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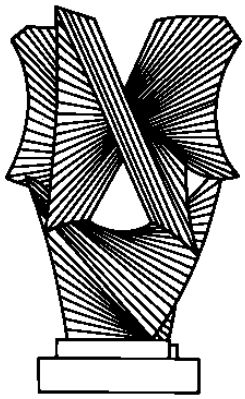

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In the United States, as Reva Siegel has recently noted, the right to abortion has increasingly been linked by pivotal justices to the idea of individual human dignity.[1] This connection between ideas about human dignity and rights of access to abortion also finds support in broader comparative context.[2]

In Canada, for example, in her concurring judgment in *R v. Morgentaler*,[3] Justice Wilson suggested that "respect for human dignity" was central to the issue of access to abortion because "the right to make fundamental personal decisions without interference from the state" was a key aspect of human dignity, as one of the central values on which the Canadian *Charter of Rights and Freedoms* 1982 was founded.[4] In Germany, in the *Abortion I* Case,[5] the German Federal Constitutional Court (GFCC) held that "pregnancy belongs to the sphere of intimacy of the woman, the protection of which is guaranteed by the Basic Law"; and further that this sphere of intimacy, and the right of self-determination it implied, were "values to be viewed in their relationship to human dignity".[6] In the *Abortion II* Case,[7] the GFCC was even more explicit in recognizing that access to abortion was supported, or indeed probably even required, by "the human dignity of the pregnant woman, her … right to life and physical integrity, and her right of personality."[8] In Brazil, in 1999, in the case of a pregnancy involving an anencephalic fetus, the Supreme Court of Brazil placed similar reliance on the idea of human dignity—and the capacity of "gestating pain, anguish and frustration" in the context of such a pregnancy to cause "violence to human dignity"—as the prime basis for invalidating a prohibition on access to abortion in

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1 Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L. J. 1694 (2008) [hereinafter *Dignity and the Politics of Protection*]. See e.g. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming the central holding in *Roe v. Wade*, 410 U.S. 113 (1973), that women enjoy a constitutionally protected right to terminate a pregnancy prior to viability, and in doing so, holding that prior decisions recognized that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and that "these matters, involving the most intimate and personal choices a person may make in a lifetime [are] choices central to personal dignity and autonomy"). For other usages of dignity, both explicit and implicit, in U.S. Constitutional jurisprudence at a Supreme Court, and also state level, see also Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 16 (2004).

2 Cf. Reva Siegel, *Dignity and the Abortion Debate*. The Seminario en Latinoamérica de Teoría Constitucional y Política – the Seminar in Latin America on Constitutional and Political Theory [SELA], June 2009, Asunción, Paraguay (on file with authors). See also Reva Siegel, *Dignity and Reproductive Rights*, (forthcoming, 60 Case Western L Rev).

3 [1988] 1 S.C.R. 30.

4 Id. at166.

5 39 BVerfGE I (1975).

6 As discussed further below, this was also the axis according to which the Court suggested fetal interests should be viewed. See notes 21-22 *infra*.

7 88 BVerfGE 203 (1993).

8 See translation of *Abortion II* provided by DONALD P. KOMMERS in THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 350 (2d ed., 1997)

such circumstances.[9] More recently, in Colombia in 2006, in holding that the Colombian Constitution protects certain minimal rights of access to abortion, the Colombian Constitutional Court cited a concern for human dignity as a basis for striking down the criminalization of abortion in three sets of circumstances: where a pregnancy is the result of rape; involves a non-viable fetus or threatens a woman's life or health.[10] In other countries, such as Australia, the idea of human dignity has also been relied on to support recognition of related reproductive rights claims, such as the freedom free from involuntary sterilization.[11]

Likewise at an international level, in recent years, the United Nations Human Rights Committee has held that a concern for human dignity implies limits on states' freedom to restrict access to legal abortion services. Art 7 of the International Covenant on Civil and Political Rights prohibits state connect that is "cruel and inhuman", and this, according to the Committee, prohibits states party from any action which infringes "the *dignity* and the physical and mental integrity of the individual". [12] Where carrying a fetus to term would involve significant physical or psychological harm to a woman, the Committee has further held, this will directly violate this guarantee of individual dignity and integrity in Art 7.[13]

At the same time, the idea of dignity as a constitutional value that supports a right of access to abortion also remains under-theorized in comparative constitutional scholarship. This is particularly so when it comes to the relationship between human dignity and women's physical and psychological health or integrity. There is a deep body of theoretical writing dating back (in the Western tradition[14]) at least to the ancient Greek and Roman Stoics, and prominently exemplified in the writings of Immanuel Kant, which supports the idea that respect for human dignity involves seeing a human being as an end and not a mere means. This respect involves a reciprocal willingness, on the part of individuals, to treat others as subjects and not merely objects, and thus entails the protection of areas of freedom around people so that they can determine their own destiny in areas of central concern.[15] There have also been numerous attempts, both judicial and scholarly, to connect this idea of dignity to the specific abortion context. By contrast, with the exception of previous work by one of us in this area, there have been few attempts at a theoretic level to connect the idea of human dignity to claims by individuals to a certain threshold level of material, physical and psychological well-being– i.e.

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[9] Arguição de Descumprimento de Preceito Fundamental - DF 54/2004 [Translation by Amy Benford, On with Authors]. See further also Debora Diniz, Selective Abortion in Brazil: The Anencephaly Case, 7 Developing World Bioethics 1471 (2007).

[10] Columbian Constitutional Court Decision C-355 of 2006.

