"Dwarf Tossing", Human Dignity and Individual Agency

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Introduction: A Look Back at Wackenheim v. France

"Dwarf tossing" (as the activity is known) is a practice that emerged in some bars and discos in the early 1980s, probably in Australia, as a form of entertainment. Persons of short stature wore padded clothing, sometimes an American football helmet, and were thrown onto mattresses or velcro-coated walls. The aim was to throw them as far as possible. A variant known as "dwarf-bowling" involves putting little persons on a skateboard and using them as a bowling ball.

The activity, due to its problematic name and nature, has been highly controversial and remains so into the 21st century. Mindful of the sensitivities around naming, in this article I will use the term "little persons" which seems to be currently favored organizationally by said little persons (LPs) at least in the English-speaking world, except when describing the activity of "dwarf tossing" as it was/is known by its practitioners.

In the 1990s, the mayor of the small French municipality of Morsang-sur-Orge adopted a bylaw prohibiting dwarf-tossing, which was then practiced in a local club (the "Embassy Club"). This followed a recommendation by then Interior Minister Philippe Marchand to stop dwarf tossing as an "intolerable attack on human dignity" and a form of exploitation. That order was then challenged and found to be illegal by the Cour d'appel of Versailles (and, in a separate case involving a similar ban in Aix en Provence, by the Cour d'appel de Marseilles). The case was appealed and went all the way to the French Conseil d'Etat, France's highest administrative court (the case was decided under administrative law given that the impugned decision was one taken by a municipality).[1] Following a failure to overturn the ban there, the case was taken first to the European Commission on Human rights (where it was held unreceivable for reasons of non-exhaustion of local remedies not pertinent to this article)[2] and then to the Human Rights Committee, the monitoring body for the International Covenant on Civil and Political Rights, which found the ban to *not* be in violation of France's human rights obligations under the Pact.[3]

Although a little neglected today, I propose that the case is emblematic of a deep tension between conceptions of human rights focused on human dignity and conceptions of human rights focused on human agency. On the one hand, both the mayor, the Conseil d'Etat and the Human Rights Committee aligned to stress that banning dwarf tossing was an appropriate limitation of human rights on public order grounds given how it offended human dignity. On the other hand, and crucially, the ban was challenged not by the club owner but by a certain Manuel Wackenheim, also known by his *nom de scène* "Mister Skyman" – the very little person who habitually made a living of being thrown in said club – and his company (Société Fun Production) who argued that it deprived him of his living.

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[1] Conseil d'État, arrêt N° 136727, 27 octobre 1995.
[2] Wackenheim v. France, Case n° 29961/96, 16 Octobre 1996.
[3] Human Rights Committee, Manuel Wackenheim v. France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

In other words, a case *about* agency (could his autonomy override whatever wariness society might have with the practice he subjected himself to?) also turned out to *rely on* agency, that of the principally interested person. Wackeheim was both "celui par qui le scandale arrive" and someone willing to take the case through the quasi-entirety of the French legal system and to the international level.

In this article, I propose to contextualize Wackenheim's complaint notably by uncovering interviews that he quite freely gave at the time and since. Although the fact that the Wackenheim case was unmistakably about human dignity and discrimination has not been lost, the details of his own views and involvement were always at risk of being sidelined by a conversation about dignity and even autonomy which, in the end, was not about him specifically but about these issues understood in the abstract. In uncovering his voice, I at least want to complicate the dominant narrative and emphasize the extent to which, in that case at least, "dignity" was invoked very much against the repeatedly and insistently stated agency of Wackenheim: a landmark human rights decision, it turns out, was adopted against the claims and wishes of the very person alleging a human rights violation.[4]

The point of the exercise is not necessarily to suggest that Wackenheim was "right" and that the authorities were "wrong" but that the passage of time and the way landmark human rights decisions are remembered themselves sometimes partly erase the agency of those involved. Although they lend their names in perpetuity to the legal system, the reasons why victims brought a case, what it meant for them to bring it, and how their agency framed the case become occluded. This is particularly the case when, as is the practice in French law, judgments are terse and only minimally seek to restitute context. In superimposing the voice of Wackenheim against the words of various judgments, then, I seek to reclaim and keep alive the dialogue between "dignity" and "agency" as one that is ongoing, fraught and, in fact, extends far beyond the particulars of "dwarf tossing."

