings. Most clearly associated with Immanuel Kant’s writings, this conception plays a constitutive role in the constitutional sphere by underpinning the notion of legal subjectivity. The second conception of human dignity is intersubjective. Articulated originally by G.W.F Hegel and developed by contemporary exponents (most notably Axel Honneth), this conception underscores human vulnerability for recognition as an equal. It therefore plays a regulative role function in constitutional adjudication. This conception reveals contextual sensitivity towards what counts for particular individual in a particular time as respect. Together, these two conceptions form the normative syntax of the liberal conception of human dignity.

Through conceptual inquiry and comparative constitutional analysis I reveal the process of illuminating tension between the universal (thin) perspective of human dignity and its
particular (thick) enmeshments in the political community. Importantly, the relation between the two conceptions is non-transcendent. There cannot be a unified comprehensive definition of human dignity. Rather, the constitutional meaning of human dignity is a result of an on-going reflective judgment and continuous restatement at the level of the political community.
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INTRODUCTION

The general experience of oppressed groups is that the subordinated are in no position to doubt the existence of the world and other people, especially that of their oppressors. It could be said that only those most solidly attached to the world have the luxury to doubt its reality, whereas those whose attachment is more precarious, whose existence is dependent on the good will or ill temper of others, are those compelled to recognize that it exists.

Charles Mills, *Blackness Visible*\(^1\)

Human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.

Hannah Arendt, *The Origins of Totalitarianism*\(^2\)

It is generally acknowledged in our times that the worst violations of human dignity take place in situations where political structures are weak and the rule of law absent. In these places violations of human dignity, whether caused by man or nature, are so basic, so profound that theoretical discussion of what human dignity means seems utterly misplaced. It is also a truism to say that more or less well-ordered societies are meant to provide a measure of protection from the most egregious violations of human dignity through the system of law. And yet interestingly, when violations of human dignity occur in well-ordered societies and under the auspices of public law they involve a very specific, symbolic, sense of wrongfulness that augments the actual harm experienced by individuals. For the coercive nature of law along with its claim to legitimacy renders the injury to human dignity particularly inescapable, demeaning and unfair. The profound sense of injustice stems from the acute dissonance between the equal recognition that is implied by law and the very real experience of misrecognition; between equal human dignity that is implicit in the idea of law and the subjective sense of indignity that the individual feels when she is treated as a lesser member of the community.

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How should the idea of human dignity be defined in the sphere of constitutional judgment? What, if any, should be its role in constitutional adjudication? These are the questions that frame this dissertation. In principle, the constitutional framework is meant to provide a range of remedies to correct institutional arrangements that violate human dignity. These include but are not limited to: voting, speaking publicly, making claims in court and in the public sphere, advancing legislation and constitutional review of contested public law. But if all human rights are founded on the recognition of human dignity, what does it mean when we say that a certain positive law violates human dignity? If constitutional arrangements are meant to uphold human dignity, at least in the minimal sense of not infringing on it, how should we (citizens, legislators and judges) invoke the idea of human dignity? Is human dignity a matter of subjective feeling or a matter of objective definition? Is human dignity a universal principle that is meant to provide a limiting principle to politics or does it come about as a result of particular historical, cultural and social context? Ought we think of human dignity in relation to rights as an abstract feature of humanity or as a kind of behavior? Is human dignity in fact the source of rights, the foundation of the constitutional system or the outcome of claiming rights? And how is it possible to claim that a specific law is contrary to human dignity if we do not have a generally agreed upon definition of what human dignity means?

A Constitutional Perspective on Human Dignity

The need to address the question of human dignity’s relation to constitutionalism, law and rights has become inescapable in the aftermath of the Holocaust. The Nazi programme of the “Final Solution” marked a conceptual and historical watershed: it offered a comprehensive theoretical underpinning for the physical annihilation of the autonomous subject, which has
hitherto been the grounding idea of the enlightenment. The horrific and unimaginable (and yet imagined by some) sights that greeted the allied liberators were seen as proof that human dignity could not rely on good will as an imperative of practical reason. Human dignity required formal recognition and concrete institutional protection. Or in Arendt’s words,

human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.

Arendt’s sentiment found practical traction among the post-war lawmakers. Since 1945 human dignity has formed the basis for “the enterprise of universal human rights that protects the rights of individuals because they are human rather than because they are citizens.” Since the Universal Declaration on Human Rights (1948) the idea of human dignity has become positively entrenched in most core human rights documents and in a growing number of constitutional texts. From a philosophical and theological concept, human dignity has turned into a constitutional and importantly a justiciable concept. This normative trend is surely laudable. After all, who could possibly object to the proposition that human dignity is a salient – even a foundational – value of human rights and constitutional law? And yet, once we move beyond the – admittedly important – symbolic rhetoric and into practical reasoning, it is

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4 Arendt, The Origins of Totalitarianism, ix.


6 Among the international human rights text we can mention: International Covenant on Economic, Social and Cultural Rights (1966); The International Covenant on Civil and Political Rights (ICCPR) – (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989); The Standard Minimum Rules for the Treatment of Prisoners (1957); The Declaration on the Elimination of all Form of Racial Discrimination (1963); The Declaration on the Protection of all Persons from being Subjected to Torture or Other Cruel, Inhumane, and Degrading Treatment or Punishment (1975); UNESCO’s Universal Declaration on Bioethics and Human Rights (2005).

7 The idea of human dignity has been recognized as a positive value in the constitutional frameworks of: Germany, Sweden, Spain, Portugal, Hungary, Israel, South-Africa, India, Canada, and the EU among others.
precisely the ubiquity of the language of human dignity in constitutional discourses that masks some important questions. What role does the idea of human dignity – and its frequently used synonyms: ‘equal dignity’, ‘equal respect’, ‘equal moral worth’, ‘inherent moral worth’ – play in the effective protection of basic rights? How is it different from the language of freedom, autonomy and equality? And what are the conceptual and normative implications of invoking human dignity in constitutional jurisprudence?

To gain a better appreciation of these questions, let me exemplify some of the ambiguities and questions that arise from employing the notion of human dignity as the interpretive constitutional touchstone in the adjudication of rights claims.

In the famous German Aviation Act case the Federal Constitutional Court found that the authorization to shoot down a plane suspected of being hijacked by terrorists was unlawful because it instrumentalized the passengers. Evoking Kant’s language the Court declared that “by the state’s using the [passengers’] killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake.”

In another, Canadian, case the constitutionality of a welfare scheme that targeted people under the age of 30 as “employable,” and consequently lowered their social assistance benefits to one third of the assistance given to people over 30, was challenged as discriminatory. In their arguments the judges relied on the Law test, which had been elaborated a few years earlier as the main judicial mechanism for dealing with equality claims. In an attempt to develop substantive equality jurisprudence, the Canadian Supreme Court held in Law that the purpose of the equality protection in the Charter is to protect and promote human dignity. More specifically, the Law test defines dignity to “mean that an individual or a group feels self-respect and self worth…the equality guarantee does not relate to the status or position of an individual or

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8 Court press release no. 11/2006 (15.2.2006)
society per se, but rather concerns the manner in which a person *legitimately feels when confronted with particular law.*”

In the *Gosselin* case the majority of the court found that Ms. Gosselin’s human dignity was not infringed by the state’s purpose or by the policies’ effect. In fact, Chief Justice McLachlin concluded that:

> Despite possible short-term negative impacts on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the regime sought to improve the situation of people in this group and *enhance* their dignity and capacity for long term reliance…Ms. Gosselin has not established…that a reasonable person in her circumstances would have perceived that the government’s efforts to equip her with training rather than simply giving her monthly stipend denied her human dignity or treated her as less than a full person.¹⁰

In a third, South-African case of *Port Elizabeth* the municipal authority sought an eviction order against a group of individuals occupying private land. The case involved a paradigmatic tension between competing rights: the right of the landowners not to suffer arbitrary or unlawful settlement on their land, and the right of the squatters to have access to adequate housing. In this case, Sachs J. argued:

> [i]n a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress can be avoided.¹¹

The Court made no attempt to identify dignity with only one side of the conflict, but rather concluded that both rights pertained to property and were underpinned by dignity. When the Court decided that it would not uphold an eviction order, it evoked the historical background to the present situation, whereby black people were routinely dispossessed and residentially segregated. In the new constitutional South Africa the Court stated: “[p]eople [who] were once

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¹¹ *Port Elizabeth Municipality v. Various Occupiers*, 2004 (12) BCLR 1268.
regarded as anonymous squatters now became entitled to dignified and individualized treatment with special consideration for the most vulnerable.”

What do these three rather different cases have in common? Firstly, they all address questions of primary normative and constitutional importance through the prism of the idea of human dignity, and in the process raise principled questions regarding the meaning of human dignity in the context of constitutional jurisprudence and the role it ought to play in constitutional adjudication. Most notably, underlying these cases is a commitment to the idea that the state and its agencies ought to take into consideration the impact their actions have on human dignity and in particular that law should reflect this respectful attitude. Thus, despite the considerable differences between the cases, the courts are preoccupied with what we might call the *expressive* function of law. That is with the permissibility, and therefore the constitutionality, of purposes embodied in a given act of legislation.

Now, there is good reason to think that law in general and constitutionalism in particular, has something, perhaps everything, to do with human dignity. But, this still leaves

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14 In the Stoic tradition Cicero in *De Legibus* established a connection between human ability to reason, which for him is the basis of human *dignitas* and natural law. He proceeds to argue that because all men are subject to one law and so are fellow citizens they must be in some sense equal. Centuries later, Pufendorf in his *De Iure Naturae et Gentium Libri Octo* book 2, ch. 1, para. 1 states: For indeed the word “man” is felt to have a certain dignity, and the last as well as the most telling reply with which the rude insults of other men is met, is, “I am not a dog or a beast, but as much man as you are…” Now since human nature belongs equally to all men, and no one can live a social life with a person by who he is not rated as at least a fellow man, it follows, as a precept of natural law, that every man should esteem and treat another man as his equal by nature, or as much a man as he is himself.” (Cited in Izhak Englard, “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework,” *Cardozo Law Review* 21.5/6 (2000): 1917-8)
More recently Ernst Bloch advanced the claim that “natural law theories … are primarily directed toward dignity, toward human rights, toward juridical guarantees of human security or freedom as categories of human pride,” *Natural Law and Human Dignity* (Cambridge, Mass: MIT Press, 1986), 205. Lon Fuller also held that “every departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent,” *The Morality of Law* (New Haven: Yale University Press, 1964), 162. See also Lorraine E. Weinrib describing dignity as being a central concept of human rights in the latter part of the 20th century and noting that the “concept of human dignity
open the question of what role human dignity should play in the application and adjudication of constitutional rights. In other words, it is not enough to say as a matter of normative postulation or philosophical presupposition that the law should uphold or at least prevent the violation of human dignity. This merely begs the practical question of how the law should do this and how we would know that this protective function has been attained. If it appears at first sight that the answer is rather self-evident consider some of the marked differences between the legal cases.

In the Aviation case the court approached the demands raised by the requirement to protect human dignity from a universal and objective point of view. It did not ask how the innocent passengers would feel knowing that authorization was granted for their effective killing on grounds of state security; it did not ask how their self-esteem or self-understanding as persons with dignity would be impaired by the legislation. Rather, the court addressed the issue of dignity’s deprivation from the state’s point of view and analyzed it in terms of the moral wrongness - and therefore impermissibility - of utilitarian calculus in law. By treating the passengers only as means and not also as ends in preemptive legislation that anticipates the demise of some persons for the sake of others, the state is guilty of denying them their legal status, the protection of the law, and in particular the unlimited constitutional duty to protect human dignity.16 In other words, the court was concerned with the way human beings can be treated by law consistently with their humanity and defined human dignity in objective terms.

“The equal dignity, with its implications for fair treatment and respect for individual autonomy, is the basic premise of liberal constitutionalism, and accordingly the ultimate meaning of the rule of law.”
16 “By using their killing …as means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victim, are themselves in need of protection, are then denied the value which is due to a human being for his or her own sake.” The Aviation Act case: BverfG, 1 BvR 357/05 (15/02/2006). English translation available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html
The Canadian Supreme Court, on the other hand, approached the question of dignity’s violation by enquiring into its intersubjective and contextualized features. The court correctly identified the harmful affects of discrimination, as relating to the damaging message of inferiority and exclusion that is expressed in unjustifiable unequal treatment by law, and therefore stressed the subjective experience of being recognized by law. Since the court perceived the harm caused to one’s self-esteem by lack of recognition as salient to a finding of unconstitutional discrimination, it undertook the analysis by asking whether a reasonable person in the claimant’s position would be right in feeling unrecognized by the state.\textsuperscript{17} In doing so, the Canadian Court relied on a subjective definition of human dignity.

The third, South African case appears to have opted for a middle-way approach. It recognized the objective right of the landowners and the state’s duty to protect it, yet it also acknowledged the right of the particular individuals who reside on the land to adequate housing. This balancing analysis was not undertaken in the spirit of figuring which right was stronger, nor was it strictly utilitarian. Rather, the judgment was explicitly rooted in the \textit{historical context} of the political community. It involved, as I will argue in more detail in the course of my discussion, reflective judgment that sought a just solution which takes into account both the positive right to property of the white owners and the historically discriminated peoples’ social right to housing.

These three examples bring into sharper focus the questions sketched earlier: firstly, what kind of a concept is the constitutional notion of human dignity? Should courts treat human dignity as an \textit{objective} category or as a \textit{subjective-psychological} notion when they deal with questions of constitutional law and human rights? Should courts view human dignity as an \textit{abstract} concept

\textsuperscript{17} With this “objective-subjective” test the Court clearly attempted to provide some measure of impartial and external standard to what otherwise would be an entirely idiosyncratic inquiry. For a critique of the analysis see ch. 7, section 4.
from the point of view of legality or should they consider the *concrete harm* inflicted on particular individuals in a specific historical, social context?

Secondly, as we saw the cases deal with different areas of constitutional law yet employ the same normative concept as the appropriate standard for adjudication. So, in the constitutional context, should human dignity be construed as relating to questions of legal subjectivity and self-determination or to claims of equality or perhaps to both? Is the idea of human dignity interchangeable with the notions of liberty or equality?

Thirdly, what should be the conceptual relationship between human dignity and rights? How is human dignity conceptually related to rights? Is it the source and basis of all rights as the German Basic Law suggests, or should human dignity be construed as the outcome, the effect that rights (or their denial) have on persons, as articulated by Canadian constitutional jurisprudence? Or is human dignity both the source of rights and the outcome of their recognition, as exemplified in the South-African case?

The Problem of Conceptual Indeterminacy Or Who Needs a Justiciable Conception of Human Dignity?

The problem of how to think about the idea of human dignity in the sphere of constitutional adjudication is both theoretical and practical. The multiple constitutional - not to mention philosophical and theological - definitions of human dignity point towards a sense of normative indeterminacy and practical vagueness. Does human dignity have a substantive content from which it is possible to derive concrete injunctions on the limits of public law or is it an empty signifier? If the idea of human dignity suffers from inherent indeterminacy, then we

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may have a serious problem on our hands. For if liberal political morality is based on the idea of human dignity, if human dignity is meant to impose serious limitations on politics, then we (citizens and critical observers) ought to have a framework to orient our judgments regarding the adequacy (that is the legitimacy and justness) of constitutional arrangements from the point of view of human dignity.

It would not be an exaggeration to say that the problem of indeterminacy has been noted by virtually every philosophical scholar and legal practitioner who has written about human dignity. One persistent stream of scholarship argues that the term “human dignity” is so hopelessly confused and overladen with meaning that the term is of little practical use in discourses of human rights and positive law. Others have attempted to dispel some of the conceptual vagueness by following one of three lines of inquiry: first by offering an analytical account that tries to identify the true normative essence of the term, secondly by pursuing the etymology of the term, and thirdly by offering an empirically legal comparative analysis which

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21 In his recent book George Kateb stresses the existential aspect of human dignity and settles on speech as the most important defining trait of humans as a species. *Human Dignity* (Cambridge, Mass: Harvard University Press, 2011). Ronald Dworkin has devoted extensive discussion to dignity in his recent book. He laments that fact that “dignity has been stained by overuse and misuse,” exhorts us “to take up the job of identifying a reasonably clear and attractive conception of dignity,” and argues that dignity is based on two principles: self-respect and authenticity. *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), 204. See also Thomas Christiano, “Two Conceptions of the Dignity of Persons,” *Jahrbuch für Recht und Ethik* 16 (2008): 101-126.

looks at the way different constitutional jurisdictions have been using the term. All three methods represent worthy academic pursuits. However, undertaken in isolation from each other, they have run into the problem of failing to substantially advance our understanding of the way the idea of human dignity influences practical judgment when it comes to constitutional matters.

The problem as I understand it is methodological. Theoretical accounts that approach the idea of human dignity as a formal concept reach the foregone conclusion that the term is empty. Etymological accounts reach the conclusion that in different times and places human dignity meant something slightly different. And while certain core elements can be identified in contemporary usages, these do little to dispel the apparent variation found in the way the term is used in everyday parlance. Lastly, legal scholarship is often confined to a crude “head count” of legal cases where the term “human dignity” has been used, without a theoretical framework that would make sense of the disparate invocations. The standard conclusion of comparative (either historical or jurisprudential) approaches is that human dignity can mean different things in different – historical or jurisprudential – contexts. From here the road is short to one of two unfeasible conclusions: either the constitutional idea of human dignity should be jettisoned, or a fixed single definition should be used to avoid ambiguity.

What is important to recognize is that the limitations of these methodological approaches signify a deeper conceptual problem. At bottom the different methods represent a

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23 Much has been written on the topic. Of particular interest see: Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” and Erin Daly, Dignity Rights: Courts, Constitutions and the Worth of the Human Person (Philadelphia: University of Pennsylvania Press, 2013).
search for a *single* definition of human dignity.\textsuperscript{26} Such a definition would in theory facilitate a clear-cut (determinative) judgment when applied to a practical problem: Is this law contravening human dignity? Is this policy discriminatory? But such a definition, as I hope to show in the course of this dissertation, is an illusion. Despite the obvious attractiveness of the idea of a universal definition of human dignity that serves as the bedrock of human rights and their positive specification, there cannot be – in principle – a single conclusive definition of human dignity (and respect) because these twin notions are to some extent context-dependent. This does not mean that we have no way of formalizing and critically evaluating the contingent uses of the terms. I also do not mean to imply that the notion of human dignity is empty, a contemporary iteration of “nonsense on stilts.” But it does mean that as a practical notion, human dignity isn’t fully determinable in advance.\textsuperscript{27} This may strike some as a frustrating, even perilous suggestion. It need be neither.

This dissertation hopes to escape the limitation of previous theoretical and empirical accounts by developing a critical perspective that seeks to address some of the valid concerns surrounding the reliance on the term of human dignity in constitutional discourse.\textsuperscript{28} Instead of asking the question “what is dignity?” and providing an answer that is either philosophical or empirical, in this project I adopt a more pragmatic conceptual approach and ask: “how does the

\begin{footnotesize}
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\item As Bernard Yack puts out: “The great majority of moral and political philosophers express considerable discomfort with the indeterminate nature of the standards by which we measure the justice of familiar norms and institutions in political life. Because they most often think of justice as a body of primary rules and principles capable of ordering the basic distribution of benefits and burdens within a community…they tend to see indeterminate standard of judgments as a threat to justice itself.” *The Problems of a Political Animal* (Berkeley, CA: University of California Press, 1993), 129.
\item Other critical attempts can be found in Rainer Forst, “The Grounds of Critique: On the Concept of Human Dignity in Social Orders of Justification” *Normative Orders Working Paper 01/2011* can be found in: http://habermas-rawls.blogspot.ca/2011/02/rainer-forst-on-concept-of-human.html (01/10/2012) and Jürgen Habermas “The Concept of Human Dignity and The Realistic Utopia of Human Rights,” *Metaphilosophy* 41.4 (July 2010): 464-480. As will become shortly apparent, I take a different analytical approach by focusing on the necessity of judgment, although commonalities might be found due to the shared goal of articulating a critical perspective that seeks to be context sensitive yet at the same time universal.
\end{enumerate}
\end{footnotesize}
idea of human dignity inform practical judgments?” This question has two aspects that require separate consideration: a working definition of the idea of human dignity and a framework for understanding how judgments (particularly, constitutional judgments) are formed. These two strands reflect the structure of the dissertation.

The Argument and Structure of Dissertation:

The relation between human dignity as a universal idea and the normative basis of human rights on the one hand, and human dignity as a particular manifestation, as a subjective feeling, or a product of locally constructed norms is the animating tension of our discussion. The tension between universal validity and particular context of interpretation, between the person’s moral status as man and political status as citizen is not purely a philosophical problem (as already identified by Marx29). It is a problem that requires ongoing political and legal resolution. It is also the normative point of departure for this dissertation; human dignity requires legal protection that is universal and is at the same time rooted in the local political community.

The broad question of how to translate general concepts to particular cases and the tension it gives rise to between universal principles and particular contexts of interpretation is especially salient in the case of the idea of human dignity. For, what is unique about the idea of human dignity – as it has come to be articulated in the second half of the 20th century – is that it is perceived as the touchstone, the foundation for liberal political morality. This leads to the central conundrum that shapes most practical discussions of human dignity: how can the idea of human dignity maintain its foundational constitutional status while at the same time serve as an effective practical tool for concrete adjudication of rights claims in different political

communities? How can it maintain its universality while retaining constant particular relevance and bite?

Acknowledging the ambiguity in the meaning of the idea of human dignity, Charles Beitz observed recently that,

Ideas of human dignity seem to apply (differently) at two distinct levels of thought about human rights – as a feature of a public system of norms and as a more specific value that explains why certain ways of treating people are (almost) always impermissible. If there could be a theory of human dignity, one of its desiderata would be to show what (if anything) these senses of human dignity have in common and how they hang together (if they do).³⁰

This dissertation seeks to address this challenge by developing an analytical framework that contends with the multifaceted role the idea of human dignity plays in the constitutional sphere. The short answer to the question of how the two uses of human dignity “hang together” is revealed through the perspective of judgment. Summarily the argument I develop in the course of the discussion unfolds in the following way:

1. Defining the constitutional idea of human dignity is a matter of on-going reflective judgment and continuous restatement at the level of the political community.

2. This process of articulation is reflective and open-ended in the sense that it involves an interplay between the universal (thin) idea of human dignity and its particular (thick) manifestation in the political context. This continuous and mutually illuminating relation between the thin conception of human dignity and its thick enmeshments accounts for the dynamic, potentially progressive adjudication that seeks to provide expanding constitutional recognition and legal protection to persons.

3. In the case of human dignity the tension between the universal and the particular perspectives is manifested by the interplay between human dignity as an objective deontological conception and

human dignity as an *intersubjective* conception through which the particular perspective is articulated. The intersubjective conception represents the particular perspective in two distinct ways: it opens up the possibility for a particular individual to communicate her claim, and it introduces the particular social-political context in which judgment takes place.

4. Viewed this way, the two conceptions of human dignity underline, respectively, *constitutive* and *regulative* functions in the sphere of constitutional law. As a *constitutive* idea human dignity underpins determinately the notion of legal subjectivity and the idea of equal freedoms. It establishes the notion of the individual as an equal bearer of rights. Pragmatically, this conception translates into the constitutional imperative of treating persons always as ends, and avoiding adjudication according to a purely utilitarian metric. As a *regulative* idea the universal idea of human dignity points towards the proposition that human dignity requires intersubjective recognition for its actualization, that it is the state’s duty to protect human dignity precisely because it is vulnerable to misrecognition and that such protection requires the equal consideration of persons when it comes to the justification of public policy and legislation.

5. Recognizing the bifurcation of the idea of human dignity and the related yet separate functions of judging from the determinate universal and indeterminate particular perspectives of human dignity is extremely helpful in critically sorting out and evaluating the different ways in which the idea of human dignity is practically invoked in constitutional adjudication. Some of the more prominent implications are:

a. As a *deontological* constitutive conception, human dignity underpins the basis for human rights, constitutional rights and the state’s duty to uphold human dignity. As an *intersubjective* regulative conception, human dignity explains how at the same time we can think of dignity as a discrete right. There is no essential contradiction between these two propositions since they each involve a different conception of human dignity.
b. This distinction is also helpful in explaining how human dignity can be implicated in diverse constitutional matters ranging from imprisonment, capital punishment, reproductive rights, equality claims and social rights.

c. The diversity in the constitutional adjudication of human dignity can be further systematized along four modalities, or patterns of judgments, in which the dynamic between the deontological and the intersubjective takes on different form. Accordingly, I identify four areas of adjudication: the idea of human dignity as a limiting principle to state and action; as justification for expanding the scope of rights’ protection; as a way for adjudicating between competing rights, values and principles in the area of self-determination and equality claims.

6. Against criticism raised – particularly by legal scholars – I will argue that just as it is impossible to define in advance the content of the notion of human dignity, it is equally wrong to argue that the openness of the notion provides a complete carte blanche for adjudication by courts. Admittedly, there is no metaphysical standard on which to rely when deliberating about the limits placed on state action by the idea of human dignity. All there is, is the internal tension between the universal thin idea of human dignity and its thick, particular or exemplary manifestations. For the perspective of reflective judgment in which the on-going definition of human dignity goes back and fro between its universal conception and its particular manifestations provides a critical limiting perspective on judicial interpretation. In each act of reflective interpretation we find an elaboration, or thickening of the thin idea, that invites us to consider a new case as an aspect of the thin idea, while at the same time retaining the “thinness” of the concept. In this way, satisfying the need to safeguard the foundational status of human dignity while leaving it open to concretization.
7. The conceptual character of the tension between the universal aspect of human dignity and its concretely embedded evolving and indeterminate meaning cannot result in a unified comprehensive definition of human dignity, for at the heart of this reflective interplay lies the immanent and non-transcendent tension between the universal and the particular; between the thin foundational conception of human dignity that underpins the constitutional order and the thick elaboration of its practical implications.

Before outlining the structure of the discussion, I would like to note three methodological points that follow from the formulation of the research question. Firstly, the research question is at once narrower and broader than it might appear at first sight. It is narrower in the sense that unlike comprehensive philosophical, moral or historical discussions of what human dignity means, this work focuses on the socio-political and constitutional implications of human dignity and its twin notion of respect.

At the same time, this discussion seeks to add to the theoretical debate surrounding the nature of political reflective judgment. In this second sense, the idea of human dignity can be understood as a case study of a broader category. Human dignity, like other practical norms, is situated – sometimes precariously – on the boundary between theory and practice; between an abstract philosophical notion and a practical tool for resolving normative dilemmas in real life.

There is a long-standing stream of scholarship that doubts the practical usefulness of moral principles for the purpose of guiding practical judgment. Richard Rorty for example argued that abstract foundational principles “never helped anyone who actually had a difficult problem and all they can possibly do is just serve to abbreviate a set of moral intuitions.” In my discussion I argue against the view that universal principles are ultimately futile in politics.

because impractical. Instead, I wish to show how the interplay between the universal and the particular, between the general abstract point of view and the (inter)subjective perspective is the animating force behind a process of judgment that fills the universal (abstract, minimal, thin) principle with particular content and curbs local parochial tendencies with its universalist pull.

The second point I wish to highlight is the nature of the inquiry. The question at the heart of this discussion is framed in descriptive terms. Descriptive accounts are often considered inferior forms of scholarly investigation. In this case, I believe it is merited, indeed required by the subject matter. Understanding how the idea of human dignity influences political judgment in the area of constitutional law, how claims to respect are articulated and how the challenge of adjudicating on the basis of human dignity can be met is the first step towards formulating a critical normative position on the uses and misuses of the term. To make it crystal clear, I do not adopt the view that all empirical invocations of human dignity are equally meaningful, legitimate or morally valid. Indeed, in the course of this dissertation I aim to provide a theoretical framework on the basis of which critical assessment can be made.

The last point concerns the relation between theory and practice. In line with the idea of reflective judgment (which, as I argue, underlies the way we think of human dignity in the constitutional sphere), the methodological position that guided me in the course of this research was the recognition of the mutually illuminating relation between theory and practice. Since scientific writing requires linearity in the construction of a coherent narrative, this back and forth movement is at times masked. Let me present then the structure of the dissertation.

Part one addresses the problem of articulating a working understanding of human dignity in a way that is sensitive to the problem noted earlier of attempting to define it determinatively. I identify two distinct ways in which the idea of human dignity has been employed in liberal theoretical accounts and make the following argument: when we think of
human dignity in the context of liberal-political morality, we are in fact speaking of two related,
yet analytically distinguishable, conceptions of human dignity: the first, most closely associated
with Kant’s moral and political thought is what I will call a deontological conception of human
dignity. It is a formal, universal, abstract, and metaphysical attribution of dignity to humanity
that cannot be lost to empirical contingency. It is a theoretical construction for the purposes of
underpinning moral action and the political duty of forming a civil society. To put it another
way, according to Kant we must assume that all humans “have”32 equal dignity, in order for us
to feel bound to treat them (and ourselves) with equal respect. This idea of human dignity
importantly underpins the idea of a need for a constitutional system (or what Kant called, a
system of Right). The second conception of human dignity is an intersubjective conception of
human dignity. It too is universal (and therefore lends itself to formalization), but most
importantly it reveals humans’ dependency on recognition as equals in order to function fully as
members of society. If the first conception of human dignity is correlated with a universal moral
point of view, the second conception is correlated with a contextual sensitivity towards what
counts as respect for a particular community in a particular time. This conception of human
dignity manifests itself through the idea of substantive equality in front of the law.

In chapter 1, I elaborate the first, deontological conception by closely examining Kant’s
notion of human dignity and its role in his political theory. The main argument I advance in this
chapter is that while Kant’s notion of dignity is wholly noumenal, Kant in fact ties his notion of
dignity to a phenomenal notion of respect. This theoretical observation has implications for the
way we think of Kant’s idea of human dignity as a foundational normative idea of human rights.
Against those who argue that Kant’s notion of human dignity is purely formal and therefore
unhelpful as a guide to practical judgment, I argue that his conception of human dignity has a

32 I use quotation marks in order to emphasize that human dignity in this view is inalienable. Unlike personal honor,
human dignity on the deontological view cannot be lost or gained. It is an attribution of morality itself.
necessary footing in the phenomenal, and as such holds practical import for practical reason. Against those who consider Kant’s notion of human dignity to be unproblematically the source and ground for modern constitutionalism, I wish to voice a note of caution by shedding light on the inherent limitations that stem from relying exclusively on a Kantian conception of human dignity. It is the irreducibly phenomenal nature of respect that leads Kant to argue forcefully and persuasively for the very need for a coherent system of law and rights that equally protects the negative freedom of all. But once the system of rights is put in place, Kant’s notion of dignity and respect are deficient – on Kant’s own terms – in specifying its just content.

In chapter 2, I turn to the intersubjective notion of human dignity by exploring neo-Hegelian elaborations of the idea that humans rely on recognition for their well-being. The intersubjective conception of human dignity is based on the proposition that the individual’s self-respect, self-esteem and autonomy are dependent on equal recognition from fellow individuals and the state. On the basis of this conception I track two theoretical implications: first, the constructed nature of autonomy forms a foundation on the basis of which the moral wrong of disrespect can be expressed from the point of view of the unrecognized individual. In this sense an intersubjective notion of human dignity provides the means for identifying disrespect and articulating moral claims for respect. In other words, the individual can argue that a particular policy or law is contrary to her dignity because it fails to recognize her as an equal member of the community. The second feature highlights the contextual nature of intersubjective respect. For what counts as respect (from the perspective of the subject) is contingent on the normative, political, social and historical context of the particular community.

Put together these two conceptions form the normative syntax of a liberal conception of human dignity. In other words, they are the building blocks that guide convictions and practical judgments about the constitutional demands of human dignity. Therefore a political theory
(such as Kant’s) that focuses on a single conception of human dignity will be limited in terms of its explanatory ability and critical perspective. It will at times miss the political dimension of the phenomenon (embodied in judgment itself), and raise unanswerable questions regarding the practical way in which the abstract notion of human dignity becomes specified in practice.

This is the topic of part two of the dissertation. Thinking about what human dignity means in the abstract moral sense is insufficient. It leaves unspecified the actual ways in which the moral commitment to human dignity is translated to affective practices. For that what is needed is a model of judgment. In part two I articulate the problems that arise from the a-political model of determinate judgment (chapter 3) and discuss at length the dilemmas (chapter 4) and potentials (chapter 5) that are found in a model of political reflective judgment. The argument I develop in this section of the dissertation is that relying on a single conception of human dignity is insufficient for determining the justness of constitutional arrangements. I will argue that the inherent tension between deontological and intersubjective conceptions of human dignity – as representing universal and particular perspectives of judgment - does not point towards the conclusion that one should be preferred over the other in the course of practical judgment. Rather, both conceptions offer valuable insights. Both resonate with core intuitions regarding the purpose and meaning of constitutionalism. But what I argue for is not a happy medium. The model of reflective judgment I will develop in this section, points towards a dialectical perspective that takes account of both conceptions. More specifically, I will argue that constitutional deliberations about dignity and respect are driven by the immanent tension between deontological and intersubjective conceptions of human dignity. As a form of reflective judgment, constitutional judgments oscillate between the two conceptions in orienting practical judgment, increasingly imbuing each conception with detailed and elaborated definition. To be clear, this is not a synthetic approach. I am not describing a process in which the two
conceptions transcend their tensions to form a coherent unified notion of human dignity. As I intend to show, the two conceptions cannot be transcended into a single coherent notion. But nor should they be seen as completely separable. The tension between the two – which becomes most manifest in moments of reflective judgments – suggests that they affect each other’s continuous definition and produce what I will call a “thickening.”

In part three I bring the two strands of investigation (two conceptions of human dignity, the perspective of reflective judgment) together to make sense of the institutional practice of judging human dignity in constitutional judicial review. Chapter 6 begins by discussing the prevalence of the determinant model of judgment in legal theory and explains through the work of legal theorists (most notably Dworkin’s) why it is an untenable position. Any adjudication of constitutional matters (namely, matters that have a footing in the moral and the expedient) requires a mode of reflective judgment. This is the basis for the detailed framework I put forward in chapter 7 that seeks to make sense of the apparently different ways in which the idea of human dignity is invoked by different constitutional courts. By looking at different legal cases where the idea of human dignity has been central to the legal argument, I identify the ways in which the interplay between deontological and intersubjective conceptions of human dignity lead to systematic variation in the way the notion of human dignity is employed.

At the system level, I identify two modalities: a delimiting modality and an elaborating modality. The delimiting modality refers to a class of cases where the deontological idea of human dignity is invoked for the purpose of unearthing and reaffirming the very normative foundations of the constitutional framework. It relies on the deontological principle of non-utilitarian calculus to argue against certain legal measures that are judged to contravene the very raison d’être of the constitutional order. In this sense the reliance on the idea of human dignity is quite Kantian in spirit; it is a moral limiting principle for politics. In this modality the leading notion is
the deontological idea of human dignity. However, the mere need to reassert it already takes it out of the realms of Kantian transcendentalism and places it squarely, if not safely, in the realm of the here and now, for the practical meaning of protecting deontological human dignity takes different forms and different justifications in concrete political contexts.

The *elaborating* modality addresses claims to new rights. Judgment in this modality explicitly aims at thickening the constitutional conception of human dignity. In this modality we see most clearly the progressive potential of human dignity adjudication. For example, recognition of socio-economic rights reflects an evolving historical understanding of what is essential for human dignity; rights to privacy of personal data, reflect temporal transformations in collective conceptions of harm to human dignity brought about by new technologies.

The elaborating modality quite explicitly involves the specification of the universal conception of intersubjective human dignity. Judgment starts from the particular claim for misrecognition and asks whether the appealed aspect of recognition is essential for human dignity. In this sense, the elaborating modality is the paradigmatic modality of reflective judgment, for it starts from the particular and seeks the universal under which to classify it. In this modality, the Court engages in reflective deliberation over what human dignity entails (against the background of the particular context of the political community) and what is essential for it. With the acceptance of a claim, this process of reflection culminates in the transformation, a reinvention of what the idea of human dignity means from the perspective of constitutional protection. In this sense the originally thin idea of human dignity is thickly fleshed out in a specific case, by first thinning it, or detaching it from that thick context, and then by giving it new flesh – thickness – in a new context.

In both the *delimiting* and *elaborating* modalities, the legal cases offer the opportunity for the court to reflect not only on what gives the thick example its poignant meaning, but also what
is essential for the ‘thinness’ of the concept. In this sense, the elaborating and delimiting modalities are not concerned so much with recognition of particular individuals but with the kind of recognition owed to all citizens equally.

When we move from the system level to adjudication of particular rights, which are derived from the constitutional value of human dignity, we find a slightly different dynamic. At the level of particular rights adjudication, courts are faced with the need to balance between competing rights and interests that involve the possibility of harm to the dignity of particular individuals. They ask, on the basis of an intersubjective conception of dignity, how much harm is too much harm. The idea of human dignity establishes a justificatory standard the court has to meet when deciding for the limitation of freedom and benefits.

The idea of human dignity is intimately related to the values of equality and freedom. The link is conceptual and normative. But freedom and equality are often taken to be in tension with each other. A perspective of reflective judgment that reviews these values, when contested, through the prism of human dignity seek to resolve the theoretical tension. In the third modality of self-determination and fourth modality of equality, justification seeks to articulate the scope and limitation of dignity within the intricate context of competing and conflicting interests, rights and values through a proportionality analysis.

In cases involving self-determination, courts (for example, abortion or conflict between the right to property and a right to housing as exhibited in *Port Elizabeth*) determine the limitation on individual liberties, either because they conflict with other liberties (often such conflicts follow from the elaborating modality), or because they clash with other interests or values. It is important to reiterate that normative coherence is not consistency. Therefore, conflicts of rights and values do not result in the invalidation of the conflicting norms themselves, but in a process of justified balancing.
In cases of claims to equality courts seek to determine the nature of the challenged distinction and determine its constitutionality by considering its impact on the particular claimant. Discrimination singles out groups of individuals for differential treatment. Often it treats individuals on the basis of group identification over which they have no control, such as gender, sexual orientation, nationality, religion, etc. Subjective harm to dignity is not limited to the individual’s feeling of humiliation, frustration and offence. Discrimination often reflects commonly held stereotypes and prejudices, and in turn entrenches them. Therefore, harm caused intersubjectively is not contained within and limited to the concrete policy, statute or legislation but has longer-term implications and perpetuates injustice. Harm to dignity caused by discrimination has also an objective dimension. It results in restrictions on one’s autonomy, and undermines the right to equal freedom. In this section I revisit the Gosselin case and explain how the conception employed resulted in a troubling judgment. I contrast it with cases from other jurisdictions (most notably South Africa) and demonstrate a different approach.

The cases reviewed in chapter 7 are meant for illustrative purposes. I do not mean to argue that all cases invoking the idea of human dignity can be neatly pigeonholed in the fourfold framework I propose. However, the framework provides a way for analytically classifying cases, evaluating their differences and similarities and a basis from which to develop normative critique. The framework, I believe, helps to instill some order over what appears as randomness and arbitrariness of constitutional judgments.
PART ONE

Two Conceptions of Human Dignity

We read that slavery and degradation are morally wrong because they take someone’s dignity away. But we also read that nothing you can do to a person, including enslaving or degrading him, can take his dignity away.

Steven Pinker, *The Stupidity of Dignity*

The point is perhaps put crudely and too literally, but the question implicit in the quote above raises a valid point. Is human dignity inviolable or is it a product of the shifting standards of social recognition? How should the idea of human dignity guide our practical deliberations as a normative principle? To state one’s commitment to human dignity isn’t enough. Such commitment raises a set of conceptual questions that are the focus of this dissertation. Is human dignity inviolable or isn’t it? Is it in need of constitutional protection or not? My discussion starts from the premise that the two characterizations of human dignity that Pinker alludes to are true in the modest sense that each resonates with contemporary liberal political morality.

In this part I delineate two conceptions of human dignity, which to my understanding play a special role in the way the idea of human dignity frames judgment in the political and constitutional spheres. The first conception of human dignity refers to dignity as an inviolable, universal, formal property of all human beings. I call this conception of human dignity Deontological Human Dignity (DHD). The second conception of human dignity conceives of dignity as a socially constructed property that comes about and is sustained by correct recognition. I call this conception of human dignity Intersubjective Human Dignity (IHD).

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To my understanding, these two conceptions are special because together they establish the parameters of liberal moral sensibility, of a liberal sense of justice. More specifically, as I hope to show in the subsequent chapters, it is their dialectical relation that provides the backbone for the operation of reflective judgment when it comes to constitutional questions implicating human dignity. But my first task is to explicate in detail each of these conceptions from the point of view of political and legal, rather than strictly moral, theory and explain why on their own they are deficient for the purpose for which they are invoked, namely the protection of human dignity in practical deliberations.

For the purpose of elucidating each of the two conceptions, I focus on the works of political theorists. In doing so, I make no empirical claim regarding how these particular thinkers have influenced the way state officials, judges, or the public at large conceive of human dignity. These theorists may or may have not had direct impact on the conceptualization of human dignity—that historical question is outside the scope of this discussion. My aim rather is to tease out how these two conceptions operate conceptually and impact practical judgments in constitutional matters. I rely on the theoretical accounts as repositories of conceptual analysis and vocabulary, on the basis of which we can critically think about practical questions concerning the elasticity of the idea of human dignity.

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2 Thus Richard Rorty observed that Harriet Beecher Stowe’s “sentimental” accounts of slavery in Uncle Tom’s Cabin, contributed far more to the ending of slavery than “the cool Kant ever did with his account of human dignity.” Richard Rorty, Truth and Progress: Philosophical Papers (Cambridge: Cambridge University Press, 1998), 172-175. See also Avishai Margalit’s critical discussion of the sentimental approach to human dignity in “Human Dignity Between Kitsch and Deification,” The Hedgehog Review 9.3 (Fall 2007): 7-19.
Chapter 1

Kant on Human Dignity and Respect:
The Foundation and End of Legality

For, nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is an unconditional, incomparable worth; and the word respect alone provides a becoming expression for the estimate of it that a rational being must give. Autonomy is therefore the ground of the dignity of human nature and of every rational nature.

Immanuel Kant, *Groundwork for the Metaphysics of Moral*, 4:436

All human beings are born free, equal in dignity and human rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

*The Preamble to the Universal Declaration on Human Rights and Article 1* (1948)

The act makes them mere objects of state action...The state may not protect a majority of its citizens by intentionally killing a minority... A weighing up of lives against lives according to the standard of how many people are possibly affected on the one side and how many on the other side is impermissible...A qualification of the passengers' right to life also cannot be sustained by arguing that they are regarded as part of the weapon that the plane has become. Whoever argues in this manner makes them mere objects of state action and deprives them of their human quality and dignity.

The *Aviation Case*¹

Kant’s universal idea of human dignity is central to liberal political morality, the idea of universal human rights and constitutional liberal democracies.² Offering a humanist foundation

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¹ The *Aviation Act* case: BverfG, 1 BvR 357/05 (15/02/2006). English translation available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bv035705en.html
² J. B Schneewind considers Kant the most radical of 18th century efforts “to articulate the normative belief about the dignity and worth of the individual.” *The Invention of Autonomy* (Cambridge: Cambridge University Press, 1996), 6. For an insightful discussion of Kant’s appeal to contemporary moral and political philosophy, see William Galston, “What is Living and What is Dead in Kant’s Practical Philosophy,” in *Kant and Political Philosophy: The Contemporary Legacy*, ed. R. Beiner and W. J. Booth (New-Haven: Yale University Press, 1993), ch. 9.
for a notion of dignity, he has come to be regarded as the “father of the human concept of human dignity.”

This view has given rise to two contradictory perspectives: the first considers Kant’s notion of human dignity as morally and politically foundational for liberal political theory and constitutional practice. The second deems Kant’s notion of human dignity so abstract in its formality that it is unclear (and Kant’s moral writings do little to dispel the worry) what role it plays (if any) in affectively specifying and determining relations between empirical beings. As one commentator put it,

“The substantial disagreement between proponents of equal respect about what should be counted as fundamental norms of disrespect or impermissible status inequality implies that our understanding of equal respect is underspecified.”

In similar vein, commenting from the ethical point of view, Thomas Christiano wonders whether, “the dignity of persons, grounded in moral self-determination, [can] be understood in a substantive way as imposing substantive constraints on how one may treat persons.” Arguing from a juridical perspective but raising a similar concern, Izhak Englard has claimed that while Kant’s conception of intrinsic worth proved to be the most influential in the constitutional

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7 Thomas Christiano, “Two Conceptions of the Dignity of Persons,” 108. I should note that Christiano’s “two conceptions” are not the two conceptions I develop in this chapter and the following.
context of the 20th century, “no concrete conclusion can be deduced from the formula of humanity.” So there are good reasons to think that Kant’s notion of human dignity is not up to the formidable task for which it has been enlisted.

In this chapter my intention is to explore further Kant’s notion of human dignity and in the course of the discussion problematize both views. Against those who argue that Kant’s notion of human dignity is purely formal and therefore unhelpful as a guide to practical judgment, I argue that his conception of human dignity has a necessary footing in the phenomenal, and as such holds practical import for practical reason. Against those who consider Kant’s notion of human dignity to be unproblematically the source and ground for modern constitutionalism I wish to voice a note of caution by shedding light on the inherent limitations that stem from relying exclusively on a Kantian conception of human dignity. I do so by exploring how Kant’s moral conception of human dignity informs and shapes his own view of politics and legality. As such the discussion will inevitably be pitched at times at a technical level. But its relevance goes beyond doctrinal nuances, of interest to a small circle of Kantian “card carriers.” For the problem presented by commitment to a universal inviolable idea of human dignity is not purely philosophical; rather, it is practical. It has to do with whether a formal idea of human dignity can in fact generate substantive moral and political constraints on how people can be treated by law, and if so, how? The question, central to liberal political morality, is how to combine the strong normative commitment to the universal idea of human dignity, as the foundation for human rights, with the real difficulty it poses in terms of spelling out its practical implications in the sphere of law.

9 I take seriously the exegetical point that to speak of a jurisprudence of human dignity in Kant’s thought is a stretch, since the notion remains very much in the background, as Habermas recently noted. Any discussion of the role of applying Kant’s idea of human dignity to legality and politics requires reconstruction. Jürgen Habermas, “The Concept of Human Dignity and The Realistic Utopia of Human Rights,” Metaphilosophy 41.4 (July 2010), 474.
10 Christiano discusses this problem from the moral, rather than the political, angle.
I should clarify what this chapter is not about. There is substantial critical literature that deals with the question of why should respect be given to all people equally. What trait of humanity deserves such recognition? Is it moral self-determination, rational capacity, or the ability to assign value? Clearly, these are important questions for a moral theorist, but it is not my central preoccupation. For regardless of the specific answer to the question (which human trait justifies the ground for equal respect?) we are still left with the question of how this particular respect should inform judgment in practical matters.

Consequently, in this chapter my discussion centers on exploring the conceptual relations in the Kantian account that spin out of the central idea of dignity, in the belief that considering how the idea of human dignity relates to other central concepts (particularly to respect, law, and right) is a better way for appreciating the possible promises and problems it holds, rather than returning repeatedly to the question of what precisely is human dignity and why all humans deserve it.

This discussion engages in a conceptual analysis of the inherent link between the twin ideas of dignity and respect. As I will argue, Kant was well aware of this connection. Some commentators have argued, against Kant, that his transcendental notion of dignity gives rise to a correlative transcendental notion of respect; that the kind of respect that emerges from his moral framework is far removed from what we would normally understand as respect because it does not apply to persons as such. In contrast I argue in this chapter that, while Kant’s notion of dignity is transcendental (for rather convincing reasons), his notion of respect cannot be entirely noumenal and has an irreducible phenomenal component. It is the irreducibly

phenomenal nature of respect that leads Kant to argue forcefully and persuasively for the very need for a coherent system of law and rights that equally protects the negative freedom of all. But the critics are right in that once the system of right is put in place, Kant’s notion of dignity and respect are deficient – on Kant’s own terms – in specifying its just content.

I begin the chapter by articulating Kant’s definitions of human dignity and respect within his moral theory. I then move to explore the salient challenges to Kant’s conceptualization. Thinking about human dignity in formal terms alone cannot capture an important element of what, at least intuitively, seems important about respecting other humans. In the third and fourth sections of the dissertation I therefore explore the internal tensions that arise from Kant’s strong theoretical commitment to the idea of human dignity on the one hand, and to the ways this commitment enables and at the same time limits his account of legality.

1.1 Noumenal Dignity – Phenomenal Respect

Kant’s philosophical engagement with the notions of dignity and respect indicates the emergence of a historically novel problem for moral and political theory; the rise of the universal individual who can rely no longer on the social matrix of honor to specify her morally and socially appropriate conduct. In Democracy in America, De Tocqueville articulates this concern from a decidedly aristocratic point of view:

True dignity in manners consists in always taking one’s proper station, neither too high nor too low, and this is as much within the reach of a peasant as of a prince. In democracies all stations appear doubtful; hence it is that the manners of democracies, thought often full of arrogance, are commonly wanting in dignity, and, moreover, they are never well trained or accomplished.12

In Kant’s moral philosophy, this problem is directly linked to the idea of autonomy and raises fundamental questions: what does it mean to treat another person with respect in accordance with her autonomy? How do I respect another person simply as a human and not as a magistrate, a priest, or a countess? To make things even more complex, given that unreflective reliance on traditional forms of normative valuation can no longer guide action (because it is heteronomous) how can I treat another person with the respect that is owed to her, while relying on my own judgment, without relying on either external authoritative sources or too subjective (relativist) grounds to ground my judgment?

In the *Groundwork of the Metaphysics of Morals* Kant makes the famous distinction between price and dignity, and stipulates the idea that persons (who have dignity and are beyond price) should never be treated only as means but always also as ends. It is therefore somewhat surprising that in the early stages of this work it transpires that not only persons have dignity. Reason, Kant tells us, also has dignity, as does the law and moral concepts, whose dignity lies “in the purity of their origin.” This may seem odd, given that the idea of treating humans as ends and not only as means is often taken to imply that persons possess (in a strong ontological sense) inherent moral value that elevates them above and beyond all other things. It is hard to see immediately how or why these abstract ideas would also enjoy this elevated status.

In the kingdom of ends, dignity is juxtaposed to “price.” “Price” expresses the value of a thing for us; whereas ‘dignity’ expresses our own value. Those things that have price are only of relative worth because their assigned value arises from the very possibility of an end in itself,

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13 *Groundwork*, 4:411. Page citations refer to the Prussian Academy edition of Kant’s work. “G” stands for the *Groundwork of Metaphysics of Morals*; “MM” for the *Metaphysics of Morals*; “CPR” for the *Critique of Practical Reason*; “TP” for *On The Common Saying: That May be Correct in Theory, But It Is Of No Use In Practice*; “CJ” for the *Critique of Judgment*; “PP” for *Perpetual Peace*; “LE” for *Lectures on Ethics*.

14 Ibid, 4:400.

15 Ibid, 4:412.
which gives value to all other things in the world.\textsuperscript{16} Practical reason is the only valid source of norms and values.\textsuperscript{17} In other words, all things that are not ends derive their relative value from the ends, and without ends there can be no value in the world. Dignity therefore denotes uniqueness, a quality that is irreplaceable because it “admits no equivalence.”\textsuperscript{18} Only that which has inner, incomparable worth has dignity.

Dignity signifies a status that, once recognized, spontaneously elicits a corresponding internal disposition that orients consciousness towards practical reason. In this sense, Kant’s conceptualization retains an aspect of the aristocratic (Roman) notion of \textit{dignitas}.\textsuperscript{19} Kant’s idea of equal dignity as denoting status points to respect as the appropriate attitude upon recognizing dignity. But what is the substance of the formal attitude of respect? How is respect manifested? And where does it ‘reside’ in the meticulous architectonics that distinguishes between nature and freedom?

