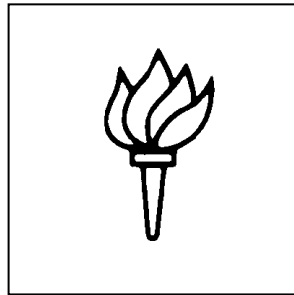


NEW YORK UNIVERSITY

SCHOOL OF LAW

PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES
WORKING PAPER NO. 12-73



Is Dignity the Foundation of Human Rights?

Jeremy Waldron

January 2013

Is Dignity the Foundation of Human Rights?

Jeremy Waldron

1. Foundation and exploration.

In this paper I would like to examine, in part with the eye of a pedant, the proposition that human dignity is the foundation of human rights. That proposition, or something like it, is found in the preambles of the major human rights conventions, and it is quite common too in the rhetoric of scholars addressing the subject of rights. It bears examining for all sorts of reasons: first, on account of the recent revival in the philosophical study of dignity;¹ second, because people continue to disagree about human rights and it is worth looking into any thesis that promises to help us with these disagreements; third, because dignity claims, if put forward as foundational, may provide a basis for challenging other values or principles that have also claimed to occupy this foundational ground (like the principle of utility, for example);² and fourth (and this is a reason that takes us in a different direction) because the very idea of *foundations* for our political ideals has been called in question, and what we find out about dignity may confirm (or refute) the proposition that searching for foundations is more trouble than it is worth.³

I hasten to add that I am undertaking this, not to discredit the concept of dignity, but to clarify its role in human rights theory. Some of the things I'll say at various stages will seem critical, even dismissive. But it is not the aim of this paper to denigrate the idea of dignity in relation to rights. For even if it turns out that a strict understanding of the foundationalist claim cannot be defended, still there may be other ways in which dignity will turn out to be important in our understanding of human rights. Subjecting the foundationalist claim to critical scrutiny may have the side-benefit of revealing some of these.

¹ For a sample, see: Jeremy Waldron, "Dignity and Rank," *European Journal of Sociology*, 48 (2007) 201; Michael Rosen, *Dignity: its History and Meaning* (Harvard University Press, 2012), George Kateb, *Human Dignity* (Harvard University Press, 2011), Christopher McCrudden, "Human Dignity in Human Rights Interpretation," *European Journal of International Law*, 19 (2008) 655.

² George Fletcher, "Human Dignity as a Constitutional Value," *University of Western Ontario Law Review*, 22 (1984) 178.

³ See, e.g., Richard Rorty, *Consequences of Pragmatism* (publisher, 1982), pincite.

2. The basic human rights documents.

We are told in the preamble to the International Covenant on Civil and Political Rights (ICCPR) that the rights it contains “derive from the inherent dignity of the human person.” The International Covenant on Economic, Social and Cultural Rights (ICESCR) says something similar, though both conventions also proclaim 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,” as though the two were coordinate principles. We see this second formulation also in the Universal Declaration of Human Rights (UDHR); there it is unaccompanied by the claim of the two conventions that rights derive from dignity.

Are these differences important? The first claim, that “rights derive from the inherent dignity of the human person,” seems straightforwardly foundational. It makes it sound as if the whole point of human rights is to protect and promote human dignity, and it would seem to follow that the best way to find out what rights we have is to figure out what the inherent dignity of the human person involves and what is necessary for its protection and promotion. The second claim, by contrast, treats rights and dignity as coordinate ideas, rather than deriving one from the other: this impression is reinforced in the first article of the UDHR: “All human beings are born free and equal in dignity and rights.”

Probably it is a mistake to put too much weight on the logic and detail of any of these preambular formulations. They are intended as prefatory pieces of rhetoric; they are not noted for their philosophical rigor; they probably represent political compromises;⁴ and they are not always consistent, at least not to the eye of a pedant. But if we discount them, we should probably discount both formulations; it is not clear that we are entitled just to sweep away one of the formulations because it is inconsistent with what is now *our* idea—rather than something expressed unequivocally in the conventions—that dignity is the foundation of rights.

⁴ See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999), ch. 8.

3. Content versus foundation of rights

Continuing with this purely textual analysis, it is interesting that both covenants also seem to present dignity as part of the content of certain rights. Article 10(1) of the ICCPR says: “All persons deprived of their liberty shall be treated with ... respect for the inherent dignity of the human person.” (This is similar to the requirement in international humanitarian law that detainees, in particular, be protected from (among other things) “outrages upon personal dignity.”)⁵ Dignity is also implicated certain particular claims about socio-economic rights. Article 13(1) of the ICESCR, recognizes a right to education and lays it down that “education shall be directed to the full development of the human personality and the sense of its dignity,” and, in the UDHR, Article 23(3) proclaims 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. Is this particularity of these claims about dignity consistent with the view that dignity is the general foundation of all human rights?

Some scholars perceive a contradiction here.⁶ Others infer that “dignity” must mean different things in these different contexts.⁷ I think they are wrong. Suppose dignity is the foundation of our rights and that the role of particular rights claims is to point to what dignity requires in particular areas (speech, worship, privacy, health care, and so on.) For some of these particular areas, it may be well known that dignity requires ϕ (say, freedom of worship or freedom from torture) and so we talk directly of a right to ϕ without mentioning dignity. In other areas, there may be no familiar benchmark, so we simply refer to dignity itself as the criterion of what is required: that’s what seems to be going on in the UDHR’s insistence on “remuneration ensuring ... an existence worthy of human dignity.” We don’t say what the required level of remuneration is: but we point to dignity as a way of pinning it down.

⁵ Geneva Conventions, Common Article III.

⁶ Luis Roberto Barroso, “Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse,” *Boston College International and Comparative Law Review*, 35 (2012) 331, 357: “It would be contradictory to make human dignity a right in its own, however, because it is regarded as the foundation for all truly fundamental rights and the source of at least part of their core content.”

⁷ Rosen, *Dignity: its History and Meaning*, 59-60.

Also, in a set of rights based generally upon dignity, there may be some requirements which engage the dignitarian foundation more or less directly. Prohibitions on “degrading” treatment are like this: they address the most direct and alarming ways in which human dignity might be assaulted—i.e., conscious attempts to treat people as having a sub-human status. Consider an analogy. Members of the judiciary have a certain dignity in most legal systems, and it is not implausible to say that marking and protecting that dignity is the foundation of many of the rights that judges have. They have the right to appear in their judicial robes on state occasions and they have, as one national constitution puts it, a right to “remuneration consistent with the dignity of their office....”⁸ As well as this they have right not to suffer direct affronts to their dignity in court; this is the basis of the law on contempt of court. Now the fact that this latter right refers more or less directly to their dignity does not preclude the possibility that judicial dignity is the foundation of *all* their rights. The law forbidding contempt of court engages judicial dignity directly; but it is not all there is to judicial dignity. And something similar may be true for human dignity. We may be able to distinguish between human dignity in general and certain particular rights that protect it explicitly and more or less directly. As we have seen, some of these particular rights are affirmative and some are negative. Both kinds of protection are important, but they are not all there is to human dignity. Dignity’s presence as a criterion for determining appropriate treatment may be explicit in some cases and implicit in others. There is no contradiction here and we have not had to assign different meanings to different occurrences of “human dignity” to prevent a contradiction from arising.