[11] In Australia, for example, the High Court of Australia held that the right to bodily security was underpinned by the idea of human dignity, or that "each person has a unique dignity which the law respects and which it will protect", and that respect for human dignity requires "that the whole personality be respected: the right to physical integrity is a condition of human dignity but the gravity of any invasion of physical integrity depends on its effect not only on the body but also upon the mind and on self-perception": see *Department of Health v. JWB* ("Marion's Case"), (1992) 175 C.L.R. 218.

[12] See Office of the High Commissioner for Human Rights, CCPR General Comment No. 20 (1992), available online at: http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument

[13] See *Llantoy Huamán v. Peru* (1153/03).

[14] For related ideas in Asian traditions, see generally AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES (1997).

[15] Siegel refers to this as "dignity as liberty," but, as we shall argue, this locution is misleading: dignity entails liberty, but is not equivalent to liberty. See generally Siegel, *Dignity and the Politics of Protection, supra* note 1.

dignity as entailing a baseline of affirmative material support– [16] and to date this work has not sought to focus specifically on the issue of abortion.

Without such a theoretical account of dignity and its potential relationship to rights to abortion, it is, moreover, extremely difficult to justify much of the existing reliance on the idea of human dignity in countries such as Germany, Brazil, Colombia and Australia, and also internationally. This is because in all of these contexts a core part of the concern of relevant decision-makers has been with the connection between human dignity and physical and psychological health, rather than simply human dignity and individual liberty or decisional autonomy.

In this essay, we therefore offer the beginnings of a more complete theoretic account of the link between ideas about human dignity and constitutional abortion rights. We do so by drawing on the capabilities-based approach developed by one of us elsewhere;[17] and by explaining for the first time in detail the logical implications of such an approach for the constitutional regulation of abortion.

The essay proceeds in three parts. Part I provides a basic explanation and outline of the capabilities approach; and the capabilities most directly relevant to the abortion context. Part II considers the implications of a capabilities approach and a concern for human dignity for the treatment of fetal life, and the degree to which such considerations may provide support for some form of ceiling, as well as a floor, on basic rights of access to abortion. Part III considers the potential practical pay-off for reproductive rights advocates, in the context of issues such as the public funding of abortion and health-based arguments for access to abortion, of being able to connect the idea of dignity in an abortion context to a capabilities approach.

Part I. A Capabilities Approach and Abortion

The Capabilities Approach, a theoretical approach to quality of life assessment and to theorizing about basic social justice, emerged as an alternative, in the global development context, to theories that focus on economic growth as the main indicator of a nation or region's quality of life. Departing from this narrow economic focus—which fails even to ask about the distribution of social wealth—the CA (as we shall henceforth call it) holds that the key question to ask, when comparing societies and assessing them for their decency or justice is, "What is each person able to do and to be?" In other words, like the Kantian approach mentioned above, it treats each person as an end, asking not just about the total or average achievements of a nation,

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[16] For this distinction between dignity in the Kantian sense, and dignity in the baseline sense, see Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong Form versus Weak Form Judicial Review Revisited*, 5 ICON 391, 400-401 (2007).

[17] See generally MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CA(2000); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006) [hereinafter FRONTIERS]; Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEM. ECON. 33 (2003); Martha C. Nussbaum, *Constitutions and Capabilities: Supreme Court Foreword: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007) [hereinafter *Constitutions and Capabilities*]. The relationship between Nussbaum's version of the approach and that of Amartya Sen is discussed in Nussbaum, *Capabilities as Fundamental Entitlements*, *supra*, and the entire related group of theories is discussed in MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (forthcoming May 2011).

but about the opportunity set available to each person. It is focused on choice or freedom, holding that the crucial thing societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs. It thus commits itself to respect for people's powers of self-definition. The approach is resolutely pluralist about value: it holds that the capability achievements that are central for people are different in quality, not just in quantity, that they cannot without distortion be reduced to a single numerical scale, and that a crucial part of understanding and producing them is an understanding of the specific nature of each. It ascribes an urgent **task to government and public policy**: namely the improvement of quality of life for all people, as defined by their capabilities.

So much is common to various users of the approach. In Nussbaum's specific version, these ideas are used as building blocks of a minimal theory of social justice, in combination with an idea of human dignity. The idea is that a minimally just society is one that secures to all citizens a threshold level of a list of key entitlements, on the grounds that such entitlements are requisite of a life worthy of human dignity. (There is also an account of the entitlements of other animal species, and here reference is made to the dignity appropriate to the species in question.) The notion of dignity is an intuitive notion that is by no means utterly clear.[18] If it is used in isolation, as if it is utterly self-evident, it can be used capriciously and inconsistently. Thus it would be mistaken to use it if it were an intuitive self-evident and solid foundation for a theory that would then be built upon it. The CA does not do this: dignity is one element of the theory, but all of its notions are seen as interconnected, deriving illumination and clarity from one another. But the basic idea is that some living conditions deliver to people a life that is worthy of the human dignity that they possess, and others do not. In the latter circumstance, they retain dignity, but it is like a promissory note whose claims have not been met. As Martin Luther King, Jr. said of the promises inherent in national ideals: dignity can be like "a check that has come back marked 'insufficient funds.'"

Although the idea of dignity is a vague idea that needs to be given content by placing it in a network of related notions, it does make a difference. A focus on dignity is quite different, for example, from a focus on satisfaction. Think about debates concerning education for people with severe cognitive disabilities. It certainly seems possible that satisfaction, for many such people, could be produced without educational development. The arguments that opened the public schools to such people used, at crucial junctures, the notion of dignity: we do not treat a child with Down syndrome in a manner commensurate with that child's dignity if we fail to develop the child's powers of mind through suitable education. In a wide range of areas, moreover, a focus on dignity will dictate policy choices that protect and support agency, rather than choices that infantilize people and treat them as passive recipients of benefit.

