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Johanna Kalb

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LITIGATING DIGNITY: A HUMAN RIGHTS FRAMEWORK

*Johanna Kalb**

I. INTRODUCTION

Prompted by the horrors of World War II, the General Assembly of the United Nations proclaimed the hortatory Universal Declaration of Human Rights (“UDHR”).¹ Among other guarantees, the UDHR speaks to the right to human dignity, promising that “[a]ll 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.”² In the years that followed the issuance of the UDHR, the notion of a protected right to personal dignity began to appear in the jurisprudence of state and federal courts in the United States. The United States Supreme Court has even adopted this term when discussing “the Eighth Amendment prohibition on cruel and unusual punishment; the Fourth Amendment protection against unlawful searches and seizures; the Fourteenth and Fifth Amendment rights to be free from discrimination, and the Ninth and Fourteenth Amendment rights to make one’s own decisions on procreation.”³ Dignity also

* Assistant Professor of Law, Loyola University New Orleans College of Law. Thanks to Martha Davis, Trey Drury, Davida Finger, Judith Resnik, Karen Sokol, and Reuben Teague for the conversations that informed my thinking in this essay. This project would not have been possible without the tireless research and editorial support of Geoff Sweeney.

¹ See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT* 38 (University of Pennsylvania Press 1999).

² Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at Art. 1 (Dec. 10, 1948).

³ Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1935 (2003). See *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (referencing personal dignity and privacy in a Fourth Amendment case); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (referring to dignity in a Fourteenth Amendment case); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (applying dignity to rights relating to marriage and family); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 532 n.6 (1979); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (applying human dignity to the Eighth Amendment); *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Trop v. Dulles*, 356 U.S. 86, 100 (1958). See also *Chimel v. California*, 395 U.S. 752 (1969).

appears in both the text of some state constitutions and, as I will explore more thoroughly below, in other non-constitutional state court jurisprudence.

In addition to its appearance in domestic litigation, the notion of a right to dignity has assumed a prominent role in many international human rights instruments enacted since the UDHR, as well as in the laws of other nations. For example, the importance of personal dignity appears frequently in the Convention on the Rights of Persons with Disabilities ("CRPD") and ties its signatories' commitment "to promote respect for the inherent dignity of all persons with disabilities"⁴ with their obligation to promote, among other things, access to education and healthcare.⁵ Dignity is emphasized in the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), which draws an explicit link between the UDHR's commitment to dignity⁶ and the Convention's goal of ending discrimination against women.⁷ The significance of human dignity is also emphasized in the constitutive documents of many countries, including Germany,⁸ South Africa,⁹ and Israel,¹⁰ and in several regional human rights instruments.¹¹

Interestingly, despite the parallel development of the dignity concept in the domestic and international realms, only rarely have they explicitly overlapped. That is, only on rare occasions have United States courts—state, federal, or territorial—considered international conceptions of "dignity," even those embodied in the

⁴ Convention on the Rights of Persons with Disabilities, G.A. Res. 67(b), U.N. Doc. A/RES/61/106, at (j) (Jan. 24, 2007) [hereinafter CRPD].

⁵ *Id.* arts. 24, 25.

⁶ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at Annex (Dec. 18, 1979) ("Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights . . .").

⁷ *Id.* ("Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity . . .").

⁸ See GRUNDGESETZ [GG] [CONSTITUTION] art. 1 (F.R.G.) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

⁹ See S. AFR. CONST. 1996, Bill of Rights § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected.").

¹⁰ See Basic Law: Human Dignity and Liberty, 1992, [CONSTITUTION] (Isr.).

