ESSAY

PROPERTY, DIGNITY, AND HUMAN FLOURISHING

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INTRODUCTION

The relationship between human dignity and human rights has become increasingly well-established in recent years. The Charter of Fundamental Rights of the European Union declares, for example, "Human dignity is inviolable. It

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must be respected and protected."[1] What is not so clear is the relationship between human dignity and human flourishing.[2] For one thing, even if we all shared the same conception of human dignity (highly doubtful), we surely do not all share a clear understanding of human flourishing, let alone how that concept relates to dignity. Even less likely do we all share a well-defined understanding of how property relates to the other two, i.e., human dignity and human flourishing. My task here is to sketch such an understanding.

I
HUMAN FLOURISHING

We all want to live flourishing lives. All but the irrational among us wishes our lives to go as well as possible for us. There are many ways to live well-lived lives, and we have different understandings of what it means for our lives to go maximally well. Still, the scope of conceptions of human flourishing is not an open set. There are limits on what it means for a person to live a well-lived life. Human flourishing is objective rather than simply a matter of individual subjective preferences. It is not something that is desired but something that is desirable, and it is desirable just because of what it is.[3] Human flourishing is ontological. Douglas Rasmussen puts it well, stating, "It [flourishing] is a state of being, not a mere feeling or experience."[4] It is not a matter of feeling happy. Rather, it is a way of living life, a way of living a life that is intrinsically good.

I said that there are many ways of living a fulfilling life. Human flourishing is inclusive, diverse, and pluralistic. In saying that it is pluralistic, I mean that it is not a value like autonomy is for Kantians, i.e., a single foundational value to

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1 Charter of Fundamental Rights of the European Union tit. I, art. 1, 2012 O.J. (C 326) 6, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

2 Martha Nussbaum's capabilities approach, which is itself a theory of human flourishing, has human dignity at its core. She writes that dignity "is a vague idea that needs to be given content by placing it in a network of related notions . . . ." MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 30 (2011). She specifically argues that a life worthy of human dignity requires development of certain basic capabilities, which she enumerates. *See id.* at 32–33.

3 Henry Richardson refers to ends of this sort as "final ends." *See* HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS (1994).

4 Douglas B. Rasmussen, *Human Flourishing and the Appeal to Human Nature*, 16 SOC. PHIL. & POL'Y 1, 3 (1999).

which all other values may be reduced.[5] It is the ultimate end of human behavior in the sense that we all want our lives to go well, but this is not to say that all other values may be reduced to it. To the contrary, flourishing includes many other goods, such as health, personal security, privacy, friendship, love, justice, and integrity, to name only a few. Each of these goods is valuable in its own right, and they are all ingredients of the good life. The love that I have for a person is valuable to me not because it moves me closer to some future point when my life will flourish. Rather, I value that love right now for its own sake. Further, these values are incommensurate, meaning that they cannot be weighed against each other. It is as if someone asserted that Einstein's genius was "(morally) better than" Mother Theresa's compassion—the balancing makes no sense.

Human flourishing is agent-relative, that is, relative to each person. There is no such thing as one-pattern human flourishing. Human flourishing is always the good for a particular person. We may say it is bespoke, not off-the-rack. The diversity of human flourishing means that the good life cannot be defined from some neutral point of view, that of the hypothetical reasonable person, but instead can only be defined by each individual person specifically.

The agent-relativity of human flourishing might seem to put it at odds with the objectivity of flourishing. The two are easily confused, but the difference between them, although subtle, is very important. The fact that something is valuable to a specific person does not necessarily mean that its value is just a matter of subjective preference.[6] Human flourishing's agent-relativity simply means that it always pertains to some person. It does not necessarily follow, however, that the flourishing life for any person is solely based on her desires or preferences. Her subjective preference might be to devote her life inflicting pain on innocent people, but despite the pleasure she may derive from such an activity, that is not an objectively flourishing life. The objectivity of values is such that although each of us chooses how we think our lives will flourish, there is a filter on what constitutes a flourishing life. As I discuss later, although there are many ways of living an objectively flourishing life, not all possible ways of living are objectively

5 *See id.* at 2.
6 *See id.* at 8.

good.[7]

One might suppose that the fact we evaluate the goodness of values relative to each person means that flourishing is an egoist theory, but this is not the case. In fact, the truth is that flourishing is often quite other-regarding. As I will discuss later,[8] the good life often involves taking account of others and acting out of concern for them. This is not a matter of pure self-sacrifice. By acting in the interests of others, we promote the development of certain capabilities that enable our own lives go better.

One of the important challenges facing a human flourishing theory is how to measure flourishing. Economists and others committed to welfare-maximization measure that value, of course, in terms of resources.[9] For these welfarists, human welfare is a matter of satisfying subjective individual preferences, revealed through exchange transactions.[10] In recent years, Amartya Sen has developed an alternative approach to measuring well-being, one that does not focus on

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7 *See infra* Part III.

8 *See infra* Part II.

9 *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2006).

10 *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347–59 (1967) (explaining that property rights develop to internalize externalities and reduce transaction costs). This is not to say that welfarists are indifferent to the social good. Far from it; their objective is precisely to maximize aggregate social welfare. Hence, the human flourishing theory and welfarism, which derives from classical utilitarianism, share common ground insofar as they both hold a basic concern with the well-being of society. The two theories part company on two important points. The first point concerns the standard by which one measures well-being. Welfarism measures it on the basis of what is commonly called revealed preferences, i.e, the actual choices a person makes between resources. According to this theory, a society is better off to the extent that it maximizes the aggregate revealed preferences of its members. *See* Robert Sugden, *Welfare, Resources, and Capabilities*, 31 J. ECON. LITERATURE 1947, 1951 (1993). The human flourishing theory, drawing upon Sen's work, rejects revealed preferences in favor of looking at the capabilities that are necessary for a person to flourish, i.e., to live a well-lived life.

The second, and related, point of difference is that welfarism holds a conception of the common good that is subjective whereas the human flourishing theory's conception is objective. As Sugden states, "Revealed preference welfarism purports to evaluate each individual's circumstances in terms of that person's own system of values, without even asking what those values are. An aggregation of such independent valuations cannot be any kind of valuation at all." *Id.* By contrast, the human flourishing theory contends that although there are many ways of living a well-lived life, not every way a person may happen to choose to spend his life is good. The common good must have an objective dimension in the sense of filtering certain values, certain choices, or certain ways of living that are intrinsically bad.

resources.[11] Sen's insight is that flourishing is a matter of what a person is able to do rather than what he has.[12] That is, the well-lived life should be measured by a person's capabilities rather than by a person's possessions or by the satisfaction of his subjective preferences. What a person actually does with their capabilities is up to him, but his life simply cannot go well unless he at least possesses certain essential capabilities.[13]

We could endlessly debate what capabilities are essential to be in a position to live a fulfilling life. Various philosophers, including Sen, have their own preferred lists of capabilities.[14] But four such essential capabilities seem uncontroversial. These are life, understood to include certain subsidiary values such health; autonomy, understood as including the freedom to make deliberate choices among alternative life horizons; practical reasoning; and sociability. I shall say more about these capabilities, especially autonomy and sociability, later, but for now I want to suggest that all four are indispensable for a good life.

No one can develop these capabilities by himself. The physical process of human development makes us dependent on others to cultivate the necessary capacities. Indeed, we are dependent on others for our ability to function as free and rational agents.[15] Our dependence on others is deeper. This form of dependence is perhaps most clear with respect to life and its subsidiary goods. We enter the world utterly dependent on others for our physical survival.[16] Even upon reaching adulthood, we continue to place at least partial physical dependence (and even emotional or psychological dependence)

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11 *See* AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

12 *See* SEN, DEVELOPMENT AS FREEDOM, *supra* note 11, at 9.

13 Sen refers to what a person actually does with her capabilities as "functionings," which he carefully distinguishes from capabilities. *See id.* at 7–10. By giving priority to capabilities, Sen means to enhance individual autonomy.

14 *Compare, e.g.*, MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78–80 (2000) (contending central human functional capabilities include living to a normal human lifespan; having good bodily health; possessing bodily integrity; using the senses, imagining, and thinking; feeling emotions; practical reasoning; affiliating with others; living with concern for nature; playing; and controlling one's environment through politics and holding property) *with* SEN, DEVELOPMENT AS FREEDOM, *supra* note 11, 286–87 ("[T]he freedom to participate in critical evaluation and in the process of value formation is among the most crucial freedoms of social existence.").

15 *See* 2 CHARLES TAYLOR, *Atomism*, in CHARLES TAYLOR, PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 205 (1985).

16 *See* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 71–74 (1999).

on others as we move through a dangerous world. Often, little more than dumb luck separates the seemingly independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence once again looms ever larger.

Life, autonomy, practical rationality, and sociability can meaningfully exist only within a matrix of social structures and practices. Even the most seemingly solitary and socially threatened of these capabilities, autonomy, depends upon a richly social, cultural, and institutional context; the free individual must rely upon others to provide this context. From the earliest age and well into adulthood, if not for our entire lives, we receive from and we rely on parents, teachers and mentors, and friends for lessons about planning and evaluation, causes and consequences, self-restraint and discipline: these are the raw materials from which the capability of practical reasoning emerges. We are, in short, inevitably dependent upon communities, both chosen and unchosen, not only for our physical survival, but also for our ability to function as free and rational agents.

Communities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities.[17] Even as free, rational persons, we never cease to operate within and depend upon the matrices of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense to others with whom we are connected as members of multiple communities. Our identities are literally constituted by the communities of which

[17] This statement makes clear what has been implicit thus far, namely, that the theory presented here is a perfectionist theory, both ethically and politically. It is ethically perfectionist in that it holds that there are certain capabilities that constitute perfection in human life and that it is essential to the attainment of a flourishing life that each person develops these capabilities. The theory is politically perfectionist in that it holds that it is for the state to create the background conditions that enable its citizens to achieve human perfection, as just defined. *See* THOMAS HURKA, PERFECTIONISM 147 (1993). That the theory is perfectionist does not mean that it is not a liberal theory. There are, of course, multiple strands of political liberalism, and political perfectionism is entirely compatible with some, though not all, of these strands. *See generally* Peter de Marneffe, *Liberalism and Perfectionism*, 43 AM. J. JURIS. 99 (1998) (contending that moderate perfectionism is compatible with the two most essential principles of liberalism: the principle of acceptability and the principle of basic liberty). For a good brief discussion, see MENACHEM MAUTNER, HUMAN FLOURISHING, LIBERAL THEORY, AND THE ARTS 2–4 (2018).

we are members. Asked who we are, we inevitably talk about the communities where we were born and raised, our nation, our family, where we attended school, our friends, our religious communities and clubs. Indeed, individuals and communities interpenetrate one another so completely that they can never be fully separated.

The communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations, and the scope of our aspirations. The homeless person, accustomed to receiving little more than abuse or neglect, may come to expect little more out of life.[18] Similarly, although membership in certain communities can obviously be based upon contract or voluntary agreement, the very possibility of these voluntarily associative relationships depends upon our prior and continuing (and typically involuntary) participation in or exposure to communal institutions. These institutions impart to us the information and capacities that give us the tools needed to permit us to understand and engage in voluntary choosing at all.[19]

Precisely because capabilities are essential to flourishing in a distinctively human way, development of one's capabilities is an objective human good, something that we ought (insofar as we accept these particular capabilities as intrinsically valuable) to promote as a good in and of itself. As a matter of human dignity, every person is equally entitled to flourish. This being so, every person must be equally entitled to those things essential for human flourishing, i.e., the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities. In the absence of these capabilities and supporting resources, recognition of the entitlement to flourish is simply an empty gesture. But not every society will be equally conducive to human flourishing. The cultivation of the capabilities necessary for flourishing depends upon social matrices, and the condition of those matrices varies among societies, sometimes quite widely. A society that fosters those capabilities that are necessary for human flourishing is morally better than one that is either indifferent or (even worse) hostile to their manifestation.

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18 *See* SEN, COMMODITIES AND CAPABILITIES, *supra* note 11, at 21 ("A person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-fulfilment if he or she has learned to have 'realistic' desires and to take pleasure in small mercies.").

19 *See* TAYLOR, PHILOSOPHICAL PAPERS, *supra* note 15, at 196–98.

II
HUMAN DIGNITY

Human dignity has been a controversial topic in recent years. Not only is there no settled meaning of dignity, but some scholars have even argued that the concept is unnecessary, indeed absurd.[20] This is not the proper occasion for responding to the dignity-doubters nor for developing a rigorous philosophical argument in support of any particular conception of dignity. But I do need to sketch a bit of background regarding the main positions and to state my conception of human dignity.

One familiar distinction in the philosophical literature on dignity is between *honor* and *worth* conceptions of dignity.[21] Honor is a matter of social position or rank and contingent, whereas worth, the conception usually associated with Kant, is intrinsic and universally attributed to all human beings.[22] Honor is the older of the two conceptions, and as Meir Dan-Cohen points out, it is often claimed that "the ascendance of dignity-talk marks a trajectory from honor to worth."[23] As I shall discuss later, however, Jeremy Waldron has offered another conception, one that takes us back to the earlier tradition of rank but with a major twist.[24] In addition to the two conceptions I have identified I should note that there are two correlative usages of dignity. The first usage is dignity as behavior. This is the idea that dignity consists in behavior that is dignified, more specifically, "the commitment and capacity to endure suffering in the struggle to meet the demands of duty . . . ."[25] The second usage draws from Kant in associating dignity with respect.[26] This is not respect for rank or privilege

20 *See, e.g.*, Ruth Macklin, Editorial, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419 (2003) (arguing that appeals to dignity are "either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding" of dignity and should be eliminated); Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC, May 28, 2008, at 28 (arguing that dignity as a concept in bioethics is relative, fungible, and potentially harmful).

21 *See* JEREMY WALDRON, DIGNITY, RANK, & RIGHTS 27 (Meir Dan-Cohen ed., 2012); Meir Dan-Cohen, *Introduction* to *id.* at 3–4.

22 *See* WALDRON, *supra* note 21, at 4, 6.

