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Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley

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Tanner Lectures: DIGNITY, RANK, AND RIGHTS
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Lecture 1: Dignity and Rank[1]

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0. My subject is…

My subject is human dignity. Dignity, we will see, is a principle of morality and a principle of law. It is certainly a principle of the highest importance; and it ought to be something we can give a good philosophic account of. That's what I am going to try and do in these lectures.

1. Morality or Law?

It is a topic that we can come to through law—analyzing the preambles of various declarations of human rights, for example, or in the rules prohibiting inhuman and degrading treatment—or it is something we can treat as, in the first instance, a moral idea.

On the second approach, which seems like a natural one to adopt, we begin with dignity as a moral idea, and then we look and see how adequately or how clumsily it has been represented in the work of the drafters of statutes or constitutions or human rights conventions or in the decisions that constitute our doctrines and our precedents. Before we get anywhere near the law, we look for the sense that moral philosophers have made of it—Immanuel Kant,[2] for example, or modern philosophers like Stephen Darwall of Michigan (in his book *The Second-Person Standpoint*)[3] or James Griffin in his recent book *On Human Rights*.[4]

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[1] Much of the argument in this first lecture is based on my essay "Dignity and Rank," *Archives Européennes de Sociologie*, 48 (2007), 201-37. But I have modified the positions taken in that essay in a number of ways.

[2] Immanuel Kant, *Groundwork*, 4: 435.

[3] Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Harvard University Press, 2006).

[4] James Griffin, *On Human Rights* (Oxford University Press, 2008).

That's a tempting approach. But moral philosophy is not our only philosophical resource for exploring an idea like dignity. What if we were to try the opposite approach? Dignity seems at home in law. Let's begin by analyzing how it works in its native habitat, and see whether the jurisprudence of dignity can cast any light on its use in moral discourse. Joseph Raz said to me a few weeks ago that "dignity" is not a term that crops up much in ordinary moral conversation.[5] Its presence is an artifact of philosophers' trying to make sense of ordinary moral ideas (like value and respect). Like "utility," it's a constructive idea, with a foundational and explicative function. If it has been imported from law to perform this constructive function, then we had better turn first to jurisprudence to find out something about the distinctive *legal* ideas that the moral philosophers have appropriated.[6]

So for example: the moral philosophers tell us that dignity is a matter of status; but status is a legal conception and not a simple one. Dignity, we are told, was once tied up with rank: the dignity of a king was not the same as the dignity of bishop and neither of them was the same as the dignity of a professor. If our modern conception of human dignity retains any scintilla of its ancient and historical connection with rank—and I think it does: I think it expresses the idea of the high and equal rank of every human person—then we should look first at the bodies of law that relate status to rank (and to right and privilege) and see what if anything is retained of these ancient and historical conceptions when dignity is put to work in a new and egalitarian environment. Dignity is intimately connected with the idea of rights—as the ground of rights, and the content of certain rights, and perhaps even the form and structural character of rights. It would be a brave moral

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[5] Joseph Raz's point, that dignity is not a feature of ordinary moral discourse: we don't complain to one another about affronts to dignity. Indeed, doing so, in those terms, would make one sound like fool or a prig. Notice also that Raz's points at Balliol lunch were about its use in ordinary interpersonal morality (as opposed to political morality (which is not the same as law and not the same as moral philosophy).

[6] A good start, albeit a moderately skeptical one, would be Christopher McCrudden's fine essay, "Human Dignity in Human Rights Interpretation," *European Journal of International Law* 19 (2008), 655-724..

philosopher who would say that the best way to understand rights (or a concept connected with rights) is to begin with moral ideas and then see what the law does with those. Surely, it is better to begin (like Hohfeld, Hart and many others)[7] with rights as a juridical idea and then look and see how that works in a normative environment (like morality) that is structured quite differently from the way in which a legal system is structured.[8]

And I think the same may be true of dignity. Even as the ground of rights—as when we are told in the preamble to the International Covenant on Civil and Political Rights that the rights contained in the covenant "derive from the inherent dignity of the human person"—even as the ground of rights, dignity need not be treated in the first instance as a moral idea. After all it is not just the surface-level rules that are legal in character (as though anything deeper must be "moral"). I am enough of a Dworkinian to believe that grounding doctrines can be legal too—legal principles, for example, or legal policies.[9] Law contains, envelops and constitutes these ideas; it doesn't just borrow them from morality.

So there's the point I want to begin with. It is probably not a good idea to treat dignity as a moral conception in the first instance or assume that a philosophical explication of dignity must begin as moral philosophy. Equally we should not assume that a legal analysis of dignity is just a list of texts and precedents, in national and international law, in which the word "dignity" appears. There is such a thing as legal philosophy, and it is a jurisprudence of dignity, not a hornbook analysis that I will be pursuing in these lectures.

2. A variety of uses

[7] Cites.

[8] Even if we say in our model-theoretic conceptions that natural rights preceded legal rights in the order of coming-into-being (in Lockean social contract theory, for example) , still we should not infer that this corresponds to the order of our understanding of rights, with rights being grasped in a way that is independent of legal understanding.

[9] Cite to Dworkin, *Taking Rights Seriously*.

There doesn't seem to be any canonical definition of "dignity" in the law. One esteemed jurist has observed that its intrinsic meaning seems to have been left to intuitive understanding."[10] [11]

If you glance quickly at the way in which "dignity" figures in the law, you will probably get the impression that its usage is seriously confused. [12] The indignant recording of such impressions is what passes for analytic philosophy in some circles, but thoughtfulness and patience actually pay off in this area, as they often do in responding to analytic critique.

The human rights charters tell us that dignity is inherent in the human person; they also command us to make heroic efforts to establish everyone's dignity. Is this an equivocation? Jeremy Bentham used to make fun of a similar duality in the use of "liberty": Defenders of natural rights would say that men are born free, but then complain in the name of rights that so many of them were born into slavery.[13] Here, the

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[10] Cf. Oscar Schachter, "Human Dignity as a Normative Concept," *American Journal of International Law*, 77 (1983), 848, at 849: "We do not find an explicit definition of the expression "dignity of the human person" in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors."

[11] And the Supreme Court of Canada said recently that dignity is "an abstract and subjective notion … confusing and difficult to apply." --R. v Kapp 2008 SCC 41 at § 22. See also McCrudden, "Human Dignity in Human Rights Interpretation," __.

[12] This is the view of Stephen Pinker, who says of the concept of dignity that "it spawns outright contradictions at every turn. We read that slavery and degradation are morally wrong because they take someone's dignity away. But we also read that nothing you can do to a person, including enslaving or degrading him, can take his dignity away." Steven Pinker, The Stupidity of Dignity, *The New Republic* May 28, 2008, available at http://www.tnr.com/story_print.html?id=d8731cf4-e87b-4d88-b7e7-f5059cd0bfbd

[13] Defenders of natural rights would say that men are born free, Bentham observed, but then complain in the name of rights that so many of them were born into slavery. If challenged to justify their demands for liberty, they would cite human liberty as the ground of these demands. But liberty, which they were citing as an existent justification for rights, was also what they were demanding, and because they thought they had to demand it, they were acknowledging that men were not free. So what became of the alleged justification for their claim? "Men ought to be free because they are free, even though they are not"—was that the claim? Such reasoning, which Bentham called "absurd and miserable nonsense" (Bentham 1987, p. 50), seemed to veer between the incoherent and the tautological. And the dual usage of "dignity" appears to partake of this logic. The blurring of the distinction between content ("a right to dignity") and justification ("rights based on dignity") means at best that the claim of right is being put forward as self-justifying. As Bentham said (not specifically about dignity but in an analogous context):

appearance of equivocation is easily dispelled. In a slave society, a person might be identified as a free man in a juridical sense--that is his legal status—even though he is found in conditions of slavery. (He may have been enslaved by mistake or kept erroneously in chains even after his emancipation.) So similarly one might say that every human person is free as a matter of status—the status accorded to him by his creator—even though it is the case that some humans are actually in chains and need to have their freedom represented as the content of a normative demand. The premise may be problematic for those who reject its implicit metaphysics, but the overall claim is not incoherent. And the same logic may work for "dignity." On the one hand, the term may be used to convey something about the *rank* or *status* of human beings; on the other hand, it may be used concomitantly to convey the demand that that rank or status should actually be respected.

A more interesting duality of uses has to do with the distinction between dignity as the ground of rights and dignity as the content of rights. On the hand, we are told that human rights "derive from the inherent dignity of the human person."[14] On the other hand, it is said that people have a right to be protected against "degrading treatment" and "outrages on personal dignity."[15] Dignity is what some of our rights are rights *to*; but dignity is also what grounds all of our rights. I have my doubts about the claim that rights derive from any single foundation, be it dignity, equality, autonomy, or (as it is now sometimes said) security. In any case, I want to leave this duality of ground and content in place. It is perfectly possible that human dignity could be the overall

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"It is from beginning to end so much flat assertion: it neither has anything to do with reason nor will endure the mention of it. It lays down as a fundamental and inviolable principle whatever is in dispute." (Bentham, *Anarchical Fallacies,* in Jeremy Waldron (ed.) *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987) 46, at p. 74).

[14] The International Covenant on Civil and Political Rights, Preamble. In this sense, "dignity" conveys "a formal, transcendental norm to legitimize human rights claims." (Klaus Dicke, "The Founding Function of Human Dignity in the Universal Declaration of Human Rights," in David Kretzmer and Eckart Klein (eds.) *The Concept of Human Dignity in Human Rights Discourse* (Martinus Nijhoff Publishers, 2002) 111, at 118.

[15] Geneva Conventions, Common Article 3. Also Rome Statute of International Criminal Court, Article 8.

telos of rights in general, but also that certain particular rights could be oriented specifically to the explicit pursuit of that objective or to protecting it against some standard threats to dignity, while others were related to this goal in a more indirect sort of way.

I will actually argue against a reading of the dignity idea that makes it the goal or *telos* of human rights. I think it makes better sense to say that dignity is a normative status and that many human rights may be understood as incidents of that status. (The relation between a status and its incidents is not the same as the relation between a goal and the various subordinate principles that promote the goal.)

Still, if human dignity is regarded as a rank or status, there remains a duality between general norms establishing that status and particular norms like those that prohibit degradation.

I think the relation between these two sorts of norms is like the relation between the general status or dignity of a judge and the specific offense of contempt. Protection against contempt of court is not all there is to being a judge, but a ban on contempt might be thought indispensable to judicial dignity. And not just a ban on contempt. More affirmative provisions may also be important. The Constitution of Poland stipulates that "[j]udges shall be granted … remuneration consistent with the dignity of their office…."[16] And there may be other accoutrements too—gowns, wigs, modes of address. Still these do not exhaust the status of a judge either; her status has to do also with her role and with her powers and responsibilities.[17] And similarly for human

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[16] Constitution of Poland, Article 178(2). Refer to Bibliography.

[17] Traditional dignities, like those of nobility also have this aspect. Nobles have to be able to maintain themselves or they can lose their dignity. See *Earl of Shrewsbury's Case* 12 Co. Rep. 106, 77 Eng. Rep. 1383 (1612): "[T]he cause of degradation of George Nevill, Duke of Bedford … was done by force of an Act of Parliament, 16 June, 17 Ed. 4. which Act reciting the making of the said George Duke, doth express the cause of his degradation in these words: 'And forasmuch as it is openly known, that the said George hath not, or by inheritance may have any livelihood to support the same name, estate, and dignity, or any name of estate; and oftentimes it is to be seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, imbracery and maintenance to be had, to the great trouble of all such countries where such estate shall happen to be: wherefore the King by advice of his Lords Spiritual and Temporal, and by the Commons in this present Parliament assembled, and by the authority of

dignity. We can distinguish between the general status and particular rules that protect it. Some of these particular rules are affirmative, like the provision in the Universal Declaration of Human Rights which says that "[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity…."[18] And some are negative, like the ban on degrading treatment. Both kinds of protection are important. But they are not all there is to human dignity.

3. Humiliation and degradation

Maybe this is too ambitious. Perhaps we should take the various specific prohibitions on degradation just at face value and not necessarily assume that they are ancillary to the broader enterprise of upholding a general rank or status of human dignity.[19] The prohibitions on "degrading treatment" in the human rights covenants[20]—can't we just say these are intended to protect people against a very specific evil of gross humiliation, particularly in situations like detention, incarceration, hospitalization, and military captivity—situations of more or less comprehensive vulnerability with total control by others of a person's

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the same, ordaineth, establisheth, and enacteth, that from henceforth the same creation and making of the said duke, and all the names of dignity given to the said George, or to John Nevill, his father, be from henceforth void and of none effect, &c.'" But Blackstone disputes this: "A peer cannot lose his nobility, but by death or attainder; though there was an Instance in the reign of Edward the fourth, of the degradation of George Nevile duke of Bedford by act of parliament, on account of his poverty, which rendered him unable to support his dignity. But this is a singular instance." (Blackstone, *Commentaries on the Law of England*. I, Ch. 12.) But still their dignity is something more than this specific requirement.

[18] UDHR in Article 23 (3). Also Locke (*Second Treatise*, § 15): "[F]or as much as we are not by ourselves sufficient to furnish ourselves with competent store of things needful for such a life as our Nature doth desire, a life fit for the dignity of man, therefore to supply those defects and imperfections which are in us, as living single and solely by ourselves, we are naturally induced to seek communion and fellowship with others."

[19] I am grateful to Carol Sanger for urging this point. See also Daniel Statman, "Humiliation, Dignity, and Self-Respect" in Kretzmer and Klein, *The Concept of Human Dignity*, p. 209: "Tying the concept of humiliation to that of human dignity makes the former too philosophical … and too detached from psychological research and theory."

[20] The Universal Declaration of Human Rights of 1948 (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both provide that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." (ECHR, Art. 3. omits "cruel").

living situation? Can't we just say that that's all that these provisions are for?[21] Why do we have to work up a general account of dignity? All we require is a retail theory, which may be no more extensive than is needed to make sense of these particular prohibitions. We do not need a grand wholesale account of dignity.

But that still leaves the question of what the law is doing when it also talks in more general (wholesale) terms about the dignity of the human person. And it does. Since we have to give an account of that *anyway*, it is certainly worth striving to produce a theory that unifies what we say about dignity in general and what we say about these specific (or retail) dignitarian requirements.

4. The need for a foundation?

Human rights law suggests that dignity is the ground of rights or (in the words of the International Covenant of Civil and Political Rights) that rights "derive from the inherent dignity of the human person." Does this assume a moral ideal of dignity that serves as an extra-legal grounding for human rights?

Not necessarily. The Covenant gives us the *legal ground* of the rights set out in the body of its text, but it's a further question whether this is supposed to be the legal representation of a moral conception. Maybe every legal idea has a moral underpinning of some sort; but it would be a mistake to think that the moral underpinning has to have the same shape or content as the legal ground.

Consider as an analogy Hannah Arendt's account of the ancient Athenian commitment to political equality among free-born male citizens. The Athenians adopted a legal principle of treating one another

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[21] I have even heard it said that the prohibition on degradation is simply intended to work with the prohibitions on cruel and inhuman treatment to define progressively more serious layers of unacceptable official treatment of individuals, and that's all there is to it. (Human rights lawyers in Europe say this about the Article 3 provision.) I don't have much time for that view myself. It seems to me that "degrading treatment" marks out a qualitatively different prohibition than "inhuman treatment." I have pursued this in "Cruel, Inhuman, and Degrading Treatment: The Words Themselves," available at http://ssrn.com/abstract=1278604 But as I say, I can imagine someone insisting that we can understand why the law prohibits degradation without having to predicate that on any more general theory of dignity.

as equals, not because of any moral conviction about real equality between them, but because such a principle made possible a form of political community they could not otherwise have. For their engagement in the joint enterprise of politics, the community created for each of them an artificial *persona*—the citizen—that could take its place on the public stage, presenting them as equals for political purposes. They did this using artificial techniques like the equal right to speak in the assembly, the equality of votes, the equal liability to be drafted into a jury, and so on.[22]

Human dignity might be something similar: there might be a point to its legal recognition, but that point need not be an underlying moral dignity.

That's a possibility. Of course many philosophers do believe in an underlying moral dignity. In his recent book *On Human Rights*, James Griffin has defended a moral account of dignity, which he thinks underlies human rights. He adopts a conception of dignity from a fifteenth century writer, Pico della Mirandola—though he drops most of the very substantial theology that Pico associates with dignity—and he comes to the conclusion that the key to dignity is the human capacity "to ... be that which he wills" (which Griffin re-labels normative agency).[23] "The sort of dignity relevant to human rights," Griffin says, "is that of a highly prized status: that we are normative agents."[24] He says that our human rights are derived from our dignity, understood in this way.[25] Sometimes the way he says this indicates that normative agency is the *telos* of our rights: human rights are a means to normative agency as an

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[22] Hannah Arendt, *On Revolution* (Penguin Books, 1977), p. 278: "[T]his equality was not natural but political, it was nothing they had been born with; it was the equality of those who had committed themselves to, and now were engaged in, a joint enterprise." By nature they might be utterly different from one another in background, abilities and character; but by political convention they *held* ourselves to be one another's equals. (See also the reflections on the wording of the Declaration of Independence in Hannah Arendt, "Truth and Politics," in *Between Past and Future: Eight Exercises in Political Thought* (Penguin Books, 1977) pp. 246-7.)

[23] James Griffin, *On Human Rights*, p. 31 (drawing on Giovanni Pico della Mirandola, *Oration on the Dignity of Man* (1486), available at http://cscs.umich.edu/~crshalizi/Mirandola/).

[24] Griffin, *On Human Rights*, p. 152.

