# DIGNITY – THE ENEMY FROM WITHIN: A THEORETICAL AND COMPARATIVE ANALYSIS OF HUMAN DIGNITY AS A FREE SPEECH JUSTIFICATION

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## ABSTRACT

The manuscript challenges the use of human dignity as an independent free speech justification. The articulation of free speech in human dignity terms carries unwarranted potential consequences that may result in limiting free speech rather than protecting it. This possible outcome makes human dignity inadequate as a free speech justification.

The manuscript also demonstrates why articulations of the rationales behind the "argument from dignity" are either superfluous, since they are aptly covered by the "argument from autonomy," or simply too broad and speech-restrictive to be considered a free speech justification. As a matter of principle, the nexus between freedom of speech and human dignity should be construed as inherently contentious.

The manuscript combines theoretical and comparative analyses to demonstrate why European, and other western democracies are more susceptible to the use of human dignity, both in their constitutional doctrines and as a speech-restrictive term. Current American scholarship regarding dignity as a free speech justification neglects to recognize the harms of such discourse in a non-American setting, as well as in the United States. Thus, unintentionally, advocates of free speech may actually promote a justification that eventually will lead to its restriction. For these reasons, the manuscript warns that inserting human dignity into the realm of free speech justifications may be analogous to inserting a "Trojan Horse," with human dignity as "the enemy from within."


## INTRODUCTION

In recent years, human dignity has increasingly become a prevailing justification both for the protection and limitation of human rights internationally.[1] At the same time, vagueness surrounds human dignity and its different possible interpretations, even in context-specific legal settings. While human dignity plays a limited role in the American legal system, its potency, influence, and even its literal meaning is far greater in other democracies.[2] In

[1] Human dignity appears in prominent international documents and treaties, as well as in an increasing number of foreign constitutions as a fundamental right. *See* Jochen Abr. Frowein, *Human Dignity in International Law*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 121 (David Kretzmer & Eckart Klein eds., 2002); Georg Nolte, *European and U.S. Constitutionalism: Comparing Essential Elements*, *in* EUROPEAN AND US CONSTITUTIONALISM 9 (Georg Nolte ed., Cambridge Univ. Press 2005).

[2] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; RONALD DWORKIN, FREEDOM'S LAW (1996); Walter F. Murphy, *Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Jordan J. Paust, *Human Dignity as a*

those countries, human dignity often encompasses values such as equality, and serves as a platform to promote progressive liberal or communitarian ideas.[3] Human dignity's increasing influence leads to a growing tendency to evaluate rights, including freedom of expression, through its lens.

The relationship between freedom of speech and human dignity is vague, ambiguous, and has not been sufficiently explored to date. Often the two conflict, and a proper balance between them is difficult to reach, as human dignity may be used as a justification for both protecting speech and restricting it. The goal of this analysis is to show the inadequacy of human dignity as an independent justification for free speech, and that it is preferable to view it and freedom of speech as contending rather than harmonious values. This manuscript offers a theoretical analysis regarding the incompatibility of human dignity as an independent justification for freedom of expression, and demonstrates how some western legal systems' nearly exclusive focus on human dignity may prove unsatisfactory when dealing with free speech issues.

The first segment reviews the evolution of freedom of expression in the United States in comparison with other western democracies. The second segment briefly reviews common justifications for freedom of expression through the "classical model" for free speech. This serves as background for the third segment, which assesses the appropriateness of human dignity as an independent free speech justification. This segment offers several parameters that assist in predicting whether a nation's human dignity focus is likely to justify protecting speech or restricting it. These parameters are then applied to the United States and other western democracies to demonstrate why, in the United States, human dignity is likely to be construed as protecting free speech, whereas in other western democracies, human dignity is likely to be construed as restricting speech. Finally, due to the problematic nexus of human dignity and freedom of expression from both a theoretical and a comparative standpoint, driving a wedge between the two is recommended.

## I. THE EVOLUTION OF FREEDOM OF EXPRESSION IN THE UNITED STATES IN COMPARISON TO OTHER WESTERN DEMOCRACIES

Freedom of Expression is one of the most universally prominent rights, if not the most prominent right, in all democratic legal systems. Although the

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*Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145 (1984); James Q. Whitman, *"Human Dignity" in Europe and the United States: The Social Foundation*, *in* EUROPEAN AND US CONSTITUTIONALISM 95 (Georg Nolte ed., Cambridge Univ. Press, 2005).

[3] *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 298 *passim* (2nd ed. 1997); David Kretzmer, *Human Dignity in Israeli Jurisprudence*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 161 (David Kretzmer & Eckart Klein eds., 2002).

protection of freedom of expression was not developed in most western democracies fifty or even thirty years ago, most democracies have started developing protective freedom of expression jurisprudence in the past ten to twenty-five years.[4] Currently, freedom of expression is considered a prominent right among virtually all western democracies, yet its scale and scope varies among different systems. The United States is probably the most protective of (most)[5] speech rights among western democracies – a phenomenon that receives the label "American Exceptionalism."[6]

Free expression rights are initially structured in accordance with nations' common conceptions of those rights, as well as the durability of nations' derived rules to withstand change over time. In the United States, freedom of expression doctrines crystallized long before other western democracies. The First Amendment was drafted and ratified more than two centuries ago, and although a small portion of its development happened in the nineteenth century,[7] most of its development by the Supreme Court began in the early twentieth century.[8] The roots of the First Amendment and its understandings are planted in libertarianism and the Enlightenment.[9] These characteristics are also manifested in the

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[4] *See* Fredrick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM 47, 53-56 (Georg Nolte ed., Council of Europe Publishing 2005) [hereinafter Schauer, *Freedom of Expression Adjudication*].

[5] *See, e.g.*, Roger Errera, *Freedom of Speech in Europe and in the USA*, *in* EUROPEAN AND US CONSTITUTIONALISM 25, 43-44 (Georg Nolte ed., Council of Europe Publishing 2005) (regarding the issue of the protection of journalists' sources as an exception to this rule).

[6] To be precise, the phenomenon of "American Exceptionalism" is broader concept than just regarding freedom of expression, and refers to the major themes in which the United States diverges from most western democracies, such as the death penalty, compliance with some international law norms, etc. *See generally* Fredrick Schauer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005) [hereinafter Schauer, *The Exceptional First Amendment*].

[7] *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); JUHANI RUDANKO, THE FORGING OF FREEDOM OF SPEECH: ESSAYS ON ARGUMENTATION IN CONGRESSIONAL DEBATES ON THE BILL OF RIGHTS AND ON THE SEDITION ACT (2003).

[8] The modern era of freedom of expression adjudication in the Supreme Court is commonly considered to begin with a series of important 1919 cases, such as Schenk v. Unites States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); and Debs v. United States, 249 U.S. 211 (1919). *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 54.

[9] *See* LEE BOLLINGER, THE TOLERANT SOCIETY 44-45 (1998) ("The classical vision of free speech has antecedents stretching far back in time. The primary connection is with the period of Enlightenment, in the eighteenth century, when the interest and faith in man's powers and reason flourished and when there occurred that enormously important revolution in the way people conceived of the relationship between the state and the individual members of society. Two cardinal premises about social organizations arose from this transformation in thought: first, that the government is possessed of only limited political powers, which it derives from the citizenry; second, that the people themselves, as the ultimate sovereign, are competent to determine their own destiny."). *Id*.

"Absolutist view" of the First Amendment – a view which currently dominates First Amendment understandings.[10] The founding fathers' Lockeian influences and their libertarian perception of rights have affected general perceptions of rights in the United States, particularly freedom of expression.[11]

The formative years of First Amendment jurisprudence by the Supreme Court occurred during the Lochner Era,[12] as well as during the early New Deal period.[13] The durability of the First Amendment rules formed during these years allowed them to withstand influences and trends that were incompatible with the "Lochnerian paradigm."[14] Although the Court seemed to be more susceptible to progressive liberal notions towards the middle of the twentieth century, at least in certain free speech contexts,[15] these trends did not last.[16] For the most part, the few minor influences that may be ascribed to this period have been later overruled or lost much of their stamina. For instance, several non-libertarian trends in the 1950s-1960s that were articulated, for example, in *Chaplinsky*,[17] were later abandoned and marginalized by the Burger Court rulings. Thus, in

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[10] *See* Guy E. Carmi, *Comparative Notions of Fairness: Comparative Perspectives on the Fairness Doctrine With Special Emphasis on Israel and the United States*, 4 VA. SPORTS & ENT. L.J. 275, 291-92 (2005).

[11] This is somewhat of a generalization, since progressive liberal thought regarding the First Amendment existed in early periods. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 211-47 (1997); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951 (1996). Nonetheless, this claim that the foundations of the First Amendment are libertarian is an appropriate portrayal. It does not mean, however, that other non-libertarian accounts of freedom of expression are incorrect, or that an originalist interpretation would yield only a libertarian outcome. *Cf*. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

[12] *See* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 31 n.4. *Cf*. ROBERT POST, CONSTITUTIONAL DOMAINS 8-10 (1995) (claiming that the Court has redefined its understandings of the First Amendment since the New Deal Era and that "as a consequence the First Amendment was fundamentally reinterpreted along democratic lines."). *Id*. at 9. I agree with this observation, yet the libertarian instincts (as opposed to property related instincts that also characterized the Lochner Era) with regards to the First Amendment remain unchanged since the early free speech rulings in the Lochner Era.

[13] The Court has continued its line of protective free speech rulings, even in the context of protecting labor unions' speech, especially in a series of rulings in 1937. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937).

[14] The resilience of First Amendment jurisprudence in the United States derives in large part from its rule-based characterization. *Cf.* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 54-56.

[15] *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding group defamation legislation); Red Lion v. FCC, 395 U.S. 367 (1969) (upholding the constitutionality of the fairness doctrine).

[16] *See, e.g.*, Carmi, *supra* note 10, at 287-96.

[17] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (creating the "fighting words doctrine."). Also *cf*. Bridges v. California, 314 U.S. 252 (1941).