So far, the CA looks like a close relative of the Kantian notions mentioned above, and this is not altogether wrong. On the other hand, the CA conceives of the human being as inherently animal and a member of the natural world. Dignity is something in and of this world, not something belonging to a noumenal realm of freedom impervious to worldly accidents. This

[18] See Martha C. Nussbaum, *Human Dignity and Political Entitlements*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 351 (Adam Schulman & Martha C. Nussbaum, eds., 2008).

emphasis leads the CA to take issue with Kantian ideas in two ways. First, whereas Kant conceives of our human dignity as residing entirely in rationality, the CA understands the basis of human dignity far more inclusively: human dignity inheres in sentience, emotion, affection, physical health, and appetite as well as in rationality. Thus it can see human beings with severe cognitive disabilities as full equals in human dignity, and damages to any of these elements as assaults on human dignity.[19] It also recognizes that dignity is not the private possession of the human species alone: each animal species possesses a type of dignity. (As in the human case, this dignity inheres in the entire organized set of its characteristic capacities, whatever they are in each case, and not in any putative set of "higher powers".[20]) Second, whereas Kant imagines dignity as like a diamond, impervious to the blows and shocks of natural accident, the CA imagines it as vulnerable, capable of suffering assaults from the world of nature. When such assaults occur, dignity is not removed, but it is profoundly harmed (just as we would say that a rape does not remove a woman's dignity, but does profoundly harm or violate it). From the perspective of the CA, then, deprivations of health opportunities or opportunities for emotional well-being are just as pertinent to the concept of human dignity as deprivations of liberty of choice.

Another way in which the CA differs from Kantian approaches is in its sensitivity to social context. Although at a high level of generality, entitlements are recommended as norms for all nations, the nation itself is assigned the task of specifying each of these entitlements more concretely. Often different nations will rightly do this in keeping with their specific histories and circumstances. For example, a free speech right that suits Germany well (allowing a complete ban on antisemitic speech) would be too restrictive in the different social climate of the U. S.: in this case, both countries are correct, though they define entitlements differently. In other cases, we may feel that a nation's tradition has been used as a mere excuse to avoid the claims of human dignity in a given area: thus, the U.S. failure (until very recently) to guarantee even minimal health care could be seen as growing out of a distinctive tradition, but it is not for that reason right. The only way to adjudicate these difficult cases is by detailed argument in each case: a nation must show that its traditions give humanly good reasons, reasons consistent with equal human dignity, for defining an entitlement differently.[21]

The primary claim of the CA is that each and every person is entitled to a minimum threshold level of ten central capabilities or opportunities, and that the job of securing these is that of the state in which they live (in some cases with the assistance of global redistribution).[22] What does this approach imply for abortion rights? The CA does not follow Kant in grounding dignity in rationality alone: it recognizes a variety of ways in which laws restricting abortion may burden or violate the dignity of women: by restriction of liberty and choice, but also by damage or risks to health, bodily integrity, emotional well-being, employment options, and affiliations. All of these are similar threats to human dignity, because human dignity is understood as involving the "animal" side of human nature as well as the side that chooses. Indeed, the two "sides" are understood as thoroughly interwoven: giving someone a life worthy

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[19] Thus not people in a permanent vegetative condition, or anencephalic infants, but all children born of human parents, and who possess some minimum level of sentience and striving.

[20] NUSSBAUM, FRONTIERS, *supra* note 17 at 346-52.

[21] NUSSBAUM, FRONTIERS, *supra* note 17 at 78-80.

[22] For the list, see Appendix. On global redistribution, see NUSSBAUM, FRONTIERS, *supra* note 17 at ch. 5.

of human dignity requires not just giving some food, but giving choices regarding nutrition; not just health, but choice regarding health. Only then can these "animal" functions be performed in a way worthy of human dignity. The policy direction of this theoretical conception is thus clear: laws should not simply shield women from a variety of burdens, it should create full-fledged capabilities, or opportunities for choice, in each area.

Part II. A Capabilities Approach and Fetal Life

It is, of course, important to note that the idea of human dignity has not only been invoked by those supporting a right on the part of women to legal access to abortion. It has also been used in various contexts by opponents of abortion, and indeed also by various constitutional courts, as supporting arguments in favor of the protection of fetal life. In Germany in the *Abortion I* case, for example, the GFCC not only recognized that the fetus enjoyed constitutional protection under the Basic Law's guarantee of the right to life.[23] It also held that this right should be understood through the prism of its "relationship to human dignity [as] the center of the value system of the constitution."[24] Likewise in the U.S., in *Gonzales v. Carhart* (*Carhart II*)[25] in the context of attempts by Congress' to ban certain procedures used to conduct late-term abortions (intact dilation and extraction or "D&X"), the Court suggested that by "proscrib[ing] a method of abortion in which a fetus is killed just inches before completion of the birth process", the Congressional statute in question "expresse[d] respect for the dignity of human life".[26]

