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Respect for human dignity as 'substantive basic norm'

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'the ultimate and essential goal of all law . . . [is] to promote and to guarantee the dignity of the human person.'

(Mamberti, 2012)

Abstract

The idea of 'human dignity' is, notoriously, as ambiguous as it is compelling. Notwithstanding the absence of any clear or settled definition of human dignity, either in the abstract or in terms of what it means in practice, it is an idea which takes pride of place in international legal documents, in judicial reasoning, and in scholarship across a range of disciplines, where it seems, particularly in recent years, to have become the focus for an explosion of academic interest and an accompanying proliferation of literature. Much of the existing literature attempts to uncover the meaning, or multiple meanings, of 'human dignity', focusing on the uncertainty surrounding the substance or content of the idea and trying to compose a catalogue of use-types. In this paper, my primary aim will be to address another type of uncertainty, namely uncertainty about the role, function or status within legal frameworks of the 'dignity norm' – the norm requiring respect for human dignity. I want to explore several possibilities: first, that the dignity norm is simply a proxy for respect for autonomy; second, that it is a right in the sense that we can speak of a specific 'right to have dignity respected'; and third, that it is a legal principle. Having problematised each of these in turn, I will contend that the function of the dignity norm is best captured by describing it as the 'substantive basic norm' of the legal systems wherein it appears.

I. Introduction

The idea of human dignity has undoubted legal presence. It has, famously, a prominent place in the Universal Declaration on Human Rights, wherein the Preamble refers to 'the inherent dignity and the equal and inalienable rights of all members of the human family', and Article 1 asserts that '[a]ll human beings are born free and equal in dignity and rights'. Similarly, Article 1 of the EU Charter of Fundamental Rights declares that 'Human dignity is inviolable. It must be respected and protected.' Dignity has also been described as 'the very essence' of the European Convention on Human Rights (ECHR).[1] The idea has been referenced again and again by courts in a host of recent cases spanning a range of different areas of law: the dignity of same-sex couples,[2] patients,[3] prisoners,[4] detainees,[5]

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1 *Pretty v. United Kingdom* [2002] ECHR 427 at para. 65.

2 *Hall v. Bull* [2012] EWCA Civ 83.

3 *R (on the application of Burke) v. General Medical Council* [2005] EWCA Civ 1003.

4 *Grant v. Ministry of Justice* [2011] EWHC 3379 (QB).

5 *R (on the Application of (HA) (Nigeria)) v. Secretary of State for the Home Department* [2012] EWHC 979 (Admin).

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asylum seekers,[6] women seeking abortions,[7] and people wishing to end their lives.[8] Over twenty years ago, one legal observer noted that 'human dignity … is not an abstract metaphysical notion; it is an established and orthodox legal concept'.[9]

The legal significance of dignity is also reflected in the volume of scholarship devoted to it: it now seems remarkable that it was ever observed that 'the literature on dignity is a sparse one indeed' (Gaylin, 1984, p. 18). It has been noted, however, that despite the 'increased attention' paid to dignity nowadays, 'the notion of the *role* of human dignity within law is still an underexplored topic' (Glensy, 2011, p. 66, emphasis added). Some legal scholars, notably Dworkin (2006, 2011), Alexy (2002) and, more recently, Waldron (2012a, 2012b, 2013), have examined dignity's role within legal normativity, scrutinising its status, function and, in particular, its relationship with rights. Dupré, writing in the human rights law context, has asked: 'is [dignity] a right, a value, or a principle?' (Dupré, 2009, p. 202), and Andorno has explored 'the dual role of human dignity in bioethics' (Andorno, 2011). Nevertheless, much academic enquiry about dignity still focuses on the *content or meaning* of dignity, asking what dignity values and why, without attending to the question of the *role* of the dignity norm in legal discourse.[10]

I have addressed matters of content elsewhere (Neal, 2012a, 2012b), but the purpose of the present enquiry is to continue the emerging discussion of the role in law of what I will refer to hereafter as the 'dignity norm': the requirement, which may be explicit or implicit, written or unwritten, that the equal dignity of all human beings must be respected.[11] Although it will be impossible not to touch upon matters of content in passing at various stages of the discussion, my primary purpose here is not to enquire about the norm's meaning, but to establish its status. I will examine three claims about the dignity norm: first, that 'respect for dignity' is mere empty rhetoric, and has no distinctive normative content of its own; second, that the dignity norm denotes a right, in the sense of there being a specific 'right to have one's dignity respected'; and third, that the norm is best understood as a legal principle (which may be fairly described as the majority view among dignity scholars in the human rights field and – in some cases – beyond). I will conclude that the norm's legal status is not captured adequately by any one of the above descriptions, and suggest that its role is better described as that of a 'substantive basic norm'.

II. The dignity norm as a proxy for respecting autonomy

A major criticism of the idea of dignity per se has been that 'dignity' does not mean anything that cannot be expressed by reference to other values, particularly the principle of autonomy and the related idea of 'respect for persons' (Macklin, 2003; Pinker, 2008).[12] For these critics, dignity is

6 *NS v. Secretary of State for the Home Department* [2012] 2 C.M.L.R. 9.

7 *RR v. Poland* (2011) E.H.R.R. 31.

8 *Nicklinson v. Ministry of Justice* [2012] EWHC 304 (QB).

9 Anthony (now Lord) Lester QC in *Airedale NHS Trust v. Bland* [1993] A.C. 789 at 848E.

10 A recent exception is the collection of essays published in W. Brugger and S. Kirste (eds) (2013) *Human Dignity as a Foundation of Law: Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009* (Stuttgart: Franz Steiner Verlag).

11 Elsewhere (Neal 2012a) I have argued that dignity can (unproblematically) mean different things in different legal contexts; in the present context, I use the phrase 'dignity norm' to indicate that my concern here is with general legal norms requiring respect for dignity, in which dignity will often (but not necessarily) be understood as referring to the intrinsic and/or equal worth of human beings.

12 Here, I want to focus on the conflation of dignity with *autonomy* in particular, since, although dignity is often equated with 'respect for persons' and the like, the tendency to associate dignity with autonomy is extremely widespread, not only among critics who argue that the dignity norm requires 'no more than' respect for

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doing no distinctive normative work – is 'not a load-bearing idea', as Waldron puts it (Waldron, 2012b, p. 201) – so is simply a 'rhetorical ornament' (Barroso, 2012, p. 333) which people cite 'when they want to sound serious but are not sure what to say' (Waldron, 2012b, p. 201).

There is a long-standing tradition in European philosophy which, drawing on Kant, tends to define 'dignity' as a property possessed by rational, autonomous beings – beings governed by reason, with the emotions kept firmly in check (Harris, 1997). According to this tradition, the dignity (by which Kant means the 'intrinsic worth') of human beings flows ultimately from 'uniquely human' capacities such as reason, autonomy and self-determination. Kant's philosophy has been hugely influential in shaping how philosophers and lawyers have conceptualised human dignity ever since, and it has been remarked that Kant's version of dignity, which puts autonomy and rationality at the forefront, still reflects 'the concept of dignity that is generally recognised in Philosophy and Law' today (Rütsche, 2010, p. 87). Rütsche writes that: 'The most obvious properties which could be used [to justify the notion of human dignity] are the ability of human beings to think rationally and to choose freely. Consequently, it is the properties of reason and autonomy which distinguish the members of humankind as unique and endow them with dignity' (p. 87).

Other recent accounts of dignity which explicitly foreground the capacity for autonomy include those of Barroso (2012), who describes individual autonomy as '*the* ethical element of human dignity' (p. 367), and Griffin (2009), who has described dignity as constituted by 'the life, autonomy, and liberty of the individual' (p. 249), where autonomy is about deliberation, and 'has to do with deciding for oneself' (p. 226) and liberty is about action, and 'concerns pursuing one's aims without interference' (p. 226). This tradition of thought may explain why critics like Macklin (2003) have come to regard the ideas of autonomy and dignity as being essentially synonymous with one another: in the influential Kantian way of understanding dignity, the idea of autonomy plays a major part in justifying the claim that human beings have dignity at all.

For those who make the explicit claim that dignity is reducible to autonomy, appeals to 'dignity' amount to nothing more than the claim that processes of autonomous individual self-determination ought not to be interfered with, and that the autonomous choices that are the outcomes of such processes ought to be respected. On such an understanding, the phrase 'human dignity' has no distinctive ethical content; everything it means is already captured more clearly and precisely by the principle of autonomy itself. But this kind of reductionism is unconvincing, whether it comes from advocates or detractors, and there are good reasons why dignity and autonomy ought to be regarded as separate values.