4. Foundational pluralism

On the other hand, we should not neglect the possibility that dignity might turn out to be foundational for some rights and not others. Human rights, notoriously, present themselves to us in the form of a list rather than as a unified theory,⁹ and a list encourages us (though it does not require us) to think pluralistically about

⁸ Constitution of Poland, Article 178(2).

⁹ For some reflection on the list-ish aspect, see John Rawls, *Political Liberalism*, 292 (Columbia University Press, 1986) and Jeremy Waldron, “Socio-economic Rights and Theories of Justice,” *San Diego Law Review*, 48 (2011) 773, 793.

rights. Maybe we should say that there are all sorts of rights, with all sorts of foundations: free speech has one sort of foundation; humane treatment for detainees has a different foundation; the right to education yet another; and so on.¹⁰

Someone may protest: doesn't the fact that all these rights are presented as *human* rights mean that they must be unified in their grounds by a single theory of what it takes for something to be a right of that kind? Possibly; but the characterization of a set of rights as human rights may mean no more than that they are rights which are properly attributed on a universal basis to all human beings. This presumably means that each of them is based on some fact about human nature. But human nature is multi-faceted and right R_1 may be based on characteristic C (which all humans share), right R_2 may be based on characteristic D (which all humans share) and right R_3 may be based on characteristic E (which all humans share). For these all to be regarded as human rights, it is not necessary for there to be a single theory of humanity that makes sense of C, D, and E together.

After all, the fact that dignity is important does not mean that other foundation-ish values that are also not important. Dignity's importance does not necessarily make it into a master-value, overshadowing every other value that might occupy a foundational role. Some rights may be based directly on liberty or autonomy—without regard to the place those ideas have, in turn, in the analysis of dignity. Some might be based on equality and social justice. Some might be even based indirectly on utility.¹¹

Dignity does not figure in the Constitution of the United States, but it is invoked sporadically in constitutional doctrine. Again this is true of some rights rather than others. It seems to be particularly important with regard to the Eighth Amendment prohibition on cruel and unusual punishment;¹² but one would not expect to see it cited, say, in interpretations of the Third Amendment (the right not have troops quartered in one's home). Even when it is cited in support of Second

¹⁰ We should also not rule out the possibility that what we regard as one-and-the-same right may have multiple foundations or multiple foundational elements.

¹¹ It would be mistake to think that because the trumping logic of rights seems to displace direct utilitarian calculations that therefore utilitarian ideas can have no place at all in a theory of rights.

¹² *Trop v. Dulles* 356 U.S. 86, 100 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

Amendment matters (the right to bear arms), dignity is cited tendentiously as an *ad hominem* response to the suggestion of liberal justices that only rights protecting “fundamental aspects of personhood, dignity, and the like” are incorporated into the meaning of “liberty” (as against the states) in the Fourteenth Amendment.¹³ More generally, it is possible to read the Bill of Rights without getting any impression that the particular rights are all derived from a single foundation. Particularly in circumstances where rights are added over time to a list or bill or charter of rights—in the way that the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments were added to the American Bill of Rights—it is perfectly possible that the concerns that motivated the original list may not be the same as the concerns that motivate the later additions. Certainly many of the non-rights amendments have been added in an ad hoc way, without particular regard to any theoretical unity—the prohibition amendment, elections to the senate, legality of the income tax, reduction of the voting age to 18, and so on. It is perfectly possible that the *rights* listed among the amendments have an ad hoc character as well. I am not actually arguing for this pluralistic approach, but I don’t think we can rule it out as a possible account of why dignity seems more germane to some rights than to others.

5. Definitional difficulties

Potential difficulties with the idea that dignity is the foundation of human rights crop up also from another direction. Perhaps the phrase “human dignity” is too vague to be of any foundational use.

A respected human rights jurist, Oscar Schachter has observed that there is no explicit definition of “human dignity” in any of the charters that invoke it. “Its intrinsic meaning has been left to intuitive understanding,” says Schachter, which is hardly satisfactory so far as a foundational role for the concept is concerned: “Without a reasonably clear general idea of its meaning, we cannot easily draw specific implications for relevant conduct.”¹⁴ Christopher McCrudden has argued that this lack of definition is not an oversight. Dignity was written into the

¹³ *McDonald v. Chicago* 130 S.Ct. 3020, 3051 and 3055 (2011), Scalia J., concurring.

¹⁴ Oscar Schachter, “Human Dignity as a Normative Concept,” *American Journal of International Law*, 77 (1983) 848

preambles of the great human rights covenants not to convey any particular meaning, but to operate as a sort of place-holder in circumstances where the drafters wanted to sound philosophical but couldn't agree on what to say.¹⁵

Outside the area of human rights, commentators have been quiet skeptical about the meaning of "dignity." Addressing its use in bioethics debates, Stephen Pinker called it "a subjective squishy" notion and Ruth Macklin observed that "the concept remains hopelessly vague. ... [T]o invoke the concept of dignity without clarifying its meaning is to use a mere slogan."¹⁶

On some accounts, the amorphous character of dignity is simply a sign that we are in the early stages of its elaboration: our understanding of its meaning is a work-in-progress. This is not inconsistent with dignity operating as a foundation for rights, for our understanding of human rights, no more than seventy years old in its modern incarnation, is a work-in-progress also. There is still no settled consensus about what it means to say that the right to ϕ is a human right, apart from the minimum claim that it is a right that all humans are now conceived to have. And we still disagree about which rights are human rights. It should not be surprising then that dissensus about rights is associated with indeterminacy in rights' foundations. Building a determinate theory is going to involve work at both levels. On this account, the claim that dignity is the foundation of rights does not point us to a determinate premise. Rather, it instructs us to pay attention to *questions* about dignity in trying to address questions about rights; it implicates the one line of inquiry in the other. For example, in addressing issues about the limits on rights and the possibility of developing concepts like *abuse of rights*, we are invited to explore recent discussions of human dignity that address its moralistic or non-emancipatory character, ideas of human dignity that explore the responsibility that each individual has in respect of the human dignity embodied in his or her person.¹⁷ My point is that these responsibility-characterizations of dignity are, at

¹⁵ McCrudden, "Human Dignity in Human Rights Interpretation," **pincite**.

¹⁶ Steven Pinker, "The Stupidity of Dignity," *The New Republic*, May 28, 2008 and Ruth Macklin, "Dignity is a Useless Concept," *British Medical Journal*, 327 (2003), 1419.

