

DIGNITY AS A CONSTITUTIONAL VALUE: A SOUTH AFRICAN PERSPECTIVE*

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The first section of the South African Constitution sets out the founding values of the post-apartheid state. They include human dignity, the achievement of equality, and the advancement of human rights and freedoms. It is not surprising that these values should be the foundations of the new constitutional order.

Apartheid was the culmination of a process of racial discrimination and white supremacy which had been in place for three centuries. It began under colonialism and was entrenched when Blacks, who constituted the overwhelming majority of the population, were denied political franchise by the Imperial Parliament when it established its new dominion.

Whites used their political and economic power to further their dominant social, economic and political position. Under apartheid this process deepened. At that time, the doctrine of the supremacy of parliament, a principle of English law later entrenched in the South African constitution by the apartheid government, was applied by our courts.¹ Its impact can best be described by a passage from a 1934

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1. See PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE: A COMMONWEALTH APPROACH 7 (John Hatchard & Peter Slinn eds., 1999) (characterizing South Africa’s apartheid-era version of the “Westminster model of parliamentary sovereignty” to be a “rubber stamp of a tyrannical executive” which

judgment of the Appellate Division, then the highest court, where the Chief Justice of that time said "Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway . . . and it is the function of the courts of law to enforce its will."²

This was done as a matter of course under apartheid. Over 80% of the land was set aside exclusively for ownership and occupation by whites, who then constituted less than 20% of the population. The majority of the black population was required to live in overpopulated, underdeveloped and impoverished homelands established in the rest of the country, and it was an offence for them to leave the homeland without a permit. Segregation was enforced in almost all spheres of life. The government passed laws denying blacks access to proper education, restricting their mobility, and their right to live and work in most of the country, other than as migrant labourers on white-owned farms or in menial positions in the white controlled commercial and industrial sector. Those permitted to live in the so-called "white areas" were forced into segregated, underdeveloped, and overcrowded ghettos in urban areas, or into single-sex hostels near the places where they worked. Although they were the great majority of the population, blacks were voteless, landless and impoverished.³

Despite the massive power of the state, there was an ongoing and intense struggle against apartheid. Draconian security laws were passed to counter this resistance, but the struggle continued, and many died or were imprisoned during its course. The first step towards what was to become a police state in South Africa was taken in 1950 with the passing of the Suppression of Communism Act.⁴ Various statutory offences relating to communism were created, including the offence of performing any act which was calculated to further the achievement of any of the objects of communism or advocating, advising, defending or encouraging the achievement of

failed to protect the people from unjust laws).

2. *Sachs v. Minister of Justice* 1934 A.D. 11 (A) at 37 (S. Afr.).

3. For an account of the impact of apartheid on day-to-day life, see generally ANTHONY SAMPSON, *MANDELA: THE AUTHORIZED BIOGRAPHY* (1999); LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* (3d ed. 2000).

4. *Suppression of Communism Act 44 of 1950* (S. Afr.).

any such object, or any such act.⁵ “Communism” was defined in the Suppression of Communism Act in a way that may possibly have included what Marx and Lenin contemplated, but it also had a sting in the tail. According to the definition, communism included any scheme which aimed at bringing about any political, industrial, social or economic change within South Africa by unlawful acts or omissions.⁶ The law was written to mean that any political action the white legislature had decided, or might in the future decide, to be unlawful would amount to communism. To counter passive resistance, a law was later passed making it a special offence to contravene a law by protesting against it or any other law, punishable by harsh penalties including flogging.⁷

In 1960, the Unlawful Organizations Act was passed to empower the government to declare organizations other than the so-called “communist organizations” to be unlawful, and to extend the criminal sanctions of the Suppression of Communism Act to such groups.⁸ The African National Congress and other anti-apartheid organizations, which until then had been at the forefront of non-violent opposition to apartheid, were banned, and it became an offence to belong to such organizations or to further their objects.

Political rhetoric set the scene for this and for the draconian security legislation that followed. The white voters were warned that the state was facing a total onslaught. They were told that the legislation was not directed against law abiding citizens and would not affect them. The targets were communists and terrorists. Detention without trial was introduced, the police were empowered to hold detainees incommunicado, and to deny them access to their lawyers or own medical advisors.⁹ Initially detention was for 90 days, then for 180 days, and then indefinitely.¹⁰ Courts were stripped of their jurisdiction to make habeas corpus orders in respect of

5. *Id.* § 11(a)-11(b).

6. *Id.* § 1(ii)(b).

7. Criminal Law Amendment Act 8 of 1953 (S. Afr.).

8. Unlawful Organizations Act 34 of 1960 (S. Afr.).

9. General Laws Amendment Act 37 of 1963 § 17 (S. Afr.).

10. *See generally* General Laws Amendment Act 37 of 1963 (S. Afr.) (setting detention without trial at ninety days); Criminal Procedure Amendment Act 96 of 1965 (S. Afr.) (setting detention without trial at 180 days); General Laws Amendment Act 83 of 1967 (S. Afr.) (allowing for indefinite detention without trial as part of the Terrorism Act).

detainees.¹¹ The isolation of the detainees and the ousting of the jurisdiction of the courts led to torture and other abuses. Censorship was introduced, newspapers aimed at the black community were banned, and in the 1980s a state of emergency was declared which allowed the security forces vast discretionary powers. But the resistance to apartheid continued within South Africa, with increasing support from the international community, including the imposition of economic and other sanctions.¹² There were widespread strikes and protests within South Africa, and the jails were filled with political prisoners. Ultimately, the conflict was brought to an end by a negotiated settlement, but it left in its wake a severely damaged economy, a fragmented and traumatized society, poverty, underdevelopment, and corruption.

It was in these circumstances that we adopted our new constitutional order. There is not time tonight to tell the story of how that was done and the processes that were followed. The outcome, however, was the Constitution of 1996.¹³ The Constitution refers to the Bill of Rights as “a cornerstone of democracy in South Africa [which] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”.¹⁴ In addition to their inclusion in the founding values of the new state, dignity, equality and freedom are entrenched as separate and discrete rights in the Bill of Rights, and have a special role in its interpretation and application.¹⁵ The Constitution instructs courts to interpret the bill of rights so as to promote the values that underlie “an open and democratic society based on human dignity, equality

11. See General Laws Amendment Act 37 of 1963 § 17(3) (S. Afr.); see also *Schermbrucker v Klindt*, N. O. 1965 (4) SA 606 (A) (S. Afr.) (holding that the court was unable to intervene in an application in which it was alleged by a detainee in a note smuggled out of prison that he was being tortured).