¹¹ See, e.g., Charter of Fundamental Rights of the European Union, art. 1, 2000 O.J. (C 364) ("Human dignity is inviolable. It must be respected and protected."); American Declaration of the Rights and Duties of Man, Preamble, May 2, 1948, *available at* http://www.oas.org/DIL/access_to_information_human_right_American_Declaration_of_the_Rights_andDuties_of_Man.pdf. The conventions and other instruments of the Inter-American system are available at http://www.oas.org/dil/declaration_and_resolutions.htm. American Convention on Human Rights: "Pact of San José, Cosa Rica," arts. 5(2), 6(2), 11(1), Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

human rights instruments signed and ratified by the United States, when discussing the role that dignitary interests have to play in resolving the claims before them. In recent years, scholars and human rights advocates have sought to amplify this connection as part of a broader attempt to situate the resolution of domestic legal claims within an international human rights framework. Particular attention has been paid to the potential for using human rights principles to inform state constitutional interpretation, given the frequent parallels between the rights guaranteed in international instruments and the positive rights provisions in some state constitutions. Thus, scholars have argued for consideration of international standards when, for example, state courts are interpreting constitutional guarantees for welfare or education.¹²

The connection between international guarantees and domestic rights is particularly pronounced in the context of dignity claims because of their common source in the post-War discourse and in the founding documents of the United Nations. As Professor Vicki C. Jackson has explained, the dignity provisions in the constitutions of Montana and Puerto Rico draw both directly and indirectly from the text of UDHR for their foundational principles.¹³ Thus, she contends that “students of transnational human rights discourse would do well . . . to pay attention to the multiple fora for the development, diffusion, and articulation of foundational concepts of human dignity.”¹⁴

Although Professor Jackson focuses on state constitutional jurisprudence, her conclusion has broader implications. Even a cursory review of state court decisions demonstrates that dignity as a concept appears in many contexts in state jurisprudence, and that the recognition of a right to human dignity is widely accepted, if not well-defined and understood. This essay proposes a strategy for “litigating dignity,” not only in those states in which dignity is an explicit constitutional principle, but more broadly, drawing on the many cases in which dignity animates state court decisionmaking on a wide variety of statutory, administrative, and common law

¹² See Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 437–42 (2004); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights Law*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 372–74 (2006).

¹³ See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004).

¹⁴ *Id.* at 40.

claims. These references in state court opinions offer opportunities for advocates to situate their arguments within a broader human rights framework by connecting the courts' recognition of dignity and the concept's grounding within international human rights law. They thus allow advocates to bring human rights principles to bear on a wide variety of substantive legal claims that state courts have determined to be intrinsic to basic human dignity—even in the absence of a particular state constitutional provision—either as to the dignity principle or as to the substantive right at issue. This is not to suggest that courts themselves cannot simply look to comparative and international experience without the mediating influence of the recognized dignity concept. Rather, my contention is that the courts' recognition of a personal dignity right provides a channel for joining the ongoing parallel international and domestic discourses.

This essay proceeds in two parts. Part II traces the origins of dignity to highlight the historical connection that ties the international conceptions of this term with its domestic manifestations. It then documents the appearance of the dignity concept in state court jurisprudence to demonstrate the breadth of opportunity that litigating dignity presents. Part III considers how advocates could use the dignity concept as a channel through which to introduce a human rights-based framework into the consideration of a broad variety of substantive legal claims.

II. THE ORIGINS OF DIGNITY

Although references to human dignity now permeate state and federal case law, this was not always the case. Judith Resnik and Julie Suk reviewed nine hundred opinions of the United States Supreme Court in which the term “dignity” appears, and made the following findings:

During the eighteenth and nineteenth centuries, the Supreme Court mentioned the word ‘dignity’ only in terms of entities such as sovereigns and courts. Moving forward to the twentieth century, . . . the word becomes linked to persons. It was not until the 1940s—the decade of World War II and the Universal Declaration of Human Rights—that the Court embraced dignity as something possessed by individuals.¹⁵

¹⁵ Resnik & Suk, *supra* note 3, at 1934.