*Cohen*[18] and subsequent cases,[19] American free expression doctrines, such as the fighting words doctrine, became more libertarian.[20]

Current First Amendment jurisprudence may be generally characterized as derived from classical libertarian understandings of a negative and a "modest" right. The *laissez faire* approach to freedom of expression in the United States still reigns, and a positive right approach is rejected.[21] Because this basic jurisprudence evolved during a libertarian era, and since freedom of expression is a relatively "old" right, it is normally classified as a "liberty" kind of right, although a free speech principle must be distinct from a principle of general liberty.[22] In fact, freedom of expression is often referred to as "the liberty of speech." Freedom of speech seems to receive a heightened protection *vis-à-vis* other rights, and justifications strong enough for general restrictions on liberty may not be sufficient to restrict speech.[23] This characteristic is universal, yet is more evident in the American legal system, whose freedom of expression protection stands out from that found in other western democracies.[24] This core

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[18] Cohen v. California, 403 U.S. 15 (1971) (ruling that a shirt with the inscription "Fuck the Draft" is protected speech, and does not constitute "fighting words").

[19] *See, e.g.*, Brown v. Oklahoma, 408 U.S. 913 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. New Orleans, 415 U.S. 130 (1974); Rosenfeld v. New Jersey, 408 U.S. 910 (1972); Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 635, n.26 (1985).

[20] *Cf.* Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 635-36 (1985) ("Following *Cohen*, the Court applied this new libertarian approach to fighting words cases."). *See also* discussion *infra* in Part III.B.2.c.

[21] *See* Susan Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 339 (1998) [hereinafter Brison, *Autonomy Defense*] (quoting Aaron Director as saying that "free speech [is] the only area where laissez faire is still respectable.").

[22] *Cf.* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 7-8 (1984) [hereinafter SCHAUER, PHILOSOPHICAL INQUIRY], Kent Greenawalt, *Free Speech Justifications*, 80 COLUM. L. REV. 119, 121-23 (1989) [hereinafter Greenawalt, *Free Speech Justifications*]. Nonetheless, the core of freedom of expression's classical understandings is heavily linked to the conceptions of liberty. For elaboration on classical negative rights see discussion in *infra* Part III.B.2.c.

[23] *See, e.g.*, Brison, *Autonomy Defense*, *supra* note 21, at 320; KENT GREENAWALT, FIGHTING WORDS 3 (1996) [hereinafter GREENAWALT, FIGHTING WORDS]; Greenawalt, *Free Speech Justifications, supra* note 22, at 120.

[24] For elaboration on the phenomenon of American Exceptionalism in the realm of free speech see Schauer, *The Exceptional First Amendment*, *supra* note 6, Yet it should be noted that American constitutional law provides additional protections of individual liberties not found in other European countries. For example, criminal procedures such as the fruit of the poisonous tree doctrine do not exist in European countries, nor does a right to a jury trial or other civil rights. *See, e.g.*, Mohammed Saif-Alden Wattad, *Did God say, 'You shall not eat of any tree of the garden?' Rethinking the "Fruits of the Poisonous Tree" in Israeli Constitutional Law* OXFORD U. COMP. L. F. 4, (2005), *available at* http://www.ouclf.iuscomp.org. Therefore, since these rights are better protected in the U.S., even if European countries provide a relatively robust protection to freedom of expression *vis-à-vis* other rights, American Exceptionalism in free speech protection most likely does not stem from a degradation of freedom of expression as

classical understanding of freedom of expression may require some non-liberty considerations to *camouflage* as liberty-related so to justify their use in this "liberty" kind of right. This may explain why considerations from another order (i.e. human dignity) use "liberty" terminology such as autonomy, or classify the use of human dignity as "dignity-based liberalism.[25]"

Rule-based First Amendment jurisprudence has generally been successful in delimiting the types of admissible arguments when it comes to free speech. These rules stabilize constitutional discourse and applicable terminology in the realm of free speech.[26] Therefore, the understandings that are attached to the First Amendment and its jurisprudence became rule-based, and to a great extent fixed,[27] at a time when other perceptions of rights, particularly human dignity,[28] either did not exist or were not substantiated enough to claim the lead.[29]

In contrast to the United States, freedom of expression jurisprudence in most western democracies began evolving in the past ten to twenty-five years.[30]

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opposed to other rights in other democracies. In other words, if we look at protection of other rights as a threshold from which the protection of freedom of expression should be elevated, then *all* western democracies follow this line of free speech protection, at least to a certain extent.

[25] *Cf.* EDWARD J. EBRELE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES xii (2002) [hereinafter EBRELE].

[26] For elaboration on the rule-based see Schauer, *The Exceptional First Amendment, supra* note 6, at 55-56; Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1312-16 (2002); David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 55 HASTINGS L.J. 829, 841 (1993).

[27] This rule-based characteristic of First Amendment jurisprudence is a "managerial argument" that may explain why doctrinal change in the United States occurs more slowly than in other western democracies. *Stare decisis* serves as a buffer that moderates change and promotes stability. This relatively slower change in the American constitutional jurisprudence *vis-à-vis* other western democracies may be yet another explanation for American Exceptionalism. The non-rule-based constitutional jurisprudence that characterizes western democracies facilitates more frequent discussions regarding the "balancing" of different rights albeit *stare decisis* plays a role in these systems as well. It seems the American system prefers stability on constant debate regarding its values, when compared to other legal systems. *See* ROBERT POST, CONSTITUTIONAL DOMAINS 4-6 (1995).

[28] As elaborated below, human dignity has emerged as a constitutional concept primarily at the end of World War II, in the middle of the twentieth century. By then, much of the First Amendment jurisprudence had been outlined and crystallized. S*ee infra* note 34 and accompanying text.

[29] For example, ideas that were promoted by scholars such as David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942) and adopted by the Supreme Court in Beauharnais v. Illinois, 343 U.S. 250 (1952) were later rejected in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). *See* Robert M. O'Neil, *Rights in Conflict: The First Amendment's Third Century*, 65 LAW & CONTEMP. PROBS. 7, 23-26 (2002).

[30] *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 54. Although the United Kingdom, for example, had a relatively robust free speech protection, their free speech doctrines were not as developed as their American counterpart. In particular, the lack of judicial review restricted the remedies in free speech cases. *See generally* DAVID STREET, FREEDOM, THE

During this period, the more "fashionable" rights in Europe had a non-libertarian character.[31] Social and positive rights were increasingly recognized in western countries, many of which even defined themselves as welfare states. In addition, during the same period, scholarly writings reframed problematic speech, such as hate speech and pornography, in terms of inequality, rather than regulation of civility and morality.[32] Therefore, when some non-American courts dealt with these kinds of speech, they viewed them differently from American courts in the sixties. This may partially explain substantial differences in free expression jurisprudence that divide the United States from the majority of western democracies, including most European States, Canada, New Zealand, and Australia.[33]

Furthermore, post World War II European human rights discourse, which introduced human dignity as a central constitutional value and pivotal right, is founded upon different philosophical heritages. These include Hegelian, Kantian, and even theological Judeo-Christian perceptions of rights.[34] Although there is no consensus as to both the origins and the present conception of human dignity, its most prevalent understandings are non-libertarian, as opposed to the American Lockeian tradition.

Freedom of expression in western democracies is viewed as an integral part of general constitutional law, whereas in the United States it is perceived as a more independent field. Therefore, general constitutional doctrines affect freedom of expression doctrines in most western democracies to a greater extent than they do in the United States. For example, in most western democracies, freedom of expression may be also considered as a "positive right," rather than merely a libertarian negative right, as in the United States.[35] Also, the distinction between the public and private spheres plays a significant role in determining some free speech doctrines, such as the regulation of media.[36]

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INDIVIDUAL, AND THE LAW (1963).

[31] *Cf.* Winfried Brugger, *Comment*, *in* EUROPEAN AND US CONSTITUTIONALISM 69, 72-74 (Georg Nolte ed., Council of Europe Publishing 2005).

[32] *See, e.g.*, the writings of Andrea Dworkin and Catherine MacKinnon; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[33] It appears that the comparative argument, according to which the United States should align with the other western democracies and restrict radical speech, is generally unpersuasive in the American context. *Cf.* Brison, *Autonomy Defense*, *supra* note 21, at 339 (1998); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

[34] *Cf.* Brugger, *supra* note 31, at 72-74; Winfried Brugger, *Communitarianism as the Social and Legal Theory behind the German Constitution*, 2 INT'L J. CONST. L. 431 (2004). Also, see, for example, Dietrich Ritschl, *Can Ethical Maxims be Derived From Theological Concepts of Human Dignity*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 87 (David Kretzmer & Eckart Klein eds., 2002).

[35] *See* Carmi, *supra* note 10, at 300-05.

[36] *See id.* at 286 and *passim*. *See also* Eric Barendt, *The First Amendment and the Media*, *in*

Because of their relatively young ages, free expression doctrines in other western democracies are still undergoing formative processes. They are less restrained by existing doctrine, and, unlike the United States, their free expression doctrines may be characterized as non-rule-based.[37] Instead, these countries frequently utilize concepts of "balancing" and "proportionality." In particular, freedom of speech is balanced with other values, rights, and interests.[38] Among these values and rights, human dignity surfaces prominently in many western democracies, particularly in Germany, where it receives heightened status *vis-à-vis* other rights.

Thus, as will be demonstrated later, while the United States views freedom of speech through the lens of "liberty," other western democracies increasingly think of freedom of expression in dignity terms. The predominance of "human dignity" as a constitutional value in many western democracies has caused an increasing number of them to redefine freedom of expression issues in "dignity" terms.[39] In these countries human dignity may serve as an internal limitation on free speech. At the very least, dignity concerns in these countries are recognized when freedom of speech cases are adjudicated and balanced *vis-à-vis* free speech, creating an external limitation on freedom of expression.[40]

It is important to understand that the American libertarian free speech paradigm is not completely rejected by other democracies. Such democracies often utilize a similar approach when core and classical freedom of expression issues are involved.[41] This is true, in particular, in cases of governmental censorship and prior restraint.[42] In these fields, the libertarian perceptions that stem from the fear of excessive state control of speech are commonly shared by

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IMPORTING THE FIRST AMENDMENT: FREEDOM OF SPEECH IN AMERICAN, ENGLISH AND EUROPEAN LAW 29 (Ian Loveland ed., 1998), ERIC M. BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY 50-95 (1995).

