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Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse

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ARTICLE

CONSTITUTIONAL DIALOGUE AND HUMAN DIGNITY: STATES AND TRANSNATIONAL CONSTITUTIONAL DISCOURSE

Vicki C. Jackson[1]

Human dignity has become an important part of the transnational vocabulary of constitutionalism and human rights. The Preamble of the *United Nations Charter* expresses belief in "the dignity and worth of the human person."[2] The *Universal Declaration of Human Rights* has been described by a leading scholar as part of the "large family of dignity-based rights" adopted after World War II.[3] Expressed in these foundational U.N. documents, human dignity also plays an important role in the jurisprudence of several nations in Europe, including Germany.[4]

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1. Professor of Law, Georgetown University Law Center. With thanks to Alida Dagostino and Amber Dolman for excellent research assistance, and to Judith Resnik and Bob Taylor for helpful comments.

2. U.N. CHARTER pmbl.

3. MARY ANN GLENDON, A WORLD MADE NEW 175 (2001); *see Universal Declaration of Human Rights*, pmbl., G.A. Res. 217(A) (III), U.N. GAOR, 3d Sess., Supp. No. 127, at 71, U.N. Doc. A/810 (1948).

4. *See* GRUNDGESETZ [GG] art. 1, § 1 (F.R.G.) (German Basic Law provision that human dignity is "inviolable"); *see also* G.P. Fletcher, *Human Dignity As a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171 (1984) ("No one would question whether the protection of human dignity was a primary task of contemporary legal culture," especially in Europe and North America.); *cf., e.g., American Declaration of the Rights*

The U.S. Constitution does not refer specifically to human dignity.[5] Yet there are some cognate concepts in the Constitution's text, such as the ban on cruel and unusual punishments, the protections of the due process clause, and others that have been developed in the U. S. Supreme Court's constitutional jurisprudence.[6] The phrase "human dignity" (according to searches in both Lexis and Westlaw) makes its first appearance in the U.S. Reports in 1946, in Justice Murphy's dissent in *In re Yamashita*.[7] This post-World War II

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and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V/II.82 doc.6 rev.1, at 17 (1992) (adopted by the Ninth International Conference of American States (1948)) (beginning with: "The American peoples have acknowledged the dignity of the individual . . . ."; followed by Preamble, beginning: "All men are born free and equal, in dignity and in rights . . . ."), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *available at* http://www.cidh.oas.org/basic.htm; *African Charter on Human and Peoples' Rights*, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, *reprinted in* 21 I.L.M. 58 (1981) (entered into force Oct. 21, 1986) ("Every individual shall have the right to the respect of the dignity inherent in a human being . . . .").

5. Human beings are referred to in the U.S. Constitution as "persons," "citizens," "residents," "accused," "subjects [of foreign states]," and "the people"—but not as "human beings." The word "dignity" does not appear.

6. Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* DIETER SIMON/MANFRED WEISS (HRSG.), ZURE AUTONOMIE DES INDIVIDUUMS, LIBER AMICORUM SPIROS SIMITIS 249 (NomosVerlagsgesellschaft, Baden-Baden 2000) (explanation of many areas of U.S. constitutional law in which the idea of human dignity, albeit underdeveloped, plays a role).

7. *In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting). The Court there upheld the authority of a military commission to try and sentence to death a defeated Japanese general for failing to prevent war crime activity by troops under his command. Justice Murphy, dissenting, praised the Court for rejecting the government's argument that there was no role for judicial review of such proceedings through habeas corpus, and dissented on the grounds that the proceedings had been unfairly conducted and that the charge against General Yamashita was not one of a war crime recognized by international law. In that context, he wrote:

> If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.

Id. at 29. Justice Murphy had earlier invoked "the dignity of the individual" in his stirring dissent in *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). "Human dignity" was referred to by Justice Frankfurter in his concurring opinion in *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring), and by Justice Murphy again in dissent on the standard of review for the denial of exemptions from selective service in *Cox v. United States*, 332 U.S. 442, 458 (1947) (Murphy, J., dissenting). The first appearance of the phrase "human dignity" in a majority opinion appears to have been in *Rochin v. California*, 342 U.S. 165, 174 (1952) (condemning the use of "force so brutal and so offensive to human dignity in securing evidence from a suspect" as inconsistent with the Due Process clause). In dozens of cases decided since 1946, members of the Court have invoked the concept of or used the words "human dignity," sometimes in dissent, *see, e.g.*, Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (referring to Justice Jackson's concerns to protect "'the dignity

appearance is consistent with the emergence of "human dignity" as a distinctive feature of western constitutionalism after the war. Although some members of the U.S. Supreme Court in the postwar period have embraced human dignity as a motivating principle for the U.S. Bill of Rights,[8] the role of the concept of "human dignity" in the Court's jurisprudence is episodic and underdeveloped.[9]

Expressed in such constitutional systems as Germany's,[10]

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and personality' of the individual" expressed in his separate concurrence in *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942)), and often in connection with Eighth Amendment claims, *see, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 (1958); Furman v. Georgia, 408 U.S. 238, 270, 306 (1972) (Brennan, J., concurring); Hope v. Pelzer, 536 U.S. 730, 738, 742 (2002) (describing cruel treatment of handcuffing a prisoner to a hitching post for long periods as inconsistent with his human dignity and finding violation of Eighth Amendment), and other criminal procedure questions, *see, e.g.*, Schmerber v. California, 384 U.S. 757, 770 (1966); Miranda v. Arizona, 384 U.S. 436, 457 (1966); Skinner v. Ry. Labor Executive's Ass'n, 489 U.S. 602, 644 (1989) (Marshall, J., dissenting) (Fourth Amendment issue). It has appeared as well in connection with free speech claims, *see, e.g.*, Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767, 781-82 (1986) (Stevens, J., dissenting), and, although not referred to as such in the Court's abortion decisions in the 1970s and 1980s, by the 1990s, human dignity is invoked in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion); *id.* at 916, 920 (Stevens, J., concurring in part and dissenting in part); *id.* at 923 (Blackmun, J., concurring in part and dissenting in part), and also in the "right to die" case, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 289 (1990); *id.* at 311 (Brennan, J., dissenting). For an early, detailed analysis of the Court's use of the term "dignity" in connection with the rights of individuals, see Jordan J. Paust, *Human Dignity as a Constitutional Right*, 27 HOWARD L. J. 145, 150-62 (1984). For further discussion of the concept of human dignity in the Court's decisions, see Neuman, *supra* note 6. For a comparative analysis of the U.S. Court's concept of "dignity," as applied to individuals and to government entities, see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

8. *See, e.g.*, Hugo Adam Bedau, *The Eighth Amendment, Human Dignity and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 151 (Michael J. Meyer & William A. Parent eds., Cornell 1992) (discussing Chief Justice Earl Warren and human dignity); Louis Henkin, *Human Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS, *supra*, at 220-256 (discussing judicial development of rights related to human dignity).

9. The concept of dignity played an important role in the Court's recent decision in *Lawrence v. Texas*, 123 S. Ct. 2472, 2478, 2482 (2003) (holding that state ban on sodomy violates Due Process clause). A number of opinions in the U.S. Supreme Court treat "human dignity" as a concept inherent in the Eighth Amendment, as well as decisions respecting individual autonomy in decision making about intimate matters. *See supra* note 7. Although U.S. human rights law markedly diverges from that of much of the international community on the death penalty, further study would be needed to determine the degrees of convergence and divergence in its approach to other human rights issues. For a very helpful discussion of convergence and divergence between international human rights norms and domestic constitutional norms, see Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

10. As Professor Klug pointed out in this journal last year, human dignity also plays an important role in the constitutional jurisprudence of South Africa, as well as many

human dignity is a core component of constitutional jurisprudence in a constitutional system which also incorporates obligations of social solidarity (and government support of positive welfare) not found in the U.S. Constitution. In Germany the right to human dignity is understood as the most basic and foundational of rights, with both negative and positive implications for how the state should act.[11] In the United States, by contrast, notions of affirmative obligations to individuals on the part of the government have been rejected, not so much for lack of textual tools,[12] but out of a set of constitutional commitments developed over time.

