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12-1-2010

# Dignity, Rights, and Responsibilities

Jeremy Waldron
*NYU School of Law*, waldronj@juris.law.nyu.edu

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Recommended Citation
Waldron, Jeremy, "Dignity, Rights, and Responsibilities" (2010). *New York University Public Law and Legal Theory Working Papers.* Paper 242.
http://lsr.nellco.org/nyu_plltwp/242

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Max Weber Lecture EUI: May 2010

# DIGNITY, RIGHTS, AND RESPONSIBILITIES

Jeremy Waldron[1]

## 1. The Rights and Responsibilities Green Paper

Last year (March 23, 2009), the government in the United Kingdom issued a Green Paper entitled "*Rights and Responsibilities: Developing our Constitutional Framework*,"[2] in which the authors (Jack Straw, Secretary of State for Justice in the Gordon Brown administration and Michael Wills, a minister in the same department) deplored the fact that "[a]lthough we have a latent understanding and acceptance of our duties to one another and to the state," responsibilities "have not been given the same prominence as rights in our constitutional architecture." They published their paper in order to launch a debate about the regime of rights in the UK and about how to "ensure that our responsibilities to one another are discharged," and "to examine[ ] a range of options for drawing up a [new] Bill of Rights and Responsibilities."

In the debate and consultation in Britain that followed the publication of the Green paper, there was considerable support for the idea of a legal charter of responsibilities but it was balanced by some quite fiercely argued misgivings.[3] Many people were unclear about the meaning of the term "responsibilities" and about what the Green Paper meant when it said that responsibilities are a "cousin" – if a "poor cousin"—to rights in our national discourse, or when it spoke of "responsibilities inherent in our rights." There was concern about the type of deontic requirement a responsibility was supposed to represent; was it simply an obligation or a duty or something different from that? And there was concern too about whether responsibilities were the sort of things that should be declared and enforced by law: summing up the responses, the Department of Justice said:

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[1] University Professor and Professor of Law, New York University and Chichele Professor-Elect, Oxford University.

[2] Green Paper, "Rights and Responsibilities: Developing our Constitutional Framework" (Cm 7577), available at http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf

[3] http://www.justice.gov.uk/publications/docs/rights-responsibilities-response-april-2010.pdf

> some responses felt that it was simply not the role of the State to articulate … responsibilities, which more properly belong to the civic and social spheres and to individual communities and families."

There was a suggestion that "the kinds of responsibilities discussed in the Green Paper were seen as more transient and lacking 'equivalence' to core human rights, which in turn risked being 'devalued' by being discussed in parallel."

Respondents expressed considerable anxiety about possible dilution of the Human Rights Act (and the concomitant ECHR structure), leading the government to emphasize (in its summary of responses) "that there would be no retreat from the protections in the Human Rights Act." Many people felt that in any new constitutional instrument there should be, at most, a preamble-style declaration of responsibilities.[4] As one response noted:

> "Codifying responsibilities for declaratory purposes may have a role in expressing a standard to which individuals, communities and government should aspire. The sanctions which help enforce declaratory principles need not always be legal sanctions. The court of public opinion is an effective one."

It is not clear what will become of the Green paper in the wake of the recent General Election. The Green Paper itself was not specifically referred to in any of the manifestoes, although Labour's manifesto insisted that "[i]n everything we do, we will demand the responsibilities that must come with rights: to work when you can, not to abuse your neighbour or neighbourhood, to show respect for Britain as a newcomer, to pay your fair share of tax."[5] The Conservatives eschewed all discussion of the document or its leading ideas in their manifesto, saying simply that "[w]e believe in

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[4] "The preferred means of giving effect to responsibilities, should they be included, was therefore overwhelmingly for a declaratory statement, possibly included in the preamble to any new Bill. It was felt among those who supported this approach that such a statement would have the potential to bring about a positive cultural change and encourage more active citizenship. "

[5] Labour: "We will build a personalized welfare system that offers protection for all those who need it, increases people's control over their own lives, and is clear about the responsibilities owed to others. … [On health care] With new rights to treatment come new responsibilities … [On immigration] We will continue to emphasise the value we place on citizenship, and the responsibilities as well as rights it brings, through the citizenship pledge and ceremony, and by strengthening the test of British values and traditions. … we need further to improve citizenship education in schools so that young people are better prepared for their democratic responsibilities"

responsibility: government responsibility with public finances, personal responsibility for our actions, and social responsibility towards each other"[6] and that "to protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights" as well as their "Big Society" thesis: "Our alternative to big government is the Big Society: a society with much higher levels of personal, professional, civic and corporate responsibility." But it was noticeable that when he entered 10 Downing Street to assume the premiership on the evening of May 11, David Cameron did go out of his way to use the rhetoric of rights and responsibilities, saying that "he wanted to build a society in Britain 'in which we do not just ask what are my entitlements, but what are my responsibilities, one where we don't ask just what am I … owed, but more what can I give."[7] Commentators however heard in this more of an echo of John Kennedy—ask not what your country can do for you, ask what you can do for your country"—than of Jack Straw's Green Paper.[8]

**2. Various things that "responsibilities" might mean**

"Responsibilities" is certainly a slippery term. Mostly I think the authors of that Green paper, Jack Straw and Michael Wills, meant it in the sense of ordinary social duty; they mentioned criminal and regulatory law and private law obligations as well, such as duties of care.

But the Green Paper referred to "responsibilities inherent in our rights." What might that mean? And consider this usage in the 2010 Conservative manifesto: "As Conservatives, we trust people. We believe that if people are given more responsibility, they will behave more responsibly." This indicates complex syntax as well as the conceptual complexity associated with this term. Obviously it is going to be quite a challenge to do for responsibilities, what Bentham, Hohfeld and other analytic thinkers have done for rights and obligations.

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[6] Conservatives: ("encouraging social responsibility in all its forms and across all the country – whether curbing incivility on our streets or supporting social enterprises with the power to transform neighbourhoods. Mending Britain's broken society will be a central aim of the next Conservative government.")

[7] The Guardian, May 12, 2010, p. 1

[8] The Guardian preceded the above quote as follows: "With echoes of the US president John Kennedy, he said…"

So let us consider some of the various ways in which ordinary people can be constrained (by something that might be called "responsibilities") in and around rights.

