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HOW LAW PROTECTS DIGNITY

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ABSTRACT. *One way in which law protects dignity is by enforcing human rights provisions that explicitly prohibit degradation. But, as Lon Fuller and others have observed, law's connection with dignity is also deeper and more pervasive than this. In the way that its requirements are presented, in its procedures, in its sponsorship of argumentation, in treating people as equals, even in the distinctive way in which it makes use of coercion, law treats humans as dignified agents, capable of self-control, with a good sense of their own interests, and an ability to respond intelligently to its demands.*

KEYWORDS: *Jurisprudence; rule of law; human rights; human dignity*

I. LEGAL RIGHTS TO DIGNITY

The most obvious way in which law protects dignity is by proclaiming and enforcing specific norms that prohibit derogations from or outrages upon human dignity. Some of these norms are explicit, like Common Article 3 of the Geneva Conventions, which prohibits "outrages upon personal dignity." Implicitly, dignity is protected also by prohibitions on degradation like those we find in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the European Convention on Human Rights (ECHR).

Many pages have been devoted to the question of what these provisions mean.[1] In this essay, I want to talk about a less obvious way in which law protects dignity, but a way that is deeper, more pervasive, and more intimately connected with the very nature of law. For when we consider Article 3 of the ECHR or Common Article 3 of the Geneva Conventions, it may strike us as a matter of contingency that dignity is protected under these provisions. Maybe any worthwhile bill or charter of human rights should regard human dignity as something worth protecting, but it is notorious that at the level of positive law many bills

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[1] See Jeremy Waldron, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves" (2010) 23 Canadian Journal of Law and Jurisprudence 269 (also in Jeremy Waldron, *Torture, Terror, and Trade-Offs* (Cambridge 2010), ch. 9.

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of rights omit things that ought to have been included. There is no mention of dignity in the US Constitution, for example, and to the extent that the ideal has had any influence at all in American constitutional jurisprudence – and it has: for example in 8th Amendment jurisprudence[2] – it has had to be imported as judge-made doctrine. And that too is historically contingent, not to say vulnerable to passing fads and fashions. So there's our question: are there connections between law and dignity that are less contingent than this?

II. Dignity as the Basis of Rights

Some have suggested not only that dignity ought to be protected as a human right, but that dignity is itself a ground of rights, perhaps *the* ground of rights. The ICCPR begins its preamble with the acknowledgment that the rights contained in the covenant "derive from the inherent dignity of the human person". And some philosophers say the same thing.[3] Even if this is not a connection between dignity and law as such, it certainly purports to identify a wholesale connection between dignity and the branch of law devoted to human rights.

Others remark (more sceptically) that "dignity" is just a sonorous word we use whenever we are engaged in human rights talk, so it is no accident that it turns up all over the law in this area. In a recent paper, Christopher McCrudden remarks that that "dignity" operates mostly as "a place holder for the absence of agreement" in human rights discourse, used when people want to sound serious but are not sure what to say.[4] That may be overly pessimistic, but it does alert us to the fact that dignity may not necessarily be a load-bearing idea. A term that is pervasive is in danger of platitude, and if we are tracking the pervasiveness of "dignity" in law, we must take care that we are not just on the trail of some embedded rhetorical bombast.

III. The Meaning of "Dignity"

So what do I mean by "dignity"? What is it that we are tracking in the law? Dignity, in my view, is a sort of *status*-concept:[5] it has to do with the *standing* (perhaps the formal legal standing or perhaps, more informally, the moral presence) that a person has in a society and in her dealings with others. So what I mean by the term, when I ask about the

[2] See *Trop v Dulles*, 356 U.S. 86, 100 (1958) on the role of dignity in the 8th Amendment, and *Furman v Georgia* 408 U.S. 238 (1972) and *Gregg v Georgia* 428 U.S. 153 (1976) on the role of dignity in death penalty jurisprudence.

[3] See Jacques Maritain, *The Rights of Man and Natural Law* (New York 1951), 65 and James Griffin, *On Human Rights* (Oxford 2008), 5–6 and 21–22.

[4] Christopher McCrudden, "Human Dignity in Human Rights Interpretation" (2008) 19 European Journal of International Law 655.

[5] For the idea of status, see R.H. Graveson, *Status in the Common Law* (London 1953).

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various ways in which law protects, recognises, vindicates, or promotes human dignity, is something like this:

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

As a general point, it is likely that a being with these capacities will have a status in law that is different from the status of a being (such as a non-human animal) that lacks these capacities. But people try to do all sorts of things with power, and one of the things they sometimes try to do is to treat certain people as having a status that is lower than this or treat people as though the capacities I have mentioned are unimportant and have no implications for the way those people are ruled. Because this is possible, dignity has to function as a normative idea: it is the idea of a certain status that ought to be accredited to all persons and taken seriously in the way they are ruled.