The U.S. Supreme Court has been slower than some other national courts to become familiar with and discuss, distinguish, or borrow from related constitutional approaches of other nations and systems. The growth in transnational judicial discourse, especially on constitutional issues relating to human rights, has been remarked by many.[13] National courts in Argentina, Botswana, Canada, Germany, India, South Africa, and elsewhere not infrequently refer to the constitutional jurisprudence of other nations in resolving domestic constitutional questions. Although such references are not unheard

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other tribunals given its significance in the Universal Declaration of Human Rights and in the preamble of major international covenants. *See* Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133 (2003).

11. *See* DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 299-301, 323-27 (2d ed. 1997); Fletcher, *supra* note 4, at 178-82 (emphasizing that under German basic law, it is the duty of the state to recognize and keep inviolable human dignity); *see also* EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE U.S. (Praeger 2002); Klug, *supra* note 10.

12. *Compare* DeShaney v. Winnebago Co. Dep't Soc. Serv., 489 U.S. 189 (1989) (holding that government generally does not have constitutional obligation under Due Process clause to protect individuals from private violence), *with* Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1911 (2001) (arguing that the Fourteenth Amendment should be understood to commit government to positive obligation of "equal protection"), *and* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

13. See Atkins v. Virginia, 536 U.S. 304 (2002), for a recent set of exchanges. *Compare id.* at 316 n.21 (noting world community's disapproval of death penalty for mentally retarded offenders), *with id.* at 322 (Rehnquist, C.J., dissenting) (disagreeing with court's reliance on world community views), *and id.* at 347-48 (Scalia, J., dissenting) (also disagreeing). *See also* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 585-86 (1999); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001); Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J.L. & FEMINISM 377 (2002).

of in the United States,[14] transnational discourse involving national courts, supranational and international tribunals is still subject to an internal debate in the United States about its relevance and propriety. [15]

However, international and national courts are not the only locations for the diffusion and generation of post World War II constitutional norms; concomitantly, federal law is not the only law whose interpretation might be informed by comparative developments. In the United States, each state has its own constitution, which is the source and site for normative constitutional development. Moreover, state common law and statutory law are also within the interpretive province of the state courts. Given the plethora of jurisdictions with often comparable provisions, many state courts have experience with the benefits of comparative law by looking to the interpretations of other state courts, albeit within the bounds of the "nested" federalism of the United States, in which all states are constrained by the supremacy of federal law.[16] Thus, notwithstanding scholarly debate over the possibilities for "bona fide" state constitutionalism or for trans-state constitutionalism in the United States,[17] many states have experience with trans-

14. *See, e.g., Lawrence*, 123 S.Ct. at 2481, 2483; *Atkins*, 536 U.S. at 316 n.21; Washington v. Glucksberg, 521 U.S. 702, 711 n.8, 718 n.16 (1997); Planned Parenthood v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C. J., dissenting).

15. *Compare, Atkins*, 536 U.S. at 316 n.21, *and* Printz v. United States, 521 U.S. 898, 975-78 (1997) (Breyer, J., dissenting), *with Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting), *and Printz*, 521 U.S. at 921 n.11.

16. *See* Vicki C. Jackson, *Citizenship and Federalism, in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 127 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., Carnegie 2001); *see also* Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 270 (1994).

17. There are a number of different perspectives on whether the United States should be understood to offer serious opportunities for the development of state-level constitutionalism based on comparative state constitutional discourse. *See, e.g.*, James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 831-32 (1992) (seeking to explain "failure of state constitutionalism" in part because significant state constitutionalism is incompatible with national constitutionalism and suggesting that variations among state constitutions are "clumpy, irregular variations of a single national character" arising from bargaining, rather than commitments of principle and deliberation); Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 195-96 (1984) (arguing that differences among state constitutions are meaningful, because those constitutional texts are "unmistakable evidence of societal action" and are "important not for what a court must decide but for what it cannot plausibly decide"); James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985 (1993) (arguing that Gardner is right only in part and that there are some aspects of state constitutions that are results of popular deliberation and struggles over high principle, including direct democracy and free public education); Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147

state comparative law[18] and, in some cases, with comparative state constitutional interpretation.[19] This exper-ience is helpful, because we are entering a world in which sustaining the autonomy of one legal system from another becomes more difficult as decision makers come to know more and as members of different legal orders increasingly interact with each other.[20]

Montana's constitutional history illustrates both the possibilities and the limitations of such multilayered trans-boundary constitutional influences. European concepts of "human dignity" have evolved in directions quite different from those in much of the United States, for reasons related at least in part to the interactions among newer and older legal ideas and the varying capacities of existing legal systems to assimilate newer legal norms to existing traditions.

(1993) (arguing that state courts should be seen as different interpreters of constitutionalism at the intersection of state and federal authorities and that state constitutional debate cannot close its eyes to the larger discursive community in which it finds itself; also arguing against originalism in state constitutional interpretation because state residents do not see themselves as members of a state community reaching back to a founding and arguing for engaging in interpretation within the larger interpretive community of the nation); Daniel Rodriguez, *State Constitutional Theory and its Prospects*, 28 N.M. L. REV. 271 (1998) (calling for a trans-state constitutional theory, because states are not political islands, but units of government within a diffuse union of states facing similar problems).

18. *See, e.g.*, Albinger v. Harris, 2002 MT 118, ¶¶ 24-28, 310 Mont. 27, ¶¶ 24-28, 48 P. 3d 711, ¶¶ 24-28 (2002) (reviewing other state court precedents to help determine appropriate rule for resolving disputes about ownership of engagement rings); Bruce v. Dyer, 524 A.2d 777, 783-86 (Md. 1987) (describing in detail the "split of authority" from other state court jurisdictions on whether "agreement to sell realty held in tenancy by the entireties and to divide the proceeds causes an immediate conversion of the estate into a tenancy in common"); Miller v. State, 732 P.2d 1054, 1063-64 (Wyo. 1987) (discussing decisions of other states' courts on intent to defraud element required for criminal conviction under Wyoming case law).

19. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 498-99 (Ky. 1992) (holding state sodomy statute unconstitutional under state guarantees of privacy, found to be broader than those of U.S. Constitution, and citing in support other state court constitutional decisions from New York, Pennsylvania, Michigan and Texas); *see also* Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (setting forth the "general rule" that, in briefing questions of Pennsylvania state constitutional law, the parties should analyze four factors, including "related case-law from other states").

20. *Cf.* Hans Linde, *Book Review: Materials on International Human Rights and U.S. Criminal Law and Procedure*, 85 AM. J. INT'L L. 414 (1991) (noting that U.S. states may not think to look to foreign or international sources of law on criminal procedure issues out of belief that U.S. system is necessarily superior, but implicitly suggesting that states might learn from comparison with international and comparative materials); Jackson, *Ambivalent Resistance*, *supra* note 13, at 600-01 (noting inevitability of comparison and benefit of increased knowledge on which to ground more accurate comparisons).

I. THE MONTANA HUMAN DIGNITY CLAUSE: ITS INTERNATIONAL AND COMPARATIVE ROOTS

Article II, section 4 of the Montana Constitution provides:

> Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Montana is unique among the fifty U.S. states to so explicitly and generally protect human dignity in its constitutional document.[21] How that clause comes to be in the Montana Constitution is a story involving both a deliberate process of comparative study and the impact of a mother's commitment to equality and human dignity on a son who was a member of the Montana Constitutional Convention in 1971.

