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Philosophical, Religious, and Legalistic Perspectives on Equal Human Dignity and U.S. Free Trade Agreements

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PHILOSOPHICAL, RELIGIOUS, AND LEGALISTIC PERSPECTIVES ON EQUAL HUMAN DIGNITY AND U.S. FREE TRADE AGREEMENTS

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ABSTRACT

What would international trade law, and particularly free trade agreements (FTAs) of the United States, look like if the dominant paradigm for their negotiation, drafting, implementation and enforcement shifted from economics to equal human dignity?

First, the concept of equal human dignity has deep philosophical roots, including in the work of Immanuel Kant, the great philosopher of the late Enlightenment. The Categorical Imperative, for which Kant (among other insights) is renowned, and which Kant articulated in three formulations, helps define the concept. Further, the American legal philosopher, John Rawls, offers a formula to elaborate and apply the Categorical Imperative. Second, the concept also has a profound religious basis, including in Roman Catholic Social Justice Theory. Third, considered in a legalistic manner, the words suggest specific criteria for trade accords. "Human" intimates neutrality. "Equal" indicates non-discrimination. "Dignity" suggests respect for the excellent. Applying these criteria to America's FTAs is not only possible but also yields specific proposals for human, labor and environmental rights that

could—and perhaps should—be advanced through those FTAs. Moreover, these criteria mandate a change in negotiating style.

Following from the philosophical, religious and legalistic perspectives, there are three "bottom lines" in respect to a paradigm shift in United States FTA law and policy toward equal human dignity. Applying Kant's Categorical Imperative calls for the United States to treat its FTA partners in a Golden Rule-like manner. Applying Catholic Social Justice Theory impels promotion of freedom of conscience as a direct effect of trade liberalization and possibly also the improvement of the economic milieu as indirect support for freedom of worship. A legalistic approach to the words "equal," "human" and "dignity" calls for incorporation into FTAs of excellent labor, environmental and human rights standards. The three perspectives on equal human dignity are not incompatible, and the practical implications for FTAs are complimentary. Yet changing the FTA paradigm to one in which equal human dignity predominates would require careful consideration of efficiency trade-offs, legal capacity, sovereign state responsibility, managed and strategic trade policy, and trade remedies. The effort may well be worthwhile. Throughout many parts of the world, the tide favoring unrelenting and uncompromising free trade has turned.

I. A DIFFERENT PARADIGM

Equal human dignity certainly is not the dominant paradigm in which the United States negotiates FTAs. It is not even a foundational principle of American trade negotiating strategy. Aside from modest references to selected labor and environmental matters, the Bipartisan Trade Promotion Authority Act of 2002,[1] through which Congress delegated trade negotiating authority to the President, says nothing about equal human dignity.[2]

Rather, as is clear from the congressional negotiating objectives set out in this Act, the ends and means of American trade policy are formulated in an economics crucible. Principles like absolute advantage, comparative advantage, free trade and fair trade, and policies like managed trade, strategic trade, infant industry and rust belt manufacturer protection, and agriculture support, fill up most of that melting pot. Mixed in is a large dose of national security.[3] The predominance—dare it be said, imperialism, for better or

1. *See* Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813 (Supp. V 2007), *amended by* Pub. L. No. 108-429, 118 Stat. 2434, 2591 (2004).

2. 19 U.S.C. §§ 3801(b), 3802(a)–(c) (Supp. V 2007). The President's trade negotiating authority expired July 1, 2007 and has yet to be renewed. *See* 19 U.S.C. § 3803(a)(1)(A)(ii) (Supp. V 2007).

3. *See, e.g.*, 19 U.S.C. § 3801(b)(1) (Supp. V 2007) (stating Congress' findings that "[t]he expansion of international trade is vital to the *national security* of the United States") (emphasis added).

worse—of economics is as true in the context of FTAs as it is in the multilateral environment of the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO).

But what if (a big "if" indeed) the paradigm changed, or at least more factors were put in the crucible?[4] What if equal human dignity became a, or even the, cornerstone of U.S. trade policy? What if U.S. national security was redefined partly in terms of promoting equal human dignity abroad through international trade agreements? What would that shift, from almost exclusively economic motives to viewing equal human dignity as a first-order concern, mean in practice?

Time and space are threshold appeals of these questions. The interest of any nation in maximizing its net societal benefits from trade is long-term. How that interest is manifest in specific trade laws and policies, actual or debated, varies across time, and from one constituency in a society to another.[5] Economic equilibria shift, comparative advantages are lost in one sector and gained in another, and protectionist interests rise and fall. By contrast, equal human dignity is enduring and universal. Drawn from philosophy, and indeed from religion, it cuts across time and space.

These questions are especially poignant now. International trade law since the birth of the WTO on January 1, 1995, and entry into force of the North American Free Trade Agreement (NAFTA)[6] on January 1, 1994, is seen by many around the world not as the new frontier and champion of a better world, but rather as the "establishment" to be rebelled against.[7] Public opinion

4. To religious leaders, of course, the "what if" question is not a "big if." For example, Pope Benedict XVI spoke of the need to deal with secularism, "which presents itself in cultures by imposing a world and humanity without reference to Transcendence," and which in turn produces a "hedonistic and consumeristic mindset,"

> by means of an appeal to the lofty values of existence that give life meaning and can soothe the restlessness of the human heart in search of happiness: the dignity of the human person and his or her freedom, equality among all men and women, the meaning of life and death and of what awaits us after the end of our earthly existence.

Pope Benedict XVI, Address at the Plenary Assembly of the Pontification Council for Culture at the Vatican's Clementine Hall (Mar. 8, 2008), *in* L'OSSERVATORE ROMANO, Mar. 19, 2008, at 2 (English translation).

5. Denis J. Brion, *Utilitarian Reasoning in Judicial Decisionmaking*, 23 LEGAL STUD. F. 93, 94, 129 (1999) (arguing that ostensibly value-free utilitarian analysis (in the context of adjudication), rather than promoting efficiency and wealth-maximization, is "strongly normative in character," and raises the specter that "our system of enterprise . . . will be a mighty engine for privatizing profits into the hands of the few and socializing costs onto the backs of the many").

6. NAFTA is reprinted in a variety of sources.

7. *See* Paul H. Brietzke, *Insurgents in the 'New' International Law*, 13 WIS. INT'L L.J. 1, 8–9 (1994) (advocating an insurgency to overthrow the established trade order to make way for better human rights protection). In the post 9/11 world, the term "insurgency" has taken on a poignantly sinister connotation.

surveys conducted in the United States and abroad clearly indicate rising skepticism about globalization generally and free trade in particular. The conventional paradigm of international trade accords like the WTO texts and NAFTA—absolute and comparative advantage—no longer command unequivocal bipartisan support or even support among a clear majority of the polity. Of course, people worry about the impact of trade agreements on their own incomes, jobs and industries, but they also worry about the repercussions of trade liberalization on the environment, labor and product safety.[8] Rising inequality (measured by income and non-income variables), which appears closely associated with (even if not definitively or directly caused by) freer trade, both within individual countries (e.g., China and the United States) and across some countries (e.g., most of sub-Saharan Africa against most of East Asia), is an additional source of anxiety.[9] The bottom line, then, is that the unease with the existing high-heat, smelting, transformative process provides justification enough to propose equal human dignity as a new lodestar for American trade law and policy.

It is premature to argue that the paradigm should (at least) integrate meaningfully equal human dignity with self-defined economic interests and champion the former over the latter. The certainty of a new U.S. president is just one reason why it is too uncertain to predict that the crucible in which American trade law and policy are formed is likely to change. Thus, whether equal human dignity ever could shape FTAs, for instance, between the United States and Arab countries, and thereby help shrink the commodious space between America and the Middle East (Israel aside), is not at issue here.

Rather, the present purpose is to inquire theoretically and generically, regardless of practical realities. What might America's FTAs—with Arab and non-Arab nations alike—look like if equal human dignity was the cornerstone of United States policy in negotiating, drafting, implementing and enforcing trade agreements? With respect to specific FTA provisions, a priori, the answer could be anywhere from "very much the same" to "radically different." Might international agreements on human, labor and environmental rights serve as guidance for FTAs? Of course, this inquiry begs a critical definitional question: What is "equal human dignity" anyway?

Section II addresses the meaning of "equal human dignity." It examines international legal documents that use the term, along with insights from

8. *See, e.g.*, Giugi Carminati, *Is International Trade Really Making Developing Countries Dirtier and Developed Countries Richer?*, 8 U.C. DAVIS BUS. L.J. 205, 231–32 (2007) (concerning the controversial ramifications of trade).

9. *See, e.g.*, William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More Accessible to American Workers*, 30 HOUS. J. INT'L L. 1, 78–83 (2007) (concerning the importance of Trade Adjustment Assistance (TAA) to address anxiety about the adverse effects of trade on incomes and jobs of some workers).

philosophers, notably Immanuel Kant and his Categorical Imperative. Section II also reviews summarily the considerable body of work of theologians, including the 2,000 year tradition of Christian thought. Section III briefly covers fields of international law in which equal human dignity has been considered as an evaluative benchmark. These specialties are environmental law and human rights. Drawing on the work of John Rawls, Section III also explores how the Categorical Imperative may be put into operation. It also asks the same question of Catholic Social Justice Theory: What would an FTA consistent with that theory look like? Section IV teases out from the definition of "equal human dignity" criteria that might be used in the context of FTAs. That is, Section IV identifies some of the literal implications for FTAs of the equal human dignity principle. Section V then applies the legalistic criteria. Section VI shows how FTA negotiations and implementation might be conducted in an equal human dignity paradigm. Section VII highlights lingering problems with that paradigm. Concluding observations are set out in Section VIII.

II. PHILOSOPHICAL AND RELIGIOUS DEFINITIONS OF EQUAL HUMAN DIGNITY

A. The United Nations Charter

The words "equal human dignity" envelop a concept not infrequently mentioned in public international law and used in international agreements. Perhaps the most renowned instance is the Preamble of the United Nations Charter. The Preamble declares that the United Nations has resolved:

> [T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.[10]

10. The Preamble states in full:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

– to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

– to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

– to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

– to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

– to practice tolerance and live together in peace with one another as good neighbours, and

– to unite our strength to maintain international peace and security, and

– to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

However, to say the Preamble prima facie intends to connote "equal human dignity"—whatever that phrase means—is not readily evident. That is because the Preamble deploys the three words of the phrase disconnected from one another. It is the "human" person who has "dignity," but "equality" pertains to the rights of men and women of big and small countries.

Strictly and logically speaking, an element is missing. For the language in the Preamble to amount to the same connotation as the term "equal human dignity," it is necessary to read the phrases "of men and women" and "of nations large and small" as meaning the same as (or encompassing) the single word "human." Yet "human" easily is the broader term, covering children (implicating children's rights, e.g., in respect of minimum working age), and the unborn (implicating rights of a fetus, e.g., to life and against abortion), whereas "of men and women" suggests humans at or past the age of maturity, i.e., adults. As for "of nations large and small," the Preamble language "equal rights" modifies this term, implying the equality of sovereign countries is at stake, distinct from the "men and women" who live in those countries.

To be sure, it is reasonable to hold that "equal human dignity" is intended by the Preamble. One piece of evidence is historical. The United Nations itself was born of the hopes and fears of (*inter alia*) the victorious Allied Powers. Surely they sought to affirm equal human dignity against the backdrop of a hideous loss of life in the Second World War to underscore the imperative of saving each person possible.

Setting aside this modest concern about interpretative equivalence, the terms "equal," "human" and "dignity" appear in several international contexts, typically next or proximate to the word "rights." Examples include the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights and the Helsinki Accords*.[11] These instances, and that of the Preamble to the United Nations Charter, are not the product solely of legal minds. Rather, thousands of years of philosophical and theological work, i.e., of reason and revealed truth on equality, humanity and dignity stand behind the appearance of the concepts in international legal instruments.

> – to employ international machinery for the promotion of the economic and social advancement of all peoples,
>
> HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS
>
> Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

U.N. Charter pmbl., *available at* http://www.un.org/aboutun/charter/preamble.shtml.

11. For an interesting treatment of equal human dignity in public international law, see Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848 (1983).

B. Kant and Three Formulations of the Categorical Imperative

Tracing the philosophical origin of the concept of equal human dignity leads to an inquiry into how humans (individually and through collective bodies, including governments) ought to treat one another. Yet obviously, even a modest attempt at a reasonably complete discussion of what philosophers—not to mention theologians—have argued on the matter through the ages is beyond the present scope. For now, it may be said that the origin of "equal human dignity," in modern times at least, is Europe in the Age of Enlightenment (which ran approximately from the beginning of the 18th century to the Napoleonic Wars of 1804–1815), and particularly in the work of the late Enlightenment German philosopher, Immanuel Kant (1724-1804).

Kant is widely touted and criticized for his philosophical theories. Nonetheless, viewing international law in Kantian terms is not new and indeed has been somewhat of a cottage industry in parts of the legal academy during the last few decades. That is for good reason. Kant himself penned an essay on international relations and law titled *Toward Perpetual Peace*, in which he discussed the emergence of democratic nation-states as an end to war.[12] In that essay, originally written in 1795 and revised slightly in 1796, Kant suggested that international justice is not merely a function of how nation-states behave toward each other, but also of how they behave toward their citizens. Put simply, the international legal order cannot be deemed just if the nation-states that constitute this order abuse individual rights. International law must penetrate through the level of the nation-state and mean something for the individuals who comprise those states.

How should individuals be treated? Kant focused on the question, and according to him:

> Whenever human dignity is at stake, we are obliged to fight for its recognition and protection. Indeed, far from being a bourgeois ideology of private happiness, Kantian liberalism proves to be a *fighting* liberalism in that it requires one to take on the challenges of moral self-responsibility and republican commitment.[13]

This fight leads directly to the concept of "equal human dignity." In Kantian philosophy, the source of the concept of "equal human dignity" appears to lie in the Categorical Imperative "to treat every human being as an end, not as a

12. *See* IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, *in* KANT: POLITICAL WRITINGS 93, 113 (Hans Reiss ed., H.B. Nisbet trans., Cambridge University Press 2d enlarged ed. 1991) (1970). For normative discussions of the essay, see generally, PERPETUAL PEACE: THE ESSAYS ON KANT'S COSMOPOLITAN IDEAL (James Bohman & Matthias Lutz-Bachmann eds., THE MIT Press 1997). For a positive account of Kant, see generally Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

13. Heiner Bielefeldt, *Autonomy and Republicanism: Immanuel Kant's Philosophy of Freedom*, 25 POL. THEORY 524, 525 (1997) (emphasis added).

means."[14] While not misleading, this oft-heard rendition of the Categorical Imperative is somewhat simple.

For Kant, though, an inquiry into the supreme principle of morality (i.e., the Categorical Imperative) is inseparable from—even buttressed upon—the metaphysical limits of human knowledge. As a result, a threshold point about the Categorical Imperative is that to regard a thing in itself, not as a means to an end, but as an end in itself, there first must be a thing to regard.[15] Put differently, there is an implicit a priori assumption, namely, the existence of a thing to behold. In response to skeptics like Reneé Descartes and David Hume, Kant's need to explain the existence, or at least the reliability, of a physical object corresponding to a mental impression was not to be taken lightly. For the present scope, such a foundational inquiry is unnecessary. Rather, international trade law (itself and its context) furnishes plenty of things to regard. Currently, those things are economic in nature—output, trade flows and the like. However, in an equal human dignity paradigm for an FTA, the thing to regard that indeed is available to behold is the person affected by the FTA. That is, human beings are things in themselves for examination. Inspired by the Categorical Imperative, the question then turns to how rules in FTAs promote the dignity of people in countries that are parties to an FTA.

Perhaps a more profound point concerns the above recitation of the Categorical Imperative. In Groundwork of the Metaphysics of Morals (1785), Kant provides three formulations of this supreme principle of morality. Each of the three formulations is complementary, and each highlights a different feature of the Categorical Imperative—universality, humanity and autonomy. The first and third formulas (below) have alternatives. The second formula (also below) is closest to the above recitation.

(1) The Formula of Universal Law –

> "[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law."[16]

Alternative Formulation for the Universal Law:

> "[A]ct as if the maxim of your action were to become by your will a universal law of nature."[17]

14. *See* Schachter, *supra* note 11, at 849.

15. *See* Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159, 183 (1997) (proposing the use of Hegel's concept of *Geist* to cure the Kantian flaw of this a priori requirement).

16. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 31 (Mary Gregor ed. and trans., Cambridge University Press 1997) (1785) (emphasis omitted).

17. *Id*. (emphasis omitted).

The Universal Law Formula and its alternative emphasize the point of view of an individual (sometimes referred to as an "agent") who wants to act morally. The individual seeks to know whether a proposed maxim (i.e., a subjective course of conduct, expressed in a sentence, put forward for consideration) is permissible.[18] Further, the individual desires to find out whether the action (i.e., the specific act and, critically, the intention behind this act, in which she would engage to put the maxim into practice) that flows from the maxim is permissible. The phrase "law of nature" (as Kant uses it) connotes a rule to which all persons adhere as if each person by her constitution were inclined to that rule. The rule is not (or need not be) enacted by a governmental authority; rather, it is essentially innate in every person and, thus, more akin to natural law.[19]

(2) The Formula of Humanity –

> "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."[20]

Whereas the Universal Law Formula highlights the perspective of the individual actor, the Humanity Formula considers the vantage of a person (or persons) affected by the action of that individual. The question is: How is another human being treated when the proposed maxim is acted out in the world? This question is to be addressed by paying attention to the humanity—the moral and rational powers—of the other human being. What is the effect of the act on the humanity of the other being?

