CONSTITUTIONAL DIGNITY

ASHLEIGH BARNES*

It has been argued that dignity was recognised in Clubb v Edwards *('*Clubb*') as an Australian constitutional value. This means that Australia must confront the well-recognised confusion and criticisms concerning dignity as a legal concept. It is widely claimed that the meaning of dignity remains either indeterminate or incoherent, or both. This article argues that the meaning of dignity can be sufficiently determinate and coherent. The route to this conclusion is not to insist on a single formula across jurisdictions and contexts such as autonomy, equality or non-fungibility. Instead, drawing on the dominant conceptions, I propose a holistic four-dimensional approach to dignity. Guided by this definition, I offer an investigation into and explanation of the meaning of Australian constitutional dignity in* Clubb.

CONTENTS

* Lecturer, Macquarie University and DPhil candidate, University of Oxford. I thank Professor Kate O'Regan, Professor Tarunabh Khaitan, Professor Nicholas Bamforth, members of the Bonavero Institute of Human Rights Perspectives Seminar and members of the UNSW–Oxford Doctoral Workshop who provided helpful feedback on earlier versions of this article. Any errors are my own.

I Introduction

It has been argued that dignity was recognised in *Clubb v Edwards* ('*Clubb*')[1] as an Australian constitutional value.[2] The aim of this article is twofold. First, I respond to the claim that the meaning of dignity is incoherent or indeterminate,

[1] (2019) 267 CLR 171 ('*Clubb*').

[2] Caroline Henckels, Ronli Sifris and Tania Penovic, 'Dignity as a Constitutional Value: Abortion, Political Communication and Proportionality' (2021) 49(4) *Federal Law Review* 554, 555–6, discussing 'the High Court's nascent recognition of dignity as a constitutional value'. Following *Clubb* (n 1), Stephenson commented that '[t]he protection of dignity thus now appears to be a principle with a degree of constitutional recognition in Australia': Scott Stephenson, 'Dignity and the Australian Constitution' (2020) 42(4) *Sydney Law Review* 369, 370. In the light of these arguments, this article explores the meaning of dignity in *Clubb* (n 1). It is beyond the scope of this article to make an argument for or against the claim that dignity was in fact recognised as a constitutional value in *Clubb* (n 1). It is also arguable that the dignity value in *Clubb* (n 1) was a statutory value only and does not yet have an independent constitutional basis. If that is the case, this article offers an explanation of the meaning of dignity adopted in *Clubb* (n 1) for which an independent constitutional basis may develop. It is also beyond the scope of this article to make an argument answering the separate but related question concerning whether dignity should be recognised as an Australian constitutional value, regardless of whether that occurred in *Clubb* (n 1). The limited scholarship responding to *Clubb* (n 1) thus far has already countered that dignity may not be properly grounded in the text and structure of the *Australian Constitution*: see, eg, Henckels, Sifris and Penovic (n 2) 555; Stephenson (n 2) 391. For an overview of the nascent literature on Australian constitutional values, see generally Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3.

or both. Second, I identify and explain the meaning of dignity in *Clubb*. In Part II, this article argues that the meaning of dignity *can* be sufficiently coherent and determinate. However, the route to this conclusion is not to insist on a single formula across jurisdictions and legal concepts such as autonomy, equality or non-fungibility. Instead, drawing on the dominant conceptions, I propose a holistic four-dimensional approach to understanding dignity. First, I explain that, like other open-textured terms, the meaning of dignity is contingent. Second, I sketch the *main* uses or understandings of dignity in philosophical literature and comparative constitutional law. Third, I develop the four-dimensional dignity account.

In Part III, I apply this analytical framework to *Clubb* and provide a doctrinal account of the meaning of Australian constitutional dignity in that decision. This article does not evaluate Australian constitutional dignity against the meanings of 'human dignity' in comparative legal contexts. This normative analysis is to follow. Instead, my aim in this piece is to offer an investigation into and explanation of the meaning of dignity in *Clubb*. This is a necessary prolegomenon to any normative analysis.

II Four-Dimensional Dignity

Dignity is the subject of intense scholarly and judicial interest around the world. Dignity is a key commitment in modern constitutional law and international human rights law. The aspiration towards dignity is invoked in several international, regional and domestic human rights instruments and constitutions. The right to dignity is often among the rights enumerated.[3] Alternatively, or in addition, dignity has been understood as a value expressly or impliedly incorporated in the instrument.[4] It has been 'invoked, interpreted, and applied by courts around the world in thousands of cases in the last few decades'.[5] It is a

[3] See, eg, *Charter of the United Nations* Preamble para 2; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Preamble paras 1–2, art 1(1); *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 1; *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 1(a), 7(1), 10, 39(1)(a).

[4] See generally Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 361.

[5] Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press, 2013) 2. For an overview of the role of dignity in legal texts, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 664–75 ('Judicial Interpretation').

concept 'deeply embedded' in legal discourse.[6] Its place as 'a central element in legal argument into the future' has been recognised and its 'unquestionable' conceptual 'power' heralded.[7]

Notwithstanding these claims, dignity has become embroiled in controversy. Debates between dignity-sceptics and dignity-enthusiasts have ensued. One core debate concerns the very meaning of dignity.[8] Scholars and judges have articulated various meanings including 'dignity as worth', 'dignity as autonomy', 'dignity as equality' and 'dignity as the opposite of indignity'. There are several other accounts. However, this article necessarily confines itself to the main uses in modern constitutional law and human rights law. These meanings are often perceived to be in conflict, with emphasis on their inconsistencies as opposed to their complementarities, and are rarely brought into conversation with each other. And unlike other open-textured terms in constitutional law and human rights law, these concerns have not always generated more sophisticated conceptions.[9] On the one hand, dignity-enthusiasts have pitched their tent solely in one camp, arguing for one conception of dignity.[10] On the other hand, there has been a rise in the 'destructive analytic critique' — the 'indignant recording' of confused legal invocations of dignity.[11] While it is clear that dignity should move beyond a radically indeterminate or incoherent conception, it is argued here that, like other substantive values, dignity 'resists capture by a single principle'.[12] In this part, I assess whether these different conceptions are

[6] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 1, 1 ('In Pursuit of Human Dignity').

[7] Ibid. See also Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) 1–2.

[8] However, the dignity-sceptics' concerns are broader than this. For an overview on current debates, see generally McCrudden, 'In Pursuit of Human Dignity' (n 6). See also Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity' (2006) 5(2) *Journal of Human Rights* 257; Roger Brownsword, 'Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the "Dignitarian Alliance"' (2003) 17(1) *Notre Dame Journal of Law, Ethics and Public Policy* 15; Roger Gibbins, 'How in the World Can You Contest Equal Human Dignity? A Response to Professor Errol Mendes' "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity"' (2000) 12(1) *National Journal of Constitutional Law* 25; Debra M McAllister, 'Section 15: The Unpredictability of the *Law* Test' (2003) 15(1) *National Journal of Constitutional Law* 35.

[9] See Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

[10] For example, Griffin argues that dignity is agency: James Griffin, *On Human Rights* (Oxford University Press, 2008) 151–2 ('*On Human Rights*'). See also below Part II(B)(2)(a).

[11] Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Jeremy Waldron, *Dignity, Rank, and Rights*, ed Meir Dan-Cohen (Oxford University Press, 2012) 13, 16 ('Dignity and Rank').

[12] Fredman (n 9) 713.

mutually incompatible. Concluding that several of these conceptions are not, I draw on the strengths of the existing schools of thought to propose a four-dimensional account of dignity which allows for dignity as both an eligibility principle and as a treatment principle. Adopting this four-dimensional framework may clarify certain aspects of the legal use of dignity.

First, I will explain that dignity is a contingent term. This means it is in use 'in different contexts and semantic fields, and its scope and meaning are not identical'.[13] These conceptions are often 'significantly different' from one another.[14] Second, I will set out a sketch of the main uses or understandings of 'human dignity'.[15] I summarise the philosophical position and briefly outline examples of each use in human rights and constitutional law. The purpose of these examples is to illustrate the way in which the various ideas have been captured in the legal context across several jurisdictions. Third, I consider if these theories can sit together. I propose a multivalent definition of 'substantive and holistic dignity' comprising four dimensions. At this stage, I do not advance an argument that this is the version of dignity that *should* be recognised in any given legal context. Nor do I argue that it is the best possible interpretation of existing legal practice. Instead, I explain what the various compatible conceptions of dignity are and formulate a way that the various uses and meanings of dignity *can* sit together and dispel impressions that they are completely rival definitions or that dignity is a redundant concept. Relieved of such trappings, the four-dimensional 'substantive and holistic dignity' definition can be helpfully and transparently used by legal actors to interpret and apply dignity. It provides an analytical framework to assess how laws, policies and practices conceptualise dignity and paves the way for more determinate and consistent use in any given jurisdiction. It captures many of the enduring conceptions of dignity and brings them into coherence. It will assist legal actors to avoid a charge of radical indeterminacy and to articulate arguments about dignity in a clear way across legal contexts, albeit with different emphases, applications and outcomes. In essence, it will assist legal actors to justify the use of dignity.

The account proposed in this article is reconstructive in the sense that it is a coherent theory of the practice of dignity invocation in human rights and

[13] McCrudden, 'In Pursuit of Human Dignity' (n 6) 5.

[14] McCrudden, 'Judicial Interpretation' (n 5) 710.

[15] Many debates arise that do not need to be considered in any detail for the understanding of Australian constitutional dignity. For example, Australian constitutional dignity is said to attach to 'members of the sovereign people': *Clubb* (n 1) 204 [82], 208–9 [98]–[99] (Kiefel CJ, Bell and Keane JJ); or to 'the people of the Commonwealth': at 196 [51], 198 [60], 209 [101]. Because of this, this article only considers conceptions of *human* dignity. The literature on conceptions of dignity that attach to institutions, such as Parliament or the Church, and to other animate and inanimate things, such as legislation or labour, can be put to one side.

constitutional law. Möller contrasts this to a purely philosophical theory which proposes the morally best theory but is 'insensitive' to any fit with practice.[16] My account identifies a lack of theoretical consensus and suggests a way forward that meets certain criteria of a successful reconstructive theory; it is 'general, salient, and mutually coherent'.[17] However, it does not yet include an evaluative dimension (ie as to whether this is a good thing or the best way forward).

A *Dignity Is Contingent*

An important background principle is that the meaning of dignity is contingent. This means that dignity derives its content from context. It is well established that '[d]ignity has come to mean different things to different people'.[18] It traverses theology, philosophy, political theory and law.[19] Within the legal context alone, dignity is used in different ways in different jurisdictions, areas of law, institutions and over time. In this article, I am predominantly concerned with the role dignity plays in constitutional law and human rights law. Even in this field, McCrudden demonstrated that the meaning of dignity is 'culturally relative, deeply contingent on local politics and values'.[20] This is suggested as one reason why

> [i]n practice, very different outcomes are derived from the application of dignity arguments. This is startlingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions.[21]

In addition to being 'context-specific', the meaning of dignity has varied significantly 'from jurisdiction to jurisdiction and (often) over time within particular jurisdictions'.[22] McCrudden's extensive examination of dignity in constitutional texts and case law demonstrated that,

[16] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012) 20.