The Dynamics of Bans and Ban Contestations

The Wackenheim decision needs to be understood in the context of efforts before and after to ban or on the contrary protect "dwarf tossing" as a practice, with varying degrees of success. In the French decisions, it is public order that is invoked and public order that is found to have been violated. This is crucial because the authorities were aware, on the basis of previous case law, that they had no a priori competence in France to limit rights on the basis of "morality." This would have infringed freedom of conscience and represented an arbitrary interference. A violation of public order is a higher threshold to clear, but it is also potentially a more incontrovertible basis. What this traditionally required in French law, however, was proof of "local circumstances" that made a ban particularly necessary (as in the case of the projection of an "immoral" film in the pilgrimage city of Lisieux).[5] Here, the Cour de cassation nonetheless bypassed that requirement on the grounds that something as momentous as "human dignity" was involved. The suggestion, then, was that dignity had a self-evident quality that put it beyond ordinary disagreements about the proper scope of morality.

[4] Although in itself this is arguably quite common. Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press, 2006).

[5] Jean-Paul Valette, "'Cinéma et liberté d'expression : la censure préventive française au tournant des années 1970'." (2019) V:10 Revue d'histoire et de prospective du management 5.

The decision of the conseil d'Etat was not to the effect that dwarf tossing should always be banned, merely that it *could* if the authorities so wanted. The Court was not asked evidently to pronounce itself as a legislator but as a jurisdiction specifically required to review an administrative decision. What it found was that the municipality was within its rights to invoke public order to cancel a show such as the one featuring Wackenheim. This was because the "power of municipal policing" allowed the city to adopt any measure to prevent an infringement of public order and that "respect for the dignity of the human person is one of the components of public order."[6] The Human Rights Committee subsequently fully aligned itself with that finding, concluding that France had "demonstrated (…) that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant." The ban was "based on objective and reasonable criteria."[7]

The argument that "dwarf-tossing" was incompatible with human dignity had, it is true, been asserted by France consistently. It was even suggested that the practice might constitute a violation of article 3 of the European Convention on Human Rights on inhumane and degrading treatments. The Cour de cassation found, specifically, that:

> […] l'attraction de lancer de nain consistant à faire lancer un nain par des spectateurs conduit à utiliser comme un projectile une personne affectée d'un handicap physique et présentée comme telle ; que, par son objet même, une telle attraction porte atteinte à la dignité de la personne humaine.[8]

Two things in particular were irrelevant: the fact that protective measures had been taken to ensure the safety of the person involved (e.g.: Wackenheim wore a helmet) and, notably, that person's consent to the activity in exchange for payment. In particular, "respect for the principle of freedom of work and the principle of freedom of commerce and industry" were not obstacles to a ban given the danger to public order. Subsequently, the Human Rights Committee also found that there was no discrimination involved even though the ban applied only to "dwarves" since "if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown."[9]

Subsequent legislative efforts to ban dwarf tossing outright have met varying degrees of success. In Canada, a private member's public bill was introduced in 2003 by Windsor West MPP Sandra Pupatello in the Legislative Assembly of Ontario. Crucially, this included penal measure in the form of a fine (up to $ 5 000) and even imprisonment (up to 6 months).[10] The bill was defeated, however,[11] as was a similar attempt in South Carolina. In the US, efforts to ban dwarf tossing are older and still ongoing. Both Florida (1989)[12] and New York (1990)[13]

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[6] Conseil d'Etat, supra note 1 (author's translation).
[7] Human Rights Committee, supra note 3.
[8] Conseil d'Etat, supra note 1.
[9] Human Rights Committee, supra note 3.
[10] Bill 97, Dwarf Tossing Ban Act, 2003.
[11] Andrea Baillie, "Windsor MPP's appeal in legislature fails to stop dwarf-tossing at nightclub", *The Globe and Mail* (13 June 2003), online: <https://www.theglobeandmail.com/news/national/windsor-mpps-appeal-in-legislature-fails-to-stop-dwarf-tossing-at-nightclub/article1017359/>.
[12] See 61A-3.048. Exploitation of Dwarf, Florida Administrative Code.
[13] "New York Governor Signs Dwarf Tossing Ban | AP News", online: <https://apnews.com/article/5548a9ee13371159a141d72995c5dabe>.

state legislatures have adopted laws that ban the practice, and other states have or are contemplating similar bans.