First, if autonomy and dignity *were* essentially synonymous, then logically only autonomous individuals could be said to possess dignity. We would have to be prepared to accept that it could make no sense to talk about 'dignity' in the context of very young children, elderly people with dementia, adults with other forms of mental incapacity, unconscious patients, and so on. Schroeder has called this 'the Kantian cul-de-sac' (Schroeder, 2012, p. 329).[13] The cul-de-sac is problematic strategically, because it is precisely in cases like these that the need to protect dignity can seem most urgent, and that reminders about human dignity can be most valuable. In the words of Baroness Hale of Richmond: 'Although respect for individual autonomy is an essential part of respect for human dignity, we are also required to respect the human dignity of those who

autonomy (Macklin, 2003), but also among proponents of dignity who give autonomy a central place within their accounts of what dignity means.

13 The same problem (excessive restriction of the community of beings recognised as having dignity) also arises if we treat other cognitive capacities – reason or moral agency, for example – as synonymous with dignity. I have focused on autonomy here, but treating dignity as synonymous with any 'higher' cognitive capacity or capacities is similarly problematic.

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are unable to make an autonomous choice. In fact, in my view it is even more important that we do so' (Hale, 2009, p. 106). The cul-de-sac is also philosophically problematic insofar as a narrow conception of dignity undermines dignity's potential as a source or justification of *universal* human rights: if dignity is conceived as attaching only to some human beings, it seems incapable of grounding rights for all of us. Perhaps the latter use of dignity is problematic already (see, e.g., Waldron, 2013), but the idea of dignity as a source of fundamental rights is currently one important mainstream understanding of what dignity 'does' in law, and accounts that are unable to support this understanding may therefore lack intuitive appeal.

Another good reason to resist the conflation of dignity with autonomy is that it is possible to distinguish between them on the basis that dignity (unlike autonomy) is what I will call a 'reflexive value'. Both dignity and autonomy are often described as having a necessarily 'relational' quality. Foster (2011), for example, refers to dignity being a 'communitarian' value that is held 'in joint account' (p. 14); this is because he equates dignity with 'thriving' and contends that 'it is impossible to talk simply about "my" thriving. My thriving is affected by and affects a multitude of other organisms, and by the super-organism [the community]' (p. 14). Elsewhere, Barroso (2012) considers 'community value' as a component in the meaning of dignity (although it seems to fulfil only a negative function within his analysis, as a brake on individual autonomy); Oliver (2010) considers dignity as essentially an act of recognition *performed by* the community; and Waldron (2008) considers the possibility that dignity might attach to communities or groups. The relational nature of autonomy has also been discussed extensively, particularly in feminist literature, including notable treatments by Nedelsky (1989) and MacKenzie and Stoljar (2000).

Despite the relational nature of both values, however, there seems to be an important difference, in that violations of dignity can, in contrast with violations of autonomy, be understood as reflexive, so that when I violate your dignity, I *necessarily and simultaneously* violate my own. This seems to depend on conceiving dignity as a *moral relationship*, within which any act/omission which violates dignity violates it simultaneously and necessarily for all parties to the relationship. (Importantly, 'all parties' could be understood to include the whole of the moral community, if indeed the community has the kind of role in dignity encounters which Oliver claims.) Maier (2010) is one writer who maintains that acts of dignity-violation (he is primarily concerned with torture) are always wrong primarily because they distort and degrade the moral relationships between persons, and the same idea is perceptible in Hale's remark that:

> 'Respect for the dignity of others is not only respect for the essential humanity of others; it is also respect for one's own dignity and essential humanity. Not to respect the dignity of others is also not to respect one's own dignity.' (Hale, 2009, p. 106)

I can violate your autonomy without violating my own, and fail to respect your autonomy while my own autonomy remains completely unaffected. By contrast, if we understand dignity as a moral relationship (*per* Maier) and the community as a party to that relationship (*per* Oliver), we can then understand dignity as attaching to human beings and their communities in a reflexive way, so that when I violate your dignity, I am simultaneously failing to respect my own dignity *and* offending against the 'community of dignity'.

We can probably say of autonomy that if I violate or deny the autonomy of others, I am creating, or contributing to, a dangerous climate within which the autonomy of all autonomous beings, including myself, may be threatened.[14] But this is not analogous to the claim that I do inevitable

14 Gewirth (1978) makes what might *seem* like a 'joint account'-type argument about moral agency when he argues that it is the kind of value which we deny in others only at risk of denying it in ourselves (his argument appears to be interpreted in this way by Smith (2008)).

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and simultaneous violence to my own dignity when I violate the dignity of another member of the community. In the latter case the claim is that a particular violation, when performed upon another person, *immediately and necessarily* causes the same kind of damage to the perpetrator. In the former, the claim is about *risk* of injury. If this is correct, then autonomy is not held in 'joint account'.

A third reason to regard respect for autonomy as only *part* of the 'dignity picture' is that not every violation of dignity involves a violation of autonomy, and vice versa. Certainly, if a person happens to have the capacity for autonomy, then failing to respect it (for example by obstructing or failing to support the exercise of the capacity, or by failing to respect the choices it generates) *may* violate that person's dignity. Personal autonomy, however, is exercised and enjoyed in perpetual negotiation both with the autonomy of others and with the limits placed upon it by state authority in order to protect public order and prevent harm to others, and, although constraints on personal autonomy *can* be dignity-violating, they need not be. Conversely, there are things that someone might do to me that I would regard as an affront to my dignity, but which have nothing to do with violating my autonomy. For example, Schachter has commented that 'nothing is so clearly violative of the dignity of persons as treatment that demeans or humiliates them' (Schachter, 1983, p. 850), yet people may be demeaned and humiliated in ways that involve no violation of autonomy. Thus, the fact that a particular individual lacks personal autonomy does not remove the potential for dignity-violation: although it must logically remove the possibility of violating that individual's dignity via autonomy-violation, it may actually *increase* the danger that dignity will be violated in other ways (via contempt, or physical abuse, for example).

It has been important to clarify that autonomy and dignity are not co-extensive, not only for reasons of conceptual clarity, but also because whether we see the two as synonymous or not will influence our view of what 'dignity' requires of us in contexts like assisted dying, reproductive freedom, human enhancement technologies, and so on (not necessarily determining the favoured outcome, but affecting how we get there). The distinction is thus of increasing practical and political significance.

An issue remains about what *role* autonomy plays in the 'dignity picture', and how we should conceive of the relationship between dignity and autonomy: is autonomy a facet or aspect of dignity (i.e. part of the definition of dignity itself), or a right *flowing or resulting from* dignity? This question is one of the subjects of a recent exchange between O'Mahony (2012a, 2012b) and White (2012). O'Mahony notes that, as well as being possessed by some people and not others (whereas human dignity is usually treated as being universal), 'personal autonomy is subject to restriction and limitation in ways that the inherent dignity of every individual that makes him or her worthy of equal treatment and respect is not' (O'Mahony, 2012a, p. 566). As such, he contends that autonomy must be conceived of as a 'resulting right', since,

> 'if autonomy is to be considered an aspect of dignity itself, then this suggests that dignity as a concept is susceptible to frequent limitation by reference to other values and goals, in which case its centrality in human rights law and discourse could be called into question. Moreover, in difficult cases where autonomy is restricted precisely to protect the dignity of others, characterizing autonomy as an aspect of dignity means that the dignity of one person is overridden by the dignity of another, which is difficult to reconcile with the concept of equal treatment and respect.' (O'Mahony, 2012a, p. 567)

White (2012) counters that we can accept that autonomy is exclusive and subject to limitations, yet still see autonomy as a constituent part of a 'universal and absolute' dignity. There is no need, she suggests, to deny that autonomy can be an aspect of dignity simply because the former cannot be 'realised completely'; instead, we can say that 'dignity relates … to the *appropriate* measure of autonomy' (p. 581, emphasis added). White acknowledges that deciding what the appropriate

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measure of autonomy is in any given case 'will, naturally, be contentious' (p. 581), but ultimately she regards this as a separate issue. Assuming that autonomy can be balanced against competing values and realised to the degree that is appropriate (and this is a task we already trust to the courts), why can we not say that, in all cases involving autonomous people, realising (or allowing *them* to realise) their autonomy to the appropriate degree is an aspect of realising the person's dignity?

This seems like a reasonable point; it appears to acknowledge the connectedness between the two values, while leaving open the possibility of conceiving dignity in a way that has nothing to do with autonomy. (This possibility is important, because as noted already, some violations of dignity do not involve autonomy, even where we are dealing with the dignity of an autonomous person.) O'Mahony's reluctance to accept it seems to be due in part to his eagerness to avoid what he sees as the erroneous idea that dignity can be a right-in-itself (discussed below), since, in his view, 'confusion between autonomy and dignity contributes to the misguided notion of a right to dignity' (O'Mahony, 2012a, p. 574).