[37] *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 49-51, 61-63; Schauer, *The Exceptional First Amendment*, *supra* note 6, at 53-56.

[38] On the distinction between these constitutional terms *see infra* text accompanying notes 136-38.

[39] Among these countries are Germany, South Africa, and Israel. *See* discussion *infra* in Part II.B.1.

[40] These countries include virtually all other western democracies, such as Canada, Australia, New Zealand, etc. *See* discussion *supra* note 33 and accompanying text.

[41] *See, e.g.*, Fredrick Schauer, *The Ontology of Censorship*, *in* CENSORSHIP AND SILENCING 147, 147 (Robert Post ed., 1988).

[42] *Compare* Errera, *supra* note 5, at 32 (referring to a relatively narrow "margin of appreciation" in the ECHR free expression jurisprudence when it comes to issues of prior restraint, as opposed to a wider margin when dealing with issues such as enforcement of morality), *with* Andrew Oliver, *The Proposed European Union Ban on Television Advertising Targeting Children: Would it Violate European Human Rights Law?*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 501, 517 (2000) (arguing that when the legitimacy of free speech limitation is founded on the protection of morals, "the ECHR gives the member States a wide latitude in determining what morals are, and what is needed to protect them.").

democracies, especially regarding political speech.[43] Nonetheless, as general attitudes about free expression move further away from core classical paradigms, other democracies increasingly recognize additional considerations that warrant limitations and restrictions on free speech. This is especially true regarding "problematic speech,"[44] as well as media regulation.[45]

Although understanding freedom of expression as derived from the narrow principles of liberty in the classic liberal paradigm is very beneficial when thinking about free speech, it is an insufficient explanation *per se*. It is therefore necessary to briefly review the theoretical justifications for free speech in order to demonstrate the incompatibility of human dignity as a central justification for free speech.

## II. THE THEORETICAL JUSTIFICATIONS FOR FREEDOM OF EXPRESSION – AN OVERVIEW

Freedom of expression has several underlying justifications that are commonly used to explicate the strong defense afforded to speech.[46] Briefly reviewing the basic purposes behind the "rule" of free speech is important in order to evaluate the compatibility of human dignity as a justification for free speech. As this paper endeavors to show, human dignity is not suitable to accommodate freedom of expression. Human dignity fails as an overarching justification for freedom of expression to appropriately cover some of the core protected speech. It also confers excessive protection on speech that is protected according to current understandings.

Many legal scholars and philosophers have attempted to define the underlying justification for freedom of expression. These different accounts sometimes offer similar descriptions of the same rationales.[47] The subtleties

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[43] *See also* discussion *infra*, Part II.A.2. (regarding the increased popularity of the "arguments from democracy" as part of the general ontology of First Amendment jurisprudence, which heavily relies on this argument when dealing with *all* kinds of speech).

[44] "Problematic speech" stands for all speech that democracies other than the United States limit (i.e. hate speech, Holocaust denial, and in some cases, pornography). Defamation may also fall under this category in certain respects. The term is a useful shorthand for kinds of speech that are restricted by some or most other western democracies. *Cf.* BOLLINGER, *supra* note 9, at 76-103 (referring to these kinds of speech as "problematic.").

[45] For example, the non-American approach may be characterized as fitting into the "Madisonian" approach to free speech, as opposed to the American approach that is "absolutist" at its core. *See, e.g.*, Carmi, *supra* note 10, at 290-96, 300-05.

[46] *Cf.* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1054-60 (5th ed. 2005).

[47] *See* Greenawalt, *Free Speech Justifications, supra* note 22 (counting the following consequentialist justifications: truth discovery; interest accommodation and social stability; exposure to deterrence and abuses of authority; autonomy and personal development; liberal democracy; and the promotion of tolerance). *See id.* (Greenawalt also lists the following nonconsequentialist justifications: social contract theory; recognition of autonomy and

some of these writings offer are not directly relevant in defining the rapport between freedom of expression and human dignity, and, therefore I will refrain from delving deeply into such nuances. Suffice it to say that the brief account offered below demonstrates how dignity concerns are far from the *core* of the common justifications for free speech, and are, at best, in the *penumbra* of these justifications. Therefore, human dignity cannot stand as a primary prism through which freedom of expression is viewed.

A common and helpful way to distinguish between different free speech justifications is to divide them into consequential and nonconsequential arguments.[48] Consequential reasons for protecting free speech focus on the positive effects of liberty, whereas nonconsequential reasons claim that, independent from consequences, the restriction of speech denies a right or constitutes an injustice.[49]

### *A. The Classical Model*

Three main free speech justifications (or clusters of justifications) are widely referred to as "the classical model.[50]" This model offers explanations regarding the "core" of free speech – the speech that is truly valued by society.[51] While theorists disagree regarding which identifiable "values" ought to be given precedence over others,[52] the "truth" and "democratic" arguments are generally perceived as the most powerful free speech justifications, especially in the United States. This paper will first review these two justifications, later elaborating on the additional "autonomy related" justification, since it is the only justification from the classical model that may be directly linked to human dignity.

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rationality; dignity and equality; and the marketplace of ideas). *Cf.* Brison, *Autonomy Defense*, *supra* note 21, at 321 (accounting for several justifications including: the argument from truth; the argument from diversity; the argument from democracy; the argument from distrust; the argument from tolerance; the pressure release argument; and the slippery slope argument).

[48] *See* Greenawalt, *Free Speech Justifications, supra* note 22, at 127-30.

[49] GREENAWALT, FIGHTING WORDS, *supra* note 23, at 3.

[50] It is important to note that there are more theoretical justifications than the three presented. The classical model falls short of offering a satisfactory explanation to the level of protection that freedom of expression receives, especially in the United States. Several theorists have articulated other justifications, or dissected the justifications into sub-justifications. *See* Brison, *Autonomy Defense*, *supra* note 21, at 320-21. However, the three justifications I have chosen to briefly present are used by many as the major classifications, and are known as the classical model. *Cf.* BOLLINGER, *supra* note 9, at 43-75. Lee Bollinger's "fortress model" and Vince Balsi's "checking value" deserve a special mention among the justifications listed above.

[51] BOLLINGER, *supra* note 9, at 44.

[52] *See* BOLLINGER, *supra* note 9, at 44.

1. The Argument from Truth

The "discovery of truth" rationale is probably the most familiar consequentialist argument. It is mostly identified with the writings of John Stuart Mill and the eloquent Supreme Court opinions of Oliver Wendell Holmes and Louis Brandeis.[53] At the core of this argument is the notion that free speech is the best tool to discover truth and prove falsehood.[54] According to this argument, the "marketplace of ideas[55]" is the best mechanism to reach truth, and regulation of speech may eventually stifle truth instead of promoting it.[56] While this argument from truth has been a prominent and popular justification for the protection of free speech, it is second to the cluster of arguments relating to democracy and self-governance, especially in the American context.

2. The Argument from Democracy

The argument from democracy and self-governance is most closely identified with the work of Alexander Meiklejohn.[57] It is considered to be the most prominent justification for the protection of free speech. The argument focuses on the importance of free speech for enabling the citizenry to self-govern. The ethos of free expression in the United States is closely linked to this rationale, and the evolutionary development of free speech doctrines suggests that political speech stands at the core of First Amendment protection.[58] Historical events such as the McCarthy Era and the Vietnam War contributed to the American understanding of the First Amendment as a tool for protecting political speech.[59] Political speech receives the highest protection in every legal system, but in the United States this protection exceeds that afforded in many other western democracies, as demonstrated by such policies as the content neutrality doctrine and the clear and present danger test.[60]

The popularity of the argument from democracy is unparalleled, and it is considered the most influential justification in the development of twentieth century free speech doctrines both in the United States and elsewhere.[61]

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[53] *See* JOHN STUART MILL, ON LIBERTY (1859); RAPHAEL COHEN-ALMAGOR, THE BOUNDARIES OF LIBERTY AND TOLERANCE 145-47 (1994).

[54] *Cf*. Brison, *Autonomy Defense*, *supra* note 21, at 321.

[55] For elaboration upon the sources of the "marketplace of ideas" metaphor, *see* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcasting Regulation*, 85 CALIF. L. REV. 1687, 1717-18 (1997).

[56] *Cf*. MILL, *supra* note 53, STONE, *supra* note 46, at 1054-56.

[57] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Brothers, 1948).

[58] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[59] Schauer, *The Exceptional First Amendment*, *supra* note 6, at 47-49.

[60] *See id*. at 48. *Cf*. Frowein, *supra* note 1, at 33.

[61] *Cf*. ERIC BARENDT, FREEDOM OF EXPRESSION 20-23 (1985), Greenawalt, *Free Speech*

Nonetheless, the centrality of the arguments from democracy in the United States is greater than in other legal systems, and First Amendment doctrines and conceptions are primarily derived from this justification.[62] The primacy of the argument from democracy in the American setting is exemplified by the classification of pornography as political speech.[63] Other democracies, while recognizing the importance of these arguments, seem less prone to using democracy rationales to justify free speech protection, instead favoring other justifications from the plethora of existing free speech justifications.[64] America's reliance on the arguments from democracy in forming its First Amendment jurisprudence, especially in non-political contexts, is quite unique. This legal-cultural aspect of American free expression jurisprudence may serve as yet another explanation for American Exceptionalism.

3. The Argument from Autonomy

Another cluster of justifications regarding underlying purposes of free speech is the autonomy defense, which is also related to self-fulfillment. Many theorists have attempted to shed light on this argument, and arguably, the autonomy defense of free speech is the one most commonly used by liberal legal and political theorists.[65] Brison counts as many as six different philosophical accounts of autonomy.[66] Principally, the argument from autonomy maintains that not respecting an individual's choice to speak—or to receive others' speech—infringes upon that person's right to autonomy.[67] Most accounts of the autonomy defense are non-consequentialist, and therefore, according to Brison, aim to show why the right to free speech is immune to balancing.[68]

There is no need to dwell in depth upon all the different philosophical accounts Brison offers in order to realize that the vagueness of this term and its different philosophical meanings renders a complex outcome. Most of the

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*Justifications, supra* note 22, at 145 (1989).