23 *Id.*

24 *See id.* at 33–70; *infra* note 53 and accompanying text.

25 MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 36 (2012).

26 In the *Groundwork*, Kant connected dignity with respect, not in the sense that we respect traffic laws (respect-as-obedience) but in the sense of the attitude that we owe to a person purely on the basis of her humanity. Kant refers to dignity as "unconditional, incomparable worth, for which the word *respect* alone makes a befitting expression of the estimation a rational being is to give of it."

but respect for a person's humanity. This conception understands that dignity lies in how we regard others and how we express that attitude. We treat others with dignity when we treat them with respect.[27] I shall come back to these usages later, but for now, I want to focus attention on the two dominant threads of dignity-talk in political and legal literature, the rank and worth conceptions.[28]

Historically, rank came first, and it comes to us today with considerable baggage. Michael Rosen observes that dignity "originated as a concept that denoted high social status and the honors and respectful treatment that are due to someone who occupied that position."[29] Rank referenced a social hierarchy in which, save the person at the top, everyone was always subordinated to someone else.

The association of dignity with rank began to change in the 18th century. The stock story is that after the French and American Revolutions dignity became incompatible with rank and social hierarchy, ushering in the egalitarian Kantian conception of dignity as human worth. James Whitman has recently provided a different, more nuanced account.[30] He argues that after 1750, continental Europe leveled up, extending formerly high-status treatment to all sectors of the population. In the United States, the process was one of leveling-down, extending rights and privileges to persons who formerly had been slaves.

I want to suggest that, ironically enough, a fruitful way of understanding dignity emerges from its harshest contemporary critics. Dignity-deriders like Stephen Pinker believe that dignity is completely unnecessary because autonomy does all the real work that dignity might possibly do.[31] Pinker is wrong, I believe, that autonomy makes dignity redundant, but he is right in seeing a close relationship

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IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 47–48 (Mary Gregor & Jens Timmermann eds., rev. ed. 2012). For an illuminating discussion on this, see ROSEN, *supra* note 25, at 26–27, 143–45.

27 *See* KANT, *supra* note 26, at 61–62.

28 Leslie Meltzer Henry has identified five conceptions of dignity that emerge from U.S. Supreme Court case law. She terms these "institutional status as dignity," "equality as dignity," "liberty as dignity," "personal integrity as dignity," and "collective virtue as dignity." Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 169 (2011).

29 ROSEN, *supra* note 25, at 11.

30 *See* James Q. Whitman, *"Human Dignity" in Europe and the United States: The Social Foundations*, *in* EUROPE AND US CONSTITUTIONALISM 108–24 (Georg Nolte ed., 2005).

31 *See* Pinker, *The Stupidity of Dignity*, *supra* note 20.

between the two. The reason why autonomy does not render dignity unnecessary is that autonomy is a human capability and dignity is not. Dignity is neither a description nor an honorific. It is not bestowed on us, so it requires no justification or criterion. Rather, dignity is a human characteristic, and a special kind of characteristic at that. It is an existential characteristic, existential in the sense that a person possesses it purely because of her or his existence. As such, it is an intrinsic characteristic, intrinsic to every human being. To be human is to have dignity.[32] A person possesses dignity from the moment of birth until death.[33] Dignity is indefeasible; a person cannot forfeit her or his dignity regardless of any act she or he commits. Even Hitler had dignity.

Autonomy is different. We need to pause on autonomy because it is an ambiguous and contested term.[34] The account that I shall offer differs importantly from that given by classical liberals and those who have uncritically accepted that traditional way of understanding the term. To classical liberals, personal autonomy connotes liberty and individualism.[35] These theorists consider that the justification of liberalism itself is grounded on the idea of personal autonomy and further that personal autonomy just means that a person is self-directed, i.e., is a person "whose deliberations about what he should do normally determine his own actions."[36]

The alternative account of autonomy offered here is much

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32 This is not to deny the possibility that non-human species may intrinsically have dignity as well. For present purposes I will put that question aside.

33 Here again, for the time being, I avoid important and difficult moral questions, notably when whether dignity obtains prior to birth, i.e., whether a fetus has dignity and whether a corpse is entitled to respect by virtue of human dignity. Regarding the former question, the Catholic Church takes the position that the dignity of the human being fully exists from the moment of conception. *See* ROSEN, *supra* note 25, at 93–99. On the latter question, the discussion in *id.* at 127–160, is highly illuminating.

34 *See* BEN COLBURN, AUTONOMY AND LIBERALISM 2, 4 (2010).

35 *See, e.g.*, RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM (2004) (discussing key principles of classical liberalism: respect for autonomy of individual, strong system of private property rights, voluntary exchange of labor and possessions, and prohibitions against force or fraud); Gerald F. Gaus, *The Place of Autonomy within Liberalism*, *in* AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS 272 (John Christman & Joel Anderson eds., 2005) (discussing the place of autonomy within liberalism, understood as a public morality).

36 Gaus, *The Place of Autonomy within Liberalism*, *supra* note 35, at 293.

thicker than this minimalist account. It considers personal autonomy as self-authorship as distinguished from self-direction. The minimal, self-directed account understands the autonomous person as one who sees her actions as following from her own deliberations. Those deliberations, however, may be based on unreflective considerations, such as superstition.[37] Autonomy as self-authorship, by contrast, understands deliberation as involving self-conscious choice about how one wishes to live one's life.[38] Choice may be self-conscious but not based on deliberation. One may self-consciously make choices based on traditions that one has inherited, for example, or on the practices of groups of which one is a member.

On this thicker view, personal autonomy means more than just freedom from state interference or freedom from others dictating what ends a person should pursue. Autonomy to classical liberals is simply a constraint on the conduct of others.[39] Once understood as self-authorship, i.e., the ability to deliberate about and to make one's own life, personal autonomy comes into view as a capability. This capacity to deliberate includes the ability to understand that a person cannot choose her values without appreciating that she is not alone and that her values must be compatible with the fact that she needs other people and they need her. From this perspective, then, whereas dignity is an innate human characteristic, autonomy comes into view as a capability, developed rather than inherited.

No one is born into this world as a fully autonomous moral agent. Rather, one develops as such an autonomous agent over time and does so with the help of the multiple communities to which one belongs, ranging from the family to school to friends. What it means to be a fully autonomous moral agent is to have the capability of imagining different possible ways of constructing one's life and choosing among them. It is the capacity to conceive alternatives and make decisions about how to live one's life and to construct a life deliberately as one passes through it. Most of us can decide

37 *See id.* at 295.

38 *See* STEVEN WALL, LIBERALISM, PERFECTIONISM AND RESTRAINT 203 (1998). What I have in mind here is closely related to what Joe Singer calls "considered judgment." *See* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 921, 935, 944 (2009).

39 *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 14, 34, 45 (2009).

whether to have this or that for dinner. But do we regard our way of living as the only way of life, a mode of thought so narrow that, to us, any other way of living is completely out of the question?[40] Can we reflect on where our lives are now and the direction in which we wish our lives to go in the future? Further, are we, for reasons having to do with fear of whatever or whoever is unfamiliar to us, incapable of understanding someone else's point of view or putting ourselves in their place?[41] This is autonomy in a specific sense, autonomy as self-authorship, self-determination,[42] and self-reflection.

Autonomy as self-authorship is closely related to another capability I previously noted as necessary for human flourishing, namely, sociability. The relationship between autonomy and sociability is such that sociability helps to define what autonomy is. Sociability involves concern for other people and getting along with them. A well-socialized person attempts to place himself in the other person's position to gain understanding of that person's perspective. The opposite of sociability is hatred. A person who is completely devoid of sociability takes difference to such a length that, for such a person, others lose their humanity. They become aliens, objects, or still worse, vermin. This process of dehumanization reaches its apogee in ideologies such as that of the National Socialist German Workers Party (NSDAP, the "Nazis"). Sadly, and frustratingly, we continue to see this around the world today.

Sociability is really just one aspect of this more profound understanding of autonomy.[43] A conception of autonomy that is exclusively self-regarding is seriously incomplete. Freedom must be other-regarding as well. To be a free person, I must regard others as concrete human beings, or else I will be a prisoner of my own ignorance, prejudices, and blindness. If I am to become someone who is able to choose among values

40 *See* Taylor, PHILOSOPHICAL PAPERS, *supra* note 15, at 187, 204.

41 *See id.*

42 Joe Singer points out that self-determination requires having the chance to act with others to collectively pass laws that set the rules for social interaction in a way compatible with equal dignity. *See* Joseph William Singer, *Democratic Property: Things We Should Not Have to Bargain For*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORIES (Hanoch Dagan & Benjamin Zipursky eds. (forthcoming 2020)).

43 In this respect my conception of autonomy fuses personal autonomy and moral autonomy. For a clear discussion of the distinction, see Jeremy Waldron, *Moral Autonomy and Personal Autonomy*, *in* AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS, *supra* note 35, at 307.

and to make considered judgments about other people, I must develop a capacity for understanding other people. This is what sociability involves. Sociability allows a person to see others, including those who seem radically different from oneself, on their own terms. This means regarding them as concrete persons with shared humanity with oneself. A fully free person has developed the capability for such perception.

Because humans are social animals,[44] we need others. Yet life within a community can be autonomy-decreasing, even autonomy-annihilating. There is a dark side to community.[45] Sociability is distinguishable from community or communal life. Rather, it refers to the capacities to view others as actual, concrete persons and to get along with them, and life within one's communities ideally nurtures such capacities. But the ability of communities themselves to perform this sociability-nurturing function varies, and we must acknowledge that even some seemingly benign categories of communities, such as families, can subvert the development of the other-regarding outlook that is essential to robust sociability. The value of communities and of society more broadly, then, is not a freestanding one, but rather instrumental to autonomy and flourishing.

Earlier I described dignity as an innate human characteristic, an existential characteristic. This means that every person is born with dignity. By contrast, no one is born with autonomy. Rather, each person has the potential to develop as an autonomous agent. Here is both the distinction and connection between dignity and autonomy. Dignity consists in the inherent bare potential to develop the thick kind of autonomy I have described.[46] It is not autonomy itself; rather, it is unrealized autonomy. One can have dignity and be autonomous or have both dignity and autonomy, but one cannot lack dignity yet have autonomy. Dignity consists in the

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44 *See* ARISTOTLE, NICOMACHEAN ETHICS 98–103 (Roger Crisp ed., 2d rev. ed. 2014).

45 *See* GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING 77–80, 100 (2018).

46 My conception of dignity bears some resemblance to that developed in James Griffin's book, *On Human Rights*. There are important differences between Griffin's conception of dignity and mine, however. Griffin does not treat dignity as an intrinsic moral status of human being, whereas I consider it as an existential characteristic. Second, his conception of freedom and my understanding of autonomy are quite different. He adopts a conventional understanding of freedom whereas my conception of autonomy is social and reciprocal. *See* JAMES GRIFFIN, ON HUMAN RIGHTS (2008).

potential to develop as a fully autonomous person. Every person has this potential based solely on the fact of her existence as a human being, and as such, a person with dignity. For any given person, however, this potential may or may not be realized. This is the reason why autonomy is a capability, rather than an objectively valuable pattern of existence, or what Amartya Sen calls "functioning."[47] Autonomy is not inherent in humans, then. It must be developed and cultivated, and this cultivation can occur only with the help of others. The cultivation of autonomy is as much a mental, emotional, and psychological process as it is a physical matter. People who are incarcerated for a time may nevertheless be or become autonomous, and, conversely, persons suffering from no physical constraints may nevertheless never develop into fully autonomous agents.[48] Sadly, some people have been raised in environments that stultify any potential for psychological and moral growth, blocking out all perspectives other than one narrow view and freezing any potential for growth. Free to choose is a meaningless claptrap unless one has the ability to see available options for living and to perceive that there are multiple understandings of the good. Choice is a matter of deliberation, and we cannot deliberate unless we are able to see and to understand the range of options.

No one can come to perceive or to understand the range of possibilities alone. Humans are not self-sufficient. We depend on others to help us develop the abilities to perceive and to deliberate that constitute autonomy. For many, perhaps most, of us, this process of development begins with the family, our parents, siblings, and grandparents. For others, initial development of autonomy begins at school, with cultivation coming from teachers, counselors, even fellow students. Autonomy continues to develop as we pass through more advanced stages of our lives, with help coming from co-workers, friends, neighbors, and others. There is nothing

47 *See* SEN, COMMODITIES AND CAPABILITIES, *supra* note 11, at 10–11.

48 The criterion of the capacity to deliberate might appear to have the consequence that certain categories of persons and persons of certain ages cannot be autonomous. So, children, at least those of a young age, are not capable of deliberation. At the opposite end of life's spectrum, some, but not all, elderly persons, such as those suffering from dementia, also lack the capability of rational deliberation. The same is true for certain persons who are mentally impaired. In such cases, the disabled persons are represented by adults who are capable of deliberation and who can act of their behalf. So, even these persons can be said to be autonomous, although in an indirect, representative way.

inevitable about this process, however. Not everyone is fortunate enough to be surrounded by family, teachers, and friends who themselves are autonomous and who are in a position to facilitate development of the capabilities necessary for a richly autonomous life. Some people are unfree for periods or even the entirety of their lives.

Dignity and autonomy, then, are intimately related, but they are not identical. Dignity is unrealized autonomy. Dignity is equal among all human beings merely by virtue of their humanity. No one has more dignity than others. Autonomy is different. Autonomy is acquired, not inherited. No one is autonomous from birth. Instead, everyone has the potential to become autonomous. So, unlike autonomy, we are all born as dignity-bearing creatures, and it is up to others, family, teachers, friends, and so on, whether our potential for autonomy develops. Because of the different background condition in which we are nurtured, not everyone develops this potential equally. Unlike dignity, then, some persons are more autonomous than others.

The potential to develop as autonomous agents imparts to humans, every human, a certain status, a singular status that demands respect. Dignity in this sense, as the potential for autonomy, creates for every person an entitlement to respect, specifically, an entitlement to respect the potential for developing the capability of autonomy. Every person is entitled to develop as a fully autonomous human being. Regardless of how fully or little developed their capacity of autonomy is at any point, everyone is equally entitled to respect. This equal right to respect is essential because it is instrumental to each person's ability to continue to develop as an autonomous agent.