**(i) Duties correlative to rights.**
One obvious idea is that our rights are constrained by respect for the rights of others. My rights correlate with your duties; your rights correlate with my duties. So when rights are equal, each person has duties in regard to the rights of others.

This is not always seen because it is assumed that our most important rights—our human rights, for example—are primarily rights against the state (which bears the correlative duties) rather than rights against individuals. But though this may be true of human and constitutional rights, it is by no means true of ordinary legal rights, which are as often held against other private individuals and firms as they are against the state. (And the authors of the Green Paper do refer to our ordinary private law obligations as among the responsibilities they have in mind.) In addition, the demand for citizen responsibilities may also be read as a demand for a horizontal reading of some of the rights contained in the ECHR. So, for example, the right to privacy might be thought to constrain private businesses, if not directly, then through the courts' use of the Human Rights Act to interpret existing common law arrangements. Or the right to freedom of religion might be thought to impose limits on an employer's freedom in regard to holidays, religious observances, and so on.

**(ii) Awareness and acceptance of limitations on rights.**
When the Green paper spoke of "responsibilities inherent in our rights," I think they meant to refer to the way in which instruments like the ECHR mentioned in the very same clause as they laid down a given right certain legitimate limitations that might be imposed upon it. For example, Article 10, sets out the right to freedom of expression; but at the same time it specifically recognizes that the exercise of this freedom "carries with it duties and responsibilities." Article 10(2) of the Convention provides:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation

> or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Or consider more broadly the very common formula, for example, the clause in section 5 of the New Zealand Bill of Rights Act: "The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." You'll find something similar in many bills of rights the world over, in Article 1of the Canadian Charter of Rights and Freedoms,[9] for example, or in section 36 of the South African Constitution.[10]

So, in the words of the Green paper, "there is a recognition that our rights do not exist in isolation. There are limitations on our conduct which allow us to co-exist harmoniously." These limitations and constraints can be internal or external; they can be internal in the sense that they govern the way we define and specify the right in question or they can be external in that they refer to justified restraints which may legitimately be imposed on an independently defined right.

Of course a limitation on a right is not in and of itself the imposition of a responsibility: what it represents is clearing space for the imposition of a responsibility by other legal means, which might otherwise be obstructed or prevented by an expansive formulation of the right. So, for example, article 10(2) of the ECHR does not actually impose any responsibilities for "national security, … public safety, for the prevention of disorder or crime, [or] the protection of health or morals." But it leaves room for the imposition of responsibilities under these headings."

**(iii) Duties governing the exercise of rights.**

A third category of constraint might be the moral restraints that apply to the way we exercise our rights. Many years ago, in one of the first papers I ever

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[9] Canadian Charter, Article 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[10] South African Bill of Rights: s. 36 "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

published, I talked of "a right to do wrong," which was intended not so much as a legitimation of license, but as an indication that ordinary moral categories of right and wrong don't disappear, or are not displaced when rights are at issue; that we continue to be governed by moral reasons even when we are exercising our rights. And so moral or social criticism of someone for the way they exercise their rights is not inappropriate.[11]

So for example, when newspapers and magazines all over Europe and all over Europe and North America, published and republished the notorious Danish Cartoons in 2005-6 and when they were criticized for their irresponsibility in publishing them, they often replied to these criticisms by citing their right to free expression and freedom of the press. We have a right to publish the cartoons, they would say, when someone said the publication was insensitive reckless and irresponsible. But the claim that you have a right to do something is no answer to a criticism of the way you exercise your right. Or put it the other way round, having a right in and of itself does not give you a reason, let alone a moral reason, for exercising the right in any particular way. My own view is that there was something foul and offensive in the self-righteousness with which Western liberals have clamored for the publication and republication of the Danish cartoons in country after country and forum after forum, and that is perfectly compatible with the acknowledgement that those who embarked on this offensive course of conduct had a right to do so. The best they could say for this was that they were showing they had a right to publish them. But a right does not give the right-bearer a reason to exercise the right one way or another, nor should it insulate him against moral criticism. My view is that the exercise of this right was fatuous, unnecessary and offensive; but as I have now said several times, offensiveness is not a good reason for restriction.

This, by the way, is not a distinction between law and morality. A claim that one had a moral right would also not be a legitimate way of rebutting moral criticism. Moral rights don't give their bearers moral reasons for acting. But if we are talking about legal rights, it is probably true that most of the criticism of the way a legal right is exercised will be moral criticism. And the Green paper might be read as urging a greater readiness in society to advance and sustain moral criticism of this kind. People should not be allowed to think that they are insulated from moral criticism of their irresponsibility simply because they are exercising a legal right which is not subject to any legal limitation.

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[11] Waldron, *A Right to do Wrong*, 92 ETHICS 21 (1981), reprinted in WALDRON, LIBERAL RIGHTS, Ch. 3.

Still, as many of the respondents to the Green paper said, the responsibilities that are invoked here are "of a very different nature to the rights" that are under discussion, and it is probably not appropriate to enforce them legally, although of course there are other ways in which a culture of moral assessment can be channeled and nurtured by the law.

**3. Rights as responsibilities**

There is one additional sense of "responsibility" that really doesn't get mentioned in the Green Paper, but it may be worthwhile to consider. This is a sense of responsibility that goes along with rights (can even be equated with certain rights) rather than being opposed to them or just correlative to them or applicable to their exercise. I believe it is possible and probably important to think about certain rights themselves as responsibilities.

Here's a preliminary example of what I mean: parental rights—the rights of parents in regard to their children—implicit in Articles 8 and 10 of the European Convention, but set out explicitly in Article 6 of the German Basic Law, which states:

> (1) Marriage and family enjoy the special protection of the state. (2) Care and upbringing of children are the natural right of the parents and a duty primarily incumbent upon them. The state watches over the performance of this duty.

What's interesting in this formulation is the designation of the "care and upbringing of children" as both a right and a duty incumbent on parents. It is a task that has to be assigned to someone; it is assigned by natural law and the law of the state to the parents; and the parents are then protected in that position, protected for example against the interference of others.