12. See, e.g., Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, H.R. 4868 (1986) (imposing economic sanctions on U.S.-South African trade and investment, and catalyzing similar sanctions by other nations, including Japan and many European nations).

13. The Constitution making process was undertaken in two stages. First, an interim Constitution was adopted in 2003 to prepare for the adoption of a Constitution by an elected Constitutional Assembly. See generally HASEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998).

14. S. AFR. CONST., 1996 § 7(1).

15. *Id.* §§ 8, 9, 12.

and freedom”.¹⁶ The entrenched rights may be limited,¹⁷ but the standard prescribed by the Constitution is that this may be done only “in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹⁸

The centrality of these values is captured by Justice O’Regan in her concurring judgment in the capital punishment case, where the Constitutional Court, now the highest court in South Africa, unanimously held that capital punishment was inconsistent with our constitution.¹⁹ “No-one,” she said, “could miss the significance of the hermeneutic standard set. The values urged upon the court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.”²⁰ And she went on to say that

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection is the touchstone of the new political order and is fundamental to the new Constitution.²¹

Some constitutional scholars reject the concept of dignity as a constitutional value, considering it to be “a vacuous concept . . . without bounds,” too uncertain to have a clear meaning, and “little function beyond the polemical.”²² Others, Justice Brennan was one,²³

16. *Id.* § 36(1).

17. *Id.* § 7(3).

18. *Id.* § 36(1).

19. *See State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

20. *Id.* at 176 para. 322-23 (O’Regan, J., concurring) (“In interpreting the rights enshrined in chapter 3, therefore, the court is directed to the future: to the ideal of a new society which is built on the common values which made a political transition possible in our country and which are the foundation of its new constitution.”).

21. *Id.* at 19 para. 329.

22. *See* Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS., 257, 268 (2006).

23. *See generally* Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223 (1998) (examining the role of Supreme Court Justice Brennan in establishing the concept of human

consider dignity to be a fundamental value crucial to the meaning and development of constitutional rights. This is not a debate for South African lawyers and judges. Respect for human dignity as a foundational value is entrenched in specific terms in our Constitution, and lawyers and judges cannot dismiss that as a vacuous concept; they have to give effect to the Constitutional mandate, and give meaning to its language. Acknowledging that dignity is a difficult concept to capture in precise terms, the Constitutional Court has held that the constitutional protection of dignity requires us at the least “to acknowledge the value and worth of all individuals as members of our society”²⁴ and to treat all with “equal respect and concern.”²⁵ Building on that has given dignity a central role in the Court’s evolving jurisprudence.

The affirmation of dignity as a foundational value of the South African constitutional order was not a romantic extravagance. To the contrary, it placed our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War. The three core international human rights instruments which laid the foundations of the international human rights order, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Cultural and Social Rights all assert that rights to be respected and to be upheld in terms of these instruments “derive from the inherent dignity of the human person.”²⁶ And this is repeated in the many international human rights Conventions that were subsequently adopted.²⁷

dignity as an essential component of human rights formulation).

24. *Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 30 para. 28 (S. Afr.).

25. *Id.* at 131 para. 134 (Sachs, J., concurring); *see also* *State v. Makwanyane* 1995 (3) SA 391 (CC) at 179 para. 328 (O'Regan, J., concurring) (S. Afr.) (“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”).

26. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

27. *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-22,

Article 1 of the Basic Rights in the German Constitution provides that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”²⁸ The basic rights of the German Constitution are all interpreted and applied by the German Federal Constitutional Court in the context of this central value, and the decisions of the German courts provide a prodigious jurisprudence of dignity.²⁹ The European Court of Human Rights has said that respect for human dignity and freedom is the very essence of the European Convention on Human Rights, which applies throughout Europe.³⁰

Dignity is not spelt out in the Canadian or Indian Constitutions. Yet the Canadian Supreme Court has said that the genesis of the rights and freedoms in the Canadian Charter of Rights include “respect for the inherent dignity of the human person,”³¹ and that the idea of dignity finds expression in almost every right and freedom guaranteed by the Charter.³² In India, the highly respected Supreme Court has held that the “right to life includes the right to live with human dignity and all that goes along with it; . . . [that] [e]very act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live, and . . . would have to be [justified] in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental

1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14; International Convention on the Elimination of All Forms of Racial Discrimination pmb., Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Rights of the Child pmb., Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, pmb., U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

28. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949 art. 1(1) (Ger.).

29. The role played by human dignity in German jurisprudence is discussed by DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 314-16 (1994); *see also* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* Ch. 7 (2d ed. 1997); Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963; George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171 (1984).

30. *S.W. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) 28, para. 44 (1995).

31. *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 64 (Can.).

32. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 164-77 (Can.); *see also* *Kindler v. Canada*, [1991] 2 S.C.R. 779 (Cory, J., dissenting) (Can.)

rights.”³³

There have been references to dignity in some of the judgments of the United States Supreme Court, particularly from Justice Brennan, who gave it considerable weight in his judgments on capital punishment.³⁴ A plurality of the Court in *Casey v. Planned Parenthood* held that “choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment.”³⁵ The Supreme Court has also held dignity to be central to the Eighth Amendment’s prohibition of cruel and unusual punishments.³⁶ More recently, in *Roper v. Simmons*, Justice Kennedy, writing for a plurality, described the Constitution as resting on “principles original to the American experience such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity.”³⁷ These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.

In extra-curial speeches Justice Brennan described dignity as being the foundation of the U.S. Constitution and its Bill of Rights,³⁸ but the centrality of dignity to the adjudication of rights does not form part of the broad jurisprudence of the United States Supreme Court. The perspective from South Africa to which I now turn may possibly

33. See Francis Coralie Mullin v. Adm'r, Union Territory of Delhi, (1981) 2 S.C.R. 516, 518 (India).

34. See *Glass v. Louisiana*, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (characterizing the death penalty as “uniquely degrading to human dignity that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional”) (quoting *Furman v. Georgia*, 408 U.S. 238, 287-291 (1972)).

35. 505 U.S. 833, 923 (1992).

36. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”); see also *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”).

37. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

38. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 439 (1986).

sound strange to a United States audience, though it may have a greater resonance with audiences in other parts of the world.