Resnik and Suk identify “[i]n such correlation . . . causation.”¹⁶ In other words, they claim that “dignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of nations, by transnational experiences, and by international legal documents.”¹⁷

Although their study focused on federal law, the appearance of the notion of personal dignity follows a similar timeline in state court jurisprudence. A Westlaw search for the terms “human dignity” or “personal dignity” yielded 2721 cases.¹⁸ The frequency of these citations appears to have increased dramatically in recent decades, which may be attributable in part to the increased availability of these decisions electronically. Over 2000 of these citations have occurred in opinions rendered since 1992.¹⁹ By contrast, only twenty-one of the decisions predate the Universal Declaration of Human Rights, and only seventeen predate the onset of World War II.²⁰

In the majority of the pre-war cases, the references are to the personal dignity of the judge.²¹ The term begins to be used in a broader variety of contexts in the late 1930s, sometimes in cases that explicitly make reference to world events. For example, in a New York case annulling a marriage for fraud based on the misrepresentation of the defendant-husband, a German citizen, that he had been naturalized as an American, the court engaged in a lengthy discussion of the events unfolding on the world stage in which “[h]uman dignity itself has been debased.”²²

Only a few years later, courts began to refer to an individual’s right to human dignity in his or her decisionmaking. In 1949, another New York court determined that “detain[ing] a [psychiatric] patient possibly for life to satisfy his wife’s objections to his release, would not seem in keeping with our belief in the right of the individual to personal dignity and freedom.”²³ In 1950, the Supreme Court of Georgia explained that “human dignity and

¹⁶ *Id.* at 1926.

¹⁷ *Id.*

¹⁸ The term “dignity” appears in 10,000 state cases on Westlaw, making a comprehensive study exceedingly difficult.

¹⁹ The precise number of cases is 2035.

²⁰ World War II commenced in 1939, while the Universal Declaration of Human Right was adopted in 1948.

²¹ *See, e.g.*, *Haines v. Dist. Court of Polk Cnty.*, 202 N.W. 268, 270 (Iowa 1925) (discussing the purpose of the contempt power).

²² *Laage v. Laage*, 26 N.Y.S.2d 874, 878 (Sup. Ct. 1941).

²³ *People ex rel. Eskenazi v. Corcoran*, 89 N.Y.S.2d 769, 772 (Sup. Ct. 1949).

individual freedom demand that one engaged in a lawful business injurious to no one must not be arbitrarily prevented from the legitimate prosecution of his business by [anti-competitive] city ordinances,"²⁴ and proceeded to void a city ordinance prohibiting the sale of milk not pasteurized within the county.²⁵

A sampling of the cases referencing personal or human dignity suggests that they fall generally into three categories. First, and most commonly, the term appears in constitutional interpretation. The case law of the Montana and Puerto Rican courts is most often discussed in this regard, as their constitutions explicitly protect a dignitary interest. The dignity clause in these constitutions has been invoked in cases relating to, inter alia, prison conditions,²⁶ the right to die,²⁷ workplace discrimination,²⁸ and the recognition of same-sex partnerships.²⁹

However, even in the vast majority of states that do not recognize dignity as an explicit constitutional principle, the term has entered the constitutional discourse. Sometimes state courts are presented with a question of federal constitutional law in an area in which the Supreme Court has previously acknowledged a dignitary interest. In *People v. Stevens*, the California Supreme Court rejected a federal due process challenge to the validity of a criminal trial holding that, "[t]he presence of a deputy [standing near a criminal defendant during trial] does not directly impair the accused's mobility, nor does it create the affront to human dignity that we have lamented in the context of visible shackles."³⁰ In other cases, the state courts have independently incorporated a concern for individual dignity into the interpretation of their own constitutional provisions. For example, California, Kansas, and West Virginia test the constitutional validity of criminal punishment by considering whether it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."³¹

²⁴ *Moultrie Milk Shed, Inc. v. City of Cairo*, 57 S.E.2d 199, 202 (Ga. 1950).

²⁵ *Id.* at 203.

²⁶ *Wilson v. State*, 2010 MT 278, ¶ 31 (Mont. 2010).

²⁷ *Baxter v. State*, 224 P.3d 1211, 1214 (Mont. 2009).

²⁸ *Colón v. Centro Grafico del Caribe, Inc.*, 98 T.S.P.R. 20 (P.R. 1998).

²⁹ *Kulstad v. Maniaci*, 220 P.2d 595, 611 (Mont. 2009) (Nelson J., concurring).

³⁰ *People v. Stevens*, 218 P.3d 272, 282 (Cal. 2009).