According to Kant, human dignity and the corollary disposition of respect it engenders, are known a priori. This point is essential both because it separates respect from other kinds of motivating grounds (which are tainted with heteronomy) and because the idea of ends and its dignity is crucially related to the possibility of giving a universal law and hence to morality. Kant states:

\begin{quote}
\textit{“}\textit{That which constitutes the condition under which alone something can be an end in itself has not merely relative worth, that is a price, but an inner worth, that is, dignity.” \textit{(G 4:435).} Note that the human ability to judge something as important or valuable is at the core of the ability to distinguish between that which has price and that which has dignity. Judgment, as we shall see, is intimately connected with respect.\textit{”}}\end{quote}

\textsuperscript{16} \textit{G} 4:435.  
\textsuperscript{17} Yirmiyahu Yovel, “Kant’s Practical Reason as Will: Interest, Recognition, Judgment and Choice,” \textit{The Review of Metaphysics} 52.2 (Dec 1998), 267. See also Christine Korsgaard, \textit{Creating the Kingdom of Ends} (NY: Cambridge University Press, 1996) “A person, an end in itself, is a free cause, which is to say a first cause. By contrast, a thing, a means, is merely a mediated cause” 140. 
\textsuperscript{18} “That which constitutes the condition under which alone something can be an end in itself has not merely relative worth, that is a price, but an inner worth, that is, dignity.” \textit{(G 4:435).} Note that the human ability to judge something as important or valuable is at the core of the ability to distinguish between that which has price and that which has dignity. Judgment, as we shall see, is intimately connected with respect. 
\textsuperscript{19} Jeremy Waldron, following Gregory Vlastos, argues that the modern notion of human dignity designates a rank, albeit an elevated one that everyone shares in. I don’t think that Waldron’s reconceptualization does much to dispel the questions that arise from Kant’s formulation. I will come back to this point in the concluding part of this chapter. \textit{Dignity, Rank and Rights} (New-York, Oxford University Press, 2012).
Nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have dignity, that is, an unconditional, incomparable worth; and the word respect alone provides a becoming expression for the estimate of it that a rational being must give. Autonomy is therefore the ground of the dignity of human nature and of every rational being.

If the ability to give oneself universal law is the ground for dignity, what kind of respect does it engender? The answer is far from obvious. On the one hand, Kant’s definition of dignity – unlike the aristocratic dignitas – seems to be self-sufficient in the sense that an attitude of respect is unnecessary for dignity’s ‘actualization’. Metaphysically, dignity exists, whether it is positively recognized by empirical human beings or not. On the other hand, as I now turn to argue, dignity necessarily gives rise to respect in the phenomenal realm and is essential for the possibility of moral autonomous action.

This sounds confusing, and indeed Kant’s idea of respect is notoriously difficult to pin down. There are two reasons for the difficulty in explaining the precise nature of respect. Firstly, respect plays an absolutely unique role in Kant’s moral theory as the nexus between the noumenal and the phenomenal. Therefore, Kant can explain it only approximately by making analogies between respect and other feelings and motivations for actions. The second technical problem that Kant (and indeed we) face in understanding the nature of respect is: how

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20 G 4:436.

21 The issue is further complicated because Kant uses the same term (achtung) to denote both respect and esteem, without always making it clear whether he refers to respect as moral recognition or respect as esteem. In the Metaphysics of Morals this distinction becomes clearer when Kant reserves the term reverentia to subjective feeling of respect (MM 6:436). This idea of respect does not serve as ground for “a judgment about an object that it would be a duty to bring about and promote” because as a “feeling” it is only consistent with duties to oneself, but cannot serve as ground for them (MM 6:403). The second kind of respect is what Kant calls “respect in the practical sense” (observantia aliis praestant) and it is not “a mere feeling.” Rather it is “to be understood as the maxim of limiting our self-esteem by the dignity of humanity in another person, and so as respect in the practical sense.” (6:449) My discussion in this section focuses on this latter meaning of respect.
can it be known a priori and at the same time be rooted in the phenomenal? Here I would like to note several important points.\(^{22}\)

In the *Groundwork*, Kant states that “duty is the necessity of action from respect for the law.”\(^{23}\) As such respect must be qualitatively different from inclination; in fact, it is the very opposite of an inclination when understood as ground for choice. This is a crucial point for Kant, since it bears directly on the very possibility of autonomy. At issue is how to theorize the incentive to act morally, without relying on purely subjective or external (for example, divine) grounds. In a lengthy footnote Kant explains his position on the matter and his choice of terminology:

> It could be objected that I only seek refuge, behind the word *respect*, in an obscure feeling instead of distinctly resolving the question by means of a concept of reason. But though respect is a feeling, it is not one *received* by means of influence; it is, instead, a feeling *self-wrought* by means of a rational concept and therefore specifically different from all feelings of the first kind, which can be reduced to inclination or fear. What I recognize *immediately* as a law for me I cognize with respect, which signifies mere consciousness of the *subordination* of my will to a law without the mediation of other influences on my sense. *Immediate* determination of the will by means of the law and consciousness of this is called *respect*, so that this is regarded as the *effect* of the law on the subject, and not the *cause* of the law. Respect is properly the representation of a worth that infringes upon my self-love. Hence there is something that is regarded as an object neither of inclination nor of fear, though it has something analogous to both. The *object* of respect is therefore simply the *law*, and indeed the law that we impose upon *ourselves* and yet as necessary in itself. As a law we are subject to it without consulting self-love; as imposed upon us by ourselves it is nevertheless a result of our will: and in the first respect it has an analogy with fear, in the second with inclination. Any respect for a person is properly only respect for the law (of integrity and so forth) of which he gives us an example.\(^{24}\)

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\(^{23}\) G 4:400.

\(^{24}\) G 4:401 (all emphases are in the original).
In this passage Kant raises several themes, which prefigure his more elaborate treatment of respect in the *Critique of Practical Reason*. First, by defensively responding to possible detractors, Kant in effect admits to the central conundrum regarding his conceptualization of respect; namely, how is it possible to have a phenomenal incentive, one that arises in the realm of empirical experiences, for acting on noumenal law-giving? Kant’s answer is that respect originates within the individual and counters irrelevant inclinations for action that Kant groups under the heading of self-love. Secondly, Kant attempts to explain how respect - as an incentive for choice - is different from subjective feelings (in particular inclination and fear), yet similar to them in the way it orients human action. According to Kant, respect for the law stems simultaneously from an objective source (which is why it is analogous to fear) and an internal one (hence, the analogy to inclination). Understood this way, respect is both imposed and self-willed.²⁵ Thirdly, to distance himself even further from the characterization of respect as an “obscure feeling” that cannot be entirely dealt with at the level of the conceptual, Kant reiterates that respect for persons is an extrapolation of respect for law, whose dignity is *apriori*. Finally, respect for the moral law, unlike any other feeling is unmediated in that it results in the recognition of the *already existing* subordination of the will to the law. This “immediacy” is essential for the purity of the determinative process of moral action. We get from this quote the sense of unease Kant feels in grounding respect in the experiential, as opposed to the conceptual, but he also finds himself unable to provide any other explication.

This short but revealing definition of respect as a hinge that brings the “two standpoints” together, receives a detailed discussion in the third section of the *Critique of Practical Reason*. Here Kant does not change any of the fundamental elements, but he addresses in greater detail the puzzling nature of respect. First, he assigns to respect the function of creating the

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²⁵ “The consciousness of the free submission of the will to the law, yet as combined with an unavoidable constraint put on all inclinations though only by one’s own reason, is respect for the law.” (CPR 5:80).
“necessity of action.” Kant is fully aware that man has a natural propensity to view self-interest as determining grounds for action, and of confusing subjective interests with objective grounds, thereby misconstruing their normative significance in guiding moral choice. In the Second Critique, he adds the additional problem of “self-conceit.” Self-love is defined as the propensity to confuse subjective determining ground for choice with objective grounds. As such it only needs to be curbed by moral law in order for it to turn into “rational self-love.” Self-conceit on the other hand is far more pernicious. The self-conceited man conceives of his worth prior and independently of the moral law, thereby turning his self-love into “lawgiving” and a “practical principle.”26 As such self-conceit involves the presumption of acting outside the moral law.27 Moral law “infringes” on self-love so that it is in agreement with the law, but it “strikes down” and “humiliates” self-conceit and as such is “an object of the greatest respect.”28

Carrying on the connotations of aristocratic respect, Kant links practical respect with humiliation as well as reverence.29 The idea that awareness of the moral law leads to feeling of humiliation and reverence is a recurring theme. Its importance lies in the fact that it reveals an interesting psychological element that Kant builds on for his explication of respect. For it is precisely due to the unfortunate fact that humans have a natural propensity for self-conceit that the moral law has such an ultimately positive over-powering effect on the rational being. Kant says,

What in our judgment infringes upon our self-conceit humiliates. Hence the moral law unavoidably humiliates every human being when he compares with it the sensible propensity of his nature. If something represented as a determining ground of our will humiliates us in our

28 CPR 5:73.
29 For a discussion of how humiliation changed in the course of the 18th century, from a religious or socially determined feeling to a subjective feeling see William Ian Miller, Humiliation (Ithaca, NY: Cornell University Press, 1993), ch. 5.
self-consciousness, it awakens respect for itself insofar as it is positive and a determining ground.\textsuperscript{30}

The humiliation experienced by self-consciousness when cognizant of the moral law, “awakens” respect for the \textit{objective} (external) determining ground of the will. But this is only a partial step. For it is in virtue of the humiliation and the recognition of one’s pathological tendencies (that are in constant need of curbing) that the feeling of respect turns into an internalized, \textit{subjective} ground.

The same cognitive (realization of the authority of the moral law) and affective (feeling of the inadequacy of private inclinations as ground for choice) process is replicated when we encounter the workings of the moral law in others. The righteous man, for example,

> holds before me a law that strikes down my self-conceit when I compare it with my conduct, and I see observance of that law and hence its practicability proved before me in fact. … Respect is a tribute that we cannot refuse to pay to merit, whether we want to or not; we may indeed withhold it outwardly but we still cannot help feeling it inwardly.\textsuperscript{31}

The instinctual nature of the feeling of respect, when facing a directive one must obey leads admittedly to a sense of inferiority, but at the same time also to a feeling of hope. Humiliation of humans’ sensible nature has the effect of elevating the moral, practical esteem for the law because it underscores the very possibility of independence from nature through self-legislation.\textsuperscript{32} Humiliation, as a self-conscious experience in empirical subjects, becomes both the “objective” transcendental ground for morality and “subjectively a ground of respect for the law.”

Although respect is a feeling, Kant insists it is unlike any other feeling. Inclinations are “pathological” because their source is entirely sensible and thus are heteronomous grounds for

\textsuperscript{30} CPR 5:74.
\textsuperscript{31} CPR 5:77.
\textsuperscript{32} CPR 5:79. For an interesting discussion between of respect and the consciousness of humility from which it arises see Paul Saurette, “Kant’s Culture of Humiliation: Political and Ethical Cultivation,” \textit{Philosophy and Social Criticism} 28.1 (Jan 2002): 59-90.
action. Respect on the other hand is a “moral feeling” brought about by reason and “is known a priori.” As such, respect holds an absolutely unique and crucial role in driving the deontological framework. Duty requires action in accordance with the moral law in a way that excludes all inclinations as determining ground. The feeling of respect is akin to inclination in that it motivates towards action, but differs from inclination in that it is the only kind of feeling that is involved in the determination of the will by the law.

What we have seen so far is that the twin concepts of dignity and respect bear on the very possibility of moral action. As the object of respect, the capacity for universal-law-giving turns the objective dictate of practical reason into an internal motivation for action. That is why dignity, in the metaphysical sense Kant ascribes to it, can never be lost. And while Kant uses as shorthand possessive verbs to describe dignity (“have dignity,” “has inner worth”) it is— as Darwall concedes—never meant in the ontological sense. But, human dignity as an attribute of autonomy underpins the very possibility of moral duty, because its recognition leads to respect all persons equally as end-setters. Therefore, in Kant’s view humans are accorded with the status of human dignity in virtue of practical reason. They are recognized as rational beings. Humans enjoy the attribution of dignity, rather than the possession of it. Thinking of dignity in empirical terms – namely, as a status that people need to live up to, as an aspect of social standing that can be earned and can therefore be lost – cannot by definition underpin moral

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33 CPR 5:79.  
34 Ibid, 5:81.  
35 “Our own will insofar as it would act only under the condition of a possible giving of universal law through its maxims… is the proper object of respect; and the dignity of humanity consists just in this capacity to give universal law, though with the condition of also being itself subject to this very lawgiving.” (G 4:440)  
36 Darwall admits in his rejoinder to his “Two Kinds of Respect” to holding such an erroneous view. He says: “I had assumed that the dignity of persons consists in the relevant moral requirements themselves or in that value that comprises or underlies them – that, as Kant puts it, the “nature” of persons “limits all choice (and [so] is an object of respect).” (G 4:428) “Respect and the Second Person Standpoint,” Proceedings and Address of the American Philosophical Association 78.2 (Nov 2004), 44.
action in the sense that Kant means. It is only the universal assumption of equal moral status that makes moral action possible.

Kant’s idea of dignity in the practical sense is transcendental, in that it creates the conditions and necessity for moral action, and in that sense does not require respect for its actualization. But while the Kantian idea of dignity is metaphysical and transcendental, respect (in the practical sense) cannot be in Kant’s own terms entirely transcendental, as I have tried to show in this section. That is because respect in Kant’s account has a necessary component of action in virtue of serving as ground for duty. If respect works the way Kant thinks it does, namely serving as motivational ground for moral conduct, then it must have an irreducible phenomenal aspect to it.37

1.2 Respect for Whom?

In the previous section I outlined in broad terms the salient role that the twin notions of human dignity and respect play in Kant’s deontological framework. I have tried to show the subtle way in which Kant admits, to my understanding, to the dual position that respect plays, as known a priori and at the same time affective experience. This goes only some way towards explicating the nature of the link between dignity and respect in practical terms. For while Kant’s account sounds perhaps plausible in terms of explicating the general attitude of respect, it remains unclear how the precise content of the respectful attitude should be determined. How does the transition from the noumenal idea of human dignity to the phenomenal feeling of respect occur? Does Kant’s idea of respect even relate to “real” particular individuals? This is the question that Honig raises. According to her,

37 There is nothing peculiarly Kantian about construing respect as the behavioral manifestation of recognizing another’s dignity. This conceptualization is standard in ordinary language and easily identifiable in many historical aristocratic contexts such as bowing, taking one’s hat off, etc.
for the most part, Kantian respect is for the moral law, not for persons. At times, Kantian respect is for the morally worthy parts of persons, but never for persons tout court; and it is certainly never for those who are other, only for the possibility of their conversion to moral worthiness.  

This line of critique purports to drive a hole through the central tenet of Kantian liberalism. For the immediate implication is that Kant’s moral framework – with all its attractive and influential ethical vocabulary – in fact fails to relate to persons as such and thus cannot possibly serve the ethical purpose for which contemporary liberalism invokes it.

This line of critique merits attention because if true it would imply a serious flaw in Kant’s moral theory and would compromise any subsequent attempts to extrapolate ethically and politically from his framework. The charge rings true, not only because it appears to be corroborated by the text itself, but also because it is based on a correct understanding of one side of the dignity-respect equation. However, the claim is ultimately wrong because it misunderstands the very nature of the equation. Let us consider the charge. When Honig argues that respect is not oriented toward people but toward the moral law they represent, what does she mean? She could be meaning one of two things: first, that in fact respect for the moral law means there is no duty to respect all persons qua persons. Rather, respect on this view should be extended only in so far and to the extent that persons are worthy of it, namely to those who act morally. Alternatively, Honig could be arguing that respect for the moral law entails respecting all people but only as rational beings rather than as particular individuals. The first charge – that persons should only be respected if they act worthily – is conceptually incorrect because it conflates two different types of respect. Respect in the practical sense, which is extended

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38 Bonnie Honig, Political Theory and The Displacement of Politics (Ithaca, NY: Cornell University Press, 1993), 18. Honig proceeds to distinguish between four types of respect, one of which at least, ‘liberal respect’, “can never be refused and manifests itself negatively because it requires that men relate to each other from distance, as equals and as bearers of rights.” (p. 32) It is therefore difficult to see how by the end of her own account Honig is able to sustain her initial sweeping claim.
universally to all rational beings, is different from respect in the sense of esteem, which is particular and can be withdrawn. Respect, unlike esteem, is extended to all persons, irrespective of how well they live up to their potential for autonomy. Esteem on the other hand, is discretionary and can be withdrawn. The second charge, that Kantian respect involves recognition only in virtue of our rational nature, is in some sense correct, however it is misguided. Universal respect for persons qua rational beings is precisely what Kant means when he speaks of humans as ends; that is, beings who are capable of universal law giving, setting ends and desiring the means for achieving those ends. Honig’s expectation, implicit in her critique of Kantian respect, that genuine unconditional respect entails respecting people for their particular features cannot be sustained by the requirement of internal consistency with which we began this chapter.\textsuperscript{39} I, as an autonomous individual, cannot be morally required to respect every person for their particular personality or temperament. This is a misapprehension of Kant’s – admittedly confounding – conceptualization of concluding from the phenomenal nature of respect a phenomenal conception of dignity. Dignity, as we saw, is not an attribute of the empirical self, but of the transcendental self, which in turn constitutes the possibility of empirical causality.\textsuperscript{40} Dignity does not ‘belong’ to a particular human’s nature, but is posited as the basis of the very possibility of rational human nature and therefore of morality. As internal critique, Honig’s argument is to my understanding incorrect. However, it points towards the intuition that Kant’s formal definition of human dignity is in some important sense lacking. For what does it mean to respect everyone and no one in particular? If dignity is a formal attribute of our humanity, how does it translate practically to substantive practices of respect? In what ways does it impose limitation on law?

\textsuperscript{39} In Kant’s terms Honig is confusing respect, which is purely formal, with love.
\textsuperscript{40} Ronald Beiner, Political Judgment (Chicago: The University of Chicago Press, 1983), 33.
The problem with dignity’s formality can perhaps be best illustrated from the Stoic perspective. In the Stoic view, one’s dignity need not be affected by external matters. Disrespect, humiliation and misrecognition should not impinge on one’s internal ordering of the soul if it is indeed organized properly. Kant’s transcendental characterization of dignity in the *Groundwork* and the *Second Critique* agrees with the Stoic view in that it admits no role for intersubjectivity. Now, it is very likely that we would find that the Stoic position contradicts basic human intuitions regarding the need for intersubjective recognition, and the objection is likely to reveal a phenomenological assumption about human nature. Namely, that a person’s dignity is constituted not only, and perhaps not at all, transcendentally, but intersubjectively through interaction with others as particulars. This counter-intuitive assumption about the need for external affirmation, recognition and respect might be correct, but it remains rather weak when applied as an external critique to Kant’s theoretical framework, since it would appear that Kant has very good reasons to insist on the formal nature of dignity.

In Kant’s understanding, dignity and respect (in the practical sense) are fundamental not because they may have a positive effect on the recipient of my respectful attitude, but because they are constitutive of morality itself. To stretch the idea of dignity from the transcendental to the empirical realm runs a great moral risk: if our capacity to act on reasons can be threatened, is our status as end-in-itself equally vulnerable? If there are degrees of agency, are there also degrees of being an end-in-itself? If I am deprived of agency can I then be rightly treated as

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41 For a discussion see Avishai Margalit’s *The Decent Society* (Cambridge, MA: Harvard University Press, 1996), 22-27.
means only?\textsuperscript{43} Kant’s robust conceptualization of dignity allows him to answer unequivocally ‘no’ to these questions because his formal notion of human dignity is metaphysical.

So in order to appreciate the theoretical and normative limitations of Kant’s formal conception of dignity we should modify the question. If I am right to argue that in Kant’s terms, noumenal dignity is always oriented towards the phenomenal through the notion of respect, the problem with Kant’s conceptualization cannot be revealed by asking only – as Honig does – who is the object of respect, since this only leads us to identify excluded categories. Rather, we should also be asking the practical question: how do we determine what counts as proper respect?\textsuperscript{44} If we accept Kant’s account about the internal motivational process that underpins the possibility of morality then we must ask: how do we practically determine and judge what constitutes respect in accordance with human dignity?\textsuperscript{45} Note that by positing the questions in terms of political judgment, we have already introduced a non-metaphysical element into the DHD, for what is implicit in the question is that at times the law substantively falls short of the mark of establishing a just system of rights.

Here we begin reconstructing the link between the deontological conception of human dignity and judgment. Kant believes (perhaps unconvincingly) that in the realm of morality the question is satisfactorily addressed by means of determinant judgment. For the purposes of acting morally, the individual needs to consult only her own universal reason to find a non-

\textsuperscript{43} Schneewind, 289.

\textsuperscript{44} By framing the question in this way I do not mean to imply that there isn’t a serious problem in Kant’s thought when it comes to inclusion and exclusion from the universe of rational being. On Kant’s problematic views on races see Thomas McCarthy, \textit{Race, Empire and the Idea of Human Development} (Cambridge: Cambridge University Press, 2009), 42-68. For a discussion of Kant’s view of women see Inder Marwah, “What Nature Makes of Her: Kant’s Gendered Metaphysics,” \textit{Hypatia} 28.3 (2013): 551-567.

\textsuperscript{45} This question is particularly pertinent due to the specific intermediary role that the feeling of respect plays in guiding moral action. “Respect” is a feeling which is directed only to the practical and which depends on the representation of a law only as to its form and not an account of any object of the law.” (CPR 5:80)
contradictory maxim, from which an imperative is derived. Kant seeks to transpose the same principle to the realm of legality. But as we shall see, it is difficult to see how determinant judgment can regulate the sphere of politics, a realm where “all actions relating to the rights of other men are unjust if their maxim is not consistent with publicity.” Plurality of judgments, which is inimical to moral judgment, is inherent in the very conception of legality; plurality of judgments constitutes the very problem legality is meant to solve and at the same time the outcome legality is meant to safeguard (in the form of pursuit of different private ends by citizens). I therefore turn now to explore the issue from the perspective of human dignity’s role in Kant’s legal theory.

1.3 Human Dignity in Kant’s Theory of Legality: Three Moments

The nature of the relation between Kant’s moral theory and his political theory is a matter of lively scholarly debate, particularly since the revival of the Kantian framework in political philosophy through the work of John Rawls. Kant’s import as a political philosopher depends greatly on how one views this preliminary question. Building on the discussion in the previous section, I now intend to highlight in some detail a problematic in Kant’s account of legality from the substantive point of view of justice that should concern those who take seriously Kant’s injunction that true politics should pay homage to morality. This problematic concerns the role that human dignity and equal respect play in Kant’s conceptualization of legality.

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46 Kant suggests that moral duty is immediately accessible. It is clear simple and easily comprehensible to anyone. “The concept of duty in its complete purity is incomparably simpler, clearer and more natural and easily comprehensible to everyone than any motive derived from, combined with, or influenced by happiness, for motives involving happiness always require a great deal of resourcefulness and deliberation.” (TP 8:286) I will have much more to say about determinant judgment in chapter 3.

47 PP 8:381.

48 PP 8:380.
Let me begin with a few general points about Kant’s theory of legality. In the *Doctrine of Right* (*Rechtslehre*) Kant sets out to explicate the *apriori* principles of “juridical practical reason.”

These principles underline positive law and give rise to law’s systematic internal divisions: private right and public right. Juridical Law, in contrast to ethical law, governs only those relations that Kant calls external; that is, actions that affect another’s choice. Consequently, juridical law is not concerned with individual well-being and it is indifferent to individual volition, namely, the ends we strive to realize individually through action. Law, Kant insists, is not meant “to teach virtue but only set forth what is right.” Similarly, whether I obey the law for fear of coercion or because I genuinely agree with the law, is immaterial from the point of view of Right. The sole aim of juridical law is to insure that each subject’s pursuit of her own ends leaves every other subject of the law free to pursue her own ends.

Out of the definition of the sphere of activity that can be – in principle – regulated by positive law, Kant defines the “universal principle of Right,” which states:

“All action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”

A juridical right action is an action in conformity with laws, which restrict each person’s actions in pursuit of his ends with the condition that these actions leave all other subjects of the law free to pursue their own ends. It follows from this formulation, that the notion of outer freedom already contains the idea of reciprocal limitation upon everyone’s exercise of choice.

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50 Jürgen Habermas refers to the public right as “structurally homologous [to private right] rights that protect the individual from the state itself.” *Between Facts and Norms* (Cambridge, MA: MIT Press, 1998), 28.
51 MM 6:214.
52 MM 6:230-1.
53 Gregor, 38.
54 MM 6:230.
55 MM 6:232.
Importantly, this also leads Kant to argue that the concept of right is not independent from the authorization to use coercion. The very concept of right in its strict, juridical sense, already connects the possibility of universal reciprocal coercion with the freedom of everyone. In other words, there are no rights until they become enforceable.\textsuperscript{56} In this way, the notion of right is “not mingled with anything ethical [and] requires only external grounds for determining choice.”\textsuperscript{57} Thus, while the idea of Right appears to structurally resemble the supreme principle of morality, the two are differentiated on the basis of the motivational grounds for compliance.

Kant then proceeds to outline the divisions of the Doctrine of Right. First, “be an honorable person” which consists of asserting one’s worth as a human being in relation to others. Secondly, do not wrong anyone, even if this means “shunning society” but if you cannot avoid association, go to the third and final step, “enter into a society, in which each can keep what is his.”\textsuperscript{58}

There is only one innate right, and that is the right to freedom: independence from being constrained by another’s choice, insofar as it can coexist with the freedom of every other in accordance with a universal law. From it also follows innate equality, that is “independence from being bound by others to more than one can in turn bind them.”\textsuperscript{59} This innate right to equal freedom is formal in that it serves as basis for all other acquired rights that are explicated in positive law.\textsuperscript{60} So to push the reconstructive point to its logical conclusion we can say that the moral imperative of human dignity, of according (all) individuals with equal respect, finds its most universal empirical manifestation in the idea of equal legal rights.

\textsuperscript{57} MM 6:232.
\textsuperscript{58} MM 6:237.
\textsuperscript{59} MM 6:238.
\textsuperscript{60} Katrin Flickshuh, \textit{Kant and Modern Political Philosophy} (Cambridge: Cambridge University Press, 2000), 48-49.
Now, Kant makes it abundantly clear that morality and legality constitute two separate spheres of motivation and action. And yet they are not entirely disconnected; the question is how are they connected? I ask this immensely intricate and multifaceted question in a very specific sense, namely: how is the idea of human dignity, so central to the sphere of morality, recast in the sphere of legality? How does it enable and constrain the system of right?

There are three, analytically distinguishable, ways in which the foundational moral idea of human dignity guides Kant’s conception of legality.

1) Human dignity underpins the very need for a system of Rights and grounds the justification for legality (the positivist perspective)

2) Human dignity informs the content of law (the natural law perspective)

3) Human dignity is the just end (telos) of legality (the teleological perspective)

These three principles are not mutually exclusive. Indeed, they are intricately connected and form a relation of lexical priority.61 But the very systematicity which links the three principles together, as I will argue, also means that Kant can only account for the realization of the first principle, thereby leaving the question of law’s content and end ultimately unaccounted. Let me now elaborate on each of these principles. Consideration of the full implications for the role of human dignity in legality and the problems it gives rise to will have to await chapter 3 after an exposition of the idea of determinant judgment.

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61 These principles are adapted from Thomas Pogge’s framework that identifies three principles that structure Kant’s view of legality:
   a. The formal principle of consistency
   b. The material principle of universality
   c. The teleological principle of enlightenment.
Pogge argues that these principles are in strict lexical hierarchy. The modes of linkage between legality and morality identified here (justification for legality, content of law, end of law) overlap with Pogge’s. See Thomas Pogge, “Kant’s Theory of Justice,” *Kant-Studien* 79.4 (1988): 407-433.
I.3.1 The 1st Moment: The Positivist Perspective

Kant states that forming civil society is a requirement of practical reason. The problem with the pre-political state of nature is not the absence of law and rights. Indeed, Kant identifies the state of nature as one governed by natural law and provisional right. Rather, the problem is that there is no privileged point of view from which to make authoritative judgment regarding conflict and disagreement. The rule of law, regardless of its specific content, is what allows us to engage at all in an activity that defines the mark of humanity, namely setting and pursuing our own ends. The fundamental principle of morality dictates the protection of the external use of freedom as a natural expression of choice and thus as part of autonomy as a whole. Respect for human dignity as a formal principle requires as a matter of practical reason a sphere of legality. Another, more familiar way of making the same point is that Kant’s twin notions of dignity and respect give rise to the idea of persons as equal bearers of rights.

Kant’s insistence on the need to enter juridical state and remain in it has led some to argue that he is a “normative positivist,” in line with Hobbes, Bentham and Hume “who argued that it was better for reasons of peace, stability, and predictability if the legality of putative rules of law could be determined by individual citizens without those citizens having to make value judgments regarding the moral content of law.” So strong is the moral imperative for establishing and maintaining legality that it seems to put Kant at odds in some respects with the social contract tradition. In fact, Kant’s insistence on the moral duty to enter civil society, obedience to the law and rejection of the right to revolution appear to undermine the very idea of dignity and respect. But it does not. Or rather, it does not undermine the idea of human

63 MM 6:322.
66 PP 8:382, TP 8:303n.
dignity as articulated in Kant's moral framework. Compliance with claims of right can be enforced, while compliance with ethical duty cannot. Coercing someone to adopt a morally obligatory end is to fail to treat them as end in themselves. But coerced compliance with claims of right involves no such lack of respect. In fact, failing to compel or to support a system of coerced law is a “wrong in the highest degree” and would fail to accord another person with her proper status as a rational and free being, entitled to external sphere where that freedom can be exercised. A juridical state requires clearly demarcated domains of external freedom so that all know in advance what they have a right to do or a duty to forbear. The system of rights is a necessary template for the exercise of external freedom. As such, the very existence of a system of right is the positive expression of the moral recognition of human dignity. But if any state, even a humiliating state, is better than no state, what are we to make of the role of human dignity as a critical political standard? Does it have in fact a role, beyond the polity’s foundational moment? As we saw on Kant’s conception, as articulated in his moral framework, humiliation cannot itself undermine human dignity, because human dignity, as Kant understands it is not of this world. It is a property of the metaphysical self.

I.3.2 The 2nd Moment: The Natural Law Perspective

Kant’s legal theory does not stop with the moral justification for positive law. Kant in fact intends to provide a formal account of the structure and content the rightful condition ought to assume. This is where we come to the 2nd moment. Kant does not think that any set of enacted rules, even if internally consistent and under an absolute sovereign, is necessarily just. Juridical law, according to Kant, ought to be based on the principles of natural law. The justness

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67 Pippin, “Mine and Thine,” 418-419.
68 Pogge argues that: “principles of reason function…as meta-constraints – constraining what constraints ought to be imposed on individuals. Hence reason’s demands affect persons only indirectly: by constraining what rights and duties a just social order is to stipulate.” “Kant’s Theory of Justice,” 412.
69 Waldron himself acknowledges this when he discusses the natural law content of positive law, “Kant’s Legal Positivism,” 1562-1566.
of the “rightful condition” is gauged by “the idea of the original contract.” Unlike any subsequent private or public contract, the original social contract is unique in that it has no specific content at all. Instead, it provides the model for a kind of association ruled by the principle of law. In this sense, the formal idea of human dignity provides a minimally substantive standard by which the mutual restriction of freedoms requires that at minimum, law should formally treat all equally.

Although law is distinguished from morality by the different ground for motivation to act and comply, the very conception of positive law and the universal principle of right can be understood as deriving their force from the formal principle of morality. From “never treat another only as means, but also always as ends” formulae we have the positive command to promote the essential ends of humanity in others and ourselves through the moral duties of virtue. The negative command of the formulae enjoins us not to use persons merely as means to our subjective ends. And it is juridical duties that regulate this negative command. Actions of right then must be only such actions that are consistent with the status of ourselves and others as ends. Thus, there is a sense in which Kant understands the claims of right as a subset of moral obligations that can be positivized in legislation. But Kant’s position on this matter is decidedly ambiguous. As Robert Pippin puts it, “too much derivation [of legality from morality] and the duties of justice look a lot like moral duties of virtue - too little derivation and there goes the basis for Kant’s claims about the bindingness of the “duties of right.”

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70 TP 8:296-297.
71 Habermas, Between Facts and Norms, 93.
72 MM 6:230. Although Kant hastens to mention that equality under the law does not preclude inequality in acquired rights and possessions. (TP 8: 291)
73 Namely those that do not include elements of virtue, equity or necessity. (MM 6:234-236)
74 This point is a matter of great scholarly debate. Pippin distinguishes between those who think, like Otfried Hoffe, Wolfgang Kresting, Mary Gregor & Leslie Mulholland, that Kant subsumes his principle of right under the moral law (e.g. MM 6:239). Other scholars, like Allen Wood and Marcus Willaschek, hold that there is complete methodological autonomy for the principle of right.
75 Pippin, “Mine and Thine,” 425.
Here is the problem: as we saw in section 2 Kant has a complex account of metaphysical dignity. Dignity on this view can never be lost. To be sure, lack of respect towards the rights of others results in grave moral wrong on the part of the wrongdoer who failed in their supreme moral duty to recognize the dignity of another and act on it, but it does nothing to diminish the dignity of the wronged person. In Kant’s account harm and wrong occur when a person’s positive right (i.e. a mutually recognized and enforceable right) is infringed. For example, if I use my neighbour’s backyard to grow vegetables without his permission I violate his right to private property, but never his dignity. My neighbor has recourse to make a claim against me in court on the grounds that his rights were violated. However, consider a different scenario: if for example the law states that only men are allowed to own land, I – as a woman - cannot appeal to my enraged sense of wronged dignity and lack of equal recognition before the law as grounds for appealing this unjust law.

So the question is how can unjust law be contested on the grounds that it infringes human dignity? How is it possible to distinguish between public measures that are in accordance with human dignity, and those that are contrary to it, if we only have the metaphysical idea to go by? It is my argument that Kant’s conception presents a real difficulty in specifying the nature of injury that results from lack of recognition from the point of view of the unrecognized individual. For all its moral force, Kant’s idea of human dignity is philosophically too narrow to encompass human vulnerability to humiliation and disrespect and therefore to be a practical guide for determining justness of public law.

76 In his Lectures on Ethics, Kant says: “the supreme duty of them all is respect for the rights of others. Woe unto him who infringes those rights and tramples them underfoot! The right of the other should keep him secure in everything; it is stronger than any bulwark or wall.” (LE 27:415)

77 I understand Christiano to be making a similar point when he says: “forms of coercion, harm, deception and indifference to another’s fate do not seem generally to interfere with or undermine a person’s exercise of the capacity of moral self-determination.” “Two conceptions of the Dignity of Persons,” 108.
I.3.3 The 3\textsuperscript{rd} Moment: The Teleological Perspective

To complicate matters even further, Kant’s later writings give rise to a 3\textsuperscript{rd} moment, which following Patrick Riley’s work I will call the teleological moment. For Kant this iteration of the relation between human dignity and legality involves the principle of progress and enlightenment.\textsuperscript{78} There are two ways in which legality can be related teleologically to morality: first, in a slightly weaker sense legality creates the conditions for the exercise of good will by expanding “negative” freedom, so that one can be “positively” free. In the stronger sense, legality enforces part of what ought to be even where good will is absent and only legal incentives are present.\textsuperscript{79} In the weaker sense, legality simply facilitates morality, in the strong sense legality produces moral conduct. Thus, according to Patrick Riley, “[p]olitics and law serve as high purpose in Kant’s practical philosophy: they are the guarantors of those negative conditions that make respect of the dignity of men as ends in themselves more nearly possible.”\textsuperscript{80}

Riley argues that Kant hopes for a convergence between the realms of law and morals. Not in terms of the grounds of action – moral incentive could never become the motive for adherence to the public legal justice – but in the sense that, as the structures of politics become more “republican,” citizens will be treated as free autonomous and legally equal persons and that law will reflect the will of the people.\textsuperscript{81} Morality and politics share the same end, that is respect for persons, which in politics is manifested through the idea of the “rights of man.”

Riley makes a very plausible case for the aspirational trajectory of Kant’s political philosophy, but he provides little evidence for how the normativization of politics will take place.

\textsuperscript{78} For a different view see Michael Sandel who argues that Kantian philosophy is opposed to any conception of teleology. \textit{Liberalism and the Limits of Justice}, 2nd ed. (Cambridge: Cambridge University Press, 1998), 175.
\textsuperscript{79} See for example, “…(for it is not the case that a good state constitution is to be expected from inner morality; on the contrary, the good moral education (Bildung) of a people is to be expected from a good state constitution)…” (PP 8:366)
\textsuperscript{80} Patrick Riley, \textit{Kant’s Political Philosophy} (Totowa, NJ: Rowman and Littlefield, 1983), 12.
\textsuperscript{81} Ibid, 14.
This is not an omission on Riley’s part. Rather it points to a structural problem that at its core has to do with the very idea that drives Riley’s interpretation, namely teleological judgment and its application to the end of politics, namely human dignity.

In one reading there is a seamless expanding conceptual and historical progression that connects the three moments; from the moral imperative for legality that ensures external freedom, to the need to approximate law’s content in accordance with the idea of the original contract, to finally creating of the conditions for “civil community” that will guarantee the realization of moral ends so “that greatest development of natural tendencies can take place.”

Indeed, one could make the argument that the 2nd and 3rd moments are already incipient in the 1st. But the conceptual disjuncture between noumenal dignity and phenomenal respect results in a real difficulty to explain how individuals could appeal unjust laws on the basis that these laws undermine their dignity. Kant here is constrained by his commitment to the systematic framework and its resulting lack of political agency. The transcendental idea of human dignity underpins the 1st positivist moment (of justifying and securing a rule of law) so successfully, that it undermines the transition to the 2nd and 3rd. Despite all hope, Kant cannot provide an account of the way in which legality could ever approximate the 2nd and 3rd moments. That is because legality is not based on consent but on the moral imperative to enter legality. Kant therefore must concede that at least sometimes the subject will not feel as the author of law, and yet will be required to comply with it. The duty to enter civil society is independent of the specific content of the contract itself. Thus, the contractual tone of the universal principle is

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82 CJ 5:432.
83 As Pogge claims, “the later theory, but not the *Groundwork*, is committed to the claim that without justice, presupposing effective juridical laws, there would be no morality at all and human life on earth would lose its value. “Kant’s Theory of Justice,” 412.
84 In Habermas’ terms the problem is that in Kant, like in Rousseau, there is still a competition between the morally grounded rights and the principle of sovereignty. *Between Facts and Norms*, 94.
misleading.\textsuperscript{85} Seen from the point of view of the theoretical system, the deduction is based on formal practical reason; seen from the point of view of enacted law, the democratic will is incidental.

1.4 Concluding Thoughts

Kant provides a brilliant, watertight philosophical solution to the problem of multiple judgments over what constitutes human dignity at the pre-political stage in the form of a justification for positive law and the system of right. Contrary to the critical view that sees Kant’s notions of dignity and respect as having no traction or effect in the empirical, I argued in this chapter that the twin notions form the basis for the (moral) justification for the establishment of the political community of law, and thus for the idea of equal respect for persons as rights bearers. In contemporary terms we could say that Kant’s conception of deontological human dignity underpins the very idea of legal subjectivity and a basic catalogue of negative constitutional rights. But as it emerged in the course of the analysis, Kant’s theory remains silent on the question of how human dignity ought to shape law in practice, once the political community has been constituted.

If we reflect back and recall Bird’s succinct diagnosis of the problem of disagreement over what counts as equal respect, we can now better appreciate the extent of the difficulty. The problem is not only philosophical. It is also, and more urgently, political. It is a question that is posited daily in the most advanced liberal-democratic societies over what counts as proper recognition for human dignity. Is the banning of the burqa, gay marriage or the criminalization/legalization of abortion contrary to human dignity? And if so, is the infringement sufficient for rethinking these restrictions? Kant’s conception of human dignity is

\textsuperscript{85} See Habermas’ critique on this point. \textit{Between Facts and Norms}, 92-94.
salient for underpinning the frame of constitutionalism, which enables citizens to make claims in the first place, but it is of limited use for evaluating the claims themselves.

Kant’s conception of human dignity can be seen as establishing an elevated but equal rank of right claimers. This idea has been taken up by several contemporary theorists: Joel Feinberg speaks about human dignity as the ability to make claims, Rainer Forst thinks of it as the right to justification, Jeremy Waldron defines human dignity as a status. These are interesting and thought provoking formulations of the basic moral intuition that Kant articulated in his writing. But the problem is, as Charles Beitz noted recently, that these notions of rank dissolve into the more general idea of moral standing. As such these notions “remain indeterminate, underspecified in the sense that they have too much content: We show respect for people’s human dignity by treating them as we ought to treat them or in ways we can justify to them.” If dignity as status is shared by all humans equally, then “we cannot grasp the meaning of the status [human dignity] by asking what special entitlement and obligations apply to persons holding that status that would not, or not necessarily, belong to those who do not.”

The question of how to combine an absolute, universal and inviolable notion of human dignity with the idea that human dignity is vulnerable and requires protection is implicitly, if not explicitly, the central dilemma of constitutionalism and liberal-democratic politics. But it remains doubtful as to whether Kant’s (or a Kantian inspired) notion of human dignity can on its own provide a framework for addressing our contemporary questions. Kant’s conception of

88 Charles Beitz, “Human Dignity in the Theory of Human Rights: Nothing But a Phrase?” Philosophy and Public Affairs 41.3 (Summer 2013), 279. Colin Bird advances a similar line of critique when he discusses Thomas Nagel’s position. According to Nagel moral status is “conferred by moral rights.” But this, as Bird points out only begs the question. “Far from answering the original question, it merely restates it. What goes to this answer seems to me also to go for the Rawlsian reply that individuals are to be regarded as “free and equal” citizens with the “two moral powers.” Once again, this is not so much to ground the claim that individuals enjoy a certain status vis-à-vis each other as it is to simply assert that they do.” (Bird, 228) Bird is referring to Thomas Nagel, “Personal rights and public Space,” Philosophy and Public Affairs 24.2 (Spring 1995), 85.
89 Beitz, 274.
human dignity is seminal and foundational for liberal thought, but we should be clear on its limitations. In the next chapter I turn to explore the notion of human dignity as a psychological, phenomenological and existential construct, rather than as a conceptually formal construct.
Chapter 2

Fragile Dignity: Human Need for Recognition

Any law that uplifts human personality is just. Any law that degrades human personality is unjust…Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.

Martin Luther King Jr, Letter from Birmingham Jail

Degraded human beings lose their identity as human beings and as particular persons…The assault on dignity has achieved its aim when the very possibility of the idea of human dignity is forced out of the mind of the victim…The extreme will to deny the humanity of targeted groups grows out of ideologies and elaborated fantasies that congeal in revulsion and bottomless contempt for the afflicted group.

Justice William Brennan, Furman v. Georgia (1972)

…Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with particular law.


In the previous chapter, I identified what I take to be the main difficulty with Kant’s formal conception of human dignity: namely, the inherent challenge in articulating injustice from the perspective of the misrecognized individual, and in contesting law on the grounds that it undermines human dignity. As I suggested, Kant’s own intuition regarding the role human dignity should play in formulating the content of law and its end, points towards the need for recognition of human dignity’s vulnerability as the basis for appealing unjust law.

Just like Kant’s moral theory, intersubjective theories of human dignity take as their starting point the basic moral universal assumption that humans should be treated with respect. However, unlike Kant, who argued that one should respect others simply because morality
dictates so, intersubjective conceptions of human dignity locate the motivation for moral action in the potentially devastating effect disrespect has for human beings as particulars. Central to all liberal intersubjective theories is the universal assumption that humans, their autonomy, integrity, self-respect and dignity are constituted (or at least dependent) on the recognition, approval and respect forthcoming from others.

In this chapter I outline what I call the Intersubjective view of Human Dignity (IHD). Instead of focusing on a single theoretical framework as I did in the previous chapter, here I look at several theoretical accounts that represent (but do not exhaust) a cluster of thought that shares an emphasis on intersubjectivity as the prism for political theory.

I begin by outlining the Hegelian roots of contemporary intersubjective theories and the way in which they seek to transform Hegel’s formal and historically determinist category of recognition into an individual and group-based political claim for respect. I present in section 2 Axel Honneth’s theory, which serves as the main foil for my argument (although I will be alluding to other theorists of intersubjective respect, namely Charles Taylor and Avishai Margalit). Having laid down the basic theoretical structure of the intersubjective view of dignity and respect, I move in section 3 to develop two constitutive features of intersubjective recognition: a) the constructed nature of autonomy and dignity and b) the contextual nature of respect.

The constructed nature of autonomy forms a foundation on the basis of which the moral wrong of disrespect can be expressed from the point of view of the unrecognized individual. In this sense an intersubjective notion of human dignity provides the means for identifying disrespect and articulating moral claims for respect. Put another way, the individual can argue that a particular policy or law is contrary to her dignity because it fails to recognize her as an equal member of the community. The second feature highlights the contextual nature of
intersubjective respect. For what counts as respect (from the perspective of the subject) is contingent on the normative, political, social and historical context of the particular community.

Viewed together, the two features of the intersubjective conception of human dignity represent a possible way of addressing the problem identified in chapter 1 of tying deontological human dignity to concrete claims against injustice by articulating the *particular* perspective. I use the term particular in two ways: IHD is particular because it can represent the individual’s point of view, and it is particular because it is enmeshed in the concrete context of a particular community. Both forms of particularity provide concrete content to the general categories of dignity and respect. In doing so they potentially hold the promise to redress the problem identified in our discussion of deontological human dignity by anchoring these categories in the empirical.

But the critical question that political (as opposed to sociological) theories of intersubjectivity must contend with is: how can claims to respect be critically judged by the members of the political community when respect is construed as essential for individual integrity, autonomy and dignity? Put another way, how can a community politically debate, accept or reject claims if all claims are articulated as morally imperative? How could rejection of a claim to dignity be justified? And how is it possible to judge the manifold dimensions of individuals’ experiences of misrecognition in the absence of a single, foundational or guiding idea of human dignity?

We face again the conundrum of political judgment when it comes to constitutional respect: if Kant’s notion of human dignity was too narrow to be relevant for the political sphere, with the intersubjective notion we encounter a somewhat different set of problems. In

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1 That is because judging from the point of view of abstract human dignity produced only the formal imperative to form a minimal form of civil society, and left the actual process of reforming law’s content in line with the idea of human dignity indeterminate.
the final section I address this challenge by considering the ways in which the intersubjective conception of human dignity can be linked to the deontological conception. It is my contention that the theorists I engage with in this chapter fail to grapple adequately with this challenge.

The epistemic problem is easy to state and difficult to solve: since the intersubjective conception emphasizes the individual’s point of view we have, at least in theory, an array of subjective experiences that threaten to overload and overstretch a working definition of what human dignity means for the purpose of critically evaluating the legitimacy of constitutional arrangements.\(^2\) The second problem is normative: since political judgment involves necessarily the rejection of some claims in favor of others, an intersubjective political theory must address the implications from the perspective of the person whose claim has been rejected.

2.1 Hegelian Roots

Intersubjective theories of respect are indebted in one way or another to Hegel’s seminal category of recognition. Hegel anchored his systematic framework in the – genetic, historical, philosophical and normative – fact of human sociability.\(^3\) Following Aristotle on this point, in Hegel’s view, individuals do not roam the state of nature as fully formed beings whereupon they promptly start claiming their pre-political rights once they begin bumping into each other. Rather, human nature develops and flourishes only in the context of social relations.\(^4\) We become fully human because we are perceived as such by others. But this

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\(^2\) See for example Jean Améry’s evocative view: “I must confess that I don’t know exactly what that is: human dignity. One person thinks he loses it when he finds himself in circumstances that make it impossible for him to take a daily bath. Another believes he loses it when he must speak to an official in something other than his native language. In one instance human dignity is bound to a certain physical convenience, in the other to the right of free speech, in still another perhaps to the availability of erotic partners of the same sex.” *At the Mind’s Limits* (Bloomington: Indiana University Press, 1980). It should be noted that Amery does think there is a fundamental feature that constitutes the core of human dignity, an existential and physical inviolability of the individual.

\(^3\) Hegel of course was not the first modern thinker to concern himself with how humans care about the way they are perceived and treated by others. See for example Locke, *Some Thoughts Concerning Education*, and Rousseau’s critique concerning living in the opinion of others in the *Discourse on Inequality*.

universal need is not easily attainable personally or indeed collectively. The realization that my status, consciousness and freedom depend on others (worse yet, on others I might consider inferior to me) is painful and unsettling. Human history is the actualization of people’s need for intersubjective recognition, consisting of a series of conflict-ridden stages, each elevating the clashing subjects to a higher level of recognition. Through differentiated spheres of social interaction that mark human historical development (family, civil society, state), the dialectical process of contradictions and their resolutions finds its end only with the full development of the liberal state where persons are finally recognized as “concrete universals, that is, subjects who are socialized in their particularity.”

Hegel’s framework represents a paradigmatic shift in the history of political philosophy by turning the standard liberal story of the state of nature on its head; accordingly, civil society is not an arena for the mutual restriction on liberty aimed to guarantee pre-political claims to freedom. Rather, civil society represents the “opportunity for the fulfillment of every single individual’s freedom.” Freedom, to use Robert Pippin’s phrase, is the question for which Hegel’s theory of recognition is the answer. In Hegel’s account, freedom is a normative and therefore a social status. Freedom is not a natural property of individuals (as it is for Locke) nor a philosophical premise (as it is for Kant), but an achieved social condition that can be realized only under specific historical circumstances. Freedom is not a serendipitous result of random historical events, but the very end of history.

6 Ibid, 13.
Importantly, the phenomenological and historical struggle for recognition is itself of normative significance because social struggle represents an ethical impetus directed towards the full intersubjective recognition of the individual subject. In other words, the moral potential, inherent in the very structure of social interaction, is gradually actualized and generalized through the consecutive stages of negation and reconciliation. Under the conditions of the ethical state, which signifies the end of the dialectical process, subjects attain freedom by recognizing each other as equal individuals. To be recognized as a concrete universal, to be seen as a person, is intrinsic to being a person. As Charles Taylor puts it, “recognizing persons is inseparable from being obliged to treat them in a certain way: according them respect.”

Here the problem of Kant’s formalism (indeed, as some termed it “emptiness”) comes up. Hegel’s critique of Kant confirms the set of problems identified in the previous chapter. For Hegel the formal process of universalization that the categorical imperative establishes is empty. It can fulfill its moral purpose only when injected with substantive assumptions about the desirability of ends. Thus for example, embezzling is wrong because if everybody did it, the institution of promising would be undermined. But if a street person asks me for some money, the fact that if everyone gave liberally poverty would be undermined does not make my act immoral.

Hegel’s theory of recognition, however, turns out to be a disappointing theory of respect, because respect remains a latent category. Hegel is more interested in the conceptual structure of relations between subjects (recognition), than with the specific content or

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8 It should be said that this conclusion is predetermined. If it is assumed that humans rely on recognition for their flourishing, then the conclusion that all of history is the story of recognition is unavoidable and in logical terms non-falsifiable. Hegel’s assertion that crime is the result of incomplete recognition is a case in point. See G.W.F. Hegel, System of Ethical Life, ed. T.M. Knox (Albany, NY: State University of New-York Press, 1979), 130.
11 This example is taken from Alessandro Ferrara, The Force of The Exemplary (New-York: Columbia University Press, 2008), 86.
manifestation of those relations (respect) or indeed with how forms of recognition are practically determined (judging correct recognition). From his transcendental point of view, Hegel can claim that full recognition has been actualized because the dialectic process has unfolded and history has reached its normative end. Hegel’s ‘discovery’ of the unified principles of reason that motivate and guide human history towards recognition paradoxically obviates the need to provide a philosophical account of respect.

And yet, just as the very structure of social relations revealed, according to Hegel, the seminal category of recognition, so the idea of recognition itself, once separated from the strong transcendental assumptions that underpins Hegel’s philosophy, reveals the category of respect, now itself in need of explication.\(^{12}\) So if recognition in the Hegelian sense entails “the ideal reciprocal relation between subjects in which each sees the other as its equal,”\(^{13}\) respect signifies concrete institutionalized forms of social interaction that enable subjects to fully function in their community in accordance with their moral and social status.\(^{14}\)

And here we encounter one of the central challenges to emerge from the neo-Hegelian shift of focus from recognition to respect; namely, how to critically evaluate claims for respect and resolve disagreements over their interpretations? This problem does not present itself in Hegel’s framework as such because history is taken to be the final arbiter of recognition, with the ethical unity of the state functioning as a substitute for political judgment. But when viewed from the post-metaphysical perspective of respect, judging the normative adequacy of social


\(^{13}\) Nancy Fraser, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003), 10.

\(^{14}\) This definition is broad enough to include pre-modern forms of respect as well as modern liberal-democratic ones.
and political institutions becomes an issue that the subjects in the polity simply cannot avoid. This is the challenge; since subjects can no longer rely on unifying ethical certainty (of the Hegelian or Rousseauvian kind) to guide their judgments as an objective standard, theoretical accounts of intersubjective dignity and respect must articulate a theory of political judgment that avoids relativism by appealing to a universal standard of validity, yet at the same time take seriously the claims that are raised by subjects who are understood to be embedded in the normative, social and cultural context of the polity. This is the problem that will occupy us for the rest of the chapter.