[17] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 11.

[18] Meir Dan-Cohen, 'Introduction: Dignity and Its (Dis)content' in Jeremy Waldron, *Dignity, Rank, and Rights*, ed Meir Dan-Cohen (Oxford University Press, 2012) 3, 3.

[19] McCrudden, 'Judicial Interpretation' (n 5) 656–63.

[20] Ibid 698.

[21] Ibid.

[22] Ibid 655.

> [s]o far, the use of the concept of human dignity has not given rise to a detailed universal interpretation, nor even particularly coherent national interpretations. No one jurisdiction has a coherent judicially interpreted conception of dignity across the range of rights, and no coherent conception of dignity emerges transnationally.[23]

McCrudden's work helpfully explores the differences in the conceptions of dignity in judicial interpretation and offers reasons for those differences. It does not follow that a definition of dignity is inevitably incoherent or completely indeterminate (a 'relatively empty shell'),[24] this being one of the main charges put against dignity by the sceptics and being the subject of this article. McCrudden acknowledged this by clarifying:

> I am *not* arguing that there is no more precise conception of human dignity that is possible … Nor am I arguing that there is no coherent extra-legal conception of dignity which could form the basis of a common transnational legal approach.[25]

However, in my view, what does follow is that any given account of dignity must be substantiated and justified. The indeterminacy charge is at least partially fuelled by dignity-enthusiasts' failure 'even to analyse these different conceptions [of dignity] separately, let alone offer specific justifications for their chosen conception'.[26] The enthusiasts' load will be lightened by first acknowledging that dignity has distinct conceptions. Indeed, Khaitan observes that '[t]hese distinct "conceptions" of dignity do not fare so badly on the indeterminacy front when analysed individually'.[27] I establish this in the following section before demonstrating that the mutual inconsistencies can be minimised or altogether avoided.

Before doing so, it is important to clarify what is meant by 'indeterminate' and 'sufficiently determinate' in this article. It is typically accepted that a legal rule is indeterminate where there is more than one legally plausible interpretation of it.[28] However, the requisite standard of determinacy varies according to

[23] Ibid 724.

[24] Ibid 698.

[25] Ibid 723 (emphasis in original).

[26] Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous nor a Panacea' (2012) 32(1) *Oxford Journal of Legal Studies* 1, 14 ('Dignity as an Expressive Norm').

[27] Ibid 19.

[28] See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 71–2, 181–2; HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 252, 272. See generally Timothy AO Endicott, 'Linguistic Indeterminacy' (1996) 16(4) *Oxford*

the legal structure being employed. Legal rules provide precise and conclusive guidance in decision-making.[29] Accordingly, legal rules tend to be determinate. Conversely, legal principles or legal values provide non-conclusive guidance and are less specific than legal rules without becoming completely meaningless.[30] Legal principles have a dimension of 'weight or importance'.[31] They may be defeated in any given case by 'other principles or policies arguing in the other direction'.[32] If a legal principle is outweighed, it does not become invalid or inapplicable.[33] Indeed, legal principles (unlike legal rules) can be fulfilled to varying degrees and the degree of fulfilment does not affect the value's validity.[34] While legal principles are less specific than rules,[35] they must have some relevant and discernible justificatory content in order to be relied on in legal adjudication. Provided there is some settled meaning, legal principles may be sufficiently determinate (despite accepting that they will be less specific than legal rules).

One of the key sites of difference across jurisdictions invoking dignity is the four distinct jurisprudential functions that dignity is tasked with: (i) 'providing a key argument as to why humans should have rights'; (ii) 'help[ing] in the identification of a catalogue of specific rights'; (iii) functioning as 'an interpretative principle to assist the further explication of the catalogue of rights generated by the principle'; and (iv) being 'itself a right or obligation with specific content'.[36] Across these four uses, dignity is sometimes being called upon to act as a legal rule and at other times being called upon to act as a legal principle. Accordingly, the requisite standard of determinacy will be adjusted along with this legal context.[37]

It is also important to clarify what is meant by 'coherent' in this article. A coherent approach to dignity does not mean a singular approach to dignity.

Journal of Legal Studies 667; Timothy AO Endicott, 'The Impossibility of the Rule of Law' (1999) 19(1) *Oxford Journal of Legal Studies* 1.

29 See Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Academic, rev ed, 2013) 40–1 ('*Taking Rights Seriously*'); Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) 41, 47–8, 57–8.

30 Dworkin, *Taking Rights Seriously* (n 29) 41–3.

31 Ibid 43.

32 Ibid 42.

33 Ibid.

34 Alexy (n 29) 47–8.

35 Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale Law Journal* 823, 838.

36 Khaitan, 'Dignity as an Expressive Norm' (n 26) 2, quoting McCrudden, 'Judicial Interpretation' (n 5) 680–1.

37 It is notable that in *Clubb* (n 1), dignity is being relied on as an Australian constitutional value (ie a legal principle): see below Part III.

Rather, a coherent approach to dignity may include several aspects of different conceptions of dignity, provided these can plausibly be held at the same time. Thus, a coherent approach to dignity may include more than one key meaning, provided there is compatibility and cohesion across these meanings. For a value to be coherent, it does not need to be collapsed into a single idea. McCrudden's 'historical examination of the development of dignity' surfaced 'several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time'.[38] A coherent account would thus identify a range of conceptions that *can* plausibly be held at the same time.

B *Different Conceptions of Dignity*

In this part, I explain the *main* uses or understandings of human dignity and illustrate these with examples. Dan-Cohen refers to the 'two contrasting poles' of dignity: dignity as worth and dignity as honour.[39] Waldron agrees and identifies 'absolute worth' accounts and 'ranking status' accounts.[40] As mentioned, between these extremities, there are a range of senses in which dignity is used. I discuss four uses: dignity as worth, with particular attention to the Kantian notion; dignity as freedom or autonomy, with particular attention to the Dworkinian notion; dignity as an expressive quality; and equal status-based conceptions of dignity, with a particular emphasis on Waldron's dignity as 'transvaluated' rank account.

Dan-Cohen suggests that the various uses or understandings of dignity can be measured, or 'fruitfully contrasted', by four criteria: *origins*, *scope*, *distribution*, and *grip*.[41] *Origins* refers to where the dignity originates or derives from. *Scope* refers to the person to whom the dignity applies. *Distribution* refers to how the dignity is distributed among those who come within the *scope*. *Grip* refers to the stickiness of the dignity and the circumstances in which dignity can be lost. These are useful criteria, however they are deficient because they only conceive of dignity as an eligibility principle, concerning who should be treated in dignity-respecting ways. To capture the full gamut of the uses or understandings of dignity, a fifth criterion is needed: *content*. What exactly is being derived, applied, distributed and maintained? This criterion considers dignity as a 'treatment principle', concerning how persons with dignity should be treated.

[38] McCrudden, 'Judicial Interpretation' (n 5) 723. McCrudden's research thus flags that some accounts will likely need to be excluded.

[39] Dan-Cohen (n 18) 3–4.

[40] Waldron, 'Dignity and Rank' (n 11) 27–8.

[41] Dan-Cohen (n 18) 4.

1 *Dignity as Worth or Dignity as Intrinsic Value*

Worth or intrinsic value is the most common interpretation of dignity. Dignity is commonly understood as 'a simple command to all of us: that we (individually and collectively) should value the human person, simply because he or she is human'.[42] On this understanding, the word dignity 'describes an inherent quality and an inherent value that resides in human beings that deserves respect'.[43] The predominant dignity as worth account is Kant's moral theory.[44] Kant's *Groundwork of the Metaphysics of Morals* reads:

> In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity. … Now, morality is the condition under which alone a rational being can be an end in itself … Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.[45]

Kantian dignity's *content* is the intrinsic non-negotiable, 'non-fungible worth of each human being as an end-in-itself'.[46] It necessitates two duties of respect: that humans cannot use other humans *merely* as means and that humans have a duty of self-respect.[47] It inheres in every human being by virtue of his or her moral capacity. This dignity has metaphysical *origins*: 'the alleged radical autonomy of the noumenal self'.[48] Kantian dignity is a deeply egalitarian concept.

[42] McCrudden, 'In Pursuit of Human Dignity' (n 6) 1.

[43] Ibid 6.

[44] Another school of thought regarding dignity as worth is the Roman Catholic teaching on human dignity: see Waldron, 'Dignity and Rank' (n 11) 28. Kant is understood to have 'opened the way for a secular understanding of the dignity of human beings': Rosen (n 7) 25.

[45] Immanuel Kant, *Practical Philosophy*, tr ed Mary J Gregor (Cambridge University Press, 1996) 84 (emphasis omitted).

[46] Jeremy Waldron, 'The Dignity of Groups' [2008] (1) *Acta Juridica* 66, 69 ('Dignity of Groups').

[47] Rosen (n 7) 25–7.

[48] Dan-Cohen (n 18) 4. Importantly, Kant's concept of autonomy is not equivalent to the modern understanding of autonomy as the capacity of individuals to choose the course of their own lives however they see fit. Instead, Kant's autonomy captures the idea that the moral law binding on humans is 'self-given': Rosen (n 7) 25. Rosen explains at 30 that

> [t]he presence of the moral law in human beings has a double character: it makes human beings intrinsically valuable, while, at the same time, prescribing to them the way in which they should act. Since we are subject to the moral law and that law has its source within ourselves, human beings also embody 'autonomy' …

It is also relevant that 'few contemporary normative Kantians espouse' the claim that 'dignity as worth' is grounded in metaphysics: Dan-Cohen (n 18) 5. The 'metaphysics of the noumenal self' can be sidestepped by adherents to this view: at 7.

Dignity as worth has 'a universal *scope*, applying to every human being'.[49] Dignity as worth is also 'evenly *distributed* over humanity as a whole'.[50] Dignity as worth has a strong *grip*: 'worth is categorical, attaching to all its possessors by virtue of their being human, no matter what'.[51]

(a) Examples

One well-known example of a legal invocation of the dignity as worth view is the *Aviation Security Act Case* before the Constitutional Court of Germany.[52] The Court considered a statute permitting the German Air Force to shoot down airliners that had been taken over by terrorists. Section 14 of the *Aviation Security Act* authorised the use of armed force against a passenger plane

> where it must be assumed under the circumstances that the aircraft is intended to be used against human lives, and where this is the only means to avert the imminent danger.[53]

The Constitutional Court of Germany held that this was not compatible with art 1(1) of the Basic Law, which says that human dignity is 'inviolable'.[54] Under art 1(1), the guarantee of dignity, it is 'absolutely inconceivable … to intentionally kill … the crew and the passengers of a hijacked plane' even when they are 'in a situation that is hopeless for them'.[55] This was because the crew and passengers would be, '[b]y their killing being *used as a means* to save others, … treated as objects'.[56] This denies them 'the value which is due to a human being for his or her own sake'.[57] This has been recognised as a relatively straightforward conception of human worth precluding objectification and trade-offs.[58]

[49] Dan-Cohen (n 18) 4 (emphasis added).

