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Human dignity: comparative and conceptual debates*

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Abstract

Is there a stable set of practices or assumptions surrounding dignity, and would these necessarily denote a single foundation sustaining that stability? Two contemporary debates offer contrasting approaches to these questions. In the first, two jurists, who share agreement over the appearances of dignity in post-1945 jurisprudence, disagree as to whether these appearances form an emerging ius commune or a contingent set of conceptions. The second, comparative, debate explores the functional consequences of dignity's aristocratic resonances. One position posits a continuing relationship between dignity and aristocratic nobility; the other, a functional division between dignity-within-aristocracy and dignity-within-democracy. This article insists that clarification of these debates depends upon a distinction between the epistemology and ontology of dignity, and, further, a distinction between dignity's genealogy and its grammar. It concludes that a complex genealogical inheritance is at the heart of much disagreement, and that attention to dignity's use clarifies its deficiencies and its continuing appeal.

Introduction

> 'Can one really speak in an intelligible way about the Nazi heritage of European dignitary law? [...] Intellectuals [...] like to talk, in our Kantianized post-war world, as though "dignity" were something that could easily be extended to all humans. But if we are honest about it, I think we can all acknowledge that the humans themselves tend to think of their "dignity" differently.' (Whitman, 2003, p. 265)

Dignity, or commonly human dignity, is a pre-eminently universal concept and as such is seemingly inappropriate for comparative study. Inhering in, or accruing to, all individuals regardless of human particularity, this concept broadly invokes and protects the integrity and the core rights of the individual. Nonetheless, both dignity and human dignity play (together and separately) different and contrasting functions in law, politics, bioethics, theology and other wider social discourses. Dignitarian positions are claimed by radicals and conservatives, positive law and Papal Encyclicals, liberation theologians and Roman Stoics. Comparison of this range of positions would be far-reaching and illuminating, but also, without conceptual guidance, unfocused and question-begging. Some a priori parameters have to be set to make identification of a range of dignitarian practices, assumptions or prohibitions comparatively significant. For reasons that are addressed in this article, setting parameters around dignity claims is difficult. For example, how do we distinguish what is rhetorical from what is meant as fundamental in invocation of a person's dignity, or how can we distinguish what is meant to draw upon, and what merely insinuate, the theological origins of 'the

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dignity of man'? Even if stable practices were found, and a common set of assumptions identified, would these necessarily denote a single underlying 'foundation' for that stability? After all, (human) dignity's universality rests on competing universal bases: anthropological (the human, the body), normative (humanity) and metaphysical (inherent properties in the individual or in our species). Given these various possible foundations, can we conclude that it is even possible for there to be a single concept of dignity? Comparative consideration of dignity cannot be wholly an exercise in functional comparison: it requires consideration of the assumptions, conditions and presuppositions that make variation possible.

Two contemporary debates offer intervention in, and contrasting answers to, these kinds of questions, and it is the nature, and particularly the underlying assumptions, of these discussions that form the object of enquiry in this article. In one debate, two jurists, who share agreement over the appearances of dignity in post-1945 jurisprudence, disagree as to whether these appearances together form a single emerging *ius commune* (an internationally shared legal discourse) or a polymorphous set of conceptions arising from an opaque core concept. In another, comparative, debate there is disagreement as to the universality (as ideologically neutral norm) that we expect to find in the functioning of dignity. One of these comparative positions suggests a continuing relationship between dignity, nobility and aristocracy. In opposition to this, a conceptual and functional break after 1945 is defended, insisting on discontinuity between dignity-within-aristocracy and dignity-within-democracy. The present analysis insists that clarification of these debates depends above all on observing a distinction between the epistemology and ontology of dignity, and, further, a distinction between functions internal and external to law, and, in the final analysis, between dignity's genealogy and its grammar. It concludes that a problematic metaphysical and theological genealogy is at the heart of much ostensive disagreement and that attention to its use clarifies both dignity's deficiencies and its continuing appeal.