2.2 Honneth’s Intersubjective Account of Dignity and Respect

Neo-Hegelian theories aim to explicate the universal human need for recognition and articulate the concrete conditions that ensure human flourishing within a post-metaphysical philosophical framework. Both Charles Taylor and Axel Honneth’s intersubjective accounts of respect and human dignity build on the idea that individual identity formation develops as a result of social interaction with others. Humans rely on the feedback from persons around them for their positive relation-to-the-self. On this view, a person’s sense of dignity and capacity for autonomy are the direct outcome of being treated as a worthy individual. Conversely, “a person or a group of people, can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.”

Axel Honneth’s work in the last couple of decades represents a concerted philosophical effort to adapt Hegel’s framework to the post-metaphysical condition. Honneth seeks to

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16 Whether complete transcendence of metaphysics is possible remains an open question. For a discussion see Ronald Beiner, Civic Religion: A Dialogue in the History of Political Philosophy (Cambridge: Cambridge University Press, 2011), ch. 23.
transform Hegel’s transcendental category of recognition into an empirical, even naturalistic category. This new focus on the psychological dimension of recognition proves to be immensely useful for Honneth’s purposes, as it gives a scientific basis from which to make his strong normative claims. This meta-theoretical shift necessarily involves also a change in agency; from the transcendental category of reason to the individual, whose intersubjective needs are now construed as the driving force behind the historical struggle for recognition. Lastly, Hegel’s philosophically untenable “end-of-history” theory is rejected in favor of a continuously progressive view of history, where recognition is an unfolding yet unending process. Whether Honneth sufficiently detaches himself from Hegel’s metaphysical legacy is debatable. But his theory aims to flesh out the individual’s needs, social conditions and historical context that give particular forms of respect their moral universal significance.

On the basis of Hegel’s tripartite structure of historically evolved recognition, Honneth’s theory contends that human flourishing depends on the existence of well-established ‘ethical’ relations in three spheres of life, which can only be established through a struggle for recognition. Humans require recognition as family subjects with concrete needs, as abstract legal persons in the sphere of law, and as unique individuals with worthy life-plans. Recognition in the three spheres leads correspondingly to the development of self-confidence, self-respect and self-esteem. These three components of the positive relation-to-the-self are historical products of bourgeois society, which has been differentiated into three spheres of recognition (love, rights, solidarity).

In the sphere of love, individuals develop self-confidence in the context of primary relations such as parent-child, friendship and erotic relations between lovers. This self-confidence (or self-trust) manifests itself internally as the learnt and reaffirmed capacity to assert

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18 For this purpose G. H. Mead’s insights from social psychology are indispensable as they provide Honneth with an alternative explanatory framework and language through which to articulate Hegel’s basic insights.
one’s needs, feelings and desires and externally in the confidence to dispose freely of one’s own body. Disrespect in this sphere pertains therefore to a person’s physical integrity.

In the second sphere, the sphere of legal recognition, every person comes to expect recognition in the form of respect for her status as an agent capable of acting on the basis of reason. To have self-respect is to have a sense of oneself as a person who is morally responsible. To be disrespected then involves the systematic exclusion from rights.

The third type of respect involves recognition of individuals as particular, unique and valuable. When valued as such, persons develop self-esteem, that is, the feeling of one’s own worth as irreplaceable. Correspondingly, disrespect in this sphere entails lack of recognition of one’s life-style and thus holds negative consequences for the social value of individuals or groups. Accordingly, the appropriate social attitude is one of solidarity with, and approval of, unconventional life-styles, where esteem is accorded on the basis of an individual’s contribution to a shared project.

### 2.3 Intersubjective Dignity and Respect: Two Basic Elements

In order to appreciate the contrast between the intersubjective perspective and Kant’s account, I want to examine in some detail two conceptual elements that are fundamental to the intersubjective theory of dignity and respect. The first element concerns the proposition that autonomy and dignity are socially constructed and therefore sensitive to contingent factors. In a way this proposition is simply a restatement of the theory’s basic hypothesis, but it merits attention because it holds important implications, which may not be immediately apparent

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21 Ibid, 194-195. The third sphere is perhaps the most puzzling of the three. First, it is not quite clear whether Honneth means recognition in the sense of acceptance or approval. Secondly, it is difficult to see how approval for difference can be granted equally, and thirdly it is doubtful whether it can be claimed in the same way as legal recognition.
regarding the person’s ability to make moral claims. The second feature is the contextual nature of dignity and respect. In other words, because dignity and respect from the intersubjective perspective are constructed categories, their particular content makes sense for the subjects themselves only against a shared normative background. This aspect is less obvious than the first element and requires some analytical reconstruction. Its importance lies in the fact that it reveals the historically grounded dynamic and therefore potentially progressive nature of respect as a political category. Both aspects stand as correctives to Kant’s immutable notion of DHD and its twin notion of respect, which is phenomenal yet non-empirical.

2.3.1 Constructed Autonomy and Dignity

Intersubjective theories conceive of autonomy as a socially constructed property, one that depends on affirmative conditions of recognition and respect. I would like to begin this discussion with the notion of autonomy, because as in Kant’s account, it is directly linked to the idea of dignity. For Kant, the possibility of acting autonomously underpins human dignity and gives rise to the duty to respect. In contrast, in the intersubjective view the causal arrow runs in the opposite direction: namely, one’s sense of dignity (the feeling of being respected) and autonomy (the capacity to pursue one’s own life plans) develop as a result of forthcoming respect. This makes us vulnerable to disrespect. As Honneth argues,

[F]ull autonomy – the real and effective capacity to develop and pursue one’s own conception of a worthwhile life – is achievable only under socially supportive conditions. …on the path from helpless infancy to mature autonomy, we come to be able to trust our own feelings and intuitions, to stand up for what we believe in, and to consider our projects and accomplishments worthwhile. We cannot travel this path alone, and we are vulnerable at each step of the way to autonomy-undermining injustices.24

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22 Not the actual need for respect, which is universal but its particular manifestation.
23 For example religious burial arrangements that reflect respect for the dead, norms of sexual propriety, forms of addressing men, women, educated people, religious figures, etc.
There are a number of preliminary questions that arise from this line of argument. Firstly, from Kant’s point of view this conceptualization of autonomy is wholly unsatisfactory because it makes autonomy empirically contingent on the particular conditions that permit its exercise. As such it runs the risk that Kant has consistently sought to avoid, of equating the potential for autonomy with the empirical ability to exercise it. This poses a serious problem for any normative political theory, because it raises the fundamental question of why all humans, even those who for physical, cultural or personal reasons have been deprived of the possibility to develop the intersubjective capacity to act autonomously, deserve equal respect as autonomous beings. In Honneth’s defense, one could argue that he is not committed to a fully constructed view of autonomy. Indeed, he seems to sway between the strong claim that autonomy is constituted by social recognition and the weaker claim that autonomy is vulnerable to misrecognition.25 To be sure, there is no doubt that Honneth’s sympathies lie with Kant rather than with Nietzsche,26 but Honneth opens himself up to this challenge because of the ambiguity in his conception.

Secondly, and setting the first unresolved ambiguity aside, Honneth’s conception appears to be very subjective, centering on the confidence in one’s ability, almost of having a can-do mentality.27 Honneth’s salient claim regarding the psychological damage that humans experience as a result of misrecognition, portrays humans as arguably overly fragile, and risks

25 For the first, stronger, view see: “[t]he integrity of human subjects, vulnerable as they are to injury through insult and disrespect, depends on their receiving approval and respect from others.” “Integrity and Disrespect,” 188.
For the second, weaker, claim see for example, “At the individual level, the experience of being recognized as a legal person by the members of one’s community ensures that one can develop a positive attitude towards oneself.” Struggle for Recognition, 80.
26 For a discussion of Nietzsche on dignity and respect see Avishai Margalit, The decent Society, 25-27 and 232-235.
27 “The ability, and confidence in one’s ability to pursue life choices is a relational property and relies on supportive recognition.” Anderson and Honneth, “Autonomy, Vulnerability, Recognition, and Justice,” 127-149.
grounding the duty of respect in sentimental reasons. Moreover, as Fraser points out in her critical exchange with Honneth, his conception is entirely focused on the individual who may or may not have suffered psychical damage, distorted identity or impaired subjectivity as a result of misrecognition. The grounding of the experience of injustice in moral psychology thus “shifts the focus away from society and onto the self, implanting an excessively personalized sense of justice.”

Fraser clearly has a point, but I believe it would be mistaken to reject the perspective of intersubjective harm to the individual’s autonomy. There are, I believe, other ways to capture the intersubjective impetus regarding autonomy, without admittedly solving all the conceptual conundrums that Honneth’s conception gives rise to. Avishai Margalit addresses the question of intersubjective respect and dignity in the political sphere in his evocative book, The Decent Society. In this book Margalit develops an account of what makes a society “decent.” His suggestion, that a decent society is a society that does not humiliate its citizens, is based on a combination of a conceptual and existential analysis of humiliation and disrespect, and as such does not strictly follow the neo-Hegelian line. For Margalit, humiliation involves the real or symbolic rejection from human society and as a consequence a sense of loss of control over one’s life. A person is justified in feeling humiliated as long as this feeling is based on “sound reasons.”

Margalit’s portrayal of the loss of control over one’s life as the essence of humiliation straddles

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28 For a critique of the misguided link between dignity and sentimentality, in particular the need to “avoid presenting humans as predominantly victims for the sake of moral consideration” see Avishai Margalit, “Human Dignity Between Kitsch and Deification,” The Hedgehog Review 9.3 (Dec 2007): 7-19.
29 Nancy Fraser, Distribution or Recognition, 29, 204, 206.
30 Humiliation sounds much stronger than disrespect. However, Margalit understands humiliation as violation of dignity and from his usage it is easy to see the parallels between his conception of humiliation and Honneth’s notion of disrespect. (The Decent Society, 52).
31 It is debatable whether Margalit’s account is intersubjective in the Hegelian sense of the term. Nonetheless, I think he has important insights that enable us to get a better sense of the intersubjective view.
33 Clearly much depends on what makes a good reason, and who is in the best position to provide authoritative interpretation. I will return to this point later in the discussion of the role of judgment.
in some ways both Kantian and intersubjective intuitions. Echoing the intersubjective view, autonomy in his view depends on contingent circumstances and can therefore be lost. But importantly autonomy is not construed purely as a matter of subjective feelings (of offence, resentment, anger or a sense of inadequacy), but rather as based on the objective presumption of human need for recognition and potential for autonomy.

If there is some ambiguity and disagreement between theorists over how to conceptualize intersubjective autonomy, there is little disagreement when it comes to the notion of dignity. Honneth, Margalit, and Taylor understand dignity in behavioral terms; namely, as the attitude with which a person who is treated with respect conducts herself outwardly and feels inwardly. As Margalit says,

[D]ignity is the expression of the feeling of respect persons feel towards themselves as human beings. Dignity constitutes the external aspect of self-respect. Self-respect is the attitude persons have due to the fact of their being human. Dignity consists of the behavioral tendencies that attest to the fact that one’s attitude toward oneself is an attitude of self-respect. Dignity is the tendency to behave in a dignified manner which attests to one’s self-respect… Dignity is the representation of self-respect.34

Charles Taylor speaks even more explicitly of dignity in a behavioral, or what he calls “attitudinal” sense,

The issue of what one’s dignity consists in is no more avoidable than that of why we ought to respect others’ rights or what makes a full life. … The very way we walk, move, gesture, speak is shaped from the earliest moments by our awareness that we appear before others, that we stand in public space, and that this space is potentially one of respect or contempt, of pride or shame.35

Humans’ dignity is developed and shaped in response to the interaction between self and others and signifies one’s social position in the world. As such the intersubjective view of respect and

34 Margalit, *The Decent Society*, 51-52. To say that people should be treated with respect simply because they are human, tells us very little in terms of what the respectful treatment entails.

dignity squarely challenges both the stoic understanding of emotional autarchy and Kant’s metaphysical conception of dignity. In the intersubjective view, disrespect has potentially devastating effects on the individual’s autonomy, not only because it causes lasting psychical damage and shapes the agent’s future capacity to function (as Honneth’s theory emphasizes), but also because it involves social exclusion and loss of control over one’s autonomy. The harm of disrespect therefore is moral because it undermines the very conditions for personhood. As Taylor puts it, receiving recognition of one’s identity from others is a “vital human need,” a precondition of effective agency.36

This is a good vantage point from which to appreciate the different political implications between the intersubjective view and Kant’s deontological conception of dignity and respect. Kant understood respect first and foremost as a moral duty, sanctioned purely by practical reason, unable to take into account for its application anything other than the dictate of moral judgment.37 And while the idea of duty implies for Kant the notion of Right and therefore establishes at least in principle a claim for right, the non-empirical nature of Kant’s idea of respect makes it difficult to articulate from the perspective of the injured party in what sense their dignity has been infringed. As argued in the previous chapter, in Kant’s positivist account of law (the 1st moment), harm and wrong can be established when a person’s positive rights have been infringed. But unjust law that discriminates between people (on what the excluded person perceives as irrelevant and therefore unjustifiable grounds) cannot be contested, in the Kantian account, on the basis of the argument that the law is contrary to

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37 In fact, the notion of respect is governed by moral duty in two different senses: there is the obvious other-regarding duty and then there is the self-regarding duty to assert “one’s worth as a human being in relation to others.” (MM 6:236). Allen Wood notes here that an explanation of perfect duties to oneself could be expected in The Doctrine of Virtue, however such explanation is not provided. He notes that the idea of affirming one’s dignity as a person may be based on the Stoic idea of honestum, and concludes that in The Doctrine of Right “the right of humanity” seems to be a limiting condition on the rights of others. Editorial Notes, Practical Philosophy, (Cambridge: Cambridge University Press, 1996), 636.
human dignity even if it causes diminution of autonomy.

In contrast, the intersubjective conception of respect and dignity reveals the possibility of making a *moral claim* for constitutional respect. By constitutional respect I mean specifically recognition as an equal citizen. Since the act of claiming involves at least two people, the intersubjective conception situates respect and disrespect firmly within the social, where autonomy and dignity can be lost as well as reclaimed and reaffirmed. Thus the transition from mutual moral obligations to reciprocally established and accorded positive rights constitutes an act of “self-empowerment to self-determination.” This is the process of moving from “symmetrically intertwined perspectives of respect and esteem for the autonomy of the other to raising claims to recognition for one’s own autonomy by the other.”

Since discrimination signifies exclusion from one’s community, the intersubjective conception establishes unequal treatment as an instance of injustice by linking it to autonomy. The IHD contains not only a subjective psychological component, but also (and this point is not sufficiently clear in Honneth’s writings) an objective component in the form of autonomy. Since autonomy is conceived in constructed terms, its infringement suggests itself as a standard by which inequality can be assessed and redressed.

2.3.2 Respect in Context

The second conceptual feature that is important for our discussion is the irreducibly contextual nature of respect. In order to avoid a misunderstanding, I want to distinguish clearly

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39 Beitz suggests that the idea of human dignity might play a role in distinguishing between forms of treatment that obstruct persons from pursuing their aims and those that subvert the capacity for self-direction itself. “Human Dignity in the Theory of Human Rights: Nothing But a Phrase?” *Philosophy and Public Affairs* 41.1 (Summer 2013), 289. I am not sure that the distinction is all that useful. Beitz has harms such as torture in mind. But what about less egregious and more subtle instances? Do reproductive rights fall in the first category or the second? Can we not think about the right to education as essential for the capacity for self-direction?
between the formal category of respect (what Hegel would call recognition), which is understood to be universal both by Kant and by the intersubjective theorists, and the particular, historically situated and culturally varied, forms that institutions of respect take. Kant had only general things to say about the latter phenomena in his political theory (namely, the need for a system of right), but he had much to say about it by way of historical commentary.

Europe’s aristocratic society with its honor-based notions of moral valuations, motivation and harm served as the backdrop for Kant’s critical discussion of what I call intersubjective dignity and respect. Honor, and the reliance it entails on the opinion of others for the affirmation of one’s social status, is, according to Kant, a fundamental challenge to practical reason because it admits to sources of moral authority that are non-autonomous. Kant believed that the culture of traditional honor, which he understood to be a necessary phase in the process of human development towards enlightenment, will give way to universal human dignity. I leave aside the question of whether Kant was right to think that humans could ever grow out of their “immature” intersubjective sensibility. What’s important to note at this point is that Kant’s critical discussion of intersubjective dignity and respect, as an empirical fact in the course of human historical development (and as an obstacle he hoped humanity would overcome) in fact gives credibility to the intersubjective theory and in particular to its emphasis on the contextual – and therefore dynamic - nature of respect.

What exactly do I mean when I say that respect is a matter of context? The intersubjective theory of respect underscores the saliency of universes of discourse, which

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40 LE 27:44.
endow concrete forms of respect with their normative significance.\textsuperscript{42} In the intersubjective view, respect and disrespect exist in the symbolic and empirical social space, within what Mead calls, “a field of meaning.”\textsuperscript{43} Institutions of respect (e.g. bowing, taking one’s hat off, or enjoying titled privileges) are objective in the sense that they exist outside the subjects themselves but their significance depends entirely on the meaning assigned to them by the subjects within a particular normative context. Rooted in society’s mores and norms, institutions of respect provide subjects with an understanding of their social reality and a guide for determining one’s place vis-à-vis others.

As expressions of society’s moral code, institutions of respect are stable, but not immutable. Since institutions of respect are products of social meaning and interpretation they are also always open to challenges and transformations.\textsuperscript{44} But how does the transformation take place if subjects are always embedded in their normative context when they come to judge the justness of social institutions? One possibility, raised by Appiah, is that local practices of honor (such as foot binding in China) become internally contested and eventually transformed because members of the local elite begin to feel - in response to outside criticism and internal advocacy - that these practices are dishonorable, and that ending them is the honorable thing to do.\textsuperscript{45} Appiah’s claim is interesting and it certainly has some historical evidence to support it. But I would like to suggest another possibility, which is that a critical and transformative standpoint emerges when a perceived dissonance between the local perspective and a universal perspective becomes articulated by the subjects themselves. The dissonance, it is important to stress, is not

\textsuperscript{42} As G. H. Mead says, “[t]he significant gesture or symbol always presupposes for its significance the social process of experience and behavior in which it arises…” \textit{Mind, Self and Society from the Standpoint of a Social Behaviorist} (Chicago: University of Chicago Press, 1934), 89.

\textsuperscript{43} Ibid, 77.

\textsuperscript{44} Interestingly, neither Honneth nor Taylor refers to their conception of respect as “contextual.” The reason for this may have to do with the theorists’ desire to distance their accounts from any possible charge of subjectivism, moral relativism or of “collapsing normativity into the given.” (See for example Fraser, \textit{Redistribution or Recognition}, 202).

analytical, a result of some philosophically detached inquiry. Rather, the tension is perceived as such by the subjects themselves and - most interesting from our perspective – points towards the idea that the universal perspective itself is not a formal empty category. For the universal perspective must necessarily be imbued with concrete content against which the local institution is judged to be unjust, discriminatory or illegitimate. This is where the transformative potential of struggles for recognition stems from. Talking specifically about the evolution of human dignity as a legal concept, Habermas puts the point this way:

The experience of the violation of human dignity has preformed, and can still preform, an inventive function in many cases: be it in view of the unbearable social conditions and marginalization of impoverished social classes; or in view of the unequal treatment of women and men in the workplace, and of discrimination against foreigners and against cultural, linguistic, religious and racial minorities...In the light of such specific challenges, different aspects of the meaning of human dignity emerge from the plethora of experiences of what it means to be humiliated and deeply hurt. The features of human dignity specified and actualized in this way can then lead both to more complete exhaustion of existing civil rights and to the discovery and construction of new ones. Through this process the background intuition of humiliation forces its way first into the consciousness of suffering individuals and then into legal texts where it finds conceptual articulation and elaboration.46

Habermas’ articulation of the historical development of constitutional respect is helpful in that it points to the link between the local conception of respect and the universal conception of human dignity. The particular experiences of disrespect, humiliation, exclusion and discrimination reveal to particular subjects the tension, the discrepancy between the local institutions and the universal deontological conception of human dignity. That is, between the

46 Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights,” Metaphilosophy 41.4 (July 2010), 468 (my emphasis).
assumption of equal freedom that is embodied in Kant’s conception of deontological human dignity and the real experience of misrecognition.47

So what have we got so far? We saw firstly that the socially constructed nature of autonomy and dignity, in the intersubjective view, forms the normative basis for individuals to make claims against unjust institutional arrangements by identifying instances of disrespect and discrimination. We also noted that institutions of respect and the notion of dignity that underline them make sense only against a concrete normative context. This is true in two senses: institutional forms of recognition exist and their expressive function is sensible only within a particular normative context. This means that analysis of dignity and respect cannot be undertaken in isolation of the context in which they exists. Secondly, and this point only becomes clear when seen from the intersubjective perspective, the universal intersubjective conception of human dignity is itself the reflection of a normative (universal) perspective that is itself constructed and as such dynamic. Thus, for example the historical movement against slavery predates the movement against racial segregation. With each critique the result is a further thickening of the idea of human dignity. Therefore, changes in institutions of respect reflect shifts in the societal understanding of what constitutes an infringement of human dignity. By moving the theoretical perspective from Kant’s formal level to the intersubjective particular level, we come to appreciate the notion that dignity and respect are dynamic constructs that have the critical potential to underpin progressive politics.

47 Habermas’ general point about the emergence of additional meaning of human dignity through the explication of humiliation that particulars feel is illustrated by the experience of American Black people. According to Bromell, Black voices speaking from the margins of the demos offer the following important insights. Firstly, the involuntary nature of indignation, when one’s dignity has been slighted, confirms its (inherent?) possession. Secondly, indignation “sets the mind on fire” provoking internal scrutiny in an attempt to understand the nature of the insult and how to stand up to it. Thirdly, when this inwardly turn occurs it has the potential to become a dialectic mode of thought that assesses and monitors one’s response to the insult. Nick Bromell, “Democratic Indignation,” Political Theory 41.2 (March 2013), 287.


2.4 Connecting Universal assumption of Dignity with Respect for the Particular

In the previous section I began drawing a possible connection between a universal idea of human dignity and the particular perspective on what constitutes harm to it. In this section I wish to develop this link further.

Neo-Hegelian theories, such as Honneth and Taylor’s, seek to provide an account of intersubjective recognition within a universal moral framework. As such they give rise to a unique philosophical and political challenge. In the aristocratic world persons were perceived as occupiers of particular social roles (e.g. duke, priest, gentlewoman). Persons could therefore expect to be treated with respect in accordance with their position in the social order. However, in the moral universe of Kantian equal dignity, humans are seen as just that. Their status is that of humans and the respect owed to them is the respect owed to all. The fundamental question that theories such as Honneth’s and Taylor’s attempt to address is, how to respect all persons universally, as equals, and at the same time as unique particulars? Theories of intersubjective recognition take on the complex task of wedding Kant’s universal idea of equal human dignity with an intersubjective perspective that stresses the particular nature of human relations. To quote Habermas again,

As a form of social dignity, human dignity also requires anchoring in a social status, that is, membership in an organized community in time and space. But in this case the status must be an equal one for everybody. Thus the concept of human dignity transfers the content of morality of equal respect for everyone to the status order of citizens who derive their self-respect from the fact that they are recognized by all other citizens as subjects of equal actionable rights.

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48 As a reminder, I employ the term particular both in the sense of the singular individual affected by misrecognition, and in the sense of interpretive context.
50 Taylor, The Politics of Recognition, 39.
One way to approach the task of elucidating the practical connection between the universal and the particular is through a historical perspective. In “The Politics of Difference,” Charles Taylor discusses the political reality and philosophical underpinnings of the encounter and dialogue between cultures. For him the politics of identity-claims is based on interpretative practices, or what Gadamer called a “fusion of horizons.” According to Taylor, the politics of difference is the historical offspring of the politics of the “politics of equal dignity.”\(^{52}\) For Taylor, at least part of the difficulty in linking the universal and the particular is resolved by assuming that the historical stage of the “politics of equal dignity,” has been completed. In other words, now that all individuals are recognized as equals the way has been paved for the possibility to engage in the recognition of them as particulars. This view assumes an unproblematic application of Kant’s deontological notion of respect as the basis of constitutionalism and as part of a neat historical and conceptual partition between equal universal respect and particular respect.\(^{53}\)

Honneth has a slightly different approach to respect as a historically progressive process of enlarged self-understanding. Even though Honneth does not use the term explicitly, I would argue that he understands intersubjective respect as a contextual phenomenon on two levels. As a synchronic phenomenon, respect takes on three distinct forms in the capitalist-bourgeois tripartite system of recognition. Each sphere represents a distinct social context for granting recognition and for the development of a positive relation-to-the-self.\(^{54}\) Honneth’s response to the fundamental question of how to reconcile universal and particular recognition centers on the identification of the universal need for intersubjective respect within the three differentiated

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\(^{52}\) Taylor, *The Politics of Recognition*, 64. Taylor uses the term “politics of equal dignity” to denote entrenchment of equal rights. Taylor’s choice of terminology is understandable, but it is misleading to the extent that it a) implies that legal recognition is difference-blind, and b) that politics of difference is somehow not about equal dignity. I reject both implications.

\(^{53}\) Taylor himself then admits that the relation between the two conceptions is more complex than it would first appear. I will come back to this point in the next chapter.

\(^{54}\) Honneth, *Redistribution or Recognition*, 142.
spheres of social interaction.

The second level where respect is framed implicitly as a contextual phenomenon is the historical diachronic perspective. It can be seen most explicitly in Honneth’s extensive analysis of the legal sphere. Faithful to Hegel’s dialectics, Honneth identifies an emancipatory trajectory in social history. Accordingly, political struggles are not only (or even primarily) about interests, as political philosophers argued in the past. Rather, conflicts are about claims for recognition raised by groups that have been systematically marginalized, discriminated against and gone unrecognized. Thus, Honneth links disrespect and the injury it causes to negative emotional reactions (such as indignation and resentment) as the explanatory variables that underline social conflict, political unrest and consequently, progressive politics.

Honneth describes at length the historical expansion in the depth and scope of legally protected rights. Central to his historical analysis is the moral and conceptual argument that the enlargement in constitutional institutions of respect reflects the “expansion in the constellation of capacities that constitutively characterize a human being as a person.” In other words, the increasing number of valid claims for constitutional respect signifies a broadening in what counts as harm to what we terms intersubjective conception of human dignity.

Honneth’s conceptual, if not empirical, attentiveness to the historical dimension of the struggle for recognition is revealing particularly when juxtaposed to Taylor’s. Honneth is critical

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55 In fact, one could even claim that the historical process of differentiation between legal respect and social esteem, which Honneth identifies as one of the important implications following the introduction of universal law, is ironically reversed in Honneth’s prescriptive account when legal recognition becomes essential for safeguarding social esteem. See for example Honneth’s in *Redistribution or Recognition*, 140, 147, 169.

56 Andreas Kalyvas claims that Honneth overstates the novelty of this point, particularly in his characterization of seminal figures in political philosophy. Machiavelli, Hobbes and Rousseau all anticipate the idea of recognition in a nuanced and problematized form (e.g. the problem of honor, reliance on the opinion of others, etc.) “Critical Theory at the Crossroad: Comments on Axel Honneth’s Theory of Recognition,” *European Journal of Social Theory* 2.1 (Feb 1999): 99-108.


59 Ibid, 136. It must be said that Honneth is very sparse on evidence in his historical claim. Moreover it is doubtful, as Kalyvas argues, that misrecognition automatically leads to only one type of political response.
of Taylor’s neat historical periodization and linear chronology. He argues that Taylor’s parsimonious account - which posits the institutionalization of “equal dignity politics” as the foundation for the “politics of difference” - is misleading because it “suggests two stages in the history of modern social movements, where[as] it [the struggle for legal equality and for recognition of cultural difference] is to a large extent merely a matter of differences of nuance and emphasis.”

Honneth is right to argue that the divide Taylor advances is neither historically accurate, nor conceptually simple. Instead, Honneth points out that the complex interaction between the deontological and the intersubjective elements that constitute modern understanding of human dignity entails an ongoing process, rather than a one-off event, as Taylor sometimes seems to imply. In other words, the institutionalization of Kant’s deontological notion in the form of the constitutional order itself does not signal the establishment of an accepted clear-cut definition of human dignity. Rather,

[O]nly when the interpretation of the situation is supplemented by practical knowledge of the constraint one must place on one’s actions vis-à-vis human persons, does one move from cognitive acknowledgment to what has been signified, since Kant, by the concept of moral respect: that to recognize every other human being as a person must then be to act, with regard to all of them, in the manner to which we are morally obligated by the features of a person. Although this does not take us all that far … the structure of legal recognition has nonetheless become a little less opaque.

Honneth raises several important points here. *Pace* Taylor’s unproblematic portrayal of the institutionalization of “politics of equal dignity,” Kant’s notion of moral respect gives rise (as argued in chapter 1) to a structure of legal recognition. However, the structure as we noted is vague because it leaves the question of defining the normatively obligating qualities of a person largely unanswered. Consequently, only with a particular definition of personhood (a

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60 Honneth, *Redistribution or Recognition*, 122-123.

61 Honneth, *Struggle for Recognition*, 112.
determination whose very purpose is to identify harm to human dignity) can the structure of legal recognition perform its fundamental function of protecting and promoting human dignity.\textsuperscript{62}

Honneth correctly identifies the limitation of Kant’s conception, the necessity of the intersubjective view as a supplement to it and the intricate relation between the two. As such, Honneth’s account offers a contrast to Kant’s static and a-historic view of legality, and points towards a teleological theory of legality, which Kant could hint to but did not have the conceptual tools to fully develop. Honneth’s theory is therefore suggestive, but it systematically fails to grapple with the question that it persistently raises: namely, having identified on the conceptual level the mutually illuminating relations between the deontological and the intersubjective conception of human dignity, what remains unanswered is the political process through which the contours of personhood are drawn and redrawn. How are claims to respect evaluated and adjudicated, accepted or rejected? In what way does the universal conception of human dignity preserve its unique limiting principle on politics? These practical questions point to the perspective of judgment, which Honneth assiduously avoids, although his theory and historical analysis give rise to again and again.

2.5 Comparative Thoughts

At this point I wish to draw some conclusions from the discussion of the two conceptions of human dignity presented so far. The deontological nature of Kant’s formal conception has radicalizes the historical idea of human dignity; it individualizes it and turns it into the supreme ground for moral duty. However, as Habermas notes, the radicalness of this move comes at a cost.\textsuperscript{63} Kant’s notion of human dignity is “assimilated to an intelligible

\textsuperscript{62} This, as you recall, resembles Kant’s 3\textsuperscript{rd} moment.
\textsuperscript{63} Habermas, “The Realistic Utopia of Human Rights,” 474.
freedom beyond space and time” thus losing precisely those historically-grounded connotations of status that qualified it as the conceptual link between morality and human rights. As a result, the normative character of legal rights gets lost. In other words, what is lost in the process of establishing the system of rights (which in itself is meant to protect human dignity by assigning to all persons the equal status of rights bearers) is the idea of self-respect and social recognition that humans derive from a status that is embedded in space and time.64

As we saw in chapter 1, Kant offers little guidance when it comes to explaining the conceptual or historical mechanism that would account for the transition from the 1st moment of political founding to ensuring the just content of law and promoting human dignity as the end of legality. Such a mechanism would necessarily rely on a conception of human dignity that is different from the one that grounds the 1st moment. What’s more, it would require a conception of political judgment that would allow the political community to determine whether particular institutions of respect are consistent with the formal idea of human dignity.

My argument is that while Kant’s views on human dignity resonate with many of our moral and political concerns, they fall short of Kant’s own sense (and ours) of the role human dignity ought to play in the political community. Even if we can no longer base our moral beliefs in human dignity on metaphysical grounds (and it is possible that the pull towards moral foundations is more difficult to do away with than we are led to believe)65 we are still left with the question: How should the universal idea that each and every person has unconditional, inherent, equal dignity translate to concrete legal forms of equal respect? How can the universal idea of human dignity be specific enough to guide judgment in particular cases and yet

64 Ibid.
sufficiently general to retain its bite as normative anchor for liberal politics? And what should guide this process of translation between universal human dignity and particular respect?

Kant’s transcendental notion of human dignity is immune to empirical contingency and therefore to political judgment. This is both its strength and its weakness; its imperviousness safeguards the moral foundation of legality from contingency and establishes unequivocally the general negative right to freedom. But at the same time Kant’s formulation limits the constitutional applicability of the idea of human dignity because its relation to the empirical remains obscure. As such, it is at odds with Kant’s own intuition (expressed most clearly in *Perpetual Peace*) that justice and dignity are related substantively, not only formally. For all its moral force, Kant’s idea of human dignity is too narrow to encompass human vulnerability to humiliation and disrespect and therefore to be a reliable guide in determining what constitutes respect.

From this perspective, one can understand all three theorists discussed in this chapter (Honneth, Taylor, Margalit) as speaking to the limitation in Kant’s account. They build on the Kantian moral intuition that dignity is related to equal freedom and that politics is meant to advance human dignity by developing a theoretical construct around which we can make sense of two related facts of social life. Firstly, the IHD provides a mechanism for articulating the individual’s experience of disrespect, humiliation and discrimination. Secondly, it (implicitly) offers a way for deciphering the particular institutions of respect and dignity against which claims are raised, because it treats these categories as historically, politically and socially contingent.

Now, there are different angles from which one could approach intersubjectivity: moral, psychological, sociological, historical, legal and political. The theorists I have engaged with in this chapter are all political theorists in the sense that they discuss the phenomenon of
recognition in the context of the state in general and of law in particular. But maintaining the focus on the political in the course of theorizing intersubjectivity turns out to be a challenge. The scholarship discussed in this chapter reveals two related problems: the first is that discussions of recognition move seamlessly between what Kant would have called legality and society, or between public and private. The second problem is insufficient attentiveness to the question of judgment and the way in which claims for recognition require deliberation, rejection or acceptance. Both problems can be traced back to the moral imperative that is at the heart of the intersubjective theory of recognition: because intersubjective theories start from the moral and existential premise that recognition is essential for the individual’s well-being, the boundary between what falls in the constitutional sphere and what falls in the private sphere (i.e. the social realm that is not subject to public legislation), becomes blurry. But even more fundamentally, theories of intersubjectivity struggle to sustain the political dimension of the theory because the moralizing pull of the theoretical premise renders all claims *prima facie* equally valid, thereby making the discussion of judgment all the more necessary.

But here we come to the conundrum of judgment that I alluded to in the introduction to the chapter: Kant thought of human dignity as the immutable touchstone that guides the duty of respect, underpinning the necessity for legal order and the general right to freedom. His account is formal, universal and abstract and on its own could not account for the emergence of a *just* legal system, but it does have the advantage of determinacy, in theory if not in practice.

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66 The notion of public in this context has two possible meanings: that which is in the public sphere, and that which is subject to legislation. Some issues are not a matter of legislation, but they can be nonetheless subject to public opprobrium (e.g. the extramarital affairs of a politician). The problem of what falls under the auspices of law and what is a matter of social convention is by no means trivial. The boundary between private and public is dynamic, subject to political deliberation, historical change and political contingency. This discussion aims to focus on the second meaning of public. For example: if an orthodox Jewish man refuses to sit next to me on a Jerusalem public bus I cannot demand respect and recognition as an equal from him. However, if the public bus company decides, in a misguided effort to accommodate religious sensibility, to divide buses into male and female sections, the matter falls under the scope of public law, and becomes the object of political judgment.
With the intersubjective view the problem that begins to emerge is the opposite problem, namely, indeterminacy. If recognition is constitutive of one’s autonomy how is it ever possible to reject a claim to respect? How is it possible to respect everyone equally *qua* particulars? And perhaps most importantly; how can embedded subjects make judgments about the justness of constitutional arrangements in terms of the equal recognition implied by them, in a way that reflects the community’s norms without resorting to local, parochial standards?

To be sure, the intersubjective conception of human dignity must not to be equated with cultural or moral relativism. It contains within it the claim to equal recognition and therefore appeals to universal validity. But the relation between the particular and the universal must be explicated. What appears to be missing is an account of political judgment that takes both perspectives on human dignity seriously. This is the topic of the next section of the dissertation.
PART TWO

From Theory To Practice: Human Dignity as the Object of Judgment

It is obvious that between theory and practice there is required...a middle term connecting them and providing a transition from one to the other...for to a concept of the understanding, which contains a rule, must be added an act of judgment”

Immanuel Kant, *Theory and Practice*

The subject of our discussion is the elasticity of the concept of human dignity. The normative question is how should commitment to the value of human dignity bear on concrete constitutional arrangements? Does the idea of human dignity have a substantive definition from which it is possible to derive concrete injunctions on the limits of public law? Or perhaps human dignity is a hopelessly indeterminate norm?

In part I, I articulated two conceptions of human dignity that resonate in different ways with moral liberal commitments. Each of these conceptions appealed to a contrasting set of intuitions: universality vs. particularity, principled moral standpoint vs. situated historical social practices; taking the standpoint of imaginary others vs. taking the standpoint of concrete particulars; universal formal equality vs. substantive equality. In this part of the dissertation I begin the journey towards discussing how these two conceptions inform constitutional practice by explicitly addressing the idea of judgment as the link between theory and practice.

The argument I will develop in this part is that relying on a single conception of human dignity is insufficient for determining the justness of constitutional arrangements. I will argue that the inherent tension that animates the two conceptions – as representing the universal and particular perspectives - does not point towards the conclusion that one should be preferred

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1 TP 8:275.
over the other in the course of practical judgment. Rather, both conceptions offer valuable insights. Both resonate with core intuitions regarding the purpose and meaning of constitutionalism. But what I argue for is not a happy medium. The model of reflective judgment I will develop points towards a dynamic perspective that takes account of both conceptions, increasingly imbuing them with thicker meaning. To be clear, this is not a synthetic approach. I am not describing a process in which the two conceptions transcend their tensions and form a coherent unified notion of human dignity. For reasons we will get to in chapter 5 the two conceptions cannot be transcended into a single coherent notion. But nor should they be seen as completely separable; the tension between the two – which becomes most manifest in moments of reflective judgments – suggests that they affect each other’s continuous definition.

In chapter 3 I explicate the notion of judgment and focus particularly on the problem of indeterminate judgment as it arises in the political writings of Kant, Honneth and Taylor. In chapters 4 and 5 I consider the notion of political reflective judgment, the conceptual dilemmas it presents and the potential possibilities it holds for formulating a modest theory of political reflective judgment.
Chapter 3

Indeterminate Judgments

This proposition, so unweariedly repeated by all the Kantians, “Man must always be treated as an end, never as a means,” certainly sounds significant, and is therefore a very suitable proposition for those who like to have a formula which saves them all further thought; but looked at in the light, it is an exceedingly vague, indefinite assertion, which reaches its aim quite indirectly, requires to be explained, defined, and modified in every case of its application and, if taken generally, is insufficient, meager and moreover problematic.

Arthur Schopenhauer, *The World as Will and Idea*

Dignity was something like...beauty and it was thus pointless to attempt to analyse it.

Kazuo Ishiguro, *The Remains of the Day*

Respect for persons is meant to provide a crucial limiting condition for politics. But how can it perform its limiting function if we are unsure what it means, and how it operates? In part one, I outlined two conceptions of human dignity that *together* are constitutive of liberal political morality. In this chapter I make the argument that each of the conceptions *on its own* is unable to support practical determination of what follows from a commitment to human dignity in the sphere of constitutional arrangements. Taken on their own, each of these conceptions is indeterminate and vague when it comes to dealing with practical questions of constitutional adjudication. The problem is two-dimensional: the reliance on a single conception of human dignity, and the model of judgment employed for the practical determinations that follow from the conception.

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To this end, sections 2-4 will each deal with one of the main theorists I have discussed in part one. In section 2 and 3 I reconstruct the link between Kant's moral conception of human dignity and his model of determinant judgment, which according to him operates in the sphere of legality, to find that Kant’s theory of judgment does not allow for concrete determinations on the exclusive basis of deontological human dignity. I argue that Kant’s insistence on determinant judgment notwithstanding, he reluctantly admits to the possibility of an alternative model of judgment in politics, namely reflective judgment. In section 4 I turn to consider the notion of intersubjective human dignity and the kind of problems it raises from the point of view of judgment. Here I demonstrate that prevalent accounts of IHD (Honneth’s and Taylor’s) lack a specified mechanism of judgment. As such, they are deficient in terms of the critical position they aspire to articulate in theory and practice, because they fail to specify the way through which the intersubjective conception of human dignity translates to concrete limitations in politics. But before embarking on these critiques, I begin with a short exposition of what I mean by judgment.

3.1 What is Judgment?

Judgment is one of those notions that are ubiquitous and yet tricky to define. Considering its saliency in everyday life, it is somewhat surprising to discover that judgment has received relatively limited attention in the canon of Western political theory, certainly when compared to other core political notions such as: power, law, legitimacy, freedom, or equality.

So a short historical excursus is in order. Aristotle offered the first useful articulation of the concept. His notion of phronesis involved the idea that judgment is not an activity that is governed by general rules. Rather, it always responds to the specific features of a given
problem. Importantly, judgment can only be learned through practice. Persons become just by performing just actions. The development of moral character, for Aristotle, happens in the context of the political body. In this sense the essence of a society is politics, and ethics forms part of politics. And yet, as Larmore points out, Aristotle’s discussion of judgment tells us little of how it is actually exercised. There is the theory of the mean, but that is not a general rule. Rather, it is a mean “relative to us,” in other words particular to the situation at hand.

In his *Theory of Moral Sentiments* Adam Smith also addressed the importance of judgment for moral experience. In contrast to what he saw as modern efforts to reduce virtues to precise rules, Smith believed that virtues are to be divided into two schematic categories: a general rule of acting which we associate with a certain virtue, and the characteristic sentiment upon which that virtue is founded.

Kant treated the faculty of judgment most extensively in his *Third Critique*. In it he develops the idea of reflective judgment as opposed to his previously elaborated notion of determinant judgment. Kant defines judgment as the activity of relating particulars to universals. Determinant judgment entails the application of known universals (principles or concepts) to particulars. This activity involves the straightforward application of rules to cases. Thus, the moral and legal spheres are governed by determinant judgment. Reflective judgment, on the other hand, becomes relevant when the universal is absent. In those situations, as in the sphere

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5 Ibid, 1179b30f.
of aesthetics, the particular is in search of a universal under which it can be, as Kant calls it, subsumed.  

Hannah Arendt is credited with resurrecting the problem of political judgment by relying on Kant’s notion of reflective judgment. As Seyla Benhabib points out, she curiously tried to bring together an Aristotelian conception of judgment (phronesis) with the Kantian understanding of judgment as “enlarged thought.” Judgment, according to Arendt is the most political of the human faculties because it requires the coming together of private individuals with their private perspectives, seeking to reach agreement and “woo consent.”

Gadamer in *Truth and Method* develops the idea of hermeneutical understanding as “interpretation” and “application” in the sphere of moral deliberation. Like Aristotle, Gadamer believes that the acquisition of moral judgment requires training, and that this formation of character can thus emerge only within an historical community in which moral considerations are important. Yet he too does not develop the discussion of what judgment consists of.

One could reconstruct an alternative history of the idea of judgment, but hopefully we now have some perfunctory sense of the history behind the theoretical treatment of the idea of judgment. However, how would we define it? We often think of judgment as having a moral

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8 I will have to say much more about both categories in chapters 4 and 5.


13 Beiner has an alternative history of judgment *Political Judgment*. He too concludes that, while the “term ‘judgment’ appears throughout the tradition of Western political thought, there is a sense in which the theme of political judgment has hitherto gone without explicit recognition.” (4-5) Beiner attributes this lacuna to Wittgenstein’s observations that “the aspects of things that are most important for us are hidden because of their simplicity and familiarity.” *Philosophical Investigations*, 3rd edition, (New-York: Macmillan, 1968), para, 129, cited in Beiner, *Political Judgment*, 5.
component: making judgment about a person, about a legal case, about the morally right course of action, but as Beiner reminds us there are many types of judgment:

Perceptual judgment (‘This table is brown’); aesthetic judgment (‘This painting is beautiful’); historical judgment (‘This event is auspicious’); legal judgment (‘This man is guilty’); hermeneutical judgment (‘This interpretation of the text is justified’); moral judgment (‘This is the right thing to do’; ‘This is what it is to be virtuous’); and last but not least, political judgment (‘This policy is just, or necessary or advisable under the circumstance’).14

Judgment can be both retrospective and prospective. Its temporality can be articulated in two different directions. We think of judgment as a culmination of a process (for example, a legal process). In this sense it is the final say, verdict on a matter. But judgment also has an opposing directionality: judging (for example, moral judgment) is something we do when we need to determine a course of action, or a practical problem. This tension between judgment as retrospective and prospective raises the tension between the agent as a spectator and the agent as a participant.15

The Oxford English Dictionary defines judgment as “the ability to make considered decisions or come to sensible conclusions.” It therefore involves a cognitive capacity to identify available options, and make an informed choice based on some self-imposed rule. Thiele defines judgment as:

The capacity to make decisions in the absence of rules that dictate right answers or rigid procedures that generate right answers… One judges well by discerning how the comprehensive informs the contextual, and vice versa. Because judgment always pertains to the particular and

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14 Beiner, Political Judgment, 6.
15 Arendt developed the idea of judgment as the retrospective faculty of “culling meaning from the past,” making sense and evaluating past experience by forming a “story” that makes sense to the contemporary. In this case, the person involved is not the actor but a spectator. Seyla Benhabib, “Judgment and the Moral Foundations of Politics,” 31.
contingent, it cannot be reduced to deductive exercise. Judgment is insight informed by reason, common sense, worldly knowledge and intuition.  

In other words, a problem that has a clear (i.e. correct) answer isn’t normally considered as involving judgment. Consider these different examples of a problem: a mathematical problem for which there is an algorithm, making a move on a chessboard, giving money to a drug addict in need, and deciding on whether prisoners should have a vote. Only the first is straightforward, not in the sense that it is easy to reach (it might be a very complicated algorithm), but in the sense that there is only one correct answer. The other three situations present dilemmas precisely because we can think of different good answers. The chess example differs from the last two because the game provides its own rules, however it is up to the player to choose the best option among several that are available to her. In the last two examples the agent needs to decide not only what are the relevant features of the situation, but also devise a rule (or principle) to govern the specific situation and apply this rule to the particular case at hand. For example, should charity be given without consideration for what it might be used for? If not, where should I draw the line? If it is obvious that giving charity money which I suspect will be used for purchasing drugs is wrong what if the homeless person uses my money to buy cigarettes, or coffee or a book? Perhaps I should buy a sandwich? But isn’t that paternalistic? How should I decide what’s the best course of action?

This intuition, that judgment in some ways requires reflection and imagination, presents itself in ordinary language, for example in the way we think of bureaucrats that apply rules without taking into consideration the particular nature of a situation. We say that these

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17 One might get the wrong answer, for example the despotic ruler of a polity, but the process of determinate judgment is non-deliberative.
bureaucrats “blindly” apply rules without seeing the people behind the cases. Concomitantly, we think of virtuous people not as people who simply follow the obvious moral choices, but as people who use their capacity for moral imagination to find the “right” moral solution in an ambivalent situation that presents hard choices. In other words, we think of the practice of good judgment as the ability to elaborate and appraise different courses of action in tricky situations.18

Thiele’s definition, however, is insufficient. In order for judgment to be deemed “good” or “right,” it cannot be idiosyncratic. It must have a shared element to it that makes it not only intelligible, but also correct in some way. Judgment must have validity. Beiner defines judgment as:

[A] form of mental activity that is not bound to rules, is not subject to explicit specification of its mode of operation…[yet] at the same time, judgment is not without rule of reasons, but rather, must strive for general validity. … Judgment allows us to comport ourselves to the world without dependence upon rules and methods, and allows us to defeat subjectivity by asserting claims that seek general assent.19

This idea of seeking general assent with others, of an “enlarged mentality”20 or “sensus communis” in Kant’s terms – or “representative thinking” and “thinking in the place of everybody else” in Arendt’s word – is central to the theoretic paradigm of judgment. Arendt understood this feature as determining the essentially political nature of judgment. Judgment is a form of being together, of forming dialogue (even if only implicitly), of coming to potential agreement among a plurality of opinions.21 I will come back to the notion of reflective judgment in the next

18 Larmore, “Moral Judgment,” 55. Kant himself admits that “there is nothing meritorious in the conformity of one’s action with right (in being an honest man)” (MM 6:390)
20 CJ 5:293-296.
chapter, but first I would like to turn to the problems raised by determinant judgment in Kant’s political theory.

3.2 The Problem of Determinant Judgment

Kant grappled with the problem of judgment throughout his moral and political writings, if only indirectly. It is arguably also one of the theoretical weaknesses on which some of Kant’s harshest critics have focused their attention. In this section, my intention is to articulate some central difficulties that arise from Kant’s account of judgment in politics, specifically from the point of view of the idea of human dignity.

I would like to begin by noting summarily some aspects of Kant’s moral theory from the point of view of judgment because they highlight problematic features in his political theory. Kant understood judgment most generally as “the ability to think the particular as contained under the universal.” There are two main types of judgment; determinant judgment is the faculty of thinking the particular under the universal, when the universal is given and the particular is subsumed under it; reflective judgment is the faculty of finding the universal when only the particular is given.

Determinant judgment has several characteristics: first, the universal under which the particular is subsumed is necessarily imposed on us and guides our recognition “with inescapable cogency.” Second, the conditions under which the particular is subsumed under the universal follow deductively, analytically or a priori, allowing us to build a method for assessing every possible case with full certainty of reaching a valid judgment. Third, the universal can be

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22 Beiner, Political Judgment, 32.
24 CPR 5:179.
25 I would like to stress that this analytical distinction is highly stylized: as I hope to show in the course of my discussion the boundary between the two types of judgment is rarely clear cut in practice. On the blurred boundary between the two kinds of judgment see, Beiner, Political Judgment, 114.
conceptually grasped apart from, and a priori to the occurrence of any particular manifestation of it.  

For Kant moral judgment is by definition determinant. According to him moral duty is immediately accessible; it is clear, simple and easily comprehensible to anyone. The categorical imperative, if understood and applied correctly, must, like the rules of algebra, give a single one correct solution for any practical problem. If a man asks himself what is his duty in the matter, “he is not at all perplexed about what answer to give but certain on the spot what he has to do.” Moral judgments are easy, according to Kant; much easier in fact, than judgments concerning attaining personal ends:

The concept of duty in its complete purity is incomparably simpler, clearer and more natural and easily comprehensible to everyone than any motive derived from, combined with, or influenced by happiness, for motives involving happiness always require a great deal of resourcefulness and deliberation.

Determinant judgment is also the operative model of judgment in the political sphere for the following reason. The problem with the pre-political state is the multiplicity of private judgments, each provisionally valid and legitimate. The rightful condition offers a way out of the problem of indeterminacy. It provides a way of issuing public judgment under the formal illusion of the original contract as expressing the united will of the people. The formulation here is analytical: I am not bound to the will of another, if it is my own will that binds me in the rightful condition.

28 TP 8:287.
29 TP 8:286. For a critique see Larmore, “Moral Judgment” in Judgment, Imagination and Politics.
30 On the notion of relinquishing private judgment when leaving the pre-political state, see MM 6:312.
What explains Kant’s reliance on the working of determinant judgment in the sphere of legality? Kant’s employment of determinant judgment in the sphere of politics must be understood against the background of the contractarian dilemma of vesting the head of state with legitimate authority on behalf of a united will;\textsuperscript{32}

A head of state must be authorized to judge for himself and alone whether such laws [directed chiefly to happiness] pertain to the commonwealth’s flourishing...Now the legislator can indeed err in his appraisal of whether those measures are adopted \textit{prudently}, but not when he asks himself whether the law also harmonizes with the principle of right; for there he has that idea of the original contract at hand \textit{as an infallible standard and indeed has it a priori} (and need not, as with the principle of happiness, wait for experience that would first have to teach him whether his means are suitable). For, provided it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is in conformity with right.\textsuperscript{33}

Kant’s allusion to happiness is a useful point of entry for problematizing his model of political judgment. Kant has a complex attitude towards happiness.\textsuperscript{34} It represents a constant counterweight to duty and to right. In the \textit{Groundwork} Kant clearly explicates the proper role of happiness not as ground for action out of duty but as the condition of the morally worthy.\textsuperscript{35} Its empirically contingent, fickle nature makes happiness impervious to \textit{apriori} reason and therefore completely unreliable in determining moral duty. And yet Kant concedes that happiness has its place. It functions as an end, a purpose for all rational beings. Happiness then can play a role in hypothetical imperatives, but not in categorical ones.\textsuperscript{36}

This distinction between happiness and morality, as Kant himself readily admits in \textit{Theory and Practice}, whilst abundantly clear to him, is widely misconstrued (in fact, it is the cause

\begin{footnotes}
\textsuperscript{32} There is some debate whether Kant is in fact a social contract theorist. For a discussion and bibliography see Katrin Flikschuh, \textit{Kant and Modern Political Philosophy} (Cambridge: Cambridge University Press, 2000), ch. 5.

