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Human Dignity

Jeremy Waldron

My task is to consider the role of human dignity in constitutional law. Here is a suggestion I would like to offer about the work that it does. Human dignity serves not only as the content of certain rights or as a ground or foundation for human rights in general, but also as a basis on which fundamental rights are interpreted and applied. Indeed, not only that: I think human dignity works as an integrating idea across the whole range of constitutional considerations – structural as well as rights-based, empowering as well as constraining. The idea of human dignity is indispensable not only to our sense of the constitutional protections that we need, but also to our whole sense of the underlying status and authority of the ordinary human persons for whose sake constitutions are framed and their provisions upheld.

I HUMAN DIGNITY IN CONSTITUTIONAL AND HUMAN RIGHTS LAW

Though human dignity is an ancient idea and though it played a significant role in late Enlightenment moral philosophy and in nineteenth-century Roman Catholic moral theology as well, it really did not surface in constitutional texts and in modern constitutional jurisprudence until the second half of the twentieth century. There were a few exceptions. The 1919 Constitution of Finland, Article 1(1), undertook to "guarantee the inviolability of human dignity."[1] And the preamble to the Irish Constitution of 1937 said that the document sought "to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured…."

At the end of the Second World War, and in revulsion against the horrors of Nazism and other forms of fascism, references to human dignity became more common and more insistent in charters of fundamental rights (Habermas, 2010, pp. 465–6). The Charter of the United Nations said in its preamble that the peoples of the world were determined "to reaffirm faith in fundamental human rights, in the

[1] For this reference, I am grateful to Barak 2015.

dignity and worth of the human person." In 1948 the Basic Law of Germany made dignity a supreme principle of governance: "Human dignity shall be inviolable," said its opening provision and, in the years that followed, the Federal Constitutional Court of Germany insisted that this means all other laws and all other rights have to be understood through a dignitarian lens.[2] In the same year, 1948, the Universal Declaration of Human Rights (UDHR) made dignity fundamental among the principles it set out. In its preamble the UDHR proclaimed 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 that*] the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, [*and*] in the dignity and worth of the human person….

Article 1 of the UDHR announced, "All human beings are born free and equal in dignity and rights." And its socio-economic provisions held that everyone who works is entitled to "to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity" (UDHR, Article 23).[3] Now, the UDHR is not law, let alone constitutional law. But it has provided both inspiration and template for the use of dignity in the constitutions of the nations of the world. And the various functions it assigns to dignity in the syntax of human rights – sometimes foundational, sometimes to help specify the content of an enumerated right – have been important, as we shall see, for its constitutional role.

Today, more than 150 nations invoke dignity in their constitutional jurisprudence or in their bodies of Basic Law, though admittedly in some of them it is not much more than a passing reference. In one or two countries, the place of human dignity is secured by court-made doctrines rather than constitutional text. In Canada, for example, there is no mention of dignity in the Charter of Rights and Freedoms, but it has had a major presence nonetheless in the interpretation of rights to equality and in end-of-life issues such as assisted suicide.[4] So too in the United States: there the Supreme Court, without benefit of any mention of human dignity in the text of the U.S. Constitution,[5] has repeatedly invoked it as a concept necessary for making sense of the Eighth Amendment – a role best known from debates about capital punishment in the 1970s.[6]

[2] See, for example, the German Air Safety case: Feb. 15, 2006, 115 BVerfGE 118 (FCC).

[3] See also UDHR Article 22 for reference to "the economic, social and cultural rights indispensable for [each person's] dignity and the free development of his personality."

[4] For the equality case-law, see *Law v. Canada (Minister of Employment and Immigration)*, *[1999] 1 S.C.R. 497*. For the use of human dignity in an end-of-life case, see, e.g., *Carter v. Canada (Attorney-General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

[5] But dignity is referred to in the text of some of the US state constitutions – in Article II.4 of the Constitution of Montana, for example.

[6] See *Furman v. Georgia* 408 U.S. 238 (1972), at 270–81. But see also the use of human dignity in the jurisprudence of the Fourth Amendment on reasonable searches and seizures (*Rochin v. California*, 342 U.S.

Some have seen, in dignity's appearing in constitutional jurisprudence all over the world, a sort of signal from each constitutional community to the others that they are willing to learn from one another in the elaboration of this and allied ideas (McCrudden 2008, pp. 694–7).[7] It is also a signal that the constitutional communities in question take seriously the relation between constitutional rights and human rights. Each body of jurisprudence is supposed to inform the other, and since the human rights material is, as it were, held in common, national discussions of human dignity can be seen as allusions to this commonality.