My concern so far has been to establish that dignity is not a mere proxy for autonomy, and that the two values, though connected, are ultimately distinct. I have outlined why I think that dignity and autonomy are different values and protect different things, and claimed that, while dignity is of general importance as a value, it can become most urgent in cases where autonomy is lacking, since it is often when dealing with persons with incapacity that the risk of dignity-violation can become most acute. My view of the relationship between the two values can be summarised by saying that autonomy is (often but not always) *part* of the dignity picture. Both O'Mahony's view of autonomy as a right flowing from dignity, and White's view of autonomy as an 'aspect' of dignity seem compatible with this assessment.

III. The dignity norm as expressing a right

The idea of dignity is, of course, very intimately associated with rights, but no specific 'right to dignity' is enumerated either in international or in UK domestic law. Instead, dignity seems usually to be regarded as an underpinning justification for substantive rights, or a 'source of rights', implying (i) that dignity is not a substantive right in itself, and (ii) that dignity is more overarching, and more fundamental, than any of the individual rights it grounds.

Nevertheless, numerous references to a 'right to dignity' can be found in the academic literature on dignity. Dworkin (1993) speaks of 'the right to dignity', although he distinguishes between the notion of a right to live in conditions which positively promote dignity (understood as 'self-respect') on the one hand, and a narrower negative 'right not to suffer *indignity*' on the other (p. 233). Dworkin himself means the latter when he refers to 'the right to dignity'. Pollmann (2011) refers to human rights as 'rights to [dignity's] protection' (p. 245). Furthermore, as some have observed, some jurisdictions *do* recognise a specific 'right to dignity' (McCrudden, 2008, p. 675; O'Mahony, 2012a). Klug has noted 'a specific right to dignity in both German and South African jurisprudence' (Klug, 2003, p. 149). Article 1(1) of the Basic Law for the Federal Republic of Germany reads: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Although phrased as a duty, this can be read as enshrining a specific 'right to dignity' (Alexy, 2002).

Something close to a 'right to dignity' is also enumerated in the Bill of Rights of the South African Constitution. Article 10 of the Bill of Rights states: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' Strictly speaking, the text of this Article would appear to contain not a 'right to *acquire* dignity', as such, but rather a 'right not to have one's (*pre-existing*) dignity violated'. Nevertheless, O'Regan J stated, in the case of *Dawood v. Minister of Home Affairs*,[15]

15 [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC).

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that 'dignity is not only a value fundamental to our Constitution, *it is a justiciable and enforceable right that must be respected and protected*' (para. 35, emphasis added). She also recognised, however, that '[i]n many cases … where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour' (para. 35).[16]

A specific right to dignity seems also to be written into Israel's Basic Law. The part of the law relating to *Human Dignity and Liberty* (1992) provides both that '[t]here shall be no violation of the life, body or dignity of any person as such' (para. 2), and that '[a]ll persons are entitled to protection of their life, body and dignity' (para. 4). As with the example from South Africa, this reads not as a right *to* dignity, as such, but as a right to have one's pre-existing dignity respected/protected. Its inclusion as a distinct provision, rather than as part of an explanatory narrative, however, seems to indicate that dignity is not seen here (only?) as a source or justification of rights, but (also?) as a stand-alone right-in-itself.

Perhaps the particular histories of these nations create a powerful cultural imperative for foregrounding and emphasising dignity, which enshrining it as a right-in-itself is meant to achieve. The idea of a specific 'right to dignity' ought to be treated with caution, however. First, there is reason to doubt whether the existence of such a right can make logical sense. In international human rights discourse and jurisprudence, 'human dignity' is conceived of as inherent and inalienable: we are all born with dignity, and no one and nothing can remove it from us.[17] But if dignity is inherent, I do not need to acquire it; and if it is inalienable, I need no protection against its loss (Killmister, 2010, p. 162). If a 'right to dignity' is a right to something everybody already has and cannot lose, it makes no sense.

Talk of dignity as a right-in-itself is not only senseless, but damaging, according to O'Mahony, in that it is prone to create conceptual confusion about the nature of the relationship between dignity and rights (O'Mahony, 2012a, 2012b). Two views of the relationship are as follows:

> 'One … is that everyone has inherent human dignity, irrespective of whether they are actually being afforded their human rights in practice. The other is that a person achieves human dignity through the enjoyment of human rights, and that the denial of those human rights leaves a person devoid of human dignity' (O'Mahony, 2012b, p. 587)

O'Mahony warns that these two positions 'cannot simultaneously be true' (p. 587). The former view, which O'Mahony supports, is the mainstream way of conceiving the relationship between rights and dignity, and is summarised by Andorno when he writes that 'rights *derive* from human dignity; human dignity is the foundation of human rights; human dignity is not a kind of super-right, but rather the ultimate source of all rights' (Andorno, 2011, emphasis in original). This conception of the relationship is compatible with the idea of dignity as inherent and inalienable, and as denoting the intrinsic worth of all human beings. The idea of dignity as a right-in-itself, by contrast, promotes the latter type of view, since a right to dignity only makes sense if dignity is *not* already intrinsic in all human beings. Those who want to use dignity to denote inherent,

16 *Ibid.* Were it not impossible within the confines of this paper, a lot more could be said about the concept of dignity in the context of South African jurisprudence; for example, how dignity might interact with the African philosophical concept of 'ubuntu', which was deployed as a constitutional principle by the Constitutional Court in the case of *S v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3), and which seems, like dignity, to be a value/virtue grounded in human interconnectedness.

17 The Preamble and art. 1 of the UDHR, quoted above, are examples. The use of dignity to denote an intrinsic worth possessed by all human beings simply by virtue of their being human also abounds in the academic literature on dignity. See, inter alia, Mattson and Clark (2011), Rendtorff (2002), Nordenfeld (2004), McCrudden (2008) Hale (2009) and Haugen (2010).

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intrinsic worth must reject the notion of dignity as a right-in-itself as erroneous, therefore, along with any rhetoric that refers to lives lacking in dignity, or to rights violations 'stripping' people of their dignity (O'Mahony, 2012a, p. 563). Such references are mistaken, confusing and play into the hands of dignity's detractors (pp. 559, 565).

A second problem with the idea of a 'right to dignity' is that it is doubtful whether such a right can carry any specific normative content not already covered by other, substantive provisions. What could understanding dignity as a right-in-itself add to the combined jurisprudence of Articles 3 and 8 of the ECHR, for example? What distinctive jurisprudential content could develop around a specific 'right to dignity' in jurisdictions where the Convention has legal force, or in a jurisdiction like the US, where matters of dignity can be debated and adjudicated under the auspices of the various Constitutional Amendments? The German Constitutional Court held, in the *German Airliner* case,[18] that

> 'the duty to respect and protect human dignity generally *forbids making any human being a mere object of the actions of the state*. Any treatment of a human being by the state that– because it lacks the respect for the value that is inherent in every human being–would call into question . . . [his or] her *status as a subject of law*, is strictly forbidden.' (para. 121)

On the face of it, this could appear to define the 'right to dignity' as a specific right not to be treated as a 'mere object', or denied one's status as a legal subject. This is still abstract enough, however, for its practical meaning to require explication in a raft of more substantive rights (each with an attendant jurisprudence), and how this would improve upon the understanding within which dignity is a background justification for, or foundation of, the human rights system (and the particular rights within it) is unclear. Indeed, an understanding wherein dignity, as a fundamental value, underpins various rights seems to make better sense than an understanding wherein dignity is seen both as an underpinning justification/source, and also as one of the enumerated rights themselves. In the latter understanding, dignity (the underpinning value) appears to be sourcing/justifying *itself* (dignity-the-right); moreover, there is an unexplained gap between the substantive character of the other rights (to life, privacy, and so on) and the much more abstract 'right to dignity'. This recalls O'Mahony's point that treating dignity as a right in itself obscures the nature of the relationship between dignity and rights.

A similar suggestion is that a right to dignity is a 'right to have rights' (e.g. Enders, 2010); again, however, this seems redundant. If I have all of the substantive rights themselves, why would I need an additional 'right to have them'? And if I live in a system which fails to acknowledge the substantive rights, what is the likelihood that such a system would acknowledge a free-standing 'right to dignity' / 'right to have rights'? The kinds of system within which a 'right to have rights' might plausibly be found are precisely those in which it would add nothing of substance.