The bans have been introduced by legislators concerned about the practice on general grounds of dignity. Crucially, however, they are supported by at least some representative organizations. In particular, Little People of America has been active in promoting a ban in the US. But it is also worth noting that, along very similar lines as Wackenheim, such bans have been challenged both judicially and legislatively, including by some little persons. In 2001, for example, Dave Flood ("Dave the Dwarf") filed a lawsuit seeking to overturn the 1989 Florida law allowing the state to fine or revoke the liquor license of a bar that allows dwarf-tossing.[14] The bans have also been challenged occasionally by individuals who are not little persons, on libertarian or non-discrimination grounds.

Legitimate Rights Paternalism or Authoritarian Dignity?

At stake in the Wackenheim decision, then, is not the tackiness or bad taste of "dwarf tossing", at least not in themselves, but the assault that dwarf tossing is said to represent on human dignity. At the opposite end of the spectrum are civil libertarians who simply argue that the state has no legitimacy in intervening to prevent people from doing what they want. As Florida House of Representatives Ritch Workman put it in introducing legislation to overturn that state's ban on dwarf-tossing, it is an "unnecessary burden on the freedom and liberties of people" and "an example of Big Brother government."

Both these arguments, in their generality, can be seen as unhelpful platitudes. A range of behavior may run against dignity, but not to the point that it should be banned. For example, it may reduce one's dignity to beg, but ordinances banning begging are widely reviled as persecuting the poorest. Conversely, a range of behavior might conceivably be justified on the basis that it follows fundamental human agency, and still be illegal. Criminal activity obviously comes to mind. The conversation on the relationship of dignity and autonomy is always, if anything, better understood as a conversation about their rightful scope.

But where Wackenheim's agency is crucial is that it intervenes to disrupt the *tête-à-tête* between two stylized positions that speak above his head, to an intellectual tension rather than his personal circumstances. Wackenheim could be seen as falling on the civil libertarian end of the spectrum, but we should not make too much of this. His argument is not (at least, we have no reason to think that it is) a *general* civil libertarian argument. For all we know (we do not actually know about Wackenheim's political opinions), Wackenheim might be a big state collectivist in many other respects. His position is not the same as Florida Representative Workman who we have reason to think is first and foremost a defender of libertarianism and second only and at best, a more or less opportunistic defender of some little peoples entrepreneurial liberty.

Indeed, nor can we take it for granted that Wackenheim is insensitive to the dignity argument. In fact, we would have to assume that he knows only too well the indignities that being a little person in early 1990s France meant one had to endure. In many other respects, it is not unreasonable to think that Wackenheim would strongly oppose undignified treatment of little

[14] Graham Brink, "Judge likely to throw out dwarf-tossing suit", *Tampa Bay* (27 February 2002), online: <https://www.tampabay.com/archive/2002/02/27/judge-likely-to-throw-out-dwarf-tossing-suit/>.

persons. In fact, unlike the authorities and the courts for whom dignity might be understood as a generality (involving other situations and persons and acting as a sort of conceptual linchpin for the human rights edifice) the argument for human dignity is, in his case, a concrete aspiration.

It is precisely because of this that his reading of his *own* dignity is highly circumstantial and susceptible to inflexion, a reading of lived dignity mediated by agency. Presumably there are things that Wackenheim would not do for a living, although in this case he felt that lending himself to dwarf tossing was not below that threshold. The point is that dignity and agency, when coexisting in one person, do not live as absolute opposites: dignity is framed by agency, agency is a condition of dignity. For the courts, however, the question was always a more systemic one, involving the broader architecture of human rights and, in particular, competing claims about the power of the state.[15]
To the claims of the French state, Wackenheim opposed his undoubted own sense of agency, including as it manifested itself in terms of his understanding of dignity. No doubt the case for freedom and autonomy here was particularly strong given the fact that the activity was a freely consented to commercial one in a private space, not involving the state and its powers of coercion. This created a particular hurdle since dignity had to be conceived not, as it often is, as a mere negative liberty requiring the state to let Wackenheim do something, but as the exact opposite: as something that would allow the state to prevent him from doing something, in the name of his own dignity.