Dignity, then, is both a potential for autonomy and a right to develop that potential. This means that others in our lives have obligations to respect that entitlement by respecting our potential for autonomy. Most immediately, those obligations are negative, that is, they are obligations of non-interference. But there may also be positive obligations as well. Negatively, other persons in our lives are obligated not to act in ways that block or impede our opportunities for acquiring the capacities of self-authorship, self-determination, and self-reflection. Parents, teachers, or others who frustrate the development of our ability to conceive alternatives and make decisions about how to live our lives and to construct our lives in a deliberate fashion breach their obligation to respect our dignity.

Likewise, insofar as they render us incapable of understanding someone's else's point of view or putting ourselves in their place, persons who have responsibilities for our moral formation may fail to meet their obligations to us. In the United States, news accounts reported that a California married couple with thirteen children were discovered to have kept their children, ranging in ages from two to twenty-nine, to their beds amid foul surroundings in their home.[49] The children were discovered by police malnourished and unwashed. They had never attended school and had no contact with the outside world.[50] This is obviously an egregious and unusual example of failure to respect dignity, but it is a useful example by illustrating so vividly how persons with great responsibility may breach their obligation by blocking the capacity to develop autonomy.

There may be positive obligations as well. I shall have more to say later about positive obligations,[51] but for now I need to point out that fulfilling our obligation to respect another person's dignity may require positive action on our part, not simply non-interference. In fact, the case of David and Louise Turpin, the California couple who abused their thirteen children, illustrates the fact that non-interference and affirmative action are often inseparable. Parents cannot meet their obligation to respect their children's dignity by simply standing aside; they must act. Cultivation of autonomy begins at birth and continues through childhood. The persons primarily responsible for assuring that children receive what autonomy development requires are parents, and this parental responsibility requires them to take many important, indeed crucial, affirmative actions to provide what children need to develop as fully autonomous agents. Certainly, these actions include providing a loving and safe home environment, but the parental obligation of respect for their children's dignity goes much deeper. It requires that they "teach their children well," as the song goes.[52] Concretely, that means teaching about

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49 *See* Marwa Eltagouri, *Before Police Rescued Their 13 Children, California Couple Had a History of Strange Behavior, Family and Neighbors Say*, CHICAGO TRIB. (Jan. 22, 2018, 10:20 PM), http://www.chicagotribune.com/news/nationworld/ct-california-children-shackled-20180122-story.html [https://perma.cc/P4UT-EGUE].

50 *See id.*

51 *See infra* Part IV.

52 *See* CROSBY, STILLS, NASH & YOUNG, TEACH YOUR CHILDREN (Atlantic 1970); *Teach Your Children*, WIKIPEDIA, https://en.wikipedia.org/wiki/Teach_Your_Children [https://perma.cc/NT2C-

multiple ways of living a life and how to choose wisely among the available options. It includes teaching about the fact that more than one value or set of values exists and that reasonable people can and do disagree about different values. Teaching wisely about values is not limited to exposing children to a multiplicity of values, but is going beyond to the matter of choosing among these values and then possibly adjusting these choices through one's life. Respecting dignity also means teaching to respect others, especially persons whose personal characteristics, background, or value commitments are different from one's own. An essential aspect of teaching respect for others is teaching how to resolve differences, even profound differences, of opinion or value in a peaceful and considered way. Parents respect their children's dignity by teaching them how to respect the dignity of others, especially persons whose viewpoints seem so alien to them. Every person, without exception, is endowed with dignity, and dignity demands respect from others, from everyone.

This conception of dignity, dignity as the potential for autonomy, overlaps with both the status and worth conceptions. From the point of view of dignity-as-potential, status and worth are really just opposite sides of the same coin. Along with the status understanding of dignity, this conception shares the view that a person has dignity purely because of who she is, i.e., her status as a human being. Yet it differs from rank, with which status is often seen as a synonym. Rank is a hierarchical understanding of dignity. It is contingent and limited, contingent in the sense that it is dependent upon certain conditions being met. Rank is limited in the sense that it is subject to ordinal placement.[53]

Existential dignity, by contrast, is universal and absolute. Because it is intrinsic to persons by virtue of their sheer humanity, the existential conception overlaps with the Kantian worth or value view of dignity. Like worth, there is an equality dimension to dignity-as-potential that rank by its very nature

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53 Jeremy Waldron suggests a conception of dignity that universalizes rank, as Pico della Mirandola did before him. This egalitarian move removes the problems of subordination that I have identified with rank and that are usually associated with the term, but, in doing so, it conflates rank with status, a move that, for reasons I have already given, I resist. *See* Waldron, *supra* note 21, at 33–90; GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 5 (Sebastian Michael ed., Charles Glenn Wallis trans., Optimist Books 2018) (1486).

lacks.[54] But it carries none of the metaphysical baggage of Kant's scheme. Moreover, by rooting dignity in the fact of human existence, it avoids the unfortunate echoes of commodification that appeals to human worth or value create. Even if we repudiated the connection to commodification as avoidable, there is still the question whether dignity is the proper word to capture the substance of the worth idea. Jeremy Waldron argues that "*Würde*, in the sense of the [relevant] passage in Kant's *Groundwork*, expresses a type of value or a fact about value. 'Dignity,' by contrast, conveys the idea of a type of status that a person may have."[55] Recalling that I have distinguished status and rank, identifying the former more closely with the sort of inherited characteristic that I have in mind, I think Waldron is right about this. Dignity expresses an idea that worth does not adequately convey. Worth is the wrong term because it does not capture the idea of dignity as the potential to develop thick autonomy.

At the same time, status fails to capture the full import of dignity. There is an expressive aspect of dignity that status misses.[56] We express our dignity by how we lead our lives. Leading a life as a robustly autonomous person expresses our dignity. As robustly autonomous humans, we discern available possible choices for our actions and the values our actions express, and we deliberate about those possible choices. In doing so, we construct for ourselves a life that expresses our understandings of ourselves and who we wish to become. Such a process of self-construction respects our own dignity. Yet it is possible for us to demean our own dignity (demean, although not forfeit, because dignity is indefeasible). Some people live lives born of impulse or whim. Others may have had experiences that lead them to close their open-minded deliberative processes, shutting out all viewpoints except one narrow set of values. When people like this act in these non-deliberative, unchosen ways they demean their own dignity because they stifle their own potential for autonomy.

54 *Cf.* Henry, *The Jurisprudence of Dignity*, *supra* note 28, at 207 n.192 (discussing institutional status as dignity and its inegalitarian nature).

55 *Id.* at 24.

56 *See* John Kleinig & Nicholas G. Evans, *Human Flourishing, Human Dignity, and Human Rights*, 32 LAW & PHIL. 539, 554 (2013).

III
THE RELATIONSHIP BETWEEN HUMAN DIGNITY AND HUMAN FLOURISHING

How, then, do human dignity and human flourishing relate to each other? The relationship is, in short, important, but it is contingent and uncertain. To see why, let us return to the meaning and requisites of flourishing.

There are many ways of living a well-lived life, I have said, but not all ways of living lead to human flourishing. James is a highly paid professional hit man. He murders for hire, and he is entirely indifferent about the identities of his targets, who number in the hundreds. When he is not off murdering, he lives a life of luxury, enjoying meals at five-star restaurants, fine wines, wearing tailored clothes, driving an expensive sports car. James is also devoid of moral values. He respects no one's life. He trusts no one and has no friends. He will do literally anything to get what he wants. James may live in luxury, but he does not live a flourishing life. I have stressed the social character of humans. Our sociality means that we flourish in a social context, not alone. Because we can flourish only within such a social environment, we must internalize and express certain values that enable our sociality and, potentially, our flourishing. A person like James who has neither internalized nor expresses those values may live in luxury, but he does not live an objectively well-lived life.

Among the values that are necessary for anyone's ability to lead a flourishing life is respect for others, specifically, respect for others' autonomy. Dignity, as the potential for autonomy, demands respect. Being an agent with dignity is one thing; having that dignity respected is another. I have argued that every person has an entitlement to respect, specifically, an entitlement to respect the potential for developing the capability of autonomy. This means, as I have stressed, that other persons have obligations to respect that entitlement by respecting our potential for dignity. No one can lead a flourishing life without the respect of others for our dignity, understood as our potential for developing as autonomous persons. This does not require that everyone with whom we come into contact respect our dignity, but it does mean that for each of us to live well we must experience a minimal level of respect. That level varies according to our relationships. We expect a fairly high level of respect from our immediate family and friends. At work, we expect respect from co-workers, including our superiors. But it is reasonable to

expect a certain kind of respect even from complete strangers. Even strangers are morally obligated not to interfere intentionally, directly or indirectly, with our potential to develop as autonomous persons. This is the heart of the offense in all forms of subordination, including racism, sexism, homophobia, and similar social practices. They profoundly disrespect the victim, including complete strangers, by radically denying the victim's autonomy. Acts such as racist comments, sexual discrimination and harassment, and homophobic bullying create environments of closed spaces, threatening to narrow the range of possible options available to the victim, implicitly denying the victim's very humanity. Such behavior fundamentally frustrates human flourishing. At a minimum, flourishing depends upon recognition of a person's humanity.

Not only does flourishing require respect from others, it also requires respect *for* others' dignity. Respect for others' dignity acts as an objective filter on which ways of living constitute flourishing. This is why the life that James, the hit man, lives, however much it may reflect his preferences, cannot be a well-lived life. James disrespected every one of his victims simply by murdering them. The murders may have been entirely anonymous and without any personal contact or communication between murderer and victim. Yet what more direct and egregious form of disrespect for another person's dignity exists than to murder that person in cold blood? James has disrespected each and every one of his victims in the gravest possible way. In doing so, he has disrespected his own dignity. If I respect my own dignity I will act in ways designed to realize my potential to develop as a fully autonomous moral agent. Part of what autonomy involves is understanding someone else's point of view or putting oneself in their place. It involves taking the other person's humanity seriously. Murdering another person for money represents repudiation of that person's concrete humanity. The victim is a "mark," an object rather than an individual with a distinctive personality.

Just as James disrespects his dignity by taking out hits on innocent victims, so, too, do people denigrate their dignity when they engage in racist, sexist, or homophobic behavior. Imagine a powerful Hollywood movie producer who widely harasses women sexually, demanding that they perform sexual acts on him in return for support for their careers. Such a man fails to see these women, or likely any woman, as a concrete human being. Much like James the hit man, he does

not perceive his victims as unique individuals who have their own talents and needs and who are just as entitled to flourish as he is. He is entirely indifferent to their flourishing and is quite prepared to deny them their needs for developing as autonomous human beings. The same is true of white people who practice racial discrimination against people of color, denying them opportunities available to white people. And it is true of straight people who utter homophobic epithets at gay, lesbian, or transgender individuals.

Patricia Williams has spoken of such behavior as "spirit-murder," murdering the spirits of victims of racial and other forms of discrimination.[57] It is that, but it is also spirit-killing of the one who engages in such behavior. The Hollywood movie producer and the white nationalist both undermine their own humanity by obliterating the humanity of their victims. They deprive themselves of the opportunities to develop their capacities to discern commonness beyond difference, to perceive, that is, what it is in others that makes those persons just like them, despite differences of race, gender, sexual orientation, or other. In doing so, they undermine their own autonomy and disrespect their own dignity.

There is an expressive aspect to respecting one's own dignity, and it connects the dignity as potential for autonomy conception with a meaning sometimes ascribed to dignity, something like noble bearing. In one meaning provided by the *Oxford English Dictionary*,[58] dignity connotes "befitting elevation of aspect, manner, or style; . . . stateliness, gravity." On this view a dignified person is someone with a particular deportment and bearing, a person possessed with self-control. There is a certain gravitas to such a person such that others know simply from her stature and self-possession that she is a person to take seriously.[59]

Nelson Mandela was a person who embodied the sort of dignified deportment I am describing.[60] Even when he was

57 *See* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

58 *See* WALDRON, *supra* note 21, at 21 (quoting *Dignity*, OXFORD ENGLISH DICTIONARY).

59 In Latin, *dignitas* and *gravitas* are related terms. Cicero used them both to describe speech that was weighty and majestic. *See* ROSEN, *supra* note 25, at 12–13.

60 Mother Teresa, despite her small size and somewhat hunched posture, also had dignified bearing. *Cf. Mother Teresa—Biographical*, NOBEL PRIZE, https://www.nobelprize.org/prizes/peace/1979/teresa/biographical/ [https://perma.cc/X93K-TKZU] (last visited Oct. 17, 2018).

imprisoned on Robbin Island, he exuded seriousness of purpose and self-possession. In Mandela's case dignity as bearing matched moral dignity, but this is not always the case. Vladimir Putin, for example, carries himself with apparent dignity, but I doubt that many of us would wish to hold him up as a model of moral dignity. Although the two men shared a certain kind of physical stature, one expressed dignity while the other does not. Mandela's entire life was expressive of a deep respect for others, including his foes. He deliberated about their point of view, attempting to understand it even as he abhorred it.[61] In doing so, he was able to see his adversaries as human beings with shared characteristics that facilitated his ability to negotiate with them. Putin, on the other hand, seems to express none of these traits. Far from respecting his political opponents, he has them assassinated.[62] His relationships with others in the public realm express a deep cynicism and distrust. Publicly, he possesses a certain kind of self-control, but it not the sort born of honesty or truth. He is a man who invites distrust. He may demand respect, but it is not respect for his virtues. Rather, it is the kind of respect arising out of distrust and even fear.

