Chapter 5

DIGNITY, PRIVACY, AND PERSONAL AUTONOMY

This chapter addresses interrelated and overlapping concerns that lie at the heart of many attempts to protect what people care about most, and what societies have come to define as fundamental or human rights. However, the recognition of these rights, as well as their application, varies according to the text, be it a constitution or a human rights instrument, and according to theory, politics, perspective and context. Despite significant variations in details, dignity focuses on the individual in fundamental ways—in the issue of abortion, paradigmatic in the U.S. in recent decades (section B) and, increasingly, in other conflicts around life and death (section C). Dignity and autonomy evoke the need of individuals to be treated with respect and not degraded, and to have their intrinsic worth recognized. Privacy is, often, closely related to such concerns. It may be invoked against a threatening state or other dominant actors, such as private corporations, and is used to establish protected spheres, places, spaces or virtual realms within which the individual's desires are privileged and his or her choices about how to act and be acted upon are respected. Sometimes replacing and often informing a right of privacy is a right to personal autonomy or self-determination and self-fulfillment that emphasizes the capacity to make decisions for oneself, which may add a more active dimension to dignity and privacy; this right to one's own identity is a genuine liberty interest (sections D, E). Together, these three rights—human dignity, privacy, and personal autonomy—form a starting point for the constitutional recognition of what it means, in legal terms, to be recognized as a subject in law—to be, in that context, human.

A. PROTECTING FUNDAMENTAL RIGHTS

Privacy is a somewhat controversial right that has been widely invoked in various forms across constitutional traditions in a broad array of cases. However significant privacy may be to people's lives, a right to privacy, like a right to dignity, while prominent in human rights texts, features explicitly in constitutions less, and is not recognized by the common law. Where are the sources of such fundamental rights? In the U.S., the discussion of "penumbras" becomes relevant; liberty and equality also figure in attempts to define privacy or dignity. Privacy seems to arise around issues connected to sexuality, in par-

ticular, as well as to sex or gender equality. The same is true for dignity, which has become what Christopher McCrudden calls a "relatively empty shell" for varying concerns.[a] Some place dignity as the basic value of constitutionalism, while it is also used to protect particular beliefs, most problematic in fascist regimes, such as Spain under Franco, or Germany under Hitler, as James Whitman has described in *On Nazi "Honour" and the New European "Dignity,"* in Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions 248 (Christian Joerges and Navraj Ghaleigh eds., 2003). There is a risk of moralizing expectations how to lead a good life, in confounding dignity with honor. Finally, autonomy may be seen as the core of liberty, as the meaning of privacy, or as an aspect of dignity, allowing people to pursue their aspirations. This chapter highlights for critical consideration the various concepts that inform fundamental rights.

Notes and Questions

1. How relevant is text? Some national constitutions and many international instruments, such as the Universal Declaration of Human Rights,[b] the International Covenant on Civil and Political Rights (ICCPR),[c] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[d] provide expressly for the protection of dignity, privacy, and personal autonomy. So does the European Union's very young Charter of Fundamental Rights.[e] In some constitutions, such as the U.S. Constitution and France's 1958 Constitution, no such protections are specified, but liberty and equality are protected interests. Does this encompass dignity? If so, in what sense? One may understand the protection of dignity to derive from a variety of norms, as does Amnesty International. *Human rights for human dignity. A primer on economic, social and cultural rights* (1995). A comparative analysis may focus on just how such a right is framed in a given context.

What inspires which framing, where? The German Basic Law of 1949 enshrines the right to dignity in Article 1, Sec. 1: "Human dignity is inviolable. To respect and protect it is the duty of all state authority." Similarly, South Africa's postapartheid Constitution of 1996 begins as follows: "1. The Republic of South Africa is one sovereign democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms." It states in Sec. 10: "everyone has inherent dignity and the right to have their dignity respected and protected." Many of the postcommunist constitutions drafted in the 1990s adopted similar language. The authors of these constitutions were strongly influenced by international human rights instruments and the rights provisions of the German Basic Law, which had been inspired by the horrors of World War Two and the Holocaust. Does the absence of explicit references to dignity in a constitution hamper the efforts

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a. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int'l L. 698 (2008).

b. Dignity is also mentioned in the preamble to the UN Charter.

c. U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1966); Art. 10.

d. U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), Art. 13.

e. 2000-12-18 EN Official Journal of the European Communities C 364. As of 2009, the Charter is not binding, but part of the Lisbon Treaty to consolidate all founding treaties of the EU, published as C 306, OJ Vol. 50, 17 December 2007.

of courts to protect fundamental rights? Or is dignity so fundamental to our understanding of rights that one does not expect it to be explicitly protected?

