

Tanner Lectures: DIGNITY, RANK, AND RIGHTS

Lecture 2: Outline

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NOTE TO COMMENTATORS:

The lectures, as delivered, will be what is in the text, not the footnotes. It may be polished between now and April 21, but the sense won't change. The footnotes are partly bibliographic, partly rubbish I couldn't bear to delete, or relevant material that there is no time to include in the lectures but which may be included in the book version (though some of it will be dropped.) Please feel free to develop commentaries and criticisms for the formal presentation as though the footnotes were not there.

Lecture 2: Law, Dignity and Self-Control

Jeremy Waldron

1. Recap from previous lecture

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

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

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

2. Law as solicitous of rank

Historically law has done all sorts of things to protect and vindicate dignity in the sense of rank or high status. Law would protect nobles against imputations against their dignity, for example, by the offense (and the tort) of *scandalum magnatum*.¹ It would protect the exclusiveness of rank with things like sumptuary laws, and requirements of proper address, deference, privilege, and precedence.

If I am right that dignity is *still* the name of a rank—only now an equally distributed one—and that this is a different matter from there being no rank at all in the law, then we would expect modern law also to commit itself to protection and vindication of the high rank or dignity of the ordinary person.² And so it does, in various ways.

We have seen how law tries to protect individuals against treatment that is degrading.³ That's one very elementary way in which law protects dignity.

Another is protection from insult—a sort of democratized *scandalum magnatum*. In countries where hate speech and group libel are prohibited, people are required to refrain from the most egregious public attacks on one another's basic social standing. A great many countries use their laws to protect ethnic and racial groups from threatening, abusive, or insulting publications calculated to bring them

¹ *The Earl of Lincoln against Roughton*, 79 Eng. Rep. 171 ; Cro. Jac. 196 (1606): "*Scandalum magnatum*; for that the defendant spake these words; "My lord (innuendo the said Earl of Lincoln) is a base earl, and a paltry lord, and keepeth none but rogues and rascals like himself." The defendant pleaded not guilty; and it was found against him. After verdict, it was moved in arrest of judgment, that these words were not actionable; for they touch him not in his life, nor in any matter of his loyalty, nor import him in any main point of his dignity, but are only words of spleen concerning his keeping of servants, which is not material. Yelverton and Fleming seemed to incline to that opinion; but Williams and Croke to the contrary, because they touched him in his honour and dignity; and to term him "base lord" and "paltry earl," is matter to raise contempt betwixt him and the people, or the King's indignation against him: and such general words in case of nobility will maintain an action, although it will not in case of a common person."

² So, for example, German constitutional law talks, in connection with dignity, of "the social entitlement to value and regard" or the "entitlement to respect ... in the social sphere"? Cite to Robert Post, IGS paper, p. 19. Refer back to the discussion of the shooting-down-airliners case in Tanner 1 (end of section 8).

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

into public contempt.⁴ The United States is an exception in the latitude it currently gives to hate speech; but even here the notion of a dignitarian basis for banning hate speech is often cited in the constitutional debate, where it is understood as posing a freedom versus dignity dilemma.⁵ Elsewhere these restrictions are not widely viewed as violations of individual rights; most countries say they have enacted them pursuant to their obligations under the International Covenant on Civil and Political Rights, which says that expressions of hatred likely to stir up violence, hostility, or discrimination *must* be prohibited by law.⁶

The other way that law protects dignity is by prohibiting invidious discrimination. This has been very important in South African jurisprudence,⁷ where, according to the Constitutional Court, the history of country demonstrates how discrimination “proceeds on [an] assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group.” The Court went on: “Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as “second class citizens.”⁸

Similarly in Canada.⁹ In a 1999 decision, it was said that “the purpose of [the anti-discrimination provisions of the Charter]¹⁰ is to

⁴ Cites.

⁵ See, for example, Stephen J. Heyman, *Free Speech and Human Dignity* (New Haven; Yale University Press, 2008). But Heyman gives little thought to what dignity means; he simply cites the Kantian notion (p. 39) as “near absolute worth.”

⁶ ICCPR, Article 20 (2)

⁷ In *Hugo v. President of the Republic* *President of the Republic of South Africa v. Hugo*, 1997 (4) SA (CC) 1, 1997 (6) BCLR 708 a case concerning gender discrimination, the South African Constitutional Court said that “the purpose of [South Africa’s] new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.” (Ibid., at § 92, citing Goldstone J.) And the court said this dignitarian conception lay at the heart of the prohibition of unfair discrimination.

⁸ *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125, at § 116. This sounds like a group-dignity idea—protecting the “dignity of the disfavored group.” Actually I think it is a matter of individual dignity, protecting individuals against denigration based on shared characteristics or group membership. (For discussions of group dignity and the application of dignity to nations and classes and institutions, see Waldron, “The Dignity of Groups,” forthcoming *Acta Juridica* (2009), presently available at <http://ssrn.com/abstract=1287174>)

⁹ I am grateful to Denise Réaume for an understanding of this material. See Denise G. Réaume, “Discrimination and Dignity, 63 *Louisiana LR* 645 (2002-3). See also R. James Fyfe “Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada” (2007), 70 *Sask. L. Rev.* 1

prevent the violation of essential human dignity ... through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”¹¹ The Canadian court said that this “overriding concern” with dignity infuses all elements of the discrimination analysis”¹² and it figured that dignitarian ideas could be used to distinguish between invidious and benign discrimination.¹³

Mostly in this lecture I want to talk about a less obvious way in which law protects dignity—a way, though, which is more pervasive and more intimately connected with the very nature of law. For when we think about something like Common Article 3 of the Geneva Conventions, it may strike us as a matter of contingency that dignity is protected in this way; we have seen in recent years how fragile the Geneva Conventions are.¹⁴ Or consider that in 2008, the Supreme Court of Canada decided it would no longer use dignity as the touchstone of its anti-discrimination doctrine.¹⁵ It was persuaded by some pedantic

¹⁰ Charter §15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹¹ *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. §51

¹² *Ibid.*, § 53-4.

¹³ *Ibid.*, § 72: “[A]meliorative” legislation “will likely not violate the human dignity of more advantaged individuals where [their] exclusion ... largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.”

¹⁴ President Bush said of Common Article 3 of Geneva Conventions in 2006: “It’s very vague. What does that mean, ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation. ... [T]he standards are so vague that our professionals won’t be able to carry forward the program, because they don’t want to be tried as war criminals. ... These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law.” *Press Conference of the President*, September 15, 2006: <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>

¹⁵ *R. v Kapp* 2008 SCC 41 at § 22: “human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.” Once again, I am grateful to Denise Réaume for this citation.

academic articles¹⁶ that “human dignity is an abstract and subjective notion” which is “confusing and difficult to apply.” So it turned its back on dignity as the basis of anti-discrimination doctrine.

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

3. Right-bearer’s dignity

One possibility is that even if jurisdictions vary in their readiness to acknowledge specific dignitary rights, still the very form and structure of a right conveys the idea of the right-bearer’s dignity. Right-bearers stand up for themselves; they make unapologetic claims on their own behalf; they control the pursuit and prosecution of their own grievances. As Joel Feinberg put it, “A right is ... something that can be demanded or insisted upon without embarrassment or shame.”¹⁷ The whole business of rights reeks of dignity,^{18 19} —particularly in theories like Feinberg’s or in H.L.A. Hart’s “Choice Theory” of rights, for example.^{20 21 22}

¹⁶ Cites.

¹⁷ Joel Feinberg, “Duties, Rights and Claims,” *American Philosophical Quarterly* 3, no. 2 (1966): 8.