Nelson Mandela's life shed light on why dignity is indefeasible despite what happens to a person over the course of his life. Mandela retained his dignity in the face of the adversity and disrespect he endured while imprisoned on Robbin Island. He never internalized that disrespect by giving in to it. But imagine a different person. Imagine a man or a woman living on the streets, ignored and shunned by others, dumped on by life so many times that she finally has come to believe the implicit narrative she reads in her life: she is unworthy. She internalizes the loss of others' respect to the point that she believes them—she no longer respects herself. Still, despite the loss of self-respect, she has retained her dignity. She is a human being with autonomy, and that is the core of dignity. This is the difference between dignity and self-

61 *See* Tom Lodge, *Nelson Mandela: Assessing the Icon*, OPENDEMOCRACY (July 18, 2008), https://www.opendemocracy.net/article/democracy_power/africa/nelson-mandela-at-90 [https://perma.cc/5LFS-QRTX].

62 *See* Calder Walton, *Russia Has a Long History of Eliminating 'Enemies of the State,'* WASH. POST (Mar. 13, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/13/russia-has-a-long-history-of-eliminating-enemies-of-the-state/?noredirect=on&utm_term=.7d1e12052dac [https://perma.cc/57D5-NGTK].

respect: Dignity, as an existential characteristic, is indefeasible, and self-respect is not.

This expressive aspect applies equally to respect for other people's dignity as well as respect for one's own dignity. The manner in which we exhibit our respect for another person is highly expressive. We do so in our speech, our demeanor, our actions, and all the ways in which we interact with that person and with others about that person. Even if the person is a total stranger, perhaps someone whose political views we abhor and completely reject, we can express our respect for that person. Suppose I attend a political rally demonstrating against certain political positions, and supporters of those positions hold a counter-rally. I do not respect their views or their values, but I respect them as persons. I respect their humanity and do not demonize them. I do not engage in pushing or shoving with them and do not strike them except in self-defense. The line is between respect for a person's views and the person himself, and that line is crucial. In the more quotidian affairs of life, the same is true. I may not approve of another person's way of driving, but I express respect for him as a person by refraining from gesturing at him.

These two expressive aspects of respect for human dignity are really not separate from each other, for expressing respect for another person's dignity draws respect from others, including opponents, for one's dignity. The person who attends the political rally and is able to stand above the melee that ensues from the counter-rally stands out as a person of great dignity when she engages constructively with her political opponents, and she is noticed and respected for her behavior. People who show respect are people who are themselves respected.

Nelson Mandela's life illustrates how human dignity contributes to a flourishing life.[63] Having our dignity respected and respecting the dignity of others are both necessary for an objectively flourishing life. Clearly, Mandela respected others' dignity, and even while he was in prison he commanded the respect of many people not only in South Africa but around the world.[64] Respect for one's own dignity and respect for the dignity of our fellows are both necessary conditions for flourishing, but they are not sufficient conditions. Certain other capabilities are also necessary. In Mandela's case, at

63 *See* Kleinig & Evans, *supra* note 56, at 558.

64 *See* Lodge, *supra* note 61.

least following his release from years of harsh imprisonment on Robbin Island, he apparently acquired those capabilities that are essential to leading a well-lived life, such as health, education, personal security, and so on. Just as respect for dignity is a necessary but not a sufficient condition for a flourishing life, so also are those capabilities. Nelson Mandela's life went better for him because he had profound respect for human dignity. It is difficult to imagine how his life would gone had he left Robbin Island an embittered man respecting no one. However else his life may have gone, it is profoundly difficult to imagine that it would have flourished.

Consider in this regard James the hit man. He seemingly has acquired all those capabilities necessary for a flourishing life, but I insist that his is not a flourishing life. He has not developed the capability of respecting others. Even if he commands the respect of others, an assumption that is dubious—there is a difference between fear and respect—fear lacks respect for other people's dignity, his life objectively is impoverished. Subjectively, he may enjoy the so-called better things in life, satisfying his preferences, but his is not a morally satisfying way of living. Most of us would not wish to trade places with James. Aside from the non-trivial risk he assumes, he may be a rather socially isolated person, but even if not, he probably does not enjoy the respect of his companions. Something about his presence will strike a bit of fear in others, and as I have indicated, fear is not the same as respect for dignity. As someone who does not respect others, he is not well-socialized and is not a fully integrated member of society. Humans are by nature social beings, and they can flourish only when they have in fact realized their sociality. A person cannot realize her sociality unless he develops respect for the human dignity of others—all others. Lacking such respect for others' dignity, he remains outside of, rather than within. The well-lived life is, among other things, a life as a person with deep connections to and for others. Such connections cannot be established unless sincere respect for others' dignity exists.

IV
CONNECTING HUMAN DIGNITY, HUMAN FLOURISHING, AND PROPERTY

What does any of this have to do with property? At first glance, it may appear that ownership of property has little or no bearing on human dignity or its contribution to a well-lived life. Upon further reflection, however, it appears that property

has a good deal to do with human dignity and human flourishing.

A. What Can Be Owned

To begin with, if we understand flourishing as I have outlined and further understand how respect for dignity is a necessary condition for the good life, then we can glean the reasons why, both morally and legally, some things simply should not, cannot be owned, i.e., be the objects of private ownership. This topic is often discussed under the rubric of commodification, but that term obscures the connection between property on the one hand and human dignity and flourishing on the other.

Consider chattel slavery. Under that system human beings are made objects of property ownership. In such a property regime, those humans are systemically denied their opportunity to fulfill their potential for developing as autonomous persons. Not only do their owners disrespect their dignity in the most direct and brutal way, but so does every other person who participates in any way in that intolerable system.

Slavery is an obvious case, but there are other controversial topics that are usually discussed in the discourses of commodification or market-inalienability that may more insightfully be analyzed in terms of dignity and flourishing.[65] These topics range widely, from babies to addictive drugs such as heroin. In such cases what autonomy means and more specifically, what respect for another person requires, is not always clear. On one level, of course, autonomy is a matter of self-determination, and we must respect another person's wishes about she wishes her own life to go. Moreover, because flourishing is agent-relative, each person is usually in the best position to determine what the good is for her. At the same time, this determination is contextual. It is always judged within a particular set of circumstances, not abstractly or indefinitely. There may be circumstances in which an individual is not well-positioned to

65 *See, e.g.*, DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing the significance of, and justifications for, market-inalienability and offering an alternative justification that relates to human flourishing); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985) (discussing role that inalienability plays in the context of private property).

evaluate what will make her life go well for her. Determinations about what makes a person's life go well require practical reasoning, what Aristotle called *phronesis*.[66] It involves deliberation about available options and discerning possible consequences of courses of action that one might take. Practical reasoning is a capability that is cultivated, not inherited, and for some people it is underdeveloped. For others, there may be impediments such as cognitive impairments, addiction, or even poverty that hinder the exercise of practical wisdom. In circumstances such as these the agent is not always the best person to evaluate what actions make her life go best. Under such conditions, autonomy may not demand that others respect the agent's choice about how to act. Understood as involving the capacity to exercise practical wisdom, autonomy may be served by not merely deferring to a person's wishes. We may in fact best express our respect for that person by deciding for her. What I most want to stress is that a libertarian approach of full deference is entirely inadequate. It regards as irrelevant what self-determination involves, and as a result it is ignorant of what respect for autonomy requires.

B. Becoming Property

Not only do dignity and flourishing inform us of limits on what can be owned, but they also shed light on *how* we should allow and not allow some things to be rendered as transferable property. In addressing the topic of limits on how things come, the focus is on the scope and contents of private agreements. The case of Henrietta Lacks is instructive here.[67] Henrietta

66 *Phronesis* is usually translated as practical wisdom. Aristotle distinguished it from *sophia*, which is theoretical reason. Practical reason, or wisdom, is the facility "to deliberate about what to do, looking for and demanding reasons for and against proposed courses of action, assessing our emotional responses and altering their strength, investigating why the world appears as it does, developing theories that explain the facts, arguing that certain theories give better explanations than others." RICHARD KRAUT, ARISTOTLE 68 (2002).

67 Chris Odinet suggested to me another interesting example. In the Facebook/Cambridge Analytica scandal, Facebook essentially denied the ownership of people's data—often representing very private and personal aspects about themselves—by selling it to a company without permission. The data we generate from when we share our niece's birthday party pictures or post "get well soon" messages on the pages of friends with cancer still reveals sensitive information about us which can be used to make us vulnerable to manipulation (often without us even knowing it). *Cf.* Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html [https://perma.cc/M572-9PBQ].

Lacks[68] was an African American woman whose cancer cells were (and are) the source of the HeLa cell line. It was the first cell line to be reproducible indefinitely under certain conditions, and it continues to be a source of important medical information today. Ms. Lacks was the unwitting source of these cells, however. They were derived from a tumor biopsied during treatment for cervical cancer at Johns Hopkins Hospital in Baltimore, Maryland, the only hospital in the area that treated black patients at the time.[69] The cells were then cultured into what became known as the HeLa cell line. Medical research had not then developed the practice of informed consent, so no one obtained Ms. Lacks' consent to culture her cells. And, of course, neither she nor her family was compensated for their extraction or use. This despite the facts that Henrietta Lacks' cells were used to develop the first polio vaccine[70] and that over 11,000 patents today involve HeLa cells.[71]

Henrietta Lacks' case is an obvious and particularly egregious example of acquisition of property by means that are a blatant affront to human dignity. The doctors at Johns Hopkins and other researchers who used her cells in their arrogance showed absolutely no respect whatsoever for her autonomy in connection with a decision of great personal intimacy. Indeed, they stripped her of that decision entirely. She had no self-determination in the matter of how her cells would be used or in the stream of royalties that they generated. It is difficult to escape the conclusion that this abuse of Henrietta Lacks' autonomy made her life go worse than it would have had the doctors and others shown respect for her dignity. True, she would still have died, but she would have had the ability to control or at least affect the lives of those close to her, the surviving family.

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68 Henrietta Lacks (1920–1951) was not her given name. That was Loretta Pleasant. The reason for the change is unclear. *See* Denise Watson Batts, *Cancer Cells Killed Henrietta Lacks—Then Made Her Immortal*, VIRGINIAN-PILOT, May 10, 2010, at 1, 12–14.

69 *See* REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS 13 (2010).

70 *See* Van Smith, *Wonder Woman: The Life, Death, and Life After Death of Henrietta Lacks, Unwitting Heroine of Modern Medical Science*, BALT. CITY PAPER, Apr. 17, 2002.

71 *See* Batts, *supra* note 68.

C. Defining What Owners Can Do (and What They Must Do)

1. *Restrictive Duties*

Among the most contentious property issues are those concerning how property is used, and here again, dignity is often at the heart of the matter. Efficient use of resources and clarity of property rights are highly contentious in such disputes, to be sure, but these concerns do not exhaust what is at stake. An especially clear example, one very familiar to American property scholars, is *State v. Shack*.[72] In that case, two individuals who worked for government-funded organizations that provided health and legal services to migrant farmworkers entered a privately-owned farm to provide assistance to migrant workers who worked and were housed there. Specifically, one aid worker was there to remove sutures from a farmworker, and the other, an attorney with a federally funded legal aid program, was there to discuss a legal problem that another farmworker had. When the two aid workers entered the farm, the owner, Tedesco, confronted them and demanded to know their business. After they disclosed their mission, Tedesco told the aid workers that he would allow them onto his farm for their purposes but only on condition that he was present when they met their clients, the farmworkers. The two aid workers refused to agree to this condition, and Tedesco then called the police, who removed the aid workers when Tedesco filed a written complaint charging them with criminal trespass.

At trial, the two aid workers were convicted of criminal trespass under New Jersey's criminal trespass statute, and their conviction was sustained on appeal.[73] The New Jersey Supreme Court took a different view of the situation.[74] It reversed the lower courts, holding that the two defendants had not invaded Tedesco's possessory right. Hence, the state trespass statute did not reach their conduct.

The heart of the New Jersey Supreme Court's opinion is its famous statement, "Property rights serve human values. They are recognized to that end, and are limited by it."[75] Property, in other words, is created to further social ends, or values, and

72 277 A.2d 369, 369–75 (N.J. 1971).
73 *Id.*
74 *Id.*
75 *Id.* at 372.

by the same token, values define the limits of property rights. The court found it "unthinkable" that the farm owner could be permitted to isolate migrant workers from persons who were trying to help them under the auspices of government aid programs. The court emphasized the predicament of these workers—their rootless condition and their isolation from the rest of the community. These workers—Tedesco's employees—were dependent upon help coming to them rather than the other way around. Hence, the court held that the owner could not exclude representatives from federal, state, or local agencies or from recognized charitable groups seeking to assist migrant workers from the premises when seeking out workers living there.

Dignity was very much involved in the case, in fact on both sides. That is what makes the case so interesting. It is perhaps easiest to see dignity involved on the workers' part. Indeed, the court itself expressly recognized that the workers' dignity was at stake, saying, "[T]he needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity."[76] As migrant workers living on their employer's farm, their autonomy was seriously compromised. They lacked the full ability to control the decisions that affect their daily well-being. This is true for all of us, of course, but not nearly to the degree that it was for Tedesco's employees. They were, as the court emphasized, isolated and cut off from the outside world. The scope of self-determination shrinks very considerably under such conditions. At a minimum, dignity requires the ability to control access to health care, and this is exactly what Tedesco's employees were denied.

Now consider the case from the perspective of the farm owner/employer. He may well have expected that his autonomy interest as owner entitled him to exclude whomever he wished and for whatever reason. As we have seen, however, autonomy is more complex than the simplistic libertarian picture of freedom from outside constraint. No one lives in a bubble, and autonomy must be understood from the perspective of that reality. There is a relational aspect to autonomy. It involves other-regarding conduct that ranges minimally from treating person as concrete human beings to affirmatively acting on their behalf in times of need. Tedesco,

76 *Id.* at 303.

the farm owner in the case, was in a position of power over his migrant workers, controlling not just their employment but their access to the outside world. In the context of Tedesco's relationships with his employees, his autonomy meant that he was obligated to take their needs and his position vis-á-vis the provision of those needs into account.