³¹ *State v. Gomez*, 235 P.3d 1203, 1210 (Kan. 2010) (quoting *State v. Freeman*, 574 P.2d 950, 956 (Kan. 1978)) (considering whether a life sentence violates section 9 of the Kansas constitution); *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972). See also *State v. Booth*, 685 S.E.2d 701, 708 (W. Va. 2009).

The second way in which dignity arguments appear in state court decisions is through the actions of state legislatures and administrative agencies. In these instances, the courts are asked to evaluate a challenged public or private action against a statutory or administrative standard that explicitly lists the protection or promotion of human dignity as one of its goals. In some cases, the dignity concept appears to be quite pivotal to the holding. For example, in *Lewis v. Harris*, the Supreme Court of New Jersey relied on the language of the state Domestic Partnership Act, emphasizing the relationship between access to the benefits of marriage and the possession of “basic human dignity and autonomy”³² in holding that there was no rational basis for denying committed same-sex couples the full array of state benefits awarded to married couples.³³

In other instances, the legislative emphasis on personal dignity seems less central to the holding, but animates the more specific statutory inquiry. In *State v. Delaoz*, the Vermont Supreme Court considered the legislative purpose behind the state’s indeterminate sentencing law before striking down the defendant’s sentence (imposing a minimum term of four years and eleven months, and a maximum term of five years) as a prohibited “fixed term.”³⁴ The indeterminate sentencing law provides that the department of corrections “shall have the purpose of developing and administering a correctional program designed to . . . render treatment to offenders with the goal of achieving their successful return and participation as citizens of the state and community; to foster their human dignity and to preserve the human resources of the community.”³⁵ The court concluded that the sentence given in this case was “so small as to effectively amount to a circumvention of the indeterminate sentence law” and of its rehabilitative purpose.³⁶

The final set of dignity references in state law are difficult to categorize. In these cases, the court raises the concept in support of the correctness of its holding, but generally without explanation or

³² *Lewis v. Harris*, 908 A.2d 196, 215 (N.J. 2006) (describing that for same-sex couples, “to have access to these rights and benefits is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy”) (citing N.J. STAT. ANN. § 26:8A-2(d) (West 2007)).

³³ *Id.* at 217. The Court questioned “how withholding the remaining ‘rights and benefits’ from committed same-sex couples is compatible with a ‘reasonable conception of basic human dignity and autonomy.’” *Id.*

³⁴ *State v. Delaoz*, 2010 VT 65, ¶¶ 40–42, 2010 WL 2795084 (Vt. 2010).

³⁵ VT. STAT. ANN. tit. 28, § 1(a) (2008).

³⁶ *Delaoz*, 2010 VT 65, ¶ 44.

citation. Thus, the function served by the notion of dignity in these cases is somewhat unclear. A Texas court concludes its opinion upholding the termination of a father's parental rights by noting that "a child's right to basic human dignity and necessity is no less a right under the law" than a parent's right to raise his own child.³⁷ A California court takes a broad view of the rights guaranteed under the Federal Americans with Disabilities Act because doing so "allows the ADA to enhance self-autonomy and human dignity in day to day living."³⁸ Two dissenting justices in Mississippi critique the court's decision to grant immunity to nursing home administrators and licensees as providing "legal cover for those responsible for ensuring the health, safety, and basic human dignity of the aged and infirm."³⁹ Although presented differently in each instance, the concept of dignity appears to be invoked in order to contextualize and emphasize the significance of the immediate issue confronting the court. And the underlying assumption of these references appears to be to a shared understanding or value—the right to human dignity.

III. LITIGATING DIGNITY

The right to personal dignity is widely acknowledged in state court decisions in a variety of substantive areas. Rarely, however, is any content given to the term; nor is it clear how consideration of the right to personal dignity influences the court's reasoning on a particular issue. The peculiar combination of a well-recognized concept lacking in explicit substantive content presents an opportunity for advocates to contextualize certain legal issues within a human rights framework by harnessing the international and transnational sources of the personal dignity right.