¹⁷ See, e.g., Stephanie Hennette-Vauchez, "A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept," *International Journal of Constitutional Law*, 9 (2011), 32.

this stage, works-in-progress, just like the idea of responsibility-rights that they appear to underpin.¹⁸

On other accounts, what an observer might see as a definitional mess may be an indication that dignity is in fact a *contested* concept—with reasonably determinate conceptions, opposed to one another, already well crystallized.¹⁹ For there is not just a proliferation of uses of the term “dignity”; there is in modern political philosophy a proliferation of dignitarian theories. There is the Kantian theory based on autonomous moral capacity, there is the Catholic theory based on humans’ being created in the image of God, there is a theory developed by me and others about dignity as a status rather than a value (more of this later) and there is the theory of dignity developed by Ronald Dworkin in *Justice for Hedgehogs*.²⁰ These rival accounts confront one another, and the cacophany of contestation may make us despair that there is any common ground to act as a rights-foundation. At least one scholar has argued that if we treat dignity as the foundation of rights, we are likely to end up with different conceptions of rights matching different conceptions of dignity. This, she suggests, may already be happening so far as constitutional alternatives on the two side of the Atlantic are concerned.²¹

Of course this won’t be the first time that foundational ideas in political theory have presented themselves as contested concepts. Contestation about the meaning of *liberty* is notorious.²² *Democracy* was cited as a paradigm case of an essentially contested concept,” by the philosopher who introduced us to that latter

¹⁸ Jeremy Waldron, “Dignity, Rights, and Responsibilities,” *Arizona State Law Journal* 43 (2011) 1107.

¹⁹ For the idea of well-defined conceptions in relation to a contested concept, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), **pincite**. Also McCrudden, “Human Dignity in Human Rights Interpretation,” **footnote pincite**.

²⁰ Immanuel Kant, *Groundwork to the Metaphysics of Morals*, ed. Mary Gregor (Cambridge University Press, 19__), **pincite** (); John Paul II, *Evangelium Vitae* (March 25, 1995); Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press, 2012); Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2010), chapters.

²¹ See Neomi Rao, “On the Use and Abuse of Dignity in Constitutional Law,” *Columbia Journal of European Law* 14 (2008) 201 and Neomi Rao, “Three Concepts of Dignity in Constitutional Law,” *Notre Dame Law Review* 86 (2011) 183.

²² Isaiah Berlin, “Two Concepts of Liberty,” in his collection *Four Essays on Liberty* (Oxford University Press, 1969), 118.

idea.²³ And *equality* and *the rule of law* have both in their time presented contestation as their leading definitive characteristic.²⁴ Presenting these values as foundational raises the stakes in the contestation about how they are properly conceived. It should be no surprise that contestation about the proper meaning of dignity has increased since people began taking seriously the foundational claims presented in the preambles of the great human rights charters.

6. Do human rights actually need a foundation (like dignity)?

On the other hand, the difficulty in defining the word “dignity” raises the question of whether we actually need a foundational theory for our commitment to human rights. Are we better off with such a foundation or are we worse off because we have now entangled rights (about which we were once reasonably clear) with an allegedly foundational idea which poses more problems than it seems to be worth? As George Kateb has put the point (though he does not actually endorse it),

[W]hatever was the case some centuries ago, the defense of rights at present requires little theoretical articulation. Why make trouble by defending rights at length and make worse trouble by claiming that human dignity is the basis, or part of the basis, for human rights? Theoretical defense invites philosophical skepticism, which is sometimes useful to stimulate thought, but there is these days not very much theory, though there is some, that comes out and says that human rights are, in Jeremy Bentham's phrase, “nonsense upon stilts,” and that the idea of human dignity adds yet more nonsense.²⁵

From a number of pragmatic points of view, this position sounds sensible. If our pragmatism is just a matter of the outcomes that we are trying to promote as human rights activists, then probably we should concede that foundationalism, particularly dignitarian foundationalism, is more trouble than it is worth. We should just get on

²³ W.B. Gallie, “Essentially Contested Concepts,” *Proceedings of the Aristotelian Society*, 56 (1955-56), 167 (**pincite for democracy**).

²⁴ See Ronald Dworkin, “What is Equality? I and II” *Philosophy and Public Affairs*, 10 (1981), 185 and 283 and Jeremy Waldron, “Is the Rule of Law a Contested Concept (in Florida)?” *Law and Philosophy*, 21 (2002), 137.

²⁵ Kateb, *Human Dignity*, **pincite**.

with sending money to Amnesty International etc. Again, if our pragmatism is that of bottom-line lawyering, then we will not find propositions about the foundational status of dignity much use either. On no account are such propositions likely to generate lines of legal argument for particular rights-claims that are clear or compelling. Lawyers and judges will disagree back and forth about the alleged foundational premise, they will disagree about its character and its definition, and they will certainly disagree about how to draw inferences from it and about what its bottom-line implications are. It is not at all clear that this tangle of disagreements represents any improvement on an environment for legal rights lawyering that is bereft of philosophical foundations.

But foundations are not inquired into for their pragmatic benefits. Sometimes they are pursued just for the sake of better understanding, where “better” means “deeper,” not “more practically effective.” Quantum physics is the foundation of our understanding of material nature; and although a case could be made that for all sorts of practical purposes we have a much clearer grasp of the nature and behavior of ordinary middle-sized objects than we do of sub-atomic particles, still we are led intellectually into the sub-atomic world for a level of understanding that is deeper than that. And even if quantum physics offers more in the way of questions rather than answers, we believe that posing those questions and wrestling with them is the best way to understand how the material world really works. Something similar may be true of foundationalism in moral and political theory. Even if our foundational inquiries do not promise to yield any sort of litmus test for assessing rights claims, still the questions we face in pursuing these inquiries help to deepen and enrich our understanding of human rights. I think this is true of value-inquiry generally; it is certainly true of what Richard Primus has called the “resurgence of normative foundationalism” in the study of rights.²⁶ Legal theorists do not pursue foundational inquiries in order to equip their more practical-minded colleagues with impressive sounding arguments that will work in the courtroom. They pursue them because it is intrinsically important to have a deep and abstract as well as a surface-level and practical understanding of these rights we claim to take so seriously.

²⁶ Richard A. Primus, *The American Language of Rights* (Cambridge University Press, 1999), 178-9.

None of this shows, of course, that human dignity is the sort of foundation we are looking for, in pursuit of this deep understanding. Dignity might be a cul-de-sac in this enterprise. But I don't think it should be dismissed out of hand on the grounds that, pragmatically speaking, it is more trouble than it is worth.

The same point can be put another way. We didn't invent the concept of dignity to be immediately useful. It has emerged as an apparently important idea in ethics and political philosophy. We cannot reverse and we should not ignore the heritage of moral theology, natural-law theorizing, and Kantian philosophy that has put this idea in front of us. Some philosophers claim that dignity adds little to concepts that are already reasonably well-understood, like autonomy and respect for persons.²⁷ They may be right. But we would be unwise to dismiss dignity unless we were sure that it neither added anything to nor modified our understanding of those other concepts. Being (so to speak) stuck with this concept by the legacy of our moral and political philosophy, it is incumbent on us to explore its content and its relations to other moral ideas. I don't pretend there are easy answers here: the legacy of our discipline has given us something of a conundrum to unravel rather than a conception already resplendent in its clarity.