[50] Ibid (emphasis added).

[51] Ibid.

[52] Bundesverfassungsgericht [German Constitutional Court], 1 BvR 357/05, 15 February 2006 reported in (2006) 11 BVerfGE 118 ('*Aviation Security Act Case*'). See also Waldron, 'Dignity and Rank' (n 11) 27, 41–2 n 47; Daly (n 5) 45.

[53] *Luftsicherheitsgesetz* [Aviation Security Act] (Germany) 11 January 2005, BGBI I, 2005, 78; *Aviation Security Act Case* (n 52) [28].

[54] *Aviation Security Act Case* (n 52) [37]–[39]; *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 1(1).

[55] *Aviation Security Act Case* (n 52) [130].

[56] Ibid [124] (emphasis added).

[57] Ibid.

[58] See, eg, Daly (n 5) 45; Waldron, 'Dignity and Rank' (n 11) 27. However, it is arguable that this judicial application is in fact a misstatement of the Kantian formula, which insists that treating

Dignity as worth has also been used by courts in the context of the death penalty. In the Supreme Court of the United States decision *Gregg v Georgia*, Brennan J considered that

> [t]he fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as nonhumans, *as objects to be toyed with and discarded*. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.'[59]

The Constitutional Court of South Africa also invalidated the death penalty because 'it strips the convicted person of all dignity and treats him or her *as an object to be eliminated by the State*'.[60] This jurisprudence also conveys the idea of dignity as non-negotiable human worth precluding objectification and trade-offs.

2 *Dignity as Freedom or Autonomy*

Alternatively, dignity is often understood as freedom or autonomy. One version of this argument is that dignity means autonomy and nothing additional. Another version is that autonomy is but one strand of dignity that is worth emphasising or that dignity represents and protects autonomy as well as additional values. Like dignity, autonomy is a protean concept. Accordingly, theories that tie dignity to autonomy must be understood by reference to their definition of autonomy.

(a) Dignity as Thin Autonomy

Dignity as autonomy advocates tend to adopt a 'thin' concept of autonomy that focuses only on the rational capacity to choose and the exercise of the power to choose. Some go slightly further and include the availability of an adequate number of choices and of barriers to choice in the definition of autonomy. Griffin is one such proponent. For Griffin, 'autonomy is a major part of rational agency, and rational agency constitutes what moral philosophers have often

people *merely* as a means violates their dignity: Kant (n 45) 579. In the *Aviation Security Act Case* (n 52), the Act made it possible to take away one person's life to save the lives of others. The formula that was applied — that treating people as a means violates their dignity — is not attributable to Kant. Rather, Kant's formula is that treating people *merely* as a means violates their dignity. Nevertheless, even if it is not attributable to Kant, this is the way the German Constitutional Court and many others have understood dignity.

[59] 428 US 153, 230 (emphasis added) (1976), quoting *Furman v Georgia*, 408 US 238, 273 (Brennan J) (1972).

[60] *S v Makwanyane* [1995] 3 SA 391, 410 [26] (Chaskalson P) (emphasis added).

called, with unnecessary obscurity, the "dignity" of the person'.[61] The key to dignity — or at least, '[t]he sort of dignity relevant to human rights' — is the human capacity for agency.[62] The argument that dignity is simply thin autonomy may have two main ramifications. First, dignity would not inhere within all persons. Instead, its *origins*, *scope* and *distribution* are limited to autonomous persons who are capable of rational agency. Its *grip* is also contingent on the capacity for rational agency.

The second ramification of this account is that dignity becomes a 'useless concept'[63] or an 'oversqueezed orange … [with] no more to give to any side in a struggle'.[64] The *content* of dignity is freedom and nothing further. Macklin is emphatic that because dignity

> means no more than respect for persons or their autonomy … appeals to dignity are either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding of the topic.[65]

If the *content* of dignity is exclusively thin autonomy or freedom, dignity is arguably redundant.[66]

(b) Dignity as Thick Autonomy

The alternative version of the argument says that autonomy is but one strand of dignity worth emphasising or that dignity protects a richer concept of autonomy. Dworkin's theory is the key account.[67]

[61] James Griffin, 'A Note on Measuring Well-Being' in Christopher JL Murray et al (eds), *Summary of Measures of Population Health: Concepts, Ethics, Measurement and Applications* (World Health Organization, 2002) 129, 131.

[62] Griffin, *On Human Rights* (n 10) 152. Feinberg agrees that dignity consists of agency, stating that 'what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims': Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980) 151 (emphasis in original).

[63] Ruth Macklin, 'Dignity Is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy' (2003) 327(7429) *British Medical Journal* 1419, 1420.

[64] See Samuel Moyn, 'The Secret History of Constitutional Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 95, 111.

[65] Macklin (n 63) 1419.

[66] Khaitan observed that 'this approach sees dignity as a (rhetorically) useful but perhaps indistinct norm': Khaitan, 'Dignity as an Expressive Norm' (n 26) 19.

[67] See generally Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011) chs 9, 11 ('*Justice for Hedgehogs*'); Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A Knopf, 1993) 236–7; Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006).

For Dworkin, the *origins* and *content* of dignity consist of two basic principles: self-respect and authenticity.[68] These principles both concern how one ought to live (ethics) and how one ought to treat others (morality). First, the principle of self-respect requires that 'each person … takes his own life seriously' (an ethical principle).[69] The principle of self-respect also yields a moral imperative concerning how one ought to treat others. This is because recognition of the objective importance of one's own life necessarily generates recognition of the objective importance of other people's lives.[70] This amounts to respect for humanity in all its forms. Accordingly, Dworkin's principle of self-respect communicates the understanding that all humans have an intrinsic value. Dworkinian dignity thus has the same *origins*, *scope*, *distribution* and *grip* as Kantian dignity. However, its *content* differs.

The second principle, the principle of authenticity, is a robust principle of self-determination. It includes *content* that is not present in the two accounts considered so far. Authenticity refers to 'a special, personal responsibility' to shape one's life according to self-chosen standards — to identify, design and live by one's own understanding of success in life and not according to the decisions and values of others.[71] The same ethical responsibility and independence must be recognised and respected in others.[72] The key *content* of Dworkin's dignity is thus a principle of self-determination.

This principle of authenticity clearly overlaps with or is equivalent to certain conceptions of autonomy.[73] Dworkin is careful to distinguish his authenticity principle from a 'thin' concept of autonomy: '[a]uthenticity, on the other hand … is very much concerned with the character as well as the fact of obstacles to choice'.[74]

Dworkinian dignity is thus commonly understood to protect self-respect and authenticity. However, this summary of Dworkin is incomplete, at least in connection to dignity within political societies, the environment in which we will analyse Australian constitutional dignity. In addition to self-respect and authenticity, Dworkinian dignity also protects equality. Dworkin's fundamental

[68] Dworkin, *Justice for Hedgehogs* (n 67) 203–4.

[69] Ibid 203.

[70] Ibid 265.

[71] Ibid 204.

[72] Ibid 210–13.

[73] Ibid 265–6.

[74] Ibid 212. A close reading shows that it is only this thin or 'misguided' use of autonomy that Dworkin disavows: Susanne Sreedhar and Candice Delmas, 'State Legitimacy and Political Obligation in *Justice for Hedgehogs*: The Radical Potential of Dworkinian Dignity' (2010) 90(2) *Boston University Law Review* 737, 742 n 45.

principles of dignity appear to be seriously compromised in political societies in which subordination to authority, deference to decisions made by others and a degree of coercive social control are part and parcel. Dworkin explains how the coercive apparatus of government can be reconciled with respect for dignity. Dignity will be protected in a democracy

> if government governs in such a way as to treat all those it governs as partners in a collective enterprise so that each can treat collective decisions — even those he disapproves — as issuing from a process in which he has an *equal voice*.[75]

Put simply, government does not violate dignity *if it treats all those it governs with equal concern*.[76] This means that citizens must play a part in the decisions about how their behaviour is regulated and that this participation is equal among citizens.[77] In these conditions, coercive state power does not compromise dignity.[78] Thus, in the constitutional context, dignity consists of three parts: self-respect, authenticity, and equality (generated by self-respect and authenticity). Dworkin's rich account of dignity values autonomy but adds more. Thus, he overcomes the concern that dignity is redundant.

(i) Examples

Dignity as autonomy or freedom is the approach which several jurisdictions have taken in conceiving of a person's interest in deciding whether to have an abortion. For example, in *Planned Parenthood of Southeastern Pennsylvania v Casey*,[79] both the plurality opinion and the individual opinion of Stevens J used dignity language to explain a person's right to choose.[80] In the plurality opinion:

> Our cases recognize 'the right of the individual, married or single, to be *free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child*' … These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the *right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.*

[75] Sreedhar and Delmas (n 74) 741 (emphasis added).

[76] Dworkin, *Justice for Hedgehogs* (n 67) 330.

[77] Ibid 379.

[78] Ibid; Sreedhar and Delmas (n 74) 745.

[79] 505 US 833 (1992) ('*Casey*').

[80] McCrudden, 'Judicial Interpretation' (n 5) 689.

> Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[81]

Justice Stevens observed that '[t]he *authority to make such traumatic and yet empowering decisions* is an *element* of basic human dignity'.[82] These passages demonstrate a rich principle of self-determination as a key aspect of human dignity requiring state abstention.[83]

3 *An Expressive Dignity: Dignity as the Opposite of Indignity or Humiliation, or Dignity as Virtue*

A third conception of dignity focuses on the expressive character of dignity. Khaitan argues that '[w]hat dignity takes seriously is the expression of disrespect/insult/humiliation etc to a cherished person, object or value'.[84] One route to understanding dignity then is to focus on what indignity and humiliation involve in order to develop an account of what dignity itself is. It has been seen that subjectivity is a crucial component of the dignity as worth account and the dignity as autonomy accounts. Other scholars disagree on the relevance of subjectivity. For these scholars, dignity is a *negative content*: 'that which a person has when not humiliated by others'.[85] The 'essence of the concern' is *in*dignity, irrespective of 'whether that human being is conscious of the indignity or not'.[86] Margalit's conception of dignity[87] thus demands protection from indignity, not protection from the experience of indignity. Dignity is also not a positive concept to be fulfilled or created. This creates a duty not to humiliate other human beings.[88] In this theory, the *origins* of this concept of dignity are attributed. The *scope* and *distribution* attach to humans to whom we have 'attributed dignity'. The *grip* is categorical. A variant of this theory conceives of dignity as a manifest quality of character or behaviour. On this view, dignity is an 'aesthetic quality'

[81] *Casey* (n 79) 851 (O'Connor, Kennedy and Souter JJ for the Court) (emphasis altered).

[82] Ibid 916 (emphasis added).