I have noted already that the prominence of extreme dignity-violation in the recent histories of Germany and South Africa, and in the narrative of Israel's creation, seems to account for the prominence of dignity-protection in these states' current laws. Perhaps, then, the point of enumerating a specific right to dignity is *not* to add substantive content to the legal system, but to fulfil a purely 'expressive' role. Sunstein notes that 'sometimes people support a law, not because of its effects on norms, but because they believe that it is intrinsically valuable for the relevant "statement" to be made' (Sunstein, 1996, p. 2026). He elaborates:

18 Case No. 1 BvR 357/05 115 BVerfGE 118.

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> 'There can be no doubt that law, like action in general, has an expressive function. Some people do what they do mostly because of the statement the act makes; the same is true for those who seek changes in law. Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.' (p. 2051)

Enders seems to support the idea of an 'expressive function' of the right to dignity in the German context when he remarks that 'the commitment to human dignity reminds the legislator, the courts and other jurists to always keep clearly in mind that the human is a self-conscious intellectual and ethical being and therefore worthy of respect' (Enders, 2010, p. 8). But if the supposed benefit of a separate 'right to dignity' is simply to highlight, emphasise or spell out more clearly the central importance of dignity within a given legal system, is this not better achieved by having dignity written into the preamble or explanatory narrative framing the substantive rights? That way, the status of dignity as a justifying, overarching principle, more fundamental than any individual right, is made clear, whereas listing dignity as one right among many others may risk obscuring its 'meta' status.

Andorno (2011) provides us with another reason to be cautious about the idea of a 'right to dignity'. He observes that 'the principle of human dignity is in recent years used not only to promote respect for the intrinsic worthiness of every individual, but also of *humankind as a whole*' (emphasis in original). As such, dignity has been invoked in opposition to 'technologies that are regarded as a threat to the identity and integrity of the human species such as human reproductive cloning and germ-line interventions'. However, as Andorno points out, 'human rights only belong to existing individuals, not to humanity as a whole', so that any 'right to dignity' could only be of use in protecting against harm to existing individuals; not harm to humanity, or to future generations.

The present discussion is not immediately concerned with 'species dignity', but specifically with the status of the norm requiring respect for the equal dignity of all (individual) human beings. The existence and source of 'species dignity' is another (albeit perhaps related) matter, so Andorno's caution cannot form part of the present case against a right to dignity. Nevertheless, the doubts raised already over whether such a right can make strict logical sense or carry any distinctive normative content still weigh in favour of the conclusion that, even if it is sometimes useful to invoke a 'right to dignity' for rhetorical or expressive purposes, the dignity norm, if it is to perform a distinctive role in law, must be more than this.

IV. Is the dignity norm a legal principle?

4.1 Distinguishing 'legal principles'

Although there are some scholars who deny the existence of 'principles' as a discrete category of legal norm (see, e.g., Günther, 1988, as discussed in Alexy, 2000, p. 299), the category of legal principles as distinct from legal rules is widely acknowledged (see, e.g., Dworkin, 1978; Alexy, 2002; Raz, 1972; Waldron, 1997) and principles play a central role in mainstream theories of law (Dworkin, 1986; Alexy, 2002). Although Dworkin's work (Dworkin 1978, 1986) brought the role of principles in law to unprecedented scholarly attention, it has been noted that their existence was acknowledged prior to this, particularly in continental European legal systems and by scholars like Esser (Raz, 1972; Muniz, 1997; Alexy, 2000; Poscher, 2009), and Raz has claimed that the existence of legally binding principles 'has never been denied by anyone, least of all . . . positivists' (Raz, 1972).

Legal theorists engage in complex disagreements about the structure of legal principles, the precise nature of their normative character, their relationship with other normative legal concepts, such as rules and rights, and what the presence of principles in the legal framework

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means for the conceptual relationship between law and morality (see, e.g., Raz, 1972; Dworkin, 1978, 1986; Waldron, 1997; Muniz, 1997; Alexy, 2002, 2010; Poscher, 2009). What matters for present purposes is only that we are able to decide whether 'principle of law' / 'legal principle' is a good way to describe the dignity norm. I will suggest that the idea that the dignity norm can be described meaningfully as a legal principle really fails to get off the ground at all, so that recourse to more detailed argument about principles and their operation becomes unnecessary. What we do need, at this stage, is a mainstream description (since an uncontested one would be impossible) of what a 'principle of law' is, and a basis for arguing that 'respect for human dignity' either fits or (as I will claim) does not fit with that description.

Academic discussion of legal principles often begins by distinguishing principles from rules and emphasising their character as 'non-rule standards'; indeed, Dworkin has *defined* principles as being 'the whole set of . . . standards other than rules' (Dworkin, 1978, p. 22). There are various suggestions about how the two types of standard can be distinguished from one another. One suggested criterion is that principles are 'norms of relatively high generality' and rules 'norms of relatively low generality' (Alexy, 2002, p. 45). Other suggestions include that rules are 'created' norms, whereas principles evolve; that principles are 'reasons for rules'; and that principles are 'norms of argumentation' whereas rules are 'norms for behaviour' (p. 46).

Dworkin (1978) provided the most celebrated version of the rule/principle distinction. He observed that, whereas '[r]ules are applicable in an all-or-nothing fashion' (p. 24), a principle 'states a reason that argues in one direction, but does not necessitate a particular decision' (p. 26). Furthermore, unlike rules, principles have 'a dimension of weight or importance' (p. 26). When conflicting *rules* seem to apply to a case, only one of them can really apply, because rules operate in an all-or-nothing way; one of the conflicting rules must be invalid, or be subject to a newly identified exception. By contrast, when two competing *principles* seem to apply, the conflict can be resolved by balancing the principles against one another. The result of the balancing exercise will be that one of the principles outweighs the other, but, as Alexy reminds us, this 'means neither that the outweighed principle is invalid nor that it has to have an exception built into it' (Alexy, 2002, p. 50).

For Alexy, principles are 'optimization requirements': they are 'norms commanding that something be realized to the highest degree that is actually and legally possible' (Alexy, 2000, p. 295). Principles can thus be 'fulfilled to different degrees', depending on actual factual circumstances and 'countervailing principles and rules' (p. 295); and not only *can* they be fulfilled to different degrees; as norms commanding optimisation they *demand* to be fulfilled to the greatest degree possible. We cannot simply disregard a principle because another apparently applicable principle conflicts with it; we are bound to weigh them in the balance and, considering what is 'actually and legally possible', to optimise the application of them both. The general rule of thumb seems to be that the more serious the interference with one of the principles, the more important the satisfaction of the other (Alexy, 2002, p. 102). Alexy regards this 'optimisation' aspect of principles as representing 'the main distinction between rules and principles' (Alexy, 2000, p. 294).

4.2 Is the dignity norm a 'legal principle'?

References to (respect for) dignity as a 'principle' are widespread in legal (and legal-related) texts (see, e.g., Alexy, 2002; Andorno, 2010; Barroso, 2012; Dworkin, 2006, 2011; Hennette-Vauchez, 2007, 2011; Iglesias, 2001; Rendtorff, 2002; Simon, 2002), but they are problematic. Some of the problems are more or less particular to the individual writers' analyses, or to the contexts they are writing in. Alexy, for example, describes dignity (in the context of German constitutional law) as both a rule *and* a principle (Alexy, 2002, p. 63). Furthermore, what is meant by 'dignity' in the German Basic Law seems to vary: on the one hand, the Federal Constitutional Court has characterised the set of conditions under which dignity is inviolable as 'the absolutely protected core area of private autonomy' (p. 63); on

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the other, it is difficult to see how it is *autonomy* that is being protected by the same court in striking down, for reasons of human dignity, legislation that would permit the shooting down of hijacked airliners even if innocent passengers were on board.[19] Thus, when Alexy describes dignity as a principle, this tells us little about either the form or the content of 'dignity', or even whether what he is describing as a 'principle' is something we are content to call 'dignity' at all. Similarly, because Barroso defines dignity in a way that identifies it very closely with individual autonomy, when he describes dignity as a 'principle' he is arguably saying little more than that *individual autonomy* is a legal principle, which we know already.

Barroso's description of dignity as a legal principle also suffers from another flaw, however, and this one, I think, must prove fatal to *any* attempt to define dignity as a legal principle. Having described dignity as a 'principle'" (2012, p. 356), Barroso acknowledges Dworkin's point that principles have a 'dimension of weight' (p. 355) and Alexy's account of principles as norms that are 'subject to balancing and to proportionality, and [which], depending on context ... may give way to opposing elements' (p. 355). From all of this, Barroso draws the (not unreasonable) conclusion that dignity can be balanced against other values, and may not always prevail: 'human dignity, as a fundamental value and principle, should take precedence in most, *but not all*, situations' (p. 357, emphasis added).