\textsuperscript{33} TP 8:299 and 8:297.

\textsuperscript{34} For a discussion see Alison Hills, “Happiness in the \textit{Groundwork},” in \textit{Kant’s Groundwork of the Metaphysics of Morals}, ed. Jens Timmerman (Cambridge: Cambridge University Press, 2009), 29-44.

\textsuperscript{35} G 4:393-396.

\textsuperscript{36} G 4:414-415.
\end{footnotes}
of much political unhappiness). And with good reason, for the distinction between unhappiness and immorality, between “imperfect justice and perverted justice” isn’t always clear-cut and therefore is itself a matter of judgment. At what point does public injustice turn from merely inflicting unhappiness to immorality? There are two separate questions here. First, an epistemic question. In the *Groundwork* Kant states that “it is a misfortune that the concept of happiness is such an indeterminate concept that, although every human being wishes to attain this, he can still never say determinately and consistently with himself what he really wishes and wills.” If the individual cannot know what makes him happy, how can the public know what makes it happy? Note that the problem cannot be mitigated by thinking of unhappiness instead of happiness. How do we know for example if state-sanctioned racial segregation, threatening suspected terrorists, or the one-child policy are merely causing unhappiness or are immoral?

The second question is practical. Even if we had a way of measuring and delineating the boundary between mere unhappiness and outright immorality, what could the public do about it? The answer I am looking for is not the extreme case of overturning the regime (Kant makes it perfectly clear that there cannot be a right to revolution). Rather, I am interested in the course of regular political debate where, I would argue, it is not clear that Kant’s vocabulary offers a way for effectively articulating individual claims based on perceived injustices.

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37 TP 8:301-302.
39 G 4:417. Also “the principle of happiness (which is really not fit for any determinate principle at all).” TP 8:302.
40 Kant couldn’t be clearer when he states: “the head of state, has gone so far as to violate the original contract and has thereby, according to the subject’s concept, forfeited the right to be legislator inasmuch as he has empowered the government to proceed quite violently (tyrannically), a subject is still not permitted any resistance by way of countering force. The ground of this is that in an already existing civil constitution the people’s judgment to determine how the constitution should be administered is no longer valid.” Thus, a right to revolution would undermine the very foundation of the civil union. It “introduces a complete lawlessness, in which all rights cease.” (TP 8:300-301)
committed by the state, from the point of view of the individual as measured against a normative standard of justice (human dignity).\textsuperscript{41}

As a basic premise Kant couldn’t be clearer when he states that “in an already existing civil constitution the people’s judgment to determine how the constitution should be administered is no longer valid.”\textsuperscript{42} This position reflects the necessity of the political union as an idea of reason rather than as a way to overcome the inconveniences (Locke) or the alleged dreadfulness of the state of nature (Hobbes). Legality, whilst not guided by morality is justified on moral grounds, which is why leaving it is “wrong in the highest degree.”\textsuperscript{43}

How are we to understand the role of determinant judgment in adjudicating the legitimacy and rightness of public law? As we saw, Kant wishes to separate the idea of happiness from the idea of Right. Public law harmonizes with right if “it is not self-contradictory that an entire people should agree to such a law.”\textsuperscript{44} This standard is purely analytical, since it is given apriori. But at the same time public lawmaking is by nature contextual and is meant to bring about a certain outcome. How can judgment about a law be divorced from its end? Indeed, it is not. In the discussion on publicity in \textit{Perpetual Peace}, Kant concedes that the content of public law cannot be, strictly speaking, entirely divorced from its end. Therefore,

all maxims which \textit{need} publicity (in order not to fail their end) harmonize with right and politics combined. For if [public rights] can attain their end through publicity, they must conform with

\textsuperscript{41} Note that I am not speaking of the medium for articulating grievances (which is free speech in the public sphere), but of the kind of claims that an individual can make in the public sphere, based on Kant’s conception of justice and human dignity. I will come back to this precise problem in the next section.

\textsuperscript{42} TP 8:300.

\textsuperscript{43} Christine Korsgaard, “Taking the Law into Our Own Hands, 319. Later on in the \textit{Metaphysics of Morals} Kant refines his position when he states that “to obey the authority which has power over you (in everything that is not opposed to morality) is a categorical imperative. (MM 6:371)

\textsuperscript{44} TP 8:299.
the universal end of the public (happiness) and to be in accord with this (to make the public satisfied with its condition) is the proper task of politics.\(^{45}\)

The justification for politics is rooted in morality, but its end is advancement of public happiness. From this perspective the injunction against the imposition of immorality seems to be a way of distinguishing between legitimate and illegitimate government, while the idea of furthering happiness suggests itself as a standard for distinguishing between the just and the not-yet-just states. If we are to believe those who argue, sensibly I believe, that Kant wishes to maintain a distinction between a merely legitimate society and a just society\(^{46}\) then there must be a criterion for political judgment that is to do with \textit{happiness rather than with morality}. But since happiness is an indeterminate principle, how can Kant’s notion of determinant judgment be applied to it?

3.3 How to Make Formal Human Dignity Concrete?

We are now in a better position to consider more specifically the problems that arise from Kant’s notion of determinant judgment when applied to his conception of human dignity. Remember that the general issue I have identified in chapter 1 is the indeterminacy of the idea of human dignity and its concrete effect on the substantive arrangements of the constitutional polity. In this section I wish to explore how Kant’s formal notion of human dignity successfully underpins the justification for a rightful condition, but fails to evolve into a normative standard against which the substantive justness of public law can be judged. This section addresses the link between the mode of judgment (determinant) and the object of judgment (human dignity).

In chapter 1 I have outlined the three ways in which human dignity informs Kant’s view of legality. Human dignity,

\(^{45}\) TP 8:386 (emphasis in the original).
\(^{46}\) Flikschuh, “Sidestepping Morality.”
(1) grounds justification for the legal system (the ‘positivist’ perspective);

(2) informs its content (the natural law perspective);

(3) promotes it as the just end of legality. (the teleological perspective).

I concluded that within the architectonic structure of his analytical framework Kant could provide an account only for the 1st moment, namely the moral duty to form civil society and remain in it. However, this conceptualization is in tension with the idea of human dignity that underlies the 2nd and 3rd moments. The problem is two-dimensional: the conception at work and the type of political-legal judgment that is available for its application.

Let us begin with the 1st moment. Kant’s conception of human dignity as a transcendental formal idea that enjoins equal respect for human autonomy is at the basis of the moral duty to enter civil society and remain in it. The system of Right is itself the positive empirical expression of respect for human dignity. In this view, any civil association (even one that is unjust) is better (namely, more respectful of human dignity) than the state of nature because it is based on the idea of equal freedom.

This ‘positivist’ perspective is in profound tension with the 2nd and 3rd moments. Remember that in the 1st moment, where human dignity underpins the justification for the need to establish a system of Right, Kant speaks on an idea of rightful condition, not an actual empirical arrangement. Once we shift our perspective from the abstract idea of a rightful condition to a concrete constitutional order with positive law, and once we acknowledge the distinction between a legitimate political order and a just republic, the reliance on a formal and metaphysical notion of human dignity as apprehended through determinant judgment begins to unravel.

The central problem has to do with identifying grounds for criticizing extant law and the difficulty in articulating lack of recognition for one’s dignity on the part of the state. There are
several dimensions to this difficulty. As we saw in the previous section, law for Kant provides determinacy in the sense of finality, of closure, of the “official answer being the only answer that can authorize the use of force.”47 One of the interesting implications that arise from this understanding of law is that only certain things can become part of law. Positive law has to be conclusive in the judgments it issues (that is after all its raison d’être), therefore only matters that lend themselves to determinant judgment can, by definition, be part of positive law.48 Put differently, human dignity is protected only in matters on which an authoritative judgment can in principle be issued. To be sure, this is a reconstructive claim that Kant does not make, because it already taints human dignity with the vicissitudes of empirical contingency. But here the link between the conception of human dignity and judgment begins to reveal itself.

As an object of political determinant judgment, human dignity provides a one-directional inference: the metaphysical formal notion of human dignity gives rise to phenomenal respect as embodiment of the idea of a rightful condition. But the empirical reality of a polity raises the perspective of an opposite inference: namely, that the idea of human dignity, if it is to have particular application and normative purchase in the phenomenal realm, must in some way be defined by what is considered (by particular people in a particular place and time) to be appropriate respect. This is also Kant’s intuition as we saw in the previous section, but he cannot offer a robust model of political judgment other than determinant judgment, without running the risk of undermining the supremacy of the law and de-transcendalizing the idea of human dignity. We now face the intriguing possibility that judgment may involve more than ‘deducing’ phenomenal respect from noumenal human dignity; political judgment may (and, I

48 That is why private ends cannot be positivized. Similarly, equity cannot be adjudicated because “a judge cannot pronounce in accordance with indefinite conditions.” (MM 6:235) This does not mean of course that all matters, which lend themselves to determinant judgment can be part of juridical law. Ethical duties are the most obvious class of such matters.
would argue, must) also run the other way. And this implies we are no longer dealing with a purely formal noumenal notion of human dignity.

Let me elaborate on this idea. The 2nd and 3rd moments involve the idea of human dignity as a constant standard for political judgment. As a norm human dignity does more than jumpstart the political project: it shapes its normative horizon. So the question is whether the same notion of human dignity, metaphysical, formal and known apriori, can function as standard for concrete application through the lens of determinant judgment. I would like to suggest that if the idea of human dignity is to successfully buttress the 2nd and 3rd moments, where human dignity determines not only the form of law but also its substance, it cannot remain purely formal. Nor can the question of how to translate the norm of human dignity to positive law be exclusively answered by means of determinant judgment.

To appreciate this, consider the following questions that arise in the course of Kant’s discussion of public law reform. The 2nd moment implies that human dignity should inform the particular content of law. It does so in the mediated form of the idea of the original contract. It must therefore be logically and empirically possible - and Kant notes this himself - that at times law falls short of the mark. Whilst not explicitly articulated as such, the 2nd moment implies a dynamic, developmental view of law, whereby law is in need of at least occasional amendment and adjustment to changing circumstances. The modification of law that Kant has

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49 I will have much more to say about the idea that the process of ‘applying’ a norm involves necessarily reflection on the norm’s justification in chapter 5.


51 For example, MM 6:372.

52 Put negatively, if from the moment of a polity’s inception law never changed there would be no need to even evoke the notion of the original contract, since any existing constellation of positivized law would suffice from the normative point of view advanced by the first principle.
in mind follows a progressive trajectory, expanding the normative purchase of law and its aims to uphold human dignity as the ultimate end of politics and law.\textsuperscript{53}

It follows that the ability to contest unjust law and advance alternative legislation implicitly involves an appeal to the idea of human dignity. More specifically, if the idea of human dignity is to function as a normative standard for the appropriate content of law and its ends, then it must involve an assessment of how current law stacks up against the idea of human dignity. And this cannot be accomplished by means of determinant judgment. For if law is to be reformed, expanded and applied to new contexts in accordance with human dignity, how are we to know in which direction? How can we tell which measures are in accordance with human dignity and which are contrary to it if we have only the inviolable metaphysical idea to rely on? There are several dimensions to this challenge.

Kant’s notion of human dignity is of little help when it comes to reforming extant positive law because, as I already noted, it makes the identification of empirical harm to dignity tricky to articulate on the moral level, and problematic to frame in terms of claims. Remember that in the Kantian view, human dignity in the practical sense is neither lost nor gained on the level of the empirical individual. Lack of respect therefore does not diminish human dignity. It need not result in humiliation or a subjective sense of inferiority. Instead, disrespect results in grave moral wrong on the part of the wrongdoer who failed in their supreme moral duty to recognize the dignity of another and act out of duty. Consequently, there is real difficulty in specifying the nature of injury that results from lack of recognition, from the point of view of the unrecognized individual.\textsuperscript{54} The question then is on what grounds can the individual appeal unjust law?

\textsuperscript{53} See for example PP 8:386.

\textsuperscript{54} Even the German \textit{Aviation Act} case, which on the surface looks as a straightforward operationalization of the Kantian injunction to never treat people only as means, could not be based solely on the moral duty to respect. As the Court noted: “Dignity cannot be taken away from any human being. What can be violated, however, is the [individual's] claim to respect which results from it.” BNerfG, 1BvR 357/05 (15.2.2006), para. 117. More on this in chapter 7, section 4.1.
Consider the same problem from the objective perspective of recognition. With the founding of a system of Right the individual’s status as a legal subject is the positive expression of his moral status; law reflects the recognition of individual moral autonomy and thus, one’s ability to set ends for oneself. Law itself, on the basis of the first – positivist - principle, is the medium for moral and political recognition: vertically between the state and the citizen in a legitimate exercise of coercion, and horizontally between equal legal subjects. This allows for the reciprocal limitation on the exercise of choice. But what kind of recognition is involved in this view of legality? Law, considered as a form, recognizes everyone and no one in particular because the reciprocity involved in the account of the social contract is strictly analytical. Since legality as a form is the concrete embodiment of the moral principle of human dignity, it is hard to argue for lack of proper recognition on the basis of a particular content of the system of rights (e.g. an unjust law). Lack of equal recognition (for example a minority contesting discriminatory policy) cannot serve as grounds for criticizing existing law in Kant’ own conception of human dignity.

With the 3rd moment, as with the 2nd, we encounter an internal contradiction between human dignity as the basis of the constitutional form and human dignity as the basis of constitutional justice. Once the transcendental formal notion of human dignity has been secured by the first principle – that is, once the moral notion of human dignity has analytically justified the need for a system of right – the 2nd and 3rd moments disclose a different conception.

57 It is even more problematic once we take into account Kant’s insistence on the duty to enter civil society as independent of the specific content of law.
58 Ripstein argues that there could be two possible defects in law from the standpoint of the idea of the original contract. First, particular laws can be inconsistent with each person’s innate right to independence. Secondly, the form in which laws are given can be defective. Each of these two defects, according to Ripstein, generates a duty for the state to improve itself. (Force and Freedom, 203). In this claim Ripstein does not provide references to the text, and I am not sure I follow the interpretive logic. Putting aside the excessive democratic tenor and even if Ripstein is right in his claim, it underscores the point that there is no mechanism through which individuals can claim rights or criticize existing law on the basis of lack of recognition.
of human dignity. One that is not purely formal and abstract, but is based on the logical and factual possibility that human dignity is vulnerable to lack of recognition due to political and legal arrangements, if those fail to demonstrate correct respect.

One could object and argue that given Kant’s stoic commitment, nothing in the empirical realm could harm or diminish human dignity. That is true, but only to a point. For Kant does not throw in the towel and give up on the ordering of the political. On the contrary, he puts great (perhaps too much) stock in the republican state as a necessary step for moral improvement. The transcendental idea of human dignity all-too successfully underpins the necessity of legality. But this success comes at a price because it closes the door on the conceptual vocabulary that would allow for an account of the broader moral and political project. If it is possible to legislate in ways that contradict human dignity then we are no longer talking of a formal, transcendental apriori notion that impresses itself upon human reason by way of determinant judgment. Instead we are looking at a conception of dignity that is intersubjective and requires the practice of reflective judgment.

3.4 How to judge Intersubjective Human Dignity?

Having considered at length the difficulties that arise from Kant’s deontological conception of human dignity, I now turn to consider whether the intersubjective notion of human dignity can on its own deliver when it comes to practical questions of constitutional arrangements. I return to consider the works of two of the main thinkers discussed in chapter 2, Axel Honneth and Charles Taylor. As such this isn’t an exhaustive account of how an intersubjective conception of human dignity could be judged, but I think it provides sufficient evidence to point towards a common, if not a systemic, problem. The main difficulty, as we

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shall see, is insufficient attention to the necessity of political judgment. Both Honneth’s and Taylor’s theoretical accounts suffer from ambiguity when it comes to articulating how the normative commitment to human dignity ought to be translated to constitutional arrangements and to assessing the justness of laws. If Kant’s notion of human dignity proved to be underdetermined when it comes to judging the justness of constitutional arrangements, meaning that virtually nothing could count as grounds for claiming the diminishment of human dignity, the intersubjective notion of human dignity, as espoused by the thinkers below, suffers from over-determinacy. In other words, it is unclear on what basis a claim could be rejected.

3.4.1 How Can it Ever be Moral to Reject a Person’s Claim to Respect?

At first sight, Honneth’s position appears to be theoretically stronger than Kant’s because his account of dignity acknowledges the contextual local nature of respect. But he ultimately fails to offer an account of how claims to recognition fortuitously appear to be historically and correctly adjudicated by society. The absence of a specified account of political judgment manifests itself on several levels in Honneth’s elaborate framework. First, there is the matter of the historical process of unfolding universalization, which functions as the backbone for the critical theory. Honneth pays great attention to the historical process through which society’s definitions of what counts as harm to dignity are increasingly deepened and broadened. This idea is clearly articulated when he talks about the “expansion of the constellation of capacities that constitutively characterize a human being as a person.” Yet this “expansion” appears to be the product of an unfolding history that reveals its implicit normativity, not the work of a political agency, which debates, examines and judges the moral foundations of its political structure in response to individuals’ claims. Reminiscent of Hegel’s deterministic

60 Axel Honneth, Struggle for Recognition, 117.
account of historical development, Honneth leaves no room for a political agency of judgment that steers the evaluative process of claims to inclusion, recognition and respect.

The absence of an account of political judgment involved in critically evaluating claims to recognition becomes all the more problematic when we consider Honneth’s understanding of the basis for claims to respect. Honneth argues that:

“[W]hat those affected regard as “unjust” are institutional rules and measures they see as necessarily violating what they consider to be well-founded claims to social recognition.”

Since it is the individual who experiences disrespect and judges its affect on her self-esteem and autonomy, it is hard to see in what way any other person or people could legitimately judge the individual’s claim. Honneth seems to be fully cognizant of the problematic nature of his position when he admits that,

The feelings of moral indignation with which human beings react to insult and disrespect contain the potential for an idealizing anticipation of conditions of successful, undistorted recognition. The admitted weakness of this practical pillar of morality… is evidenced by the fact that these emotional reactions do not automatically disclose the injustice which disrespect entails but only bear the potential for doing so. Whether the cognitive potential inherent in the feelings of social shame and offense evolves into a moral conviction depends largely on the form that the political and cultural environment of the subjects in question takes.

In Honneth’s terms there is no role for political agency deliberating and judging the validity of the claims, nor the justness of institutional arrangements that may have the effect of making systemic injustices opaque. And yet democratic adjudication of claims to respect requires, as

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61 Honneth, *Redistribution or Recognition*, 133 (my emphasis).

62 Ibid, 199-200. Here Honneth comes very close to acknowledging the problem that Patchen Markell has articulated “there is profound irony involved in the idea of recognition: the very desire that makes that ideal so compelling-the desire for sovereign agency…may itself help to sustain some of the forms of injustice that many proponents of recognition rightly aim to overcome. …in characterizing injustice as the misrecognition of identity, and in embracing equal recognition as an ideal, they may simultaneously make it more difficult to comprehend and confront unjust social and political relations at their root.” *Bound by Recognition* (Princeton: Princeton University Press, 2003), 5.
Nancy Fraser correctly notes, “determining the validity of the claims in question, a matter which in turn requires that claimants press their case via public reasons, not subjective feelings.”

Honneth’s reluctance to address the matter on the political level, rather than the social level, is understandable given his theoretical commitment to interpret all forms of exclusion as moral violations of personal integrity. This position commits him to view all negotiation, justification and adjudication of person’s claims as taking place outside the purview of the political sphere. But the problem, to quote Fraser again, is that

For Honneth, once moral psychology purports to establish that misrecognition as the sole *bona fide* experience of injustice, then everything else follows in train: all political demands must be translated into claims for recognition: all modes of subordination must be interpreted as denied recognition and traced to the recognition order of society.

Thus throughout his account, Honneth shuns explicitly addressing the issue of critically evaluating claims to respect. Even when he hints at the potential problematic outcome of uncritical approbation he does so awkwardly,

Of course, it is obvious that *we* cannot endorse every political revolt as such – that *we* cannot consider every demand for recognition as morally legitimate or acceptable. Instead, *we* generally only judge the objective of such struggles positively when they point in the direction of social development that *we* can understand as approximating our ideas of a good or just society.

Here Honneth hints at the necessity for reflective judgment. But nowhere does Honneth explain *who* this collective “we” is, and *how* “we” come to view some claims as beneficial for social development and others detrimental. Honneth creates a direct link between the moral and

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63 Fraser, *Redistribution or Recognition*, 234, n. 4.
64 Ibid, 206. Interestingly Fraser herself fails to address law as a salient domain in her critical framework. Instead, she “locates [the idea of participatory parity] in the liberal family of ideas of equal respect, dignity, autonomy, and the like, but she does not elaborate it in legal- and political-theoretical terms; thus, she largely bypasses the complicated contestation of the meanings of equality, autonomy, and the like within the liberal tradition.” Thomas McCarthy, Review of *Redistribution or Recognition*, by A. Honneth and N. Fraser, *Ethics* 115.2 (2005): 397-402.
65 As when he speaks of “what is taken to be justified recognition” or “appropriate interpretation.” Honneth, *Redistribution or Recognition*, 160.
66 Ibid, 172 (my emphasis).
the social in a way that completely bypasses the political. This de-politicizing effect becomes more apparent in his more recent writing, where the very idea of the particular political community is superseded entirely.\textsuperscript{67} Although Honneth is preoccupied with law and rights his theory cannot be considered a political theory in the sense that “social morality”\textsuperscript{68} rather than political judgment is the arbiter of claims to recognition.\textsuperscript{69}

Another salient dimension of political judgment – indeed any form of judgment – is the problem of harmony or commensurability of claims to respect. Honneth argues that,

I proceed from the premise that the purpose of social equality is to enable the personal identity-formation of all members of society. For me this formulation is equivalent to saying that enabling individual self-realization constitutes the real aim of the equal treatment of all subjects in our societies.\textsuperscript{70}

In itself this aim is worthy, but it surely requires addressing the possibility – indeed the unavoidable fact in plural society – that different self-realization projects conflict with each other, requiring judgment and resolution. To say, as Honneth implies, that all claims to respect must be recognized and accommodated avoids the issue of judgment altogether, for the idea of judgment logically presupposes selectivity and finality; that is, the conclusive acceptance of some claims in favor of others, on non-arbitrary grounds. In his framework, Honneth provides no account for this kind of political engagement.

\textsuperscript{67} Thus for example Honneth claims that “in the choice of the basic principles by which we want to orient our political ethic, we rely not merely on empirically given interests, but rather only on those relatively stable expectations that we can understand as the subjective expression of imperatives of social integration. It is perhaps not entirely wrong to speak here of ‘quasi-transcendental interests’ of the human race; and possibly it is even justified to talk at this point of an ‘emancipatory’ interest that aims at dismantling social asymmetries and exclusions.” Ibid, 174.
\textsuperscript{68} Ibid, 177.
\textsuperscript{69} Ibid, 184-187.
\textsuperscript{70} Ibid, 177.
Honneth paradoxically turns the idea of equal respect into a formal category,\(^{71}\) thereby stripping it of its critical potential in evaluating conflicting claims to respect and recognition. In doing so, Honneth’s framework interestingly comes close to facing problems similar to the ones we identified in Kant’s. Honneth gestures towards the problem of judgment throughout his framework. He even goes so far as to suggest that the process of judgment involved in the adjudication of claims to respect would be opposite from the one developed by Kant;

“What makes esteeming someone different from recognizing him or her as a person is primarily the fact that it involves not the empirical application of general, intuitively known norms but rather the graduated appraisal of concrete traits and abilities.”\(^{72}\)

This appreciation of uniqueness, of the particularity of the person as opposed to the universal aspects of humanity to which Honneth refers to is the object of Taylor’s discussion. I now turn to examine his approach to judging claims for recognition.

### 3.4.2 The Problem with Aesthetic Judgment

Like Honneth, Taylor is aware of the danger in uncritical approbation of claims to respect, and the inherent difficulty in passing critical judgment. However, he too is unable to provide a satisfactory resolution to the conundrum of judgment he identifies, because he oscillates ambiguously between determinant judgment (when he calls for equal presumption of value) and purely reflective judgment (when he questions the possibility of justification for judgment).

In chapter 2 I outlined Taylor’s historical two-staged account of the relation between the “politics of difference” and the “politics of equal dignity.” To recap, Taylor puts forward a sequential historical account in which the politics of equal dignity formed the basis for the

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\(^{71}\) See Fraser’s critique on this point in *Redistribution or Recognition*, 227.

\(^{72}\) Honneth, *Struggle for Recognition*, 113.
development of the politics of difference. This view, I argued, is too simplistic in general and in particular raises the question of whether the “politics of equal dignity” was merely a passing historical phase.\(^\text{73}\)

And yet, as the last part of his essay reveals, Taylor’s understanding of the relation between the two forms of politics is in fact more complex. According to Taylor, the discovery of authenticity, “a way of being human that is *my way,*”\(^\text{74}\) is part and parcel of the decline of hierarchal society. Like equal dignity, authenticity fulfills the need to provide social meaning and standing against the background of a receding aristocratic culture. Everyone is equal, yet each person is unique. Each person deserves equal respect and equal recognition of one’s own distinctiveness.

The political ramifications following this development have been profound. It generated on the one hand a “politics of universalism,”\(^\text{75}\) which is based on the principle of equal dignity; and on the other hand, a “politics of difference,” which seeks recognition for what is not universally shared. It seeks universal recognition of particularity.

Taylor formulates the distinction between the two forms of recognition as a distinction between an equal recognition of equal *potential* and an equal recognition of actual identity and culture.\(^\text{76}\) He says: “the demand for equal recognition extends beyond an acknowledgment of the equal value of all humans potentially, and comes to include the equal value of what they have made of this potential in fact.”\(^\text{77}\) The two forms of recognition are in fact in continuous conflict;

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\(^{73}\) Calhoun makes the important point that the two forms of politics have always been interlinked. See his *Critical Social Theory: Culture, History and the Challenge of Difference* (Oxford: Blackwell, 1995), 215-216.


\(^{75}\) Taylor, *The Politics of Recognition,* 37.

\(^{76}\) Ibid, 42.

\(^{77}\) Ibid, 43.
The politics of equal dignity is based on the idea that all humans are equally worthy of respect. It is underpinned by a notion of what in human beings commands respect, however we may try to shy away from this “metaphysical” background. For Kant, whose use of the term dignity was one of the earliest influential evocations of this idea, what commanded respect in us was our status as rational agents, capable of directing our lives through principles. Something like this has been the basis for our intuition of equal dignity ever since, though the detailed definition of it may have changed. …In the case of the politics of difference, we might also say that a universal potential is at its basis, namely the potential for forming and defining one’s own identity, as an individual and also as a culture. This potentiality must be respected equally in everyone. …These two modes of politics, then, both based on the notion of equal respect, come into conflict.  

This passage raises two interesting questions. How, by what historical-political process has the idea of human dignity come to be redefined? Secondly, what is this universalized ground on which the politics of difference is based? What does it mean to recognize everyone for their uniqueness?  

Let me start with the second question. Taylor’s main critique of “the politics of equal dignity” is that it has an overwhelmingly homogenizing effect and can at best provide limited acknowledgement of cultural difference. A liberalism of rights is, according to Taylor, inhospitable to difference because a) it insists on the uniform application of the rules defining the rights without exception; and b) it is suspicious of collective goals. The solution according to Taylor can be found in the incorporation of judgment in less stringent forms of liberalism. Those forms of liberalism that are more hospitable to difference would have the invariant defense of certain rights (like the habeas corpus), but other rights would not be governed by pure

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78 Ibid, 41-43.
80 The first question will have to await a fuller discussion in the next chapter.
81 Taylor, The Politics of Recognition, 51, 60.
82 For a critique of this view see Jürgen Habermas’ reply to Taylor in the same volume.
83 Taylor’s distinction looks intuitively correct, but we should ask why is it that some rights are set beyond the standard of judgment, while others aren’t. I will address this problem in greater detail in the next chapter.
proceduralism. Instead, they would be grounded on “judgments about what makes a good life – judgments in which the integrity of cultures has an important place.”

Judgment turns out to play a crucial role in the integration of the “politics of difference” into the liberal context, and also the greatest challenge for Taylor’s framework. Taylor adopts “judgments of worth” as the framework for judgments. In other words, cultural appraisal must be undertaken from the presumption of equal worth. Viewed this way the “politics of difference” relies on the “politics of equal dignity” in a surprising way:

If withholding the presumption [of equality] is tantamount to a denial of equality, and if important consequences flow for people’s identity from the absence of recognition, then a case can be made for the universalization of the presumption as a logical extension of the politics of dignity. Just as all must have equal rights, and equal voting rights, regardless of race or culture, so all should enjoy the presumption that their traditional culture has value.

This conclusion, that cultural appraisal should start from the presumption of equal worth, is odd according to Taylor, yet logical (and necessary in order to avoid harm to human subjectivity). It also makes the need to explain how judgments of cultural claims to recognition can be critically evaluated as all the more pertinent. For as Taylor himself acknowledges, the demand made by proponents of a politics of difference is that “actual judgments of equal worth be applied to the customs and creations of these different cultures.”

There are several important objections to this kind of judgment. First, against the background of value pluralism and without an overarching ethical framework (of the Hegelian variety for example) what kind of worth judgments can be made? How can an “external court of judgment” render evaluation on authenticity and uniqueness? As Taylor himself notes, “it

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84 Taylor, _The Politics of Recognition_, 61.
86 Maeve Cooke, “Beyond Dignity and Difference,” 78.
can’t make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great, or equal to others. To hand out a favorable judgment on demand is an act of “breathtaking condescension.” Surely, it cannot count as an act of respect. And, paradoxically, what would be the implications for the homogenizing effect of multiculturalism? The peremptory demand for favorable judgments of worth relating to different cultures implies that “we already have the standards to make such judgment.” In a sense, the kind of judgment Taylor calls for is not reflective in the Kantian sense, because it does not even have general concepts (“standards”) under which to classify cases.

To be sure, there is a distinction to be made between recognition of different cultures in pluralistic societies (like the one Taylor has identified), and the recognition of an individual as an equal, as discussed (implicitly) by Kant and (explicitly) by Honneth. The two forms of recognition are historically tied, but conceptually separate (and are often in tension with each other). Cultural recognition involves feeling positively as an individual who is part of a group, whereas individual recognition involves being recognized positively as a unique individual, who is not considered arbitrarily (i.e. by someone other than herself) as part of a group in virtue of a feature the individual feels is irrelevant in the particular context (e.g. color of skin, age or gender).

Both types of recognition necessarily involve a mechanism of judgment, but the first kind of (cultural) recognition proves to be rather more problematic. This is why Taylor finds himself at an impasse; on the one hand, he is sympathetic to the critics of liberalism, on the other hand he is critical of the claims of multiculturalism. But ultimately he engages with the

88 Ibid, 70.
89 Ibid, 71.
90 This is not to imply that features such as color, gender, skin, marital status, etc. are irrelevant to a person’s identity. At issue is whether they are relevant for a particular distinction made by the law.
conundrum of judgment that the politics of difference gives rise to from within the Neo-Nietzschean perspective of its proponents. What is missing is the universal and political aspect of judgment.\(^9\) This is most apparent in his articulation of the nature of judgment:

> [T]he moral and political thrust of the complaint concerns unjustified judgments of inferior status allegedly made of nonhegemonic cultures. But if those judgments are ultimately a question of the human will, then the issue of justification falls away. One doesn’t, properly speaking, make judgments that can be right or wrong; one expresses liking or dislike, one endorses or rejects another culture.\(^9\)

In this definition, judgments of worth lack a cognitive element; they require no justification or consent from others. They are a matter of human will and as such, they are idiosyncratic pronouncements of taste. By overlooking universal validity as a basis for shared judgments the framing of the problem necessarily runs into a standoff between equally valid private aesthetic judgments. If all cultures are equally valid how can a community pass political judgment on the acceptability of certain cultural practices?

Taylor rightly identifies the notion of judgment as framing the conflict between the politics of dignity and the politics of difference, but having availed himself of the resources for justifying such judgments, his conclusions ring at best conciliatory:

> “there is perhaps after all a moral issue here. The presumption of equality require from us a willingness to be open to comparative cultural study of the kind that must displace our horizons in the resulting fusions.”\(^9\)

Taylor leaves us with an insufficient conceptual basis from which to resolve the immanent conflict between the two forms of politics. Either we must accord (as a matter of determinant

\(^9\) Blum argues that by the end of the essay recognition has lost its link to equality and has “gotten confined to the domain of distinctiveness.” Lawrence Blum, “Recognition, Value and Equality: A Critique of Charles Taylor’s and Nancy Fraser’s Accounts of Multiculturalism,” *Constellations* 5.1 (March 1998), 51.


\(^9\) Ibid, 73.
judgment?) the presumption of equal value to all cultures, or we lack the concepts (i.e. standards) by which to comparatively evaluate different cultures.

### 3.5 Concluding Thoughts

The premise for the discussion in this chapter is that if respect for persons is meant to provide a crucial limiting condition for politics, then we need an account of how this limiting condition functions in practical constitutional deliberations. Certainly, in Kantian terms the whole point of establishing public right is to create the conditions under which people are treated as ends and not only as means. Intersubjective theories on the other hand, construe respect for persons as the hallmark of a just and decent society. But how would we (as citizens) know which arrangements can be justified from the point of view of equal respect for difference?

These questions point towards the real possibility that neither one of the conceptions of human dignity, on its own, can generate a clear criterion for judgment. Kant’s formal notion of deontological human dignity looks promising because it relies on a mode of determinant judgment. However, as we saw, this makes its application to practical matters vague at best. The intersubjective conception of human dignity on the other hand, engenders an opposite problem for judgment, since it is unclear how it is possible in principle to reject some claims and accept others. We could say that the first notion of human dignity is underdetermined (there is nothing to indicate when it might be empirically infringed), and the second over-determined (there is no basis to argue that it hasn’t been infringed). Thinking about the claims of dignity and equal respect through the narrow prism of a single conception therefore results in a depoliticized account of judgment and in a normatively ineffectual account of human dignity.

What we need is a conceptual framework that links the two conceptions. But the fundamental theoretical question that hovers above this discussion of human dignity is whether
universalistic morality is compatible with contextual judgment. If, as Benhabib wonders, the moral law enjoins us to abstract from “situational detail and to think of what could be valid for all rational beings,” could there be such a compatibility? In the next chapter, I address some aspects of this question through the idea of reflective judgment.

94 Benhabib, “Judgment and Politics in Arendt’s Thought,” 197.
CHAPTER 4

Political Reflective Judgment I: Dilemmas

As the means to strike a fair equilibrium between self and other, justice confronts the paradox of having to be both universal and singular. To be fair to the other, justice must consider him or her in all his or her singularity. But to strike an equilibrium between self and other, justice must avoid speaking in the voice of either one of them and is thus compelled to adopt a universal language that transcends the peculiarities of all the selves that come within its sweep.

Michel Rosenfeld, *Just Interpretation*¹

One judges always as a member of a community, guided by one’s community sense, one’s sensus communis. But in the last analysis, one is a member of a world community by the sheer fact of being human: this is one’s “cosmopolitan existence.” When one judges and when one acts in political matters, one is supposed to take one’s bearings from the idea, not the actuality, of being a world citizen and therefore, also a Weltbetrachter, a world spectator.

Hannah Arendt, *Lectures on Kant*²

So far I have argued that in practical deliberations, judgments about the concrete implications of what follows from a normative commitment to human dignity involve reliance on two separate notions of human dignity; a deontological and an intersubjective conceptions of human dignity. Attentiveness to this conceptual bifurcation, I believe, already advances our theoretical understanding and provides a basis from which to counter those who argue that human dignity in the constitutional adjudication is meaningless, and therefore useless and potentially dangerous.

However realizing that there are two conceptions at play is not enough. As we saw in the previous chapter, taken individually, both conceptions proved to be problematic for

generating concrete answers to practical constitutional dilemmas because the mechanism of judgment that explicated their practical functioning remained vague.

The problem isn’t so much that we lack a definition of human dignity. The problem rather is that we don’t have a sufficiently clear understanding of how practical judgments regarding human dignity are formed. What is therefore needed is not a formula that will provide a precise definition that of how human dignity should be translated and interpreted in each and every case. Such a predictive formula is an unrealistic goal because it relies on the erroneous assumption that it is possible to form apriori determinative judgments about the meaning of practical norms in particular cases. Instead, what we can strive for is a more modest yet more realistic goal in the form of a framework that takes into account the conflicting conceptual features of human dignity. This is the task I embark upon in this chapter and the next.

My focus in this chapter is on the works of Kant and Arendt, but since my interest is not strictly exegetical, I will not be offering an exhaustive analysis of their texts. Instead, I mine their theories for the purpose of highlighting salient points that are central for a reflective theory of judging human dignity. I begin this chapter with an exposition of Kant’s model of reflective judgment and its basic elements of purposiveness, intersubjective validity and sensus communis. I then move in section 2 to explore the central features of Arendt’s notion of reflective judgment. In section 3 I consider the tension between universality and particularity that the model of reflective judgment exposes. Section 4 concludes with raising the question of whether a political theory of reflective judgment is in fact possible. In chapter 4 I apply the insights developed here to the specific matter of human dignity.

3 Although this, as we shall see in chapter 7, is what many legal scholars call for.
4.1 Kant’s Notion of Reflective Judgment

What is beautiful? Is this rose beautiful? Is this painting by Rothko beautiful? For Kant the problem of aesthetic judgment represented an area that challenged his previous ideas on judgment. Debates over questions of aesthetics reveal several interesting insights: we seem to want to reach an agreement on these questions; we want to persuade others of our position, even though in many societies taste is considered to be a personal matter. The very fact that we enter into debate about these questions and wish to persuade others of our rightness, appears to attest to our wish to validate our personal judgment. Taken on its own, and without reaching common ground, the very fact that we debate the matter in the first place suggests that we all have some shared notions of beauty. In other words, language permits us to share certain general precepts under which we try to classify particular cases. And yet, as a general category, beauty cannot command its own application. Unlike truth we cannot know in advance what is beautiful until we encounter it. Each case needs to be individually assessed. This special character of judgment, that starts from the particular and looks for general concepts under which to classify it (subsume it, in Kant’s terminology) is the subject of Kant’s Third Critique.

Kant referred sporadically to the idea of judgment throughout his writing, but at the time he set out the project of the Critiques, he had no intention of devoting special attention to judgment as a distinct cognitive function. The need for an additional critique, which dealt specifically with the power of judgment, developed out of Kant’s work in the Second Critique. Kant’s need to develop a systematic treatment of the feeling of pleasure and displeasure stemmed from the realization that these feelings were not empirical.5 Kant came to believe that

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4 CJ 5:386-389.
5 As Kant confided in a letter to Karl Leonhard Reinhold Paul Guyer, “Editor’s Introduction,” Critique of the Power of Judgment (Cambridge: Cambridge University Press, 2000), xviii-xix. The important implication of this “discovery” is that the faculty of judgment is not a learned faculty that can be socially cultivated, as Kant had previously thought.
it is possible to articulate a priori principles for taste, and while these principles do not generate a mechanical or determinative scheme for individual judgments, they nevertheless lend themselves to a systematic – and therefore critical – treatment. *The Critique of the Power of Judgment* represents this effort. It is a difficult text; its structure seems disconnected and contrived, unlike the neat architectonic structure of Kant’s other critical works. Any attempt to provide a concise summary of it will leave some important aspects out of the discussion. But I will address what seem to me to be the elements most pertinent to our discussion.

In *The Critique of the Power of Judgment* Kant situates the faculty of judgment between the faculties of understanding and reason.⁶ If by the end of the Second Critique there appeared to be an unbridgeable gap between nature and freedom, in the Third Critique judgment is offered as a mediating element that attempts to establish a standpoint from which the is and the ought can be harmoniously interconnected.⁷ Yet, unlike understanding or reason, judgment is not a self-sufficient faculty. It provides “neither concepts like understanding, nor ideas, like reason, of any object at all, since it is a faculty merely for subsuming under concepts given from somewhere else.”⁸ This leads Kant to articulate the transcendental principle of the Third Critique.⁹ This principle states that if there is to be a concept or a rule that arises independently from the power of judgment it is that nature conforms to our power of judgment. Put another way, there is a concept of “purposiveness of nature on behalf of the faculty for cognizing it.”¹⁰

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⁶ “The power of judgment, provides the mediating concept between the concepts of nature and the concept of freedom, which makes possible the transition from the purely theoretical to the purely practical, from lawfulness in accordance with the former to the final end in accordance with the latter.” CJ 5:196.


⁸ First Introduction, CJ 20:202

⁹ CJ 20:210, Section V in the Second Introduction.

4.1.1 What is purposiveness?

Kant understood judgment as the process of “thinking the particular as contained under the universal.” In the Critique of Judgment, Kant initially divides judgment into two types: determining judgment where a concept or a universal is available and can be applied to the particular by what Kant calls “subsumption,” and reflective judgment, where only the particular is given and judgment needs to ascend from it to find a universal rule that will contain it. Logical judgments and moral judgments are examples of determinant judgments with which Kant deals with in the First and Second Critiques, respectively. Aesthetic and teleological judgments are cases of reflective judgments. With regard to aesthetic judgments, Kant attempts to show that they have rational foundation even though they cannot be grounded on determinate principles. In his discussion of teleological judgments, on the other hand, he responds to scientific debates of his time and addresses the ability to undertake scientific inquiry under the apriori assumption of the unity of nature and living organisms.

The principle that guides the discovery of a universal law for specific cases is the heuristic assumption that nature is coherently and systematically arranged for our power of judgment. We cannot know for certain that nature has in fact conveniently organized itself for our benefit, but we must make this apriori presumption in order to make sense of the world when we come to make judgments. This is the transcendental principle of teleology. However, Kant is careful to make clear that this principle is unlike the apriori principles of reason and understanding. The principle of reflective judgment,

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11 CJ 20:211, CPR 5:179.
13 Alexandre Lefebvre, “Critique of Teleology in Kant and Dworkin,” Philosophy and Social Criticism 33.2 (March 2007), 181.
14 Teleology was first defined by Christian Wolff as the “part of natural philosophy that explicates the purpose [finis] of things.” Guyer’s “Introduction,” Kant and Modern Philosophy, xiv.
does not directly determine what kinds of properties our experiences must have in order to represent objects or what our maxims of action must be like in order to be morally acceptable (i.e. universalizable). Instead it is a general assumption, necessary for guiding and encouraging scientific enquiry that nature itself has a kind of systematic organization that we seek to find in it.\textsuperscript{15}

Reflective judgment therefore relates to the form of our concepts, the condition of knowledge and judgment, not to the empirical objects of reflection. So the crucial thing to bear in mind is that the principle of purposiveness is only an assumption we cognitively make for the sake of a possibility of judgment.\textsuperscript{16} The principle of judgment says absolutely nothing about the actual causal relations of the empirical reality; if it did, it would be a determinative principle rather than reflective. Purposiveness is a “transcendental principle of the power of judgment”\textsuperscript{17} and as such its aim is to provide orientation to judgment. Without this purposive assumption “reflection would be arbitrary and blind.”\textsuperscript{18} We would have nothing to go on when confronted with the plurality that surrounds us. In this sense, the concept of finality is regulative, rather than constitutive.\textsuperscript{19}

4.1.2 The Validity of Reflective Judgments and the Idea of Sensus Communis

But how does the procedure of reflective judgment actually work? Let us say that following the regulative principle of purposiveness we make an assumption that art and nature (and perhaps even the political world around us, although that – as we saw in the previous chapter - is not what Kant himself is saying) are available for our comprehension in a sufficiently methodical way on the basis of which we can make judgments about beauty and

\textsuperscript{15} Guyer, “Introduction,” xxv.
\textsuperscript{17} CJ 20:211.
\textsuperscript{18} CJ 20:212.
\textsuperscript{19} Beiner, \textit{Political Judgment}, 37. I belabor the point that purposiveness is a transcendental assumption rather than an ontological statement, because as we shall see in the area of law there is often confusion on this point. Law is said to have either no structure or that it has a fixed meaning.
The obvious question that comes up is: what is the validity of these reflective judgments? Determinative judgment has an absolute principle from which to derive its universal validity, but whence does the validity of reflective judgment come from? What prevents reflective judgments from being entirely subjective, and therefore inherently unsystematizable? The question of validity emerges out of the definition of reflective judgment, but for Kant it poses a special problem because at its core it is tied with the problem of autonomy. The difficulty is, how to preserve the autonomy of judgment in the absence of determinative (universal) grounds? How can reflective judgment avoid the danger of heteronomy? This is a complex question and the answer as I articulate here, inevitably simplified.

Kant’s argument hangs on the explication of a latent feature in social interaction. A background evaluative grid he calls “sensus communis.” In section 40 of the *Critique of Judgment*, which is entitled “Taste as a kind of sensus communis” Kant defines it thus:

> By the name “sensus communis” must be understood the idea of a communal sense, i.e. a faculty for judging that in its reflection takes account (a priori) of everyone else’s way of representing in thought, in order, as it were, to hold its judgment up to human reason as a whole and thereby avoid the illusion which, from the subjective private condition that could easily be held to be objective, would have a detrimental influence on the judgment. Now this happens by one holding his judgment up not so much to the actual as to the merely possible judgments of others, and putting himself into the position of everyone else, merely by subtracting from the limitations that contingently attach to our own judging, which is in turn accomplished by leaving out as far as possible everything in one’s representational state that is matter, i.e. sensation, and attending solely to the formal peculiarities of his representation or his representational state.

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20 Kant employs the term “technik” to articulate the process of judging nature. “Reflective judgment works…not schematically, but technically, not just mechanically like a tool controlled by understanding and the senses, but artistically, according to the universal but at the same time undefined principle of a purposive, systematic ordering of nature.” CJ 5:18/20:213-214 and CJ 20:234-235

Arendt defines technical as “artificial,” i.e. something fabricated with a purpose.” *Lectures*, Lecture no. 2, 14.

21 The concept has been sometimes translated into English as common sense, but the common English sense of simplified uncomplicated thought doesn’t capture the full meaning of the Latin, *sensus communis*, thus my decision to keep the Latin phrase throughout the discussion. Ferrara suggests instead “communal feeling” or “communal sensibility” in Alessandro Ferrara, “Does Kant Share Sancho’s Dream? Judgment and Sensus Communis,” *Philosophy and Social Criticism* 34.1 (2008), 72.
Now perhaps this operation of reflection seems much too artificial to be attributed to the faculty that we call the common sense; but it only appears thus if we express it in abstract formulas; in itself, nothing is more natural than to abstract from charm and emotion if one is seeking a judgment that is to serve as a universal rule.\textsuperscript{22}

There are several elements that emerge out of this definition that are particularly important for our discussion. Firstly, the very notion of “\textit{sensus communis}” is based on an intuition of basic universal communicability.\textsuperscript{23} In other words, the fact that individuals can use speech to explain themselves implies that there is a possibility for a common ground of understanding. It follows that this “\textit{sensus communis}” isn’t a private feeling, but a “public sense,” in that it is a “consensus of different judging subjects.” Individuals tacitly share norms, concepts and evaluative feelings. This is a transcendental assumption that underpins the notion of enlarged mentality.\textsuperscript{24}

The second thing we should note is that the three basic elements that comprise \textit{sensus communis} (which Kant develops after the passage quoted) are: 1) to think for oneself; 2) to think from the standpoint of everyone else; 3) to think consistently.\textsuperscript{25} In simplified terms Kant refers to the need for unprejudiced, broad minded, and consistent thought when approaching matters that require reflective judgment. “The first of this is the maxim of understanding, the second that of judgment, the third that of reason.”\textsuperscript{26} This broad mindedness or impartiality, which we may also call disinterestedness, requires of the individual two difficult accomplishments: it requires removing oneself from the particular circumstances in which the judging individual finds herself; and secondly it requires the individual to exercise her imagination to try and come up with a judgment that everyone could agree to. So the guarantee against subjective judgments, that mask themselves as objective, is the concerted effort to universalize one’s own judgment.

\textsuperscript{22} CJ 5:293-294 (all emphasis in the original).
\textsuperscript{23} CJ 5:238.
\textsuperscript{24} CJ 5:239.
\textsuperscript{25} CJ 5:293-294.
\textsuperscript{26} Ibid.
The third thing to note is that while it is clear from the quote above that Kant does not have in mind an actual conversation between concrete persons who try to convince each other of the rightness of their judgment, it would be wrong to think of it as a purely formal exercise of rubber stamping one’s personal opinion with the label of universal judgment. Thus, in a letter to Markus Herz, Kant writes:

You know that I do not approach reasonable objections with the intention merely of refuting them, but that in thinking them over I always weave them into my judgment, and afford them the opportunity of overturning all my most cherished beliefs. I entertain the hope that by thus viewing my judgments impartially from the standpoint of others some third view that will improve upon my previous insight might be obtainable.27

This said, the community Kant describes in the Third Critique is a universal, formal community. It is not a particular community bound in time and space. This is important to clarify; Kant cannot fall back on anything other than a universal community if he is to avoid the problem of autonomy. As Beiner rightly notes, “any principle of community, aside from the purely formal universality of the human subject as such, serves to reduce judgment to heteronomy.”28 This leads to the based conundrum of any theory of political reflective judgment: how to maintain autonomy while reaching universal judgments?

4.1.3 The Practical Implications of Kant’s Theory of Reflective Judgment

This is a useful starting point where to begin evaluating the possible – intended and unintended – practical implications of Kant’s notion of reflective judgment. Firstly, I want to briefly address the question of original intent. Based on his political writings, it seems clear that Kant understood the sphere of political life (legality) to be governed, in theory if not in practice, by determinant judgment. In the previous chapter I devoted an extensive discussion to Kant’s

27 Arendt, Kant Lectures, 42.
28 Beiner, Political Judgment, 57.
position and the considerable difficulties it gives rise to. Furthermore, to dispel any doubts, in
the beginning of the *Third Critique* Kant provides a useful outline of the mind’s faculties, their
principles and products.\(^{29}\) It too states quite clearly that the *Critique of Judgment* is not concerned
with morality or the realm of freedom. So I think it would be fair to say that while Kant
recognized that his theory of judgment could prove to be the “missing link” between nature and
freedom, he did not explicitly work out the implications of this bridge in terms of his political
theory.

And yet the “repressed” dialogical and therefore potentially political dimension of the
work is highly suggestive. As Cassirer reminds us, “the true mediation between the world of
freedom and that of nature cannot consist in our inserting between the realms of being and of
willing any sort of middle ground essence, but consists instead in our discovery of a type of
contemplation that participates equally in the principle of empirical explanation of nature and in
the principle of ethical judgment.”\(^{30}\) Some critics have gone further to argue that the seeds for
an ethical and political theory of judgment do not require reconstruction, but are present in the
*Third Critique* itself. Guyer for example argues that,

Kant had become convinced that both aesthetic and teleology have something profound to
teach us about the relation between nature and morality… Somehow, without violating the
distinction between the beautiful and the morally good that he had long advocated … Kant
suddenly saw how he could take the existence of both natural and artistic beauty and our
sense of the purposiveness in the organization of nature as evidence that human beings as moral
agents can nevertheless be at home in nature, and even as of value in preparing ourselves for the
exercise of our moral agency. \(^{31}\)

\(^{29}\) CJ 20:246/5:198.
\(^{30}\) Cassirer, “Kant’s Life and Thought,” 287.
\(^{31}\) Introduction to the *Critique of Judgment*, xxii-xxiii. Based on e.g. CJ 5:196. Another major exponent of this view is
My own view is that Kant’s *Third Critique* is most useful as a basis for a discussion of political reflective judgment when considered as a foil, rather than as a direct source to draw upon. In particular, two features emerge from Kant’s theory of reflective judgment that bear direct normative and political implications for our discussion. The first element that emerges out of Kant’s theory of reflective judgment is the autonomy of judgment, which secures the moral worth of all judging subjects. As such, autonomy of judgment underscores the idea of formal equality. Each person’s judgment is as valuable as the next one. But it serves as basis for further elaboration of the distinction Kant drew between dignity and price. It is the ability to make judgments and valuations about things in the world that turn human beings into ends, rather than just means. The second element that holds potentially profound normative and political implications, is the question concerning the nature of the community that forms the background for the formation of judgments. Which community is implicated in “sensus communis”? Is it the universal community of autonomous individuals or the local political community of citizens? Kant’s position on this question is ambiguous. Kant’s observations in his *Critique of Judgment* and in particular the notion of *sensus communis* have been developed most prominently by Hannah Arendt and it is to her thought that I turn now.