¹⁸ Alan Gewirth writes: ‘The ultimate purpose of the rights is to secure for each person a certain fundamental moral status: that of having rational autonomy and dignity in the sense of being a self-controlling, selfdeveloping agent who can relate to other persons on a basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others.’—Alan Gewirth, “Rights and Virtues,” *Review of Metaphysics*, 38 (1985), 752, at p. 743. Also Joel Feinberg “The Nature and Value of Rights” *Journal of Value Inquiry* (1970) 243, at p. 252 suggests that “what is called ‘human dignity’ may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity simply is to think of him as a potential maker of claims.” (I am grateful for this citation to Christopher McCrudden, “Human Dignity in Human Rights Interpretation,” *European Journal of International Law* 19 (2008), 655, at p. 680.)

¹⁹ Some may say (cynically) that “dignity” is just a buzz-word, used indiscriminately whenever there is talk of human rights, so it’s no accident that it turns up all over the law in this area. Chris McCrudden has speculated that “dignity” operates mostly as “a place holder for the absence of agreement” in human rights discourse. (McCrudden, “Human Dignity,” at p. 675.) That may be overly pessimistic, but it does alert us to the fact that it may not be a load-bearing idea. Legal rhetoric is more windy than most. A term that is pervasive is in danger of platitude, and if we are tracking the pervasiveness of “dignity” in law, we must be careful that we are not just on the trail of some embedded rhetorical bombast. It is a fine-sounding phrase and there may be reasons to use it in human rights rhetoric that do not have much to do with the conveying of any determinate content. Sixty years ago, Bertram Morris observed that “[f]ew expressions call forth the nod of assent and put an end to analysis as readily as ‘the dignity of man’” (Bertram Morris, “The Dignity of Man,” *Ethics*, 57 (1946), 57.)

When Jacques Maritain said that the expression “the dignity of the human person ... means nothing if it does not signify that ... the human person is the subject of rights” (Jacques Maritain, *The Rights of Man and Natural Law* (New York, Charles Scribner’s Sons, 1951) p. 65), he was condemned as uttering platitudes. “The

4. Fuller and internal connections between law and dignity

What about other internal connections between dignity and the forms and procedures of law?²³ Well, we are familiar with something like this in the contrast between internal and external aspects of law's moral connections in the jurisprudence of Lon Fuller.

In his book *The Morality of Law*, Fuller developed an account of what he called the inner morality of law—the formal principles of generality, prospectivity, clarity, stability, consistency, whose

attribution of dignity adds nothing to the attribution of rights,” said Alan Gewirth. But that’s just the point: dignity is already bound up with rights, particularly in those conceptions of rights that emphasize the active authority of the right-bearer to pursue her own claims at her own discretion (conceptions that present the right-bearer as upstanding, not just the passive recipient of moral or legal concern).

²⁰ H.L.A. Hart argued, in, “Are There Any Natural Rights?” *Philosophical Review*, 64 (1955), 175 (reprinted in Waldron (ed.) *Theories of Rights*), that crucial to having a right was having the power to determine what another’s duty should be (in some regard): “Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X’s freedom of choice” (ibid., p. 180). Y (the right-bearer) can make a sort of demand upon X, that X is required to pay attention to, and it may be that this is what his dignity amounts to. Hart developed this argument first for natural rights, but he thought (at least for a while) that it was true of legal rights too. But see Hart, “Bentham on Legal Rights” [citation?] for the beginnings of a retreat from this position.

²¹ Moral philosophers sometimes loosely use the word standing—“moral *standing*”—to characterize human dignity. Stephen Darwall uses it along with status: “the dignity of persons ... is the second-person standing of an equal. It is the status of an equal member of the moral community.” (Darwall, *The Second-Person Standpoint*, p. 243.) I’m not sure whether Darwall understands these terms “status” and “standing” in anything like their technical legal sense—i.e., whether he is developing an analogy between moral terminology and the language of law, where these terms are originally at home. I’ll say more about “status” towards the end of this lecture. But “standing” has a legal use—“*locus standi*”—which refers to a person’s ability to bring and control proceedings in a court, on the basis that their rights are affected by the matter they complain of. (You may be greatly offended by the government’s program of extraordinary rendition, but you can’t go into court to challenge it; only someone affected by it can.) And it is not just a technicality: the law protects a person’s dignity by allowing him or her to control proceedings brought in their name for the vindication of their rights.

²² Please notice that this is not the same as saying that rights are *based on* dignity or *derived from* dignity. The claim is that dignity characterizes claiming one’s rights or standing up for one’s rights or exercising choice or control over one’s rights. That’s not the same as saying that dignity is the *foundation* of rights. People have sometimes made a similar mistake about security. From the fact that security (of some interest or liberty) is what one demands when one demands one’s rights, they infer that all rights are based on security (and so rights cannot be set up against security or against the activity of the security state.)²² (For discussion of this misconception, see Liora Lazarus, “Mapping the Right to Security,” in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 325.) We must not mistake a characteristic of rights for a foundation. Dignity is characteristic of the way one pursues one’s rights; security is the mode in which one wants one’s rights guaranteed; both refer to pervasive adverbial aspects of rights; but neither establishes a *foundation*.²² (See also my complaints about Jim Griffin’s foundational claims in Lecture 1.) I think that one can say something similar, too, about the role of freedom in Hart’s choice theory of rights and the role of equality in Dworkin’s jurisprudence; in neither case is there a genuine *foundation* being identified.)

²³ The idea of an internal relation is a philosophically intriguing one, which I not explore here. Cf. G. E. Moore, “External and Internal Relations,” *Proceedings of the Aristotelian Society*, New Series, 20 (1919-20), 40.

observance is bound up with the basics of legal craftsmanship.²⁴ Legal positivists have sometimes expressed bewilderment as to why Fuller called these internal principles a “morality.”²⁵ He did so because he thought his eight principles had inherent moral significance. It was not only that he believed that observing them made it much more difficult to do substantive injustice; though this he did believe.²⁶ It was also because he thought observing the principles he identified was itself a way of respecting human dignity:

To embark on the enterprise of subjecting human conduct to rules involves ... a commitment to the view that man is ... a responsible agent, capable of understanding and following rules.... Every departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey ... your indifference to his powers of self-determination.²⁷

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

These are not just platitudes. Fuller is referring here to a quite specific characteristic of law—its general reliance on what Henry Hart and Albert Sacks in *The Legal Process* called “self application,”²⁸ i.e. people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state.²⁹

²⁴ Fuller, *The Morality of Law*, esp. Ch. 2.

²⁵ See, e.g., H.L.A. Hart, “Book Review of Lon Fuller, *The Morality of Law*,” *Harvard Law Review* 78 (1965), 1281 at p. 1284. For a characterization of Hart’s bewilderment as disingenuous, see Jeremy Waldron, “Positivism and Legality: Hart’s Equivocal Response to Fuller,” *NYU Law Review*, 83 (2008) 1135, esp. pp. 1154-6.

²⁶ Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” *Harvard Law Review* 71 (1958), 630, at pp. ____.

²⁷ Lon Fuller, *The Morality of Law*, p. 162.

²⁸ For discussion of the idea of self-application, see Henry M. Hart, And Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 120-1 (William N. Eskridge and Philip P. Frickey eds., 1994): “[E]very directive arrangement which is susceptible of correct and dispositive application by a person to whom it is initially addressed is self-applying. . . Overwhelmingly, the greater part of the general body of the law is self-applying, including almost the whole of the law of contracts, torts, property, crimes and the like.”

²⁹ Self-application is not possible in all cases. Cases where it is not require what Hart and Sacks call “individual administration” (*The Legal Process*, p. 121). “[A]s an example, the law of divorce is individually administered. You

Self-application is an important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, self-control, self-monitoring and the modulation of their own behavior in regard to norms that they can grasp and understand.³⁰

All this makes ruling by law quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog. It is quite different too from eliciting a reflex recoil with a scream of command. A pervasive emphasis on self-application is, in my view, definitive of law, distinguishing it sharply from systems of rule that work primarily by manipulating, terrorizing or galvanizing behavior.³¹

cannot, being a married man, say to yourself, 'such and such has happened, and now that woman is no longer my wife.' An official determination—an individualized settlement of the matter—is necessary. So also with the law of adoption. So also with the law with respect to the passing of property by will or intestate succession. Case by case application by officials is characteristically resorted to when accuracy of application is highly valued. But the consequences in restricting the freedom of private action and burdening public administration are drastic."