I referred earlier to the core foundational values of our Constitution: dignity, equality and freedom. For many constitutional scholars there is a tension between liberty and equality. Taken to their extremes this is no doubt so. But this tension is not an obstacle to interpretation if each is seen as having its origin in respect for human dignity, and to reflect different aspects of it. The Constitutional Court gives equal weight to all three values.³⁹ This involves the weighing up of different values, and ultimately an assessment based on proportionality.⁴⁰ Through the influence of dignity, the values of liberty and equality are harmonized, and taken together the three values have provided a coherent foundation for the South African Constitutional Court's jurisprudence. These core values, given content by the specific provisions of the Bill of Rights and other provisions of the Constitution, provide an objective normative value system according to which South African courts are required to interpret the Constitution and develop the law.⁴¹

The influence of dignity is apparent in the Court's approach to equality and discrimination. A right to equality before the law and the equal protection of the law is entrenched in our Constitution,⁴² which goes on to provide that

Equality includes the full and equal enjoyment of all rights and freedoms.
To promote the achievement of equality, legislative and other measures

39. *See* *State v. Mamabolo* 2001 (3) SA 409 (CC) at 37 para. 41 (S. Afr.) (upholding the offense of 'scandalising the court' as a means of limiting the right to freedom of expression in order to protect the dignity and integrity of the judiciary in certain narrowly defined cases). "[T]he Constitution . . . proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity."

40. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 69 para. 104 (S. Afr.); *see also* *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at 25 para. 46 (S. Afr.) (holding that it is now "well-established" that a proportionality test must be used by the Court to weigh the "purpose and effects of infringing provisions" against "the nature and extent of the infringement caused").

41. *See Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at 33 para. 54 (S. Afr.) (emphasizing that the South African Constitution embodies an "objective normative value system" which must be used to develop and shape the common law).

42. S. AFR. CONST., 1996 § 9(1).

designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.⁴³

This is followed by specific anti-discrimination provisions which prohibit unfair discrimination directly or indirectly by the state or any person on one or more of the grounds of “ race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁴⁴

Recognizing that differences in approaches to equality taken by courts in different national jurisdictions arise not only from different texts and different histories, but also from “different jurisprudential and philosophical understandings of equality,”⁴⁵ the South African Constitutional Court has made clear that it considers equality to have a substantive content.⁴⁶ In doing so, it has taken a path similar to that taken by the Canadian Supreme Court.⁴⁷ In an early decision dealing with discrimination, the Constitutional Court recalled that

We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.⁴⁸

This was the essence of the discrimination which so many had suffered in our country. We had lived through it. The wounds were fresh. We understood from our own experience what it meant to be the object of discrimination, how it impaired the dignity of those who suffered under it, and affected their lives adversely. It was with this

43. *Id.* § 9(2).

44. *Id.* § 9 (3).

45. *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at 22 para. 39 (S. Afr.).

46. *See Minister of Fin. v. Van Heerden* 2004 (6) SA 121 (CC) at 20 para. 31 (S. Afr.); *id.* at 46 para. 78 (Mokgoro, J., concurring); *id.* at 85 para. 142 (Sachs, J., concurring); *see also Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 59 para. 62 (S. Afr.).

47. *Law v. Canada (Minister of Emp't & Immigration)*, [1999] 1 S.C.R. 497 para. 25 (Can.) (describing equality as a “substantive concept” under the Canadian Charter of Rights and Freedoms, and holding therefore that unfair discrimination “can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society.”).

48. *Prinsloo v. Van der Linde* 1997 (3) SA 1012 (CC) at 22 para. 31 (S. Afr.).

understanding that the Court has held that at the heart of the prohibition of unfair discrimination “is the recognition that under our Constitution all human beings regardless of their position in society, must be accorded equal dignity.”⁴⁹ Discrimination, held the Court, exists when there is a differentiation “based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”⁵⁰

Some critics of this approach argue that dignity has an individual focus, and is not an appropriate standard to address the ravages of past discrimination.⁵¹ But the Constitution makes clear that equality is concerned not only with individuals, but also with “categories of persons”.⁵² Consistent with this, the Court has recognized “that ongoing discrimination builds patterns of group disadvantage and harm” and that a primary purpose of the equality right is to prevent this, and to remedy the results of past discrimination.⁵³ In its judgment declaring the criminalisation of sodomy to be inconsistent with our Constitution, the Constitutional Court said “it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination.”⁵⁴ In the same case it stressed that “past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely”, saying “like justice, equality delayed is equality denied.”⁵⁵ It thus accepts that Section 9 of the Constitution, “heralds not only equal protection of the law and

49. Hoffmann v. S. Afr. Airways 2001 (1) SA 1 (CC) at 18 para. 27 (S. Afr.).

50. Harksen v. Lane 1997 (11) BCLR 1489 (CC) at 38 para. 53 (S. Afr.).

51. See, e.g., Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. HUM. RTS. 248, 269 (1998); D.M. Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L.J. 398, 408 (1999).

52. S. AFR. CONST., 1996 § 9(3).

53. Brink v. Kitshoff 1996 (4) SA 197 (CC) at 23 para. 42 (S. Afr.).

54. Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) at 20 para.19 (S. Afr.).

55. *Id.* at 57-58 (asserting that the Constitution and the Bill of Rights cannot merely ensure elimination of past discrimination, but must also remedy the ongoing negative consequences of past discrimination against categories of individuals).

non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework.”⁵⁶

The South African Constitutional Court’s approach to affirmative action is thus quite different to that of the United States Supreme Court. It does not see such measures in themselves, as the United States courts do, as being invasions of the right to equality which have to be subjected to strict scrutiny.⁵⁷ If the measures target persons or categories of persons who have been disadvantaged by unfair discrimination, are designed to protect or advance such persons, and promote the achievement of equality, they are considered by the South African courts to be “integral to the reach” of the Constitution’s protection of equality, and to contribute to the constitutional goal of ensuring “full and equal enjoyment of all rights.”⁵⁸

A different approach to that of the U.S. Supreme Court is also evident in cases dealing with same-sex relationships. A divided U.S. Supreme Court based its decision striking down the criminalization of sodomy on privacy interests protected by the Bill of Rights.⁵⁹ Although privacy is a right entrenched in the Constitution,⁶⁰ and the Constitutional Court recognized privacy interests as being involved in the sodomy case, a unanimous court chose to base the core of its judgment in that case on dignity and discrimination. It said that the crime of sodomy

[P]unishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a

56. *Minister of Fin. v. Van Heerden* 2004 (6) SA 121 (CC) at 15 para. 25 (S. Afr.).

57. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (applying strict scrutiny to a school district policy that aimed to achieve racial integration by assigning students to schools on the basis of race, and finding that racial balancing was an insufficient compelling state interest to justify the policy).

58. *See Minister of Fin. v. Van Heerden* 2004 (6) SA 121 (CC) at 20 para. 30 (S. Afr.) (rejecting the use of the terms “reverse discrimination” or “positive discrimination,” and adopting the term “remedial or restitutionary equality” as “integral to the reach of our equality protection.”).

59. *Lawrence v. Texas*, 539 U.S. 558 (2003).

60. S. AFR. CONST., 1996 § 14.

significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity⁶¹

Dealing with the issue of equality and discrimination, the judgment states “[t]o understand ‘the other’ one must try, as far as is humanly possible, to place oneself in the position of ‘the other.’”⁶²

Then, quoting from a Canadian judgment, it says

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned.⁶³

[The judgment then continues]

The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives.⁶⁴

[And quotes the following from a lecture by Professor Cameron, now a Justice of the Constitutional Court]

Even when these provisions are not enforced, they reduce gay men . . . to what one author has referred to as ‘unapprehended felons,’ thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters

61. Nat’l Coal. for Gay & Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) at 30 para. 28 (S. Afr.).

62. *Id.* at 24 para. 22.

63. *Id.* at 25 para. 22 (citing *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 69 (Can.)).

64. *Id.* at 25 para. 23.

bearing on orientation.⁶⁵

This had implications beyond the issue of criminal conduct. Proceeding on the basis that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be, the Constitutional Court has held different forms of discrimination against gays and lesbians to be inconsistent with the Constitution. Most recently, it has held that the law must make provision for same sex partners to marry.⁶⁶ In the marriage case, the Court said that this discrimination occurred at “a deeply intimate level of human existence and relationality”, and reviewing the evidence before it along with the reasoning in the earlier cases, said:

The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays. [This denied them] that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.⁶⁷

Section 9(3) of the Constitution includes sexual orientation as a specified ground of prohibited discrimination. There can be little doubt, however, in the light of the Court's reasoning that it would have reached the same conclusion if sexual orientation had not been referred to in section 9(3). The Constitution makes clear that the prohibition of unfair discrimination is general, that it applies both to direct and indirect discrimination, and that there can be grounds other than those specified in section 9(3) which would fall within the purview of the clause. The difference is that when discrimination on a specified ground is established it is presumed to be unfair unless it

65. *Id.* (citing Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. Afr. L.J. 450, 455 (1993)).

66. *See* Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at para. 114 (S. Afr.) (holding that the failure of South African law to allow gay and lesbian couples to marry was an unjustifiable violation of their right to dignity and equality).

67. *Id.* para. 50 (citing Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice 2000 (2) SA 1 (CC) para. 42 (Ackermann, J.) (S. Afr.)).

is established that it is not unfair,⁶⁸ If an unspecified ground is relied on, unfairness must be established by the claimant. Thus, the Court has held that persons suffering from the HIV virus⁶⁹ and foreigners,⁷⁰ groups not mentioned in section 9(3), are vulnerable groups entitled to the protection of section 9 of the Constitution.

Though purpose is not irrelevant, what is of concern is the impact that the disputed law or conduct has on the affected persons or group of persons. The purpose of the provisions prohibiting unfair discrimination is not to punish the discriminator. Rather, it is to provide relief for the victims of discrimination. Conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination. If it does, and if viewed objectively it impacts unfairly on the dignity of the vulnerable group or person, then irrespective of the intention of the law a South African court would hold that it infringes the prohibition against unfair discrimination.⁷¹

There is another area in which dignity is relevant to a difference between South African law and United States law, and that is in respect of positive action demanded from the government. Unlike the United States, where courts draw a distinction between action and inaction in relation to the Due Process Clause,⁷² our Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights,”⁷³ and this may call for positive action from the state to protect individual rights.⁷⁴ This is most apparent in, but not confined to, the taking of action to give effect to the socio-economic

68. S. AFR. CONST., 1996 § 9(5).

69. *See Hoffmann v. S. Afr. Airways* 2001 (1) SA 1 (CC) at 29 para. 40 (S. Afr.) (holding that South African Airways’ refusal to employ the appellant because of his HIV status “impaired his dignity and constituted unfair discrimination”).

70. *See Larbi-Odam v. Member of the Exec. Council for Educ. Nw. Province* 1998 (1) SA 745 (CC) at 26 para. 25 (S. Afr.) (holding that an employment regulation permitting only South African citizens to become permanent teachers at state schools unfairly discriminated against permanent residents).

71. *See City Council of Pretoria v. Walker* 1998 (2) SA 363 (CC) at 34 para. 43 (S. Afr.) (holding that proof of intent to discriminate is not a threshold requirement for claims of either direct or indirect discrimination).

72. *See, e.g., DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv.*, 489 U.S. 189 (1989) (concluding that a state’s failure to protect its citizens from private violence does not constitute a violation of the Due Process Clause).

73. S. AFR. CONST., 1996 § 7(2).

74. *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at 40 para. 62 (S. Afr.).

rights entrenched in the Constitution.

The Constitution requires the state to take reasonable legislative and other measures within its available resources to achieve the progressive realization of rights, such as making provision for access to housing, health care, food, water and social security. I will call them rights concerned with basic needs. The interpretation of these socio-economic rights concerned with basic needs, and the emerging jurisprudence of the court dealing with claims for their enforcement, raise complex issues which go beyond the scope of tonight's discussion. The Court has, however, held that dignity is foundational to these rights, that they are justiciable, and oblige the state to take positive action to meet the needs of those living in extreme conditions of poverty.⁷⁵

The Court has developed a quasi-administrative model for dealing with claims for the enforcement of these rights, according to which challenges to government programmes are reviewed for reasonableness – the basic standard set by the relevant provisions of the Constitution.⁷⁶ This requires the government to respond to assertions that its policies do not meet the constitutional standard. When challenged, “Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected.”⁷⁷

These rights have both a positive and negative component. The government must fulfill its obligations and it must also refrain from acting in ways that undermine the constitutional rights. Dignity has an important role in respect of both the positive and negative aspects of the rights. This was made clear in *Grootboom*, an early case dealing with the positive component of the right to have access to housing, where in a unanimous judgment the Court held that

75. South Africa v. Grootboom 2001 (1) SA 46 (CC) at 34 para. 44 (S. Afr.).

76. *Id.*

77. See *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) para. 161 (S. Afr.) (“The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions.”).