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32 This of course raises the problem of how to distinguish between good judgments and bad judgments. Beiner, *Political Judgment*, 62.

33 At times Kant appears to adopt the universalist approach. This seems the most plausible interpretation of the suggestion that the ruler is relying on the formal standard of the original contract to guide his determinative judgment. (TP 8:297–299) Thus for example, with respect to the question of whether it is possible for a constitution to contain religious clauses, Kant’s answer is emphatically negative. Kant argues that it would be irrational for a people to hinder itself from making progress in future generations, by entrenching their current “immature” religious beliefs in the constitutional order. (TP 8:305) At other times it seems that the bounded political community, is the ‘focus’ group against which the legitimacy of public law is measured. This view seems to be advanced in the paragraph quoted above when Kant says: “provided it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is in conformity with right.” (TP 8:299) Here it seems that Kant speaks of a particular political community – “an entire people” – as opposed to a formal universal audience who needs to live with the real consequences of hated legislation. I suspect that this duality is inherited from Rousseau.
4.2 Arendt’s Theory of Judgment

Arendt was interested in the human capacity for judgment throughout her writings. Her interest, as Beiner tracks it, is intimately related to her preoccupation with the historical phenomenon of totalitarianism (which she saw as part of a broader moral crisis of the West; a “topsy-turvy world… where we cannot find our way by abiding by the rules of what was once common sense”\(^{34}\)). This general interest found its specific representation in the seemingly unremarkable figure of Adolf Eichmann and the problem he presented of what Arendt called “thoughtlessness.” Eichmann’s trial in 1961 brought to the fore the problem of individual judgment and personal responsibility.

Arendt, as it is well known, claimed that Kant did not have a political theory, but in his *Critique of Judgment* she believed to have found the foundation for his most important political work.\(^{35}\) In her lectures on Kant’s political philosophy Arendt explores Kant’s theory of aesthetic judgment with the specific intent of appropriating it for her political theory.\(^{36}\)

Arendt defined politics as “self-disclosure in the space of appearances”\(^{37}\) where “debate constitutes the very essence of political life.”\(^{38}\) Like art, politics is the realm of appearance and performance; a shared spectacle that elicits the spectators’ judgments.\(^{39}\) For Arendt, “the capacity to judge is a specifically political ability insofar as it enables individuals to orient themselves in the public realm and to judge the phenomena that are disclosed within it from a standpoint that is relatively detached and impartial.”\(^{40}\) Kant’s notion of enlarged mentality, which she sometimes referred to as “representative thinking,” involves potential agreement with

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“Judging is the one, if not the most, important activity in which this sharing-the-world-with-others comes to pass.”

Arendt follows Kant closely when she states:

The power of judgment rests on a potential agreement with others, and the thinking process which is active in judging something is not, like the thought process of pure reasons a dialogue between me and myself, but finds itself always and primarily, even if I am quite alone in making up my mind, in an anticipated communication with others with whom I know I must finally come to some agreement. From this potential agreement judgment derives its specific validity. This means, on the one hand, that such judgment must liberate itself from the “subjective private conditions” that is, from the idiosyncrasies which naturally determine the outlook of each individual in his privacy and are legitimate as long as they are only privately held opinions, but which are not fit to enter the market place, and lack all validity in the public realm. And the enlarged way of thinking, which as judgment knows how to transcend its individual limitations, cannot function in strict isolation or solitude; it needs the presence of others “in whose place” it must think, whose perspective it must take into consideration, and without whom it never has the opportunity to operate at all.

Consequently *sensus communis*, as opposed to *sensus privatus*,

is what judgment appeals to in everyone, and it is this possible appeal that gives judgments their special validity. The it-pleases-or-displeases-me, which as a feeling seems to be utterly private and non-communicative, is actually rooted in this community sense and is therefore open to communication once it has been transformed by reflection, which takes all others and their feelings into account. The validity of these judgments never has the validity of cognitive or scientific propositions, which are not judgments, properly speaking. … Similarly, one can never compel anyone to agree with one’s judgments – “that is beautiful” or “this is wrong”…; one can only “woo” or “court” the agreement of everyone else. And in this persuasive activity one actually appeals to the “community sense.” In other words, when one judges, one judges as a member of a community.

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43 Arendt, “The Crisis in Culture,” in *Between Past and Future*, 221-222.
44 Arendt, *Kant Lectures*, Lecture no. 13, 72.
I wish to draw attention to three themes that emerge out of these quotes: the apprehension of particulars, exemplarity, and intersubjective validity. All three are present in Kant’s account but Arendt re-articulates and develops them in thought-provoking directions.45

The first point is the matter of how one approaches particulars. This issue is not always clear in Kant, but the initial apprehension of particulars involves classifying them under some universal.46 Thus, in fact we may think of judgment, not as the faculty of subsuming a particular under a universal, but as the “faculty of contextualizing the universal such that it comes to bear upon the particular.”47 To recognize a case as a particular involves thinking of it as a particular of some more general concept. This salient point is obscured by the parsimonious distinction Kant draws early in the Third Critique between determinative and reflective judgment, which can be read to mean that in the latter case the universal enters judgment only at the very last stage when judgment is formed. However, an un-classed particular is not a possible object of judgment. Apprehending something as a particular already involves having a vague notion of what the case might be part of.48 This is not to say that reflective judgment as we have described it so far is an empty category.49 Rather, at issue is how fixed one’s general concepts are. Arendt stresses the point that being a slave to rigid concepts inhibits one from recognizing the phenomenal richness of appearance and consigns thought to accepted conventional modes of

45 It is now an accepted view in Arendtian scholarship that Arendt’s interpretation of Kant’s Third Critique reflects her own theoretical concerns, rather than the wish to remain faithful to the text. See Beiner’s “Interpretive Essay” in the Kant Lectures, and his “Rereading Hannah Arendt’s Kant Lectures,” Philosophy and Social Criticism 23.1 (1997): 21-32.
46 Beiner describes this as the gap between what we are presented with and what we are called upon to judge. Political Judgment, 134.
48 Anyone who has spent time with young children has noticed the care they take in trying to classify the many new cases they encounter in their daily lives into their modest, yet rapidly growing stock of general concepts.
49 I have mentioned in the previous chapter that determinate judgment doesn’t actually work in the mechanical way Kant describes. This is not to suggest that either forms of judgment are empty categories. Rather, they are a result of stylized rendering that serves to highlight their different aspects.
representation. For her, thinking is the activity that clears the ground and removes obstacles such as rules, concepts or values, for the exercise of reflective judgment.

In this context, I would like to point out Arendt’s unique take on the idea of aporias. Unlike the classic definition of aporia as a-historical conceptual stalemate or unresolved quandary, Arendt understood aporias as political and ethical dilemmas that are shaped and transformed by historical events and conditions. In this reconstructed view, aporias involve thinking about ordinary concepts of political life, calling into question their conventional understanding and thereby opening up the possibility to think them anew. Aporetic thinking about concepts of political vocabulary underlies the resistance to turn to easy absolute principles or incontrovertible truths.

The second element Arendt extracts from Kant and develops further is exemplarity. By examples and exemplarity Arendt refers to special particulars that allow us to discover the universal in and through the particular, insofar as they embody a universal meaning while retaining their particularity. Exemplarity then denotes singularity, a uniqueness that is nonetheless communicable. This communicability underlies the universal aspect of the example. Achilles is a classic (i.e. commonly accepted) example of bravery; Rosa Parks and Nelson Mandela are examples of dignified defiance. People in different historical times and cultures can comprehend what these exemplary persons symbolize. Thus, exemplarity, which Kant discussed in the context of aesthetic judgments, becomes invoked in the political context. Historical

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50 Beiner, “Interpretive Essay,” in Kant Lectures, 111.
events, such as the American and French revolutions, possess for Arendt an exemplary validity that makes them of universal significance, while still retaining their own specificity and uniqueness. Exemplary judgment is a component of critical thinking because it allows us to loosen “the grip of the universal over the particular.” In a world that increasingly loses its “standards” for ethical and political judgment, examples become ever more important.

The third political element that Arendt fleshes out in Kant’s theory of judgment is the notion of intersubjective validity. Here Arendt relies on the Kantian categories of communicability or publicness. On the most obvious level, publicness guarantees that certain things cannot be expressed in public. But Kant, according to Arendt, meant to denote an “extra mental capability” that makes it possible for the individual to fit in a community. “It is the very humanity of man that is manifest in this sense.” It is specifically human because it is based on the most distinctly human trait of speech. Publicness relies on enlarged mentality; one can communicate only if one is able to think from the other person’s standpoint. This is the essential basis for the potential to form intersubjective agreement.

Reflective judgment is not objective as truth strives to be, but nor is it subjective. It takes its specific character from the capacity both for enlarged mentality, of putting oneself in the place of others, particularly those who are absent from the political debate, and for thinking – disinterestedly – from the point of view of as many others. Importantly, this is not “a
question of empathy, as though I tried to be or to feel like somebody else, nor of counting noses and joining majority but of being and thinking in my own identity where actually I am not.” 59 Once formed, judgments do not compel like truth. Instead, they try to persuade “in the hope of coming to agreement with everyone else eventually.”

4.3 The Tension Between the Universal and the Particular

Central to our discussion is the link Arendt makes between the notion of human dignity, the theme of judgment in general and the tension between the universal and the particular. In this she also took her cue from Kant, albeit in a different direction. In light of the calamitous historical events of the 20th century Arendt was acutely aware that,

human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.

In chapter 1, we saw that for Kant human dignity formed the basis for the need for morality and, construed more narrowly, for legality. Arendt rejected this view. To be more precise, she rejects the Kantian conception of human dignity as human rationality and as the moral basis of politics. As Beiner suggests, for Arendt human dignity requires the participation in a public sphere where “meaningful stories, historical narrative” give traction to the actors and participants in the common “stage of human affairs.” What she found particularly troubling was the conception of human dignity as it emerged from Kant’s theory of history. In Kant, she says,

Infinite Progress is the law of the human species; at the same time, man’s dignity demands that he be seen (every single one of us) in his particularity, and, as such, be seen - but without comparison and independent of time-as reflecting mankind in general. In other words, the very idea of progress - if it is more than a change in circumstances and an improvement of the world - contradicts Kant’s notion of man’s dignity.63

In a way we could say that Arendt’s defense of human dignity is the motivating undercurrent behind her theory of judgment. Put another way, the saliency of reflective judgment as the constitutive procedure of politics stems from the ability to conceive individuals in their uniqueness and particularity;64 “judgment involves attending to the particular as an end in itself; that is as a singular locus of meaning that is not reducible to universal causes or universal consequences.”65

In contradistinction to Kant’s view of history, Arendt thought that judgment allows persons to reclaim their human dignity against those theories that posit a world-historical process whose only criterion is “success.” In the post scriptum to Thinking she wrote: “If judgment is our faculty for dealing with the past, the historian is the enquiring man who by relating it sits in judgment over it. If that is so, we may reclaim our human dignity, win it back, as it were, from the pseudo-divinity named History of the modern age.”66 We find then both in Kant’s and in Arendt’s thought an essential link between judgment, autonomy and human dignity. In Kant autonomy is inherently connected to universalism. In Arendt’s thought on the other hand, the tension between the universality of humanity and the uniqueness of the individual, result in an ambivalence that I would like to turn to now.

63 Arendt, Kant Lectures, 77.
64 Beiner, “Rereading Hannah Arendt’s Kant Lectures,” 25.
65 Arendt, Kant Lectures, 56.
66 Hannah Arendt, “Thinking,” in Life of the Mind, (New-York: Harcourt, Brace, Jovanovich, 1978), 216. There is another element to the link between judgment and human dignity, and that is responsibility: responsibility for making autonomous judgment, and responsibility for understanding even that which we find utterly disagreeable. “To judge a genuinely human situation is to partake of the tragedy that is potential in circumstances where human responsibility is exercised and borne to its limit. This helps to explain why “Arendt associates the faculty of judging with the sense of human dignity.” Beiner, “Interpretive Essay,” Kant Lectures, 100.
Arendt thought of judgment as the nexus between acting and thinking, the “missing link” between the life of the citizen and the life of the mind. The question of whether Kant’s notion of reflective judgment was indeed successful in bridging the gap between nature and freedom, is still open. According to Beiner, Arendt’s evolving reflections have resulted not in a unified theory of judgment that straddles the experiences of action and contemplation, but rather in two separate theories of judgment. As Beiner tracks this development in his interpretive essay, Arendt pursued the question of judgment from the point of view of the vita activa until the beginning of the 70’s; after that the emphasis shifted to the life of the mind. This represents a shift of emphasis “from the representative thought and enlarged mentality of political agents to the spectatorship and retrospective judgment of historians and storytellers.”

This is a puzzling theoretical move, as Wellmer points out. Firstly because Arendt’s interest in judgment arose in the context of reflections on political action and argumentation, and secondly because reflective judgment requires intersubjectively valid judgment, that is judgments that everybody could agree to.

Arendt traces the tension between the actor and the spectator back to Kant’s writing on revolution, where this tension overlaps with another, one between politics and morality. One way to understand the theoretical shift from the actor to the spectator may have to do with what Wellmer called Arendt’s “latent orthodox Kantianism,” that is the Kantian insistence on

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69 Wellmer, Ibid, 33. Wellmer attributes these two aspects to Arendt’s attempt to assimilate political and moral judgments into aesthetic judgments, which are dissociated from action, and performed by the spectator.

the autonomy of judgment.\textsuperscript{71} In putting judgment in the hands of the actor who inhabits her community of norms, habits and procedures, it is possible that Arendt feared that too much is ceded to the authority of the particular community.

But there is another, more general, way of formulating the problem, which is not specifically Kantian. Judgment is by definition an activity that presupposes a community. As Beiner puts it:

The effort at persuasion is not external to the judgment; rather, it supplies the very raison d’être of judgment. This is because there is no epistemologically secure procedure for achieving correspondence to the object judged short of consensus arrived at in the actual course of truth-seeking communication.\textsuperscript{72}

But here is where the paradox of judgment arises: how is it possible to maintain one’s autonomy from the judgments of others while forming one’s own intersubjective judgment?\textsuperscript{73}

Judgment has this mercurial, elusive quality; a dual imperative of being on the one hand, the result of autonomous reflection, yet on the other hand, appealing to and rooted in a communicable context (the “\textit{sensus communis}”). So, if judgment always involves some kind of \textit{sensus communis}, the crucial question becomes, what is the relevant community? Is it a bounded political community? Is it the universal community?

Considering what we have said so far about how Arendt perceived judgment to be anchored in the political experience and considering her strong rejection of Kant’s vision of a metaphysical universal community, it comes as a surprise that Arendt herself seems ambivalent on this point. At the end of her lectures on Kant she says,

One judges always as a member of a community, guided by one’s community sense, one’s \textit{sensus communis}. But in the last analysis, one is a member of a world community by the sheer fact of being human: this is one’s “cosmopolitan existence.” When one judges and when one acts in

\textsuperscript{71}Wellmer, ibid, 37.
\textsuperscript{72}Beiner, “Interpretive Essay,” \textit{Kant Lectures}, 120.
political matters, one is supposed to take one’s bearings from the idea, not the actuality, of being a world citizen and therefore, also a *Weltbetrachter*, a world spectator.\textsuperscript{74}

This passage is highly suggestive. Here Arendt states clearly that the actor and the spectator are not inherently disconnected, separate roles, undertaken by different people. Each person inhabits, or rather, ought to inhabit both roles. As judges we are both actors and spectators, taking our cues not only from our own political community but also from the regulative idea of a universal humanity. The following passage from the *Life of the Mind* provides further clues to the role of humanity as a guide to universal norms:

> It is by virtue of this idea of mankind, present in every single man, that men are human, and that he can be called civilized or humane to the extent that this idea becomes the principle of their actions as well as their judgments. It is at this point that the actor and the spectator become united; the maxim of the actor and the maxim, the “standard” according to which the spectator judges the spectacle of the world become one.\textsuperscript{75}

How can the individual play both roles? It might look something like this: action requires a background (hi)story that has shaped contemporary social institutions, normative evaluative stances, and political arrangements. One way to escape from the sway of these precepts (which are handed down by various means of inculcated public memory, indoctrinated symbols, national education and myth building practices) is Arendt tells us is by appealing to a universal standard of spectatorship. It is easy to see that taking on such a role involves a tall order on the part of the individual. It would require, to begin with, recognizing as problematic conventional practices that through their repetitive hegemonic status have become transparent. Secondly, the individual would need to imagine and identify an alternative point of view from which to

\textsuperscript{74} Arendt, *Kant Lectures*, 75-76.
\textsuperscript{75} Arendt, *Life of the Mind*, (New-York: Harcourt Brace Jovanovich, 1978), 271. Wellmer points out that Arendt shows her real modernism by shying away from a notion of ethical community (which would have been a natural choice in a neo-Aristotelian Hegelian train of thought) in favour of a universal community that is not an existing ethical community, but a regulative idea. “Hannah Arendt on Judgment,” 34.
criticize these parochial practices. Finally, the individual would find herself at a decisive juncture where she would need to decide how to act on her judgment. This may be a particularly painful decision when there is a contradiction between the communal practice and the universal standpoint.\footnote{It is important to note that the roles of spectator and actor both require agency and self-ownership. Historical moments of catastrophe reveal just how active the role of spectatorship is. In \textit{Radical Hope} Jonathan Lear discusses the loss of meaning for Aboriginal people with the disappearance of their traditional way of life. Plenty Coups tells his ‘biographer’ that “when the buffalo went away the hearts of my people fell to the ground, and they could not lift them up again. After this nothing happened” in \textit{Radical Hope} (Cambridge: Harvard University Press, 2006), 2. Similarly, a study of Jews’ diaries from the Holocaust reveals the inability to bear witness to moments that take people outside of their linguistic, cultural and social context. Yanusz Korczak’s recorded in his diary a trivial incident that took place in the Warsaw Ghetto in which a customer becomes angry at a shopkeeper. “Madam,” replies the shopkeeper to the customer, “this is not merchandise, and this is not a store, and you are not a customer and I am not a shopkeeper and I am not selling and you are not paying because these bits of paper are not really money. You don’t lose and I don’t profit. Why would anyone be swindling? Except we need to be doing something, no?” Amos Goldberg, \textit{Trauma in the First Person: Diary Writing in the Holocaust} (Kineret, Zmora-Beitan and Ben-Gurion University Publishing, 2013) [in Hebrew]. Using Arendt’s terminology we could say that when life becomes meaningless because all the symbolic frames of reference have been eradicated, the subject ceases to be either an actor or a spectator. However, in the aftermath of a catastrophe, the historian, the storyteller has a moral duty to form a narrative of past events. For a discussion see, María Pía Lara, \textit{Narrating Evil}, chapter 5.}

This tension, between the universal standpoint and the perspective of the particular community, plays out on the level of the judging individual because it personalizes the theoretical tension between universal morality and sensitivity to the particular. In doing so, it depoliticizes the tension because it ultimately leaves it at the level of the individual. The question is whether this tension can also be translated in a meaningful way to fuel a progressive theory of political reflective judgment.

\textbf{4.4 Is a Political Theory of Reflective Judgment Possible?}

The first – pedantic – point to note is that neither Arendt nor Kant offer a ready-made theory of \textit{political} reflective judgment. I have explained extensively in chapter 3 the problems that arise from the suppressed role that judgment plays in Kant’s political theory. With Arendt we have a somewhat different set of problems. Arendt’s exaltation of politics notwithstanding, her definition of politics was very different from what we think of nowadays as politics. Arendt
was not interested in the mundane aspects of politics that we have come to associate with the term. Debates over health, welfare, education, or tax policies not only did not count for her as political matters. On the contrary, preoccupation with these everyday commonplace issues represented to her understanding the instrumentalization of politics – as yet another evidence in the de-politicization that modernity has undergone in the name of promoting the non-political end of social equality. Politics, in her view, was a grand enterprise that served an existential function “to deal with (or redeem) the limitations of the human situation, of our natal and mortal condition as creatures in flux.” Consequently, literally construed, Arendt’s theory of political judgment is a “mythology of judgment,” emerging as a mysterious faculty that resides between truth and opinion. And yet, Arendt’s thoughts on judgment, prompted by Kant’s *Third Critique*, bring into sharper focus several interrelated themes, that while by their very nature defy complete (and determinate) resolution, need to be nevertheless addressed if the project of articulating a political theory of reflective judgment is to stand a chance.

1) **What is the nature of the judging community?** One of the central questions that came up in the course of our discussion is the nature of the link between the transcendental universal community and the empirical politically-bounded community. Kant, as we noted, is not primarily interested in real argument between citizens, or in the effect sociability has on bringing about actual intersubjective agreement. His main concern is with the philosophical problem of outlining the conditions for the possible validity of such judgments. This casts into doubt his theory’s ability to bring together the universal and the particular perspectives. Beiner spells it out clearly when he says:

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78 Albrecht Wellmer, “Hannah Arendt on Judgment,” 38. Still, just as with Kant’s theory of judgment, various commentators have found Arendt’s thoughts on judgment to be fertile ground for developing alternative models of political judgment (e.g. Habermas, Benhabib, Beiner, Zerilli, Honig, Nedelsky).
If the transcendental subject is a universal subject and if the only way for it to win a rationally compelling basis for its principles of judgment is by ascending to a universal standpoint detached from all contingent empirical conditions, what is it that gives the deliberations of this subject enough determinacy to have any content at all? In the ascent to universality, at what point is one sufficiently distanced from the particular and the contingent to satisfy the transcendental requirement…? And if it is through shedding all particularity and contingency that the Kantian subject secures transcendental validity for its judgments, doesn't the standpoint of the transcendental subject turn into no standpoint at all, and isn't the universal self in danger of becoming self-less?79

Beiner is doubtful as to whether Kant’s model of aesthetic judgment can form the basis for political judgment “where one certainly does require actual dialogue between real (rather than hypothetical) interlocutors in communities shaped by a large range of ‘heteronomous’ factors (such as existing traditions, shared vocabulary).”80 Beiner also believes that Arendt never fully appreciated this aspect in Kant’s theory of judgment.81 But I am not sure that the case is clear-cut. Arendt’s fascination with Kant’s account was specifically with the aesthetical aspect of it, the judgment of the spectator whose judgment is dissociated from action and argumentation.82 As Beiner himself notes, according to Arendt: “one acts with others, one judges by oneself. In judging, …one weighs the possible judgments of an imagined others, not the actual judgments of real interlocutors.”83

So I think it would be fair to say that the nature of the judging community remains an unresolved theme for both thinkers. Nevertheless, a political theory of reflective judgment would have to accommodate the need for a “real dialogue” between “real people” in a way that isn’t entirely bound up with the contingent normative standards of the particular community. It

79 Beiner, Political Judgment, 33-34.
81 Beiner, ibid, 26.
82 Here I follow Albrecht Wellmer, “Hannah Arendt on Judgment,” 33.
would have to aspire to the inclusion of a universal perspective in order to avoid subjectivism. Another element that both theoretical discussions reveal is that the tension between universal and particular doesn’t necessarily map on the community-individual divide. For it is often the case that the claim of the particular individual in fact represents the universal point of view and it is this perspective that is in tension with the particular point of view that is promulgated by the political community. So we are concerned with three levels of judgments: the individual, her community and the universal community.

2) **Truth and Politics:** Both Kant and Arendt agree that reflective judgment does not concern truth. Kant could not overcome the schism between truth and politics because of the dichotomous distinction in his thought between logical judgments and non-cognitive aesthetic judgments. Arendt on her part, claimed that truth has a despotic character in that it compels universal assent and eliminates the diversity of views and reduces the richness of human discourse. According to Wellmer, Arendt was trapped in Kant’s conceptual framework. Because Kant conceives cognition as well as moral reasoning in a monological way, there is no real space for the exercise of judgment. Arendt stuck to Kant’s monological dimension of cognition and his formal conception of rationality, therefore

Arendt could not use the notion of reflective judgment to uncover a suppressed dialogical dimension of Kant’s conception of practical reason, but only to assimilate moral – and political – judgment to aesthetic judgment. Arendt remains entrapped within an epistemological framework, from the perspective of which physical science must appear as the paradigm of knowledge, physical facts as the paradigm of factuality, and logical demonstration as the paradigm of rational argument; correlative, the activities of thinking and judging must appear as lying outside the sphere of cognition, truth and rational argument proper.”

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85 Albrecht Wellmer, “Hannah Arendt on Judgment,” 43. The communicative turn in philosophy towards rational argumentation and its indebtedness to both Kant and Arendt (I am thinking here in particular of Habermas’ work), represents an attempt to resolve the schism between truth and politics. For Habermas’ indebtedness and thoughts on Arendt’s work see: “Hannah Arendt’s Communications Concept of Power,” *Social Research* (1977): 3-24; “On
But, again as Beiner reminds us, it is difficult to think that politics doesn’t involve searching for the right answer to various questions that invariably implicate normative dimensions. The tentative solution to the problem of truth and politics, put forward by the paradigm of reflective judgment, relies on the notion of intersubjective validity, of which more will be said in the next chapter.

3) Taking teleology seriously: One way of defining politics is thinking of it as a way of organizing social collective action for the purpose of some shared collective goals. This is not a definition that Arendt would agree with, but without it, it is difficult to see what makes politics different from other forms of social interaction. Though unacknowledged, Arendt’s own ‘political’ philosophy is in fact shaped by a strong view of an end. Her view – articulated most clearly in The Human Condition – which distinguishes between private and public spheres is a teleologically driven perspective on politics; for the question of where and how to draw the line between the private and the public is, pace Arendt, itself a question regarding the end of human existence that finds its resolution by means of public argumentation.

As I noted in the previous section, Arendt was highly critical of the teleological undercurrent in Kant’s view of history, which to her understanding undermines the ability to view the individual as a unique and particular being. Kant’s position is, I would argue, more complicated than Arendt makes it out to be. Kant has conflicting agendas: on the one hand he is committed to the moral imperative to form a rightful condition, on the other hand, there is a commitment to further the rights of humanity as an end of legality. At issue is the very purpose of politics; Kant’s justification for entering civil society is underpinned by the idea of

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the German-Jewish Heritage,” *Telos*, 44 (1980): 127-131, where Habermas laments the fact that Arendt did not take the “step towards communicative rationality, which is built into speech and action itself” (On the German-Jewish, 130).

human dignity. Yet, at the same time, the very end of legality is to create the conditions for promoting human dignity. These two different views of politics – let’s call them minimal and teleological – require different conceptions of judgment. The former determinant; the latter reflective.

My point is that it is difficult to conceive of politics without some notion of an end. What those ends are, how they are negotiated and how the polity judges whether they are being promoted or not is a matter of debate. Both Kant and Arendt rely (implicitly) on an element of teleology in their political writings, but neither gets it quite right. Kant’s notion of teleology is purely transcendental and as far as it is applicable to the empirical world, remains out of the reach of human agency.\textsuperscript{87} Arendt’s notion of teleology is undisclosed, and as such, it too remains impervious to human agency and action.

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Any tentative political theory of reflective judgment must take into account these three challenges (the nature of the judging community, truth and politics, teleology). As should be clear by now, these open themes do not represent questions that have easy solutions, which happened to elude both Kant and Arendt. In the next chapter I try to think seriously about the possibility of political reflective judgment with particular attention to the promise it may hold for critically evaluating the role of human dignity.

\textsuperscript{87} Beiner, \textit{Political Judgment}, 69.
CHAPTER 5

Political Reflective Judgment II: Possibilities?

Political arguments about justice and injustice ordinarily refer to two kinds of standards: the relatively determinate standards embodied in the fund of norms familiar to members of a political community and the much vaguer and more indeterminate standards by which the justice of these norms is measured. The interplay between these two kinds of claims about justice gives political argument much of its characteristic liveliness and lack of finality.

Bernard Yack, *The Problems of the Political Animal*

The previous chapter ended on an uncertain note. It seemed as though the project of articulating a theory of political reflective judgment was off to an unpromising start. The tension between the universal and the particular took the following form: the autonomy of the judging individual appeared to be in conflict with the individual’s embeddedness in the political community. How is it possible to form autonomous judgments that are independent of (and in potential contradiction with) with the community’s judgment? Is it even possible to speak of practical judgment that is entirely autonomous? Isn’t every judgment embedded in and appeals to some concrete political community? What does this mean in terms of the ability to articulate the universal perspective?

The more circumscribed question that arises out of our discussion is: how do we (as a community of citizens) judge constitutional question that implicate the idea of human dignity? In this chapter, I begin addressing the problem of political judgment by thinking seriously about the practical aspects of one variant of political judgment, namely constitutional judgment. By constitutional judgment I mean the determination in matters that have to do with constitutional

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design and judicial review. Constitutional judgment is undertaken in various loci; most obviously, in parliaments and by constitutional courts. But in a more modest way it is debated in smaller political forums such as city councils and citizens’ assemblies.

Since these questions have been the subject of extensive theoretical scholarship, this chapter begins with two theoretical models, which offer useful insights. In section 1 I discuss Jürgen Habermas’ distinction between justification and application discourses. This model appears at first glance to be a useful way for understanding how political judgments can be formed in a way that retains their particularity, without giving up on the claim to their universal validity. However, I will argue that this model turns out to be problematic because it drives an artificial wedge in the process of judgment. Instead, in section 2 I advance the framework of thick-thin normative notions which, as I intend to show, lends itself to a more fluid and complex conceptualization of the relation between the universal and the particular. I conclude the chapter (in section 3) with a tentative framework for political (constitutional) reflective judgment.

5.1 Justification and Application Discourses

I noted in the previous chapter that Habermas sees himself as building on Arendt’s insights about Kant’s theory of judgment in his work on discursive rationality and deliberative democracy. In the broadest sense, Habermas’ development of a discourse theory of morality seeks to find a middle ground between the universal abstract Kantian ethics and the communitarian tradition of Aristotle and Hegel. Contrary to Kant’s monological stance, discourse ethics is based on the assumption – following the linguistic turn – that monological reflection is insufficient for grounding the validity of moral principles and judgments. Fundamentally the challenge is to retain a role for rational autonomy within a context where
individual consciousness and identity formation are understood to be socially structured by language.\(^2\)

One of the main two principles that guide Habermas’ discourse theory is the universalization (U) principle, which states that a norm is valid when the consequences for the interests of each individual which arise from following this norm can be accepted by everyone.\(^3\) This procedural principle is a dialogical variation on Kant’s idea that valid moral norms allow for an egalitarian community of autonomous agents. The (U) principle bears the burden of proof that adequate procedures of justification are complied with. Habermas conceives of this principle not purely in hypothetical terms, but in actual terms of discourse between all affected individuals. It requires not just a mental representation of other possible points of view (as Kant and Arendt – in her later writings – saw it) but putting forward claims to rightness in the hope of gaining reasonable consent from actual participating subjects.

To counter the problem of the Kantian gap between valid principles and empirical contexts of action, Habermas develops the distinction between a discourse of justification and the application of a norm. The problem that the distinction between justification and application is meant to address is the following: a norm should be capable of commanding rational consent from all affected by it. On the other hand, it should be appropriate for all situations where it is applicable. But these two requirements cannot be satisfied simultaneously because the participants in the practical argumentation cannot take all possible situations in which the norm might be relevant in the future into account. This means that “valid norms owe their abstract universality to the fact that they withstand the universalizing test only in a

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decontextualized form.” But this feature limits their application only to standard situations whose “salient features have been integrated from the outset into the conditional component of the rule as conditions of application.” In Kantian terminology we might say that standard situations that have already undergone the universalization test are subject subsequently to determinate judgment, because they function as schemata that orient judgment.

It follows then that when unforeseen situations arise, new applications must be addressed separately from the question of justification, by a discourse of appropriateness. It is not possible, according to Habermas, to decide by a single act of justification what is the right thing to do in a given circumstance. Instead, there is a “two-stage process of argument consisting of justification followed by application of norms.”

The crucial point to underscore here is that the justification discourse takes a universal perspective (“what is good for all?”) whereas the application or appropriateness discourse asks for the point of view of the concrete individuals affected by the application. In this sense, the distinction between justification and application is meant to address the tension between universality and particularity, or singularity.

To clarify, neither Habermas nor Gunther, who is the clearest exponent of this theory, argue that a norm remains immutable once it has been justified. As Gunther puts it in the following way:

If every valid norm is dependent on coherent supplementation by all others in situations in which norms are applicable, then their meaning changes in every situation. In this way we are

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4 Habermas, “On the Employments of Practical Reason” in Justification and Application, trans. C. Cronin (Cambridge, Mass: MIT Press, 1993), 13. Habermas is aware of the open-endedness of the justification discourse. “Every justification of a norm is necessarily subject to the normal limitations of a finite, historically situated outlook that is provincial in regard to the future.” Ibid.

5 Habermas, “Remarks on Discourse Ethics,” in Justification and Application, 36; Klaus Gunther, Der Sinn für Angemessenheit (Frankfurt, 1998), 55. Cited in “Remarks on Discourse Ethics,” 37.
dependent on history, since it first produces the unforeseeable situations that compel us in each instance to produce a new interpretation of all valid norms.  

The distinction between justification and application looks very promising because it appears to successfully combine the need for universal validity with attention to particular context; between elements of determinant and of reflective judgment. But on closer inspection it raises some questions, which point to the possibility that it is largely a theoretically stylized construct, casting into doubt its usefulness as a way of understanding and - importantly criticizing - the application of norms. Here I follow the insightful criticism of Matthias Fritsch who addressed the problem in two articles.

Every norm anticipates its application. The valid norm is “case impregnated,” or has an unavoidable “situational index.” The future application of a norm is part of its conception, and therefore the future change in the norm is implicit. It follows that Habermas’ attempt to neatly separate justification from application discourses overlooks the fact that the applicability of a norm plays a “co-constitutive” role in its normativity.

Habermas, as I noted in the previous section, readily acknowledges the open-endedness of the justification discourse. Agreement on the validity of the norm is not the final word. Because we cannot foresee all possible eventualities, because the parties to the debate do not have endless time, limitless resources and complete knowledge, norms can change as a consequence of new applications. But this description of the specification of an already justified

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6 Klaus Gunther, “A Normative Conception of Coherence and Discursive Theory,” *Ratio Juris* 2.2 (July 1989), 163.
7 It is also another telling sign of Habermas’ attachment to a determinate model that starts with universal form and applies them to particular cases. As Ferrara puts it “the cogency of the principle has a separate origin from its applications,” *The Force of The Exemplary* (New-York: Columbia University Press, 2008), 8.
norm by a *subordinate* process of application obfuscates the real tension that Habermas in fact wishes to dissolve: that is the tension between moral universalism and contextual sensitivity, between equal consideration for all and the singular case. As Fritsch puts it:

The normativity of singularity, appropriateness, or of doing justice to the particular case and the people involved in it, cannot be contained in a norm – and thus also not be justified in a prior discourse – for it comes into being, again and anew, only in confrontation with a case. Thus, the justification of a norm is *always incomplete* for conceptual and not merely empirical reasons, as fallibilism typically has it.\(^\text{11}\)

Following the criticism of Benhabib and others on his insufficient attentiveness to the role of the particular in the justification of a norm, Habermas has restated his position. He acknowledged that both the universal point of view and the concrete other are essential for the universalization principle, but he continues to maintain that they are dealt with respectively in the two separate discourses.\(^\text{12}\) However, this two-stage approach, which seeks to dissolve the potential tension between the universal and the particular, by means of separating them, masks their inherent interdependence.\(^\text{13}\)

This point is not lost on Habermas, as when he says, “in discourses of application, the principle of appropriateness takes on the role played by the principle of universalization in justificatory discourses. Only the two principles together exhaust the idea of impartiality.”\(^\text{14}\) The

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\(^\text{11}\) Ibid. Wellmer argues similarly: “arguments always operate in contexts that are organized not in a linear, but in a holistic way. The compelling force of arguments is therefore always dependent on contextual presuppositions which themselves may be questioned as the argument goes on. This does not only mean that rational discourse cannot rest on ultimate premises that in principle could not be questioned, but also, and more specifically, that there are no universal and a priori criteria of what would count as a good argument in specific contexts.” “Hannah Arendt on Judgment,” in *Hannah Arendt: Twenty Years Later*, ed. L. May and J. Kohn (Cambridge, MA: MIT Press, 1996), 45.


\(^\text{13}\) Fritsch, “Equality and Singularity,” 333.

\(^\text{14}\) Habermas, *Justification and Application*, 37.
principle of appropriateness, then, including the demand to consider and understand concrete others from their own perspective, must be understood as co-constituting of the very meaning of validity. It cannot be the case that discourses of justification, independently of the principle of appropriateness, are to establish the validity of norms.  

Habermas has argued that all norms are “inherently indeterminate” in ‘their reference to situations’, in ‘need of additional specifications in the individual case’. The question – as Arendt posed it – is to what extent a new application changes the norm, to what extent concepts are rigid and preventing one from recognizing the richness of appearance. If it is merely a specification, (i.e. a new situation that has not fundamentally changed the norm), then we have the felicitous consequence of anticipating the validity of the applied norm retrospectively. Application that results in substantial modification of the norms requires going back a step and undergoing a new discourse of justification. But at the same time, Habermas argues that “if every norm must be coherently complemented by all other norms applicable in a situation, then the meaning of the norm subtly changes in every situation. In this way we depend on history, since it alone provides us with the unforeseeable situations that compel us at each point to provide a different interpretation of the set of all valid norms.” In other words, the meaning of a norm changes with every new situation. Every ‘additional specification’ co-determines and thus changes the meaning of a norm in a way that could not be covered by the validity-

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18 Between Facts and Norms, 219 (emphasis added). But the German original says nothing about “subtle” change. This is Rehg’s interpolation. For a full discussion see Alexandre Lefebvre, The Image of Law: Deleuze, Bergson, Spinoza, (Stanford: Stanford University Press, 2008), 46-47.
conferring consensus in discourses of justification. Such change of meaning, however, does not just make the retrospective pretension to full justification an idealizing presupposition, as Günther argues, but renders it necessarily false. An appropriate application of a new case involves retrospectively projecting back to the justification discourse, "as if it were already included in the norm." Hence, the two-discourse approach merely shifts the pragmatically impossible step from justification to application: either the former has to anticipate all situations of application, or the latter has to pretend that they have been anticipated.

The discourse of justification and application as Habermas conceives it involves different practices: of inclusion and exclusion, of universalizing and particularizing. If it were possible to artificially separate the two stages, he would be right. But this is not how practical reason functions, as Fritsch demonstrates and as I argue in the discussion below. The principle of appropriateness cannot be banished from justification all together. “Shifting from one to the other marks interruption. At the same time one confronts the other as its limit: we can abstract from singularity only so far.” The relationship between justification and application is one of interdependence yet interruption. In this sense, the two projects – doing justice to individuals and to all equals – depend on each other while at the same time, limiting one another.

5.2 Between Thick and Thin

I ended the previous section with the conclusion that in the context of liberal morality judging norms involves the related, yet interrupted in the sense of non-transcended, relations between universality and particularity. One way to conceptualize the tension between universal

20 Fritsch, “Equality and Singularity,” 337.
21 Alexandre Lefebvre, The Image of Law: Deleuze, Bergson, Spinoza, 47.
22 Fritsch, “Equality and Singularity,” 337. Lefebvre articulates essentially the same point differently when he argues that for Gunther the “perfect” (hypothetical) norm is not abstract and empty but full of content. Such a norm however is only a regulative idea. See Gunther, The sense of Appropriateness (Albany, NY: SUNY Press, 1933), 33-34; Alexandre Lefebvre, The Image of Law, 43.
24 Ibid, 340.
and particular is through the framework of thick and thin morality, which is particularly useful because it takes the reflective notion of exemplarity very seriously. This distinction has had several contemporary philosophical iterations. Generally, thin moral concepts refer to universal context-neutral morality, while thick moral concepts refer to how they are enmeshed in particular culture, tradition, steeped in history and language. Bernard Williams speaks of essentially “thick” moral concepts such as courage, gratitude, and treachery as opposed to essentially “thin” moral concept such as good, bad, and right. Responding to Williams' account, Thomas Scanlon defines the thinness/thickness of a concept based on its abstractness vs. a degree of particular content. Michael Walzer thinks that all moral concepts have thin and thick meanings, and Moody-Adams goes as far as to argue that “a concept is a moral concept only if it is possible to give both thin and thick accounts of it.”

The distinction between thick and thin illuminates a profound theoretical disagreement regarding how practical judgment unfolds. Kantians start from the idea of thin morality as prescribed by reason, which is then being applied to concrete circumstances. Others argue that “morality is thick from the beginning, culturally integrated, fully resonant, and it reveals itself thinly only on special occasions, when moral language is turned to specific purposes.”

I do not intend to assess the merits and the different iterations of this framework, except to say that it, like the justification and application distinction, it is most often presented in dichotomous, binary terms. In that sense it does not seem to offer a significant improvement

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25 It should be noted that Williams does not provide either a defense for his list nor a way for identifying other concepts. Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985), 167, 129, 140-141.


for conceptualizing the way we practically address the tension between universal concern for all and particular respect for a concrete other. However, I would like to argue that integrating the analytical distinction between thick and thin into the perspective of reflective judgment as developed in the beginning of the chapter, might help us reconceive of it as a continuum on which judgment moves back and forth between the universal and the particular.\(^{30}\)

A concrete example might be a good place to start. Take bravery.\(^ {31}\) In defining a collectively appealing notion of bravery we may think of the mythic story of Achilles, who has come to represent classical martial values of valor and fearlessness. But then what would we think of a person who hid Jewish people during the holocaust? The two stories have very little in common in terms of their specific details, yet the more recent story in some way rivals the old story as an account of the virtue being exemplified. It thus extends the definition of bravery because it somehow makes it more illustrative, more poignant, more in tune with our current sensibilities.\(^ {32}\)

This example represents what Flakne calls “imaginative synthesis,” which contains three important elements. Firstly, we (the judges) form a coherent narrative out of a novel sequence of events. Secondly, we recognize a resemblance between two stories, which have very little in common. The resemblance we identify is the telos of the examples. Importantly, the telos is communicable (i.e. we can create the connection between two different stories) in a way that simultaneously retains the specific features of each singular story but contains analogical features between the two. Thirdly, the new story alters the meaning the original story holds for us. This does not mean that the old story completely loses its meaning; rather its meaning (e.g.

\(^ {30}\) In this I am heavily influenced by an illuminating article by April Flakne, “Through Thick and Thin: Validity and Reflective Judgment,” *Hypatia* 20.3 (Summer 2005): 115-126.
\(^ {31}\) This example is developed by Flakne.
\(^ {32}\) It is worth noting that the poignancy of the more recent example stems from the fact that while Achilles acts in a heroic way, his heroism is rooted in the values of his particular community, whereas in the case of the person who hid Jews we recognize the quality of what Kant and Arendt would call autonomous judgment, which, sets itself against the socially prescribed norms, and is recognizable to us as a universal humane judgment.
an example of bravery) is altered in the sense that it is no longer exemplary – and, in this case, emblematic of a virtue). If the reflective process has been successful we now have a rival account of the concept of bravery, for the story of Achilles does not quite retain its exemplarity. This is how establishing exemplary validity works: by forging a link between two events, creating a novel unity of the notion of bravery that now becomes a new entry in the common moral vocabulary or “sensus communis.”

Let us consider another, thematically closer, example. In the movie adaptation of Kazuo Ishiguro’s book, The Remains of the Day, Anthony Hopkins plays the role of the head-butler to a powerful man who, out of misguided political zeal, attempts to forge an alliance with the top brass of Nazi Germany. The character is emblematic in several interesting ways. Stevens (Hopkin’s character) is steeped in his lifeworld as a head-butler; that is the essence of his identity, with all the decorum and strict observance of minute protocol that goes with it. He strikes us as a tragic character for two reasons: firstly, because he is the perfect servant to a man whose actions are objectionable. Consequently, Stevens’ honor is tainted by his master’s poor judgment and dishonor. Secondly, he pays a personal price in terms of the unfulfilled relation with Miss Kenton, the house-keeper (the character played by Emma Thompson). Here too decorum and propriety prevent him from following his (private) free will. Stevens therefore represents the value of self-respect understood as social honor, as a person who follows scrupulously the norms prescribed to him by his station in life.

Now consider a contending example of self-respect, that of Rosa Parks. Consider the image of Rosa Parks sitting quietly in a bus, refusing to obey the bus driver who ordered her to give up her seat in the colored section to a white passenger after the white section was filled. This symbolic image was so powerful that it paved the way to the rights revolution in the US

33 Flakne, 118-119.
(even though she was not the first activist who resisted bus segregation). This seemingly unprepossessing event has become exemplary because it highlights certain admirable human features (dignified self-possession, a non-violent stance against powerful authority, willingness to pay a personal price for doing what is just) in a particularly poignant way. This is the first stage of the “imaginative synthesis”: we (the judges) form a coherent narrative out of a new sequence of events. Secondly, we can identify a common telos or point to the two stories, even though they are very different in terms of their details. This telos is communicable in a way that preserves each story’s unique features yet at the same time it conveys their analogical nature. Thirdly, the new story alters the meaning of the first story. It does not mean that the first story loses its normative meaning, but against the new story it loses its original exemplarity. In other words, it no longer speaks to us as an example to follow and behold. Unlike Stevens the head butler, Rosa Parks didn’t simply follow conventional rules. Rosa Parks’ image extends the meaning of self-respect in a more poignant way because it highlights the possibility of resisting injustice through ordinary people doing ordinary things. The story of Rosa Parks becomes a new entry in a common moral vocabulary.

What the examples of bravery and self-respect illustrate is the fluid relation between the thin and thick notions of norms. Contrary to Williams’ assertion, even a culturally “thickly” embedded notion of bravery retains a certain “thin” universal aspect. A new example establishes the validity of the general concept but also nominates a new candidate that is different from the existing stock of examples. Thus, the thinness of a moral concept is encapsulated in its openness to analogical stipulation despite its thick enmeshment in prior examples. The idea of a thin-thick continuum allows us to appreciate reflective judgment as a creative re-imagination and reinterpretation of an evaluative concept, thickly fleshed out in a
specific context, by “first thinning it or detaching it from that thick context, and second, giving
it new flesh – thickness – in a new context.”

There are several aspects, which I would argue render the thick-thin model more fruitful
from the point of view of reflective judgment, when compared to Habermas’ framework.
Flakne’s framework allows us to think beyond binary dichotomies when it comes to the
inherent tension between universal morality and particular context. I believe it rings truer than
the somewhat artificial division that Habermas and Gunther propose. Instead of constraining
judgment to strict binary categories (justification and application, thick or thin), we can imagine
a continuum between two constantly evolving limit points, that are re-imagined whenever a
candidate example comes up and initiates reflection not only on what gives thick terms their
meaning, but what is essential for the thinness of the term. This process results in the
concomitant imbuing of meaning of both thin and thick conceptions. Each of the conceptions
exerts gravitational pull towards the other: the particular conception contains the seeds for
reinterpreting the universal conception, while the universal conception, when considered from
the point of view of the particular conception, strives for specification (if not quite
particularization). The “trueness” or universality of a thin conception (the justification of a
norm in Habermas’ terms) is never a complete phase (not even for a temporary period of time),
for it is in principle always and continuously open to the possibility of a better (i.e. more
resonant or correct) definition.

34 Ibid, 122.
35 Following Heidegger Gadamer frames this process in terms of “the hermeneutical circle,” Truth and Method (NewYork: Seabury Press, 1975). I will address concrete examples in the sphere of constitutional rights, but for the
moment consider the South African case of Port Elizabeth, and the recognized right to housing it addresses, as a
thick explication of the thin notion of human dignity. Judgment in the case fleshes out what it is that human dignity
requires. It simultaneously elucidates the deontological thinness of the concept of human dignity by detaching it
from the particular context of interpretation, and embedding it in the particular circumstances of the case (humans
have equal dignity, dignity requires protection, living with dignity means having somewhere to live, many people in
our community have been deprived of this right).
One might wonder whether it would not be possible to relax Habermas’ framework into a less rigid model and conceive of it as a more fluid process. I think such an organic expansion, without fundamental modification, would not be possible for the following reason: the community of judgment that Habermas specifies for the discourses of justification and application is different in each stage: the first universal, the second particular. The two discourses are separate not only conceptually, but also one might say empirically. In contrast, the dynamic involved in reflecting on thin-thick conceptions is a single judging event, where a ‘real’ community of judges considers simultaneously the particular features of the (exemplary) case and its bearing on the universal moral concept.

The other important aspect that can be better appreciated when we take the thick-thin perspective seriously is the sense in which the “new” definition feels right and somehow familiar (i.e. reflects an already recognized feature of the norm that has hitherto gone unarticulated). Habermas defines this feeling in analytical terms as a retrospective validation of norms (implicitly implying, although perhaps without meaning to, that the new, more enlightened definition of norms has always been ‘there’). Because the thick-thin framework makes the ‘new’ thin (or universal) conception of a norm directly tied to a certain particular example and imagery, it underscores the contemporaneity and the historic situatedness of both the universal and particular conceptions of the norm. In this way, the related yet interrupted relation between the universal and the particular that Fritsch identified in the context of the

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36 This is what Habermas means when he says: “Prima facie valid norms remain open to further interpretation in the light of particular constellations of unforeseeable situations of application. The question of whether norms determined to be valid with reference to anticipated typical situations cited as exemplars are also appropriate for similar situations actually occurring in the future in the light of the relevant features of these situations is left unanswered by justificatory discourses. This question can be answered only in a further discursive step, specifically, from the changed perspective of a discourse of application.” “Remarks on Discourse Ethics,” in Justification and Application, 37 (all emphasis in the original).

37 According to Gadamer, “only when confronted with the demands of action in the context of a particular set of circumstances, do we formulate a true understanding of what our ends really are.” Quoted in Beiner, Political Judgment (Chicago: Chicago University Press, 1983), 24. For a discussion of the theoretical debate between Gadamer and Habermas see Ronald Beiner, Philosophy in a Time of Lost Spirit (Toronto: Toronto University Press, 1997), ch. 10.
justification/application discourse is maintained. The universal and particular are inextricably related in the sense that they illuminate each other’s meaning. But they are interrupted in the sense that they can never be conceptually unified into a single notion. They are in an essential state of tension.

5.3 A Tentative Framework

Following this discussion, I would like to offer in this section a tentative framework for political reflective judgment. I begin with a definition of political judgment and then go on to enumerate a list of characteristics that to my understanding render judgment reflective in the sense discussed above and the previous chapter. Since theory cannot displace judgment, this list does not purport to offer an algorithm for issuing sound political judgment. Its usefulness is retroactively analytical and therefore critical in the sense that it allows us to identify elements of successful and faulty instances of judgment.

Beiner defines political judgment as judgment that involves an implied “responsibility for the assumption of a shared way of life… how are we to “be” together, what is to be the institutional setting for that being-together?” Political judgments are characterized by implicit judgment about the form of collective life that is appropriate for a community to pursue.

On the basis of our discussion I would like to suggest that political reflective judgment is characterized by being:

1) **Interpretive.** It starts from the particular but relies on existing general categories to make sense of it as a case. It is context dependent yet it strives to universality and in that it requires

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39 Ibid, 138-139.
imagination and interpretation. It asks: is x a case of Y or of Z, or of a certain combination of the two? And does it make us rethink what Y or Z mean?\textsuperscript{40}

2) **Teleological.** This is a quasi-transcendental assumption. I say quasi because the telos is itself a matter of reflection, and it is transcendental because it allows subjects to make judgments about what otherwise would be chaotic reality. Contrary to Kant’s view, politics is about human needs (not just the relations between man and the rational law). So it would seem that a possible – indeed necessary – way for articulating a political theory of judgment would have to take human needs as its starting point. Further, the distinction Kant makes between aesthetic and teleological judgments needs to be relaxed. If politics involves debate about the desired ends of the community is it necessary that the “politics of dignity” be opposed to the “politics of purpose”?\textsuperscript{41} Might we not choose to debate which politics promotes human dignity and which doesn’t and in that develop a clearer discussion of what human dignity requires?

3) Reflective judgment strives to be *impartial* or *disinterested*. It aims to take as many points of view into account as possible. This does not mean empathy as Arendt noted, nor does it involve a theoretical assumption that takes a universal perspective, which is no one’s perspective. A theory of political reflective judgment that is anchored in a democratic ethos seeks to include as many concrete perspectives in a dialogue. The truthfulness of a resolution relies on the intersubjective validity established through actual dialogue.\textsuperscript{42}

4) Reflective judgments are *open-ended* and *aporetic*. They are open-ended because they are contestable. Since reflective judgments arise against a concrete context, a change in context will require re-evaluation of past judgments. Perhaps more importantly, not all judgments must


\textsuperscript{41} Beiner, *Political Judgment*, 71.

meet the standard of general consent, for then communicability will be replaced by contingency. Disagreement over judgments is part and parcel of the process.