The two ways to respond to this question, or more generally, to interpret the Universal Law Formula, are either positively or negatively.[21] Interpreted positively, the actor has an affirmative duty to ensure that other actors are not treated as merely a means to some end. When interpreted negatively, the Formula requires an actor to refrain from acts that may treat others as a means to an end. The respective difference can be seen, for example, in the context of FTAs.

Positively, the Formula requires countries that are parties to an FTA to eliminate any existing conditions in which labor is exploited (e.g., through reforms to labor market rules). Negatively, the Formula demands the parties abstain from using exploited labor (e.g., via a ban on forced and other

18. *See* THE OXFORD AMERICAN DICTIONARY AND THESAURUS 926 (Am. ed. 2003) (entry for "maxim"). *Id.* at 1199 (entry for "propose").

19. *See generally* Thom Brooks, *Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory*, 23 GA. ST. U. L. REV. 513, 559–560 (2007) (discussing and differentiating natural law from various philosophical perspectives).

20. KANT, *supra* note 16, at 38 (emphasis omitted).

21. *See* JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 190–195 (Barbara Herman ed., Harvard University Press 2000).

objectionable labor practices). The positive and negative responses are not mutually exclusive. Indeed, they may complement each other, as when an FTA obligates parties both to upgrade existing labor laws and noxious labor practices.

(3) The Formula of Autonomy –

> " . . . [T]he idea of the will of every rational being as a will giving universal law."[22]

Alternative Formulation for Autonomy:

> "[A]ct in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends[.]"[23]

The Autonomy Formula redirects attention back to the individual actor and examines moral law from her perspective. Essentially, the Formula designates her as a lawmaker in a realm of being (or, as lawyers might put it, jurisdiction) in which each person is to be valued as an end in herself.

The three formulations may be translated into the context of international trade law. All three are about moral behavior and the formulation and implementation of rules that channel action to good ends. Evaluating America's FTAs in terms of whether they promote human dignity is a moral reflection.

The Formula of Universal Law asks the United States to consider whether its trade policies, and the FTAs that follow from them, are morally acceptable. This inquiry—aside from pressure brought by non-governmental organizations (NGOs) and other select groups on particular labor or environmental issues—typically is not central to official thinking. Rather, American FTA policy, forged in the crucible of economics, emphasizes utilitarian calculations about market access. The Universal Law Formula, for instance, asks American officials to step outside their immediate preoccupation and imagine a world trading system in which officials of every country behaved the way they do.

Manifestly, the inquiry under the Formula of Humanity is how United States FTA policy affects the humanity of persons in other countries that are parties to an FTA. How might an FTA with Malaysia affect Bumiputras and the affirmative-action style preferences they have enjoyed since roughly 1970? How might an FTA with Qatar influence Wahhabi thinking among the majority Sunni population or the lot of the minority Shi'ites? Would an FTA with Uruguay reinvigorate the confidence of average citizens in that country in the face of regional dominance by Brazil? These kinds of questions typically are not part of the official calculus when America pursues an FTA (as it has been, in varying degrees, with Malaysia, Qatar and Uruguay). Rather,

22. KANT, *supra* note 16, at 39 (emphasis omitted).
23. *Id.* at 46.

Malaysians, Qataris and Uruguayans are a means to an end. They are (1) customers of American exporters of goods and services and (2) suppliers of inputs and products to American consumers. The end they serve is the promotion of America's economic well-being (and, if they negotiate FTA terms and conditions astutely, their own). But advancing their humanity and moral and rational agency, while not presumptively excluded by an FTA, is not the primary aim of the trade deal.

The Formula of Autonomy puts the United States in the role it effectively plays in most FTA negotiations. The United States is the lawmaker, with more or less give-and-take depending on the legal sophistication of trade officials from the country with which it is negotiating. Suppose the kingdom of ends—the world trading system—was one in which each individual, regardless of citizenship, was valued as an end in herself. How would the United States behave in the negotiations? Would it call for immediate, unconditional market access in all goods and services sectors? In its aggressive pursuit of free trade, would the United States be motivated by the interests of individuals in other countries? Would treating Americans as ends in themselves mean the United States accepts the converse, instantaneous, duty-free and quota-free access (DF/QF) to all American markets by foreign producers and exporters?

C. Five Steps in Catholic Social Justice Theory[24]

Philosophy is not alone in appreciating that in any economic endeavor in which a society engages, one moral problem that arises concerns the appropriate relationship of the individual to a society. Religions also appreciate the gravity of the issue.[25] For instance, Catholic Social Justice Theory proposes a clear resolution: champion human dignity. Individuals

24. This section draws from RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE 420–426 (2003). For a discussion of equal human dignity in relation to the 1948 *Universal Declaration of Human Rights*, and in particular whether that *Declaration* is coherent and rests on a genuinely universal approach to dignity, or is essentially an instrument of western cultural imperialism, see Mary Ann Glendon, *International Law: Foundations of Human Rights—The Unfinished Business*, *in* REDISCOVERING SELF-EVIDENT TRUTHS—CATHOLIC PERSPECTIVES ON AMERICAN LAW 319–20 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

25. Of the world's approximately 6.5 billion people, and rounding figures, 33% (2.1 billion) are Christian (17.4% Catholic, and 15.6% Protestant), 21% (1.5 billion) are Muslim (split approximately 80 to 20% between Sunni and Shi'ia), 14% (900 million) are Hindu, 6% (376 million) are Buddhist, 0.36% (23 million) are Sikh, and 0.22% (14 million) are Jewish. Non-religious persons (covering agnosticism, atheism, and secular humanism) account for 16% (1.1 billion) of the world's population. A variety of religions (e.g., Chinese traditional, Baha'i, Jainism, Shinto and Zoroastrianism) are adhered to by the remainder of the world's people. *See World has More Muslims than Catholics*, SBS WORLD NEWS HEADLINE STORIES, Mar. 31, 2008, *available at* FACTIVA, doc. SBSWNH0020080330e43v0005y; Adherents.com, Major Religions of the World Ranked by Number of Adherents, http://www.adherents.com/Religions_By_Adherents.html (last visited Sept. 30, 2008).

ought to relate to one another, either directly or through social groupings and constructs, in a manner that promotes the worth of each individual from natural conception to natural death. Negotiating, drafting, implementing and enforcing an FTA is just one of many economic endeavors in which American society, partly through its elected and appointed officials, is engaged. The Theory then would call for the FTA endeavor to respect human dignity. But what does this Theory mean by "human dignity" and "respect" for it?[26]

The answer is revealed through five steps. Free will is the first step. Respect for human dignity, and as a corollary, the promotion of equality of the human person, is a logical extension of the Catholic precept that the dignity of a human being lies in her ability to discern freely good from evil.

> [M]an is given [by God] intelligence and free will so that he can choose the good, the good made known through the objective law of God. For those who do not know the one true God, this good is known through the natural law. For those who do know God, the good is known by Revelation and the Church which interprets it.[27]

Of course, to opt for good over evil presumes each person enjoys the requisite political and economic freedom to exercise this choice.

Freedom to organize into groupings, then, is the next step toward respecting human dignity and promoting equality. Individuals must be free to organize themselves into such groups in the first place. In turn, when people organize themselves into a society—be it civic, political or economic in nature—that society must respect the dignity of each constituent individual.[28] As Pope John XXIII explains in his 1963 encyclical, *Pacem in Terris*:

26. Professor Glendon recounts a distinction in Christian teaching in the meaning of the term "dignity of the human person," namely, (1) an attribute given by God, versus (2) an achievement or goal to be realized gradually over time through strenuous effort to overcome sin. Professor Glendon points out the second connotation implies not every human being is entitled to human rights—only those individuals who have strived to practice virtue. She also provides the Christian rebuttal, namely, that the duty incumbent upon each person to perfect his or her own dignity obliges that person to respect the God-given spark of dignity in all other persons, whether or not those other persons have similarly strived to reform themselves. *See* Glendon, *supra* note 24, at 331. For present purposes, no position is taken on the distinction between dignity as a given characteristic and dignity as a quality to be realized. However, the aforementioned rebuttal of the implication from the second connotation is accepted as a premise here, i.e., all are entitled to equal human dignity, and its promotion through FTAs is a question of both theoretical and practical importance.

27. RODGER CHARLES, S.J., AN INTRODUCTION TO CATHOLIC SOCIAL TEACHING 29 (1999).

28. *Id.* at 61 (stating "[t]he structures and mechanisms of economic society must respect the dignity of the man who works, and his spiritual, moral and intellectual needs as well as his material needs").

> Men have the right to form associations and give them the form which they consider most suitable for their objectives. Such organizations safeguard man's personal freedom and dignity.[29]

The declarative tone and language are not too strong in the context of international trade law. Individuals form a society to serve their interests and the common good, such as negotiating collectively a trade agreement with another society—not the other way around. They submit to the authority of a society insofar as the society operates, including through its FTAs, to their benefit. Trade agreements are social constructs meant to serve people for their mutual benefit. People are not supposed to be slaves to FTAs imposed on them.

Here, then, is the third step. The dignity of each human being is not a gift from the society of which she is a part. It is not a legal right or a customary privilege flowing from the society to the individual. Respect for human dignity is not justified by sentimentality (i.e., that it is "nice" to do so) or by secular democratic theory (which champions individual rights). Thus, that dignity is not rightly available for a society to withdraw or curtail by law (including an international agreement like an FTA), extra-legal means (e.g., the use of force) or any other measures.

Rather, that dignity is a consequence of being made in the image of God. It is innate in every human being, and it is put there by God. In effect, dignity is a gift from the common Creator of all persons. The reason is human beings are "made in God's image and likeness."[30] Pope Leo XIII put the point forcefully in the 1891 encyclical, *Rerum Novarum*, which heralded modern Catholic Social Justice Theory by responding to the challenges of free-wheeling capitalism:

> All men have the same Father who is God the Creator, the same benefits of nature and gifts of divine grace belong in common to the whole human race: "we are children, we are heirs as well; heirs of God and co-heirs with Christ."[31]

In brief, the arrow of causation starts with God, who makes us. What is more, God makes us in a particular way. Namely, each person is unique, unrepeatable and of inestimable value. By respecting the true origin of all persons and these three attributes of each person, we respect God.

To explain the third step another way, respect for human dignity is an inalienable right conferred by God on each human in a special, one-time and priceless manner. Failure of a society to respect this dignity is a key indicator

29. *Id.* at 34 (citing POPE JOHN XXIII, ENCYCLICAL LETTER, PACEM IN TERRIS [Peace on Earth] ¶¶ 23–24 (Apr. 27, 1963)).

30. *Id.* at 29.

31. *Id.* at 34 (citing POPE LEO XIII, ENCYCLICAL LETTER, RERUM NOVARUM [On the Condition of the Working Classes] ¶ 24 (May 15, 1891)).

the society has become oppressive. Political and economic societies are particularly susceptible to this vice. In turn, oppression is a legitimate reason for individuals to cease with their responsibilities toward the society, to rescind their fidelity to that society, and in serious instances, to revolt against the society.[32] Even if unintended, oppression can occur in the name of trade liberalization or by operation of international trade agreements.

The fourth step to understanding what "equal human dignity" means, in the light of Catholic Social Justice Theory, is to appreciate what is truly at stake. There is more to the rationale that individuals must be free to associate than a social contract-type bargain between individuals and society. Catholic Social Justice Theory teaches that the stakes are as high as ever could be imagined—the eternal destiny of each human being in a society. If an individual is unduly constrained by, for example, international trade agreements, then he cannot exercise his free will to choose whether to embark on a path in contemplation of the after-life or which path to choose. Why not? Simply because he is not free to choose right from wrong, and thus cannot work toward a spiritual end.

> [M]an is born into freedom and for freedom. Made in God's image and likeness, he must be able to obey God's law in freedom. In this way he can be happy in this life and, when life is over, receive the reward of eternal life. He must therefore have political and economic freedom, because only through them can he make the free choices in his life which will enable him to serve God worthily.[33]

Put succinctly, "[m]an is the purpose and end of every society, and the State (and any social organisation) exists to serve him. He does not exist to serve them."[34]

Applied to FTAs, the point is they should operate to liberate each affected person not only for appropriate material pursuits in this life, but also to support, or at least not to obstruct, the spiritual quest of each person toward the afterlife. (To be sure, whether a particular individual takes up that quest is another matter.) When an FTA achieves both aims, it respects the dignity of the human person. Lest this linkage seem tenuous, or even laughable, consider the general observation of Father Massaro:

> [T]he Catholic view of human rights is distinctive because it is grounded on a complete theological framework, in which God is the ultimate source of our rights. . . . In comparison, purely secular doctrines of rights have no similar foundation in a compelling portrayal of human nature and its origin. In a sense, they are doctrines without a solid theory behind them. They are

32. *See* CHARLES, *supra* note 27, at 14.

33. *Id.* at 16 (emphasis omitted).

34. *Id.* at 13. *See also id.* at 35 (stating "[t]hat the citizen has rights which the state cannot take away from him, and that man is the end and purpose of every social organisation, are principles which a healthy civil society must foster").

> exposed to the weighty charge that rights just seem to "float around," sticking to people without any justification behind their passing claims. (Emphasis added).[35]

To be sure, scholars not inclined to argumentation based on revealed truth would take issue (and indeed have done so) with the suggestion that secular doctrines of human dignity, derived solely from human reason, lack heft. Some of them would (and do) cast the same charge back at religion-based doctrines. This debate is beyond the present scope. For now, suffice it to say that perhaps neither side has to fear authentic, genuine argumentation of the other insofar as faith and reason are complementary, and truth (derived from one source) does not contradict truth (derived from the other source).

The fifth and final step concerns "equality." If human dignity is to be respected for the aforementioned reasons, then does it follow that the dignity of each human person should be respected equally? After all, if each person is unique, unrepeatable and of inestimable worth, then why not attempt to make reasonable gradations among individuals? At least three rationales strongly favor equal treatment. First, consider the First Commandment. It is for God to make judgments among persons. To put oneself on par with God is intrinsically sinful.

Second, all persons share a common Creator. The differences are not borne of different gods creating different people—it is not that Ra made Egyptians, Zeus made Greeks, and Jupiter made Romans. A key implication of monotheism contends that differences among people pale in significance to the spark of a single Divine power in each person. Indeed, a verse from the Holy Qur'an explains:

> Believers, no one group of men should jeer at another, who may after all be better than them; no one group of women should jeer at another, who may after all be better than them; do not speak ill of one another; do not use offensive nicknames for one another. How bad it is to be called a mischief-maker [i.e., one who engages in any of the aforementioned behaviors] after accepting faith! Those who do not repent of this behavior are evildoers. . . . So be mindful of God: God is ever relenting, most merciful. People, We [i.e., God (Allah)] created you all from a single man and a single woman, and made you into races and tribes so that you should recognize one another. In God's eyes, the most honoured of you are the ones most mindful of Him: God is all knowing, all aware.[36]

In other words, God created differences among people for a counter-intuitive reason: they interact with each other, thereby develop an

35. THOMAS MASSARO, S.J., LIVING JUSTICE: CATHOLIC SOCIAL TEACHING IN ACTION 118 (2000).

36. THE QUR'AN, *The Private Rooms* 49:11–13 (M.A.S. Abdel Haleem trans., Oxford University Press 2004).

understanding of their respective national, ethnic or other backgrounds, and in turn—most importantly—realize their common origin.

Third, recount the consequences of denying the equal dignity of each individual. To categorize individuals along ethnic, disability, gender, linguistic, racial or religious lines is to begin down the slippery slope of dehumanizing certain groups—rejecting the very humanity of individuals in those groups. The results conjure up some of the worst episodes in human history.

III. IMPLEMENTING PHILOSOPHICAL AND RELIGIOUS DEFINITIONS OF EQUAL HUMAN DIGNITY

A. Practicing the Categorical Imperative in Other Areas of International Law

Traditionally, international trade law, and international business law generally, have been segregated (with much of the inequality segregation implies) from public international law (aside from obvious areas of overlap, such as treaty interpretation) and have not discussed equal human dignity as a top priority. Perception may be the reason; namely, a sense that trade often is antithetical to the advancement of human dignity.[37] A key goal of public international law, from a Kantian outlook, is to protect human rights by providing a structure for international justice and thereby protect human dignity.[38] In contrast, the goal for international trade is to engage in transactions that provide a just economic regime, where parties can maximize the efficiency of preference satisfaction, focusing on what they will get from the transaction, not what they are necessarily doing to the other in the transaction.[39]

Surely, as the common feeling goes, the two global regimes are bifurcated in their attributes and share little, if any, common ground. One regime is about human rights and veers toward absolutism in their promotion. The other regime is about economic consequentialism and demands rational self-interested calculations. Equal human dignity fits as a paradigm far better in the first regime than the second, making public international law matters more easily susceptible to an equal human dignity analysis than international trade rules. There is an incongruity, just as there would be if the evaluative paradigm for a basketball player were baseball metrics like earned run average (ERA), on base percentage (OBP) or slugging percentage (SLG).

37. *See* Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 63–64 (1999).

38. *See id.* at 69–73.

39. *See id.* at 64–69.

