

HUMAN DIGNITY AND EUTHANASIA LAW

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I ABSTRACT

The NSW law relating to euthanasia is considered in the light of 'human dignity'. 'Dignity' derives from the Latin *DEC+NUS, 'the quality of worthiness'. Both in Latin and in modern English, it refers to the relative worthiness of a living thing. However, 'human dignity' should be understood as an absolute concept: the value every human possesses by virtue of human life, not by virtue of associated qualities, such as rationality. I conclude that liberal euthanasia legislation cannot be supported on the grounds of human dignity, as this cannot be compromised by personal defects or suffering, whether congenital or otherwise.

II INTRODUCTION

The broad question of euthanasia and physician-assisted suicide is dealt with in many places.¹ This paper aims at exploring one simple question: what, if any, is the relevance of 'human dignity' in the debate on euthanasia? Simple as the question is, it is potentially far-ranging. The Preamble to the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948, relevantly states that: 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...'.² Elaborating these ideals in practice and identifying a hierarchy of norms, has proved difficult.³ Indeed, member nations of the UN do not all take the same view

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1 For a general introduction, see Margaret Battin 'Euthanasia and Physician-Assisted Suicide' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (Oxford: Oxford University Press, 2003) 673 and her bibliography, to which add John Keown, *Euthanasia, Ethics and Public Policy; An Argument Against Legislation* (Cambridge: Cambridge University, 2002).

2 Available at United Nations, *Universal Declaration on Human Rights* (1948) <www.un.org/Overview/rights.html> as at 31 March 2007. See also the United Nations, *International Covenant on Civil and Political Rights* (1966), at www.un.org/millennium/law/iv-4.htm, as at 31 March 2007, esp the Preamble.

3 Theodor Meron, *Human Rights Law-Making in the United States*, (Oxford: Clarendon, 1986) 173-178.

of the very meaning of the term.⁴ It is desirable, then, to define ‘human dignity’ and to establish what the concept should mean in discussing law reform. To simplify matters, this paper will take the law in New South Wales as its starting point, and as a field for understanding ‘human dignity’. Other considerations, such as the ‘sanctity of life’, will be excluded.⁵ The law in other States of Australia does not significantly vary.

This paper is predicated upon the belief that the law and ethics are, and should be, at least to some extent inter-related. In an obvious way, they are, for Parliament passes laws, and in doing so expresses, at least to some extent, its own ethical opinions. In turn, these reflect, to some degree, the ethical standards of the electorate.⁶ Further, notions of human dignity are not foreign to the judges, especially to the judges of the appellate courts.⁷ Thus, the Court of Criminal Appeal of NSW has several times approved the *dicta* of Sully J in *R v Cheung Wai Man and Ors*⁸ that

The importation or the attempted importation of, and the trafficking or attempted trafficking in, a quantity of heroin of the amount here in question is in a very real sense a declaration of war upon this community. It is a distinct challenge both to concepts of human dignity and to moral values otherwise which are fundamental to our way of life.⁹

This paper is set out as follows:

- 1 Physician-assisted suicide in NSW
- 2 Defining ‘human dignity’
- 3 The ethical basis and content of ‘human dignity’
- 4 Conclusion

4 Martin Hailer and Dietrich Ritschl, ‘The General Notion of Human Dignity and the Specific Arguments in Medical Ethics in Kurt Bayertz (ed), *Sanctity of Life and Human Dignity*, (Dordrecht: Kluwer Academic Publishers, 1996) 91, 100.

5 For example, some of the more novel ideas in Ronald Dworkin, *Life’s Dominion; An Argument About Abortion and Euthanasia* (London: Harper Collins, 1993) relate to the sanctity of life.

6 This is not always so, but it is beyond the scope of this paper to delve into this area.

7 In Germany, ‘human dignity’, or ‘Menschenwürde’ is prominently mentioned as Article I.1 of the Constitution: ‘The dignity of man is inviolable’, Martin Honecker, ‘On Appeal for the Recognition of Human Dignity Law and Morality’ in Kurt Bayertz, above n 4, 259, and so this concept ‘serves as a checking device in the process of actual juridical decision making.’ Hailer and Ritschl above n 4, 101.

8 *R v Cheung Wai Man and Ors* (Unreported, Supreme Court of NSW, Sully J, 22 March 1991) 9.

9 *R v Chen and Ors*. [2002] NSWCCA 174, (Unreported, Heydon JA, Sully and Levine JJ, 11 June 2002) [286]. See also *R v Hendradinata and Ors* [2003] NSWCCA 161 (Unreported, Santow JA, Sully and Buddin JJ, 27 June 2003), [11] per Sully J with whom Santow JA and Buddin J agreed; *R v Stanbouli* [2003] NSWCCA 355 (Unreported, Spigelman CJ, Hulme J and Carruthers AJ, 4 December 1999), [114] per Hulme J with whom Spigelman CJ and Carruthers AJ relevantly agreed; *R v Chung* [1999] NSWCCA 330 (Unreported, Sully, Ireland and Hidden JJ, 22 October 1999) per Sully J, with whom Ireland J agreed; and *R v Attallab* [2005] NSWCCA 277 (Unreported, James, Buddin and Rothmen JJ, 25 August 2005), [214] per James J with whom Buddin and Rothman JJ agreed.

III PHYSICIAN-ASSISTED SUICIDE IN NSW

Physician-assisted suicide is one form of euthanasia. The word ‘euthanasia’ is perhaps best defined as: ‘A gentle and easy death’, and, in recent usage: ‘The action of inducing a gentle and easy death’. As Oxford English Dictionary (‘OED’) notes, in this sense, the word is ‘Used *esp.* with reference to a proposal that the law should sanction the putting painlessly to death of those suffering from incurable and extremely painful diseases.’ Butterworth’s *Encyclopaedic Australian Legal Dictionary* glosses the word, in the context of Australian law:

Gk. - a good death. Generally, the bringing about of someone’s death, either by the removal of or interference with life supporting processes, or the administration of a lethal substance. Most often it involves people with incurable or extremely painful conditions. Euthanasia may be ‘active’ (actively assisting a person to die, or causing death), or ‘passive’ (not acting to prolong life).

We can accept these definitions. In this paper, I shall be concentrating upon physician-assisted euthanasia if only because most proposals for reform, and indeed, legislation such as the *Oregon Death with Dignity Act* and the *Rights of the Terminally Ill Act 1995* (NT)¹⁰ feature physician-assisted euthanasia. Often, different questions arise when euthanasia is implemented not by a physician but by a lay person, often a partner, a member of the family, or a close friend. Yet, in all these various circumstances, the mental element is critical in assessing criminal liability. Generally speaking, there would be criminal liability for one of two offences, murder, or assisting suicide. In New South Wales, the starting point is section 18 *Crimes Act 1900* (NSW) which relevantly provides:

- 18 (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
- (b) Every other punishable homicide shall be taken to be manslaughter.
- (2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.¹¹

10 The Northern Territory legislation was repealed by the *Euthanasia Laws Act 1997* (Cth). Schedule 1 of that Act added s 50A to the *Northern Territory (Self-Government) Act 1978* (Cth), effectively stripping the NT Legislative Assembly of the power to make laws which permitting euthanasia or the assisting of a person to terminate his or her life. Schedule 1(2), concludes with the words: ‘For the avoidance of doubt, the enactment of the Legislative Assembly called the *Rights of the Terminally Ill Act 1995* has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act.’

11 This provision refers only to murder: *The Queen v Lavender* [2005] HCA 37 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 4 August 2005).

This provision covers not only acts of commission, but also acts of omission: the ‘thing by him or her omitted to be done’. The distinction between ‘active’ and ‘passive’ euthanasia is pertinent, even if the term ‘passive’ is infelicitous, as ‘passive euthanasia’ will not necessarily comprise murder. *Halsbury’s Laws of Australia* observes

it is lawful under the common law to withdraw from even a young person invasive treatment initiated without the consent of the patient and which confers no benefit; the principle of the sanctity of life, which is not absolute, is not violated and the duty of care no longer applies in such circumstances.¹²

As authority for this proposition, the editors cite *Airedale NHS Trust v Bland*.¹³ This appears to state the law for New South Wales, for it has been favourably cited in *Harriton*:¹⁴

There have been cases involving cessation of life support facilities, in which the law has recognised, or at least tolerated, the existence of circumstances in which life could be terminated. (See, for example, *Airedale NHS Trust v Bland*). However, in all such cases, the decision is taken, and taken exclusively, from the perspective of the person whose life is to cease. That person is not in a position to make or even influence the decision. Nevertheless, the only relevant considerations are those relating to that person. After birth, that is the only legitimate perspective.

In New South Wales, the *prima facie* position at law, then, is that to assist another person to die is murder. However, the sentence one receives can, in the circumstances, be quite light.¹⁵ This reflects, perhaps, a slow but significant change in the law, or at least in the sphere of sentencing, and perhaps even law enforcement (insofar as fewer instances are, perhaps, being prosecuted). Legislative intervention has quite substantially amended the common law position on suicide. Section 31A *Crimes Act 1900* (NSW) provides: ‘The rule of law that it is a crime for a person to commit, or to attempt to commit, suicide is abrogated.’