Judgments are also aporetic in the following sense: unlike the standard definition of aporias as a-historical conceptual stalemates or unresolved quandaries, Arendt understood aporias as political and ethical dilemmas that are shaped and transformed by historical events and conditions. In this reconstructed view aporias involve thinking about ordinary concepts of political life, calling into question their conventional understanding thereby opening up the possibility to think them anew. Aporetic thinking about concepts of political vocabulary underlies the resistance to turn to easy absolute principles or incontrovertible truths. If we turn the subject of this discussion into an object of reflective judgment we might say that the unresolved tension between the universal community and the particular community is not in itself a testament to a misunderstanding or an ambiguous thought process, but points to a genuine tension, the overcoming of which is a constant end that safeguards the community from complacency and self-righteousness. However, political judgments must contain an element of finality if they are to serve as guidance to concrete political action. This in itself is not contradicted by the open-ended status of the resolution.

5) Reflective judgment relies on examples and looks for the exemplary.

6) Political reflective judgments are disclosive in that they reveal to the community what its core normative values are. This is where the critical and potentially progressive impetus lies.

7) Lastly, political reflective judgment straddles the legal and moral. This is a concrete manifestation of the tension between the particular and the universal, and will occupy us extensively in chapters six and seven. At this point, suffice it to say that “in politics, moral

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43 Ibid.
44 Ibid, 5.
claims are mediated by assumption of responsibility of institutionally embodied forms of life, and at the same time, deliberation about the most effective policy is mediated by claims to moral legitimacy.”

The framework articulated in this section does not constitute a “shopping” list that would help anyone who is confronted with a problem to make the right judgment. Mostly I mean it as an analytic framework for the purpose of advancing critical thinking about judgment. But it might help in identifying – certainly in retrospect - positive and negative aspects of specific judgments. At this point I wish to mention the most prominent theory of reflective judgment, John Rawls’ idea of reflective equilibrium and explain briefly in what way the perspective advanced here, despite possible similarity in terminology, differs from his. To begin with, my focus has been on reflective judgment specifically as a political undertaking, rather than a personal quest involving clarifying one’s ethical convictions under conditions of counterfactual or hypothetical constructs. Secondly, I think it would be wrong to think about the dynamic between the universal (thin) notion and the particular (thick) conception as necessarily one of reaching equilibrium. On the contrary, the process of reaching judgment is often a disruptive process in two ways: firstly because it unsettles past convictions, but more importantly, because the perspective of reflective judgment accepts as an inherent part of judgment the fact that the progressive back and forth dynamic between the universal and the particular is a movement that whilst seeking universalization, and therefore inclusion, is also necessarily exclusionary by definition. There is a related methodological point here that goes back to the distinction between the philosophical and the political. Since every political judgment exists (if only temporarily) does it mean that it necessarily represents a deeper

46 Beiner, Political Judgment, 151-152.
equilibrium of considered convictions? How is it possible to identify empirically a state of dis-equilibrium? Thirdly, according to Rawls the result of a challenge to previously held convictions comes from arguments that are derived from already developed positions in moral and political philosophy.\textsuperscript{47} The perspective of reflective judgment seems to me more open to discovery, imagination and the creating of new narratives. In that sense, it is truer as a description of how political judgments operate in practice.

5.4 Concluding Thoughts

This chapter dealt with the general problem of autonomous judgment and of political reflective judgment. Habermas’ framework raised some useful points: it sought to address the possible tension between the universal justification of a norm and its particular application. His theoretical account recognizes in principle the problem of open-endedness and the implication that future “application” of a norm will necessitate a new “justification” of the norm. What we gained from a critical analysis of Habermas’ framework is the realization that the two perspectives are inherently interdependent, but they are in an analytical sense also separate. Habermas’ framework gives due consideration to the separateness, but overlooks the interconnectedness between the universal moral point of view and the particular context in which it plays out. In this sense, Habermas’ theoretical resolution of the problem of political judgment ultimately skirts the tension between the universal and the particular by dividing it into two separate parts. The thick and thin perspective offers a less rigid approach to thinking about the ongoing influence the particular conception has on the universal conception and vice versa. It does so by offering a reflective perspective that centers on exemplarity as a way of revealing the mutually illuminating relations between the universal and the particular. Judgment,

according to this perspective, is always situated and as such must strive to avoid the risk of relativism. This isn’t a problem that can be rectified by opting for a different model of judgment, but only by facing up to the realities of judgment.
PART THREE

HUMAN DIGNITY AND CONSTITUTIONAL JUDGMENT

We have seen in the previous part how intimately the universal conception of a norm is tied to the particular conception and the concrete context in which the former is being applied. This points towards the idea that a critical discussion of the way in which universal norms are translated into particular political contexts, cannot take place only on the theoretical level; it must attend to the institutional level. In this part, my aim is to bring together the two strands of investigation developed in part one and part two and consider the analytic and critical usefulness of the framework of reflective judgment to the area of the constitutional judgment of human dignity.

A note on terminology: I consider constitutional judgment to be a sub-set of political judgment rather than a separate conceptual category. Compared to the general category of political judgment, constitutional judgment is characterized by the following: it involves explicit reason giving; it is bound by an institutional and normative framework (precedents, the constitutional text, accepted norms, etc.) that sets out the kind of reasoning and justifications that can be put forward while maintaining the coherence of the system as a whole; and it places heavy onus to get the mix between the moral and the expedient right. Constitutional judgment is most commonly exercised by constitutional courts, however it can be found in other political forums such as city councils and citizens’ assemblies. Methodologically, the explicit reason giving and justification that is part of constitutional judgment makes it an obvious candidate for an investigation that seeks to critically analyze the normative aspect of practical decision making. I stress the critical aspect of the investigation, because it is important to make crystal
clear that it does not follow from the character of reflective judgments that all judgments are
right simply because they reflect a certain local understanding, tradition or context.

In this part of the dissertation my aim is to apply my argument to the institutional area
of constitutional law and empirical cases of judicial review. To recap, the question that has been
guiding our discussion is this: is there a way of determining how the moral commitment to
human dignity should affect constitutional arrangements? My argument is that human dignity is
not a monolithic concept, but rather contains two analytically distinguishable yet related
components, which I called deontological human dignity and intersubjective human dignity.
Against the commonly held view (by theorists, legal scholars, and legal practitioners) that
applying the notion of human dignity in law involves applying a single conception in a
mechanical (determinate) fashion, I advanced the argument that in fact the way we think about
the limits human dignity places on the way we organize political life involves a process of
reflective judgment that oscillates between the deontological (universal) conception of human
dignity and the intersubjective (particular) conception of the same. In this way the constitutive
and regulative function of human dignity as a political norm contains the potential for
progressive politics, because it is always open-ended and open to critical evaluation. In chapter
6 I elucidate what I mean by the constitutive and regulative role that human dignity plays in
constitutional reflective judgment. In chapter 7 I look at the empirical practice of judicial review
of human dignity on the basis of a detailed framework that distinguishes between different
impulses and areas of constitutional law. I consider various cases from different jurisdictions
that highlight the various aspects of the use.
CHAPTER 6

Reflective Judgment in Law: The Constitutive and Regulative Role of Human Dignity

Every departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent.

Lon Fuller, The Internal Morality of Law

The general principle latent in [...] diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality and inequality. [...] *Treat like cases alike and different cases differently is a central element of justice, but does not provide a determinant guide for action.* This is so because any set of humans will resemble each other in one way and differ in another, and until it is established what resemblance and differences are relevant, treat like cases alike must remain an empty form.

H.L.A Hart, *The Concept of Law*

How does reflective judgment operate in the sphere of law? And what relationship does it have to the idea of human dignity? These are the two questions that will preoccupy us in this chapter. We have already seen the strong theoretical link that Kant and Arendt establish between law, rights and human dignity. In this chapter, I continue the move from the abstract to the concrete by focusing on the employment of reflective judgment in legal adjudication, and the special role the idea of human dignity plays in constitutional adjudication.

I begin the chapter with explicating the tenaciousness of the determinate model of judgment in law. The persistence of this view is a useful background for appreciating the work of Ronald Dworkin, whose theory, as I articulate in section 2, is a variation (albeit unattributed) on Kant’s idea of reflective judgment. I then move in section 3 to consider the question of the validity of judgments as it arises out of Dworkin’s theory of constitutional adjudication in order

to explicate the unique role that the idea of human dignity plays in judicial review, as both constitutive and regulative, limiting and enabling idea. In particular, I consider two theoretical models that recognize the special normative function of human dignity as a guiding principle: Alessandro Ferrara’s notion of “oriented reflective judgment,” and Habermas’ view on human dignity as the “seismograph” for what is constitutive for a democratic order. I conclude the chapter with a provisional model that builds on these two theoretical accounts.

6.1 Determinate and Reflective Judgment in Law

The view that the adjudication of law is governed by determinate judgment has long historical, cultural and ideological roots. On a theoretical level there are several obvious reasons that account for the tenaciousness of this view. Firstly, law is understood as a sphere whose entire purpose is to stabilize social action and individuals’ expectations. It therefore prizes transparency and predictability. Indeterminate adjudication threatens to undermine this stability. In order to guarantee the permanence of law the judge must appear neutral, impartial, above the fray of politics. As Judith Shklar presciently noted,

As law serves ideally to promote the security of established expectations, so legalism with its concentrations on specific cases and rules is, essentially, conservative. In its epitome, the judicial ethos, it becomes clear that this is the conservatism of consensus. It relies on what appears to be already to have been established and accepted.3

And she adds,

Impersonal judgments and the striving for objectivity are intellectual virtues of the highest order. But they are the virtues of observers, of technicians, and of strategists, not of those who must make social choices for themselves and for others in situations where it is far from clear what ends can and should be pursued, however much the participants may long for clear rulebooks to guide them.4

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In the Western tradition, law is perceived as means for limiting politics. The term politics in this context often acquires a negative connotation, implying narrow interest, partisan ideology and power struggles. That is why the charge against courts of politicizing the law is so unsettling. However, in a pluralistic society no judgment can ever be met with unanimous approval. And without consensus the appearance of neutrality vanishes. The idea that the adjudication of law is entirely governed by determined judgment or by what Kant called subsumptive logic is spurious. The application of laws, principles, legal categories, or precedents to new cases cannot be governed entirely by determinate logic for the simple reason that the rule cannot contain the complete specification of its own application.

The implication of this conceptual feature of rules is that they require interpretation when applied to particular cases. In itself there is nothing disruptive or revolutionary about this view. Yet, particularly in American jurisprudence this idea has evolved into a profound scholarly polemic, which has been occupying legal scholars for decades now. Without getting too embroiled in this debate (for it would take us too far from the topic at hand) I would like to turn to Ronald Dworkin, who has been the clearest exponent of the view that judges must rely on the faculty of reflective judgment when dealing with constitutional principles. In his writings Dworkin seeks to establish an understanding of law as grounded in a moral point of view.

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5 See for example Jeremy Waldron, a vocal critic of judicial review, “a large part of the authority, the legitimacy—if you like, the simple appeal — of a legal system is that we may regard ourselves as subject to government by laws, not by men...The processes by which courts reach their decisions are supposed to be special and distinctive, not directly political, but expressive of some underlying spirit of legality...Everyone knows that argument in Congress or in Parliament is explicitly and unabashedly political.” The Dignity of Legislation (Cambridge: Cambridge University Press, 1999), 24-25.

6 Neither Arendt nor Kant for example thought that the special capacity for reflective judgment is involved in law. Both saw legal judgment as determined by rules or principles. Editors’ Introduction, Judgment, Imagination and Politics: Themes from Kant and Arendt, ed. R. Beiner and J. Nedelsky (Oxford: Rowman and Littlefield Publishers, 2001), xii.

7 There is a vast literature on the subject. Some of the seminal writers are Stanley Fish, Owen Fiss, Roberto Unger, and Drucilla Cornell.

Relying on a deontological concept of rights, Dworkin’s theory explains how judicial adjudication can satisfy both the requirements of legal certainty and rational acceptability. Following a procedure of constructive interpretation, judges ought to reach ideally valid decisions on the basis of a scheme of principles that best justifies “the entire body of statutes and common law decisions” by revealing their embedded practical reason and rejecting certain elements of the jurisprudential history as mistaken or incoherent. As I intend to show below, there are several salient features, which justify arguing that Dworkin’s position constitutes a modern interpretation of Kant’s notion of reflective judgment. Chief among these is the assumption of law’s purposiveness (in the form of integrity), which stands for Kant’s presupposition of the unity and coherence of a system as a necessary condition for adjudication.

### 6.2 Dworkin and Beyond

Before delving into Dworkin’s specific arguments, it might be helpful to appreciate the scholarly context in which he developed his account of constitutional (reflective) judgment. In *Law’s Empire* Dworkin makes the interesting and counter-intuitive observation that those who adhere to the “plain facts” view of law (we could also call them “originalists”) make the same assumption about the adjudication of law as those who appear to be their theoretical opponents, namely the realists and Critical Legal Scholars. Dworkin argues that both sides share the view that a determinative model guides law’s adjudication. Accordingly, for the “plain fact” camp judgment involves digging into the archives for precedents and applying the right rule to the particular context. Realists and CLS scholars, on the other hand, have a more “sophisticated” and skeptical view. Because they perceive each case as unique, realists “conclude

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that there is never really law on any topic or issue but only rhetoric judges use to dress up decisions actually dictated by ideological or class preferences.”

The realists then point out the inadequacy of the determinative view of judgment without calling into question the premise of this view.

This antinomy, the impasse generated by the assumption of a determinative model of judgment, serves as a useful basis for appreciating Dworkin’s critique and solution. The first step towards dissolving this antinomy is the essential distinction he makes between rules and principles. According to Dworkin, determinative judgment has its place in legal adjudication in the application of rules, which always contain the specification for their application. For example, the question who is allowed to run for the American presidency is a rule that can be easily applied. Principles, on the other hand, such as privacy, equal protection or free speech are not determinative because they do not contain criteria that specify in advance which particular cases can be subsumed under them. Principles, unlike rules (which are applied in an all-or-none fashion) possess a dimension that is missing from rules; principles can be weighed in term of their importance. Principles do not come labeled in advance with weight tags. They are assigned weight in light of specific cases. This means that decisions about the relative priority of


12 This conclusion is lost on some of the main advocates of the CLS school of thought. In her book, *The Philosophy of the Limit* (New-York: Routledge, 1992), Cornell argues: “[Members of the CLS movement] have not only shown that rules of procedure cannot escape an appeal to substantive ethical justification, they have also shown us that the very idea of a rule as a force that pulls us down the track through each new fact situation, determining the outcome of a particular case, is false. Therefore, no line of precedent can fully determine a particular outcome in a particular case because the rule itself is always in the process of reinterpretation as it is applied. It is interpretation that gives us the rule, not the other way around. This insight is what has come to be know as the ‘indeterminacy thesis’...Law cannot be reduced to a set of technical rules, a self-sufficient mechanism that pulls us down the track through each new fact situation” (12). As Stone points out Cornell never explains why the need for interpretation implies the complete lack of structure in law. For a discussion that casts doubt about the indeterminacy of legal rules see Martin Stone, “Focusing the Law: What Legal Interpretation is Not,” in *Law and Interpretation*, ed. A. Marmor (Oxford: Clarendon Press, 1995), 42.


14 “A principle does not even purport to set out conditions that make its application necessary.” *Taking Rights Seriously*, 26.

15 Ibid.
principles are necessarily contestable. Thus, when people disagree about the law, they actually disagree about how to balance conflicting principles. They disagree about values and priorities.

At this point, Dworkin’s notion of ‘interpretivism’ becomes relevant. Dworkin defines it as the attitude of judging according to principles. There are two features to this activity: first, the assumption that law has value, that it serves a purpose and expresses a principle. Secondly, that law remains sensitive to its principles. Relying on the interpretive attitude, judges must “try and impose meaning on the institution – to see it in its best light – and then to restructure it in the light of that meaning.” Interpretation begins with an evaluative stance shaped by pre-understanding that posits a prior relation between norm and circumstances while opening up the possibility for further rational connections. The initially vague pre-understanding becomes more articulate and concrete to the extent that under its direction the norm and the circumstances reciprocally specify each other and constitute the case by making the norm more concrete. Legal hermeneutics answers the question of “how can the application of a contingently emergent law be carried out with both internal consistency and rational external justification, so as to guarantee simultaneously the certainty of the law and its rightness?” It does so by contextualizing reason within the historical trajectory of a given tradition. Thus the pre-understanding or pre-interpretation of the judge is shaped by her ethical tradition, and steers the flexible ground between norms and states of affairs in the light of received, and historically corroborated principles. The indeterminacy of a process of interpretation can be

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18 Dworkin, *Law’s Empire*, 47.
21 Habermas, *Between Facts and Norms*, 199, or in Dworkin’s words “[t]he question of justification has important ramifications, because it affects not only how far judicial authority extends, but the extent of an individual’s political and moral obligation to obey judge-made law.” *Taking Rights Seriously*, 5.
somewhat reduced by referring to principles, but these principles can be legitimated only from within the forms of law and life in which judges contingently find themselves.\textsuperscript{22}

Although Dworkin does not credit Kant, this element, as Lefebvre argues, is an appropriation of Kant’s idea of purposiveness from teleological judgment; a transcendental assumption that judges make so that they can view law coherently.\textsuperscript{23} This assumption gives basis both for investigating legal history and for finding the best law by which to judge a case. Thus, when judges and lawyers disagree about law, it is a disagreement about which principles best express the purposes that law is meant to uphold.

The important thing to note here is that according to Dworkin, laws ought to be judged \textit{as if} they were the product of specific purposes and at the same time it is acknowledged that the purposes imposed are none other than our own.\textsuperscript{24} Importantly, in Dworkin’s reflective teleology “we make no claim as to the actual intentions of lawgivers. … To make the best it can be, we impute purposes and intentions throughout our legal history but make no claims that these intentions were present in the actual genesis of law.”\textsuperscript{25}

The metaphor of the judge as a chain-novelist illustrates this point. If the authors of a chain novel take the task of continuity seriously, each author - each judge - endeavors to write a chapter that makes her chapter fit coherently with the rest of the book in the best possible way.

\textsuperscript{22} Habermas, \textit{Between Facts and Norms}, 200.
\textsuperscript{23} There is a vast literature on the notion of coherency in law. One standard distinction is between narrative coherence and normative coherence. Narrative coherence is understood to be “a test of truth or probability in questions of fact and evidence upon which direct proof by immediate observation is unavailable.”\textsuperscript{23} It permits the construction of a chain of facts that can justify judgment. Normative coherence on the other hand, entails ‘consistency’ of principles. In its most minimal definition, normative coherence is a matter of “the common subservience by a set of laws to a relevant value(s); and an absence of avoidable conflict with other relevant values.” Put differently, we could say that a set of rules is coherent “if they all satisfy or are instances of a single more general principle. See Stefano Bartea, “Arguments from Coherence: Analysis and Evaluation,” \textit{Oxford Journal of Legal Studies} 25.3 (2005): 369-391; J. M. Balkin, “Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence,” \textit{Yale Law Journal} 103.1 (Oct 1993): 105-176; Neil MacCormick, “Coherence in Legal Justification” in \textit{Theory of Legal Science}, ed. A. Peczenik et al. (Hingham, MA: Kluwer Academic Publishers, 1984). Habermas, \textit{Between Facts and Norms}, 211.
\textsuperscript{24} Dworkin, \textit{Law’s Empire}, 59, 228.
\textsuperscript{25} Lefebvre, \textit{The Image of Law}, 28.
“The best it can be” is a recurring phrase in Dworkin’s book. Presumably it means more than simply insuring that the book is coherent as a whole (although this in itself would be an accomplishment); what Dworkin means is something along the lines we explored in the previous chapter of “imaginative synthesis” that creates a new narrative, in a way that retains and even sharpens the essence (or the telos) of the underlying norm. This activity of “valorizing” involves a “series of overall judgments as [the contributing] author writes and re-writes” the intention of the story, seeking to leave no major structural aspect of the text unexplained.26 In the process the judge will likely need to resolve a tension between “textual and substantive judgment that distinguish a chain novelist’s assignment from more independent creative writing.”27 The result aims to create a coherent whole that makes it appear as if a single author had written the text with a consistent purpose in mind. 28

What is latent in this interpretive view of law, and is therefore worth noting, is the role of the community as a backdrop to judgment. In each chapter of the chain novel judges must take into consideration that future judges will follow, by giving expression to “convictions about morality that are widespread through their community.”29 With each chapter the author reorients the story and provides an overarching narrative in which all the parts hang together coherently. In this way legal judgment must interpret contemporary legal practice as an unfolding political narrative.30 Legal interpretation does not happen in a vacuum but against the backdrop of historically situated practice.

26 Dworkin, Law’s Empire, 330.
27 Ibid, 232.
29 Dworkin, Law’s Empire, 248. See for example as Justice Barak wrote specifically about the notion of human dignity: “The contents of the term “human dignity” will be determined on the basis of the view of the enlightened public in Israel and on the background of the purpose of the Basic Law: Human Dignity and Liberty.” (Vickselbaum v. Minister of Defence (1992) 47 P.D. (2) 812, 827
30 Dworkin, Law’s Empire, 225.
6.2.1 Hercules and Human Dignity

The idea of coherence and the normative commitment to human dignity go hand in hand. Law as integrity proposes to think of legislation and adjudication through the lens of coherence. But there is one norm that is more fundamental than any of the others. According to Dworkin, the system of law must be understood as the instantiation of the basic moral norm of equal concern and equal respect (ECER). This basic “right” cannot be justified on further grounds; it is the right that gives rise to all other rights.31 The basic norm of ECER distinguishes a principled community committed to the ideal of integrity from the “de facto” and “rulebook” communities. In a principled community, it is assumed “that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means.”32 A principled political community is subject to the requirement of being able to justify itself coherently. To be sure, the principled community may fall short of the ideal by having a defective conception of equal concern or by violating rights of citizens and others, but these deficits are potentially rectifiable precisely because of the need to justify coherently that is anchored in the commitment to ECER.

What guiding role does the commitment to ECER, play in the practical course of legal adjudication on Dworkin’s view? It is constructive to see how Dworkin himself considers the process by which the basic norm is being appropriated, interpreted and applied in concrete cases:

Suppose the earlier due process cases can be justified only by supposing some important right to human dignity, but do not themselves force a decision one way or the other on the issue of whether dignity requires complete control over the use of one’s uterus. If Hercules sits in the abortion cases, he must decide that issue and must employ his own understanding of dignity to

do so…Hercules might think dignity an unimportant concept; if he were to attend a new constitutional convention he might vote to repeal the due process clause, or at least to amend it so as to remove any idea of dignity from its scope…It is of course necessary that Hercules have some understanding of the concept of dignity, even if he denigrates the concept; and he will gain that understanding by noticing how the concept is used by those to whom it is important. If the concept figures in the justification of a series of constitutional decisions, then it must be a concept that is prominent in the political rhetoric and debates of the time… Hercules will notice, simply as a matter of understanding his language, which are the clear settled cases in which the concept holds. He will notice for example, that if one man is thought to treat another as his servant, though he is not in fact that man’s employer, then he will be thought to have invaded his dignity… Hercules will then use his theory of dignity to answer questions that institutional history leaves open. His theory of dignity may connect dignity with independence…In that case he may well endorse the claim that women have a constitutional liberty of abortion, as an aspect of their conceded constitutional right to dignity.33

It pays to carefully follow Dworkin’s train of thought in this paragraph. First, it is given that while we know that a certain matter (for example, due process) involves the idea of human dignity, this does not necessarily mean that when the same norm is transposed to another case (let’s say, abortion) it generates an immediate (determinate) single right answer as to what judgment ought to be. Each new case requires rethinking what the accepted (thin) norm of human dignity entails in practice. Dworkin then goes a step further; even a judge who does not agree with previous interpretations and judicial employments of human dignity, must pay attention to what Kant would call “sensus communis.” By tapping into this shared normative backdrop, by taking stock of the way people use and understand norms, the way in which some norms become more salient over time, by the force of accepted examples, the judge gains insight into the resolution of the case. In the case Dworkin describes above, Hercules has

33 Dworkin, *Taking Rights Seriously*, 127-129. For an argument that the normative essence that underpins the American Bill of Rights and the American Constitution is the idea of human dignity see George Kateb, “Undermining the Constitution,” *Social Research* 70.2 (Summer 2003), 579-604. He sees it as a “different kind of originalism.”
performed his task particularly well, because – again to use the terminology developed in the previous chapters - he exercised impartiality, by abstracting from his own particular perspective, imagined what other positions *in his society* might argue, and let himself be persuaded by the force of the better argument. By doing so the judge unearthed the constitutional right to human dignity; she created a link between the (thick, exemplary) case of abortion and the (thin) universal idea of human dignity.34

Is this a plausible description of the adjudicative process? It goes without saying that any attempt to systematize thought, imagination and judgment is bound to appear schematic and therefore simplified. But I think that Dworkin’s description of how a judge might go about employing reflective judgment is at least suggestive in the following way: between Kantian determinism and complete indeterminism (as the critical school of thought portrays it), constitutional judgment can be seen as striking a middle (reflective) ground, where judgment is based on existing schemas of understanding that strive to be universalized. Judgment is open-ended and therefore contestable and correctable, but it is also final until reversed. This speaks to a basic feature of law, which often goes unacknowledged, of the dual imperatives for change and stability: in order to maintain relevance, law must reflect change, in order to maintain its authority, law must be stable. Reflective judgment in constitutional adjudication, strives to strikes a balance between these two competing imperative.

## 6.3 The Question of Validity

Dworkin’s work must be seen, as I noted earlier, against the wider phenomenon in (predominantly American) legal scholarship, which has been termed by some as the crisis in

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34 In the next chapter we will see how this link takes different forms in different constitutional jurisdictions.
legal interpretation.\textsuperscript{35} Fundamentally, this crisis reflects a loss of faith concerning the availability of objective criteria permitting the ascription of distinct and transparent meanings to legal texts. Moreover, as one commentator has argued, “this loss of faith manifests itself in the intensification of the conflict among the community of legal actors, the seemingly inescapable indeterminacy of legal rules, and the belief that all the dispositions of legal issues are ultimately political and subjective.”\textsuperscript{36}

I understand Dworkin’s theory as an attempt to engage these valid concerns regarding indeterminacy in adjudication and the grounds of validity. However, in order to appreciate this aspect more clearly I would like to engage with a critical perspective that attacks Dworkin on this very point. The critique, I think, falls short of its mark precisely because the intersubjective nature of the process goes unacknowledged.

Inspired by Hegel’s critique of Kant, Alan Brudner has made the argument that Dworkin’s position is highly problematic because the notion of validity he endorses turns out to be empty. In particular, he finds the idea of “fit” problematic. Brudner worries that all that is left from the exercise of “fitting” is an internal measure of the object itself. Dworkin’s theory, according to Brudner, breaks down, leaving his position “no different from that of the nihilists he seeks to refute.”\textsuperscript{37} The problem is that “the object of interpretation cannot in itself constrain interpretation without a “consensus” within the interpretive community as to what the object consists of, a consensus that may or may not exist.”\textsuperscript{38} Brudner comes to the heart of his critique when he states:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{35} Michel Rosenfeld, “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism,” in \textit{Deconstruction and The Possibility of Justice}, ed. D. Cornell, M. Rosenfeld, et al. (New-York: Routledge, 1992), 1211.
\item \textsuperscript{36} Ibid.
\item \textsuperscript{37} Alan Brudner, “The Ideality of Difference: Toward objectivity in Legal Interpretation,” \textit{Cardozo Law Review} 11.5-6 (July 1990), 1158.
\item \textsuperscript{38} Ibid, 1159
\end{itemize}
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The reflexive character of integrity negates it as the unifying theme of law. Because the unity of the practice has been conceived by abstracting from the plurality of substantive ends, the required continuity between the subject and object of understanding has been interrupted. Integrity ceases to be the name for the synthetic unity of concrete intuitions...As a consequence, the principle of integrity now hovers over the battleground where the real work of interpretation goes on, more as a regulative guide for substantive interpretation than as a principle constitutive in its own right. Because it constitutes no material aspect of the practice, no specific ideal, institution, or doctrinal configuration, it is quite devoid of explanatory force. The principle of integrity fits everything and nothing in particular. Inasmuch as it dissolves all determinateness in the abstract universality of coherence, it can explain nothing determinate. It has in fact ceased to be interpretive and become transcendent, a new “semantic” principle. Hence the grounds of law remain the substantive ideals that are genuinely interpretive, and these are conceded to be irreducibly manifold. As Dworkin constructs it, law’s modern empire resembles nothing so much as the medieval one, for it too is a fictitious unity set over against a plurality of independent claims to dominion.39

Brudner’s eloquent critique of the interpretive process seems at first glance to be devastating.40 Two elements stand out: firstly, the notion of social consensus on which interpretation and adjudication relies for its cogency,41 and secondly the problem of abstraction which severs the link between the different positions that need to be taken into account in the course of interpretation and judgment on the one hand and the object of interpretation on the other hand. It seems to me that on both accounts the charge is mistaken when considered from the broader point of view of reflective judgment theory (that is, not relying solely on Dworkin’s account whose indebtedness to reflective judgment theory goes unacknowledged by him). The first thing to note is that the two charges run in opposite directions. Either the problem is that interpretation relies on too much substance (provided by social consensus, which as Brudner

39 Ibid, 1164-1165 (my emphasis).
points out, may or may not exist) or the problem is that interpretation has no substantive standard on which to rely for interpretation. Judicial interpretation (in other words, judgment) is caught between too much concreteness of the local consensus or it is too abstract without a substantive standard on which to rely for interpretation. This is a variation on the theoretical difficulty that has come up again and again throughout our discussion of judgment; how to grapple with the opposing pull of the concrete judging community vs. the universal abstracted community? As a model of judgment, the perspective of reflective judgment attempts to address the conundrum first by thematizing this tension (unlike other theories of legal judgment, e.g. originalism that overlook it altogether) and secondly addressing it by means of the reflective process itself, which goes back and forth between the particular case and the universal standpoint. It is far from obvious that this process will be successful in each case. But it presents a model of judgment that knows itself to seek a common point between the often conflictual perspectives of the particular vis-à-vis the universal.

And yet, I believe Brudner is right to remind us that in the case of legal adjudication, the transcendent principle of reflective judgment is itself content-less without the substantial value of a normative anchor to guide judgment. This normative anchor, the normative telos that guides judicial interpretation, the idea for which law (or legality) comes into existence, is the idea of human dignity. Dworkin makes the point when he talks about the idea of equal concern and equal respect, Kant when he articulates the idea of human dignity as the raison d’être of law and Arendt when she reminds us of the constant need to be aware of the link between human dignity and positive law (particularly within national jurisdictions). Brudner’s reading of Dworkin in particular and the charge against the reflective method in general are misguided;

42 See also Lon Fuller “Every departure from the principles of the law’s inner morality is an affront to man's dignity as a responsible agent.” The Morality of Law (Yale: Yale University Press, 1978), 162.
43 This is not a universally accepted position. Jeremy Waldron for example disagrees with the idea that human dignity is the telos of human rights. Dignity, Rights and Rank (New-York: Oxford University Press, 2012), 6.
neither must necessarily result in interpretation that is empty and devoid of substantive ends. The substantive ends of law are not fixed and are themselves the object of political reflective judgment, but that does not make them completely indeterminate (i.e. bound entirely with political will and “claims to dominion”). Human dignity has a dual role in legal judgment; it is both constitutive and regulative.

Dworkin’s theory of interpretation is a variation on the idea of reflective judgment that places human dignity at its centre. But it could be argued that both features – its reflectiveness and the foundational role of human dignity – are not sufficiently fleshed out. In the next section I move to consider two theoretical models that attempt to bolster both elements and conclude by offering a provisional framework for assessing specific case studies that builds on the insights of the two models.

6.4 Human Dignity as the Basis of Constitutional Reflective Judgment

I concluded the last section by pointing towards the need for a better articulation of how constitutional judgments about human dignity are formed. My first step is to build on Alessandro Ferrara’s account of what he calls the “judgment view of justice.”

6.4.1 Ferrara and “Oriented Reflective Judgment”

In his writings Alessandro Ferrara demonstrates how some of the key political theorists of our time - John Rawls, Jürgen Habermas, Ronald Dworkin (as we already saw), Frank Michelman and Bruce Ackerman - develop their normative accounts on the basis of a deep commitment to the notion of equal respect. In fact, “it would not be surprising if we discovered
that it is much more difficult to find contemporary liberal conceptions of justice and normative validity that are *not* premised on the ideal of equal respect.\textsuperscript{44}

According to Ferrara what makes judgment about justice distinct from judgments about art or literary texts, “is the fact that our judgment is oriented by an additional element, of the idea of equal respect.”\textsuperscript{45} Ferrara defines equal respect to mean that “no one should be treated in a way that directly or indirectly suggests that his or her human dignity is of less import than that of someone else.”\textsuperscript{46} This intentionally minimal definition leaves it open to different conceptualizations about what it is that constitutes human dignity and what are the best ways to protect it.\textsuperscript{47}

Since Ferrara aims to develop a theory of justice that is based on the principle of reflective judgment, he is at pains to argue for the non-foundational status of human dignity as a norm. Ferrara warns against relying on descriptive “characteristics” of human traits such as autonomy or self-determination to justify the normative reliance on human dignity as orienting reflective judgment. Attempting to identify objectively true elements of the human agent undermines a theory’s political status and turns it into another comprehensive moral conception “that grounds a notion of justice on some controversial philosophical anthropology.”\textsuperscript{48}

\textsuperscript{44} Ferrara, *Justice and Judgment*, 210.
\textsuperscript{45} Ibid, 202.
\textsuperscript{46} Ibid, 203.
\textsuperscript{47} The drafters of the German basic law – on the basis of which the most elaborate and influential human dignity jurisprudence was developed - debated whether to explicitly base it on natural law, but decided eventually to avoid references to any comprehensive philosophical or ethical concept so that it remain open to different approaches. Michael Andries, “On the German Constitution’s 50th Anniversary: Jacques Maritain and the 1949 Basic Law,” *Emory International Law Review* 13.1 (1999): 1-76.
\textsuperscript{48} Ferrara, *Justice and Judgment*, 211. Ferrara, along with Larmore identifies human dignity as a foundationalist assumption in Rawls’ (and Habermas’) political writings. However, they draw different conclusions from it; Larmore believes that this latent assumption must be made explicit while Ferrara believes that a foundationalist principle is untenable from a judgment view of justice. For an extended view of Larmore’s position see: “The Moral Basis of Political Liberalism,” *Journal of Philosophy* 96.12 (Dec 1999): 599-625.
Ferrara hopes that the very openness of the idea of equal respect allows it to function by creating an “overlapping area” for political justice that is sufficiently open to different “reasonable comprehensive conceptions of the good.” He says,

The ordering function that “political” theories of justice are supposed to exert with respect to claims raised from within ethically comprehensive standpoints can be exerted by the ideal of “equal respect” in relation to the popularity of understanding of the notion of justice that the various approaches put forward. The ideal of equal respect cannot function as a criterion or a yardstick…but it certainly can be understood as the main guideline which orients the kind of reflective judgment with which we assess the merits of the completion reconstructions of the notion of justice available to us. It is the significance…of the idea that everyone should be treated with an equal concern for his or her human dignity that allows us to make sense of the variety of approaches to questions of justice and normative validity as variations around the same theme and, at the same time, gives us the feeling that judgments about what justice requires – for all its imperviousness to subsumption under principles – do nonetheless resemble more closely the relatively less controversial assessment of martial valour than the more indeterminate assessment of aesthetic congruence or well-formedness.

To escape an ontological, essentialist or foundational characterization of human dignity, Ferrara relies on the idea of the human being as possessing a “life-course,” which under the conditions of modernity is endowed with meaning by the person herself. It is the ability to make that human unique that directs our respect to it. In Ferrara’s words:

It is an ability, a potential for living one’s life creatively amidst the human context of norms, values, social expectations and technical constraints on action- a potential that as such commands our respect even when it fails to be realized owing to external circumstances. The idea that an equal respect is due to every human being in matters of moral justice, and to every

50 Ibid, 210-211. (emphasis in the original) David Weissstub puts forward a similar argument when he says that “dignity, perhaps more than any other concept, has emerged as a convergence point for what is perceived to be a non-ideological humanistic point of departure towards a social liberal ideal.” “Honor, Dignity and the Framing of Multiculturalist Values” in *The Conception of Human Dignity in Human Rights Discourse*, ed. D. Kretzmer and E. Klein, 263.
citizen in matters of political justice is rooted ultimately in the intuition of the invaluable salience of the one irreplaceable life each of us has to the human being who lives it.\textsuperscript{51}

I am not sure that Ferrara is successful in his attempt to escape the kind of quasi-foundationalist definition of human dignity when he calls the capacity to give meaning to one’s life-course “an ability or potential.” I wonder whether and to what degree it is substantially different from neo-Kantian notions of ability or potential to exercise autonomy, act morally, or assign value to things in the world. Perhaps it is impossible to escape certain normative foundations, as Larmore has argued, but this does not mean that the debate should be confined to those determinate normative foundations. If we are to take seriously the paradigm of reflective judgment, then the on-going definition and specification of the idea of human dignity reveals itself not only as an analytical construct (as Kant would have it) but also a historical and social construct. This is the point that Jürgen Habermas advances, and one I want to turn to next.

\textbf{6.4.2 Habermas and the Realistic Utopia of Human Dignity}

In a recent article, Jürgen Habermas makes the strong claim that human rights must be understood as specifications of the idea of human dignity.\textsuperscript{52} In his article Habermas advances the thesis that an intimate, if initially only implicit, conceptual connection has existed from the beginning between the notion of human rights and the idea of human dignity. Without ever labeling his perspective under the rubric of reflective judgment, he notes on the one hand that judges (and lawmakers) in different cultural and political contexts often reach different conclusions regarding contested ethical issues. On the other hand, he maintains that “changing historical conditions have merely made us aware of something that was inscribed in human

\textsuperscript{51} Ferrara, \emph{Justice and Judgment}, 212 (my emphasis).

\textsuperscript{52} Jürgen Habermas, “The Concept of Human Dignity and The Realistic Utopia of Human Rights,” \emph{Metaphilosophy} 41.4 (July 2010): 464-480.
rights implicitly from the outset; the normative substance of the equal dignity of every human being that human rights only spell out.” In describing the process of specification it transpires that examples (such as poverty, inequality between men and women, discrimination against foreigners, and other minorities) have come to play a key role.

However, the mechanism of judgment remains unspecified in Habermas’ argument, without the explicit model of reflective judgment elaborated in our discussion so far. Consider this argument:

“[J]ustified decision in hard cases often becomes possible only by appealing to a violation of human dignity whose absolute validity grounds a claim to priority.”

Here Habermas appears to view human dignity determinatively as a norm whose unconditionality brooks no compromise. So it merits to ask what does he mean by “hard cases”? Normally, hard cases refer to instances that involve the need to take into consideration competing rights and equally valid compelling claims. The case of abortion might be considered as a paradigmatic hard case, where the right of the woman’s self-determination is set against the right of the fetus to life. Which side in an abortion case can claim absolute priority for the violation of their human dignity?

But in other places Habermas puts forward a more nuanced view as when he says that “human dignity performs the function of a seismograph that registers what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons.” He adds, “after 200 years of modern constitutional history, we have a better grasp of what distinguished this development from the beginning: human

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53 Ibid, 467.
54 Ibid, 469 (emphasis in the original).
55 Ibid.
dignity forms the “portal” through which the egalitarian and universalistic substance of morality is imported into law. In other words, the idea of human dignity functions according to Habermas as a notion that orients constitutional judgment and specifies what the moral foundation of the system of Rights.

In advancing this argument, I think that Habermas is making a structurally similar argument to the one developed here regarding the disclosive role of the intersubjective conception of human dignity, when he admits in a footnote,

I did not originally take into account two things: first, the cumulative experiences of violated dignity constitute a source of moral motivations for entering into the historically unprecedented constitution-making practices that arose at the end of the 18th century. Second, the status-generating notion of social recognition of the dignity of others provides a conceptual bridge between the moral idea of the equal respect for all and the legal form of human rights.

Here we find Habermas creating an explicit link between the two conceptions of human dignity as I have elaborated them in part one of the dissertation: the Kantian/deontological and the intersubjective. His critique of Kant, who assimilated the notion of human dignity beyond space and time, is particularly telling. For it is the connotation of status (as an equal citizen) that creates the conceptual link between morality and human rights through the notion of intersubjective human dignity. However, this link is strictly speaking, formal and empty without the injection of substantive value that comes about only in the “thickening” process of practical judgment. Habermas is of course aware of the contextual nature of binding norms,

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56 Ibid.
57 Habermas is also aware that this revised view may hold important implications for his political theory more generally: “I leave aside at this point whether this shift in focus towards these issues has further consequences for my deflationary reading of the discourse principle “D” as part of the justification of basic rights.” Ibid, 470. Jürgen Habermas, “On the Architectonics of Discursive Differentiation” in Between Naturalism and Religion (Cambridge: Polity Press, 2008), 77-79.
58 Note though that his second conception, the status generating conception of human dignity, relates to an equalizing notion of social recognition, rather than the equal recognition of difference.
“on the one hand human rights could acquire the quality of enforceable rights only within a particular political community. On the other hand, human rights are connected with a universalistic claim to validity, which points beyond all national boundaries.”

While noting the two dual nature of norms Habermas does not articulate the specific function of human dignity as arising out of the tension between universal morality and particular context in judging constitutional norms. Rather, Habermas’ emphasis is on human dignity as a “hinge” that connects Kant’s rationally justified morality, with the coerciveness of law, or to put differently the “shift of perspective from moral duties to legal claims.” It seems to me that Habermas leaves unthematized the active political agency of judgment. The metaphor of “hinge” or “seismograph” raises an image of a smooth translation between the particular plight and the universal norm that it helps to identify. I think Habermas would willingly concede that the reflective process, not to mention its political ramifications, are rarely seamless or straightforward.

I think that in this respect Arendt had a better intuition of the inherent tension that is involved in the problem of upholding human dignity, when she stated:

human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.

The tension between the two conceptions of human dignity – between a claim to universal validity on the one hand, and local interpretation on the other hand – is what animates the process of constitutional adjudication.

60 Ibid, 470-471.
6.5 Towards An Improved Framework?

Dworkin, Ferrara and Habermas’ respective theoretical accounts converge around the idea that constitutional adjudication involves a process of reflective judgment at the centre of which stands the norm of human dignity. It is my contention that the judicial review of human dignity is characterized by an immanent tension between deontological and intersubjective conceptions of human dignity, a bifurcation that structurally maps – albeit imperfectly - on to the inherent tension between the universal standpoint and the contextual interpretation. This conceptualization goes some way towards dispelling and clarifying some of the common misunderstandings that are prevalent in the philosophical and legal literature on the subject of judging human dignity.

The tension between the deontological and intersubjective conceptions of human dignity reveals itself along different dimensions of analysis: between a “thin” universal idea of human dignity and “thick” explication that is rooted in the particular context; between the inalienable and the socially constructed; between the formal recognition of all humans as equals and the particular recognition of the individual as an equal yet unique member of her political community; between the universal community of judgment and the particular community of judgment; and between the determinative impulse of deontological judgment and the reflective perspective that arises from the point of view of particular individuals who claim intersubjective recognition.

This bifurcation, while noted (particularly by Dworkin and Habermas), has not been properly thematized and its significance not sufficiently appreciated. In what follows I would like to push the theoretical argument further by centering on the tension between the universal and the particular when a claim to constitutional protection of human dignity is raised.
My argument is that in the process of correct constitutional judgment, the meaning of the idea of human dignity and consequently what follows from the state’s duty to uphold it, is determined by a reflective process of judgment that involves both deontological and intersubjective conceptions of human dignity. This process of constitutional articulation is centered around the mutually illuminating relation between the universal (thin) idea of human dignity and its particular (thick) enmeshment in the political context. The tension between the universal aspect and the particular can be articulated as the tension between human dignity as an objective deontological conception and human dignity as an intersubjective property of the individual.

Viewed this way, the two conceptions of human dignity underline, respectively, constitutive and regulative functions in the sphere of constitutional law. As a constitutive idea human dignity underpins the notion of legal subjectivity and the idea of equal freedoms. It establishes the notion of the individual as an equal bearer of rights and a potential rights claimer. Pragmatically, this conception translates into the constitutional imperative of treating persons always as ends, and avoiding adjudication according to a purely utilitarian metric. As a regulative idea the universal idea of human dignity points towards the proposition that human dignity requires intersubjective recognition for its actualization, that it is the state’s duty to protect human dignity precisely because it is vulnerable to misrecognition and that such protection

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62 I emphasize again that I have deliberately avoided addressing the question of what are the moral, philosophical or religious grounds for respecting human dignity. In other words, I avoid the theoretical question of what is it about humans that deserves respect? This is no doubt an important philosophical question, but I view it as remaining outside the purview of this project. Different “comprehensive” accounts have been put forward. Each, I suspect, would be problematic on philosophical grounds when we evaluate it from the perspective of the post-linguistic turn, and on political grounds as and when the question becomes contentious. I am not sure that one can provide an account for why humans are owed equal respect in a way that is entirely foundation-less, as Ferrara attempts. More importantly, I am not sure it is strictly necessary and helpful for answering the question that guides this project. In this sense I agree with Ferrara that the idea of human dignity serves as an overlapping norm around which different comprehensive views can converge. The question at the heart of this project is how do we make practical judgments about what human dignity means? My argument regarding the bifurcated nature of human dignity into a universal and particular conceptions stands regardless of one’s precise definition of human dignity. It is part of the syntax of the notion.
requires the equal consideration of persons when it comes to the justification of public policy and legislation.

To clarify, the binary distinction between the universal and the particular does not map perfectly on to the conceptual distinction between deontological and intersubjective conceptions of human dignity. In fact, the intersubjective conception of human dignity functions as the linchpin in the reflective process that moves between the universal and the particular. It is difficult – if not impossible – to schematize thought and break it down to constitutive blocks but we can perhaps imagine the process in the following way: When confronted with the question of what are the implications of the deontological idea of human dignity in practice, the reflective thought process runs from the deontological to the practical, by passing through the idea of intersubjective human dignity. This is the conclusion drawn from the extensive discussion of Kant’s theory. For to bring the Kantian idea of human dignity into this world so to speak, as a limiting principle for politics, requires reconfiguring it for the purpose of practical judgment. At the very minimum, this reconfiguration involves thinking of human dignity as vulnerable to misrecognition and in need of protection. Viewed from the perspective of DHD, intersubjective human dignity is a formal universal conception: everyone requires equal recognition for their well-being. Now let’s shift our point of view: with a case that on its face implicates the idea of human dignity, for example a claim against state discrimination, the reflective thought process follows the opposite route. The intersubjective conception of human dignity enables articulation of the particular perspective. This is true in two distinct senses of the term “particular”; it allows for the particular individual to claim equal recognition (or indeed recognition as unique) and it opens up the possibility for judgment to take stock of the specific – historical, political, cultural – context in which the particular claim is being made. The particular perspective seeks generalization through the universal intersubjective conception of
human dignity. Correct constitutional judgment of human dignity embodies both perspectives: the particular seeks generalization and the universal seeks particularization. A successful case of judgment results with a novel “thick” explication of the “thin” notion of human dignity that renders it in “better” light.

Generalization is a reflective process that comes about by imagining the universal point of view. Yet, it is always a particular community of judgment that undertakes the thought experiment. Three implications follow: firstly, the impetus to universalize judgment bumps against the exclusionary fact that any judgment relies on information and categories that are available at a given time. Secondly, judgment requires accepting some claims and rejecting other claims. And thirdly, there is no independent universal court of judgment. Therefore reflective judgment moves between the claims of the particular (individual and context) and what the judge imagines the universal perspective to be. The universality of the deontological position and its inviolability stem from the role assigned to it as a foundational “thin” concept. It seeks to be particularized but it resists complete once-and-for-all explication. It retains its thin core of deontological meaning irrespective of the different local interpretations it is imbued with and in that sense it remains as a norm outside of the concrete political community of judgment.

This bifurcation between deontological and intersubjective, I argue, is salient for understanding how we think about human dignity in practical judgments. As I have argued in chapter 3, thinking about the demands of human dignity from the perspective of a single conception results in a de-politicized, depleted and only partial account of the experience of being treated with lack of respect. It is not coincidental that the single conception perspective is particularly prevalent in conjunction with a model of determinant judgment. They go hand in hand. What makes the model a-political is that it avoids the problem of contestation all together.
Constitutional judgment of human dignity addresses specifically those features of human existence and co-existence that have to do with legal recognition. In other words, it deals specifically with the practical matter of identifying the polity’s constitutional values, human entitlements and the state’s duties. Because the idea of human dignity as a practical norm is subject to reflective political judgment that continuously imbibes it with meaning (without ever reaching exhaustive definition), and because the reflective process involves ever-increasing generalization, constitutional judgment of human dignity is a process that holds the potential for progressive adjudication.

Since reflective judgment takes place against the background of a particular political community, it quite naturally leads to different interpretations of nominally similar notions. This causes much angst among legal scholar, a point to which I will return in the next chapter. But what the variation, or rather the scholarly attitude to the variation, reveals is the sense of unease at the realization that a universal idea of human dignity can be interpreted in different ways. This discloses a latent universal expectation that human dignity should be understood similarly everywhere. This universal and determinative feature of the deontological conception of human dignity is immensely important because it functions as a normative safeguard from the parochial tendencies of the particular interpretation.

As I hope to demonstrate in the next chapter, indeterminacy is not the opposite of determinate judgment. Determinate judgment is a deceptive moniker for a practice that has little role in practical judgment. Pure determinate judgment is not possible as a political practice. Reflective judgment, on the other hand, offers the space for doubt, open-endedness and political contestation. The openness, or porousness of law is not a defect of law that needs to be mended. Rather, it is a constitutive feature of law that allows it to maintain its stability while adapting to new circumstances, thereby retaining its legitimacy. If anything, the open-endedness
of application that is part of the model of reflective judgment is a testament to the universal aspiration of law. In this sense, the particular application of law does not undermine its universality.

On this basis of the argument stated above I develop in the next chapter a framework for evaluating the constitutional adjudication of human dignity.
The meaning of human dignity needs no further definition.

Hans Carl Nipperdey\textsuperscript{1}

It’s very vague. What does it mean, “outrages upon human dignity”? That’s a statement that is wide open to interpretations… [T]he standards are so vague that our professionals won’t be able to carry forward the program, because they don't want to be tried as war criminals. They don’t want to break the law. These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law.

President George Bush\textsuperscript{2}

Some constitutional scholars reject the concept of dignity as a constitutional value, considering it to be a “vacuous concept…without bounds,” too uncertain to have clear meaning and “little meaning beyond the polemical. Others… consider dignity to be a fundamental value crucial to the meaning and development of constitutional rights. This is not a debate for South African lawyers and judges. Respect for human dignity as a foundational value is entrenched…in our constitution, and lawyers and judges cannot dismiss that as a vacuous concept; they have to give effect to the Constitutional mandate, and give meaning to its language.

Arthur Chaskalson, “Dignity as a Constitutional Value”\textsuperscript{3}

In the previous chapter I made the argument that judicial review involves the practice of reflective judgment. It is a conceptually descriptive argument with profound practical implications. In this chapter I come back to the central subject of the dissertation, and consider its implications for the practice of constitutional adjudication. In this chapter I look at the

\textsuperscript{1} Handbuch der Theorie und Praxis der Grundrechte 1(1954).
\textsuperscript{2} Press Conference of the President, (15/09/06) available in http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html
practice of adjudication to substantiate my argument – that judicial review of human dignity is characterized by an interplay between deontological and intersubjective conceptions of human dignity, a bifurcation that structurally maps – albeit imperfectly – onto the inherent tension between the contextual interpretation and the universal standpoint. Looking at legal cases that involve the idea of human dignity from the analytical perspective developed here goes some way towards dispelling and clarifying some of the common misunderstandings that are prevalent in the legal literature on the subject of how courts invoke the norm of human dignity. If my conceptual argument is correct then it can serve as basis for progressive critique when constitutional judgment falls short of its mark. In that the argument is descriptive and normative at the same time.