[62] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 104-05 (Harper & Brothers, 1948); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992) (saying that "the First Amendment is principally about political deliberation."). *See also* Gregory Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247 (2005).

[63] *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 324 (1985), *aff'd* 475 U.S. 1001 (1986); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992). Also *cf.* CATHERINE MACKINNON, ONLY WORDS 92-93 (1993).

[64] For a good account of prevalent free speech justifications *see generally* Greenawalt, *Free Speech Justifications, supra* note 22. See also *supra* note 50.

[65] *See* Brison, *Autonomy Defense*, *supra* note 21, at 312-13.

[66] *Id*.

[67] Brison, *Autonomy Defense*, *supra* note 21, at 322.

[68] *Id*.

accounts Brison presents favor the protection of free speech even when hate speech and pornography are involved. Yet, one of the six accounts Brison reviews justifies restricting these kinds of speech due to autonomy considerations.[69] Therefore, autonomy cannot serve as a magic bullet to solve the issue of "problematic speech," and it may send mixed signals as to the propriety of restricting various kinds of speech. Nonetheless, as discussed below, autonomy's mainstream understandings are still far more speech-protective than their human dignity counterparts.

Those who use the autonomy argument to protect all kinds of speech, including "problematic speech," emphasize the notion that the state cannot paternalistically dictate to its citizenry which views are "correct."[70] Dworkin, for example, argues that restricting people's speech, as well as limiting people's access to other's speech, out of contempt for their way of life or their view of good, violates their right to autonomy or moral independence.[71] Such restriction unacceptably fails to treat these people with equal respect and concern.[72] Suppression of certain views represents a kind of contempt for citizens that is objectionable independent of its consequences. When suppression favors some points of view over others, it does not treat citizens equally.[73]

Such aspects of the autonomy defense of free speech can be articulated in terms of "dignity," "equality," and "liberty."[74] Yet this account may be somewhat misleading, since it depends on the content one ascribes to those terms. The autonomy defense is more compatible with the meanings of these constitutional terms as they are commonly viewed in the United States, but those same terms tend to receive other emphases in other western countries.[75] This account focuses on the speaker more than his listeners, and is, in fact, closely related to general concepts of "liberty."[76]

The autonomy defense is often linked with artistic speech or speech that defines personality (e.g. speech relating to our sexual identity or personal appearance), since these kinds of speech lie close to how people conceive themselves.[77] Such speech is more closely connected to the autonomy argument,

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[69] *See* Brison, *Autonomy Defense*, *supra* note 21, at 336-38

[70] *Id*. at 316.

[71] *See* RONALD M. DWORKIN, A MATTER OF PRINCIPLE 353 (1986).

[72] *See* Brison, *Autonomy Defense*, *supra* note 21, at 339; Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 58.

[73] *Cf.* Greenawalt, *Free Speech Justifications, supra* note 22, at 152-53.

[74] *Cf. id.*

[75] *See* discussion *infra* in Part III.B.2.

[76] *Cf.* Greenawalt, *Free Speech Justifications, supra* note 22, at 153 ("How to take this argument depends on whether any infringement of liberty impairs dignity and any infringement that is significantly selective impairs equality. […] The concerns about dignity and equality may seem not to be specially related to speech but to be arguments, perhaps rather weak ones, in favor of liberty generally.").

[77] *Cf.* Greenawalt, *Free Speech Justifications, supra* note 22, at 153; Justice Dorner in

and therefore its protection primarily depends on how important this justification is in a specific legal system.

The autonomy defense of free speech is of special interest for the purpose of this analysis, since some of its versions and some of the versions of human dignity may overlap. Therefore, when referring to human dignity as an argument for protecting free speech, one must refer to the autonomy argument. Yet, focusing solely on this argument for the protection of freedom of expression, while abandoning the other primary classical justifications (truth and democracy), offers only a partial foundation for this right. The other arguments are at least as important as the autonomy argument, if not more important.

## III. THE ARGUMENT FROM DIGNITY?

The nexus between Human Dignity and Freedom of Expression is problematic in nature. The inadequacy of human dignity as a principle justification for freedom of speech is reviewed by Frederick Schauer who remarks that "there is little to be gained by thinking of the right to freedom of speech as but the instantiation of a more general right to dignity,"[78] leading to the declaration that "[s]peaking about dignity thus appears not to take us very far in thinking about the protection of freedom of speech."[79]

Nonetheless, human dignity is articulated by some scholars as a free speech justification. Human dignity is even considered a possible source for the incorporation of freedom of expression, where it is an unenumerated right.[80] Unfortunately, it is unclear what exactly the "argument from dignity" encompasses. A deeper look into the relationship between human dignity and freedom of expression reveals that it is perceived differently by different scholars.

Should the "argument from dignity" be recognized as an independent theoretical free speech justification? This paper claims that such a view would be mistaken primarily because it is either not sufficiently distinguishable from the argument from autonomy or it is too general to constitute a free speech justification per se. The following analysis is devoted to demonstrating why human dignity and freedom of expression are more appropriately conceived

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CrimA 4463/94 Golan v. The Penitentiary Service [1996] IsrSC 50(5) 136.

[78] Frederick Schauer, *Speaking of Dignity, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178, 179 (Michael J. Mayer & William A. Parent, eds., 1992) [hereinafter Schauer, *Speaking of Dignity*]. *Cf.* Dani Statman, *Two Concepts of KAVOD*, 24 IUNAI MISHPAT 541, 576-77 (2001).

[79] Schauer, *Speaking of Dignity*, *supra* note 78, at 190.

[80] For example, in a fashion similar to the incorporation of the unenumerated right to privacy into the Fourteenth Amendment in the United States, the Israeli Supreme Court has considered incorporating the unenumerated right of free speech into the Human Dignity Clause. *See* CrimA 4463/94 Golan v. The Penitentiary Service [1996] IsrSC 50(5) 136.

separately rather than as connected.

### *A. Two Accounts of the "Argument from Dignity"*

What exactly do we mean when regarding the "argument from dignity"? When someone argues that her right to free speech is derived from her entitlement to dignity (or alternatively, that certain speech should be curtailed due to infringement of her dignity), what does this justification encompass? The vagueness surrounding the term "human dignity" clutters the ability to clearly define and demarcate the boundaries of this justification. In an attempt to restore the rationales behind this so-called free speech justification, this paper offers two possible accounts for the scope and meanings of the "argument from dignity."

#### 1. A Minimalist Account

The first account of the "argument from dignity" is a minimalist version of human dignity, as it purports to focus solely on the rights of speakers. It is intended to serve exclusively as a justification for protecting free speech and not as a justification for restricting it. Both Kent Greenawalt and Ronald Dworkin articulate similar justifications relying on dignity and equality as independent free speech justifications.

Greenawalt's brief account of dignity (and equality) strikingly resembles an argument presented earlier as part of the argument from autonomy. According to this view, suppression of certain views represents a kind of contempt for citizens that is inherently objectionable, independent of its consequences,[81] because it fails to treat citizens equally or with the dignity they deserve.[82]

Greenawalt also briefly mentions human dignity as stifling a person from expressing her views or beliefs, thereby hurting that person's sense of dignity and self-respect. Yet he concedes that "[a]n argument that is based the value of liberty as an emotional outlet and means of personal development is not restricted to speech alone."[83] He also fails to recognize that restricting specific speech in particular circumstances rarely stifles a person from expressing her views in alternative permissible ways, and thus can hardly be said to substantially infringe upon the right for self-expression.[84]

Greenawalt himself acknowledges that what he calls the dignity and equality justification is closely related to the recognition of autonomy and rationality.[85]

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[81] Greenawalt, *Free Speech Justifications, supra* note 22, at 153. *See also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 27-28, 33-34 (1989).

[82] Greenawalt, *Free Speech Justifications, supra* note 22, at 153.

[83] GREENAWALT, *supra* note 81, at 28.

[84] *See* Statman, *supra* note 78, at 576-77.

[85] Greenawalt, *Free Speech Justifications, supra* note 22, at 152.

He also questions whether "concerns about dignity and equality may seem not to be specially related to speech but to be arguments, perhaps rather weak ones, in favor of liberty generally."[86] Nonetheless, although Greenawalt raises some of the difficulties in recognizing dignity as an independent free speech justification, he fails to persuade as to why dignity *should* be considered as such, as well as how exactly this justification is sufficiently distinguishable from other free speech justifications, in particular the argument from autonomy.

It appears that Greenawalt's attempt to present a detailed and distinguishable taxonomy of free speech justifications went one step too far. Greenawalt describes his analysis of free speech justifications as an attempt to "provide some antidote for confusion and for oversimplification, the main disease of legal and philosophical scholarship."[87] While his ambitious endeavor is quite remarkable, it may suffer from over-complication.[88] There is no real merit in distinguishing the "argument from dignity" from the "argument from autonomy," even if one attempts to thoroughly dissect and distinguish the different free speech justifications.

Although Greenawalt refrains from referring to any specific theorist who endorses the arguments from dignity and equality, one may assume he is primarily referring to Ronald Dworkin.[89] Dworkin's works emphasize an account of a dignity-based free speech justification which is parallel to Greenawalt's account. For the sake of a fair analysis of Dworkin's view of dignity and equality as free speech justifications, it is important to relate to the broader context of his works. Dworkin, probably the most esteemed legal philosopher alive, generally tends to use the values of equality and dignity as the primary values for a moral reading of the American Constitution.[90] Although his writings over the years have offered more than one version of justifications for rights in general and free speech in particular,[91] it is fair to characterize his view of dignity and equality as the primary moral justifications for rights.

Dworkin's free speech justification that relies on dignity and equality is, in fact, a version of an autonomy justification (or of a general non-discrimination

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[86] *Id*. at 153.

[87] Greenawalt, *Free Speech Justifications, supra* note 22, at 119.

[88] *Cf*. Brison, *Autonomy Defense*, *supra* note 21, at 313 n.5.

[89] Surprisingly, in Greenawalt's brief account of the dignity and equality justifications he does not offer even one footnote to support his analysis or offer reference to other scholars who hold this view. *See* Greenawalt, *Free Speech Justifications, supra* note 22, at 152-53.