[25] Griffin, *On Human Rights*, p. 192.

end;[26] we have a right to welfare, for example, because you can't exercise normative agency when you are hungry.[27] Other times what he says conveys the point that protecting our rights *vindicates* our normative agency (e.g. by respecting our choices), which is a rather different idea.[28]

The second of these is more closely connected to dignity as status. In general a status is not a goal or a *telos*: a status *comprises* a given set of rights rather than defining them as instrumentalities. I am attracted, as I have said, to the status account; and much of the rest of these lectures is devoted to it. I mention the uncertainty in Griffin's account, just so that we do not have too simple a picture of dignity as a foundation. A status account will present dignity (however defined) as foundation-*ish* (or, as we might say, foundation*al*) but it may not be a foundation in the simple way that (for example) the major value-premises of a consequential argument are a foundation of everything else in the consequentialist's moral theory.

5. Dignity and bearing

We place a high value on human dignity, but height can be understood in different ways. We might just mean that dignity counts for more than other values.

Or height might mean something like rank.[29] Consider again the idea of status. Some legal statuses are low and servile, like slavery and villeinage (or, in the modern world, felony or bankruptcy). Others are quite "high," like royalty or nobility. "Highness," here, is not like moral *weight* (as in the moral weight of a particularly prolonged or intense episode of pleasure for the purposes of Jeremy Bentham's felicific

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[26] I mean they are a means to an end *in the case of each agent*. The structure of the suggested account is that normative agency is utterly and equally important for each person. It's an individualized teleological account, quite different from saying (e.g.) that rights are a means to aggregate utility or political stability or whatever.

[27] Griffin, *On Human Rights*, p. 179-80

[28] Griffin, *On Human Rights*, p. __ .

[29] Consider the use of the phrase "the height and dignity of the Pope" in a case entitled *Of Oaths Before An Ecclesiastical Judge Ex Officio* 77 Eng. Rep. 1308 , 12, Co. Rep. 26.

calculus). It is more a matter of *rank*, and it conveys things like authority, and deference.

The high character of dignity also has physical connotations—a sort of "moral orthopedics of human dignity"—what some Marxists, following Ernst Bloch, used to call "walking upright."[30] "Dignity" has resonances of something like noble bearing. In one of the meanings the Oxford Dictionary ascribes to the term, it connotes "befitting elevation of aspect, manner, or style; … stateliness, gravity."[31] When we hear the claim that someone has dignity, what comes to mind are ideas such as: having a certain sort of presence; uprightness of bearing; self-possession and self-control; self-presentation as someone to be reckoned with; not being abject, pitiable, distressed or overly submissive in circumstances of adversity.[32]

These connotations resonate with what I called earlier the retail use of "dignity" in humanitarian law and human rights covenants. The ban on degrading treatment can be read as requiring that people must be permitted to present themselves (even in detention, even in the power of the police) with a modicum of self-control and self-possession.[33]

I think it is a good thing in a philosophic account of dignity, not just to unite the retail and the wholesale uses of "dignity" in the law, but

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[30] See Jan Robert Bloch & Caspers Rubin, "How Can We Understand the Bends in the Upright Gait?" *New German Critique*, 45 (1988) 9, at pp. 9-10. A wonderful article.

[31] OED "dignity" meaning 4.

[32] See also the account in Aurel Kolnai, "Dignity," *Philosophy*, 51 (1976), 251 at pp. 253-4: "Here, then, are the features typifying Dignity that most vividly occur to me. First—the qualities of composure, calmness, restraint, reserve, and emotions or passions subdued and securely controlled without being negated or dissolved (verhaltene Leidenschaft in German). Secondly—the qualities of distinctness, delimitation, and distance; of something that conveys the idea of being intangible, invulnerable, inaccessible to destructive or corruptive or subversive interference. Dignity is thus comparable, metaphorically, to something like 'tempered steel'. Thirdly, in consonance therewith, Dignity also tends to connote the features of self-contained serenity, of a certain inward and toned-down but yet translucent and perceptible power of self-assertion: the dignified type of character is chary of emphatic activity rather than sullenly passive, perhaps impassive rather than impassible, patient rather than anxiously defensive, and devoid but not incapable of aggressiveness."

[33] Refer to Waldron, in "Cruel, Inhuman, and Degrading Treatment: The Words Themselves" (available at http://ssrn.com/abstract=1278604) at pp. __, for the ways in which the bestialization or infantilization of detainees is at odds with this (in the "war on terror").

to do so in a way that makes illuminating sense of these intuitions about moral orthopedics. A good account of human dignity will explain it as a very general status. But it will also generate an account of it as noble bearing and an account of the importance of the ban on humiliating and degrading treatment. That is what I am trying to do with an account of dignity as a high-ranking status, comparable to a rank of nobility—only a rank assigned now to every human person, equally without discrimination. Dignity as nobility for the common man.

6. Stipulative uses of "dignity"—Dworkin[34] —*omit*

7. Value: Kant

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[34] Some philosophers' definitions of "dignity," seem quite unrelated to these themes of nobility, bearing, and non-degradation. Consider, for example, Ronald Dworkin's use of "dignity" in his most recent books, *Is Democracy Possible Here?* and *Justice for Hedgehogs*. At the beginning of *Is Democracy Possible Here*, Dworkin states two principles which he says 'identify … abstract value in the human situation" (p. 9). One has to do with the objective value of a human life. (This is connected with the idea of the sacredness of human life, to which Dworkin devotes some enormously insightful discussion in Dworkin, *Life's Dominion*, pp. 68-101.) The other states that each person has a special responsibility for how his or her own life goes. Dworkin says: "These two principles … together define the basis and conditions of human dignity, and I shall therefore refer to them as principles or dimensions of dignity" (p. 10). He says, quite rightly, that these principles reflect values that are deeply embedded in Western political theory. They have not always been labeled "principles of dignity," but of course there is no objection to calling them that, if this is what Dworkin wants to do. However, he nowhere suggests that the "dignity" label adds any illumination to the principles, and his elaboration of them is conducted in a way that does not rely on any of specific connotations we have noticed. (It is interesting that in his early work on rights, Dworkin distinguished his own position, which he articulated in terms of equality, from positions that he called Kantian, which were associated with dignity: see Dworkin, *Taking Rights Seriously*, pp. 198-9. (For a discussion see Parent ____, pp. 70-1.) Of course we might just *make* the term mean what Dworkin says it means, by linguistic stipulation. But there is no particular reason why we should assign "dignity" to this task. Other words would do as well. We could use the word "glory," and talk about the inherent glory of the human being, respect for glory, humans having an inalienable right to glory, and so on. We'd acknowledge that of course "glory" has some other connotations, which may or may not resonate with its use here, but we'd say we are giving it new work to do, where it will stand for the these two Dworkinian principles. I hope I will not be misunderstood as making fun of Dworkin's stipulation when I remind you that the word "glory" has a history of being used in his way. (Cf. Lewis Carroll, Through the Looking Glass (1899), Ch. 6 .) It can be put to work in political philosophy just as Humpty Dumpty puts it to work in logic (as a term for a certain sort of argument). But we would have to pay it extra and it may turn out that "dignity" comes cheaper for this task, being more manageable, less temperamental, and so on

I might as well say now that the account I am going to give is at odds with one of the best-known philosophical theories: the definition of dignity in Immanuel Kant's *Groundwork to the Metaphysics of Morals*, which says (in the translation I use):

> In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what, on the other hand, is raised above all price and therefore admits of no equivalent has a dignity. Now, morality is the condition under which alone a rational being can be an end in itself…. Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.[35]

The first thing to say about this definition is that "dignity" here is the English translator's term, not Kant's. Kant uses the German term "*Würde*." There's a well-established practice of translating *Würde* as "dignity."[36] But the two words have slightly different connotations.[37] "*Würde*" is certainly much closer to "worth" than our term "dignity" is.

The second thing to say is that although "value beyond price" and "the intrinsic non-negotiable non-fungible worth that inheres in every human being in virtue of his or her moral capacity" are wonderful and important ideas, there is no particular reason to use our term "dignity" to convey them. "*Würde*," in sense of the passage in Kant's *Groundwork*, expresses a type of *value* or a fact about value. "Dignity," by contrast, conveys the idea of a type of *status* that a person may have. The distinction may seem a fine one, particularly if we acknowledge that in

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[35] Kant, *Groundwork*, 4: 435. Kant goes on to say that the moral will is "infinitely above all price." He says it cannot be brought into comparison or competition with any other value at all "without, as it were, assaulting its holiness." Cite. Notice also that James Griffin is wary of associating his view with Kantian dignity; he says that dignity in the Kantian sense is supposed to be characteristic of all morality, not just human rights (op. cit., p. 201)

[36] It's a general practice, not just in translations of Kant's work. I was wrong about this in "Dignity and Rank," pp. 212-3.

[37] For a suggestive discussion of some differences, see Kolnai, op. cit., at pp. 251-2. See also the comment in the *Dignity: Ethics and Law—Bibliography* (Copenhagen: Centre for Ethics and Law, 1999), p. 9: "The Scandinavian and German nouns *vœdighed* and *Würde* are derived from the Germanic *werpa- (werd, wert) which means that these languages point to worth and value more than to dignity."

moral theory a person's status of can derive from an estimation of that person's fundamental worth.[38] A person may have dignity (in the sense that interests us) *because* he or she has worth (or "*Würde*" in Kant's sense): but this is genuine derivation, not synonymy. We can distinguish the ideas also in terms of appropriate responses to value and status, respectively.[39] The thing to do with something of value is promote it or protect it, perhaps maximize things of that kind, at any rate to treasure it.[40] The thing to do with a ranking status is to respect and defer to the person who bears it.

Now Kant does also say that the basis of human worth commands respect. But this is not exactly respect for persons.[41] What commands respect is the capacity for morality; and I agree with Michael Rosen that

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[38] McCrudden, "Human Dignity," p. 679, follows Gerald Neuman, "Human Dignity in United States Constitutional Law," in D. Simon and M. Weiss (eds), *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* (2000), at 249, 249-50, in identifying the core meaning of "human dignity" (if it has a core meaning) with the intrinsic worth of the individual.

[39] Kolnai's discussion of this is very fine: see ibid., pp. 252-4.

[40] For the claim that it is not always appropriate to maximize value; that the appropriate responses to a certain type of value is to treasure it, not necessarily to see that as much of it as possible comes into existence, see Ronald Dworkin's discussion of secular notion of "sacredness" in *Life's Dominion*. Does he connect this with dignity in *Justice for Hedgehogs*? **{check}**

[41] It is not entirely clear that Kantian respect, important though it is in his moral philosophy, is really the right sort of shape for our purposes. Kant's awe in the famous passage from the *Second Critique* is more like *amazement* and "admiration" that there should be this moral capacity. How, exactly, is my amazement at a person's having the capacity for moral action—a sort of moral aesthetic—supposed to motivate a sense of constraint on treating them in certain ways. Why exactly does the awe-inspiring fact—that even the most hardened sinner possesses a residual capacity to act morally—mean that he mustn't be shot or tortured? How do we get from the one position to the other?

In the *Critique of Practical Reason*, Kant presents respect as a feeling of awe that a person experiences when he notices how pure practical reason strikes down his inclinations and his self-conceit. (Immanuel Kant, *Critique of Practical Reason*, Part I, Ch. III, in Immanuel Kant, *Practical Philosophy*, edited by Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 199 ff. (V: 73 ff. of the Prussian Academy Edition of Kant's *Works*). It is something that takes place in the internal economy of the exercise of moral capacity. It's a response that I have to my own sense of duty; it's not independently a way of *generating* duties. Kant himself seems to recognize this because, as he puts it, "the concept of duty cannot be derived from respect"—ibid., p. 172 (V: 38) --since respect for pure practical reason just "*is* morality … subjectively considered as an incentive' (ibid., p. 201 (V: 76)). Kantian respect is not our response to something that matters, but rather our response *to* our response to something that matters. Kant used the term 'respect' very carefully. We tend to use it quite loosely, and we may be led to see in his account not what it strictly implies but what we need.

this, in the first instance, is a sort of Platonism;[42] it involves respecting something within a person, not a person him- or herself. Our respect for the workings of the moral law within ourselves is subjectively a sort of quivering awe at the way the moral law can strike down our inclinations.[43] Rosen argues that it is a quasi-aesthetic ideal, and I'm inclined to agree with him.

I am sure there some in the audience who will regard my turning my back on the conception of dignity in the *Groundwork* as a *reductio ad absurdum* of my whole enterprise. "If not Kant, then who?"—they will ask. But Kant's use of dignity (or "*Würde*") is complicated. He does also use the term in ways that line up much more closely to the traditional connotations of nobility that we've been talking about. In his political philosophy, Kant talks of "the distribution of dignities"; he describes nobility as a dignity which "makes its possessors members of a higher estate even without any special services on their part"; and he says that "no human being can be without any dignity, since he at least has the dignity of a citizen."[44] These sayings associate dignity with rank in more or less exactly the way that I want to associate them.

Additionally, *The Metaphysics of Morals* contains a long, priggish passage "On Servility," where Kant talks of our "duty with reference to the dignity of humanity within us":

> Be no man's lackey.—Do not let others tread with impunity on your rights.—Contract no debt for which you cannot give full security.—Do not accept favors you could do without. … Complaining and whining, even crying out in bodily pain, is unworthy of you, especially if you are aware of having deserved it….—*Kneeling down or prostrating oneself on the ground, even*

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[42] See Michel Rosen, "The Shibboleth of All Empty-Headed Moralists": The Place of Dignity in Ethics and Politics," (2007 Boston University Benedict Lectures), Lecture 3.

[43] In the *Critique of Practical Reason* (V: 74), Kant says: "If something represented as a determining ground of our will humiliates us in our self-consciousness, it awakens respect for itself insofar as it is a positive and a determining ground. Therefore the moral law is even subjectively a ground of respect"

[44] *The Metaphysics of Morals* 6: 328-30.

> *to show your veneration for heavenly objects, is contrary to the dignity of humanity*…. Bowing and scraping before a human being seems in any case unworthy of a human being."[45]

This Polonius-like account of dignified bearing sounds like the sort of thing I ma pursuing. But the problem is to connect back to what dignity is said in the *Groundwork* to *be*: namely, value beyond price. That's what I have trouble with. There is no doubt that Kant has some such connection in mind. The "absolute inner worth" of our moral personality begins as a basis of self-esteem,[46] but it is also a sort of asset by which a person "exacts respect for himself from all other rational beings in the world" and measures himself "on a footing of equality with them."[47] Stephen Darwall makes much of this passage in his recent book.[48] He believes that there is an important conception of dignity to be found in Kant's work, which has much more to do with the way in which we elicit respect for ourselves from others by making what he calls "second-person" demands on them, than with any notion of the objective preciousness of our moral capacity.[49] Darwall, though, is reluctant to give up on the *Groundwork* definition. He pays lip-service to it. He says that the "moral requirements that interest him "structure and give expression to the distinctive value that persons equally have: dignity, a 'worth that has no price.'"[50] But that last expression is a wheel that turns nothing in Darwall's account. Everything has to do with the

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[45] *The Metaphysics of Morals* 6: 435

[46] "[F]rom our capacity for internal lawgiving and from the (natural) human being's feeling himself compelled to revere the (moral) human being within his own person, at the same time there comes exaltation of the highest self-esteem, the feeling of his inner worth, in terms of which he is above any price and possesses an inalienable dignity, which instills in him respect for himself." Kant, MM, 6: 435-6.

[47] Ibid., 6: 435-6.

[48] Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Harvard University Press, 2006), Ch. 6

[49] This is not the place to consider the criticisms of Darwall's broader position by Jay Wallace etc.

[50] Darwall, *The Second-Person Standpoint*, p. 119.

generation of respect through second-person demands. "Worth beyond price" is just decoration.

A more promising approach is indicated in a recent paper by Darwall's colleague at Michigan, Elizabeth Anderson.[51] Anderson has been exploring the notion of "commanding value," which if it works may bridge the gap between dignity as value-beyond-price and dignity as rank or authority. She's interested in the way Kant appropriated and transformed ideas about honor: a man of honor treats his independence and self-esteem as something above price; he would not trade it for anything in the world, certainly not for the sake of material interest. This bridges exactly the gap that I'm worrying about. And Kant's transformation of it is precisely a universalization of the ethic of honor.[52] If Professor Anderson is right about this, then I should rethink my claim that the *Groundwork* definition has little to offer the modern jurisprudence of dignity.

I have no doubt about the importance of the ideas that Kant associates with "dignity" in the *Groundwork* definition: fundamental worth or value beyond price, the insistence that human persons are not to be traded off against each other. But, taken on its own, it has had a deplorable influence on philosophical discussions of dignity and it has led many lawyers, many of whom are slovenly anyway in these matters, lazily to assume that "dignity" in the law must convey this specific Kantian resonance.[53] Kant's later work does indeed accord with the idea of dignity as a ranking status. But not his fundamental equation in the *Groundwork* of "*Würde*" with value beyond price," at least not without the elaboration that Elizabeth Anderson has offered.

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[51] See Elizabeth Anderson, "Emotions in Kant's later Moral Philosophy: Honor and the Phenomenology of Moral Value," unpublished draft.

[52] Anderson, "Emotions in Kant's Later Moral Philosophy," p. 21: "The ethic of honor reserves respect, the status of being a bearer of commanding value … exclusively to people of superior social rank. [But] Kant's ethic universalizes respectful standing to all rational agents."

[53] See, for example Stephen J. Heyman, *Free Speech and Human Dignity* (New Haven; Yale University Press, 2008), p. 39, simply defining dignity as "near absolute worth." See also Schachter, "Human Dignity as a Normative Concept," 849 equating dignity with "the Kantian injunction to treat every human being as an end, not as a means and G.P. Fletcher, "Human Dignity as a Constitutional Value," 22 *U. W. Ontario L. Rev.* 171 (1984).