The English philosopher Elizabeth Anscombe once argued that rights of this sort are like assignments of authority. Now we normally think of authority as going along with a duty of obedience: the mother has authority; the child must obey. But as Anscombe points out, authority has additional dimensions:

> Authority stemming from a task does not indeed relate only to obedience. … A small baby does not obey, but we may acknowledge the authority of a parent in decisions about what should be done with it. So authority might be thought to be a right to decide in some domain, and its correlative not to be obedience, but respect. For you can go against

> someone's authority not merely by being a disobedient subject of it, but also by being an interfering outsider.[12]

Or even if a child is of an age where obedience is at issue, parent's authority still has this outward-looking aspect. Suppose a stranger intervenes (on a bus or somewhere) to reprimand a little kid for acting boisterously. The mother may protest: "It is not for you to discipline my child; that is my responsibility." What she is claiming here is something like a right that she holds, but it is a right that is kind of synonymous with a responsibility.

The German provision suggests that a right of this kind can also be conceived as a duty. In the parenting case, we may even say that the right is something which a person, if she is a parent, has a duty to exercise. It's her job, it is something incumbent on her; but it's *still* a RIGHT that she has; it's something which (in the normal case) she holds against others. And the duty aspect of the right is not just a matter of submitting to a set of rules. Often what it involves is continual and active exercise of intelligence and choice; and these are her choices to make, her intelligence to exercise. She is privileged in this regard.

True, in the parenting case, there are limits, beyond which we will collectively intervene to take the right/responsibility away from her. As the German provision says: "The state watches over the performance of this duty." and it adds in subsection (3) of Article 6:

> (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

But that is an extreme back-up provision and it leaves an immense amount of space for the freedom and choice of the parent. The parent's privileged position and the legitimate choices that are open to her in this regard, plus the perceived interest benefit to her in a broad (not necessarily egoistic) sense of interest or benefit of having and exercising this right, are what justify us in talking of this responsibility as also a right.

Is this one of things that the authors of the British Green Paper had in mind? I'm not sure. They did at one point quote Article 6 of the German Basic Law as an example; but they didn't dwell on it. But it is an interesting sense of responsibility for us to think about, particularly because it offers an alternative analysis of rights rather than standing in opposition to rights to or as a limitation upon them. The idea of a responsibility right actually comes

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[12] Anscombe, "On the Source of the Authority of the State," in Raz (ed.) *Authority* at 148.

close to the suggestion from the Conservative party manifesto that I mentioned a few moments ago: "We believe that if people are given more responsibility, they will behave more responsibly."

I actually think lots of rights are like this, especially political rights (and I am going to say more about that in a moment). They have this dual character of right and responsibility:

**(1) the designation of an important task,**

**(2) the privileging of someone as the person to perform the task, making the decisions which the task requires**

**(3) doing so in view of the particular interest that they have in the matter, and**

**(4) the protection of their decision-making-sphere pursuant to this responsibility against interference by others and even by the state (except in extreme cases)**

—this seems to me to be a distinctive form of right and one worth studying in some detail. I shall rights of this kind "responsibility-rights" and the formal analysis I have just sketched the "responsibility-form" of rights. I don't think it applies to all rights. But it can be useful in the analysis of a great many of them.

Let me give you another preliminary example: you must forgive me; it is a specifically American example, though it is a well-known, indeed a notorious one.

It focuses on the Second Amendment to the U.S. Constitution, the one about the right to bear arms (cited continually by opponents of gun control). What is remarkable about this provision is that it has a preamble, which specifies a role or a task for those who bear arms: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Those who are utterly opposed to gun control—like Charlton Heston and the NRA—tend to minimize the preamble and just emphasize the entitlement end of the provision. Defenders of gun control, on the other hand, tend to put great emphasis on the preamble and use this to qualify the right,

- either by saying that the right to bear arms doesn't matter much these days when we depend for "the security of a free state" on a professional all-volunteer standing army, rather than a civilian militia.

- or by conditioning the right to bear arms on the responsible discharge of civic functions, i.e. the functions of a member of a citizen militia, a well-regulated and well-trained militia.

But certainly the way the 2nd Amendment is drafted presents it as a responsibility right, which admittedly doesn't obliterate the restraint on government—indeed the citizen militia is suppose dot bee a potentially anti-government force—but doesn't leave it as a simply libertarian entitlement either. The responsibility aspect is a way of informing and conditioning the individual possession and exercise of the right.

**4. Responsibilities and Dignity**

The title of my lecture today referred not only to rights and responsibilities but to dignity, and I want to turn now to the relation between responsibility-rights and the idea that rights are either founded upon or expressive of the value of human dignity.

(At this point: I should warn you at once that my analysis is sailing full steam ahead into a confrontation with the work of Stéphanie Hennette-Vauchez (who I believe is a Marie Curie Fellow here at the Robert Schuman Center) and the argument of a paper she published in 2008 entitled "A Human *Dignitas*? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept."[13] More of that in a moment.)

Dignity, as you all know, has been associated with the idea of human rights and constitutional rights throughout the modern period of the growth of human rights law. The UDHR says that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and the ICCPR asserts that the rights it contains "rights derive from the inherent dignity of the human person." And we find it in the foundation of national constitutions as well, most significantly in Article 1 (1) of the German Basic Law: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

But until the last few years, dignity has not been a focus of academic study. That is changing, and now legal scholars and moral and political philosophers are devoting more attention to dignity as a foundational idea, as well as to dignity as itself a human right (e.g. in provisions that prohibit various forms of degrading treatment or, in the words of Common Article III of the Geneva Conventions, "outrages upon personal dignity.")

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[13] http://ssrn.com/abstract=1303427

**5. Dignity and Rank:**

Those who study dignity know that there was a time when dignity was associated with rank and hierarchy. In Roman usage, *dignitas* embodied the idea of the honor, the privileges and the deference due to rank or office,[14] perhaps also reflecting one's distinction in holding that rank or office. And the Oxford English Dictionary still gives as its second meaning for the term "Honourable or high estate, position, or estimation; … degree of estimation, rank" and as its third meaning "An honourable office, rank, or title; a high official or titular position."

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."[15] Blackstone tells us that "the ancient jewels of the Crown are held to be … necessary to … support the dignity, of the sovereign for the time being."[16]

It is not just monarchy. Kant talks about the various dignities of the nobility.[17] In England, nobles have dignity, in the order of duke, marquis, earl, viscount, baron. Degrees have dignity according to law; certainly a doctorate does. Clergymen have dignity, or some do. Ambassadors have dignity according to the law of nations. 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 … are equally eligible to all dignities and to all public positions and occupations, according to their abilities…."