In 1937, the Australian High Court stated that the common law does not recognize a right to privacy (*Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor*, 58 C.L.R. 479). How can courts recognize such a right, if it is not in the legal text at hand? In the *Bioethics Decision*,[f] France's CC held that dignity was a principle of constitutional value, despite its absence from the constitutional text, and that dignity concerns trumped legislation as readily as any other constitutional right:

> [T]he preamble of the 1946 Constitution reaffirmed and proclaimed (declared) the rights, freedoms (liberties) and constitutional principles in the following terms: "On the morrow of the victory of the free peoples over the regimes that attempted to enslave and degrade the human person, the French people proclaims once more that every human being, without distinction of race, religion or belief possesses inalienable and sacred rights" [translation from Albert Blaustein, Constitutions that Made History (1988)] that safeguards the dignity of the human being against all forms of subjection (subjugation) and degrading treatment as a principle of constitutional value.

The U.S. Constitution, like the Irish and the French, does not contain an explicit privacy provision. Nonetheless, in a challenge brought against a state law that prohibited the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the USSC stated in the majority opinion:

> * * * [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'
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> The Fourth and Fifth Amendments were described as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' * * *
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> We have had many controversies over these penumbral rights of 'privacy and repose.' * * * [A law that prohibits contraceptives] cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

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f. Cons. Const., July 27, 1994, D. 1995, Somm., 299, note Favoreu, DC 94-343/344.

In *Griswold*, two Justices dissented with the argument:

> * * * The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. * * *
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> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for * * * "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. * * * I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. * * *

Does this decision—or any attempt to find protection for fundamental values that have no explicit basis in constitutional text or history—amount to judicial activism? Or is it part of constitutionalism, which we discuss as a concept in Chapter 1?

Although adopted in 1982, the Canadian Charter of Rights and Freedoms also does not provide explicitly for the protection of human dignity. Does the age of the document make a difference? The European Convention on Human Rights and Fundamental Freedoms (ECHR) was drafted in the 1950s. When the European Court of Human Rights (ECtHR) found corporal punishment of a pupil to be degrading treatment, rejecting the argument that it was socially accepted to do so, it stated (in *Tyrer v. United Kingdom*, A 26 (1978); (1979–80) 2 EHRR 1, para 31):

> [T]he Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.

Should that be a standard for attempts to protect fundamental rights? If so, courts cannot defer to moral beliefs or social attitudes to justify violations of fundamental rights.

2. *Are these rights universal?* Is human dignity a fundamental right that is universal, or is it "European" or "Western" or "Asian"—if such terms make sense—or in any other way specifically contextual? The Universal Declaration of Human Rights provides:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world * * *
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> Art. 1—All human beings are born free and equal in dignity and rights.

> They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. * * *
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> Art. 22—Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

In human rights texts, dignity is associated with protection of human life and physical integrity; prohibition of torture and inhuman and degrading treatment; and personal autonomy, as well as with rights related to self-realization. Art. 5(2) of the American Convention on Human Rights (ACHR)[g] provides

> "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

The ECHR does not mention dignity per se. Are we to conclude that dignity lies outside its scope, or that dignity is addressed by the notion of the Convention as a "living instrument"? What does the protection of dignity add to a scheme of fundamental rights? Consider the reasoning of the High Court of Singapore when it dealt with the admissibility of certain evidence in a corruption case:

> 25. * * * [I]n determining the scope of a right or liberty, the importance that the court have regard to the Constitution in its entirety cannot be overstressed. This is necessary in order that the court give equal effect to all the provisions of the Constitution, and not to distort or enhance the interpretation of a particular right to the perversion of the others. * * *
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> 26. [Thus our] decisions illustrated that no right, even a constitutional one, is absolute. In many cases, the scope of a constitutional right is itself limited by the provisions of the Constitution itself.
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> —*Taw Cheng v. Public Prosecutor*, 1998-1 S.L.R. 943 (Karthigesu J.A.).