Not only that, but whether we like it or not, a more recent heritage—this time a heritage of human rights proclamations—has saddled us with claims about dignity's foundational role to explore. Those of us who want to explore the connection between dignity and human rights did not make that connection up. The world (as it were) committed itself to a claim about a foundational connection between dignity and human rights. The claim might turn out to be false, misconceived, confused, or merely rhetorical. The skeptics may be right when they say it is mere decoration in the great charters, or a place-holder to conceal intractable controversy. But we can't be sure of this in advance. Anyway, for those who practice philosophy, there is no option but to explore these claims. The fact that good-hearted men of action may have other priorities does not affect the philosopher's mission. It is often our job, in the great division of labor, to explore claims like this long after a more pragmatic-minded person has thrown up his hands and gone back out into the field again. The exploration may be undertaken

²⁷ Macklin, "Dignity is a Useless Concept," **pincite**.

in a moderately skeptical spirit (as mine is, in this paper). But it needs to be undertaken nevertheless in good faith.

7. What is a foundation?

Part of this exploration involves asking: what is it, anyway, for something to be the *foundation* of rights? Are foundational claims just symbolic? Is this foundational claim just a claim about dignity's importance?—e.g., the proclamation of “human dignity as a right so fundamental that no decent society, or legal system, would deny it strong protection.”²⁸ Or is there a real sense in which dignity may be regarded as “the fountainhead from which the equal rights of man follow”?²⁹

The idea of foundations can be understood in many ways. I am going to explore (and apply to the relation between dignity and rights) four possible accounts of what it might mean to say that one concept, α , is the foundation of another concept, β . It might mean

- (i) that, as a matter of history and genealogy, β was generated out of α ;
- (ii) that α is the source of β , in the way that the application of one legal proposition may be the source of the validity of another;
- (iii) that β can be derived logically from α , either deductively or with the help of empirical premises; or
- (iv) that α throws some indispensable light on β or helps in the interpretation of β .

As we pursue these possibilities for $\{\alpha = \text{human dignity}, \beta = \text{human rights}\}$, it is probably also worth noting that the β -term, human rights, might be understood in different ways. Not only are there still substantive disagreements about the content and character of human rights, but the idea of foundations might engage with human rights at a number of different levels. “Human rights” might be understood to describe a concept, a list of rights, and a practice of asserting and applying them;

²⁸ This phrase is taken from Norman Rosenberg, *Dignity, Rights, and Recent Legal Scholarship*, **citation**, reviewing Michael J. Meyer and W. A. Parent (eds.) *The Constitution of Rights: Human Dignity and American Values*.

²⁹ Yehoshua Arieli, “On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights,” in D. Kretzmer and E. Klein (eds.), *The Concept of Dignity in Human Rights Discourse* (Kluwer Law International, 2002), 1, at 8.

and the concept, the list and the practice, may be understood in moral or legal terms. Accordingly, so what human dignity is supposed to be foundational to (or for or of) may vary depending on whether we claim it to be foundational *vis-a-vis* a moral or legal proposition, a moral or legal concept or theory, or a moral or legal practice. My pedantry in these matters usually knows no bounds, but I will not explore these variations systematically. As we consider options (i) through (iv), I hope it will be clear which level of human rights I am engaging.

(i) origins and genealogy

When people say that human rights are based on human dignity, one possibility is that they mean that our discourse of human rights grew out of a pre-existing discourse about human dignity. The claim would be that the latter is foundational in a genealogical sense, that the prevalence or power of talk about human dignity helps us explain, in an historical way, where our ideas about human rights came from. The genealogy of human rights talk is an important topic: it is an interesting task in the history of ideas to relate it to much earlier talk of natural rights, and to explain why, when the notion of natural rights lay fallow or discredited in many circles for more than a hundred years (roughly from the end of the eighteenth until mid-way through the twentieth century), it was so easily revived under this new label.³⁰

There was certainly a pre-existing discourse of human dignity before the emergence of human rights talk in its modern form. But, as Oscar Schachter has argued, it is implausible to suppose that human rights grew out of the discourse of dignity:

The Helsinki Final Act declares in Principle VII that all human rights and fundamental freedoms “derive from the inherent dignity of the human person.” This statement should be understood in a philosophical rather than historical sense. As history, it would probably be more correct to say the opposite: namely, that the idea of dignity reflects sociohistorical conceptions of basic rights and freedoms, not that it generated them.³¹

³⁰ See, e.g., Jeremy Waldron, “The Decline of Natural Right,” in Allen Wood and Songsuk Susan Kahn, *The Cambridge History of Philosophy in the Nineteenth Century* (Cambridge University Press, 2012), 62, and Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2012).

³¹ Schachter, “Human Dignity as a Normative Concept,” **pincite**.

No doubt existing dignity discourse had some effect on the way in which human rights discourse emerged. But it would be wrong to treat the former as the historical precursor of the latter. And in many respects, the reverse story seems more plausible, as Schachter suggests. Our modern dignity discourse owes more to the human rights discourse that has emerged since 1948 than the latter owes to the former.

(ii) source and legitimacy

In an recent essay, Klaus Dicke has suggested that in the UDHR “the dignity of human beings is a formal transcendental norm to legitimize human rights claims.”³² This terminology is rather opaque but Dicke seems to be invoking a Kelsenian idea. Just as the “*grundnorm*” of a legal system—the norm that says that the provisions of the highest constitution are to be respected—is the source of legal validity and, in that sense, legitimacy in that system for all statutory and regulative norms,³³ so a norm regarding human dignity might be an ultimate source for the legitimacy of human rights norms. The legitimacy of a statute derives from the constitutional norms that empower a given legislature and lay down the basic procedures for enactment; and, on Kelsen’s account, in order to preclude unanswerable questions about where the legitimacy of the relevant constitutional provisions derive from, we *posit* a final and transcendental norm to underpin the validity of the constitution, rather than trying to locate a still higher positive norm (say, the empowering statute of a former colonial power) to legitimize it. In a moment, I shall say something about the difference between this story, which concerns what Kelsen called the “dynamics” of a legal system, and the sort of story that I suspect Dicke has in mind, which seems to have more in common with what Kelsen called the “static” derivation of one norm from the content of another.³⁴

But first let’s explore what could possibly be meant here. Dicke presumably does not want to deny the status of the great human rights covenants as sources of law, valid on account of their signature and ratification by a large number of countries. But I think he wants to deny that persons have the rights mentioned in

³² Klaus Dicke, “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer & Klein, *The Concept of Dignity in Human Rights Discourse*, 111, at 118.

³³ Kelsen, *Pure Theory of Law*, **citation and pincite**.