[90] *See generally* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2. For criticism of Dworkin's views on the moral reading of the Constitution, see, for example, Catharine A. MacKinnon, *Freedom from Unreal Loyalties: On Fidelity in Constitutional Interpretation*, 65 FORDHAM L. REV. 1773 (1997).

[91] *Cf*. Brison, *Autonomy Defense*, *supra* note 21, at 339. Dworkin's writings on these issues spread over several decades and evolved over time. The portrayal above relates to his later works where the focus on dignity and equality is more evident and fully developed.

justification). Dworkin views all kinds of speech as protected under this justification, not only political speech.[92] Thus, his argument for the protection of free speech has a broad implication of a principled objection towards the limitation of any kind of speech. This is a nonconsequentialist justification (or in Dworkin's words a constitutive justification) that exists side by side with the instrumental justifications to free speech (such as the truth and democracy arguments).[93]

Dworkin believes that the government cannot discriminate among citizens by permitting some views and denying other views. Such conduct is discriminatory not only to the speaker but also to the society as a whole (or potential individual listeners).[94] The paternalism applied by government when censoring certain opinions deprives the citizenry from exercising autonomy and choosing from all available views, including those that the government dislikes or finds distasteful or dangerous. As Dworkin puts it, "we retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion form us on the ground that we are not fit to hear and consider it."[95] In other places, Dworkin emphasizes the egalitarian role of the First Amendment by saying that "First Amendment liberty is not equality's enemy, but the other side of equality's coin."[96]

Although Dworkin's powerful writing is thought provoking, it is hard to distinguish, for example, Dworkin's earlier accounts of justification of free speech protection as a negative right,[97] from newer accounts of dignity and equality. It seems as if Dworkin is simply trying to rearticulate these two leading values as more appropriately covered by autonomy or liberty concerns. In any case, he fails to convince why it is doctrinally correct to view these issues through the lens of dignity rather than autonomy, and why dignity concerns should always work in favor of the speaker, even when they patently and

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[92] *Compare* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 195-213 *with* SCHAUER, PHILOSOPHICAL INQUIRY, *supra* note 22, at 65 (claiming that the restriction of political speech that limits the ability to meaningfully participate in the political process harms equality, but should be more appropriately categorized under the "argument from democracy.").

[93] *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 209.

[94] *See id*. note 2, at 200.

[95] DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 200. *See also* Ronald Dworkin, Women and Pornography, N.Y. REV. BOOKS, Oct. 21, 1993 (Only one answer is consistent with the ideals of political equality: that no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and example, just because these tastes or opinions disgust those who have the power to shut him up or lock him up.").

[96] *Id*. Dworkin also claims that "equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections," and that "equality demands that everyone's opinion be given a chance for influence, not that anyone's opinion will triumph or even be represented in what government eventually does." *Id*.

[97] *See, e.g.*, Ronald Dworkin, Liberty and Pornography, N.Y. REV. BOOKS, Aug. 15, 1991 [hereinafter Dworkin, Liberty and Pornography].

potently infringe upon others' dignity.[98]

The question is whether one can develop a free-speech *theory* that is based in a *particular* conception of what human dignity entails is possible, and whether the contours they chose will be upheld by others. The employment of human dignity as a touchstone for doctrine on speech is problematic if its base is manipulable. As shown below, since a human dignity-based regime may be more prone to suppress speech, the mere use of human dignity as a free speech justification is a cause for concern.

As discussed below, the minimalist account of the argument from dignity is compatible with American understandings of rights and of human dignity. Also, the minimalist account for the argument from dignity is actually not distinct enough to justify separating it from the argument from autonomy. Therefore, it is not surprising that it was articulated in the above manner by American scholars.

2. An Expansive Account

A broader view of the possible relationship between human dignity and freedom of expression attributes more meaning to human dignity and acknowledges the potential of conflict between the two – a conflict that the first account disregards. The principal scholar who points out the problematic theoretical nexus between dignity and speech is Fredrick Schauer.

Schauer questions the merits of using human dignity as a foundation for the protection of speech and raises several difficulties with this approach. His most important contribution questions the implicit premise behind the minimalist account that human dignity serves only as a justification for protection of speech. He demonstrates how some accounts of human dignity can serve as rationales for restricting speech, and therefore questions the suitability of human dignity as a free speech justification.

From a theoretical standpoint, it is hard to see how human dignity can cover *all* types of speech, when it patently stands at odds with *some* types of speech. Human dignity is most effective and relevant for protecting self-regarding speech.[99] But if this is the case, then the argument from dignity is not an argument for protecting speech *simpliciter*, or even an argument for protecting the kind of speech that is commonly protected in the United States, but rather, it

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[98] *Cf.* Greenawalt, *Free Speech Justifications, supra* note 22, at 151; SCHAUER, PHILOSOPHICAL INQUIRY, *supra* note 22, at 60-66.

[99] Schauer, *Speaking of Dignity*, *supra* note 78, at 189 ("The use of dignity-based conceptions of protecting choice as a way of protecting speech thus hinges on the assumption that the decision to speak is either in general or in particular cases not a choice that will infringe on the rights or the dignity of others. But we have seen that the assumption that speech in general cannot and does not infringe on the dignity or the rights of others is untrue. Consequently, it must be only *some* linguistic and pictorial acts that would be protected under this conception of freedom of speech as instantiating a choice-based protection of dignity.") (emphasis in original).

is an argument only for protecting substantially self-regarding speech.[100]

A focus on dignity as a free speech justification falls short of satisfactorily covering many kinds of speech. Unlike the arguments from truth and democracy, which clearly relate directly to free speech, it is unclear what work is being done by the "dignity" component of the free speech equation. It seems that human dignity is generally applicable to non-speech settings,[101] since the protection of dignity as protection of self-regarding choice would protect both linguistic and non-linguistic self-regarding choices.[102] It is apparent, therefore, that "trying to tailor a speech-protective conception of dignity as choice to the need to avoid protecting harmful choices leads to a dropping of speech qua speech from the analysis."[103]

Human dignity and freedom of expression do not share a common grounding in their theoretical justifications. While freedom of expression has several classical justifications, just some of them overlap with human dignity rationales.[104] The "democratic" and "truth" arguments that stand at the base of freedom of expression, and that normally receive the highest level of constitutional protection,[105] are not covered by the blanket of human dignity. The contours that the human dignity blanket covers are limited, and do not even cover some of the core expressions such as political speech. Thus, because of its formative role in self-conception, artistic speech may receive greater protection than political speech under human dignity rationales,[106] deviating from the current paradigm under which political speech receives the highest protection.

Although human dignity and freedom of expression are not necessarily contradictory, and in some cases may even be compatible, it would be a wrong to assume that the two are compatible and should be analyzed through the seemingly unifying lens of human dignity. Framing freedom of expression in terms of human dignity reduces freedom of expression from its existing parameters according to current predominant free speech understandings.[107] In

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[100] *Id*. This view is compatible with Justice Dorner's *dicta* in CrimA 4463/94 Golan v. The Penitentiary Service [1996] IsrSC 50(5) 136, as well as her article Dalia Dorner, *The Constitutional Protection of Human Dignity*, *in* HUMAN DIGNITY OR ITS DEGRADATION? THE TENSION OF HUMAN DIGNITY IN ISRAEL 16, 23-25 (Aluf Hareven & Hen Baram eds. 2000).

[101] Dworkin's writings also apply a similar rationale in other settings, such as private homosexuality, contraception, and pornography. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 275-76; SCHAUER, PHILOSOPHICAL INQUIRY, *supra* note 22, at 65.

[102] Schauer, *Speaking of Dignity*, *supra* note 78, at 189.

[103] *Id*.

[104] *See supra* Part II.A.

[105] *See*, *e.g*. WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 23 (2001).

[106] *See infra* note 109 and accompanying text.

[107] *Cf*. Schauer, *Speaking of Dignity*, *supra* note 78, at 179 (discussing free speech justifications),("If the principle of freedom of speech is not the instantiation of a more general principle of dignity, then it should not be surprising that the two will frequently diverge in

addition, human dignity is equally problematic as a *supplemental* free speech justification, because its expansive account conflicts with speech protected under other justifications. In these cases, a free speech justification would serve as a reason for *limiting* speech, and this concept is unacceptable. No other free speech justification serves as a reason to restrict speech, and any "justification" that may have this effect should not be considered as an independent free speech justification.

Obviously, not every limitation on freedom of expression involves harm to human dignity. Commercial speech, for example, can hardly be seen as a violation of the human dignity of the commercial enterprise.[108] However, when free speech limitations relate to the essence of the individual's rights to express herself, it is likely to involve degrading treatment that violates human dignity.[109] The paradigmatic cases in which human dignity and freedom of expression diverge are what we may refer to as "problematic speech" (such as hate speech, libel, and pornography).[110] In these cases, speech is used to deprive human dignity from an individual or members of a group, due to racial or gender considerations.[111] For instance, in applying autonomy as self-fulfillment and human dignity to hate speech, it may seem more appropriate to apply it to the victims of the speech rather than the racist speakers.[112]

In fact, the expansive account of the argument from dignity gives a consequentialist twist to Dworkin and Greenawalt's nonconsequentialist formulation. It challenges the premise that dignity can serve as a categorical justification for protecting speech without ever looking at the consequences of that speech and its possible infringements of the dignity of others. Because the expansive account has consequentialist traits, it is no longer "immune from balancing,[113]" and may lead to speech restriction.

### *B. The Relevance of Human Dignity from a Comparative Perspective*

#### 1. The Two Accounts from a Comparative Perspective

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extension, with freedom of speech often producing deprivations of dignity, and the desire to promote dignity often suggesting restrictions on speech. If this is so, then resolving many hard issues by reference to dignity will be question-begging, and consequently it may be necessary at times to consider directly which of the values of free speech and dignity is more important.").

[108] Even under First Amendment doctrines, commercial speech is considered to be low value speech that is subjected to heightened regulation. Kretzmer, *supra* note 3, at 174.

[109] *Id*.