Is there no such thing as a right that is subject to no limitation? What, then, are "fundamental" rights? Are they universal in the sense of being absolute, or universal only in the legal sense that any interference must be properly justified, or are they subject to the prevailing norms in a given society? Consider a perspective from Namibia: "Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts, such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America, the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people." *S. v. Tcoeib*, 1996 (7) BCLR 996 (NmS). Such arguments are also well known in the U.S., where some justices reject any use of international or comparative constitutional law in a national context.

Similar questions arise around a right to privacy. It is recognized in the

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g. O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 1978).

Universal Declaration, the ICCPR, the U.N. Convention on the Rights of the Child, the ECHR, and the ACHR, as well as in the Cairo Declaration on Human Rights in Islam (CDHRI), but not expressly in the African [Banjul] Charter on Human and People's Rights (Banjul Charter). Sometimes, privacy is protected only by statute. France's Constitutional Council, like the Australian High Court, has held that a right to privacy as articulated in *Griswold* does not exist (CC, Jan. 18, 1995, D. 1997, Somm., 121, *note Tremeau*, CC 94-352, 1995). However, the CC does accept a constitutional right to protection of the home (Finance Law Case for 1984, CC, Dec. 19, 1983, A.D.J.A. 1984, 97, *note Philip*, CC 83-164, 1983), as a function of personal space. The preamble of the Australian Privacy Charter of 1994 states that: "Privacy is a value which underpins human dignity and other key values such as freedom of association and freedom of speech. * * * Privacy is a basic human right and the reasonable expectation of every person." And President Hamilton of the Irish Supreme Court, interpreting a constitution that contains no express protection of privacy, stated: "[T]hough not specifically guaranteed by the Constitution, the right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality." (*Kennedy v. Ireland*, [1987] I.R. 587, at 592.) What might the Irish Court mean by the "Christian nature" of the state? In Jewish law privacy is the right to be free from being watched (Rosen, 18–19), which informs Israel's Basic Law on Human Dignity and Liberty: "(a) All persons have the right to privacy and to intimacy," particularly on private premises, (b) against searches, (c) and to secrecy." How important are religious convictions in constitutional law, or in such states as the U.S. or Germany? Are these truly secular states, and what does secularism mean for understandings of dignity, or privacy?

3. What exactly is protected as "private"? Privacy is traditionally associated with the home, as is intimacy and unfettered autonomy, or self-determination, which is why, for example, indecent acts may be prohibited in public, but not in one's bedroom, even if performed in front of an uncovered window (*R. v. Clark*, Supreme Court of Canada, 2005 SCC 2). However, notions of privacy differ across time and jurisdictions. In 1890, referring to an 1888 treatise on tort law by Judge Cooley, noted American lawyers called privacy simply the "right to be let alone" (Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890)). Some thirty-eight years later, Brandeis would use this in support of a constitutional right of privacy under the Fourth Amendment in a famous dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928). According to William Prosser's canonical U.S. treatise on torts, invasion of privacy "comprises four distinct kinds of invasion of four different interests of the plaintiff, which * * * have almost nothing in common except that each represents an interference with the right * * * 'to be let alone'." Prosser on Torts, 804 (4th ed., 1971). He maintains that privacy protects against (1) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment)' (2) public disclosure of private facts; (3) publicity putting the plaintiff in a false light; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or like-

ness. Are these the most relevant conflicts today? How might they be framed as constitutional issues? Consider a case from Britain, where the House of Lords held that a ban on fox hunting does not violate a right to private life or dignity. One justice argued that, while games played in private should be protected, hunting foxes should not, because it is done in public. Baroness Hale of Richmond made a different point:

> 111. When does the freedom to do as one pleases become a human right? How broadly should we construe the scope of the rights and fundamental freedoms guaranteed to us all in the European Convention on Human Rights? How strictly should we approach the justifications for restricting those rights? In my view there is no human right to be left alone to do as one likes; the Convention has defined some specific rights which can only be interfered with in specified circumstances; there is a good deal of flexibility and room for development on both sides of the scales; but the more broadly one construes the right, the greater the latitude one must allow the democratically elected legislature to strike the balance between the interests of those who wish to pursue a particular activity and the interests of those who wish to prevent them.
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> 112. "It's a free country, i'n'it?" So say we all if we object to being told what we may or may not do. And so it is. But until the Human Rights Act 1998 came into force, all this meant was that we could do what we liked as long as there was no law forbidding or preventing us. We may have had a national antipathy to regulation. Many of us may agree with John Stuart Mill that "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." [On Liberty, 1859]. But many others might take a different view on a particular issue, and if that view prevailed in Parliament, then it became the law and the courts would have to enforce it. * * *
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> 115. The right to respect for our private and family life, our homes and our correspondence, guaranteed by Art. 8, is the right most capable of being expanded to cover everything that anyone might want to do. * * *
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> 116. [But] Art. 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Art. 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they

might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity. * * *

—*R v. Her Majesty's Attorney General and another* [2007] UKHL 52.