Under the CA itself, it is plausible to make similar arguments about the standing of the fetus. A CA sees human beings with severe cognitive disabilities as full equals in human dignity. It also recognizes that dignity is not the private possession of the human species: each animal species possesses a type of dignity. And while the fetus does not possess a great deal in the way of agency, it does appear to have a stronger claim to agency than a person in a permanent vegetative condition (not a bearer of dignity, according to the CA), because it is at least potentially sentient and an agent. So it would seem inconsistent if the CA refused all moral status to the fetus. And indeed the CA does recognize that the fetus possesses a type of human dignity—although its dependent and merely potential status means that its type of dignity is distinctive, and not directly commensurable with that of independent human beings. The CA, then, both grants the fetus a type of (potential) human dignity and (in its focus on agency and striving) explains why that status is distinct from that of post-birth human beings. Because of this, in some sub-set of constitutional contexts (i.e. those that in general a draw close connection, in constitutional terms, between shared national values and a duty on the part of the state to advance those values), to some degree the CA may also support, rather than undermine, the validity of the state imposing some form of ceiling on legal access to abortion. But, even if this is so, the recognition of the fetus as having potential standing under a CA does not undermine the case a CA makes for recognizing some form of legal floor regarding access to abortion—or, depending on the context, for states giving constitutional or quasi-constitutional status to

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23 See translation of Abortion I in KOMMERS, *supra* note 8 at 338

24 Id. at 339.

25 550 U.S. 124 (2007).

26 Id. at 156-157.

abortion rights at least within certain "central ranges", common to the constitutional systems of most countries that permit legal access to abortion.[27]

Among such countries, there is a clear "overlapping consensus"[28] in favor of permitting access to abortion where a woman's life or health is at stake; and also broad (if somewhat lesser) recognition of a legal right of access to abortion where a pregnancy is the result of sexual violence or continuing a pregnancy would otherwise impose a particularly serious burden on a woman.[29] A CA also provides a variety of reasons to support recognizing legal access to abortion in each of these circumstances.

Prior to the viability of the fetus *ex utero*, the continued existence of the fetus as a being entitled to human dignity is entirely contingent on the provision of affirmative support by a woman.[30] In these circumstances, a fetus cannot be said to have a "right to life" unless, from a normative perspective, a woman is also under a corresponding duty to provide such affirmative support.[31] In a liberal society which prizes individual autonomy, there will also be few circumstances in which it is legitimate—from the standpoint of notions of equal justice– to impose such a duty.[32]

Such a duty certainly could not reasonably be said to arise where a woman's own life was in danger if she continues a pregnancy to term, given her right, as a normative matter, to engage

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[27] For the idea of central ranges as applied to various rights, see JOHN RAWLS, POLITICAL LIBERALISM (1993). On the potential for such protections to take different constitutional form, or indeed quasi- or sub- constitutional, form, according to the context, see also id; Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815 (2007) [Hereinafter *Sex Equality Arguments*]

[28] On the idea of, and significance, of an overlapping consensus of this kind from a normative perspective, compare RAWLS, *supra* 27 at 212-20.

[29] See Center for Reproductive Rights, *The World's Abortion Laws 2009 Factsheet*, online at: http://reproductiverights.org/en/document/world-abortion-laws-2009-fact-sheet (Oct. 2009); Susheela Singh et. al., *Abortion Worldwide: A Decade of Uneven Progress*, Guttmacher Insitute 50 (2009). For a broader survey of global abortion laws, see also e.g. United Nations, *Abortion Politics: A Global Review* (2002), online at: http://www.un.org/esa/population/publications/abortion/; Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence* (Working Paper 2010); Seigel, *Sex Equality Arguments*, *supra* note 27.

[30] After viability, there is perhaps greater scope for disagreement among reasonable persons as to how the balance ought to be struck between the constitutional rights or interests of the fetus, and those of the woman, because for some, the importance of human life as a constitutional value will mean that the claims of the fetus should take priority except in cases where the life of a woman is at stake. However, for those who see human dignity as the "center of the value system of the constitution" (compare *Abortion I*, translated in KOMMERS, *supra* note 8 at 339), there will still be an argument that in some cases a physical or mental health exception should be allowed – because, for example, continuing a pregnancy prevents a woman from obtaining treatment (such as chemotherapy) that is critical for her own health, risks triggering a serious latent illness, or requires a woman to give birth to a child she knows will die shortly after birth, and is subject to other severe forms of impairment: compare e.g. *Llantoy*, *supra* note 13.

[31] Cf. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF., 47, 56 (1971).

[32] See Jarvis Thomson, *supra* note 31 at 51-53.

in at least certain limited forms of self-defense.[33] A similar self-defense argument can be made in cases in which the woman risks severe bodily injury.

If a pregnancy threatens seriously to undermine a woman's physical or psychological health, because of the danger associated with the pregnancy itself, or the trauma associated with giving birth to a child who is the result of sexual violence or subject to the severe impairments, in most instances it would also be unreasonable in a liberal society, which generally prizes individual human dignity over notions of communal obligation, to impose such a duty, even if fetal itself has a claim to be treated with dignity.[34] As part I notes, one of the key contributions of the CA in this area is to make clear how and why health is central to a woman's *own* dignity.[35] One of the benefits of this is that it makes clear how it is that any demand a woman makes to access an abortion on therapeutic grounds is based on claims with the same type of normative force as those made on behalf of the fetus, and therefore why it would be unreasonable for the state to seek systematically to prefer one of these claims, over another, by (for example) broadly criminalizing access to abortion.[36] Once we add recognition of the potential and dependent status of the pre-viability fetus, the degree of normative force in the woman's claim seems, as a general matter, stronger.