³⁰ H.L.A. Hart, *The Concept of Law*, Second edition, ed. Bulloch and Raz (Oxford University Press, 1994), pp. 206-7 acknowledges that law "consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further direction." Hart also insists at the beginning of *The Concept of Law* that the point of orientation for jurisprudence should not be the proverbial "bad man" of Holmes's theory, but perhaps the "puzzled" man, "who is willing to do what is required if only he can be told what it is" (ibid., p. 40).

³¹ It is part of the modern positivist understanding of law that we should appreciate the way in which norms are designed to *guide action* rather than simply coerce it. Joseph Raz recognizes this as key to the Rule of Law when he says that "if the law is to be obeyed it must be capable of guiding the behaviour of its subjects." "It must be such that they can find out what it is and act on it. This is the basic intuition from which the doctrine of the Rule of Law derives: the law must be capable of guiding the behaviour of its subjects. See Joseph Raz, "The Rule of Law and its Virtue" in his book, *The Authority of Law* (Oxford University Press, 19__) 214, at p. __.

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

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

Coleman is surely right to emphasize that not every potential of a practice is part of its concept. Religion has the potential to stir up murderous passions, yet this is not in any way definitive of religion, though in the world we

6. Self-control.

In an article published some years ago, Michael Meyer of Santa Clara University argued for a strong link between human dignity and the idea of self-control.³² Meyer emphasized mainly the self-control involved in one's self-presentation to others. We talked about this in yesterday's lecture in regard to the noble bearing and self-possession that dignity expresses and protects.³³

But self-command is more than just *setting one's stance*, as it were. It's also a matter of people fine-tuning their behavior effectively and gracefully in response to the legitimate demands that may be made upon them,³⁴ controlling external behavior—monitoring it and modulating it in accordance with one's understanding of a norm. This one might imagine as quintessentially aristocratic virtue, a form of self-command distinguished from the behavior of those who need to be driven by threats or the lash, or by forms of habituation that depend upon threats and the lash.³⁵ But if it is an aristocratic virtue, it is one which law now expects to find in all sectors of the population.

7. Themes from law: (b) Standards

Law does not always present itself as a set of crisply defined rules which are meant to be obeyed mechanically. Its demands often come to us in

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

³² Michael J. Meyer, "Dignity, Rights, and Self-Control," *Ethics*, 99 (1989), 520. A person with dignity, said Meyer, is "a person who is self-possessed."

³³ Tanner 1, section 5.

³⁴ Kant's moral psychology celebrated in individuals the power to subordinate impulse and desire to the law-like demands of morality, revealing, as he says, "a life independent of animality" (Kant, *Critique of Practical Reason*, 5: 162. (Kant, *Practical Philosophy* (Mary Gregor, ed.), p. 270.)

³⁵ Cf. Aristotle, *Nicomachean Ethics*, Book X, Ch. 9.

the form of standards—like the standard of “reasonable care”—norms which require, frame and facilitate genuine thought in the way we receive and comply with them.

Some jurists say that law can guide conduct (and be self-applying) only if the indeterminacy of standards is reduced to clear rules through official elaboration.³⁶ But in many areas of life, law proceeds without such definitive elaboration. We operate on the basis that it is sometimes better to facilitate thoughtfulness about a certain type of situation (“When there is fog, drive at a *reasonable* speed”) than to lay down an operationalized rule (“When visibility is reduced to less than a hundred meters, lower your speed by 15 m.p.h.”) And people respond to this.

If standards rely necessarily on official elaboration, then the life of the law shows that ordinary people can sometimes have the dignity of judges. They do their own elaborations. They are their own officials: they recognize a norm, they apprehend its bearing on their conduct, and they make a determination and act on it.³⁷

8. Themes from law: (c) hearings

A third way in which law respects the dignity of those who are governed is in the provision that it makes for hearings in cases where an official determination is necessary. These are cases where self-application is not possible or where there is a dispute that requires official resolution.³⁸

By hearings, I mean formal events, like trials, tightly structured procedurally in order to enable an impartial tribunal to determine rights and responsibilities fairly and effectively after hearing evidence and argument from both sides.³⁹ Those who are immediately concerned have

³⁶ Cite to Hart and Sacks on “The Reasoned Elaboration of Avowedly Indeterminate Directions” in *The Legal Process*, 150-2.

³⁷ This is separate from the extent of technical knowledge of law’s structure. Hart and others may right that law does not assume a wide dispersal of understanding about the way in which the apparatus of secondary rules operate. See Hart, *The Concept of Law*, pp. 116-7 and see also Jeremy Waldron, “All We Like Sheep,” *Canadian Journal of Law and Jurisprudence*, 12 (1999), 169. See also note 77 below.

³⁸ Much of this section is adapted pretty much verbatim from Waldron, “The Concept and the Rule of Law.”

³⁹ It is remarkable how little there is about courts in the conceptual accounts of law presented in modern positivist jurisprudence. In *The Concept of Law*, H.L.A. Hart conceives of law in terms of the union of primary rules of conduct and secondary rules that govern the way in which the primary rules are made, changed, applied and

an opportunity to make submissions and present evidence, and confront, examine and respond to evidence and submissions presented from the other side. Not only that, but both sides are listened to by a tribunal which is bound to respond to the arguments put forward in the reasons that it eventually gives for its decision.⁴⁰

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

9. Themes from law: (d) argumentation

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

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

enforced. When he introduces the concept of secondary rules, he does talk of the emergence of "rules of adjudication" in the transition from a pre-legal to a legal society: he says these are "secondary rules empowering individuals to make authoritative determinations of the question of whether, on a particular occasion, a primary rule has been broken." (Hart, *The Concept of Law*, op. cit., p. 96) But his account defines the relevant institutions simply in terms of their output function—"the making of ... authoritative determinations ... of whether a primary rule has been broken." There is nothing on the distinctive process by which this function is performed. Hart acknowledges that of course secondary rules will have to define processes for these institutions (ibid., at 97). But he seems to think that this can vary from society to society and that nothing in the concept of law constrains that variety. A Star Chamber proceeding *ex parte* without any sort of hearing would satisfy Hart's definition; so would the tribunals we call in the antipodes "kangaroo courts"; so, for that matter, would a Minister of Police rubber-stamping a secret decision to have someone executed for violating a command. I think there is a considerable divergence here between what these philosophers say about the concept of law and how the term is ordinarily used. Most people, I think, would regard hearings and impartial proceedings, and the safeguards that go with them, as an essential rather than as a contingent feature of the institutional arrangements we call legal systems.

⁴⁰ Lon L. Fuller, "The Forms and Limits of Adjudication," 92 *Harvard Law Review* 353 (1978).

particular items into a structure that makes intellectual sense.⁴¹ And ordinary people take advantage of this aspiration to systematicity and integrity in framing their own legal arguments—by inviting the tribunal hearing their case to consider how the position they are putting forward fits generally into a coherent conception of the spirit of the law.⁴²

In this way too, then, law conceives of the people who live under it as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between *their* actions and purposes and the actions and purposes of the state. This too is a tribute to human dignity.⁴³

⁴¹ See also the discussion in Jeremy Waldron, 'Transcendental Nonsense and System in the Law,' *Columbia Law Review*, 100 (2000), 16, at pp. 30-40.