In 1971, the people of Montana voted to hold a constitutional convention to propose a replacement for the 1889 Constitution. At least one impetus for the convention was the failure of the 1889 Constitution to include sufficient protections from discrimination.[22] The legislature established a Con-

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21. Only two other state constitutions of which I am aware explicitly refer to human or individual dignity. The Louisiana Constitution of 1974, apparently inspired in part by article II, section 4 of the Montana Constitution of 1972, includes section 3, "Right to Individual Dignity." *See* Mary Anne Wolf, *Louisiana's Equal Protection Guarantee: Questions About the Supreme Court Decision Prohibiting Affirmative Action*, 58 LA. L. REV. 1209, 1223 (1998). The text of the provision, however, does not repeat the words used in its title. It provides in full:

> §3 Right to Individual Dignity.
>
> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs or affiliations. No law shall arbitrarily, capriciously or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

LA. CONST. art. I, § 3. In Illinois, article I, section 20 of the Illinois Constitution of 1970, titled simply "Individual Dignity," protects "individual dignity" by "condemning" communications that incite violence, hatred, abuse or hostility towards persons or groups based on religion, race, or ethnic or national affiliation. The provision has been construed as "purely hortatory," and creating no private cause of action nor imposing a limitation on the powers of government. AIDA v. Time Warner Entm't Co., 772 N.E.2d 953, 957, 961 (Ill. 2002); Irving v. J. L. Marsh, Inc., 360 N.E.2d 983, 984 (Ill. 1977).

22. *See* Tia Rikel Robbin, *Untouched Protection from Discrimination: Private Action in Montana's Individual Dignity Clause*, 51 MONT. L. REV. 553, 555 (1990).

stitutional Convention Commission which, inter alia, prepared several studies, including one that contained selected provisions from the bill of rights provisions of other jurisdictions. The delegates, elected in late 1971, deliberated and drafted the proposed constitution in the early part of 1972; the proposed constitution was accepted by the voters in June, 1972.[23]

In the work of the Commission, a deliberate effort was made to benefit from comparative learning. *Constitutional Convention Study Number 10*, on the Bill of Rights, is over 300 pages of text analyzing federal and state caselaw and scholarly works on constitutions and constitutionalism in the United States.[24] Its forty-page appendix of "Selected Rights Provisions" includes provisions from many state constitutions, designed to suggest "alternative subjects and wording that might be considered for inclusion" in the new Montana Constitution. Included under the general heading of "Freedom from Discrimination," is article II, section 1 of the Puerto Rico Constitution, which begins with: "The dignity of the human being is inviolable"—language ultimately borrowed and included in the Montana Constitution.

According to two studies of the dignity clause in the Montana Constitution, the language for this clause was indeed drawn from the Puerto Rican constitution's provisions included in this study.[25] As Clifford and Huff report, Richard Champoux, the delegate who introduced into the Montana Convention the proposed text that became article II, section 4, not only confirmed the Puerto Rican source but explained his own purposes in introducing the language:

> When asked about his intentions . . . he spoke eloquently about the influence of his mother, who strongly believed that men and women should be treated equally and with dignity . . . . [H]is mother's beliefs reflected, in part, the indignities she had suffered in the employment markets when she was unable to get a job . . . . [He also expressed] deep concern about the degradation of native peoples in Montana . . . .[26]

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23. *See* Mathew O. Clifford & 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, 315 (2000) (citing Rick Applegate, *Study No. 10: Bill of Rights, in* MONTANA CONSTITUTIONAL CONVENTION 1971-1972, at iii (prepared by Mont. Const'l Convention Comm'n); 1 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS vi (1982)).

24. *See* Rick Applegate, *Study No. 10: Bill of Rights, in* MONTANA CONSTITUTIONAL CONVENTION 1971-1972 (prepared by Mont. Const'l Convention Comm'n).

25. Clifford & Huff, *supra* note 23, at 321 n.92 (2000); *see also* Robbin, *supra* note 22, at 555-56.

26. Clifford & Huff, *supra* note 23, at 321 n.92. I am grateful to the authors of this

If Montana was inspired by Puerto Rico in 1972, how did Puerto Rico come to have a dignity clause in its constitution? Adopted in 1951, the Constitution of the Commonwealth of Puerto Rico, in article II, section 1, declares:

> The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.

This inviolable dignity clause is characterized both by constitutional scholars and by Puerto Rican courts as fundamental to the entire structure of the Puerto Rican constitution (in ways reminiscent of the German constitutional Court's treatment of human dignity as a basic norm). As one constitutional scholar explained, the concept of the dignity of the human being is "the moral basis for democratic government," and implies the "essential equality" of all people before the law.[27] In other words, the inviolable dignity of human beings must be reflected in both the governance structures of a democracy and the way in which individual members are treated.

The movement in the late 1940s for constitutional change in Puerto Rico was the result of a complex interaction between different political views and aspirations for Puerto Rico's status and relationship to the United States, both in Puerto Rico and in the Congress.[28] These developments were influenced by what

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study for having called delegate Champoux and interviewed him concerning this history and for having included this information in their helpful article. Robbin agrees that Champoux is the delegate who introduced the proposal ultimately adopted as article II, section 4 of the Montana Constitution. *See* Robbin, *supra* note 22, at 560 n.43.

27. JUAN M. GARCIA-PASSALACQUA, PUERTO RICAN CONSTITUTIONAL LAW 41 (1974). Note that Puerto Rico's constitution also has a provision that every person has the right to protection of law against abusive attacks on his honor, reputation and private or family life. *See* P.R. CONST. art II, § 8 ("Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life.").

28. *See* JUAN TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (U. P.R. Press 1985). In 1950, Congress authorized Puerto Rico to adopt, by referendum, a constitution, subject to certain federal limitations. *See id.* at 146-53. Delegates to a constitutional convention in Puerto Rico were elected and their draft approved by referendum in 1951-52. *See id.* at 153. Under the 1950 federal law, Congress had reserved authority to approve the constitution before it went into effect, and Congress ultimately insisted on the removal of a section guaranteeing positive social welfare rights and the revision of another dealing with the right to a free public education, before approving the constitution. *Id.* at 154-58. Whether the course of dealings leading to the adoption of the constitution was in the nature of a compact, changeable only by mutual consent of both parties, or had changed nothing about Puerto Rico's status insofar as it was subject to legislative control by Congress was a subject of serious disagreement. *See infra* note 30.

one author has called an "international atmosphere of decolonization" and the ideas of "self-government and independence that developed during the international 'independence boom' at the end of the Second World War."[29]

In drafting the Commonwealth Constitution the drafters both used and expanded on the U.S. Constitution, drawing on international human rights norms. The United Nations played a key role, both in inspiring provisions based on the Universal Declaration of Human Rights and as a vehicle for attempted resolution of the Commonwealth's relationship to the United States.[30] As one study says, "borrowing from the Universal Declaration of Human Rights" approved by the United Nations,[31] the Puerto Rican constitution included rights not then found in the federal, or in other state, constitutions.[32] According to the Supreme Court of Puerto Rico:

> [F]ormulation of a Bill of Rights following a broader style than the traditional, that would gather the common feeling of different cultures on new categories of rights[,] was sought. Hence the Universal Declaration of Human Rights and the American Declaration of Human Rights and Duties exercised such an important influence in the drafting of our Bill of Rights.[33]

The Puerto Rican courts have emphasized statements by drafters to the effect that the right to human dignity was the

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29. ALFREDO MONTALVO-BARBOT, POLITICAL CONFLICT AND CONSTITUTIONAL CHANGE IN PUERTO RICO, 1898-1952, at 118 (U. Press of Am. 1997); *see also id.* at 125 (noting assertion by governor of Puerto Rico's "unique political and economic structure").

30. *See* TORRUELLA, *supra* note 28, at 160-65 (describing representations made to the U.N. committee overseeing colonial possessions that, by 1953, the United State's relationship with Puerto Rico was that of a compact, changeable by neither body unilaterally, and thus Puerto Rico was outside any reporting obligations respecting colonies). However, both in the 1950s and since, other statements from members of the government of the United States have been that Puerto Rico remains subject to the powers of Congress, exercisable without Puerto Rico's consent. *See, e.g., id.* at 169-75 (describing congressional views in the 1950s); H.R. REP. NO. 104-713, pt. 1, at 10, 21-22 (1996) (asserting that existing authority for self governance in Puerto Rico could be "rescinded" by Congress pursuant to Territories clause and referring to opinion from Justice Department that "mutual consent" clauses were ineffective as not binding later Congresses); *see also id.* at 14 (referring to "discrepancy" between interpretation of Puerto Rico status by U.N. in 1953 and "reality" of Puerto Rico's status in United States federal system).

31. MONTALVO-BARBOT, *supra* note 29, at 135-36 (noting in particular the right to work, health, clothing and medical care).