The key provision is now section 31C, which reads:

- (1) A person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years.
- (2) Where:
 - (a) a person incites or counsels another person to commit suicide, and

12 *Halsbury’s Laws of Australia* 80-900.

13 [1993] 1 All ER 821. There have been numerous discussions of this case. Accessible and readable commentaries, taking different positions, may be found in John Keown, *Euthanasia, Ethics and Public Policy*, above n 1, 217-228 and more briefly, John Harris, ‘Euthanasia and the Value of Life’ in John Keown *Euthanasia Examined: Ethical, Clinical and Legal Perspectives*, (Cambridge: Cambridge University Press, 1995) esp 7-8 and 17-8.

14 (2004) 59 NSWLR 694 per Spigelman CJ at [45].

15 Ian Kerridge, Michael Lowe and John McPhee, *Ethics and the Law for the Health Professions* (2nd ed, Sydney: Federation Press, 2005) 382.

- (b) that other person commits, or attempts to commit, suicide as a consequence of that incitement or counsel,

the first mentioned person shall be liable to imprisonment for 5 years.

The offence created by section 31B covers the survivors of ‘suicide pacts’, but exonerates the participants of murder. It is not unknown for suicide pacts to effectively comprise the euthanasia of one of the parties, and the suicide of the other. Suicide pacts, can of course, fail to work out as planned. In *R v Duthie*,¹⁶ the accused managed to slay the other member of the pact, but not himself. Both euthanasia and assisted suicide can mitigate the sentence otherwise appropriate for murder. In *R v Hoerler*,¹⁷ Spigelman CJ, with whom Hulme and Adams JJ relevantly agreed, held at [27]:

there are situations in which the charge of murder may be accompanied by circumstances which reduce the objective gravity of the offence, e.g. a case of euthanasia or a suicide pact. Such matters can result in an appropriate sentence being well below the maximum permissible for manslaughter.

In addition, there are occasions when ‘euthanasia’ might not be considered to be either murder or assisting suicide. I refer especially to the circumstances where a physician may ‘withhold life-prolonging treatment from a patient in a persistent vegetative state’ to use the terminology of *Airedale NHS Trust v Bland*.¹⁸ The phrase ‘vegetative state’ was coined in 1972 by Professors Jennett and Plum to describe:

behavioural features of patients who have suffered severe brain damage that has resulted in the cerebral cortex being out of action. ... these patients are unconscious, in the sense that they make no responses that indicate any meaningful interaction with their surroundings, and remain unaware of themselves or their environment.¹⁹

I shall briefly deal with the position in New South Wales, first, because it is revealing of present attitudes in relation to the treatment of certain patients, and second, because many argue that there is little moral difference between ‘killing and letting die’.²⁰

16 [1999] NSWSC 1224 (Unreported, Newman J, 15 December 1999).

17 [2004] NSWCCA 184 (Unreported, Spigelman CJ, Hulme and Adams JJ, 11 June 2004).

18 [1993] AC 789.

19 Byron Jennett, ‘Letting Vegetative Patients Die’ in John Keown *Euthanasia Examined*, above n 13, 171.

20 Kerridge, above n 13, 372, referring to James Rachels, ‘Active and Passive Euthanasia (1975) 292 *The New England Journal of Medicine*, January 9, 78-80. The precise distinction between killing and letting die is difficult to draw, but it persists in ethics: for example, Buddhist ethics draws a distinction between the ‘deliberate attempt to destroy life’ (which is forbidden in Buddhism) and ‘extreme lengths to preserve life at all costs’ (which is not mandatory): Damien Keown, *Buddhism and Bioethics* (London: Palgrave, 1995) 167.

Two New South Wales cases nicely illustrate the common law on ‘letting die’ patients in a persistent vegetative state. In *Northbridge v Central Sydney Area Health Service* (‘*Northbridge*’),²¹ on 12 March 2000, Mrs Northridge sought from the Duty Judge, O’Keefe J, an order to stop the Royal Prince Alfred Hospital, Camperdown withdrawing treatment and life support from her brother, Thompson, who was a patient in the hospital. He had been admitted unconscious on 2 March 2000. Within four days, Northridge had been given to understand that the hospital considered that her brother had ‘no hope’ and ‘was not going to make it’.²² Northridge had her brother examined by her own doctor, Prof. Lance. By 9 March Thompson was alert, looked at the examiner when he entered the room, moved his upper limbs on request, and could make sounds. When the Professor waved goodbye, Thompson made a modest gesture.²³ On 20 March 2000, Thompson had a respiratory arrest. He was revived only because the NFR had been lifted.²⁴ His Honour concluded:

the evidence reveals a lack of communication, a premature diagnosis, an inadequate adherence to the hospital’s own policies in relation to consultation with relatives and an absence of recognised criteria for the making of the diagnosis of ‘vegetative state’. Significantly it emerges as common ground that within a matter of days after his admission Mr Thompson was dealt with on the basis that any treatment would be futile. This was far too short a time after his injury for there not to be a serious risk of mis-diagnosis, as proved to be the case.²⁵

Mr Thompson is unarguably alive. He moves, responds, is able to write, articulate and to control a number of muscular and bodily functions. According to the material last put before the court he was then in a nursing home under the control of the defendant.²⁶

His Honour relevantly ordered that:

1. Until further order and whilst ever John Robert Thompson remains in a hospital or other institution within the area and under the control of the defendant:
 - (a) John Robert Thompson be provided with necessary and appropriate medical treatment directed towards the preserving of his life and the promoting of his good health and welfare;
 - (b) no Not for Resuscitation Order be made in respect of John Robert Thompson without prior leave of the court.

On the other hand, in *Isaac Messiba (By His Tutor Magdy Messiba) v South East Health* (‘*Messiba*’),²⁷ the Supreme Court of NSW allowed treating doctors to cease treatment and permit the patient to die. The

21 [2000] NSWSC 1241 (Unreported, O’Keefe J, 29 December 2000) (‘*Northbridge*’).

22 *Northbridge*, [2000] NSWSC 1241, (Unreported, O’Keefe J, 29 December 2000) [26].

23 *Northbridge*, [2000] NSWSC 1241, (Unreported, O’Keefe J, 29 December 2000) [47].

24 *Northbridge*, [2000] NSWSC 1241, (Unreported, O’Keefe J, 29 December 2000) [77].

25 *Northbridge*, [2000] NSWSC 1241, (Unreported, O’Keefe J, 29 December 2000) [103].

26 *Northbridge*, [2000] NSWSC 1241, (Unreported, O’Keefe J, 29 December 2000) [106].

27 [2004] NSWSC 1061, (Unreported, Howie J, 11 November 2004) (‘*Messiba*’).

patient's family had made an application for an injunction that the relevant hospital where Mr Messiba was a patient continue to treat him. This application was based upon the Supreme Court's *parens patriae* (father of the fatherland) jurisdiction. It is, as Howie J said, the jurisdiction: 'to act in the welfare of a person who is unable to care for himself or make his own decisions as to what is in his own best interest.'²⁸ Howie J accepted medical evidence which made him decidedly sceptical of the family's claims that the patient continued to make responsive eye movements.²⁹ There was evidence that a nurse believed that the patient had opened his eyes 'in response to voice during a shift on 24 October ... (and the same day) there is a note in the records that the eyes opened spontaneously' [15] These movements ceased, and Howie J accepted the doctors' evidence that the patient's condition had not improved.³⁰ The treatment offered at the time of the hearing was invasive. Howie J held:

Apart from extending the patient's life for some relatively brief period, the current treatment is futile. I believe that it is also burdensome and will be intrusive to a degree. I am not satisfied that this Court's jurisdiction has been enlivened by the evidence before me from the family members. The Court is in no better position to make a determination of future treatment than are those who are principally under the duty to make such a decision. The withdrawal of treatment may put his life in jeopardy but only to the extent of bringing forward what I believe to be the inevitable in the short term. I am not satisfied that the withdrawal of his present treatment is not in the patient's best interest and welfare.³¹

Although His Honour decided this case on the basis that the arguments for the exercise of the court's jurisdiction were not sufficiently strong, it is clear that he also took the view that the best interests of the patient were served by allowing treatment to cease. (I suggest that there is, in fact, no rigid distinction between the two tests in these circumstances. If the patient's best interests did lie in continuing treatment, the exercise of the court's *parens patriae* jurisdiction would be invoked). Thus, while it would shorten the patient's days to take the patient off the hospital's regime and provide only palliative care, this was allowable, and would therefore not be murder. The case turned on medical evidence, and it was held that the court did possess jurisdiction to require the hospital to continue treatment.

The conclusion then, is that in New South Wales, physician-assisted euthanasia is still a crime against the *Crimes Act 1900* (NSW), but that there are circumstances in which failing to intervene to save a life, or even switching off a life support system, is allowable. Equally, as *Northbridge*

28 *Messiba* [2004] NSWSC 1061, (Unreported, Howie J, 11 November 2004) [3].