II THE SYNTAX OF DIGNITY

We saw that, in the UDHR, human dignity operates at a number of different levels. In the preamble it seems to have a foundational presence – a role also made explicit in the International Covenant on Civil and Political Rights (ICCPR), whose preamble says that "rights derive from the inherent dignity of the human person." In Article 23 of the UDHR, by contrast, dignity helps determine a benchmark for social and economic rights.

Some countries in their constitutions indicate a similar variety of roles for human dignity. The best example is the 1996 Constitution of South Africa (CSA), which both uses dignity as a benchmark for conditions of detention[8] and cites respect for and protection of inherent dignity as something to which people have a fundamental right.[9] As well as those two quite different uses, the CSA (in section 1) also sets out dignity as a constitutional value, standing alongside other values like equality, non-racialism, non-sexism, the rule of law, and democracy. The CSA's Bill of Rights, we are told in Section VII, is a way of affirming those values, and subsequent provisions assign specific roles for these constitutional values in interpretation (section 39) and in regard to the limitation of rights (section 36).

These different types and levels of operations – e.g., dignity as one specific right among others and dignity as the basis of all rights – are all too often dismissed as

165 (1952), at 174), the Fifth Amendment on self-incrimination (*Miranda v. Arizona* 384 US 436 (1966), at 457), and substantive due process in the Fourteenth Amendment (*Planned Parenthood v. Casey* 505 US 833 (1992), at 851). There are good overall surveys in Goodman 2005–6 and Neuman 2000.

7 McCrudden 2008, p. 695 quotes Justice O'Connor as saying, in her dissenting opinion in *Roper v. Simmons* 543 U.S. 551 (2005) at 605 that Americans' "evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement … that a particular form of punishment is inconsistent with fundamental human rights."

8 CSA, section 35: "Everyone who is detained, including every sentenced prisoner, has the right … to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment…."

9 CSA, section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."

evidences of confusion. Luis Roberto Barroso, of the Brazilian Constitutional Court, has argued that it is "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" (Barroso 2012, p. 357). But I actually do not think it is contradictory.[10]

Suppose dignity *is* the foundation of our rights; then the role of particular rights-claims is to point out what this foundational consideration 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 may talk directly of a right to φ without mentioning dignity. In other areas, there may be no independently familiar benchmark, so we refer to dignity itself as the criterion of what is required: that is what seems to be going on in the UDHR's insistence in Article 23 on "remuneration ensuring … an existence worthy of human dignity." We do not say what the required level of remuneration is: but we say that questions are to be asked about human dignity as a way of pinning it down. There is no contradiction here and we have not had to assign different meanings to different occurrences of "human dignity," as Michael Rosen has suggested, in order to prevent a contradiction from arising (Rosen 2012, pp. 59–60).

What about the distinction between human dignity as a right (whether it is general or specific) and human dignity as a constitutional value? The deontic syntax of dignity has always been a little unclear. Kant famously described it as a species of value – value beyond price – in the *Groundwork of the Metaphysics of Morals*:

> In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what, on the other hand, is raised above all price and therefore admits of no equivalent has a dignity.
>
> (Kant 2012 [1785], p. 42)

But, as Stephen Darwall notes (2006, pp. 132–8), Kant in his later work also presents dignity as a sort of *commanding* value – it is the basis on which each of us "exacts respect for himself from all other rational beings in the world" (Kant, 2017 [1797], p. 201). This gives dignity a more direct and compelling normativity than that associated with values generally. (It makes it more like the rights-based edge of a principle.) Either way the understanding of dignity as a non-fungible value certainly affects how policy calculations are to be made. Consider, for example, the way in which the lens of human dignity in Germany's Basic Law refracted the government's appeal to the right to life in the *Air Safety Case* and sustained a refusal by the Federal Constitutional Court to countenance trade-offs among different quantities of human lives.[11]

Aharon Barak (2015, pp. 49 ff.) points out that "human dignity" does different work as a constitutional right than it does as a constitutional value. A right to dignity

[10] The argument that follows is adapted from Waldron 2012b, pp. 18–19.

[11] The German Air Safety case is cited in footnote 2 above.