⁴² These are not just arguments about what the law *ought to be*—made, as it were, in a sort of lobbying mode. They are arguments of reason presenting competing arguments about what the law *is*. Inevitably, they are controversial: one party will say that such-and-such a proposition cannot be inferred from the law as it is; the other party will respond that it can be so inferred if only we credit the law with more coherence (or coherence among more of its elements) than people have tended to credit it with in the past. And so the determination of whether such a proposition has legal authority may often be a matter of contestation. Law in other words becomes a matter of argument. The legal philosopher who has done the most to develop this theme is of course Ronald Dworkin, particularly in *Law's Empire*.

⁴³ No doubt the price of this strand of dignitarian respect is a certain diminution in law's certainty. (Indeed it may seem to be at odds with the first dignitarian strain we identified: respecting people enough to entrust them with front-line self-application of legal norms. How, it will be asked, can we maintain this mode of respect if law becomes contestable in the way I have outlined? But the self-application idea does not necessarily presuppose that law has the form of determinate rigid rules. The act of faith in the practical reason of ordinary people may be an act of faith in their *thinking*—e.g., about what is reasonable and what is not—not just in their recognition of a rule and its mechanical application. And so also it may be an act of faith not just in their ability to apply general moral predicates (such as "reasonable") to their actions, but also to think about and interpret the bearing of a whole array of norms and precedents to their conduct—rather than just the mechanical application of a single norm.) And there are conceptions of the Rule of Law which would deplore that. For them the essence of the Rule of Law is people knowing exactly where they stand.

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

10. Law by rank

Let's pause and take stock. For us, dignity and equality are interdependent.⁴⁴ But one can imagine (or historically one can recall) systems of governance that involved a radical discrimination, in legal standing, among individuals of different ranks.

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

Those with a certain high dignity, used to have the right to be tried according to a separate system of law. For example, nobles used to be entitled to trial by their peers or by the House of Lords (as a court of first instance), certainly not by a common jury.⁴⁵ The old English Reports are replete with cases in which a noble was not properly named (not properly addressed by his title) in proceedings brought against him; he was entitled to that dignity under the law.⁴⁶

wrong. He will have a point of view on the matter, and he will seek an opportunity to bring that to bear when it is a question of applying a rule to his case. And when he brings his point of view to bear, we can imagine his plaintiff or his prosecutor responding with a point of view whose complexity and tendentiousness matches his own. And so it begins: legal argumentation and the facilities that law's procedures make for the formal airing of these arguments. The freedom of one person may sometimes conflict with the dignity of another (as in the American debate about hate speech, for example). But a Hayekian condemnation of this form of legal uncertainty would require us to oppose the conditions of one person's freedom to the conditions for the dignity of that very person. Unless we are prepared to divorce freedom from the very idea of intelligent involvement in the conditions of one's life, we have to reject these overly mechanical images of the Rule of Law. I have pursued this at much greater length in Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review*, 43 (2008), 1.

⁴⁴ Chaskalson quote from Tanner 1.

⁴⁵ *Magna Carta* (1215), Article 21: "Earls and barons shall not be amerced except through their peers...."

⁴⁶ Consider this case, from the aftermath of the Jacobite risings in the 1740s: *The Case of Alexander, Lord Pitsligo*, Fost. 79; 168 Eng. Rep. 40, in which a distinction was drawn as between Bills of Attainder and legal indictments so far as the requirement to correctly state the title and dignity of a defendant was concerned: "[T]he legislature never thought itself confined to the strict rules of law in describing persons whom it made the objects of punishment. It was sufficient, that the terms made use of were descriptive of the persons intended to be punished. It never was doubted whether the regicides, who are attainted or otherwise subjected to pains and penalties by the Acts just now cited, were properly described; or whether their estates vested in the crown, though the very same objection might have been made in their cases as in the present, that their full title of dignity was not set forth. It is plain they were men of some dignity, knights or baronets; and it must be admitted, that all titles of dignity, the lowest as well as the highest, are parcel of the name, and that in all judicial proceedings the omission of even the lowest dignity would be fatal."

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

[T]he said serjeants in Cheapside, with many others, came to the countess in her coach, and shewed her their mace, and touching her body with it, said to her, we arrest you, madam, at the suit of the [creditor] ... and thereupon they compelled the coachman to carry the said countess to the compters in Wood Street, ... where she remained seven or eight days, till she paid the debt.⁴⁷

The Star Chamber held that the “arrest of the countess by the serjeants-at-mace ... is against law, and the said countess was falsely imprisoned” and “a severe sentence was given against [the creditor], the serjeants, and the others their confederates.”⁴⁸ The court quoted an ancient maxim to the effect that “law will have a difference between a lord or a lady, &c. and another common person,”⁴⁹ and it held that “the person of one

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

⁴⁷ *Isabel, Countess Of Rutland's Case*, 6 Co. Rep. 52 b, 77 Eng. Rep. 332 (1606), at 336.

⁴⁸ *Idem*.

⁴⁹ *Ibid.*, at 333.

who is ... a countess by marriage, or by descent, is not to be arrested for debt or trespass; for although in respect of her sex she cannot sit in Parliament, yet she is a peer of the realm, and shall be tried by her peers." There are two reasons, the court went on, "why her person should not be arrested in such cases; one in respect of her dignity, and the other in respect that the law doth presume that she hath sufficient lands and tenements in which she may be distrained."⁵⁰ In light of this presumption of noble wealth, the seizing of her body cannot legally be justified as it could in those days to recover the debts of a commoner.

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

At the other extreme, in our imagined (or recollected) hierarchical society, there might be a caste or class of persons, who were dealt with purely coercively by the authorities: there would be no question of trusting them or anything they said; they would appear in shackles if they appeared in a hearing at all; like slaves in Ancient Athens, their evidence would be required to be taken under torture; and they would not be entitled to make decisions or arguments relating to their own defense, nor to have their statements heard or taken seriously. They were not necessarily entitled to bring suit in the courts, or if they were it would have to be under someone else's protection; they were not, as we sometimes say, *sui juris*. Slave societies were like that, and many other societies in the past, with which we are uncomfortably familiar, evolved similar discriminating forms that distinguished between (if you like) the legal dignity of a noble, the legal dignity of a common man, the legal dignity of a woman, and the legal dignity of a slave, serf or villain.

I think it is part of our modern notion of law that almost all such gross status differences have been abandoned (though there are relics here and there). We have adopted the idea of a single-status system,⁵¹ evolving a more or less universal status—a more or less universal legal dignity—that entitles everyone to something like the treatment before law that was previously confined to high-status individuals.

⁵⁰ *Idem*.

⁵¹ I take this phrase from Gregory Vlastos, "Justice and Equality," in Jeremy Waldron (ed.) *Theories of Rights*, p. 55.

11. “Sorts and Conditions of Men”⁵²

Status is an interesting legal idea. There is tons to be said about it,⁵³ very little of which I have time to say in this lecture. But I would like to

⁵² The phrase is adapted from the "Prayer for all Sorts and Conditions of Men" in the old Book of Common Prayer, which begins: "O God, the Creator and Preserver of all mankind, we humbly beseech thee for all sorts and conditions of men: that thou wouldest be pleased to make thy ways known unto them, thy saving health unto all nations..."

⁵³ We ought to say something about status. How does it work in the law? How is it related to the idea of rank? And how is all that related to dignity? What follows is going to be a little technical. (Much of this section (and also section 3) is drawn from Jeremy Waldron, "Does 'Equal Moral Status' Add Anything to Right Reason?," a paper presented at American Political Science Association Annual Meetings 2004, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/0/8/p59080_index.html)

Modern moral philosophers who talk about dignity say that it is a status applying to all human persons. Stephen Darwall, for example, says that dignity is "the status of an equal member of the moral community."⁵³ (Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Harvard University Press, 2006), p. 243, says that dignity is "the status of an equal member of the moral community ('the realm of ends') to hold one another accountable for compliance with the mandatory norms that mediate relations between free and rational persons.") But it is not clear whether they mean moral status in a sense that is analogous to its technical legal sense. You see, the term "status" has looser and tighter meanings in law. Sometimes "the status of X" means nothing much more than "the legal situation with regard to X." X can be anything; we talk about the status of autograph wills, the status of surrogate motherhood, the status of riverbanks, and the status of young offenders. If we ask "What is the status of X?" we expect an answer setting out the most important rules, principles, and doctrines applying to X.⁵³ A tighter and more technical sense of status in law is when we talk about the statuses of infancy, lunacy, and so on. Historically, in English law, to be a married woman or a monk or a villein or a noble or the monarch was to be assigned a particular legal status. Even today the law recognizes that aliens (resident and non-resident non-citizens), members of the armed forces, adjudged bankrupts, and convicted felons occupy a distinct status in law.