The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental value of human dignity. [The right to have access to housing], read in the context of the Bill of Rights as a whole, must mean that the [claimants] have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.⁷⁸

A similar approach is evident in claims concerned with the negative component. A challenge to legislation permitting sales in execution of immovable property for the recovery of judgment debts, without providing adequate protection in process and substance for the homeowners, was upheld as being inconsistent with the negative component of the right to have access to housing. In doing so, the Court stressed the link between housing and dignity, saying “to have a home one calls one’s own, even under the most basic circumstances, can be a most empowering and dignifying human experience.”⁷⁹ The impugned provision was held to be unconstitutional because it had the potential of undermining that experience.

Policy is not immune to judicial review. This was made clear by the Court in a challenge to the state’s policy dealing with the mother to child transmission of the HIV virus. The policy prohibited the use by public health care facilities of an available antiretroviral drug, which was recommended by the World Health Organisation for preventing transmission of the virus and had been approved by the South African Medical Research Council for such purposes. The Constitutional Court rejected an argument that the policy was beyond the scrutiny of the Court,⁸⁰ holding that

A dispute concerning socio-economic rights is . . . likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of [the Constitution] to make a

78. *See* South Africa v. Grootboom 2001 (1) SA 46 (CC) at 61 para. 83 (S. Afr.).

79. *Jaftha v. Schoeman* 2005 (2) SA 140 (CC) at para. 39 (S. Afr.).

80. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 98-100 (S. Afr.).

declaration to that effect.⁸¹

The Court went on to hold that reasonable measures within available resources had not been taken by the state to provide access to necessary health care. The reason: “A potentially lifesaving drug was on offer and . . . it could have been administered within the available resources of the state without any known harm to mother or child.”⁸²

There are also related socioeconomic rights concerned with children, land, education and the environment that may require positive action by the state, which would call for a somewhat different approach because of the difference in language of the relevant texts.⁸³ Dignity is relevant here too. It is common, however, for the Court to examine claims for infringement of entrenched rights through the lens of dignity. For instance, it has placed weight on the right to human dignity in holding that capital punishment⁸⁴ and corporal punishment⁸⁵ are inconsistent with section 12 of the Constitution, which recognizes the right of everyone “not to be treated or punished in a cruel, inhuman or degrading way.” The Court has also held that the right to vote of every citizen is “a badge of dignity and personhood; quite literally, it says that everybody counts”⁸⁶ and thus a general exclusion of all convicted prisoners from the right to vote is inconsistent with the Constitution.⁸⁷ Dignity is a value held to be relevant to the right to a fair trial,⁸⁸ the rights of

81. *Id.* at 60 para. 101.

82. *Id.* at 48 para. 80.

83. S. AFR. CONST., 1996 §§ 24-25, 28-29.

84. *State v. Makwanyane* 1995 (3) SA 391 (CC) at paras. 57-62 (S. Afr.).

85. *See State v. Williams* 1995 (3) SA 632 (CC) at paras. 89-91 (S. Afr.) (holding that the punishment of whipping for juvenile offenders violates the right to dignity as enshrined in the constitution and constitutes cruel, unusual and degrading punishment); *see also Christian Educ. S. Africa v. Minister of Educ.* 1999 (2) SA 83 (CC) at paras. 50-52 (S. Afr.) (upholding a national law banning corporal punishment in schools).

86. *August v. Electoral Comm'n* 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).

87. *Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Re-Integration of Offenders* 2005 (3) SA 280 (CC) at 42 para. 80 (S. Afr.) (ordering the Electoral Commission to provide all prisoners, who are entitled to vote, with a reasonable opportunity to register and vote); *see also August v. Electoral Comm'n* 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).

88. *State v. Jaipal* 2005 (4) SA 581 (CC) at 14 para. 26 (S. Afr.) (holding that the right to a fair trial is essential in a society which is based on “the rights to

refugees,⁸⁹ and is relevant to matters of status and public policy.⁹⁰ These examples can be multiplied by searching through the reported judgments of the Constitutional Court.

In a speech made at Georgetown after almost thirty years of service as a Justice of the Supreme Court, Justice Brennan talked about the importance of human dignity for constitutional adjudication. He said

I do not mean to suggest that we have in the last quarter-century achieved a comprehensive definition of the constitutional ideal of human dignity. . . . if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.⁹¹

We are people of our times. As societies evolve we gain a better understanding of the causes of discrimination and exclusion, and how this is expressed and experienced. Under the South African Constitution, dignity is a value asserted to “invest in our democracy respect for the intrinsic worth of all human beings.”⁹² It is, as the Court has held, a value that informs the interpretation of many, possibly all, other rights.⁹³ As the Court’s jurisprudence develops,

human dignity and to the freedom of security of the person.”); *see also* State v. Dzukuda 2000 (4) SA 1078 (CC) at 13 para. 11 (S. Afr.).

89. Union of Refugee Women v. Dir.: Private Sec. Indus. Regulatory Auth. 2007 (4) BCLR 339 (CC) at 70 para. 135 (S. Afr.) (outlining the rights of refugees under the Convention, which include issuing refugees with identity papers and prohibiting discrimination against refugees on the basis of race, religion, or country of origin).

90. Hassam v. Jacobs NO 2009 (11) BCLR 1148 (CC) at 15 para. 25 (S. Afr.) (declaring certain provisions of South Africa’s Intestate Succession law to be unconstitutional in so far as these provisions discriminate against spouses in traditional Muslim marriages. Nkabinde J. reasoned that the Court must have due regard for the diversity of modern society and emphasized that “the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society” in the past).

91. *See* Wermiel, *supra* note 23, at 239 (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986)).

92. Dawood v. Minister of Home Affairs 2000 (3) SA 936 (CC) at 39 para. 35 (S. Afr.).

93. *Id.* at 39 n.50 (citing Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice 1999 (1) SA 6 (CC) para. 120 (Sachs, J., concurring) (S. Afr.) (“It will be

which must happen in the years to come, it will surely bear testimony to Justice Brennan's vision that "the demands of human dignity will never cease to evolve."⁹⁴

PROFESSOR MICHELMAN: Joining in this event with Chief Justice Chaskalson and Professor Schwartz is a special pleasure for me, for reasons that I will briefly go into before I sit down. Thanks to the Dean for inviting me and to all who helped to arrange this event.