(like a right to anything else) is supposed to operate insistently in the form of an uncompromising principled demand, and though of course there are always questions to be asked about the interpretation of its content, answers to those questions are to be laid out on the deontic matrix of a compelling normative claim. But if human dignity is a constitutional value, then it also makes itself available as an idea to guide the interpretation of all rights provisions, even those that are not explicitly rights *to* dignity in either a general or a particular sense. Plus, dignity as a value may also be involved in forms of constitutional jurisprudence that identify new rights as implicit in what is regarded as a living constitutional text. It features in the purposive aspect of such judicial extrapolations. We see this happening in American constitutional jurisprudence, in the line of cases addressing the question of which liberties are to be treated as particularly importance in substantive due process analysis.[12]

One or two U.S. scholars have argued that the use of dignity as a constitutional value along these lines is incompatible with the spirit of constitutional rights in the American tradition. They see it as introducing "a values-centered constitutionalism, one that emphasizes the needs of the community over the individual, and that protects rights, but only alongside other interests and values" (Rao 2008, p. 255). The reference here seems to be to the role dignity plays in proportionality analysis and in determining possible limitations upon rights, as in the South African provisions mentioned above. However, it is probably better to associate the reference to dignity with one strand among others in U.S. constitutional controversy, rather than to call it un-American. And certainly, it is wrong to say that the dignitarian approach involves tainting individual rights with communitarianism. Even if there is a communitarian element in the very idea of limitations upon rights, the fact that such limitations must be shown to be acceptable in a society based on human dignity, actually reintroduces an individualist constraint into the limitation equation.

III THE FOUNDATION OF RIGHTS

Unlike the UDHR and the ICCPR, national constitutions mostly do not make grand proclamations about the foundation of the rights they protect. They just stipulate what the rights are and state that they must be upheld. So, for example, there is a contrast between the Bill of Rights associated with the U.S. Constitution and the opening lines of the 1776 Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights…."[13] Still people find it natural to see dignity as foundational for rights in constitutional law as well as for those laid down in human rights documents.

[12] See, e.g., *Planned Parenthood v. Casey* 505 US 833 (1992), at 851 and *Lawrence et al. v. Texas*, 539 U.S. 558 (2003) at 567.

[13] For the connection between the two, see Black 1997, p. 22.

We should be careful, however, in our understanding of "foundations." The ICCPR formulation – that "rights derive from the inherent dignity of the human person" – suggests that human dignity is a sort of major premise and that sufficient knowledge of it will enable us to deduce the rights that it entails (rights as conclusions of a syllogism); or it suggests that human dignity is the telos of rights, and conclusions about particular rights can be inferred on the basis of instrumentalist reasoning (rights as a means to an end). I have come to see these understandings of foundationalism as unhelpful (Waldron 2015). Instead, we may think of human dignity as, so to speak, the *flavor* of certain constitutional rights, as a way of making sense of them and establishing their significance.

To firm this up: We may want to try thinking of human dignity as a *status*-idea, under the auspices of which we range a number of different rights and other normative elements. A legal status sums up the whole normative situation of a person in certain conditions, such as bankruptcy or infancy. Human dignity does this with regard to the default status, so to speak, of a human individual. It draws attention to the rights, duties, powers, and immunities that attach to the human person as such. Now, this is a technical point, but we can hardly treat human dignity as a foundation of rights if, as a status term, it functions primarily as a container or covering term for some given array of individual rights. Still, there is something like a foundational element present in this analysis: A status term is not just an abbreviation for the elements ranged under it; it makes sense of their being grouped together in terms of what Jeremy Bentham (1834) calls "*une base idéale*," an underlying reason.[14] And in the case of human dignity that underlying reason seems to be the special and momentous significance of the ordinary individual human person. I will say more about this in Section IV.

Before I get to that, however, let me say a word about the positive law and the suprapositive aspects of human dignity. Constitutional rights exist, in the first instance, as black-letter positive law; they are framed and enacted by human lawmakers. And for some rights there may not be much else to be said about them. Americans have the right to bear arms, for example, or the right to trial by jury in common law suits where a sum greater than twenty dollars is at stake because that is what a bunch of people decided in the late eighteenth century. But certain other rights – to free speech and freedom of worship, the right not to be subject to cruel punishment, the right to the equal protection of the law – are usually taken to point beyond their black-letter formulations and beyond the contingent decisions of their framers to a source for their standing among us that transcends positive law and legitimates and compels their observance. They are understood to have what is sometimes called a "suprapositive aspect" (Neuman 2003, pp. 1866–7).