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

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

Jurisprudence (Oxford: Clarendon Press, 1931), p. 34.) And I have heard people like Raz say the same about moral status—that it is just a way of *summarizing* the duties and rights associated with some person or position.

But Austin's skepticism neglects the idea, intimated in the definition I gave a moment ago, that a status attaches to a person when their occupying a certain position is a matter of public concern. (Graveson, *Status in the Common Law*, pp. 114-6. Jeremy Bentham held a view of this kind, provoking Austin (usually bone of Bentham's most famous disciples) to observe that "Mr. Bentham ..., I am forced to admit, appears to me to be inconsistent and obscure in all he says on the subject." He went on: "It is remarkable that Bentham (who has cleared the moral sciences from loads of the like rubbish) adopts this occult quality under a different name. In the chapter in the *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, p. 699, original emphasis. (Compare Jeremy Bentham, *The Theory of Legislation*, ed. C.K. Ogden (London: Kegan Paul, Trench, Trubner & Co., 1931), p. ____.) According to Austin, Bentham's definition is an example of "the once current jargon about *occult qualities*." Austin, *Lectures on Jurisprudence*, p. 697. Austin says he rejects the view that the rights, duties, capacities, and liabilities incident to the status are not themselves the *status*, but that the *status* is rather "a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences." But that is not quite Bentham's view. For Bentham, the "*base idéale*" is a *reason* informing the attribution of the rights etc., not just a quality on which they are, so to speak, supervenient.)

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

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

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

Some distinctions of status are still with us. There are legal statuses that apply to individuals in virtue of certain conditions they are in, that they may not be in forever, or that they may have fallen into by choice or happenstance: they embody the more important legal consequences of some of the ordinary stages of human life (infancy, minority), or some of the choices people make (marriage, felony, military service, being an alien), or some of the vicissitudes that ordinary humanity is heir to (lunacy) or that through bad luck or bad management may afflict one's ordinary dealings with others (bankruptcy, for example). I call these condition statuses. They tell us nothing about the underlying personhood of the individuals who have them: they arise out of conditions into which anyone might fall.⁵⁴

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

matter of definition: it is always liable to comprise new incidents or lose some of the old ones. You can never give a definitive list of what a given status involves. If dignity is a status, then calls for a timeless definition of legal dignity will be similarly misconceived.

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

⁵⁴ The category of condition statuses may include a status that almost everyone is in for a large portion of their lives—such as the status of being married—less true now than it used to be. It may for that matter include infancy and minority, are statuses that everyone goes through.

vicissitudes. The idea behind sortal-status is that there are different kinds of person.

Now it is precisely this last claim that the principle of *human* dignity denies. There are not different kinds of person, at least not for human persons.⁵⁵ We once thought that there were different kinds of human—slaves and free; women and men; commoners and nobles; black and white—and that it was important that there be public determination and control of the respective rights, duties, powers, liabilities and immunities associated with personhood of each sort. We no longer think this. There is basically just one kind of human person in the eyes of the law and conditional status is defined by contrast with this baseline.⁵⁶

⁵⁵ There might be different kinds of corporate personality. See Graveson, *Status in the Common Law*, pp. 72-8.

⁵⁶ Following Maine, people sometimes describe the decline of multiple sortal statuses as a "movement from status to contract" (Maine, *Ancient Law*). The idea is that once upon a time one's rights and duties were determined by one's status, but now they are determined as freely undertaken obligations (and their correlatives), embodied for example in contract: every person is free to determine, according to his own will, his rights and duties towards his fellow men. (This is Allen's expression of Maine's view in Allen, *Legal Duties*, op. cit., p. 36.) However, the persistence of condition-status casts some doubt on this as an exact formulation. There are still choices, stages, and vicissitudes whose consequences are determined by operation of law, reflecting a public determination about the rights, duties, capacities, and liabilities that should be born by those who have made those choices (marriage), are at that stage of their lives (infancy), or have suffered those vicissitudes (lunacy). Maine's position is more accurate with regard to sortal-status. We have certainly moved to a situation in which differences in people's rights and obligations are determined more by differences in the undertakings they have entered into, than by differences in sortal-status. Still, it would be wrong to say that all or even most of one's rights and obligations are determined by voluntary undertaking in this way. Most of them are determined by operation of law: criminal law, public regulation, tort law, and so on, and many of these cannot be varied by agreement. Even one's ability to determine rights and obligations by choice reflects the standard application of a capacity to contract, whose existence of course is due to the operation of law and is not subject to voluntary control. This is why I am inclined to the opinion that there is such a thing as a single normal status, in which considerable portion of rights and obligations are conferred by law but which also contains the capacity to vary some of these by the exercise of contractual powers (which are themselves governed by law). It is not that status has been superseded by contract; it is rather that freedom-of-contract is now the normal or normative status. F.A. Hayek goes a little further (in *The Constitution of Liberty*?): "The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all." Now, Hayek seems to have thought that a status-system could not work with "abstract general rules." In theory that's wrong: a status system can have general rules on the basis of which people are assigned to a given status (e.g. by birth) and general rules defining the incidents of each status; and Hayek himself acknowledges elsewhere that abstract general rules can differentiate between groups on the basis of universalizable characteristics. But one can see his point. The idea of a system of general rules applicable to everyone, in virtue of characteristics which anyone might have or acquire, is quite different from the idea of a legal system which uses one set of generalizations to sort people into groups and another set of generalizations (the bulk of the law) to define separate sets of rights and duties for the members of each group. Both may be formally universalizable, but the second embodies a much more robust idea of equality before the law than the first does.

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

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

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

12. Legal citizenship

If I were to give a name the status I have in mind, the high rank or dignity attributed to every member of the community and associated

with their fundamental rights, I might choose the term “legal citizenship.”⁵⁷

What I have in mind is something like the sense of citizenship invoked by T.H. Marshall in his famous book *Citizenship and Social Class*,⁵⁸ where he was concerned to tease out different strands of citizenship in a modern society. What I have been talking about in this lecture, we might associate with the specific dignity of what Marshall called “civil citizenship,” though in his famous trichotomy of civil citizenship, political citizenship, and social citizenship, Marshall ran together under the “civil citizenship” heading ordinary civil liberties as well as rights of legal participation.