If taken too closely to heart, however, this common feeling can petrify into conventional wisdom and paralyze exploration of possible new paradigms, crucibles and frameworks. Perhaps equal human dignity, as inspired by Kant's work, can reveal something meaningful and different about the way in which America negotiates, drafts and implements its FTAs with Arab countries. Accordingly, while by no means a comprehensive review of Perpetual Peace or the Categorical Imperative, or even a survey of the commendable efforts of legal scholars to apply Kantian philosophy to international legal problems (public or private) is possible, the effort here is to see what might be gleaned from this body of primary and secondary work with a view to building a viable model of equal human dignity with which to examine FTAs.[40]

Interestingly, applying Kantian concepts to trade issues often concentrates on the ethics of international corporate behavior. Condemnation of the diamond trade in Africa and Holocaust survivor claims against the European finance industry from the Second World War are examples of international corporate responsibility in the arena of international business.[41] Corporations are wont to dwell on maximizing their own self-defined interests and not internalize the costs of their actions on the communities, or broader world, around them. Many of them boast a pseudo-state level of power, and their actions can heavily impact the economic, political and social conditions of a country in which they operate. All the more reason, then, for ethics intervention.[42]

However, the two most common international legal arenas in which equal human dignity, sometimes with explicit references to Kant's work, play a larger and sometimes center-stage role, are human rights law and environmental law. Indeed, recent scholarship highlights the importance of equal human dignity in the realm of public international law generally, and that point was underscored in the address of the Holy Father, Pope Benedict XVI, to the United Nations General Assembly on April 18, 2008.[43] The role of

40. *See generally* Frank J. Garcia, *Book Reviews and Notes*, 93 AM. J. INT'L L. 733, 746–749 (1999) (reviewing FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (Westview Press 1998) and (discussing "'the Kantian thesis'—namely, that the normative status of the individual is at the center of international law" and its implications for international legal theory); Harry D. Gould, *Toward a Kantian International Law*, 5 INT'L LEGAL THEORY 31, 31–56 (1999) (featuring a paper titled "*Toward a Kantian Theory of International Law*," with several replies).

41. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446–47 (2001) (citing these examples among others as a victory for human rights activists over private corporations).

42. *See id.* at 497–98, 503.

43. *See* PATRICK M. CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Hart Publishing 2007). His Holiness Pope Benedict XVI, Meeting with the Members of the General Assembly of the United Nations Organization (Apr. 18, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html.

equal human dignity in other spheres of the international legal order illuminates possibilities for international trade law.

To begin, it seems odd that equal human dignity would not be part of the core analytical framework of human rights law. Indeed, whenever that omission does occur, it seems a glaring one. The application of Kantian theory to human rights practice is an obvious one, given the emphasis in Kant's work on the treatment of individuals. The promotion of labor rights (closely allied with, if not a subset of, human rights) is seen in some quarters as antithetical to trade. Enhanced worker treatment (e.g., raising wage rates and the minimum age for employment) and protection (e.g., ensuring the right to associate, organize and bargain collectively) potentially erodes the comparative advantage that derives from essentially exploitative conditions.[44] (The obvious response, on non-Kantian, utilitarian economic grounds, is that happy, healthy workers are more productive than downtrodden ones. Thus, the wage rate of a worker is (or ought to be) linked to marginal revenue product of that worker, and productivity gains are a critical source of economic growth and competitiveness.) From a perspective inspired by the Categorical Imperative, however, market forces and merit-based decisions can be great levelers of the global competitive playing field, and through respect for human dignity in the marketplace, individual liberty can be maximized and made more equal across countries.[45] Rules governing international commercial intercourse, then, can advance human rights if they are properly crafted with equal human dignity in mind.

As for environmental law, Kant's Categorical Imperative has been applied to the nexus between the physical environment (natural resources) and trade. It is argued that environmental standards would be accorded far greater weight relative to trade liberalization if a Categorical Imperative standard were imposed on environmentally risky trade behavior.[46] Moreover, environmental law itself would occupy even more time and energy of international lawyers and diplomats, and environmental treaties would be more readily and

44. *See* Risa L. Lieberwitz, *Linking Trade and Labor Standards: Prioritizing the Right of Association*, 39 CORNELL INT'L L.J. 641, 645–646 (2006) (arguing in favor of an international collective bargaining process to counterbalance the effect of transnational corporations).

45. *See* Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 434–435 (2003) (advocating a strong constitution to create a marketplace in which human rights are protected).

46. *See* Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1376–1381 (1992) (comparing a John Stuart Mills-style analysis to a Kantian examination of the impact of the Tuna/Dolphin GATT panel decisions and advocating a paradigm where trade advances the human condition).

aggressively enforceable and enforced, if that Imperative were the principle governing the environment-trade nexus.[47]

Notably, the United Nations Environment Program (UNEP) on Cultural Diversity has looked at cultural (as distinct from physical) environmental protection. The UNEP interprets equal human dignity as regard for the diversity of the world and protection of cultural heritage.[48] In its view, globalization threatens this diversity and thereby undermines equal human dignity. In turn, trade, because it promotes or leads to a globalized world, is a causal variable.[49] It is not globalization per se. After all, a more closely connected, inter-linked world is an environment in which cultures can learn more about one another and (thinking optimistically) develop admiration and respect, or at least tolerance, for each other. Rather, it is the centralization of power in a few countries and corporations, and in their political and economic elites associated with globalization that leads to the dominance of one or a few cultures. In respect to trade, it is the dominance of goods and services from one or a few countries and corporations in the marketplaces of so many other countries that threatens to wipe out diversity of the cultural environment.[50]

B. The Rawlsian Algorithm for the Categorical Imperative

John Rawls suggests a four-step methodology for applying the Categorical Imperative to practical situations:

- Proposal of an individual maxim;
- Generalization of the individual maxim into a universal precept;
- Transformation of the universal precept into universal law; and
- Imagining the world as adjusted by operation of the universal law. [51]

The first step is the most difficult because it builds on Kant's nebulous definition of a "maxim." Thereafter, the steps follow rather logically.

Kant defines a maxim in *Groundwork of the Metaphysics of Morals* (1785) as the "subjective principle of volition."[52] This definition reflects an

47. *See generally* Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131 (2006) (calling for more robust sanctions for international environmental violations).

48. *See* Governing Council of the United Nation Environment Programme, *Summary Report of the High-Level Roundtable on Cultural Diversity and Biodiversity for Sustainable Development*, UNEP/GC.22/INF/16 (Dec. 20, 2002) (focusing especially on comments from Mr. Klaus Töpfer, Executive Director of UNEP).

49. *See id.* (focusing especially on comments from Mr. Jacques Chirac, former President of France and Dr. Massoumeh Ebtekar, Vice-President of the Islamic Republic of Iran and Head of the Department of the Environment).

50. *See id.* (focusing especially on comments from Mr. Juan Mayr, former Minister of the Environment for Colombia).

51. *See* RAWLS, *supra* note 21, at 167–70.

52. KANT, *supra* note 16, at 14.

ontological claim (i.e., an assertion about the nature of being) Kant initially made in the first edition of the *Critique of Pure Reason* (1781). That claim holds the only way an individual knows the world is through her unique perspectives of experience. This contention bespeaks the Copernican Revolution Kant hoped to bring to philosophy, specifically through metaphysics (the theoretical inquiry into being and knowing). Consequently, the bedrock of human understanding starts—indeed, must commence—from the subjective mind of the individual. In *Groundwork*, Kant urges that the initial point for any moral evaluation is for the individual making the evaluation to act in response to the situation the individual is evaluating in a way that produces a more desirable state of affairs. Rawls describes this evaluation as follows:

> I [the individual moral evaluator] am to do *X* in circumstances *C* in order to bring about *Y* unless *Z*. (Here, *X* is an action and *Y* is an end, a state of affairs.)[53]

In effect, moral evaluation begins with an individual inquiry into how to improve, via a voluntary act of the free will, *X*, the status quo, *C*, which will lead to *Y*. (It is assumed implicitly that *X* is not physically impossible to perform.) The end, *Y*, is chosen over all other outcomes, except for *Z*. This preference is the proposal of an individual maxim by the individual moral evaluator.

In the second step, the individual maxim is generalized to a universal precept, i.e., a moral rule of conduct that applies to everyone. In effect, the pronoun "I" in the above quote becomes "We," meaning all persons. Rawls re-writes the moral statement as follows:

> Everyone is to do *X* in circumstance *C* in order to bring about *Y* unless *Z*.[54]

The act *X* not only must be physically possible to do, but it also must be generalizable. This requirement is not an easy one to satisfy, though various means for doing so have been proposed. One suggestion is an act can be generalized only if it passes the "Practical Contradiction Interpretation."[55] How would the world be if everyone engaged in the act, *X*? This question is the essence of the Test.

Suppose an individual cannot act in accordance with *X*. The Test is failed, as the act is impossible. Suppose an individual can perform *X* but cannot

53. RAWLS, *supra* note 21, at 168.

54. *Id.*

55. *See* CHRISTINE KORSGAARD, *Kant's Formula of Universal Law*, *in* CREATING THE KINGDOM OF ENDS 77–78 (Cambridge University Press, 1996). Professor Korsgaard offers three possibilities, adopting the one discussed above. The Logical Contradiction Interpretation considers whether a maxim is inconceivable when universalized. The Teleological Contradiction Interpretation considers whether, when a maxim is universalized, it "is inconsistent with a systematic harmony of purposes." *Id*. at 78.

achieve the desired goal, *Y*. Again, the Test is failed because the act is not efficacious. By way of example, suppose the maxim is that everyone in similar circumstances, *C*, is allowed to make a false promise in order to obtain a loan, *Y*.[56] Imagine a world in which every similarly situated person makes a false promise to a prospective lender. The act would lose its appeal, and the unappealing act would lose its efficacy. That is, if everyone makes a false promise to secure a loan, then the act of promising becomes unattractive, and that act is ineffectual in securing the loan. In brief, *X* (false promise) fails to bring about *Y* (loan disbursement), hence *X* contradicts *Y*—the Test is failed.

Assuming that a universal precept is agreed upon that passes the Practical Contradiction Interpretation, the third step in the Rawlsian algorithm is joined. The universal precept is transformed into a universal law. The individual moral evaluator asks whether she could will the perturbed social world. The perturbed social world is the world that would result if the generalized maxim were implemented as a law of nature. ("Perturbed" here means changed, with no necessary pejorative connotation.) Unfortunately, Kant does not clearly answer how an individual gives content to this will. Rawls indicates that the individual cannot apply her own personal preferences, desires or interests to make this determination. He offers two sensible reasons. First, the individual might have evil preferences. Second, an individual must regard herself as having an end she could share with all other human beings. If the individual could not share such an end, it could not possibly satisfy the Formula of Autonomy.

Rawls helpfully explains this content-giving step by analogizing to the legislative intent of a one-person moral congress.[57] The subjective maxim that started this process determines the scope of the inquiry by intending to bring about a certain state of affairs. That state of affairs may pass the Practical Contradiction Test, but it fails the third step "if [the moral actor] cannot at the same time both will this [perturbed] social world and intend to act from that maxim as a member of it."[58] Rawls thus recasts the moral statement, aggregating the first three steps, as follows:

> Everyone always does *X* in circumstances *C* in order to bring about *Y*, as if by a law of nature (as if such a law was implanted in us by natural instinct).[59]

Notably, Rawls characterizes the universal law established in this third step as a "law of nature" (or "as-if law of nature" because it is not actually in force).[60]

56. KANT, *supra* note 16, at 15.

57. *See* RAWLS, *supra* note 21, at 169.

58. *Id.*

59. *Id.* at 168.

60. *Id.* at 168–69. The Rawlsian aggregation quoted above raises a question, namely, from which point of view should an individual assess whether she can will this perturbed social world? *See generally* HENRY SIDGWICK, THE METHODS OF ETHICS (Hackett Publishing 1981) (1907).

The introduction by Rawls of Natural Law to the moral evaluation may, on a personal level, reflect the interest this great philosopher had in a Christian seminary. In fact, Rawls had planned on enrolling in divinity school after completing his undergraduate degree at Princeton.[61] Instead, he enlisted in the armed services and fought in the Second World War.[62] After completing his tour of duty, but grappling with dramatic challenges the war posed to his religious beliefs, he chose to forego divinity school and study philosophy.[63] Nevertheless, it seems his early interest continued to influence his work and at least may suggest the complementarity of philosophical and religious approaches to equal human dignity and FTAs.

Intellectually, the recourse to Natural Law provides a bridge to the religious explanation for equal human dignity (discussed in Section III.C, *infra*). Natural Law, of course, refers to principles, including moral distinctions between right and wrong, that an individual can discern through the use of reason. These principles are natural to the individual. From a religious perspective, the principles are impressed into the nature of each individual by our common Creator. Natural legal principles thus are consistent with authentically true religious precepts.

The fourth and final step of the Rawlsian algorithm is to envision the new world. What does the adjusted social world look like after the universal law has taken hold in it and its repercussions filtered through it? Rawls explains this imagination test as follows:

> We are to adjoin the as-if law of nature at step (3) to the existing laws of nature (as these are understood by us) and then think through as best we can what the order of nature would be once the effects of the newly adjoined law of nature have had sufficient time to work themselves out.[64]

In effect, the fourth step is not a literal application and post hoc examination of the effects of the universal law. Rather, it is a rough guide to test the law in an a priori sense before actually applying it.

How might Rawls's algorithm help in applying Kant's Categorical Imperative to United States FTA policy? Consider each step in the context of that policy. The "individual" is the United States, and the other individuals—everyone else—are the other trading nations of the world. Step one would be the formulation of an individual maxim by the United States. That maximum would be something like this:

> The United States is to relegate free trade as its top priority in international trade law, whenever it negotiates, drafts, implements or enforces an FTA (the

61. SAMUEL FREEMAN, RAWLS 8 (Brian Leiter ed., Routledge 2007).
62. *Id.*
63. *Id.*
64. RAWLS, *supra* note 21, at 169.

> circumstance, *C*), so as to advance equal human dignity (the act, *X*) through each FTA as the top priority, unless free trade itself would bring about an advancement in human dignity.

In step two, this individual American maxim would be generalized to a universal precept. Therefore, promoting equal human dignity would become the preeminent goal of every country, and the action of each country would be to subordinate all other goals, particularly free trade.

> Every country is to relegate free trade as its top priority in international trade law, whenever it negotiates, drafts, implements, or enforces an FTA (the circumstance, *C*), so as to advance equal human dignity (the act, *X*) through each FTA as the top priority, unless free trade itself would bring about an advancement in human dignity.

Of course, transforming the individual maxim to a universal one must pass a two-pronged Practical Contradiction Test.

First, each country must be capable of making the trade policy shift. Precisely how each country would alter its trade policy depends on its own constitutional and governmental structure. In the United States, Congress would make the change because the Commerce Clause of the Constitution (Article I, Section 8, Clause 3) imparts to the legislative branch the power to regulate foreign trade. More serious is the question of whether each country could make the shift. There are roughly 350 FTAs in the world, meaning there are more of them than countries (192). Among the 152 WTO members, only Mongolia is not a party to an FTA. What are countries to do about their existing FTAs, which do not necessarily or explicitly champion equal human dignity over free trade? Are they to renegotiate them entirely or merely amend them to add an "equal human dignity override clause"?

The solution possibly lies in the desire to make the maxim universal. If every country is to make the policy change, then it ought to be non-problematical for each country. Yet that begs a question many countries—especially ones with authoritarian or totalitarian regimes—may ask: What does "equal human dignity" mean? If a country does not like the definition, then it will claim impossibility as a defense in making the policy shift. The discussion in Section IV, *infra*, proposes a legalistic definition. Whether every country would agree to it or interpret it in the same manner is dubious.

Second, the policy shift by each country must work. It must advance, not undermine, the equality of each human person. Nor may it leave different persons in the same state of inequality they find themselves in already. This second prong of the Test raises an epistemological question: How is the world trade community to know whether the shift worked? There also is a potentially significant problem in respect of the multilateral trading system. Suppose countries are successful in promoting equal human dignity through FTAs, but

GATT-WTO agreements, both present and future, undermine or leave untouched that dignity.

In Step three of the Rawlsian algorithm, the universal precept becomes a universal law. Accordingly, in the FTA context:

> Every country always relegates free trade as its top priority in international trade law, whenever it negotiates, drafts, implements or enforces an FTA (the circumstance, *C*), so as to advance equal human dignity (the act, *X*) through each FTA as the top priority, as if by a law of nature.

That law of nature is trade should be voluntary and mutually beneficial at a human level, not just at an aggregated national level.

Finally, what would the world trading system look like if the proposed universal law were adopted and practiced by every country? Following implementation of equal human dignity—not market access—as the key goal of an FTA, would the dignity of individuals in countries that are parties to an FTA be better respected than before?

C. Applying Catholic Social Justice Theory[65]

In proclaiming respect for equal human dignity as an inviolable human right sourced in a common Creator, Catholic Social Justice Theory proposes a connection between that respect on the one hand and human rights on the other hand. Theologians agree that such a connection exists:

> Law, morality, justice, the common good and human rights are inter-linked in the Christian understanding of things. The purpose of the law is to give justice, to see that each gets what is his due; we know what is just because the moral law of God instructs us. The common good means the good of each and the good of all. And we can see that good is being achieved when all have their human rights. These too are founded in God's law; being made in God's image and likeness; all men must be treated according to that dignity.[66]

Respect for equal human dignity necessarily means the promotion of human rights because they derive from that dignity, which in turn is divine in origin and nature.[67] Upon what, specifically, are those rights founded other than the precept (or, dare it be said, axiom) of respect for human dignity? In sum, from a religious perspective, the dignity of the human person is to be respected

65. This section draws from RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 642–643 (Matthew Bender & Company, Inc. 3d ed. 2008).