Some constitutions explicitly protect the home against search and seizure, which might be viewed as the territorial aspect of privacy. How is this territorial dimension to be understood? Why, in various societies, is the home so important, and to whom? Do homeless people have a sphere of privacy in which they are protected? Are places where people stay against their will, such as prisons, protected as "homes"? In a 1984 case brought by a prisoner against searches of his cell, Chief Justice Burger stated:

[We] have repeatedly held that prisons are not beyond the reach of the Constitution. No "iron curtain" separates one from the other. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. * * * [It] is also clear that imprisonment carries with it the circumscription or loss of many significant rights. [The] curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of "institutional needs and objectives" of prison facilities. *Wolff v. McDonnell, supra*, at 555, * * * We must determine here * * * if a "justifiable" expectation of privacy is at stake. * * * [We] hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the [constitutional] proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

—*Hudson v. Palmer*, 468 U.S. 517, 523 (1984).

In response to a complaint by a prisoner that his letters to a civil rights organization were intercepted by prison administrators, the German Federal Constitutional Court (GCC) ruled that a prisoner's rights may be curtailed, but only through legislative action and not merely by administrative power. Here, procedure shall protect fundamental rights: "It would contravene this encompassing restriction of all state power if prison conditions could be set arbitrarily or at free will. A restriction of rights is only conceivable if it is intended and necessary to reach a social end which is legitimate under the value order of the constitution, and which is acted out in the constitutionally required form." *Prison Correspondence I,* 33 BVerfGE 1 (1973). The European Commission, in *Silver v. United Kingdom*, 3 EHRR 475, 500 (1980), held that protection of fundamental rights includes respect for private correspondence but that a "balance" must be struck between "legitimate interests of public order and security" on the one hand and "rehabilitation of prisoners" on the other. Here, balancing is applied when protecting privacy. Which approach is more convincing?

If privacy is territorial, we must note that personal space may move, as in the case of travelling peoples. When gypsies were prohibited from camping on public grounds, a strong minority of judges on the ECtHR argued that

privacy is implicated when a state does not affirmatively ensure it: "Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition." *Chapman v. United Kingdom*, 33 EHRR 20, (2001). However, those justices who came from East European countries held, by and large, that the right to privacy was not violated. How relevant are political traditions and contexts to the interpretation of fundamental rights?

Also note that privacy, today, may be an interest to virtual space, as in data protection cases discussed below (section E). When courts require a legal basis for wiretapping, as the ECtHR did in *Kruslin v. France*, 12 EHRR 547 (1990), we may think of privacy as an informational or virtual concept. And finally, privacy may be conceptualized as a realm in which one may realize aspirations, and fulfill personal dreams and desires, which concerns issues of identity and intimacy we discuss in sections C and D.

4. How ambiguous are fundamental rights? Fundamental rights may be interpreted in very ambiguous ways. Dignity, as well as privacy, is a case in point. Dignity, as a human right, dictates that human beings be treated humanely, while, for others, dignity refers to leading a dignified life. The distinction is particularly relevant to conflicts around biotechnology. For example, some argue that fundamental rights are attached to a concept of rational decision making, to lead a dignified life, and cannot be attributed to human beings who lack this capacity, such as the severely mentally disabled.[h] To defend the rights of the disabled, one may emphasize the alternative. The concepts that inform fundamental rights also have a long and complex history that allows for conflicting interpretations. Christian theology, for example, understands dignity as a value inherently bound to duties and obligations, and Muslim or Confucian theology also offer distinct interpretations. For many, the understanding of dignity is inspired largely by Enlightenment philosophy, particularly that of Immanuel Kant. For Kant, dignity was a function of autonomy, captured in the definition of the human being as an end in herself; it required mutual respect and recognition. In German jurisprudence, this has been promulgated as "object theory," attributed to Günter Dürig (Theodor Maunz and Günter Dürig, *Kommentar zum Grundgesetz*, Art. 1 Abs. 1 Rn. 28, 34); the doctrine says: dignity is the right not to be turned into an object for someone else's needs. Would a duty to donate blood or body organs to enable another's survival or welfare be constitutional? If a woman has a duty to carry a pregnancy to term, as the German GCC ruled in its *Abortion I Case*, below, is she objectified to serve another's need? The concept is also relevant in the *Mephisto* (Chapter 7) and *Life Imprisonment* (below) cases.