A number of scholars treat general references to dignity in human rights law and in some constitutions as references to the objective character of this suprapositive

[14] Note, however, that John Austin (1885, vol. II, pp. 687–8) disagreed with Bentham over this view of status-terms; Austin held a pure abbreviation view of status terms.

aspect. Klaus Dicke (2002, p. 114) says that dignity conveys the point that we are required to *recognize* certain facts about human beings as the basis of their rights; our attitude towards them is not just constructive; we don't just make them up.[15] Christopher McCrudden (2008, p. 679) says something similar: it is part of the core meaning of "human dignity," he says, that it conveys this ontological content. There is something about humans – their dignity – that commands or requires our recognition; it is not just the registering of some way we have decided to behave towards one another. And everyone who uses the term "human dignity" makes an implicit promise to give an account of that something.

IV SACREDNESS

Should we think of human dignity as a religious idea, attesting non-negotiably to the *sacredness* of the human person? Some theorists worry that human dignity might operate as a sort of Trojan horse for the infiltration of religiously-loaded content into moral and political theory.

It may be helpful, however, to put the point the other way round (Gushee 2013). We know that, historically, the richest and most powerful accounts of the commanding value of individual personality were articulated in the context of religious world-views.[16] Now, beginning with the Enlightenment, there have been attempts to develop secular accounts of this – accounts that might capture a sense of the sacred that is secular on the one hand but avoids a sort of bland utilitarianism on the other. Kantian moral philosophy is one such attempt; Ronald Dworkin's late work on religion is another (Dworkin 2013); George Kateb (2014) is a third. Even though everyone knows that the idea of human dignity comes trailing a religious as well as philosophical heritage, still talk of dignity in modern jurisprudence represents an attempt to see whether moral and political ideas can be extricated from those foundations, without abandoning the key insights of respect for personhood. This remains a work-in-progress: Dignitarian jurisprudence is one of the sites where we are trying to figure out whether a sense of the momentous importance to be attached to every human individual can be expressed altogether in purely secular terms.

This process is undertaken more or less tolerantly, or more or less aggressively. Many philosophers think of themselves as engaged in a systematic endeavor to construct a frame of moral analysis that simply excludes the influence of what they

[15] See also Schachter (1983), p. 853.

[16] For a fifteenth century example, see Della Mirandolla (1996). Human dignity also occupies an important role in modern Catholic moral theology, connecting with ideas about the image of God in every human being. In John Paul II (1995), the encyclical *Evangelium Vitae* (EV), we are told of "the almost divine dignity of every human being" (EV §25):

> [M]an, although formed from the dust of the earth … is a manifestation of God in the world, a sign of his presence, a trace of his glory. … Man has been given a sublime dignity, based on the intimate bond which unites him to his Creator: in man there shines forth a reflection of God himself. (EV, § 34)

call "irrational religious ideas." They worry that the term "human dignity," even when it is used by secular thinkers, retains many of the characteristics of religious discourse – pomposity, a lurch toward transcendence, lack of definitional clarity, grand-sounding equivocation, a shrinking from rigor and so on.

Others, less exercised by these worries, are determined to remain alert to all the various ways in which the momentous significance of the human individual can be accounted for. I think Christopher McCrudden (2008, pp. 675–8) intended to sound cynical when he said that the statesmen framing the UDHR used the phrase "human dignity," whenever they wanted to sound grand and transcendent but couldn't agree on what to say. But their perseverance with this can also be seen as a tribute to the as-yet-untapped resources available in various religious traditions for making sense of the supreme importance to be accorded to each individual in modern jurisprudence and political morality.

V IS DIGNITY REDUNDANT?

It is sometimes said that the idea of human dignity is redundant, since whatever is of value in its application can be captured by other, better-understood concepts.

Plainly, human dignity has important resonances with equality and liberty, and these are more familiar values. Some theorists (Macklin 2003; Pinker 2008) wonder whether "dignity" could not be replaced with "autonomy," for the latter has in their eyes a relatively straightforward meaning and a clear connection with a liberal privileging of choice in the living of a human life. But we may need both: Dignity is used in constitutional analysis to discern the sort of choices that are of particular importance in the constitutional value of autonomy or ordered liberty;[17] to do that, something more than the bare idea of liberty is necessary (Taylor 2006, p. 150).