I am going to say more in a moment about conceptions that equate human dignity with the sacred worth or value of human life. Before I do, let me just cite one example of the legal use of a Kantian conception of dignity as a simple conception of human worth precluding trade-offs.[54] In a well-known case, the Constitutional Court of Germany considered a statute passed in the wake of the 9/11 terrorist attacks, permitting the *Luftwaffe* to shoot down airliners that had been taken over by terrorists. The German Constitutional Court held that was not compatible with Article One of the Basic Law, which says "[h]uman dignity is inviolable." It is "absolutely inconceivable," said the Court, under the Article One guarantee of dignity to intentionally kill … the crew and the passengers of a hijacked plane," even when they are in a situation that is hopeless for them,"[55] that is, even when they are "doomed anyway." "[H]uman dignity enjoy[s] the same constitutional protection regardless of the duration of the physical existence of the individual human being." It's an admirable and brave decision, and it may be right. But it takes "dignity" in a direction that leaves behind many of its familiar connotations.

8. Catholic teaching on human dignity

There are "absolute worth" accounts of dignity and there are "ranking status" accounts. I favor the second, but right now I am trying to do

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[54] For the Kantian provenance of the dignity provision in the German Basic Law, see Fletcher, "Human Dignity as a Constitutional Value," at 178, and the sources cited therein. Fletcher is convinced that the modern constitutional notion of dignity is entirely Kantian: see ibid., 174. See also Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law*, 19 (2008) 655, at 665.

[55] Bundesverfassungsgericht, Feb. 15, 2006, 115 BVerfGE 118, available at http://www.bundesverfassungsgericht.de/en/decisions/rs20060215_1bvr035705en.html . "[T]he assessment that the persons who are on board a plane that is intended to be used against other people's lives … are doomed anyway cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being … Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity."

justice to the first, at least in the currency of the scarce time available for this lecture. So here's another well-known conception on the "absolute worth" side of things.

Roman Catholic social teaching about the absolute worth of each human life (starting from conception) about the sanctity of life, and the absolute character of the prohibition on murder, abortion, euthanasia, and scientific exploitation of embryos is sometimes expressed using the term "dignity."[56] We are told of "the almost divine dignity of every human being."[57] We are told that "human beings have a special type of *dignity* which is the basis for … the obligation all of us have not to kill them"?[58] This theme is particularly familiar from Catholic doctrine concerning abortion, which cites "the dignity of the unborn child" as the basis for an absolute prohibition on abortion,[59] and holds also that "the use of human embryos or fetuses as an object of experimentation constitutes a crime against their dignity as human beings."[60] What do we make of this?

Well, the view that I take is similar to my view of Kant's definition of "*Würde*" in the *Groundwork*. I don't understand why "dignity"—with its own distinctive connotations—is a good term to use to do work that might be done as well by "worth" or "sacred worth".

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[56] See Pope John Paul II's encyclical, *Evangelium Vitae* (March 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html

[57] Ibid., § 25. See also ibid., §§ 34 and 38). "Why is life a good? … The life which God gives man is quite different from the life of all other living creatures, inasmuch as man, although formed from the dust of the earth … is a manifestation of God in the world, a sign of his presence, a trace of his glory. … Man has been given a sublime dignity, based on the intimate bond which unites him to his Creator: in man there shines forth a reflection of God himself. … The dignity of this life is linked not only to its beginning, to the fact that it comes from God, but also to its final end, to its destiny of fellowship with God in knowledge and love of him."

[58] Patrick Lee and Robert George, "The Nature and Basis of Human Dignity," *Ratio Juris*, 21 (2008), 173.

[59] EV § 44.

[60] EV §63. For discussion, see also *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington D.C., 2008), available at http://www.bioethics.gov/reports/human_dignity/index.html

I am aware that nothing I say here will persuade Catholics or Kantians to adopt different terminology. And the Catholic account does not altogether ignore alternative approaches to dignity. The sort of conception I am developing in these lectures presents dignity as a rank or status that a person may occupy in society, display in his bearing, and exhibit in his speech and actions. But what about the dignity of those who cannot control their self-presentation or cannot speak up for themselves? John Paul II's encyclical, *Evangelium Vitae* condemns "the mentality which equates personal dignity with a capacity for verbal and explicit ... communication."

> [O]n the basis of these presuppositions there is no place in the world for anyone who, like the unborn or the dying, is a weak element in the social structure, or for anyone who appears completely at the mercy of others and radically dependent on them, and can only communicate through the silent language of a profound sharing of affection.[61]

The critique is a little overstated. As we saw earlier, dignitary provisions are particularly important for those who are "completely at the mercy of others."[62] But I think the former pope was referring to those who are incapable of speaking for themselves or controlling their self-presentation even if they were permitted to. Certainly we do have to give an account of how human dignity applies to infants and to the profoundly disabled. My own view is that this worry should not necessarily shift us away from a conception that involves the active exercise of a legally-defined status. But it does require attention. I believe it can be addressed by the sort of structure that John Locke introduces into his theory, when he said of the rank of equality that applies to all humans in virtue of their rationality: "Children, I confess, are not born *in* this full state of equality, though they are born *to* it."[63]

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[61] *Evangelium Vitae*, § 19.

[62] *Supra*, section 3 (beginning).

[63] Locke, *Two Treatises*, II, § 55. [Value derived from dignity – like the value of a infant prince of the royal blood.]

Like heirs to an aristocratic title, their status looks to a rank that they *will* occupy (or are destined to occupy); but it doesn't require us to invent a different sort of dignity altogether for them in the meantime.

Nothing I have said is intended to refute or cast doubt on the Catholic position regarding the sanctity of life.[64] (any more than my critique of Kant casts doubt on his view about trade-offs.) We are arguing here about "what" dignity means, not about the permissibility of abortion.

And I certainly don't think that any of this shows that dignity (whether in the Catholics' hands or in general) is a stupid or useless concept. Stephen Pinker and Ruth Macklin[65] say it does. But they say this just because they are annoyed that Catholics and other "theocons" oppose substantive positions (e.g., about stem-cell experimentation) that they support and because they fear that the word "dignity" might intensify that opposition. Pinker and Macklin are not really interested in the analysis of dignity. They oppose the Catholic use of the word because they are politically annoyed by the positions it conveys.[66] They

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[64] It would be wrong to give the impression that the Catholic use of "dignity" is confined to issues like abortion and stem-cell research. It is also used as the basis of an extensive and far-reaching doctrine of human rights, and in that regard it covers a lot of the ground that any theory of dignity has to cover: "Whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, or wilful self-destruction, whatever violates the integrity of the human person, such as mutilation, torments inflicted on body or mind, attempts to coerce the will itself; whatever insults human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children; as well as disgraceful working conditions, where people are treated as mere instruments of gain rather than as free and responsible persons; all these things and others like them are infamies indeed. They poison human society, and they do more harm to those who practise them than to those who suffer from the injury. Moreover, they are a supreme dishonour to the Creator."-- Second Vatican Council Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, 27, quoted with forceful approval in EV, § 3.

[65] Stephen Pinker says that "'dignity' is a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it." He adds: "The sickness in theocon bioethics [involves] imposing a Catholic agenda on a secular democracy and using "dignity" to condemn anything that gives someone the creeps."—Steven Pinker, The Stupidity of Dignity, *The New Republic* May 28, 2008, available at http://www.tnr.com/story_print.html?id=d8731cf4-e87b-4d88-b7e7-f5059cd0bfbd See also Ruth Macklin, "Editorial: Dignity is a useless concept," *British Medical Journal* 327 (2003) 1419, at 1420 (available at http://www.bmj.com/cgi/content/full/327/7429/1419).

[66] The tone of Pinker's annoyance is given by questions like this: "How did the United States, the world's scientific powerhouse, reach a point at which it grapples with the ethical challenges of

have little interest in what "dignity" might mean if it were not associated with such opposition to abortion or stem-cell research or whatever. [67]

9. Rank

My view of dignity is that we should contrive to keep faith somehow with its ancient connection to noble rank or high office.

In Roman usage, *dignitas* embodied the idea of the honor, the privileges and the deference due to rank or office,[68] perhaps also reflecting one's distinction in holding that rank or office.[69] Of course Latin "*dignitas*" is not necessarily English "dignity" any more than Kantian "*Würde*" is. But the Oxford English Dictionary gives as its second meaning for the term "Honourable or high estate, position, or

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twenty-first-century biomedicine using Bible stories, Catholic doctrine, and woolly rabbinical allegory?"

[67] This is perhaps less true of Pinker than it is of Macklin. Macklin (op. cit.) simply says that "autonomy" can do anything useful that "dignity" is supposed to do. Pinker (op. cit.) says: "The perception of dignity … elicits a response in the perceiver. Just as the smell of baking bread triggers a desire to eat it, and the sight of a baby's face triggers a desire to protect it, the appearance of dignity triggers a desire to esteem and respect the dignified person. This explains why dignity is morally significant: We should not ignore a phenomenon that causes one person to respect the rights and interests of another. But it also explains why dignity is relative, fungible, and often harmful. Dignity is skin-deep: it's the sizzle, not the steak; the cover, not the book. What ultimately matters is respect for the person, not the perceptual signals that typically trigger it. Indeed, the gap between perception and reality makes us vulnerable to dignity illusions. We may be impressed by signs of dignity without underlying merit, as in the tin-pot dictator, and fail to recognize merit in a person who has been stripped of the signs of dignity, such as a pauper or refugee."

[68] See Teresa Iglesias, "Bedrock Truths and the Dignity of the Individual," *Logos: A Journal of Catholic Thought and Culture*, 4 (2001), 111, at pp. 120-1: "The idea of *dignitas* was central to Roman political and social life and closely related to the meaning of honor. Political *offices,* and as a consequence the *persons holding them*, like that of a senator, or the emperor, had *dignitas*. … The office or rank related to *dignitas* carried with it the obligation to fulfil the duties proper to the rank. Thus 'decorum,' understood as appropriate dignified behavior, was expected of the person holding the office. … The Roman meaning of *dignitas* played a role in determining distinctions of people in front of the law. There was no equal punishment for everyone for equal offenses in Roman law; everyone was not equal in front of the law. Punishment was conditioned, measured, and determined according to one's *dignitas*."

[69] So the *dignitas* of a Caesar might be different from that of other generals or that of other holders of the office of *pontifex maximus*.

estimation; honour; degree of estimation, rank" and as its third meaning "An honourable office, rank, or title; a high official or titular position."[70]

So people would talk about the dignity of the monarch. A 1690 indictment for high treason against a Jacobite spoke of an "intent to depose the King and Queen, and deprive them of their Royal dignity, and restore the late King James to the government of this kingdom."[71] Blackstone tells us that "the ancient jewels of the Crown are held to be … necessary to maintain the state, and support the dignity, of the sovereign for the time being."[72] And the 1399 statute that took the crown from off the head of Richard II stated that he "renounsed and cessed of the State of Kyng, and of Lordeshipp and of all the Dignite and Wirsshipp that longed therto."[73]

It is not just monarchy. Kant talks about the various dignities of the nobility.[74] In England, nobles had dignity, in the order of duke, marquis, earl, viscount, baron.[75] Degrees have dignity according to law; certainly a doctorate does.[76] Clergymen have dignity, or some do;[77] and a bishop

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[70] And Samuel Johnson defined dignity as "a rank of elevation" (Samuel Johnson, A Dictiionary of the English Langauge (Philadelpia 1819, cited by Michael Meyer in "Dignity as a (Modern) Virtue," in Kretzmer and Klein (eds.) *The Concept of Human Dignity*, 195, at p. 196.

[71] *Patrick Harding's Case*, 86 Eng. Rep. 461, 2 Ventris, 315. And a felony would be said to be committed "against the peace of our … Lord the King, his crown and dignity."

[72] Comm. Bk. II, Ch. 28

[73] 1399 Rolls Parl. III. 424/1, as cited in the *Oxford English Dictionary*, entry for "dignity."

[74] MM 6: 330

[75] In Blackstone's descending order: Blackstone, Commentaries , I, Ch. 12.

[76] *The King v. The Chancellor, Masters and Scholars of the University of Cambridge, or Doctor Bentley's Case*, 92 Eng. Rep. 818, Fortescue, 202 (1737): "[A doctorate is a dignity] It is a dignity meerly civil, granted originally by the Crown, and conferred by the university; the dignity is the same, whether applied to a civil or spiritual person. What was said about degrees being only licences to teach was wrong said ; for licences to teach were long before degrees, which were about the year 1200, and there was teaching in the schools long before there were universities."

[77] Though note that not all holy orders are technically dignities:: "The civilians divided spiritual functions into three degrees. First, a function, which hath a jurisdiction; as bishop, dean, &c. Secondly, a spiritual administration, with a cure; as parson of a church, &c. Thirdly, they who have neither cure nor jurisdiction; as prebends, chaplains, &c. And they defined a dignity to be *administratio ecclesiastica cum jurisdictione, vel potestate conjunctd*, and thereby they exclude the two last degrees from being any dignity; … an archdeacon is not a name of dignity: … a parson is not a name of dignity. ... a provost is not a name of dignity. … a precentor is not a

has higher dignity than an abbot.[78] Ambassadors have dignity according to the law of nations.[79] [80] And the French *Declaration of the Rights of Man and of the Citizen*, approved by the National Assembly in 1789 says in Article 6 that "[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents."

Now, this equation of dignity and rank may seem an unpromising idea for human rights discourse, inasmuch as human rights ideology is associated specifically with the *denial* that humans have inherent ranks distinguishing some of them as worthy of special dignity in the way that a duke or a countess might be.[81] However, I am reluctant to leave the matter there. I suspect that this *ranking* sense of "dignity" offers something more to an egalitarian theory of rights than meets the eye.

Some have suggested that the old connection between dignity and rank was superseded by a Judaeo-Christian notion of the dignity of humanity as such,[82] and that this Judaeo-Christian notion is really quite different in character. I'm not convinced. I don't want to underestimate the breach between Roman-Greek and Judaeo-Christian ideas,[83] but I believe that as far as dignity is concerned the connotation of *ranking status* remained, and that what happened was that it was transvalued rather than superseded.[84]

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name of dignity. … a chaplain is not a name of dignity." (*Boughton v. Gousley*, Cro. Eliz. 663 78 Eng. Rep. 901 (1599).)

[78] *Cootes v. Atkinson*, 75 Eng. Rep. 1072, Gouldsborough, 171.

[79] *Taylor v. Best*, 139 Eng. Rep. 201, 14 C. B. 487.

[80] Poland's Constitution says that "[j]udges shall be granted … remuneration consistent with the dignity of their office…." (Article 178(2).)

[81] In America, for example, we associate the egalitarian rights-talk of (say) the opening lines of the Declaration of Independence with the Constitution's insistence that "[n]o title of nobility shall be granted by the United States."—U .S. Constitution, Article 1: 9 (8)

[82] Who?

[83] See, for example, Joshua A. Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (Oxford: Oxford University Press, 2008).

[84] Even those who think in terms of a fundamental opposition between the rank notion of dignity and the human rights notion of dignity also discern a dynamic connection. Teresa Iglesias

Let's explore some ways in which the idea of noble rank may be made be compatible with an egalitarian conception of dignity.[85]

(i) I said a few moments ago that the Catholic equation of dignity with sacredness of life seems quite different from the idea of dignity as status.[86] Yet when you think about it the Catholic notion is not unconnected with rank.

When we talk about *human* dignity, we may be saying something about rank but not about the rank of some humans over others. We may be talking about rank of humans generally in the great chain of being. The dictionary cites Richard Hooker as writing in *Ecclesiastical Polity*, about stones' being "in dignitie of nature inferior to plants."[87] Well, presumably in this ranking, plants are in turn inferior in dignity to beasts, and beasts are inferior to humans, and humans are inferior to angels, and all of them of course are inferior in dignity to God. Catholic dignitary teaching continues to draw on this idea of the special rank accorded to all humans in the great chain of being. Unlike the lower

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("Bedrock Truths") distinguishes between what she calls "the Universal and Restricted Meanings of Dignity."

> Consulting the dictionary we can find that the term "dignity" connotes "superiority," and the "decorum" relating to it, in two basic senses. One refers to superiority of role either in rank, office, excellence, power, etc., which can pertain only to *some* human beings. I will identify this as the "restricted" meaning. The other refers to the superiority of intrinsic worth of every human being that is independent of external conditions of office, rank, etc. and that pertains to *everyone*. In this universal sense the word "dignity" captures the mode of being specific to the human being *as* a human being. This latter meaning, then, has a universal and unconditional significance, in contrast with the former that is restrictive and role-determined. (Iglesias op. cit., p. 120)

She associates the restrictive use with classical Roman culture and the universal use with notions of inherent human worth that emerged in Jewish ethics and theology. But though, as she says, "the meaning of dignity has been historically marked, up to the present time, by a tension between its universal and its restrictive meanings," what has happened is that "historically, the restrictive Roman meaning of *dignitas* assigned to office and rank, and used as a discriminatory legal measure, began to be used with a new meaning of universal significance that captures the equal worth of everyone." (Iglesias p. 122.)

[85] JW, "Dignity and Rank"

[86] In section 9: text accompanying note 74.

[87] The OED citation is as follows: "1594 HOOKER Eccl. Pol. I. vi. (1611) 12 Stones, though in dignitie of nature inferior to plants."

beings, each of us is made in the image of God and each of us bears a special dignity in virtue of that fact.[88]

It is often a striking implication of this sort of ranking that, *within* each rank, everything is equal.[89] This has been hugely important for theories of human equality (in John Locke's work, for example).[90] Humans rank higher than other creatures because, with reason and free will, they have God's special favor and are created in His image; this is a rank in which each of us shares, without distinction or discrimination.[91]

(ii) Or picture this. In an earlier article on "Dignity and Rank,"[92] I mentioned a certain *transvaluation of values* that seemed to happen in late-eighteenth-century romantic poetry. One begins with an idea of dignity associated with the high rank of some humans (compared to others), and then one *reverses* that ordering ironically or provocatively to claim that the high rank of some is superficial or bogus, and that it is the lowly man or the virtues of very ordinary humanity that enjoys true dignity. The OED cites a passage from William Wordsworth to illustrate this: "True dignity abides with him alone, [w]ho, in the silent hour of

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[88] This may be something that Darwin is supposed to have destroyed, though there is also the observation of George Eliot to the effect that "[i]f Darwin's theory should be true, it will not degrade man; it will simply raise the whole animal world into dignity, leaving man as far in advance as he is at present."