Others conceive, not of dignity but, rather, of liberty at the heart of all other rights. Constitutional reasoning, then, focuses on where exactly the fundamental right to liberty finds its limits, a topic well known in philosophical debates of liberalism.[i] Regarding the scope of fundamental rights, consider Justice Wilson concurring in the Canadian SC decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30:

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h. The discussion is associated with Peter Singer, Writings on an Ethical Life 135 (2000).

i. Compare John Stuart Mill, On Liberty (1859), with Patrick Devlin, Enforcement of Morals (1965), and the critical assessment in Carole Pateman, The Sexual Contract 11 (1988).

227 The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue.

228 [An] aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This language reflects the liberal conception of liberty as freedom from interference. A slightly different conception, which animates constitutional jurisprudence in parts of Europe, could be associated with the tradition of republicanism, which understands liberty as freedom from dependence. *See* Maurizio Viroli, Republicanism 67 (2002). One constitutional scholar has commented, in reference to French jurisprudence, that "the development of a general principle of general freedom may provide a more solid foundation for the idea of privacy as a constitutional value." John Bell, French Constitutional Law 148 (1992). In the U.K., it was held that no right to privacy existed—*Kaye v. Robertson* [1991] F.S.R. 62 (C.A.)—yet interests called "private" are recognized in the courts. In Germany, free development of the person is the right on which fundamental interests can be based when no more specific provision is applicable. *Elfes Case*, 6 BVerfGE 32 (1957). Similarly, the Hungarian Constitutional Court (HCC) has provided for minimal protection to "persons with equal dignity," in the absence of infringement of an explicit constitutional right. What are the best possible bases on which courts can protect fundamental interests? Consider that fundamental rights may be conceived of as a pyramid, with dignity on top which inspires both liberty and equality. As an alternative, one may construct a holistic understanding of fundamental rights, and pose dignity, liberty, and equality interests as three equally important corners of a triangle: "Fundamental rights, if seen in light of each other, serve as reciprocal warnings against the isolated use of any one of them, or of any right to ever merely trump another. Each fundamental right has distinct meaning, yet they are not alone, but they are better understood relating to each other, like a triangle." Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 4 U. Toronto L. J., 417, 468 (2009).

When constitutions protect fundamental rights, the lines demarcating law from moral philosophy, theology, and metaphysics sometimes blur. Consider the reasoning of Chief Justice Solyóm (concurring) in a holding by the HCC that the death penalty is unconstitutional based on the sanctity of life:

[The] right to human dignity is not merely a declaration of a moral value. The concept that human dignity is a value a priori and beyond law, and is inaccessible by law in its entirety does not preclude this value from being regarded as the source of rights—as many international conventions and constitutions do by following natural law—or the law from

requiring respect of dignity or the transformation of some of its aspects into a true right.

The right to human dignity has two functions. On the one hand, it means that there is an absolute limit which may not be transgressed by the State or by the coercive power of other people—i.e., it is a seed of autonomy and individual self-determination withdrawn from the control of anybody else by virtue of which, according to the classical wording, man may remain an individual and will not be changed into a tool or object. * * *

The other function of dignity is to ensure equality. [This] means that dignity is indivisible and irreducible, * * * [and that it] must ensure * * * [that] bare lives are not to be treated differently in the legal sense. No one is more or less worthy of life. [The] equality of lives is also guaranteed by dignity.