I am not *stipulating* this as a definition of dignity. I believe that the definition I have given captures much that is already present in our ordinary usage of "dignity." But it is controversial; and other accounts are different. I am using dignity as a status idea rather than a value idea (as it is used by Kant, for example, in the *Groundwork of the Metaphysics of Morals*, where it refers to a certain kind of precious and non-fungible value). Twelve years after the publication of the *Groundwork*, Kant wrote again about dignity in "The Doctrine of Virtue" which is the second part of his late work, *The Metaphysics of Morals*, and there he spoke of it much more as a matter of status: he talks of the respect which a person can "exact" as a human being from every other man, and that respect is no longer simply the quivering awe excited in a person by his own moral capacity (which is what you find in the *Second Critique*, for example) but a genuine making-room for another on a basis of sure-footed equality and acting toward another as though he or she too were one of the ultimate ends to be taken into account. The later discussion preserves the element of infinite value but presents it much more in the light of this status idea.

My conception does not directly capture all the work that "dignity" does in law. Rules against "degradation" and "outrages upon personal dignity" are sometimes used to vindicate the human interest in

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elementary aspects of adult self-presentation (care of self, taking care of elemental physical needs) and to protect against forms of humiliation impinging on this interest.[6] This is a cognate idea, connected with my conception via the idea of being recognised and treated as a being capable of self-control. So, consider the requirement in ECHR jurisprudence that it is degrading to parade criminals or suspects in shackles (unless they pose a clear and present danger to themselves and others).[7] This requirement is connected to the idea that humans are capable of self-control. They are not just wild animals to be leashed. And they are not to be exhibited as such.

There are many aspects of our proper moral treatment of humans that have little directly to do with dignity. I believe that our basic duty to respect and sustain human life, for example – important though it is – is not really connected to dignity. The preciousness or sacredness of human life is not really a dignitarian idea. I know that in Roman Catholic literature and in some bioethics literature, human dignity is used just in this sense of the special worth or sacredness of human life.[8] In my view, the problem with this account is not that it has strong theological foundations, but that it appropriates the term "dignity" to do work that "worth" or "sacred worth" might do as well. But there is much more to be said – unfortunately elsewhere – about some of the indirect connections between this use of dignity and the use that I am insisting upon.[9]

When you hear my definition, the sense in which law inherently promotes dignity begins to become apparent. For it is easy to get the impression from the way I set this out of a person appearing in their own behalf before a public tribunal (say) and demanding to be listened to, demanding indeed that their view of things be taken account of before any public decision is made (for example, any public decision about what is to be done with them). This is evidently a legal idea, and it is arguably non-contingently so – in the sense that it is not a matter of the law-maker having just decided to promote dignity (in the way that the framers of Common Article 3 of the Geneva Conventions decided to promote dignity). Dignity seems to hook up in obvious ways with juridical ideas about hearings and due process and status to sue. And the basic aim of the rest of this paper is just to elaborate these connections and make them explicit.

[6] See Waldron, "Inhuman and Degrading Treatment."
[7] Cf. *Tekin v Turkey* (2001) 31 E.H.R.R 4.
[8] See, e.g., Patrick Lee, and Robert George, "The Nature and Basis of Human Dignity" (2008) 21 Ratio Juris 173.
[9] For some connections, see also the discussion in Jeremy Waldron, "The Image of God: Rights, Reason, and Order," in John Witte and Frank Alexander (eds.), *Christianity and Human Rights: an Introduction* (Cambridge 2010), ch. 10.

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IV. Dignity and the Form of Rights: Hart, Feinberg and Dworkin

Here is a preliminary foray. At the beginning of the lecture, I considered the idea of a specific right to dignity. A few minutes later I considered the idea – commonly expressed in the preambles of major human rights instruments – that dignity might be at the ground of every human right. A third possible connection is that the very form and structure of a right conveys the idea of the right-bearer's dignity.

This is familiar to us in the so-called "choice theory" or "will theory" of rights, once advanced by H.L.A. Hart.[10] In an essay published in 1955, Hart believed that having a legal or a moral right was not just a matter of being the object of legal or moral concern. He rejected what is sometimes known as the "benefit theory" or the "interest theory" of rights. He favoured instead the description of the right-bearer as having the power to determine what another's duty should be (in some regard):

> Y is … morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has a right.[11]

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.[12] Something similar can be found in Joel Feinberg's work on rights as claims: to have a right in law is to possess the dignity of a recognised claimant entitled to push his case before us and demand that it be considered.[13] To the extent that rights are pervasive in law, the recognition and respect that claimants are entitled to elicit is going to be a pervasive aspect of law's commitment to dignity.

It is sometimes said that we can imagine law without rights. If that means we can imagine law without any of the elements discussed in this section, I think that is false. Even if Hart is wrong about rights generally, law will nevertheless characteristically (not just contingently) establish and respect positions that have the features that Hart's choice theory attributed to rights: for example, law will recognise potential plaintiffs and defer to their dignity in allowing *them* to make the decision whether some norm-violator is to be taken to task or not. It is even more evidently false if Ronald Dworkin is right in the basic "rights

[10] See H.L.A. Hart, "Are There Any Natural Rights?" (1955) 64 Philosophical Review 175 (reprinted in Jeremy Waldron (ed.), *Theories of Rights* (Oxford, 1984), ch. 3).
[11] Ibid., 180.
[12] But see H.L.A. Hart, "Bentham on Legal Rights" in A.W.B. Simpson (ed.) *Oxford Essays in Jurisprudence* (Oxford 1973), ch.7 for the beginnings of a retreat from this position.
[13] Joel Feinberg, "The Nature and Value of Rights" (1970) 4 Journal of Value Inquiry 243.