[89] There may, however, be divisions of ranks—as in the ranks of different kinds of beast. See, for example, Locke 1988, p. 158 (First Treatise, § 25): "[I]n the creation of the brute inhabitants of the earth, [God] first speaks of them all under one general name, of living creatures, and then afterwards divides them into three ranks."

[90] So, for example, John Locke wrote at the beginning of the *Second Treatise* that there is "nothing more evident, than that creatures of the same species and *rank*, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection … [B]eing furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorise us to destroy one another, as if we were made for one another's uses, as the inferior *ranks* of creatures are for ours." (Locke, *Second Treatise*, §§ 4 and 6; pp. 269-71.)

[91] Get cite from Aquinas in Eckhart's essay in Kretzmer and Klein (eds.) *The Concept of Human Dignity*, 44. Also figure out where to use Lorberbaum on the idea that originally it was just the king (in Babylonian ideology) who was held to be created in the image of God: Lorberbaum, in ibid., 55.

[92] Waldron, "Dignity and Rank," p. __.

inward thought, [c]an still suspect, and still revere himself, [i]n lowliness of heart."[93] Robert Burns is the real master of this move, with the remarkable reversal of rank/dignity in the three central stanzas of "For A' That and For A' That."[94]

> A prince can mak a belted knight, / A marquis, duke, an' a' that;
> But an honest man's abon his might, / Gude faith, he maunna fa' that!
> For a' that, an' a' that, / Their dignities an' a' that;
> The pith o' sense, an' pride o' worth, / Are higher rank than a' that.

And Burns looks forward to a time when "Sense and Worth, o'er a' the earth, / Shall bear the gree, an' a' that." And then the great peroration of human brotherhood, founded on this equality:

> For a' that, an' a' that, / It's coming yet for a' that,
> That Man to Man, the world o'er, / Shall brothers be for a' that.

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[93] OED: "1795 WORDSW. Yew-tree Seat, True dignity abides with him alone Who, in the silent hour of inward thought, Can still suspect, and still revere himself, In lowliness of heart."

[94]The words of Robert Burns:

> What though on hamely fare we dine, / Wear hoddin grey, an' a that;
> Gie fools their silks, and knaves their wine; / A Man's a Man for a' that:
> For a' that, and a' that, / Their tinsel show, an' a' that;
> The honest man, tho' e'er sae poor, / Is king o' men for a' that.
>
> Ye see yon birkie, ca'd a lord, / Wha struts, an' stares, an' a' that;
> Tho' hundreds worship at his word, / He's but a coof for a' that:
> For a' that, an' a' that, / His ribband, star, an' a' that:
> The man o' independent mind / He looks an' laughs at a' that.
>
> A prince can mak a belted knight, / A marquis, duke, an' a' that;
> But an honest man's abon his might, / Gude faith, he maunna fa' that!
> For a' that, an' a' that, / Their dignities an' a' that;
> The pith o' sense, an' pride o' worth, / Are higher rank than a' that.

The lowly person's toil, clothes and diet may be homely, but "the man of independent mind" does not pay attention to things like that. He pays attention to honesty and good sense in his attribution of "true rank." Notice also how Burns straddles two positions: one is that merit is and ought to be the basis of true rank and dignity; the other is that rank and dignity are associated with the inherent worth of human beings:

> Then let us pray that come it may, / (As come it will for a' that,)
> That Sense and Worth, o'er a' the earth, / Shall bear the gree, an' a' that.
> For a' that, an' a' that, / It's coming yet for a' that,
> That Man to Man, the world o'er, / Shall brothers be for a' that.

The use of "dignity" in this poetry is but an instance of a broader transvaluation that I believe has taken place with regard to dignity generally: a sea-change in the way "dignity" is used, enabling it to become a leading concept of *universal* rights (as opposed to special privileges), and bringing into the realm of rights what James Whitman has called "an extension of formerly high-status treatment to all sectors of the population."[95] But we see this only if we understand the *dynamics* of the movement between modern notions of human dignity and an older notion of rank. The older notion is not obliterated; it is precisely the resources of the older notion that are put to work in the new.[96]

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[95] James Whitman, "Human Dignity in Europe and the United States'' in G. Nolte (ed.) *Europe and US Constitutionalism* (Council of Europe Publishing, 2005), 95, at p. 97 argues that "[t]he core idea of 'human dignity' in Continental Europe is that old forms of low-status treatment are no longer acceptable. … 'Human dignity,' as we find it on the Continent today, has been formed by a pattern of leveling up, by an extension of formerly high-status treatment to all sectors of the population."

[96] You can read Blackstone as an apostle of dignity as differential rank, for example in his figure of "that gradual scale of dignity, which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises" (Blackstone, *Commentaries*, I, Ch. 2), in his list of the different ranks of noble dignity—prince, duke, marquess, viscount, earl, and baron (ibid., I, Ch. 12)—and his insistence that even "[t]he commonalty … are divided into several degrees" with various ranks of knighthood (garter, banneret, baronet, bath, and bachelor); then "colonels, serjeants at law, and doctors; Esquires, Gentlemen, Yeomen; Tradesmen, Artificers, Labourers." (ibid., I, Ch. 12). But even Blackstone discerns a dynamism in the dignities of the British polity: the abolition, first, of the lowest ranks of servility (the villeins and the bondsmen), which moved a large number of people *up* in rank (Blackstone, *Commentaries*, IV, Ch. 33: "From so complete and well concerted a scheme of servility, it has been the work of generations, for our ancestors, to redeem themselves and their posterity into that state of liberty, which we now enjoy"). And he also traced a broader reform in which the general spirit of liberty, which he thought had always pervaded the constitution, began to be taken seriously in its application to individuals—"Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay even to assert them was treated as the height of sedition and rebellion." Blackstone, *Commentaries*, IV, Ch. 33—as an enlightened, scientific, and industrious people "began to entertain a more just opinion of the dignity and rights of mankind" (Blackstone, *Commentaries*, IV, Ch. 33). The sense here is not of an abandonment of distinctions of rank, but as Whitman calls it, "an extension of formerly high-status treatment to all sectors of the population" (Whitman, "Human Dignity in Europe and the United States'' at p. 97). Of course relics of aristocratic nobility remain—and remained forceful and important in Blackstone's day—but even the old Tory jurist himself could see that there was change in the air, and that we were not just leveling down, but that we were beginning to treat the common person as something to be reckoned with.

So there's my hypothesis: the modern notion of *human* dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.

11. Rank and Equal Rights[97]

Something like this was noticed many years ago by Gregory Vlastos, whom I knew at Berkeley in the '80s, in a neglected essay "Justice and Equality."[98] In an extremely interesting discussion of equality and rights, Vlastos argued that we organize ourselves not like a society *without* nobility or rank, but like an aristocratic society which has just one rank (and a pretty high rank at that) for all of us. Or (to vary the image slightly), we are not like a society which has eschewed all talk of caste; we are like a caste society with just one caste (and a very high caste at that): every man a Brahmin.[99] Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone's person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege.

I take Vlastos's suggestion very seriously indeed. If he is right, then we can use aspects of the traditional meaning of dignity, associated

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[97] "Dignity and equality are interdependent,"--Arthur Chaskalson, "Human Dignity as a Constitutional Value" in Kretzmer and Klein (eds.) *The Concept of Human Dignity*, 133, at 140

[98] Gregory Vlastos, "Justice and Equality," in Jeremy Waldron (ed.), *Theories Of Rights* (Oxford University Press, 1984), 41, originally published in 1962.

[99] Vlastos, "Justice and Equality," p. 54. Now, unlike Robert Burns, Vlastos wanted to separate the issues of merit and inherent worth. He imagined an interlocutor who only understood merit—what a person had done to deserve something or what skills and abilities he had that might make him useful to others or to society—and whose whole basis for thinking about human beings was a merit system (or, as Vlastos abbreviates it, the *M*-system). A person who was accustomed to the *M*-system, says Vlastos, would be puzzled by the idea of inherent human worth:

> This last comparison is worth pressing: it brings out the illuminating fact that in one fundamental respect our society is much more like a caste society (with a *unique* cast) than like the *M*-system. The latter has no place for a rank of dignity which descends on an individual by the purely existential circumstance (the "accident") of birth and remains his unalterably for life. To reproduce this feature of our system we would have to look not only to caste-societies, but to extremely rigid ones, since most of them make some provision for elevation in rank for rare merit or degradation for extreme demerit. In our legal system no such thing can happen: even a criminal may not be sentenced to second-class citizenship. And the fact that first-class citizenship, having been made common, is no longer a mark of distinction does not trivialize the privileges it entails. It is the simple truth, not declamation, to speak of it, as I have done, as a "rank of dignity" in some ways comparable to that enjoyed by hereditary nobilities of the past. (Vlastos op. cit. p. 54)

with high or noble rank, to cast light on our conceptions of human rights.[100]

Think of the change that comes when one views an assault on an ordinary man or woman, not just as a crude physical interference, but as a sort of sacrilege (like assaulting a prince or a duke). It is a salutary recharacterization of this familiar right, for it reminds us that a dignitarian attitude towards the bodies of others is one of sacral respect, not just nonchalant forbearance.

Or think of the proverbial saying "An Englishman's home is his castle." That too reflects something of the generalization of rank. The idea is that we are to live secure in our homes, with all the normative force that a noble's habitation of his ancestral fortress might entail. The modesty of *our* dwellings does not signify that the right of privacy or security against incursion, search, or seizure is any less momentous.

A third example: the rights of prisoners of war, and the insistence in Common article 3 of the Geneva Conventions that ''outrages upon personal dignity, in particular humiliating and degrading treatment'' shall be prohibited. In ages past, chivalry might require that noble warriors, such as knights, be treated with dignity when they fell into the hands of hostile powers; but this was hardly expected in the treatment of the common soldier; they were abused and probably slaughtered. Traces of differential dignity remain: you'll remember Colonel Nicholson (played by Alec Guinness) in the David Lean movie, *The Bridge on the River Kwai*, who insists to the Japanese commander of a prisoner-of-war camp that he and his officers are exempt by the laws of war from manual labor, even though the private soldiers under his command may legitimately be forced to work.[101] But modern prohibitions on degrading

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[100] Here I draw on some extensive work at the end of my "Dignity and Rights" essay.

[101] David Lean, *The Bridge on the River Kwai* (based on Pierre Boulle's novel, *The Bridge over the River Kwai* (1957). Colonel Nicholson clearly believes that forcing the officers to work would be degrading, and he suffers a great deal as a result of the Japanese reaction to his refusal to accept this degrading treatment. Intriguing though this is, however, it is pretty clear that the reference to degrading treatment in the modern Geneva Conventions is not about insensitivity to military rank. It depends on an idea of dignity that is more egalitarian than that. See also the discussion in Waldron, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves," available at http://ssrn.com/abstract=1278604 .

treatment are oriented specifically to the common soldier, the ordinary detainee, solicitous of their dignity in ways that would have been inconceivable in times past for anyone but officers and gentlemen.

(I don't have to remind you how fragile this change is and how close we have come in recent practices of detention in the war on terror to a frightening leveling-*down*, as we characterize the extension of formerly high status treatment to all detainees as "quaint and obsolete." I shall say more about these unpleasant realities tomorrow. For now, it is important to remember that, in these lectures, we are exploring the shape of a *normative* universe, which may or may not succeed in governing or modifying all aspects of our practice. This is as true in law as it is in morality.)

No doubt there are some aristocratic privileges that cannot be universalized, cannot be extended to all men and women. Some we wouldn't want to universalize: a *droit de seigneur*, for example, in matrimonial relations. And some when they are extended will change their character somewhat: a nobleman might insist as a matter of dignity on a right to be consulted, a right to have his voice reckoned with and counted in great affairs of state; if we generalize this—and *really* generalize it—giving *everyone* a right to have his or her voice reckoned with and n counted in great affairs of state, then what was formally a high and haughty prerogative might come to seem as mundane as the ordinary democratic vote accorded to tens of millions of citizens. And citizens sometimes complain that their votes are meaningless, and philosophers support them in this complaint.[102] But the dignity

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[102] See Dworkin, for example, in *Freedom's Law*, pp. __. In a different way, Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Constant: Political Writings*, edited by Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 309, at 316, gives voice to this concern when he contrasts the participatory rights of the ancients with those of modern suffrage: "The share which in antiquity everyone held in national sovereignty was by no means an abstract presumption as it is in our own day. The will of each individual had real influence: the exercise of this will was a vivid and repeated pleasure. … Everybody, feeling with pride all that his suffrage was worth, found in this awareness of his personal importance a great compensation. This compensation no longer exists for us today. Lost in the multitude, the individual can almost never perceive the influence he exercises. Never does his will impress itself upon the whole; nothing confirms in his eyes his own cooperation. The exercise of political rights, therefore, offers us but a part of the pleasures that the ancients found in it." But maybe the

hypothesis reminds us that, although it is shared with millions of others, this vote is not a little thing. It too can be understood in a more momentous way, as the entitlement of each person, as part of his her dignity as an (equal) peer of the realm, to be consulted in public affairs

There's more to say. But I think all this is tremendously helpful in deepening our talk of human dignity and enriching our understanding of rights. The idea that both notions are connected with ideas of status and rank is a stimulating one, and I am heartened by the fact that other theorists are also beginning to explore this line.[103] In tomorrow's lecture, I want to say more about the way status works in law, and more too—much more—about how the law defines a powerful dignity for us all, in the ways it gives distinctive *dignitarian* content to the ideal of equality before the law.

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better view is that of Judge Learned Hand, quoted in Dworkin, *Freedom's Law*, pp. 342-3who contemplated the possibility of being "ruled by a bevy of Platonic Guardians"

> I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the Sheep."

[103] E.g., Allen Buchanan, "The Egalitarianism of Human Rights," forthcoming in special issue of *Ethics* on Griffin's book, *On Human Rights.*

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Lecture 2: Law, Dignity and Self-Control

Jeremy Waldron

1. Recap from previous lecture

In yesterday's lecture, we were toying with the idea that "dignity" is a term used to indicate a high-ranking legal, political, and social status, and that the idea of *human* dignity is the idea of the assignment of such a high-ranking status to everyone.

We know that human dignity can be treated as a moral concept. But we were pursuing a hunch that we might do better by considering first how dignity works as a legal concept—and then model what we want to do morally with it on that. I argued that we should consider ways in which the idea of human dignity keeps faith with the old hierarchical system of dignity as noble or official rank, and we should view it in its modern form as an equalization of high status rather than as something that eschews talk of status altogether.

Today I want to pursue this further by considering the variety of ways in which law vindicates dignity in this sense.

2. Law as solicitous of rank

Historically law has done all sorts of things to protect and vindicate dignity in the sense of rank or high status. Law would protect nobles against imputations against their dignity, for example, by the offense (and the tort) of *scandalum magnatum*.[104] It would protect the

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[104] *The Earl of Lincoln against Roughton*, 79 Eng. Rep. 171 ; Cro. Jac. 196 (1606): "*Scandalum magnatum*; for that the defendant spake these words; "My lord (innuendo the said Earl of Lincoln) is a base earl, and a paltry lord, and keepeth none but rogues and rascals like himself." The defendant pleaded not guilty; and it was found against him. After verdict, it was moved in arrest of judgment, that these words were not actionable; for they touch him not in his life, nor in any matter of his loyalty, nor import him in any main point of his dignity, but are only words of spleen concerning his keeping of servants, which is not material. Yelverton and Fleming seemed to incline to that opinion; but Williams and Croke to the contrary, because they touched him in his honour and dignity; and to term him "base lord" and "paltry earl," is matter to raise contempt betwixt him and the people, or the King's indignation against him: and such general words in case of nobility will maintain an action, although it will not in case of a common person."

exclusiveness of rank with things like sumptuary laws, and requirements of proper address, deference, privilege, and precedence.

If I am right that dignity is *still* the name of a rank—only now an equally distributed one—and that this is a different matter from there being no rank at all in the law, then we would expect modern law also to commit itself to protection and vindication of the high rank or dignity of the ordinary person.[105] And so it does, in various ways.

We have seen how law tries to protect individuals against treatment that is degrading.[106] That's one very elementary way in which law protects dignity.

Another is protection from insult—a sort of democratized *scandalum magnatum*. In countries where hate speech and group libel are prohibited, people are required to refrain from the most egregious public attacks on one another's basic social standing. A great many countries use their laws to protect ethnic and racial groups from threatening, abusive, or insulting publications calculated to bring them into public contempt.[107] The United States is an exception in the latitude it currently gives to hate speech; but even here the notion of a dignitarian basis for banning hate speech is often cited in the constitutional debate, where it is understood as posing a freedom versus dignity dilemma.[108] Elsewhere these restrictions are not widely viewed as violations of individual rights; most countries say they have enacted them pursuant to their obligations under the International Covenant on Civil and Political

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[105] So, for example, German constitutional law talks, in connection with dignity, of "the social entitlement to value and regard" or the "entitlement to respect ... in the social sphere"? Cite to Robert Post, IGS paper, p. 19. Refer back to the discussion of the shooting-down-airliners case in Tanner 1 (end of section 8).

[106] I mean provisions like the International Covenant on Civil and Political Rights (Article 7: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment"), the European Convention on Human Rights (Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment") and Common Article 3 of the Geneva Conventions and Article 8 of the Rome Statute of the International Criminal Court which prohibit "outrages upon personal dignity."

[107] Cites.