In his written paper, the Chief Justice makes reference to dignity skeptics (as I will call them), commentators for whom appeals to human dignity in constitutional adjudication are not only a distraction but are also potentially troublesome, possibly getting in the way of what the critics envision as the best adjudicative outcomes. I had thought to use my time at the podium to talk somewhat broadly about dignity skepticism and some issues it raises. But I decided to throw away that grand script while listening to Chief Justice Chaskalson, and rather to treat the question a bit more concretely.

I will focus on a particular context, one in which a certain highly plausible notion of the human dignity to be recognized and protected by constitutional law might easily be thought to get in the way of best adjudicative outcomes. The context that I have in mind is that of a directly or indirectly race-based (race-coded, race-correlated) rule or policy, undertaken in the pursuit of "the achievement of equality"—a commitment that comes just on the heels of "human dignity" at the head of the South African Constitution's list of its founding values and is then followed up closely by the value of "non-racialism."⁹⁵

In South Africa, an equal and nonracial society is unlikely to be achieved within any number of eons without a good deal of state action of the sort I have just mentioned. That would seem pretty much a given. I soon will read to you a few lines, aimed at reminding you about a certain kind of dignity problem that arises in such a setting. I'll then go on to describe how the South African

noted that the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity.")).

94. Wermiel, *supra* note 23 at 239.

95. S. AFR. CONST., 1996 § 1.

Constitutional Court has worked its way through this problem. And I will ask you to think comparatively about the United States and whether the South African solution is one that could conceivably work here with us.

Here, then, is a passage from Justice Lewis Powell's decisive opinion for the Supreme Court in the famous *Bakke* case:

All state imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating them privileges on the basis of skin color and ethnic origin.⁹⁶

Justice Powell did not use the term human dignity, but he might have. For there is an easily recognized, widely understood sense of the notion of human dignity—one that is a natural for consideration in constitutional law—that is plainly conveyed by this passage. I mean dignity understood as a person's sense of standing in society, secure against maltreatment or disadvantage owing to arbitrary or prejudicial hostility, or deprecation from others including decision-makers. For Justice Powell, it seems human dignity in that important sense is placed at risk by each instance of public racial classifying, no matter how allegedly benign a purpose.

With Justice Powell's concern in mind, I now introduce a South African case called *City Council of Pretoria v. Walker*.⁹⁷ The facts of the *Walker* case are a bit complex and raise a number of issues. For now, it is enough to say that the case involved a set of policies adopted by the city council of a newly reorganized city of Pretoria encompassing both an "old Pretoria" area occupied almost exclusively by economically well-off white residents and two former black township areas occupied almost exclusively by people who were black and economically stressed. The plain, certain, and doubtless intended effect of these policies was to require residents of

96. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (citations omitted).

97. 1998 (2) SA 363 (CC) (S. Afr.).

old Pretoria to pay more heavily for consumption of city-supplied utility services than residents in the poverty-stricken former townships. Over a transitional period of uncertain duration, the latter were to get a break not only in the unit prices charged to them but in the form of much milder treatment in case of nonpayment.

As adopted by the city council, these policies were cast in terms of which part of the new city you lived in, not in terms of anyone's racial identity. The break went to residents of areas that happened to be almost 100% black-occupied in comparison with residents of areas that happened to be almost 100% white-occupied—not, of course, by chance accident but rather by force of historical apartheid. So we have here a case of express discrimination not by race but by area of residence, but also a rather dramatic instance of what U.S. doctrine sometimes calls “de facto” race-based discrimination.

The Constitutional Court had to decide whether the preference in favor of the residents of the former townships amounted to prohibited “unfair discrimination” on a racial ground, prohibited by Section Nine of the Constitution. Those who know the U.S. case of *Gomillion v. Lightfoot*⁹⁸ might find some echoes here. But the South African rules are different from those that governed in *Gomillion*, and they would not require any inference of specific intent to burden whites as whites or benefit blacks as blacks in order to establish a constitutional violation. As Arthur Chaskalson has explained, the equality clause in South Africa's Constitution is worded so as to cover “indirect” as well as “direct” discrimination on a racial ground, and *Walker* looks like a clear case of what the text almost certainly must mean by “indirect” race-based discrimination. The Constitution does not, however, make unconstitutional all direct and indirect racial discrimination, but only that which is found “unfair.” And as Chief Justice Chaskalson also has explained, the Constitutional Court has developed a body of doctrine by which the test of unfairness—the test that would make the difference between permissible and non-permissible discrimination—is an impact-based test. The question ultimately has to be whether the challenged policy would affect the complaining party by impairing his or her dignity or in some equivalently serious way.

98. 364 U.S. 339 (1960).

So the question facing the Court in the *Walker* case was whether Mr. Walker, the white resident of old Pretoria, was suffering or was in danger of suffering an impairment of his dignity in consequence of the de facto race-based classification. The opinion for the Court's majority was prepared by Justice Pius Langa, who was at that time the Court's Deputy President and would later, after Arthur Chaskalson's retirement, become the Chief Justice. And in the one branch of the case where the majority found unconstitutional unfairness, it did find the kind of impairment of dignity with which the South African Constitution is concerned. Justice Langa started by acknowledging that Walker belongs to a group (that is, the group of white residents of old Pretoria) that had *not* "been disadvantaged by the racial policies and practices of the past."⁹⁹ Moreover, Walker's group, having "been benefited from rather than adversely affected by the discrimination of the past," is not currently disadvantaged or vulnerable "in an economic sense."¹⁰⁰

But what if we look past the "economic sense" of current disadvantage? Mr. Walker does unquestionably, in the new South Africa, belong to "a racial voting minority" that could "in a political sense be regarded as a vulnerable minority." And it is "precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who in a very special sense must look to the bill of rights for protection."¹⁰¹

Now think about Justice Powell as I read you a further passage from Justice Langa's opinion.

No members of a racial group should be made to feel that they are not deserving of 'equal concern, respect, and consideration,' and that the law is likely to be used against them more harshly than others who belong to other race groups. That is the grievance that the respondent has. . . . The impact of such a policy on the respondent and other persons similarly placed, viewed objectively . . . would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity.¹⁰²

Might that have been Justice Powell speaking about Allen Bakke?

99. *Walker*, 1998 (2) SA 363 (CC) at para. 47 (S. Afr.).

100. *Id.*

101. *Id.* Para. 48.

102. *Id.* para. 81.