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 bishop

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[14] 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.

[15] *Patrick Harding's Case*, 86 Eng. Rep. 461, 2 Ventris, 315.

[16] Blackstone, *Comm*. Bk. II, Ch. 28. 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."--1399 Rolls Parl. III. 424/1, as cited in the *Oxford English Dictionary*, entry for "dignity."

[17] MM 6: 330

might be.[18] Some have suggested that the old connection between dignity and rank was superseded—replaced—by an alternative and really quite different conception of dignity—a Judaeo-Christian notion[19] of the dignity of humanity as such, with roots in Stoic ideas found in the work of Cicero, Seneca and others; and that this was a separate tradition that always existed in parallel, and as a rival, to the more hierarchical conception.

There is something to that, but I believe the connection between dignity and rank was not lost with the triumph of the more egalitarian idea. What happened was that the idea of general human dignity associated itself the notion that humans as such were a high-ranking species, called to a special vocation in the world, and that in a sense each of us was to be regarded as endued with a certain nobility or royalty, each of us was to be regarded as a creature of a high rank. High rank was generalized rather than being simply repudiated. So the strategy I pursued in an article entitled "Dignity and Rank" published in the *European Journal of Sociology* in 2007[20] and in my 2009 Tanner Lectures on "Dignity, Rank, and Rights" was to explore various ways in which 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.

I know that something similar has been explored in James Whitman's recent work on dignity. I was actually inspired in this direction by arguments pursued many years ago by the great classical scholar Gregory Vlastos, whom I knew at Berkeley in the '80s, in a neglected essay "Justice and Equality."[21] 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

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[18] 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)

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

[20] Waldron "Dignity and Rank," *Archives Européennes de Sociologie*, 48 (2007), 201.

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

Brahmin.[22] 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.

**6. Dignity and Role**

I said that dignity was traditionally associated not just with rank, but with office. In Roman times, Julius Caesar's dignity as a leading citizen had to do not just with his high birth, but with his civic functions, including being a general and being, for a period, *pontifex maximus*.

One would talk of the dignity of an ambassador, and that would have to do not with his likely noble birth but with his role as representative of another nation and the general function of diplomacy in a world that needed honest brokers between nations. One might speak of the dignity of a judge, in regard to his judicial appointment –again not just his noble status (in a country like England, for example), but in terms of the important tasks that needed to be performed by the judiciary. Or one might speak of the dignity of a clergyman, such as a bishop, in terms of his responsibility for the administration of a diocese, or even (though loosely) the dignity of a rector, in terms of his elementary right to administer the sacraments (or direct their administration) in a particular parish.

There is natural fit between the idea of role-based dignity and the idea of responsibility-rights as I have defined them. One may associate the dignity of parenthood with the right/responsibility for the upbringing of a child; and the 2nd Amendment example I gave associates the dignity of the citizen of a free republic with the right/responsibility of bearing arms in preparation for the work that a citizen militia might have to do to protect the freedom of such a republic. I find this connection between dignity, as associated with role or office, and rights conceived as responsibilities interesting and intriguing.

(And just so you know that I am keeping track: the very idea that I find intriguing, I know Dr. Hennette-Vauchez regards as dangerous and insidious. And I am going to get to her critique in a moment.)

**7. Roles for Everyone? (a) The Rights of the Citizen**

When I emphasized the rank and honor aspect of the traditional notion of dignity, I had in mind the idea that as a matter of social and ethical decision,

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[22] Vlastos, "Justice and Equality," p. 54.

we might just decide to treat everyone as royalty. But It might be thought that the role idea is not so easily generalisable, and that this connection that interest me—between responsibility rights and role-based conceptions of dignity—won't get us very far beyond rights that are associated with particular social functions in particular societies, rather than human rights generally.

I am intrigued, though, by the possibility of seeing how far we can extend this, moving step by step from specific roles to idea of role in general for every human being.

One obvious first step is to think of the roles associated with citizenship—since this is a high status—a dignity—assigned, if not universally, then very broadly in modern democratic societies. We might think of citizenship as a role and see if that role can be used as the basis of a responsibility analysis of the rights of the citizen (distinguishing for the moment as Karl Marx did, between the rights of the citizen and the rights of man.) I have already intimated an analysis along these lines of the 2nd amendment right to bear arms in the United States.

But if I may be excused for introducing another American controversy—we may think about the campaign to allow openly gay men and women to serve in the military. This is seen by most of those who campaign for it as a right, and I imagine it would still be seen as a right even if the army were not an all-volunteer force. Even if there were conscription, even if military service were a matter of social duty, the case might be made that openly gay men and women have the right to assume this duty as well. There isn't necessarily a great deal of liberty or discretion associated with this responsibility, so it is somewhat distinct from the parenthood case. But it may still satisfy the basic form that I set out, in that it involves the identification of a certain task and of people as having an interest in being designated, if need be among lots of others, as the appropriate people to perform that task.

Political rights themselves can easily fit the analysis we are consider. It can apply to public office. The patron saint of this lecture series spoke of politics as a vocation, in terms of a statesman assuming a "*personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer." Politics, said Weber, "is a strong and slow boring of hard boards. It takes both passion and perspective," and for this task he famously contrasted an 'ethic of ultimate ends' with an 'ethic of responsibility.' saying that there is

> an abysmal contrast between conduct that follows the maxim of an ethic of ultimate ends—[such as] 'The Christian does rightly and leaves the results with the Lord'—and conduct that follows the maxim of an ethic of responsibility, in which case one has to give an account of the foreseeable results of one's action.

That's true of political leadership and perhaps it is also true of the rights of citizenship.

The democratic franchise, for example, the right to be enrolled as an elector and to vote—these are classic political rights but they can also be viewed as responsibilities in the sense that the person who exercises them is fulfilling a function (along with millions of others) in running and managing the democratic community. In some countries, most notably Australia, there is a legal duty to exercise the right to vote. Section 245(1), of the Commonwealth Electoral Act 1918 states that "[i]t shall be the duty of every elector to vote at each election." The actual duty of the elector is to attend a polling place, have their name marked off the certified list, receive a ballot paper and take it to an individual voting booth, mark it, fold the ballot paper and place it in the ballot box.[23] All this is enforced with a fine of $50. Other countries that impose a legal duty to vote include Argentina, Fiji, Peru, Singapore, Switzerland, and Turkey (and in addition there are countries like Italy, actually, where in theory there is a legal duty to vote but there is no enforcement). It is interesting that in Australian discussion of whether to repeal the provision, the element of compulsion is often opposed on the ground that voting is properly regarded as a right, and therefore ought to be voluntary; and defenders of the compulsion element appeal to the fact that many rights are limited in various ways by social duties. Both positions it seems to me neglect the point that rights themselves may be considered as responsibilities; and that the importation of the element of compulsion is not necessarily to be conceived as something, whether justified or unjustified, brought in from the outside to limits the right but as part and parcel of the right and dignity of voting.