[108] See, for example, Stephen J. Heyman, *Free Speech and Human Dignity* (New Haven; Yale University Press, 2008). But Heyman gives little thought to what dignity means; he simply cites the Kantian notion (p. 39) as "near absolute worth."

Rights, which says that expressions of hatred likely to stir up violence, hostility, or discrimination *must* be prohibited by law.[109]

The other way that law protects dignity is by prohibiting invidious discrimination. This has been very important in South African jurisprudence,[110] where, according to the Constitutional Court, the history of country demonstrates how discrimination "proceeds on [an] assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group." The Court went on: "Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as "second class citizens."[111]

Similarly in Canada.[112] In a 1999 decision, it was said that "the purpose of [the anti-discrimination provisions of the Charter][113] is to prevent the violation of essential human dignity … through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally

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[109] ICCPR, Article 20 (2)

[110] In *Hugo v. President of the Republic President of the Republic of South Africa v. Hugo*, 1997 (4) SA (CC) 1, 1997 (6) BCLR 708 a case concerning gender discrimination, the South African Constitutional Court said that "the purpose of [South Africa's] new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups." (Ibid., at § 92, citing Goldstone J.) And the court said this dignitarian conception lay at the heart of the prohibition of unfair discrimination.

[111] *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125, at § 116. This sounds like a group-dignity idea—protecting the "dignity of the disfavored group." Actually I think it is a matter of individual dignity, protecting individuals against denigration based on shared characteristics or group membership. (For discussions of group dignity and the application of dignity to nations and classes and institutions, see Waldron, "The Dignity of Groups," forthcoming *Acta Juridica (2009),* presently available at http://ssrn.com/abstract=1287174)

[112] I am grateful to Denise Réaume for an understanding of this material. See Denise G. Réaume, "Discrimination and Dignity, 63 *Louisiana LR* 645 (2002-3). See also R. James Fyfe "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev.* 1

[113] Charter §15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

capable and equally deserving of concern, respect and consideration."[114] The Canadian court said that this "overriding concern" with dignity infuses all elements of the discrimination analysis"[115] and it figured that dignitarian ideas could be used to distinguish between invidious and benign discrimination.[116]

Mostly in this lecture I want to talk about a less obvious way in which law protects dignity—a way, though, which is more pervasive and more intimately connected with the very nature of law. For when we think about something like Common Article 3 of the Geneva Conventions, it may strike us as a matter of contingency that dignity is protected in this way; we have seen in recent years how fragile the Geneva Conventions are.[117] Or consider that in 2008, the Supreme Court of Canada decided it would no longer use dignity as the touchstone of its anti-discrimination doctrine.[118] It was persuaded by some pedantic academic articles[119] that "human dignity is an abstract and subjective notion" which is "confusing and difficult to apply." So it turned its back on dignity as the basis of anti-discrimination doctrine.

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[114] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. §51

[115] Ibid.,, § 53-4.

[116] Ibid., § 72: "[A]meliorative" legislation "will likely not violate the human dignity of more advantaged individuals where [their] exclusion … largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation."

[117] President Bush said of Common Article 3 of Geneva Conventions in 2006: "It's very vague. What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation. … [T]he standards are so vague that our professionals won't be able to carry forward the program, because they don't want to be tried as war criminals. … These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law." *Press Conference of the President*, September 15, 2006: http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html

[118] *R. v Kapp* 2008 SCC 41 at § 22: "human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be." Once again, I am grateful to Denise Réaume for this citation.

[119] Cites.

Courts do that sometimes. They just decide to change the basis and direction of doctrine. Are there connections between law and dignity that are less contingent than this?

3. Right-bearer's dignity

One possibility is that even if jurisdictions vary in their readiness to acknowledge specific dignitary rights, still the very form and structure of a right conveys the idea of the right-bearer's dignity. Right-bearers stand up for themselves; they make unapologetic claims on their own behalf; they control the pursuit and prosecution of their own grievances. As Joel Feinberg put it, "A right is … something that can be demanded or insisted upon without embarrassment or shame."[120] The whole business of rights reeks of dignity,[121] [122] —particularly in theories like Feinberg's or in H.L.A. Hart's "Choice Theory" of rights, for example.[123] [124] [125]

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[120] Joel Feinberg, ''Duties, Rights and Claims,'' American Philosophical Quarterly 3, no. 2 (1966): 8.

[121] Alan Gewirth writes: 'The ultimate purpose of the rights is to secure for each person a certain fundamental moral status: that of having rational autonomy and dignity in the sense of being a self-controlling, selfdeveloping agent who can relate to other persons on a basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others.'—Alan Gewirth, "Rights and Virtues," *Review of Metaphysics*, 38 (1985), 752, at p. 743. Also Joel Feinberg "The Nature and Value of Rights" *Journal of Value Inquiry* (1970) 243, at p. 252 suggests that "what is called 'human dignity' may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity simply is to think of him as a potential maker of claims." (I am grateful for this citation to Christopher McCrudden, "Human Dignity in Human Rights Interpretation," *European Journal of International Law* 19 (2008), 655, at p. 680.)

[122] Some may say (cynically) that "dignity" is just a buzz-word, used indiscriminately whenever there is talk of human rights, so it's no accident that it turns up all over the law in this area. Chris McCrudden has speculated that "dignity" operates mostly as "a place holder for the absence of agreement" in human rights discourse. (McCrudden, "Human Dignity," at p. 675.) That may be overly pessimistic, but it does alert us to the fact that it may not be a load-bearing idea. Legal rhetoric is more windy than most. A term that is pervasive is in danger of platitude, and if we are tracking the pervasiveness of "dignity" in law, we must be careful that we are not just on the trail of some embedded rhetorical bombast. It is a fine-sounding phrase and there may be reasons to use it in human rights rhetoric that do not have much to do with the conveying of any determinate content. Sixty years ago, Bertram Morris observed that "[f]ew expressions call forth the nod of assent and put an end to analysis as readily as 'the dignity of man'" (Bertram Morris, "The Dignity of Man," *Ethics*, 57 (1946), 57.)

4. Fuller and internal connections between law and dignity

When Jacques Maritain said that the expression "the dignity of the human person … means nothing if it does not signify that … the human person is the subject of rights" (Jacques Maritain, *The Rights of Man and Natural Law* (New York, Charles Scribner's Sons, 1951) p. 65), he was condemned as uttering platitudes. "The attribution of dignity adds nothing to the attribution of rights," said Alan Gewirth. But that's just the point: dignity is already bound up with rights, particularly in those conceptions of rights that emphasize the active authority of the right-bearer to pursue her own claims at her own discretion (conceptions that present the right-bearer as upstanding, not just the passive recipient of moral or legal concern).

[123] H.L.A. Hart argued, in, "Are There Any Natural Rights?" *Philosophical Review*, 64 (1955), 175 (reprinted in Waldron (ed.) *Theories of Rights*), that crucial to having a right was having the power to determine what another's duty should be (in some regard): "Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice" (ibid., p. 180). Y (the right-bearer) can make a sort of demand upon X, that X is required to pay attention to, and it may be that this is what his dignity amounts to. Hart developed this argument first for natural rights, but he thought (at least for a while) that it was true of legal rights too. But see Hart, "Bentham on Legal Rights" **[citation?]** for the beginnings of a retreat from this position.

[124] Moral philosophers sometimes loosely use the word standing—"moral *standing*"— to characterize human dignity. Stephen Darwall uses it along with status: "the dignity of persons … is the second-person standing of an equal. It is the status of an equal member of the moral community." (Darwall, *The Second-Person Standpoint*, p. 243.) I'm not sure whether Darwall understands these terms "status" and "standing" in anything like their technical legal sense--i.e., whether he is developing an analogy between moral terminology and the language of law, where these terms are originally at home. I'll say more about "status" towards the end of this lecture. But "standing" has a legal use—"*locus standi*"—which refers to a person's ability to bring and control proceedings in a court, on the basis that their rights are affected by the matter they complain of. (You may be greatly offended by the government's program of extraordinary rendition, but you can't go into court to challenge it; only someone affected by it can.) And it is not just a technicality: the law protects a person's dignity by allowing him or her to control proceedings brought in their name for the vindication of their rights.

[125] Please notice that this is not the same as saying that rights are *based on* dignity or *derived from* dignity. The claim is that dignity characterizes claiming one's rights or standing up for one's rights or exercising choice or control over one's rights. That's not the same as saying that dignity is the *foundation* of rights. People have sometimes made a similar mistake about security. From the fact that security (of some interest or liberty) is what one demands when one demands one's rights, they infer that all rights are based on security (and so rights cannot be set up against security or against the activity of the security state.)[125] (For discussion of this misconception, see Liora Lazarus, "Mapping the Right to Security," in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 325.) We must not mistake a characteristic of rights for a foundation. Dignity is characteristic of the way one pursues one's rights; security is the mode in which one wants one's rights guaranteed; both refer to pervasive adverbial aspects of rights; but neither establishes a *foundation*.[125] (See also my complaints about Jim Griffin's foundational claims in Lecture 1.) I think that one can say something similar, too, about the role of freedom in Hart's choice theory of rights and the role of equality in Dworkin's jurisprudence; in neither case is there a genuine *foundation* being identified.)

What about other internal connections between dignity and the forms and procedures of law?[126] Well, we are familiar with something like this in the contrast between internal and external aspects of law's moral connections in the jurisprudence of Lon Fuller.

In his book *The Morality of Law*, Fuller developed an account of what he called the inner morality of law—the formal principles of generality, prospectivity, clarity, stability, consistency, whose observance is bound up with the basics of legal craftsmanship.[127] Legal positivists have sometimes expressed bewilderment as to why Fuller called these internal principles a "morality."[128] He did so because he thought his eight principles had inherent moral significance. It was not only that he believed that observing them made it much more difficult to do substantive injustice; though this he did believe.[129] It was also because he thought observing the principles he identified was itself a way of respecting human dignity:

> To embark on the enterprise of subjecting human conduct to rules involves … a commitment to the view that man is … a responsible agent, capable of understanding and following rules…. Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey … your indifference to his powers of self-determination.[130]

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[126] The idea of an internal relation is a philosophically intriguing one, which I not explore here. Cf. G. E. Moore, "External and Internal Relations," *Proceedings of the Aristotelian Society*, New Series, 20 (1919-20), 40.

[127] Fuller, *The Morality of Law*, esp. Ch. 2.

[128] See, e.g., H.L.A. Hart, "Book Review of Lon Fuller, *The Morality of Law*," *Harvard Law Review* 78 (1965), 1281 at p. 1284. For a characterization of Hart's bewilderment as disingenuous, see Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," *NYU Law Review*, 83 (2008) 1135, esp. pp. 1154-6.

[129] Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1958), 630, at pp. ___.

[130] Lon Fuller, *The Morality of Law*, p. 162.

5. Themes from law: (a) Self-application

These are not just platitudes. Fuller is referring here to a quite specific characteristic of law—its general reliance on what Henry Hart and Albert Sacks in *The Legal Process* called "self application,"[131] i.e. people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state.[132]

Self-application is an important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, self-control, self-monitoring and the modulation of their own behavior in regard to norms that they can grasp and understand.[133]

All this makes ruling by law quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog. It is quite different too from eliciting a reflex recoil with a scream of command. A pervasive emphasis on self-application is, in my view,

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[131] For discussion of the idea of self-application, see Henry M. Hart, And Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 120-1 (William N. Eskridge and Philip P. Frickey eds., 1994): "[E]very directive arrangement which is susceptible of correct and dispositive application by a person to whom it is initially addressed is self-applying. . Overwhelmingly, the greater part of the general body of the law is self-applying, including almost the whole of the law of contracts, torts, property, crimes and the like."

[132] Self-application is not possible in all cases. Cases where it is not require what Hart and Sacks call "individual administration" (The Legal Process, p. 121). "[A]s an example, the law of divorce is individually administered. You cannot, being a married man, say to yourself, 'such and such has happened, and now that woman is no longer my wife.' An official determination—an individualized settlement of the matter—is necessary. So also with the law of adoption. So also with the law with respect to the passing of property by will or intestate succession. Case by case application by officials is characteristically resorted to when accuracy of application is highly valued. But the consequences in restricting the freedom of private action and burdening public administration are drastic."

[133] H.L.A. Hart, *The Concept of Law*, Second edition, ed. Bulloch and Raz (Oxford University Press, 1994), pp. 206-7acknowledges that law "consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further direction." Hart also insists at the beginning of *The Concept of Law* that the point of orientation for jurisprudence should not be the proverbial "bad man" of Holmes's theory, but perhaps the "puzzled" man, "who is willing to do what is required if only he can be told what it is" (ibid., p. 40).

definitive of law, distinguishing it sharply from systems of rule that work primarily by manipulating, terrorizing or galvanizing behavior.[134]

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[134] It is part of the modern positivist understanding of law that we should appreciate the way in which norms are designed to *guide action* rather than simply coerce it. Joseph Raz recognizes this as key to the Rule of Law when he says that "if the law is to be obeyed it must be capable of guiding the behaviour of its subjects." "It must be such that they can find out what it is and act on it. This is the basic intuition from which the doctrine of the Rule of Law derives: the law must be capable of guiding the behaviour of its subjects. See Joseph Raz, "The Rule of Law and its Virtue" in his book, *The Authority of Law* (Oxford University Press, 19__) 214, at p. __.

On the other hand, positivist jurisprudence is cautious about pursuing the implications that this may have for law's commitment to human dignity. Jules Coleman, for example, who places great emphasis on the way law guides action, is at pains to insist that the action-guiding function of law is not necessarily expressive of a dignitarian value. He tries to separate the issues in this way (Jules Coleman, *The Practice of Principle*, p. 194-5:

> Law just is the kind of thing that can realize some attractive ideals. That fact about law is not necessarily part of our concept of it. … If one is moved by the moral ideals of autonomy and dignity, then one can see how the elements of my analysis constitute a thing (law) that has the capacity for accommodating those ideals in ways that other forms of governance cannot. … But autonomy [and] dignity … do not enter at any point into the analysis that I offer…. These ideals are external to the concept of law; law happens to be the kind of thing that can serve them well. The capacity to do so is, in a metaphysically innocent sense, an inherent potential of law. This implies nothing about how the analysis of law must proceed. (See also ibid., 205-6)

Coleman is surely right to emphasize that not every potential of a practice is part of its concept. Religion has the potential to stir up murderous passions, yet this is not in any way definitive of religion, though in the world we know it follows more or less straightforwardly from what religion is. Other cases are more difficult. It is part of our concept of democracy to embody a principle of political equality, but is it also part of our concept of democracy (as Joseph Schumpeter argued) to make transitions from one regime to another more peaceful? (Cite to Schumpeter, *Capitalism, Socialism and Democracy*.) The feature that Schumpeter emphasizes is certainly a notable fact about democracy, and the commitment to dignity—in the use of self-application—is also a notable fact about law. I suppose the argument, in the case of dignity, might be that the choice of this distinctively legal mode of governance might be merely a matter of efficiency; it does not necessarily betoken a commitment to human dignity, however minimal. On its own, that may be a plausible position. But as we begin to apprehend other ways in which law protects dignity, we may be less patient with Coleman's view (suspecting that it is motivated more by a dogmatic desire to resist any connection between the concept of law and values like dignity than by any real insight into the distinctiveness of an action-guiding rather than a purely behavior-eliciting model of social control).

6. Self-control.

In an article published some years ago, Michael Meyer of Santa Clara University argued for a strong link between human dignity and the idea of self-control.[135] Meyer emphasized mainly the self-control involved in one's self-presentation to others. We talked about this in yesterday's lecture in regard to the noble bearing and self-possession that dignity expresses and protects.[136]

But self-command is more than just *setting one's stance*, as it were. It's also a matter of people fine-tuning their behavior effectively and gracefully in response to the legitimate demands that may be made upon them,[137] controlling external behavior—monitoring it and modulating it in accordance with one's understanding of a norm. This one might imagine as quintessentially aristocratic virtue, a form of self-command distinguished from the behavior of those who need to be driven by threats or the lash, or by forms of habituation that depend upon threats and the lash.[138] But if it is an aristocratic virtue, it is one which law now expects to find in all sectors of the population.

7. Themes from law: (b) Standards

Law does not always present itself as a set of crisply defined rules which are meant to be obeyed mechanically. Its demands often come to us in the form of standards—like the standard of "reasonable care"—norms which require, frame and facilitate genuine thought in the way we receive and comply with them.

Some jurists say that law can guide conduct (and be self-applying) only if the indeterminacy of standards is reduced to clear rules through

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[135] Michael J. Meyer, "Dignity, Rights, and Self-Control," *Ethics*, 99 (1989), 520. A person with dignity, said Meyer, is "a person who is self-possessed."

[136] Tanner 1, section 5.

[137] Kant's moral psychology celebrated in individuals the power to subordinate impulse and desire to the law-like demands of morality, revealing, as he says, "a life independent of animality" (Kant, *Critique of Practical Reason*, 5: 162. (Kant, *Practical Philosophy* (Mary Gregor, ed.), p. 270.)

[138] Cf. Aristotle, *Nichomachean Ethics*, Book X, Ch. 9.

official elaboration.[139] But in many areas of life, law proceeds without such definitive elaboration. We operate on the basis that it is sometimes better to facilitate thoughtfulness about a certain type of situation ("When there is fog, drive at a *reasonable* speed") than to lay down an operationalized rule ("When visibility is reduced to less than a hundred meters, lower your speed by 15 m.p.h.") And people respond to this.