29 *Messiba* [2004] NSWSC 1061, (Unreported, Howie J, 11 November 2004) [13]-[14].

30 *Messiba* [2004] NSWSC 1061, (Unreported, Howie J, 11 November 2004) [16]-[19].

31 *Messiba* [2004] NSWSC 1061, (Unreported, Howie J, 11 November 2004) [28].

and *Messiba* show, these circumstances are not universal, and physicians are subject to supervision by the courts. The different conclusions in those two cases are to be attributed to their different facts, especially the medical evidence. *Northbridge* is also important in this context, as the behaviour of the hospital staff, and even the doctors, raises significant questions and concerns as to their attitude and, one might say, the medical or bioethical culture which subsists today, at least in certain places.

IV DEFINING HUMAN DIGNITY

Etymology is an art. It is not sufficient to consult the lexicographer, the subject word needs to be placed in its historical and contemporary context to uncover its nuances and associations, that is, not only what it denotes, but also what it connotes. One can mislead oneself by using a dictionary in too plain a manner. For example, Meyer cites Johnson's definition of 'dignity' in the famous dictionary to support the view that 'dignity' once referred exclusively to 'nobility as a hereditary character'.³² However, had Meyer consulted the occurrence of 'dignity' elsewhere in the dictionary, he would have seen that Johnson used it also when defining the words 'handsome' and 'graceful' as meaning 'beautiful with dignity'.³³ Johnson therefore conceived a use of the term going beyond social grades. I cannot conjecture why he did not list this use in the entry for 'dignity'.

It is desirable, then, to try and capture some of the aura, as it were, of the phrase. We will start with 'dignity', which etymologically comes from the Latin *DIGNITAS* < *DEC+NUS, meaning 'the quality of worthiness', 'the quality of being valuable'.³⁴ In Republican Rome, the term was an important and charged one, and so came to have many shades of meaning. It was both a social and a political term. The most important surviving treatment is Cicero's, in *De Officiis*, where at I.105-106, he writes:

32 In the introduction to Michael Meyer and William A Parents (eds), *The Constitution of Rights; Human Dignity and American Values* (Ithaca and London: Cornell University, 1992) 4-5. Elaine Pagels, 'The Roots and Origins of Human Rights' in Alice H Henkin, *Human Dignity: The Internationalization of Human Rights* (New York: Aspen Institute for Humanistic Studies and co-publishers, 1979) 1 and 4, notes that while the concept of 'human rights' never appears in ancient or rabbinic Judaism, yet the substance of the idea existed there. The same might well be the case for 'human dignity' but I shall not explore that in this paper.

33 Samuel Johnson, *A Dictionary of the English Language* (London: Time Books, 1983), under 'graceful', 'gracefully', 'gracefulness' (which he defined as 'dignity with beauty') and 'handsome'.

34 The finer points of the meaning of the *DEC root are dealt with in J. Hellegouarc'h *Le vocabulaire latin des relations et des parties politiques sous la république* (Paris: Société d'Édition, 1963) 389-90. As he notes at 394, the nasal suffix 'sert à former une catégorie d'adjectifs verbaux ...'.

But it is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and other beasts: they have no thought except for sensual pleasure and this they are impelled by every instinct to seek; but man's mind is nurtured by study and meditation; he is always either investigating or doing, and he is captivated by the pleasure of seeing and hearing.

From this we see that sensual pleasure is quite unworthy of the dignity of man ...And if we will only bear in mind the superiority and dignity of our nature, we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right it is to live in thrift, self-denial, simplicity, and sobriety.³⁵

So, 'human dignity' was known as a term which referred to the superiority of man to animals, in the ways described. 'Dignitas' is not simply 'worth'. Were it so, the word would be redundant. It is, rather, a value which is recognized as distinguishing humanity from beasts. For this reason, when applied in the political sphere, it referred to a distinction among people, 'the esteem and standing enjoyed by an individual because of the merit that was perceived to exist in him'.³⁶ While a person's 'dignitas' was to be respected, and not to respect it would cause offence, even grave offence,³⁷ not every person possessed it to the same degree.³⁸ 'Dignitas', in its political sense, was due only to a man who had proved his *virtus*.³⁹ 'Dignitas' represented:

purement et simplement la <<réputation >> qui résulte de l'estime suscitée par un personnage (*existimatio*) à des termes impliquant que cette <<célébrité>> est due à l'homme qui a fait preuve de sa *virtus* et qu'elle doit donner lieu à des actes qui soient la manifestation de la reconnaissance de ses concitoyens.⁴⁰

purely and simply the 'reputation' which results from the esteem inspired by a personality (*existimatio*) in terms implying that this 'celebrity' is due to the man who has proved his *virtus* and that it must give rise to acts manifesting the recognition (of this) by his fellow citizens.

Politically, 'dignitas' did not lead to notions of human equality, rather, it was the opposite: it led to the notion that those possessed of the greatest 'dignitas' were to be entrusted with the greatest 'auctoritas' (authority).⁴¹ Thus, in such a context, Cicero said:

35 Marcus Tullius Cicero, *De Officiis* (1913). Translation by Walter Miller, <http://www.constitution.org/rom/de_officiis.htm> as at 4 April 2007. In Latin, Cicero uses the words 'dignam hominis' and 'dignitas' at I.106 [105]-[106].

36 Thomas N Mitchell, *Cicero the Senior Statesman* (New Haven and London: Yale University, 1991) 47.

37 Hellegouarc'h, above n 34, 388-9 giving the famous example of Caesar defending his 'dignitas' by arms. See also Mitchell, above n 36, 176-7 and n 90.

38 In fact, to someone like Cicero, '*virtus* and *dignitas* did not seem to him compatible with the world of the poor and the humbly employed.' Mitchell, above n 36 at 48-51.

39 This is not simply 'virtue'; but an essay would be needed for this word, too. The root is 'vir', 'man', so it could mean 'manly virtue', and also, 'power, force, courage' and so on.

40 Hellegouarc'h, above n 34, 388.

41 Mitchell, above n 36, 54-55.

dignitas est alicuius honesta et cultu et honore et verecundia digna auctoritas.⁴²

Dignity is a person's worthy influence (or 'authority') with honesty, reverence, honour and modesty.⁴³

These social and political domains were not the only sense of 'dignitas': it also had the aesthetic meaning of 'beauty', or more specifically, male beauty, as opposed to 'venestas', female beauty.⁴⁴ Once more, it marks a distinction. As such, the Latin word is cognate not only with our own word 'dignity' but also with words such as 'decorum'. In her treatment of dignitas in Latin, Carpino notes the connection, and states of 'decorum':

Il *decorum*, corrispondente al Greco *πρέπον* ... implica un ideale di temperanza, moderazione, misura, considerate segno indicativo di un'intima armonia spirituale (*σωφροσύνη*), cui esteriormente corrisponde un'armonia delle membra, che suscita piacere estetico negli altri uomini.⁴⁵

Decorum corresponds to the Greek *prepon* ... implying an ideal of temperance, moderation, measure, being a sign indicative of innermost spiritual harmony (*sophrosune*), which outwardly corresponds to a harmony of the members, which inspires aesthetic pleasure in other men.

The connection between these two words persists into modern English. 'Decorum' is defined by OED as:

1. That which is proper, suitable, seemly, befitting, becoming; fitness, propriety, congruity. †a. *esp.* in dramatic, literary, or artistic composition: That which is proper to a personage, place, time, or subject in question, or to the nature, unity, or harmony of the composition; fitness, congruity, keeping. *Obs.*

b. That which is proper to the character, position, rank, or dignity of a real person

Note the connection in definition 1b between the concepts of 'decorum' and 'dignity'. But our word means more than simply 'worthy' or 'valuable'; it has significant overtones. As stated, in Latin, 'dignitas' came to mean the quality of worth possessed by a living thing, as evaluated on a scale, of being held in respect, and of specifically male beauty. With the possible exception of the last sense, these overtones are found also in modern English. The OED relevantly defines 'dignity' as:

1. The quality of being worthy or honourable; worthiness, worth, nobleness, excellence.

42 Cicero, 'De Inventione' in H M Hubell (ed), *Cicero in Twenty Eight Volumes* (vol 2, Harvard: Harvard University, 1976) 166.

43 Cicero's Latin is a little repetitive and perhaps circular, but Hubbell, above n 42, 333 renders 'dignitas' as 'rank', and the entire clause as: 'Rank is the possession of a distinguished office which merits respect, honour and reverence.'

44 Hellegouarc'h, above n 34, 394.

45 Teresa Carpino, 'Dignitas in Cicerone. Tra Semantica e Semiologia' (1979) 9, *Bollettino di Studi Latini*, 253, 261-62.

2. Honourable or high estate, position, or estimation; honour; degree of estimation, rank.
3. An honourable office, rank, or title; a high official or titular position.
4. Nobility or befitting elevation of aspect, manner, or style; becoming or fit stateliness, gravity.⁴⁶
5. *Astrol.* A situation of a planet in which its influence is heightened, either by its position in the zodiac, or by its aspects with other planets.