Also, the element of right has a clear sense of empowerment and choice that is largely unaffected by the element of compulsion. The voter may exercise her right as she pleases, voting for whomever she likes or even none of the above; and her voting in this way represents a degree of control over the political system, assigned to her, on an equal basis with its assignment to every other citizen. These elements of choice and

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[23] Evans, Tim. Compulsory Voting in Australia, Australian Electoral Commission.

empowerment are not limited by the duty of compulsion; on the contrary the compulsion represents a requirement that a choice be made and that the citizen accept the empowerment offered to her by the democratic franchise. On the other hand, she may exercise it as she pleases. (Contrast with parenting case mentioned earlier. The political case is an example: you can vote frivolously without having your vote taken away. )

Or think of jury service, in countries with a common law heritage, like Britain, the United States, Canada, Australia and New Zealand. There is a wonderful book entitled *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* by Linda Kerber, who is a professor of History at the University of Iowa. The fourth chapter of her book discusses the campaign by women to secure the right to serve on duties, and this—like the case of military eservice—was emphatically like seeking a responsibility, equal to the civic responsibility shouldered in this regard by men. Voting is not compulsory in the US (even registration to vote is not compulsory). But in other respects, Kerber says jury service, like voting,

> is one of the basic rituals by which Americans confirm their participation in society. Unlike voting, it is a civil obligation; the citizen who does not respond to a summons to serve on a jury faces sanctions ranging from fines to contempt of court.

As in the military case, the element of choice or liberty is not the key here: the jurors have a choice to make, in determining the guilt or innocence of the defendant in the matter before them, but it is supposed to be a matter of judgment, structured and responsible choice, rather than a matter of pure liberty. And the State most definitely does watch over and supervise the way in which it is exercised, even if it cannot second-guess the outcome.

**8. Rights of Man: religious conceptions.**

What if we take the next step and think not just of the rights of the citizen, but human rights generally? Can they be conceived as responsibilities associated with the dignity of important roles?

Well, there are very significant traces of this in the classic theory of natural rights. In Virginia in 1785, James Madison described the right to religious freedom in terms that also used the language of duty

> [W]e hold it for a fundamental and undeniable truth, …[that] [t]he Religion … of every man must be left to [his] conviction and conscience; and it is the right of every man to exercise it as these may

> dictate. This right is in its nature … unalienable, because … what is here a right towards men, is a duty towards the Creator.[24]

The duty is owed to God, but as against other men it represents itself as a right, imbued with the choice "of every man to render to the Creator such homage … as he believes to be acceptable to him."

And certainly the religious grounding of many theories of natural rights produced rights which have exactly this responsibility form. Locke grounded the basic right to life and physical integrity in this way. Men, he said, are

> all the workmanship of one omnipotent and infinitely wise Maker; … sent into the world by His order and about His business; [and so] they are His property, whose workmanship they are[,] made to last during His, not one another's pleasure. And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. [25]

I may not destroy my life, said Locke, since it is something assigned to me, entrusted to me, by my Creator, to be used for his purposes; and by the same token you may not destroy my life either, because that too would be encroaching upon a responsibility that has been assigned to me.

Even among thinkers whose frame of reference is not primarily theological, one finds elements of responsibility associated with the idea of the rights and fundamental dignity of the individual. In the Enlightenment, rights were associated with the idea of a calling or a vocation for every person, in the words of Condorcet, "rights to which we are called by nature."[26] There is a task to be performed, namely the moral governance of the lives of individuals, and the idea behind natural rights is that this task is properly assigned, individual by individual, to the person himself. We don't have to be governed by others. As a right-bearer, every human is capable of self-mastery and self-control, and if there is any further governing to be

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[24] James Madison, Memorial and Remonstrance against Religious Assessments [1785] opposed a Bill in the Virginia Legislature "establishing a provision for Teachers of the Christian Religion,"

[25] Locke, Two Treatises, II, §6.

[26] Condorcet, 'Sketch for the Progress of the Human Mind,' in Keith Michael Baker (ed.) *Condorcet: Selected Writings* (Indianapolis: Bobbs Merrill, 1976).

done, it is to be done under the auspices of political institutions set up by the free choice of self-governing individuals.

That natural rights are in this sense responsibilities and that they are associated with the dignity of an assignment to a being capable of bearing these responsibilities—this theme is made evident also in what the Enlightenment philosophers say about the way we bear and conduct ourselves in our individual and social lives. There is a sort of moral orthopedics associated with rights—some Marxists, following Ernst Bloch, used to call "walking upright."[27] –having a certain sort of presence or uprightness of bearing, self-possession and self-control, indomitability, self-presentation as someone to be reckoned with, and not presenting oneself as abject or overly submissive in circumstances of adversity.[28] "Be no man's lackey," said Immanuel Kant, "Do not let others tread with impunity on your rights. … Bowing and scraping before a human being seems in any case unworthy of … human [dignity]."[29] We are responsible for standing up indomitably for our own rights, without fuss or moral embarrassment, and equally we are capable of standing up for the rights of others, taking join t responsibility with all others for the whole regime of rights which has been entrusted to us, jointly and severally.

These are diffuse ideas, largely background to the specification of particular rights; but it would be a misrepresentation of the natural rights tradition and I believe of the human rights tradition not to see rights in the light of these convictions about human capacity and human responsibility.

## 10. From Subjective to Inalienable Rights

It used to be thought that the discourse of rights progressed from what is called an objective[30] notion in medieval times—where rights were more or less equated with duties (like the right of a priest to say mass)—to a subjective notion, where rights were conceived much more voluntaristically, as faculties of will, or perhaps as property, which the individual proprietor could use or dispose of as he saw fit. And it is sometimes said that you don't really get the modern notion of rights until we are in possession of this full subjective will-based conception. From this perspective, responsibility-

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[27] See Jan Robert Bloch and Caspers Rubin, "How Can We Understand the Bends in the Upright Gait?" *New German Critique* 45 (1988): 9-10.

