Criminal Defense Lawyering and Client Dignity

Another purported justification for a criminal defense exception is that CDLs are uniquely situated to protect their clients’ dignitary interests. Simon is skeptical that this is true in any way that may be sufficient to justify aggressive lawyering.

This is partly because the conception of dignity that underwrites Simon’s skepticism is fairly thin. At the very least, if Simon has a more robust notion of dignity, he does not think that the work of CDLs has much at all to do with protecting it:

In the criminal process, we show respect in the general way by extending rights independent of an individual’s guilt and innocence-for example, rights to notice of charges and to freedom from cruel and unusual punishment. Defense counsel respects the dignity of the client by helping enforce such rights as well as by observing the general civilities of polite intercourse with the client. {Simon, 1993, 1713}

What is telling about that passage is that, while the “criminal process” respects dignity by extending rights to criminal defendants, no dignitary interests are implicated by CDLs’ work to safeguard those same rights. The actors in the justice system whose work most affects client dignity are: 1) the drafters of the state and federal constitutions for creating broad dignity-respecting rights ab initio; 2) legislators who create new procedural safeguards for individuals accused of crime, some of which may also grant important entitlements; 3) judges who have the power to ensure that these rules have teeth; and, perhaps most puzzlingly, 4) prosecution and law enforcement who uphold dignity to the extent that they abide by the rules placed on them. Simon does not explicitly state that the power to protect the dignity of criminal defendants vests in these places, but such a view is implicit in his identification of dignity with the creation of rights and their exercise.

Furthermore, when he does state what role he thinks defense counsel play in protecting client dignity at the end of that passage, it is not in defending rights. Rather, on Simon’s view, the part of criminal defense lawyering that has the most to do with client dignity is treating clients like human beings while interacting with them. This is indeed an important part of what CDLs do, and any criticism of Simon’s view is not meant to diminish this fact. However, saying that this is the only way that CDLs defend their clients’ dignity seems incorrect and dismissive. This is especially true if this implies that police (for instance) do more to protect criminal defendants’ dignity by not violating it when given an opportunity to do so than do those defendants’ lawyers.

Rights and Dignity

To see why Simon’s suggested division of labor with respect to protecting defendants’ dignity is suspect, it is worth examining the relationship between dignity and rights. First, one must have in mind some idea of what dignity consists in. For our purposes, we will examine Jeremy Waldron’s conception of dignity, which is based in autonomy and self-expression:

Dignity is the status of a person predicated on the fact that she is recognised as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others’ attitudes and actions towards her, and in social life generally.

Thus, according to Waldron, an individual’s dignity consists in: 1) her being allowed to conduct herself in accordance with the norms she holds most important; 2) her being permitted to explain her life and values to a respectful audience; and 3) her autonomy to perform (1) and (2) being infringed only as much as necessary to accommodate the political, social, and dignitary interests of others.

None of the facets of dignity Waldron elaborates are captured in Simon’s account of criminal defense advocacy. While engaging in polite conversation with someone who is accused of serious crimes is arguably related in some penumbral way to (1) and (2), one could just as easily argue that treating such a person rudely fulfills this conception of dignity just as well as doing so would be an authentic response to the moral decisions the accused had made.

A conception of criminal defense lawyering as a defending the constitutional rights of the accused comports with the idea that CDLs protect client dignity (at least as Waldron understands it).

Consider the privilege against self-incrimination. If a criminal suspect incriminates herself as a result of state coercion, the state may not use her statement against her in court. The test of whether an incriminating statement is admissible is whether “the behavior of the State’s law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined.” *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). When a suspect-defendant’s will is overborne to the point where her choices are not her own, it infringes in important ways of every aspect of her dignity. If dignity requires individuals to be able to express themselves in the manner of their choosing, it must an affront to that dignity to force

Indeed, on a Waldronian conception of dignity, police and prosecutors qua state actors violate suspects’ dignity whenever they seek to coax those individuals into waiving the privilege. The privilege “reflects the limits of the individual’s attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state,” *Application of Gault*, 387 U.S. 1, 47, 87 (1967). Law enforcement, by seeking waiver, is doing nothing less than asking the suspect to subordinate herself to the state.

Luban goes so far as to say that self-incrimination is actually a kind of self-alienation. {Luban, 2007, 83}. On his view, being a witness in a criminal case requires giving an account of the facts from the disinterested perspective of the community as a whole. However, the suspect-defendant has a clear stake in the outcome of her case and so is clearly not disinterested. When she is forced to be a witness against herself, the state is forcing her to take the position of the disinterested third party with respect to herself. This bears directly on core issues of autonomy and selfhood.

The clear connection between dignity and the privilege against self-incrimination shows how criminal defense lawyers can protect the former by vigorously defending the latter. In the ideal scenario, a CDL will be able to intervene on a client’s behalf before a statement is coerced. In this case, the attorney clearly protects the clients’ dignity by keeping her out of the scenario in which her capacity for self-determination and hence dignity, will be infringed. However, in the scenario where the attorney is not able to prevent the dignitary harm, she may nonetheless be able to remedy it later by getting the incriminatory statement suppressed and thereby mitigating the harm the state visited on the suspect-cum-defendant. (Of course, there may be additional good that comes from this if suppressing evidence deters future misconduct by law enforcement, but as this does not do anything for the client du jour, it is irrelevant to the question of whether CDLs protect client dignity).

Even if this picture of criminal defense attorneys as protectors of client dignity is incomplete, it strongly suggests that Simon’s view that CDL work relates to dignity only insofar as CDLs treat their clients like humans is itself incomplete at best.

Luban’s view of how CDLs protect dignity is based more in the second plank of Waldron’s platform. Rather than directly protecting a client’s rights or autonomy, Luban maintains that defense counsel protects dignity by facilitating authentic self-expression. Indeed, the role of the attorney in helping the client tell her story is integral to the right to counsel, with the Supreme Court nothing that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

However, the opportunity to speak means very little if the court and other parties are committed at the outset to the idea that the speaker is lying. Luban, quoting Alan Donagan, maintains that, “no matter how untrustworthy somebody may have proved to be in the past, one fails to respect his or her dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith.” Unfortunately, the belief that individuals accused of crimes will say anything to escape responsibility (or punishment) is deeply ingrained in most prosecutors. Conversations around the negotiating table frequently involve exchanges in which defense counsel presents the client’s version of events only to have the assistant district attorney look at her as if she were the greenest naif and ask “…and you believe her?” In such cases, Luban would suggest that counsel defends their clients’ dignity by insisting that prosecutors at least provisionally listen to their stories as if they were given in good faith.