The concept of 'degree of estimation' distinguishes 'dignity' from 'worth' or 'value'. Its other historically attested meanings are subsidiary to these, or obsolete, or both. It is apparent then, that 'dignity', as a shorthand for 'human dignity' does have two broad senses, united by the notion of a scale of values: there is the quality of dignity as worth, and the recognition of someone's individual value, the ascribing to them of dignity.⁴⁷ Hence, by easy steps, one can speak of a person being 'raised to the dignity of the priesthood', of the astrological dignity referred to by OED as sense 5, and one can refuse to 'dignify' a silly question with a reply. It is as if answering the foolishness would elevate it beyond its desert.

The notion of 'human dignity', however, is more than simply a noun with an adjective, the way that 'human hair', for example, serves simply to distinguish our hair from fur and pelt. 'Human dignity' is a difficult concept to define in a way which meets general assent, and emotional responses to it are strong. 'Human dignity' can be applied in diametrically opposite ways in one and the same debate. For example, in the euthanasia debate, some persons appeal to human dignity in support of the call for a relaxation of the laws against physician-assisted suicide, while others make the same appeal in support of maintaining the laws, resisting relaxation.⁴⁸ Yet, despite the controversy, the concept is not manifestly nonsensical. The notion of human dignity has roots in the ancient world, and was adopted in early Christianity, but it was probably most thoroughly

46 This sense may echo the meaning of 'dignitas' as (male) beauty, a sense which was found in Johnson's Dictionary, above n 33, definition of 'handsome'. But as we saw, Johnson does not restrict it to males.

47 There is a vast bibliography on human dignity available, especially from Europe. I have omitted a great deal, but the interested reader could consult Michael A Smith, *Human Dignity and the Common Good in the Aristotelian-Thomistic Tradition* (Queenston and Lampeter: Mellen University, 1995) and the annotated bibliography in Kurt Bayertz, *Sanctity of Life and Human Dignity* (above n 4).

48 See, for example, Christoph Scwöbel, 'Recovering Human Dignity' in Kendall Soulen & Linda Woodhead (eds) *God and Human Dignity* (Michigan: William B Eerdmans, 2006) 44, Derych Beyleveld & Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University, 2001) 233 and Mohammed Bedjaoui, Untitled Speech, (Speech delivered at the *Proceedings of the Third Session of the International Bioethics Committee of UNESCO*, September 1995) 137-145.

explored, and its modern sense defined through the efforts of 13th century Christian theologians in Europe, who taught that humans possess a 'moral nature, which commands unconditional respect.'⁴⁹ This concept of 'human dignity' asserts that

there is something in human beings that makes them unique and gives them incomparable value. This implies that human dignity is not derived from anything external to their very nature but is intrinsically bound up with what makes them human. ... human dignity defines the duties and prohibitions to others as well as to the actor; it has implications for objective as well as for subjective decisions about the end of life.⁵⁰

This concept was never lost to the tradition, and as we shall see, appeared in Kant. However, in England, and perhaps echoing Cicero, Hobbes (1588-1679) wrote in *Leviathan*:

The *Value*, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependant on the need and judgment of another. ... The publique worth of a man, which is the Value set on him by the Common-wealth, is that which men commonly call DIGNITY. And this Value of him by the Common-wealth, is understood, by offices of Command, Judicature, publike Employment; or by Names and Titles, introduced for distinction of such Value.⁵¹

It is difficult to imagine a more relativistic concept. Few today would agree that Hobbes' view was an exhaustive treatment of 'human dignity'. However, in Hobbes' system, 'the order of priority ... is: power, law, justice.'⁵² The modern history of the phrase 'human dignity' in law and ethics, especially in Europe, is more profoundly influenced by the treatment of Immanuel Kant (1724-1804). In *Grundlegung zur Metaphysik der Sitten* (1785), he wrote (in translation):

But a human being regarded as a *person*, that is, as the subject of a morally practical reason, is exalted above any price, for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.

... The respect that I have for others or that another can require from me is therefore recognition of a dignity (*dignitas*) in other human beings, that is, of a

49 Gerhold Becker, 'Practical Wisdom, Justice and Human Dignity: Some Comments on the Consensus Statement of the Working Group on Roman Catholic Approaches to Determining Appropriate Critical Care' (2001) 7(2), *Christian Bioethics*, 265-270, 268. Kendall Soulen & Linda Woodhead (eds), 'Contextualising Human Dignity' in Soulen, above n 48, 3-8 deal with the concept in early Christianity.

50 Becker, above n 49, 268. The theological basis of this view is also given, with reference to scripture and Aquinas, in Anthony Fisher, 'Theological Aspects of Euthanasia' in Keown above n 13, 316-317.

51 Thomas Hobbes, *Leviathan* (London: Everyman's Library, 1651) 44.

52 Montagu Brown, *The Quest for Moral Foundations: An Introduction to Ethics* (Washington D.C: Georgetown University, 1996) 40, see also 37-41.

worth that has no price, no equivalent for which the object valued could be exchanged ...⁵³

Kant's concept of 'human dignity' is radically centred on human rationality and autonomy, so that there is no duty to revere anything else, except insofar as it is respected or revered for the sake of humanity.⁵⁴ However, before we leave this question, and examine what human dignity could, or perhaps should mean, it must be noted that some scholars refine the concept of 'human dignity' further. For example, Pullman distinguishes between 'basic dignity' and 'personal dignity'. Pullman's 'basic dignity' is a universalist concept: it refers to the dignity of all humans, and has the corollary that humans have inalienable rights because they possess this dignity: to refer to dignity in this manner is to invoke a species referenced conception that *ascribes* worth to human beings simply on the basis of their humanity.⁵⁵

By contrast, 'personal dignity' is a 'socially referenced'⁵⁶ concept derived from particularist notions of human dignity, as Pullman states:

Particularist conceptions of dignity include all those that are tied to particular historical, traditional, cultural, or otherwise personal perspectives on what gives life - whether individual or corporate - meaning and purpose.⁵⁷

These two concepts can also be distinguished in that 'basic dignity' is not contingent upon the individual qualities of any given person. Therefore, basic human dignity mandates 'moral recognition' (perhaps, one might say, 'respect') even for the human corpse, for the human foetus, and human genetic material.⁵⁸

It is important to have an intellectual grasp of the different spheres of these two related concepts, for communitarian ethics tends, on Pullman's analysis, to give priority to particularist, rather than universalist, conceptions of human dignity.⁵⁹ And yet, Pullman argues, the concept that all human beings, as humans, are possessed of dignity, must be a

53 Immanuel Kant, 'The Metaphysics of Morals' in Mary Gregor, *Cambridge Texts in the History of Philosophy* (Cambridge: Cambridge University Press, 1996) 186, 209. The German edition was not available to me at the time of writing.

54 John Laird, *The Idea of Value* (New York: Augustus M Kelley, 1929) 295-6. For more details on this and related lines of thought, see Kurt Bayertz, 'Human Dignity: Philosophical Origin and Scientific Erosion of an Idea, in Bayertz, above n 13, 74-77, 81, 83, noting that Kant, above n 53 made 'autonomy' the ground of the dignity of every rational nature, including the human. Likewise, see Honecker, above n 7, 261.

55 Daryl Pullman, 'Universalism, Particularism and the Ethics of Dignity' (2001) 7(3), *Christian Bioethics*, 333-358, 341, see also 342.

56 Pullman, above n 55, 349.

57 Pullman, above n 55, 342, see also 348-9.

58 Pullman, above n 55, 349-50.

59 Pullman, above n 55, 344.

'fundamental axiom in moral discourse'.⁶⁰ Therefore, to claim that there is no moral distinction between torture and kindness is to make a statement which is nonsensical 'within a language intended to communicate moral meaning.'⁶¹ Pullman makes a link here to Wittgenstein's concept of language games,⁶² but perhaps one can find an analogy in games more generally. For example, were a Chess Association meeting to debate the rules of chess, and one of their number contended that they should not be playing chess at all, the time spent arguing that would not be useful in resolving the issue before them.

Then, there are definitions which are unworkable because of their elasticity. For example, Eric Poole, the Member for Araluen in the Northern Territory Parliament, told the (Australian Commonwealth's) Senate Legal and Constitutional Legislation Committee:

Dignity in death is solely to be defined by the individual and his or her own set of values. Undignified deaths are those in which the moral values of others are imposed on the dying individual against the values, judgment and wishes of the patient.⁶³

If 'dignity' is solely to be defined by each individual for themselves, then there is no point in discussing the issue, and it disappears from coherent discourse. I submit, contrariwise, that the concept of 'human dignity' should be more frequently discussed, and more effectively employed. It is, after all, one of the few concepts upon which diverse systems of thought and belief might find common ground.