In its own narratives about itself, however, law, in jurisdictions that claim to value dignity at all, claims to elevate human dignity *above* all other values and interests, and *never* to permit its violation. Klein (2002) has observed that, in German constitutional law,

> '*any* encroachment upon human dignity means a violation. This is not the case with other human rights,[20] where interference with the protected rights may be justified by the limits which are, expressly or implicitly, provided for by the Constitution. By contrast, human dignity has an *absolute effect*. There is, according to the jurisprudence of the courts, no way to balance other legal interests, be they of other individuals or of the community, with the dignity of a person.' (pp. 148–49, emphases added)

Accordingly, in the *German Airliner* case,[21] the German Federal Constitutional Court held that:

> 'the duty to respect and protect *human dignity* generally forbids making any human being a mere object of the actions of the state. *Any* treatment of a human being by the state that–because it lacks the respect for the value that is inherent in every human being–would call into question his or her quality as a subject, [his or] her status as a subject of law, is *strictly forbidden*.' (para. 121, emphases added)[22]

We are accustomed (following Dworkin and Alexy) to understand legal principles as the kinds of norm that may be balanced against other values and realised to a greater or lesser extent. By contrast, any failure to realise dignity completely seems to be unconscionable. It is unlike other principles in that, although various aspects of dignity must often be weighed against one another to get the focus of the dignity picture right, *dignity itself* is never truly weighed against other values: no outcome can be both dignity-violating *and* legally acceptable.

19 See discussion in Section 4.1.

20 Dignity is treated as both a right and a principle in the German Basic Law (Alexy, 2002, p. 63).

21 See *supra* note 18.

22 Translation taken from Naske and Nolte (2007, p. 467).

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Notwithstanding that in many situations human dignity *is* in fact violated, narratives (particularly *legal* narratives) about dignity insist that violations of human dignity are, legally speaking, impermissible and intolerable. As such, the official legal story about dignity – implicitly, if not explicitly – is that it is an 'absolute' standard. It is difficult to bring to mind any other legal norm which has such an apparently absolute character: the principle of sanctity is, ironically, not sacred, since it has been held that it must occasionally yield to the principle of self-determination;[23] and the exercise of personal autonomy is of course subject to an infinite number of legal and practical limitations. The requirements of dignity, by contrast, do not yield to competing demands. Dignity does not conform to the mainstream understanding of what a legal principle is, then, since dignity is not treated, in law, as a value that may be weighed in the balance against competing values and realised incompletely.

It is difficult to unearth *any* judicial rhetoric which purports explicitly to weigh or balance dignity against other things, or to enquire about the proper degree of dignity to be afforded in the light of other considerations. It can be tempting to characterise the judicial weighing exercises that pit one right against another as involving the weighing of dignity.[24] Because of dignity's supposedly 'foundational' role in human rights (Waldron, 2013), however, this activity is best understood as an attempt to get the dignity picture as a whole into the best possible focus – to realise dignity in the fullest way possible – rather than in terms of deciding 'how much dignity' we should settle for in a given case, and how much we can sacrifice. The law's official narrative is that *we cannot sacrifice any*: if dignity is at stake, it demands to be satisfied completely, even at the expense of satisfying other important values. In a legal system that includes the dignity norm, no practice or policy could survive a finding that it violated human dignity, and any judgment or statute that openly admitted to fulfilling the demands of dignity only partially, or not at all, would be legally (and probably culturally, politically and ethically) unacceptable.

The reasons why law is unable to countenance partial- or non-fulfilment of the dignity norm will become clearer in the course of Section V, where I will argue that, where the dignity norm is present, it operates not as one principle among many, but as the *substantive basic norm* of the legal systems in which it is present; the norm expressing (in the words of the opening quotation) 'the ultimate and essential goal of all law.

V. Respect for dignity as the 'substantive basic norm'

There is ample (and growing) evidence that the dignity norm has some sort of elemental role in law. In international and European human rights law systems, as noted already, dignity is treated by many as foundational, and as capable of grounding a multitude of individual rights and freedoms. The Canadian Supreme Court has repeatedly declared dignity an 'essential interest' and the basis for Canadian law's guarantee of substantive equality (Leckey, 2005, p. 63). Meanwhile, references to the pre-eminence of dignity abound in recent academic literature (both legal and otherwise). For example, an emerging trend in international bioethics seems to be rejecting the dignity-scepticism of the previous mainstream (which privileged autonomy) and recognising respect for dignity as '*the* basic normative principle' (Haugen, 2010, p. 204) and 'central among international norms of bioethics' (Andorno, 2010, p. 58, my translation).[25] More generally, the dignity norm has been

23 *Airedale NHS Trust v. Bland* [1993] A.C. 789 at 826H-827A *per* Hoffmann LJ.

24 *Station Film Co. v. Public Council for Film Censorship* (1994) 50 PD (5) 661 is one example; the court purported to balance human dignity against freedom of expression. The case is probably better understood, however, as an attempt to give full effect to the value of dignity by weighing competing aspects of it.

25 'La principe de la dignité humaine occupe une place central au sein des norms internationals relatives à la bioéthique.'

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described variously as a 'super-principle' (Andorno, 2011), a 'meta-principle' (Knoepffler and O'Malley, 2010, p. 69), a 'unique and higher-order principle ... the principle behind the principles, the foundation of the edifice of ethical principles' (p. 70), 'the highest principle of the [German] constitution' (Dürig, quoted in Alexy, 2002, p. 245), a 'fundamental value' (Barroso, 2012, p. 354), 'the ultimate legal value' (Munby, 2011, p. xiv) and a 'substantive basic concept' (Alexy, 2002, p. 299). Dignity itself has been said to '[come] as close as any notion to being a universal good' (Mattson and Clark, 2011, p. 305).

Formulations that make use of the language of principles ('super-principle', 'meta principle', 'highest principle', 'higher-order principle', 'basic normative principle', and so on) are unhelpful, I think: not only because such language is redolent of Dworkinian balancing, which I have already argued is inapplicable in the case of the dignity norm, but also because these terms imply that the difference between dignity and 'other' principles of law is a matter of degree, whereas my claim here is that the dignity norm has a completely different status in law from that of 'ordinary' legal principles. The difference between the two is, I claim, a matter of quality and not quantity. Similarly, referring to dignity as a 'fundamental value' fails to capture the sense in which dignity, unlike other values, is not something which the law is prepared to balance against other considerations.

Alexy's use of the phrase 'substantive basic concept' to describe the status of the idea of dignity in the German Basic Law (Alexy, 2002, p. 299) comes closest, I think, to expressing *both* the idea that the dignity norm is 'fundamental' in the sense of being of great importance, and *also* the idea of a *necessary connection* between dignity and law. Even this form of words is not ideal, however. I have argued elsewhere (Neal, 2012a) that it is essential to recognise that 'dignity' is not a single concept, but rather a plurality of concepts grouped under an 'organising idea' (see also Pollmann, 2011, p. 248), and describing dignity as '*a* [single] substantive basic concept' obscures this important point.

In my view, the best way to describe the legal role of the dignity norm is as *the substantive basic norm* in a given legal system. This formulation has the advantage of referring specifically to the dignity *norm* itself, rather than to 'dignity' as an abstract idea, and it also evokes the kind of necessary and foundational connection between dignity and law that I am arguing for.

My claim that dignity is the substantive basic norm may be prefigured in the work of Gustav Radbruch in the 1940s. Jovanović has argued (Jovanović, 2013) that Radbruch's post-World War II writings, published recently in English (Radbruch, 2006a, 2006b), posit a test for legal validity that essentially amounts to a dignity-test. Jovanović points to Radbruch's observations that some laws 'deliberately betray the will to justice – by, for example, arbitrarily granting and withholding human rights' and that these laws 'are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them' (Radbruch, 2006b, p. 14, cited by Jovanović, 2013, p. 156). But in what sense is this a 'dignity' test, rather than a general 'justice' test, or perhaps a (slightly) more specific 'equality' test? It seems to be equality, rather than dignity, that Radbruch is concerned with when he writes that: 'Where there is not even an attempt at justice, where *equality*, the core of justice, is deliberately betrayed in the issuance of positive law, then [a] statute is not merely "flawed law", it lacks completely the very nature of law' (Radbruch, 2006a, p. 7, emphasis added). Jovanović argues, however, that 'the ultimate criterion of legal validity in [Radbruch's] formula concerns ... human dignity' (Jovanović, 2013, p. 145). He bases this on the threshold Radbruch sets for invalidity, and the examples that inspired Radbruch's formulation in the first place.