The civil element is composed of the rights necessary for individual freedom, liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The last is of a different order from the others, because it is the right to defend and assert all one’s

⁵⁷ I am conscious of my former colleague Gerald Neuman’s “plea against the overuse of the rhetoric” of this term. Gerald Neuman, “Rhetorical Slavery, Rhetorical Citizenship,” 90 *Michigan Law Review* 1276 (1992) at 1283. (Professor Neuman is worried about political theorists’ using citizenship in a way that is oblivious to the technical exclusions that the term connotes—exclusions which might define the status of non-citizens, such as resident alien, for example.) Neuman says (ibid., 1284-5 and 1291) of Judith Shklar’s book, *American Citizenship*: “Shklar’s focus is on the difference between first- and second-class citizenship, both of which presuppose American nationality. I do not deny that there are some duties that a state owes first, or only, to its own citizens. It owes other duties to its residents of whatever nationality; still other duties to all persons within its territory, for whatever duration; and some, perhaps contingent, duties to all of humanity. International human rights treaties often obligate states to all persons within their jurisdiction. It is nonetheless common for political theorists to limit their attention to citizens, and to leave unaddressed the state’s responsibilities to noncitizens within its territory. The authors may then formulate conclusions that, if taken literally, would have serious negative consequences for those who are not citizens. For example, in the same volume of the Tanner Lectures in which the original version of Shklar’s work appears, we find Ronald Dworkin describing as “a fundamental, almost defining, tenet of liberalism that the government of a political community should be tolerant of the different and often antagonistic convictions its citizens have about the right way to live.” This phrasing comes very close to implying the acceptability of intolerance toward convictions that are held by noncitizens but are not shared by citizens, an attitude that in the past has supported discrimination against “heathen Chinese” and the exclusion of foreigners holding “un-American” political views. ... [H]er invocation of citizenship follows a pervasive and troubling habit in political theory. A philosophical culture that concentrates needlessly on citizens can influence public political discourse and the legal culture. I do not mean to criticize or discourage deliberate investigation of the differences between citizens and aliens - indeed, I engage in it myself. But I do plead for more caution in resorting to the rhetoric of citizenship, on occasions when the rhetoric of humanity may suffice.”

⁵⁸ T.H. Marshall, *Citizenship and Social Class* (originally 1949) Tom Bottomore ed. (Pluto Press, 1992). See also Desmond King and Jeremy Waldron, “Citizenship, Social Citizenship and the Defence of Welfare Rights,” *British Journal of Political Science*, 18 (1988), 415 (reprinted in Waldron, *Liberal Rights*.)

rights on terms of equality with others and by due process of law. This shows us that the institutions most directly associated with civil rights are the courts of justice.⁵⁹

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

Another term we could use is “equality before the law”—though that by itself doesn’t convey the *height* of the legal status that we have universalized. And by some philosophers it is confused with formal equality—that is, impartial application of general norms according to their terms.⁶⁰ Formal equality may or may not be important,⁶¹ but it’s not what I am talking about here; I am talking about the equal rights of self-application, hearing and argument in relation to the legal process.

13. Equality, construction, and (e) representation

Obviously the sense in which we stand equal before the law is somewhat fictitious.⁶² But remember our suggestion in yesterday’s lecture, that dignity might be something constructed rather than natural.⁶³ I think the primary technique we use to manufacture equal dignity in law is the

⁵⁹ Marshall, *Citizenship and Social Class*, p. 8.

⁶⁰ Wojciech Sadurski, *Equality and Legitimacy* (Oxford University press, 2008), p. 94.

⁶¹ See the discussion in Hart, *Concept of Law*, 157-67. Cf. Leslie Green’s paper, “The Germ of Justice.”

⁶² Most ordinary people are not in a position of straightforward familiarity with law; much law is technical and forbidding and takes years of study to master. And, as Max Weber pointed out, this is getting worse not better. See Max Weber, *Economy and Society*, p. 894: “Whatever form law and legal practice may come to assume under the impact of these various influences, it will be inevitable that, as a result of technical and legal developments, the legal ignorance of the layman will increase” (ibid., p. 895).

⁶³ This was our analogy to Hannah Arendt’s discussion of constructive equality, in Lecture 1, section 4.

artifice of legal representation. David Luban of Georgetown Law School has developed a persuasive account along these lines.⁶⁴ Luban asks: Why should litigants have lawyers? He cites as the basis of his answer the following principle: ‘[O]ne fails to respect [a person’s] dignity ... if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith.’⁶⁵ From this, Luban infers:

An immediate corollary to this principle is that litigants get to tell their stories and argue their understandings of the law. A procedural system that simply gagged a litigant and refused even to consider her version of the case would be, in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt. Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. ... None of this should matter. ... Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece. Thus, [the] argument connects the right to counsel with human dignity in two steps: first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard.⁶⁶

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

⁶⁴ David Luban, *Legal Ethics and Human Dignity* (2007); David Luban, “Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It),” 2005 *University of Illinois Law Review* 815.

⁶⁵ Luban attributes this to Alan Donagan, “Justifying Legal Practice in the Adversary System,” in *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* 130 (David Luban ed., 1984).

⁶⁶ Luban, “Lawyers as Upholders of Human Dignity,” cite p. 819.

14. Themes from law: (f) coercion

Maybe the dignitarian account that I am giving makes law seem too “nice”; maybe I am obscuring the violent and coercive character of law.⁶⁷ Law kills people; it locks them up and throws away the key. And these are not aberrations; this is what law characteristically does. Where, it might be asked, is the dignity in that? Some have worried--Meir Dan-Cohen expressed this concern once--that “the entire enterprise, central to the criminal law, of regulating conduct through deterrence (that is, through the issuance of threats of deprivation and violence) is at odds with human dignity.”⁶⁸

According to Lon Fuller, we have to choose between definitions of law that emphasize coercion and definitions of law that emphasize dignity.⁶⁹ I think this is a mistake. It is because law is coercive and its currency is life and death, freedom and incarceration, that its pervasive commitment to dignity is so momentous.⁷⁰ Law is the exercise of power. But that power should be channeled through *these* processes, through forms and institutions like these, even when that makes its exercise more difficult or requires power occasionally to retire from the field defeated⁷¹—this is exactly what is exciting about the dignity of legal citizenship in the context of the rule of law.

⁶⁷ See, e.g. Austin Sarat and Thomas Kearns, “A Journey Through Forgetting: Toward a Jurisprudence of Violence,” in *The Fate of Law* (Austin Sarat and Thomas Kearns eds., 1993). The suggestion there is that law is always violent and that the most important feature about it is that it works its will, in Robert Cover’s phrase, “in a field of pain and death” (Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986), 1601).

⁶⁸ Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984), at 672-3.

⁶⁹ Fuller, *The Morality of Law*, p. 108.

⁷⁰ Fuller actually recognizes this when he observes that the “branch of law most closely identified with force is also that which we associate most closely with formality, ritual, and solemn due process”—and as we have seen, formality, ritual and process are exactly where law’s commitment to dignity resides.

⁷¹ Cf. E.P. Thompson, *Whigs and Hunters*, p. 265.

That is a wholesale answer to the objection.^{72 73} We might also give some retail responses. I have already mentioned the importance of self-application. Law looks wherever possible to voluntary compliance, which of course is not the same as saying we are never coerced, but which does leave room for the distinctively human trait of applying norms to one's own behavior. This is not a trick; it involves a genuinely respectful mode of coercion.

Max Weber is famous for observing that, although “the use of physical force is neither the sole, nor even the most usual, method of administration,” still its threat “and in the case of need its actual use ... is always the last resort when others have failed.”⁷⁴ But it would be wrong to infer from this that law uses any means necessary to get its way. The use of torture, for example, is now banned by all legal systems.⁷⁵ Elsewhere I have argued that modern law observes this ban as emblematic of its commitment to a more general non-brutality principle: “Law is not brutal in its operation; ... it does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by methods which respect rather than mutilate the dignity and agency of those who are its subjects.”⁷⁶ I think this aspiration is now fully internalized in our modern concept of law. The law may force people do things or go places they would not otherwise do or go to. But even when this happens, they

⁷² In *Selmouni v. France* 23 EHRR (1999) 403. the European Court of Human Rights insisted that “in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3” of the European Convention ban on degrading treatment.

⁷³ In section 7, we also noted that law does not always or characteristically present itself as a set of crisply defined rules which are meant to be obeyed mechanically, like shouted commands on a military parade-ground. Its demands are often presented to us in the form of standards, which require, frame and facilitate genuine thought and deliberation in the way we receive and comply with them.

⁷⁴ Weber, *Economy and Society*, p. 54.