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thesis" he set out years ago in *Taking Rights Seriously*.[14] Dworkin argued that anyone making a case of any sort in law makes it in the tones and language of rights, in the mode of entitlement rather than request or lobbying. (This applies whether it is formally a case about human rights or just an ordinary action in, say, tort or contract.) A party in law does not phrase his argument in terms of its being *a rather good idea* to require a defendant or respondent to pay such-and-such a sum of money; he stands on his rights and in recognising this standing the law accords him the dignity of a right-bearer. So that's worth bearing in mind.

Still, I think it is worth pursuing the possibility of even more direct connections than this. Even if the rights thesis proves a red herring or takes us down a jurisprudential *cul-de-sac*, is there nevertheless a conceptual connection between dignity and the very idea of law?

V. Fuller and the Dignity of Self-Application

Famously, in the book based on his 1963 Storrs Lectures, *The Morality of Law*, Lon Fuller developed an account of what he called the inner morality of law – the formal principles of generality, prospectivity, clarity, stability, consistency, and so on whose observance is bound up with the basics of legal craftsmanship.[15]

Positivist legal philosophers (beginning with H.L.A. Hart) have sometimes expressed bewilderment as to why Fuller called these internal principles a "morality."[16] I think this bewilderment is disingenuous; and I said so in an article published in the New York University Law Review in 2008.[17] Fuller called these internal principles a "morality" because he thought they had inherent moral significance. It was not just that he believed that observing them made it much more difficult to do injustice; though this he did believe.[18] It was also because he thought observing the principles he identified was itself a way of respecting human dignity. Fuller said this in *The Morality of Law*:

> To embark on the enterprise of subjecting human conduct to rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure

[14] Ronald Dworkin, *Taking Rights Seriously* (London 1977).
[15] Lon Fuller, *The Morality of Law* (New Haven 1964), esp. ch. 2.
[16] See, e.g., H.L.A. Hart, "Book Review of Lon Fuller, *The Morality of Law*" (1965) 78 Harvard Law Review 1281, 1284.
[17] Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller" (2008) 83 NYU Law Review 1135, esp. pp. 1154–6.
[18] Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harvard Law Review 630 at pp. 636–7 and 644–5.

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> from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.[19]

These are not just platitudes. Fuller is referring here to a quite specific aspect of law – its general reliance on what Henry Hart and Albert Sacks in *The Legal Process* called "self application,"[20] i.e., people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state. Self-application is an extraordinarily 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, for self-control, for self-monitoring and modulation of their own behaviour in relation to norms that they can grasp and understand.

Even when the self-application of general norms is not possible and institutional determination is necessary, either because of disputes about application or because application inherently requires an official determination, still the particular orders that are eventually issued at law look towards self-application. Unsuccessful defendants in private law litigation are expected themselves to pay the damages that have been decreed; rare is the case where bailiffs have to turn up and take away their property. I do not mean to deny the ultimately coercive character of law (and I shall say more about this later). But even in criminal cases, where the coercive element is front and centre, it is often the case that a date is set for a convict to report to prison of his own volition. Of course if he does not turn up, he will be hunted down and seized. Still, the law strains as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees.

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. The pervasive emphasis on self-application is, in my view, definitive of law, differentiating it sharply from systems of rule that work primarily by manipulating, terrorising or galvanising behaviour. And as Fuller recognises, it represents a decisive commitment by law to the dignity of the human individual. There is something of this recognition too in Joseph Raz's famous article from 1977 on the Rule of Law, where he

[19] Lon Fuller, *The Morality of Law*, p. 162.

[20] For the idea of self-application, see Henry M. Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury NY 1994), 120–1.

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connects the rule of law to law's action-guiding character and relates that in turn to the idea of dignity:

> [O]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future.[21]

Other positivists have indicated a reluctance to pursue the implications of law's commitment to human dignity. Jules Coleman, of the Yale School, takes pains to argue that the action-guiding function of law is not necessarily expressive of a dignitarian value. He tries to separate the issues in this way:

> Law just is the kind of thing that can realise 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.[22]

Coleman is surely right to emphasise that not every potential of a practice is part of its concept. Let me illustrate with some analogies. Religion has the potential to stir up murderous passions, yet this is not in any way definitive of religion. 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 to diminish violence by facilitating peaceful transitions from one regime to another? Joseph Schumpeter thought it was, but others have argued that this is fact about democracy rather than a conceptual truth.[23] It is hard to see how one would decide this. It is certainly a notable fact about democracy. And equally the commitment to dignity – in the use of self-application – is also a notable fact about law. I suppose the argument the other way is that the choice of this definitive legal method of governance (as opposed to some other way of governing) might be merely a matter of efficiency; it does not necessarily betoken a moral commitment to human dignity, however minimal. On its own, that may be a plausible position. But in the following sections, as we consider

[21] Joseph Raz, "The Rule of Law and its Virtue," in his collection *The Authority of Law: Essays on Law and Morality* (Oxford 1979), 221.
[22] Jules Coleman, *The Practice of Principle* (Oxford 2001), 194–5; see also pp. 205–6.
[23] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York), ch. 22.