To restate the conclusion: 'dignity' is the quality of worth possessed by a living thing, as evaluated on a scale. 'Human dignity' refers to the intrinsic value of humans as humans, and can be thought of in terms of 'basic' and 'personal' dignity, depending upon perspective. In speaking of basic dignity, we distinguish humans as more valuable than animals and plants. In speaking of personal dignity, we focus on the cultural and social value of individuals. But notions of personal dignity do not, and cannot, undercut basic dignity. They are simply different ways of speaking, and are drawn from one central concept.

V THE ETHICAL BASIS AND CONTENT OF HUMAN DIGNITY

Having now defined 'dignity' and briefly touched upon the general meaning of 'human dignity', the question arises, what is the basis, in ethics,

60 Pullman, above n 55, 346.

61 Pullman, above n 55, 346.

62 Pullman, above n 55, 346.

63 Cited by the Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee, Euthanasia Laws Bill 1996*, 6.16.

of human dignity? Can one ever find an absolute basis for the value of 'human dignity'? I mean here 'absolute' in the original grammatical sense of 'independent, free of condition'. This absolute sense is opposed to a relativistic one, which would make human dignity dependent upon some other quality. Does human dignity pertain to all people in the same way? I shall be arguing that it does, although the understanding of human dignity, if, indeed, it is understood at all, may well be influenced to a significant degree by the concrete social, cultural and religious context in which people find themselves.⁶⁴ But this does not mean that human dignity is no more than a culturally conditioned concept, any more than a mountain is other than a mountain because different cultures describe mountains in diverse terms, for example, some cultures revere sacred mountains and others do not.

Although I have introduced Pullman's distinction between 'basic dignity' and 'personal dignity', we have not split the concept of 'human dignity' into two. Rather, we will here consider the one concept from two different perspectives. If we think of all the people of the world, we can ascribe to each of them 'basic dignity', that is, the worth which they possess 'simply on the basis of their humanity'. But once we narrow our perspective upon an individual, then the concept of 'human dignity' can be analysed with respect to: 'particular historical, traditional, cultural, or otherwise personal perspectives on what gives life ... meaning and purpose', as Pullman has described. For example, if we took a topic such as 'human thought' or 'responsibility', we would be justified in speaking of them in a general or basic sense, but equally, any discussion of the thought of, say, Aristotle, would be far richer than a discussion of the thought of David Duke.⁶⁵

This is a vital concept to grasp. One can possess a human quality, yet not manifest it with any preeminence, or at all. It requires, then, more understanding from the observer to divine its presence. Perhaps, one might say, more feeling, or sympathy, or better yet, *compassion*, in its etymological sense of 'togetherness-feeling'. Similarly, while one can recognize the basic 'human dignity' of any person, including infants born with spinal bifida and elderly persons with dementia, the 'personal dignity' of these people is not manifested to the same degree as it is with others. This also means that the human dignity of the demented cannot be affronted in so many ways as that of many others, because their social

64 William Wagner, 'Universal Human Rights, the United Nations and the Telos of Human Dignity' (2005) 3, *Ave Maria Law Review*, 197-226, 206 notes that the ideas of the 'good life' and 'rights' have also, traditionally, been understood within a concrete context.

65 A quondam member of the Ku Klux Klan and founder of the National Association for the Advancement of White People.

world is so much smaller. However, it does not mean that their intrinsic human dignity is diminished. There is nothing novel in this point: the constitutional right to freedom of speech is less pertinent in the instance of a person who has little desire to exercise it outside their own immediate circle than it is in the example of a person who is evoking opposition by advocating an unpopular cause, eg, civil rights workers in the southern USA in the 1960s.⁶⁶

Bearing this in mind, we can see how partial is, for example, Hobbes view that a person's dignity is dependent upon 'Price; that is to say, so much as would be given for the use of his Power'. Faithful to his premises, Hobbes went on to illustrate this by a gifted military strategist, whose 'price' is greater in war but less in peacetime. As he explicitly states, 'not the seller but the buyer determines the Price.'⁶⁷ Like Cicero's political usage, this is a relativistic view of human dignity, because being dependent upon other factors, one's dignity can fluctuate. According to the analysis we are adopting, such opinions can only ever relate not to basic dignity but to personal dignity.⁶⁸

To return to basic dignity, we recall that Becker stated that human dignity is intrinsically bound up with human nature. Further, it defines both the subject's and others' duties and prohibitions to others. That is, there will be courses of action towards which considerations of 'human dignity' impel us, and other courses which 'human dignity' interdicts. How can we identify these? Is there any connection between human dignity and moral obligation?

One simple answer to these lines of enquiry, which would possess the apparent virtue of brevity, would be to reply that there is no reason to accept that human dignity is anything but an idea which happens to be socially current until we have, for example, outgrown our 'speciesism', 'the view that it is morally justifiable to treat human life differently from other relevantly similar non-human life, simply because it is human.'⁶⁹ This is effectively the position of Singer and Kuhse.⁷⁰ Singer has described talk

66 See for example Aldon Morris, *The Origins of the Civil Rights Movement* (New York: Free Press, 1984) *passim*.

67 Hobbes, above n 51, 44.

68 And even in respect of personal dignity, I would not be inclined to agree with Hobbes, above n 51, 44.

69 Helga Kuhse, *The Sanctity-of-Life Doctrine in Medicine: A Critique* (Oxford: Clarendon, 1987) 14.

70 Shortly before completing this paper, Fr Amin Abboud kindly sent me a copy of Amin Abboud, *The Fundamental Moral Philosophy of Peter Singer and the Methodology of Utilitarianism* (PhD, University of Navarre, 2006). I have not incorporated his research into this paper. He offers a thorough assessment of Singer's philosophical position, and a critique of it. For Abboud's treatment of human dignity, see especially 261-287. Where my comments overlap with Abboud's this is entirely accidental, as is immediately apparent from the significant superiority and fullness of his treatment.

of 'human dignity' as 'waffle' and 'high sounding phrases', predicated upon a belief that 'men (humans?) had some worth that other beings did not ...'.⁷¹ In a recent editorial opinion piece concerning a young girl who was in the news as being treated with hormones to remain below normal height and weight, Singer stated:

As a parent and grandparent, I find 3-month-old babies adorable, but not dignified. Nor do I believe that getting bigger and older, while remaining at the same mental level, would do anything to change that.

Here's where things get philosophically interesting. We are always ready to find dignity in human beings, including those whose mental age will never exceed that of an infant, but we don't attribute dignity to dogs or cats, though they clearly operate at a more advanced mental level than human infants. Just making that comparison provokes outrage in some quarters. But why should dignity always go together with species membership, no matter what the characteristics of the individual may be?⁷²

For several reasons, I would contend that this is misconceived. First, I will be mounting an argument that three month old babies do indeed possess human dignity, whether or not this is recognised by others – but I am inclined to think that in ordinary usage, one could say that even a baby on the day of its birth possesses human dignity. In addition, I shall be contending that this usage is soundly based. As for babies being 'adorable', but 'not dignified', it seems to me, that there is a trick of the eye here: 'human dignity' is one thing, and the quality of appearing 'dignified' is another. For example, many sights which people say possess beauty, nonetheless do not appear to be 'beautified'. It is not that the concepts of 'dignity' and 'dignified' are not related: it would be idle to assert otherwise. Gewirth observes that 'dignity is a characteristic that is often also signified by its corresponding adjective, *dignified* ...'⁷³ But the relationship is not one of equivalence: it is in the nature of languages to coin anomalous uses, and it happens that the word 'dignified' has overtones of bearing oneself with 'lofty self-respect without haughtiness', as OED puts it. It is not reasonable to expect a baby to manifest this, and a sleeping person, for instance, may possess 'human dignity' without being dignified.

Neither is it clear to see why mental level should determine the possession of dignity: although Singer confidently assumes this.⁷⁴ I do not doubt that dignity, whether human or animal is often manifested in a

71 Peter Singer, 'All Animals are Equal' in T Regan & Peter Singer (eds), *Animal Rights and Human Obligations* (New Jersey: Prentice-Hall, 1989) 157.

72 Peter Singer, *A Convenient Truth* (2007) New York Times
<<http://www.nytimes.com/2007/01/26/opinion/26singer.html?ex=1327467600&en=7a4359e1131b4fc3&ei=5090&partner=rssuserland&emc=rss>> as at 27 March 2007.

73 Alan Gewirth, 'Theological Aspects of Euthanasia' in Meyer and Parent, above n 32, 12.

74 To like effect, see also Gewirth, above n 73, 18.

being's mental level. However, many things which are neither mental nor rational possess great value, and human beings are not simply localized mental events with names. Also assumed, it seems to me, is that 'dogs or cats ... clearly operate at a more advanced mental level than human infants.'⁷⁵ This is not the place to go into this in detail, although I hope to do so in a future article. It is sufficient for me here to point out that this is an assumption. But to adumbrate my thoughts here, children are learning from the moment of birth, if not indeed, in utero. They are learning language, if nothing else, to an extent and in a manner impossible for dogs and cats. But they evidently do learn far more than language, even if it is not intellectually expressed on day one. Babies possess an extraordinary emotional life. They recognize and respond to relationships, they are sensitive to the people they come into contact with. A crying baby will stop when picked up by someone collected and sympathetic, but will howl if taken by someone who is distressed.