The notion of human dignity has been increasingly employed in constitutional adjudication since its incorporation after World War II in the Universal Declaration of Human Rights. In the last couple of decades in particular, “human dignity” has become progressively more prevalent in judicial review in many national jurisdictions. In fact, as one scholar noted, “human dignity is now recognized as a right in most of the world’s constitutions, and hardly a new constitution is adopted without its explicit recognition.” This invocation has led to heightened concerns about the term’s legal certainty and conceptual clarity. In the sphere of constitutional practice critics have been pointing to the concept’s vagueness, ambiguous status vis-à-vis rights (is it the foundation of rights, the outcome of claiming rights, an independent right?), over-determinacy that does not definitively resolve normative debates, and seemingly unconstrained invocation as grounds for doubting its usefulness as a legal concept. My first task in this chapter is to trace summarily the explosion in the judicial reliance on the idea of human dignity and the criticisms it has given rise to. In section 2, I focus on one prevalent line of

critique. I do so by relying on the erudite and much cited article of Christopher McCrudden. McCrudden’s comprehensive comparative study leads him to the disheartening conclusion that there is very little commonality when it comes to the constitutional adjudication of human dignity. In response to this critique I move in section 3 to elaborate a conceptual-functional framework for analyzing the judicial invocation of human dignity along for modalities of adjudication. In section 4 I demonstrate this framework by examining concrete legal cases from different constitutional jurisdictions.

A few methodological remarks before we start. In the court judgments I consider, I look at cases where the court addresses the category of human dignity explicitly. This takes much of the reconstructive guesswork out of my interpretation of the reasons and justifications. Naturally, it could be argued that all human rights and their constitutional adjudication implicates human dignity, particularly if we take the Kantian perspective that the state in general and the constitution in particular are themselves the expression of human dignity. While philosophically true, this position is unhelpful for my purposes. I concede that determining which case implicates human dignity, and which doesn’t is itself very much a matter of judgment (often rooted in local political and legal culture). Secondly, I would like to preclude any misunderstanding by noting that it does not follow from my argument that every single case involving human dignity is adjudicated “correctly” or even sensibly. Indeed, as we shall see, some cases raise questions, precisely because the adjudicating Court has chosen a problematic conception of human dignity to rely on or because the mode of judgment is unreflective. Finally, I am also not arguing that my proposed framework resolves all the problematic issues.

5 For example, the decriminalization of sodomy in the US is based on privacy; the one in South Africa on the idea of human dignity. For a discussion, see Arthur Chaskalson, “Human Dignity as a Constitutional Value: A South African Perspective,” *American University International Law Review* 26.5 (2011): 1377-1407.
But it hopefully gives an alternative systematic perspective on the judicial invocation of human dignity that often appears as random, arbitrary and unconstrained in its judgment.

7.1 The Standard Critique

Before noting the standard criticisms that are leveled against the practice of judging human dignity, I think a few words on the history and legal entrenchment of human dignity are necessary in order to appreciate the extent of the phenomenon and its topicality. There is a vast literature dealing with the historical rise of the legal concept of human dignity, so I will outline the major developments only briefly.⁶

Human dignity was present as a legal concept in the pre-war years, but only sporadically.⁷ Several commentators advanced the hypothesis that the reason for this lacuna must be located in the foundational and therefore implicit nature of the idea.⁸ Be that as it may, there is general agreement among scholars that the invocation of human dignity in the Universal


⁸ George Kateb argued that the value of human dignity underlies the American constitution, “Undermining the Constitution,” Social Research 70.2 (Summer 2003): 579-604. In similar vein, Charles Beitz suggests that before and even at the beginning of WWII (e.g. FDR’s “Four Freedoms” speech) the central values that were advanced are civil and political liberty, equality before the law and material and social wellbeing. These values are presented as though their importance is self-evident. Beitz “Human Dignity in the Theory of Human Rights: Nothing But a Phrase?” Philosophy and Public Affairs 41.1 (Summer 2013), 262.

It could be argued that the appeal to human dignity in human rights discourse indicates the reflective process of searching for the universal idea that underpinned hitherto accepted (but violated) values. This in itself is historic manifestation of the reflective process of historical judgment: the confrontation with particular historical reality prompts the articulation of a universal norm that is implicated in the violation and serves at its critique.
Declaration of Human Rights marks a shift point in the constitutional resonance of human dignity. The preamble to the Universal Declaration reads:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation for freedom, justice and peace in the world; Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind […] Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

And article 1 continues:

All human beings are born free, equal in dignity and human rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.\(^9\)

Since the drafting of the UNDHR the notion of human dignity has come to figure prominently in many international human rights texts,\(^{10}\) and more significantly for the purposes of our discussion, in a growing number of constitutional texts. One of the most interesting historical aspects of the incorporation of human dignity as a central value into the constitutional order of different nations is its timing. The polities that have adopted the language of dignity in their constitutional text have typically done so following a historical break, brought about by war, revolution, or fundamental change of constitutional order.\(^{11}\) Those nations were seeking to

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\(^{10}\) For example: The International Covenant on Economic, Social and Cultural Rights (1966); The International Covenant on Civil and Political Rights (ICCPR) – (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989); The Standard Minimum Rules for the Treatment of Prisoners (1957); The Declaration on the Elimination of all Form of Racial Discrimination (1963); The Declaration on the Protection of all Persons from being Subjected to Torture or Other Cruel, Inhumane, and Degrading Treatment or Punishment (1975); Unesco’s Universal Declaration on Bioethics and Human Rights (2005).

\(^{11}\) For a different perspective that underlies continuity, rather than breaking with the past see James Q. Whitman “On Nazi ‘Honour’ and the New European ‘Dignity’,” *The Darker Legacies of Law in Europe: Perceptions of Europe and Perspectives on a European Order in Legal Scholarship during the Era of Fascism and National Socialism*, ed. Joerges and Ghaleigh (Cambridge: Hart, 2003): 243-266. See also his ““Human Dignity” in Europe and the United States: The
define and articulate a national constitutional identity that is premised on the universal ideas of human rights and the democratic institutional order, in many cases after recognizing the damage that unbridled politics can cause. Thus, between 1945 and 1950 three of the most prominent nations that were defeated in the war (Japan, Italy and Germany) have incorporated dignity into their constitutional order. In 1950 India adopted dignity into the preamble of its constitution. Later, in the 70’s with the fall of the military dictatorships in Greece, Spain, and Portugal, dignity was incorporated into the new democratic constitutional orders. In the 90’s, with the transition to democracy in Eastern and Central Europe, and influenced by the model of the German constitution with its emphasis on human dignity as an absolute value, human dignity was incorporated into many of the new democratic constitutional texts. The German influence has extended beyond Europe to the new constitution of Post-apartheid South Africa and then to the “constitutional revolution” in Israel.

Considering its novelty, or perhaps because of it, human dignity has been attracting mostly negative critical attention in legal scholarship. The ‘constitutionalization’ of human dignity in national jurisdictions has complicated the conceptual difficulties arising from the increased invocation of human dignity by employing it in the binding context of positive constitutional law. It is one thing to have multiple definitions on the level of normative rhetoric, but it is quite another when it comes to binding judicial decision-making. More

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12 Art. 24.
14 Chap. 1, Art. 1(1) of the West German Constitution 1949.
15 Preamble.
18 Constitution of the Portuguese Republic, 2 Apr. 1976, Arts. 1, 26, and 59.
19 Hungary, Art. 54; Czech Republic, Preamble; Estonia, Art. 10; Lithuania, Art. 21; Poland, Arts. 30 and 41, Slovakia, Arts. 21 and 34, Slovakia, Arts. 12 and 19.
specifically, critics have been pointing to the concept’s vagueness and ambiguous status vis-à-vis rights: is it the foundation of rights, the outcome of claiming rights, an independent right, a mother right or merely a general guiding principle?

One of the considerations when it comes to institutionally-driven definitions is the fear of making the notion of human dignity so expansive as to include all forms of human grievances, thus stretching its meaning and diluting its normative edge. Ronald Dworkin, cautioned that dignity’s plasticity has made it “debased by flabby overuse.” Indeed, some commentators have been advocating for a reduction in “the descriptive content of this normative concept to a central and undisputed core meaning that leaves less room for subjective interpretation that stands above the political disputes of the day.”

The constitutionalization of human dignity and its invocation in judicial reviews has generated critique from other directions as well. Advocates of progressive legislation lament the ineffective role human dignity plays in constitutional adjudication, particularly when it comes to social rights. Others, wary of what they perceive to be the increasingly undemocratic role of

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22 This is the interpretation of the Hungarian Constitutional Court, which sees the entrenched constitutional right to dignity (section 54(1)) as “a “mother right,” i.e. a subsidiary fundamental right which may be relied upon at any time … for the protection of an individual’s autonomy when none of the fundamental rights named are applicable to the particular facts of the case.” (36/1994) See also Hillel Sommer, “The Non-enumerated Rights: on the Scope of the Constitutional Revolution,” Mishpatim 28 (1997): 257-340. [In Hebrew]


constitutional courts, find that the vagueness of the notion of dignity allows judges too much interpretive leeway that undermines legislative intent.27

These different critiques attest to the ambiguity surrounding the meaning and role of the idea of human dignity in constitutional adjudication and to the absence of a conceptual framework through which to assess its various invocations. This perceived ambiguity is highly problematic because it points to one of two unsatisfactory conclusions: either courts should not be in the business of adjudicating human dignity or they should settle on a single narrow definition that will be applied unreflectively to all relevant cases. Based on the discussion in the preceding chapters, it should come as no surprise that neither of these conclusions is desirable or even conceptually possible. If the promotion and protection of human dignity is the hallmark of the constitutional state, then the messy business of figuring out how to integrate a universal commitment to the moral principle of equal human dignity in the context of the particular political community cannot be avoided.

7.2 No Common Definition - But a Common Institutional Function?

So far we have noted that while the idea of human dignity comes up in a similar contexts of “constitutional moments,” its underpinning, legal status and judicial interpretation vary considerably from one jurisdiction to another. I want to look more carefully at the problem

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27 Hyman argues that “local variation [in the interpretation of human dignity] places unbearable pressure on the claim that there is a single coherent notion of human dignity separate from the idiosyncratic preferences of those writing and enforcing the rules.” He goes on to say that since “dignity cannot be quantified, it cannot be operationalized, no matter how appealing as a policy standard it might otherwise appear to academics.” David Hyman, “Does Technology Spell Trouble with a Capital “T”? Human Dignity and Public Policy,” 7, 14. Justice Scalia has chimed in by deriding the use of the concept of human dignity as merely “a collection of adjectives that simply decorate a value judgment and conceal a political choice.” Planned Parenthood v. Casey, 505 U.S. 833, 983 (Scalia, J., dissenting). Not everyone is critical. For a sympathetic view of human dignity as a workable legal concept see Matthias Mahlmann, “The Basic Law at 60 – Human Dignity and the Culture of Republicanism,” German Law Journal 11 (2010): 9-32.
of different meanings and the concomitant conclusion that the diversity itself is symptomatic of unrestrained judicial review.

Christopher McCrudden’s comparative article provides a thorough comparative analysis of the global contemporary phenomenon that view human dignity as a justiciable notion. So I would like to begin by presenting the article’s main points before considering how my argument might offer an alternative critical perspective. The most fundamental problem that McCrudden identifies is that beyond articulating a certain “minimum core” the notion of human dignity does not appear to provide

[A] universalistic, principled basis for judicial decision making in the human rights context...The meaning of dignity is ...context-specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. ...Dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances.28

McCrudden concedes that on some issues (most notably the death penalty) there seems to be an agreement when it comes to the interpretation of human dignity. Yet, beyond this “minimum core” “very different outcomes are derived from the application of dignity arguments.” According to McCrudden, this is most apparent when we look across jurisdictions at similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often found “on both sides of the argument, and in different jurisdictions supporting opposite conclusions.”29 This, to be clear, represents a

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problem as far as McCrudden is concerned. For he goes on to say,

All that is left of dignity, it might be said, is the relatively empty shell provided by the minimum core, but when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions. McCrudden notes with some puzzlement the differences in courts’ approaches to conflicts between individualistic and communitarian values: the German Constitutional Court adopts a more communitarian approach, whilst the predominant approach to dignity in the US Supreme Court is more individualistic. The South African Constitutional Court appears to be significantly split on the issue. Hungary, which heavily borrowed from Germany has not followed as closely with the interpretation of human dignity, opting instead for a more individualistic interpretation. He concludes;

The apparently common recognition of the worth of the human person as a fundamental principle … seems to camouflage the use of dignity in human rights adjudication to incorporate significantly different theoretical conceptions of the meaning and implications of such worth, enabling the incorporation of just the type of ideological, religious, and cultural differences that a common theory of human rights would need to transcend. By its very openness and non-specificity, by its manipulability, by its appearance of universality disguising the extent to which cultural context is determining its meaning, dignity has enabled East and West, capitalist and non-capitalist, religious and anti-religious to agree (at least superficially) on a common concept. But this success should not blind us to the fact that where dignity is used either as an interpretive principle or as the basis for specific norms, the appearance of commonality and universality dissolves on closer scrutiny, and significantly different conceptions of dignity emerge.

McCrudden’s conclusions raise some fascinating points. Firstly, against those who fear that the

30 Ibid.
31 Ibid, 701-702.
language of human dignity and human rights is oppressively Western, imposed from a hegemonic perspective and impregnated with Western historical, religious and ideological baggage, McCrudden’s assessment seems to point to the opposite conclusion.\textsuperscript{33} The problem with human dignity is not that it imposes a (Western) hegemonic language of human rights, which is insufficiently culturally sensitive. Rather, on McCrudden’s empirical analysis, human dignity turns out to be too open to local interpretation. As he states tellingly, “dignity appears to become other than impossibly vague only when it is tethered to a coherent community of interpretation.”\textsuperscript{34}

McCrudden’s findings, although not the conclusions he draws from them, sit comfortably with my argument. The fact that a norm is interpreted differently, across different communities and within the same community over time, is unsurprising from the perspective of political reflective judgment and in itself not necessarily problematic. Such variation attests to the central conceptual feature of the reflective process, where judgment attempts to find a common ground between the universal and local points of view. In itself the fact that this process yields different judgment in different communities is to be expected. In fact, it would be rather more surprising if McCrudden had found global unanimity.\textsuperscript{35}

The underlying reason for McCrudden’s sense of discomfort stems from the fact that he operates from within the determinate model of judgment. This becomes most evident when he

\textsuperscript{33} Ibid, 69. This view stands in direct contradiction to the view advanced by Michael Ignatieff in “Human Rights as Idolatry” in Human Rights as Politics and Idolatry, ed. Amy Gutmann (Princeton: Princeton University Press).

\textsuperscript{34} McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” 723.

\textsuperscript{35} Carozza emphasizes the practice of \textit{determinatio} when it comes to the process of specifying the idea of human dignity using “human reason and freedom to give specific practical expression to moral general abstract principles. “This means that the instantiation can be realized in a variety of different ways, each different from one another but each fully consistent with the general principle.” He also points out that the comparative judicial practice of interpreting human dignity reveals that the idea of human dignity serves firstly as a justification for courts to rely on foreign sources of law, and at the same time, when diverging from decisions of other courts, courts take care to explain and justify a different local interpretation. “A Reply,” 932-933.

To preempt a possible objection, let me make it clear that the variation in itself does not mean that every single local interpretation of human dignity is legitimate or just. My proposed framework aims to provide some conceptual standards by which it would be possible to assess and criticize local judgments.
Dignity discourse has, so far at least, done little to provide a conception with significant enough substantive content to *solve the most profound issues in the judicial resolution of human rights claims:* the appropriate balance between the individual and the community, including such questions as the appropriate limits on individual freedom; the appropriateness of the use of state power to ensure basic standards of material security; what rights should be attributed at the beginning of life and at the end of life; and how far we have responsibilities to ourselves and to the community. …We are left, then with an apparently descriptively more accurate but normatively disappointing, conclusion that in the judicial interpretation of human rights there is no common substantive conception of dignity, although there appears to be an acceptance of the concept of dignity.\(^{36}\)

McCrudden’s conclusion – that while the notion of human dignity has failed to generate a universal substantive (read: determinative) definition, it does appear to be have common institutional function in constitutional adjudication – has much to recommend it. “Human dignity,” as he points out, provides “useful but limited language with which to address certain difficult constitutional issues to which human rights adjudication gives rise to.”\(^{37}\) This functional perspective sits well with Jürgen Habermas’ characterization of human dignity as a seismograph that “registers what is constitutive of the democratic legal order.”\(^{38}\) Human dignity, Habermas tells us, has an “inventive function,” which highlights different humiliating experiences as instances of infringement of human dignity. This conceptual function leads to a “more complete exhaustion of existing civil rights and to the discovery and construction of new ones.”\(^{39}\) Looking at the role human dignity plays in constitutional adjudication is in line with the perspective of reflective judgment, where the thin universal notion seeks particular specification

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\(^{36}\) McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” 712. Daly concurs: “Dignity is fundamentally the same idea throughout the world – there is an identifiable emerging consensus that dignity is the bedrock value of human rights in any constitutional regime.” *Dignity Rights,* 4.

\(^{37}\) McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” 713.

\(^{38}\) Habermas, “Human Right and the Utopia of Human Dignity,” 469.

\(^{39}\) Ibid, 468.
and the corresponding thick conception seeks universalization.

Habermas acknowledges the role of human dignity in the process of interpreting international human rights norms to the local legal system but is vague when it comes to the precise nature of the process. Against this vagueness and McCrudden’s despair at the absence of a “common substantivte conception of human dignity” I propose to think of the relation between the two conceptions of human dignity as the elusive common substance that McCrudden and others are searching for.

7.3 A Functional-Conceptual Approach: Four Modalities of Adjudication

I have made the conceptual argument that the meaning of human dignity in the constitutional sphere is an outcome of reflective judgment, a process of going to and fro between the deontological conception of human dignity and the intersubjective conceptions. Through this process, the practical meaning of human dignity is continuously imbued in particular contexts of interpretations. This may give rise to the impression that when we move from the theoretical to the empirical we will find that the dynamic between the two conceptions (if not its outcome) is uniform. But in fact there is systematic variation in terms of how the constructive tension works itself out in practice. As we shall see, different categories of cases reveal different conceptual dynamics of judgment. In what follows I offer a tentative taxonomy of four modalities where similar patterns of judgment can be identified:

On the level of the system of rights, human dignity plays a constitutive role in upholding the normative coherence, and elucidating the normative *telos* of the constitutional order. Constitutional adjudication in accordance with the basic moral principle of equal dignity entails therefore:
(a) A delimiting modality: preventing laws that do not cohere with the foundational principle of human dignity from becoming an integral part of the system of rights and;

(b) An Elaborating modality: elaborating the system of rights to insure its dynamic protective scope and continual coherence from the point of view of human dignity.

On the level of particular rights, human dignity plays a regulative role. Adjudication in accordance with the basic moral principle of human dignity again entails two basic modalities:

(c) Adjudicating claims for self-determination;

(d) Adjudicating claims to equality.

Let me elaborate on each of these modalities before proceeding in the next section to illustrate how they play out in concrete cases. The first two modalities are premised on the holistic idea that rights constitute a system, rather than a list of rights. In other words, rights arise from the basic moral principle of equal dignity and cohere with each other to form a comprehensive system of protection. This, I hasten to add, is not an empirical statement, but a normative aspiration, or better yet a teleological assumption posited for the purpose of reflective judgment. In the case of these two modalities the Court makes two - not always explicit - assumptions: the first, is the Kantian premise that the system of rights, the constitutional order is itself the concrete expression of formal respect and recognition of the dignity of the moral person. On the basis of the first premise of legal subjectivity that postulates the individual as an equal rights bearer, the second premise concerns the expressive function of law and reveals the implicit premise of intersubjectivity. Relying on the universal idea of intersubjective human dignity the second premise involves the idea that human dignity is

vulnerable to misrecognition and therefore requires substantive (not just formal) recognition in terms of the particular content of law in order to uphold it.

Both the delimiting and elaborating modalities underscore the importance of maintaining the normative coherence of the system of rights, when viewed from the foundational perspective of human dignity. But whereas the delimiting modality discloses the constancy of the formal norm as constitutive of the constitutional order, the elaborating modality discloses the evolving nature of its content. In this way, the elaborating modality conceptually complements the delimiting modality. The idea that the system of rights should strive to coherence is based on two related arguments. Firstly, that “political rights and duties are not exhausted by the particular decisions the political institutions have reached, but rather depend more generally, on the scheme of principles those decisions presupposed and endorse.”41 Secondly, that the abstract principles that underline the constitutional order have to be continuously interpreted in light of societal changes and new circumstances. What counts in a given society as harm to dignity and therefore what counts as respect, as argued in chapter 2, changes continuously.42

Echoing the Kantian intuition that the constitutional order is founded on the principle of human dignity, the delimiting modality seeks to protect the system of rights from elements that might undermine this foundation by creating internal normative contradiction in the constitution; contradictions that undermine a person’s legal subjectivity. This modality contends with clashes between extant or proposed legislation (which arguably reflect the democratic will) and moral universal principles embodied in the foundational conception of human dignity. In this modality we typically find cases dealing with torture and capital punishment, which relate to

41 Dworkin, Law’s Empire, 211.
42 For example, the German Constitutional Court held that “any decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity.” BVerfGE, 45, 187, 229 (1977), in Currie, The Constitution of the Federal Republic of Germany (Chicago: Chicago University Press, 1995), 315.
what is often called the “minimal core” of human dignity. The most typical feature of this modality is the explicit exclusion of a utilitarian metric of judgment and the concomitant embracing of the deontological view that humans ought to be treated always as ends. The postulation of the inviolability of humanity explains why the delimiting modality exhibits the most determinative character of all four modalities. It is important to reiterate however that pure determinative judgment is conceptually impossible. The appearance of strong determinative elements is a result of the moralistic nature of this modality. Of the four this modality exhibits least deference to indeterminate imperatives such as political expediency. Nevertheless, as we shall see, the intersubjective conception of human dignity serves as the basis for grounding judgment in the polity’s historical context and articulating the polity’s normative commitment to deontological human dignity.

The elaborating modality addresses claims to new rights. Judgment in this modality explicitly aims at thickening the constitutional conception of human dignity. In this modality we see most clearly the progressive potential of human dignity adjudication. For example, recognition of socio-economic rights reflects an evolving historical understanding of what is essential for human dignity. Rights to privacy of personal data, reflect temporal transformations in collective conceptions of harm to human dignity brought about by new technological reality. Therefore it is not surprising to find acknowledgement of the unfolding nature of rights in cases adjudicated in the delimiting modality.43

The elaborating modality quite explicitly involves the specification of the universal conception of intersubjective human dignity. Judgment starts from the particular claim for misrecognition and asks whether the appealed aspect of recognition is essential for human

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43 For example in the capital punishment case (23/1990), the Hungarian Court held: “The right to human dignity is an express “mother right”… to protect the freedoms of action and self-termination, the court derives newer fundamental freedoms there from.” Reprinted in Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court, ed. Laszlo Solyom and Georg Brunner (Ann arbor: University of Michigan, 2000), 128.
dignity. In this sense, the elaborating modality is the paradigmatic modality of reflective judgment, for it starts from the particular and seeks the universal under which to classify it. In this modality, the Court engages in reflective deliberation over what human dignity entails (against the background of the particular context of the political community) and what is essential for it. With the acceptance of a claim, this process of reflection culminates in the transformation, a reinvention of what the idea of human dignity means from the perspective of constitutional protection. In this sense the originally thin idea of human dignity is thickly fleshed out in a specific case, by “first thinning it or detaching it from that thick context, and second, giving it new flesh – thickness – in a new context.”

Both the delimiting and elaborating modalities are not concerned with recognition of particular individuals but in the kind of recognition owed to all citizens equally. Recognition of human dignity in these two modalities is not formal (because it is embedded in a concrete political context of judgment), but nor is it particular.

When we move from the system level to adjudication of particular rights, which are derived from the constitutional value of human dignity, we find a slightly different dynamic. At the level of particular rights adjudication, courts are faced with the need to balance between competing rights and interests that involve the possibility of harm to the dignity of particular individuals. They ask on the basis of an intersubjective conception of dignity, how much harm is too much harm. Taking a straightforward single-conception approach, some have argued that it is impossible to balance competing claims to human dignity. I believe that this view is mistaken because it fails to distinguish between the idea that human dignity can function as a determinate constitutive value and as an indeterminate regulative ideal. The distinction helps to see that at the system level (the delimiting and elaborating modalities) dignity is perceived as inviolable;

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44 Ibid, 122.
whereas at the level of clashes between discrete rights, and between rights and public interests, the idea of human dignity establishes a justificatory standard the court has to meet when deciding for the limitation of freedom and benefits.

The idea of human dignity is intimately related to the values of equality and freedom. The link is conceptual and normative. But freedom and equality are often taken to be in tension with each other. A perspective of reflective judgment that reviews these values, when contested, through the prism of human dignity seek to resolve the theoretical tension. As J. Chaskalson argued in the context of his own country,

For many constitutional scholars there is a tension between liberty and equality. Taken to their extremes this is no doubt so. But this tension is not an obstacle to interpretation if each is seen as having its origin in respect for human dignity, and to reflect different aspects of it. The Constitutional Court gives equal weight to all three values. This involves the weighing up of different values and ultimately an assessment based on proportionality. Through the influence of dignity, the values of liberty and equality are harmonized, and taken together the three values have provided a coherent foundation for the South African Constitutional Court’s jurisprudence.46

In the 3rd and 4th modalities justification seeks to articulate the scope and limitation of dignity within the intricate context of competing and conflicting interests, rights and values. This function often employs a formula of proportionality which involves: firstly, determining whether the limit placed on a claimed right furthers a legitimate aim; secondly, whether the means chosen to achieve the aim are rationally connected to the aim; and thirdly, whether the measure is proportionate in the strict sense or are there are less restrictive means that would achieve the

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46 Arthur Chaskalson, “Human Dignity as a Constitutional Value: A South African Perspective,” 1385. Compare to Susanne Baer’s idea of an equilateral triangle: “I hold that we need to ask for equality in conjunction with both dignity and liberty, just as we need to understand dignity in light of liberty and equality, and liberty in light of equality and dignity. (430) Susanne Baer, “Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism,” University of Toronto Law Journal 59.4 (Fall 2009): 417-468. I tend to side with Chaskalson regarding the nature of the conceptual relation between the three norms. It seems to me that human dignity forms a foundation – at least from the point of view of judgment – through which claims to freedom and equality are assessed. This view is supported by the legal cases discussed in the next section.
objective, and whether the benefits of the restrictions outweigh the harms.\textsuperscript{47} What’s most interesting to note is that the invocation of the legal concept of human dignity is most associated with those jurisdictions that have adopted the proportionality analysis. McCrudden thinks that this is not coincidental,\textsuperscript{48} and I believe he is right.

In cases involving self-determination courts determine the limitation on individual liberties, either because they conflict with other liberties (often such conflicts follow from the elaborating modality), or because they clash with other interests or values. It is important to reiterate that normative coherence is not consistency. Therefore, conflicts of rights and values do not result in the invalidation of the conflicting norms themselves, but in a process of justified balancing. Coherent justification will rely on the notion of human dignity to determine the extent to which the rights in question should be limited, by articulating the nature of harm to dignity resulting from the limitation. Therefore, in this modality courts often adjudicate by ascertaining the ‘proximity’ of the right in question to the core necessary for upholding human dignity. This is particularly true in cases that involve conflicts of rights, where the correlative duties implied by them are not compossible.\textsuperscript{49} Such cases require reflective judgment that prioritizes some rights as more essential to upholding human dignity than others. Here coherent adjudication involves ‘drawing’ concentric circles of rights around the normative core of dignity to justify the importance of one right over another in terms of their effect on dignity.

In cases of claims to equality courts seek to determine the nature of the challenged distinction and determine its constitutionality by considering its impact on the particular claimant. Discrimination singles out groups of individuals for differential treatment. Often it

\textsuperscript{47} McCrudden, “Human Dignity and the Judicial Interpretation of Human Rights,” 706.
\textsuperscript{48} Ibid, 716. For a comprehensive historical and comparative account see Moshe Cohen-Eliya and Iddo Porat, Proportionality and Constitutional Culture (Cambridge: Cambridge University Press, 1213).
treats individuals on the basis of group identification over which they have no control, such as gender, sexual orientation, nationality, religion, etc. **Subjective** harm to dignity is not limited to the individual’s feeling of humiliation, frustration and offence. Discrimination often reflects commonly held stereotypes and prejudices, and in turn entrenches them. Therefore, harm caused intersubjectively is not contained within and limited to the concrete policy, statute or legislation but has longer-term implications and perpetuates injustice. Harm to dignity, caused by discrimination, has also an **objective** dimension. It results in restrictions on one’s autonomy, and undermines the right to equal freedom.

### 7.4 Applying the Framework

Before looking more closely at specific cases, a few methodological comments are in order. The legal cases discussed below have been chosen to illuminate the theoretical argument. They do not represent a systematic study of human dignity jurisprudence. I intentionally chose cases from different national jurisdiction in order to highlight their commonality, an important point considering the often-raised charge of significant divergence in dignity adjudication. Another criteria is the explicit reliance of the court on the idea of human dignity. It could be argued that in constitutional questions any adjudication touches upon the idea of human dignity. Consequently it is a matter of debate whether the norm of human dignity should be explicitly relied on for the purpose of constitutional adjudication. That in itself is a matter of judgment.

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It goes without saying that there are many systemic variables that influence and shape constitutional judgment beyond the conceptual properties of the idea of human dignity. These include but are not restricted to institutional variations, linguistic and interpretative practices, the formal role of human dignity in the constitutional order and political culture.

7.4.1 Delimiting the Constitutional System

This modality deals with what the constitutional order cannot tolerate on pain of internal contradiction. Capital punishment, as McCrudden notes, is perhaps the paradigmatic case that relates to the “core minimum” (or what we might call the thin conception of human dignity) outlined in the UNDHR along with degrading treatment. Consequently, we would expect the justification to be based purely on the moral ground of universal norms. So it is worth noting that the interpretation of the universal norm is “domesticated” and anchored in the historical context the local political culture.

In South Africa, the local interpretation of human dignity played a central role in the decision to find the death penalty unconstitutional.51 Chackalson P. found that the death penalty “destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable.”52 This may sound like a general justification, but in fact the history and the context play a central role in this decision. O’Regan J. added, respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of

51 State v. Makwanyane and Mchunu 1995 (6) BCLR 665 (CC).
52 Ibid, at para 95.
human dignity is the touchstone of the new political order and is fundamental to the new Constitution.\(^5\)

Note that the justification refers to the historical context and is perceived as part of a constitutional project to redefine the normative foundation of the political order to include recognition of human dignity. In other words, finding the death penalty unconstitutional is not a simple application of a basic tenet in the catalog of universal human rights; it serves to underscore and articulate the common identity of the new polity.

What is common to cases in the delimiting modality is a finding of unjustifiable contradiction between the appealed governmental measure and the very purpose (the telos) of the legal system, namely of upholding human dignity. The German *Aviation Act* case and the Israeli *Privatized Prison* case are helpful examples of the delimiting modality, in that they underscore two different approaches to justification in this modality. In the Israeli case we find an explicit articulation of what the local understanding of state function is, whereas in the German case we find a seemingly abstract justification, which nonetheless is entirely rooted in the historical context of the constitutional culture.

In the *Privatized Prison case* (2605/05) Chief Justice Beinish, writing for the majority, found that the state-sanctioned building of a private prison, undermined the fundamental principle that sees the government as the executive body in charge of administering justice and executing incarceration.\(^5\)\(^4\) She found that the purpose of maximizing economic profit cannot be balanced against the harm to human dignity. In divesting itself of one of its most basic functions – executing punishment – the state effectively reneges on its part in the social

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\(^{53}\) Ibid, at para 329. This view of dignity was subsequently affirmed in the seminal cases of Corporal punishment (*Bernstein v. Bester* (1996) 4 BCLR 449 (CC), para. 65, 67), privacy (*Harkan v. Lane NO* (1997) 11 BCLR 1489 (CC) para 53) and equality (*National Coalition for Gay and Lesbian Equality v. The Minister of Justice CCT 1998 12 BCLR*).

contract. Punishment is only legitimate when executed by the state; it loses its legitimacy when undertaken by a private party. Delegating the incarceration of prisoners to a private consortium whose sole aim is financial gain turns the prisoners into objects for profits. And in that, their dignity is reduced. Beinish is also careful to reject the state’s claim that this feeling of diminished dignity is a subjective feeling; the harm to dignity is an objective infringement of the prisoners’ right to human dignity. It may look as if the court was exclusively relying on what I called the DHD, an objective non-viable notion of human dignity. But that would be a hasty conclusion. The court specifically addressed the symbolic aspect of being imprisoned in a private prison, thereby relying on the conception of IHD. This symbolic meaning, the court says, is always interpreted against a concrete social context, and it is in the context of the Israeli society that the symbolic harm is assessed. The court couldn’t be clearer when it says:

the authorization [to privatize prisons] undermines the constitutional right to personal freedom, but it also constitutes an independent harm in the dignity of the prisoners in the private prison. For incarcerating a person in a private prison stands against the basic view of the Israeli society about the responsibility of the state, which organizes through the executive branch to legitimate use of force against its subjects.

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55 Court judgment, para. 26. The court reiterated its reliance the “intermediary model” of human dignity, meaning that the right to human dignity does not include only those obvious harms that have to do with personhood, such as physical and emotional abuse and humiliation, nor does it entail all justiciable rights. (Para. 34) As Chief Justice Barak defined it in an earlier case, “what is the definition of human dignity by the Supreme Court? The answer to this question must be given by means of legal interpretation against the background of the law. This interpretive approach is based on the history of the basic law, on its relation to other basic law, the fundamental principle of the constitutional order and comparative law. … At the heart of the right to human dignity stands the realization that the individual is a free being, who is allowed to develop his body and spirit as he pleases in the society; at the heart of human dignity are the sanctity of life and freedom. At the heart of human dignity are the autonomy of individual, the right to choose freely and act as a free being. Human dignity involves the recognition of the physical and spiritual completeness of the individual, his humanity, his value as a person, irrespective of the utility he gives others.” (Para. 35)

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56 J. Arbel even quotes Kant’s categorical imperative on this point. (61, para. 3)

57 Para. 36.

58 Para. 38.

59 Para. 39.
Having found that the act is unconstitutional the court turned to proportionality analysis, but unsurprisingly at the step that requires assessing proportionality in the “strict sense” the court admitted that the interpretation is inherently normative and substantive. Moreover, the court noted that in different countries the common perceptions regarding the scope of the state’s authority and the interrelation between the private and the public sector might be different (noting in particular the US). The court said it must “reflect the norms that are revealed in social consensus and common basic norms, identify what makes the society democratic and disclose the fundamental and normative elements while rejecting the temporary and passing.”

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Even if it could be proven that no actual diminishment of liberty and human dignity would occur as a result of privatizing the prison, the problem, according to J. Arbel, would remain at the conceptual level. For what is at stake is the fine balance between the need to deny prisoners of their liberty for the sake of public interest, and the objective of protecting their most basic rights.61 The issue that rests in front of the Court in the delimiting modality therefore refers to the objective conception of human dignity, not the subjective feelings private persons might sense. At its core the question is how persons ought to be treated by the state.

This last point is clearly exemplified in the highly publicized German case of the Aviation Act. In German jurisprudence, human dignity represents “the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of all guaranteed rights.”62 As such it is not subject to any limitation. In the Aviation Act case the German Constitutional Court contended with a new section of the Security Aviation Act. Section 14(3) empowered the

60 Para. 53. The court concedes that in the US the constitutionality of private prisons does not seem to pose a constitutional problem. The court also notes that in the US and Britain, where private prisons operate, there is a history of private prisons, which may reflect on the social perception and its effect on human dignity. This is an illustration of the argument that what counts as harm to dignity is a matter of particular context.

61 Para. 5, 65.

minister of defence to order the shooting down of a passenger airplane, if it was thought that the aircraft was intended for use against others and if the downing of the plane was the only means of preventing the present danger. The Court found the statute “incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed forced affects persons on board the aircraft who are not participants in the crime. By the state’s using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake.”63 This Kantian-inspired formulation reveals the operative conception of dignity on which the Court relied in determining what constitutes harm to dignity, the state’s duties that follow from this conception, and its function within the system of rights.

The central constitutional problem with the authorization to shoot down hijacked planes is that it deprives the innocent passengers of their dignity. However it is important to realize that the problem with section 14(3), is not that it might lead to a situation where the actual dignity of concrete individuals might be diminished if a passenger plane was to be shot down, but that the section already treats the (hypothetical) passengers as things, merely as parts of a plane that must be destroyed for the preservation of others, by anticipating the demise of some for the sake of others. By treating the passengers only as means and not as ends in preemptive legislation, the state and its law, delegalizes them by denying them the protection of the law, and in particular the constitutional unlimited protection of human dignity.64 The Court was concerned with the way human beings can be treated by law consistently with their

63 1 BvR 357/05 Court press release no. 11/2006 (15/2/2006).
64 BverG, c. II. 2 b) aa) and bb) (2006). The ‘object formulae’ maintains that “it is contrary to human dignity to make the individual the mere tool of the state. The principle that ‘each person must always be an end in himself’ applies universally to all areas of law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.” 45 BverfGE at 245, cited in David Currie, The Constitution of the Federal Republic of Germany, 314.
humanity.\textsuperscript{65} The issue is one of coherence; can the constitutional order rest on the fundamental notion of human dignity, and at the same time contain a provision that contradicts that very norm? The Court answered in the negative. Therefore, the statute could not be saved by any constitutional duty to protect, for the very aim of the statute has already violated human dignity.\textsuperscript{66}

These examples demonstrate that the delimiting morality is concerned with identifying the thin ("core") conception of human dignity \textit{in light of a particular case} for the explicit purpose of articulating the normative principles of the constitutional order. It is easy to identify the deontological conception of human dignity, and equally easy to overlook the intersubjective conception of human dignity. But it is important to remember that the deontological conception of human dignity can be "operationalized" only through an idea of intersubjective human dignity. As the German Court noted in the \textit{Aviation} case, dignity "cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it."\textsuperscript{67} In delimiting cases, the intersubjective conception of human dignity plays a covert role; its aim is to explicate why it is that the state has a duty to protect human dignity in the first place (remember that metaphysical human dignity does not require protection, it is inviolable).

The process of thickening (or specifying) the "core minimum" of the universal idea of human dignity always takes place against the background of a local understanding of intersubjective human dignity (that too is not given, but is in need of spelling out in each case) and the specific case that serves as an anchor for the normative discussion. This modality very explicitly involves an interpretive component of teasing out the universally moral aspects of the

\textsuperscript{65} Michael Rosen disagrees. Following an extensive analysis he concludes that "all in all, I find the Court’s claims that it has consistently interpreted dignity as an inner kernel of human value that may never be compromised or balanced hard to sustain." \textit{Dignity}, pp. 107-114. Jeremy Waldron also finds fault in the Court’s decision. The judgment is "admirable and brave, and may be right. But it takes “dignity” in a direction that leaves behind many of its familiar connotations." \textit{Dignity, Rights and Rank} (New-York: Oxford University Press, 2012), 18.


\textsuperscript{67} BVerfG, 1BvR 357/05 (15.2.2006), para. 117.
particular case; a teleological component (in the court spelling out the constitutive norms of the legal order) and a disclosive aspect (in defining “who we are” as a nation). Also characteristic of delimiting cases, as we have seen, is the explicit rejection of a purely utilitarian metric of adjudication in favour of an interpretive normative approach that begins from the deontological premise that humans are ends in themselves, that the end does not justify the means, that the objective of the constitution is recognition of human beings and that dignity needs to be protected. Thus arriving at view of human dignity, which constitutes a limiting principle for politics.

Lastly, we can see that in the delimiting modality, cases deal not with examples of what constitutes human dignity, but with what the Court perceives as contradictions to human dignity. The very idea of coherence of the constitutional order, and the attempt to diffuse internal contradiction of norms raises the imagery of determinant judgment. And indeed of all four modalities, the delimiting one exhibits the most determinant elements of judgment. It looks determinative, because we can grasp the idea of human dignity as the determinant foundation of the constitutional order independent (a priori) of any particular claim.\(^\text{68}\) However, we cannot grasp the specific implication of this ‘fact’ without considering it against the particular features of a case. As the delimiting modality reveals, the meaning of human dignity, (but not its delimiting function) remain essentially open-ended.\(^\text{69}\) In this sense constitutional adjudication strives to avoid turning the universal idea of human dignity into a rigid and determinate concept.\(^\text{70}\)

\(^\text{68}\) See the discussion in Chapter 3, section 2.
\(^\text{69}\) In the Aviation case the Court made clear that it is impossible to determine the content of the right to dignity “once and for all.” BVerfG, 1 BvR 357/05 (15.2.2006), para. 119. And in the Hungarian Death Penalty case the justices stressed that “the standards for the protection of [the inherent right to life and dignity] are unlimited and consequently binding upon the state.” To define the contours of dignity is to “arbitrarily restructure the above values protected by the Constitution.” Decision 23/1990, 31.10.1990, para. 5 quoted in Erin Daly, Dignity Rights, 171.
\(^\text{70}\) See discussion in chapter 4, section 2.
7.4.2 Expanding the System of Rights

Demands for “new” rights are framed as claims that arise out of the need to coherently protect human dignity within the system of rights. This modality concerns itself with the ongoing redefinition and expansion of what protection of human dignity requires. In this sense it relies most clearly on the reflective mode of judgment, where the particular (a claim for a new right) is lifted and transformed into a facet of the (now reimagined, thin) constitutional conception of human dignity.

In Hungary, the right to human dignity has come to be seen by the Court as a “mother right,” a general personality right, which includes non-enumerated rights of self-determination. It is a “subsidiary fundamental right, which may be relied upon at any time…for the protection of an individual’s autonomy when none of the fundamental rights named are applicable for the particular facts of the case.”\(^7\) Over the years it has been interpreted in relation to the freedom of speech (14/2000), the right to die with dignity (22/2003), abortion (48/1998), and privacy (23/1999) among others, thus “thickening” the Hungarian constitutional notion of human dignity.

In the case of Alice Miller the Israeli Supreme Court addressed the military policy restricting women from serving as combat pilots in the air force. The Court was faced with the question of whether this policy was discriminatory. Judge Dorner, siding with the majority and finding in favor of the claimant, explicitly raised the issue of discrimination and equality, which arises from the Basic Law of Human Dignity and Freedom. (1992)

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\(^7\) Decision of the Hungarian Constitutional Court (36/1994), cited in Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart publishing, 2003), 110. The right to dignity has a complementary aspect; together with the right to life, it relates to one’s legal status. This conception, as I showed, informs the first modality.
For complex political reasons, the right to equality is not enumerated in the Basic Laws. However, equality is one of the basic principles enumerated in the Declaration of Independence (1948). Consequently, the “case-law established a substantive-interpretive principle according to which, in the absence of any contrary statutory provision, the authorities (and in certain cases, even private individuals and bodies) are prohibited from discrimination against women because of their sex.” The Basic Law of Human Dignity, however, “gave a constitutional, super-legislative status to the prohibition of discrimination against women.”

What is particularly interesting about this interpretation is that, as Dorner frankly acknowledges, “the legislative history of the Basic Law indicates that the omission of the general principle of equality was intentional.” For, as was indicated by one of the principal law drafters, the section dealing with general equality, which was part of the early drafts “was a stumbling block, an obstacle that would have prevented the passing of the comprehensive draft proposal.”

Dorner states plainly;

“I doubt whether it is possible – or at least whether it is proper – to hold by means of construction that the purpose of the Basic Law is to provide constitutional protection to the

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72 The right to equality was deemed to be too contentious in the eyes of the religious parties that were part of the first governing coalition after the declaration of independence in 1948. More generally, it was argued that the Jewish people do not need a written constitution, since it already has the bible. Instead, the Basic Laws provided the framework for an unwritten constitution until the changes of the “constitutional revolution” of 1992. For a discussion see Ruth Gavison, “Constitution and Political Reconstruction? Israel’s Quest for A Constitution,” International Sociology 18.1 (March 2003): 53-70.

73 Where it is stated that, “the State of Israel will uphold complete equality of social and political rights for all its citizens irrespective of their sex, race, nationality.”

74 Alice Miller v. Minister of Defense (HCJ 4541/94), available in English on the Court’s website (http://elyon1.court.gov.il), 42.

75 Ibid. Section 1 of the Basic Law – Liberty and Human Dignity (1992) provides that, “Basic human rights in Israel are founded on recognition of the worth of man, the sanctity of his life and his freedom, and they shall be respected in the spirit of the principles in the Declaration of the Establishment of the State of Israel.”

principle of general equality. The clear intention of the legislator... was precisely not to enshrine this general principle in the Basic Law.” 77

And yet, J. Dorner finds that the clear purpose of the Basic Law was to protect people from degradation, since “the degradation of a human being violates his dignity.” Not all discrimination is degrading, thereby violating the right to dignity. But discrimination that is based on “attributing an inferior status to the victim of discrimination, a status that is a consequence of his supposedly inferior nature” is contrary to human dignity. She concludes, “my opinion is therefore that the Basic Law protects against a violation of the principle of equality when the violation causes degradation, i.e. an insult to the dignity of a human being as a human being.” 78 The Court was then able to proceed with a judicial justification for a finding of discrimination that is not saved by the limitation clause.

In India the Supreme Court expanded on the meaning and grounding of the idea of human dignity:

Fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the furthest extent. They weave a 'patterns of guarantees on the basic structure of human rights' and impose negative obligations on the State not to encroach on individual liberty in its various dimensions.

The court went on to say

it cannot be disputed that there must exist a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values. This basic freedom of the human being is expressed at various levels...Freedom to go abroad is one such right, for the nature of man as a free agent necessarily involves free movement on his part. 79

78 Alice Miller, Ibid.
In this case, typical to the elaborating modality, the Court, confronted by a particular claim elucidates a “new” facet of the constitutionally enshrined idea of human dignity. In another case the Court found that the protection of human dignity includes a right to live with human dignity and “all that goes along with it. Namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.”

Another example of establishing social rights on the basis of the value of human dignity can be found in Colombia. There the Court found that right to health has been deemed judicially enforceable when linked to the right to life, integrity and dignity. The right to health is not a right to be healthy, per se, but neither is it merely the right to “biological existence.” The right to health is defined in terms of human dignity: “A human being needs to maintain appropriate levels of health, not only to survive, but also to preform adequately.” The right to health then is compromised when government action diminishes people’s capacity to develop inherent human faculties in a dignified way and determine the course of their lives.

When addressing a case that seeks to expand the protective scope of the system of rights, the court adjudication in the elaborating modality attempts to determine the symbolic significance of law (or lack thereof) and decide whether it is compatible with a coherent view of the legal system as expressing the underlying notion of human dignity. What the elaborating modality underscores is the duty of the state to uphold human dignity, not merely to avoid its diminishment. In his finding for the constitutionality of same sex marriage the South African

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81 Sentencia T-244/08, cited in Daly, Dignity Rights, 57.
Constitutional Court held that dignity, “is not the right to be left alone, but the right to be acknowledged as equals, and to be embraced with dignity by the law.”\(^\text{82}\)

Against the teleological assumption that the constitutional order is meant to reflect respect for human dignity, a successful case in the elaborating modality involves finding a claim exemplary in the sense that it highlights a certain aspect of human dignity in a particularly persuasive way. This aspect then is generalized by anchoring it in the community’s normative self-understanding. In this sense, the elaborating modality continuously addresses the question of what it means to be a political subject and what is the state’s affirmative role in safeguarding (through the intersubjective conception of human dignity) the individual’s moral status as a bearer of rights that is grounded in the deontological conception of human dignity.

### 7.4.3 Balancing Human Dignity I: Self-determination

Abortion is perhaps the paradigmatic “hard” case where the dignity of two individuals (one is as potential individual) is pitted against each other. It is instructive to consider what McCrudden and others find puzzling, namely the divergence between different national jurisdictions when it comes to adjudicating a similar issue through the lens of the universal notion of human dignity. Dworkin, as we saw in the previous chapter, articulated eloquently American political culture when he asserted that the reliance on the idea of dignity in the context of abortion leads to the conclusion that since dignity is connected to independence, “women have a constitutional liberty of abortion, as an aspect of their conceded constitutional right to dignity.”\(^\text{83}\)

Other jurisdictions however, approach the matter differently, revealing their local interpretations of human dignity and interestingly explicitly raising the tragic but inescapably

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\(^{82}\) *Minister of Home Affairs v. Fourie and Another*, CCT 60/04 (2005), para. 78.

\(^{83}\) Dworkin, *Taking Rights Seriously*, 127.
aporetic nature of the problem. The Hungarian Constitutional Court distinguished between two aspects of dignity: the right to dignity, together with the right to life and legal capacity, determines one’s legal status. It is therefore “absolute and without restrictions.” Secondly, the right to dignity is the “general personality right” and the particular rights that are derived from it are subject to limitation. The Court was presented with reviewing the constitutionality of the relatively unrestricted abortion regulations inherited from the Communist regime. In its judgment (64/1991), the Court first required that abortion be regulated by legislative statute rather than by governmental regulation since the matter concerned fundamental rights. Secondly, the Court laid down normative and legal guidelines for the future abortion law.

In this case, which was one of the first to deal with the enumerated right to dignity, the Court chose an interesting argumentative strategy. First, it articulated the inseparability of the right to life from the right to dignity. On this basis, the decisive question became whether the fetus is a human being who as such must be recognized as a legal subject. The Court held that both answers could be reconciled within the interpretation of the constitutional text, yet they are mutually exclusive. Either the fetus is a human being or it is not. Therefore, the Court argued that it lacked the competence to answer this question and deferred it to parliament. In other words, it left the sensitive matter of determining what constitutes life to public debate.

Subject to parliament’s decision regarding the fetus’s status, the Court delineated the constitutional limitations on abortion. Thus, if the legislature were to decide that the fetus was a human being, i.e. a legal subject entitled to the right to life and dignity, abortion would be permissible only in those situations in which the law tolerates a choice being made between two

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84 See case 64/1991.
86 The case is reprinted in *Constitutional Judiciary in a New Democracy*, 178-200.
lives without punishment, as when pregnancy gravely endangers the mother’s life.\textsuperscript{87} If, on the other hand, the legislature did not accord legal subjectivity to the fetus, then the state would be compelled to balance its duty to protect the life of the fetus against the woman’s right to self-determination.

However, the Court insisted that even in the absence of a full human status, the fetus enjoys the state’s protection under article 54(1) in conjunction with article 8(1).\textsuperscript{88} The state’s duty to “respect and protect” fundamental rights, is not exhausted by the duty not to encroach on them, but generates the obligation to ensure the conditions necessary for their realization. In the case of abortion, it is not human life in the abstract that is at risk, claimed the court, but a specific individual life that is singled out for termination. Therefore, the state carries the duty to seek justification for abortion within limits that do not overburden the mother and infringe on her right to privacy to ensure that the denial of life is not “arbitrary.”\textsuperscript{89}

In Germany, we find a different approach, which was developed over two cases. In the First Abortion Case The German Constitutional Court (FCC) addressed the constitutionality of the Abortion Reform Act of 1974, which liberalized some restrictions on abortion. The Act was challenged as unconstitutional. In adjudicating the case, the FCC identified the conflicting interests at stake as on the one hand the mother’s right to personality under Article 2(1) and on the other hand, the state’s duty to protect life under Article 2(2). Faced with balancing the mother’s rights and the state’s duty to protect life, the FCC turned to dignity. The Court identified dignity as the supreme value in German law, stating that “[i]n the ensuing balancing

\textsuperscript{87} Indeed, this is the position taken by the German Constitutional Court in two separate abortion cases (39 BVerfGE I 1975 and 88 BVerfGe 203 1993). In the first abortion case, the Court held: “the decision must come down in favor of the preeminence of protecting the fetus’ life over the right to self-determination of the pregnant woman. Pregnancy…may impair the woman’s right to self-determination. The termination of pregnancy however destroys potential life.” Cited in Kommer, 329.

\textsuperscript{88} Article 8(1) of the Hungarian Constitution states: “The Republic of Hungary recognizes the inviolable and inalienable rights of persons. Ensuring respect and protection for these rights is a primary obligation of the state.”

\textsuperscript{89} This was elaborated in a subsequent abortion case (48/1998).
process, both constitutional values must be perceived in their relation to human dignity as the centre of the Constitution’s value system’. Unlike in the Hungarian case, the court emphasized the life interest as a community value rather than an individual right belonging to the fetus.