32. As noted above, provisions guaranteeing certain social welfare rights in the Puerto Rico constitution were controversial in Congress and were deleted or modified before approval of the Commonwealth Constitution. *See id.* at 136-41; TORRUELLA, *supra* note 28, at 154-58.

33. Arroyo v. Rattan Specialties, Inc., 117 P.R. Dec. 35, 60 (1986) (quoting Estado Libre Asociado v. Hermandad de Empleados, 104 P.R. Dec. 436, 439-40 (1975)).

foundational and most important element of that Bill of Rights, one from which all others could be inferred even if they had not been express.[34] The influences on the Bill of Rights of the Puerto Rican constitution, then, were themselves transnational and international in character, and their influence was the product of a deliberate effort to "gather . . . [from] different cultures . . . new categories of rights."

The *Universal Declaration of Human Rights*, adopted in 1948, just three years before the Puerto Rican constitution, begins with a whereas clause referring to the "inherent dignity" of human beings, and its first article states: "All human beings are born free and equal in rights and dignity."[35] The *American Declaration of the Rights and Duties of Man*, also adopted in 1948, likewise acknowledges in its first line the "dignity of the individual," and in the first line of its preamble states: "All men are born free and equal, in dignity and in rights."[36]

Puerto Rico's incorporation of language and ideas from these international human rights documents was part of a wave of post World War II constitution making. Puerto Rico's 1951 Constitution parallels the German Basic Law of 1949 in two interesting respects (though I am unaware of any direct influence of the German constitution on Puerto Rico's constitution). The German Basic Law, adopted in 1949 under Allied supervision, begins with article I, section 1: "The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority." According to Donald Kommers, a leading U.S. scholar of the German constitution:

> [The human dignity clause is] of primary importance . . . . In the view of the Federal Constitutional Court, this clause expresses the highest value of the Basic Law, informing the substance and spirit of the entire document. While encompassing all guaranteed rights, the concept of human dignity also includes a morality of

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34. *See, e.g.*, *Arroyo*, 117 P.R. Dec. at 69-72 (discussing statements made by the Convention on the Bill of Rights regarding the purpose of the dignity clause found in 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUTYENTE 2561, and 2 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE 1372); Figueroa Ferrer v. Commonwealth, 107 P.R. Dec. 278, 281-87 (1978) (discussing the meaning of the dignity clause as a constitutional right and its relationship to the right of privacy established in article II, section 8 of the Puerto Rican constitution).

35. *See* GLENDON, *supra* note 3, at 174 (describing views of a principal drafter, René Cassin, that the general principles of "dignity, liberty, equality and brotherhood" were the foundations for the rest of the Declaration); *cf. id.* at 146 (describing Eleanor Roosevelt's defense of the dignity clause in the Universal Declaration as meant to explain why human beings have rights to begin with).

36. *See American Declaration of the Rights and Duties of Man*, *supra* note 4.

duty that may limit the exercise of a fundamental right.[37]

Like Puerto Rico's constitution, the German Basic Law prohibits the death penalty, a provision not found in either of the international instruments discussed above.[38] Whatever specific transnational influences may have been at work, both Puerto Rico and Germany were part of a wider constitution-making phenomenon reflecting increased legal commitments to human rights.

So, to summarize: Montana's "human dignity" clause reveals connections to a history of international and foreign constitution-making and human rights declarations in the years following the end of World War II, at a time when the international community was converging on the centrality of human dignity as a fundamental value.[39] Puerto Rico, in its own struggle for greater degrees of autonomy and independence, deliberately seeks to incorporate multiple constitutional traditions and borrows language and ideas for its human dignity clause from the Universal Declaration of Human Rights and other transnational sources. Given the importance of international supervision to emerging colonies, it was perhaps especially understandable that Puerto Rico should have looked in this direction for influence. But what is perhaps less predictable is that twenty years later, the state of Montana would in turn look to Puerto Rico, not necessarily in a self-conscious effort to draw on different constitutional cultures but simply to improve its own constitution. From the defeat of the Nazis, to international declarations of the centrality of human dignity, to a constitutionally anomalous territory becoming a commonwealth of the United States, to the State of Montana,

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37. KOMMERS, *supra* note 11, at 298. For an insightful discussion of the pre-World War II roots of German and French commitments to the protection of personal dignity, rooted in respect for honor, see James Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000).

38. *See* P.R. CONST. art. II, § 7 (stating that the "death penalty shall not exist); GRUNDGESETZ [GG] art. 102 (F.R.G.) (German Basic Law provision that "capital punishment is abolished"). The German Basic Law also includes the idea of state responsibility for social welfare, an idea embodied as well in the version of a proposed constitution drafted by the Puerto Rican Constitutional Convention and approved in a popular referendum. As noted above, some of the social welfare provisions in the Puerto Rican constitution were stricken by Congress before it would approve the proposed constitution in 1951. *See supra* note 28.

39. In the Japanese constitution, the word dignity appears in article 24, dealing with equality of the sexes with respect to matrimonial and family matters. *See* KENPŌ, art. 24. This constitution was drafted, essentially by the Allied Command, in 1946—two years before the *Universal Declaration of Human Rights* was adopted.

the idea of a constitutional right to human dignity has traveled through a set of international and intra-national boundaries.

II. HUMAN DIGNITY AS TRANSPLANT: DOMESTICATION OR INVIGORATION?

In the Universal Declaration of Human Rights, the idea of human dignity was a unifying basic concept that related both to the guarantees of "negative" civil rights and liberties[40] and "positive" concepts of human rights to minimally adequate necessities of life.[41] The dignity clause in the Montana Constitution, coupled with the extension of the ban on discrimination to private persons as well as the government, might have foreshadowed judicial development of a jurisprudence closer to those of nations, like Germany, under the influence of domestic constitutional social welfare commitments. But for the most part, the dignity clause in Montana has been treated as reinforcing values, such as protection from unlawful searches and seizures, government discrimination, and privacy, more specifically identified elsewhere. The migration of the idea of human dignity illustrates not only the diffusion of ideas but also the interaction between new ideas and other elements of the system in which they are embraced. The impact of constitutional text may vary substantially depending on context, development, history and culture. New texts may be as readily domesticated within existing paradigms as they may transform those paradigms.[42] A brief discussion of human dignity and constitutional law in Montana and Puerto Rico will illustrate

40. *See, e.g.*, UNIVERSAL DECLARATION, *supra* note 3, arts. 9-11 (protection from arbitrary arrest or punishment without trial in which presumption of innocence obtains).

41. *See, e.g., id.* arts. 22-26 (right to social security, right to work in just conditions, right to education).

42. Professor Klug has suggested that Montana "mine foreign dignity jurisprudence in its efforts to define the content and scope of its own clause," despite "inherent limitations" based on "particular legal forms inherent to [other] countries' legal systems." Klug, *supra* note 10, at 155. Although I share Professor Klug's enthusiasm for increasing judicial awareness of constitutional development in other countries of cognate legal ideas and values, the term "mining" connotes a more direct kind of utilization of external sources of law. Even where the same words are used to refer to concepts or rights with universal qualities, both institutional and historic differences may mediate and complicate the directness of appropriate influence or consideration. *See* Neuman, *supra* note 9, at 1890.

this phenomenon.

Notwithstanding the presence of the human dignity clause in the Montana Constitution for now over thirty years, it has played a secondary and at best complementary role in the Montana cases in which it has appeared.[43] Far more important has been the next sentence of article II, section 4, securing equal protection. It is not uncommon to find courts employing extended analysis of the equal protection component of the constitutional provision,[44] with perhaps a short rhetorical reference to dignity. Notwithstanding the constitutional text extending the anti-discrimination principle to action by private entities, there are a number of Montana cases that appear to say that the equal protection clause has the same meaning as the federal equal protection provision (which applies only in the presence of state action).[45] The analogy to the federal

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43. For discussion of this underutilization, see, for example, Robbin, *supra* note 22, at 553-54, 562-63, Clifford & Huff, *supra* note 23, at 302-303, and Mark S. Kende, *The Issues of E-Mail Privacy and Cyberspace Personal Jurisdiction: What Clients Need to Know About Two Practical Constitutional Questions Regarding the Internet*, 63 MONT. L. REV. 301, 315-16 (2002).