What would it mean, then, for Tedesco to have acted in a dignified manner? We are not told of the exact details the interaction between Tedesco and the two aid workers. The court's opinion tells us only that Tedesco confronted them at the entrance to his farm, asked what they wanted, and when told, informed them that he would allow them to talk to the migrant workers only if he were present. The aid workers said they had the right to see the workers in private and without Tedesco's supervision, and Tedesco responded by calling the state police to remove the aid workers for trespassing on his property.[77] Tedesco may have believed that he was justified in calling for their removal because in his view the aid workers did not respect him or, more concretely, his power to control his own business. From his point of view, this was a matter of asserting his autonomy as owner. What he asserted, however, was his liberty, not his autonomy, and there is an important difference between the two. Had he expressed his autonomy, he would have attended to the needs of his employees, who were also tenants on his farm. He would have sought out ways to accommodate their needs with whatever legitimate interests he had. Since he had opened his farm to them, presumptively, those interests did not include privacy. If his concerns were legal, he might have asked his personal attorney to meet with the legal aid worker. By expressing respect for the autonomy of his workers, he would have acted upon his own dignity.

Dignity, in its relationship to human flourishing, is particularly prominent in those property disputes that involve housing. Where and how one resides are matters that bear in the most intimate way on personal autonomy. Consider another well-known American trespass case, *Jacque v. Steenberg Homes, Inc.*[78] In this case, a homeowner and his wife, Lois and Harvey Jacque, sued Steenberg Homes for damages for intentional trespass to their land. Steenberg Homes delivered a mobile home by plowing a path across the Jacques' snow-covered field despite strenuous protests from

77 *Id.* at 300–01.

78 563 N.W.2d 154, 154–66 (Wis. 1997).

the Jacques. Steenberg Homes' employees might have used a road around the Jacques' property to deliver the mobile home, although concededly it would have been difficult to do so because the snow was very deep. In the face of the Jacques' clear objection, Steenberg Homes went ahead and crossed the Jacques' property.

The question in the case was not whether Steenberg Homes had trespassed, for clearly it had. Rather, the issue concerned damages. The jury had awarded the Jacques one dollar in nominal damages and one hundred thousand dollars in punitive damages. The issue was whether such punitive damages could properly be awarded on the basis of only nominal property damage. The Wisconsin Supreme Court ruled that in cases of intentional trespass the jury may award punitive damages even though the compensatory damages are nominal only.

Some scholars have criticized the court's decision, believing that it falls short of what it means for a person to live freely.[79] In my view, the decision was correct and the court well understood what it means to be a fully autonomous person.[80] Punitive damages were justifiable precisely because Steenberg Homes had so flagrantly disrespected the Jacques' dignity and undermined their flourishing.

John Makdisi argues that "the purpose of the law is to care for one's neighbor."[81] He further contends that there is a difference between a conception of human flourishing as living freely in an undirected way and a conception of flourishing as living freely "for a purpose," as he puts it.[82] He wants the law to encourage property owners to act as Good Samaritans and objects that punitive damages discourage them from doing so.

Turning to the *Jacque* case, Makdisi is skeptical that any of the capabilities necessary for the Jacques' flourishing were

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79 *See* John Makdisi, *Uncaring Justice: Why* Jacque v. Steenberg Homes *Was Wrongly Decided*, 51 J. CATH. L. STUDIES 111 (2012).

80 Had the facts of the case been different such that it was virtually impossible or seriously dangerous for Steenberg Homes' employees to use the road rather than cut across the Jacques' field, my analysis and conclusion would change. Eric Freyfogle states Steenberg "tried to get the mobile home down the road," but he does not indicate why this attempt was aborted and the reason for stopping seems to me decisive. *See* Eric T. Freyfogle, *The Enclosure of America* (Ill. Pub. Law and Legal Theory Research Papers Series, Research Paper No. 07-10, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024846 [https://perma.cc/6KE9-K6S3].

81 Makdisi, *supra* note 79, at 113.

82 *Id.*

at stake. In his view there was no invasion of the "private space" of their farm. Steenberg Homes had rolled the mobile home over "a vacant unused field" that was part of the Jacques' 179-acre farm, causing no damage to the land.[83] Makdisi asserts that there was no impingement on the Jacque's health "nor on their freedom to make deliberate choices."[84] Nor did Steenberg Homes threaten the privacy or security of the Jacques' home. It seems to be Makdisi's view that because the location of Steenberg Homes' activity was removed from the Jacques' house and further because the Jacques were not using that portion of their land at the time (it was winter), the Jacques acted ungraciously in not giving Steenberg Homes permission to cut across their property and the law should not encourage such ungenerous conduct.

Perhaps the Jacques did not act graciously, perhaps not. The Jacques were not acting out of sheer spite; they had understandable reasons for refusing to give Steenberg Homes permission. The court tells us that "[t]he Jacques were sensitive about allowing others on their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action" several years earlier.[85] Of course, had they given Steenberg Homes permission, there would have been no risk of adverse possession, but the Jacques were not lawyers and could not be expected to know the fine points of adverse possession law. Still, one might ask, were punitive damages justified where there was no real injury to the owner? This was not a case of simple trespass. Steenberg Homes' trespass was intentional; indeed, it was aggravated. Steenberg Homes' employees testified that when they informed the assistant manager of the Jacques' response, he told them "I don't give a —— what [Mr. Jacque] said, just get the home in there any way you can."[86] They further testified that when they told the assistant manager that they had gone across the Jacques' field, he reacted by giggling and laughing.

We might compare Steenberg Homes' trespass with activity now permitted under Scotland's right to roam statute (Land Reform (Scotland) Act 2003 (LRSA)).[87] The Act creates "a right

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83 *Id.* at 1234.

84 *Id.*

85 *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157 (Wis. 1997).

86 *Id.*

87 Land Reform (Scotland) Act 2003, (ASP 2). For a good discussion of the statute, see John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 741–43 (2011). For the legal–cultural

[in any person] to go almost anywhere in Scotland, on most land and inland water, whether privately owned or public, without a motorized vehicle, for purposes of recreation, education, and passage, as long as one acts responsibly."[88] Sir Paul McCartney owns a large farm in Scotland.[89] Under the LRSA, I am now entitled to hike across his land without his permission. Would Steenberg Homes' entry onto the Jacques' land have been similarly privileged under the Act? The Scottish Outdoor Access Code 2005 permits access "on any land in which crops have not been sown or are not growing."[90] Steenberg Homes' entry occurred during the winter when snow was on the ground and presumably the land was lying fallow, but there is another difference between my hiking across Sir Paul's land and Steenberg Homes' actions. Although my access would be strictly for recreational purposes, Steenberg Homes' activity was commercial in nature. It was delivering a mobile home to a customer and was trying to save money by taking the shorter route. Under the Act, rights are given to "cross land . . . for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit."[91] The National Access Forum -Scotland elaborates on this somewhat vague language. It makes clear that the commercial activities that the provision contemplates are those consistent with the overall thrust of the Act, namely, commercial activities connected in some way with recreation. It provides that commercial activities with access rights are diverse "and include a wide range of guided outdoor activities, outdoor skills training, tours and other services which are directly based on

history of the statute, see Gregory S. Alexander, *The Sporting Life: Democratic Culture and the Historical Origins of the Scottish Right to Roam*, 2016 U. ILL. L. REV. 321, 324–47 (2016).

88 Lovett, *supra* note 86, at 741.

89 In 1966, McCartney purchased High Park Farm in Kintyre, a peninsula located in the southwest on Scotland. There he wrote some of his most famous songs, including "The Long and Winding Road," "Maybe I'm Amazed," and "The Mull of Kintyre." *See* Mike Merritt, *Unseen Photos of Paul McCartney's Kintyre Hideaway*, SCOTSMAN (Nov. 3, 2014), https://www.scotsman.com/lifestyle/culture/music/unseen-photos-of-paul-mccartney-s-kintyre-hideaway-1-3591914 [https://perma.cc/M942-W34J].

90 Scottish Outdoor Access Code 2005, Pt. 3.35, https://www.outdooraccess-scotland.scot/sites/soac/files/docs/scottish_outdoor_access_code_-_part_3_exercising_access_rights_responsibly.pdf [https://perma.cc/DL9S-PVWT].

91 Land Reform (Scotland) Act 2003, (ASP 2) § 1(2)(b), 1(c)(3).

active pursuits."[92] Among the examples provided are guided walking and climbing, guided photography, guided wildlife watching, and commercial dog-walking. With the exception of dog-walking, all of the activities listed are recreational in nature. It appears highly unlikely that the Act contemplated commercial delivery of large, heavy equipment or materials. If correct, Steenberg Homes' actions would have constituted trespass under Scottish law, even with a right-to-roam statute that substantially dilutes the owner's right to exclude.

Scottish law recognizes that dignity involves the potential for autonomy and that respect for a person's dignity requires enabling development of that person's capacity for self-authorship. As I have stressed, autonomy is not strictly self-regarding. Rather, it possesses an other-regarding dimension as well, and these two dimensions are reciprocal. If I am obligated to regard others as concrete persons and to respect them, so they are obligated to treat me likewise. As a moral agent with dignity, I am entitled to have others express respect for my dignity and to express that respect in the way they treat me. This is precisely what was lacking in Steenberg Homes' conduct. Steenberg Homes showed the grossest sort of disrespect for the Jacques' dignity. Its manager instructed its employee, "I don't give a —— what [Mr. Jacque] said, just get the home in there any way you can."[93] In an illuminating essay on dignity, Don Herzog recounts an episode from 1573 England in which a trespassing lord told a landowner who had repeatedly complained, "Stuffe a turd in your teethe."[94] This, in effect, is what Steenberg Homes told the Jacques after the Jacques refused to grant permission to cross. Hardly a display of respect.

Viewed from this perspective, Steenberg Homes' action appears to be an especially aggravated sort of intentional trespass. Viewed from the perspective of capabilities, the matter hardly appears any different. No necessity was involved. No great risk was involved in taking either route to deliver the mobile home. Taking the longer route would not have threatened physical injury to any of Steenberg Homes' employees. None of Steenberg Homes' necessary capabilities

92 National Access Forum - Scotland cl. 5, https://www.outdooraccess-scotland.scot/sites/soac/files//docs/commercial_access_to_the_outdoors_in_scotland_-_guidance_on_local_management_-_19_march_2014.pdf [https://perma.cc/75ER-2S2W].

93 *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157 (Wis. 1997).

94 Don Herzog, *Aristocratic Dignity?*, *in* WALDRON *supra* note 21, at 99–100.

were at stake. From all that appears from the court's opinion, this was purely a case of saving a few bucks.[95] If the right to exclude is to have any substance, *Jacque* presents a set of facts for giving it content.

Consider another case which we may contrast with *Jacque* to see why, from a dignitarian perspective, *Jacque* was correctly decided. This case involves another land invasion but in a different country, for very different reasons, and posing a different legal issue. In *Modder East Squatters v. Modderklip Boerdery (Pty) Ltd.*,[96] some 400 residents of an established informal settlement near Johannesburg moved onto adjacent land that they mistakenly thought was owned by the city of Johannesburg. In fact, the land was a private farm owned by Modderklip Boerdery Ltd. Within six months, the new settlements included 18,000 people, living in 4,000 shacks.[97] The owner sought to evict the occupants, relying on the Prevention of Illegal Eviction and Unlawful Occupation of Land (PIE) Act.[98] The lower court granted an eviction order, but the occupants failed to vacate. Meanwhile, the Modder East settlement had grown to 40,000 inhabitants.[99] An execution writ was issued, and the sheriff was ordered to execute it. The sheriff insisted on a large sum of money[100] to cover the estimated cost of employing a private firm large enough to carry out the eviction and demolition of the shacks. The owner was unable or unwilling to pay the sum, especially because it exceeded the estimated value of the land. Modderklip then filed trespassing charges against the occupants, some of who were found guilty. The sheriff, however, failed to take any action, treating the matter as a civil dispute. Modderklip then sought assistance from various public bodies. The President referred the matter to the Department of Land Affairs, which referred the matter to the Department of Housing, which did

95 It is possible, of course, that more was involved in the case. We do not know why the mobile home was needed on the other end or whether there was a matter of timing. It could be that necessity of a sort was involved from that perspective. We also do not know whether delivering the mobile home via the road involved danger to Steenberg Homes' employees. The case might be different if a few facts such as these were different.

96 2004 (8) BCLR 821 (SCA) (S. Afr.).

97 *Id.* at 824 para. 2.

98 *Id.*

99 *Id.* at 825 para. 3. The settlement had just one water tap, and the only facilities were rudimentary pit toilets. *Id.*

100 R1.8 million, or approximately $151,600 US (as of April 5, 2018). *Id.* at para. 4.

not respond.[101] In the meantime, the sheriff had increased the sum required for eviction. Understandably frustrated, the owner once again went to court and obtained a declaratory order forcing all the relevant government officials (including the National Police Commissioner) to take all necessary steps to remove the unlawful occupants.

As it was presented before the Supreme Court of Appeal, the case was a combined application from the state appealing the initial eviction order and the enforcement order. The court denied leave to appeal the eviction order but granted the appeal from the enforcement order in part. The court then issued a different enforcement order.[102]

At first blush the case appears to present a straightforward private law matter, i.e., enforcement of an eviction order. Indeed, that is exactly how both the state agencies and the police initially viewed the matter. The Supreme Court of Appeal took a different view of the matter, however, observing that this perspective "does not reflect an adequate appreciation of the wider social and political responsibilities [that the Constitutional Court in previous cases] identified in respect of persons such as the present occupiers."[103] In the court's view, the case posed an apparent conflict between two constitutional duties of the state: its duty to protect Modderklip's ownership rights under the property clause of the South African Constitution[104] and its duty to provide adequate housing under the Constitution's housing clause.[105] The court treated the state's failure in this regard as simultaneously a breach of Modderklip's section 25 property right and the occupants' section 26 housing right.[106] The basis for that conclusion was section 7(2) of the Constitution, which provides that the state is under a duty to "respect, protect, promote and fulfil [sic] the rights in the Bill of Rights."[107] In the court's view, by failing to provide the occupants with alternative housing in accordance with section 26, the state failed to protect the owner's section 25 property right as section 7(2) requires. The court stated:

> [I]n a material respect the State failed in its constitutional duty to protect the rights of Modderklip: it did not provide

101 *See id.* at 825–26 para. 7.
102 *Id.* at 826 para. 10.
103 *Id.* at 828 para. 16.
104 S. AFR. CONST., 1996, s. 25.
105 *Id.* s. 26(2).
106 2004 (8) BCLR 821 (SCA) at 841–42 para. 21–22 (S. Afr.).
107 S. AFR. CONST., 1996, ch. 2, s. 7(2).