Notable decisions linking the dignity concept with its international roots demonstrate the effectiveness of using it to frame a substantive issue before the court. In *Sterling v. Cupp*, the Oregon Supreme Court was asked to determine whether the practice of cross-gender patdowns of prisoners violated the state constitution prohibition on treating prisoners with "unnecessary rigor."⁴⁰ Writing for the court, Justice Linde noted that there are

³⁷ *In re V.V.*, No. 01-08-00345-CV, 2010 WL 2991241, at *1 (Tex. App. 1st July 29, 2010).

³⁸ *Nicholls v. Holiday Panay Marina, L.P.*, 93 Cal. Rptr.3d 309, 311 (Ct. App. 2d 2009).

³⁹ *Howard v. Estate of Harper ex rel. Harper*, 947 So. 2d 854, 862 (Miss. 2006) (Diaz J., dissenting).

⁴⁰ *Sterling v. Cupp*, 625 P.2d 123, 130 (Or. 1981); see also OR. CONST. art. I, § 13.

“numerous and pervasive conditions intrinsic to the life of prisoners to which persons who have not forfeited their liberty would not willingly submit,”⁴¹ but framed the prisoners’ objections as “to the imposition of a needless indignity, to an invasion of [their] residuum of personal dignity that is an imposition insofar as it goes beyond recognized necessity.”⁴² He went on to explain “that even convicted prisoners retain claims to personal dignity”⁴³ and noted the explicit connection between humane punishment, bodily integrity, and personal dignity that is found in many national prison standards, as well as in a number of international law sources.⁴⁴ He concluded that due to their intimate nature, routine cross-gender patdowns are unconstitutional unless justified by necessity.⁴⁵

Sterling demonstrates that even in the absence of an explicit constitutional provision, the notion of personal dignity can act as a significant restraint on governmental action.⁴⁶ Moreover, it demonstrates how an international human rights framework can contribute to conceptualizing what this barrier looks like. Justice Linde relies on the international law sources to bolster his claim that prisoners retain a right to personal dignity. He tracks the personal dignity concept from the UDHR to the International Covenant on Civil and Political Rights, which requires “[a]ll persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person,”⁴⁷ and explains how this norm was then adopted into a number of international and regional human rights instruments.⁴⁸ By incorporating recognition of prisoners’ protected rights to personal dignity into the prohibition on unnecessary rigor, the court extended the constitutional protection beyond “such historically ‘rigorous’ practices as shackles, the ball and chain, or to physically

⁴¹ *Cupp*, 625 P.2d at 130.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 130–32.

⁴⁵ *Id.* at 136.

⁴⁶ Of course, it has performed a similar role in the federal context, for example as a restriction on governmental intrusions on privacy and on the kinds of punishments that the government may impose. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966) (noting that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State”); *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (characterizing certain inhumane and dangerous conditions by which a prisoner was restrained as “antithetical to human dignity,” and thus violative of the Eighth Amendment’s prohibition against cruel and unusual punishment).

⁴⁷ *Cupp*, 625 P.2d at 131 n.21 (emphasis omitted).

⁴⁸ See *id.*

brutal treatment or conditions," to encompass a broader understanding of injury.⁴⁹

The concept of personal dignity may also work to create a positive obligation. A California court's decision in *Boehm v. Superior Court* provides another example of how the concept of dignity can act as a bridge between the substantive question before a court and the human rights framework.⁵⁰ In *Boehm*, recipients of general assistance welfare payments sought to prevent their county's reduction of these payments. The court explained that the statutory provisions governing the public assistance program required the provision of "benefits necessary for basic survival."⁵¹ The court then determined that this level of "[m]inimum subsistence . . . must include allocations for housing, food, utilities, clothing, transportation, and medical care," citing in support of this decision the methodology used by the state in determining costs of living for poor families and precedent of the Supreme Court of California describing these expenditures as essentials.⁵² The court went on to quote from the UDHR's provision guaranteeing every person the right to an adequate standard of living, and then noted that:

it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation and medical care. Such allowances are essential and necessary to "encourage self-respect and self-reliance . . . in a humane manner consistent with modern standards." Without a clothing allowance, recipients must wear tattered clothing and worn out shoes. The lack of adequate and decent clothing and essential transportation is damaging both to recipients' self-respect and their ability to obtain employment. Finally to leave recipients without minimum medical assistance is inhumane and shocking to the conscience.⁵³

The *Boehm* court relies on the concept of personal dignity to help connect the guarantees of the UDHR to the statutory definition of minimum subsistence. By framing the harm of deprivation as partially a dignitary one, the court successfully links the state law

⁴⁹ *Id.* at 129.