[110] *Cf*. BOLLINGER, *supra* note 44 (defining problematic speech).

[111] *See* Statman, *supra* note 78, at 577; Brison, *Autonomy Defense*, *supra* note 21, at 314; Matsuda, *supra* note 29.

[112] *See* Statman, *supra* note 78, at 577.

[113] *Cf*. Brison, *Autonomy Defense*, *supra* note 21 and accompanying text.

The two accounts offered above for the "argument from dignity" are parallel to comparative understandings of what human dignity is in general and in relation to freedom of expression in particular. The minimalist account characterizes the American approach, whereas the expansive account characterizes the approach of most other western democracies to these issues. Thus, intuitively, for an American, human dignity may seem like a justification for protecting speech, whereas for a European, human dignity may seem like a justification for limiting it.

In the American system, the debate concerning the nature of the nexus between human dignity and freedom of expression may seem insignificant. Indeed, although some scholars and jurists argue that human dignity is a central value in the American constitutional jurisprudence,[114] it does not arise to be a prominent or a central *value* under the common American legal understanding, and it is certainly not a recognized *right*.[115] In addition, as discussed above, the argument from autonomy, as well as human dignity, are more influential abroad than in the United States, especially in relation to non-political speech. Therefore, the effect of human dignity on freedom of expression in the United States cannot be overreaching. This is also true due to the rule-based First Amendment jurisprudence that serves as a "buffer" against "irrelevant considerations" affecting its contours and content.[116] The minimalist account is also compatible with current First Amendment jurisprudence and with key doctrines such as content neutrality, which is unique to the American setting in its implications. Also, more general constitutional doctrines, such as the anti-classification rule and the focus on discriminatory intent rather than disparate impact,[117] are different in the United States than the application of human dignity in other countries. Nonetheless, the effects of human dignity on freedom of expression in other constitutional settings may reach further.

Human dignity is a central *right* and a leading *value* in many western constitutional regimes, especially those formed in the second half of the

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[114] *See generally* STEPHAN BREYER, ACTIVE LIBERTY (2005); RONALD DWORKIN, FREEDOM'S LAW (1996); Murphy, *supra* note 2.

[115] *See* Paust, *supra* note 2; THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Mayer & William A. Parent eds. 1992). It is noteworthy that some State Constitutions (such as Montana, *see* MONT. CONST. art. II, § 4) explicitly enumerate Human Dignity as a right. However, the Federal Constitution prevails when it comes to freedom of expression, so the likelihood that state courts would balance human dignity and freedom of expression as rights is minuscule. See Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301 (2000); Heinz Klug, T*he Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133 (2003).

[116] *Cf.* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 54-56

[117] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Washington v. Davis, 426 U.S. 229 (1976).

twentieth century.[118] In some cases, the right to human dignity is at the focal point of nations' constitutional schemes.[119] These systems are also characterized by a non-rule-based free expression jurisprudence, which makes them more susceptible to, and less protected from, the "irrelevant consideration" of human dignity *balanced* into their free expression doctrines.[120] In addition, as discussed below, most other western democracies hold different constitutional ideals than the United States in regard to enforcement of community values and morals in speech regulation, framing free speech as a positive right, and recognition of the rights of the audience. These differences may lead those legal systems to adopt the expansive account of dignity, and, therefore, are more prone to limit free speech due to dignity concerns rather than protecting it. In any case, in most western democracies, the debate on the interrelationship between human dignity and freedom of expression is far more substantial (than in the United States), and carries greater consequences.

Using human dignity as a free speech justification legitimizes the discourse in this field and blunts the tension between the two. A horizontal balancing between freedom of speech and human dignity is facilitated by this discourse, resulting in yet another danger threatening freedom of expression: the further restriction of speech. Since human dignity has become such a robust right in some of the western democracies, and it is so prevalent in the constitutional discourse of countries such as Germany, Israel, and South Africa, it is not surprising that many judges in those nations frame freedom of expression issues in human dignity terms. However, few justices have observed that where human dignity and freedom of expression are in conflict, to prevent speech restriction, they should be viewed as contending rights.[121]

2. The Extent Human Dignity and Autonomy Concerns Affect Different Legal Systems – Three Parameters

As mentioned earlier, most western democracies construe the nexus between human dignity and freedom of expression as the "expansive account," whereas in the United States the "minimalist account" may seem more appropriate. In order to demonstrate why this proposition is correct, I will now attempt to contextualize a framework to assist predicting whether a specific legal system is more prone to limiting free speech due to human dignity concerns or protecting

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[118] *See, e.g.*, David Kretzmer & Eckart Klein, *Forward*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE v-vii (David Kretzmer & Eckart Klein eds., 2002).

[119] Germany is a good example for such a system. *See generally* EBRELE, *supra* note 25; Carmi, *supra* note 10, at 300-05.

[120] *Cf.* Schauer, *Speaking of Dignity*, *supra* note 78.

[121] *See* Statman, *supra* note 78 (referring to the Supreme Court rulings both in Israel and South Africa).

it.

Although several variables may be relevant for this kind of prediction, three are particularly valuable in determining whether a human dignity focus will result in the limitation or protection of free speech in a specific legal system. These are: (a) individualism versus communitarianism and paternalism; (b) speakers' focus versus audience focus; and (c) negative rights versus positive rights perceptions. The combination of these factors may offer a good predictor on how a specific legal system will treat human dignity concerns in its freedom of expression jurisprudence.

a. Individualism versus Communitarianism and Paternalism

The constitutional instincts in the United States are far more libertarian than in most western democracies, especially when First Amendment doctrine is involved. Thus, America's perception of autonomy and freedom of speech is a very individualistic.[122] For instance, the content neutrality doctrine, prohibiting censorship on grounds of content, can be explained as a commitment to this kind of individualism and individual moral responsibility. Consequently, any censorship on grounds of content is inconsistent with America's libertarian commitment.[123]

As opposed to America's libertarian origins, communitarian European perceptions of fraternity (fraternitė), solidarity, and paternalism, characterize most other western democracies.[124] In such paternalistic societies, valuing certain thoughts above others is essentially limiting speech because of its content.

Even when European courts deal with individual rights, they are usually contextualized within "community surroundings."[125] Differences of community

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[122] *See, e.g.*, Brison, *Autonomy Defense*, *supra* note 21; POST, *supra* note 22, at 9-10, 89-113, *and* Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1998). *See also* Kent Greenawalt, who plays with themes of "individuals" and "communities" when comparing Canadian and American freedom of expression. Yet he states a broader comparative perspective, according to which "[a]ny country's dominant culture will place more or less emphasis on individuals or communities, and this will affect the kind of latitude the political branches and courts will afford to speech." GREENAWALT, FIGHTING WORDS, *supra* note 23, at 8-9.

[123] *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 205; Dworkin, Liberty and Pornography, *supra* note 97.

[124] *See* Kommers, *supra* note 3, at 694 ("Thus, the political system as seen through the eyes of the Federal Constitutional Court is marked indelibly by fraternity as by liberty and equality."). *See also* SCHAUER, PHILOSOPHICAL INQUIRY, *supra* note 22, at 65 ("Many countries recognize a strong Free Speech Principle but regulate on the basis of moral and paternalistic principles."); Winfried Brugger, *Communitarianism as the Social and Legal Theory behind the German Constitution*, 2 INT'L J. CONST. L. 431 (2004).

[125] Kommers, *supra* note 3, at 694 ("In the German view, human dignity can exist only when

and individualism in the context of free speech in Europe and the United States are articulated nicely by Sionaidh Douglas-Scott who says that:

> European case law rejects a conception of individuals as being who merely should be left to their own devices to make up their own minds about the value of expression in the public domain, to be free to ignore it, or to counter it with more speech. Such an approach isolates human beings by forcing them to take the consequences of painful conduct and ignores the particular susceptibilities of certain groups to injury, especially when the offence of the speech seems to be targeted at such groups because of their identity. Under the American model, the individual will be left to his or her less communal and somewhat atomistic existence.[126]

These differences have many reasons. Most European countries have more homogenous societies than the United States, making societal common grounds seemingly easier to define and reach. The law in these countries is meant to facilitate maintaining this collective identity,[127] even at the expense of regulating certain speech due to its content.

In addition, the European experience during World War II was a formative experience not only for Germany, but for the Continent as a whole. Though the United States does not have a positive history when it comes to racial relations (e.g. slavery, the Civil War and Jim Crow), the American democracy never produced a totalitarian regime as some European countries did, nor did it experience the traumatic reaction Europe shared from the War. One of the reactions to these experiences was the adoption of human dignity as a leading constitutional value.[128]

The restriction of some problematic speech, especially group libel and hate speech, may be justified from a communitarian viewpoint: holding that a restriction of such speech is desirable "not only in order to protect certain groups but for the well-being of the society as a whole.[129]" Maintaining a minimum of civility in the public discourse may be viewed as the ultimate goal of such restrictions, since permitting vilification harms the society as a whole.[130] The legal basis that legitimizes these restrictions "can be found in the central constitutional principles of equality, *human dignity* and non-discrimination."[131]

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persons are allowed to develop themselves as rational beings in community with others.").

[126] Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL OF RTS. J. 305, 343 (1999).

[127] *See, e.g.*, Kommers, *supra* note 3, at 695 ("In Germany, however, speech is juridically valued for its capacity to create community. The German view holds that free speech requires persons participating in the forum of public discussion to speak the truth and to do so with respect for other persons' personal honor and dignity. In short, the purpose of political discourse in German theory is to create a tradition of civility and a polity of responsible citizens.").

[128] *See, e.g.*, Kretzmer & Klein, *supra* note 228, at v-vi.

[129] Roger Errera, *Freedom of Speech in Europe and in the USA*, *supra* note 5 at 36.

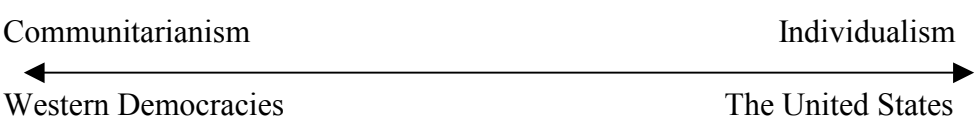
[130] *See id*.