A similar analysis also applies, under a CA, in circumstances where a woman claims that if she were denied access to an abortion, she would lose all meaningful chance to determine the future shape of her life.[37] Not only would a woman in such circumstances lose the opportunity to exercise a central human capability—i.e., her capacity for practical reason. The possibility that this could occur, even where sex is fully protected, could also serve to discourage women more generally from forming the kind of intimate relationship, or seeking the kind of sexual pleasure, that is integral to the opportunity for a life worthy of full human dignity. Again, the woman (or women) in this context also invoke(s) the same type of normative claim that is made on behalf of

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[33] See Jarvis Thomson, *supra* note 31 at 60-64. As Cass Sunstein notes, any notion that the act of a woman in refusing such support is in fact active killing, rather than a more passive refusal to provide affirmative support, rests on deeply gendered, stereotypical assumptions about women's presumptive or baseline role in society: see Cass R. Sunstein, *Neutrality in Constitutional Law (With Special References to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 35 (1992) [hereinafter *Neutrality*].

[34] Compare Jarvis Thomson, *supra* note 31 at 58-60, 64 (making similar arguments, though not ones based on the same language of capabilities); Paul Freund, *Storms over the Supreme Court*, 69 A.B.A. J 1474 (1983). Jarvis Thomson raises the possibility that, in some circumstances, where a woman could be shown affirmatively to have assumed the risk of pregnancy – with full knowledge of its potential risks and consequences– a different position might apply. Like Jarvis Thomson, however, we believe that in practice such cases would tend to be relatively rare, and that in any event, such considerations would only justify constraints on women's access to abortion in limited circumstances, where, for example, the costs to her in terms of dignity of continuing a pregnancy were relatively insignificant.

[35] See part I *supra*.

[36] One argument that is sometimes made to the contrary is that a woman's claim in this context is of lesser standing because she voluntarily assumed the risk of pregnancy. At most, however, such an argument could only legitimately be deemed to apply in very narrow circumstances – where a woman had truly voluntary, unprotected sexual intercourse with full knowledge of the potential risks of pregnancy that entailed: compare Jarvis Thomson, *supra* note 31 at 58-59; Sunstein, *Neutrality*, *supra* note 33 at 41.

[37] In many countries, this is recognized by the provision for access to abortion after a process of counseling and deliberation, and in others, by provision for access to abortion in cases of "social emergency": see e.g. *Abortion II*, *supra* note 7.

the fetus, but the asymmetry between a potential and an actual being suggests that, pre-viability, the woman's claim should in general prevail.

Consistent with this understanding, in comparative constitutional jurisprudence there is broad recognition, even amongst most constitutional courts that explicitly recognize the fetus as having constitutional standing, that clear limits exist as to when the state may *reasonably* require a woman to continue a pregnancy to term.[38] The GFCC, for example, has held that, even though the fetus possesses human dignity from the moment of conception, and the state is affirmatively obliged under Art 2 of the Basic Law to protect fetal life, a woman's right to freedom and dignity mean that cannot "exact" from a woman the continuation of a pregnancy where this would involve "unreasonable demands."[39] In France, in the face of statutory principles that enshrine a "principle of respect for all human beings from the inception of life",[40] the *Conseil Constitutionel* has likewise held the Voluntary Interruption of Pregnancy Act is consistent with both statutory and constitutional principles, given that the Act both limits the circumstances in which abortion is available (to cases in which there are therapeutic grounds for an abortion or "reasons of distress", and is designed to respect the "freedom of persons" (i.e. the woman). [41]

For those who advocate moral standing for the fetus, under a CA or otherwise, it is also important to recognize what this entails for the practice of sex-selective abortion common in many parts of the developed and developing world, particularly the nations of East and South Asia.[42] Sex-selective abortions affect human capabilities in two different ways: instrumental and intrinsic. Instrumentally, such abortions serve to perpetuate denigrating stereotypes of the worth of female life; and also, in many cases, to reinforce gender-based hierarchies in social and economic life. Intrinsically, they constitute a statement that expresses the unequal worth of female life, and they also constitute a type of discrimination: the fetus, which has some standing, is harmed because it is female. Here we see the value in allowing the fetus to have moral standing: not any and every claim of the parents, but only a claim securely grounded in protection of the woman's central capabilities, will clearly trump the claim of the fetus. "I must protect my health" has one kind of force; "I don't want to pay a dowry" or "I am longing for sons", quite another.

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38 One exception is Poland: see *Family Planning Act Amendment*, K. 26/96 (1997).

39 See KOMMERS, *supra* note 8 at 353. See also Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW (Susan Williams, ed. 2009).

40 See *Voluntary Interruption of Pregnancy Act*, Decision 74-54 DC (1975).

41 Id.

42 For data see JEAN DRÈZE & AMARTYA SEN, INDIA: DEVELOPMENT AND PARTICIPATION 257-62 (2002). Natality ratios (the biologically common ratio being 95 girls born to 100 boys) suggest a high rate of sex-selective abortion not only in poorer nations with low levels of female education and economic participation (such as India, with 92.7 girls for 100 boys), but also in Singapore (92/100), Taiwan (92/100), South Korea (88/100), and China (86/100). Wide regional differences exist within India, corresponding to cultural differences.