The article proceeds by looking briefly at the history of 'dignity' and then turns to the two comparative and jurisprudential debates. Flowing from the distinctive nature and demands of clarifying these debates, a dual methodology is outlined reflecting the need for first comparative, then conceptual, study. The comparative study, which considers dignity within post-1945 detention law, concludes with a discussion of dignity's varied functions in law. The conceptual study concludes with a discussion of the relative merits of centralising the 'genealogy' or the 'grammar' of dignity. The article concludes by stressing that comparative and conceptual debates are mutually illuminating in this context.

I Dignity: history, contestation and methodology

1.1 History

In order to begin to delimit the complexity of the debates surrounding dignity, we can sketch a simplified history from its etymological roots in Latin to the post-1945 international legal order. The Latin term *dignitas* denotes both the status of an individual (a 'dignitary') and the bearing associated with that status (Agamben, 2002, p. 66). This bivalence grows from distinct legal and ethical currents within Roman thought. On the one hand, the aristocratic ethics of Stoicism centralised dignified bearing as part of its holistic socioethical interpretation of Socratic and Stoic Greek philosophy (Cicero, 2000, p. 44). It is also linked, through Roman law, with 'persona', with its Latinate origins in the 'mask' that the individual adopts as an individual with juridical status within a court of law (Cancik, 2002, p. 21). Thereby (Stoic) aristocratic self-control became entwined, through the Roman legal development of the *ius honorarium* (providing legal standing regardless of social status) and *ius gentium* (universal legality), with the pragmatic extension of legal standing to slaves (Lee, 1956). From these currents *dignitas* ultimately came to denote both a

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(normative) demand for, and the (factual) possibility of, a universal legal status and a shared form of human behaviour. The Renaissance mixed this Latinate inheritance with the notion of man as *imago dei* – man made in the image of God – in order to stress the elevation of the species as a whole; the 'dignity of man' asserted humans' elevation, including their dominion over nature, within this worldview (Kristellar, 1979, p. 173). In the revolutionary era this was progressively democratised and materialised, and human dignity was accomplished through both the metaphysical elevation of man and, more concretely, the levelling of the station between common man and aristocrat (Paine, 1791/1969, p. 194). The philosophical origins of these political developments lie in the Enlightenment, which, through Kant in particular, sought to derive man's dignity from autonomy and rationality rather than revealed religion (Hutchings, 1972). Whether or not Kant was successful in this, it can be said that, premised as it is on centralising human autonomy, the Enlightenment gave rise to a fully democratised 'human dignity' shifting between two slightly different arguments: autonomy as a distinguishing characteristic evidencing an *already qualitatively different* mankind from animals, or, rationality as the origin of autonomy providing a *self-contained* ground of dignity (Kant, 1785/1948, pp. 97f.).

In spite of, or perhaps because of, this ambiguous legacy, dignity became a key normative principle in the post World War II international arena (Glendon, 2001). As a foundational norm within the United Nations, its organs and the rule of law it promulgated, human dignity served to signify that moral consensus, indeed universality, was the necessary response to the war's atrocities. International legality was premised on a shared commitment to the value of the individual over and above the interests of the state. Such value does not always have clear political or moral correlates, but it does have clear legal consequences in requiring that all members of the international community work to prohibit the worst excesses possible in war (international humanitarian law) and to observe minimal standards of civil, political and social recognition (international human rights law). These bare commitments to an international rule of law, articulated through an appeal to human dignity, continue to have a rich, though not uncontested, life within international and domestic legal discourse.