66. CHARLES, *supra* note 27, at 45–46. *See also* DAVID BOHR, CATHOLIC MORAL TRADITION 324 (Our Sunday Visitor Publishing Division rev'd ed. 1999) (observing "Pope Leo XIII rooted his social ethics in the *supreme value of the human person*," and "[a]ll political and social structures need to respect and respond to this *primary moral claim of human dignity*") (emphasis added).

67. *See* CHARLES, *supra* note 27, at 29.

because of the common Creator of each individual, the likeness according to which each individual is made, and the invitation to each individual to live in this world with a view to the world that is to come.

Turning to the practical, what does this kind of religious approach to equal human dignity mean for FTAs, particularly ones pursued by the United States? One possibility is that human rights should play a more central role in FTAs than they generally do. Perhaps through its FTAs, the United States ought to explicitly commit itself and fellow members to advancing human rights through peaceful commercial intercourse and clearly set out the proposition that the ultimate aim of the FTA is not merely to liberalize trade to realize efficiency gains but also to realize "humanity" gains.

An obvious difficulty this proposition raises is deciding which particular human rights matter. Surely an FTA ought not be redundant with a human rights convention. Are there particular human rights on which an FTA ought to focus, perhaps because they can be most easily connected to and advanced by trade? To address this difficulty and thereby focus on certain rights, it may be helpful to recall the admittedly debatable normative paradigm shift outlined in Section I, *supra*. The key purpose of trade liberalization through an FTA ought to be the enhancement of equal human dignity, which from a religious perspective should mean improved economic standards of living so as to create enlarged spaces for individuals to realize their full spiritual potential.

In the conventional economic paradigm, net social wealth maximization—occasionally with a few noises about income distribution—is seen as the goal of international trade liberalization. However, from a religious perspective, accumulation of wealth, even with more just income distribution, ought not to be an end in itself of trade or any other economic endeavor. A person does not exist for work. Work exists for a person to draw on her God-given abilities, grow physically, intellectually, emotionally and culturally, and serve the communities in which she is a part. Through that growth and service, she has the opportunity to develop as a spiritual being, to draw nearer to the Divine source whence she came and to which she might hope to return. In this personal encounter, she may come to realize her common bond with the rest of the human family. Put in overtly Catholic terms, work ought to be a forum in which the human person is invited to a deep, enduring peace with God and his neighbor, thus practicing the two Great Commandments.[68]

Whether a particular individual accepts this invitation depends from one to another. Acceptance of the offer cannot (and ought not) be imposed by any external force. But trade liberalization should not cut off or impinge on this

68. *See* UNITED STATES CATHOLIC CONFERENCE, LIBRERIA EDITRICE VATICANA, CATECHISM OF THE CATHOLIC CHURCH ¶ 2055 at 499 (United States Catholic Conference 2d ed. 1997) (quoting the two Great Commandments from *Matthew* 22:37–40, and discussing them in relation to the Ten Commandments).

opportunity. Removing burdens or restrictions on international commerce through an FTA, only to burden or restrict the ability of each human to exercise freedom of conscience, is a short-term and Faustian pact. In brief, the proposition is whether an FTA liberalizes trade in a manner that invites all affected individuals to develop, each at her own pace and in her chosen way, in the image and likeness of their common Creator.

To assess whether an FTA does so, it is useful to distinguish between direct and indirect effects that a trade liberalizing agreement can have on the opportunity of individuals in FTA countries to realize (again, should they choose to make the effort) their full spiritual potential. The direct effect, most obviously, is an FTA that explicitly obligates the member countries to remove impediments to freedom of worship. Lest there be doubt that trade liberalization can promote religious freedom, consider what happened in Vietnam following its accession to the WTO.

In September 2007, the Vietnamese government permitted Stella Maris Major Seminary, the third major Catholic seminary in the country, to recruit an unrestricted number of candidates. Vietnam has six total seminaries and twenty-six dioceses.[69] Since 1991, when this seminary reopened (having been closed by the government in 1979), until the change in policy, Stella Maris had to present a list of forty to forty-five candidates to the government, which would approve no more than thirty of them. With the change, in September, the seminary admitted (on its own) forty-four candidates. Significantly, Father Pierre Pham Ngoc Phi drew a direct link between trade liberalization and greater freedom of conscience:

> This privilege can be seen as a sign the government is gradually loosening its policy on the local Church's priestly formation, *since the country joined the World Trade Organization in 2006*.[70]

Indeed, two other seminaries—in Hanoi and Ho Chi Minh City—obtained the same governmental authorization in 2005 and 2007 respectively. Admittedly, this illustration is at the multilateral level, and it does not appear the terms of accession to the WTO obligated Vietnam to improve its climate of religious freedom. Yet imagine what might be achieved at an intensive FTA level where the topic is addressed squarely.

Indubitably, a trade accord, whether multilateral or an FTA, ought to promote neither a particular faith nor a specific kind of worship. For two reasons, promotion should not equal favoritism but rather be non-

69. Catholic News Service, *Vietnamese Priest: Government Loosens Control of Seminary Admissions*, Mar. 26, 2008, http://catholicnews.com/datea/briefs/cns/20080326.htm.

70. *Vietnam: More Permission For Annual Seminary Recruitment Seen As Sign of Government Openness*, UNION OF CATHOLIC ASIAN NEWS, Mar. 26, 2008, *available at* http://www.ucanews.com/2008/03/26/more-permission-for-annual-seminary-recruitment-seen-as-sign-of-government-openness (emphasis added).

discriminatory in a most favored nation (MFN)- and national treatment-like sense. First, such favoritism does not promote authentic freedom of conscience. It serves narrow interests of certain clergy, opening up one line of belief yet clamping down on another. (Consider the post-9/11 controversy about Saudi funding of extremist Wahhabi madrassas (Islamic schools), and the point should be clear.) The end result can be theocracy, an unholy alliance of religious and secular political authority, and suppression of disfavored religions.[71]

Second, from at least some religious (including Christian) perspectives, only a choice to love God, commensurate with free will, is meaningful. As Pope Benedict XVI suggested on January 18, 2008, to Bishops of the Arab Region on their *ad limina Apostolorum* visit to the Vatican:

> Obstacles on the paths to unity must never extinguish enthusiasm for creating the conditions for a daily dialogue, which is a prelude to unity.
>
> Meeting with members of other religions, Jews and Muslims, is a daily reality for you. In your Countries, the quality of relations between believers acquires a very special meaning, since it is at the same time a witness borne to the one God and a contribution to establishing more brotherly relations between people and between the various components of your societies.
>
> *A better mutual knowledge is therefore necessary in order to foster ever greater respect for human dignity*, the equality of rights and duties of people, and renewed attention to the needs of each one, particularly those who are the poorest.
>
> *Moreover, I firmly hope that authentic religious freedom may be effective everywhere and that the right of each individual to practise his or her religion freely, or to change it, may not be hindered. This is a primordial right of every human being*.[72]

Put bluntly, compelled adoration is utterly orthogonal to the inalienable dignity of the human person.

The key point about a direct effect between trade liberalization and freedom of conscience is that an FTA would require each member country to guarantee this freedom. The FTA would articulate specific manifestations of this freedom, such as (*inter alia*) the right to (1) establish teaching facilities to train clergy; (2) construct places of worship; (3) engage in organized religious

71. *See generally Promote Human Dignity, Foster Legitimate Freedom*, L'OSSERVATORE ROMANO, Jan. 9, 2008, at 10 ("[T]o promote human dignity in an integral way . . . [requires] effectively combat[ing] intolerance and discrimination against Christians, Jews, Muslims, and members of other religions. . . . [Because] [r]eligious discrimination can only effectively be addressed if all religions are equally respected and protected.") (alteration to original).

72. *Christians with the Mission to be "Artisans of Peace and Justice,"* L'OSSERVATORE ROMANO, Jan. 30, 2008, at 3 (emphasis added).

services; and (4) communicate and transmit religious information to interested (or potentially interested) individuals. Moreover, the FTA would commit member countries to minimize state monitoring or interference with the overall guarantee and the enumerated rights. Exceptional circumstances would be limited to security threats (e.g., active engagement in planning violence, as occurred with Branch Davidians, or certain groups acting in the name of Islam), and then only in accordance with broadly acceptable law enforcement standards.

Notwithstanding even the best legal drafting of this guarantee and exceptions to it, eliminating the specter of abusing such rights is impossible. Therefore, the FTA also might establish an independent commission that would ensure member countries adhere to the guarantee and itemized rights. That commission also could play an adjudicatory function, sponsoring a mechanism to resolve claims that a particular FTA country has infringed on the guarantee. Remedies might involve monetary sanctions, suspension of trade benefits, or both, all with a view to underscoring the proposition that the FTA ought not to detract from freedom of worship.

The indirect effect of trade liberalization on freedom of conscience operates through the economic climate created by that liberalization. A trade accord that impoverishes people in one country or a segment of the population (e.g., cotton farmers) hampers their ability to exercise whatever freedom of worship they might have. The FTA to which their country is a party embodies the formal guarantee of that freedom, but they can rarely, if ever, exercise this freedom. Their daily routine is consumed with an oft-degrading search for food and potable water. Their milieu is squalid, congested and hot. To borrow the terminology of Nobel Prize-winning economist Amartya Sen and apply his analysis from *Development as Freedom* (1999), people in one FTA country are un-free. They are developmentally disabled from participating in the benefits of open trade because such trade reifies their hideous status quo. They lack the capacity—nutrition, primary (much less secondary) education, modest housing and medical care—to make use of, or even come to appreciate, those benefits. Their principal contact with a place of worship is less to contemplate or pray, and even less to explore their innate spiritual dimension. It is more to depend on the charity for sustenance afforded by the church, gurudwara, mosque, synagogue or temple.

What particular human rights, in addition to freedom of conscience itself, ought an FTA promote to help create an economic climate that facilitates individual spiritual development?[73] Consider *Pacem in Terris* (1963), in which

73. Manifestly, human rights abuses are of increasing importance to trade law, as evidenced (for example) by the raucous debate on China's entry into the WTO, and by the burgeoning literature on the link between trade and human rights. *See, e.g.*, Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (2000) (discussing

Pope John XXIII identifies fundamental human rights that follow from respect for human dignity. (These rights have been articulated, in a variety of ways and forms over the centuries in previously issued Church documents.) In summary form, there are ten such human rights, as follows:[74]

1st. *The Right to Life and Development.*

> Man has a right to live, to bodily integrity and the means necessary for proper development, to food, clothing, medical care, rest, [and] necessary social services . . . [which include care during] unemployment or whenever through no fault of his own he is deprived of the means of livelihood.[75]

2nd. *The Right to Be Respected.*

> *[Man] has a right to be respected*, to a good name, to freedom in investigating the truth, and—within the limits of the moral order and the common good—to freedom of speech and publication, to pursue whatever

China's WTO accession). In a variety of United Nations, the Holy See has emphasized not only this linkage, but also the related linkages to labor and environmental rights. *Environmentally Sensitive*, L'OSSERVATORE ROMANO, Mar. 19, 2008, at 10 (reprinting the Feb. 12, 2008 intervention at the General Assembly by Archbishop Celestino Migliore, Apostolic Nuncio and Permanent Observer of the Holy See to the United Nations in New York, on the issue of climate change). Of course, the purpose here is not to pursue any of these links. That would take the discussion potentially far off course into topics worthy of dedicated, extended treatments themselves. Rather, the broad question is whether America's FTAs respect the rights enumerated above in a manner leading to greater freedom of worship. *Decent Work for All*, L'OSSERVATORE ROMANO, Feb. 27, 2008, at 10 (urging that unemployment offends human dignity and is corrected by paying attention to the needs of the afflicted). *See generally* Garcia, *supra* note 37, at 51 (concerning human rights and trade)

74. *See* POPE JOHN XXIII, *supra* note 29, ¶¶ 11–27, *listed in* CHARLES, *supra* note 27, at 30–31). Both history and current events adduce that not every political or economic society respects each of these human rights to the fullest degree (or even to a minimal degree) at all times. Human dignity is under attack, nearly at any given historical moment, in one or more societies—hence a reason for the tenacious defense of it by the Catholic Church and in the life and writings of Pope John Paul II. This defense sometimes is put in terms of the duty to do justice toward others:

> *Human society demands that men be guided by justice, respect the rights of others and do their duty. They must feel the needs of others as their own.* So considered, we think of society as primarily a spiritual reality. Its foundation is truth, brought into effect by justice. Such an order, absolute, immutable in its principles, *finds its source in the true personal and transcendent God*, who is the first truth and the highest good, the deepest source from which human society can draw its genuine vitality.

POPE JOHN XXIII, *supra* note 29, ¶¶ 35–38, *quoted in* CHARLES, *supra* note 27, at 31–32 (emphasis added).

75. CHARLES, *supra* note 27, at 30 (emphasis omitted).

> profession he may choose, [and] to be accurately informed about public events.[76]

3rd. *The Right to Education.*

> [Man has the right to] a good general education, technical or professional training consistent with the degree of educational development in his own country, to engage in advanced studies, to (as far possible) positions of responsibility commensurate with his talent and skill.[77]

4th. *The Right to Worship.*

> [Man has a right] *to worship God according to his conscience* and profess his religion in private and in public.[78]

5th. *The Right to Choose a Lifestyle.*

> [Man has the right] to choose for [himself] the life which appeals to [him], to marry and found a family, in which man and women have equal rights; or not to marry.[79]

6th. *The Right to Work.*

> Man has the right to the opportunity to work and to take personal initiative in it. Conditions in it must not be such as to weaken physical or moral fibre.[80]

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76. *Id.* at 30. *See also* MATTHEW F. KOHMESCHER, CATHOLICISM TODAY: A SURVEY OF CATHOLIC BELIEF AND PRACTICE 156 (Paulist Press 3rd ed. 1999) ("We all have the duty not only to respect the basic rights of others but to work with them in order that these rights be respected, cherished and promoted by all. We should do this not to gain our own selfish ends but because it is right and just to treat others as we would want to be treated."); POPE JOHN XXIII, *supra* note 29, ¶¶ 63–65 (declaring that "[t]he influence of the State must never be exerted to the extent of depriving the individual citizen of his freedom," and that "[i]t must augment his freedom while guaranteeing protection of everyone's rights").

77. CHARLES, *supra* note 27, at 30.

78. *Id.* at 30. *See also* JOHN PAUL II, RESPECT FOR HUMAN RIGHTS: THE SECRET OF TRUE PEACE (MESSAGE OF HIS HOLINESS POPE JOHN PAUL II FOR THE CELEBRATION OF THE WORLD DAY OF PEACE) ¶ 5 (United States Catholic Conference 1999) (stating "[r]eligious freedom therefore constitutes the very heart of human rights" because "[r]eligion expresses the deepest aspirations of the human person . . . [and] basically it offers the answer to the question of the true meaning of life," and adding that "no one can be compelled to accept a particular religion, whatever the circumstances or motive").

79. CHARLES, *supra* note 27, at 30. *See generally* MASSARO, *supra* note 35, at 124–27 (discussing family life).

80. CHARLES, *supra* note 27, at 31. As Pope Leo XIII states:

> [T]he first [task] . . . is to *save [ ] workers from the [brutality] of [those] who [make] use [of] human beings as mere instruments [in the creation of wealth,* impose a burden of labour, which] *stupef[ies] [ ] minds and [exhausts] [ ] bodies*. Let workers and

7th. *The Right to Associate and Participate.*

> Man has a right to engage in economic activities suited to his degree of responsibility; to a wage in accordance with justice; to ownership of private property, including productive goods.[81]

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employers make bargains freely about wages, but there underlies a requirement of natural justice higher and older than any bargain; a wage ought not to be insufficient for needs.

POPE LEO XIII, *supra* note 31, ¶ 45, *quoted in* CHARLES *supra* note 27, at 34 (emphasis added).

This task is "first" because its fulfillment is part of what it means to respect human dignity. As Pope John Paul II explains in *Laborem Exercens*, it is a person who does work, who "ought to imitate God, his Creator, in working," and who "by means of work . . . participates in the activity of God himself . . . [as] *given particular prominence by Jesus Christ*," and "[t]he Christian finds in human work a small part of the Cross of Christ"). POPE JOHN PAUL II, ENCYCLICAL LETTER, LABOREM EXERCENS [On Human Work] ¶¶ 25–27 (United States Catholic Conference Sept. 14, 1981) (emphasis added). *See also id.* ¶¶ 16–19 (discussing the right and duty to work, and identifying "no more important way of securing a just relationship between the worker and the employer" than payment of "just remuneration" because it is "a *practical means* whereby the vast majority of people can have access to those goods which are intended for common use: both the goods of nature and manufactured goods," and "is the concrete means of *verifying the justice* of the whole socioeconomic system") (emphasis added); CHARLES, *supra* note 27, at 61 (stating "[i]t is the task of the state to ensure economic freedom and to see that that freedom is not abused, but that, through it, all may have access to the means of a decent livelihood") and 63 ((1) discussing the spiritual significance of work, in that man—as made in God's image—shares in the creative activity of God through work, and can liken vicissitudes at work to the hardships endured by Jesus; (2) arguing Jesus gave work a new dignity because he spent most of his earthly life working with his hands; and (3) affirming "[t]he *subject* of work is more important than the work done or the *object* achieved by it)" (emphasis original).