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other ways in which law also protects dignity, we may be less patient with Coleman's view. We might suspect that it is motivated more by a doctrinaire 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 behaviour-eliciting mode of social control.

One other point. It is tempting to say that law can guide conduct only if it is determinate, i.e. only if it is cast in the form of clear rules. But it is remarkable that law often presents itself in the form of *standards*, such as the standard of reasonable care in tort law. Some theories of legal process suggest that law can be self-applying only if the indeterminacy of these standards is reduced through official elaboration.[24] But in many areas of life, law actually proceeds without such definitive elaboration. It evinces faith in individuals' abilities to think about and proceed with the application of standards without any assurance that any two applications to similar circumstances will yield exactly the same result.[25]

I believe that this feature of law also presupposes a commitment to human dignity. Law assumes that ordinary people are capable of applying norms to their own behaviour and it uses this as the pivot of their being governed. Ordinary people are capable of acting like officials – recognising a norm, apprehending its bearing on their conduct, making a determination, and acting on that.

VI. Procedure

A second way in which law respects the dignity of those who are governed is in the provision that it makes for trials or hearings in cases where an official determination is necessary. These are cases where self-application is not possible or desirable or where there is dispute about the application of norms that requires official resolution.[26]

A legal system is not just a set of general norms, officially recognised and applied to individual cases. We call a mode of governance *law* on account of the distinctive way in which official applications are conducted. Law is applied by *courts*, by which I mean institutions devoted to settling disputes about the application of norms and directives established in the name of the whole society to individual cases. And I mean institutions which do that through the medium of hearings, formal events which are tightly structured procedurally in order to enable an impartial tribunal to determine the rights and responsibilities

[24] See Hart and Sacks, *The Legal Process*, pp. 150–2.
[25] See Jeremy Waldron, "Vagueness and the Guidance of Action" in A. Marmor and S. Soames (eds.) *Philosophical Foundations of Language in the Law* (Oxford 2011), 58.
[26] Much of this section is adapted from Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 Georgia Law Review 1.

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of particular persons fairly and effectively after hearing evidence and argument from both sides.

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 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".[27] But that 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.[28] 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. Outside the hallowed halls of academic legal positivism, I suspect that most people 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. It should certainly be treated as an essential rather than incidental aspect of the Rule of Law.[29]

Of course we should not be essentialist about details. In general jurisprudence (the study of law as such), our concept of a court and a hearing is necessarily rather abstract.[30] The nature of hearings and the procedures that are used differ between one legal system and another. Still, it is not just the concept of a law-enforcement agency. The essential idea is much more than merely functional: applying norms to individual cases. It would be quite wrong, even in general jurisprudence, to abstract away from the elements of process, presentation, formality, impartiality, and argument. The basic idea is procedural: the operation of a court involves a way of proceeding which offers to those who are immediately concerned an opportunity to make submissions and present evidence (such evidence being presented in an

[27] H.L.A. Hart, *The Concept of Law*, revised edition (Oxford 1994), 96.

[28] Hart acknowledges that of course secondary rules will have to define processes for these institutions (ibid., at p. 97). But he seems to thinks that this can vary from society to society and that nothing in the concept of law constrains that definition.

[29] Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in James Fleming (ed.), *Nomos 50: Getting to the Rule of Law* (New York, 2011), 1.

[30] See Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, 1986).

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orderly fashion according to strict rules of relevance oriented to the norms whose application is in question). The mode of presentation may vary; but the existence of such an opportunity does not. Once presented, the evidence is made available to be examined and confronted by the other party in open court. And each party has the opportunity to present arguments and submissions at the end of this process and answer those of the other party. In the course of all of this, both sides are treated respectfully, and above all listened to by a tribunal which is bound in some manner to attend to the evidence presented and respond to the submissions that are made in the reasons it eventually gives for its decision.[31]

These are abstract characteristics. But they are not arbitrary abstractions. They capture a deep and important sense associated foundationally with the idea of a legal system, that law is a mode of governing people that acknowledges that they have a view or perspective of their own to present on the application of the norm to their conduct and situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.

VII. Legal Argument

Indeed, it is not just a matter of hearing both sides of the story. I think it is part of our concept of law that legal positions are sustained or defeated as a matter of argument – argument by counsel for each side and responsive argument (rather than just peremptory decision) at the level of the tribunal making a determination. This, I believe contributes yet another strand to law's respect for human dignity. Let me explain.