For the authorities, the natural road was to analyze the situation in terms of conventional rights limitation analysis. Public order provided the notional and familiar basis. But it was quite clear from the decisions that it was not public order itself which was directly doing the work, as much as dignity. The Courts never clarified, for example, how public order would be disrupted by "dwarf tossing." No evidence was adduced that suggested that the events might lead to conventional breaches of public order (violence, for example). In short, there was little that suggested a specific understanding of public order as distinct from an underlying concept of dignity.

This, in turn, made it look dangerously like the French Courts were re-introducing considerations of morality through the back door of public order. As the plea of counsel for Wackenheim before the HRC was summed up by the Committee:

> Case law of this kind at the dawn of the twenty-first century revives the notion of moral order […] directed against an activity that is both marginal and inoffensive when compared with the many forms of truly violent, aggressive behaviour that are tolerated in modem French society. The effect […] is to enshrine a new policing authority that threatens to open the door to all kinds of abuse: are mayors to become censors of public morality and defenders of human dignity? Are the courts to rule on citizens' happiness?[16]

In fact, the reliance on dignity was all the more surprising given the somewhat shaky status of dignity in human rights law. Although dignity is sometimes referred to as a sort of implicit

[15] In fact, in the telling title of an article published subsequently, the question is not what "Wackenheim" may have thought of the case, but what "Kelsen" would have thought of it. Paul Martens, "Sixième leçon. Qu'eût pensé Kelsen de l'arrêt « Wackenheim » (« lancer de nain ») ?" in *Le droit peut-il se passer de Dieu ?* Droit (Namur: Presses universitaires de Namur, 2020) 127 container-title: Le droit peut-il se passer de Dieu ?
[16] Human Rights Committee, supra note 3.

conceptual linchpin to human rights, there is no "right to dignity" even as there is, by contrast, clearly a right to employment (understood at least as the right to not be unreasonably denied the employment of one's choice), a right not to be discriminated against and, more generally, a default assumption that, in a liberal society, that which is not prohibited is and should be allowed. In other words, dignity, a mere principle whose incidence might have seemed to be mostly interpretative, was elevated to the level of a rule.[17]

Dignity refers traditionally to the non-instrumentalization of human beings and their inherent worth. Human beings should not be treated as mere means but as ends in themselves. Specifically, it has sometimes been framed as a taboo about the commodification of human beings. In the case of "dwarf tossing" it is not difficult to see how the practice is a sort of spectacular, almost literal illustration of precisely what one is not supposed to do under a dignity framework. But here there is of course one significant caveat which is that the supposed direct victim of an assault on his dignity (and whoever else may be affected indirectly, there is little doubt that in all reasonings Wackenheim himself is identified as a victim) has agreed to the practice. The case seems almost destined to confirm some of the worst suspicions about "dignity's" role in human rights as a standard that is highly indeterminate and vague and that can be used to bypass serious argumentation about the content of rights.[18]

Moreover, it is not even clear whose dignity is at stake. Is it Wackenheim's? But then how did one reconcile upholding his dignity against his own, very clearly articulated personal wishes? Is it society's conception of dignity, but then how did one not risk upholding some right-thinking majority's sense of *bienséance* (to use a French word) and perhaps even a sort of bourgeois revulsion at "vulgar" working class entertainment? Or is it little peoples' dignity more generally that was at stake? But in this case, was one effectively accusing Wackenheim of being untrue to his own, perhaps implicitly accusing him, in his selfish drive to make a decent living, of compromising the well-being of one larger class of peoples to which he belonged?

Beyond Dignity and Agency?

Traditionally, there are several ways for states around consensual but nonetheless undignified activity. A first is to describe the activity in question as essentially a type of self-harm. Clearly the state routinely prohibits and even criminalizes the consumption of certain drugs, even when it is very much persons' expression of their agency to have access to them. 'We' (or at least a part of 'us') need to be protected against the 'worst' version of our layered selves by, for example, being forced to wear seatbelts even if we think that we are impeccable drivers.[19]

But this is a potentially problematic move from the point of view of human rights, not least because in this case the nature of the harm to Wackenheim was somewhat elusive and, in fact, not adduced by the French state. In such a scenario, it seemed to deny human agency and freedom – which one otherwise have every reason to think are central to human rights – on the grounds that their exercise offends a public canon. This sort of paternalism, reintroducing a kind of pre-modern abuse of self delictum, opens up an avenue for civil libertarians who, as Representative of Florida Workman put it (himself supposedly not a fan of dwarf tossing): "if