81. CHARLES, *supra* note 27, at 31. As Pope John XXIII writes:

> The dignity of the human person also requires that every man enjoy the *right to act freely and responsibly*. For this reason, therefore, in social relations man should exercise his rights, fulfill his obligations and, in the countless forms of collaboration with others, act chiefly on his own responsibility and initiative. This is to be done in such a way that each one acts on his own decision, of set purpose and from a consciousness of his obligation, *without being moved by force or pressure brought to bear on him externally*. For any human society that is established on relations of force must be regarded as *inhuman*, inasmuch as the personality of its members is repressed or restricted, when in fact they should be provided with *appropriate incentives and means for developing and perfecting themselves*.

POPE JOHN XXIII, *supra* note 29, ¶ 34 (emphasis added). It is important, of course, to discern with care "legitimate" aims and "appropriate" incentives. Pope Leo XIII counseled that workers would be empowered by banding together in an association, but that workers' associations operated under "a general and constant law," namely, "that the individual members of the association secure, so far as possible, an increase in the goods of body, of soul, and of prosperity." POPE LEO XIII, *supra* note 31, ¶ 76. *See also* POPE JOHN PAUL II, *supra* note 78, ¶ 20 (observing that by protecting worker rights and enhancing worker solidarity in a constructive manner within the framework of the common good, and by eschewing class egoism, conflict and political power battles, trade unions play an indispensable role in advancing social justice). *See generally* MASSARO, *supra* note 35, at 138–141 (on worker rights and labor unions).

8th. *The Right to Private Property.*

> [Man has the right to] form associations with their fellows, to confer on such associations the type of organisation best calculated to achieve their aims [including ownership of private property and economic assets (i.e., productive resources)].[82]

9th. *The Right to Migrate.*

> [Man] has the right to freedom of movement and residence in his own state and, where just reasons favour it, to emigrate to other countries.[83]

10th. *The Right to Legal Protection.*

> [Man has the right to have the aforementioned human rights enshrined in the legal system of his country,] to take an active part in public life, [and to the enforcement of these rights in an efficacious and unbiased way.][84]

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82. CHARLES, *supra* note 27, at 31. *See id.* at 61 (stating man "must have freedom to choose his work, to prosper at it *and to own property*," and "[u]nless he has these freedoms all other freedoms are at risk from his economic masters") (emphasis added). Interestingly, Church Fathers such as Saint Ambrose viewed private property as an illusion because all property belongs to God. Private ownership, and more specifically inequality of distribution, was unknown before the Fall, and was said by them to be a consequence of sin. Consequently, Saint Ambrose characterized almsgiving by an avaricious person as the restitution of goods stolen from the poor. *See* BOHR, *supra* note 66, at 330. *See generally* MASSARO, *supra* note 35, at 132–138 (discussing the rights and responsibilities of property ownership).

83. CHARLES, *supra* note 27, at 31. *See, e.g.*, POPE JOHN PAUL II, *supra* note 78, ¶ 23 (declaring that "[m]an has the right to leave his native land for various motives—and also the right to return—in order to seek better conditions of life in another country," and that "[t]he most important thing is that the person working away from his native land, whether as a permanent emigrant or as a seasonal worker, should not be *placed at a disadvantage* in comparison with the other workers in that society in the matter of working rights") (emphasis added).

84. CHARLES, *supra* note 27, at 31. The government authority in a political or economic society is responsible for providing this protection. That responsibility is especially important with respect to poor members in the society.

This importance derives from more than just the preference for the poor (a Catholic response to the third moral problem, discussed below). As Pope Leo XIII put it bluntly, "[r]ich people can protect themselves; the poor have to depend above all upon the state." POPE LEO XIII, *supra* note 31, ¶¶ 37–38, *quoted in* CHARLES, *supra* note 27, at 35.

This responsibility does not inexorably compel the conclusion that democracy is the best form of government, and Catholic Social Justice Theory does not go that far. Saint Thomas Aquinas urged a mixed form of government, combining monarchy, aristocracy, and democracy, thereby providing the respective advantages of an authoritative figure, involvement of qualified persons and choice by the people. *See* SAINT THOMAS AQUINAS, SUMMA THEOLOGICA I^{a} II^{ae} Q. 105 Art. 1 (Richard J. Regan ed., University of Scranton 1999), *quoted in* CHARLES *supra* note 27, at 40.

More generally, for a discussion of Gelasian theory (named for Pope Gelasius, whose pontificate was in the 5th century, from 492–496 A.D.), see BOHR, *supra* note 66, at 309. In brief, the theory holds that the Church and State are powers established by God on earth to

Applying this listing to the trade realm, it may be suggested that an FTA ought to promote (or at least not undermine) not only the Fourth right (i.e., the direct effect), but also the other nine rights (i.e., the indirect effects). Trade liberalization designed with the other nine rights in mind may assist in expanding the space an individual needs to meaningfully exercise freedom of worship.

The difficulty of proceeding with this kind of design is fashioning specific negotiating criteria. If trade affects freedom of conscience through the remaining rights, then what particular outcomes in an FTA should be sought to promote those other rights and thereby indirectly support this freedom? The Sixth and Seventh rights are explicitly related to the conditions of labor, and the Ninth right is about freedom of migration.[85] In turn, the Sixth and Seventh rights can be translated into labor rights provisions of an FTA. The Ninth right can inform services trade liberalization (by expanding temporary worker visa programs under Mode IV delivery of services). However, what trade negotiation position is spawned by the First, Second, Third, Fifth, Eighth or Tenth right? The Firth right is economic; the Second right is about politics; the Third about education; the Fifth about family and community; and the Eighth and Tenth about the rule of law. All of them are general. It could well be that some of the rights lead to conflicting negotiating positions redolent of contemporary trade debates.

For example, enhancing economic status through better food, clothing, shelter and medical care (the First right) arguably is had by free trade—or by protecting certain constituencies from exploitation (say, by foreign utility and water services providers, which raise costs and cut distribution to poor or rural communities). Private property rights (the Eighth right) may be expanded by

operate autonomously in different spheres, the ecclesiological and the secular, respectively, and that Church and State authorities are to respect and support each other. This theory dominated most of the Middle Ages, though the reign of Charlemagne was marked by a "theocratic character," and starting in the 11th century A.D., conflict between popes and emperors was "the norm for the next several centuries." *Id.* at 309. The opposite of Gelasian theory is "hierocratic" theory, articulated by Pope Boniface VIII in *Unam Sanctam* (1302), whereby the Church is viewed as superior to the State, hence a pontiff is authorized to intervene in political affairs to save souls. *Id.* at 311. For a discussion, of the grand theological synthesis of political theories, developed by Saint Thomas Aquinas, see *id.* at 311. *See also* CHARLES, *supra* note 27, at 50–54.

The responsibility for providing legal protection of human rights also does not inexorably mean the government must regulate the ownership and use of private property. Regulation entails the risk of undermining the institution of private property. Hence, the key principle that ought to constrain the government from excessive intervention is promotion of the common good. *See id.* at 61.

85. *See* CHARLES, *supra* note 27, at 31. Note, then, that closely allied with the trade—human rights link is the trade—labor rights link, because some work-related rights are claimed to be human rights. The above list (most directly the sixth and seventh rights, and indirectly the first, third, ninth and tenth rights) are examples.

free trade, or extant ownership patterns that are skewed in favor of elites may be worsened by open trade (because they are in the best position to capture gains and have no legal obligation to share them). In brief, promoting freedom of conscience indirectly through other variables (i.e., rights) is problematic. Depending on the variable and context, the best outcome, in terms of a specific rule in an FTA, may be indeterminate.

D. Freedom of Conscience and the Indirect Effects of a Peoples Trade Agreement

A final remark about putting into practice a religiously grounded concept of equal human dignity ought to be made. Inspired partly by some socialist-oriented Latin American leaders during the first decade of the new millennium such as Bolivian President Eva Morales and Venezuelan President Hugo Chávez, the idea of a "PTA" has emerged. This acronym means "Peoples Trade Agreement." (The Spanish acronym is "TCP," for *El Tratado de Comercio entre los Pueblos*, i.e., "Trade Treaty for the Peoples"). A PTA is a new kind of trade agreement, being an economic alternative and political challenge to a conventional American-style FTA.

In April 2006, Bolivia and Venezuela joined Cuba in signing a ten-point statement of principles on which their existing (and presumably any future) trade agreement ought to be based. (Technically, the extant accord is the *Acuerdo Para La Aplicación de la Alternativa Bolivariana para los Pueblos de Nuestra América* (ALBA) *y el Tratrado de Comercio de los Pueblos* (TCP), which means "Accord for the Application of the Bolivarian Alternative for the Peoples of our America and the Peoples' Trade Agreements." In 2007, Nicaragua joined ALBA, and in 2008 Dominica also joined. In other words, ALBA is the actual trade agreement, and the TCP embodies the principles on which ALBA is based.) The ten TCP points are:

1. The Trade Treaty of the Peoples, which was proposed by President Evo Morales, is a response to the failed neo-liberal model, based as it is on deregulation, privatization and the indiscriminate opening of markets.

2. TCP understands trade and investment *not as ends in themselves, but rather as means toward development*. Therefore, its aim is not total market liberalization and the shrinking of the State but rather *seeking benefits for all peoples*.

3. TCP promotes a model of trade integration between people that limits and regulates the rights of foreign investors and multinationals so that they serve the purpose of national productive development.

4. TCP does not prohibit the use of mechanisms to promote industrialisation, nor does it prevent protection of areas of the internal market that are *necessary to preserve the most vulnerable sectors of society*.

5. TCP recognises the right of peoples to define their own agriculture and food policies and to protect and regulate national agricultural production in order to prevent domestic markets being inundated with excess products of other countries.

6. TCP considers that vital services must depend on public companies as exclusive providers, regulated by the State. The negotiation of any trade agreement must hold as a central principle that the majority of basic services are public goods that can not be handed over to the market.

7. TCP proposes complementarity instead of competition; co-existence with nature against irrational exploitation of resources; defence of social property against extreme privatisation.

8. TCP urges participating countries involved in a process of integration based on solidarity to give priority to national companies as exclusive providers to public entities.

9. With the proposal for a Trade Treaty of the Peoples, Bolivia is proposing a true *integration that transcends economic and trade considerations*; the philosophy is based on achieving an *endogenous just and sustainable development* based on community principles that takes into account national differences.

10. TCP proposes a *different logic of relationship between human beings*, in other words a distinct model of co-existence that isn't based on competition and the urge to accumulate which takes advantage of and exploits to the maximum human labour and natural resources.[86]

The TCP is not designed to be a "Catholic Trade Agreement." There is no such thing, any more than there is "Catholic Chemistry."

In addition, promotion of freedom of conscience is not the direct aim or intent of a TCP. What, then, motivated Presidents Morales and Chávez to sign a TCP? One answer suggests the agreement might not be new in concept. Consciously or not, these countries may well have done little else than resurrect socialist-style trade policies popular in Latin America in the 1950s and 1960s. These policies were advocated by leading economists like Paul Baran, Raul Prebisch and Hans Singer. Another answer is a genuine sense that a conventional market capitalist FTA will not work for them. President Morales vowed in March 2006 that Bolivia never would negotiate an FTA with

86. Movimiento Boliviano por la Soberanía y la Integración solidaria de los pueblos: Contra el TLC y el ALCA, *Trade Treaty of the Peoples*, Apr. 13, 2006, http://www.boliviasoberana.org/blog/_archives/_2006/4/13/1896922.html (emphasis added). *See also Venezuela, Bolivia, and Cuba Sign Alternative 'Trade Treaty for the Peoples'*, 23 Int'l Trade Rep. (BNA) Leave No. 18, at 692 (May 4, 2006), *available at* http://pubs.bna.com (quoting the first, third, and ninth points, and other portions).

the United States. Yet, in August 2006, Bolivian Vice President Alvaro Garcia Linera explained:

> Bolivia wants trade relations with the entire world. I traveled to the United States to try to advance a trade pact. But, we can't just have free trade under the old rules, because it is too aggressive for our economy.
>
> For example, how is a small farmer in Bolivia going to compete with farmers from countries that use the latest tractors and other technologies? It's like trying to make the 2nd century compete with the 21st century. The same goes for our urban small businesses. How are we going to compete with giant factories under such conditions?[87]

Another answer is that the TCP is about self-interest. Soybean economics may have provoked the Bolivia-Venezuela-Cuba accord. When Colombia signed an FTA with the United States on February 27, 2006, it agreed to purchase a 600,000 ton quota of American soybeans.[88] Until that point, Bolivia had shipped 500,000 tons of soybeans to Colombia worth $166 million in 2005. The U.S.-Colombia FTA thus diverts soybean trade away from Bolivia and toward the U.S. Bolivian President Morales responded immediately with the PTA proposal. Andean region politics reinforced his call.[89]

Accordingly, the focus of an examination of the TCP through the lens of religion and equal human dignity ought to be on indirect effects. That is, in terms of indirect effects, might this kind of trilateral accord be consistent with (or even advance) certain social justice principles, including equal human dignity, found in religious traditions? To what extent might a TCP operate indirectly through supervening variables on the economic circumstances in which that freedom may be exercised?

As the TCP is a new accord, it is premature to render a final judgment. And, of course, this type of agreement could prove to be a dismal economic failure. Like many of its socialist-oriented predecessors, a TCP might render workers and peasants materially worse off, or elites materially better off, than

87. *See Bolivia Looks for New Kind of Trade Pact With U.S., While Seeking ATPDEA Extension*, 23 Int'l Trade Rep. (BNA) No. 32, at 1198 (Aug. 10, 2006), *available at* http://pubs.bna.com.

88. *Id*.

89. As intimated, there are additional answers, based on political economy. For example, the Community of Andean Nations (CAN)—founded in 1969, and comprised of Bolivia, Colombia, Ecuador, Peru and Venezuela—had been disintegrating. Not only Colombia, but also Peru (in April 2006), signed FTAs with the United States. Further, in December 2005, MERCOSUR admitted Bolivia and Venezuela to full membership, and in April 2006, Venezuelan President Chavez announced his country was withdrawing from CAN (and sought to make MERCOSUR an anti-American bloc) and called the Peruvian President, Alejandro Toledo, a traitor to South America for signing an FTA with the United States.

before. That outcome hardly would be a positive indirect effect on freedom of religion.

For now, at least on paper it appears there may be some common ground. The Second Point indicates economic agreements ought not to be ends in themselves, but rather means to an end, and that one appropriate end is promotion of the common good. The Fourth point is redolent of a Catholic Social Justice Principle known as the preferential option for the poor.[90] The Ninth Point seems to call for solidarity among people across borders on the basis of more than economic self-interest and the building of relationships that are just and sustainable. Finally, the Tenth point calls attention to the human person, not merely to business profits, in respect of trade agreements and their effects.

IV. EQUAL HUMAN DIGNITY CRITERIA FOR FTAS – A LEGALISTIC APPROACH

Failure to tease out any specifics means equal human dignity remains potentially an ambiguous, amorphous concept susceptible to different, even contrasting, interpretations. Lawyers who deal with FTAs need not a fist full of sand, but some clear markers.

Accordingly, consider in addition to the philosophical and religious perspectives a third approach to identifying equal human dignity criteria for FTAs: a legalistic one. What do each of the words "equal," "human" and "dignity" mean in the context of international trade law? Responding to this question yields three specific criteria:

- From "human," the criterion is *neutrality*.
- From "equal," the criterion is *non-discrimination*.
- From "dignity," the criterion is *respect*.

To be clear, this approach is informed by literalism (as the word "legalistic" connotes), lexicography (i.e., reference to dictionary usages of terms) and common sense. "Legalism," in the sense used here, simply refers to contemplating what key terms mean and considering the ramifications of those meanings. The recourse to philosophy or theology is neither direct nor immediate. However, the results could well be relatively similar under a rigorous philosophical or systematic religious approach.

A. "Human" and Neutrality

It is easiest, perhaps, to start with "human." As the middle word, it operates as an adjective for dignity; it is the dignity of humans at stake. In that middle position, it is also part of what "equal" modifies. "Human" plays a noun-like role, in that it is humans—namely, their dignity—that is to be equal.

90. *See* BHALA, *supra* note 24, at 432–438.

The word "human," then, indicates that what is equal, and what dignity is at issue, is whatever (or, better put, whoever) is "human." There is no differentiation among humans. The phrase is not, for example, "equal businessman dignity," nor is it "equal consumer dignity." The equal dignity of no one kind of human is preferred above any other kind. Rather, the dignity of all people affected by an FTA must be protected, and in equal measure. The subjects of an FTA are all humans in the countries that are parties to the FTA, with no one sub-group, i.e., constituency, preferred. In that sense, the word "human" is a horizontal concept. The FTA is truly a collective endeavor involving all people of the member countries, not just the capitalist over the laborer, the landowner over the tenant, the manufacturer over the farmer, the producer over the consumer, the service professional over the craftsman or the public official over the private agent. Critically, "human" means the FTA does not favor the American over the non-American.

The word "human" also has a vertical connotation. Even within the various aforementioned categories, negotiating, drafting, implementing or enforcing an FTA does not prefer one kind of human to another. For example, among capitalists, the steel company manager and the surgical instrument company manager are the same. Among farmers, no distinction exists between the cotton farmer and the corn farmer. Among service professionals, the lawyer and the engineer are united in their humanity. Further, the word "human" is vertical in nature in that each person within each category or sub-category of a constituency, from natural conception to natural death, is the subject of the FTA. An FTA affects not just adult males who, for instance, are laborers in the auto industry, but also the children of those workers, who, upon maturity, may seek employment in that industry or by force of circumstance may have to look to another line of work, and who one day will be retirees.