44. For cases decided under Montana's "individual dignity" clause that focus analysis on equal protection, see, for example, *State v. Taylor*, 168 Mont. 142, 542 P.2d 100 (1975), which rejected an equal protection challenge to a method of jury selection, *Oberg v. City of Billings*, 207 Mont. 277, 674 P.2d 494 (1983), finding unconstitutional an exception as to law enforcement workers from a state statute that generally barred employers' use of polygraphs, *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 744 P.2d 895 (1987), holding unconstitutional a workers' compensation statute's exclusion of members of the employer's family, and *Stratemeyer v. Lincoln Co.*, 259 Mont. 147, 855 P.2d 506 (1993), rejecting a challenge to an exclusion for recovery for mental stress in workers' compensation law.

45. *See* Emery v. State, 177 Mont. 73, 79, 580 P.2d 445, 449 (1978) (stating that "[t]he similar provisions of the equal protection clause of the United States Constitution and the equal protection clause of the 1972 Montana Constitution provide generally equivalent but independent protection in their respective jurisdictions"); *see also* Godfrey v. State Fish & Game Comm'n, 193 Mont. 304, 306, 631 P.2d 1265, 1267 (1981) (noting that both the Montana Constitution, article II, section 4, and the equal protection clause of the U.S. Constitution have the same purpose, to "ensure that persons who are citizens of this country are not the subject of arbitrary and discriminate [sic] state action"). As noted, the analogy is particularly surprising in light of the apparently clear text of the equal protection part of the Montana clause to extend to private discrimination, when the federal equal protection clause does not. *See* Robbin, *supra* note 22, at 553, 556 (describing different understandings of this clause in the Convention, noting that its prohibition of discrimination by private parties "has remained dormant," and urging more use of its express language to protect people from private as well as public discrimination). But, for more recent apparent judicial recognition that the clause does apply to private discrimination, see *Harrison v. Chance*, 244 Mont. 215, 225, 797 P.2d 200, 206 (1990), asserting, in a sexual harassment claim against a private employer, that "[f]reedom from sexual discrimination is a constitutional right in Montana under Article II, Section 4," but concluding that the plaintiff's exclusive remedy was that provided in

Constitution may have overwhelmed the potential for developing independent lines of analysis that are latent in the individual dignity clause.[46]

Yet, justices on the Montana Supreme Court have also asserted on occasion that the state constitution provides rights that are different from and, in some respects, more expansive than those in the federal Constitution;[47] in some cases, the dignity clause may have played some role.

In *Oberg v. City of Billings,*[48] a police officer challenged a requirement that he submit to a polygraph, and argued that an exemption in a state law generally prohibiting employer's uses of polygraphs for law enforcement employees was unconstitutional. The court agreed, finding the exception uncon-

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state statute, and *Drinkwalter v. Shipton Supply Co.*, 225 Mont. 380, 732 P.2d 1335 (1987), holding that the legislature had not indicated a clear intent to abolish other common law remedies and that, in light of the constitution's protection against gender discrimination, plaintiff was not limited to a statutory Human Rights Commission remedy for sexual harassment. *Drinkwalter*, as was noted in *Harrison*, was legislatively overruled within months of being decided; *Harrison* upheld the limitation of such plaintiffs to the statutory Human Rights Commission remedy. In a very recent dissent, Chief Justice Karla M. Gray has argued that discussion by the delegates to Montana's Constitutional Convention shows that the "dignity" clause of article II, section 4 captured an intent to "eradicat[e] public and private discrimination based on race, color, sex, culture, social origin or condition, or political or religious ideas," and that the section had "no intent" to accomplish anything other than removal of certain types of discrimination. Walker v. State, 2003 MT 134, ¶¶ 98-99, 316 Mont. 103, ¶¶ 98-99, 68 P.2d 872, ¶¶ 98-99 (Gray, C.J., dissenting) (quoting two different delegates). She concluded that "[n]othing in the transcripts supports a free-standing, separate dignity right." *Id.* ¶ 99. Chief Justice Gray's emphasis in her opinion was on the absence of a separate right to human dignity, and not on whether the section extended to private discrimination, though the passage quoted above contemplates that it does reach such private discrimination.

46. *See also* Ronald K. L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985) (describing Montana Supreme Court's failure to adhere to state grounds of decision with respect to unlawful search and seizure on Supreme Court remand of issue).

47. *See, e.g.*, Dorwart v. Caraway, 2002 MT 240, 312 Mont. 1, 58 P.2d 128 (holding that cause of action for monetary relief is implied from provision of state constitution protecting privacy, relying on state constitution and statutory law and considering cases from many other states). Justice Nelson, concurring, emphasized that:

> *[I]ndependent* of any federal jurisprudence, federal constitutional authority, the common law, or other authority, the foundation for private causes of action for damages for constitutional violations is found in the language of Montana's 1972 Constitution . . . it is important to acknowledge this principle, because the greater guarantees of individual rights afforded by Montana's Constitution may be neither bounded nor frustrated by federal court decisions which, with seeming increasing frequency, are weakening similar protections of the federal Constitution.

Id. ¶ 84.

48. 207 Mont. 277, 674 P.2d 494 (1983).

stitutional under "rational basis" equal protection scrutiny.[49] In dicta, the court indicated, that had there been further evidence that the exception was intended by the legislature to apply to law enforcement officers because of their office of public trust, the exception would have passed rational basis scrutiny, but would still have been vulnerable under strict scrutiny because, under article II, section 4, "subjecting one to a lie detector test is an affront to one's dignity."[50]

In *Gryczan v. State*,[51] the court held unconstitutional a statute criminalizing gay sex between adults. The court rested on violations of the right to privacy, without resolving challenges that the statute infringed the right to dignity and the right to equal protection of the law.[52] And in *Armstrong v. State*,[53] the court noted the dignity clause as well as the state constitution's privacy clause in support of its conclusion that a statute prohibiting certified physician assistants from performing abortions violated the right to privacy protected by article II, section 10 of the Montana Constitution.

In an interesting discussion, *Armstrong* appears to attribute both some independent value to the "dignity" clause and a coherent connectedness between the right to dignity and other rights secured in the state constitution:

> Respect for the dignity of each individual—a fundamental right, protected by Article II Section 4 of the Montana Constitution—demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions. Equal protection . . . requires that people have an equal right to form and to follow their own values in profoundly spiritual matters . . . . Finally the right of individual privacy . . . requires the government to leave us alone in all these most personal and private matters.[54]

Armstrong raised the possibility that the Montana court was poised to articulate a distinctive vision of what respect for individual human dignity means by building on this passage.[55]

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49. *See Oberg*, 207 Mont. at 281, 674 P.2d at 496.

50. *Oberg*, 207 Mont. at 285, 674 P.2d at 498.

51. 283 Mont. 433, 942 P.2d 112 (1997).

52. *See Gryczan*, 283 Mont. at 451, 942 P.2d at 123.

53. 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

54. *Id.* ¶ 72.

