

RESPONSIVE CONSTITUTIONALISM AND THE IDEA OF DIGNITY

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For many years, I have argued that the United States' constitutional vision is deficient because of our surprising inability to appreciate what I now call the *responsive* character of our reconstructed Constitution. I describe our Constitution as responsive because during Reconstruction it was, to an important extent, remade in response to the lessons of slavery.¹ Our understandings of citizenship and of basic human rights were enriched by the experience and critique of slavery, and these enriched understandings informed the Reconstruction Amendments' elaboration of civil rights.

For many years, I have argued for what is, in essence, a responsive constitutionalism. I emphatically do not argue for originalism vis-à-vis the Constitution's Second Founding in the Reconstruction period. I argue instead that our understanding of the basic rights set out in the Reconstruction Amendments should be contextualized by an appreciation of the Amendments' anti-slavery origins. Because anti-slavery critique informed the process of constitutional reconstruction, it should inform our interpretations of the reconstructed Constitution. The Reconstruction Amendments responded to slavery—not only in the sense that they were intended to address the harms done to enslaved people, but also (and, I think, more importantly) in the sense that they were intended to universalize human freedom and define human freedom in contrast to slavery. When I speak of a responsive constitutionalism, I speak of a jurisprudence that is alive to this insight.

My arguments for a responsive constitutionalism have not won wide acceptance here in the United States. Elsewhere, however—notably in post-Nazi Germany and in post-apartheid South Africa—responsive constitutionalism thrives and richly informs the elaboration of basic rights. I persevere in the hope that examples of responsive constitutionalism abroad will inspire a responsive constitutionalism at home. I address here the example of South Africa, exploring

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¹ Our original Constitution was similarly responsive in that it was, in important respects, created as a response against British oppression.

how responsive constitutionalism has supported the development of a concept of human dignity.

Lourens Ackermann, a former Justice of the South African Constitutional Court, has explained that, in the constitutional scheme of the new South Africa, human dignity itself is not conferred, but rather accepted categorically as an attribute of humankind.² Respect for the dignity of each human being is conferred as an independent right, but dignity itself is inalienable.³ As Justice Ackermann argues, categorical acceptance of the dignity of all persons informs—and has the potential to broaden—the interpretation of all other human rights.⁴

But what is human dignity, and what does it mean to respect it? The concept of respect for human dignity has, I think, been best understood in the process of contemplating its lack. Certain constraints on people and certain ways of relating to people strike us as deeply inconsistent or dissonant with the respect they are due. We then reason back to discover what causes our sense of dissonance. When we contemplate physical abuse or the taking of human life, our sense of dissonance may reflect identification and faith that our own kind is precious. And identification may encompass a communal feeling such that the pain or death of one is felt as a direct loss to all.⁵ But our sense of dissonance may also reflect an understanding of what it means to be human—a belief that human beings are self-aware in ways that add dimensions to experiencing abuse or facing death. Surely when we move from the physical to the psychological and social aspects of respect for human dignity, understandings about what it means to be human are central to our sense of what respect is due. When we contemplate coercion or constraint with respect to such things as sexual intimacy, marriage, reproductive choice, political voice, or religious observance, we test the coercion or constraint in terms of our understandings of human capacity and human desire. How, we ask, is it right to treat a reasoning being who has self-awareness, moral consciousness, and ambitions about the construction of a life? This, I think, is what we mean when we say that human

² Lourens W H Ackermann, *The Legal Nature of the South African Constitutional Revolution*, 2004 N.Z. L. REV. 633, 643–47 (2004).

³ *Id.*

⁴ *Id.*; see also STUART WOOLMAN, *Dignity*, in 2 CONSTITUTIONAL LAW OF SOUTH AFRICA 36–1 to 75 (Woolman et al., eds., 2d ed. 2008).

⁵ See Drucilla Cornell, *A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation*, (2004) (manuscript, on file with author) (explaining that the concepts of ubuntu and seriti stand for an interconnectedness such that harming one member of a community harms all members).

life is valued for its expressive, as well as its natural, qualities.⁶ We respect human dignity in order to give reign to human expressive capacities and desires.

The process of reasoning back from a sense of dissonance has been most profoundly instructive in the contemplation of extreme violations of human rights. Genocide, slavery, and apartheid have sharpened our sense of both the literal and expressive value of human life. This is why, as Justice Ackermann has pointed out, there may be a special kind of wisdom in responsive—or, to use Justice Ackermann’s term, “reactive”—constitutional thought.

The new South Africa would see itself as transformed by a determination not to repeat the abuses of the past. And Justices of its Constitutional Court realize that this transformation should be grounded in an understanding of how and why those past abuses affronted human dignity. The South African Constitutional Court’s decisions respecting, for example, the death penalty, procedural due process, consensual sodomy, and gay marriage all show that responsive constitutionalism can yield a respect for human dignity that commits one to much more than saying “never again” to apartheid.