> the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual . . . .[108]

Failure to protect one right, in other words, meant failure to protect another right. The theory is that the constitutional duty to protect and promote fundamental rights, derived from a constitutional provision placing such a duty on the state, places a general duty on states to protect their citizens from all infringements of their fundamental rights, even if the actions of other individuals, rather than the state, threaten those rights.

On appeal, the Constitutional Court acknowledged that the eviction order was correct and that Modderklip was entitled to it. But the court conditioned that right on the state first providing alternate housing or land to the squatters. It explicitly ordered the state to comply with its constitutional obligations by providing land so that the eviction could proceed (unless, of course, the state elected to purchase or expropriate the land).[109] The occupants were entitled to remain on Modderklip's land until the state provided them with alternative land. In the meantime, the owner, Modderklip, was entitled to receive from the state the compensation the Supreme Court of Appeal had awarded.[110]

Both the Supreme Court of Appeal and the Constitutional Court focused on the state's obligations, but the decision implicates the private landowner's obligations as well. It seems likely that in the long run the state will be compelled, as a practical matter, to acquire either new land or, more likely, the land currently occupied. In the meantime, however, the law would protect Modderklip's constitutional property right through a liability rule rather than a property rule, i.e., through damages rather than through eviction, even though the latter would have restored Modderklip's right to possession.[111] In effect, both courts forced the state to exercise its expropriation power to acquire at least a temporary interest in Modderklip's land, something akin to a common law determinable tenancy. This remedy is clearly less than what Modderklip wanted. Even if the damages were equal to the fair

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108 2004 (8) BCLR 821 (SCA) at 834 para. 30 (S. Afr.).
109 *Id.* at 841 para. 43.
110 *Id.* at 841–42 para. 44.
111 *See id.* at 841–42 para. 43–44.

market value of the occupied portion of its farm, Modderklip was likely to be dissatisfied with this remedy. The right of exclusive possession of its farm—its entire farm—is what Modderklip really wanted, but Modderklip was constitutionally obligated to sacrifice that entitlement.

Modderklip's sacrifice is no trivial matter. The court forced Modderklip to continue a relationship with a contingent of squatters that was the equivalent of a small city's population, a relationship that doubtless it was eager to terminate. Moreover, as time goes by, the force of the squatters' claims to remain on Modderklip's land permanently will grow even stronger, increasing the pressure on the state to expropriate the land outright, albeit with some compensation to Modderklip.

Not only as a matter of human flourishing and dignity, but from multiple perspectives, *Modderklip* strongly contrasts with *Jacque*. In dignitarian terms the differences between the two cases illuminate why the Jacques owed no duty to Steenberg Homes. *Modderklip* was an appropriate case for Professor Makdisi's ethic of caring.[112] First, the occupiers were on Modderklip's land under a mistaken assumption of fact, i.e., that the land was part of the parcel they already occupied. Unlike *Jacque*, this was not a case of intentional trespass. More fundamentally, the occupants were people in great need. These were people living in so-called informal settlements, squatter settlements created by folks who have no access to decent housing and typically live on government-owned land following illegal land invasions.[113] As vulnerable people lacking housing, they had capability needs that were especially compelling. They had no meaningful personal security or privacy, and the deplorable conditions in which they lived

112 *See* Makdisi, *supra* note 79, at 115.

113 As the South African Constitutional Court stated in *Port Elizabeth Municipality v. Various Occupiers*, "The term 'land invasion' . . . must be used with great caution." 2004 (12) BCLR 1268 (CC) at 1280 para. 20 n.22 (S. Afr.). Justice Albie Sachs explains that the term

> [C]an be stretched to cover widely dissimilar cases, [such as] where a relatively small number of people have erected shacks and lived on undeveloped land for relatively long periods of time, or the situation in *Grootboom* [Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.)] where although a thousand desperate people occupied a hillside due to be developed for low-cost housing, no intent to jump the queue was shown and a remedy was not refused, or . . . [where] there had been a deliberate and premeditated act culminating in the unlawful invasion and occupation of a large tract of land.

Id.

jeopardized their health. They had no access to health care, nor did their children have access to education. Their conditions were hardly of their own making. It is only in the thinnest possible sense of the word that one could say that they exercised self-determination. Autonomy in any full sense was absent in their lives. As human beings, they possessed dignity, but that dignity was not respected. The repeated evictions they experienced represented iterated expressions of disrespect for their dignity. What the Supreme Court of Appeal and the Constitutional Court did was finally to show them the dignitarian respect so long denied them.

What of Modderklip's dignity? One might say that the courts denied him the self-determination that would have expressed respect for his dignity. After all, his right to exclude, unlike that of the Jacques, was not enforced. He wanted the occupiers removed, and he did not get them removed. A closer reading of what both courts did, however, suggests that those courts in fact showed a great deal of respect for his dignity. The Supreme Court of Appeal attempted to structure a remedy that took his dignity, as well as that of the occupants', into account. It stated that under the given circumstances, the only remedy that was justified were "constitutional damages." The court said, "No other remedy is apparent. Return of the land is not feasible."[114] The South African Constitutional Court expressed a similarly sympathetic view of Modderklip's position:

> I agree with the finding of the Supreme Court of Appeal that Modderklip cannot be blamed for any delay in instituting eviction proceedings and for the failure to consummate the eviction order. As already mentioned, the costs of the eviction order if implemented by the sheriff far exceed the price at which the land was offered for sale. I agree also that Modderklip's conduct in its pursuit of an effective solution has been prudent and reasonable in the circumstances.[115]

The court continued,

> The position of Modderklip, as a victim of the unlawful occupation of its property on a massive scale, is aggravated by the failure to have the eviction order carried out. Its efforts to extricate itself were frustrated

114 2004 (8) BCLR 821 (SCA) at 841 para. 43 (S. Afr.).

115 *President of the Republic of S. Afr. v. Modderklip Boerdery (Pty) Ltd* 2005 (5) BCLR 3 (CC) at 23 para. 38 (S. Afr.).

> by the ineffectiveness of the mechanisms provided by the state to resolve this specific problem because of the sheer magnitude of the invasion and occupation of Modderklip's property.[116]

The problem was not one of Modderklip's making, the court thought; rather, the onus was on the state to act where it was impossible for Modderklip to evict the occupiers due to their sheer number.[117]

The discussions of Modderklip's situation by both courts underscore a fundamental point about autonomy and self-determination. Because the context in which capabilities develop is always social and interdependent, autonomy and self-determination are relational, not purely individualistic or independent. The relational nature of autonomy and self-determination has several important consequences that the *Modderklip* case illustrates.[118] First, perhaps most obviously, self-determination is contingent, not absolute. I do not and cannot control everything and everyone around me. I do not even have complete control over my own body. What I can control is how I think about situations and how I react to them. I can determine how I will act in particular situations and what I will do over the course of my life, given certain constraints.

The relationality of autonomy and self-determination also means that my autonomy inevitably and always will bump up against someone else's autonomy. Constraints exist, and adjustments must be made. In *Modderklip*, both the Supreme Court of Appeal and the Constitutional Court struggled to accommodate the autonomy interests of both the owner and the occupiers. That was an especially difficult task because the party who really held the key to resolving the housing problem was a third party over whose purse neither court had true power. The remedy that both courts fashioned was the best that they could achieve to recognize the autonomy interests of both the owner and the occupiers.

Related to the point just made, within its inherently relational context, self-determination is reciprocal. Because we live in a world with others rather than our own individual

116 *Id.* at 25–26 para. 44.

117 *Id.* at 27 para. 48.

118 Hanoch Dagan has a sophisticated discussion of "relational justice" as what he calls "reciprocal respect for self-determination" in his forthcoming book. *See* Hanoch Dagan, A Liberal Theory of Property ii (unpublished manuscript) (on file with author). It is similar in many respects to what I am saying here, particularly about the reciprocal nature of self-determination.

world, we must accommodate others and they us. This is an aspect of the respect we owe to others' dignity, and they to ours, discussed earlier. This reciprocal respect for each other's dignity requires that each of us recognize and treat each other as self-determining persons. The reciprocal character of self-determination places constraints on what we are entitled to do with and in our lives. I am not entitled to shape my life in a way that unduly interferes with how you wish to conduct your life. As a self-determining moral agent, I am obligated to respect your status as a self-determining agent, and you, mine. Each of us must take each other and treat each other as concrete human beings equally worthy of respect from each other. As we have seen, especially in *State v. Shack*, this obligation places intrinsic constraints of the exclusionary rights of property owners, but as the *Jacque* case illustrated, the same requirement of reciprocal respect for self-determination places limits on these constraints.[119]

2. *Affirmative Duties*

The property duties that I have identified as aspects of respect for dignity thus far have all been restrictive or negative in character. They are limits on what an owner may do with her property. Traditionally, property law and the law of obligations more generally draw a clear line between restrictive and affirmative obligations, although the distinction between the two is slippery. As Hanoch Dagan explains,

> Private law, like law more generally, is rightly cautious about affirmative interpersonal duties to aid others, in part because they may excessively interfere with people's autonomy (also because imposing an obligation to rescue may dilute the ethical value of altruism, while pragmatically, it may be difficult to draw lines between easy and hard cases). Placing limits through a negative duty on a person's courses of action is typically less intrusive on that person's autonomy than dictating – through an affirmative duty – what

[119] My discussion of these cases may be taken by some readers to indicate that I am suggesting that courts should conduct a dignity analysis for each case given its particular circumstances, leaving me open to the kind of critique made by Henry Smith to previous work of mine. *See* Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 982–89 (2009). That is not my intent. My purpose, rather, was to use these cases as examples for the refinement of categories. In no way do I advocate purely ad hoc decision-making.

that course of action should be.[120]

Dagan goes on to point out that property law does and should recognize some affirmative obligations that owners must bear. He mentions, for example, the duty to disclose in real estate law.[121] Just as the old regime of caveat emptor should be abandoned, so should the traditional regime of caveat lessee in favor of an implied warranty of habitability. Respect for another person's dignity illuminates reasons for—and limits of—these obligations.

D. The Warranty of Habitability

Consider the landlord's obligation under the warranty of habitability. In all but a small number of American states, such a warranty, either implied or statutorily mandated, exists in all residential leases.[122] The exact standards of the warranty vary from state to state but the gist is that the landlord is obligated to deliver and to maintain throughout the duration of the tenancy premises that are safe, clean, and generally fit for human habitation.[123] Reversing the common law default rule, the warranty requires that landlords make repairs, at least those that are necessary to make and keep the premises habitable. The most arresting feature of this warranty is that it is a mandatory rather than a default rule, meaning that the parties are not free to contract around it.

The warranty itself does not seem unduly disrespectful of either the landlord's or the tenant's dignity. All that the warranty does is to presumptively shift the assignment of the duty to repair from tenant to landlord, and that can be justified consistently with dignity by pointing to the two parties' relative advantages and disadvantages of information. More difficult to justify in terms of the parties' dignity is the warranty's non-waivability. Insofar as we understand dignity as potential for autonomy, mandatory terms appear to result in dignitary losses to both parties. There are two points to make here.

120 Dagan, *supra* note 116, at ms. p. 144 (footnote omitted).

121 *See id.* at 145.

122 *See* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 805 (2013); Jonathan M. Purver, Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R.3d 646 § 5a (2018).

123 *See, e.g.*, Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984) (holding that an implied warranty of habitability exists in an oral or written lease for residential premises which obligates the landlord to maintain a residence that is safe, clean, and fit for human habitation).

First, the dignity concerns of more than two parties are at stake here. Not only are the landlord and tenant affected by the conditions of rental housing, but so are, at least potentially, third parties, including the tenant's children, neighbors, and guests. The tenant may be perfectly willing to assume the risks of living in slum conditions in exchange for a lower price, but others may not. The tenant's children are hostages to choices made by their parent, and choosing to live in unsafe conditions in exchange for a reduced rent is no sign of respect for the children's autonomy.

Second, even if we focus on the dignity interests of the two parties alone, an uneasy case can still be made for non-waivability on the basis of dignity. In many, perhaps most, situations in which a tenant chooses to live in unsafe conditions in exchange for a lower rent, a degree of desperation exists. The tenant typically is poor, underprivileged, and in need of the cheapest housing she can possibly get. Safety and health in exchange for a lower price is a deal she is willing to make. Has the landlord unreasonably taken advantage of the tenant in these circumstances? More to the point, has the landlord failed to respect the tenant's dignity by making a deal that jeopardizes the tenant's physical and possibly mental well-being? A breezy answer is no because the landlord has taken the tenant's expression of her own autonomy at face value. But that response is certainly too quick. We can imagine situations in which we do not and should not take other people's expressed preferences at face value. I come upon a person lying on the sidewalk who appears to have just suffered a heart attack, and I offer to call to emergency assistance. The person waves me off, saying he is okay, feeling better, and can take care of himself. If I call the ambulance despite his assertions, have I failed to show respect for his dignity by not deferring to his autonomy? I have not deferred to his liberty, but autonomy is not liberty. It is self-authorship, but self-authorship itself is developed through the exercise of practical reasoning. It is tempting to think of practical reason in maximizing terms, such as in decision theory, but such a conception can be very misleading. There are reasons to question the assumption that it is always irrational not to take the action that would be optimal, relative to one's preferences.[124] Entirely rational agents sometimes content

[124] *See* R. Jay Wallace, *Practical Reason*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/practical-reason/

themselves with states that are "good enough" from the perspective of their subjective utility, even though they are aware of the availability of other, better alternatives.[125] Revealed preferences are not always the product of practical reasoning. Well-known cognitive miscues such as heuristics and biases not infrequently result in expressed preferences that would not otherwise be the result of a deliberative form of practical reasoning.