55. For possible evidence of this, see *Associated Press, Inc. v. Mont. Dep't of Revenue*, 2000 MT 160, ¶ 58, 300 Mont. 233, ¶ 58, 4 P.3d 5, ¶ 58, in which Justice Nelson, specially concurring, relied on the individual dignity clause to conclude that the right to

Yet in *Armstrong*, the court's emphasis on the dignity clause as respecting people's rights to make their own decisions about fundamental questions appears virtually identical to the right of personal decision making, articulated as a matter of federal constitutional law in *Casey*, notwithstanding the absence of a human dignity clause in the U.S. Constitution.[56]

Although this might suggest that the human dignity clause should be understood simply as a new phrase permitting elaboration of analyses already reasonably well developed under other clauses in U.S. constitutional culture, two later cases suggest that a more expansive use of the human dignity clause in Montana may have arrived. In *Albinger v. Harris*,[57] the court held, in an issue of first impression in Montana, that an engagement ring was an irrevocable gift, rejecting the view of many other states that it was conditional on marriage. In the opinion for the court, Justice Nelson (who has also sought to give substance to the "dignity" idea in his opinions in *Gryczan* and *Associated Press*) relied on the individual dignity clause as committing the state to oppose gender bias. The court concluded that, in the context of the abolition of actions for breach of a promise to marry (including denial of actions to recover money spent—in the court's view, typically by women—on wedding preparations), treating engagement rings as conditional gifts would reinforce gender unfairness. The court wrote:

> Article II, Section 4 of the Montana Constitution recognizes and guarantees the individual dignity of each human being without regard to gender . . . . While not explicitly denying access to the courts on the basis of gender, the 'anti-heart balm' statutes closed courtrooms across the nation to female plaintiffs seeking damages for antenuptial pregnancy, ruined reputation, lost love and economic insecurity . . . . Conditional gift theory applied exclusively to engagement ring cases carves an exception in the state's gift law for the benefit of predominantly male plaintiffs. . . . [T]he statutory 'anti-heart balm' bar continues to have a disparate impact on women. If this Court were to fashion a special exception for engagement ring actions under gift law theories, we would

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privacy protected by the Montana Constitution is that of individuals, not corporations.

56. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (Joint Opinion of Justices Kennedy, O'Connor and Souter) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

57. 2002 MT 118, 310 Mont. 27, 48 P.3d 711.

> perpetuate the gender bias attendant upon the Legislature's decision to remove from our courts all actions for breach of antenuptial promises.[58]

Although the court relied specifically on the individual dignity clause, given its reasoning it might well also have relied on the commitment to equality and antidiscrimination found in the same section.

Most recently in *Walker v. State*,[59] the Montana Supreme Court, again in an opinion by Justice Nelson, concluded that the Montana Constitution's human dignity provision established more demanding standards for the treatment of prisoners than those under the Eighth Amendment of the U.S. Constitution. Although Montana's constitution has a cruel and unusual punishment clause, the court indicated that in some cases that clause must be interpreted together with the individual dignity clause to require that, "'whatever means we use to reform, we must not punish or reform in a way that degrades the humanity, the dignity of the prisoner.'"[60] The court is explicit in stating that the human dignity clause, together with article II, section 22 of the Montana Constitution "provide Montana citizens greater protections from cruel and unusual punishment than does the federal Constitution."[61] Although the language of article II, section 22 of the Montana Constitution tracks that of the federal clause,[62] the court indicated that in some cases, the right of individual dignity will be implicated together with the cruel and unusual punishment clause and found such a violation there.[63] A strongly worded dissent disagreed with the effort to ground a heightened standard for the treatment of prisoners in

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58. *Id.* ¶¶ 35-37. The court's opinion elicited a strongly worded dissent by Justice Trieweiler. *See id.* ¶ 75 (Trieweiler, J., dissenting) (noting that the dignity clause and gender bias arguments had not been raised by the parties and arguing that the court's opinion itself was based on gender stereotypes about who tends to jilt whom and who gives whom engagement rings and perpetuated gender bias). *But see* Rebecca Tushnet, *Rules of Engagement*, 107 YALE L.J. 2583 (1998) (arguing that "the shift to mandatory ring return rules and the denial of women's claims for restitution have combined to make premarital law unfavorable to women," a regime that is "both unequal and unjustified").

59. 2003 MT 134, 316 Mont. 103, 68 P.3d 872.

60. *Id.* ¶ 81 (quoting Clifford & Huff, *supra* note 23, at 331-32).

61. *Id.* ¶ 73.

62. *Compare* MONT. CONST. art. II, § 22 ("Excessive sanctions" clause, providing: "Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted."), *with* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

63. The court found a violation where degrading living conditions (including very unhygienic conditions) exacerbated a prisoner's mental illness. *Walker*, ¶¶ 82-84.

the dignity clause, asserting that the only purpose of the constitutional section in which the dignity clause is found was to establish an antidiscrimination principle.[64]

In contrast to the generally subordinate or, in recent years, controversial use of the human dignity clause in Montana, in a number of cases the Puerto Rican Supreme Court framed its analyses around the concept of human dignity, asserting that the inviolability of human dignity is the foundational concept at the base of the Commonwealth's commitments both to democracy and to human rights.[65] Thus, in one case, the court quotes from the proceedings of the constitutional convention where the president of the Committee on the Bill of Rights, Jaime Benitez, explained the function of the human dignity clause:

> It is the affirmation of the moral principle of democracy; the principle that the human being and his dignity constitute the raison d'etre and justification of political organization . . . . [W]e believe that the expression, in its sober declaration, encompasses the totality of the principles that shall later on develop and delimit themselves as required in each case.[66]

In developing its human dignity clause jurisprudence, the Puerto Rico court borrows from U.S. constitutional law on privacy (thus revealing similar convergences to those described in Montana),[67] and also invokes scholarly work on human dignity,[68] and the experience in other jurisdictions with similar

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64. *Walker*, ¶¶ 98-101 (Gray, C.J., dissenting).

65. *See* Arroyo v. Rattan Specialities, Inc., 117 P.R. Dec. 35, 60, 69-70 (1986) (quoting from the record of the constitutional convention); García Santiago v. Acosta, 104 P.R. Dec. 448, 453 (1975) (discussing degree to which state interference in family life is consistent with provision that dignity of human being is inviolable); Figueroa Ferrer v. Commonwealth, 107 P.R. Dec. 250, 278, 282-87 (1978) (holding that requirement for fault to obtain a divorce violated Puerto Rico's constitution, through discussion of dignity clause and privacy clause, and arguing that the inviolability of human dignity requires that interferences with private life be limited only to compelling circumstances). The cases often associate human dignity with the right of privacy and honor found later in the Puerto Rican constitution. For scholarly discussion, see Luis Anibal Aviles Pagan, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JUR. U.P.R. 343, 366-70 (1998), describing the depth of the framers' commitments to the "principle of human dignity", and Garcia-Passalacqua, *supra* note 27, at 40-41, discussing human dignity as the moral basis for democratic government because the human being and his dignity constitute the reason for and justification of political organization.

66. *Arroyo*, 117 P.R. Dec. at 70 (quoting 2 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE 1372 (1951)).

67. *See Figueroa Ferrer*, 107 P.R. Dec. at 284-86.

68. *See id.* at 286 (referring, inter alia, to writings of Maaritan, Rommen, Friedman, Machan, McDougal, Lasswell, and Tribe).

issues,[69] including in at least one instance a German constitutional court decision.[70]

The emphasis on human dignity comes through in a number of decisions under the Puerto Rico constitution. The 1978 decision in *Figueroa-Ferrer*, holding that human dignity and privacy required no-fault divorce, found unconstitutional a divorce statute that permitted divorce only for cause; the court criticized a fault regime in divorce as one that requires married couples either to mislead the court or to surrender aspects of their private lives to public scrutiny.[71] Moreover, the court noted the current reality was one in which couples in fact procured divorces on mutual consent, albeit through a judicial charade. The constitutional principles of dignity and privacy "are based on principles which aspire to universality," and "protect . . . dignity and private life in divorce proceedings through the expression of the mutual decision to obtain a divorce."[72]

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69. *Id.* at 287-95 (surveying divorce laws in many state jurisdictions in the United States and in the countries of Latin America and Europe).

70. *See Arroyo*, 117 P.R. Dec. at 50 n.15 (citing a German case on polygraphy, *Judgment of Bundesgerichtshof (I. Strafsenat)*, Feb. 16, 1954, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen 332).