Part III. Reproductive Rights Advocacy and a Capabilities Approach

Theories shape practical debates, for better or worse. For many years, the equation of economic growth with improvement in quality of life skewed the emphasis of public policy. [43] Similarly, Kantian and other theories that equated human dignity with rationality contributed to the marginalization of people with severe cognitive disabilities. Getting the theories out into the open and articulating them with clarity is important, so that we can challenge what we find defective once we see it plainly. And when a defective theory exercises wide influence on public policy, articulating a counter-theory is usually the best way of clearing the way for a more adequate set of policies. In one sense, the CA does not say anything that non-theoretical people themselves could not say, if given the chance. It does, however, provide an explicit critique of what is defective in dominant theoretical approaches, at the same time spelling out a richer set of goals with clarity. In the abortion area as well, it has distinct advantages over other theoretical paradigms, not only as Part I has argued, in its ability to explain the connection between human dignity in the baseline sense and rights of access to abortion, but also in its capacity to shed light on existing state practices regarding public funding for abortion and on the deficiencies of "women protective" anti-abortion arguments.[44]

The CA, as part I notes, helps show why, as a normative matter, rights of access to abortion should be understood in terms that refer both to barriers against state interference and to affirmative duties on the part of the state to provide support. A life with human dignity requires protection of all the Central Capabilities up to a minimum threshold level: but all are conceived as opportunities for choice, and thus none has been secured unless the person has the opportunity to exercise choice in matters of actual functioning.

A CA also help show the close connection between autonomy and health-based reasons for allowing access to abortion, in a way that can help highlight the deep normative inconsistency in allowing women access abortion on health grounds, while at the same time denying her capacity for rational decision-making about her health. Under the CA, practical reason is not merely one capability on the list: it also suffuses and shapes all the others, making their pursuit truly worthy of human dignity. By providing a theoretical vocabulary in which these interrelationships are articulated, the CA thus gives advocates and policy-makers a way of articulating these claims that is richer and more precise that that promised by Kantian or narrowly economic approaches.

In the U.S. in particular, given the nature of ongoing controversies surrounding access to abortion, both of these theoretical insights are likely to be especially valuable. Access to abortion for poor women remains a major issue in many states in the U.S. in the wake of the 1977 Hyde Amendment restricting access to abortion under federal Medicaid programs in all but the most

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[43] See Joseph E. Stiglitz et. al., Report by the Commission on the Measurement of Economic Performance and Social Progress (2009), online at: http://webcache.googleusercontent.com/search?q=cache:http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf .

[44] See Siegel, *Dignity and the Politics of Protection supra* note1; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 [hereinafter *The New Politics of Abortion*].

extreme circumstances,[45] which the Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980) upheld as constitutional. [46] There have also been increasing challenges in the U.S. in recent years to legal rights of access to therapeutic abortions, or certain abortion procedures designed to protect women's health, based on women protective anti-abortion arguments.[47] Following *Carhart II* in which the Supreme Court dismissed a facial challenge to the Partial-Birth Abortion Ban Act of 2003 (Act),[48] it is illegal in almost all cases in the U.S. for medical practitioners to use D&X procedures in order to perform a late-term abortion. In eight states, there is also legislation that (at least *prima facie*) prohibits the use of all abortion procedures (including non-intact dilation and extraction (D&E)) post-viability, unless they are necessary to save the life of a woman, or justified on very limited health-grounds.[49] In the earlier stages of pregnancy, at least until recently, there have also been concerted attempts to limit access to RU486 or medical abortion, as another medically beneficial abortion option for many women.[50]

In other countries, however, there are also similar ongoing controversies surrounding access to abortion services. While most countries that allow legal access to abortion, other than the U.S., also provide at least some form of public funding for abortion, in many countries there also continue to be important gaps in the adequacy and universality of such funding.[51] As to

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[45] Many recent proposals to expand health-care coverage for uninsured Americans also specifically exclude the possibility of indirect government funding for abortion services: see e.g. Heather D. Boonstra, *The Heart of the matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 12 (2007).

[46] See *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (holding, in the context of provisions of the Hyde Amendment preventing use of Medicaid funds for all abortions – including medically necessary abortions –the Court held that: "[a]lthough the liberty protected by the Due Process Clause affords protection against government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom"). See also *Maher v. Roe*, 432 U.S. 464, 475 (1977) (holding in the context of state-based limitations on public funding for non-medically necessary abortions that "[t]he indigency that may make it difficult -- and in some cases, perhaps, impossible -- for some women to have abortions is neither created nor in any way affected by" state law and therefore such laws were "not [an impingement] upon the fundamental right recognized in *Roe*").

[47] Siegel, *The New Politics of Abortion*, *supra* note 44; Siegel, *Dignity and the Politics of Protection*, *supra* note 1.

[48] 18 U. S. C.§1531 (2000 ed., Supp. IV)

[49] See Guttmacher Institute, *State Policies in Brief: State Policies on Late Term Abortions* (2010), online at: http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf (listing 10 states that impose such procedural restrictions, and 8 states that impose relevant substantive limitations).

[50] See Siegel, The New Politics of Abortion, *supra* note 44; Siegel, *Dignity and the Abortion Debate*, *supra* note 2; Siegel, *Dignity and the Politics of Protection*, *supra* note 1. See also e.g. arguments in a "citizen's petition" by W. David Hager, member of the FDA Advisory Committee for Reproductive Health Drugs, that mifepristone "endangers the lives and health of women" see American Association of Pro Life Obstetricians and Gynecologists, *Petition Filed with FDA Regarding Seriously Flawed Mifeprex (RU-486) Approval Process*, Aug. 20, 2002 (cited in NARAL, *The Safety of Legal Abortion and the Hazards of Illegal Abortion*, online at: http://www.prochoiceamerica.org/issues/abortion/medical-abortion/mifepristone-abortion-politics.html, which continues a reliance on such arguments).