—Decision 23/1990 (X.31.) AB. hat, 1 E. Eur. Case Rep. Const. L. 177, 194–95 (1994)

Privacy also has an ambiguous history, as Anita Allen observes: "[S]laves and servants, as well as women and children, have, in all legal traditions (and in some legal systems still), been legally considered property of the head of the household (*pater familias*), rather than persons. To the extent the household was protected, legal rules accepted the domination and abuse in the privacy of the household." She has commented that "[w]omen have had too much privacy, in the form of confinement in their homes and imposed standards of modesty and reserve; but they have had too little privacy in the form of opportunities for replenishing solitude and independent decisionmaking." Anita A. Allen, *Gender and Privacy in Cyberspace*, 52 Stanford L. Rev. 1175, 1179 (2000). Should the private sphere be protected nonetheless? Although some argue that pornography violates the rights of people, particularly the rights of women and children (*see* Catharine MacKinnon, Sex Equality, 1532–1536 (2nd ed., 2007), the USSC has held that there is a right to consume pornography in private: "[T]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness." *Stanley v. Georgia*, 394 U.S. 557 (1969). Whose happiness counts? Which fundamental rights, held by whom, are at stake? Is pornography about happiness? Consider that in South Africa, the SACC, in *Curtis v. Ministers of Safety and Security*, 1996 (3) SALR 617 (CC), 1996 (5) BCLR 609 (CC), argued with reference to the Canadian decision, *R. v. Butler* (see Chapter 7), that pornography should not be viewed from "a public-morality basis that underpins the American approach" but, rather, judged according to "a standard based explicitly on the harm believed to be engendered by certain kinds of sexually explicit material." The SACC nonetheless upheld its consumption in private. Consider that crimes committed against children and women, many of them sexual in nature, are often committed at home. Should this make a difference to the inviolability of privacy rights?

5. *What is the effect of different frames?* Similar controversies may be argued in very different ways from one jurisdiction to another, so that a "dignity" case in Europe may be a "free speech" case in the U.S., and a "privacy" case in Japan may be a "dignity" case elsewhere, and so on. What frame becomes legally relevant in a given case, and why? What does it do if such diverse legal frames are attached to human experience? For example,

several courts construe dignity as a fundamental right so as to ensure access to basic resources, just as liberal philosophers consider basic "goods" or "needs" a key component of justice. In Germany, the GCC draws a right to life-sustaining state subsidies—a "minimum livelihood" allowance—from the right to dignity, interpreted in conjunction with the constitutional principle of the welfare state, which results in specific state action requirements regarding tax laws, such as a tax reduction in favor of children; *Children's Existential Minimum*, 99 BVerfGE 246 (1998). Similar arguments are used by the Israeli High Court. In India, the ISC interprets the constitutional guarantee of life and personal liberty thus: "We think that the right to life includes the 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 commingling with fellow human beings." *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 2 S.C.R. 516, (1981) 1 S.C.C. 608, 618-19; AIR 1981 SC 746, 753. Note that the ISC finds dignity relevant to free speech and assembly, and to a right of workers—men, women and children—to protection from abuse of their health and strength. *Bandhua Mukti Morcha v. Union of India*, ((1984) 2 S.C.R. 67, A.I.R. 1984 S.C. 802, (1984) 3 S.C.C. 161. In a case dealing with the low pay of domestic workers, the Hong Kong Court of First Instance found: "any right thinking member of our civilised society must regard such a wage an affront to justice and insult to human dignity." *Andayani v. Chan Oi Ling*, (2001) 1 H.K.C. 252. The Court argued that domestic workers are in especially dependent and vulnerable positions. Does dignity then limit freedom of contract, and ensure equality? Note that the SACC has held that there is a dignity-related right to HIV treatment, *Minister of Health v. Treatment Action Campaign*, (2002) (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*See* Chapter 10). Also from the SACC, consider the words of Justice Sachs (concurring) in *S. v. Makwanyane and Another*, 1995 (3) SALR 391 (CC):

> 389. Historically, constitutionalism was a product of the age of enlightenment. It was associated with the overthrow of arbitrary power and the attempt to ensure that Government functioned according to established principles and processes and in the light of enduring values. It came together with the abolition of torture and the opening up of dungeons. It based itself on the twin propositions that all persons had certain inherent rights that came with their humanity, and that no one had a God-given right to rule over others.
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> 390. The second great wave of constitutionalism after World War II, was also a reaction to gross abuse of power, institutionalised inhumanity and organised disrespect for life. Human rights were not merely declared to exist: against the background of genocide and crimes against humanity committed in the name of a racial ideology linked to state sovereignty, firm constitutional limits were placed on State power. In particular, the more that life had been cheapened and the human personality disregarded, the greater the entrenchment of the rights to life and dignity.

Are rights to dignity, privacy, and autonomy primarily protected through processes of constitutional review? Or are they rooted in the cultural and political history from which such decisions spring?