[17] Martens, *supra* note 15.
[18] Giorgio Resta, "Human Dignity" (2020) 66:1 mlj 85–90.
[19] John Kleinig, "Paternalism and Human Dignity" (2017) 11:1 Criminal Law, Philosophy 19–36.

a little person wants to make a fool out of themselves for money, they should have the same right to do so as any average sized person."[20]

Another route, then, is to say that the consent to such activity is vitiated from the start because one cannot, in fact, have consented to one's harm. The problem is that this is still hard to maintain in the face of lucid and insistent claims by those involved that they are very much aware of what it is they got themselves into (including evidence of their own calculus about the cost-benefits of engaging in the activity, etc.). The only way to do so is to claim that the individuals concerned are: (i) being coerced, by others or circumstances, to make bad choices, but there was little evidence of at least the former at least as regards Wackenheim and the latter seems very vague; (ii) incapable of giving their consent which could work with children but not Wackenheim and connects to a whole, profoundly liberticide, tradition of thinking that women or the disabled for example are "minors" incapable of making decisions for themselves; or (iii) alienated, i.e.: that they operate on the basis of some form of false consciousness so that Wackenheim does not "know what is good for him," but that the state does. The latter sort of paternalism is evidently quite difficult to reconcile with the libertarian thrust of human rights.

Or, to put it differently, it is difficult such a strong dignity-based line of argument without revealing the human rights project not as a project of liberty but as project of engineering and rewarding a certain kind of "right" subject, i.e.: the subject who does not engage in behavior unbecoming of their human (or otherwise specified) status, and of punishing those subjects that do not conform to human rights' ideal of subjecthood. On its own, then, this is a difficult and even improbable route to follow because of the way it clashes with widespread beliefs that, if freedom in society is to mean anything, it must include behavior that many would frown on as undignified. Broad repression of "hooliganism" as a kind of byword for deviant behavior (homosexuality, hippiness, punkness, etc), for example, is readily associated with authoritarian regimes.

This then leaves open another possibility which is that Wackenheim is not in this on his own and that the state must be mindful of how his behavior might impact others. In allowing himself to be tossed, he is not only compromising his own dignity (something which society might live with), but the very notion of dignity. Ultimately, the point is that his dignity is not for him to define because of the way in which his "indignity" stands to affect not just well-meaning society but, crucially, other little persons.

Here the suggestion is that, whatever reasons Wackenheim may have to allow himself to be tossed, these pale in comparison to the general prejudice that dwarf tossing inflicts on the little persons' community by reinforcing prejudices that concern them. This is, in fact, the argument that some little persons' groups make. In France, famous little person and actress Mimy Mathy spearheaded a movement to ban dwarf tossing and the French government's argument was that Wackenheim was indeed very much the minority among little persons. Such arguments are also at the heart of the Little People of America's advocacy: ″Dwarf-tossing may help financially the person who does it. [...] However, it tears down the structure and the esteem that little people are trying to gain.″[21] Evidently that argument gathers strength not just on its own merits but because who it is uttered by.

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[20] Paul Bois, "Republican State Senator Wants To Ban 'Dwarf-Tossing' In Washington", *The Daily Wire* (26 January 2019), online: <https://www.dailywire.com/news/republican-state-senator-wants-ban-dwarf-tossing-paul-bois>.

[21] Ap, "Little People Oppose Events In Which Dwarfs Are Objects", *The New York Times* (3 July 1989), online: <https://www.nytimes.com/1989/07/03/us/little-people-oppose-events-in-which-dwarfs-are-objects.html>.

At the same time, all that this may bring attention to is that little people are not a homogenous, non-political group. They include, presumably, individuals who err on the side of a strong sense of their liberty and others who emphasize the importance of a sort of common dignity. There are conservative, left wing and centrist little persons and many shades in between: little persons have just as much agency as everyone else and therein even lies part of their dignity, the dignity of not being reducible (and particularly not by others or by the state) to membership in a particular group.

In other words, even a representative organization cannot rule over the lives of its members or even claim to represent them wholly. We should be wary, in particular, of the loose invocation of majoritarian claims within the community of reference. Note moreover that one may be sensitive to the argument taken from dignity on general moral grounds, but not think it reaches the level where one has the authority to stop individuals from exercising their liberty, in extremis. This is not a situation where people with different reasonable views discuss the general merits of allowing oneself to be tossed, but one where the state is called in to intervene and bring about change through law, a change that stands to affect all involved even as, inevitably, it generalizes a particular sensitivity about "dwarf tossing" (pro or con).