In fact, the relative stability of human dignity claims within public international law is potentially misleading. A term's having global discursive currency does not entail its garnering universal assent, nor does human dignity's definitional universality necessarily entail global significance. Consideration of dignity in terms of its connotations of bearing, grace and aristocracy forms a more philosophically complex starting point to outline the full range and scope of contestation that dignity has generated. These aristocratic or behavioural connotations are problematic for any theory that associates dignity with universality – aristocratic status cannot be, by definition, a universal property – and emphasis on them is a strategic move in criticising the use of dignity (Pinker, 2008). Most radically it has been claimed, on the basis of these aristocratic connotations, that there can be use, indeed an increase in the use, of dignity within highly hierarchical or stratified societies. Note that this, prima facie, accords with the assumption that discourses of dignity have evolved in culturally specific ways rather than its having a stable 'universal' core. And it is clearly plausible that very different functions arise from an etymologically complex word like 'dignity'. However, this 'evolutionary' narrative seems to deny us any critical purchase if we wish to distance ourselves entirely from 'aristocratic dignity': it is the same word, albeit made to function in a way unhelpful for discussion of normative universality. If, however, we reject any continuity between 'aristocratic dignity' and 'contemporary dignity' we may be therefore obliged to deny that there is any conceptual or normative continuity in dignity claims at all. It places us in the position of either accepting radical indeterminacy in meaning (i.e. accepting dignity simply means whatever people say it means), or, conversely, stipulating that certain conceptions of dignity should be privileged as primary or definitive. Neither of these positions, certainly without further justification, is satisfactory.

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1.2 Comparative and conceptual debates

From this complex history, bound up as it is with anthropology, theology, ethics and law, it is not surprising that dignity is a locus of debate and heavily contested. Dignity is a valuable prize. Because of its conclusory air (appeal to dignity simply *feels* or appears decisive and definitive) it can be deployed as a normative vanishing point where debate has to end. Accordingly, contemporary debate concerning dignity takes place in a number of fields, within which dignity appears crucial and normatively decisive (Malpas and Lickiss, 2007). I will focus on two predominantly legal academic debates: a comparative debate concerning the function of dignity (this centres upon problems concerning the *functional variations* of dignity), and a conceptual debate concerning the content and bases of the notion of dignity (this generates problems concerning the *normative stability* of dignity). These will be considered respectively.

An intriguing set of problems is generated within a recent comparative discussion of dignity within nineteenth- and twentieth-century German law. It is suggested by James Q. Whitman that, moving away from the social inequalities of the nineteenth century, and in particular as a means of controlling the (pseudo-)aristocratic practice of duelling, German law increasingly afforded *locus standi* to working men to settle honour differences and honour slights (2000; 2003). This access to what now might be classified as 'personality law' was increased, not as we might expect reduced, by the Nazis coming to power. The Nazi preoccupation with honour led to the creation of popular 'people's' courts wherein honour claims could be contested regardless of the class of the claimant. In fact, the courts were often used for workers to claim that they had been harmed or slighted by managers who should have been exercising respect for workers through leadership responsibilities delegated from, and vicariously exercised by, the Fuhrer himself (the '*Führerprinzip*') (Whitman, 2003, p. 256). This affording of legal standing is, of course, not purely egalitarian – this honour, and this form of legal recognition, is open to Aryans only. It is nonetheless a recognition, within working men and women, of something resembling aristocratic honour. Consequently, says Whitman, the 1949 German Basic Law's lauding of human dignity as the first principle of the constitution[1] and dignity as the apex of the constitution's 'objective values', evidences continuity not discontinuity with the Third Reich. Conversely, two scholars – Gerald Neuman and Roger Cotterrell – engaging with Whitman, contest this assertion of continuity and its implicit undermining of a break between pre- and post-war German law. Cotterrell explores Whitman's position as a comparativist and suggests that certain background assumptions equating civility with a distinctively American conception of liberty lead him inevitably to a denigration of European legal cultures (Cotterrell, 2007). Neuman argues that Whitman has construed the scope of dignity claims too specifically, leading to a counter-intuitive conclusion: 'in post-War discourse, the obligation to respect human dignity signifies a *minimum level* of treatment owing to all persons [. . .] I doubt that older norms of social honour can provide [. . .] guidance for this purpose' (Neuman, 2003, p. 273, emphasis in original). Post-war, dignity claims do not demand a 'levelling-up' of the social hierarchy to universal aristocratic status (p. 272). It is Neuman's counter-argument that I will concentrate on, suggesting that it is correct but incomplete. Whitman is right in that we cannot ignore the honorific connotations of dignity, and Neuman appears in part to be simply stipulating away unfortunate and unhelpful conceptions of dignity. Nonetheless, if Nazi dignity is simply synonymous with 'honour' then there is clearly discontinuity with post-1945 jurisprudence, which Whitman himself concedes is 'Kantianised' (2003, p. 265). Not only that, it appears in some respects simply wrong-headed: Nazi honour, and the understanding of human dignity that the present German Constitution shares with international law, reflect palpably different worldviews, and denying any contextual discontinuity ignores sixty years of jurisprudence and politico-legal activity. Thus, I too will argue against