In its arguments, the court was fully aware of the different approach it was taking compared to the American *Roe v Wade*, which was published only two years earlier. Nonetheless, the court insisted that given Germany’s history the need to repudiate the National Socialist policy of the “destruction of life unworthy of life” obliged the Federal Republic to be particularly vigilant in the protection of human life and dignity.\(^90\) It therefore found that “the decision must come down in favor of the preeminence of protecting the fetus’ life over the right to self-determination of the pregnant woman. Pregnancy…may impair the woman’s right to self-determination. The termination of pregnancy however destroys potential life.”\(^91\)

Almost two decades later the FCC addressed the matter again, this time against the historical context of the unification of East and West Germany. The existing regulation in FDR differed from the more liberalized regulation that was effective in the former GDR. In the *Second Abortion case* the woman’s right to self-determination received greater weight. Here the FCC departed from its technique of attributing dignity solely to the life interest in the fetus. Instead, the Court placed dignity on both sides of the rights-balancing equation, stating ‘[w]here the woman’s constitutional rights, namely her right to free development of her personality...and to the protection of her dignity, collides with the duty to protect the unborn, the conflict must be solved in accordance with the principle of proportionality.’\(^92\) Unlike in the *First Abortion* case, the woman’s right to personality, and not just fetal life, was seen to engage dignity. Dignity was


\(^{91}\) Cited in Koomers, 329.

\(^{92}\) BverfGE 88 (1993).
no longer used to tip the scales in favor of the life interest. Rather, dignity’s association with both sides of the conflict resulted in the decision that the state’s duty to protect life and the woman’s basic rights must be balanced. Consequently, the character of the opinion was decidedly more respectful of the woman’s rights and reflected a more even-handed balancing overall.

What is particularly worthy of note is the comment made by the dissenting J. Mahrenholz and Sommer who point out that “legal regulation of the termination of pregnancy strikes to the innermost core of human life and touches fundamental questions of human existence. … Any regulation of the termination of pregnancy raises questions about the sphere of inviolable autonomy of the individual on the one hand, and the right of the state to regulate on the other; here the legislator finds itself at the limit of its capacity to regulate in any way an aspect of human life. It can introduce a better or worse regulation, but it cannot “solve” the problem; in this sphere the state can no longer be confident that it can lay down the “correct” legislation.”

The two German abortion cases reveal the open-ended, historically evolvement of norms (reflecting the changes in the scope of the political community and the passage of time). At the same time the tragic clash between two valid claims to recognition of deontological human dignity account for the aporetic nature of the decision. The case of abortion is emblematic of the need to reach a decision and introduce regulation that is “better” without the confidence of laying down the “correct” legislation. The test to the legitimacy of the decision lies in the Court’s genuine consideration of both claims to human dignity (the mother’s and the fetus’). For the court to completely ignore one in favour of the other would undermine

94 Reva Siegel notes how the two German abortion cases reflect change in the conception of women as deliberative agents. She adds that abortion cases “offer a fascinating window on the roles dignity can play in mediating conflict within a constitutional community.” “Dignity and the Duty to Protect Unborn Life,” in Understanding Human Dignity, ed. Christopher McCrudden, (Oxford: Oxford University Press, 2013), 514.
the justness of the decisions. In this case, the universal perspective requires taking both claims for recognition of dignity into account. The tension between the universal perspective and the particular manifests itself in the inherently precarious and temporal nature of the compromise, which is rooted in the local and changeable context of interpretation.

I would further like to note that the abortion cases, particularly in the German context where the determinant impetus of the deontological conception is most apparent, reveal the inescapability of the need to define on an on-going basis what human dignity means. As one commentator said, “today the doctrine of human dignity, originally meant to be the cornerstone of the whole constitutional order, is more contested that the interpretation of any other fundamental right. One of the elements of the dominant interpretation of human dignity was to avoid any positive definition of human dignity. This project seems to have failed.”

Another case that illustrates poignantly how two clashing claims to human dignity find contextualized resolution, is the South African case of Port Elizabeth. In this case, the municipal authority sought an eviction order against a group of individuals occupying private land. Although the city proposed that the group move to a different piece of land, the individuals rejected the offer because the proposed site of relocation was crime-ridden, crowded, and would not offer them security from another eviction. The City had housing to serve the needs of the poor, but contended that allowing individuals to receive priority in the allocation of this housing was tantamount to rewarding them for illegally occupying land. The Court found itself in a situation of conflicting rights: the right of the landowners not to suffer arbitrary or unlawful deprivation of their land, and the right of the squatters to have access to adequate housing. As in other cases we have already seen, Sachs J. was unwilling to fall on a utilitarian metric to resolve the problem. As he argued, “[i]n a society founded on human dignity, equality

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95 Christoph Mollers, “Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Order,” *Israel Law Review* 42.2 (Jan 2009), 425.
and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided.\textsuperscript{96} Instead, in deciding the case, the Court emphasized that the “starting and ending point of the analysis must be to affirm the values of human dignity, equality, and freedom.”\textsuperscript{97} The Court made no attempt to identify dignity with only one side of the conflict, but rather concluded that both rights pertained to property and were underpinned by dignity. Given that they were commensurate, the Court’s role was to seek a solution that would best comport with dignity. When the Court decided that it would not uphold the eviction order, it justified its decision to limit the right of the landowners to be free from unlawful deprivation of their land as being the choice more congruent with dignity.

Sachs J. spends considerable time describing the historical background to the present situation. “In the pre-democratic era the response of the law to a situation like the present would have been simple and drastic...For all black people, and for Africans in particular, dispossession was nine-tenths of the law”\textsuperscript{98} as residential segregation was the cornerstone of the apartheid policy. The new government and policy meant that homeless persons had to be treated with dignity and respect. “Thus, the former depersonalized processes that took no account of the life circumstances of those being expelled were replaced by humanized procedures that focused on fairness for all. People once regarded as anonymous squatters now became entitled to dignified and individualized treatment with special consideration for the most vulnerable.”\textsuperscript{99}

The act under which the eviction was considered expressly required the Court to infuse

\textsuperscript{96} Port Elizabeth Municipality v. Various Occupiers, [2004] ZACC 7. Para. 29.
\textsuperscript{97} Para. 15
\textsuperscript{98} Para. 8-9.
\textsuperscript{99} Para. 13.
non-determinate elements of grace and compassion into the formal structure of law. It was called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and the policy in question confirm, said Sachs J., that

We are not islands onto ourselves. The spirit of Ubuntu,\textsuperscript{100} part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.\textsuperscript{101}

This case demonstrates a constructive tension between deontological and intersubjective conceptions of human dignity; where the deontological conception of human dignity that gives rise (even in Kant) to property rights is in tension with a competing claim to property and housing against the backdrop of historical injustice. In this case, the intersubjective conception of human dignity obliges the state to act on its duty to recognize the plight of the historically discriminated and in effect privilege their (newly recognized) right to housing over the landowners undisputed (conventional) right to property.

The South African Court’s resolution is provisional and open-ended because over time social values and the pull of historical events may change and with it the community’s understanding of what can be justified on the basis of the idea of human dignity. What once seemed like a justifiable resolution between competing claims may no longer appear that way (as

\textsuperscript{100} “Generally, Ubuntu translates as “humaneness.” In its most fundamental is translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities...Its spirit emphasizes a respect for human dignity, marking a shift from confrontation to reconciliation. In South Africa Ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of “humanity” and “menswaardigheid,” are also highly priced. It is values like these... that give meaning and texture to the principles of a society based on freedom and equality.” \textit{S v Makwanyane and Another} 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) and para. 308.

\textsuperscript{101} \textit{Port Elizabeth}, para. 37.
The balancing of competing claims to self-determination is a tricky business from the point of view of justification because it involves diminution of self-determination of those who *prima facie* have right on their side. In this modality, the Court attends to the claims to dignity of individuals as particulars, rendering justification especially important. For the Court must explain, to the parties themselves, why it views the limitation of some individuals’ freedom permissible and constitutional. It must explain, why is it that in a particular constellation, another individual’s claim to freedom overrides theirs. This brings me to the next important point.

The *Port Elizabeth* case is particularly illuminating because it raises the issue of the relations between fellow citizens in a democratic constitutional polity. The avoidance of a zero-sum game, a dynamic of winners and losers, can only be avoided when the judgment is viewed from a communitarian perspective. This is why the Court’s insistence on “neighbourliness,” “shared concern” and the interdependence of the citizens of the new South Africa is central to the judgment. Only against such a normative perspective, where a shared constitutional project that construes citizens not as atomistic individuals but as co-members of the political community, can the limitation of self-determination in favour of enhancement of underprivileged others’ be seen as legitimate and just.

### 7.4.4 Balancing Human Dignity II: The Right to Equality

Aristotle’s definition of equality gives rise to a well-known conundrum. To say that equals should be treated equally does not get us very far because the rule does not prescribe the criteria for determining which features ought to be judged as similar and which as different. Equality jurisprudence that strives to avoid the pitfalls of formal equality analysis and substitute it with substantive equality is faced with the basic question: how to differentiate legitimate
statutory distinctions from illegitimate ones? But this question merely restates the Aristotelian problem, unless a fundamental human interest is posited as underlying the right to equality. Such an interest could then serve as the benchmark for determining the legitimacy and therefore the constitutionality of regulatory and statutory distinctions.

Human dignity and equality are interdependent norms.102 In its deontological (Kantian) sense the elevation of all rational (human) beings to the status of dignity confers on them formal equality. In the intersubjective sense, as elaborated in chapter 2, equality is a necessary component for self-esteem and the ability to function as a full member of society. As an object of judicial reflective judgment, equality claims pose a particularly thorny problem, because of all the modalities discussed thus far, this one involves assessing cases in all their thick contextuality. Equality claims require evaluating the alleged harm to a person’s intersubjective dignity by assessing the harm to the individual against the particular context of comparison, both of which defy straightforward judgment. It might appear then that the deontological conception of human dignity is irrelevant for the purpose of judging equality claims. And yet, as I mean to show, it is essential in order to prevent judgment of equality claims from degenerating into the questionable practice of scrutinizing the claimant’s psychological state of mind, by providing community-based yet objective measure as a counterpoint.

One of the most elaborate and sustained attempts to integrate the idea of human dignity into constitutional adjudication of equality claims was undertaken by the Canadian Supreme Court. The experiment turned out to be disappointing. It is worthwhile to consider the way in

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which the Court construed the idea and attempted to turn it into a justiciable concept in order to understand why it ultimately failed.

The Law case, formally introduced the idea of harm to human dignity as a test for assessing equality claims. Iacobucci J. writing for the majority held that the purpose of s. 15(1) (which guarantees equality) is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and recognition.”103

In explaining what is the relevant definition of human dignity for purposes of adjudicating equality claims, Iacobucci stated:

Human dignity is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or a group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. …Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with particular law. 104

The Court, relying implicitly at least, on the intersubjective conception of human dignity, emphasized the psychological damage that occurs to the individual as a result of misrecognition. But in order to inject judgment with an impartial basis on which to make justifiable determination, judicial inquiry shall have to be “both subjective and objective,” meaning that “the relevant point of view is that of the “reasonable person” in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.”105 In other

104 Ibid, 53. [My emphasis]
105 Ibid, 7.
words, a ‘reasonable person’ needs to correctly assess the pre-existing disadvantage of individual or group, actual circumstance of the individual, ameliorative purpose of the law, and the nature and scope of interests affected by law, before having a legitimate basis for a feeling of discrimination.

The Court correctly identified the harm to dignity as brought about by lack of recognition. Dignity is a psychological state of mind that results from being recognized as equal. Therefore equality analysis is concerned with the claimant’s sense of self-respect, empowerment and feeling as equal. But it is much more than that. It is therefore unsurprising that the Court’s conception of dignity and corollary understanding of harm to dignity has proved to be restrictive for generating successful s. 15(1) claims.\textsuperscript{106} The reason for this lies in the fact that the Law test relies exclusively on the psychological dimension of IHD.

Let me explain. The language of “subjective-objective” that the Canadian Supreme Court developed, looks at first blush to map onto the distinction advanced here between deontological and intersubjective. Reading more carefully however, we can see that both the “subjective” and the “objective” perspectives refer in fact to the psychological aspect of the claim; subjective refers the claimant’s state of mind; objective refers to a “reasonable person’s” state of mind. In this sense the intersubjective conception is equated with subjective, and the subjective with feelings. This unfortunate conceptualization had obvious negative consequences. To see why, I now turn to the \textit{Gosselin} case.

In the \textit{Gosselin} case, the constitutionality of a welfare scheme that targeted people under the age of 30 as “employable” and lowered their social assistance to one third of the assistance given to people over 30 was challenged as discriminatory. This was the first ‘social rights’ case

to reach the Supreme Court. Chief Justice McLachlin, writing the majority opinion and finding against the claimant, concluded that the challenged social regime did not harm the claimant’s dignity. On the contrary,

The regime constituted an affirmation of young people’s potential rather than a denial of their dignity. From the perspective of a reasonable person in the claimant’s position, the legislature’s decision to structure its social assistance programs to give young people the incentive to participate in programs specifically designed to provide them with training and experience was supported by logic and common sense. …Despite possible short-term negative impacts on the economic circumstances of some welfare recipient under 30 as compared to those 30 and over, the regime sought to improve the situation of people in this group and enhance their dignity and capacity for long term self-reliance.¹⁰⁷

And went on to find,

Ms. Gosselin has not established …that the scheme did not correspond to the needs and situation of welfare recipients under 30 in the long or short term, or that a reasonable person in her circumstances would have perceived that the government’s efforts to equip her with training rather than simply giving her monthly stipend denied her human dignity or treated her as less than a full person. ¹⁰⁸

Within the subjective dignity framework, the Court’s analysis is a perfectly consistent. On this view, the right to equality means the right (underpinned by IHD) to be treated with dignity, but not the (DHD-based) right to equal freedom. However, it is also a paradoxical and ultimately a normatively incoherent position. The Court found that the claimant suffered no harm to her dignity because the state argued that promotion of autonomy (by denying welfare payments) is evidence of its commitment to individuals’ self-respect, self-realization and empowerment. But the infringement of autonomy, as experienced by the claimant, could not be factored into the analysis, because the test does not admit objective inequality in autonomy as harm to dignity.

¹⁰⁷ [2002] 4 S.C.R. 3
¹⁰⁸ Ibid, §53, p. 29.
Donna Gershner correctly noted, “dignity is indeed a feeling…but equality rights are legal rights and law is a discipline of reason and persuasion. The problem with feelings is that no one can argue against them.” The problem as demonstrated by the Gosselin case may be even more fundamental; the problem with feelings is that it is easy to dismiss them, precisely because they appear to be a very flimsy kind of reason, thereby adding insult to the claimant’s injury.

By relying on an exclusively psychological, subjective conception of human dignity, the Canadian Supreme Court denied itself the possibility of adjudicating equality claims from the objective standpoint of universal equal dignity. Instead, the Court found itself explaining to Ms. Gosselin that she was unreasonable in feeling that her ontological dignity has been diminished, when in fact it remains intact.

To be sure, the Canadian court’s choice to focus on the psychic dimension for assessing harm to dignity has its roots in the conception of intersubjective of human dignity itself. We came across this very problem when discussing in chapter 2 Axel Honneth’s view, which overemphasized the sense of wrong and psychological damage on the part of the unrecognized individual as the touchstone of the claim for justice. As a political theorist Honneth does not need to contend with the nitty gritty of judging people’s claims to recognition. In fact, as we saw, it is difficult to see how on Honneth’s terms it can ever be moral to reject a claim for recognition. The Gosselin case demonstrates how, against the necessity to reach constitutional judgment, the reliance on a purely subjective conception results in a decision that is arguably even more detrimental to the claimant’s self-esteem than the appealed policy.

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Moving beyond the perspective of the affected claimants, such a conceptualization paradoxically narrows down subjects’ ability to articulate the harm involved in discrimination (because it confines it to the psychological) and diminishes the potentially progressive impact a successful claim may hold (again, because it overlooks the objective impact discrimination has on real people). Furthermore, an overly subjective mode of judgment that simply equates dignity with self-esteem undermines (unwittingly) the idea of dignity as inviolable. Compared to Kant’s non-fungible conception of dignity, the Canadian Court’s conception of dignity becomes something one loses or keeps like small change.

It is hardly surprising then that after several years of adjudicative attempts the Court reached the conclusion that the reliance on the idea of human dignity raised more problems than it solved. It held that “human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.”

The Court correctly identified the negative effect its working conception of human dignity had on discrimination law and past claimants. Yet, I wonder if the court was not too hasty in dismissing the idea of dignity from the process of discrimination adjudication all together.

To see why, it might be useful to consider an example from a different jurisdiction. In post-apartheid South Africa the Constitutional Court has also developed elaborate equality jurisprudence, and it is constructive to see how it differs from the Canadian one.

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The South-African Court argued that the “history of the country demonstrates how discrimination proceeds on an assumption that the disfavoured group is inferior to other groups and this is an assault on the human dignity of the disfavoured group…Equality as enshrined in our constitution does not tolerate distinctions that treat other people as “second class citizens.” Having articulated its commitment to recognize and protect what I would call, given our discussion, an intersubjective conception of human dignity, the Court acknowledges the appropriate mode of judgment it gives rise to:

One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.

The Court’s intersubjective conception of human dignity gives voice to the particular and the “situation-sensitive” parameters of the claim. But importantly, the Court is cognizant of the fact that adjudication of human dignity pertains to the “impact” discrimination has on the individual. This impact has at least two facets: symbolic and objective. As the SA Court noted eloquently in its decision for decriminalizing sodomy:

[The crime of sodomy] punishes a form of sexual conduct, which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals… But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction…simply

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112 Minister of Finance v Van Heerden 2004 (11) BCLR 1125 at para. 116. See also Hugo v President of the Republic of South Africa, 1997 (6) BCLR 708.
113 Sachs J, National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC) para. 126.
because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men.\textsuperscript{114}

Discrimination not only makes people feel bad because they are unrecognized as equals by the state. Discrimination affects the capacity for self-determination in terms of the options available to the individual. On these two grounds the Court found in \textit{Hoffman v. South African Airways} SAA’s refusal to employ HIV positive individuals unjustifiably discriminatory. Ngcobo J. found that SAA’s policy is stigmatizing and therefore constitutes an assault on the dignity of HIV positive people. But the real impact of the discrimination is not limited to the psychological effect. “[The discrimination] is even more [devastating] when it occurs in the context of employment.”\textsuperscript{115} Here too, the Court did not restrict its analysis to the legitimate sense of disrespect the claimant was justified to feel, but also emphasized the loss of autonomy, here especially important given that HIV positive individual suffer from systematic disadvantage.

Viewing the constitutional adjudication of equality claims through the conceptual prism advanced in this project illuminates the need to approach the idea of human dignity from its bifurcated perspective. The crux of constitutional judgment in equality claims is identification of the distributed benefit and the effect it has on a group from which it is withheld. Human dignity provides a lens through which such determination can take place. Denise Réaume identified this essential feature of judgment in a recent article. Réaume first argues for the need to identify what is it that is owed to people in terms of concrete entitlements. She says:

> In the equal protection context the thought experiment begins at a somewhat abstract level. We start not from the concrete entitlement of the privileged, but from an image of the dignified person. And instead of universalizing a specific entitlement, we generalize from the

\textsuperscript{114} Ibid, para. 28.
characteristics of dignity to a conception of human worth. Filling out this notion gives us some benchmarks to use to determine what feature or qualities describe a life with dignity.¹¹⁶

Pursuant to this “thought experiment,” correct constitutional adjudication of equality claims involves, according to Réaume, identifying the objective interest that underlies the distribution of a certain benefit.

Benefits based on need exhibit a direct connection to the conception of human worth revealed at the first layer of our analysis. They constitute acknowledgment that certain goods are necessary to a life with dignity, are part of respect for human worth. If that is so, discerning the connection of this benefit to that framework principle may ground an argument that respect for human worth requires extension of the benefit. Those who are protected are protected in virtue of some significant interest that is important for a reason. Do those reasons extend to the claimant class? If so, the benefit should be extended, because that is what it means, in this society and in this context, to treat people with dignity.¹¹⁷

Réaume’s point is highly suggestive. She is right to identify the two stages of the judging process: identification of what is essential for living with dignity and deciding whether this interest is equally owed to the claimants. In effect what she describes is a procedure of reflective judgment that starts from the particular “thick” case, moves to the “thin” idea of human dignity to determine what is necessary for life with dignity, and returns to the particular case at hand.

This reflective process is especially necessary in cases where the state’s ameliorative purpose for the differentiated policy appears to the Court as legitimate.¹¹⁸


¹¹⁸ Because equality claims challenge the government’s ability to pursue certain policies, equality claims almost always lead to a discussion about judicial deference to legislative choices. This issue is taken up following a finding of discrimination, by enquiring whether the advantage of the proposed statute or regulation outweighs the harm to equality (proportionality) and is it saved by the limitation clause. In Canadian constitutional law the question of whether a violation of rights is saved by s. 1 is conducted by following the Oakes test. [1986 1 SCR 103]
7.5 A Critical Perspective: The Israeli Case

Up till now I have demonstrated how the four modalities systematically reflect the ways in which human dignity is interpreted by constitutional courts. In this section I take a different methodological approach. The four modalities are a useful analytic tool when we come to consider generally what function the idea of human dignity can play in constitutional adjudications. Another way, in which the modalities - and the two conceptions of human dignity that underline them - can be used is for an in-depth analysis of a single jurisdiction (and of course as a basis for a comparative constitutional analysis among several jurisdictions). This single jurisdictional analysis reveals firstly which of the four modalities are prevalent in the studied jurisdiction. As I argued earlier, common agreement on the salient normative role of human dignity, as a constitutional value does not entail unanimity when it comes to its particular interpretation and anchoring in a specific political and constitutional context. The particular slant in the local conception of human dignity generates an internal logic, which explains why in a certain jurisdiction we are likely to find only some of the modalities but not others. This understanding in turn opens up the possibility for a critical debate.

In this section, I consider the case of Israel, where human dignity has been enshrined as a constitutional value and a right since 1992, as central tenet of what is commonly referred to as the Israeli “constitutional revolution”. Constitutional judgments are delivered by different judges, each bringing a slightly different normative and interpretive set of tools. But to the extent that it is possible to generalize and identify common themes in a Court’s conceptualization and therefore judgments, several scholars have made the argument that the Israeli Supreme Court has interpreted – certainly under chief justice Aharon Barak – the idea of
human dignity as a relating predominantly to personal autonomy. I am in agreement with this argument, but I think we can do better on the basis of the conceptual framework developed in this dissertation. My argument is that, with a few notable exceptions, the Court has largely failed to recognize both the full implications of the deontological conception of human dignity with its immanently related idea of law itself as reflecting the positive commitment to human dignity, and (perhaps surprisingly) the intersubjective conception of human dignity. For this reason we find human dignity employed in the 2nd elaborating modality (mostly pertaining to rights of self-determination), and 3rd modality which attempts to reconcile competing rights to self-determination. This argument may appear surprising at first sight since the court’s judges have been historically heavily indebted to German Constitutional jurisprudence, where as we saw the court has been extensively engaged in rulings in the 1st delimiting modality. Yet, a more careful conceptual and historical analysis reveals uncritical and unreflective reliance on a blend of liberal and collectivist framework, which in Germany has undergone significant normative revision.

Aharon Barak, former chief justice of Israel’s Supreme Court (between 1995-2006), has been a central figure in the institutionalization of human dignity as a constitutional value in Israel’s constitutional law. He wrote some of the seminal judicial opinions contending with the Basic Law: Human Dignity and Liberty (1992) and has been instrumental in the


120 I say surprisingly, because in Hebrew the word Kavod means, depending on the context both dignity and respect. For an interesting discussion see Orit Kamir, Israeli Honor and Dignity.

121 For a careful historical, linguistic and legal analysis see Fania Oz-Salzberger and Eli Salzberger, “The Secret German Sources of the Israel Supreme Court”, Israeli Studies 3.2 (1998): 159-192. Of note is their discussion of the term Rechtsstaat (Medinat Chok) and ‘the enlightened public’ which have been directly lifted from German jurisprudence along with its Kantian connotation with conservatism, legalism and paternalism.
operationalization of human dignity as a constitutional value in Israeli law. Moreover, he expanded on his views in several essays and articles. A full-length book treatment of the subject is now forthcoming.

Shortly after the value of human dignity has been positively enshrined in the constitutional order, Barak offered a cautious warning;

Human dignity is a complex principle. In the process of its articulation one must be careful to avoid adopting the moral perspective of someone or philosophical perspective of another. Human dignity must not turn into a Kantian notion…The content of “human dignity” will be determinate by the views of the enlightened public in Israel.122

Tentatively, Barak went on to offer the following perspective on how to interpret the constitutional protection for human dignity:

At the center of human dignity stand the sanctity of human life and his liberty. Human dignity is based on the autonomy of the free will, freedom of choice and freedom of action. Human dignity means the freedom to shape life and develop personality as one sees fit. Human dignity is based on the recognition of the person’s physical and spiritual integrity, his humaneness, his value as a person irrespective of the value he serves for others. Human dignity presumes a free human being, who is his own end and not a means for the accomplishment of the community’s ends or another person’s ends.123

From this general definition with its clear Kantian connotation, Barak goes on to explain that in Israel the right to dignity has four components:

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122 Aharon Barak, “Human Dignity as a Constitutional Right”, Selected Writings, ed. Haim Cohen and Itzhak Zamir (Jerusalem: Nevo, 2000), 417. [In Hebrew] (All translations are mine unless noted otherwise). Barak has incurred much criticism for his allusion to the “enlightened public”. See for example, Shahar Ilan, “Barak Apologizes For The ‘Enlightened People’ and ‘Everything is Justiciable’”, Haaretz, 15 May 2001, 1, 6. However, the term has been used by judges of the Israeli Supreme Court since the 60’s and with clear connotation to Kantian thought. In 1962 Witkon J. discussing the opinions of the progressive public wrote that this public “wishes to belong to the family of enlightened nations”, and share the values of the “entire civilized world”. The court must therefore defend progressive values against primitivism and religion. Cited in Oz-Salzberger and Salzberger, 181. The phrase ‘enlightened public’ has since become part of the judicial jargon of Israeli constitutional jurisprudence.

1) Human dignity as a human being. This is the basis for the view that human dignity includes equality. Discrimination therefore infringes on a person’s dignity.

2) Human dignity as a person’s freedom of will. Freedom of choice to develop his personality and determine his fate.

3) Human dignity is infringed when a person’s life or physical or mental welfare is harmed. Thus, torture, humiliation, forced labor infringe on human dignity. Human dignity assumes the guarantee of the minimum condition of physical and mental existence.

4) Human dignity assumes that the individual is not means for satisfying the needs of another individual. Each person is a world unto himself. Criminal procedural rights such as the right to a fair trial evolve, according to Barak, from this view of human dignity.124

This list raises some normative concerns. Firstly, absent entirely is recognition of the intersubjective nature of human dignity, of humans need for equal recognition from the fellow citizens. Secondly, despite some superficial similarities to Kant’s conception, Barak’s interpretation of human dignity does not consider human dignity as a deontological, inviolable property of the individual. Let me begin with this last point. The argument I am making is admittedly philosophical-theoretical. But it has direct practical implication: what is missing from Barak’s explication of human dignity is the idea that constitutional law itself is a positive reflection of the idea that human dignity requires protection. In fact, Barak states quite clearly that human dignity is not inviolable:

A person does not deserve protection of his dignity if he will not defend the dignity of others…

“Human dignity” in the Basic Law, is the dignity of a person in an organized society, which has national goals and maintains government. The point of departure is that government is essential for the continuous existence of the state and for the existence of human rights themselves. [Human] rights do not provide carte blanche for national annihilation. A constitution is not a recipe for national suicide. Human rights represent a national compromise between the power of

the state and the rights of the individual. Therefore, the Basic Law recognizes, through the limitation clause, the constitutional possibility for limiting human rights, among them, human dignity, in order to promote national ends.\textsuperscript{125}

There are many striking aspects to Barak’s position. Firstly, as it relates to a “Kantian” position (I hesitate to call it that): Barak adopts the popular, simplistic view that equates human dignity with liberty and autonomy. \textit{Prima facie}, it seems to map broadly onto the deontological conception of human dignity as I articulated it in the first chapter. However, missing is recognition of the deep essentially logical connection between the idea of human dignity (as the basis for the equal right to freedom) and its necessary implication for the need for law. On Barak’s view, human dignity is the product of political society and therefore subject to the needs of the political body. Compare this to Kantian idea that civil society and law itself is the positive reflection of the moral duty to uphold human dignity. In an inversion (not to say complete self-contradiction) Barak goes from stating that the human being is an end in itself, to stressing that human dignity is subject to the “promotion of national ends”. This raises broader questions: in what sense is human dignity universal on this view? And consequently to what extent can it preform the protective normative function for which it has been invoked in the first place?

Barak’s emphasis on the liberty perspective of human dignity is evident in many of his judgments. In the seminal case of \textit{Bank ha-Mizrahi}, which laid the foundations for the “constitutional revolution”\textsuperscript{126} by establishing the supra-legislative status of the new Basic Laws had supra-legislative, Justice Barak stated:

\begin{flushright}
\text{Ibid, 427.}
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Human dignity, liberty, property, movement, privacy and freedom of occupation are not absolute rights. They may be limited in order to protect the social framework.\textsuperscript{127}

In a later case he developed this point further:

Among the values of the state of Israel human dignity is the supreme value. But this is the dignity of man as the member of a community, which is entitled to protect its existence and security. Only in this way may the human dignity of all its sons and daughters may be maintained. Therefore it is permissible to violate human dignity in order to maintain the social framework that protects human dignity.”\textsuperscript{128}

This utilitarian view, which prioritizes the interest of the many over the rights of the individual, has led to what some have guardedly called “pernicious implications”, particularly in the area of national security.\textsuperscript{129} In the case of \textit{Ploni v. Minister of Defense} Lebanese nationals were detained in Israeli jails for extended periods. The state openly made the argument that the detainees were being held as “bargaining chips” in negotiations for the return of Israeli soldiers who had disappeared in Lebanon. The majority of the Supreme Court confirmed the constitutionality of the practice. Writing for the majority Justice Barak stated:

Administrative detention violates the individual’s freedom. When the detention is carried out in circumstances in which the detainee constitutes a “bargaining chip”, indeed this entails a severe violation of human dignity, since the detainee is perceived as a means for achieving an end and not as the end itself. …This is a grave situation…However, …I am satisfied that this violation – harsh and painful as it may be – is necessitated by the security and political reality, and reflects the proper balance point in the circumstances of the case, between individual freedom and the necessity to protect state security.\textsuperscript{130}

If severe violation of human dignity is not grounds for finding administrative action unconstitutional, what is the point of referring to it in the first place? Barak, it should be noted, has subsequently changed his mind. In a further hearing of the case, the original decision was

\textsuperscript{127} Bank ha-mizrahi v. Migdal Kfar Shita\textsuperscript{fi} (1993) 49 P.D. (4) 221.
\textsuperscript{128} Klingberg v. Parole Committee (1995) 96 Takdin-Elyon (1) 192, 197.
\textsuperscript{129} David Kretzner, “Human Dignity is Israeli Jurisprudence” in \textit{The Concept of Human Dignity in Human Rights Discourse}, 171-172.
\textsuperscript{130} Ploni v Minister of Defense, Dinim-Elyon (1994) vol. LVI no. 921.
This change of heart notwithstanding, it is not surprising that the Israeli Supreme Court has been reluctant to issue judgments concerning human dignity in the 1st delimiting modality.

Barak’s emphasis on autonomy as the frame of reference for interpreting human dignity is to a large extent textually based. The Basic Law: Human Dignity and Liberty explicitly protects the right to life, body and dignity (sections 2 and 4), the right to property (section 3), the right to personal liberty (section 5), the right of all Israeli nationals to enter and leave the country (section 6), and the right to privacy (section 7). The court has also engaged in the 2nd elaborating modality to identify non-enumerated rights, for example freedom of religion and freedom of expression.

Conspicuously absent from this modality has been the interpretation of human dignity as an intersubjective value. This may strike some readers as surprising for two reasons: firstly, the Hebrew word for dignity (Kavod) also means respect, depending on the context. It would therefore be logical to conclude that discussions of dignity will entail claims for lack of recognition. This has mostly not been the case. Secondly, since Barak has placed great interpretive emphasis on the idea of the individual as part of society, one could have expected a more comprehensive communitarian view, where equal recognition from fellow members is essential for the well-being of the individual. However, this is not the sense in which Barak has invoked the relatedness of individuals in Israeli society. Instead, what emerges is a collectivist

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132 HCJ 10203/03, Solodoh v. Municipality of Rehovot.
133 HCJ 4804/94, Station Film v. Council of Film Supervision 50(5) PD 661, 674-675. I would like to point out that there is a fundamental internal contradiction in a treating human dignity as a source of non-enumerated rights (the elaborating modality) and at the same time failing to recognize it as the underlying foundation of already positivized rights (which results in failure to adjudicate in the first, delimiting modality).
134 With a few notable exceptions, for example the Alice Miller case, discussed in section 7.4.2 of this chapter.
view that emphasizes the subservient role of the individual in the workings of the state and government. A case in point is the status of positive, socio-economic rights.

On the one hand Barak has claimed that “[a] person living in the street with no home, …a person who goes hungry …a person who has no access to basic medical care …a person forced to live under humiliating physical conditions is a person whose human dignity is infringed.” But this rhetorical commitment did not extend to the pragmatic level. In an important test case for social rights (involving cancellation of transfer payments to an impoverished claimant), Barak sided unambiguously with the state, opining that; “it cannot be said that the existing Basic Laws give full and complete protection to social rights.” In that he was entirely consistent with a view articulated much earlier: “human dignity” he stressed, “does not mean a 19th laissez-faire; human dignity is not a socialist program, human dignity is not the 20th welfare state”.

The Family Unification case exemplifies the deep problematic nature of interpreting human dignity within a utilitarian framework that prioritizes the interest of the state (and the Jewish majority in it) over the rights of the individual. I mention this case because while Barak has put forward strong objections to the utilitarian and parochial interpretation of human dignity, the majority opinion represents nevertheless the logical conclusion of Barak’s own views. In this case the Supreme Court reviewed the constitutionality of The Nationality and Entry into Israel law, which prevents family unification in Israel between Palestinians and their

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136 Commitment to Peace and Social Justice Association v. Minister of Finance, 60(3) PD 464, 475 (2005). J. Levy, writing a minority opinion, doubted the conclusion that “living conditions, which do not allow even a minimal degree of correlation with the accepted standard of living in society, or which prevent a person having an opportunity, no matter how small, of developing himself, of defining his goals and ambitions and of acting in order to achieve them, do not violate the constitutional right to dignity. Ibid, 496.
137 Barak, “Human Dignity as a Constitutional Right”, 436.
Israeli spouses. The claimants relied on the Basic Law: Liberty and Human Dignity to argue that the law discriminates against them (on the basis of nationality, since it targets only Israeli-Arabs) and infringes on their right to family, in a way that does not withstand the limitation clause. In response, the state argued that in this case dignity should be interpreted in its narrow sense, namely as protecting against “physical, mental abuse and humiliation” but not as implying the right to equality and the right to have a family. Moreover, the right to equality is not being infringed since the distinction relates to the foreign, not Israeli spouse. Nor is there infringement of the right to self-determination since the law does not involve incarceration or detention, and the law does not prohibit the individual from choosing a partner, it merely prevents the individual from fulfilling the right in Israel.

Chief justice Barak, writing one of two main opinions, argued that human dignity must be interpreted as including the right to choose one’s family and live with one’s children, and a right to equality. Not all aspects of family life can be derived from the right to dignity. Therefore, judicial analysis must focus on the relevant aspects that are protected under the idea of dignity. He then moved to the limitation analysis and concluded that the infringement of these constitutional rights was disproportionate and therefore did not withstand the limitation clause.

In the other main opinion, Cheshin J. distinguished in the first stage between the right to have family with an Israeli, as flowing directly from the right to human dignity, and the right to have family with a foreigner, as peripheral to human dignity. This distinction is based on the argument that public opinion regarding the nature of family should determine the constitutional

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138 Adalah et al. v. Minister of Interior (HCJ 7052/03) §9, 12.
139 Ibid, para. 14, 14. For further explanation of his position see Aharon Barak, “Proportional Effect: The Israeli Experience”, paper presented at the constitutional roundtable, Faculty of Law, University of Toronto 31/10/2007.
140 Ibid, para. 24-38.
141 Ibid, para. 32, 31.
interpretation of the right to human dignity. Thus, he argued “the human dignity of Israel citizens – all citizens – requires that we do not give the freedom to every individual as a matter of constitutional right – to change the social status quo ante by bringing foreigners to Israel as spouses.”\footnote{Ibid, para. 54, 56.} He therefore concluded that the right to family of an Israeli citizen, when a foreign spouse is involved, does not enjoy the same constitutional protection, since the right of human dignity does not impose a constitutional duty upon the state to permit entrance into Israel for foreign nationals who have married Israeli citizens, and the state is entitled to limit by law the immigration of foreign nationals.

Cheshin’s reasoning raises some troubling questions. First, from a technical point of view, Cheshin’s interpretation of the right to dignity is conflated with the analysis of its limitation. Considerations of state security and public opinion must be undertaken only at the second stage of proportionality analysis, not at the stage of elaborating and interpreting the right to human dignity. Secondly, Cheshin’s interpretation of the notion itself is incommensurable with the universal idea of human dignity. Human dignity underscores, in the elaborating modality, the moral right to have rights. It is held individually and its interpretation admits only moral, not prudential, reasoning. Moreover, the distinction between a core right of an Israeli to marry an Israeli citizen and a periphery right to marry a non-Israeli defies the universality of rights and their moral nature. While the distinction between core and periphery rights is in itself logical and relevant for limitation analysis, the designation of ‘core human dignity right’ that must withstand the limitation clause, and ‘periphery human dignity right’ that does not require similar constitutional protection, “empties human rights of their normative content.”\footnote{Barak’s opinion, para. 104, pp. 80-8. Barak proceeds to underscore the difficulty of balancing liberty with security needs. In a case of a conflict between life and quality of life, life will always prevail. But the analysis must always take into account the probability of harm to life and the extent of the limitation to individual liberty in order to maintain the democratic essence of the state. Para. 110, 111, pp. 84-85.} Thirdly,
Cheshin’s claim that public opinion regarding the nature of family should determine the constitutional interpretation of the right to human dignity contains a startling revelation; it admits on the one hand that there exists (at least in theory) a universal standard for the constitutional interpretation of human dignity as it pertains to marriage (the acceptance of which would render the law unconstitutional), and on the other hand it ties constitutional adjudication – consistently with Barak’s view about the role of the enlightened public – to the parochial particular view of the Jewish population. In this case, Barak was in the liberal minority, but his problematic conceptualization of human rights in general and human dignity in particular, has paved the way for this normatively flawed but constitutionally consistent view.

The judges of the Israeli Supreme Court, and Barak especially, are often criticized for being aloof, sitting in their ivory tower, disconnected from the people. I would argue – sadly – that this is a mischaracterization. That if anything, the constitutional revolution led by Aharon Barak has been, despite his liberal commitments, all too reflective of the collectivist ethos in the Jewish population in Israel. For the issue at the heart of the Unification Case was not the prevention of terrorism (which, as Barak never tires of pointing out) requires finding a legitimate and workable balance between the protection of human rights and the continual safe existence of the democratic state and its citizens, but about the demographic composition of the Israeli state. In this sense the “pernicious implications” of Barak’s conceptualization of human dignity are not restricted to urgent matters of national security. It raises grave concerns regarding the role of the Supreme Court as protecting human rights against the majority’s views.

It has been argued that Barak’s assertion that “the enlightened public” will be the judge of how to interpret the Israeli constitutional idea of human dignity signals a clear commitment

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144 As Cheshin openly admitted: “the human dignity of Israel citizens – all citizens – requires that we do not give the freedom to every individual as a matter of constitutional right – to change the social status quo ante by bringing foreigners to Israel as spouses.” Adalah et al. v. Minister of Interior (HCJ 7052/03), para. 56.
to liberal-universal-secular values.\textsuperscript{145} If that is the case then it is not only ironical but also one might say tragic that Israel’s \textit{sensus communis} repeatedly endorses a parochial conception of human dignity, the invocation of which was presumably meant to offer a moral underpinning to the idea of human rights.

Barak has argued that: “there is not contradiction between the ‘enlightened public’ and the values of the state of Israel as a Jewish state.”\textsuperscript{146} The tension between human dignity as a universal deontological and community-based intersubjective conception is very real. There is real reason to worry – despite Barak’s optimism – that the Israeli Supreme Court judges have failed (all too often) to resolve justly the tension between judging as a community member and judging as “a member of a world community by the sheer fact of being human.”\textsuperscript{147}

\textbf{7.6 Concluding Thoughts}

I want to draw at this point some conclusions that follow from the empirical illustrations, particularly in light of the critiques leveled against judicial reliance on the idea of human dignity in the sphere of constitutional judgment.

The first point worth noting is that without the conceptual framework developed here, the cases reviewed in this chapter, appear at first sight to be quite random in their reliance on the idea of human dignity. Seen from the point of view of the fourfold framework however, these cases become manifestations of different modalities of constitutional adjudication and justification. Consequently, much of the ambiguity concerning the use and concept of equal

\textsuperscript{145} Dan Avnon, ““The Enlightened Public”: Jewish and Democratic or Liberal and Democratic?” \textit{Mishpat u Mimshal (Law and Government)} 3.2 (1996), 423.
\textsuperscript{146} Aharon Barak, “The Enlightened Public”, \textit{Sefer Landa} Vol. 2, 677-697. [In Hebrew]
\textsuperscript{147} Hannah Arendt, \textit{Lectures on Kant’s Political Philosophy}, ed. Ronald Beiner (Chicago: University of Chicago Press, 1982), Lecture 13, 75-76. Perhaps some comfort can be found in Chief Justice Beinish’s (Barak’s successor) judgment in the \textit{Privatized Prisons} case (which I have discussed in some detail in section 7.4.1). As I demonstrated there, that judgment falls squarely in the first \textit{delimiting} modality. It thus represents a departure from Barak’s fundamental limited view of the normative role of human dignity in the rule of law.
dignity can be explained away if we recognize what justificatory function the enacted idea of human dignity plays in a certain case, or in other words, in which modality is the Court is adjudicating.

Secondly, the diverging interpretations of similar cases in different jurisdictions makes sense once we realize that reflective judgment is always tied to a polity’s particular, historical, political, social background. To repeat, this does not make every local interpretation legitimate, but nor does it make it necessarily illegitimate, simply because it differs from the way American jurisprudence, for example, would have dealt with it.\textsuperscript{148}

Thirdly, The different positive status of human dignity (dignity as the foundation of rights, dignity as a constitutional principle, dignity as a discrete right and dignity as the outcome of claiming rights) makes sense once we take into consideration that different modalities of judgment might be at play. At the system level, dignity is a constitutive value that is understood as the foundation of rights; at the level of rights’ adjudication it is also a right to justification. The constitutional ascription of deontological human dignity establishes the individual as a bearer of rights; the constitutional commitment to intersubjective human dignity established the state’s duty to recognize the objective and subjective needs of the individual.

Fourthly, it would be mistaken to conclude that we should expect to find all four modalities in all jurisdictions that employ the idea of human dignity. That would be ideal. However, there are systemic variables (historic, institutional, interpretive practices) that explain why one jurisdiction gravitates towards some modalities but not others. Such a rigorous

\textsuperscript{148} If anything, one could make the opposite point. In \textit{Roper v Simmons} the US Supreme Court held that the imposition of the death penalty on offenders under 18 was unconstitutional under the Eighth Amendment. In his opinion for the Court, Kennedy J. drew on ‘foreign’ material (still a contentious practice in American jurisprudence) to demonstrate “that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty” 125 S Ct 1183 (2005) at 1198.
comparative constitutional research is outside the purview of this discussion, but it is possible on the basis of the framework.

Provisionally we can see that there is a logical correlation between the conception of human dignity the Court relies on and the prevalent modalities we tend to find in the jurisdiction. In Germany, where dignity is understood to be the source of rights and is therefore ostensibly not subject to limitation, we find many delimiting modality cases. On the other hand, in Canada, where the Supreme Court viewed dignity in strictly intersubjective terms, as the outcome of legal recognition, we found human dignity used predominantly in the equality modality (Furthermore, the Canadian Supreme Court’s rejection of the concept for purposes of establishing equality claims is hardly surprising, if lamentable). Nevertheless, given the conception employed, we can see why the Israeli Supreme Court was able to derive to right to social welfare from the right to dignity in the elaborating modality, while the Canadian Court, which was limited to the equality modality, did not (for example in Gosselin). Further, it seems unlikely that we will find many cases adjudicating by the Israeli Court in the first modality (particularly in matters of state security), since the right to dignity is not construed as an absolute value, and can therefore be limited.

Fifthly, critics are right to argue that the notion of human dignity defies apriori exhaustive definition. It is by nature open-ended both as a basis for individual rights claims and as a horizon of judgment through which the polity’s foundational normative commitments are articulated and evaluated.149 Still, open-ended does not mean random. The modalities help us identify specific aspects of protection to which human dignity pertains: legal subjectivity, right to have rights, right to self-determination, right to equality.

In adjudicating human dignity, courts do not engage in the justification of “human dignity” itself, but they imbue it with historically, socially, politically and legally informed content to ground normatively coherent justification within their political communities. The advantage of the framework developed in this chapter is that it imposes conceptual structure, while acknowledging institutional variation between jurisdictions. It therefore enables comparative inter-jurisdictional analysis along the same modality, as well as intra-jurisdictional analysis along the spectrum of modalities.

The courts in a way have exhibited a more philosophically sophisticated approach to the problem of defining once-and-for-all the idea of human dignity. The prevalent tendency in theoretical scholarship and legal practice to search for a conclusive well-elaborated definition of what human dignity means, a definition that transcends time and place, has resulted in disappointment. Like all ethical and legal concepts the notion of human dignity is to some extent an elastic concept. For, even with a provisionally agreed upon general definition each translation and interpretation of the abstract idea to the particular case requires concretization and working out how the general notion applies to the new specific situation.

Lastly, does the idea of human dignity open the door for Constitutional Courts to exercise rampant personal discretion? Does the adjudication of human dignity imply a carte blanche when it comes to constitutional interpretation? I would argue not, or at least no more than in any other area of constitutional adjudication that involves norms, values and principles, and for the following reason.

Courts rely on an operative conception of dignity in their attempt to generate – sometimes successfully, others unsuccessfully – a normatively coherent justification that takes into account moral considerations, procedural constraints and political rationales. It is true that the kind of judgment involved in these cases is not determinate judgment, as in the minority of
cases where courts decide on the application of a rule. Instead, it is based on reflective judgment, which presupposes that dignity is a fundamental constitutional principle that orients judgment in the normative and procedural sense. Reflective however doesn’t imply random or arbitrary. The cases reviewed here reveal the limits that are created by the tension between the determinate idea of deontological human dignity and the indeterminate idea of intersubjective human dignity. To counter ineffectual determinateness the deontological conception of human dignity requires explication in the empirical through the intersubjective conception and the duty it lays on the state to protect and promote human dignity. To counter the ineffectual indeterminateness of a pure intersubjective conception, judgment requires a universal perspective that seeks in good faith to transcend the local, parochial and potentially regressive perspective.

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\(^{150}\) For an explication of teleological judgment see Alexandre Lefebvre, “Critique of Teleology in Kant and Dworkin,” *Philosophy and Social Criticism* 33.2 (Mar 2007): 179-201.
Concluding Comments: From Theory to Practice and Back Again

In this concluding part I wish to address two themes that have remained in the background until now but deserve further consideration. Firstly, there is the conceptual and normative question of whether the idea of human dignity can be differentiation from notions of equality and autonomy, which have been the pillars of constitutional thought and practice since the French revolution. Is there an added descriptive or normative value to the idea of human dignity that goes beyond what is already encapsulated by the ideas of autonomy and equality? There are several ways to answer this question.

One line of argument stresses the novelty of “human dignity” as a legal concept. As such it doesn’t have the same pedigree as notions of autonomy, equality, privacy, etc. In other words, it does not have the same weight of legal precedent to guide judges. Therefore, it is arguably more open to definition and precedent-setting. If this argument is true, we would expect to see a decline in the kind of controversy that surrounds the idea of human dignity (in the theoretical scholarship, if not in the judgments themselves).

There is clearly certain merit to this legal empirical argument, but I think there is a more profound, philosophical reason for considering the idea of human dignity special in the context of constitutional adjudication. The notion of human dignity outlines in some sense the normative boundaries of the constitutional order. It defines simultaneously the minimal (determinate) basis for the political community and its aspirational (and therefore indeterminate) trajectory. A case concerning the idea of human dignity involves disclosure of the polity’s historical foundation and political culture. This is of course why human dignity is often adopted at founding or transitional moments. But even in the many jurisdictions which have adopted human dignity into their constitutional texts, where political and moral rupture did not occur, the evocation of the idea of human dignity signifies an attempt to capture and
explicate what it is that humans are entitled to in virtue of being human and translate it into constitutional language.\footnote{This still leaves open the question of how do we know whether a case indeed implicates the idea of human dignity. One could argue that all cases that come before a constitutional court have something to do with human dignity. But this over-sweeping approach to my knowledge does not seem to be the norm.}

So is human dignity really different from autonomy and equality? Yes and no. The three concepts are profoundly related. Commitment to the idea of human dignity underpins the constitutional values of autonomy and equality. But I would argue that the concepts are different in the way they inform and affect constitutional judgment. Because of the special conceptual structure of human dignity - determinant and indeterminate, representing a universal perspective and at the same time revealing the local particular context - “human dignity” discloses convictions and judgment that shed a light on the often contradictory claims to self-determination and equality.

This brings me to the second theme: the relation between human dignity and democracy. Here I would like to briefly outline two thoughts. Firstly, if one understands human dignity as expressing the constitutive self-understanding of a political community, then the meaning of human dignity and its concrete implications are continuously deliberated in an open democratic debate. On the other hand, if human dignity is a substantive, universal construct, then certain aspects must remain immune from majoritarian institutions. This is another way of iterating the tension between universal moral values that are embodied in the notion of human rights and their particular positive manifestation that is the animating progressive force behind constitutional-democratic politics because it provides a critical measure for identifying unjust, parochial judgments.

The second thought has to do with the salutary effect that reflective judgment on human dignity might hold for the quality of deliberative democracy. Constitutional adjudication
of competing rights and claims that appeals to human dignity (both as a norm the polity is
founded on, and as a value it seeks to promote through its policies), does more than settle
(authoritatively but provisionally) concrete disputes. It speaks to the citizens in the obvious
sense that judgment offers the affected parties justification. But it does more than that. It
reminds citizens that they are part of a constitutional project whose aim is the promotion of
human dignity for all. This is particularly true in cases, like Port Elizabeth, where the ostensibly
legitimate claim of the white property owners was rejected in favor of the black residents’ claim
for housing; in other words, in places where deep historical cleavages require corrective policies
of distributive justice. If the constitution is understood to be a social-transformative project, in
which all citizens are presumed to be committed members, the redistribution of benefits for the
purpose of relieving injustice must be accepted as legitimate aim. What’s fair or unfair, must be
considered not from the point of view of one party or the other, but “simultaneously from the
diverse points of view of all the inhabitants of the whole, [while] bearing in mind the values
enshrined in the constitution.”152

This dignity-centred constitutional jurisprudence can only operate legitimately where the
political culture reflects recognition of intersubjective dependence. Germany’s Basic Law, for
instance, proceeds from an “image of man” or “image of humankind” not as an “isolated,
sovereign individual; rather the Basic Law has decided in favor of a relationship between
individual and community in the sense of a person’s dependence on and commitment to the
community, without infringing upon a person’s individual value.”153 As Frank Michelman puts
it, this view of humankind perceives people “not as a collection of independent souls each
trying to find his or her own way through life, but [as] individuals who are also citizens, who

152 Albie Sachs J. in Walker, 1998 (2) SA 363 (CC) at para. 129 (S. Afr.)
153 BVerfG (20 July 1954), 4 BVerfGE 7 (15-16) 1954 (Investment Aid Case, I). Cited by Frank Michelman in
understand themselves to be associates in a commonly adopted civic project. Accordingly to treat a person with regard for his or her dignity is to treat him or her as a person and a citizen thus committed.”

This may not work in polities that are built on a different, more individualistic interpretation of human nature and the end of society. It remains an open question whether the introduction of the idea of human dignity as a justiciable concept can transform deep-rooted political culture, but perhaps it can start a conversation.

It is possible that this dissertation raises more questions than it answers. But as one of my favorite writers concluded, “in the course of writing this book I have had many arguments with myself…but you must state a case, I think, before you can plead against it.”

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154 Ibid.
155 In the American case of Bakke, Justice Powell wrote “all state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.” These individuals “are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority…” Regents of University of Cal. V. Bakke 438 U.S. at 294 n.34 (1978) cited in Ibid, p. 1402.
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