Law presents itself to its subjects as something that one can make sense of. I do not just mean that one can make sense of each measure, as one might do on the basis of a statement of legislative purpose. I mean that a person can try and make sense of the "big picture," understanding how the regulation of one set of activities relates rationally to the regulation of another. The norms that are administered in our courts may seem like just one damned command after another, but the way in which they are treated conveys an aspiration to systematicity. Though legislation and precedents add to law in a piecemeal way, lawyers and judges characteristically try to see the law as a whole; they try to see some sort of coherence or system in it,

[31] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353, 358.

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integrating particular items into a structure that makes intellectual sense. This is the stuff of codification and Restatements. But it is also a resource and an opportunity for ordinary parties. It is open to people when they are confronted with law's particular demands to take advantage of this aspiration to systematicity in framing their own arguments – by inviting the tribunal to consider how the position a given party is putting forward fits generally into a certain conception of the logic and spirit of the law.

In this way too, then, law pays respect to the people who live under it, conceiving them as the bearers of reason and intelligence.[32] The individuals whose lives law governs are treated by it as thinkers who can grasp and grapple with the rationale of that governance 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, in its way, is a tribute to human dignity.

The price of this strand of dignitarian respect is undoubtedly a certain diminution in law's certainty. Occasionally an argument will be made, by counsel or by a judge, to the effect that the impact of the law on a particular type of event or transaction should be treated as embodied in some proposition, even though that proposition has not previously been explicitly adopted in legislative form or explicitly articulated (till this moment) by a court. The claim may be that since the proposition can be inferred, argumentatively, from the mass of existing legal materials, it too should be accorded the authority of law. It is a characteristic feature of legal systems that they set up institutions – courts – which are required to listen and respond in detail to submissions along these lines. 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, of course, the arguments 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 than people have tended to credit it within 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. This 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, as I said in my

[32] I have expanded on this theme in "Thoughtfulness and the Rule of Law," *British Academy Review*, issue 18 (July 2011).

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brief discussion of standards, the self-application idea does not rigidly presuppose that law has the form of determinate 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.

Courts, hearings and arguments – those aspects of law are not optional extras; they are integral parts of how law works; and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to slice in half, to truncate, what law and legality rest upon: respect for the freedom and dignity of each person as an active intelligence.

VIII. Rank and Equality

Let me turn now in another direction for a different sort of link between dignity and our modern notion of law. In an article published in 2007, and in my 2009 Tanner Lectures at Berkeley, I argued that we should pay attention to the ancient connection between dignity and rank. (The article was called "Dignity and Rank" and the lectures were entitled "Dignity, Rank and Rights.")[33]

In Roman usage, *dignitas* embodied the idea of the honour, the privileges and the deference due to rank or office. And in English this was the original meaning of dignity, as when the 1399 statute taking the crown away from Richard II stated: "Ye renounced and cessed of the State of Kyng, and of Lordeshipp and of all the Dignite and Wirsshipp that longed therto."[34] Some have suggested that this old connection between dignity and rank was superseded by an originally Stoic and then Jewish-Christian notion of the dignity of humanity as such.[35] I am not convinced. As I argued in "Dignity and Rank," I think that what happened was a generalisation of high-rank – a sort of levelling

[33] Jeremy Waldron, "Dignity and Rank" (2007) 48 European Journal of Sociology 201, and "Dignity, Rank and Rights" in Suzan Young (ed.), *The Tanner Lectures on Human Values*, Volume 29 (Salt Lake City 2011), 207.

[34] 1399 Rolls Parl. III. 424/1, as cited in the *Oxford English Dictionary*, entry for "dignity."

[35] See, e.g., Teresa Iglesias, "Bedrock Truths and the Dignity of the Individual" (2001) 4 *Logos: A Journal of Catholic Thought and Culture* 111.

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up – rather than the abandonment of one (hierarchical) notion and its replacement by another.[36]

The idea is that the modern notion of *human* dignity does not cut loose from the idea of rank; instead it involves an upwards equalisation of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility. (I got this idea from Gregory Vlastos,[37] and Jim Whitman has also pursued in his work the idea of "an extension of formerly high-status treatment to all sectors of the population.")[38] I believe this is true also of the status-concept that I have been trying to elaborate here in connection with the institutions, processes and practices distinctive of law.

One can imagine – historically of course one can actually trace – systems of governance that involved a radical discrimination among different sorts of rank. High-ranking persons would 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. If they were coerced, they would be dealt with under the auspices of a quite respectful mode of coercion, quite different from, and much less brutal than, those applying to members of other strata of society. If they were executed even, there were special methods of noble execution: beheading rather than hanging, for example. At the other extreme 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; 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 defence, nor to have their statements heard or taken seriously. They would not have the privilege of bringing 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 iuris*. 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

[36] See Waldron, "Dignity and Rank," pp. 215 ff.

[37] Gregory Vlastos, "Justice and Equality" in Waldron (ed.) *Theories of Rights*, 41.