1 Basic Law for the Federal Republic of Germany 1949, Article 1(1).

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Whitman's conclusion, but suggest, observing a distinction between ontology and epistemology, that the problem with Whitman's continuity thesis lies in a twofold blurring of these levels, both in terms of dignity's varied appearances and function as both norm and external critique (section 2.5), and in terms of distinguishing the genealogy of dignity and its grammar within debate (section 3.4).

A different set of problems is generated by recent jurisprudential concern with the content of 'human dignity'. The issue, as conducted by Christopher McCrudden and Paulo Carozza, is not one of function but of axiological stability, i.e. the basis of its normative force, not simply its functional efficacy (McCrudden, 2008; Carozza, 2008). There is agreement that dignity has a functional stability: it is a perennial part of our moral and legal vocabulary; it meets denigration of the person with an assertion of the worth of the person. Nonetheless, on one side (Carozza) we see defence of a phenomenological core. Dignity articulates minimum standards of humanity which are often observed in the breach when there are 'gross and systematic violations of the life, liberty, integrity and equality' (2008, p. 936). On the other hand, McCrudden concludes that there is an irreducibly plural set of 'conceptions' of dignity, premised on, but not over-determined by, ideas of intrinsic dignity, extrinsic dignity and politico-legal dignity (2008, pp. 679f.). In other words, despite functional stability, McCrudden identifies an underlying normative instability which Carozza denies: 'No one jurisdiction has a coherent judicially interpreted conception of dignity across the range of rights, and no coherent conception of dignity emerges transnationally' (2008, p. 724). I would suggest that both are correct when articulated in the following terms. Consistency and stability can be found in the moral and legal 'grammar' of dignity – i.e. the linguistic use that can be made of it, and the limits of intelligibility in its use – but it is epistemologically unstable (some people will simply fail or refuse to see the presence or absence of human dignity), ontologically plural (there can be no definitive account of the foundation of dignity) and often compounded (it may be better in some circumstances to articulate moral and legal claims in other more specific terms). Note that this construction draws upon an ontological and epistemological division. We *know* dignity through using the language of dignity, particularly where there is grave or tragic diminution of the person. This can be separated from *how it exists at all*, a far more difficult question concerning how it is that the (diminished) value or property of humanness, personhood or humanity may become separated from, or is revealed as different from, the individual physical human. 'Human dignity' is part of an ongoing attempt to articulate what human being is – dignity is at the fracture point of human and animal – and does this by articulating both facts and values. Because this ontology is, and will remain, uncertain and contested, dignity itself, whether *simpliciter* or as human dignity, remains uncertain and contested, inhabiting, ultimately, an unresolved space between human-as-fact and human-as-value.