³⁴ *Ibid.*, **pincite**.

those covenants just because the ICCPR, for example, was enacted as a multi-lateral treaty. The ICCPR on his account does not create the rights; it recognizes and proclaims the rights that humans already have. Why is the invocation of human dignity a way of saying this, or what does it add to this? Dicke believes that the invocation of human dignity is a reference to the special nature of human beings, their inherent worth, which explains why they really do have the rights that the covenants proclaim, prior to and independent of the positive law proclamation.

Oscar Schachter seems to infer something similar, at least in a negative way: “as a philosophical statement, the proposition that rights derive from the inherent dignity of the person ... implies that rights are not derived from the state or any other external authority.”³⁵ Again, Schachter, one of the first generation of great human rights jurists, need not be interpreted here as denying the authority of positive international law. He is merely insisting on the “suprapositive” element that lies behind the law’s recognition of these rights.³⁶ More affirmatively, the invocation of dignity may suggest that there is a suprapositive explanation for why we accord the importance to human rights that we do, why we insist on their universality, inalienability, and non-forfeitability. It is not simply a matter of our having decided to create positive law in this form; our creation of laws with these features presents itself as an affirmative response to facts about human specialness that we recognize in our ethical talk of human dignity.

I think this is about as far as I can take this version of the foundational claim. I suppose one could go a step further and say that the legitimacy of our human rights law is derived from a higher law respecting human dignity—God’s law, for example, or some natural law conception. Certainly the belief in such a higher law explains the positive law-creating actions of many who drafted and subscribed to the human rights covenants. But I think this is better conveyed by saying, as I said in the last paragraph, that the covenants represent themselves as positive law responses to suprapositive ideas, rather than that the legitimacy or validity of human rights norms can be traced to non-positive law. Some will concede the point readily enough so far as legal validity is concerned; like me they may be unable to

³⁵ Schachter, “Human Dignity as a Normative Concept,” **pincite**

³⁶ For “suprapositive element,” see Gerald Neuman, “Human Rights and Constitutional Rights: Harmony and Dissonance,” *Stanford Law Review*, 55 (2003), 1863, at **pincite**.

make good sense of Dicke's implicit comparison of the value of human dignity with a Kelsenian *grundnorm*. But "legitimacy" is a looser term—it can mean anything from legal validity through popular acceptance to moral appeal. If it means "moral appeal," then, yes, we can say that the legitimacy of human rights ideas owes a lot to the legitimacy of dignitarian ideas (and vice versa).

In his legal theory, Hans Kelsen distinguished between the dynamics and the statics of a legal system.³⁷ In a dynamic sense, validity is a matter of higher laws empowering the making of laws or legal orders at a lower level. The constitution empowers legislators; they enact statutes which empower municipal authorities; municipal authorities enact ordinances which empower local magistrates to condemn this or that dilapidated house.³⁸ A static analysis, on the other hand, is a relation between legal propositions which is more like derivation than like empowerment and enactment. A static analysis will show why if wounding is wrong, then stabbing is wrong: the idea of stabbing is already comprised in the more general idea of wounding and the connection is established more or less by deduction. **[maybe get Kelsen quote.]**³⁹ I think the Dicke approach unhelpfully blurs this distinction between static and dynamic approaches. But of course, this doesn't mean that a static analysis of the relation between human dignity and human rights is impossible. Maybe one *can* be derived from the other; it is to this possibility that we now turn.

(iii) a genuine basis for derivation

The sense of "foundation" that promises the most is the suggestion that knowing what the foundation of rights is would enable us to generate or derive human rights claims. We could then build up an account of human rights on a more rigorous basis than the list of rights given in a legal charter; and this foundationalism would also provide a sort of litmus test for assessing what people say about human rights. People make all sorts of suggestions as to what rights we have or what human rights there are: a foundation of the kind now being contemplated would give us a

³⁷ Kelsen, *Pure Theory of Law*, **pincite**

³⁸ *Ibid.*, **pincite**.

³⁹ *Ibid.*, **pincite**.

basis on which we could test such claims, by looking to see whether the content of a given claim could indeed be derived from the foundation.

Of course this foundational power could not be bought cheaply. Slight variations in the way the foundation is specified—variations in our conception of dignity, for example—might lead to significant differences in the claims about rights that are generated or certified by this method. People will be tempted to rig their conception of the foundational value so that it generates the kinds of rights claims they already favor; and antagonists will stand ready to accuse rights-theorists of doing this. In other words, this foundational approach does not ease the burden involved in the defense of particular claims about human rights. Instead it shifts the burden to the foundational level, by implying that that is the level at which rights-controversies really arise. Still, in the spirit of the way we have been proceeding, this shifting of controversies is not necessarily disreputable. It may be sensible and illuminating to relocate our controversies about human rights in this way. Perhaps we'll be better able to see what is at stake in the assessment of (say) claims about socio-economic rights, by seeing the distinctive form of dignity-foundation that is needed to generate rights of this kind.

Formally, the sort of derivations I have in mind are going to be partly deductive and partly empirical. On a deductive approach, we begin with our conception of the foundational value—say, human dignity—and we unpack it analytically to see what it involves.

James Griffin's argument in *On Human Rights* is an example. Griffin begins with "the dignity of the human person" and he argues that that idea is best understood in terms of the importance of normative agency in the life of a human being.⁴⁰ The value of the normative agency of a human being discloses itself in that being's autonomy, that is, in her ability to determine for herself what the shape of her life will be and what it is for her life to go well.⁴¹ And that ability in turn requires liberty in certain key areas—indeed certain basic rights embodying liberty, to guarantee that the person in question is the one who makes the key decisions about her life without coercive interference.⁴² Griffin believes we can also infer

⁴⁰ Griffin, *On Human Rights*, 152.

⁴¹ *Ibid.*, 150-1.

⁴² *Ibid.*, **pincite**.

from the importance of autonomy that the key choices must be educated choices and must be made from an array of meaningful available options.⁴³

All of this, I think, is supposed to be established analytically, with step-by-step deductions from dignity to normative agency to autonomy to negative and positive liberty. And of course it can be challenged by someone who denies that dignity is the foundation of human rights, or that dignity (if it *is* the foundation) is connected successively to the value of normative agency, the importance of autonomy, and the right to liberty, in the way that Griffin argues.

Some of the derivations that Griffin has in mind are mediated in part by empirical premises. (They operate, presumably, as minor premises, with dignitarian propositions or propositions deduced from dignitarian propositions as major premises.) So they too are open to challenge—but now empirical challenge as well as analytic challenge. In his argument that human rights include certain welfare rights, Griffin suggests that there may be points about what is needed to protect and promote autonomy that cannot be established *a priori* but only by observation of how autonomy flourishes or withers in particular kinds of political economy. He says that not all arguments for welfare rights are of this character—“There are forms of welfare that are empirically necessary conditions of a person’s being autonomous and free, but there are also forms that are logically necessary”;⁴⁴ still a rights-foundationalist has to be ready to work both sides of this street.⁴⁵

I have gone on at length with Griffin’s theory because it illustrates, better than any other, what might be involved in this third, most robust kind of rights-foundationalism. I don’t mean either to endorse it or criticize it. I do think it is important to see it as one account among several of what it means to say that something like dignity lies at the foundation of human rights.