For Radbruch, the threshold for invalidity is reached when 'the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law", must yield to justice' (Radbruch, 2006a, p. 7). (Although Radbruch is writing specifically about statutes here, his formulation can be applied more widely to all 'positive law'.) In Radbruch's formula, according to Jovanović, 'the threshold for extreme injustice amounts to the infringement of human dignity'

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(Jovanović, 2013, p. 162) In other words, it is when positive law violates human dignity that 'an intolerable degree' of conflict between law and justice occurs. For example, Radbruch writes that '[l]egal character is … lacking in all the [Nazi] statutes that treated human beings as subhuman and denied them human rights' (Radbruch, 2006a, p. 8). Jovanović points to other examples in Radbruch's work of references to certain Nazi laws' 'bestiality' and their 'negation of humanity and human rights' (Jovanović, 2013, p.162). Radbruch was writing in the mid 1940s, before it had become second nature to understand dignity as the core value animating the substance not only of national constitutions (including the German Basic Law of 1949) but of international human rights law. Nevertheless, it seems clear that any law which treated people as 'subhuman' or 'denied them human rights', or which 'arbitrarily grant[ed] or with[held] human rights' would be criticised nowadays under human rights law in terms of dignity-violation. To this extent, Jovanović's argument that *dignity* is Radbruch's ultimate criterion appears plausible.

If Jovanović's interpretation is correct, then Radbruch makes a very specific type of connection between dignity and law, wherein law's respect for dignity is a prerequisite for its validity. This is the same sort of connection I want to argue for here. In Sections 5.1 and 5.2, I will explore the idea of respect for dignity as the 'substantive basic norm' by considering two important ways, identified by Waldron in his recent work (2005, 2012b), in which law and dignity are necessarily and fundamentally connected.

5.1 Law's *procedures* reveal a necessary connection between law and dignity

Jeremy Waldron has recently wondered (Waldron, 2012b) whether there is 'a conceptual connection between dignity and the very idea of law' (p. 205) that runs even deeper than the strong association between dignity and human rights. Waldron acknowledges that 'the very form and structure of a right conveys the idea of the right-bearer's dignity' (p. 204); as he once put it memorably, 'rights reek of dignity' (2012a, p. 50). But he maintains that enacting and safeguarding rights is only *one* of the ways in which law protects dignity. Drawing on Fuller's discussion of the 'inner morality of law' (Fuller, 1964), Waldron argues that in fact respect for dignity permeates the whole of the legal landscape.

He points, first, to law's 'pervasive emphasis on self-application' (2012b, p. 206); in other words, its preference for 'people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state' (p. 206). In emphasising self-application, law assumes that 'ordinary people are capable of applying norms to their own behavior' (p. 208)–in effect, of 'acting like officials–recognizing a norm, apprehending its bearing on their conduct, making a determination, and acting on that' (p. 208). This shows that

> 'legal systems operate … 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.' (p. 206)

Waldron agrees with Fuller that this dedication to promoting individual agency and self-government 'represents a decisive commitment by law to the dignity of the human individual' (p. 206). Inevitably, there are many cases where some form of official dispute resolution is required, but in such cases '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' (p. 206, emphasis added).

Thus, law tries to enable self-application to some extent, even where institutional intervention is unavoidable. But Waldron sees respect for dignity as embedded in legal processes anyway, since '[d]ignity seems to hook up in obvious ways with juridical ideas about hearings and due process and status to sue' (2012b, p. 204). He identifies several features of legal processes that he says

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evince a commitment to respect for dignity. The structure of legal hearings, for example, gives 'each party … the opportunity to present arguments and submissions … and answer those of the other party. In the course of all of this, both sides are treated respectfully, and above all listened to' (p. 210). This structure 'embodies a crucial dignitarian idea–respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves' (p. 210). The nature of legal argumentation and legal decision-making, too, is respectful of dignity: in requiring reasoned arguments from both sides, followed by a decision that proceeds upon them and is justified by way of reasons, law 'presents itself to its subjects as something that one can make sense of' (p. 210). This is not only about making sense of individual decisions, but also about placing individual outcomes in context so as to make sense of the body of law as a whole system that has a logic and coherence to it (p. 210).

Another feature of law that reveals its commitment to respecting dignity, Waldron says, is the aspiration that all should 'have equal access to the law, participate equally in its proceedings, and enjoy the benefits of its confidence' (2012b, p. 215). Although, as Waldron notes, it would be 'somewhat fictitious' to claim that this happens in practice, nevertheless law does not just 'throw us back upon our own natural resources' where access to justice is concerned, but uses 'a variety of practices and techniques to create something [like] a rough and artificial equality in standing before the law' (p. 215). One of the most important of these is legal representation. Dignity demands that everyone has the opportunity to present her case and be heard, but a particular litigant may lack knowledge and understanding of the law; she may lack the intelligence necessary to choose the best arguments and build a clear and persuasive legal case; she may lack the confidence for public speaking, or have an unpleasant voice or annoying mannerisms; she may, indeed, be worn down or depressed by the circumstances which have led her to court in the first place. The right to counsel safeguards the 'dignity of being heard' by providing for professional advocacy in order to level the playing field, and thus represents yet another dignity-protecting feature of the legal process (pp. 215–16).

In summary, wherever possible, law '[respects] people enough to entrust them with front-line self-application of legal norms' (2012b, p. 211). Where complete self-application is impossible, and institutional involvement is necessary, law's procedures respect people's dignity by literally 'giving them a fair hearing', and by seeking to make its processes and their outcomes intelligible, predictable and accountable. In all of these ways,

> 'law pays respect to the people who live under it, conceiving them as the bearers of reason and intelligence. The individuals whose lives law governs are treated by it as thinkers who can grasp and grapple with the rationale of that governance … .' (p. 211)

This reveals, Waldron says, 'an implicit commitment to dignity in the tissues and sinews of law' (p. 222).

Now, it could be claimed that these procedural requirements reveal a necessary relationship not between law and dignity, as Waldron and Fuller maintain, but between law and *autonomy*, since the requirements seem all to be about respecting individuals' capacities to think and speak for themselves and to be active participants in the legal process. As we have seen, self-application concerns 'the agency of ordinary human individuals' and 'people's capacities for practical understanding, for self-control, [and] for self-monitoring', and the requirements relating to hearings are about conceiving of individuals as 'bearers of reason and intelligence'.

Earlier, when arguing that dignity should not be conflated with autonomy, I acknowledged that autonomy will often represent an important part of the dignity picture. Accordingly, I want to agree that the features Waldron and Fuller highlight here are most immediately concerned with respecting individual autonomy, and would add that the respect for autonomy evident in law's procedures

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points *towards*, and not away from, a fundamental connection between law and dignity. Autonomy is far from being *all* there is to dignity: respecting dignity will not always involve respecting autonomy, and conversely, it is conceivable that someone might respect autonomy (and therefore get that part of the dignity picture right) while failing to respect other aspects of human dignity. At least to the extent that it respects autonomy, therefore, law honours dignity. But Section 5.2 brings out more clearly how the fundamental connection between law and dignity goes beyond respect for autonomy.

5.2 Law's commitment to *non-brutality* reveals a necessary connection between law and dignity

Even when law is at its most coercive, Waldron says, it evinces a commitment to respecting the dignity of its subjects. Indeed, '[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' (Waldron, 2012b, p. 217, emphasis added). Waldron connects this with an argument he has previously made about the prohibition on torture constituting what he calls a 'legal archetype' (Waldron, 2005). By 'archetype' he means 'a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle' (p. 1687). The prohibition on torture is an archetypal rule in this sense, according to Waldron, because it is 'emblematic of our determination to break the connection between law and brutality and to reinforce [law's] commitment to human dignity, even when law is at its most forceful and its subjects are at their most vulnerable' (p. 1739). He expands upon this as follows in the later piece:

> '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 … an enduring connection between the spirit of law and respect for human dignity …' (Waldron, 2012b, p. 218)

For Waldron, then, law's commitment to respect for human dignity is revealed not only by the fact that so many aspects of legal procedures presuppose a view of legal subjects as reasonable, intelligent beings who deserve to be listened to and treated fairly, but also by law's more general and fundamental rejection of brutality (the prohibition on torture being a totemic example of this rejection). It is the essence of legal coercion that it coerces 'without compromising the dignity of those whom it constrains and punishes' (Waldron, 2005, p. 1727); in this sense, *legal* coercion is 'genuinely respectful' (Waldron, 2012b, p. 217).