But think, now, about the possible ramifications of such a dignity-centered objection to such an indirectly race-coded policy in view of South Africa's current situation. Think about how gravely it might get in the way of all kinds of transformation-minded policies: say more generous state aid to schools in impoverished areas that are overwhelmingly black-inhabited as compared with schools in economically advantaged areas that are overwhelmingly white-attended, and go on from there.

This problem of dignity potentially getting in the way of the social transformation to which the Constitution is also committed was very much on the mind of Justice Albie Sachs, who submitted a separate judgment in the *Walker* case. An "understandable sense of unfairness," wrote Justice Sachs, "cannot be separated from the purpose for which the measure was taken."¹⁰³ The more "manifestly justifiable the public purpose in the light of the objectives of the Constitution, the less scope for a legitimate feeling of having been badly done by."¹⁰⁴

Now, what is Justice Sachs saying there? He is saying that there is or there should be no impairment of Mr. Walker's dignity because this is, after all, Mr. Walker's Constitution as much as anyone else's. It is a social-transformative project to which he, as a South African citizen, is presumably committed along with all the others. What is fair or unfair, Justice Sachs continued, must be considered not from the standpoint of the white resident of old Pretoria or the black resident of a former township, but "simultaneously from the diverse points of view of all the inhabitants of the whole, [while] bearing in mind the values enshrined in the Constitution."¹⁰⁵ Yes, all are "entitled to equal respect," and so we must pay Mr. Walker the respect that is his due by allowing him the dignity of a citizen, committed to his country's project, declared by its Constitution, of the achievement of equality and a nonracial society and to doing what it takes to get from here to there. That is what I take away from the judgment of Justice Sachs in the *Walker* case. But I could show you, too, how Sachs's judgment in this respect really speaks for the full Constitutional Court, in the *Walker* case and elsewhere.

103. *Id.* para. 129.

104. *Id.*

105. *Id.* para. 130.

You might think of Justice Harry Blackmun in *Bakke*: “In order to get beyond racism we must take race into account. There is no other way.”¹⁰⁶ And then of Chief Justice John Roberts in *Parents Involved*: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁰⁷ We see there a conflict of opinions about how possibly to get from here to there, and that conflict occurs in South Africa, too. As a possible difference, though, between the two scenes, consider that perhaps the notion of human dignity prevailing in our courts takes sides on the how-to-get-there disagreement (remember Justice Powell), while the notion of human dignity prevailing in the Constitutional Court of South Africa awaits public, communal resolution of that disagreement before picking a side to take. If so, then a dignity-centered constitutional jurisprudence could appear troublesome to transformation-minded Americans in a way that would not apply in South Africa.

According to the Federal Constitutional Court of Germany, that country’s Basic Law proceeds from an “image of man” (perhaps better translated as “image of humankind”) that deeply informs the Basic Law’s conception of human dignity. The image of man in the Basic Law “is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on and commitment to the community, without infringing upon a person’s individual value.”¹⁰⁸

Rather similar, perhaps, is the South African Constitution’s image of humankind and correspondingly of human dignity: humankind not as a collection of independent souls each trying to find his or her own way through life, but of individuals who are also citizens, who understand themselves to be associates in a commonly adopted civic project. Accordingly, to treat a person with regard for his or her dignity is to treat him or her as a person and citizen thus committed. It speaks for a South African constitutional doctrine of what we might term “objective dignity.”

106. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978).

107. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

108. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 20, 1954, 4 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 7 (15-16) 1954 (Ger.) (Investment Aid Case, I).

Might such a notion possibly catch on here? Think again about Justice Powell: “All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.”¹⁰⁹ These individuals “are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority”¹¹⁰ Perhaps that is simply the truth about the American as opposed to the South African way, ours as opposed to their image of humankind. If so, then, to repeat, dignity skepticism must stand on a different footing here than it does there.

There is one matter of human dignity in regard to which I am no kind of a skeptic, and that has to do with Arthur Chaskalson’s life and career and their representation of human dignity and what philosophers sometimes call the humanity in the person. “Representation” in any sense you like. I have in mind Arthur’s career as an advocate defending, at considerable risk to self, those oppressed and endangered by the system of apartheid law. I have in mind the man who became an architect of the Constitution whose meaning and content he described to us, and then the man whose captaincy of the brave new Constitutional Court combined great legal doctrinal acuity with pragmatic wisdom and diplomacy—including both a sense of when to act and when to wait, and a gift for seeing how to combine the sometimes differing perceptions and priorities of members of the Court into judgments speaking for them all—to produce in a short space of time a world-class body of constitutional jurisprudence. So, having begun these remarks by thanking the Dean for having me here, I close them by thanking Arthur Chaskalson for his life’s work of contribution to the advancement of the cause of human dignity.

PROFESSOR SCHWARTZ: I believe that there have been four great chief justices in the postwar period: our own Chief Justice Earl Warren, President Aharon Barak of Israel, President Laszlo Solyom of Hungary and Chief Justice Chaskalson. Even in this stellar group Chief Justice Chaskalson stands out, for he is the only one who spent years as a lawyer fighting for human rights, courageously confronting a brutal regime and enduring many setbacks. What

109. *Bakke*, 438 U.S. at 294 n.34.

110. *Id.*

Arthur has therefore brought to those young people fortunate enough to be his students, and indeed to all of us, is a sense of realism, a direct experience of what it takes to be in the forefront of those fighting for human rights on a daily basis.

He has brought that same realistic idealism to his court. To read a truly great decision, read Arthur's opinion in the capital punishment case, including the footnotes.¹¹¹ Not only does he do a careful and thorough analysis of scores of capital punishment cases from courts throughout the world, but most importantly he sets out the terrible difficulties that defendants face in death penalty cases, where there is always a shortage of competent defense counsel and very few of the other necessary resources. This is realism that I am sad to say is rarely seen in the capital punishment opinions in our Supreme Court. It is this realistic idealism that has made the South African Constitutional Court one of the leading courts in the world, even though it is a very young tribunal.

My talk will consist largely of footnotes to Arthur's discussion of dignity. Arthur observed that the respect for human dignity is reflected in an insistence on equality and freedom from discrimination. Except for Justice William Brennan, however, dignity has not been a central element in the jurisprudence of our Supreme Court. In American constitutional jurisprudence, and indeed in our country in general, there has been little respect for true equality except occasionally and for brief periods of time.