1.3 Methodology

This analysis is informed by the underlying assumption that dignity is conceptually problematic, but that it is nonetheless a significant and meaningful part of our moral and legal vocabulary. This forms a basis for intervening in both comparative and conceptual debates. Precisely because it is conceptually problematic and articulated differently in different contexts, we need to chart the range of appearances of dignity, whether or not they accord with prevailing (i.e. post World War II) orthodoxies. We also need to attend to the bases – perceptual, axiological, metaphysical or historical – of those appearances. These bases generate conceptual confusion, but they also allow it to play a role in a number of contexts. The article also insists upon the centrality of a division between ontology and epistemology not only in order to explain the concept's resilience but also as a methodological strategy that sensitises us to the influence that certain key appearances – honour, elevation, self-possession, sovereignty, etc. – have on our understanding. These can be divided from the fundamental bases of the appearances, namely a range of ethical and political sources, be they metaphysical, theological or axiological. Clarification of debates concerning dignity is not ultimately a question of identification of the 'correct' foundation for dignity claims, but rather requires clear separation of the question of its

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origins from that of its use. More fundamentally, for clarificatory purposes at least, dignity's grammar, what is said and what can be said with it, is much more significant than its past. Consequently, the core intervention of this article in contemporary debates is its insistence on how dignity is now a predominantly generalised and universalised notion – it cannot be made consonant with enslavement or a 'natural social hierarchy' without dissonance with prevailing discourses – while avoiding commitment to any underlying metaphysical or axiological position. Without understanding the movement of dignity towards generality, we can understand neither the plurality of its usage nor the anachronistic danger of reading it purely as a synonym of nobility.

I have broadly separated analysis into the comparative–historical and the jurisprudential–conceptual, the first intervening in the Whitman–Neuman debate, the second intervening in the McCrudden–Carozza debate. What specific methodological requirements do they demand? First, the comparative–historical debate: I have focussed here on legal discussion of dignity. Because the legal function of dignity is wide and varied across jurisdictions and across legal fields, the legal functioning of dignity is separable from, and in some respects unrelated to, both its origins and functions in other practices. Consequently, a cross-jurisdictional comparison is needed to draw out both legal-practice and also legal-cultural differences of function. The law considered is predominantly post-war law, or functions within systems partially or radically transformed after World War II. This is the period when most dignitarian jurisprudence has been generated and when the phrase 'human dignity' took on global significance (Glendon, 2001). However, even within this narrow historical period there is an express appeal to ideas and principles which long pre-date 1945, and the reception or revival of these ideas in contexts as historically divergent as Germany and the United States evidences the value of comparative study even within a narrow scope. The choice of jurisdictions is intended to draw out an important spectrum of both cultural and legal differences. Namely, dignity as a core norm in public international law, as a heuristic in European human rights law, as a key constitutional principle in German law and as an 'import' within US constitutional law. Focus is on the law of detention, because this is where there is a very direct relationship between the individual and the state, where dignity frequently arises, and because the notion of detention should not be taxonomically 'loaded'. That is to say, all municipal jurisdictions have detention rules and obligations, and 'detention', unlike e.g. 'private law', 'public law', etc. is less question-begging in terms of what is a priori included or excluded. Second, the conceptual clarification of dignity: this employs a combination of 'ordinary language' analysis (i.e. analysis broadly informed by Wittgenstein's work) with attention to dignity within those philosophical traditions – from Stoicism, through Kantianism, to poststructuralism – which have been preoccupied with moral universality and personhood (Solomon, 1988). What this shows is that – evidenced by the ambiguous qualification of dignity as *human* dignity – the term is analytically complex, but part of fundamental discourses where the fact of humanness meets the value of humanity.