[28] See also the account in Aurel Kolnai, "Dignity," *Philosophy* 51 (1976): 253-54.

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

[30] I don't mean "objective" in the sense of cognition of a moral reality.

rights—the sort that I have been emphasizing—will seem like throw-backs (except perhaps to the extent that they privilege important ranges of choice or individual discretion).

Richard Tuck has traced aspects of this trajectory in his book, *Natural Rights Theories*, and it is true that there was a movement of this kind from objective rights to subjective rights. By the 16th century, in the work of Spanish thinkers like Molina and Suarez, we find rights being treated entirely like individual property, utterly subject to the will of those who have them. But Tuck shows that it was not an uninterrupted trajectory. The effect of the Molina/ Suarez position was that a man conceived as *dominus* (owner) not only of his external goods, but … of his own liberty," might according to natural law be in a position to "alienate it and enslave himself." A theory that appeared to be empowering of the individual will could therefore be used, at least in principle, to justify slavery or absolute subjugation,[31] since people could be thought of as having sold or abdicated their liberty, for the price of subsistence or security, to a master or a king.

Tuck tells the story of how in the 17th century, many thinkers were prepared to accept this position only as a matter of abstract principle. In practice, they held the view that interpretive charity would require us to reject any account of what a person had said or done that had him alienating his liberty. And by the time you get to the late 17th century, you have thinkers like Hobbes and Locke insisting that certain rights are just in principle inalienable—for Hobbes it is a minimal right of self-defense and self-protection which, as he says, no one can be deemed to have given up; for Locke it is a full scale inalienability position:

> [A] man, not having the power of his own life, cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another power over it.

This thesis was crucial to Locke's idea of limited government:

> Though the legislative … be the supreme power in every commonwealth, yet, … it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to

[31] Tuck, pp. 56-7.

> the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself…. . A man, as has been proved, cannot subject himself to the arbitrary power of another."[32]

And it is this notion of inalienable rights that is referenced by Jefferson when he drafts the Declaration of Independence for the American states in 1776. You see what is happening here: Something close to objective rights fought a strong rearguard action in the 17th century and 18th centuries in the inalienable rights theories of Locke and Jefferson others. The idea of rights being wholly matters of individual freedom is radical idea; but it has conservative and repressive political implications; to combat those implications people are retreating to a more objective conception of inalienable rights, which I think corresponds in many regards to the idea of rights as responsibilities which I have been emphasizing.[33]

So: It is sometimes thought that modern human rights ideas could not have emerged from the discourse of natural rights, if the objective understanding of rights as responsibilities had not been replaced by a more subjective conception. But I have been arguing that that is a mistake.[34] Early modern ideas of *inalienable* rights actually represented a resurgence of an objective theory of rights against subjective theories that had flourished in sixteenth-century thought and had been used to underpin contractarian defenses of slavery and absolute rule. It was only with the *revival* of the idea of objective rights, that it became possible for thinkers like John Locke

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[32] Locke, TT, II, §22 "§135.

[33] Sometimes in 15th and 16th century political theory, this sense of right (=responsibility) was associated with an "objective" rather than a "subjective" sense of right. In the objective sense, one's right was a "ius" which came very close to conveying a sense of what it was right for one to do (one would talk, for example about the priest's right or or responsibility or *ius* to celebrate mass; it was something that it was his right to do, but also it was something that he had a responsibility to do; he couldn't just say "Oh fuck it, I am not going to celebrate mass this week.") A subjective notion of right (right = *dominium* or property rather than *ius*) by contrast emphasized much more a matter of choice (entirely up to the right-bearer how he exercised the right and indeed what he did with it). On the subjective account, it's your right, and you can do what you damned-well like with it. It is often said that natural rights talk evolved from objective rights→ subjective rights in the period 14th century→17th century, but in fact as Richard Tuck has shown in *Natural Rights Theories*, it was more complicated than that. Something close to objective rights fought a strong rearguard action in the 17th century and 18th centuries in the inalienable rights theories of Locke and Jefferson others.

[34] There is an excellent discussion in Richard Tuck, *Natural Rights Theories*, pp. 143 ff.

(in the *Two Treatises of Government*) and Thomas Jefferson (in *The Declaration of Independence*) to say that our natural rights are *inalienably* ours. Inalienable means they are not ours to give away; and that means that a contractarian defense of slavery or subjection to an absolute monarch is simply out of the question. Now perhaps under the influence of free market ideas, some people want to go in the opposite direction, and privilege the freedom of people to subject themselves to exploitative arrangements, or sell themselves into sex-slavery or degradation. If they do that they should be aware of how much of a hard-fought heritage of natural rights ideas they are giving up and how bad a bargain that has proved in the past.

**7. The Hennette-Vauchez critique**

As I have said, I am acutely aware of the disagreement on almost all of these matters between the view that I have set out and the view set out in Stéphanie Hennette-Vauchez's critique of the human dignity principle in the paper she published on SSRN in 2008.[35]

Hennette-Vauchez's critique is directed at the uses that are made of human dignity—a principle which she believes has proved a "two-edged sword" in human rights discourse –oriented as much towards grounding legal obligations[36] (or even prohibitions) as towards genuinely emancipatory rights. She is concerned about the use of dignitarian ideas not to empower people by providing a secure foundation for their rights but to "limit[ ] rights in the name of social values" and to express "the idea of duties and obligations of the individual." Hennette-Vauchez does not talk about the particular conception of rights that I have set out, in terms of responsibilities (though she does address the theme of inalienable rights in some very interesting passages towards the end of her paper) But I have no doubt that she will find the responsibility analysis also uncongenial, not least because of the obvious links that I have set up between that analysis and the traditional hierarchical conception of dignity, defined in terms of rank and role.