Because the reconstructed United States Constitution is responsive to slavery, it might have been interpreted to encompass an anti-slavery understanding of human dignity and the respect that human beings require in light of their basic dignity. But our Constitution has not been so interpreted. As a result, our jurisprudence touching on human rights is impoverished. Opinions of the United States Supreme Court guaranteeing or compromising the right to marriage, procreative choice, parenthood, sexual intimacy, procedural fairness, protection against extreme punishments, or control over the manner of one’s death are uninformed by a story of how and why our Constitution should protect such things. The closest thing we have to a concept of human dignity is the statement, made in *Planned Parenthood v. Casey*,⁷ relied upon in *Lawrence v. Texas*,⁸ woefully lacking support in the current Court, and derided by Justice Scalia as “sweet-mystery-of-life”⁹ dictum: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compul-

6 *Id.* at 11 (citing RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993)).

7 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

8 539 U.S. 558 (2003).

9 *Id.* at 588 (Scalia, J., dissenting).

sion of the State.”¹⁰ The Court has never related this idea about human dignity and human rights to our national history of slavery, emancipation, and constitutional reconstruction. Still, if we were to read, in light of our history, the guarantees contained in our Reconstruction Amendments, we would see a notion of individual worth and the accompanying belief in a right of self-definition intentionally, and responsively, implanted.

To demonstrate the difference a responsive constitutionalism can make, I draw your attention briefly to the opinions in which first the South African Constitutional Court and then the United States Supreme Court declared unconstitutional the criminalization of homosexual sodomy.¹¹ Comparing these opinions can teach us a great deal. I focus here on how responsive constitutionalism nourishes the elaboration of human rights by activating memories of atrocity and reviving the sense of common humanity that atrocity offends.

At the heart of the United States Supreme Court’s opinion, in *Lawrence v. Texas*, is a conclusion that distills and relies on the *Casey* swing Justices’ “sweet-mystery”¹² passage: “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹³ But there is nothing in the opinion that tells us *why* liberty presumes this kind of autonomy or why the people of the United States might have chosen to define liberty in this way. The statement is made in absolute terms, admitting of no dispute. It must be accepted, if it is accepted, as indisputably implied by our Constitution’s language or as indisputably “true.”

The opinion of the South African Constitutional Court of course relied on the South African Constitution’s more explicit terms, not only in its requirement of respect for human dignity, but also in its guarantees against discrimination.¹⁴ But the power and clarity of the South African Constitutional Court’s opinion come equally from the fact that its constitutional tradition is explicitly responsive. The Constitutional Court has committed itself to constructing constitutional rights, liberties, and obligations in a way that reflects the lessons of apartheid and the principles embodied in the struggle against it. And it rightly and unreservedly takes confidence from the fact that in different cultures around the globe, democratic societies have chosen

¹⁰ *Casey*, 505 U.S. at 851.

¹¹ *Lawrence*, 539 U.S. at 558; *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1998 (12) BCLR 1517 (CC) (S. Afr.).

¹² *Lawrence*, 539 U.S. at 588.

¹³ *Id.* at 562.

¹⁴ *See generally Nat’l Coal. for Gay & Lesbian Equal.* 1998 (12) BCLR 1517 (CC) (S. Afr.).

to construct their founding documents similarly. The South African Court spoke, not in terms of naked absolutes, but in terms unhesitatingly informed by conscientious analysis of South Africa's history and that of other nations.¹⁵ When it said that "[t]he experience of subordination—of personal subordination, above all—lies behind the vision of equality,"¹⁶ it appealed to both logic and experience.

In considering whether the sodomy laws' discrimination against homosexual people was unfair, the South African court was required by precedent to focus on "the impact of the discrimination on the complainant or the members of the affected group."¹⁷ It did this, not from a position of power, but from a *responsivist's* position of empathy for those who are subordinated. After observing that the experience of subordination lies behind the vision of equality, the court said: "[t]o understand 'the other' one must try, as far as is humanly possible, to place oneself in the position of 'the other.'"¹⁸ Attempting to understand the constitutional question before it from all relevant perspectives, the South African court was able to weigh the full range of the government's justifications for the discrimination against the full range of its personal and social effects. A responsive constitutionalism became, then, a more richly democratic constitutionalism.

By contrast, the United States' opinions concerning homosexual sodomy are acontextual, ahistoric, and lacking in empathy. *Bowers v. Hardwick*, the United States Supreme Court opinion that *Lawrence* overruled, is written in terms that are painfully disrespectful of the sensibilities and likely perspectives of queer people.¹⁹ If the majority Justices had imagined their words being heard or read by anyone who was not heterosexual, it is hard to believe that these otherwise humane people would have spoken as they did. The majority described *Hardwick's* claim, that under the Court's precedents, criminal proscriptions against homosexual sodomy unconstitutionally infringed upon his liberty, as "at best, facetious."²⁰ Chief Justice Burger found it necessary in his concurrence to quote Blackstone to the effect that homosexual sodomy was an "'infamous *crime against nature*' . . . an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be

15 *Id.*

16 *Id.* at ¶ 22 (quoting MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xiii (1983)).