⁴³ Ibid., 159-69.

⁴⁴ Ibid., 180.

⁴⁵ If I read him rightly, Arthur Chaskalson, “Human Dignity as a Constitutional Value,” in Kretzmer and Klein (eds.) *The Concept of Dignity in Human Rights Discourse*, 133 at 135, gives the impression that the whole of the dignitarian case for rights is instrumental; he says that having introduced dignity into the picture, the idea is that all of the remaining rights “can be analyzed and defended as being necessary for the protection or promotion of human dignity.” But this may be to ignore the constitutive and deductive element.

(iv) the key to interpretive understanding

The approach we have just been considering is—to mix a metaphor—a “top-down” approach to foundationalism. We envisage the foundation of rights—human dignity, in our discussion—as a very abstract major premise from which we derive particular rights, perhaps also with the help of minor empirical premises. We start with the foundation and we generate rights out of that. An alternative approach would be more inductive or “bottom-up,” and goes as follows.⁴⁶

We begin with an understanding of the rights we have—maybe not a complete or fully elaborated understanding, but something like one of the lists of human rights that is widely accepted. And then we try to make sense of that, perhaps considering the values that would have to be presupposed in order for this list of rights to be sensible. We may try to hook up with approach (iii) by first asking what would have to be postulated as a foundation in order to generate all or most of the items on our list, and then treating the value that we have postulated as a major premise for the formal derivation of what we had assumed as our rights already. Or the bottom-up approach may be looser than that. We might think of the postulated value as helping us make sense of the rights on our list, whether we then go on to assign a formally foundational role to it or not. Michael Rosen says this about the connection between human dignity and human rights:

Human rights are obviously deeply puzzling— almost everyone nowadays professes commitment to them, yet few people would claim that they had a good, principled account of what they are and why we have them. Could a modern understanding of dignity meet that need?⁴⁷

Giving an good, principled account of what rights we have and why we have them need not involve linear derivation on the model of (iii). Understanding why we have human rights involves understanding the point of the rights we have. But again, the point of rights need not be understood in a rigidly teleological sense—a sense that would license the derivation of other rights from a statement of the *telos*. The sort of understanding that I have in mind under section (iv) may be loosely oriented to a class of human rights that is in some sense given, and our

⁴⁶ I owe the distinction between top-down and bottom-up approaches in this context, to Griffin, *On Human Rights*, Ch. 1, **pincite**.

⁴⁷ Rosen, *Dignity*, Ch. 1, vii (**check cite**).

understanding of it need not be conceived in a way that permits any expansion of the list of rights beyond what we started with. This of course is definitely the case when human rights are understood as *legal* rights. We can't always show that something is law by showing that it can be derived from what seems necessary for understanding other legal propositions.

Still, the fact that rights have a legal presence (in constitutional law or in human rights law) does not obviate the need for an understanding of the kind I am talking about. Even our most clearly established rights may still be bewildering. As Ronald Dworkin put it,

The institution of rights against the government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these.⁴⁸

We need not accept Dworkin's account of the alternatives to appreciate the point that he is making. What we need—and what we sometimes loosely call a

⁴⁸ Dworkin, *Taking Rights Seriously*, **pincite**.

“foundation”—is a way of understanding the point of rights that will help us interpret particular rights provisions as well as help determine the spirit in which we should proceed in advancing rights-based claims, as well as the way in which we deal with possible conflicts of rights or the question of their limitation.⁴⁹

If dignity were treated as the foundation in sense (iv), it might have a greater or a lesser impact depending on how robust the conception of dignity was taken to be. In the *German Airliner Case*, the German Constitutional Court considered the right to life in the context of a statute that would empower the armed forces to shoot down a passenger plane in a 9/11 type of situation. The Court insisted on viewing the right to life through the lens of dignity and since it was using a strongly Kantian notion of dignity, it was able to insist that the innocent passengers and crew of the airliner could not be destroyed simply to save the lives of a greater number of other innocent people (e.g. in a building targeted by the hijackers).⁵⁰ On a less robust conception of dignity, however, approach (iv) might simply indicate that we are to take individuals and their autonomy seriously in interpreting rights and not treat them as heuristics for the advancement of the general good. It would not tell us much more than that.

8. Foundations and characteristics

The looser our approach to the alleged foundational role of dignity, the more we need to be alert to another possible worry. We need to be alert to the fallacy of mistaking a feature common to all rights for something that plays one of these foundational roles.

This often happens with rights on account of their rather complex formal structure. The idea of a right (let alone a human right) is a not a simple one. In the discourse of rights, a given content is not just presented normatively; it is presented in a particularly demanding normative mode. The demand is peremptory and the demand is for the securing not just the adventitious satisfaction of the norm.

⁴⁹ Barroso, “Here, There, and Everywhere,” *pincite*.

⁵⁰ *Bundesverfassungsgericht*, Feb. 15, 2006, 115 BVerfGE 118, at §122: “By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.”

Moreover, the demand is presented in a way that relates it essentially to the interests and perhaps also to the choices of an individual. Finally, if we are talking about human rights, we are also talking about equality—i.e., rights that are held equally, rights such that if any person has them, then everybody has them.

These features of human rights can be established by analysis. They are important and their ubiquity might lead us to mistake them for foundational elements. But though they are structural components characteristic of all rights, it is a mistake to infer anything foundational on this basis.

For example, on some approaches, to have a right is a matter of being able to control another's duty by one's choice.⁵¹ This is not the place to discuss the detail of the "Choice Theory" of rights, beyond saying that even if the theory were true, it would be wrong to infer that free choice is therefore the foundation of rights or that rights exist in order to protect and promote autonomy. I don't mean that these latter claims are false;⁵² I mean rather that this formal move is not the right sort of way to establish such foundational claims. The substance of a given right might have nothing to do with freedom: it may be a human right to health care for example. All that the Choice Theory implies is that even for a right like this (which does not directly concern liberty), the right-bearer has the privilege of choosing whether the duty-holder is held liable for a breach. It is up to him (his choice) whether a lawsuit is brought. That is not enough to establish a foundation in liberty for the right to health care.

For a second example, consider that it is often supposed to be a feature of rights that they must *secure* the goods or freedoms that they promise, not just bring them about adventitiously. I don't have a legal right to ϕ unless ϕ is in some way guaranteed to me beyond the day-to-day vicissitudes of public policy. But again we should not make too much of this, at least for foundational purposes. From the fact that security (of some interest or liberty) is what one demands when one demands one's rights, we cannot infer that all rights are *based* on security. Those who make this inference use it sometimes as a basis for saying that civil liberties

⁵¹ For the "Choice Theory" of rights, see H.L.A. Hart, "Are There Any Natural Rights?" in Jeremy Waldron (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984), 77. Mention Hart's subsequent recantation in "Bentham on Legal Rights," **cite and pincite**.