In 2005, Waldron was concerned only to point out the archetypal character of the prohibition on torture, and not to use this as the basis for any major claim about a necessary connection between dignity and law. By 2012, however, he is prepared to go further:

> '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.' (Waldron, 2012b, p. 215)[26]

In this passage, and also when he refers to 'an enduring connection between the spirit of law and respect for human dignity', Waldron comes very close to making the claim I advocate here,

26 The references to 'legal dignity' here draw the eye. However, Waldron does not develop any distinction between this and what he refers to as 'dignity' or 'human dignity' elsewhere.

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namely that the dignity norm is the 'substantive basic norm' of a legal system properly-so-called. Although he does not say so explicitly, his arguments seem to imply strongly that law is, of its very nature, a normative system that aspires to treat its human subjects as *beings whose dignity must be respected* – by one another, by the state, by corporations, organisations and groups, and (perhaps above all) *by law itself*, in its procedures, institutions, officials, norms, judgments, premises and background assumptions. This is the strong implication, for example, when Waldron says that law's emphasis on self-application (which he says 'represents a decisive commitment by law to the dignity of the human individual' (p. 206)) is essential in 'differentiating it sharply from systems of rule that work primarily by manipulating, terrorising or galvanising behaviour' (p. 206).

I have proposed in the context of another argument that human dignity can be understood in terms of a balance, or equilibrium, between the 'animal' and 'transcendent' aspects of human existence and selfhood (Neal, 2012b). Human beings embody (quite literally) a combination of the material/finite/mortal, and the transcendent/infinite/sublime, and our dignity consists in our (possibly unique) job of striking a balance between these two sets of qualities, while neither fetishising nor disparaging either. It is of the essence of this view of dignity that we are animals, but not brutes:

> 'We aspire to be, not *just* animals, but moral beings: to pursue second-order preferences and desires; to hold ourselves and others to standards of behaviour that surpass those we tolerate from other animals and would settle for from ourselves if we were content to fulfil only the animal side of our nature.' (Neal, 2012b, p. 194, emphasis added)

Human dignity is inherently 'non-brutal' precisely because it is a value that attaches to humans as 'transcendent animals' rather than 'brute beasts'. When Jovanović argues that Radbruch's formula is a *dignity*-test, specifically, he points to Radbruch's reference to the 'bestiality' of certain Nazi laws, and to the fact that, for Radbruch, the threshold for intolerability seems to occur at the point where the violation is 'brutal' (Jovanović, 2013, p. 162). A commitment to non-brutality *just is* a commitment to human dignity. As such, when Waldron identifies a fundamental commitment to non-brutality at the heart of law he is right to recognise this as a fundamental and necessary connection between the 'idea of law' and the idea of respect for human dignity. 'Even when law is at its most forceful and its subjects are at their most vulnerable' – including when the weight of the law is being brought to bear on those convicted or suspected of the most heinous crimes – law *ought* not to manipulate, terrorise, herd, break or beat its subjects.

But what are we to make of the fact that many legal systems *do* perpetrate violations of dignity? Waldron gives a list of examples from the US, including the torture of terrorist suspects, the deliberate humiliation of prisoners at Guantánamo Bay, the 'terrorising' conditions of detention in other US prisons, the treatment of defendants in courts, and the ultimate 'savagery' of the death penalty. He cites France, the UK, Russia and Israel as other examples of legal systems which have 'fallen short' of the demands of dignity. Does this mean that the idea of a necessary and fundamental connection between law and dignity is illusory? No, says Waldron:

> '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 and, as in ordinary moral life, it would be a 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

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> as a simple cynic about their commitments or to neglect the power of [immanent] critique as the basis of a reproach for their shortcomings.' (Waldron, 2012b, p. 221)

It would be wrong to deny the necessary connection between law and dignity on the basis that law sometimes realises the ideal of respect for dignity incompletely, and sometimes actually violates dignity; even when this occurs, there is still an implicit 'promise' to respect dignity written into, as Waldron puts it 'the tissues and sinews of law'. A commitment is not absent simply because we sometimes fail to make good on it. Note too Waldron's final point that if we use examples of failure to deny that the commitment is there in the first place, we can only deplore the shortcoming from an external perspective. We cannot level the particularly powerful kind of criticism that says to the evildoer: 'you are offending not only against my standards, but against your own: you are failing in terms of your own aspirations and commitments.' On the other hand, if we embrace the idea that a commitment to respect for human dignity is one of the defining characteristics of a 'legal system', we can then condemn practices and policies that neglect, ignore or positively violate dignity on the basis that these have no place in any legal system at all.

VI. Conclusion

What might be gained and lost, in a practical sense, by acknowledging the role of the dignity norm as a 'substantive basic norm'? In particular, since this understanding posits the dignity norm as a foundational *critical* standard, might it deprive the norm of its current role as a *practical* standard in legal reasoning?

Certainly, when understood as a right or a principle, the dignity norm is treated as a justiciable value; but it is not necessarily robbed of its justiciability when understood in the way I am proposing. Although I have identified some ways in which the idea of a '*right* to dignity' might be problematic, I have not suggested that it can never be appropriate to refer to a 'right to dignity'; indeed, in some cases it might serve some important expressive function to do so. My point has been only that the idea of dignity-as-a-right in itself is vulnerable, and cannot be the only, or even the main way of characterising the dignity norm. To the extent that it is vulnerable on grounds of lack of logic or normative contentlessness, its current usefulness as a justiciable standard is questionable anyway.

Similarly, my argument against understanding the dignity norm as a legal *principle* need not mean the loss of a practically useful standard; a key part of my case against the 'principle' label has been precisely that the dignity norm is not used (weighed, balanced and incompletely realised) like a legal principle anyway; as such, I am arguing for a re-labelling that better reflects its actual use by judges and jurists, not recommending a change of practice. It is submitted, therefore, that we have nothing to lose by understanding the dignity norm in the way I propose here.

There are important things to gain, however. My primary motivation in exploring the function of the dignity norm has been to challenge the tendency to ascribe inappropriate labels to it, either by conflating it with autonomy, or by describing the dignity norm as straightforwardly a 'right' or a 'principle'. We stand to gain conceptual clarity, therefore. Moreover, if the dignity norm is indeed a fundamental benchmark of justice, as Waldron's work and the treatment of dignity by many other legal scholars seem to suggest, then recognising it as such reveals an important, but hitherto somewhat hidden, criterion for assessing law's moral validity, and this must also represent a significant gain.

VII. References

ALEXY, Robert (2000) 'On the Structure of Legal Principles', *Ratio Juris* 13(3): 294–304.

ALEXY, Robert (2002) *A Theory of Constitutional Rights* (trans. Julian Rivers). Oxford: Oxford University Press.

https://doi.org/10.1017/S1744552313000359 Published online by Cambridge University Press