There are a number of cases we could use to bring this disagreement into focus. One is the infamous "dwarf-tossing" case, from France, where the French authorities invoked the principle of human dignity to prohibit an

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[35]"A Human *Dignitas*? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept," http://ssrn.com/abstract=1303427

[36] She cites D. Beyleveld and R. Brownsword as thinking of dignity in terms of a "duty-led approach"

activity which involved large men tossing dwarfs or little people along padded hallways or corridors, to see who could throw their dwarf the farthest. The dwarf would wear a little harness, with a handle on his back. The dwarfs consented to this use of their bodies, and were apparently well paid. But the Conseil d'État upheld the ban on dignitarian grounds[37] and the UN Human Rights Committee refused to entertain a complaint of discrimination by one of the dwarfs—Manuel Wackenheim—that banning the activity was a form of economic discrimination. Dr. Hennette-Vauchez believes this is an unacceptably paternalistic use of the human dignity principle, placing human dignity as a general idea inherent in humanity as such above the particular economic interests and self-determination of the individual.[38]

To paraphrase Hennette-Vauchez, the way she reads the principle behind this decision is that every human being is treated as a repository (but not a proprietor) of a parcel of human dignity, in the name of which that person may be subjected to a number of obligations that have to do with this parcel's preservation at all times and in all places. It goes right to the issue of inalienability: the dwarf's consent is treated as irrelevant. ""Since human dignity relates to humankind more than it does to the human individual, it remains out of the latter's reach: [he] cannot renounce it, [he] is stuck with it."

Another example she cites is a 2002 decision from South Africa. In the case of *State v. Jordan*, the South African Constitutional Court used the principle of human dignity to uphold the terms of an old 1957 statute prohibiting prostitution,[39] i.e., penalizing women for engaging in sex work, where that might be their only economic option.

Now actually, what happened in the Jordan case was that the idea of dignity was interpreted in the context of prostitution to rebut a dignity-based challenge to the statute. The provision under which the sex-workers were convicted was challenged on a number of constitutional grounds: that it

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[37] Conseil d'Etat, Ass., 27 oct. 1995, Commune de Morsang sur Orge, Recueil Lebon p. 372.

[38] "The French Council of State reasons in a very similar fashion as it upholds municipal orders prohibiting dwarf-throwing shows in accordance with the *commissaire de gouvernement*'s plea that: 'the respect for human dignity, absolute concept if any, can not accommodate to any kind of concession depending on subjective appreciations". In these examples, the human dignity it is referred to is human dignity intended as a quality of the whole species, of humankind –and not of the sole individual."

[39] Constitutional Court of South Africa, 9 Oct. 2002, Case CCT31/01, *Jordan v. the State*

discriminated against women, that it violated the right to privacy, that it was incompatible with the "right to freely engage in economic activity and to pursue a livelihood," and that it violated the principle of human dignity. It was in response to the last of these challenges that the Constitutional Court said the following:

> Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that [the provision prohibiting prostitution] can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself.[40]

That was in the joint judgment of Justices Albie Sachs and Kate O'Regan, concurring in part in the decision of the majority, upholding the ban. It is an eloquent statement of what Hennette-Vauchez might regard as the paternalistic use of the human dignity principle.[41] I should say that it is balanced by an additional statement that insists that those arrested for this offense "must be treated with dignity by the police" and there must not be any subsequent "invasion of dignity, going beyond that ordinarily implied by an arrest or charge." "Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual

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[40] Constitutional Court of South Africa, 9 oct. 2002, Case CCT31/01, *Jordan v. the State* per O'Regan and Sachs JJ. *concurring* {majority agreed with this part of the Sachs and O'Regan judgment : "[74]

[41] She speaks of "similarities in the legal regime that is associated with the dignity principle in both its ancient (dignitas) and contemporary fashions must be added to the previous functional and structural ones. Indeed, both versions of the dignity principle seem to heavily rely on the concept of inalienability when it comes to their legal regime. Then again, theoretical stakes are high on this particular issue, for the question of human dignity's inalienability re-opens the wider one of rights waivers in general. Yet it is well-known that the question of waiving rights is a highly difficult one. It must be admitted that it is somewhat disturbing to envisage the configuration in which a given individual behaves in a way that is exactly opposite to the one that is generally expected of her – which is the case, for instance, when she waives fundamental rights. It can indeed convincingly be argued that the quest and recognition of human rights have been long and painstaking enough processes for one to legitimately expect that their beneficiaries wish not to renounce them!"

services does not afford the client unlimited license to infringe the dignity of the prostitute." But still the O'Regan / Sachs position is uncompromising

> Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by [the statutory provision] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.

What can be said in response to the concerns voiced in the sustained and elegant arguments of Dr. Hennette-Vauchez's paper?

First, a trivial analytic point. Neither the dwarf-tossing case nor the prostitution case seem to be susceptible to what I have called a responsibility analysis of rights. Except in the most diffuse and background sense (or perhaps in some diffuse theological sense), we don't really want to say that the prostitute or the dwarf are entrusted with the task of ordering the use of their bodies (in the way that a parent is trusted with the task of ordering the lives of her children or in the way that a voter is entrusted, along with millions of others, with the task of ordering the life of community). The responsibility analysis doesn't really fit. But the dignity-principle does, and I think this is an example of the dignity principle engaging broader and deeper ethical considerations than can be captured in the responsibility analysis that I have been pursuing.

Responsibility connects with dignity via the notion of role; but the cases Hennette-Vauchez considers connect with dignity visa the idea of rank: that there is something inherently demeaning or degrading in these activities, as though a member of the royal family were to consent to their body being used in this manner.

Within the realm of dignity, what is striking about these cases is their continuity with other uses of the dignity idea, specifically with regard to degradation: uses that are perhaps less controversial. We do think it is important that prisoners and detainees not be treated in a degrading manner (for example, by interrogators at Guantanamo Bay or by reservist guards at Abu Ghraib) and few of us think that the key to this prohibition is whether the prisoner can be deemed to have consented to the treatment in question. Or consider the treatment of people who are incapable by reason of infancy, age, or disability (such as dementia) from giving their consent. In a recent decision, the English High Court insisted, I think quite properly that:

> Treatment is capable of being 'degrading' within the meaning of article 3, whether or not there is awareness on the part of the victim. However unconscious or unaware of ill-treatment a particular patient

> may be, treatment which has the effect on those who witness it of degrading the individual may come within article 3. It is enough if judged by the standard of right-thinking bystanders it would be viewed as humiliating or debasing the victim, showing a lack of respect for, or diminishing, his or her human dignity.[42]

If one makes the issue of degradation hostage to the consent of the victim in order to reach the non-paternalistic result that one wants for the dwarf-tossing case or the prostitution case, it is not clear what becomes of these other cases in which we seem to want an active and demanding prohibition on degradation that is not dependent on consent in that way.