⁷⁵ This is why the recent proposals in the United States to introduce judicial torture warrants (Alan Dershowitz), and to make torture a procedure in law, not just (in Blackstone's words) an engine of state (Blackstone, *Commentaries*, vol. 4, p. 326), aroused such anger in parts of the legal community. See generally, Waldron, “Torture and Positive Law,” *op. cit.*, pp. 1718-20, for a fuller discussion.

⁷⁶ This is adapted from Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House,” *Columbia Law Review*, 105 (2005), 1681, at pp. ____.

are not herded like cattle, broken like horses, beaten like dumb animals, or reduced to a quivering mass of “bestial desperate terror.”⁷⁷

Finally: law punishes. But again—and increasingly this too is internal to our conception of law—we deploy modes of punishment that do not destroy the dignity of those on whom it is being administered. Some of this is the work of the specific dignitary provisions we talked earlier, requiring that any punishment inflicted should be bearable—something that a person can endure, without abandoning his or her elementary human functioning.⁷⁸ One ought to be able to do one’s time, take one’s licks, while remaining upright and self-possessed.⁷⁹

No one thinks the protection of dignity is supposed to preclude *any* stigmatizing aspect of punishment.⁸⁰ Whatever one’s dignity, there is always something shameful in having to be dealt with on the basis that one has violated the common standards set down in society for one’s behavior. But an aristocratic society might distinguish between the inevitable stigma of the punishment accorded to a noble (in relation to his baseline dignity) and the inevitable stigma of the punishment accorded to a commoner or slave. There are punishments commensurate

⁷⁷ Hannah Arendt, *The Origins of Totalitarianism* (New edition, 1973), p. 441.

⁷⁸ See Waldron, “Cruel, Inhuman and Degrading Treatment: The Words Themselves,” available at <http://ssrn.com/abstract=1278604>

⁷⁹ There is an on-going debate about whether the death penalty is compatible with human dignity. Some abolitionists in the United States use dignity as the ground of their opposition to the death penalty. It is not always clear which sense of dignity is at stake here. It may be something like the “sacredness of human life” notion that we distinguished in yesterday’s lecture. (Tanner 1, section 8. This might be the basis of unequivocal opposition or the basis of a more nuanced position like that taken in the Catholic catechism §2267: “If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.”) Or it might be something about the administration of the death penalty. Here again, the bearability of punishment could be crucial. Even going to one’s execution is something that a human can do with dignity. (Cf. Kant : “[T]hus a criminal’s death may be ennobled (its disgrace averted) by the resoluteness with which he dies.” (*The Metaphysics of Morals* 6: 435.) To the extent that these provisions affect the death penalty, there is an implicit requirement that it must be administered in a way that enables the persons to whom it is applied to function as self-possessed individuals up until the point at which their lives are extinguished. (This, then, might be the ground on which the “death row phenomenon” is seen as inhuman.)

⁸⁰ In administering the ECHR ban on “degrading treatment,” the European Court of Human Rights has held that in order to count as degrading treatment, the adverse treatment “must ... go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.”

and punishments incommensurate with one's status in both cases. I believe Jim Whitman is right in his suggestion that in some European countries, there has been a sort of leveling up—outlawing the dehumanizing forms of punishment formerly visited upon low-status persons: everyone who is punished is to be punished now as though he were an errant noble rather than an errant slave.⁸¹

15. Dignity and indignity: norm and failure.

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

Think of the United States, for example, burdened by a history of slavery and institutionalized racism. When the Thirteenth Amendment abolished slavery, it did not do so unconditionally, but made an explicit exception for the treatment of prisoners—“Neither slavery nor involuntary servitude, *except as a punishment for crime* ..., shall exist within the United States”—as though Americans were anxious to maintain at least a *vestige* of the great denial of human dignity that had for years disfigured their constitution.⁸² I don't need to tell you the impression that is created when one combines an understanding of this reservation with the staggering racial imbalances in our penitentiaries.

American defendants are sometimes kept silent and passive in American courtrooms by the use of technology which enables the judge to subject them to electric shocks if they misbehave.⁸³ Reports of prisoners being “herded” with cattle prods emerge from time to time.⁸⁴

⁸¹ See Whitman, “Human Dignity in Europe and the United States” and Whitman, *Harsh Justice*.) See also Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008), pp. 30-40.

⁸² U.S. Constitution, 13th Amendment: “Neither slavery nor involuntary servitude, *except as a punishment for crime* ..., shall exist within the United States, or any place subject to their jurisdiction.”

⁸³ See, e.g., Harriet Chiang, “Justices Limit Stun Belts in Court,” *San Francisco Chronicle*, August 23, 2002, p. A7 and William Glaberson, “Electric Restraint's Use Stirs Charges of Cruelty to Inmates,” *New York Times*, June 8, 1999, p. A1.

⁸⁴ See, e.g., “37 Prisoners Sent to Texas Sue Missouri,” *St. Louis Post-Dispatch* (Missouri), September 18, 1997, p. 3B: “Missouri prisoners alleging abuse in a jail in Texas have sued their home state and officials responsible for

Conditions in our prison are *de facto* terrorizing and well-known to be so; even if they are not officially approved or authorized, we know that prosecutors feel free to make use of defendants' dread of this brutalization as a tactic in plea-bargaining.⁸⁵ And generally: we often participate in what Sandy Kadish once termed "the neglect of standards of decency and dignity that should apply whenever the law brings coercive measures to bear upon the individual."⁸⁶

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

A legal system is a normative order, both explicitly and implicitly. Explicitly it commits itself publicly to certain rules and standards. Some of these it actually upholds and enforces, but for others, in certain regards, it fails to do so. The explicit content of the norms recognized by the legal system provides us with a pretty straightforward basis for saying, on these occasions, that the legal system has fallen short of its own standards, without necessarily licensing the cynical conclusion that these were not its standards after all.⁸⁷

Less straightforward is the case where a normative commitment is embodied *implicitly* in the procedures and traditions of a system of governance. But I believe a similar logic obtains. The commitment to dignity that I think is evinced in our legal practices and institutions may be thought of as *immanently* present even though we sometimes fall short of it. Our practices sometimes convey a sort of promise⁸⁸ and, as

running the jail where a videotape showed inmates apparently being beaten and shocked with stun guns," and Mike Bucsko and Robert Dvorchak, "Lawsuits Describe Racist Prison Rife with Brutality," *Pittsburgh Post-Gazette*, April 26, 1998, p. B1.

⁸⁵ Some would say that the use of the death penalty represents a residuum of savagery in our system that shows the limits of American adherence to the principles that I have been talking about.

⁸⁶ Sanford H. Kadish, "Francis A. Allen: An Appreciation," 85 *Michigan Law Review* 401, at 403 (1986).

⁸⁷ This is because law is an institutionalized normative order, and there are ways of establishing the institutional existence (legal validity) of a given norm apart from its actually being fulfilled. A norm may be institutionalized in a given country inasmuch as it is proclaimed, posited and published in that country, whether it is actually fulfilled or not. Or it may be, as we say, "honored in the breach," when its existence is revealed by the way in which we violate it (shamefacedly or furtively, for example). (Cite to Max Weber, *Economy and Society*, vol. 1.)

⁸⁸ Jeremy Waldron, "Does Law Promise Justice?" *Georgia State University Law Review*, 17 (2001) 759, at pp.760-1. For analogous arguments about justice, see Philip Selznick, *The Moral Commonwealth: Social Theory and the*

in moral life, it would be mistake to think that the only way to spot a real promise is to see what undertakings are actually carried out. Law may credibly promise a respect for dignity, and yet betray that promise in various respects. Institutions can be imbued in their structures, practices, and procedures with the values and principles that they sometimes fall short of. In these cases, it is fatuous to present oneself as a simple cynic about their commitments or to neglect the power of imminent critique as the basis of a reproach for their shortcomings.⁸⁹

16. Moral Status? Moral Rank? Moral Dignity.

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

Is it possible to say in an exactly analogous sense that “morality” embodies a respect for human dignity?⁹⁰ I wonder. Morality (in the relevant sense)⁹¹ is not an *institutionalized* order; it is an array of reasons. And it may be harder to think of morality as *proceduralized* in the way that legal systems obviously are.