Dignity is also important in capturing concerns associated with degradation – even degradation that is the upshot of choice and consent. The issue of dwarf-tossing illustrates these concerns. In 1995 the French *Conseil d'État* recognized that the protection of dignity may appropriately be invoked by police authorities in shutting down sports that involve the manipulation of disabled persons "presented as such" for public entertainment.[18] Does this mean that talk of dignity imports a moralistic element into a field previously dominated by autonomy-values? Some have said so (Hennette-Vauchez 2011): they worry that human dignity will be cited as a ground for upholding sexual orthodoxy. But does this mean we should abandon any notion of treatment or behavior unworthy of a human being? Maybe that would be too hasty. Our experience in the law relating to the mistreatment of detainees has shown that we definitely do need a concept of degradation with which to condemn certain modes of detention and interrogation, and that the key to that concept is not the

[17] See, e.g., *Planned Parenthood v. Casey* 505 US 833 (1992).
[18] CE, Ass., 27 Octobre 1995, 372: *Commune de Morsang-sur-Orge*.

involuntariness of the treatment, but the contempt that bestial degradation shows for the dignity of human nature. We must hang on to that as a distinctive value, even if we want to question its deployment in other cases that involve sexual misconduct. Dignity has the advantage of bringing together concerns about freedom and non-degradation in a way that autonomy, as it is popularly understood, does not.[19]

VI DIGNITY ACROSS THE FULL RANGE OF CONSTITUTIONAL PROVISIONS

So far, we have been concentrating on the role of human dignity as an organizing idea in regard to the rights element of a modern constitution. I mentioned the important distinction between (i) dignity as a right and (ii) dignity as a constitutional value (Barak 2015). But though dignity as a constitutional value helps inform our interpretation of constitutional rights, it can also serve as a value that informs the constitution as a whole. It can work as an integrating value for the entire constitutional edifice.

So, extending its ambit out from the content of particular rights, we find that dignity is also used to capture the importance of citizenship and what judges and scholars have called "the right to have rights" (Arendt 1973). In the United States, when Chief Justice Warren said in *Trop v. Dulles* 356 U.S. 86 (1958) that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," he associated human dignity with precisely this element. The case was about the use of denationalization as a punishment. Determining that denationalization was an unconstitutional punishment, the Chief Justice argued that

> [t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.[20]

This association of human dignity with political status is important. I have argued elsewhere (Waldron 2012b, p. 73) that human dignity is itself a status concept: I talked about this in Section III above. It is a status concept under which we range and rationalize a number of different elements, explaining their significance jointly

[19] But for a more refined understanding of autonomy, see Raz 1986.

[20] *Trop v. Dulles* 356 U.S. 86, at 101–2 (1958).

and severally in terms of a single organizing idea. In moral theory, that organizing idea is (as we have seen) the momentous considerability of the human person. In constitutional jurisprudence, it is the notion that republican political arrangements are made for the benefit and empowerment of ordinary members of the public.

"Dignity" used to be deployed as a term for high office: the dignity of a king or the dignity of a judge. This is how "*dignitas*" was used by Roman statesmen, to mark out special status or high authority (Hennette-Vauchez 2011). I have found it useful to consider that this hierarchical notion of dignity has not been abandoned, but in a sense reversed. We are now *all* possessed of high-status dignity: perhaps we always were. That's what conceptions of human dignity have to justify: the high status of all human beings (Waldron 2007).

Some of this may be captured in the special role of citizenship (Waldron 2013). In republican political theory, the dignity of citizenship is not just the status of a passive beneficiary of our constitutional arrangements, but that of an active and empowered participant.[21] This is particularly important in the constitution of a republic, whose fundamental norm is political equality. Gerald Neuman points out that "the entire edifice of U.S. constitutional law is built on a vision of human dignity, as reflected in popular sovereignty, representative government and entrenched individual rights" (Neuman 2000, p. 251).[22] But it is not just the United States. Constitutional government everywhere is about recognition and empowerment of ordinary people. Human dignity makes sense of our active political equality in democratic and electoral arrangements, our empowerment as participants and our standing to demand accountability (Waldron 2016a). It is our status as members of the popular sovereign – each of us as a person in "We the people" – in whose name the constitution is constructed. Even at ground-zero of the elaboration of human dignity in moral philosophy, Kant (2012 [1785], pp. 42–5) found it necessary to invoke a political image – the image of each person as (like) a legislator in the kingdom of ends (actually "republic of ends" is a better translation).[23] We are like lawmakers, not just subjects in the moral enterprise. In Kantian moral philosophy, that's a metaphor. But it takes on direct and literal importance in constitutional jurisprudence. We – all of us – are credited as makers of the constitutional structures that protect us and empower us.