[38] James Whitman, "Human Dignity in Europe and the United States" in G. Nolte (ed.), *Europe and US Constitutionalism* (Strasbourg 2005), 95, at p. 97 argues that "[t]he core idea of 'human dignity' in Continental Europe is that old forms of low-status treatment are no longer acceptable. … 'Human dignity,' as we find it on the Continent today, has been formed by a pattern of leveling up, by an extension of formerly high-status treatment to all sectors of the population." See also James Whitman, *Harsh Justice* (Oxford 2003).

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of a slave, serf or villein. I think it is part of our modern notion of law that all such gross status differences have been abandoned (though there are relics here and there). And the equalisation has been an upwards equalisation, which is why I think it is a matter of dignity.

Consider this incident. 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 compter in Wood Street, where she remained seven or eight days, till she paid the debt.[39]

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". 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,"[40] and it held that the person of one 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.[41] In light of this presumption of noble wealth, the seizing of her body could not legally be justified as it could in those days to recover the debts of a commoner.

But now we apply the first point at least to all debtors: no one's body is allowed to be seized; no one can be held or imprisoned for debt. We have evolved 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.

True, we might still use the term "legal system" to describe the highly stratified society I have been imagining, with some members having legal dignity and being *sui iuris* and others not. But it would be much in the way that we describe ancient Athens, nineteenth century

[39] *Isabel, Countess of Rutland's Case* (1606) 6 Co. Rep. 52 b, 77 E.R. 332, 336.
[40] Ibid., at p. 333.
[41] Idem.

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Britain, or apartheid South Africa as "democracies": they had sort of gotten hold of the idea of democracy – governance through the participation of the common people rather than oligarchic elites – but had failed to extend that to all the common people in the society, excluding large sections of the population such as women, slaves, non-whites and so on. They had a proto-democracy, but not a true democracy. And in a similar way, I am inclined to say that the idea of law or of a legal system now embodies the assumption that everyone in a society ruled by law is treated as *sui juris*, as having full legal dignity in the sense that I have been discussing. A system that embodied radical differences of legal dignity might be a sort of proto-legal system, but we should not call it a true system of law.

IX. Dignity and Representation

Obviously the sense in which we all have equal access to the law, participate equally in its proceedings, and enjoy the benefits of its confidence is somewhat fictitious. Most ordinary people are not in a position of straightforward familiarity with law; most law is technical and forbidding and takes years of study to master. And, as Max Weber was famous for pointing out, this is getting worse not better.[42] Moreover, law often still excludes and denigrates some of those it deals with, discriminates in favour of the rich and powerful, and so on.

These are fair points. And we have to come to terms with the normative rather than the purely descriptive character of equal legal dignity. Even if it is conceived as a response to the objective moral facts of inherent human dignity, still *legal* status – equal legal dignity – has to be understood as a constructed human artifice, with all the fragility, bad faith, and ramshackle character of human constructions. Moreover, as I said at the beginning, the artifice is a normative one, and like all norms honoured often in the breach. And even at its best, it has to deal with descriptive inequalities among people using a variety of practices and techniques to create something likely a rough and artificial equality in standing before the law.

The primary technique we use is the artifice of legal representation. David Luban has developed a persuasive account along these lines,[43] building on some philosophical insights of Alan Donagan. Forgive me if I quote Professor Luban at length, but he makes exactly the points

[42] Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich (Berkeley 1978), 894–5.
[43] 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.

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I want to make. He asks why litigants should have professional representatives:

> The answer that, over the years, has appealed to me the most rests on a principle stated by the late philosopher Alan Donagan: "[N]o matter how untrustworthy somebody may have proved to be in the past, one fails to respect his or her dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith." 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 disorganised, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. Knowing no law, they may omit the very facts that make their case, or focus on pieces of the story that are irrelevant or prejudicial. They may be unable to utilise basic procedural rights such as objecting to their adversary's leading questions. Their voices may be nails on a chalkboard or too mumbled to understand. They may speak a dialect, or for that matter know no English. None of this should matter. Human dignity does not depend on whether one is stupid or smooth. Hence the need for the advocate. 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, Donagan's 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.[44]

The account that I gave in sections VI, VII, and VIII might have seemed rather rosy and utopian, especially the account of process and argumentation. It becomes a little less so when we realise that law does not just throw us back on our own natural resources in this regard. It sets out to create the equal legal dignity that it is committed to.

X. Dignified Coercion

Some of you will be tempted to complain that I am making law seem too "nice," and that all this emphasis on dignity obscures the ultimately power-ridden, violent and coercive character of law.[45] Law kills people,

[44] Luban, "Lawyers as Upholders of Human Dignity,' p. 819, quoting Alan Donagan, "Justifying Legal Practice in the Adversary System," in David Luban (ed.) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 130 (Lanham MD 1983).

[45] See, e.g. Austin Sarat and Thomas Kearns, "A Journey through Forgetting: Toward a Jurisprudence of Violence" in Austin Sarat and Thomas Kearns (eds.), *The Fate of Law* (Ann Arbor 1993). The suggestion there is that law is always violent and that the most important feature

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ruins them, beats them up, spoils their reputation, and 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?