II Comparative analysis

2.1 Public international law

How does dignity function within international law with respect to detention? It naturally asserts the maintenance of dignity in detention. This is often generally associated with the prohibition on inhuman or degrading punishment. It also more specifically links this with rehabilitation, demanding that non-violative punishment must contain a rehabilitative element. Both minimal protection and fuller rehabilitation rights can be read as implicit within general human rights instruments. The minimal status claims of the Universal Declaration of Human Rights[2] (UDHR) – an inalienable

2 Universal Declaration of Human Rights 1948, General Assembly resolution 217 A (III).

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dignity / the worth of the person / the inalienability of certain rights – can be read flexibly as both minimal protections and a more general defence of the integrity of the person (Kretzmer and Klein, 2002). Parts of the UDHR have been converted to treaty instruments, principally the 'twin covenants', including the International Covenant on Civil and Political Rights (ICCPR) which uses dignity particularly with reference to the treatment of detained individuals.[3] Dignity is also found in the Convention on the Rights of the Child[4] (CRC), which also links dignity with detention, both in its nature and duration.[5] This broad reading of detention rights is explicit in commentary on both the ICCPR and the CRC.[6] The continuing work of international criminal tribunals confirms this (Henham, 2005). In this context – which draws together the laws of war and human rights discourses surrounding fair trials, due process and welfare for participants – dignity is often invoked to draw together the distinct *lex generalis* of human rights law and the *lex specialis* of humanitarian law.[7] The minimal reading of dignity found in international humanitarian law – 'outrages upon personal dignity'[8] – requires the existence of an armed conflict and is intended primarily as a minimal standard for soldiers in the theatre of war ('outrages against dignity' is to be read in the light of 'degradation' and is '*personal* dignity', deterring a potential reading of dignity as aristocracy, i.e. it is more fundamental than attacks upon the 'socially elevated'[9]). Nonetheless, dignity continues to straddle these otherwise distinct legal fields, both as minimal prohibition and normative common denominator.

Two normative themes are at work in these instruments and fields: basic protection of the body against the afflictive, and what might be termed a 'personality-preserving' claim calling for rehabilitation. Translated into moral terms, these twin protections represent a Kantian injunction against objectification: even prisoners should not be seen merely as a means to an end (arbitrary detention), which can be understood more specifically as exclusive pursuit of the social ends of punishment (protection of society and general deterrence). So, despite the relatively limited content of dignity – prohibiting the most egregious forms of afflictive punishment – it is also found in conjunction with stronger claims for 'personality rights' (Neethling, 2006). A fortiori, dignity, as an international norm, exhibits duality. On the one hand, we are dealing with the minimal (the protection of the body), on the other, a far more fulsome conception of the detainee (with a personality requiring protection).

What are the contextual peculiarities of the international arena which inform or underpin its deployment? Stemming from the United Nations Charter and the UDHR, international law conceptualises dignity in a non-culturally and non-normatively specific way: it does not specify how dignity should be realised or qualified other than through other norms, through legality and through the rule of law (Kretzmer and Klein, 2002, pp. 111f.). This flows from prevailing notions of public international law which are positivist, or more particularly, 'sovereigntist': they insist that the essence of normativity in the international arena is sovereign decision and sovereign self-limitation by states; this denies that normativity can exist aside from the will of a sovereign state. Nonetheless, international law places human dignity at its heart to the extent that it is a foundational principle for its core organisation (the United Nations), and for its core normative document (the UDHR). In these respects it is possible to characterise human dignity as a kind of *grundnorm*, a ground of normativity

3 International Covenant on Civil and Political Rights 1966, Article 10.

4 CRC 1989, 28 I.L.M. 1448.

5 *Ibid.*, Articles 37 and 40.

6 See UNHCHR 1996, General Comment 25; Committee on the Rights of the Child 1994, 'Concluding Statement' CRC/C/SR 176, 10 October 1994, para 46.

7 See *Prosecutor v. Anto Furundzija* 1995, ICTY Case No. IT-95-17, para. 183.

8 Geneva Conventions 1949, Common Article 3(c).

9 See ICC Elements of Crimes, Art. 8(2)(b)(xxi) 'War crime of outrages upon personal dignity'.

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within the system. Even if the functioning of international law militates against the possibility of such a self-subsisting source of normativity, it is nonetheless important to stress that it *is* a norm, and one with clearly moral and ethical overtones, and as such can be read as a reaction against pre-war sovereigntist conceptions of legality which allowed positive law to become the tool of crimes against humanity apparently without contradiction.