In sum, "human" is horizontal in that it covers all people in all sectors of the economies of the countries that are parties to an FTA. It is "vertical" in that it covers all people within a particular economic sector or a country that is a party to the FTA, and all people throughout their natural life cycle. To be sure, "human" does not mean that all people in the FTA members will, in actuality, be affected by the FTA, much less by a particular rule in the FTA. For any given person (e.g., a textile mill worker), an FTA rule (e.g., on sugar) may be irrelevant at this juncture in his life. In theory, any rule could potentially affect any person if that person engages in the behavior (in the example, sugar production or processing) that is within the purview of the rule.

In other words, the rules are facially neutral in how and why they are written and in the pattern in which they are practiced. Here, then, is the first criterion to extract from the concept of "equal human dignity," and specifically the word "human"—neutrality, in both a horizontal and vertical sense. The FTA rules treat as a world citizen each individual, natural person in every country that is party to the FTA. The rules are not drafted or used for the

American over the Arab, for the Israeli over the Palestinian, or for the French Canadian over the non-French Canadian.

Consequently, should a person change his behavior or nationality and come within the purview of the rule, the rule itself is not a disincentive to this change. Similarly, if a country is party to two or more FTAs (as is true for the United States), then the diversity of the different constituencies encompassed by the different FTAs is accommodated by ensuring each FTA embraces all peoples in the member countries. For instance, suppose an FTA between the United States and Morocco differentiates (e.g., by a preferential rule of origin) Moroccan wool sweater producers from other Moroccan textile and apparel producers, whereas an FTA between the United States and Oman does not do so. "Human" means that all wool sweater producers, actual or potential, in the United States, Morocco and Oman, are to be treated as such. To treat one differently, such as to impose restrictions on Moroccan wool sweaters, is to single out the Moroccan producer for special (in this instance, less favorable) treatment, leading (as discussed in Section IV.B, *infra*) to discrimination.

A final point about the word "human" concerns its inter-generational implications. To what extent do, or should, the rights of the unborn factor into an FTA? Interestingly, a commonly accepted principle in international environmental law is inter-generational equity. Succinctly put, this principle holds that "in meeting the needs of present generations, the needs of future generations should not be sacrificed."[91] The principle of intergenerational equity associates logically with the concept of sustainable development. An FTA seeking to promote "equal dignity" in respect of environmental rights indeed would embrace the unborn in its definition of humanity.

B. "Equality" and Non-Discrimination

As for "equality," the rather obvious criterion emanating from the term is non-discrimination. That would mean every FTA to which the United States is a party neither intentionally creates, nor tolerates in its implementation, actual or potential, de jure or de facto, discrimination. All humans living in the FTA countries are treated as if they hold the same citizenship. No distinction exists between a domestic or foreign person, i.e., the national treatment manifestation of non-discrimination is pervasive and without exception, notably including subsidies relating to production or production processes.[92]

91. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 381 (Thomson-West 2006).

92. This criterion begs an obvious question—what about the treatment of humans who are not citizens of a country with which the United States has an FTA? Concededly, "equal human dignity" seems to mean "equal human dignity for humans in an FTA." An imperfect response is that just because, as a practical matter, equal human dignity cannot be promoted in all countries at

How is "equality" different from "humanity"? The answer is the two are complementary, with "humanity" being the foundation of, or leading to, "equality." "Humanity" highlights natural personhood and demands horizontal and vertical neutrality across all natural persons, without any further sub-division among them. As basic (even simplistic) as it may seem, the point is nothing more or less than stressing that human beings are who FTAs ultimately affect. "Equality" shifts the focus slightly to the creation of categories of natural persons and the actual or potential differential treatment among the categorized persons. It forbids discrimination against one or more categories of natural persons.

In an FTA between the United States and Jordan, for example, American and Jordanian persons, natural and legal, are treated alike for all purposes governed by the FTA. If there are more than two countries in the FTA—e.g., (NAFTA), involving the United States, Canada and Mexico or a hypothetical Middle East Free Trade Agreement (MEFTA) comprising the United States and many Arab countries and possibly Israel, too—then all humans (and non-natural legal person) have the same rights under that FTA, plus no persons from one country are preferred over persons from another country.[93] In other words, an FTA involving multiple countries adheres to both aspects of non-discrimination: national treatment, as between American and non-Americans; and MFN treatment, as among all humans. The latter feature would mean it would be impermissible, for example, in a MEFTA for the United States to prefer wool sweaters from Israeli workers over wool sweaters from Jordanian or Moroccan workers (assuming all the countries are MEFTA members). Put differently, the critique offered by one observer of the Jordan FTA—"[t]he

once through the multilateral trading system does not mean it should not be promoted in some countries now through a web of FTAs.

93. In May 2003, President George W. Bush declared it was American trade policy to create a United States-MEFTA by 2013. MEFTA would comprise nearly all countries in the region. The United States has signed and implemented FTAs with Jordan (2001), Morocco (2004), Bahrain (2006) and Oman (2006), and of course has had an FTA with Israel (since 1985). FTA talks have bogged down and are moribund between the United States and United Arab Emirates (UAE) (launched in March 2005) over an array of commercial matters. For political and economic reasons, the United States (in 2006) decided against commencing FTA talks with Egypt.

Countries in doubt for inclusion in MEFTA, while not expressly identified or excluded a priori, seem likely to be Iran (for political and national security reasons), Israel (for political reasons), Syria (for political and national security reasons), and Turkey (because of its links to and interest in joining the European Union (EU)). Certainly, without renewed trade negotiating authority (which expired on June 30, 2007), there is virtually no chance of a MEFTA, much less any further FTAs in the Middle East. *See Bush Says U.S. Open to Mideast Trade But Suggests No Early FTA Talks with Egypt*, 25 Int'l Trade Rep. (BNA) No. 3, at 88–89 (Jan. 17, 2008); *Some Progress Likely on 5th Anniversary of Bush MEFTA Initiative; No New FTAs*, 25 Int'l Trade Rep. (BNA) No. 3, at 102 (Jan. 17, 2008).

United States in the FTA did not take the interests of Jordan into account"—would be untenable.[94]

To be sure, "equal" does not mean that a country in an FTA is forbidden from discriminating on matters not covered by the FTA. Such matters likely would include voting rights, serving on a jury, receiving subsidized education, health care or housing. Conversely, trade liberalization in goods and services, plus intellectual property (IP) matters, foreign direct investment (FDI) and immigration, all likely would be embraced by the FTA. "Equal" would mean whatever rights and obligations are created by the FTA must be accorded and imposed, respectively, for all humans (and, again, non-natural legal persons) throughout the countries in the FTA. Citizenship, for purposes of the FTA, would not matter; being human would be enough for entitlement to equality.

For instance, it would not be permissible to import beans, corn or sugar from Canada, but not Mexico, in NAFTA. Similarly, favoring Bahraini over Moroccan banks in a MEFTA would not be allowed. Still another example concerns pollution. The principle of non-discrimination is a widely accepted principle of international environmental law. It requires that a country, when addressing pollution originating from within its borders, not differentiate between pollution affecting itself and pollution harming other countries.[95] This principle is manifest (*inter alia*) in the 1991 *Convention on Environmental Impact Assessment in a Transboundary Context*, which requires countries to assess with equal vigor and even-handedness the extraterritorial and domestic environmental repercussions of a proposed project in their territory.

Notably, equal treatment for humans ought to be logically consistent across FTAs. The United States, like many countries, has multiple FTAs. Different degrees of non-discrimination, depending on the FTA partner, would sniff of discrimination. That is, a consistent, rigorous equality criterion (non-discrimination in the sense of national and MFN treatment) should be found in all trade-liberalizing arrangements. By way of hypothetical example, with two bilateral FTAs—one with Israel, and one with an Arab country—equality in respect of matters covered by the FTAs ought to be horizontal. The United

94. Bashar H. Malkawi, *Lessons from the United States—Jordan Free Trade Agreement*, 14 INT'L TRADE L. & REG. 26, 38 (2008). Highlighting unequal aspects of the FTA rules of origin for textiles and apparel, as well as the causation standard for safeguards and visa commitments in respect of services trade, the critique concludes:

> To adopt a contract law language, the entire U.S.-JO [United States-Jordan] FTA was a contract of adhesion or an unconscionable contract, which was submitted by the United States as a *fait accompli*. Trade negotiations require political will and administrative efforts and skills, which are finite resources for Jordan. The U.S.-JO FTA was negotiated with a major power that obviously had its own objectives, while Jordan played the role of "demandeur." Jordan must be a "rule-maker," rather than a "rule-taker."

Id. (emphasis omitted).

95. *See* MURPHY, *supra* note 91, at 380–381.

States could no more favor Israeli over Moroccan orange growers than it could favor in its domestic commercial regime Florida over Texas orange producers. Thus, there would be horizontal equality within any one FTA and across all FTAs.

C. "Dignity" and Respect for the Excellent

Finally, what criterion may be teased out of "dignity"? In the concept of "equal human dignity," a great deal of substance import is connoted by the word "dignity." *The New Shorter Oxford English Dictionary* defines this word as:

> 1. The quality of being worthy or honourable; true worth, *excellence*. . . . 2. Honourable or high estate; degree of estimation, rank.[96]

This lexicographic source continues on with an example of "stand on one's dignity," which means "insist on *respectful* treatment."[97]

The italicized words suggest that crafting the substance of international trade laws, such as FTA rules, ought to be a quest for the best of treatment of individual natural persons. The rights of humans ought not to be undermined but rather elevated to the highest of the levels extant in any of the countries in the FTA. The status quo on human rights, and, by extension, labor and environmental rights, should not be worsened; nor is a standstill acceptable (unless it already is at the most excellent level). Rather, the status quo must be advanced toward the highest level that exists among the FTA countries. Better yet, perhaps, the pursuit of world-class levels is (or ought to be) the aim. Significantly, "dignity" extends to treatment—especially the process of negotiating—an FTA with another or other countries. Domination and intimidation are fundamentally at variance with respectful treatment.

In brief, the criterion to implement "dignity" is respectful treatment that inclines toward the excellent.[98] Three obvious substantive areas in which such treatment can be shown, in addition to the stylistic demeanor of trade

96. THE NEW SHORTER OXFORD ENGLISH DICTIONARY vol. I at 671 (1993) (entry for "dignity") (emphasis added).

97. *Id.* (emphasis added).

98. An interesting inquiry (beyond the present scope) might be to explore the Aristotelian theory of excellence, as to its possible relevance in shaping the meaning of "dignity." The Ancient Greek word "*arête*" is translated into "excellence" (especially recently) or "virtue" (frequently in the 20th century and before). "Excellence" has fewer religious overtones than "virtue." (It was Saint Thomas Aquinas who used the translation "virtue" and infused Christian concepts into that term.) The key point is Aristotle's definition of the "highest good" (*summum bonum*) is "activity of soul and actions accompanied by reason . . . in accordance with excellence [*arête*] . . . in a complete life." ARISTOTLE, NICOMACHEAN ETHICS—TRANSLATION, INTRODUCTION, AND COMMENTARY ch. 7, 1098a14–1098a19 (Christopher Rowe trans., Oxford University Press 2002). Put simply, this definition of the "highest good," in which excellence is central, is equivalent to a well-lived life (*eudaimonia*).

negotiators toward one another, are human, labor and environmental rights. The question is what would be the best, the most excellent, levels of treatment encouraged or required by an FTA in each of these areas? That question is treated below.

V. IMPLEMENTING THE LEGALISTIC CRITERIA IN FTAS

A. Three Methods for Identifying the Excellent

Beginning with the presumption that the substantive areas for "dignity" relevant to FTAs are human, labor and environmental rights, there are at least three ways to identify excellence worthy of respect: (1) absolutely and internationally; (2) regionally; or (3) pragmatically by reference to individual FTA members. Using the first method, an absolute level of excellence is defined, and FTA members are called upon to measure up to that level. The benchmark is international; i.e., what has the world community agreed on as being universally applicable? This approach is a rigorous one, inquiring into what is excellent for all in a pure sense. The United Nations is the obvious promulgating institution to look at.

The second method is regional. The focus is on the human, labor and environmental rights established by and for the region encompassing the FTA. For example, for NAFTA, the region would be North America, so the *American Convention on Human Rights* (under the auspices of the Organization of American States (OAS), a regional agency) would set the relevant benchmark.[99] Under the third method, the existing practices of the members are examined, and the best of those practices are adopted for all the members (a kind of MFN treatment on an FTA level). The third approach is practical. It demands at least an improvement among the FTA countries to the level that is the best among any one of them.

Perhaps, in some FTA contexts, the three approaches might yield the same result. That is because one of the FTA members might adhere to an absolute level, which becomes the benchmark for all the countries in the FTA. Alternatively, depending on the human, labor or environmental right in question, it could be equally well-articulated and protected in an international, regional and national document.

The regional approach raises two immediate concerns. First, the countries in an FTA may not be part of the same region. The FTA between the United States and Bahrain is an example. Which region, North America or the Gulf, should set the benchmark on human, environmental and labor rights, and what criteria should govern the choice of region? Second, what if the same country

99. *See* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144 (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 101 (1970).

is a party to multiple FTAs in different regions? The United States has FTAs with countries in North America (Canada and Mexico, through NAFTA), Central America (the Central American Free Trade Agreement (CAFTA), to which Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua, plus the Dominican Republic, are parties), South America (Chile), the Middle East (Bahrain, Jordan, Israel, Morocco and Oman) and East Asia (Singapore). Would different regional standards, depending on the FTA region, for equal human dignity be tolerable, both conceptually and practically speaking?

Likewise, the pragmatic individual approach raises some threshold concerns. No single country should foist as "best" its human, labor or environmental standards on the other FTA member (or members). There must be a reasonably objective way to choose the best between or among the FTA members. A fixed menu should not be imposed. Rather, the top-quality items should be selected from a cafeteria. While the absolute, universal approach likely suffers from concerns, too, its generic appeal commends it as the initial methodology.

B. A Starting Point on "Dignity"?

Accordingly, as an initial approach, what might be the most excellent treatment, worthy of respect to promote dignity, following the first approach? In respect of human rights, one possibility would be for every FTA to mandate full adherence to the leading international human rights agreements.[100] The obvious top candidates in that category would be as follows:[101]

- The 1948 *Universal Declaration of Human Rights*, a United Nations General Assembly Resolution that is the foundational document in international law on human rights, and the basis for subsequent agreements (including the 1966 Covenants listed below).[102] The *Declaration* proclaims all people are born free and equal (Article 1). It contains a long list of rights and freedoms, many of which now are beyond aspirations and are part of customary international law. Among the rights proclaimed, are to: life, liberty, and security of person (Article 3); equal recognition by and protection of the law (Article 7); effective legal remedies (Article 8); a fair,

100. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW ch. 25 (5th ed. 1998) (1966); VALERIE EPPS, INTERNATIONAL LAW ch. 8 (3d ed. 2005). The discussion of human rights agreements draws from Professor Epps' textbook, particularly pp. 281–285, 292–300, 310–312, 317–319, and Professor Brownlie's treatise, particularly pp. 576–581. For further background, see STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW §§ 9.02–9.03 (LexisNexis 2006). *See generally* JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION (Hart Publishing 2007) (concerning the trade-human rights link).

101. All of the listed documents are reproduced in a variety of sources. *See, e.g.*, BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlie ed., Clarendon Press 3d ed. 1992) (1971).

102. *See* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 183d plen. mtg. (Dec. 10, 1948).

public hearing by an independent and impartial tribunal (Article 11); the presumption of innocence (Article 11(1)); move freely within a country and to leave a country (Article 13(1)-(2)); a nationality (Article 15); own property and not be deprived arbitrarily of it (Article 17(1)-(2)); take part in the government of one's country through freely chosen representatives (Article 21(1)); equal access to public service (Article 21(2)); universal and equal suffrage and a secret ballot (Article 21((2))); social security (Article 21(3)); work and choose freely employment, and just and favorable working conditions (Article 23(1)-(3)); join trade unions (Article 23(4)); rest and leisure (Article 24); an adequate standard of living, including food, clothing, housing, medical care and security upon unemployment, disability, or old age (Article 25); special care for mothers and children (Article 25(2)); education, including free, compulsory primary education and equally accessible, merit-based professional and technical education (Article 26(1)), where education is directed at the full development of the human person and advances human rights (Article 26(2)), and the choice of education rests with parents (Article 26(3)); participate freely in the cultural life of the community (Article 27(1)); and, social and international order (Article 28). Among the freedoms listed in the *Declaration* are: freedom from discrimination (Article 2), slavery or servitude (Article 4), torture or cruel, inhuman, or degrading treatment or punishment (Article 5), arbitrary arrest, detention, or exile (Article 9), and interference with privacy, family or home (Article 12); freedom to marry when of full age and found a family with free, full consent (Article 16); and freedom of thought, conscience, and religion (Article 18), opinion, and expression (Article 19), and peaceful assembly (Article 20).[103]

- The 1966 *International Covenant on Civil and Political Rights*, which entered into force in 1976.[104] This *Covenant* identifies specific "first-generation" rights and freedoms (so-called because they were the first ones to obtain widespread recognition).[105] Most of these rights and freedoms are grounded in the Charter and indeed expressly reiterate many of them. Notably, the Charter proclaims the equal right of women and men to enjoy civil and political rights (Article 3). Accordingly, the *Covenant* covers the right to life (Article 6), liberty and security of person (Article 9), due process (Articles 9 and 14-15), equality before the law (Article 14), movement (Article 12), thought, conscience and religion (Article 18),

103. *Id.* The Resolution passed with forty-eight votes in favor, zero against and eight abstentions. For purposes of America's FTA policy in the Middle East, it is worth noting the Kingdom of Saudi Arabia abstained. (The other seven abstentions were the former countries of Byelorussia, Czechoslovakia, U.S.S.R., and Yugoslavia, plus Poland, South Africa and Ukraine). *See* U.N. GAOR, 3d Sess., 183d plen. mtg. at 912, U.N. Doc. A/777 (Dec. 10, 1948), *available at* http://www.un.org/Depts/dhl/landmark/pdf/a-pv183.pdf.

104. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, entered into force on Mar. 23, 1976), *reprinted in* 6 I.L.M. 368 (1967).

105. EPPS, *supra* note 100, at 282–283.

peaceful assembly (Article 21), association (Article 22), marriage and family (Article 23(2)), and voting (Article 25(b)). It also proclaims freedom from torture (Article 7) and slavery (Article 8), and calls for special protections for children (Article 24). With very limited exceptions, and then only during a public emergency threatening the life of a nation, where notice is given to the Secretary-General, no derogation is permitted from these rights and freedoms. Moreover, adherence to them must be on an entirely non-discriminatory basis, meaning birth, color, language, national or social origin, political (or other) opinion, property, race, religion, sex, or other status are immaterial.

- The 1966 *International Covenant on Economic, Social, and Cultural Rights*, which also entered into force in 1976.[106] In this *Covenant*, which also draws heavily for its rights and freedoms list on the 1948 *Universal Declaration*, countries recognize (*inter alia*) so-called "second-generation" human rights (because they followed recognition of civil and political rights).[107] Thus, the *Covenant* protects the right of each person to: self-determination, political status and the free pursuit of economic, social and cultural development (Article 1(1)); freely dispose of natural wealth and resources (Article 1(2)); to work, including technical and vocational guidance and training programs (Article 6); just, favorable, safe and healthy working conditions, equal opportunity, promotion, rest and leisure, and an adequate standard of living for oneself and one's family (Article 7); form trade unions and strike (Article 8(1)); social security (Article 9); a family as the natural, fundamental group unit of society (Article 10(1)); special protections for mothers before and after childbirth, and working mothers (Article 10(2)); special protections for children, including a minimum working age (Article 10(3)); an adequate standard of living, including food, clothing, and housing, and to be free from hunger, in part through an obligation on the state to ensure it improves its methods to produce, conserve, and distribute food (Article 11(1)-(2)); enjoy the highest attainable standard of physical and mental health, including the reduction of infant mortality through an obligation on the state to improve environmental and industrial hygiene (Article 12); education, including compulsory, free primary education (Article 13(1)-(2)); take part in cultural life and enjoy the benefits of scientific progress (Article 15(1)).

106. *See* International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, (entered into force on 3 January 1976), *reprinted in* 6 I.L.M. 360 (1967).

Traditionally, developed countries tend to lend strong support to the ideas embodied in the ICCPR, whereas developing and newly industrialized countries championed the principles of the ICESR. The debate over the two *Covenants* exposed deep schisms between western governments (which generally argued civil and political rights are foundational for economic and social liberties) and non-western governments (which said the reverse sequence was logical and inevitable).

107. *See generally* EPPS, *supra* note 100 (additionally stating that group rights, like the right to development and self-determination, are third generation).

> The *Covenant* (Article 2(1)) declares these rights and freedoms must be provided on a non-discriminatory basis (with the exception in Article 2(2) for developing countries that they may decide the extent to which they can guarantee economic rights to non-nationals).

In effect, an FTA in which the United States is engaged would incorporate by reference these human right conventions.

Preposterous as this legal maneuver might sound, two observations should be made. First, there is considerable consistency, and even indeed overlap, between the religious and international legal principles at stake. That is evident from even a cursory comparison of the ten fundamental rights needed to support human dignity Pope John XXIII identifies in *Pacem in Terris* with the itemized rights and freedoms in the conventions. In other words, religious faith and legal reason can and do support one another in insisting on respect for human rights, and they mutually provoke the question: What can an FTA do to enhance this respect?

Second, the EU has exercised a mild form of it. In its new Generalized System of Preferences (GSP) Plus scheme, the EU encourages beneficiary countries to implement and enforce a variety of human rights conventions, if they seek enhanced trade benefits. To be sure, whether the precise technical arrangements comply with the 2004 WTO Appellate Body decision in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* is open to debate.[108] Moreover, the EU may move to a different system in 2009 when it revamps its preferences scheme. Nonetheless, that a major trading power, whatever its motives might be, has seen fit to tying human rights directly to trade is a significant example for the United States.

Suppose the United States followed suit, putting human rights criteria in its FTAs. It could then further "piggy back" on institutional mechanisms established in the relevant human rights conventions. That is, in the event of a dispute about human rights under the FTA, the FTA itself could require recourse to an adjudicatory, arbitral or investigative body relevant to the accord at issue, such as the International Court of Justice (ICJ), the United Nations Human Rights Committee (HR Committee) (under Article 41 of the *International Covenant on Civil and Political Rights*) or the United Nations

108. *See* Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) (*adopted* Apr. 20, 2004). For a discussion of this case and the subsequent changes the EC made to its GSP program, see Lorand Bartels, *The WTO Legality of the EU's GSP+ Arrangement*, 10 J. INT'L ECON. L. 869, 869–886 (2007). *See also* Elena Fierro, *Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?*, 7 EUR. L. J. 41 (2001). For treatments of the linkages forged by the EU between trade policy and human rights, see, for example, Peter Hilpold, *Human Rights and WTO Law: From Conflict to Coordination*, 45 ARCHIV DES VÖLKERRECHTS 484 (2007).

Human Commission (HR Commission).[109] If the accord does not create the mechanism, or if a party to the FTA does not consent to the jurisdiction of the ICJ or submit to the HR Commission, then the FTA could provide the necessary gap-filling institution. For instance, the FTA could establish a standing FTA "Human Rights Council," consisting of qualified individuals from the member countries.

An interesting question is whether America's FTAs ought also to incorporate the leading United Nations Conventions on specific human rights topics. These accords include:

- The 1951 *Convention on the Prevention and Punishment of the Crime of Genocide*.
- The 1951 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.*
- The 1954 *Convention Relating to the Status of Refugees* (and its 1967 Protocol).
- The 1957 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions Similar to Slavery*.
- The 1969 *International Convention on the Elimination of All Forms of Racial Discrimination*.
- The 1976 *International Convention on the Suppression and Punishment of the Crime of Apartheid*.
- The 1981 *Convention on the Elimination of All Forms of Discrimination Against Women*.
- The 1987 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
- The 1990 *Convention on the Rights of the Child*.[110]

At least under the absolute, universal approach, whether the United States is a party to the document should not matter. (Along with Sudan, it is not, for example, a party to the *Convention on the Rights of the Child*.) The human rights these documents embody establish what is worthy of respect as excellent.

109. Part IV of the *Covenant on Civil and Political Rights* establishes the HR Committee. A distinct body, the HR Commission, is a subsidiary of the United Nations Economic and Social Council (ECOSOC) and is authorized via Article 19 of the *Covenant on Economic, Social and Cultural Rights*. The HR Commission studies and reports on gross violations of human rights. *See* EPPS, *supra* note 100, at 283–284, 292–294.

110. These accords, including their basic legal citation and enforcement mechanism, are set out in EPPS, *supra* note 100, at 297–298 (listing the years the provisions were entered into force).

On labor rights, an FTA seeking dignified treatment of labor could look for inspiration to two international sources. First, the 1948 *Charter for an International Trade Organization* (ITO), i.e., the *Havana Charter*, while never implemented, expressed concern about employment, wages and fair labor practices. Indeed, this concern was evident at the outset of the document, especially in Articles Two and Seven:

> ARTICLE 2.
>
> IMPORTANCE OF EMPLOYMENT, PRODUCTION AND DEMAND IN RELATION TO THE PURPOSE OF THIS CHARTER
>
> 1. The Members recognize that the avoidance of unemployment or underemployment, through the achievement and maintenance in each country of useful employment opportunities for those able and willing to work and of a large and steadily growing volume of production and effective demand for goods and services, is not of domestic concern alone, but is also a necessary condition for the achievement of the general purpose and the objectives set forth in Article 1, including the expansion of international trade, and thus for the well-being of all other countries.
>
> 2. The Members recognize that, while the avoidance of unemployment or underemployment must depend primarily on internal measures taken by individual countries, such measures should be supplemented by concerted action under the sponsorship of the Economic and Social Council of the United Nations [ECOSOC] in collaboration with the appropriate inter-governmental organizations, each of these bodies acting within its respective sphere and consistently with the terms and purposes of its basic instrument.
>
> 3. The Members recognize that the regular exchange of information and views among Members is indispensable for successful co-operation in the field of employment and economic activity and should be facilitated by the Organization.
>
> . . . .
>
> ARTICLE 7.
>
> FAIR LABOUR STANDARDS
>
> 1. The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and,

> accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
>
> 2. Members which are also members of the International Labour Organisation [ILO] shall co-operate with that organization in giving effect to this undertaking.
>
> 3. In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.[111]

This language is redolent of expressions from some human rights documents that mention the right to work and adequate working conditions. That is not surprising, as basic labor rights are (or seem to be accepted as) human rights and worthy of respect by all employers in all countries.[112] Notably, however, because the rights to employment and decent employment conditions are fundamental, it may not be accurate to call them the most excellent standards. They are minimum floors, and thus respect for them, without more, probably would neither improve the status quo in some contexts nor comport generally with a vigorous interpretation to the word "dignity."

Thus, turning to a second source to which an equal human dignity-oriented FTA might look is necessary. That source is suggested by the *ITO Charter*, namely, the ILO. Created by the *Treaty of Versailles* in 1919 and based in Geneva, Switzerland, the ILO boasts membership by over 150 countries. Some of the ILO standards replicate particular human rights articulated in the *Universal Declaration* or one of the *Covenants*. It sponsors a number of conventions. The leading ones embodying core labor rights are:

- The freedom of association.[113]
- The right to organize and bargain collectively.[114]
- The freedom from forced or compulsory labor.[115]

111. *See* BHALA, *supra* note 65, at 7–10.

112. *See generally* Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UNIV. MO. KAN. CITY L. REV. 1 (2007) (concerning the dignified treatment of labor).

113. *See* Int'l Labour Org. [ILO], Convention concerning *Freedom of Association and Protection of the Right to Organise*, ILO Convention No. 87 (June 17, 1948), *compiled in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919–1951 vol. 1, 527 (ILO 1996).

114. *See* Int'l Labour Org. [ILO], Convention concerning *The Application of the Principles of the Right to Organise and to Bargain Collectively*, ILO Convention No. 98 (June 8, 1949), *compiled in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919–1951 vol. 1, 639 (ILO 1996).

115. *See* Int'l Labour Org. [ILO], Convention concerning *Abolition of Forced Labour*, ILO Convention No. 105 (June 5, 1957), *compiled in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919–1995 vol. 2, 88 (ILO 1996).

- A minimum age for the employment of children.[116]
- Measures that set forth minimum standards for work conditions.[117]

Here again, the criticism may be entertained that adherence to the ILO core labor standards evinces respect for workers, but not at the most excellent level. However, the criticism this time is less persuasive. The core standards, along with the right to work and good working conditions from the *ITO Charter* and human rights law form a package of best practices. It is evident that these practices are not followed in many countries, rich and poor alike. Imagine a world in which they were, and the sense of excellence of the package becomes apparent. (That same thought experiment helps justify many of the human rights obligations, which, but for the fact they are not respected universally, seem stunningly obvious as setting minimums.)

Finally, in respect of environmental rights, some are redolent of specific human rights articulated in the *Universal Declaration* or one of the *Covenants*.[118] Therefore, one possibility, akin to the methodology intimated on labor rights, would be to itemize the rights emanating from human rights law and trace their development into the world's leading international and multilateral environmental agreements (MEAs). Theoretically, that would mean countries seeking to form an FTA accept environmental rights—specifically, the right of each individual to a clean, healthy environment—as a third-generation human right, following the first-generation civil and political human rights, and the second-generation economic and social rights.

Practically speaking, an FTA could focus on MEAs that directly affect the lives of humans in countries proposing to form an FTA. That is because, as the 1972 *Stockholm Declaration on the Human Environment* provides, environmental protection is for the benefit of mankind.[119] If equal human dignity is the lodestar of an FTA, then no trade liberalization between or among countries should cause degradation in the cleanliness of the air or water consumed by humans living in the FTA countries. Rather, the FTA should help enhance air, land and water quality, as it ought to bolster human and labor rights. Accordingly, international environmental agreements addressing

116. *See* Int'l Labour Org. [ILO], Convention concerning *Minimum Age for Admission to Employment*, ILO Convention No. 138 (June 6, 1973), *compiled in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919–1995 vol. 2, 525 (ILO 1996); Int'l Labour Org. [ILO], Convention concerning the *Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, ILO Convention No. 182 (June 17, 1999), *available at* http://www.ilo.org.

117. A variety of ILO conventions embody this core labor right.

118. *See generally* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS ch. 12 (2d ed. 2006) (regarding information on international environmental law); MURPHY, *supra* note 91, at ch. 12 (regarding information on international environmental law).

119. *See* U.N. Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416.

atmospheric, land-based and water pollution may be appropriate to consider.[120] Additionally, MEAs that address acute or chronic human public health problems, such as the 2003 *Framework Convention on Tobacco Control* (FCTC), could factor into FTAs.[121] After all, an FTA that eliminates tariff and non-tariff barriers to trade in cigarettes hardly comports with respect for good, much less first-rate, human health.

That is not to say the exclusive focus of countries in an FTA should be on anthropocentric rights. Inspired by the 1982 *World Charter for Nature*[122] and the 1992 *Rio Declaration on Environment and Development*,[123] countries would be free (even encouraged) to synthesize those rights with provisions that protect nature for its own sake, preserve animal and plant species, and employ sustainable development practices. Thus, adherence to the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), which concerns poaching endangered animals and harvesting rare plants, could be required by the FTA.[124] Further examples would be the 1992 *Convention on Biological Diversity* and the 1997 *Kyoto Protocol* (or a suitable successor accord).[125]

Regarding both environmental and labor rights, considerable attention must be paid to enforcement mechanisms. The solution outlined for human rights—that an FTA establish a dispute resolution mechanism if an international text incorporated into the FTA by reference lacks one—would mean plenty of gap-filling will be needed because the ILO conventions contain little in the way of stringent enforcement. Similarly, enforcement mechanisms in MEAs tend to be weak, inchoate (taking the form of notification,

120. *See*, *e.g.*, Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10,541, 1302 U.N.T.S. 217 (regarding European and North American countries regulating of sulfur dioxide and other long-range pollutants); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100–10 (1987), 1522 U.N.T.S. 3 (requiring the progressive reduction by target dates of the production and consumption of chlorofluorocarbons (CFCs) and halons, because they deplete the ozone); Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. Treaty Doc. No. 102–5 (1991), 1673 U.N.T.S. 57 (concerning the transport and disposal of hazardous materials across borders); U.N. Convention on the Law of the Sea, Dec. 10, 1982, S. Treaty Doc. No. 103–39 (1994), 1833 U.N.T.S. 397 (concerning protection of the marine environment). For an overview of these and other international environmental accords, see MURPHY, *supra* note 91, at 372.

121. WHO Framework Convention on Tobacco Control, May 21, 2003, 42 I.L.M. 518.

122. *See* World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

123. *See* Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874.

124. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

125. *See* Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, *reprinted in* 31 I.L.M. 818; Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, *reprinted in* 37 I.L.M. 22.

consultation and black-listing) and hotly debated. Aside from the exact nature of the institutional apparatus an FTA creates, a key topic will be the appropriate triggers and types of punishment for violations. Are trade sanctions appropriate, as in WTO dispute settlement, or should monetary fines be used, as the NAFTA Environmental and Labor Side Agreements envision? Following the traditional public international law doctrine of state responsibility, would liability fall only on sovereign governments, or could individuals and their firms be punished?

VI. EQUAL HUMAN DIGNITY AND NEGOTIATING STYLE

In international trade law, style sometimes matters as much as substance. The style with which an FTA is negotiated and implemented is susceptible to an equal human dignity analysis. Indeed, on negotiating style, "dignity" can be interpreted quite concretely by returning to Kant's Categorical Imperative. Would the tactics and tone employed by a country such as the United States be ones the American side agreed ought to be universal? Among the suspect practices, all of which by anecdotal evidence are or have been used by the United States in the midst FTA negotiations, include:

- Presenting an FTA as a *fait accompli*, in a "take-it-or-leave-it" manner.
- Declaring "here is the agreement, I would like your answer, preferably in fifteen minutes."
- Playing one country (e.g., Panama or Qatar) off against another country (e.g., Colombia or Oman).

None of these tactics would pass muster under the Categorical Imperative, much less a sound book on negotiations such as *Getting to Yes*.[126] Rather, they conjure up images of the Ancient Greek Melian Dialogue—that the strong will do what they do, and the weak will suffer what they must—in practice.