The great triad of values of the French Revolution is liberty, equality, and fraternity. As a nation and as a society under the rule of law, we have been quite good on liberty, not very good at equality, and quite weak on fraternity, insofar as that means concern for our fellow human beings when they are in trouble. This is not new. Although our founding document, the Declaration of Independence, opened with the revolutionary pronouncement that "all men are created equal," those who wrote it and those who signed it were aware that this did not reflect the way Americans lived or even wanted to live. We were a slave society with one fifth of our people in bondage. Many signers of the Declaration of Independence, including Northerners like Robert Livingston of New York and John

111. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

Hancock of Massachusetts, were slaveholders. In 1770, 40% of New York City households owned slaves, and 9% of the people in Philadelphia were slaves. Women were certainly not equal to men in that society. Everyone knew this, and right from the very beginning, the assertion that “all men are created equal” was undermined by the reality of American life.

Unlike the Declaration, our original Constitution (which for these purposes includes the Bill of Rights, since it was part of the original understanding) contains no reference at all to equality. There could not be, for the Southern states, particularly South Carolina and Georgia, would not have allowed it. Instead, the slave trade was protected until 1808; there was a provision for a fugitive slave law, and of course there was the infamous three-fifths clause which insured Southern dominance of American politics up to the Civil War. Thus, right from the beginning we had a Constitution that not only showed no concern for equality but actually incorporated inequality in its most brutal form.

This was followed seventy years later by the infamous *Dred Scott*¹¹² decision, which ensured that black people could never be equal to whites, for it held that they could never be citizens. The Civil War Amendments overturned that decision and did try to promote true equality but failed to do so, either for black people or for women. When Reconstruction ended in 1877, black people and women were denied the equal protection of the laws despite the clear language of the Fourteenth Amendment. And, despite the Fifteenth Amendment, black people and women still could not vote, either legally with respect to women, or in practice with respect to the former slaves.

In his discussion today, Arthur pointed out that there is no significant difference between action and inaction when it comes to protection for human rights and human dignity. Of course, he is absolutely right. A failure to prevent discrimination can be as harmful as active discrimination. American law, however, has refused to recognize that. As recently as 2000, in a case involving the states' failure to protect women from violence, our Supreme Court ruled that the Constitution forbids only positive action against human

112. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

rights and not failures to act by state officials. Yet the literal meaning of the Fourteenth Amendment that no state may “deny to any person within its jurisdiction the equal protection of the laws” clearly condemns the failure to provide protection for those who are entitled to it under the law, *a failure* to act. Indeed, the amendment was aimed in part at the refusal of Southern law enforcement officials to protect the freedmen against white violence.

In sum, the end of Reconstruction saw the end of efforts to achieve equality in this country. Instead, the nation’s racism reasserted itself, North and South. In 1890, there was a half-hearted effort in Congress to protect black voting rights in the South. Southern senators filibustered and the effort failed. In 1896, in *Plessy v. Ferguson*¹¹³ the Supreme Court gave its imprimatur to racial oppression when it approved the doctrine of “separate but equal.” Here again, and I know no other word for it, the hypocrisy that has been a constant of American constitutional law where equality is concerned, asserted itself. The justices of the Supreme Court, many of them Northerners, knew that separation really meant subordination and inequality. Then, in the early 1900s, many Southern states adopted constitutions that were openly designed to deny black people any opportunity to vote. American democracy was thereby profoundly compromised, because if human dignity means anything, it is that each citizen is entitled to an equal voice in how the citizenry governs itself.

All this meant that there would be many more decades of human misery as black people were denied not only the vote but economic and every other kind of fair treatment. They risked physical violence, economic retaliation and even death if they tried to assert their right to be treated as equal human beings.

During the first half of the twentieth century it can fairly be said that most of the country, including its legal system, ignored the nation’s constitutional commitment to equal treatment for all. After World War II, things began to change. At first it looked as if very little had been altered. Black soldiers who returned to their Southern homes found discrimination and even violence if they tried to assert the rights they had fought and died for. But this time was different. Inspired in part by the *Brown*¹¹⁴ decision in 1954 and by great leaders

113. 163 U.S. 537 (1896).

114. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)

like Dr. Martin Luther King Jr. and Rosa Parks, black people first and then women, gays, and others began to assert their rights to equal treatment and human dignity. Although great social and economic changes resulted, the moment didn't last long. One of the first major blows came in 1976, when the Supreme Court, reversing all of the Courts of Appeals that have dealt with the issue, insisted that for there to be a constitutional violation discriminatory intent by a particular actor or group of actors was required.¹¹⁵ What the Court implied—which has been a central feature of American constitutional law—is that discrimination is a bad thing done by nasty individuals. That's true, but it completely ignores the way racism has penetrated all of our institutions. Even if one cannot find an individual perpetrator—they still exist but they are far more sophisticated today and harder to pin down—racism is embedded in the educational system, the employment system, and in many other contexts and institutions. Statutes have remedied this in part, but these have been interpreted much too narrowly in recent years to be truly effective as the federal courts have become increasingly conservative. As a result, the fight for human dignity, particularly for Black and Hispanic people, has suffered setbacks again and again.

I will conclude with what seems to me among the worst of all examples of the insensitivity and hypocrisy that pervades our courts' dealing with America's continuing inequalities. This is something that both Arthur and Frank touched upon: the current judicial insistence on colorblindness. Colorblindness, as a constitutional norm for dealing with our legacy of racism, is a superficially attractive piece of deception. It is, in fact, a strategy for undermining efforts to undo the vestiges of America's greatest historical evil. There is a profound moral difference between public and private action to *help* those in need and public and private action to *hurt* them. It is the difference between good and evil. Yet today's conservative justices and judges insist on equating the two. The kind of blindness that Frank quoted from Chief Justice Roberts' opinion in the *Seattle* voluntary school integration case¹¹⁶—using Thurgood Marshall's own words in the *Brown* argument to block a modest

115. *Washington v. Davis*, 426 U.S. 224 (1976).

116. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

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effort to integrate black and white schoolchildren, something that Justice Marshall fought for his entire life—is one of the most shameful utterances by a Supreme Court justice in recent memory; it ranks with the approval of “separate but equal” in *Plessy*.

So this is where we are today. We have adopted potentially strong amendments to promote equality and human dignity, and there have been many advances in our constitutional jurisprudence. Unfortunately, we are not likely to have many more such advances soon. I don’t think that the doctrines and principles developed by Chief Justice Chaskalson and by the South African Constitutional Court under his leadership will have much influence on our country, at least not in the foreseeable future. I am afraid that we are not yet ready to follow the path toward human dignity blazed so courageously and brilliantly by Chief Justice Arthur Chaskalson.