71. *Figueroa Ferrer*, 107 P.R. Dec. at 301. In other parts of the United States it appears that the move to "no-fault" divorce was led by legislatures, and that the issues brought before courts challenged the constitutionality of abandonment of fault-based grounds for divorce. *See, e.g., In re* Walton, 28 Cal. App. 3d 108 (1972); Joy v. Joy, 423 A.2d 895 (Conn. 1979); Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973). For at least a hint that some members of the U.S. Supreme Court would have regarded with skepticism a claim that the federal Constitution prohibited states from maintaining a fault-based system for divorce, see *United States v. Kras*, 409 U.S. 434, 462 (1973) (Marshall, J., dissenting). Disagreeing with the Court's decision upholding fees for indigent filings in bankruptcy, Justice Marshall argued that given the decision in *Boddie v. Connecticut*, 401 U.S. 371 (1971), striking down filing fees for divorce as applied to indigents, the same logic should have invalidated the bankruptcy filing fee. The Court had sought to distinguish bankruptcy from divorce because the granting of divorces impinges on "associational interests." *Kras*, 409 U.S. at 444-45. Justice Marshall's dissent commented on this "suggestion":

> Are we to require that state divorce laws serve compelling state interests? For example, if a State chooses to allow divorces only when one party is shown to have committed adultery, must its refusal to allow them when the parties claim irreconcilable differences be justified by some compelling state interest?

Id. at 462 n.4 (Marshall, J., dissenting). Marshall went on to explain that his questions were intended, "only to suggest that the majority's focus on the relative importance in the constitutional scheme of divorce and bankruptcy is misplaced," because the important issue was "access to the courts," *id.*; yet his questions hint at the difficulty a federal constitutional challenge to divorce laws might have faced.

72. *Figueroa Ferrer*, 107 P.R. Dec. at 301. Between 1969 and 1991, virtually all of the states and D.C. had by statute provided for some form of no-fault divorce. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 83-91

In 1986, the Puerto Rico court in *Arroyo* held unconstitutional a private employer's use of a polygraph. Human dignity played a central role in the opinion, which emphasized the need to respond to technological advances while protecting

> the most precious thing in the lives of all human beings in a democratic society: dignity, integrity and privacy. Our Constitution is the safekeeper of these values. Therefore, we must refer to its provisions and set them up as the main protectors of these ethico-moral values which are consubstantial with human nature and essential to community life in a democratic society.[73]

The court went on to assert that the right to control the disclosure of one's own thoughts was protected by the constitution, as against intrusions by the state and private citizens.[74]

This opinion has a distinctive feel to it, as compared to the Montana court's opinion in *Oberg* (also dealing with polygraphy), both in the form and breadth of argument from a variety of comparative sources and in the Puerto Rico court's confident assertion that the constitution constrained private citizens in their dealings with others.[75] Interestingly, the Puerto Rico court cites both to the German Basic Law provision that, "the dignity of the human being is inviolable," and to a German decision prohibiting use of polygraphs in a criminal case, not on grounds of their unreliability, but rather because use of polygraph tests, "violated the individual's freedom to make his own decisions and act according to his will."[76] While some U.S. state jurisdictions reached similar results as a matter of state tort law, constraining employers from using polygraphs on their employees,[77] others did not;[78] and both state and federal

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(1991) (all states but Arkansas); *see* ARK. CODE ANN. § 9-12-301(5) (2003).

73. *Arroyo*, 117 P.R. Dec. at 56-57 (citations omitted).

74. *See id.* at 72 ("Regardless of the degree of reliability that the polygraph test could reach, its intrusion upon the mind of the human being, with his thoughts, is such that he loses the freedom to control the disclosure of his own thoughts. . . . Our Constitution guarantees that a part of ourselves may be free from the intrusion of the State and of private citizens.").

75. Although the Montana dignity clause's equal protection provision explicitly refers to private entities, this aspect of the clause for a long time lay "dormant," to use Robbin's word. Robbin, *supra* note 22, at 553; *see supra* note 45.

76. *Arroyo*, 117 P.R. Dec. at 59 n.15 (citing *Judgment of Bundesgerichtshof (I. Strafsenat)*, Feb. 16, 1954, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen 332).

77. *See, e.g.*, Cordle v. Gen. Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (holding that it violated West Virginia's public policy to require an employee to be polygraph tested, because of the State's recognition of individual interests in privacy).

78. *See, e.g.*, Smith v. Am. Cast Iron Pipe Co., 370 So. 2d 283 (Ala. 1979) (upholding discharge of employee for refusing to take a polygraph test).

statutory schemes have been enacted which significantly limit employer-administered polygraphs.[79] The Puerto Rico court's reliance on its constitutional provisions to protect the right against self-disclosure has some resonance with a line of German cases protecting a right to control information about one's self derived from the human dignity clause.[80] Also notable is its ready willingness to assert the application of the constitutional norm of human dignity to the actions of private parties, a step the Montana court has been criticized for failing to take in the face of seemingly explicit language.[81]

Puerto Rican decisions in other areas as well invoke the human dignity and privacy clauses as a basis for distinctive constitutional interpretation. For example, the Puerto Rican court has asserted that the Puerto Rican constitutional provision against illegal searches and seizures, article II, section 10, should be more broadly construed to prevent searches than its counterpart in the U.S. Constitution, in part because of the foundational commitments to human dignity.[82] A minor's right to determine his paternity was held to be protected by the

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79. In some cases, state courts were dealing with equal protection attacks on exclusions from statutory bars on polygraphs, and did not have to face what might seem more centrally related to the idea of human dignity—whether the use of the polygraph itself was unconstitutional. In addition to the *Oberg* decision in Montana, see, for example, *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660 (Cal. 1986), upholding a constitutional challenge, based on equal protection, to the exception, for public employees from the general ban on the use of polygraph testing by employers. For the federal statute, see Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (2000).

80. *See* KOMMERS, *supra* note 11, at 299-301, 323-27.

81. *See supra* notes 75, 45. Robbin, *supra* note 22, at 553, 556, draws attention as well to another area of contrasting decisions, the application of constitutional norms to private inheritance disputes. *Compare In re* Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980) (rejecting federal constitutional challenge to testamentary trust instructions excluding female 4-H members from receipt of benefits under provisions of will because of absence of "state action" and not referring at all to state constitutional provisions), *with* Gonzalez de Salas v. Super. Ct. of Puerto Rico, 97 P.R. Dec. 788, 791 (1969) (refusing to enforce custom denying female heirs the knowledge of a secret formula for the production of rum as inconsistent with the Puerto Rico constitution; "The family tradition may be kept among the heirs and interested parties, but they cannot have the benefit of the court to make good, against the laws and the Constitution [of the Commonwealth], a discrimination."). Neither of these cases refer to the respective human dignity clauses of their constitutions, but each decision illustrates something of the divergent approaches these courts have taken where the concerns of the human dignity clause might be thought in play.

82. People v. Lebrón, 108 P.R. Dec. 324, 340 (1979); People v. Gonzalez, 20 P.R. Offic. Trans. 487, 493 (1988); People v. Berrios, 142 P.R. Dec. 386, 397-98 (1997) (affirming that human dignity and privacy clauses give the Puerto Rican prohibition on unreasonable searches and seizures more breadth than the federal one).

inviolable dignity clause,[83] and the clause has been invoked in a variety of settings involving causes of action for wrongful discharge and tortious invasions of privacy and dignity-related interests.[84]

The human dignity clause in Puerto Rico, then, has been drawn more actively into dialogue with other parts of the Puerto Rican constitution, perhaps not surprisingly, since the expressed motivation of the drafters was to bring together different constitutional cultures. Resonances with transnational human rights instruments and European constitutionalism (including that of Germany) are apparent not only in the constitution's textual provision on human dignity and prohibition of the death penalty, but in the question of compelled polygraphy, and perhaps others.[85] In this sense, the "expressive" aspects of Puerto Rico's original decision to incorporate a more multicultural and transnational constitutionalism has been reflected in the subsequent constitutional decisions of the Commonwealth's highest court.[86]

Although Montana's adoption of the human dignity clause was less explicitly associated with the purpose of bringing together different legal traditions than was the case in Puerto Rico, several very recent decisions in Montana (often written by Justice Nelson) suggest some greater degree of movement towards a more distinctive state constitutional jurisprudence. Very recently the Montana Supreme Court relied on the human dignity clause and principles of gender equality to inform its decision in an engagement ring return case between two private persons, and to find and enforce enhanced standards of treatment of prisoners. It has insisted, relying on the human dignity clause, on the independence in meaning of the Montana

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83. Lopez v. Santos, 109 P.R. Dec. 563, 754 (1980). The German constitutional Court has invoked the German "personality" clause, closely related to its "human dignity" clause, to strike down time limitations (two years after majority) on the ability of a child to contest his or her legitimacy. *See* KOMMERS, *supra* note 11, at 312-14 (discussing Child Legitimacy Case of 1994).