In *The Morality of Law*, Lon Fuller seemed to suggest that we have to choose between definitions of law that emphasise coercion and definitions of law that emphasise the sort of dignitary considerations I have been explaining.[46] I think this is a mistake. It is because law is coercive, because its currency is ultimately life and death, prosperity and ruin, freedom and imprisonment, that its inherent commitment to dignity is so momentous. Fuller actually recognises 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."[47] Law is a mode of governance and governance is the exercise of power. But that power should be channelled through *these* processes, through forms and institutions like these, even when that makes the exercise of power more difficult or requires it occasionally to retire from the field defeated, is exactly what is exciting about rule by law.[48]

That is a wholesale answer to the objection. We might also give some retail responses. The coercive character of law manifests itself in a number of ways. (i) Law presents its norms as categorical and non-negotiable demands. (ii) Law is committed, *in extremis*, to doing what it takes to see that its orders are obeyed and its demands complied with. (iii) Law imposes punishment. And (iv) law has and exercises the power to hold persons against their will and sometimes uses force to tightly control their behaviour. These four points are undeniable. But in each case, there is a strong dignitarian strand in the *manner* in which law exercises its power.

(i) I have already mentioned (in section V), the importance of self-application, so far as the administration of law's demands is concerned. Law looks wherever possible to voluntary compliance, which of course is not the same as saying we are free and never coerced, but which does leave room for the distinctively human trait of monitoring and applying norms to one's own behaviour. This is not a trick; it involves a genuinely respectful mode of coercion, even though the coercive element is not dispelled.

(ii) Max Weber is famous for observing that, although "the use of physical force is neither the sole, nor even the most usual, method of

about it is that it works its will, in Robert Cover's phrase, "in a field of pain and death" (R. Cover, "Violence and the Word" (1986) 95 Yale Law Journal 1601).

[46] Fuller, *The Morality of Law*, p. 108.

[47] Ibid., p. 109.

[48] Cf. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth 1976), 265.

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administration," still "the threat of force, and in the case of need its actual use, is the method which is specific to political organisations and is always the last resort when others have failed."[49] 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. Elsewhere I have argued that modern law observes this man as emblematic of its commitment to a more general non-brutality principle:

> Law is not brutal in its operation; law is not savage; law 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.[50]

People may fear and be deterred by legal sanctions, they may on occasion be literally forced against their will by legal means or by legally empowered officials to do things or go places they would not otherwise do or go to. But even when this happens, they are not herded like cattle or broken like horses or beaten like dumb animals. Instead, there is be an enduring connection between the spirit of law and respect for human dignity – respect for human dignity even *in extremis*, even in situations where law is at its most forceful and its subjects at their most vulnerable.

No one denies that law has to be forceful. But forcefulness can take many forms and not all of it involves, for example, the savage breaking of the human will or a regression of the subject into an infantile state, where the elementary demands of the body supplant almost all adult thought that is the aim of torture. The force of ordinary legal sanctions and incentives does not work like that, nor does the literal force of physical control and confinement. For example, when a defendant charged with a serious offense is brought into a courtroom, he is brought in whether he likes it or not, and when he is punished, he is subject to penalties that are definitely unwelcome and that he would avoid if he could; in these instances there is no doubt that he is subject to force, that he is coerced. But in these cases force and coercion do not work by reducing him to a quivering mass of "bestial desperate terror,"[51] which is the aim of every torturer. If something cannot be done without torture, law generally accepts that it cannot be done.

(iii) Law punishes, but again there is a sense that we work with modes of punishment that do not destroy the dignity of those on whom

[49] Weber, *Economy and Society*, p. 54.
[50] This formulation is adapted from Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Columbia Law Review 1681, 1726 (reprinted in Waldron, *Torture, Terror and Trade-offs*).
[51] Hannah Arendt, *The Origins of Totalitarianism* (New York 1973), 441.

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it is being administered. Some of this is the work of the external dignitary provisions we noted at the beginning of this paper. Provisions like ICCPR Article 7 and ECHR Article 3 impose a requirement that any punishment inflicted should be bearable – should be something that a person can endure, without abandoning his elementary human functioning. One ought to be able to do one's time, take one's licks, while remaining upright and self-possessed. Even going to one's execution is something that a human can do; and to the extent that these provisions affect the death penalty, there is an implicit requirement that it be administered in a way that enables the persons to whom it is applied to function as human beings up until the point at which their lives are extinguished.[52]

(iv) Even in circumstances where behaviour is very tightly controlled by law (e.g. the behaviour of a person in custody), there is an assumption that people will stand upright and move in response to commands rather than being dragged as though they were incapable of self-locomotion. And the commands will be given rather than screamed at them, Nazi-style. These may seem trivial matters. I have hard-ass colleagues who will say: If someone is about to be killed, who cares how he gets from his cell to the execution chamber? If someone is under tight custodial control, who cares whether he is dragged into and out of a courtroom or allowed to walk in under his steam? Who cares about the tone of voice in which coercive commands are issued? They will say: These are just matters of sentiment. Once we have abandoned negative freedom all the rest is detail. I disagree. For one thing, the individuals concerned do seem to care greatly about these things, however dismissive legal scholars may be. Also, we know from the case-law on degradation that things sometimes do come down to details like this, and that in the extreme situation of custody such details loom large for human dignity. Dignity has long had a connection with something like physical bearing – standing upright: a sort of moral orthopaedics.[53] We have an idea, too, that *in*dignity on these "trivial" matters may presage much more substantial affronts: is it an accident that, at the beginning of the war on terror, Guantanamo Bay detainees did not walk to their interrogations but were carried to and fro in wheel barrows like scarecrows? Those who take what I am calling the hard-ass line on custodial control often also take the hard-ass line on abusive interrogation.