In the case of the tenant who is stuck between a rock and a hard place, we might imagine that if the tenant's budget constraints were removed, she would not accept the same premises. She accepted the unsafe apartment for the simple reasons that she cannot afford a more suitable alternative and cannot afford to pay for repairs. The non-waivable warranty reflects a judgment, both empirical and normative, that as between landlords and tenants, landlords in residential leases are usually better suited to bear the cost of making the repairs necessary to bringing the conditions up to the required level.[126] It attempts to place the tenant in the situation she would choose if she were under no such budget constraint. In that sense, the non-waivable warranty can be reconciled with the tenant's dignity and self-authorship.

The case just made is uneasy for several reasons. First, it is not at all clear that the cost of maintaining clean and habitable premises will remain on landlords. Unless some sort of rent control regime is in place, landlords may be able to pass at least some of their costs on to tenants in the form of higher rents, squeezing out exactly the class of tenants whom the non-waivable warranty aimed to benefit in the first place.[127]

[https://perma.cc/X26H-SVG4] (last visited on May 1, 2018).

125 *See* MICHAEL SLOTE, BEYOND OPTIMIZING: A STUDY OF RATIONAL CHOICE 21–22 (1989).

126 Whether landlords will pass the cost of the required repairs onto tenants in the form of higher rents is debated in the literature. For some examples, see, for example, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 645–48 (8th ed. 2011) and Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 484, 489–92 (1987) (arguing that selective enforcement of a warranty of habitability may decrease rent levels for low income tenants). For some recent empirical studies, see Michael A. Brower, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 867–89 (2011) (finding a statistically significant relationship between the existence of an implied warranty of habitability and increased rent rates) and David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 434–39 (2011) (finding that landlords won the overwhelming majority of nonpayment cases, even where housing conditions were bad).

127 *See supra* text accompanying note 124.

Second and more fundamentally, the argument flirts with paternalism.[128] It seems to assume that a tenant who is stuck between a rock and a hard place, acting under severe budget constraints, cannot nevertheless make an informed and rational choice regarding what is in her best interest. That assumption flies in the face of self-authorship and gives the back of the hand to the tenant's dignity.

Despite these concerns, the obligation imposed under the non-waivable warranty is justified. Mandatory terms, although not numerous, exist throughout the law regulating private transactions, and they generally represent the collective judgment that certain matters that constitute the core of the legal definition of the type of legal arrangement involved are beyond private volition.[129] Transactions that cross these legal boundaries are commonly said to violate public policy. In trust law, for example, a private trust that "imposes manifestly value-impairing restrictions on the use or disposition of the trust property"[130] is not enforced because it violates the mandatory rule that a trust must benefit the beneficiaries rather serve some whimsical or capricious preference of the donor.[131] The non-waivable warranty of habitability is such a term. It expresses the view that agreements in which one party stands in a position of high vulnerability to the other due to lack of meaningful alternatives constitute an abuse of the parties' relationship and are outside the legitimate scope of private ordering. Usurious contracts are a clear example of such arrangements. Residential tenants who accept rental spaces in deplorable conditions can be assumed usually to be in highly vulnerable positions in relation to landlords. The warranty makes such agreements legally unenforceable less as an exercise in paternalism but rather as an expression of the boundaries of the landlord-tenant relationship as a matter of law.

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128 Duncan Kennedy, in fact, contends that the warranty is based on paternalism, but he defends it on those grounds. *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638–49 (1982).

129 *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1248–49 (2003).

130 *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U.L. REV. 1105, 1109 (2004).

131 *See id.*

E. The Duty to Disclose

Another example of non-waivable obligation that property law imposes on owners is the duty of sellers to disclose. In the United States the regime of caveat emptor is rapidly eroding. An increasing majority of states places on sellers the duty to disclose all known defects, equating nondisclosure with fraud or misrepresentation.[132] To be actionable, the defects must be material, but the test for materiality sometimes is finely grained. In New York, for example, a court famously held that the seller must disclose that the house was reputed to have been haunted by poltergeists.[133]

The modern duty to disclose is explainable in terms of information costs. In the large majority of vendor-purchaser transactions today, the seller has greater access to all relevant information than the purchaser does, and the duty to disclose simply shifts to the seller the burden of coming forth with that information. The parties are free to reverse the shift by inserting an "as is" clause in the sales agreement. These clauses are generally enforceable if the defect is reasonably discoverable and there is no fraud.[134]

This is another example of an affirmative duty that does not unduly intrude on the owner's autonomy or offend his dignity. For one thing, the owner may avoid the duty by inserting an "as is" clause. More to the point, the duty to disclose makes no serious incursion on the owner's access to self-authorship. It merely causes him to fully ventilate all facts relevant to the transactions, a duty that is entirely in keeping with the spirit of purchase-and-sale agreement. Moreover, by disclosing relevant defects, the owner expresses respect for the purchaser's dignity. Recall that autonomy is not strictly self-regarding and that it has an other-regarding aspect. This means that dignity is reciprocal. I am entitled that you should respect my dignity, but by the same token I am obligated to respect your dignity. I express my respect for your dignity by respecting your potential for developing autonomy. An owner-vendor expresses respect for the purchaser's dignity by treating the purchaser as an equal, autonomous agent. Concretely, this means disclosing the same information that he would expect to have disclosed to him if the tables were

132 *See* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 588 (8th ed. 2014).

133 *See* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 677 (N.Y. App. Div. 1991).

134 *See* DUKEMINIER ET AL., *supra* note 130, at 592.

reversed. By treating the purchaser this way, the owner-vendor expresses respect for his own dignity.[135]

V

HOMELESSNESS, DIGNITY, AND FLOURISHING

In a widely, and justly, celebrated article written a number of years ago, Jeremy Waldron argued that homelessness violates the affected person's negative liberty.[136] Without denying Waldron's claim, I want to suggest that it also violates the homeless person's dignity, as I have defined it here. In this final Part, I want to discuss homelessness for three reasons. First, I hope to make the connection between dignity and property more concrete. The earlier discussion of dignity had been rather abstract, and I wish to show some of its implications. Second, this Part extends my earlier comments regarding the importance of adequate housing for the ability of a person to flourish by taking that discussion in the direction of the most pressing housing crisis facing the country today. Finally, this Part indicates some limits of what law, including private law, is able to do.

The previous discussion of the *Modderklip* case underscored the importance of adequate shelter to a flourishing life.[137] It also suggested how dignity connects with adequate housing. In *Modderklip*, the occupiers of Modderklip's land were vulnerable people whose capability needs were especially compelling. As human beings, they possessed dignity, but that dignity was not respected. The repeated evictions they experienced represented iterated expressions of disrespect for their dignity.

This same experience has been repeated throughout the world over the past few decades as the problem of

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135 Other examples could be added, such as the non-waivability of anti-self-help statutes for foreclosure in certain states (see, for example, Jordan v. Nationstar Mortgage, LLC, 374 P.3d 1195, 1202–04 (Wash. 2016) (en banc) (holding that entry provisions which allowed the lender to take control of property after default violated state law prohibiting lenders from taking control of property until foreclosure) and under master-servant liability in collateral repossession under the UCC (see Rand v. Porsche Fin. Servs., 167 P.3d 111, 119–21 (Ariz. Ct. App. 2007) (holding that the lessor of an automobile had a nondelegable duty to repossess the leased automobile only if it could do so without breaching the peace) and U.C.C. § 9-609).

136 *See* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 304 (1991).

137 *See* 2004 (8) BCLR 821 (SCA) at 828 para. 16 (S. Afr.) (explaining that the intolerable living conditions that people are enduring are repugnant to human dignity).

homelessness continues to plague both developed and underdeveloped countries. In countries like South Africa, the conflict between homelessness and dignity takes on a special dimension because those countries have made housing a matter of an affirmative constitutional right.[138] In South Africa, the Constitutional Court has interpreted that right as imposing on the government a duty to take reasonable legislative and other measures to achieve the progressive realization of the housing right within available resources.[139] The term "progressive realization" meant that the constitutional right to housing could not be realized immediately. At the same time, section 26 imposed on the state a duty to take measures calculated to attain the goal expeditiously and effectively, albeit within the state's budget constraints.

No such obligation apparently exists in Hungary despite that country's housing provision in its Basic Law.[140] Although it is difficult to say exactly how many people are homeless in Hungary today, the number of "effectively homeless people" or those who live on the street or in shelters is at least 30,000 and roughly 100,000 experience homelessness every year.[141] Hungary has no comprehensive national housing strategy and social housing policies are extremely limited.[142] If anything, its apparent strategy has been in the opposite direction. In 2010 the Hungarian Parliament enacted a statute allowing local municipalities to ban the "inadequate use" of public spaces. Taking advantage of this provision, the Budapest City Council adopted a decree which prohibited the use of public spaces for "habitual residence" and the storage of belongings for this purpose.[143] In 2012, the city enacted a new measure making it a crime for someone to use public space in a way that is "different from its original designation"—for habitual residence or for the storage of personal property used for habitual residence. The initial sanction is a fine, but non-payment

138 *See* S. AFR. CONST., 1996 art. 26(2).

139 *Government of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

140 *See* FUNDAMENTAL LAW OF HUNGARY art. XXII ("Hungary shall strive to ensure decent housing conditions and access to public services for everyone.")

141 *See* Rita Bence and Éva Tessza Udvarhelyi, *The Growing Criminalization of Homelessness in Hungary – A Brief Overview*, 7 EUR. J. HOMELESSNESS 133, 136 (2013), http://www.feantsaresearch.org/download/rb_and_tu_review74560100470883 21940.pdf [https://perma.cc/FZA3-Q9ST].

142 *See id.* at 136.

143 *See id.* at 137.

results in incarceration.[144] The act also allowed imposition of an on-the-spot fine: if a person admitted to committing the petty offense on the premises, she was denied any further legal remedy.[145]

In November 2012, the Hungarian Constitutional Court struck down this provision of the Budapest criminal statute as well as the section of the national statute which authorized attaching criminal sanctions to "flagrantly anti-communal behaviour."[146] It held that criminalizing the status of homelessness is unconstitutional because it violates human dignity, protected under the Hungarian Fundamental Law. The Court stated,

> [N]or the removal of homeless persons from public premises, nor urging them to draw on social maintenance may not be considered such a legitimate, constitutional aim which would substantiate that the living of homeless persons on public premises is declared a petty offence. Homelessness is a social problem, which shall be dealt with by the state with the means of social administration and social maintenance instead of punishment. It is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law to declare [homeless persons] dangerous to the society and punish [them].[147]

Following this decision, an amendment of the Fundamental Law, effective April 2013, repudiated the Constitutional Court's view. It inserted into the Fundamental Law the following provision: "An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values."[148] Hence, despite the fact that the Hungarian Fundamental Law recognizes human dignity as a fundamental right, it allows local governments to effectively prohibit street homelessness. It does add that "Hungary shall strive to provide the conditions for housing with human dignity and to guarantee access to

144 *See id.* at 138, citing Act 2 of 2012 on Petty Offences, art. 186.

145 *See id.*

146 Az Alkotmányíróság [Constitutional Court of Hungary] Decision 38/2012. (XI. 14.) (Hung.).

147 *Id.* at Reasoning [53].

148 Fourth Amendment, Article 8(3) (amending Article XXII(3)), https://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf [https://perma.cc/H83R-2CBT].

public services for everyone,"[149] but the phrase "shall strive" effectively dilutes that provision into an aspiration. It imposes no obligations on the state of the sort that the South African government has, even under the *Grootboom* interpretation.[150]

The cases of South Africa and Hungary invite us to ask, what does it mean to express respect for a person's dignity? In the context of homelessness, in which affected persons lack capabilities essential to human flourishing, including personal security, privacy, and autonomy, what measures, concretely, must be taken to satisfy its legal and moral obligation existing under a constitutional housing clause? Must the state actually house the people who desperately need permanent and secure habitation? Respect for another person's dignity means respect for that person's potential for developing the capability of autonomy, and such respect requires both non-interference with the development of self-authorship, self-determination, and self-reflection and at times positive action to enable such development, for example, by parents for their children. In the case of the state there are limits to the positive measures that the state can reasonably undertake to promote development of the autonomy of its citizens. This is the problem with positive socioeconomic constitutional guarantees. A constitution may guarantee a right to education, for example, as South Africa's does,[151] but such a guarantee is very difficult to realize. It should come as no surprise that the South African courts have interpreted its guarantee in strictly material terms—provision of schools, classrooms, books, and supplies.[152] Guaranteeing schools and books is one thing, guaranteeing education in another, especially if we understand education to include development of the capability for practical reasoning. Many American schools fail to develop their students' abilities to read at grade level, let alone their capacities to think rationally and reflectively about their future life possibilities and how to make

149 *Id.* at Article 8(1).

150 *See supra* note 112.

151 *See* S. AFR. CONST., 1996 § 36. The section provides, in relevant part:

> Everyone has the right -
>
> a. to a basic education, including adult basic education; and
>
> b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

152 *See Madzodzov. Minister of Basic Educ.* 2014 (3) SA 441(ECM) at 11 para. 20 (S. Afr.); *Section 27 v. Minister of Educ.* 2013 (2) SA 40 (GNP) at 13–14 para. 25 (S. Afr.).

informed choices among them. Schools can only do so much. A state does not disrespect its citizens' dignity when it falls short of educating its students in this deeper but deeply important way.

The same limitations on what a state can do and how it may show its respect for its citizens' dignity apply in the context of housing. The *Grootboom* decision is defensible for this reason. When the South African Constitutional Court held that the government has a duty to take "reasonable legislative and other measures" to achieve the "progressive realization" of the housing right "within available resources," it was doing nothing more than stating a hard reality.[153] In a country with seriously limited resources like South Africa, homelessness, although not intractable, cannot be eliminated easily or quickly. The number of homeless persons in South Africa is large,[154] and there are multiple sources of the problem.[155] In addition, South Africa faces many other problems which place great demands on the public fisc, so the state must establish difficult priorities for its limited resources. All these considerations suggest that the state fulfills its obligation to express its respect for the dignity of its homeless citizens when it does the best it can to provide housing for them, even knowing that an actual end to homelessness will be long in coming.