It is important to understand, however, exactly what this means for Wackenheim. Deep below the metrics of human rights limitations and public order, this is potentially quite a vicious accusation. It essentially faults Wackenheim and those like him for a lack of solidarity, perhaps even of advancing their own dubious self-interest at the expense of those of the broader community of little persons. This seems, first, particularly petty, almost like a divide-to-rule tactic, where the majority pits a minority within the minority against the majority within the minority. It lays a huge amount of blame at the door of Wackenheim, as if he were, essentially, solely responsible for dwarf tossing. And it also punishes the agency of someone from a vulnerable minority who genuinely (and one might think, with some reason) thought he was unfairly deprived of a job by hinting that, in making a fuss, they are further entrenching their own indignity.

The move also has several other effects. For one, it identifies Wackenheim as having duties, perhaps primarily so, vis-à-vis fellow little persons. This is a way of further typecasting him into his identity. We do not know what Wackeneheim's identification with the community of little persons was or is. But it is perfectly possible and it would be perfectly acceptable for Wackenheim to not particularly think of himself as a little person, or as someone destined to socialize with or identify with little persons. One could imagine similar situations where persons do not particularly identify with their co-religionists, their ethnicity, nationality or race. Wackenheim is not just a little person: he is also, in good intersectional analysis, a cis-gendered white working-class male from Eastern France. Again, holding someone to account on the basis of a primary identity one assigns to them might be seen as guilty of the very thing that one accuses the "Embassy Club" of doing: little persons are only little persons after all.

But on one reading, Wackenheim's position is even worse. He is not only a traitor to little persons, but a traitor to humanity. Because human dignity belongs to all, the harming of the dignity of any group within humanity harms the dignity of all. In that scenario, Wackenheim is not only the artisan of his own downfall (unbeknownst to him); he is also guilty of nothing less than trampling upon the basic common fabric of human dignity. Of course, under that scenario, the shock of the community at the spectacle of dwarf tossing and the harm to

humanity at large become one thing. The community understands itself to, conveniently, speak for humanity. Wackenheim is guilty of not doing his share to uphold humanity's dignity.

Here, however, what is interesting is how Wackenheim tries (even though he ultimately fails) to turn the tables on society by providing an entirely distinct account of what is going on. Wackenheim's argument was that he indeed had no choice, but not because he was alienated and did not know better, quite the contrary. Wackenheim had no choice because French society afforded him no other opportunities of gainful employment than participating in dwarf tossing. Essentially, Wackenheim refused to be blamed for his own oppression/discrimination, turning the mirror on society. As he himself put it in an interview 20 years after he lost a job that had seen him tour France and obtain a measure of success, but who was now condemned to (the indignity of) odd jobs:

> J'avais galéré longtemps avant de trouver cette voie et surtout un moyen de gagner ma vie. On m'a retiré mon métier, mais sans rien me donner en compensation. J'ai essayé d'expliquer ça à ceux qui étaient contre moi. Rien à faire.[22]

One could dispute this factually: maybe there is always something else that Wackenhem might have done; but the courts are not well placed to make these judgment calls in lieu of the agency of the plaintiff. More poignantly, Wackenheim's argument was that protecting society from the indignity of "dwarf tossing" effectively pushed him into the indignity of a life of barely eking a living. As he put it, "Pour moi ce qui est dégradant et humiliant, c'est plutôt de ne pas avoir de travail."[23] Or, as the Human Rights Committee summed up his line of argument (only to better reject it): "his job does not constitute an affront to human dignity since dignity consists in having a job."[24]

If one follows Wackenheim, then, it is not him who is alienated, ultimately, but society itself: society thinks it is protecting dignity when all it is doing is piling up on the weakest individual and faulting him for its sins. At the same time, society is oblivious to the ways in which it brought about that indignity in the first place and continues to perpetuate it by fixating on decisions taken by those who have been left with very diminished life opportunities. Where the Cour de cassation saw a quintessential scenario where dignity defined along narrow parameters was violated, Wackenheim saw a complex economic and social situation of alienation which he had sought to navigate as well as possible.