Kuhse states that young children and the senile lack rationality.⁷⁶ Briefly, I doubt this is so: they both possess 'rationality', but the ability to manifest may be lesser or greater in individual cases. For example, children avoid sources of pain, and that is a rational activity. Singer and Kuhse perhaps attribute too much importance to intellect alone: I think it is truer of the human experience to think in terms of the 'human psyche' rather than 'mental level' or 'rationality'. The psyche includes intellect, but also emotion and organic instinct, both of which possess an intelligence.

Then, many people do attribute dignity to animals, but we don't attribute 'human dignity' to them.⁷⁷ Animals have usually been placed lower on this hierarchy than humans, and plants beneath them. Indeed, in some states one may have a sense, even a mystic sense, of the dignity of any aspect of creation. I knew one mystic who possessed this sense, and said that some trees had 'a magnificent presence'. There is no contradiction in acknowledging the dignity of nature, and animals in particular: as we saw from Cicero, a hierarchy is fundamental to the idea of 'dignity'.⁷⁸

More fundamentally, perhaps, in the present context we are only discussing 'human dignity' and how that should be reflected in the law. I

75 If Singer has proved this assertion, I have not found this. For example, this is not done in Singer, above n 55.

76 Helga Kuhse, 'Interests' (1985) 11, *Journal of Medical Ethics*, 146-149, 146.

77 Article 120 of the Swiss Constitution recognizes the 'dignity of creation'. See also Michael Meyer, 'The Simple Dignity of Sentient Life: Speciesism and Human Dignity' (2001) 32(2) *Journal of Social Philosophy*, 115-126 *passim*.

78 Scwöbel, above n 48, 51 provides material which shows how, in Christian theology, humans are placed above animals.

think that the exclusion of animals from the discussion has to be reasonable *prima facie*.⁷⁹ However, I shall make one brief observation: to my mind, it is futile to assert that humans do not possess qualities which animals do not. As Cicero noted in *De Officiis*, animals do not engage in a myriad of activities which human do, from writing to building cities. Further, there is no reason to believe that they have any mystical experience, but reason to think that they do not: indeed very few people do, but they possess the potential.⁸⁰ Xenophanes of Colophon (c.570-480 BCE) said that if horses and cattle could draw or sculpt, they would depict gods in their own shape.⁸¹ In terms of our argument, that misses the point: and that point is that animals cannot draw and cannot sculpt, while nothing they do leads us to imagine that they conceive of gods.

In other words, the concept of a distinctive 'human dignity' is not meaningless. However, Singer's argument does draw attention to a lack of systematic treatment of the issue of how human dignity, and, I would say, virtue should express themselves in relation to animals and nature in general. But first we have to achieve a better understanding of human dignity, and then work to related topics.

Some have attempted to find a basis for 'human dignity' in the capacity to assert a claim, although as Gewirth states, that capacity is simply not possessed by all people or in equal measure.⁸² As with 'mental level', the assertion of claims is one way in which human dignity is manifested; one could easily agree with that. But this would hardly be a complete and satisfactory understanding of human dignity, as it would apparently allow more dignity to those who could more powerfully assert their claims, which in effect, is the same as saying that might makes right. If human dignity is predicated upon power, then it is merely descriptive of a certain

79 Kuhse, above n 68, 212-3 argues that 'speciesism' is indefensible, because it would leave us with no reply to racists. Singer does the same in several places. Apart from the fact that 'species' can be 'genetically identified, whereas 'race' cannot, this is not a watertight *argument*, for a racist could then consistently embrace speciesism. It is, rather, a *consideration* which, they hope, would dissuade one from taking a 'speciesist' view. And besides, if we are to take it as certain that racism is to be rejected, why should we not take any other position, such as affirming human dignity?

80 This is not the place to go into it, but humane treatment of animals is enjoined by human virtue and human dignity. There are explicit statements to this effect in religious literature, and even to the effect that animals and indeed, all of the creation, has a role in what is sometimes called 'the universal adoration'. For examples, see the psalm in Daniel 3 and Francis' 'Canticle of Brother Sun', available in many editions, but see for example the translation at <prayerfoundation.org/canticle_of_brother_sun.htm> as at 24 October 2007.

81 Cited and translated in G S Kirk, J E Raven & M Schofield, *The Presocratic Philosophers* (2nd ed, Cambridge: Cambridge University Press, 1983) 168-169.

82 Gewirth, above n 73, 12.

prerogative which is extracted by force. But in fact, it was long argued by reformers that the mistreatment of the poor and helpless was an affront to their human dignity. Of artists and writers like Coleridge, Arnold, Ruskin and William Morris, Schilling states: 'they wrote on social and economic subjects to defend the dignity of man, violations of which they could not endure ...'.⁸³ In other words, 'human dignity' cannot be ethically based on power, rather, it may ground ethical demands for a redistribution of power.

Dworkin sees human dignity as being 'normally connected' to an individual's 'capacity for self-respect', and as being something to care about only if the individual's past 'as a competent person is in some way still implicated.'⁸⁴ If so, says Dworkin, 'we may take his former capacity for self-respect as requiring that he be treated with dignity now; we may say that dignity now is necessary to show respect for his life as a whole.'⁸⁵ Later in *Life's Dominion*, Dworkin relates these ideas to the 'right to be treated with dignity', and suggests that dignity is 'a central aspect of ... the intrinsic importance of human life.'⁸⁶ Dworkin's argument is subtle, and I cannot do it justice here, but it is immediately apparent that it is not fully consistent. If human life does possess an intrinsic importance, then it cannot depend on a person's capacity for self-respect, let alone their history. In a book marked by what seem to me to be naked assertions, persuasively made as if self-evident,⁸⁷ one of the more remarkable is that: 'dignity now is necessary to show respect for his life as a whole'. Why 'as a whole'? Why does the passage of time make any difference? If Dworkin is correct that human dignity is related to the intrinsic importance of human life, then those three words are not needed. But Dworkin wishes to advance an argument for liberal abortion and euthanasia laws, and so makes human dignity dependent upon a capacity for self-respect. This results in inconsistency, and ties human dignity to a trait which may or may not be cultivated, and which can be culturally, religiously and socially encouraged. Indeed, the order should be reversed. In Victoria, recent committal proceedings have disclosed the case of a man who registered himself as a dog with a local council to show subservience to his 'master'. Yet, deluded and pathetic as he is, such a person does not forfeit his human dignity, rather, he lives beneath his privileges, as it were.⁸⁸

But could 'human dignity' be predicated upon 'human rights'? Insofar as I can understand Habermas, this is his position, for he seems to assert that

83 Bernard Schilling, *Human Dignity and the Great Victorians* (New York: Columbia University Press, 1946) 176.

84 Dworkin, above n 5, 221.

85 Dworkin, above n 5, 221-222.

86 Dworkin, above n 5, 236.

87 For example, a Rembrandt is intrinsically valuable, if not sacred, in Dworkin's idiosyncratic redefinition of 'sacred', Dworkin, above n 5, 71-73.

88 'HIV man "tricked sex slave"', *The Australian* (Sydney), 29 March 2007, 7.

'fundamental rights' are 'constitutive' for 'human dignity'.⁸⁹ Apart from the observation that qualifying some 'rights' as 'fundamental' does not make those rights in fact fundamental, and hence solve the inherent problem of relativism, I am minded to think that the true position is the reverse. That is, 'rights' must be grounded on something intrinsic to the individual, such as 'human dignity', and 'human dignity' upon something more fundamental than that. In legal discussions, the concept of 'justice' is as basic as we need to go. Habermas' view is informed by the crucial reference to 'human dignity' in the German constitution, but as Gewirth has observed, one can hardly be satisfied with a position where to say that someone has human dignity 'merely reduplicates' the statement that they have rights.⁹⁰ Gewirth goes on to say:

the connection between the claiming of rights and the having of empirical dignity cannot provide the primary basis of human dignity. For, in the inherent sense, human dignity is not a quality that waits for its existence on the empirical fulfillment or claiming of positive legal rights; rather, it exists even in the absence of such fulfillment; indeed, it is the ground or antecedent of the rights insofar as they are morally justified, not their consequent.⁹¹

Rights are, as Aquinas contended, in truth 'a description of what justice requires in a given circumstance'.⁹² The modern tendency to speak of 'rights' can ground an absolute individualism if the dependence of rights themselves upon a broader concept of justice is not borne in mind, and such an individualism may well prove inimical to respect for human dignity.⁹³ As MacIntyre has shown, ethical systems become 'incommensurable' when they appeal variously to rights or to justice as exemplified in stated norms, because 'there is and can be no independent standard or measure by appeal to which their rival claims can be adjudicated, since each has internal to itself its own fundamental standard of judgment'.⁹⁴

89 Jürgen Habermas, *The Future of Human Nature* (Cambridge: Polity, 2003) 31. Habermas argues so often at so abstract a level that one can rarely be sure of what he means for more than a brief span. At 33 he states that 'human dignity' is not a quality which one "possesses by nature", it is inviolable. I do not see why one cannot possess something inviolable by nature. At 37, however, he states that "Even in its anonymous forms, human life possesses 'dignity' and commands 'respect'." This, I think, is correct, and in this essay I attempt to link the concepts, 'dignity' and 'respect'.