Beyond that, whatever constitutions do in the way of establishing and maintaining democracy and in protecting the integrity of electoral and representative institutions is also in large part a reflection of dignitarian ideas. We will miss this if we associate the dignitarian aspect of a constitution with the upholding of rights *against* democracy. Human dignity most definitely *is* engaged on the side of such rights

[21] See also Kant (2017 [1797], p. 113): "Certainly no human being can be without any dignity, since he has at least the dignity of a citizen."

[22] On the other hand, see Neuman (2000, pp. 251–2), for failures of universalism in US constitutional law.

[23] See also the discussion of Kant's conception of the kingdom of ends in Waldron 2018.

against the majority, but it is engaged too on the side of democratic empowerment. Many jurists see constitutionalism as just a limitation on majority rule (Sajó 1999). But constitutions have to empower as well as constrain, and the constitution of a democracy involves the difficult task of empowering those who would otherwise be powerless for the purposes of ordinary political decision-making (Waldron 2016b, pp. 36–8). The man whom Colonel Rainsborough referred to in the 1647 Putney Debates as "the poorest he that is in England" is the hardest man to empower, because if things are left to themselves he will have no political power at all (Sharp 1998, p. 103). If he is empowered and if his empowerment is secured, it is the affirmative achievement of a democratic constitution that has had to go out of its way to ensure that he has and keeps as much formal political authority as "the greatest he." And this too is motivated by our conception of his human dignity and his entitlement to be treated as an equal in the political process.

What I am trying to show, in other words, is that dignity has work to do in almost every aspect of constitutionalism. It motivates and informs rights-based constraints, democratic ideals, and many of the structural principles that constitutionalism insists on: for example, the separation of powers, bicameralism, federalism – all of which are ways of designing government to respect the dignity of ordinary people and to prevent it from riding over them roughshod.

Even a constitutional principle like the rule of law conveys the importance of human dignity. We respect dignity, when we insist that law must provide a stable framework for action.

> To embark on the enterprise of subjecting human conduct to rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.
>
> (Fuller 1969, p. 162)

As Raz (1979b) has pointed out, dignity is what is at stake in the formal requirements of the rule of law such as clarity, stability, and prospectivity. "[O]bservance of the rule of law is necessary if the law is to respect human dignity," states Raz and also, "Respecting human dignity entails treating humans as persons capable of planning and plotting their future." It requires that our rulers act as though the lives and the plans of ordinary people are important and that our rulers foster an environment friendly to such planning, a predictable environment at least so far as the demands of political power are concerned. The due process aspect of the rule of law also picks up the dignitarian theme: we empower people as participants in the legal process and sponsor and structure the making of arguments. As I have said elsewhere (Waldron 2012c, p. 210),

> Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.

Put all this together, and we see human dignity operating as a wide-ranging constitution value, picking up and gathering together a whole array of ideas – an array of protections, benefits, structures, empowerments, entitlements, institutions, forms of respect, and equalizations going well beyond a list of individual rights.

VII SKEPTICISM ABOUT MEANING

I believe the pervasiveness of human dignity as I have just explained can help us with some of the skepticism that is sometimes expressed about the vagueness and malleability of the concept. For one hears a steady drum-beat of suspicion about human dignity in the philosophical literature, especially among those moral philosophers who take part of their job to be the maintenance of intellectual hygiene (see Pritchard 1972). Ronald Dworkin, who actually wanted to deploy the idea, says that "[t]he idea of dignity has been stained by overuse and misuse" (2011, p. 204).[24] There is considerable unease about an idea that seems vulnerable to overuse because of its chameleon-like character; it is all things to all people; it is a purely decorative device; "nothing but a phrase" (Beitz 2013). Sixty years ago, Bertram Morris (1946, p. 57) observed that "[f]ew expressions call forth the nod of assent and put an end to analysis as readily as 'the dignity of man.'" It doesn't help, say the skeptics, that official use of this concept in constitutions and international charters of rights is still uncontaminated by any authoritative definition. A respected human rights jurist, Oscar Schachter once observed of "human dignity" that "[i]ts intrinsic meaning has been left to intuitive understanding," and he worried that "[w]ithout a reasonably clear general idea of its meaning, we cannot easily draw specific implications for relevant conduct" (1983, p. 849).