84. *See, e.g.*, Negron v. Caleb Brett U.S.A., Inc., 212 F.3d 666, 669-70 (1st Cir. 2000) (finding violation of rights of dignity and privacy under Puerto Rico constitution in wrongful discharge of employee for refusing to change lab results); Dopp v. Fairfax Consultants, Ltd., 771 F. Supp. 494, 496 (D.P.R. 1990) (noting breadth of Puerto Rico constitution's dignity clause in deciding, in diversity case, whether claim for invasion of privacy was dismissable).

85. *See supra* text accompanying note 76.

86. *See generally* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269-85 (1999) (discussing "expressive" functions of comparative constitutionalism).

Constitution from the federal Constitution.[87] So if the human dignity clause in Montana has largely been confined to playing a supportive role in elaboration of long standing paradigms of individual rights, it may well be that a newer jurisprudence is now evolving in which the human dignity clause helps justify the construction of different paradigms.

A further point to consider about the different sources of law that are subject to interpretation in the state courts is that the state courts generally have authority to elaborate on and change state common law, as well as to interpret the state constitution and statutes. For example, state courts sometimes look to state constitutional provisions—even those limited to government action—to determine the "public policy" to be applied in litigation between private litigants.[88] The "engagement ring" decision might be taken as an example of this development in Montana. In New York, Chief Judge Judith Kaye has noted the ability of state courts to "move seamlessly between the common law and state constitutional law," and has also identified benefits from state court creativity based clearly on common law rather than constitutional grounds, because common law decisions are more readily subject to modification by courts and by legislatures.[89] Such an attitude of invited partnership

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87. *Cf.* Dorwart v. Caraway, 2002 MT 240, ¶¶ 79-114, 312 Mont. 1, ¶¶ 79-114, 58 P.3d 128, ¶¶ 79-114 (Nelson, J., specially concurring) (noting that Montana Constitution should not be interpreted like federal because it includes many provisions, including dignity clause, that federal Constitution does not have, all in support of finding state constitutional privacy clause gives rise to implied private right of action for damages).

88. *Compare* Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992) (concluding that private employer discharge of employee who failed random drug test was inconsistent with public policy and thus actionable as wrongful discharge and treating the state constitution as well as state common law and legislation as sources for public policy), *with* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989) (concluding that although the state constitution's protection of privacy did not apply to private employers the provision could be considered by the court in determining whether public policy was offended by an employer's discharge of an employee but concluding that given public policy interests in safety the employer's drug testing did not contravene public policy) (I am grateful to ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 236 (3d ed. 1999), for helpful attention to the phenomenon of state courts' use of state constitutions to determine public policy.). To the extent that state courts develop state common law based on the "policy" in state constitutional provisions, the distinctions in federal "state action" doctrine between the application of common law rules in private litigation, on the one hand, and application of state statutory or constitutional law, on the other, may become ever more difficult to sustain.

89. Judith S. Kaye, *Brennan Lecture: State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15-17 (1995). Kaye's attitude of partnership with the legislature in the elaboration of rights is in marked contrast to the U.S. Supreme Court's assertion of hierarchic dominion over

between state courts and legislatures in defining rights stands in significant contrast to recent decisions on issues of federal law by the U.S. Supreme Court.[90] It may reflect the state courts' deeper engagement with development of the common law, in which legislative intervention is now a norm. It may reflect as well state courts' greater comfort levels with the general comparative exercise; that is, of looking to other related sources of law and other articulators of law—in the federal courts and the other state courts—for assistance in reaching their own decisions. It is possible that these habits of mind in the state judiciary will also make it possible for state courts, like the Supreme Court of Puerto Rico in the private polygraph case and others, to begin to learn from comparative constitutional law and human rights law from courts around the world, to the extent they grapple with similar issues.[91]

III. CLOSING THOUGHTS

It is important to note the degree of transnational influence within U.S. constitutionalism, broadly understood as including decisions in state, territorial or commonwealth courts. It would be a mistake to think that national level governments are the only diffusers of transnational constitutionalism. Even if largely unnoticed in federal constitutional discourse, our subnational units have been learning, not only from other states and from federal decisions, but also from the transnational and international constitutional discourse of human rights.[92] But it

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the interpretation of federal rights.

90. In federal constitutional interpretation, the U.S. Court has manifested some resistance to having its own constitutional interpretations informed by congressional views. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997); *see also* Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 153-55 (2001); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945-46 (2003). On statutory issues, by contrast, the Court has recently been reluctant to engage in purposive interpretation of federal remedial statutes, on grounds of at least purported deference to Congress. For critical discussion, see Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343.

91. *Cf.* Jackson, *Ambivalent Resistance*, *supra* note 13, at 634-38 (linking U.S. Court's skepticism towards congressional involvement in constitutional interpretation with its resistance to comparative constitutional learning). On state court receptivity to international or foreign sources of law on human rights, see *infra* note 92.

92. Indeed, an increasing number of state courts have referred to such international or foreign sources of law on human rights. *See, e.g.*, Sterling v. Cupp, 625 P.2d 123, 131 n.21 (Or. 1981) (Linde, J.) (interpreting state constitutional rule protecting prisoners against "unnecessary rigor" of confinement and referring to Universal Declaration of

is important also to note the relatively small inroads on discourse in Montana that the human dignity clause has had thus far, perhaps showing the influence of a dominant model of constitutional discourse derived from the U.S. Constitution, though one perhaps itself in the process of change.[93] Given the apparently robust tradition in Puerto Rico and the possibilities for development in Montana, students of transnational human rights discourse would do well in the future to pay attention to the multiple fora for the development, diffusion, and articulation of foundational concepts of human dignity, looking not only to international, transnational and national sources but also to subnational entities that function with sufficient independence to develop their own lines of authority and reasoning.[94]

Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights as illuminating aspects of human dignity involved in such protection); Boehm v. Super. Ct., 178 Cal. App. 3d 494, 502 (1986) (analyzing state statute concerning general assistance payments, quoting from Universal Declaration and enjoining certain administrative cutbacks in benefits); Moore v. Ganim, 660 A.2d 742, 771, 780-82 (Conn. 1995) (Peters, J., concurring) (discussing the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights in concluding that, while state constitution should be construed to include right to minimal subsistence, the challenged statute was consistent with historic limitations on public support); State v. Wilder, 2000 ME 32, ¶20, 748 A.2d 444, ¶ 20 (reversing father's conviction for assaulting son; discussing British common law approach; contrasting European Court of Human Rights approach; concluding that under Maine law parents had right to administer moderate or reasonable punishment, even though nine countries in Europe ban corporeal punishment of children); Jones v. Florida, 740 So. 2d 520, 524-25 (Fla. 1999) (reversing conviction for failure to hold timely competency hearing in violation of Due Process Clause and Florida rule of criminal procedure and relying in part on Justice Breyer's opinions invoking foreign decisions on delay in carrying out death penalty, including the decision in *Soering v. United Kingdom* in the European Court of Human Rights, 161 Eur. Ct. H.R. (ser. A) (1989), *available at* http://hudoc.echr.coe.int/hudoc).

93. In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the U.S. Supreme Court overturned its own earlier decision and held unconstitutional a state law criminalizing consensual adult sodomy. The Montana court had reached this conclusion under its own constitution in 1997. The U.S. Court relied, in part, on European decisions, concluding that: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." *Id.* at 2481-83. The Court also noted state court decisions, including that of the Montana court in *Gryzcan,* abolishing prohibitions on same sex sodomy. *Id.* at 2480. The U.S. Court's greater openness to comparative legal approaches to human rights may invite further exploration of these approaches by the state courts on state law issues.

94. *See, e.g.*, Linde, *supra* note 20, at 416 (urging state court attention to foreign and international law in interpreting state criminal procedure; "If a state court is persuaded that the state's people deserve no less liberty, fairness or humane treatment under its Bill of Rights than are received by citizens of other countries, it can so decide without concern about federal holdings or doctrines.").