[52] This might be one ground on which the "death row phenomenon" is seen as inhuman. See *Pratt v Attorney General of Jamaica* [1994] 2 A.C. 1 (Privy Council in respect of Jamaica).

[53] By the "moral orthopedics" of human dignity, I have in mind what some Marxists, following Ernst Bloch, used to call "walking upright." See Jan Robert Bloch & Caspers Rubin, "How Can We Understand the Bends in the Upright Gait?" (1988) 45 New German Critique 9, at pp. 9–10. See also the account in Aurel Kolnai, "Dignity" (1976) 51 Philosophy 251 at pp. 253–4.

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XI. Aspiration and Reality

The point just mentioned reminds us that various systems of power that call themselves legal systems fall often short of this respect in one way or another. The discipline of dignity is a normative discipline and as such it is a costly and demanding discipline. It presents itself on the one hand as an aspiration, and on the other hand as a reproach to our shortcomings – shortcomings that sometimes come close to a betrayal of the whole idea. Add to that the fact that any actually-existing legal system has to cope with the burden of its own history, which may not always have been a history of respect for human dignity, and we can see how complicated and controversial the characterisation I have given in this paper might become.

The United States illustrates a number of these points. It is burdened by a history of slavery and racism, which particularly affects the law: it is notable for example that the Thirteenth Amendment that abolished slavery did not do so pervasively or unconditionally, but made an exception for the treatment of prisoners.[54] Critics have observed that in regard to the dignitarian aspect of its treatment of prisoners, America remains an outlier, compared say to West European systems of penal law.[55] And so too with some of the other aspects I have mentioned. 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.[56] Reports of prisoners being "herded" with cattle prods emerge from time to time.[57] Conditions in our prison are *de facto* terrorising and well-known to be so, even if they are not officially approved or authorised; and we know that prosecutors (who pride themselves on their righteousness) feel free to make use of defendants' dread of this brutalisation as a tactic in plea-bargaining. Some would say too 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

[54] 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" (my emphasis).

[55] Whitman has argued that American history tells quite a different story from the development of dignitarian jurisprudence in Europe. (See Whitman, "Human Dignity in Europe and the United States," op. cit., and Whitman, *Harsh Justice*, op. cit.) See also Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge 2008), 30–40.

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

[57] See, e.g., "37 Prisoners Sent to Texas Sue Missouri," *St. Louis Post-Dispatch* (Missouri), September 18, 1997, 3B: "Missouri prisoners alleging abuse in a jail in Texas have sued their home state and officials responsible for 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, B1.

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I have been talking about – though, as indicated, I think everything depends on the way it is administered. In recent years, too, we have seen the United States tempted away from dignitarian ideals in a number of important regards – in its attempt to establish a form of legally unreviewable detention at Guantánamo Bay, for example, and in its recent use of torture. Other examples, and examples from other countries (France, the United Kingdom, Russia, Israel, etc.) could be multiplied. All have fallen short of the characterisation given in this paper.

A legal system is a normative order, both explicitly and implicitly. Explicitly it commits itself to certain norms – the rules and standards that it says publicly it will uphold and enforce. Some of these it actually upholds and enforces, but for others, in certain regards, it fails to do so: the law says that the state should pay a pension or should pay compensation to Smith, but Smith does not receive it. The explicit content of 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.

Less straightforward is the case where a normative commitment is embodied implicitly in the institutions or traditions of a system of governance. But I believe a very 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 them. Our practices sometimes convey a sort of promise[58] and, as in ordinary 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 fall short of that in various respects. Institutions can be imbued in their structures, practices, and procedures with 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.

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.

[58] See Jeremy Waldron, "Does Law Promise Justice?" (2001) 17 Georgia State University Law Review 759 at pp.760–1. For analogous arguments about justice, see Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* 443 (Berkeley 1992), and John Gardner, "The Virtue of Justice and the Character of Law" (2000) 53 Current Legal Problems 1.

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This is not unusual in regard to legal ideals. Think of an analogy: 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. We didn't need the provision of positive constitutional law to know that retroactive laws were an abomination. We knew that anyway. Still, the combination of an explicit standard and an implicit principle represent 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 prospectivity, so it would be quite wrong to infer from the fact that the ICCPR or Geneva Conventions might have been different that law is only contingently committed to the protection of dignity. There is an implicit commitment to dignity in the tissues and sinews of law – in the character of its normativity and in its procedures – and we do well not to sell this short by pretending that dignity is a take-it-or-leave-it kind of value.

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