In my view, these concerns are overblown. As many jurists have pointed out, lots of value-terms do their work in constitutional jurisprudence without the benefit of simplistic definitions.[25] Not all definitions in law come in the form of a checklist of necessary and sufficient conditions. Instead a thick value term like "dignity" serves as a catalyst for thinking; and the heritage it trails is an invitation to reflect on the application of that thinking to the case at hand. "Human dignity" may not have a ready-made definition, but it refers to the history of our attempts over the centuries to say what is special and worthy of respect in the human individual. That this use

[24] Still, when he introduced the term he said that "it would be a shame to surrender an important idea or even a familiar name to this corruption" (Dworkin 2011, p. 204).

[25] See generally, H.L.A. Hart, *Definition and Theory in Jurisprudence*.

of it may be challenging or difficult for lawyers doing advocates' work should not be – as the Supreme Court of Canada seems to think it is[26] – a disqualifying factor. We sometimes need concepts in law that challenge the demands of technical advocacy and that invite serious normative reflection, ideas whose elaboration involves continual argument about their proper application (Gallie 1956). It would be a mistake to filter out of the law all concepts of this kind for the sake of spurious clarity.

Moreover, we must expect – what we have seen already in some of this discussion – that a concept as wide-ranging as dignity will not always give us easy and unequivocal solutions in constitutional argument. American constitutional jurisprudence is replete with examples of human dignity being cited on both sides of a given issue – on both sides of an argument about gun rights, for example, or *pro se* representation in court.[27] In the latter case, Justice Breyer said that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel," while Justice Scalia said (in dissent) that "the loss of 'dignity' the right is designed to prevent is not the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice."[28] These two opinions do not cancel each other out. Rather, in each case, the appeal to dignity enriches the sense of what is at stake on both sides of a given issue. It shows that the concept is, as Roberto Barroso (2012) argues, "multi-faceted." Different uses and the generation of different insights is not the same as different and equivocal meanings. Human dignity has work to do all over our constitutional jurisprudence, and it is no surprise that the work it does should crop up sometimes in ways that disconcert those who are looking for easy arguments.

VIII A CONSTITUTION AS A WHOLE

A constitution is not just a "heap" of provisions, each separate from the others, which we are supposed to mine for particular texts or doctrines that may be used as the basis of "slam-dunk" arguments in court. It is supposed to make sense as a whole – both as a machine whose moving parts work together (Kammen 2006), and as something with normative integrity along the lines of Ronald Dworkin's conception in *Law's Empire* (1986). The integrity component means paying attention to what different provisions and doctrines, in what appear to be different areas of

[26] *R. v Kapp* 2008 SCC 41 at § 22: "[A]s critics have pointed out, human dignity is an abstract and subjective notion that … cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."

[27] See, e.g., *McDonald v. Chicago*, 561 U.S. 742 (2010) on gun rights, and *Indiana v. Edwards*, 554 U.S. 164 (2008) on pro se representation.

[28] *Indiana v. Edwards*, 554 U.S. 164 (2008), 176 (Breyer J. for the Court) and 186–87 (Scalia J., dissenting).

constitutional concern, have in common. We are familiar with this in colloquial terms when we assume that the US Constitution, for example, is pervaded by a commitment to freedom, and that unless we can see what is in common between (say) freedom as upheld by the First Amendment, freedom as reinforced in the voting rights provisions, and freedom as embodied in various structural checks and balances, then we don't really understand it.

The burden of my argument in this paper is that "human dignity" performs a similarly pervasive and uniting function within many liberal/democratic constitutions. It has particular work to do when it figures in the content of some particular right, but, beyond that, it helps mark out the point of the whole enterprise. We, the nominal authors of such a constitution, attribute human dignity to one another. We insist on being treated by our government with that dignity and on the protections that are necessary to ensure that. Indeed, we insist as a matter of dignity that the government is ours and for us to control; its accountability to us, through established political mechanisms, is a matter of the tribute that agents must pay to the dignity of those who employ them (Waldron 2016a). By insisting on the rule of law, we maintain that we are to be treated with dignity even when it is a question of coercing us. Our well-being is to be regarded as that of individuals with dignity and not as the well-being of cattle who graze for their masters' benefit. All these constitutional uses of dignity – and more – are united in a common conception that, I think, is pervasive and indispensable in modern constitutionalism.

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