⁵⁰ *Boehm v. Superior Court*, 223 Cal. Rptr. 716 (1986), *superseded by statute*, CAL. WELF. & INST. CODE § 17000.5 (West 2001), *as recognized in* *Hunt v. Superior Court*, 987 P.2d 705, 711 (Cal. 1999).

⁵¹ *Boehm*, 223 Cal. Rptr. at 720.

⁵² *Id.*

⁵³ *Id.* at 72. (citation omitted).

provision to a broader human rights framework, thereby promoting a more robust understanding of what benefits are necessary for basic survival.

These two examples are demonstrative of how advocates could advance human rights-based dignitary claims in a variety of substantive contexts. Of course, state courts could—as others have suggested—simply draw upon relevant comparative and international experience without injecting the mediating influence of a dignity claim. My argument here is that the additional value of “litigating dignity” is two-fold. First, the shared historical root of the personal dignity concept in key international human rights instruments offers further justification for referencing international and comparative law sources when considering how the right to personal dignity impacts United States courts’ consideration of a particular substantive right. By making this connection explicit, advocates can help provide content for a well-recognized norm in a way that may seem more legitimate, or at least more relevant. Second, the introduction of dignity to the calculus will promote discussion (and hopefully consideration) of the broader implications of narrow issues confronting the courts. This in turn allows for parallels to be drawn between the issue presented and the human rights principles to which the United States has committed. In other words, it helps advocates highlight the fundamental importance of what may otherwise seem to be mundane questions of common law development or statutory interpretation.

How would this work in practice? Advocates should first look to see where and when a right to personal dignity is recognized in the relevant state’s statutory and common law. The New Jersey Legislature has, for example, recognized the dignitary interests of, *inter alia*, the elderly, persons with disabilities,⁵⁴ patients in psychiatric facilities,⁵⁵ and the dying.⁵⁶ Assume the parents of a disabled adult wish to challenge the process by which their son’s placement in a state facility was determined as insufficiently open to participation by the institutionalized person and his guardians.⁵⁷

⁵⁴ See, e.g., N.J. STAT. ANN. 26:2Y-10 (West 2007) (“A client of an adult family care home . . . has the right to: (1) be treated as an adult, with respect, dignity, courtesy and consideration . . .”).

⁵⁵ N.J. STAT. ANN. 30:4-27.11d (West 2008).

⁵⁶ See, e.g., N.J. STAT. ANN. 26:2H-54 (West 2007) (“This State recognizes the inherent dignity and value of human life and within this context recognizes the fundamental right of individuals to make health care decisions to have life-prolonging medical or surgical means or procedures provided, withheld, or withdrawn.”).

⁵⁷ This case was heard by the New Jersey Supreme Court in 1993. See *J.E. ex rel. G.E. v.*

Under the approach outlined here, their lawyer⁵⁸ would highlight the significance placed on the protection of the dignity of disabled individuals by the state legislature and the connection the legislature has drawn between individual dignity and the disabled person's right to placement in "the least restrictive conditions necessary to achieve the purposes of treatment."⁵⁹ The lawyer would then note the historical roots of the concept of personal dignity (now well-established in New Jersey law) in the language of the UDHR and the development of this concept in the CRPD, which lists as its purpose the "promot[ion] [of] respect for [the] inherent dignity" of the disabled.⁶⁰ The advocate could then point to the CRPD's specific commitments towards realizing this objective—the most relevant of which include ensuring that disabled persons are not deprived of their liberty arbitrarily,⁶¹ that they are able to live independently and participate fully in all aspects of life, and that they receive the support they may require in exercising their legal capacity⁶²—to argue that full participation in these placement decisions is core to a reasonable conception of human dignity. As in *Sterling*⁶³ and *Boehm*,⁶⁴ the tactical goal would be to frame the dispute about a particular challenged practice within the broader context of the disabled individual's claim to personal dignity under international human rights law.