⁵² For a defense of the claim that rights are based on autonomy, see James Griffin, *On Human Rights* (details).

cannot be set up against security or against the activity of the security state, because they are all in the end dependent on security.⁵³ There may be something to this if it is meant in the spirit of Henry Shue's claim that one cannot enjoy one's rights except in circumstances of security.⁵⁴ But it is not persuasive if the inference is drawn simply from the fact that it is the point of rights to establish the goods or freedoms they protect securely.

A third example involves equality. If there are any human rights, they are presumably to be secured to all humans equally. But that doesn't license us to say that equality is the *foundation* of all rights, though again there may be independent arguments to that effect.⁵⁵ Nor does it license us to make the more foundational-sounding claim that it is the point of human rights to see that all persons are treated as equals.

Might the claim that dignity is the foundation of human rights based on an analogous mistake? It may be. It is sometimes said that there is a certain dignity just in being a right-holder. Joel Feinberg who has long insisted on the importance of the analytic point that exercising a right means making a claim has suggested 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."⁵⁶ This is a relatively weak conception of dignity and even if it is implicated with rights in the way Feinberg suggests, it cannot plausibly be regarded as foundational for rights. It is just one of the features that all rights possess.

⁵³ For discussion of this misconception, see Liora Lazarus, "Mapping the Right to Security," in Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights* (Hart Publishing, 2007) 325.) See also Jeremy Waldron, "Safety and Security," *Nebraska Law Review*, 85 (2006), 454 (reprinted in Waldron, *Torture, Terror and Trade-Offs*).

⁵⁴ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980). See the discussion in Jeremy Waldron, "Security as a Basic Right (after 9/11)," in Charles Beitz and Robert Goodin (eds.) *Global Basic Rights*, (Oxford University Press, 2009), 207 (reprinted in Waldron, *Torture, Terror, and Trade-Offs*).

⁵⁵ Dworkin, *Taking Rights Seriously*. Refer forward to Ronald Dworkin, *Justice for Hedgehogs*.

⁵⁶ Joel Feinberg, "CLJ paper," [?], as quoted by Rosen, I.vii. –q.v.

9. Dignity as a status

Sometimes it is said—correctly in my view—that dignity is a status-concept, not a value-concept.⁵⁷ If we think carefully about status, it may seem that this opens up yet another possibility for a mistake about dignity’s alleged foundational role.

In law, a status is a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities accruing to a person by virtue of the condition or situation they are in. Bankruptcy, infancy, royalty, being an alien, being a prisoner, being a member of the armed forces, being married—these are all statuses, each of them comprising its particular package of rights, powers, etc. In Britain, the monarch has distinctive powers and duties; in most countries, a bankrupt has distinctive disabilities; so do convicts (often they cannot vote, for example); a serving member of the armed forces has distinctive duties and a few distinctive privileges; and infants have few, if any, of the legal rights and powers that adults have. In all these cases, the status-word operates rather like an abbreviation for the list of rights, powers, etc. that a person in one of these situations has. We could, if we liked, laboriously spell out each of these incidents. For infancy, we could say (a) that if X is under eighteen, then X has the right to support from X’s parents; and (b) that if X is under eighteen, then X does not have the power to enter into certain contracts; and so on. Or, for bankruptcy, we could say (a) that if Y’s liabilities have been adjudged to exceed his assets or he does not have the wherewithal to pay his debts as they fall due, then he is forbidden from incurring any further debts and (b) if Y’s liabilities have been adjudged to exceed his assets or he does not have the wherewithal to pay his debts as they fall due, then he is entitled to protection from his creditors; and so on. But instead we summarize all this information by saying that in law X is an infant and Y is a bankrupt, and our understanding of the technical legal meanings of those terms—bankruptcy and infancy, respectively—carries with it knowledge of the details of the legal position that people with this status are in.

The point I want to make is that the status term does not seem to introduce any new information. As John Austin wrote in his *Lectures on Jurisprudence*, “[t]he sets of rights and duties, or of capacities and incapacities, inserted as status

⁵⁷ For argument to this effect, see Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012), **pincite**.

in the Law of Persons, are placed there merely for the sake of commodious exposition.”⁵⁸ A status-term, he said, is “an ellipsis (or an abridged form of expression),” purely a matter of expository convenience.⁵⁹ It is nothing but an abbreviation, a “device of legal exegetics.”⁶⁰

If all this is true, and if dignity is a status, then it will be a mistake—a sort of category mistake—to talk of dignity as the foundation of rights. Instead, we may say that dignity is a status that *comprises* a given set of rights. The old notion of *dignitas* was like this: the *dignitas* of a noble was a different status from the *dignitas* of a priest and the difference consisted simply in the detail of the rights associated, respectively, with the status of nobility or holy orders. And so too, perhaps, with our notion of human dignity. To say of a being that it has the status of human dignity is certainly to imply that it has human rights.⁶¹ But that is because human dignity as a status term is just a short way of conveying that information. Like every other status term, it abbreviates a list of rights. We don’t have human rights because we have human dignity; our having human dignity is our having human rights.

However, maybe this is not the end of the matter. On Austin’s view, a status-term is just an abbreviation for a list of rights, powers, disabilities, duties, privileges, immunities, and liabilities. But perhaps it is also worth insisting that the list is not arbitrary; it is supposed to be a list that *makes sense* relative to some *underlying idea* that informs the status in question. And the meaning of the status-

⁵⁸ John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 5th edition, ed. Robert Campbell (John Murray, 1885), vol. II, Lecture XL, pp. 687-8.

⁵⁹ *Ibid.*, p. 700

⁶⁰ 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.

⁶¹ Some jurists maintain that, strictly speaking, the status of a human person is a sort of oxymoron. R.H. Graveson, *Status in the Common Law* (Athlone Press, 1953), at 2, defines “status” 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.” I disagree with this: it compares unfavorably with Roman law notions, which included, as one status among others, the status of the ordinary free man.

term embraces this idea as well.⁶² In the example of infancy, propositions (a) and (b) are not arbitrary legal propositions. Each of them makes sense in terms of the underlying idea that human children are much less capable of looking after themselves and much more vulnerable to depredation or exploitation by others than adults are. And they make sense together, as a package, in response to that idea—i.e., they make sense jointly as well as severally. The underlying idea—that being an infant (in the ordinary-language meaning of that term) requires special solicitude from society—is what makes sense of infancy in its technical legal meaning. We can say something similar about bankruptcy, alienage, royalty, being a prisoner, and all the other status-terms I mentioned. Each of them is not just an abbreviation of a list of legal “if-then” propositions; it packages a list of propositions deemed to make sense, jointly and severally, in virtue of a certain underlying idea about a particular circumstance or vicissitude of the human condition.