ALEXY, Robert (2010) 'The Dual Nature of Law', *Ratio Juris* 23(2): 167–82.
ANDORNO, Roberto (2010) 'Dignité humaine, droits de l'homme et bioethique: quel rapport?', *International Journal of Bioethics* 21(4): 51–59.
ANDORNO, Roberto (2011) 'The Dual Role of Human Dignity in Bioethics', *Medicine, Health Care and Philosophy* (published online 16 December 2011).
BARROSO, Luís R. (2012) 'Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse', *Boston College International and Comparative Law Review* 35(2): 331–93.
DUPRÉ, Catherine (2009) 'Unlocking Human Dignity: Towards a Theory for the 21st Century', *European Human Rights Law Review* 2: 190–206.
DWORKIN, Ronald (1978) *Taking Rights Seriously*. London: Duckworth.
DWORKIN, Ronald (1986) *Law's Empire*. Cambridge, MA: Harvard University Press.
DWORKIN, Ronald (1993) *Life's Dominion: An Argument About Abortion and Euthanasia*. London: HarperCollins.
DWORKIN, Ronald (2006) *Is Democracy Possible Here? Principles for a New Political Debate*. Princeton: Princeton University Press.
DWORKIN, Ronald (2011) *Justice for Hedgehogs*. Cambridge, MA: Belknap Press of Harvard University Press.
ENDERS, Christoph (2010) 'The Right to Have Rights: The Concept of Human Dignity in German Basic Law', *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)* 2(1): 1–8.
FOSTER, Charles (2011) *Human Dignity in Bioethics and Law*. Oxford: Hart Publishing.
FULLER, Lon (1964) *The Morality of Law*. New Haven: Yale University Press.
GAYLIN, Willard (1984) 'In Defense of the Dignity of Being Human', *Hastings Center Report* 14(4): 18–22.
GEWIRTH, Alan (1978) *Reason and Morality*. Chicago: University of Chicago Press.
GLENSY, Rex (2011) 'The Right To Dignity', *Columbia Human Rights Law Review* 43(1): 65–142.
GRIFFIN, James (2009) *On Human Rights*. Oxford: Oxford University Press.
GÜNTHER, Klaus (1988) *Der Sinn für Angemessenheit*. Frankfurt: Suhrkamp.
HALE, Brenda (2009) 'Dignity', *Journal of Social Welfare and Family Law* 31(2): 101–108.
HARRIS, George (1997) *Dignity and Vulnerability: Strength and Quality of Character*. Berkeley and Los Angeles: University of California Press.
HAUGEN, Hans M. (2010) 'Inclusive and Relevant Language: The Use of the Concepts of Autonomy, Dignity and Vulnerability in Different Contexts', *Medicine, Health Care and Philosophy* 13: 203–213.
HENNETTE-VAUCHEZ, Stéphanie (2007) 'When Ambivalent Principles Prevail: Leads for Explaining Western Legal Orders' Infatuation with the Human Dignity Principle', *Legal Ethics* 10: 193. Online: <http://ssrn.com/abstract=1093274>.
HENNETTE-VAUCHEZ, Stéphanie (2011) 'A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence', *International Journal of Constitutional Law* 9(1): 32–57.
IGLESIAS, Teresa (2001) 'Bedrock Truths and the Dignity of the Individual', *Logos: A Journal of Catholic Thought and Culture* 4(1): 114–34.
JOVANOVIĆ, Miodrag (2013) 'Legal Validity and Human Dignity: On Radbruch's Formula', in Winfried Brugger and Stephan Kirste (eds), *Human Dignity as a Foundation of Law: Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009*. Stuttgart: Franz Steiner Verlag, 145–67.
KILLMISTER, Suzy (2010) 'Dignity: Not Such a Useless Concept', *Journal of Medical Ethics* 36: 160–64.
KLEIN, Eckart (2002) 'Human Dignity in German Law', in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse*. Leiden: Martinus Nijhoff, 145–60.
KLUG, Heinz (2003) 'The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?', *Montana Law Review* 64: 133–55.
KNOEPFFLER, Nicholas and O'MALLEY, Martin (2010) 'Human Dignity: Regulative Principle and Absolute Value', *International Journal of Bioethics* 21(3): 63–76.

https://doi.org/10.1017/S1744552313000359 Published online by Cambridge University Press

LECKEY, Robert (2005) 'Embodied Dignity', *Oxford University Commonwealth Law Journal* 5(1): 63–83.
MACKENZIE, Catriona and STOLJAR, Natalie (eds) (2000) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*. New York: Oxford University Press.
MACKLIN, Ruth (2003) 'Dignity is a Useless Concept', *British Medical Journal* 327: 1419–20.
MAIER, Andreas (2010) 'Torture: How Denying Moral Standing Violates Human Dignity', in Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser and Elaine Webster (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated*. London: Springer, 101–117.
MAMBERTI, Dominique (Archbishop) (2012) Statement at the 67th Ordinary Session of the General Assembly of the United Nations on the Rule of Law at the National and International Levels, UN Headquarters, New York, Monday 24 September 2012. Available at: ‹http://www.vatican.va/roman_curia/secretariat_state/2012/documents/rc_seg-st_20120924_rule-of-law_en.html›.
MATTSON, David and CLARK, Susan (2011) 'Human Dignity in Concept and Practice', *Policy Sciences* 44: 303–319.
MCCRUDDEN, Christopher (2008) 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 19(4): 655–724.
MUNBY, James (2011) 'Foreword', in Charles Foster, *Human Dignity in Bioethics and Law*. Oxford: Hart Publishing, xiii–xvi.
MUNIZ, Joaquín R.-Toubes (1997) 'Legal Principles and Legal Theory', *Ratio Juris* 10(3): 267–87.
NASKE, Nina and NOLTE, Georg (2007) 'Legislative Authorization to Shoot Down Aircraft Abducted by Terrorists if Innocent Passengers Are On Board – Incompatibility with Human Dignity as Guaranteed by Article 1(1) of the German Constitution', *American Journal of International Law* 101(2): 466–71.
NEAL, Mary (2012a) 'Dignity, Law and Language-Games', *International Journal of the Semiotics of Law* 25(1): 107–122.
NEAL, Mary (2012b) '"Not Gods But Animals": Human Dignity and Vulnerable Subjecthood', *Liverpool Law Review* 33: 177–200.
NEDELSKY, Jennifer (1989) 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', *Yale Journal of Law and Feminism* 1: 7–36.
NORDENFELD, Lennart (2004) 'The Varieties of Dignity', *Health Care Analysis* 12(2): 69–81.
OLIVER, Sophie (2010) 'Dehumanization: Perceiving the Body as (In)Human', in Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser and Elaine Webster (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated*. London: Springer, 85–97.
O'MAHONY, Conor (2012a) 'There Is No Such Thing as a Right to Dignity', *International Journal of Constitutional Law* 10(2): 551–74.
O'MAHONY, Conor (2012b) 'There Is No Such Thing as a Right to Dignity: A Rejoinder to Emily Kidd White', *International Journal of Constitutional Law* 10(2): 585–87.
PINKER, Steven (2008) 'The Stupidity of Dignity', *The New Republic*. Available at: ‹http://www.tnr.com/article/the-stupidity-dignity›.
POLLMANN, Arnd (2011) 'Embodied Self-Respect and the Fragility of Human Dignity: A Human Rights Approach', in Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser and Elaine Webster (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated*. London: Springer, 243–61.
POSCHER, Ralf (2009) 'Insights, Errors, and Self-Misconceptions of the Theory of Principles', *Ratio Juris* 22(4): 425–54.
RADBRUCH, Gustav (2006a) 'Statutory Lawlessness and Supra-Statutory Law (1946)', *Oxford Journal of Legal Studies* 26(1): 1–11.
RADBRUCH, Gustav (2006b) 'Five Minutes of Legal Philosophy', *Oxford Journal of Legal Studies* 26(1): 13–15.
RAZ, Joseph (1972) 'Legal Principles and the Limits of Law', *Yale Law Journal* 81(5): 823–54.

https://doi.org/10.1017/S1744552313000359 Published online by Cambridge University Press

RENDTORFF, Jacob D. (2002) 'Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability – Towards a Foundation of Bioethics and Biolaw', *Medicine, Health Care and Philosophy* 5: 235–44.

RÜTSCHE, Bernhard (2010) 'The Role of Human Dignity in the Swiss Legal System: Arguing for a Dualistic Notion of Human Dignity', *International Journal of Bioethics* 21(4): 83–92.

SCHACHTER, Oscar (1983) 'Human Dignity as a Normative Concept', *American Journal of International Law* 77(4): 848–54.

SCHROEDER, Doris (2012) 'Human Dignity and Human Rights: An Appeal to Separate the Conjoined Twins', *Ethical Theory and Moral Practice* 15: 323–35.

SIMON, Jürgen (2002) 'Human Dignity as a Regulative Instrument for Human Genome Research', in Cosimo M. Mazzoni (ed.), *Ethics and Law in Biological Research*. The Hague: Kluwer Law International, 35–45.

SMITH, Stephen W. (2008) 'Precautionary Reasoning in Determining Moral Worth', in Michael Freeman (ed.), *Law and Bioethics* (Current Legal Issues Vol. 11). Oxford: Oxford University Press, 197–212.

SUNSTEIN, Cass (1996) 'On the Expressive Function of Law', *University of Pennsylvania Law Review* 144(5): 2021–53.

WALDRON, Jeremy (1997) 'The Need for Legal Principles', *Iowa Law Review* 82(3): 857–66.

WALDRON, Jeremy (2005) 'Torture and Positive Law: Jurisprudence for the White House', *Columbia Law Review* 105(6): 1681–750.

WALDRON, Jeremy (2008) 'The Dignity of Groups', *Acta Juridica*, 2008(1): 66–90.

WALDRON, Jeremy (2012a) *Dignity, Rank and Rights*. New York: Oxford University Press.

WALDRON, Jeremy (2012b) 'How Law Protects Dignity', *Cambridge Law Journal* 71(1): 200–222.

WALDRON, Jeremy (2013) 'Is Dignity the Foundation of Human Rights?', *NYU School of Law, Public Law Research Paper No. 12–73*. Available at: ‹http://ssrn.com/abstract=2196074›.

WHITE, Emily K. (2012) 'There Is No Such Thing as a Right to Dignity: A Reply to Conor O'Mahony', *International Journal of Constitutional Law* 10(2): 575–84.

https://doi.org/10.1017/S1744552313000359 Published online by Cambridge University Press