[51] In some cases, this is because of an unwillingness on the part of public, as well as private, hospitals to provide abortion services: see e.g. Center for Reproductive Rights, *Center Praises Momentous Decision in Abortion case in Columbia* (Oct. 2009), http://reproductiverights.org/en/press-room/center-praises-momentous-decision-in-abortion-case-in-colombia (discussing the Constitutional Court's ruling that institutions had to ensure that they had qualified medical staff on hand to perform abortions, a decree that was later suspended by the Council of State. See Neda Vanovac, *State Council Suspends Abortion Decree*, COLOMB. REP. (Oct 22, 2009), http://colombiareports.com/colombia-news/news/6522-state-council-suspends-abortion-decree.html); in others it is because of budgetary short-falls: see e.g.*Women 'Forced to Pay for Private Abortions'*, BBC News (Dec. 7, 1999),

women-protective anti-abortion arguments, there has also been a rise in the prevalence of such arguments outside the U.S. in recent years. Such arguments have been voiced in the context of the deliberations of the Parliamentary Assembly of the Council of Europe[52] and also hearings of the United Nations Committee on the Elimination of Discrimination Against Women.[53] More recently, such arguments have also been made in domestic courts such as the High Court of New Zealand, in the context of a challenge to the administration and supervision of various exceptions to the general prohibition on abortion under s. 183 of the Crimes Act.[54]

In almost all these contexts, and particularly in the U.S., there is also some existing at least *quasi*-constitutional commitment to recognizing the importance of human dignity, either in a Kantian or baseline sense, in the context of rights of access to abortion, that provides a natural starting point for reproductive rights advocates in seeking to make arguments based on a CA.[55]

Across a wide variety of contexts, therefore, the CA has the potential to make a difference to existing rights of access to abortion on the ground—particularly if it is used by

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http://news.bbc.co.uk/2/hi/health/553204.stm (discussing the situation in the UK in the early 1990's). In yet others, threats to the public funding of abortion arise because of political opposition to access to at least certain forms of abortion: see e.g. Don MacPherson, *Morgantaler wins NB Challenge for Funding Abortions*, EDMONTON SUN (May 21, 2009), http://www.edmontonsun.com/news/canada/2009/05/21/9530486.html (describing challenges in New Brunswick, Canada to funding for medically necessary abortions); *Barnett calls for action on late-term abortions*, ABC NEWS (Dec 22, 2008),

http://www.abc.net.au/news/stories/2008/12/22/2452586.htm?site=news (describing political challenges to the public funding of late-term abortions in Australia).

[52] See discussion in Siegel, *Dignity and the Abortion Debate*, *supra* note 2 at *5.

[53] See *"Abortion Bad For Women," Protests United Nations Women's Representative* (July 21, 2005), available at: http://www.lifesitenews.com/ldn/2005/jul/05072102.html (citing arguments by Hungarian me mber of the Committee, Krisztina Morvai, that "One thing that is invisible and lost in the debate is that abortion is bad for women….No woman actually wants to have an abortion. We have this illusion that women have free choices. But abortion is a terribly damaging thing psychologically, spiritually and physically").

[54] See *Right to Life New Zealand Inc. v. Abortion Supervisory Committee*, [2008] 2 NZLR 825 para. 152 (noting that "there is expert evidence that abortions can have adverse psychological side-effects, although the existence and extent of such problems is controversial" but declining to deal with the issue). For ongoing controversy surrounding the administration of the Act, see also *Right to Life v. Abortion Supervisory Committee* (Unreported High Court judgment No 2 of Miller J, 20 July 1999).

[55] In the U.S., there is a particularly strong constitutional grounding for both dignity as liberty and dignity as equality as applied to the abortion context: see e.g. *Roe*, *supra* note 2; *McRae*, 448 U.S. at 316 (noting that "it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does, in fact, lie at the core of the constitutional liberty identified in *Wade*"); *Casey*, 505 U.S. at 846 (affirming "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State" and the right of women, post-viability, to access medically necessary abortions). However, in many other countries that have recently experienced debates over access to public funding for abortion, or the rise of women-protective anti-abortion arguments, there is also some form of *quasi*-constitutional commitment to recognizing the importance of either dignity as liberty, or dignity in the baseline sense, that provides a starting place for making such arguments in the political sphere: see e.g. *Right to Life* [2008] 2 NZLR 825 par 77 (holding in the context of statutory provisions allowing abortion in circumstances where "the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of a woman or girl) that "from the perspective of a woman who wants an abortion, pregnancy and childbirth impose burdens of a profound and private nature, affecting her physical autonomy, her health, her relationships and her socio-economic status).

reproductive rights advocates so as to complement or supplement, rather than wholly replace, existing constitutional discourses—such as the language of gender equality.

The CA draws a close connection between human dignity and human equality. The dignity of all human beings (who possess a minimum of agency and sentience) is held to be fundamentally equal.[56] The deep equality of human beings does not necessarily mean that they are only treated justly if they are treated alike: it remains to be seen, in each area, what sort of treatment sufficiently acknowledges the fact of human equality. In some areas (voting, religious liberty) it will readily be agreed that the recognition of human equality (treating as equals) requires equal treatment: giving some people more votes than others would be offensive to their equal human dignity. In other areas (e.g. education) it remains controversial whether respect for human equality requires giving equal educational provisions.[57] In yet other areas (e.g. housing), it may seem that respect for human equality requires only a threshold of adequacy, not similar housing for all. But one thing that is clearly unacceptable is to give a disadvantage or burden to a group within the population that is already marginalized or disadvantaged on other grounds: this insight, which lies behind modern Equal Protection Clause review, is also articulated by the CA.[58] This insight will show us why the CA supports a common form of argument for abortion rights based on women's equality.