If standards rely necessarily on official elaboration, then the life of the law shows that ordinary people can sometimes have the dignity of judges. They do their own elaborations. They are their own officials: they recognize a norm, they apprehend its bearing on their conduct, and they make a determination and act on it.[140]

8. Themes from law: (c) hearings

A third way in which law respects the dignity of those who are governed is in the provision that it makes for hearings in cases where an official determination is necessary. These are cases where self-application is not possible or where there is a dispute that requires official resolution.[141]

By hearings, I mean formal events, like trials, tightly structured procedurally in order to enable an impartial tribunal to determine rights and responsibilities fairly and effectively after hearing evidence and argument from both sides.[142] Those who are immediately concerned

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[139] Cite to Hart and Sacks on "The Reasoned Elaboration of Avowedly Indeterminate Directions" in *The Legal Process*, 150-2.

[140] This is separate from the extent of technical knowledge of law's structure. Hart and others may right that law does not assume a wide dispersal of understanding about the way in which the apparatus of secondary rules operate. See Hart, *The Concept of Law*, pp. 116-7 and see also Jeremy Waldron, "All We Like Sheep," *Canadian Journal of Law and Jurisprudence*, 12 (1999), 169. See also note 77 below.

[141] Much of this section is adapted pretty much verbatim from Waldron, "The Concept and the Rule of Law."

[142] It is remarkable how little there is about courts in the conceptual accounts of law presented in modern positivist jurisprudence. In *The Concept of Law*, H.L.A. Hart conceives of law in terms of the union of primary rules of conduct and secondary rules that govern the way in which the primary rules are made, changed, applied and enforced. When he introduces the concept of secondary rules, he does talk of the emergence of "rules of adjudication" in the transition from a pre-legal to a legal society: he says these are "secondary rules empowering individuals to make authoritative determinations of the question of whether, on a particular occasion, a primary rule has been broken." (Hart, *The Concept of Law*, op. cit., p. 96) But his account defines the

have an opportunity to make submissions and present evidence, and confront, examine and respond to evidence and submissions presented form the other side. Not only that, but both sides are listened to by a tribunal which is bound to respond to the arguments put forward in the reasons that it eventually gives for its decision.[143]

Law, we can say, is a mode of governance that acknowledges that people likely have a view or perspective of their own to present on the application of a social norm to their conduct. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view. As such it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as *beings capable of explaining themselves*.

9. Themes from law: (d) argumentation

The institutional character of law makes law a matter of *argument*, and this contributes yet another strand to law's respect for human dignity. Let me explain.

Law presents itself as something one can make sense of. The norms that are administered in our legal system may seem like just one damned command after another, but lawyers and judges try to see the law as a whole; to discern some sort of coherence or system, integrating particular items into a structure that makes intellectual sense.[144] And

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relevant institutions simply in terms of their output function—"the making of … authoritative determinations … of whether a primary rule has been broken." There is nothing on the distinctive process by which this function is performed. Hart acknowledges that of course secondary rules will have to define processes for these institutions (ibid., at 97). But he seems to think that this can vary from society to society and that nothing in the concept of law constrains that variety. A Star Chamber proceeding *ex parte* without any sort of hearing would satisfy Hart's definition; so would the tribunals we call in the antipodes "kangaroo courts"; so, for that matter, would a Minister of Police rubber-stamping a secret decision to have someone executed for violating a command. I think there is a considerable divergence here between what these philosophers say about the concept of law and how the term is ordinarily used. Most people, I think, would regard hearings and impartial proceedings, and the safeguards that go with them, as an essential rather than as a contingent feature of the institutional arrangements we call legal systems.

[143] Lon L. Fuller, "The Forms and Limits of Adjudication," 92 *Harvard Law Review* 353 (1978).

[144] See also the discussion in Jeremy Waldron, 'Transcendental Nonsense and System in the Law,' *Columbia Law Review*, 100 (2000), 16, at pp. 30-40.

ordinary people take advantage of this aspiration to systematicity and integrity in framing their own legal arguments—by inviting the tribunal hearing their case to consider how the position they are putting forward fits generally into a coherent conception of the spirit of the law.[145]

In this way too, then, law conceives of the people who live under it as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between *their* actions and purposes and the actions and purposes of the state. This too is a tribute to human dignity.[146]

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[145] These are not just arguments about what the law *ought to be*—made, as it were, in a sort of lobbying mode. They are arguments of reason presenting competing arguments about what the law *is*. Inevitably, they are controversial: one party will say that such-and-such a proposition cannot be inferred from the law as it is; the other party will respond that it can be so inferred if only we credit the law with more coherence (or coherence among more of its elements) than people have tended to credit it with in the past. And so the determination of whether such a proposition has legal authority may often be a matter of contestation. Law in other words becomes a matter of argument. The legal philosopher who has done the most to develop this theme is of course Ronald Dworkin, particularly in *Law's Empire*.

[146] No doubt the price of this strand of dignitarian respect is a certain diminution in law's certainty. (Indeed it may seem to be at odds with the first dignitarian strain we identified: respecting people enough to entrust them with front-line self-application of legal norms. How, it will be asked, can we maintain this mode of respect if law becomes contestable in the way I have outlined? But the self-application idea does not necessarily presuppose that law has the form of determinate rigid rules. The act of faith in the practical reason of ordinary people may be an act of faith in their *thinking*—e.g., about what is reasonable and what is not—not just in their recognition of a rule and its mechanical application. And so also it may be an act of faith not just in their ability to apply general moral predicates (such as "reasonable") to their actions, but also to think about and interpret the bearing of a whole array of norms and precedents to their conduct—rather than just the mechanical application of a single norm.) And there are conceptions of the Rule of Law which would deplore that. For them the essence of the Rule of Law is people knowing exactly where they stand.

But I don't think a conception of the Rule of Law that sidelines the importance of argumentation can really do justice to the value we place on government treating ordinary citizens with respect as active centers of intelligence. (There is also a fine discussion of the argumentative aspect of the Rule of Law in Neil MacCormick, *Rhetoric and the Rule of Law* (2005).) The traditional demand for clarity and predictability is made in the name of individual freedom—the freedom of the Hayekian individual in charge of his own destiny, who needs to know where he stands so far as social order is concerned. (F.A. Hayek, *The Constitution of Liberty*.) But with the best will in the word, and the most determinate-seeming law, circumstances and interactions can be treacherous. From time to time, the Hayekian individual will find himself charged or accused of some delict or violation. Or his business will be subject—as he thinks, unjust or irregularly—to some detrimental rule. Some such cases may be clear; but others may be matters of dispute. It seems to me that an individual who values his freedom

10. Law by rank

Let's pause and take stock. For us, dignity and equality are interdependent.[147] But one can imagine (or historically one can recall) systems of governance that involved a radical discrimination, in legal standing, among individuals of different ranks.

High-ranking persons might be regarded as capable of participating fully in something like a legal system: they would be trusted with the voluntary self-application of norms; their word and testimony would be taken seriously; they would be entitled to the benefit of elaborate processes etc. Among high-ranking persons, there might be important distinctions of which law applies.

Those with a certain high dignity, used to have the right to be tried according to a separate system of law. For example, nobles used to be entitled to trial by their peers or by the House of Lords (as a court of first instance), certainly not by a common jury.[148] The old English Reports are replete with cases in which a noble was not properly named (not properly addressed by his title) in proceedings brought against him; he was entitled to that dignity under the law.[149]

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enough to demand the sort of calculability that the Hayekian image of freedom under law is supposed to cater to, is not someone who we can imagine always tamely accepting a charge or a determination that he has done something wrong. He will have a point of view on the matter, and he will seek an opportunity to bring that to bear when it is a question of applying a rule to his case. And when he brings his point of view to bear, we can imagine his plaintiff or his prosecutor responding with a point of view whose complexity and tendentiousness matches his own. And so it begins: legal argumentation and the facilities that law's procedures make for the formal airing of these arguments. The freedom of one person may sometimes conflict with the dignity of another (as in the American debate about hate speech, for example). But a Hayekian condemnation of this form of legal uncertainty would require us to oppose the conditions of one person's freedom to the conditions for the dignity of that very person. Unless we are prepare to divorce freedom from the very idea of intelligent involvement in the conditions of one's life, we have to reject these overly mechanical images of the Rule of Law. I have pursued this at much greater length in Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review*, 43 (2008), 1.

[147] Chaskalson quote from Tanner 1.

[148] *Magna Carta* (1215), Article 21: "Earls and barons shall not be amerced except through their peers…."

[149] Consider this case, from the aftermath of the Jacobite risings in the 1740s: *The Case of Alexander, Lord Pitsligo*, Fost. 79; 168 Eng. Rep. 40, in which a distinction was drawn as between Bills of Attainder and legal indictments so far as the requirement to correctly state the title an dignity of a defendant was concerned: "[T]he legislature never thought itself confined to the

Or you might be unable to proceed against a duke or a baron for debt, in the ordinary way. In 1606, in London, a carriage carrying Isabel, the Countess of Rutland, was attacked by serjeants-at-mace pursuant to a write alleging a debt of £1,000.

> [T]he said serjeants in Cheapside, with many others, came to the countess in her coach, and shewed her their mace, and touching her body with it, said to her, we arrest you, madam, at the suit of the [creditor] … and thereupon they compelled the coachman to carry

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strict rules of law in describing persons whom it made the objects of punishment. It was sufficient, that the terms made use of were descriptive of the persons intended to be punished. It never was doubted whether the regicides, who are attainted or otherwise subjected to pains and penalties by the Acts just now cited, were properly described; or whether their estates vested in the crown, though the very same objection might have been made in their cases as in the present, that their full title of dignity was not set forth. It is plain they were men of some dignity, knights or baronets ; and it must be admitted, that all titles of dignity, the lowest as well as the highest, are parcel of the name, and that in all judicial proceedings the omission of even the lowest dignity would be fatal."

The casuistry used to be quite dense. Consider for example, the *Dethick, King of Arms Case*, 1Leonard, 247, 74 Eng. Rep. 226 (1591): "William Dethick, alias Garter king of arms, was indicted … for striking in the church-yard: for that the said Dethick in Pauls Church-yard in London, struck I. S. [T]he defendant pleaded, that before the indictment found, he was created and crowned by the letters patents of the Queen which he shewed, chief and principal king of arms, and it was granted by the said letters patents, that he should be called Garter, and that that name is not in the indictment, and demanded judgment : the Kings Attorney by replication said, that by the law of arms and heraldry, every one who is made king of arms before he receives his dignity ought to be led betwixt two officers of arms, by the arms, before the Earl Marshal of England, or his deputy, and before him are to go four officers of arms, whereof the one is to bear his patent, another a collar of esses, the third a coronet of brass double guilt, fourthly a cup of wine, and his patent shall be read before the Earl Marshal; and afterwards his coronet shall be set upon his head, and the collar of esses about his neck, and afterwards the wine poured upon his head : and that the defendant had not received these ceremonies, for which cause he is not king of arms. … Broughton argued for the defendant … that we have letters patents of the Queen, and that we were sworn in the said office, and so we are king of heralds by matter of record, against which is pleaded only matter in defect of ceremony and circumstance, which is not material. An earl is created with the ceremonies of putting a sword broad-wise about his body, and a cap with a coronet upon his head. Yet the King may create an earl without such ceremonies: and may also create an earl by word, if the same be after recorded…. Afterwards it was objected, that the same is but a name of -office, but not a name of dignity. To which it was answered, that this word *coronamus* always imports dignity, and this is a dignity and office, as earl, marquess, &c. … Fenner Justice, The patent is, *Nomen tibi imponimus*, and therefore (Garter) is parcel of his name: and therefore he ought to be indicted by such name. And it should be hard, to tye estate and degrees to ceremonies."

> the said countess to the compter in Wood Street, … where she remained seven or eight days, till she paid the debt.[150]

The Star Chamber held that the "arrest of the countess by the serjeants-at-mace … is against law, and the said countess was falsely imprisoned" and "a severe sentence was given against [the creditor], the serjeants, and the others their confederates."[151] The court quoted an ancient maxim to the effect that ""law will have a difference between a lord or a lady, &c. and another common person,"[152] and it held that "the person of one who is … a countess by marriage, or by descent, is not to be arrested for debt or trespass; for although in respect of her sex she cannot sit in Parliament, yet she is a peer of the realm, and shall be tried by her peers." There are two reasons, the court went on, "why her person should not be arrested in such cases; one in respect of her dignity, and the other in respect that the law doth presume that she hath sufficient lands and tenements in which she may be distrained."[153] In light of this presumption of noble wealth, the seizing of her body cannot legally be justified as it could in those days to recover the debts of a commoner.

But now we apply this whole presumption to all debtors: no one's body is allowed to be seized; no one can be held or imprisoned for debt.

At the other extreme, in our imagined (or recollected) hierarchical society, there might be a caste or class of persons, who were dealt with purely coercively by the authorities: there would be no question of trusting them or anything they said; they would appear in shackles if they appeared in a hearing at all; like slaves in Ancient Athens, their evidence would be required to be taken under torture; and they would not be entitled to make decisions or arguments relating to their own defense, nor to have their statements heard or taken seriously. They were not necessarily entitled to bring suit in the courts, or if they were it would have to be under someone else's protection; they were not, as we

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[150] *Isabel, Countess Of Rutland's Case*, 6 Co. Rep. 52 b, 77 Eng. Rep. 332 (1606), at 336.

[151] Idem.

[152] Ibid., at 333.

[153] Idem.

sometimes say, *sui juris*. Slave societies were like that, and many other societies in the past, with which we are uncomfortably familiar, evolved similar discriminating forms that distinguished between (if you like) the legal dignity of a noble, the legal dignity of a common man, the legal dignity of a woman, and the legal dignity of a slave, serf or villain.

I think it is part of our modern notion of law that almost all such gross status differences have been abandoned (though there are relics here and there). We have adopted the idea of a single-status system,[154] evolving a more or less universal status—a more or less universal legal dignity—that entitles everyone to something like the treatment before law that was previously confined to high-status individuals.

11. "Sorts and Conditions of Men"[155]

Status is an interesting legal idea. There is tons to be said about it,[156] very little of which I have time to say in this lecture. But I would like to

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[154] I take this phrase from Gregory Vlastos, "Justice and Equality," in Jeremy Waldron (ed.) *Theories of Rights*, p. 55.

[155] The phrase is adapted from the "Prayer for all Sorts and Conditions of Men" in the old Book of Common Prayer, which begins: "O God, the Creator and Preserver of all mankind, we humbly beseech thee for all sorts and conditions of men: that thou wouldest be pleased to make thy ways known unto them, thy saving health unto all nations..."

[156] We ought to say something about status. How does it work in the law? How is it related to the idea of rank? And how is all that related to dignity? What follows is going to be a little technical. (Much of this section (and also section 3) is drawn from Jeremy Waldron, "Does 'Equal Moral Status' Add Anything to Right Reason?," a paper presented at American Political Science Association Annual Meetings 2004, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/0/8/p59080_index.html

Modern moral philosophers who talk about dignity say that it is a status applying to all human persons. Stephen Darwall, for example, says that dignity is "the status of an equal member of the moral community."[156] (Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Harvard University Press, 2006), p. 243, says that dignity is "the status of an equal member of the moral community ('the realm of ends') to hold one another accountable for compliance with the mandatory norms that mediate relations between free and rational persons.") But it is not clear whether they mean moral status in a sense that is analogous to its technical legal sense. You see, the term "status" has looser and tighter meanings in law. Sometimes "the status of X" means nothing much more than "the legal situation with regard to X." X can be anything; we talk about the status of autograph wills, the status of surrogate motherhood, the status of riverbanks, and the status of young offenders. If we ask "What is the status of X?" we expect an answer setting out the most important rules, principles, and doctrines applying to X.[156] A tighter and more technical sense of status in law is

when we talk about the statuses of infancy, lunacy, and so on. Historically, in English law, to be a married woman or a monk or a villein or a noble or the monarch was to be assigned a particular legal status. Even today the law recognizes that aliens (resident and non-resident non-citizens), members of the armed forces, adjudged bankrupts, and convicted felons occupy a distinct status in law.

So what is status in the technical legal sense? It has been defined by one jurist as "a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law... whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents thereof are a matter of sufficient social concern." (R.H. Graveson, *Status in the Common Law* (London: Athlone Press, 1953), p. 2 .) Notice how the definition says "a *special* condition ... differing from the legal position of the normal person." The implication is that legal status is something differentiated from the incidents of legal personality ordinarily attributed to natural persons. I have never understood why the English writers take this view. It compares unfavorably with Roman law notions, which included, as one status among others, the status of the ordinary free man. Obviously if human dignity is a status, it is not going to be special in the way that lunacy, bankruptcy, and infancy are special—though if my speculations at the end of yesterday's lecture are correct, it may have evolved from something special in the sense of being a high rank confined to a few people to something that is now widely and ordinarily ascribed.

A status is a legal condition characterized by distinctive rights, duties, liabilities, powers, and disabilities. The monarch has distinctive powers; a bankrupt has distinctive disabilities; and a serving members of the armed forces has distinctive duties and distinctive privileges. So, is a status anything more than an abbreviation for all this detail? John Austin didn't think so. He wrote in his *Lectures on Jurisprudence* that "[t]he sets of rights and duties, or of capacities and incapacities, inserted as *status* in the Law of Persons, are placed there merely for the sake of commodious exposition" (John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 5th edition, ed. Robert Campbell (London: John Murray, 1885, vol. II, Lecture XL, p. 687-8. A status-term, says Austin, is "an ellipsis (or an abridged form of expression)," ibid., p. 700., purely a matter of expository convenience. It is a "device of legal exegetics"--this is the rendering of Austin's position in C.K. Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford: Clarendon Press, 1931), p. 34.) And I have heard people like Raz say the same about moral status—that it is just a way of *summarizing* the duties and rights associated with some person or position.