90 Gewirth, above n 73, 13.

91 Gewirth, above n 73, 14.

92 As paraphrased by Wagner, above n 64, 208, citing at 208-9, St Thomas Aquinas, *Summa Theologica* Part II-II Q 57 article 1.

93 This is some of Wagner's thesis: see in particular Wagner, above n 64, 215, and also 220 in respect of the relativisation of traditional belief systems.

94 Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopedia, Genealogy and Tradition* (Indiana: Notre Dame Press, 1990) 4. Helga Kuhse, 'Sanctity of Life, Voluntary Euthanasia and the Dutch Experience: Some Implications for Public Policy' in Kurt Bayertz, above n 4, 19-20 makes a similar point.

However, this much is clear: justice must be prior to rights, unless one actually holds that there is no fundamental principle of justice, except insofar as 'justice' describes the implementation of a conventional system for the protection of human rights, such as a constitution. This must be so, because without a notion of justice, there is no obligation to respect, let alone enforce another's 'rights'. Note that Aquinas did not say that no one has rights. Rather, he contended that these rights are dependent upon the application of justice in any particular situation. For example, rights may be endowed by contract, statute and custom. But the construction of these contracts, statutes and customs, and any conflict of rights, falls to be resolved by appeal to some higher standard, and that standard must include a right to justice.⁹⁵

I suggest that Kant's philosophy, although it is tremendously important in the history of these questions, especially in Germany and Europe, provides another example of a 'false absolute', for if 'human dignity' is a function of 'rationality' then it is no longer really *human* dignity, but the dignity of rationality. This is not a tautology, for not all human beings are rational at all times of their life – a point which Kuhse and Singer make.⁹⁶ If human dignity is a property which based upon rationality, then the concept of human dignity is resolved into a chemical property, as it were, of rationality, and can be dispensed with. Further, if rationality is compromised, so is human dignity. Once more, one can accept that human dignity is often vindicated in and by rationality and autonomy, but human dignity is nonetheless a larger concept, by virtue of being inherent in all humans.

There is an interesting development of Kant's work in a series of lectures by the philosopher and playwright, Gabriel Marcel. Marcel accepts as beyond question Kant's idea that 'the inalienable value of man lies in the fact that he is a rational being ...'.⁹⁷

As a Catholic, Marcel is, himself, not satisfied that the rationalist view is all that one needs to consider, although he accepts that it is correct so far as it goes. First of all, he notes that rationalism has lost some of its 'vitality', and that 'there is hardly anything left of the aura which still accompanied the word *Vernunft* ... for Kant and his followers.'⁹⁸ But more fundamentally, he states that

we cannot succeed in preserving the mysterious principle at the heart of human dignity unless we succeed in making explicit the properly sacral quality peculiar to

95 'One can only have a right to something good' Brown, above n 52, 100.

96 Kuhse above n 68, 212.

97 Gabriel Marcel, *The Existential Background of Human Dignity* (Massachusetts: Harvard University Press, 1963) 128.

98 Marcel, above n 97, 128-9. 'Vernunft' is 'reason, understanding'.

it, a quality which will appear all the more clearly when we consider the human being in his nudity and weakness – the human being as helpless as the child, the old man or the pauper.⁹⁹

Marcel points out that human dignity is not supported by the pretentious display of pomp, what he calls ‘an affected dignity’, which is actually ‘the very antithesis of dignity ...’.¹⁰⁰ One can see why this should be so: the weak and the poor have nothing with which to cover, or distract from, their humanity. For that reason, it speaks all the clearer. On the other hand, the proud and insolent signal that they are identified with their display, and hence that they are concealing ‘only emptiness and deceit’.¹⁰¹

When these issues are treated in Christianity, and in some other religions, humanity as a whole is utterly dependent upon God, who is of course an absolute.¹⁰² It is worthwhile spending a minute on this, because some, such as Kuhse and Singer do see fit to criticize religiously informed perspectives, although I doubt that they understand them as fully as they might believe. In religion, not all values are relativistic. Indeed, the most important values are objective.

One could stop at this point, and cite religious beliefs as an absolute ground for a discussion of human dignity. While this would be quite legitimate in the genre of theology, in legal and bioethical writing it is insufficient. Therefore, Singer and Kuhse are correct to leave theology out of their account, not for the reasons they give, but because theology is a different discipline from bioethics, even if the two overlap.¹⁰³ But it also follows that few philosophers are properly qualified to critique religious views. For example, Kuhse and Singer argue that the ‘supporters of the Sanctity-of-Life Principle’ are inconsistent in that they base their practical judgments upon quality-of-life considerations.¹⁰⁴ But from a religious point of view there is no rigid distinction between the two: the quality of life is related to its sanctity. Life is sacred because it is bestowed for a divine purpose. It is also, since ‘the Fall’, limited. Eventually, a life returns

99 Marcel, above n 97, 128.

100 Marcel, above n 97, 128 and 134.

101 Marcel, above n 97, 129.

102 Reza Sheikholeslami, ‘The Creation and Dignity of Man in Islam’ in Silija Vöneky Rüdiger Wolfrum (ed), *Human Dignity and Human Cloning* (Leiden and Boston: Martinus Nijhoff Publishers, 2004) 6: ‘Man’s nobility is, in fact, a sacred gift from God’.

103 Helga Kuhse & Peter Singer, *Should the Baby Live? The Problem of Handicapped Infants* (Oxford: Oxford University Press, 1985) 117, and Kuhse above n 68, 11-12. Kuhse, in criticizing the appeal to authority, herself appeals to the authority of G E Moore and others. Singer, above n 70, speaks of ‘metaphysical and religious shackles’, but provides no basis for the judgment.

104 Kuhse and Singer, above n 103, 34 and Kuhse, above n 68 in many places, but see esp. 21-24.

to God (see for example *Ecclesiastes* 12:7). One could say that when illness and feebleness diminish the quality of life to a degree where that divine purpose can no longer be served, the life does not lose its sanctity, but it has run its course (*Ecclesiastes* 3:2). Today, perhaps, one should say that it would do so without the intervention of modern medicine. Hence it is obligatory, as Kuhse quotes Pius XII, to employ only 'ordinary means'.¹⁰⁵ It may be very difficult to distinguish 'ordinary means' from 'extraordinary means', but that is not an objection to the soundness in logic or ethics of the position, it only indicates the complexity of the position. As Sullivan stated after an exposition of the concept:

Of course, sometimes it will be hard to say whether a treatment offers a benefit or whether providing it imposes disproportionate burdens on the patient or on others. But just as the existence of twilight does not prove there is no difference between night and day, so the existence of borderline cases does not show that there is no difference between ordinary and extraordinary means.¹⁰⁶

There are very many matters where the application of a rule is attended with controversy: one only has to think of the principles of sentencing in Australia. However, at the time Kuhse was writing, the euthanasia debate had already moved on. In its *Declaration on Euthanasia* of 5 May 1980, the Sacred Congregation for the Doctrine of the Faith stated:

In the past, moralists replied that one is never obliged to use 'extraordinary' means. This reply, which as a principle still holds good, is perhaps less clear today, by reason of the imprecision of the term and the rapid progress made in the treatment of sickness. Thus some people prefer to speak of 'proportionate' and 'disproportionate' means.¹⁰⁷

So Kuhse's critique does not adequately address the absolutist position on sanctity of life and deciding when to exercise only proportionate palliative care. Yet, Kuhse is correct to address the issue of consistency.¹⁰⁸ A theological view may not be susceptible to rational proof or disproof, but it should at least be consistent. But so too, should an ethical position exhibit consistency, and ethical relativism is not a consistent and coherent ethical position. As Brown states:

Relativism expressed as a moral judgment would look something like this: "It is better to be a relativist than an absolutist," or "It is good that there are no moral

105 Kuhse and Singer, above n 103, 30-33. See also Kuhse above n 68, 198-9 citing Pius XII's address of 24 February 1957, *Acta Apostolicae Sedes*, 49 (1957) 146.

106 Thomas Sullivan, 'Coming to Terms: A Response to Rachels' in Bonnie Steinbock & Alastair Norcross (eds), *Killing and Letting Die* (2nd ed, New York: Fordham University, 1994) 160.

107 This document may be read at Franjo Cardinal Seper, *Declaration on Euthanasia* (1980) Sacred Congregation for the Doctrine of the Faith <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html> as at 3 April 2007.