On the other hand, moral thought does sometimes use institutional metaphors to convey the character and tendency of moral reasons:

Promise of Community 443 (1992): “Law is not necessarily just, but it does promise justice.” See also John Gardner, “The Virtue of Justice and the Character of Law” (2000) 53 *Current Legal Problems* 1.

⁸⁹ Of course the interesting thing, now, about law’s commitment to dignity is that the promise is embodied institutionally in both the ways we have been describing. It is there, internally or inherently, in the tissue of our practice and institutions, but it is also present in rules and standards that we have explicitly committed ourselves to (like the Geneva Conventions or Article 7 of the ICCPR or, in Europe, Article 3 of the ECHR). The two sorts of commitment reinforce each other. This is not unusual in regard to legal ideals. Article I. 9 of the U.S. Constitution states that “[n]o Bill of Attainder or *ex post facto* Law shall be passed,” but many people would say that this is also a definitive feature of the rule of law as such. It represents at any rate an abundance of riches and just as it would be quite wrong to infer from the fact that Article I. 9 might have been different that law is only contingently committed to generality or prospectivity, so it would be quite wrong to infer from the fact that the ECHR might have been different that law is only contingently committed to the protection of dignity.

⁹⁰ As Darwall says in *The Second Person Standpoint*, p. ____.

⁹¹ That is, critical morality, not positive morality.

Kant's metaphor of the "kingdom of ends" is the best-known example.⁹² And though we think perhaps less about moral due process than we ought to—we think about the reactive attitudes,⁹³ but not nearly enough about how accusation, explanation, and response (including sanctions) ought to work in the context of the pursuit of moral reproach—there are proceduralized visions of morality in the work of people like Habermas and Scanlon, for example.⁹⁴

Also we have to remember that a lot of what we call moral thought is not devoted to the establishment of a moral order *analogous* to a legal order, but is in fact oriented to the evaluation and criticism of the legal order itself. Political morality is about law and so the place of dignity in political morality orients itself critically to the place of dignity in the legal system. What I have been arguing is that a lot of this moralizing involves *immanent critique*, rather than bringing standards to bear that are independent of those the law itself embodies. We evaluate law morally using (something like) law's very own dignitarian resources.

What about the hypothesis I have pursued that *human* dignity involves universalizing, rather than superseding, the connotations of status, rank, and nobility that "dignity" traditionally conveyed? These metaphors of transformation—of a change in the concept of dignity—may not make sense when we talk about critical morality.⁹⁵ But we can certainly talk of changes in our *understanding* of moral requirements. Moralists used to work with the notion that there were different kinds of human being—low-status ones and high-status ones—and they have now dropped the idea of low-status human beings, assigning what was formerly high moral status to everyone.

⁹² Refer to Kant, and refer to Darwall's formulation in *The Second Person Standpoint*, p. ____.

⁹³ Cite to Strawson

⁹⁴ Cites to Habermas and Scanlon.

⁹⁵ John Finnis once observed (*Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 24) that "of natural law itself there could, strictly speaking, be no history." Natural law is a timeless set of values, reasons, and requirements. Conversely, in 1847, Karl Marx denounced the use of "dignity" by a fellow socialist as a "refuge from history in morality." (For this citation, I am obliged to McCrudden, "Human Dignity," at 661.) And the same might be said of morality (again of critical morality, not positive morality). Unless we are prepared to be more Hegelian about morality than most moral philosophers are, we can't really talk of a transformation in moral requirements as we talk of a transformation in the law.

Could respectable moral thought *ever* have differentiated in this way? Could morality have recognized different sortal statuses? Well we do this for the differences in moral considerability as between animals and humans. Or some do, and those who take this line claim that it is possible to draw it while still treating members of both classes morally.⁹⁶ And there is no doubt that ideas about a distinctive dignity in which animals do not share⁹⁷—play a large role in this distinction.

Could respectable moral thought ever have differentiated in this way *among humans*? Certainly. In 1907, the Clarendon Press at Oxford published the following in a two-volume treatise on moral philosophy by the Reverend Hastings Rashdall,⁹⁸ concerning trade-offs between high culture and the amelioration of social and economic conditions:

It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower Well-being—it may be ultimately the very existence—of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men.⁹⁹

⁹⁶ For doubts about this, see, Mark H. Bernstein, *On Moral Considerability: An Essay on who Morally Matters* (Oxford University Press, 1998).

⁹⁷ Psalm 8: 4-8, for example: "What is man, that thou art mindful of him? ... For thou hast made him a little lower than the angels, and hast crowned him with glory and honour. Thou madest him to have dominion over the works of thy hands; thou hast put all things under his feet: all sheep and oxen, yea, and the beasts of the field; the fowl of the air, and the fish of the sea, and whatsoever passeth through the paths of the seas."

⁹⁸ Rashdall was a Fellow and Tutor at New College, and a pupil of Henry Sidgwick and T.H. Green. His memorial in the cloisters of New College reads: "In memory of Hastings Rashdall DD FBA 1858-1924, Scholar, Fellow and Tutor, and Honorary Fellow of New College and Dean of Carlisle. Historian, Philosopher, Theologian. In thought fearless, in learning various and profound, rich in humour. In his books, in his teaching, in his public duties, he brought to the service of his age a rare passion for virtue, knowledge, and truth."

⁹⁹ Hastings Rashdall, *The Theory of Good and Evil: A Treatise on Moral Philosophy*, Second Edition (Oxford University Press, 1924), Vol. I, p. 237-8. Rashdall also appends a footnote: "The exclusion is far more difficult to justify in the case of people like the Japanese, who are equally civilized but have fewer wants than the Western" (p. 238). The author continued: "If we do defend it" (and he had no doubt that we would) "we distinctly adopt the principle that higher life is intrinsically, in and for itself, more valuable than lower life, though it may only be attainable by fewer persons, and may not contribute to the greater good of those who do not share it." (Ibid, p. 238.)

That's what passed for moral philosophy at Oxford a few generations ago. As far as I can tell there is nothing ironic in Rashdall's observation.¹⁰⁰ For Rashdall, this is one of our considered judgments in what would now be described as *reflective equilibrium*. "Individuals, or races with higher capacities ... have a right to more than merely equal consideration as compared to those of lower capacities."¹⁰¹ This comes close to accepting a distinction among humans, analogous to that which we accept as between humans and animals.¹⁰²

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

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

the age of chivalry is gone. That of sophisters, economists, and calculators, has succeeded. ... Never, never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience. ... [N]ow all is to be changed. ... All the decent drapery of life is to be rudely torn off. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion. On this scheme of things, a king is

¹⁰⁰ It rests explicitly on what he calls "our comparative indifference to the welfare of the black races, when it collides with the higher Well-being of a much smaller European population." Ibid., p. 241.

¹⁰¹ Ibid., p. 242.

¹⁰² Some of this is drawn from Jeremy Waldron, *Two Essays on Basic Equality*, unpublished manuscript available at <http://ssrn.com/abstract=1311816>

but a man, a queen is but a woman; a woman is but an animal, and an animal not of the highest order.”¹⁰³

This is what reactionaries always say: if we abolish distinctions of rank, we will end up treating everyone like an animal, “and an animal not of the highest order.” But the ethos of human dignity reminds us that there is an alternative: we can flatten out the scale of status and rank and leave Marie Antoinette more or less where she is. Everyone can eat cake or (more to the point) *everyone’s* maltreatment—maltreatment of the lowliest criminal, abuse of the most despised of terror suspects—can be regarded as a sacrilege, a violation of human dignity, which (in the words of Edmund Burke) ten thousand swords must leap from their scabbards to avenge.

¹⁰³ Ibid., paragraphs 126-9.