[83] McCrudden, 'Judicial Interpretation' (n 5) 689.

[84] Khaitan, 'Dignity as an Expressive Norm' (n 26) 4. Khaitan's objective at 5 is to demonstrate

> dignity's special contribution to human rights law, one that sets it apart from other non-expressive values such as autonomy and equality. … [T]he expressive conceptions alone can make a distinctive contribution to human rights law. If dignity is not expressive, there is little it does that other values cannot do on their own.

[85] McCrudden, 'In Pursuit of Human Dignity' (n 6) 42.

[86] Ibid 40.

[87] See Avishai Margalit, 'Human Dignity between Kitsch and Deification' in Christopher Cordner (ed), *Philosophy, Ethics and a Common Humanity: Essays in Honour of Raimond Gaita* (Routledge, 2011) 106, 112.

[88] Ibid.

or virtue that 'manifests itself in human behavior'.[89] The *scope*, *distribution* and *grip* are dramatically reduced: 'some people (at least) are dignified (at least some of the time)'.[90] The *content* is an instruction 'to act in ways that express appropriate attitudes'.[91] However, several expressive conceptions of dignity are possible. For example, under a dignity as autonomy conception, '[a]ny action which suggests that an autonomous being is not capable or worthy of being autonomous would violate one's' dignity.[92] This is an instance where one theoretical conception is insufficient to guide legal actors. An expressive dignity must be substantiated by a determinate concept of dignity. This will be closely tied 'to a community's idea of civilized life and what is distinctly valued about human existence'.[93]

(a) Examples

An example of this use of dignity in law is the way dignity has been understood as central to what is being protected by prohibitions on degrading treatment.[94] The European Court of Human Rights ('ECtHR') consistently invokes dignity language in this way. For example, in *Ireland v United Kingdom*,[95] the ECtHR viewed dignity as determinative when considering what constituted 'degrading treatment' under art 3 of the *European Convention on Human Rights*:[96]

> In the present context it can be assumed that it is, or should be, intended to denote something seriously *humiliating, lowering as to human dignity, or disparaging*, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke *ridicule or contempt* …[97]

[89] Rosen (n 7) 6, citing Aurel Kolnai, 'Dignity' in Robin S Dillon (ed), *Dignity, Character, and Self-Respect* (Routledge, 1995) 53.

[90] Rosen (n 7) 6.

[91] Khaitan, 'Dignity as an Expressive Norm' (n 26) 5 n 25, quoting Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148(5) *University of Pennsylvania Law Review* 1503, 1504.

[92] Khaitan, 'Dignity as an Expressive Norm' (n 26) 14.

[93] R James Fyfe, 'Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007) 70(1) *Saskatchewan Law Review* 1, 3.

[94] McCrudden, 'Judicial Interpretation' (n 5) 686–8.

[95] (1978) 25 Eur Court HR (ser A) ('*Ireland v United Kingdom*').

[96] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[97] *Ireland v United Kingdom* (n 95) 114 [27] (emphasis added).

Another example is the 'dwarf-throwing' case heard in the French Conseil d'État.[98] Here, the Conseil d'État affirmed that protection of human dignity justified a ban on the spectacle of dwarf-throwing, notwithstanding that the dwarfs consented to the activity.[99] The Conseil d'État found that 'the dwarfs compromised their own dignity by allowing themselves to be used as a projectile'.[100] In this case, dignity as the opposite of indignity came into conflict with dignity as thick autonomy.

4 *Dignity as Equal Status*

Kantian dignity, Dworkinian dignity and expressive attributed dignity pull towards the dignity as worth pole. The dignity as honour pole is starkly different across the four criteria:

> Honor is of social *origin*: it derives from and reflects one's social position and the norms and attitudes that define it … Consequently, honor is in principle limited in *scope*, capable of privileging only those who occupy certain positions while excluding others who occupy different ones … Relatedly, the *distribution* of honor is typically uneven and hierarchical, reflecting and indeed in part constituting social stratification …[101]

Under the dignity as honour or ranking status accounts, dignity is an attributed quality giving expression to moral status. Historically, dignity or *dignitas* was connected to hierarchy, rank and office, and the privileges and deference due to each.[102] Dignity was understood as an honour attached to people of certain status. Waldron introduces a conception of dignity as universalised high social rank ('dignity as equal status' or 'dignity as transvaluated rank') — an account a world apart yet keeping in 'faith' with the historic conception.[103] Waldron's account is of 'dignity as a high-ranking status, comparable to a rank of nobility — only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man'.[104] The modern notion of dignity 'involves an upwards equalization of rank'.[105] Combining the historical conception with modern commitments to equality leads to an equal status-

[98] Conseil d'État [French Administrative Court], 27 October 1995 reported in [1995] Rec Lebon 372.

[99] Ibid; Brownsword (n 8) 29–30, cited in Fyfe (n 93) 3.

[100] Fyfe (n 93) 3.

[101] Dan-Cohen (n 18) 4 (emphasis added).

[102] Waldron, 'Dignity and Rank' (n 11) 30.

[103] Ibid 30–3; Waldron, 'Dignity of Groups' (n 46) 71, 73, 87.

[104] Waldron, 'Dignity and Rank' (n 11) 22.

[105] Ibid 33.

based conception of the dignity of the citizen. The motivation behind the account is Waldron's view that 'we *should* contrive to keep faith' with these ancient connections.[106]

Interestingly, Waldron says that the dignity of the citizen is different to human dignity but that the two are congruent in many respects.[107] The dignity of the citizen casts considerable light on human dignity.[108] It is recalled that Dworkin worked in the opposite direction, beginning with human dignity and theorising a political association that can appropriately respect it.[109] What is most notable for the constitutional context is that under both conceptions of the dignity of humans in political association, a key strand of the *content* of dignity is that there must be equality between citizens and between the government and the governed.

(a) Examples

Reliance on equal status-based conceptions of dignity are prevalent in the judicial interpretation of constitutional and statutory equality and of anti-discrimination requirements in several jurisdictions.[110] For example, in *Law v Minister of Human Resources Development*, Iacobucci J described human dignity in equal status-based terms:

> Human dignity means that an individual or group feels self-respect and self-worth. … Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. … Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.[111]

In this passage, Iacobucci J is relatively straightforward in his explanation of human dignity as equal treatment.

[106] Ibid 30 (emphasis added).

[107] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 327, 333.

[108] Ibid.

[109] See above Part II(B)(2)(b).

[110] Daly (n 5) 34–5, 90–1; McCrudden, 'Judicial Interpretation' (n 5) 689–94.

[111] [1999] 1 SCR 497, 530 [53].

C *The Relevant Differences among the Accounts*

These four accounts capture a range of meanings of dignity. As I have done until this point, most authors handle these meanings discretely.[112] Listed in this way, it is easy to view these concepts as distinct or rival and, subsequently, to fall for a 'destructive analytic critique' conceiving of dignity as redundant or confused.[113] But to be distinct or rival would require *relevant* mutually exclusive differences between the accounts. It has been asserted that the *scope*, *distribution* and *grip* of most of the definitions is the same. Dignity as worth, dignity as thick autonomy, expressive dignity, and dignity as equal status (together, the 'potentially overlapping theories') all have universal *scope*, applying to every human being, and an even *distribution* over humanity as a whole. In each of these accounts, dignity has a strong 'categorical' *grip*: 'attaching to all its possessors by virtue of their being human, no matter what'.[114] The only exceptions are dignity as thin autonomy (attaching to those with rational agency and meaning no more than rational agency) and the outdated idea of dignity as honour (attaching according to social convention) (together, the 'outlier theories').

The potentially overlapping theories may be able to cohere. Putting the outlier theories to one side leaves two areas for divergence between the potentially overlapping theories: *origins* and *content*. The *origins* of dignity in each account are starkly different. The accounts vary as to whether dignity is intrinsic to all humans or is attributed to all humans. This boils down to a choice between dignity as being tied to the 'philosophy of worth' or tied to the 'tradition of honour'. Waldron insists on his account because of his view that 'universal and equal dignity is better anchored in evolving social practice than in Kantian metaphysics'.[115] However meritorious this claim may be, it also exposes the limited significance of the role of dignity's *origins*. Certainly, *origins* are relevant to the extent they determine dignity's *content* and, indeed, its *scope*, *distribution* or *grip*. However, it has already been shown that this *origins* debate has no bearing

[112] Waldron, for example, identifies three definitions: (i) the Kantian idea of non-fungibility; (ii) the Dworkinian idea of self-determination; and (iii) his own idea of transvaluated noble rank: Waldron, 'Dignity of Groups' (n 46) 69, 73. Rosen refers to 'four strands' of meaning: (i) dignity as intrinsic value (including the Kantian concept); (ii) dignity as a status (including Waldron's concept); (iii) dignity as an expressive concept; and (iv) his own idea of dignity as respectfulness: Rosen (n 7) 114. I have demarcated four definitions: (i) dignity as worth (with emphasis on the Kantian concept); (ii) dignity as autonomy (with emphasis on the Dworkinian concept); (iii) expressive dignity (including Rosen's idea of respectfulness); and (iv) dignity as equal status.

[113] Waldron, 'Dignity and Rank' (n 11) 15–16.

[114] Dan-Cohen (n 18) 4.

[115] Ibid 5.

on the latter three criteria. The key point then is the *content* of the dignity itself and the *origins* must only be relevant to the point they shape or effect dignity's *content*. Despite Waldron's insistence on keeping faith to dignity's historical *origins*, the significance of the *origins* debate shrinks due to his understanding of the development of dignity from its inception to its range of current invocations. Waldron's account concerns dignity as a legal concept, not as a philosophical concept. Waldron says that dignity is 'an artifact of philosophers … imported from law'.[116] However, while law is his starting point, Waldron also embraces principles of morality. For Waldron, '[l]aw creates, contains, envelops, and constitutes these ideas'.[117] It follows that both of dignity's *origins* in the philosophy of worth and its *origins* in the tradition of honour may be relevant to its current form and *content*, with the question of which came first having little bearing on the contemporary *content*. A dignity account is thus not clarified or made more determinate or coherent on account of taking a stand in the *origins* debate.

D *Substantive and Holistic Dignity*

The 'destructive analytic critique' is dependent on the distinct meanings of dignity having rival or mutually inconsistent *content*. I demonstrated that the *origins* and *content* of dignity are the main sites of difference and that the *scope*, *distribution* and *grip* are much the same across each theory. Nevertheless, the differences in *origins* and *content* can be largely resolved in the complementary four-dimensional definition of dignity that I sketch. I argue that the potentially overlapping theories can come together and provide a multivalent definition of 'substantive and holistic dignity' comprising four dimensions. The definition is both substantive and holistic. It is substantive because it has a solid basis, is self-sustaining and is not illusory. It encapsulates the essential parts or aspects of dignity. It is holistic because it recognises that these essential parts *may* contribute to a whole concept. The differences in *content* can be brought together in the complementary four-dimensional definition of dignity that I propose. This exposition of the way the various uses and meanings of dignity can sit together dispels any impression of rival definitions or that dignity is a redundant concept. This sits in contradistinction to the outlier theories (comprising dignity as thin autonomy, which has been flagged as problematic and potentially redundant, and the historical conception of dignity as honour, which has been rejected). Thus, I do not argue that all of the several conceptions of dignity

[116] Waldron, 'Dignity and Rank' (n 11) 14.