In many countries, as a matter of existing constitutional practice, there is also an extremely close link between, on the one hand, constitutional commitments to human dignity, and on the other, constitutional guarantees of equality. Indeed, in countries such as Canada, Germany and South Africa, perhaps the most important determinant of whether a constitutional guarantee of equality is violated is in fact whether a measure adversely affects individual dignity—in the sense of an individual's sense of self-worth, or enjoyment of respect from others.[59] In the United States, there are also arguable emerging traces of such an understanding in the jurisprudence of Justice Kennedy.[60] In the specific context of abortion, as Canadian Justice Wilson noted in *Morgentaler,* there is also a particularly close connection between the struggle for human dignity and gender equality, given that for many women the struggle for reproductive rights advocates is parallel to previous struggles by men to "assert their common humanity and dignity against an overbearing state apparatus", such that "the right to reproduce or not to reproduce … is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being."[61]

At a more theoretic level, Kenneth Karst, Ruth Bader Ginsburg, Cass Sunstein and Reva Siegel, among others, have further made powerful equality-based arguments in favor of

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[56] See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 18 at ch. 5.

[57] See id. (arguing that it does).

[58] See Nussbaum, *Constitutions and Capabilities*, *supra* note 17.

[59] In Canada, see e.g. *Law v. Canada*, [1999] 1 S. C. R. 497; in South Africa, see e.g *President of the Republic of South Africa and Another v. Hugo*, [1997] ZACC 4; *Harksen v. President of South Africa and Others*, [2000] ZACC 29; *City Council of Pretoria v. Walker*, [1998] ZACC 1; *Khosa v. The Minister of Social Development*, [2003] CCT 13/03.

[60] Siegel, *Dignity and the Politics of Protection*, *supra* note 1(noting the idea of dignity as equality in various US Supreme Court opinions).

[61] See *Morgentaler*, [1988] 1 S.C.R. at 172 (emphasis in original).

recognizing a constitutional right of access to abortion.[62] Sunstein argues that the imposition of a burden of life-support on women, given that they are already a "suspect class" for Equal Protection purposes, is unconstitutional, even if we should grant for the sake of argument that the fetus is a full person—in much the way that a law requiring all and only African-Americans to make kidney donations would be unconstitutional.[63] Karst's argment rests, instead, on a notion of equal citizenship, taken to mean equality of legal and social status.[64] The choice to become a parent, he argues, is, among other things, a choice of a social role or status. For the state to deny such a choice is for society to deny the person's equal worth.[65] Ginsburg makes similar arguments. Siegel argues that restrictions on abortion not only express invidious stereotypes about women's role, but also create a caste-like hierarchy by increasing women's dependence on men and impairing women's access to sexual pleasure.[66]

All such arguments, however, gain in clarity when they are expressed in connection with an idea of human capabilities. We always need to say in what respect people are equal or unequal, and assessing capability equality and inequality is particularly pertinent to Equal Protection analysis.[67] Compared to an abstract equality-based approach to reproductive rights advocacy, an approach that seeks to ground the relevant equalities in the idea of human capabilities is, in our view, likely to offer a more robust basis for defending abortion rights in many countries– at least over the long-term.

Equality arguments are important, since they may persuade people who are convinced that the fetus has a moral status fully equal to that of a born person. They are, however, historically contingent: they depend on a finding that a given classification is "suspect" for Equal Protection purposes, and this, in turn, depends upon finding that it suffers from (at least) a history of discrimination. If women were ever fully equal in a given society, however, they—like all the other people in that society—would still need protections for choice across the entire list of the capabilities, and such guarantees are not supplied by the reliance on equality alone.[68] Laws forbidding marriages of white and black could be struck down on Equal Protection grounds, as they were. Laws prohibiting the marriages of Episcopalians and Presbyterians, should they exist, would be profoundly offensive to the idea of minimal social justice, even though they would not involve an equality component. The CA reminds us that the protection of human dignity requires the protection of spheres of choice and bodily and mental health in all contexts, not just a

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[62] See generally Kenneth L. Karst, *Supreme Court Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) [hereinafter *Equal Citizenship*]; Sunstein, *Neutrality*, *supra* note 33; Ruth Bader Ginsburg, *Some Thoughts on Equality and Autonomy in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Siegel, *Dignity and the Politics of* Protection, *supra* note 1; Siegel, *The New Politics of Abortion*, *supra* note 44.

[63] See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993). See also Sunstein, *Neutrality*, *supra* note 33.

[64] Karst, *Equal Citizenship*, *supra* note 62

[65] Id. at 32.

[66] See Siegel, *Dignity and the Politics of Protection*, *supra* note 1; Siegel, Sex Equality Arguments, *supra* note 27.

[67] See Nussbaum, *Constitutions and Capabilities*, *supra* note 17 on a range of equal protection cases, esp. Justice Ginsburg in *U. S v. Virginia*, 518 U.S. 515 (1996).

[68] Compare VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 210-22 (2009) (exploring the distinction between equality and liberty as basis for recognizing rights of access to abortion); Siegel, *Dignity and the Politics of Protection*, *supra* note 1 (distinguishing notions of "dignity as liberty" and "dignity as equality").

situation in which interference is equal for all. In that sense, it not only builds on, but also enriches the current global constitutional jurisprudence connecting legal rights of access to abortion to the idea of respect for human dignity.

APPENDIX
The Central Human Capabilities

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason -- and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation.

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control over one's Environment.

A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

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