But Austin's skepticism neglects the idea, intimated in the definition I gave a moment ago, that a status attaches to a person when their occupying a certain position is a matter of public concern. (Graveson, *Status in the Common Law*, pp. 114-6. Jeremy Bentham held a view of this kind, provoking Austin (usually bone of Bentham's most famous disciples) to observe that "Mr. Bentham ..., I am forced to admit, appears to me to be inconsistent and obscure in all he says on the subject." He went on: "It is remarkable that Bentham (who has cleared the moral sciences from loads of the like rubbish) adopts this occult quality under a different name. In the chapter in the *Traités de Législation*, which treats of *États* (or of *status* or conditions), he defines a status thus: *Un état domestique ou civil n'est qu'une base idéale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités*. » Austin, p. 699, original emphasis. (Compare Jeremy Bentham, *The Theory of Legislation*, ed. C.K. Ogden (London: Kegan Paul, Trench, Trubner & Co., 1931), p. ___.) According to Austin, Bentham's definition is an example of "the once current jargon about *occult qualities*." Austin, *Lectures on Jurisprudence*, p. 697. Austin says he rejects the view that the rights, duties, capacities, and liabilities incident to the status are not themselves the *status*, but that the *status* is rather "a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences." But that is not quite Bentham's view. For Bentham, the "*base*

idéale" is a *reason* informing the attribution of the rights etc., not just a quality on which they are, so to speak, supervenient.)

For example, the situation of an infant is special and calls for special care and solicitude: the determination of the legal incidents associated with infancy flow from this. And so too with the status of a bankrupt or an alien. Austin might respond: "Well, no doubt every law has its reasons." But the reasons or concerns we're talking about are not just reasons for legal provisions one at a time (which might then be expounded seriatim or together, according to expository convenience). They explain how the various rights, duties, etc. hang together; they explain the underlying coherence of the package. Particular provisions often hang together: the legal disabilities of a bankrupt are understood in relation to the process of adjudication in bankruptcy; the contractual incapacities of infants are understood in relation to the duties of their parents to make the provision for them that for most of us is made by our own ability to enter into contracts. Abstracted from the whole package, no particular incident of a given status makes much sense, though of course we can always ask why the package has to be shaped thus-and-so. In other words, our response to Austin's claim that legal status is useless for anything except exegetical convenience, is to say that they embody important information about the legally recognized concerns that underlie the packaging of distinct sets of right, duties, capacities, and liabilities. The packaging of the particular legal incidents is important, for the law (not just for its exposition) and its importance cannot be grasped in a piecemeal way.

I think status is a *dynamic* idea in the law and skepticism about legal status tends to suggest itself from a purely *static* point of view. For the distinction between static and dynamic points of view in law, see Hans Kelsen, *The Pure Theory of Law* (_____), pp. __. If all the law were given, settled, and known, maybe status would be redundant. We would just refer to the particular rule that determines who can vote or to the particular rule that determines in what circumstances a given person is liable to deportation. But the *status of being an alien* tells us something about the rationale of these provisions; it makes sense of them; it indicates their ground or reasons in public policy. Statuses package certain arrays of rights, duties, etc. under the auspices of a certain entrenched and ongoing concern in the law. I don't just mean someone's particular opinion as to why a given set of legal provisions is or might be justified. I mean something more like legally-established justification—like a legally recognized purpose or policy. I mean something which is not just present in politics to persuade people that the law is good and right, but rather suffuses the law itself with a sense of purpose and operating as an integral part of what it is to grasp and understand the law. Justification in this sense has a more solid and established presence in the law than the arguments anyone might come up with, though of course ultimately it amounts to the legal recognition and currency of such arguments as aspects of the legal system. For a discussion, see Ronald Dworkin's observations on "institutional support" for legal principles and policies in *Taking Rights Seriously* Revised Edition (Cambridge: Harvard University Press, 1977), pp. 40-45. Viewing the bundle of rights as a status also reminds us of the *open-endedness* of a given legal position; the reason for these provisions now reminds us that there may a reason in the future for generating additional rules of this kind. The legal position of an alien is never settled as a matter of definition: it is always liable to comprise new incidents or lose some of the old ones. You can never give a definitive list of what a given status involves. If dignity is a status, then calls form a timeless definition of legal dignity will be similarly misconceived.

An analogy might help. It has sometimes been remarked that once we have all the information there is about legal duties, we don't need any additional information about rights. But legal rights are important as a way of presenting the underlying interest that is the rationale for the imposition of a duty. Cf. Joseph Raz, "Legal Rights" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), pp. __, and *The Morality of Law* (Oxford: Clarendon Press, 19__), pp. __. And status may work similarly. No doubt Austin is right

introduce an elementary distinction between two types of status—*sortal* status and *condition* status, to amplify what I am saying about a dignitarian society being, these days, *a single-status society*.

Some distinctions of status are still with us. There are legal statuses that apply to individuals in virtue of certain conditions they are in, that they may not be in forever, or that they may have fallen into by choice or happenstance: they embody the more important legal consequences of some of the ordinary stages of human life (infancy, minority), or some of the choices people make (marriage, felony, military service, being an alien), or some of the vicissitudes that ordinary humanity is heir to (lunacy) or that through bad luck or bad management may afflict one's ordinary dealings with others (bankruptcy, for example). I call these condition statuses. They tell us nothing about the underlying personhood of the individuals who have them: they arise out of conditions into which anyone might fall.[157]

Condition-status may be contrasted with sortal-status. Sortal-status categorizes legal subjects on the basis of *the sort of person* they are. One's sortal-status defines a sort of baseline (relative to condition-status). Modern notions of sortal-status are hard to find, but earlier I mentioned a few historical examples: villeinage and slavery. Racist legal systems such as that of apartheid era South Africa or American law from 1776 until (at least) 1867 recognized sortal statuses based on race. Some legal systems ascribe separate status to women. Sortal status represents a person's permanent situation and destiny so far as the law is concerned. It is not acquired or lost depending on actions, circumstances, or vicissitudes. The idea behind sortal-status is that there are different kinds of person.

Now it is precisely this last claim that the principle of *human* dignity denies. There are not different kinds of person, at least not for

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that status also has an exegetical use, in helping us organize and present legal knowledge in treatises etc. But its expository function is not just mnemonic, it is dynamic.

[157] The category of condition statuses may include a status that almost everyone is in for a large portion of their lives--such as the status of being married—less true now than it used to be. It may for that matter include infancy and minority, are statuses that everyone goes through.

human persons.[158] We once thought that there were different kinds of human—slaves and free; women and men; commoners and nobles; black and white—and that it was important that there be public determination and control of the respective rights, duties, powers, liabilities and immunities associated with personhood of each sort. We no longer think this. There is basically just one kind of human person in the eyes of the law and conditional status is defined by contrast with this baseline.[159]

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[158] There might be different kinds of corporate personality. See Graveson, *Status in the Common Law*, pp. 72-8.

[159] Following Maine, people sometimes describe the decline of multiple sortal statuses as a "movement from status to contract" (Maine, *Ancient Law*). The idea is that once upon a time one's rights and duties were determined by one's status, but now they are determined as freely undertaken obligations (and their correlatives), embodied for example in contract: every person is free to determine, according to his own will, his rights and duties towards his fellow men. (This is Allen's expression of Maine's view in Allen, *Legal Duties* , op. cit., p. 36.) However, the persistence of condition-status casts some doubt on this as an exact formulation. There are still choices, stages, and vicissitudes whose consequences are determined by operation of law, reflecting a public determination about the rights, duties, capacities, and liabilities that should be born by those who have made those choices (marriage), are at that stage of their lives (infancy), or have suffered those vicissitudes (lunacy). Maine's position is more accurate with regard to sortal-status. We have certainly moved to a situation in which differences in people's rights and obligations are determined more by differences in the undertakings they have entered into, than by differences in sortal-status. Still, it would be wrong to say that all or even most of one's rights and obligations are determined by voluntary undertaking in this way. Most of them are determined by operation of law: criminal law, public regulation, tort law, and so on, and many of these cannot be varied by agreement. Even one's ability to determine rights and obligations by choice reflects the standard application of a capacity to contract, whose existence of course is due to the operation of law and is not subject to voluntary control. This is why I am inclined to the opinion that there is such a thing as a single normal status, in which considerable portion of rights and obligations are conferred by law but which also contains the capacity to vary some of these by the exercise of contractual powers (which are themselves governed by law). It is not that status has been superseded by contract; it is rather that freedom-of-contract is now the normal or normative status. F.A. Hayek goes a little further (in *The Constitution of Liberty*?): "The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all." Now, Hayek seems to have thought that a status-system could not work with "abstract general rules." In theory that's wrong: a status system can have general rules on the basis of which people are assigned to a given status (e.g. by birth) and general rules defining the incidents of each status; and Hayek himself acknowledges elsewhere that abstract general rules can differentiate between groups on the basis of universalizable characteristics. But one can see his point. The idea of a system of general rules applicable to everyone, in virtue of characteristics which anyone might have or acquire, is quite different from the idea of a legal system which uses one set of generalizations to sort people into groups and another set of generalizations (the bulk of the law) to define separate sets of rights and duties for the members of each group. Both may be formally universalizable, but the second embodies a much more robust idea of equality before the law than the first does.

But *what kind* of person is that? We used to think there were many kinds: nobles, commoners, slaves, etc. Which one have we made standard?

The idea I pursued yesterday is that we have made standard a rather high-ranking status, high enough to be termed a "dignity." The standard status for people now is more like an earldom than like the status of a peasant; more like a knight than a squire. Or forget the quaint Blackstonian conceits: it is more like the status of a free man than like a slave or bondsman; it is more like the status of a person who is *sui juris* than the status of a subject who needs someone to speak for him; it is the status of a right-bearer—the bearer of an imposing array of rights—rather than the status of someone who mostly labours under duties; it is the status of someone who can demand to be heard and taken into account; it is more like the status of someone who issues commands than like the status of someone who obeys them.

Of course it's an *equal* status. We are all chiefs; there are no Indians. If we all—each of us—issue commands or demand to be taken seriously or insist on speaking for ourselves, it is everyone else—our peers, who have similar standing—who have to obey or make room or listen. But that doesn't mean it's a wash; that doesn't mean we might as well all be peasants or squires or bondsmen. High status can be universalized and still remain high, as each of an array of millions of people regards him- or herself (and all of the others) as a locus of respect, as a self-originating source of legal and moral claims. The Kantian idea of *a kingdom of ends* comes to mind. We all stand proud, and we all of us look up to each other from a position of upright equality. I am not saying we always keep faith with this principle. But that's shape of the principle of dignity that we're committed to.

12. Legal citizenship

If I were to give a name the status I have in mind, the high rank or dignity attributed to every member of the community and associated with fundamental rights, I might choose the term "legal citizenship."[160]

What I have in mind is something like the sense of citizenship invoked by T.H. Marshall in his famous book *Citizenship and Social Class*,[161] where he was concerned to tease out different strands of citizenship in a modern society. What I have been talking about in this lecture, we might associate with the specific dignity of what Marshall called "civil citizenship," though in his famous trichotomy of civil citizenship, political citizenship, and social citizenship, Marshall ran together under the "civil citizenship" heading ordinary civil liberties as well as rights of legal participation.

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[160] I am conscious of my former colleague Gerald Neuman's "plea against the overuse of the rhetoric" of this term. Gerald Neuman, "Rhetorical Slavery, Rhetorical Citizenship," 90 *Michigan Law Review* 1276 (1992) at 1283. (Professor Neuman is worried about political theorists' using citizenship in a way that is oblivious to the technical exclusions that the term connotes—exclusions which might define the status of non-citizens, such as resident alien, for example.) Neuman says (ibid., 1284-5 and 1291) of Judith Shklar's book, *American Citizenship*: "Shklar's focus is on the difference between first- and second-class citizenship, both of which presuppose American nationality. I do not deny that there are some duties that a state owes first, or only, to its own citizens. It owes other duties to its residents of whatever nationality; still other duties to all persons within its territory, for whatever duration; and some, perhaps contingent, duties to all of humanity. International human rights treaties often obligate states to all persons within their jurisdiction. It is nonetheless common for political theorists to limit their attention to citizens, and to leave unaddressed the state's responsibilities to noncitizens within its territory. The authors may then formulate conclusions that, if taken literally, would have serious negative consequences for those who are not citizens. For example, in the same volume of the Tanner Lectures in which the original version of Shklar's work appears, we find Ronald Dworkin describing as "a fundamental, almost defining, tenet of liberalism that the government of a political community should be tolerant of the different and often antagonistic convictions its citizens have about the right way to live." This phrasing comes very close to implying the acceptability of intolerance toward convictions that are held by noncitizens but are not shared by citizens, an attitude that in the past has supported discrimination against "heathen Chinese" and the exclusion of foreigners holding "un-American" political views. … [H]er invocation of citizenship follows a pervasive and troubling habit in political theory. A philosophical culture that concentrates needlessly on citizens can influence public political discourse and the legal culture. I do not mean to criticize or discourage deliberate investigation of the differences between citizens and aliens - indeed, I engage in it myself. But I do plead for more caution in resorting to the rhetoric of citizenship, on occasions when the rhetoric of humanity may suffice."

[161] T.H. Marshall, *Citizenship and Social Class* (originally 1949) Tom Bottomore ed. (Pluto Press, 1992). See also Desmond King and Jeremy Waldron, "Citizenship, Social Citizenship and the Defence of Welfare Rights," *British Journal of Political Science*, 18 (1988), 415 (reprinted in Waldron, *Liberal Rights*.)

> The civil element is composed of the rights necessary for individual freedom, liberty of the person, freedom of speech, thought and faith, the right to own property arid to conclude valid contracts, and the right to justice. The last is of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law. This shows us that the institutions most directly associated with civil rights are the courts of justice.[162]

I think that if I were undertaking the sort of disaggregation of layers of citizenship that T.H. Marshall undertook, I might perhaps want to *distinguish* between legal citizenship and civil citizenship (in the sense that associates the latter with the enjoyment of civil liberty), though of course Marshall is right that the two usually go together. As well, Marshall traced not only the expansion of the citizenship idea into new areas—from civil to political to social—but also, in each area, the expansion of the benefits and rights of citizenship to all the human members of a society. And it is this phase, with regard to legal citizenship, that I am focusing on here.

Another term we could use is "equality before the law"—though that by itself doesn't convey the *height* of the legal status that we have universalized. And by some philosophers it is confused with formal equality—that is, impartial application of general norms according to their terms.[163] Formal equality may or may not be important,[164] but it's not what I am talking about here; I am talking about the equal rights of self-application, hearing and argument in relation to the legal process.

13. Equality, construction, and (e) representation

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[162] Marshall, *Citizenship and Social Class*, p. 8.

[163] Wojciech Sadurski, *Equality and Legitimacy* (Oxford University press, 2008), p. 94.

[164] See the discussion in Hart, *Concept of Law*, 157-67. Cf. Leslie Green's paper, "The Germ of Justice."

Obviously the sense in which we stand equal before the law is somewhat fictitious.[165] But remember our suggestion in yesterday's lecture, that dignity might be something constructed rather than natural.[166] I think the primary technique we use to manufacture equal dignity in law is the artifice of legal representation. David Luban of Georgetown Law School has developed a persuasive account along these lines.[167] Luban asks: Why should litigants have lawyers? He cites as the basis of his answer the following principle: '[O]ne fails to respect [a person's] dignity … if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith."[168] From this, Luban infers:

> An immediate corollary to this principle is that litigants get to tell their stories and argue their understandings of the law. A procedural system that simply gagged a litigant and refused even to consider her version of the case would be, in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt. Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. … None of this should matter. … Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a

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[165] Most ordinary people are not in a position of straightforward familiarity with law; much law is technical and forbidding and takes years of study to master. And, as Max Weber pointed out, this is getting worse not better. See Max Weber, *Economy and Society*, p. 894: "Whatever form law and legal practice may come to assume under the impact of these various influences, it will be inevitable that, as a result of technical and legal developments, the legal ignorance of the layman will increase" (ibid., p. 895).

[166] This was our analogy to Hannah Arendt's discussion of constructive equality, in Lecture 1, section 4.

[167] David Luban, *Legal Ethics and Human Dignity* (2007); David Luban, "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)," 2005 *University of Illinois Law Review* 815.

[168] Luban attributes this to Alan Donagan, "Justifying Legal Practice in the Adversary System," in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 130 (David Luban ed., 1984).

> mouthpiece. Thus, [the] argument connects the right to counsel with human dignity in two steps: first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard.[169]

Forgive me for quoting Professor Luban at such length, but he makes exactly the point I want to make (only better than I can). We are committed to doing whatever it takes to secure the dignity of a hearing for everyone.

14. Themes from law: (f) coercion

Maybe the dignitarian account that I am giving makes law seem too "nice"; maybe I am obscuring the violent and coercive character of law.[170] Law kills people; it locks them up and throws away the key. And these are not aberrations; this is what law characteristically does. Where, it might be asked, is the dignity in that? Some have worried--Meir Dan-Cohen expressed this concern once--that "the entire enterprise, central to the criminal law, of regulating conduct through deterrence (that is, through the issuance of threats of deprivation and violence) is at odds with human dignity."[171]

According to Lon Fuller, we have to choose between definitions of law that emphasize coercion and definitions of law that emphasize dignity.[172] I think this is a mistake. It is because law is coercive and its currency is life and death, freedom and incarceration, that its pervasive commitment to dignity is so momentous.[173] Law is the exercise of

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[169] Luban, "Lawyers as Upholders of Human Dignity,' cite p. 819.

[170] See, e.g. Austin Sarat and Thomas Kearns, "A Journey Through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of Law* (Austin Sarat and Thomas Kearns eds., 1993). The suggestion there is that law is always violent and that the most important feature about it is that it works its will, in Robert Cover's phrase, "in a field of pain and death" (Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), 1601).

[171] Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984), at 672-3.

[172] Fuller, *The Morality of Law*, p. 108.

[173] Fuller actually recognizes this when he observes that the "branch of law most closely identified with force is also that which we associate most closely with formality, ritual, and solemn

power. But that power should be channeled through *these* processes, through forms and institutions like these, even when that makes its exercise more difficult or requires power occasionally to retire from the field defeated[174]—this is exactly what is exciting about the dignity of legal citizenship in the context of the rule of law.