[117] Ibid 15.

relied upon throughout history can be held at the same time. Rather, the argument is that the overlapping theories identified above may be plausibly held at the same time. This is an argument for compatibility and cohesion across several key meanings, as opposed to an argument that these key meanings can be collapsed into a single idea.

There have been two previous suggestions that a definition of this kind may be possible. Waldron had a hunch that '[s]ometimes the various ideas associated with what we suspect is an ambiguous term in fact turn out to make complementary rather than rival contributions to its meaning'.[118] He instructed us to 'first check whether the alleged ambiguities might not be combinable as complementary contributions to a single multifaceted idea'.[119] In 2008, Waldron briefly suggested this in a comparatively neglected lecture. He observed that

> human dignity might ascribe to each person a very high rank, associated with the sanctity of her body, her control of herself and her determination of her own destiny, values and capacities that are so important that they must not be traded off for anything.[120]

He explained that

> [t]he three definitions we have been considering [ie (i) the Kantian idea of non-fungibility; (ii) the Dworkinian idea of self-determination; and (iii) transvaluated noble rank] *make disparate but complementary contributions to this complex idea*. The rank definition tell[s] us about the ontological basis of dignity, the Kantian contribution tells us about the axiological status of the values involved, and the Dworkinian idea points us towards the capacities that are going to be privileged and treasured in this way.[121]

Waldron did not attempt to bring together *all* the meanings of dignity under one umbrella.[122] However, he hinted that the various conceptions may be complementary.[123] Also in 2008, McCrudden queried whether 'a common core to the idea of dignity' could be identified despite divergences between jurisdictions and the 'several different strands of metaphysical and philosophical

[118] Ibid 16.

[119] Ibid.

[120] Waldron, 'Dignity of Groups' (n 46) 73.

[121] Ibid (emphasis added).

[122] For instance, Waldron focused on the claim that rights are based on dignity or 'human dignity as a foundational right' as opposed to dignity as the content of certain rights: ibid 68 (emphasis omitted). In so doing, Waldron considered only some of the jurisprudential functions of dignity: at 69. See also above n 36.

[123] Waldron, 'Dignity and Rank' (n 11) 16.

thinking feeding these differences'.[124] McCrudden demarcated the outlines of a 'basic minimum content' of human dignity comprising three elements:

> The first is that every human being possesses an intrinsic worth, merely by being human [the 'ontological' claim]. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth [the 'relational' claim]. … [The third] is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa [the 'limited-state' claim].[125]

However, McCrudden's minimum content is intended to capture transnational *consensus* on the meaning of dignity. McCrudden thus stated the minimum content at a 'very high level of generality', holding 'within it the seeds for much debate'.[126] Because McCrudden's criteria for formulating the minimum core is consensus, he does not attempt to reconcile the 'fault lines', being

> disagreement on what that intrinsic worth consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state.[127]

Nevertheless, McCrudden's formulation is a strong indication that several of the dominant conceptions can be complementary to each other. While he maintains that there is an 'absence of a consensus *substantive* meaning of the concept beyond that minimum core',[128] the consensus minimum core itself suggests that at least three of the conceptions should be considered compatible across several jurisdictions.

Waldron and McCrudden's formulations are thus strong indications that the various uses of dignity can be united in a single but complicated definition. However, both accounts are limited. Neither account substantiates the idea.[129] Notwithstanding their brevity, both accounts are unduly committed to the *origins* debate and both accounts miss a fourth dimension. Waldron captures three of the ideas explored in this article: (i) the Kantian idea of non-fungibility; (ii) the Dworkinian idea of self-determination; and (iii) his own idea of transvaluated noble rank. However, he does not include the expressive concept of dignity.

[124] McCrudden, 'Judicial Interpretation' (n 5) 675.

[125] Ibid 679.

[126] Ibid.

[127] Ibid 723.

[128] Ibid 724 (emphasis added).

[129] Waldron does not substantiate such a definition. Nor did McCrudden, as his minimum content was intended to be descriptive as opposed to theoretical: see ibid 679–80.

In McCrudden's terms, Waldron does not include the relational claim. His definition merely identifies 'the capacities that are going to be privileged and treasured'.[130] It omits *how* the capacities are to be privileged and treasured. Conversely, McCrudden's minimum content does not include the Kantian idea of non-fungibility. Moreover, he intentionally makes no attempt at delineating what comprises intrinsic worth because doing so is beyond the bounds of consensus.[131] Accordingly, McCrudden's minimum content contains no indication as to which values and capacities possessed by humans fall within the bounds of ontological 'intrinsic worth' and thus require recognition and respect under the relational claim and the limited-state claim. In addition, I consider both accounts to be unduly committed to the *origins* debate because, beyond its specification at the ontological level, this debate does not appear to have any other bearing on the definition of 'intrinsic worth'. My 'holistic and substantive dignity' account attempts to cure these shortcomings. I propose a multivalent definition of 'substantive and holistic dignity' comprising four dimensions:

1 Substantive and holistic dignity is distributed equally, universally and categorically (the application dimension);

2 Substantive and holistic dignity consists of the sanctity of the body, control of oneself and determination of one's own destiny, values and capacities (the qualities dimension);

3 Substantive and holistic dignity is so important that it must not be traded off for anything (the non-fungibility dimension); and

4 Substantive and holistic dignity demands treatment consistent with the qualities dimension — this means some forms of treatment by others (whether at the individual or state level) are inconsistent with, or required by, respect for substantive and holistic dignity (the duties dimension).

The first dimension responds to the *distribution*, *scope* and *grip* criteria. On this dimension, dignity operates as an eligibility norm concerning who should be treated in dignity-respecting ways. This dimension is sufficiently determinate without needing recourse to the *origins* debate. The three remaining dimensions — the qualities, non-fungibility and duties dimensions — set out the key aspects of the *content* of dignity. Along these dimensions, dignity is a treatment principle concerning how persons with dignity should be treated.[132] My

[130] Waldron, 'Dignity of Groups' (n 46) 73.

[131] McCrudden, 'Judicial Interpretation' (n 5) 679–80, 723.

[132] It is beyond the scope of this article to explore in detail the potential applications of the fourth dimension.

account includes a thicker development of the qualities protected by dignity than the brief suggestions from McCrudden or Waldron. Whether adopting my definition, or the suggestions from McCrudden or Waldron, the notion of rival definitions and the claims that dignity is a redundant or confused concept are mightily reduced.

This four-dimensional 'substantive and holistic dignity' account acknowledges, and indeed is grounded in, the possibility that the invocation of dignity in any given jurisdiction or legal context may embrace one or more of the four dimensions to a range of extents. I do not suggest that this framework will be applied identically across jurisdictions. There are several reasons why the meaning and application of dignity will diverge across jurisdictions, including but not limited to the way in which dignity is incorporated into the relevant legal texts; the culturally relative aspects of the meaning of dignity; and the context-specific applications of dignity, including that dignity will be brought into conflict with other open-textured values.

It is important at this juncture to recall the difference between a degree of uncertainty or alleged inconsistency in some *applications* of dignity and the charge of complete indeterminacy or incoherency of the concept. Where dignity is being weighed as a legal principle as part of a balancing test, for example as part of a proportionality analysis, the context-specific nature of that analysis and the inevitable instances of dignity conflicting with itself and with other values may mean that one dimension of dignity does not always prevail or prescribe the same outcome. Several rival concepts, such as autonomy, equality or justice, are frequently weighed in proportionality-style analyses on both sides of the argument. That legal values or principles may come into conflict does not render them inherently incoherent. Rather, it is part of the structure and utility of legal principles that they behave in this way.[133] An objection to dignity being used in this way may reflect the 'inherent limitations that reliance upon nebulous values may pose in structured proportionality review' and the associated challenges regarding commensurate claims concerning the same value,[134] as opposed to a dignity-specific complaint.[135]

At a minimum, the four-dimensional dignity account provides a framework that will enable legal actors to interpret and apply the concept more transparently. This framework will allow us to fruitfully compare the use of dignity in different jurisdictions. It will assist us to understand and evaluate any given

[133] See above nn 30–5 and accompanying text.

[134] Henckels, Sifris and Penovic (n 2) 555, 563–4.

[135] For a consideration of 'dignity's utility as a common measure' in such cases, see ibid 565–6.

interpretation or application of dignity, as will be seen in Part III in its application to *Clubb*.

E *Conclusion*

This part squarely confronted the claims that dignity is a redundant or confused concept. First, I explained that dignity is a contingent term. Its meaning is not fixed. Second, I sketched the main uses or understandings of dignity in modern constitutional and human rights law. I argued that dignity is a multivalent concept capable of being interpreted and applied in different and overlapping ways. However, I argued that these different and overlapping conceptions can be complementary. While certain legal invocations and understandings do conflict, the 'substantive and holistic dignity' definition both accommodates dignity's contingent meaning and allows us to overcome instances of complete mutual incompatibility. It thus brings legal argument and analysis along four dimensions. This will allow us to highlight when a jurisdiction's approach to or understanding of dignity is muddled or inconsistent as opposed to condemning dignity at large. Given dignity is so deeply embedded in legal argument across jurisdictions, this allows us to move toward productive analysis. Given the arrival of dignity in Australian constitutional law, this is a task Australian lawyers must also confront.

III Dignity in *Clubb*

I explained above that dignity is a contingent term.[136] In the academic engagement with *Clubb* so far, Stephenson has acknowledged that the meaning of dignity is not fixed and that one challenge with the reliance on dignity in *Clubb* 'is to determine what is actually meant by the term'.[137] He explained that the 'challenge is that dignity can refer to a range of ideas and interests, some of which are mutually inconsistent'.[138] Stephenson's work predominantly focused on the *role* of dignity in Australian constitutional law,[139] as opposed to the *meaning* of dignity. The objective was to highlight issues that the High Court will need to

[136] See Part II(A).

[137] Stephenson (n 2) 388.

[138] Ibid 389.