This is not just a matter of each item (in the list abbreviated by a given status) having some rationale.⁶³ It is a matter of their having a common rationale which explains how the various rights, duties, and so on hang together, i.e. the underlying coherence of the package. So, for example, 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. Because an infant lacks contractual capacity, someone else must make provision for them. Abstracted from the whole package, a given incident of a

⁶² Austin was not unaware of this account. He associated it with the work of his own mentor Jeremy Bentham, and he offered rare criticism of the master in this regard, complaining that “Mr. Bentham ... appears to me to be inconsistent and obscure in all he says on the subject.”

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 *Traité 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, *Lectures on Jurisprudence*, p. 699. Austin is quoting from a work we know now as Jeremy Bentham, *The Theory of Legislation*, ed. C.K. Ogden (Kegan Paul, Trench, Trubner & Co., 1931), **pincite**, but which in Austin's day was, for some reason, published only in French.

⁶³ I don't just mean someone's particular opinion as to why a given set of legal provisions is justified. I mean something more like a legally-established justification—like a legally recognized purpose or policy—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.

given status may not make much sense. But, in the package, it makes sense in relation to the underlying idea which it shares with all the other incidents.

Accordingly, if human dignity is a status, then we should say that it comprises not just a set of human rights, but an *underlying idea which explains both* the importance of each of these rights in relation to our being human and the importance of their being packaged together in this regard. If this is so, then the objection we considered early on in this section is a mistake. It is wrong to criticize a claim that dignity is the foundation of rights by saying that all that dignity does is abbreviate a set of rights. It doesn't just abbreviate them, it refers to the idea that underlies and unifies them.

10. The grounds of dignity

My aim in this paper has been to explore some of the difficulties that might seem to stand in the way of a claim that rights are derived from dignity or that human dignity is the foundation of human rights. One last objection needs to be entertained.

When we say that dignity is the foundation of human rights, we often give the impression that dignity is an irreducible value, that we have burrowed deep below the rights that are recognized in the familiar human rights charters and that once we burrow down to dignity, it is not necessary to go any further. But when dignity is discussed in other settings, it is often accepted that dignity is an idea with foundations of its own and that it is sensible to ask what dignity is based on and from what features of the human person or the human species human dignity is derived. For example, some say that our dignity consists in God's claim upon us, or our being created in His image.⁶⁴ Others say, with Kant, that our dignity is based on the metaphysical significance of our possession of moral capacity, the ability to act on principle even when every empirical impulse or inclination, every sentiment, and every element of self-interest pressures us to the contrary.⁶⁵ Others say that dignity is based on our ordinary non-metaphysical ability to take responsibility for

⁶⁴ For the former conception, see Jürgen Moltmann, *On Human Dignity: Political Theology and Ethics* (Fortress Press, 1984), **pincite**. For the latter, Jeremy Waldron, "The Image of God: Rights, Reason, and Order," in John Witte and Frank Alexander (eds.) *Christianity and Human Rights: An Introduction* (Cambridge University Press, 2010), 21.

⁶⁵ Kant, *Groundwork of the Metaphysics of Morals*, **pincite**.

our lives and our recognition of similar abilities in others.⁶⁶ Others still, say it is rooted partly in the specialness of the human species, of which every individual partakes *qua* human even if he or she does not actually share the qualities and achievements that distinguish the species.⁶⁷ As I said in section 5, a rights-theorist's foundational claim about dignity directs us, not to a clear conception, but to questions and controversies about that idea—questions and controversies that can't be answered without going much deeper than the alleged foundation itself.

Is this a problem—that our alleged foundational idea turns out to be in quest of foundations for itself? I don't think so. That X is a foundation for Y may be a relative rather than an absolute claim; the claim is that X illuminates Y in an interesting way or that claims like Y can be derived from X; it is not necessarily a claim that X is rock-bottom, as it were. It does not preclude the possibility of there being an even deeper value W that in turn illuminates X or from which conceptions like X can be derived.

Alternatively, we may use the framework discussed in the previous section to convey the thought that the invocation of dignity points not just to the rights that constitute a particular status but to the underlying idea that unifies them. That underlying idea may be thought of as what dignity ultimately amounts to or as what dignity is ultimately based on or as what the rights that dignity comprises are

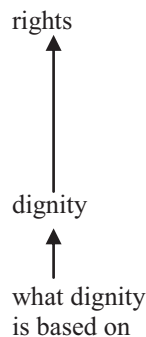


fig. 1

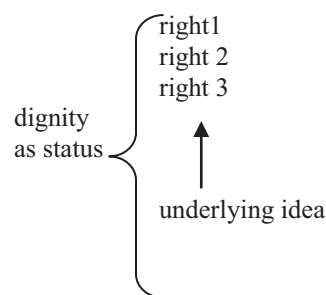


fig. 2

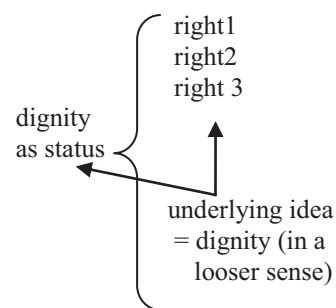


fig. 3

⁶⁶ Dworkin, *Justice for Hedgehogs*, pincite.

⁶⁷ George Kateb, *Human Dignity*.

ultimately based on. It might even convey the idea that dignity and rights are co-foundational, which will be unsurprising if the grammar of dignity is that of a status-concept, along the lines I set out in section 9. It is probably wise not to be too fussy about this. Section 9 dealt with status in a technical legal way. But moral philosophers and others use status—particular in relation to dignity—in a much looser sense. Once we understand that the technical analysis does not disclose any insuperable objection to talk of dignity (the status) as a foundation for the rights it comprises, then we can afford to be accommodating of the looser sense and relatively indiscriminate as between the models indicated in figures 1 through 3 (on p. 28).

I said at the beginning of this essay that my aim was to explore the claim that human rights are based on human dignity, not with a view to refuting the claim, but in order to see what obstacles the claim might face. The claim is often made loosely; sometimes it is barely more than a piece of decorative rhetoric. Other times, it seems to convey a quite precise (and controversial) proposition. I don't want to make a fetish of precision; part of the point of my analysis is to see where we can afford loose talk in this regard and where it is important to tighten up the claim about the relation between dignity and rights. Philosophers tend to think that precision is always important; but they have known since Aristotle that that may not always be wise.⁶⁸ Sometimes the quest for precision blinds us to certain insights that we can as yet only formulate haltingly; sometimes it blinds us to the importance of pursuing certain questions (and linking them to other questions) even when there is not yet an answer in sight.

It has not been my intention to defend any particular version of the claim that human dignity is the foundation of human rights. For what it is worth, I think some such claim is true and helpful. Mostly I have wanted to see whether there is room for any such claims. I think there is; there are all sorts of pitfalls and fallacies, but the propounding of a foundational relation between human rights and human dignity is not always a matter of confusion.

⁶⁸ Aristotle, *Nicomachean Ethics*, **passage about not demanding more precision than the subject allows.**