How should individuals express their respect for the dignity of homeless persons? For property owners, does such respect involve sharing their resources with members of the homeless population? More specifically, should the law of property place on the owners an obligation to contribute in some way, as property owners, to provide adequate housing to the many people who currently lack access to it? Despite the great need of housing for the many Americans who lack it, I resist the suggestion that the law of property is an appropriate

153 *Government of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) at para. 21.

154 One recent estimate is 200,000 street homeless persons out of a population of 53.5 million. *See* Carol Rule-Groenewald et al., *More Than Just a Roof: Unpacking Homelessness*, HUM. SCI. RES. COUNCIL http://www.hsrc.ac.za/en/review/hsrc-review-march-2015/unpacking-homelessness [https://perma.cc/Y672-C29S] (last visited Feb. 8, 2019). Homelessness is a complex term. Homeless people may have no shelter, access to a temporary roof, or an informal shack that is not safe or secure. *See id.*

155 *See id.*; *Homelessness in South Africa*, CAPE TOWN PROJECT CTR., http://wp.wpi.edu/capetown/projects/p2015/service-dining-rooms/background/homelessness-in-south-africa/ [https://perma.cc/3TFJ-HYUS] (last visited Feb. 8, 2019).

vehicle for satisfying this acute need. Although property law does at times have redistributive effects, wealth redistribution is not its primary function, nor is property law well-suited to engage in major redistributive projects. Private law has its limits, and a solution to the housing crisis is not within those boundaries.

There is no single housing crisis within the United States today. Rather, several housing crises exist, for economically distressed Americans face different challenges in their struggles to find adequate housing.[156] Homelessness—actual out-on-the-street homelessness—represents the most extreme of our housing problems. Other types of impediments also stand in the way of the ability of millions of people in this country to enjoy what others take for granted. These include eviction, access to mortgage lending, and mortgage foreclosure. These problems overlap to varying extents, but each requires its own solution or set of solutions.

The problems are systemic in nature and require structural solutions that courts are not capable of administering. Courts, using private law principles, can make improvements, but these improvements are marginal and often are only incompletely effective. Structural solutions require legislative and administrative action at all levels of government, federal, state, and local. They begin with, but only begin with, substantial wealth and income redistribution taking several forms including wealth transfer payments, subsidies, tax credits, and enforcement subsidies. These housing problems defy quick solutions. Even with substantial governments, they are likely to persist for some time. But they can be alleviated through concerted government actions that strive for systemic solutions.

Consider homelessness itself. Homelessness has decreased since 2014, both overall and in every counted subpopulation.[157] This extends national trends since 2007.[158] The greatest decreases have been among veterans (35% decrease since 2009), the unsheltered homeless (32% decrease since 2007), and people who are chronically homeless (31%

156 Joel Kotkin, *America's Emerging Housing Crisis*, FORBES (July 26, 2013, 10:30 AM), https://www.forbes.com/sites/joelkotkin/2013/07/26/americas-emerging-housing-crisis/#7fd6095571b3 [https://perma.cc/Q7LN-27Q2].

157 See HOMELESS RESEARCH INST. & NAT. ALL. TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA 2016 3 (2016).

158 *See id.* at 9.

since 2007).[159]

These trends, however, do not reflect an entirely accurate picture of homelessness in America. Unsurprisingly, larger and more populous areas of the country, such as New York City, Chicago, and Los Angeles, see larger numbers of homeless people, but the objective numbers of homeless people do not necessarily translate into higher rates.[160] But rates tell us much about the trends in homelessness in relation to the size of and trends in the general population of the nation or in individual states.[161]

Several factors contribute to the economic dimension of homelessness. For one, recovery from the Great Recession has been very uneven, with nagging persistency of poverty. In 2014, the national poverty rate was 15.5%.[162] This figure was not appreciably higher than it was the previous year, but it was significantly higher than it was in 2007, just before the Great Recession. Although the number of unemployed people has steadily decreased since 2009, the number of people living in poverty has steadily increased.[163] The number of poor renter households paying more than 5% of their income towards housing increased by 2.1% to total 6.5 million.[164] The increase is likely due to the fact that while incomes for this group have remained flat, rents have continued to increase.

Another factor is the cost of housing. Although housing costs do vary considerably by state, the national picture is one of a lack of affordability. In its 2014 report, the National Low Income Housing Coalition developed a metric it called the annual Housing Wage—the hourly wage a full-time worker must earn to afford a decent two-bedroom rental home at the Department of Housing and Urban Development's (HUD's) estimated Fair Market Rent (FMR) while spending no more than 30% of income on housing costs.[165]

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159 *Id.*

160 *Id.*

161 *See id.* at 11.

162 *See id.* at 37.

163 *See id.*

164 *See id.*

165 Housing costs vary significantly from state to state. In 2014, a two-bedroom apartment in Mississippi would require that a household make $13.67 per hour in a full-time job; in New Hampshire the household would need to earn $20.50 an hour. *See* ALTHEA ARNOLD, SHEILA CROWLEY, ELINA BRAVVE, SARAH BRUNDAGE & CHRISTINE BIDDLECOMBE, NAT. LOW INCOME HOUS. COAL., OUT OF REACH 2014, http://nlihc.org/oor/2014 [https://perma.cc/GY7J-T448].

Homelessness strongly correlates with mental disorders.[166] According to the 2014 Point-In-Time Count, on a given night in 2014, approximately 20% of the homeless population had severe mental illness or conditions related to chronic substance abuse.[167] The most common mental disorders are alcohol and drug dependence.[168]

Problems like homelessness elude solutions through private law. Homelessness, and related housing problems such as eviction and mortgage foreclosure, are structural and systemic in nature. They are not matters that can be sorted out through discrete entitlement recognition or arrangement, which is the core of property law. Rather, their origins lie in institutions, social networks, and social norms. They are deeply entrenched, and they are complex. They defy any single or simple solution.

Toward the end of his justly celebrated book, *Evicted*,[169] Matthew Desmond observes that "[a] problem as big as the affordable-housing crisis calls for a big solution."[170] Desmond's most ambitious proposal is a universal housing voucher. Every family below a specified income level would be eligible for a housing voucher which they could use to live anywhere they choose within certain constraints. Premises would be required to be decent, modest, and fairly priced. Desmond suggests that program administrators could develop finely grained analyses to prevent landlords from overcharging and families from selecting excessively large premises. Families would spend no more than 30% of their own income toward housing, with the voucher picking up the difference.[171] Desmond asserts that this program would "change the face of poverty in this country. Evictions would plummet and become rare occurrences. Homelessness would almost disappear."[172]

166 *See, e.g.*, Seena Fazel, Vivek Khosla, Helen Doll & John Geddes, *The Prevalence of Mental Disorders among the Homeless in Western Countries: Systemic Review and Meta-Regression Analysis*, 5 PLOS MED. 1670 (2008), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0050225 [https://perma.cc/V4LN-6Y4E] (finding that homeless people in Western countries have a higher prevalence of psychotic illnesses and personality disorders than the age-matched general population).

167 *See* HOMELESS RESEARCH INST. & NAT. ALL. TO END HOMELESSNESS, *supra* note 155.

168 *See* Fazel et al., *supra* note 164.

169 MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

170 *Id.* at 303.

171 *See id.* at 308.

172 *Id.*

Although a universal housing voucher would surely make a significant difference in the several housing problems, it overstates the case to say that as a result homelessness would almost disappear.[173] Homelessness is a complex problem and has several causes. One of these is these lies on the supply side, the strong imbalance between demand and supply of decent and affordable housing. We need to know to what extent a universal housing voucher would stimulate construction of or conversion to low-income housing. Further, without more, there is nothing to prevent new affordable housing from being located in the same undesirable places (i.e., locations distant from schools, jobs, public transit, and other amenities) as existing affordable housing options.[174]

A further source of homelessness is non-economic. It is well-known that many who are now on the streets (or in cars, etc.) suffer from serious emotional and mental disorders that contribute to their homeless condition. The 2015 point-in-time HUD Homeless Assessment Report found that 25% of the homeless (140,000 of the 564,708 people were homeless on a given night in the United States) were seriously mentally ill at any given point in time.[175] Forty-five percent of the homeless had any mental illness.[176] The problem of inadequate treatment for mental illness must be addressed simultaneously with problems of supply and inadequate income if we are to truly eliminate homelessness.

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173 Desmond addresses two further problems with a universal housing voucher. One is moral hazard. It might create a disincentive for tenants to work. Desmond acknowledges that some data indicate some support for the claim, but he points out that other studies have found no effect. He argues, "By and large, the poor do not want some small life." *Id.* at 310. A second problem is that landlords could use the voucher program as an opportunity to increase their profits by raising rents. Desmond's proposed solution is rent regulation. "Making a universal housing program as efficient as possible would require regulating costs," he states. *Id.* at 311. "Expanding housing vouchers without stabilizing rent would be asking taxpayers to subsidize landlords' profits." *Id.*

174 For more on this, see Lisa T. Alexander, *Evicted: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J.F. 431 (2017).

175 E. Fuller Torrey, *250,000 Mentally Ill Are Homeless. 140,000 Seriously Mentally Ill Are Homeless*, MENTAL ILLNESS POL'Y ORG., https://mentalillnesspolicy.org/consequences/homeless-mentally-ill.html [https://perma.cc/6XRT-YX4S] (last visited Oct. 8, 2018).

176 *See* MEGHAN HENRY, AZIM SHIVJI, TANYA DE SOUSA & REBECCA COHEN, U.S. DEP'T OF HOUS. & URBAN DEV., THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS (2015), https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf [https://perma.cc/DNE7-3HEU]; *see also* Torrey, *supra* note 173 (stating that 45% of the homeless population in the United States suffers from a mental illness).

This is not at all to say that the private law of property can make no contribution to ameliorating homelessness conditions. Timothy Mulvaney and Joseph Singer are surely correct in stating, "Property law cannot treat the concerns of homelessness as irrelevant."[177] Wrongful eviction obviously is a matter very much within the proper limits of property law, and as Desmond's book vividly depicts, unjustified eviction often leads to the streets.[178] Similarly, mortgage law obviously plays a key role in preventing and remedying unfair and deceptive lending practices that often are the source of a foreclosure proceeding that may be a step toward homelessness.[179] Mulvaney and Singer discuss non-enforcement of housing codes as a cause of eviction.[180] An all-too-frequent pattern, they find, is that local authorities allow rental buildings to become so dilapidated that they pose imminent danger to the public, leading to the state to order the dilapidated building vacated, with the result that the tenants are displaced.[181] As Mulvaney and Singer state, "Should the persons displaced by the state's approach to code enforcement not have anywhere else to go, the state has made them homeless."[182] Some relatively simple procedural reforms might ameliorate the eviction rate in this subcategory of cases. For example, Mulvaney and Singer suggest reforming the summons sent to the tenant so that it includes instructions on what the implied warranty of habitability is and how to assert it.[183] Tenants who could successfully assert the warranty of habitability as an affirmative defense for nonpayment of rent often fail to do so because they simply are unaware of the defense's existence.[184] Reforms that make tenants, especially poor tenants, aware of their legal rights, may have some mitigating effect on homelessness that results from

177 Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy (A Tribute to André Van Der Walt)*, *in* TRANSFORMATIVE PROPERTY LAW: FESTSCHRIFT IN HONOUR OF AJ VD WALT (G. Muller, R. Brits, B.V. Slade & J. van Wyk eds., 2018).

178 *See* DESMOND, *supra* note 167, at 308 (linking decreased evictions and decreased homelessness); *see, e.g.*, Miles v. Deutsch Bank Nat'l Trust Co., 186 Cal. Rptr. 3d 625, 635–36 (Cal. Ct. App. 2015).

179 *See, e.g.*, Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548 (Mass. 2008) (holding that an injunction restricting a lender's ability to foreclose on certain loans that were presumptively unfair was in the public interest).

180 *See* Mulvaney and Singer, *supra* note 175, at 6–13.

181 *See id.* at 6.

182 *Id.* at 11.

183 *See id.* at 18.

184 *See id.* at 13–15.

nonenforcement of housing codes and failure to raise to warranty of habitability defense.

Homelessness denies a person's dignity. If, as I have argued we should, we understand dignity to mean the potential to develop as a fully autonomous person, certain basic material conditions are necessary for the realization of dignity. Among these conditions is decent shelter. It hardly seems possible for a person to live a life of self-authorship without some place where she belongs. Decent housing provides more than bare shelter. It also secures personal security and privacy, conditions that facilitate reflection and deliberation about choices. The person who wanders the streets by day, scrounging for food and spare change, hoping to find a safe post in a doorway or under a bridge in which to spend the night, is far from being the author or creator of his own life. Some homeless persons, those who suffer from mental illness, are incapable of deliberation and do not view themselves as controlling their own actions. But even those who do not experience such cognitive impairments spend lives that are controlled by others. Police tell them where they cannot be; business owners tell them where they are not welcome; pedestrians signal subtle (sometimes not so subtle) orders to go elsewhere. The problem for them is that there *is* no place else to go where they belong. In this sense their lot is worse than that of prisoners, who at least belong somewhere. Homeless people simply are not in charge of their own lives. Having a place where a person belongs is a precondition for self-authorship. Homeless persons lack that condition, and they lack full autonomy. Lacking such self-authorship, they do not experience flourishing lives.

CONCLUSION

Human flourishing and human dignity are not empty phrases. They have real content, and they matter in real lives. The facts are that we *want* to live flourishing lives and we *want* to live lives of dignity. We cannot live such lives, however, unless certain conditions are fulfilled. Among these conditions, flourishing is personal autonomy, understood in the sense of self-authorship. Autonomy in that sense itself requires certain conditions. Property is among the conditions intimately connected with self-authorship. A person who lacks basic forms of property such as food and adequate shelter is denied self-authorship, without which she cannot experience whatever form of life she considers fulfilling. The harsh reality

is that many, all too many, people, do not live such a life. Those of us who are fortunate enough to know what it means to live a fulfilling life should be profoundly disturbed by that reality and unwilling to accept things as they are.