But of course, the story is a complex one. Where Wackenheim sees undue state interference in his liberty, one might also see the rampant, thoroughly commodifying logic of the market and human exploitation. As "Dave the dwarf" put it on the other side of the Atlantic, "I'm capitalizing on what I have. If I was 7 feet tall, I'd get paid to put a basketball through a hoop. I'm not 7 feet tall. I'm 3-feet-2 and a dwarf, so I'm capitalizing on getting tossed."[25] Wackenheim's view of his own dignity as, essentially, his private right to dispose of, surrendered perhaps a little too easily to that powerful logic, one which one has reason to fear

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[22] Antoine Pétry, "Lancer de nains : l'interdiction a brisé sa vie", *Le Dauphiné* (17 February 2014), online: <https://www.estrepublicain.fr/actualite/2014/02/16/petite-taille-grande-rancoeur-nwdg>.
[23] "Manuel Wackenheim : "Mimie Mathy, le drame de ma vie"", (28 February 2014), online: *Public.fr* <https://www.public.fr/News/Manuel-Wackenheim-Mimie-Mathy-le-drame-de-ma-vie-1735392>.
[24] HRC, supra note 3.
[25] "Give Me a Break: Dwarf-Tossing - ABC News", *ABC News* (8 March 2002), online: <https://abcnews.go.com/2020/story?id=123931&page=1>.

ultimately has very little to do with dignity.[26] Yet the point may be that the market was at least there for him, where the state would have neither allowed him to continue his job nor provided any suitable altnerative.

Dwarf tossing as Metaphor?

The argument by Wackenheim was, in the end, clearly inaudible. Even Mimie Mathy, a fellow little person but crucially one of the most successful one in France, was harsh towards Wackenheim: "Pour moi, il y a en tous cas d'autres solutions pour s'en sortir que d'être ridicule et dans une situation dégradante."[27] Ultimately, it seems, holders of rights are expected to do their part for the upholding of their own fundamental dignity, even if society constantly puts some of them in situations where their only way to attain a certain dignity (the dignity of an income-making life) is by, arguably, harming their underlying symbolic self-worth. Individuals do not just have rights, they also have duties, and the price of living in society is that one must uphold a certain abstract concept of self as the right sort of human even against one's own interests as a concrete human.

I suggest that this is, in fact, part of a broader genus of arguments based on human dignity, where individuals are held hostage to a certain concept of what their dignity entails. This then trumps not only any consideration of their agency but also of how their being in a position of indignity is, in the circumstances, a dignified response to material conditions of indignity. These include debates on prostitution, organ donation, surrogacy, euthanasia or wearing of religious symbols (and before those on homosexuality or sadomasochism)[28] where claims of consent and necessity have often been overridden by a vague societal emphasis on dignity. In fact, Wackenheim himself made the connection to the prostitution debate: "Les putes gagnent bien leur vie avec leur cul. Pourquoi je ne pourrais pas être lancé en France? »[29]

This article could only hint at the depth of these issues and the continued price that decisions such as Wackenheim exact on the most vulnerable by only seeing their agency to the extent that it suits a broader pre-ordained conception of dignity. It has suggested that the debate is, ultimately, less one about a stylized opposition between heavy handed, top down "dignity" v. bottom-up, libertarian "autonomy," than it is about how certain societal conceptions of dignity get foregrounded that minimize and deny the many ways in which dignity is also largely in the eyes of the beholder. The ways in which, in fact, dignity is profoundly conditioned by the very possibility and the peculiar reality of agency. As Wackenheim himself put it: "Dignité humaine ? C'est bien beau tout ça. Moi, je gagnais ma vie comme je pouvais."[30]

[26] Olivier De Schutter, "Waiver of Rights and State Paternalism under the European Convention on Human Rights" (2000) 51:3 N Ir Legal Q 481–508.
[27] Xavier Frere, "Mimie Mathy : « Il aurait pu se reconvertir autrement »", (17 February 2014), online: <https://www.ledauphine.com/france-monde/2014/02/17/mimie-mathy-il-aurait-pu-se-reconvertir-autrement>.
[28] Antonin Sopena, "La dignité à l'épreuve du sadomasochisme, et inversement" (2010) 51:2 Vacarme 74–77.
[29] Quentin Girard, "Manuel Wackenheim, cloué au sol", *Libération* (30 January 1924), online: <https://www.liberation.fr/societe/2014/01/30/manuel-wackenheim-cloue-au-sol_976662/>.
[30] Pétry, *supra* note 22.