[139] See ibid 372–7. Henckels, Sifris and Penovic (n 2) 555 also raised a range of concerns about the use of dignity in *Clubb* (n 1). Rochow and Rochow explore the use to which 'dignity may now be put' and, in particular, the potential relationship between *Clubb* (n 1) and religious freedom in Australia: Neville Rochow and Jacqueline Rochow, 'From the Exception to the Rule: Dignity, *Clubb v Edwards* and Religious Freedom as a Right' (2020) 47(1) *University of Western Australia Law Review* 92, 94.

address if it continues to use dignity in the same manner as it did in *Clubb*.[140] While Stephenson demonstrated that questions about dignity's meaning cannot be circumvented by simply adopting a 'capacious' definition,[141] he ultimately concluded 'that there are no straightforward ways of resolving' the meaning of dignity in Australian constitutional law.[142] Thus, Stephenson went no further than observing that the use of dignity in *Clubb* 'potentially encompasses a wide range of understandings of the term'.[143] He correctly concluded that '[t]he High Court will need to specify what it means by dignity before it can be usefully employed … and that will be no easy task'.[144] However, I argue that in *Clubb*, the High Court did begin to specify what it means by dignity. This part explores exactly what it said. I assert that the extant meaning of Australian constitutional dignity can be revealed through a doctrinal analysis. The following doctrinal analysis of the meaning of dignity in *Clubb* is a new and necessary contribution to Australian and comparative constitutional law. However, this doctrinal analysis of dignity's application in one case will not resolve all the outstanding questions about the meaning and role of dignity in all future cases.

I begin with an overview of the High Court's invocations of dignity in *Clubb*. I then analyse these uses to discern a potential meaning of dignity in Australian constitutional law. I identify aspects of all four dimensions of substantive and holistic dignity. I weigh in on the *origins* debate to the extent it is relevant. This analysis provides the groundwork for future normative analysis on the proper role and *content* of dignity as an Australian constitutional value.[145]

[140] Stephenson (n 2) 388.

[141] Ibid 390.

[142] Ibid 394.

[143] Ibid 389.

[144] Ibid 390.

[145] Henckels, Sifris and Penovic also examined the High Court's treatment of the concept of dignity through the lens of *Clubb* (n 1). They considered the meaning of dignity in cases concerning access to abortion and freedom of speech: Henckels, Sifris and Penovic (n 2) 557–62. They argued that in such cases courts tend to approach dignity in a 'dichotomous' way as either 'dignity-as-autonomy or dignity-as-constraint': at 556–7. They also acknowledged that this approach was not exhaustive of how dignity could or should be understood, as it only incorporates two 'frames' of dignity and only in two subsets of cases: at 557. This dichotomy in *Clubb* (n 1) was, 'in stark terms, dignity-as-autonomy through exercising a person's reproductive choices, versus dignity-as-autonomy through engaging in political communication': Henckels, Sifris and Penovic (n 2) 566. In this article, I demonstrate that this confined approach misses several of the dimensions of dignity present in *Clubb* (n 1), including the application dimension (how does Australian constitutional dignity apply?), the qualities dimension (what type of autonomy is protected?); the non-fungibility dimension (is this dimension present in the Australian conception?); and the duties dimension (what type of behaviour is prescribed?).

A *Overview of the Judgment*

Clubb involved challenges to the constitutional validity of Tasmanian and Victorian legislative provisions prohibiting protest activities within a 150-metre radius of a facility where abortion services were provided ('safe access zones').[146] The laws were challenged on the basis that they violated the implied freedom of political communication.[147] The Court found that the laws restricting protests outside of abortion facilities were justified limitations on the implied freedom partly on the basis that they protected the dignity of persons accessing those facilities.[148] I will first set out the different areas in which dignity was put to work, before examining the different ideas about dignity that emerged in these different contexts. The concept of dignity was relevant to the judicial assessment of the validity of the law's burden on the implied freedom. It was relied on in four stages of the reasoning, concerning the law's legitimate purpose, suitability, necessity and adequacy in the balance.

1 *Dignity as a Legitimate Purpose of the Impugned Law*

First, the Court recognised that dignity was a part of the legitimate purpose of the law. The plurality acknowledged that one of the purposes of the Victorian legislation was 'the preservation and protection of the privacy and dignity of women accessing abortion services'.[149] The plurality then observed that '[p]rivacy and dignity are closely linked; they are of special significance in this case'.[150] Their Honours elaborated on what dignity means by reference to Barak's extra-judicial writing that claims that dignity 'is the source from which all other … rights are derived' and that '[d]ignity unites the other human rights into a whole'.[151] For Barak, the 'right to dignity' is therefore the '[m]ost central of all human rights'.[152] The plurality then said:

> Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person. As Barak said, '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.

146 *Clubb* (n 1) 185 [2]–[3], 187 [9] (Kiefel CJ, Bell and Keane JJ).

147 Ibid 185–6 [4].

148 Ibid 215 [127]–[128] (Kiefel CJ, Bell and Keane JJ), 241 [213] (Gageler J), 276 [294], 286 [325] (Nettle J), 304 [386]–[387] (Gordon J), 345 [501] (Edelman J).

149 Ibid 195 [49] (Kiefel CJ, Bell and Keane JJ).

150 Ibid 195–6 [49].

151 Ibid 196 [50], quoting Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 85 ('*The Judge in a Democracy*').

152 *Clubb* (n 1) 196 [50] (Kiefel CJ, Bell and Keane JJ), quoting Barak, *The Judge in a Democracy* (n 151) 85.

> Within the present constitutional context, the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom, is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Thus, when in *Lange* the Court declared that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia', there was no suggestion that any member of the Australian community may be *obliged* to receive such information, opinions and arguments.[153]

In concluding that the Victorian law had a legitimate purpose, their Honours said:

> [A] law that prevents interference with the privacy and dignity of members of the people of the Commonwealth through co-optation as part of a political message is consistent with the political sovereignty of the people of the Commonwealth and the implied freedom which supports it.[154]

Justice Nettle understood the purpose of the Victorian law in similar terms:

> [W]omen seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and with dignity, without haranguing or molestation. The protection of the safety, wellbeing, privacy and dignity of the people of Victoria is an essential aspect of the peace, order and good government of the State of Victoria and so a legitimate concern of any elected State government. …
>
> A law which has the purpose of protecting and vindicating 'the legitimate claims of individuals to live peacefully and with dignity', as is the case here, is consistent with the implied freedom.[155]

[153] *Clubb* (n 1) 196 [51] (Kiefel CJ, Bell and Keane JJ) (emphasis in original) (citations omitted), quoting Barak, *The Judge in a Democracy* (n 151) 151, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'). Their Honours also found that the Tasmanian law's purpose was also to protect the dignity of women accessing abortion services even though it was not expressly stated in the *Reproductive Health (Access to Terminations) Act 2013* (Tas): *Clubb* (n 1) 213 [120]–[122] (Kiefel CJ, Bell and Keane JJ).

[154] *Clubb* (n 1) 198–9 [60] (Kiefel CJ, Bell and Keane JJ) (citations omitted).

[155] Ibid 260–1 [258]–[259].

Justice Nettle also found that the protection of dignity was one of the purposes of the Tasmanian legislation.[156] He added:

> Although views differ as to the moral and ethical propriety of the intentional termination of human pregnancy, it is now a lawful medical procedure in Tasmania. Accordingly, a purpose of improving the health and wellbeing of women by enabling their access to a lawful termination service, privately, with dignity and without harassment, stigma or shame, is a purpose which is consistent with the system of representative and responsible government mandated by the *Constitution*. …
>
> [T]he purpose is to protect the health and wellbeing of women seeking termination of their pregnancies by shielding them from the haranguing, shaming and stigmatising of anti-termination protesters in close proximity to the premises.[157]

For Gageler J, the Tasmanian law's purpose also was

> to ensure that women have access to premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity. The purpose so identified is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling.[158]

Justice Edelman also concluded that the protection of dignity is a legitimate purpose. He stated that it is legitimate for Parliament

> to make laws for peace, order and good government, including those laws that provide substantive aspects of a free and democratic society and laws that guarantee social human rights, such as 'respect for the inherent dignity of the human person'.[159]

[156] Like the plurality, Nettle J held that

> the legislative purpose of proscribing protests in relation to terminations in the access zone as it appears from the text of the proscription read in context presents as the advancement of women's health through the enablement of women's access to lawful termination services, privately, with dignity and without the adverse psychological impact of being subjected to the harangue of abortion protesters.
>
> Ibid 280 [306].

[157] Ibid 280–1 [307], [309] (citations omitted).

[158] Ibid 235–6 [197].

[159] Ibid 344 [497] (citations omitted), quoting *R v Oakes* [1986] 1 SCR 103, 136 [64] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ). Unlike the other judges, Edelman J did not source the dignity purpose within the *Constitution* itself. However, in more recent judgments, Edelman J has more explicitly linked the protection of dignity and the

Mrs Clubb advanced an argument challenging the legitimacy of the Victorian law's purpose. On one formulation, this argument was that 'to prohibit communications on the ground that they are apt to cause discomfort is not compatible with the constitutional system'.[160] This is because 'political speech is inherently apt to cause discomfort, and causing discomfort may [even] be necessary to the efficacy of political speech'.[161] The plurality observed:

> The tendentious suggestion that the communication prohibition might be engaged by conduct apt to cause no more than 'discomfort' or 'hurt feelings' calls to mind suggestions to the effect that political speech cannot be truly free if it can be silenced for no reason other than to spare the feelings of those spoken about. Suggestions to that effect may have some attraction in the context of public conflict between commercial or industrial rivals or in the context of a political debate between participants who choose to enter public controversy. But they have no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain.[162]

On another formulation, Mrs Clubb's submission was that the protection of dignity is not a legitimate purpose 'because all political speech has the potential to or does affect the dignity of at least some others'.[163] Justice Nettle rejected this argument on the basis that it misconceives the nature of the implied freedom:

> It is a freedom to communicate ideas regarding matters of political controversy to persons who are willing to listen. It is not a licence to accost persons with ideas which they do not wish to hear, still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of seeking lawful medical advice and assistance. A law which has the purpose of protecting and vindicating 'the legitimate claims of individuals to live peacefully and with dignity', as is the case here, is consistent with the implied freedom.[164]

protection of the implied freedom: see, eg, *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1, 62 [264] ('*Farm Transparency*').

160 *Clubb* (n 1) 196 [52] (Kiefel CJ, Bell and Keane JJ).

161 Ibid 196–7 [52].

162 Ibid 198 [59].

163 Ibid 261 [259] (Nettle J).

164 Ibid (citations omitted).

2 *Dignity and Suitability*

Second, the plurality invoked a concept of dignity in evaluating the law's suitability. The suitability assessment turns on whether the law is rationally connected to its legitimate purpose.[165] This involves a consideration of the nature and extent of the burden on the implied freedom.[166] Mrs Clubb's argument turned on the alleged special potency of onsite protests as a form of political communication. She submitted that such protests were 'a characteristic feature' of political debate about abortion.[167] Accordingly, she said that the Victorian law targeted political communication at the very location where it is most effective, which amounted to a significant burden on the implied freedom and demonstrated that the law had no rational connection to its legitimate purpose.[168] In support of her argument, Mrs Clubb drew on the decision of *Brown v Tasmania*, where the High Court invalidated a Tasmanian law restricting protest activities near forestry operations.[169] In that case, the 'long history of political protests' at environmental sites in Australia contributed to the conclusion that the law imposed a considerable burden on political communication.[170]

The plurality in *Clubb* rejected the analogy. The most important reason for distinguishing the two cases was that '[t]he on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message'.[171] Their Honours observed that the burden on the implied freedom only applied within the safe access zones and that

> [i]t is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is apt to be most effective to deter those persons from making use of the facilities available within the safe access zones. This, after all, is the very reason for Mrs Clubb's activities. Mrs Clubb's own argument demonstrates that the legitimate purpose which justifies the burden is at its strongest within the perimeter of the safe access zones. Within those zones, the burden on the implied freedom is justified by the very

165 Ibid 186 [6] (Kiefel CJ, Bell and Keane JJ).

166 Ibid 202 [75].

167 Ibid 203 [80].

168 Ibid.

169 (2017) 261 CLR 328, 375 [154] (Kiefel CJ, Bell and Keane JJ), 397 [234] (Gageler J), 425 [295] (Nettle J).