[131] *Id*. at 37 (emphasis added).

European sensitivity regarding racist speech has not been applied, so far, to speech that some say impinges upon gender equality (i.e. pornography). Canada is the only western democracy that has so far seriously attempted to restrict pornography due to communitarian concerns that relate to dignity and equality.[132] Nonetheless, Europeans are more susceptible to such a possible restriction than Americans.[133]

Therefore, while autonomy focuses on the individual in the American context, it tends to be an argument that protects all speech. Contrary to the American emphasis on individualism, the communitarian conceptualization of autonomy and rights in other western democracies, may well lead to autonomy and dignity concerns being used to limit speech.

Diagram I: Recognition of Individual and Communal Concerns in Free Speech Doctrines




b. Speakers' Focus versus Audience Focus

In addition to, or, in fact, as a result of, the different emphases on individual and communitarian perception of rights in the United States and Europe, there are also different emphases on who holds rights in those societies. In the American system, many leading commentators put an emphasis on the rights of the speaker and the potential harm to members of the audience is usually categorized as infringement on their interests, rather than their rights.[134]

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[132] *See, e.g.*, R. v. Butler [1992] 1 S.C.R. 452, 449 ("This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.").

[133] *See, e.g.*, HCJ 5432/03 Shin v. The Cable and Satellite Council, [2004] IsrSC 58(3) 65; HCJ 4804/94 Station Film Co. v. Film Review Bd. [1997] IsrSC 50(5) 661, ¶ 11 (English translation *available at* http://elyon1.court.gov.il/files_eng/94/040/048/z01/94048040.z01.HTM).

[134] *See* Brison, *Autonomy Defense*, *supra* note 21, at 316-18 (critiquing Ronald Dworkin); Ronald Dworkin, The Rights of Myron Farber, N.Y. REV. BOOKS, Dec. 7, 1978; Frederick F. Schauer, The Rights of M.A. Farber: An Exchange, N.Y. REV. BOOKS, Dec. 7, 1978 (saying that "Dworkin's analysis prevails automatically over considerations of policy are those that are based on the moral rights of the speaker, then it is hard to see why there is such a strong presumption in

Normally, rights in general, and the right of free speech in particular, are beneficial to the speaker, not at the audience.[135] This classic perception of *rights* usually classifies harms to a hypothetical audience as caused by the fulfillment of a person's right as societal *interests*, and balances these interests as inferior to the individual rights, which in the lack of some compelling legal justification would be trumped by the rights.[136] Therefore, using human dignity to defend victims of speech (such as in cases of hate speech or pornography), may be argued as a confusion between rights and interests.[137]

The determination of whether a certain violation infringes upon rights or interests carries great significance. According to the Dworkinian perception applied by many western democracies, since only substantial harm that is caused by an interest may trump a certain right. This balancing between rights and interests is called vertical balancing, and interests rarely win this battle. An example of such balancing is the Clear and Present Danger test, which balances the right to free speech with society's interest of security. The test prescribes that the prior restraint of speech is permissible only when there is actual or imminent danger, such as violence or injuries to others.[138] However, if the harm infringes upon a right, then two rights are conflicting (e.g. the speaker's right for free speech and the addressee's right for human dignity). In such a case a horizontal balancing is applied, with no inherent strength to any of these rights *vis-à-vis* the competing right.[139] While in the United States the harms racial and pornographic speech may cause are perceived as interests, they are perceived in other legal systems as infringement of rights.[140]

Arguments from dignity much more plausibly generate arguments for restricting various kinds of speech than for protecting it.[141] When a person is

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favor of allowing the publication.").

[135] *See* Michael Dan Birenhak, *Constitutional Engineering – The Supreme Court's Methodology in Value-based Decisions*; 19 MECHKARI MISHPAT 591 (2003).*Cf.* CrimA 3750/94 Ploni v. Israel [1994] IsrSC 48(4) 621, 630, where Chief Justice Shamgar claims that human dignity defends the rights of the victims, and not only the rights of perpetrators.

[136] *See* Ronald M. Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

[137] *Cf.* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 198-203. Another possible construction of this conflict is defining these harms as infringing upon *group rights*. *See, e.g.*, Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913-1962*, 66 BROOK. L. REV. 71, 75-76 (2000).

[138] *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449, 455 (1996).

[139] *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 184-205.

[140] *See* R. v. Butler [1992] 1 S.C.R. 452, 449; HCJ 4804/94 Station Film Co. v. Film Review Bd. [1997] IsrSC 50(5) 661 (English translation *available at* http://elyon1.court.gov.il/files_eng/94/040/048/z01/94048040.z01.HTM), CrimA 3750/94 Ploni v. Israel [1994] IsrSC 48(4) 621, 630.

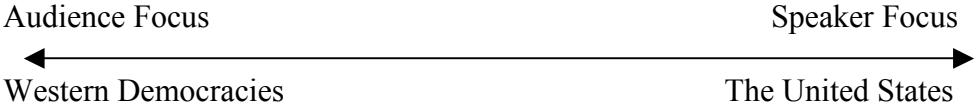
[141] Schauer, *Speaking of Dignity*, *supra* note 78, at 184. *See also* Statman, *supra* note 78, at

vilified because of his race, for example, the harm to his dignity is quite evident. Yet, it is harder to articulate the harm to the vilifier's own dignity, if he is prohibited from saying racial slurs. Even so, it seems more plausible to view human dignity as protecting the rights of minorities than of racists. A similar example may be pornography, where many claim that human dignity naturally leads for protecting the "victims" of this speech rather than the publishers.[142]

The rights discourse in most western democracies recognizes the rights of the audience or the victims, and rejects an exclusive focus on the rights of the speaker or perpetrator. Thus, for example, rights of victims are balanced *vis-à-vis* the rights of criminals, and the rights of speakers are balanced *vis-à-vis* the rights of the addressees. For instance, the right to human dignity in Germany is interpreted as protecting both the rights of speakers and addresses.[143] The Israeli Supreme Court has also interpreted the right to human dignity as applying to victims as well as perpetrators.[144] Canada's pornography rulings also share a similar rationale.[145]

Some of the approach towards recognition of audience's rights may also be attributed to the third factor, which relates to the recognition of positive and negative rights.

Diagram II: Recognition of Speaker and Audience Rights in Free Speech Doctrines




c. Negative Rights versus Positive Rights

Whether freedom of expression is construed, as a negative right,[146] or as a

576-580.

[142] *See* Statman, *Two Concepts of KAVOD*, at 577-78. *See also* literature on "silencing," such as CENSORSHIP AND SILENCING (Robert Post, ed. 1988). The writings of Catherine MacKinnon focus on equality and human dignity as primary justifications for the restriction of pornography. *See, e.g.*, CATHERINE MACKINNON, ONLY WORDS (1993).

[143] Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 18-19 (2002) (especially note 45 and accompanying text).

[144] *See* CrimA. 3750/94 Ploni v. Israel [1994] IsrSC 48(4) 621, 630 (where Chief Justice Shamgar claims that human dignity defends the rights of the victims, and not only with the rights of the perpetrators).

[145] *See* R. v. Butler [1992] 1 S.C.R. 452.

[146] Negative liberty can be briefly characterized as not being obstructed by others in doing one might wish to do. *See* Dworkin, Liberty and Pornography, *supra* note 97.

positive right,[147] has a potential effect on the way human dignity on freedom of expression.

The First Amendment is distinctively perceived as protecting a negative right. The negative perception of rights is characteristic to American constitutional law, but is probably most evident in First Amendment doctrines.[148] Thus, the courts have articulated the First Amendment as guaranteeing "the negative liberty of free speech[149]" and the this choice of framing freedom of expression as a negative right is characterized by Dworkin as "the core of the choice modern democracies have made."[150]

Yet, it appears that Dworkin's premise is inaccurate, since most modern democracies recognize, to certain degrees, some positive-rights' aspects of their free speech doctrines. Germany is the clearest example for the application of rights as positive rights, including when it comes to free expression.[151] Nonetheless, as in the examples given earlier, Germany does not stand alone in this trend, and it is followed, usually to a lesser extent, by other western democracies such as Canada, Israel, and France.[152]

The distinction between the public and the private spheres is also affected by positive and negative rights perceptions. If freedom of expression is merely a negative right, it basically means that the government is not allowed to censor its citizens. However, if rights are construed in a positive manner, government can regulate harm that is caused by private actors (e.g. pornographers). Indeed, some of the debate regarding the restriction of pornography revolves around the classification of right as positive or negative.[153]

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[147] In a nutshell, positive liberty can be characterized as the power to control or participate in public decisions, including the decision how far to curtail negative liberty. Dworkin summarizes the concept of positive liberty by saying that "in an ideal democracy—whatever that is—the people govern themselves. Each is master to the same degree, and positive liberty is secured for all." *Id*. Also, see generally ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (Oxford Univ. Press, 1968).

[148] *See* Brison, *Autonomy Defense*, *supra* note 21, at 339.

[149] Dworkin, Liberty and Pornography, *supra* note 97, at n.4. *See, e.g.*, Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 327 (1985), *aff'd* 475 U.S. 1001 (1986) (Judge Easterbrook wrote that "the government must leave to the people the evaluation of ideas.").

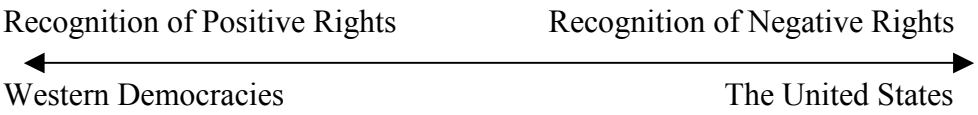
[150] *Cf.* Dworkin, Liberty and Pornography, *supra* note 97 ("Freedom of speech, conceived and protected as a fundamental negative liberty, is the core of the choice modern democracies have made, a choice we must now honor in finding our own ways to combat the shaming inequalities women still suffer.").

[151] *See* Dieter Grimm, *Human Rights and Judicial Review in Germany*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 267, 283 (David Beatty ed., 1994) (referring to the German jurisprudential perception of "protective duties" (Schutzpflicht)).