Of course both of these cases are now of somewhat older vintage. As the adoption of the UDHR and several other major human rights instruments has become more distant (and as the political climate has become more hostile),⁶⁵ judges and justices may be less aware of (or less willing to consider) the relationship between domestic, international, and comparative sources in defining basic human rights. Nonetheless, this should not discourage advocates from the

Dept. of Human Services, 622 A.2d 227 (1993).

⁵⁸ Or perhaps the author of an amicus brief, given space limitations.

⁵⁹ N.J. STAT. ANN. § 30:4-24.2(e)(2) (2011).

⁶⁰ See CRPD, *supra* note 4, at 4.

⁶¹ *Id.* at 10.

⁶² *Id.* at 9.

⁶³ See generally *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981) (using the concept of human dignity in the prisoner treatment context).

⁶⁴ See generally *Boehm v. Superior Court*, 223 Cal. Rptr. 716 (1986), *superseded by statute*, CAL. WELF. & INST. CODE § 17000.5 (West 2001), *as recognized in* *Hunt v. Superior Court*, 987 P.2d 705, 711 (Cal. 1999).

⁶⁵ The most recent manifestation of this hostility has come in the form of legislative and other efforts to ban the use of international or comparative law by state court judges and justices. See Martha F. Davis & Johanna Kalb, *Oklahoma State Question 755 and An Analysis of Anti-International Law Initiatives*, AM. CONST. SOC'Y, 1–3, (Jan. 2011), available at http://www.acslaw.org/files/Davis%20and%20Kalb_Anti-International%20Law.pdf.

strategic use of these sources in their advocacy. Even if these sources never appear in the court's decision, which based on current trends seems likely,⁶⁶ situating the substantive question within a human rights framework may help define the relevant issues presented to the court in a manner that ultimately has positive effects. In other words, the dignity reference would act as a "norm portal" for incorporating the human rights norms embodied in the UDHR and other treaty instruments into domestic jurisprudence. Professor Margaret McGuinness, who coined the term, uses it to:

describe any *horizontal gateway that allows, through a formal procedural mechanism or substantive right, the importation of external norms in a legal system*. A norm portal represents an alternative pathway for international human rights norms to enter a legal system. Where those norms may not otherwise be enforceable through traditional vertical adjudicatory processes, . . . the norm portal permits those norms to seep into the legal system, forcing mediation between the external norm and the domestic standard.⁶⁷

Thus, I contend that the advancement of these types of arguments has inherent value, even if the reasoning is unlikely to be replicated in the court's decision. By modifying the court's analytical framework, it is forced to engage with external norms in ways that may ultimately influence its decision.

IV. CONCLUSION

Much has been written about the sources and content of the right to personal dignity.⁶⁸ Nonetheless, as a practical matter, when it is invoked in state jurisprudence, it often stands alone. Giving

⁶⁶ See Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN STATE L. REV. (forthcoming 2011) (on file with author).

⁶⁷ Margaret McGuinness, *Medellín, Norm Portals, and the Horizontal Integration of Human Rights*, 82 NOTRE DAME L. REV. 755, 760 (2006).

⁶⁸ See, e.g., Arthur Chasakalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 133, 134 (David Kretzmer & Eckert Klein, eds., 2002) ("In a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner."); Matthias Mahlmann, *The Basic Law at 60—Human Dignity and the Culture of Republicanism*, 11 GERMAN L.J. 9, 13–17 (2010) (discussing the development of the concept of human dignity in antiquity and its roots in world religions); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202–04 (2008) (discussing how the value-based model of human dignity in European constitutionalism does not translate to rights-based American constitutionalism).

content to “dignity” could increase the role it plays in informing a court’s decisionmaking and, given its roots in international human rights law, advocates should refer courts back to this source for suggestions as to its development. Although unlikely to effect an immediate change in the language of judicial opinions, adopting this framework may subtly begin to impact our collective understanding of what is at stake.