170 Ibid 346–7 [32]–[33] (Kiefel CJ, Bell and Keane JJ), 387–8 [191]–[193] (Gageler J), 400 [240], 410–11 [264] (Nettle J).

171 *Clubb* (n 1) 204 [82] (Kiefel CJ, Bell and Keane JJ).

> considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom.[172]

3 *Dignity and Necessity*

Third, dignity was determinative in answering the necessity question. The necessity question considers whether the burden on the implied freedom is necessary to achieve the legitimate purpose.[173] It includes consideration of whether there were less burdensome alternatives capable of achieving the legitimate purpose.[174] Unlike the Victorian law, the Tasmanian law applied whether or not the prohibited protest was likely, reasonably likely or reasonably possible to cause distress or anxiety.[175] Mr Preston argued that the Tasmanian protest prohibition would be less burdensome if such a limiting requirement was included.[176] The plurality rejected the argument, finding that

> the absence of a limiting requirement that the protest be likely to cause distress or anxiety is of little moment … A public demonstration or manifestation about abortions in the vicinity of a clinic inevitably constitutes a threat to the equanimity, privacy and dignity of a pregnant woman seeking medical advice and assistance in relation to a termination. And that will be so whether or not such a person is likely to suffer distress or anxiety as a result. A decision to avoid a protest about abortions may reflect a calm and reasonable decision to eschew an unwelcoming environment as well as a stressed and anxious reaction to it.[177]

4 *Dignity in the Balance*

Finally, the plurality invoked dignity in its assessment of the Victorian law's adequacy in its balance and in its conclusion that the law did not impermissibly burden the implied freedom. Their Honours stated:

> The implied freedom is not a guarantee of an audience; a fortiori, it is not an entitlement to force a message on an audience held captive to that message. As has been noted, it is inconsistent with the dignity of members of the sovereign people to seek to hold them captive in that way.
>
> A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message

[172] Ibid.

[173] Ibid 186 [6].

[174] Ibid.

[175] Ibid 212 [116].

[176] Ibid 214 [125].

[177] Ibid 214 [125]–[126].

> accords with the political sovereignty which underpins the implied freedom. A law that has that effect is more readily justified in terms of the third step of the *McCloy* test than might otherwise be the case.[178]

Their Honours further stated:

> [I]n the present case, difficulties in the balancing exercise do not loom as large as they sometimes may. The balance of the challenged law can, in significant part, be assessed in terms of the same values as those that underpin the implied freedom itself in relation to the protection of the dignity of the people of the Commonwealth.[179]

B *The Dimensions of Australian Constitutional Dignity*

Various ideas emerge from these excerpts that capture aspects of each of the four dimensions of substantive and holistic dignity.

1 *The Application Dimension*

It appears that Australian constitutional dignity attaches to 'the people of the Commonwealth' and is distributed equally among them. The plurality used the following iterations: 'the dignity of the people of the Commonwealth' (which appeared twice);[180] the 'dignity of members of the people of the Commonwealth';[181] the 'dignity of the citizen as a member of the sovereign people';[182] and 'the dignity of members of the sovereign people'.[183] Justice Nettle also referred to the 'dignity of the people of Victoria'.[184] And, in their initial handling of dignity, the plurality appeared to accept that the protection was conferred on 'any member of the Australian community'.[185] In addition to demonstrating the equal *distribution* of dignity, the *origins* debate set out in the previous section is clearly at play here. These statements quite straightforwardly capture an equal status-based conception of dignity that is anchored to membership of the Commonwealth (reminiscent of Waldron's dignity as transvaluated rank). The outer

[178] Ibid 208–9 [98]–[99] (citations omitted). Their Honours also found that this purpose helped establish that the Tasmanian law satisfied the third step of the structured proportionality test: at 215 [125]–[127].

[179] Ibid 209 [101].

[180] Ibid 196 [51], 209 [101].

[181] Ibid 198 [60].

[182] Ibid 204 [82].

[183] Ibid 208 [98].

[184] Ibid 261 [258].

[185] Ibid 196 [51] (Kiefel CJ, Bell and Keane JJ).

boundary of that membership is not entirely clear and questions remain as to whether dignity is attributed only to those with the formal status of citizen or on the basis of another membership criterion.

However, two aspects of the judgment put pressure on this status-based conception and suggest that the dignity derives from the humanity or intrinsic worth of the people of the Commonwealth, or is at least informed by it. First, the plurality's definition of dignity explicitly referred to 'human dignity' and cited Barak's definition of it.[186] Stephenson points out that 'Barak is the only person cited in [the] judgment on the meaning of dignity'.[187] The plurality includes Barak's conception of the relationship between dignity and all other human rights.[188] Barak invokes the Kantian catchcry that '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.[189] This pulls us clearly into dignity as worth territory. It could be that the plurality moves in the same direction as Dworkinian dignity, beginning with the idea of human dignity and applying that within the political association set out in the *Australian Constitution*. This could explain why dignity explicitly attaches to members of the Commonwealth, but includes dignity as worth features. The plurality's language suggests that human dignity and the dignity of the citizen are congruous, and that human dignity casts light on the dignity of the people of the Commonwealth.

Second, in the plurality judgment, dignity is understood to apply only to natural persons and their activities. This is clear from the plurality's response to Mrs Clubb's argument concerning the alleged special potency of onsite protests. In rejecting that argument, the plurality relied on dignity to identify a type of harm caused by the protest activities — 'an attack upon the privacy and dignity of other people'.[190] Stephenson points out that in doing so, their Honours distinguished the position of natural persons from that of corporations:

> The reason why the harm to dignity was relevant in *Clubb*, but not *Brown*, is that in *Brown*, the protests were targeted at forestry operations (that is, corporations and their activities), while in *Clubb*, the protests were targeted at persons accessing abortion services (that is, natural persons and their activities).[191]

Thus, natural persons have an interest that corporations do not — the protection of their dignity. This suggests there is something about the nature of natural

[186] Ibid, quoting Barak, *The Judge in a Democracy* (n 151) 86.

[187] Stephenson (n 2) 374.

[188] *Clubb* (n 1) 196 [50] (Kiefel CJ, Bell and Keane JJ).

[189] Barak, *The Judge in a Democracy* (n 151) 86, quoted in ibid 196 [51].

[190] *Clubb* (n 1) 204 [82] (Kiefel CJ, Bell and Keane JJ).

[191] Stephenson (n 2) 376.

persons that confers dignity, confirming the relevance of dignity as worth accounts. These ideas are developed further along the remaining three dimensions: the qualities dimension, the non-fungibility dimension and the duties dimension.

2 *The Qualities Dimension*

At one level, the judgment embraces dignity as autonomy.[192] This is evident in the passages on dignity as a legitimate purpose. Immediately, the plurality observes that privacy is 'closely linked' to dignity.[193] Privacy is of course often understood as an autonomy right.[194] I have already mentioned that the plurality only cites Barak's account of dignity. In the work cited, Barak says that '[h]uman dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice'.[195] This is synonymous with the Dworkinian principle of self-determination.

Consistent with dignity as autonomy, Australian constitutional dignity protects the exercise of a lawful choice. Justice Nettle referred to enabling 'access to a lawful termination service, privately, with dignity and without harassment, stigma or shame'.[196] Justice Gageler also referred to ensuring 'access to premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity'.[197]

The judgment also stressed the consequences of the proscribed conduct, adding more depth or 'thickness' to the autonomy interest protected by dignity. The concern was that the proscribed conduct would prevent women from exercising their choice to have an abortion. This was clear in the plurality's characterisation that

> persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt *to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain*.[198]

Further, in the course of rejecting Mrs Clubb's argument as to the alleged special potency of onsite protests, the plurality said:

[192] This was also recognised in Henckels, Sifris and Penovic (n 2) 557, 561.

[193] *Clubb* (n 1) 195–6 [49] (Kiefel CJ, Bell and Keane JJ).

[194] See, eg, *Farm Transparancy* (n 159) 10 [31] (Kiefel CJ and Keane J), citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 256 [125] (Gummow and Hayne JJ).

[195] Barak, *The Judge in a Democracy* (n 151) 86.

[196] *Clubb* (n 1) 280–1 [307].

[197] Ibid 235–6 [197].

[198] Ibid 198 [59] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

> It is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is *apt to be most effective to deter those persons from making use of the facilities available within the safe access zones*.[199]

Finally, in the course of rejecting Mr Preston's submission that the protest prohibition should be limited to protest likely to cause distress or anxiety, the plurality put this in even clearer terms. It was stated that a threat to dignity *inevitably* arises

> whether or not such a person is likely to suffer distress or anxiety as a result. A decision to avoid a protest about abortions may reflect a calm and reasonable decision to eschew an unwelcoming environment as well as a stressed and anxious reaction to it.[200]

It is notable that in this last instance, the plurality appears to exclusively consider '*a decision to avoid a protest about abortions*'[201] and to completely disregard the relevance of the subjective experience to dignity. These descriptions demonstrate a clear understanding that interfering with someone's autonomous decision amounts to an interference with dignity. They suggest that the qualities dimension of Australian constitutional dignity is largely concerned with protecting a thick autonomy interest.

A slightly less straightforward autonomy-based conception of dignity also arises from the plurality's claim that 'to *force* upon another person a political message is inconsistent with the human dignity of that person'.[202] Dignity as autonomy would support the claim that no person should be forced to receive political information that they do not want to receive.[203] This is underscored by the plurality accepting that the implied freedom does not operate to oblige any member of the Australian community to receive information, opinions and arguments concerning government and political matters.[204] The implied freedom 'is not an entitlement to *force* a message on an audience held captive to that message'.[205] The plurality also repeatedly uses the word 'captive' in this

199 Ibid 204 [82] (emphasis added).

200 Ibid 214 [126].

201 Ibid (emphasis added).

202 Ibid 196 [51] (emphasis added).

203 This was also recognised in Henckels, Sifris and Penovic (n 2). In their words, this may also be an instance of 'dignity-as-constraint': at 557–62.

204 *Clubb* (n 1) 196 [51] (Kiefel CJ, Bell and Keane JJ).