That is a wholesale answer to the objection.[175] [176] We might also give some retail responses. I have already mentioned the importance of self-application. Law looks wherever possible to voluntary compliance, which of course is not the same as saying we are never coerced, but which does leave room for the distinctively human trait of applying norms to one's own behavior. This is not a trick; it involves a genuinely respectful mode of coercion.

Max Weber is famous for observing that, although "the use of physical force is neither the sole, nor even the most usual, method of administration," still its threat "and in the case of need its actual use … is always the last resort when others have failed."[177] But it would be wrong to infer from this that law uses any means necessary to get its way. The use of torture, for example, is now banned by all legal systems.[178] Elsewhere I have argued that modern law observes this ban

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due process"—and as we have seen, formality, ritual and process are exactly where law's commitment to dignity resides.

[174] Cf. E.P. Thompson, *Whigs and Hunters*, p. 265.

[175] In *Selmouni* v. *France* 23 EHRR (1999) 403. the European Court of Human Rights insisted that "in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3" of the European Convention ban on degrading treatment.

[176] In section 7, we also noted that law does not always or characteristically present itself as a set of crisply defined rules which are meant to be obeyed mechanically, like shouted commands on a military parade-ground. Its demands are often presented to us in the form of standards, which require, frame and facilitate genuine thought and deliberation in the way we receive and comply with them.

[177] Weber, *Economy and Society*, p. 54.

[178] This is why the recent proposals in the United States to introduce judicial torture warrants (Alan Dershowitz), and to make torture a procedure in law, not just (in Blackstone's words) an engine of state (Blackstone, *Commentaries*, vol. 4, p. 326), aroused such anger in parts of the legal community. See generally, Waldron, "Torture and Positive Law," op. cit., pp. 1718-20, for a fuller discussion.

as emblematic of its commitment to a more general non-brutality principle: "Law is not brutal in its operation; … it does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by methods which respect rather than mutilate the dignity and agency of those who are its subjects."[179] I think this aspiration is now fully internalized in our modern concept of law. The law may force people do things or go places they would not otherwise do or go to. But even when this happens, they are not herded like cattle, broken like horses, beaten like dumb animals, or reduced to a quivering mass of "bestial desperate terror."[180]

Finally: law punishes. But again—and increasingly this too is internal to our conception of law—we deploy modes of punishment that do not destroy the dignity of those on whom it is being administered. Some of this is the work of the specific dignitary provisions we talked earlier, requiring that any punishment inflicted should be bearable—something that a person can endure, without abandoning his or her elementary human functioning.[181] One ought to be able to do one's time, take one's licks, while remaining upright and self-possessed.[182]

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[179] This is adapted from Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review*, 105 (2005), 1681, at pp. __.

[180] Hannah Arendt, *The Origins of Totalitarianism* (New edition, 1973), p. 441.

[181] See Waldron, "Cruel, Inhuman and Degrading Treatment: The Words Themselves," available at http://ssrn.com/abstract=1278604

[182] There is an on-going debate about whether the death penalty is compatible with human dignity. Some abolitionists in the United States use dignity as the ground of their opposition to the death penalty. It is not always clear which sense of dignity is at stake here. It may be something like the "sacredness of human life" notion that we distinguished in yesterday's lecture. (Tanner 1, section 8. This might be the basis of unequivocal opposition or the basis of a more nuanced position like that taken in the Catholic catechism §2267: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.") Or it might be something about the administration of the death penalty. Here again, the bearability of punishment could be crucial. Even going to one's execution is something that a human can do with dignity. (Cf. Kant : "[T]hus a criminal's death may be ennobled (its disgrace averted) by the resoluteness with which he dies." (*The Metaphysics of Morals* 6: 435.) To the extent that these provisions affect the death penalty, there is an implicit requirement that it must be administered in a way that enables the persons to whom it is applied to function as self-

No one thinks the protection of dignity is supposed to preclude *any* stigmatizing aspect of punishment.[183] Whatever one's dignity, there is always something shameful in having to be dealt with on the basis that one has violated the common standards set down in society for one's behavior. But an aristocratic society might distinguish between the inevitable stigma of the punishment accorded to a noble (in relation to his baseline dignity) and the inevitable stigma of the punishment accorded to a commoner or slave. There are punishments commensurate and punishments incommensurate with one's status in both cases. I believe Jim Whitman is right in his suggestion that in some European countries, there has been a sort of leveling up—outlawing the dehumanizing forms of punishment formerly visited upon low-status persons: everyone who is punished is to be punished now as though he were an errant noble rather than an errant slave.[184]

15. Dignity and indignity: norm and failure.

I know, I know: many political systems do not exhibit anything like the respect for dignity that I have outlined here. Also every country has to cope with the burden of its own history, with vestiges of its commitment to an ideology of differential dignity.

Think of the United States, for example, burdened by a history of slavery and institutionalized racism. When the Thirteenth Amendment abolished slavery, it did not do so unconditionally, but made an explicit exception for the treatment of prisoners—"Neither slavery nor involuntary servitude, *except as a punishment for crime* …, shall exist within the United States"—as though Americans were anxious to

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possessed individuals up until the point at which their lives are extinguished. (This, then, might be the ground on which the "death row phenomenon" is seen as inhuman.)

[183] In administering the ECHR ban on "degrading treatment," the European Court of Human Rights has held that in order to count as degrading treatment, the adverse treatment "must … go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty."

[184] See Whitman, "Human Dignity in Europe and the United States" and Whitman, *Harsh Justice*.) See also Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008), pp. 30-40.

maintain at least a *vestige* of the great denial of human dignity that had for years disfigured their constitution.[185] I don't need to tell you the impression that is created when one combines an understanding of this reservation with the staggering racial imbalances in our penitentiaries.

American defendants are sometimes kept silent and passive in American courtrooms by the use of technology which enables the judge to subject them to electric shocks if they misbehave.[186] Reports of prisoners being "herded" with cattle prods emerge from time to time.[187] Conditions in our prison are *de facto* terrorizing and well-known to be so; even if they are not officially approved or authorized, we know that prosecutors feel free to make use of defendants' dread of this brutalization as a tactic in plea-bargaining.[188] And generally: we often participate in what Sandy Kadish once termed "the neglect of standards of decency and dignity that should apply whenever the law brings coercive measures to bear upon the individual."[189]

Other examples and examples from other countries (France, the United Kingdom, Russia, Israel, etc.) could be multiplied. All have fallen short of the characterization given in this paper.

A legal system is a normative order, both explicitly and implicitly. Explicitly it commits itself publicly to certain rules and standards. Some of these it actually upholds and enforces, but for others, in certain

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[185] U.S. Constitution, 13th Amendment: "Neither slavery nor involuntary servitude, *except as a punishment for crime* …, shall exist within the United States, or any place subject to their jurisdiction."

[186] See, e.g., Harriet Chiang, "Justices Limit Stun Belts in Court," *San Francisco Chronicle*, August 23, 2002, p. A7 and William Glaberson, "Electric Restraint's Use Stirs Charges of Cruelty to Inmates," *New York Times*, June 8, 1999, p. A1.

[187] See, e.g., "37 Prisoners Sent to Texas Sue Missouri," *St. Louis Post-Dispatch* (Missouri), September 18, 1997, p. 3B: "Missouri prisoners alleging abuse in a jail in Texas have sued their home state and officials responsible for running the jail where a videotape showed inmates apparently being beaten and shocked with stun guns," and Mike Bucsko and Robert Dvorchak, "Lawsuits Describe Racist Prison Rife with Brutality," *Pittsburgh Post-Gazette*, April 26, 1998, p. B1.

[188] Some would say that the use of the death penalty represents a residuum of savagery in our system that shows the limits of American adherence to the principles that I have been talking about.

[189] Sanford H. Kadish, "Francis A. Allen: An Appreciation," 85 *Michigan Law Review* 401, at 403 (1986).

regards, it fails to do so. The explicit content of the norms recognized by the legal system provides us with a pretty straightforward basis for saying, on these occasions, that the legal system has fallen short of its own standards, without necessarily licensing the cynical conclusion that these were not its standards after all.[190]

Less straightforward is the case where a normative commitment is embodied *im*plicitly in the procedures and traditions of a system of governance. But I believe a similar logic obtains. The commitment to dignity that I think is evinced in our legal practices and institutions may be thought of as *immanently* present even though we sometimes fall short of it. Our practices sometimes convey a sort of promise[191] and, as in moral life, it would be mistake to think that the only way to spot a real promise is to see what undertakings are actually carried out. Law may credibly promise a respect for dignity, and yet betray that promise in various respects. Institutions can be imbued in their structures, practices, and procedures with the values and principles that they sometimes fall short of. In these cases, it is fatuous to present oneself as a simple cynic about their commitments or to neglect the power of imminent critique as the basis of a reproach for their shortcomings.[192]

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[190] This is because law is an institutionalized normative order, and there are ways of establishing the institutional existence (legal validity) of a given norm apart from its actually being fulfilled. A norm may be institutionalized in a given country inasmuch as it is proclaimed, posited and published in that country, whether it is actually fulfilled or not. Or it may be, as we say, "honored in the breach," when its existence is revealed by the *way* in which we violate it (shamefacedly or furtively, for example). (Cite to Max Weber, *Economy and Society*, vol. 1.)

[191] Jeremy Waldron, "Does Law Promise Justice?" *Georgia State University Law Review*, 17 (2001) 759, at pp.760-1. For analogous arguments about justice, see Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* 443 (1992): "Law is not necessarily just, but it does promise justice." See also John Gardner, "The Virtue of Justice and the Character of Law" (2000) 53 *Current Legal Problems* 1.

[192] Of course the interesting thing, now, about law's commitment to dignity is that the promise is embodied institutionally in both the ways we have been describing. It is there, internally or inherently, in the tissue of our practice and institutions, but it is also present in rules and standards that we have explicitly committed ourselves to (like the Geneva Conventions or Article 7 of the ICCPR or, in Europe, Article 3 of the ECHR). The two sorts of commitment reinforce each other. This is not unusual in regard to legal ideals. Article I. 9 of the U.S. Constitution states that "[n]o Bill of Attainder or *ex post facto* Law shall be passed," but many people would say that this is also a definitive feature of the rule of law as such. It represents at any rate an abundance of riches and just as it would be quite wrong to infer from the fact that Article I. 9 might have been

16. Moral Status? Moral Rank? Moral Dignity.

It is time to finish. At the beginning of these lectures, I said I would take my insights about dignity primarily from law. And I have combined this with an argument that the use of "*human* dignity" in constitutional and human rights law can be understood as the attribution of a high legal rank or status to every human being. I think we understand now some of the ways in which legal systems constitute and vindicate human dignity, both in their explicit provisions and in their overall *modus operandi*.

Is it possible to say in an exactly analogous sense that "morality" embodies a respect for human dignity?[193] I wonder. Morality (in the relevant sense)[194] is not an *institutionalized* order; it is an array of reasons. And it may be harder to think of morality as *proceduralized* in the way that legal systems obviously are.

On the other hand, moral thought does sometimes use institutional metaphors to convey the character and tendency of moral reasons: Kant's metaphor of the "kingdom of ends" is the best-known example.[195] And though we think perhaps less about moral due process than we ought to—we think about the reactive attitudes,[196] but not nearly enough about how accusation, explanation, and response (including sanctions) ought to work in the context of the pursuit of moral reproach—there are proceduralized visions of morality in the work of people like Habermas and Scanlon, for example.[197]

Also we have to remember that a lot of what we call moral thought is not devoted to the establishment of a moral order *analogous* to a legal order, but is in fact oriented to the evaluation and criticism of the legal

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different that law is only contingently committed to generality or prospectivity, so it would be quite wrong to infer from the fact that the ECHR might have been different that law is only contingently committed to the protection of dignity.

193 As Darwall says in *The Second Person Standpoint*, p. __.

194 That is, critical morality, not positive morality.

195 Refer to Kant, and refer to Darwall's formulation in *The Second Person Standpoint*, p. __.

196 Cite to Strawson

197 Cites to Habermas and Scanlon.

order itself. Political morality is about law and so the place of dignity in political morality orients itself critically to the place of dignity in the legal system. What I have been arguing is that a lot of this moralizing involves *immanent critique*, rather than bringing standards to bear that are independent of those the law itself embodies. We evaluate law morally using (something like) law's very own dignitarian resources.

What about the hypothesis I have pursued that *human* dignity involves universalizing, rather than superseding, the connotations of status, rank, and nobility that "dignity" traditionally conveyed? These metaphors of transformation—of a change in the concept of dignity—may not make sense when we talk about critical morality.[198] But we can certainly talk of changes in our *understanding* of moral requirements. Moralists used to work with the notion that there were different kinds of human being—low-status ones and high-status ones—and they have now dropped the idea of low-status human beings, assigning what was formerly high moral status to everyone.

Could respectable moral thought *ever* have differentiated in this way? Could morality have recognized different sortal statuses? Well we do this for the differences in moral considerability as between animals and humans. Or some do, and those who take this line claim that it is possible to draw it while still treating members of both classes morally.[199] And there is no doubt that ideas about a distinctive dignity in which animals do not share[200]—play a large role in this distinction.

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[198] John Finnis once observed (*Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 24) that "of natural law itself there could, strictly speaking, be no history." Natural law is a timeless set of values, reasons, and requirements. Conversely, in 1847, Karl Marx denounced the use of "dignity" by a fellow socialist as a "refuge from history in morality." (For this citation, I am obliged to McCrudden, "Human Dignity," at 661.) And the same might be said of morality (again of critical morality, not positive morality). Unless we are prepared to be more Hegelian about morality than most moral philosophers are, we can't really talk of a transformation in moral requirements as we talk of a transformation in the law.

[199] For doubts about this, see, Mark H. Bernstein, *On Moral Considerabiity: An Essay on who Morally Matters* (Oxford University Press, 1998).

[200] Psalm 8: 4-8, for example: "What is man, that thou art mindful of him? … For thou hast made him a little lower than the angels, and hast crowned him with glory and honour. Thou madest him to have dominion over the works of

Could respectable moral thought ever have differentiated in this way *among humans*? Certainly. In 1907, the Clarendon Press at Oxford published the following in a two-volume treatise on moral philosophy by the Reverend Hastings Rashdall,[201] concerning trade-offs between high culture and the amelioration of social and economic conditions:

> It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower Well-being—it may be ultimately the very existence—of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men.[202]

That's what passed for moral philosophy at Oxford a few generations ago. As far as I can tell there is nothing ironic in Rashdall's observation.[203] For Rashdall, this is one of our considered judgments in what would now be described as *reflective equilibrium*. "Individuals, or races with higher capacities … have a right to more than merely equal consideration as compared to those of lower capacities."[204] This comes

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thy hands; thou hast put all things under his feet: all sheep and oxen, yea, and the beasts of the field; the fowl of the air, and the fish of the sea, and whatsoever passeth through the paths of the seas."

[201] Rashdall was a Fellow and Tutor at New College, and a pupil of Henry Sidgwick and T.H. Green. His memorial in the cloisters of New College reads: "In memory of Hastings Rashdall DD FBA 1858-1924, Scholar, Fellow and Tutor, and Honorary Fellow of New College and Dean of Carlisle. Historian, Philosopher, Theologian. In thought fearless, in learning various and profound, rich in humour. In his books, in his teaching, in his public duties, he brought to the service of his age a rare passion for virtue, knowledge, and truth."

[202] Hastings Rashdall, *The Theory of Good and Evil: A Treatise on Moral Philosophy*, Second Edition (Oxford University Press, 1924), Vol. I, p. 237-8. Rashdall also appends a footnote: "The exclusion is far more difficult to justify in the case of people like the Japanese, who are equally civilized but have fewer wants than the Western" (p. 238). The author continued: "If we do defend it" (and he had no doubt that we would) "we distinctly adopt the principle that higher life is intrinsically, in and for itself, more valuable than lower life, though it may only be attainable by fewer persons, and may not contribute to the greater good of those who do not share it." (Ibid, p. 238.)

[203] It rests explicitly on what he calls "our comparative indifference to the welfare of the black races, when it collides with the higher Well-being of a much smaller European population." Ibid., p. 241.

[204] Ibid., p. 242.

close to accepting a distinction among humans, analogous to that which we accept as between humans and animals.[205]

We may not be able to make sense of the idea that *morality* (moral reasons) has changed in this regard; but *we* have certainly changed in our moral views (however deplorable our conduct continues to be). And again, I want to say that our moral views have moved *upward* in this respect, according to all men and women now the moral respect and consideration that Hastings Rashdall thought should be accorded to "a much smaller number of white men."

We could have moved in the opposite direction. Edmund Burke feared that we were. Lamenting the violation of the serene and beauteous dignity of the Queen of France, in his *Reflections on the Revolution in France*, Burke lamented that

> the age of chivalry is gone. That of sophisters, economists, and calculators, has succeeded. … Never, never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience. … [N]ow all is to be changed. … All the decent drapery of life is to be rudely torn off. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion. On this scheme of things, a king is but a man, a queen is but a woman; a woman is but an animal, and an animal not of the highest order."[206]

This is what reactionaries always say: if we abolish distinctions of rank, we will end up treating everyone like an animal, "and an animal not of the highest order." But the ethos of human dignity reminds us that there is an alternative: we can flatten out the scale of status and rank and leave Marie Antoinette more or less where she is. Everyone can eat cake or

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[205] Some of this is drawn from Jeremy Waldron, *Two Essays on Basic Equality*, unpublished manuscript available at http://ssrn.com/abstract=1311816

[206] Ibid., paragraphs 126-9.

(more to the point) *everyone's* maltreatment—maltreatment of the lowliest criminal, abuse of the most despised of terror suspects—can be regarded as a sacrilege, a violation of human dignity, which (in the words of Edmund Burke) ten thousand swords must leap from their scabbards to avenge.