17 *Id.* at ¶ 19; see also *Harksen v. Lane and Others* 1997 (11) BCLR 1489 (CC) at ¶ 50 (S. Afr.).

18 *Nat'l Coal. for Gay & Lesbian Equal.*, 1998 (12) BCLR 1517 (CC) at ¶ 22 (S. Afr.).

19 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

20 *Id.* at 194 (Burger, C.J., concurring).

named.”²¹ He then added this, without the cover of an attribution: “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”²² Neither opinion contained a word that referenced the perspectives of homosexual people.

When the United States Supreme Court overruled *Hardwick*, the majority opinion challenged the *Hardwick* majority’s narrow characterization of the right at stake as a right to commit homosexual sodomy; it addressed the stigma that the anti-sodomy laws attach to homosexual people, and it disputed the *Hardwick* majority’s assertions that proscriptions against homosexual intimacy were sustained throughout Judeo-Christian cultures. But, like the *Hardwick* court, the *Lawrence* court never spoke from or about the perspective of homosexual people. Even in *Lawrence*, the queer were voiceless.

What stands in the way of our adopting a responsive constitutionalism? I offer a story in answer: The black physician, James McCune Smith, and the white patrician, William Gerrit Smith, were friends and colleagues in the abolitionist movement.²³ In an essay written in 1861, Gerrit Smith wrote that the president of the Southern Rebel Confederacy was “cheered and strengthened by the entire devotion . . . to his cause of all around him.”²⁴ McCune Smith pointed out in a letter to his friend Gerrit Smith that this single phrase showed a failure to appreciate the situation in the rebel South. McCune Smith wrote: “Is this true? is it not virtually ignoring one half of those around Jeff Davis (I mean the Slaves)?”²⁵ A substantial proportion of the people living in the Confederate states were slaves, free blacks, or Native Americans. Yet, as McCune Smith understood, when most people in the United States during the Civil War imagined the Confederate community—when they imagined the political and social entity that the South had become—they instinctively imagined it in terms of its superordinate members. They erased slaves, Native Americans, and free blacks, and they imagined a white community.

I tell this story to show how easy it is, even for people with the most egalitarian intentions, to slip into imagining a political institution or community in terms of its more affluent and powerful sectors.

Assumption of a superordinate perspective is, of course, not only easy but also deeply consequential. It is important, but not often dif-

21 *Id.* at 197 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *215).

22 *Id.*

23 5 THE BLACK ABOLITIONIST PAPERS 113–14 (C. Peter Ripley ed., 1992).

24 *Id.*

25 *Id.* at 114.

difficult, to avoid fallacious reasoning in public discourse. The difficult and often more consequential moves are made in the construction of premises rather than in reasoning from them. And a great deal turns on whether those premises are chosen from a subordinate or a superordinate perspective.

Consider, for example, how one might analyze the equity of requiring that a government guarantee its citizens a measure of social and economic security. Is it fair that I be taxed so that this requirement can be enforced? This is not a question of logic, but a question of valuation. The answer depends on how I identify and monetize the value to me of what my tax dollars will buy. To the extent that my tax dollars buy roads, power lines, street lights, sanitation services, and police protection that I use, then I have made an investment rather than a sacrifice. If my tax dollars provide these basic services, or provide food, shelter, or medical care for others, I can regard the expenditure as an unfair sacrifice. But if I share a bond of community with those who benefit from my tax dollars, and if I value our collective well-being, then, once again, I can feel that I have made an investment rather than a sacrifice.

A similar analysis could be made with respect to any number of public questions. Affirmative action can be thought of as an inequity or as a social good. Restraints on police interrogations or limitations on criminal punishments can be thought of as risky or respectful of human dignity.

To focus on a tension between socioeconomic justice and sacrifice is to imagine the issue from a superordinate perspective, from a perspective of power. This is a perfectly legitimate perspective, but it is a perspective. If we think through the issue from different perspectives, we might see it differently. Instead of asking, "How is it fair to tax Joe the Plumber-Turned-Entrepreneur to benefit others?" we might take a subordinate perspective to ask, "How do we build a society in which my children and I can be full participants?" And we might take a collective perspective to ask, "How should the fruits of our nation's natural resources and our people's labor be shared?"

A responsive constitutionalism forces us to recall atrocity and to revive the moments when our sense of common humanity caused us to stand against the abuse of power. It sustains empathy and it sustains community. These things are not so easy to sustain. There are reasons to doubt our capacity to summon the new South Africa's determination to face and learn from its past. Alas, there is also reason to fear that South Africa's Reconstruction will be abandoned as ours was. But there are also reasons for hope. After all, we have elected to the Oval Office a person who exudes the traditions of our Recon-

struction's heroes; who seems to speak with the wisdom of a James McCune Smith.²⁶

²⁶ See generally *Neglected Voices*, <http://www1.law.nyu.edu/davis/neglectedvoices/index2.html> (last visited May 8, 2009) (linking the speeches of sixteen African-American men who served in the United States Congress during the Reconstruction period).