There is a more general point here. I get the impression from Dr. Hennette-Vauchez's paper that she is already in possession of some reasonably clear convictions about how cases like the dwarf-tossing case or the prostitution case ought to come out, and she is concerned that the foundational value of dignity, as I and others are conceiving it, is yielding different results form that—wrong results in her opinion. And that's a reason for criticizing this sort of dignitarian foundation. An alternative approach would be to begin with a strong foundational commitment to dignity and be willing to follow that commitment wherever it lead us, even if it lead us to revise some of our well-established positions. After all the case of prostitution and the case of dwarf-tossing are hardly clear-cut; they are fraught with moral difficulty and we are supposed to be appealing to foundational values to help us think them through.

Probably the course of wisdom is some sort of reflective equilibrium. We sometimes modify our given judgments about particular cases in the light of foundational commitments and we sometimes modify our foundation commitments, when we have a choice, in the light of our settled convictions about individual cases. We work at both ends, so to speak. But then it really is an open question about what should be settled and what should be up for grabs in the South African case of *State v Jordan* or in the dwarf-tossing case. Certainly what is valuable about Hennette-Vauchez's criticism is that it alerts us to various dimensions of conflict and difficulty that might attend the use of dignitarian foundations. But alerting us to a possible difficulty is not the same as resolving the matter.

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[42] *Regina (Burke) v General Medical* Council (Official Solicitor intervening) [2005] QB 424, at §178.

## 8. Conclusion

Let me return finally to my analysis of rights as responsibilities. We have seen that this analysis does not overlap perfectly with the foundation of rights in an objective conception of inalienable human dignity.

It should also be clear—and I have tried to emphasize this throughout—that the analysis of rights as responsibilities does not apply to all rights: it does not apply for example to the right not to be tortured, which is simply a right protecting us against us against the worst that can be done by the state; and it does not apply in any straightforward fashion to rights that govern detention, interrogation, trial and punishment—unless one wants to say that these rights specify an adversarial responsibility and the privileges of that responsibility for a criminal defendant.

In other cases it will be unclear how to analysis the idea of a right, for example, rights to consent to medical treatment: Do these include the right to refuse life-saving treatment in all circumstances? Do they include the right to assisted suicide? These are important controversies and we must not think they are settled by the concept of a right or any particular theory of its analytic structure.

In general, we should beware of thinking that one size fits all in the analysis of rights. "Rights" is a heterogeneous category and sometimes one form of analysis will be appropriate and sometimes another one will be. The pedagogical practice whereby students are taught that there is a face-off between Benefit or Interest theories of rights, on the one hand, sponsored by Bentham and Raz, and Choice or Will theories of rights, on the other hand, sponsored by Ihering or Hart is unhelpful if it suggests that rights have to fit just one form of analysis.[43] Indeed the participants in this face-off no longer accept that dichotomy. In a paper entitled "Legal Rights," written in 1973 and published in his volume *Essays on Bentham*, H.L.A. Hart conceded, in a section entitled "The Limits of a General Theory" that his choice theory of rights was inadequate to cover all aspects of all rights and that for certain

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[43] We offer various analyses of the idea of a right—but it is possible that there is no single clear idea, definable by necessary and sufficient conditions. It may be a cluster of ideas; each layered in various ways and intelligible form various perspectives. For a generation, now, students in philosophy classes have thought they had to choose between the "Choice" or "Will" theory of rights, associated with Ihering and the early work of H.L.A. Hart, and the Interest or Benefit theory of rights, associated in various stages of its development with the work of Jeremy Bentham, David Lyons and Joseph Raz. Then there is Joel Feinberg's notion of rights as claims; and Elizabeth Anscombe's theory of rights as authority. Sense that none of these really exhausts the rights relation.

aspects of certain rights it needed to be at least supplemented, if not supplanted, by a Benthamite "benefit' theory.

The virtue of Hart's early work in 1955 is that he made the choice-form available as an analytic resource, for capturing one aspect of some of these multi-faceted and exasperatingly diverse category of normative considerations, not that he managed to convince anyone that the Choice Theory captured everything there was to say about the formal characteristics of rights. And that's how I want to think about the responsibility-analysis. It is available as an account of certain rights; but it may not be useful for analysis of other rights.

I can imagine that once the responsibility-form for rights is made available—once it is well-understood among participants in rights-discourses—there may be a temptation by some people to use it in ways that other people will want to resist. For example, I can imagine pro-life people (anti-abortion campaigners) arguing that a woman's right over her body and her reproductive capacities is to be understood as a responsibility—akin to the responsibility of parents—rather than as a pure right of willful choice. And I can imagine the distress and anger this might occasion among pro-choice advocates who are used to regarding a woman's right over her body in a more empowering and emancipatory light. So there will be controversy and, since we know the responsibility form for rights doesn't fit all rights, the mere availability of this form doesn't settle anything.

Someone committed to the pro-choice position may say that it is a strategic mistake to even raise the possibility of the responsibility form of rights or make it available as a possible structure for understanding rights claims, because this will only add to the armory of the pro-life opposition, giving them ways of co-opting the language of women's rights to express their side of the debate. But I don't accept that. We should not be so shackled to an advocacy position, that we fail to notice different modes in which rights can present themselves and different ways in which the multi-faceted value of dignity may contribute to their foundation and expression; we should not suppress a possible way of thinking about rights just in order to deny our opponents a way of articulating their position.

We have come a long way from the British Green Paper on rights and responsibilities. And I suspect that this discussion is probably not what Jack Straw and his co-author had in mind when they talked about responsibilities. They had in mind a cruder and perhaps more repressive idea of limits on rights and the imposition of obligation. I have taken the opportunity provided by their Green Paper to consider this more subtle way in which rights relate to responsibilities. Unlike a crude obligation-analysis, this way

of thinking can be genuinely empowering; it is a way of thinking about freedom as authority, not just freedom as some willfulness that the society has to put up with; and it is a way of connecting rights with socially important functions not just seeing them as an individualist limit on the ambit of social functions. It is also, as I have said, an important way of connecting rights with dignity. For these reasons, then, I think the responsibility form of rights is a useful and important resource to add to our analytic repertoire.