108 Kuhse, above n 68, 24-29.

absolutes.” While such judgments might arise out of a fear of oppression by absolutists, or in the spirit of tolerance and respect for others, they are internally incoherent. The one thing that simply cannot be meaningfully said about moral relativism is that it is good and should be embraced.¹⁰⁹

Finally, it seems to me that Kuhse’s moral philosophy ultimately rests upon assertions, acts of faith, as it were. In an instance where she discusses her philosophical imperative, Kuhse writes: ‘... to the extent that morality demands the equal consideration of all interests ... we are ‘speciesists’.¹¹⁰ But why does morality demand the equal consideration of all interests? For the reasons I have sketched above, even if this is not the place to set out all the reasoning and counter-arguments in detail, human dignity militates in favour of giving greater consideration to humans. More fundamentally, without an absolute standard of right or wrong to appeal to, I cannot see how Kuhse can establish that ‘morality *demands* the equal consideration of all interests’ (my italics).

Kuhse’s second act of faith is her acceptance that morality is related to interests, and that only ‘conative life’ or ‘sentience’, bringing the capacity for suffering and enjoyment, is capable of enjoying interests.¹¹¹ Realizing that painless killings would present her theory with an immediate problem, Kuhse argues that such murders would be wrong because they ‘would leave a whole range of future-directed desires unsatisfied – including the desire not to be killed against one’s wishes.’¹¹² But what is wrong with leaving these desires unsatisfied? Kuhse merely asserts that this is wrong. If she is understood to say that this is because the person has interests, then this act of faith is simply buttressed by her first one. Indeed, on her analysis, if the person is killed while sleeping or unconscious without arousal, they are killed when they have no interests. It is true that a sleeping person will awaken unless they die in their sleep or drift into a coma, but then a foetus will almost certainly be born, and Kuhse argues that ‘killing a foetus ... is not a direct wrong to the being killed because it does not override that being’s desire for, or interest in, continued existence.’¹¹³

But even if it did have desires or interests, so what? Why should anyone else respect anyone else’s desires or interests?

If, on the other hand, one approaches the entire question from the point of view of ‘human dignity’ as something implicit in the quality of human life itself, these tangled arguments are sidelined, and an absolute criterion of values can be appealed to.

109 Brown, above n 52, 11.

110 Kuhse, above n 68, 146.

111 Kuhse, above n 68, 147.

112 Kuhse, above n 68, 148.

113 Kuhse, above n 68, 149.

VI CONCLUSION

As we have seen, it is not satisfactory to ground human dignity upon any other quality unless that quality is an absolute.¹¹⁴ Ultimately, one needs to go further, and not only show what is incorrect, but to establish a positive position, otherwise the critique appears incomplete, and we could conclude that in fact there are no ethical principles at all over and above what each person selects as their principles from time to time, should they even bother to do so. We are engaged in an exercise at the intersection of law and bioethics. I have tried to avoid religious and theological issues except where the academic debate has introduced them.¹¹⁵ I would suggest that the argument so far has been sufficient to establish two important points: first, that the law would be unsound not to adopt an absolute view of human dignity. That is, that 'basic dignity' applies to each and every human by virtue of their humanity.¹¹⁶ The second point, which is now clear, is that there is little effective difference between the position of the law in New South Wales and a position which protects human dignity as a quality adhering to the individual by virtue of their existence as humans.

The difficult question, as Pullman notes, is how specifically, does the assumption of the axiomatic importance of 'basic dignity' actually 'constrain moral discourse'?¹¹⁷ If the concept cannot do that, then it is of little use to us. For example, Smith argues that although Article 1 of the Universal Declaration on Human Rights urges that all beings 'should act towards one another in a spirit of brotherhood', this is so broad as to fail to be a viable 'mechanism for imposing concrete duties.'¹¹⁸

In New South Wales, as we have seen, suicide is not illegal, but assisting suicide is. Therefore, physician-assisted suicide is illegal. Ordinarily, if one may do something, one may seek assistance to do it. But the prohibition in question subsists out of respect for the dignity of human life. In other words, it recognizes that there is something special about human life, and that even if one cannot be prohibited from ending one's own life, yet that life is so valuable that no one should be allowed to render aid to the intending suicide.

114 Bedjaoui, above n 48, 139 asserts this, but while he demands it, he does not venture a positive thesis of what this 'platform of incontestable values' would look like. In a way, this essay is a first step in taking up Bedjaoui's challenge.

115 However, for a theological discussion, see Fisher, above n 50.

116 I am aware of the debate concerning whether 'human' and 'person' are synonymous. I agree with Robert Spaemann, 'Christianity and Western Philosophy' in Vöneky & Wolfrum, above n 102, 48-9 that they are.

117 Pullman, above n 55, 347 and 348.

118 George Smith, *Human Rights and Bioethics* (The Hague: Kluwer Law International, 2000) 12.

Further, the rules for the withdrawal of medical treatment from the terminally ill and irremediably comatose are not very different from the rules which an absolutist view of human dignity would dictate. Thus, in *Northbridge* the hospital was enjoined not to cease treatment, whereas in *Messiha* this was allowable. One could say that the medical means taken in *Northbridge* were proportionate to Thompson's situation. On the other hand, further efforts to keep *Messiha* alive were disproportionate: it was sufficient to take palliative care with the result that he would shortly die.

It is worthwhile looking more closely at this area. Surely there is a widely shared perception that the ill, the incontinent, and the dying lose their dignity. Why is this? Could it be that we are now teaching ourselves to speak and think as if they had? Clearly, if human dignity is an inalienable human characteristic, there can only be one answer, that is, these people's dignity subsists despite these frailties and events, and even though they may themselves believe otherwise. If this is so, it follows that euthanasia, if it is to be justified, cannot be justified on the basis of an appeal to 'death with dignity'. Rather, the way forward in such cases is to restore their sense of dignity to these people, and treat them with all available means of therapy, including palliative care where needed. This is a part of what Cassell speaks of when he contends that too frequently 'the profession of medicine appears to ignore the human spirit'.¹¹⁹ One could take this line of enquiry further, for example, Twycross says that 'where there is hope, there is life', and that hope is essential in hospice care, and goal setting is integral to it.¹²⁰

Ira Byrock, a physician who specialises in care for the dying, argues that slow decline and dying is not indignity, even if many terminally ill people suffer tremendously when they feel that they have lost their dignity. This sense of loss, Byrock observes, is often related to losing the ability to perform the countless small activities one barely thought about, and especially perhaps, from losing and control over one's body, eg, being unable to feed oneself, or control toilet functions.¹²¹ Indeed, Byrock concludes that patients can accept the care needed with grace and dignity.¹²² This immediately raises the possibility that it may be possible to educate people to retain their sense of dignity, or at least to challenge

119 Eric Cassell, *The Nature of Suffering and the Goals of Medicine* (Oxford: Oxford University Press, 1991) 43, and also 46.

120 Robert Twycross, 'Where there is Hope there is Life: A View from the Hospice' in Keown, above n 13, 143.

121 Ira Byrock, *Dying Well* (New York: Riverhead Books, 1997) 85.

122 Byrock, above n 121, 86.

their sense that they have lost their dignity.¹²³ If I understand Byrock correctly, he argues that this very sense of loss is itself a learned response:

Unfortunately, society reinforces the belief that the loss of capability and independence renders a person undignified. Our society reserves its highest accolades for youth, vigor, and self-control and accords them dignity, while their absence is thought to be undignified. The physical signs of disease or advanced age are considered personally degrading, and the body's deterioration, rather than being regarded as an unavoidable human process, become a source of embarrassment.¹²⁴

Byrock's work provides examples from clinical experience of how a physician who can see, and respects, the dignity of their patients, can assist those people to 'achieve a sense of meaning and value about who (they are)'.¹²⁵ This is in accord with both Twycross' clinical experience,¹²⁶ and with the ethical position we have explored above. For example, Gewirth concludes that human dignity subsists even if a person is not treated with respect: 'certain modes of treatment may violate but not remove their (sc. the people's) dignity.'¹²⁷

Our exercise in rejecting relativistic theories has been useful in that it has at least established where one cannot look to find a moral absolute which will justify and give content to our ideas of 'human dignity': one cannot appeal to particular human qualities or properties. These qualities such as rationality and autonomy may be forceful reminders of human dignity, and provide reasons to respect others' dignity, but they cannot ground it. Rather, the only foundation of 'human dignity' must be in human nature, as an integral whole. It is futile, and ultimately incoherent to try and break 'human dignity' up into a spectrum like white light, or to resolve it into respect for rationality or the ability to assert a claim.

Insofar as considerations of 'human dignity' have any weight, they militate in favour of maintaining the euthanasia law as it is in New South Wales, for human dignity is not, and cannot be, compromised by virtue of personal defects or suffering, whether congenital or otherwise.

123 'We can forget that dignity is not recognized by telling the old, infirm or comatose how undignified their condition is, or how they would be better off dead ... Dignity in old age, handicap, unconsciousness, and suffering are above all recognized by our showing the infirm love and respect.' Fisher, above n 50, 325-326.

124 Byrock, above n 121, 86.

125 Byrock, above n 121, 114.

126 Twycross, above n 120, 144.

127 Gewirth, above n 73, 16.