What does this combination of function and context reveal? Dignity represents a basic norm: a peremptory norm, but not perhaps a conclusory norm (Simmonds, 2008, pp. 311f.). That is, it should not be violated, and no derogation from it is possible, but it is not necessarily a conclusive end point to debate. This in turn heightens its duality. It is maximal: it has a substantial normative role, founding the principal organs of the international arena (the United Nations / the International Court of Justice) and acting as a foundation for human rights law. And it is minimal: its content is spelt out explicitly as prohibition of 'outrages' (humanitarian law) and a general defence of rehabilitative practices (CRC). As such it offers to be a basic norm in international law – and one with a broadly Kantian moral pedigree – but the nature of international law, and, we might suppose, the ambiguity of dignity, militates against a substantial dignitarian jurisprudence emerging. To the extent that international law is sovereigntist, we should only expect the most minimal normative commitments within the international arena. To the extent that international legal normativity has meaning independently of the state, that normativity tends towards low common denominators (respect for persons) and a defence of human security (basic respect for material conditions of human wellbeing) with an attendant respect for the independence of individual states in defining those standards.

2.2 European human rights law

European human rights law is a rich depository of judicial consideration of dignity and detention (be it judicially imposed detention, or part of administrative processes like immigration practice) and features widely within this jurisprudence. For present purposes it is notable that the European Court of Human Rights (ECtHR) is willing to use the language of dignity in relation to Article 5 cases, Article 3 cases, and reads these often in the light of Article 8 (Harris, O'Boyle and Warbrick, 1995, pp. 81, 337). In other words, the law of detention overlaps with minimal prohibitions on inhuman treatment (Art. 3) and, explicitly, with the conception and defence of a personal, private, family sphere where the individual, all things being equal, would expect autonomy and freedom from state interference (Art. 8). With respect to Article 3, there is use of dignity across the scale from the inhuman to the degrading, with breach of dignity more or less synonymous with inhuman treatment and having a bearing on degrading treatment (*Ireland v. The United Kingdom*,[10] *X v. The United Kingdom*[11]). In part this charts a movement from raw physical vulnerability (*Testa v. Croatia*[12]) to more general notions of autonomy (*Keenan v. The United Kingdom*[13]). More specifically, it indicates the destruction of personality in inhuman treatment, and the diminution of personality in degrading treatment. Where the detention falls short of generally accepted standards to the point of intolerability (*Bitiyeva & X v. Russia*[14]), dignity is invoked; where detention intersects with illness and isolation, dignity is important (*N v. The United Kingdom*[15]). There is a minimal, Kantian, prohibition at work here (i.e. not treating merely as a means to an end) but also at times a more distinctively

10 [1978] application no. 5310/71.

11 [1984] application no. 7215/75.

12 [2008] application no. 20877/04.

13 [2001] application no. 27229/95.

14 [2007] application nos. 57953/00 and 37392/03.

15 [2008] application no. 26565/05.

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civilian tradition that certain personality rights should be respected (Neethling, 2006), hence the combination of Articles 3 and 5 with consideration of Article 8 (i.e. the person's 'private sphere').