[152] *See, e.g.*, ERIC M. BRANDT, BROADCASTING LAW: A COMPARATIVE STUDY 13-19 (1995).

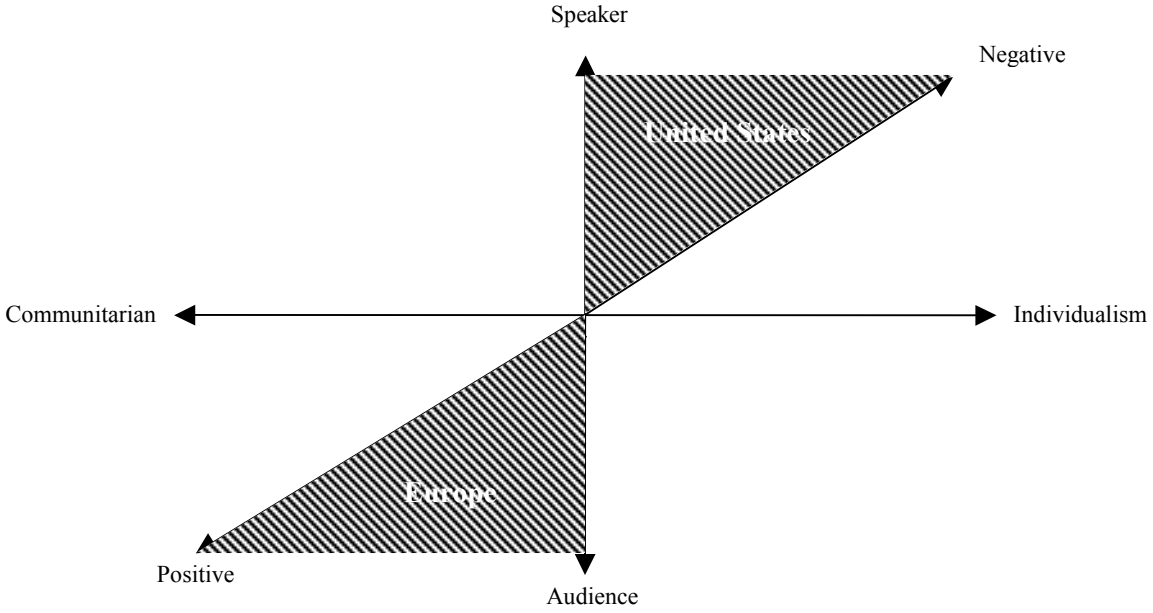
[153] *See, e.g.*, Dworkin, Liberty and Pornography, *supra* note 97 ("But the most imaginative feminist literature for censorship makes a further and different argument: that negative liberty for pornographers conflicts not just with equality but with positive liberty as well, because pornography leads to women's *political* as well as economic or social subordination.").

Diagram III: Recognition of Negative and Positive Rights in Free Speech Doctrines




As we can see, the parameters reviewed above align with American and European free speech perceptions. The United States is clearly individualistic, speaker-focused, and based on negative rights. Most other western democracies are quite clearly on the opposite side due to their recognition and application of community values, audience/victims rights, and positive rights. These differences set apart the United States from the rest of western democracies. This may serve as yet another explanation for American Exceptionalism and for why in America human dignity is perceived as having different implications on free speech than elsewhere.

Diagram IV: Combined: United States versus Europe and Other Western Democracies



## IV. CONCLUSION: DRIVING A WEDGE BETWEEN FREEDOM OF SPEECH AND HUMAN DIGNITY

Speaking of speech in human dignity terms may be a two-edged sword. As Schauer notes, the "conflation of dignity and speech, as a general proposition, is mistaken, for although speaking is sometimes a manifestation of the dignity of the speaker, speech is also often the instrument through use of which the dignity of others is deprived."[154] Both freedom of expression and human dignity may gain by untying this "Gordian knot." From a theoretical perspective, a construction of conflict rather than unity between these two constitutional concepts[155] is preferable.[156]

> To drive a wedge between the principles of dignity and free speech is not to suggest that dignity is not a primary human good. Nor is it to suggest that free speech, as a constraint on the ability of some agent in control to limit the communication of some agent under control, is not also a good thing. But noting that dignity and speech are not necessarily conjoined leads to the conclusion that the values of free speech and preservation of dignity will often collide. When that is the case, considering the instances in which an act of speech is an expression of dignity will be of little assistance. Consequently, thinking seriously about dignity may cause us either to recognize its irrelevance to free speech theory or to reevaluate some of that theory itself. [157]

This wedge between the principles of dignity and free speech exists in the American setting, *inter alia*, in the form of the rule-based First Amendment jurisprudence.[158] It is lacking in most European systems, which are non-rule-based, and deploy constitutional "balancing" in cases that involve freedom of expression.[159]

A prime justification for this wedge is the potential for misapplication of the term "human dignity." Ronald Dworkin, throughout his writings, warns of the confusion of terms. For example, he repeatedly cautions against the conflation of interests, values, and rights.[160] Framing a free speech justification in human

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[154] Schauer, *Speaking of Dignity*, *supra* note 78, at 179.

[155] I deliberately use the term "constitutional concepts," and not rights or values, since, as I show in this paper, the term human dignity may be regarded as either a right or a value (or even both), but this determination may vary among different legal systems and different circumstances, and may carry practical consequences.

[156] *Cf.* Statman, *supra* note 73, at 579. According to Statman, construing the conflict between human dignity and freedom of expression in terms of conflicting rights, rather than viewing human dignity as part of the justification for freedom of expression, offers a clearer conceptualization of this tension. *Id*. at 578-79.

[157] Schauer, *Speaking of Dignity*, *supra* note 78, at 179.

[158] *See* Schauer, *The Exceptional First Amendment*, *supra* note 6, at 53-56.

[159] *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 4, at 49-53; O'Neil, *supra* note 30, at 30.

[160] *See generally* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2.

dignity terms leads to such a possible confusion, so the connection between freedom of expression and human dignity (or equality) may by construed as legitimizing the limitation of speech. Avoiding this confusion may be facilitated by keeping human dignity and free speech doctrinally separated.

In advocating for the separation of dignity and speech I am not saying that dignity is less important than freedom of expression. [161] Rather, I am simply saying that dignity is irrelevant for free speech *protection*, and should be regarded as an external constraint on free speech rather than an internal justification.

Labels matter. If freedom of expression is articulated in human dignity terms, it would not be long before someone who has neglected to fully understand the delicate nature of this connection would mistakenly interpret it in a very different way than Dworkin and Greenawalt understand it. Furthermore, the minimalist account of human dignity does not reflect many western legal systems' understanding of rights and human dignity. In these cases, human dignity sends mixed signals as to the protection or limitation of speech. Therefore, the possible harm of juxtaposing freedom of expression with dignity and equality may well exceed the benefits of distinguishing the "argument from dignity" from the "argument from autonomy."

Autonomy is not affiliated with the same values as dignity, and is perceived more in a libertarian way than dignity or equality, both in Europe and the United States. Keeping an emphasis on autonomy (or liberty) does not carry the same risks, or at least significantly decreases the chances for possible term confusion and its undesirable consequences.[162]

Autonomy is mainly (and intuitively) affiliated with libertarian values, and is therefore more compatible with the American paradigm to free speech. As opposed to autonomy, prevalent perceptions of human dignity, especially outside the United States, are communitarian.[163] Although autonomy may be interpreted as accommodating communitarian concerns,[164] and human dignity may be interpreted as accommodating libertarian concerns,[165] both instances are

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[161] *Cf.* Schauer, *Speaking of Dignity*, *supra* note 78, at 190-191 ("As a differential protection for or immunization of various other-regarding and harm-protecting acts under circumstances in which the same harms would justify official intervention, *freedom of speech is different in dramatic ways from most other individual rights, and thus the idea of dignity, which is highly relevant to thinking about many other rights, may be much less relevant in thinking about freedom of speech*.") (emphasis added).

[162] *Compare* Dworkin, Liberty and Pornography, *supra* note 97, *with* Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: the Case of Pornography Regulation*, 56 TENN. L. REV 291, 303-04 (1989).

[163] *Cf.* Post, *supra* note 22, at 23-116 (affiliating human dignity with community), Brugger, *supra* note 31, at 72-74.

[164] *See* Michelman, *supra* note 163, at 303-04, and Brison, *Autonomy Defense*, *supra* note 21, at 336-38 *passim*.

[165] *See* discussion on Dworkin and Greenawald at *supra* Part III.A.1.

peripheral interpretations. The mainstream understandings of both terms lean on different heritages.[166] When it comes to free speech justifications, it is more appropriate to lean on classic liberal perceptions than communitarian perceptions. Therefore, although autonomy is not the silver bullet to the problems human dignity presents, it is still far better, since the human dignity-based regime is more prone to suppressing speech.

The "argument from dignity," in its narrow sense, is not sufficiently distinguishable from the "argument from autonomy." The latter actually captures and conceptualizes the minimalist view of the "argument from dignity" quite adequately, and does not carry similar potential misunderstandings as does the former. This "slippery slope" argument may seem unsubstantiated to the American reader because, in the American context, human dignity (and equality) carries different meanings than in most other western democracies. Yet, as demonstrated above, this should be a genuine concern in other legal settings. When Greenawalt and Dworkin articulated their view as to the "argument from dignity" they did so from an American perspective, and may have overlooked the non-American approach that sheds a different light on their arguments.

Free speech justifications must be aimed at protecting speech – not restricting it. Recognition of human dignity among these justifications, with all its abovementioned potential interpretations that are speech-restricting, is simply a bad idea. On one hand, speech-protecting features of the "argument from dignity," namely the minimalist account, are not sufficiently discernable from existing justifications. Moreover, it is doubtful how exactly these arguments are free speech justifications as opposed to general principles for the protection of *all* rights. On the other hand, the more expansive "argument form dignity" is not a justification for protecting free speech, since it is also a potential justification for the limitation of speech. Therefore, free speech protection has very little to gain from affiliation with human dignity, and discourse that aligns the two might prove a "Trojan Horse" with dignity as "the enemy from within."

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[166] *See* discussion *supra* Part I (regarding the communitarian sources of human dignity and libertarian sources of American rights discourse).