In terms of the legalistic equal human dignity criteria, each practice (and many akin to them) is offensive. First, "humans" are not treated neutrally. Rather, they are separated into the powerful versus the weak. With powerful negotiating counterparties, these tactics and tone are unacceptable and unworkable. The United States, for instance, will not tolerate them from Colombia, Oman, Panama or Qatar. But the United States can get away with it vis-à-vis such countries (or so it may believe). Second, these tactics and tone undermine equality, in that certain groups of humans are discriminated against. Strong humans, i.e., trade negotiators from powerful (typically wealthy) countries, do not suffer these practices. Weak humans, i.e., trade diplomats and lawyers from weak (typically poor) countries, have little choice but to put up with the mischief. In effect, MFN treatment is not accorded in terms of

126. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 141–42 (Bruce Patton ed., Penguin 2d ed. 1991) (1981).

negotiating decency. Third, none of these practices is respectful, nor does any represent the best, or most excellent, of treatment that one human (e.g., an American official) is capable of extending to another human (e.g., a foreign government official).[127]

Certain post-negotiation practices also are dubious in terms of having any claim to universality. For example, a deal, when signed, ought to be a deal. Unless further negotiations are built into an agreement in writing, the agreement itself, once signed, ought to be implemented with all deliberate speed and meaning immediacy, not self-interested foot-dragging (as, of course, occurred in the aftermath of the famous 1955 school desegregation implementation case, *Brown v. Board of Education (Brown II)*, in which the United States Supreme Court penned the phrase "with all deliberate speed").[128] These principles embody respect for the party with which the agreement is signed and should apply neutrally (i.e., to all parties with whom a deal is signed), and in a non-discriminatory way (regardless of whether the party may be put into one or another category, like rich or poor, or Arab or Israeli). Holding up implementation by presenting new issues undermines the trust and confidence one side places in another that they can rely, with certainty and predictability, on the terms they just concluded. Yet American behavior toward Oman exemplified these very incongruities.

The United States and Oman signed an FTA on January 19, 2006.[129] The House and Senate approved the accord in July and September, respectively, of the same year. The deal fit into America's plans for a MEFTA, being the fifth FTA in the Middle East following deals with Israel, Jordan, Morocco and Bahrain.[130] Two years later, as of January 2008, the President still had not issued a proclamation to put the Oman FTA into force. All other MEFTA building blocks—the FTAs with Israel, Jordan, Morocco and Bahrain—had taken effect relatively swiftly after congressional passage. Why was Oman treated unequally?

127. Lest the rebuttal be offered that foreign officials occasionally treat American officials badly in trade negotiations, from an equal human dignity perspective the answer is obvious: receipt of ill treatment in practice is no excuse for running afoul of a Categorical Imperative. That is, if decent conduct in negotiations is accepted as a behavior to generalize, then the episodic incivility does not undermine this understanding. Rather, the departure only shows the need for renewed efforts at good behavior, not for a departure into puerile tit-for-tat behavior.

128. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955). Possibilities of unscrupulous behavior in the negotiations (e.g., one side lying to another), or egregious supervening events (e.g., war or terrorism), are discounted here.

129. *See U.S. Free Trade Pact with Oman Expected to Enter Into Force Shortly*, 25 Int'l Trade Rep. (BNA) No. 2, at 60 (Jan. 10, 2008).

130. The legal, political and economic aspects of America's FTAs are analyzed in a series of tables in RAJ BHALA, DICTIONARY OF INTERNATIONAL TRADE LAW Annex B (LexisNexis 2008).

The reason was that after the FTA was signed, American trade officials handed Omani authorities a twenty-four page list of issues that the Omanis would have to address to the satisfaction of the Americans before the FTA could take effect. After about two years, the Omanis had worked through twenty-three pages and were seeking to satisfy the Americans on a final page of topics. Manifestly, the deal the Omanis thought they had in January 2006 did not exist. Would the American side have accepted this treatment from a prospective FTA partner? To ask the question is to reveal the answer.

Regrettably, there are three additional examples in which the United States has engaged in post-negotiation tactics that are dubious in terms of dignified and equal treatment of people (both trade officials and private citizens potentially affected by a trade liberalization agreement) in other countries. On June 30, 2007, the United States and Korea signed an FTA (KORUS). On June 28, 2007, the United States and Panama signed an FTA, and on November 22, 2006, the United States and Colombia signed an FTA. In all three instances, following the signature, one or another constituency in the American government objected to the bargain and intentionally stalled congressional consideration of implementing legislation.[131]

In respect of KORUS, Max Baucus, a Democrat from Montana and the Chairman of the Senate Finance Committee, indicated repeatedly his opposition to KORUS unless and until the Korean government lifts sanitary and phytosanitary (SPS) measures that restrict American beef imports. KORUS does not resolve all the beef SPS measures, perhaps partly because of the severe time pressure under which negotiators operated. They completed the actual deal on March 31 and April 1, 2007, minutes before they had to notify Congress of their intent to submit one under fast-track Trade Promotion Authority (TPA) under the Trade Act of 2002.[132] That pressure aside, is the failure to address one issue fully an appropriate justification for Congress to hold up congressional passage of a deal Korea thought it had cinched and had the signatures to prove it?

As for the Panama FTA, a number of American legislators have indicated that implementation is impossible unless and until Panama addresses an individual legal case. The Speaker of its National Assembly (i.e., the

131. *See Hill Watch*, Int'l Trade Rep. (BNA) No. 13, at 460, 462 (Mar. 27, 2008) (tabular entries for "Colombia, Panama FTAs" and "Korea FTA").

132. *See* BHALA, *supra* note 65, at 687.

The 2002 Trade Act amends the Trade Act of 1974 and various other American trade statutes in title 19 of the United States Code. Basic trade negotiating authority initially was set out in the Trade Act of 1974, Subchapter I (entitled "Negotiation and Other Authority"), as amended, particularly 19 U.S.C. §§ 2111–2213 (2000), and these provisions generally remain relevant. The TPA provisions constitute the Bipartisan Trade Promotion Authority Act of 2002, codified at 19 U.S.C. §§ 3801–3813 (Supp. V 2000), and supplement and amplify the basic authority.

Panamanian parliament), Pedro Miguel González-Pinzon, a member of the ruling PRD party, has been indicted in a United States federal court for allegedly murdering an American soldier, United States Army Corporal Zak Hernandez, near Panama City in 1992.[133] Mr. González took office in September 2007, long after the FTA negotiations commenced in 2004, and the FTA was signed on June 28, 2007. His term as Speaker was scheduled to expire on September 1, 2008.

Though acquitted of the charge by a jury in Panama, Mr. González offered to resign so as not to be an impediment to the FTA. He also intoned: "The era in which the U.S. had last word in determining who governed our nation and how they did so is over."[134] In March 2008, he declared he would serve out his term but not seek re-election.[135] Not persuaded, the United States insisted it would not consider the FTA for implementation until the Speaker left office and faced its judicial process. Vociferous opposition in the United States came from Congress, including Speaker of the House of Representatives, Nancy Pelosi (Democrat-California), and Chairman of the House Ways and Means Committee, Representative Charles Rangel (Democrat-New York).[136] Officials of the administration of President George W. Bush, such as Carlos M. Gutierrez, the Secretary of Commerce, met with Panamanian government officials and told them the matter was a problem but did not set out specifically what Panama needs to do to get the FTA unstuck.[137]

Thus, an arrest warrant for him remains outstanding in the United States. Serious as that charge is and tragic as the passing of Sergeant Hernandez is, the case is not even remotely connected with cross-border trade in goods and services. As Panama's Minister of Transport, Balbina Herrera, explained:

> What happened with thousands of Panamanians [during the 1989 U.S. invasion of Panama] also hurt us, so don't open up old wounds.
>
> There are much more important things than just an economic issue. For us, the relationship with the US is *not* an economic one. *It is an issue of respect.*[138]

Put simply, query whether the American post-negotiation tactic is old-fashioned bullying of one country by a larger one to get a result the latter seeks on an unrelated issue, a tactic at variance with fidelity to equal human dignity.

The Colombia FTA presents another instance of dubious post-negotiation behavior, although the issue on which the United States seeks progress is

133. *See* Adam Thomson, *U.S. Angered as Panama Elects Wanted Man*, FIN. TIMES, Sept. 4 2007, at 2.

134. *Id.* (quoting González).

135. *See Panamanian Lawmaker Stalling Approval of U.S. Free Trade Pact Plans to Step Down*, 25 Int'l Trade Rep. (BNA) No. 15, at 527 (Apr. 10, 2008).

136. *See id.*

137. *See id.* (quoting Secretary Gutierrez).

138. *See* Thomson, *supra* note 133, at 2 (emphasis added).

consistent with the indirect effects of trade on equal human dignity under a religious approach (discussed in Section III.C, *supra*). The hideous violence against trade unionists in Colombia is an appropriate concern of American trade officials, and labor rights were addressed in the FTA talks. Some congressional leaders, such as House Speaker Pelosi are dissatisfied with the outcome and have demanded that Colombia redouble its efforts to protect trade unionists. An enhanced trade adjustment assistance (TAA) package also is a pre-condition to passing the Colombia FTA (and other such accords).

To be fair, given its constitutional authority to regulate foreign trade, Congress is legally entitled to object to a trade agreement on the merits or to link passage of a trade deal to forward progress on other issues, be they trade-related or not. Even under the delegation of this authority to the President and the concomitant use of fast-track procedures under TPA, which apply to KORUS and the Panama and Colombia FTAs, Congress can reject a deal on an up-or-down vote if it finds the deal fails to resolve an important issue.[139] In other words, the point of these illustrations is not to question the existence of congressional power.

Rather, the key question concerns the wise exercise of that power. If a matter is of great importance to legislators, then the earlier it is brought to the attention of trade negotiators, and the more assiduous they are about implementing the will of Congress in their negotiations, the better. There is ample statutory authority for Congresspersons and Senators to provide guidance and feedback. Indeed, members of the House of Representatives and Senate can and do serve as congressional advisers to the Executive Branch on trade negotiations, policy and implementation,[140] and the United States Trade Representative (USTR) is legally obligated to accredit members of the Congressional Oversight Group as official advisers to a United States delegation engaged in trade negotiations.[141] If dignified treatment of other people matters, then exercising this authority on a critical matter—particularly one that, to America's trading partners, may be unconnected or only loosely connected with an FTA—is necessary. The people with whom the United States negotiates FTAs then will not be surprised, following the inking of a deal, by what they perceive as new, higher or different demands. Bluntly stated, appropriate consultation before and during FTA talks will preempt an accusation from abroad that the United States engages in blackmail. Surely, American trade officials would prefer no less certainty, predictability and decency from foreign negotiators.

139. The prohibition on amendments in the House of Representatives or Senate to implementing bills is set out in the Trade Act of 1974, as amended, 19 U.S.C. § 2191(d) (2000).

140. *See* 19 U.S.C. § 2211 (2000) (mandating congressional involvement).

141. *See* 19 U.S.C. § 3807(a)(4) (Supp. V 2000) (concerning accreditation).

VII. QUESTIONS YET UNANSWERED

Admittedly, the present discussion is at best exploratory and tentative. An equal human dignity paradigm for international trade law generally, and FTAs particularly, would raise as many questions as it might resolve.

First, the list of human, labor and environmental accords potentially relevant to incorporation explicitly or by reference in an FTA is rather daunting. At what point might an FTA become bogged down with human rights obligations because of rigid insistence on comprehensiveness in following the "dignity" criterion of respect for excellence? Under a changed paradigm, the FTA is supposed to insist on the primacy of equal human dignity over efficiency. But, the new paradigm does not posit an invariable trade-off between the two concepts, and thus is not merely an umbrella document for human, labor and environmental rights. Rather, the FTA is supposed to say something about liberalizing trade, finance and investment flows to advance equal human dignity. Might it be prudent to trim the list of accords and focus on particular obligations that matter most—say, for example, freedom of conscience in respect of human rights, core labor rights and clean water and breathable air as regards environmental rights?

A second concern, following from the first one, is legal capacity.[142] An FTA created in the crucible of equal human dignity could have little practical effect, at least in the short term, if one or more of the parties lack the ability to implement and enforce the human, labor and environmental rights mandated by the accord. That difficulty is especially foreseeable with some developing, and essentially all least developed, countries that might be partners in an FTA with the United States. It would not be satisfactory, in the long run, to "dumb down" the equal human dignity criteria in an FTA to accommodate poor legal capacity. The result almost certainly would be no advancement in the status quo on human, labor or environmental rights. Rather, it would seem preferable to encourage movement on an upward trajectory by helping FTA parties realize the most excellent of treatment, on a neutral and non-discriminatory basis. To do so will require help; put bluntly, money and brains.

142. For example, the Apostolic Nuncio of the Holy See to the United Nations states:

> [N]ot all States have the technical capacity to cope with all their international obligations. There is a growing gap between the development of international law and the capacity of individual States to incorporate it into national legislation and implement it.
>
> Thus, technical assistance to these countries is of the utmost importance if observance of international treaties is to be had.

Archbishop Celestino Migliore, Apostolic Nuncio and Permanent Observer of the Holy See to the United Nations, Address at the 62nd Session of the General Assembly, before the Sixth Committee on Item 86–The Rule of Law at the National and International Levels (Oct. 26, 2007), *in* L'OSSERVATORE ROMANO, Jan. 16, 2008, at 10 (English translation).

The question, then, is to what extent should an FTA premised on equal human dignity also contain provisions for technical assistance by the United States to ensure proper execution? Possibly, a developed country (or countries) in an FTA can be the primary obligor in respect of helping less fortunate partners satisfy the equal human dignity criteria in the FTA. Yet, pursuing this approach opens the door to special and differential treatment, which erodes the non-discrimination criterion associated with "equal." There must be a compelling reason for overriding this criterion, such as a religiously based preferential option for the poor or a legal canon (found in most post-1990 MEAs) like the principle of common but differentiated responsibilities.[143] Instead, might it be appropriate for an FTA to draw for technical assistance explicitly on specialized inter-governmental bodies, like the ILO in respect of labor rights, and the United Nations Environmental Program (UNEP) and United Nations Sustainable Development Commission (CSD) as regards environmental rights?

Third, international trade agreements conventionally are between sovereign states. With limited exceptions in some FTAs, such as Chapter Eleven of NAFTA, they tend not to confer rights and obligations on individuals within those states, much less provide direct causes of action by an individual against the government of a state that is party to the agreement. Yet the first *Optional Protocol to the International Covenant on Civil and Political Rights* allows individuals to submit complaints against governments directly to the HR Committee, once they have exhausted all domestic remedies.[144] Equal human dignity focuses attention on the individual, and how a trade agreement affects her is a deliberate aim of the paradigm shift. However, would an equal human dignity paradigm for FTAs mean individuals can bring human, labor and even environmental rights claims against a government? If so, what kind of liability ought to attach to such claims? Might an offending government be held jointly and severally liable to an aggrieved person not only with another violating government, but in appropriate circumstances, with a violating individual or firm? In brief, how might state and civil liability regimes be constructed or adjusted to ensure equal human dignity criteria in an FTA are enforceable?

Fourth, trade remedies are another example where much further research into the implications of a paradigmatic shift would be needed. For instance, how would the criteria of neutrality, non-discrimination, and respect apply in the context of trade remedies? Would their application be the same for

143. *See* BHALA, *supra* note 24, at 432–38 (concerning the preferential option for the poor); MURPHY, *supra* note 91, at 381 (on the principle of intergenerational equity).

144. The United Nations General Assembly adopted the first optional Protocol in 1966, and it took effect a decade later. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 383.

remedies against unfair trade (antidumping (AD) and countervailing duties (CVDs) and IP infringement) as for fair trade (safeguard actions)?

Fifth, how do and should equal human dignity criteria relate to the management of trade typical in FTAs? Typically, FTAs do not lead to immediate, unconditional, economy-wide free trade. Rather, they liberalize a swath of trade in goods and services but phase out trade restrictions in a variety of sectors over many years, sometimes decades. Does equal human dignity require immediacy of trade liberalization and comprehensiveness of sectors?

VIII. CONCLUSION

The dominant paradigm in which international trade agreements, including FTAs, are negotiated, drafted, implemented and enforced remains an economic one. For all the criticism Adam Smith's law of absolute advantage and David Ricardo's law of comparative advantage have attracted in the current era of globalization, those laws still drive trade law and policy in the United States and indeed throughout much of the world. However, what if the prime concern shifted from efficiency-based economic principles and criteria to equal human dignity?

Equal human dignity has a distinguished philosophical legacy, dating at least as far back as Immanuel Kant, namely his essay *Perpetual Peace*, and the Categorical Imperative. Properly understood, the Imperative boasts three different articulations: the Formula of the Universal Law, the Formula of Humanity and the Formula of Autonomy. Applying the Categorical Imperative to FTAs would suggest, at a minimum, Golden Rule-like treatment of FTA partners.

A religious perspective, such as the one offered by Catholic Social Justice Theory, calls attention to the ultimate source of the equal dignity of the human person (a common Creator) and the ultimate end to which each person is invited to contemplate (eternal life). Put into practice in FTAs, this Theory focuses attention on the direct and indirect effects of trade liberalization on freedom of conscience. Directly, does an FTA enshrine freedom of worship as a fundamental right of each human person and obligate each FTA member to respect it above all else? Indirectly, does an FTA operate to enhance freedom of worship by improving the economic milieu in which this freedom may be more easily exercised?

Taking a legalistic approach to tease out what the lofty concept of "equal human dignity" would mean for trade negotiators, lawyers and policy makers in practice suggests three criteria, one associated with each word of the concept. "Human" would mean all trade accords apply neutrally. "Equal" would mean the rules of the accords apply in a non-discriminatory fashion. "Dignity" would mean that the accords champion, as a first priority, respect, and that respect is manifest in human, labor and environmental rights.

The philosophical, religious and legalistic perspectives on FTAs need not be mutually exclusive, and their implications may be quite similar. Of course, considerably more work is needed, both as to theory and practice, for there to be a credible and viable case for a paradigm shift in the minds of hard-headed economic realists.