205 Ibid 208 [98] (emphasis added).

context.[206] Justice Nettle echoes this sentiment, confirming that the implied freedom is 'not a licence to accost persons with ideas which *they do not wish to hear*'.[207] This could be explained by an autonomy interest — the Dworkinian concept insists on the special responsibility of each person to make decisions for themselves, and the concomitant requirement not to seek domination over others or submit to the domination of others.[208] In Nettle J's formulation, it is sufficient simply that 'they do not wish to hear'.[209] Likewise, in this context, being 'captive' to another is not understood as being constrained against one's will. In addition, these passages directly link dignity to the implied freedom of political expression and characterise dignity as autonomy as a basis for political participation.[210]

The qualities dimension of Australian constitutional dignity thus draws on a dignity as autonomy account in three ways. First, an individual's life-shaping choice is being denied or impacted. Second, the fact of an individual's choice not to receive a political message has been removed. Third, dignity is understood as a basis of the implied freedom of political expression, thereby linking dignity to political participation. It will be seen that these same passages invoke the non-fungibility and expressive dimensions of dignity.

3 *The Non-Fungibility Dimension*

The emphasis on the prevention of a person being 'forced' to receive an unwanted political message also conveys the non-fungibility dimension. This occurs in three ways.

First, there is the inclusion in the plurality judgment of the Kantian catchcry, via Barak, that '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.[211] This is immediately followed by the plurality's claim that 'to force upon another person a political message is inconsistent with the human dignity of that person'.[212] At one level, this implies that in 'forcing' another person to receive a political message, the person is being used as a means to achieve the political ends of others. However, the plurality is more clear in its statement that '*co-optation* as part of a political message'

[206] Ibid 204 [83], 208–9 [97]–[100].

[207] Ibid 261 [259] (emphasis added).

[208] See Dworkin, *Justice for Hedgehogs* (n 67) 320.

[209] *Clubb* (n 1) 261 [259].

[210] This was also recognised in Henckels, Sifris and Penovic (n 2) 562.

[211] This restatement is subject to the same criticism set out at Part II(B)(1)(a): see above n 58 and accompanying text. It is arguable that this is in fact a misstatement of the Kantian formula, which insists that treating people *merely* as a means violates their dignity.

[212] *Clubb* (n 1) 196 [51] (Kiefel CJ, Bell and Keane JJ).

amounts to an 'interference with the privacy and dignity of members of the people of the Commonwealth'.[213] This concern is not limited to hearing the unwanted message, but to being manipulated as *part* of the unwanted message.

Another interesting instance of this idea is present in the plurality's holding that protest prohibition is viewpoint neutral and does not discriminate against one side of the debate about abortion.[214] The plurality maintains that '[t]he privacy and the dignity of the persons intended to be protected by the prohibition may be adversely affected by either kind of communication' — that is, by pro-abortion messages and by anti-abortion messages.[215] One justification for this otherwise tenuous argument is that the dignity interest is non-fungible and not exclusively protecting an autonomy interest or an interest in dignified treatment. The concern here is that either side of the debate may use the persons attending abortion clinics as part of a political message and thus as means and not ends, and not so much that the autonomy of the persons attending the abortion clinic will be interfered with or that the persons attending the abortion clinic will have to experience indignity to exercise their choice.

Finally, the idea is apparent in the aforementioned rejection of the analogy to *Brown*. The plurality clearly states that '[t]he on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people *as part of the sending of the activists' message*'.[216]

There is thus a consistent emphasis on appropriation, manipulation and use of the persons attending the clinic by the protestors. This suggests a strong embrace of the non-fungibility dimension of substantive dignity.[217]

4 *The Duties Dimension*

Finally, there are indications of the fourth element of substantive and holistic dignity. The duties dimension demands treatment consistent with that dignity. This means that some forms of treatment are inconsistent with, or required by, respect for substantive and holistic dignity. This idea runs throughout the judgment. First, recall the passages set out above that refer to the choice to access

[213] Ibid 198–9 [60] (emphasis added).

[214] In his separate opinion, Gageler J found that in its practical operation the Tasmanian protest prohibition discriminates against the anti-abortion viewpoint: ibid 227–8 [170], 229 [174], 232 [183].

[215] Ibid 197 [56] (Kiefel CJ, Bell and Keane JJ).

[216] Ibid 204 [82] (emphasis added).

[217] This claim may not stand up to critical interrogation. However, the aim of this article is an exposition of the Court's understanding of dignity as opposed to a normative analysis of the merits of the Court applying dignity in this sense in *Clubb* (n 1). For instance, it may be argued that there was no co-optation and no manipulation on the facts of *Clubb* (n 1).

abortion clinics.[218] These were quite easily understood as protecting an autonomy interest. However, they also suggested an interest in dignified treatment (or in treatment that is not undignified). This is particularly clear in Nettle J's judgment. Justice Nettle held that the legitimate purpose of the law was facilitating 'access to a lawful termination service, privately, *with dignity and without harassment, stigma or shame*'.[219] Earlier, Nettle J said that

> women seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and *with dignity, without haranguing or molestation*.[220]

Third, Nettle J observed that the implied freedom

> is not a licence to *accost* persons … still less to *harangue* vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of seeking lawful medical advice and assistance.[221]

For Nettle J, dignity is something that can be expressed and experienced. Justice Gageler also referred to ensuring 'access to premises at which abortion services are lawfully provided in an *atmosphere* of privacy and dignity'.[222] This captures the expressive dimension of dignity. The plurality's repeated reliance on the word 'captive'[223] and its associated imagery also suggests a type of treatment proscribed by dignity.

Together, these passages suggests that Australian constitutional dignity proscribes harassment, stigma, shame-inducing treatment, haranguing or molestation in the course of attempting to exercise a lawful medical choice. The emphasis on these characteristics of the choice — that it is lawful and that it is a personal medical decision — are persistent.

However, as should be evident by now, this dimension is only one aspect of Australian constitutional dignity. While the dimensions can be looked at individually, the understanding of each dimension is developed by holding the four dimensions in symbiosis. In this instance, the emphasis on the experience of dignity (or indignity) and the correlative duties are best understood alongside the qualities dimension and its strong emphasis on the autonomy interest. The duties required by the fourth dimension are inextricably linked to the commitment in the second dimension to self-determination. Together, substantive and

[218] See above Part III(B)(2).

[219] *Clubb* (n 1) 280–1 [307] (emphasis added).

[220] Ibid 260–1 [258] (emphasis added).

[221] Ibid 261 [259] (emphasis added).

[222] Ibid 235–6 [197] (emphasis added).

[223] See above n 206 and accompanying text.

holistic dignity requires the creation and maintenance of conditions facilitative of the exercise of choice. The same passages leave open, but do not fully develop, Australian constitutional dignity as a positive concept to be fulfilled or created (for example, 'with dignity'[224] and 'in an atmosphere of … dignity').[225]

Second, the duties dimension — and the concept of dignity as an experience — is grappled with explicitly in response to Mrs Clubb's argument that political speech is inherently apt to cause discomfort[226] and that 'all political speech has the potential to or does affect the dignity of at least some others'.[227] The plurality and Nettle J flatly rejected these arguments.[228] The plurality said that the arguments had

> no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain.[229]

This passage has already been relied on above to develop the capacities dimension of Australian constitutional dignity and its commitment to self-determination. However, it also gives us a clue as to what indignity is. It is clear that the harm in the present case — which amounted to a threat to dignity — was different to and more serious than discomfort or hurt feelings and does not flow automatically from all political speech.

Finally, there is the suggestion that dignity need not be a subjective experience. This occurs in the plurality's aforementioned controversial insistence that the limitation is viewpoint neutral and that protest in a safe access zone *inevitably* constitutes a threat to dignity 'whether or not such a person is likely to suffer distress or anxiety as a result'.[230] In addition to suggesting that indignity may comprise distress or anxiety, the key point here is that the harm to dignity occurs irrespective of whether that person is conscious of the indignity or not. As above, our understanding of this fourth duties dimension is clarified by another dimension — the non-fungibility dimension. Because the person is non-fungible (the third dimension), the person cannot be used as a means and the duty to treat a person only as an end is generated (the fourth dimension). In this particular judicial statement, it is clear that the fourth dimension persists

[224] *Clubb* (n 1) 261 [258], 280 [306]–[307] (Nettle J).

[225] Ibid 236 [197], 240 [210] (Gageler J).

[226] Ibid 196–7 [52] (Kiefel CJ, Bell and Keane JJ).

[227] Ibid 261 [259] (Nettle J).

[228] Ibid 198 [59] (Kiefel CJ, Bell and Keane JJ), 261 [259] (Nettle J).

[229] Ibid 198 [59] (Kiefel CJ, Bell and Keane JJ).

[230] Ibid 214 [126].

irrespective of the subjectivity of the person. This takes us back to the application dimension and confirms the categorical *grip* of Australian constitutional dignity.

C *Conclusion*

In Part II, I argued that Australian constitutional dignity is a multivalent concept. The judicial use of dignity in *Clubb* suggests that Australian constitutional dignity is an interest held by the people, distributed universally and categorically across members of the Australian Commonwealth. It attaches only to natural persons and is informed by understandings of human dignity. There is no suggestion that dignity is conferred on the basis of high social rank or hierarchy. Relatedly, it consists of and protects a range of human qualities, including most predominantly a thick concept of autonomy akin to the Dworkinian principle of self-determination. There is no suggestion that dignity is confined to protecting a thin autonomy interest. Australian constitutional dignity is purportedly non-fungible, invoking Kant's concept. Australian constitutional dignity protects against a harm that natural persons might suffer. Accordingly, in *Clubb*, it operates to justify legislative proscription of treatment that is inconsistent with these qualities and this non-fungibility. Harm to dignity (or indignity) may be experienced subjectively, but it need not be. Understanding what dignity means in *Clubb* lays the groundwork for important future analysis as to whether this is the appropriate meaning of dignity in Australian constitutional law.

IV Conclusion

Many questions about Australian constitutional dignity remain, including, inter alia, whether it was properly sourced in the *Australian Constitution* and its appropriate *role* in constitutional adjudication. This article responded to the pressing concerns that dignity is an indeterminate, incoherent or empty concept, and that this indeterminate, incoherent or empty concept had been imported into Australian constitutional law. In Part II, I argued that dignity can have a sufficiently determinate and coherent meaning. Drawing on the dominant conceptions of dignity-thought and its main uses in comparative constitutional law, I proposed a holistic, four-dimensional approach to dignity. In doing so, I offered an alternative to the 'destructive analytic critique' — the 'indignant recording' of confused legal invocations of dignity.[231] In Part III, I applied the four-dimensional framework developed in Part II to *Clubb*. In so doing, I

[231] Waldron, 'Dignity and Rank' (n 11) 16.

began to expose its potential extant meaning. I offered the first general investigation into and explanation of the emerging meaning of dignity in *Clubb*. This is the necessary precursor to a normative analysis of the meaning of Australian constitutional dignity. A critical interrogation of the meaning of dignity set out in *Clubb* will follow.