Functionally, dignity is associated with at least three different kinds of notions. It serves first as a *foundational* notion which focuses on the most minimal demands made by the individual. The individual is the source of normative claims which are not conditional upon the will of states. Appealing to 'holistic' conceptions of the person, dignity is invoked where an individual is being considered as a whole, rather than as possessing individual, divisible, rights. By considering the dignity of an individual, particularly where there are questions of individual suffering (*Pretty v. The United Kingdom*[16]), the complex demands of a 'situated' individual as a whole can be used as a counterweight to demands made by, and upon, the state. Second, it is a *bridging* notion which connects different rights, particularly minimal prohibitive claims (to life, contra torture) to more substantial rights concerning personality (to family life, to health). Dignity therefore gives weight to (though does not independently establish) the 'indivisibility of rights', that is, opposition to a de jure hierarchy of rights, each right being seen in a relationship with every other right (Van Boven, 1982). This gives rise to a third, principally *heuristic* notion of dignity as a problem-solving tool which is both foundational and bridging. In functional terms dignity is not reducible to either a holistic conception of the person, or as a bridge between rights, but as a problem-solving tool that can play these, and other rhetorical, roles simultaneously (*Keenan v. The United Kingdom*[17]). In sum, as a heuristic dignity mixes basic prohibitions with personhood and personality claims entailing thin minimal prohibitions (denial of life destroys the person, torture reduces the person to the body) but also more substantial conditions of maintaining a personality and even flourishing as a person.

These claims can be contextualised by, first, a secure normative foundation for rights claims and by the interpretive strategies of the European Court. The European Convention on Human Rights (ECHR) accepts the importance of dignity via its drawing upon the UDHR with its basic commitment to dignity.[18] This commitment is underpinned by European states' willingness (be it historical or following World War II) to observe human rights standards. These may well be contested domestically (where they are potentially contrary to positive domestic law), but derogation from or rejection of the Convention is politically imprudent, and, given the longevity of its influence, legally difficult in Europe. Second, for this consensus to be maintained, the Court must function in a way which is ecumenical with respect to jurisdictional differences. While it is often held that the Convention bears a greater stamp of common law influence (Moravcsik, 2008), the very discussion of personality is more commonplace within civilian systems. Accordingly, the foundational, bridging and heuristic functions of dignity should be understood as, first, depending in part on a pre-existing consensus on the value and integrity of the ECHR itself. Second, the ECHR offers a synthesis of common law emphasis on minimal protections with civil law's more nuanced commitments to personality rights including privacy and reputation as part of public law. Dignity does not have a pedigree in any particular form of legal system (although some link with Roman law can be posited), rather this (legally and religiously) ecumenical notion allows problem-solving within the normatively complex context of the ECHR.

2.3 German constitutional law

Human dignity has a complex, and fundamental, function within the German Constitution as inviolability-implying, personality-affording and reputation-protecting. Each of these has direct significance for detention and each will be considered in turn.

16 [2002] application no. 2346/02.

17 [2001] application no. 27229/95, paras. 74, 87, 113.

18 European Convention on Human Rights 1950, Preamble; Protocol No. 13 (2002).

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First, *inviolability* can be read as a substantive 'defensive' right, but above all as a value:

> 'Because fundamental rights, being defensive rights, are a priori unsuitable for preventing the legislature from repealing penal provisions, the majority of the court would find the basis for doing so in the more extensive meaning of fundamental rights as objective value decisions. According to this theory, fundamental rights not only regulate defensive rights of the individual vis-à-vis the state but also contain objective value decisions, which the state must continually implement through affirmative measures.' (Kommers, 1989, p. 357)

This is explicated both as defensive against the worst forms of afflictive treatment but also a more nuanced basis for judicial determination of values concerning the severity and impact of detention (*Tobacco Atheist Case*[19]). This accords with a second, fuller, interrelationship of dignity and *personality*, evidenced inter alia by the *Life Imprisonment Case*.[20] It begins with an unequivocal assertion of the core constitutional principles:

> 'The free human person and his dignity are the highest values of the constitutional order. [. . .] This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather of a person related to and bound by the community.' (Kommers, 1989, p. 316, parenthetical remarks removed)

The consequences of this stress on persons and personality include an inexorable presence of rehabilitative goals within sentencing (*Lebach*[21]). While this goal may never be reached, courts must strive to keep personality as a primary principle: 'In determining whether to release a person sentenced to life imprisonment, courts must consider the personality of the offender, his behaviour in prison, the circumstances of his crime, and his capacity to lead a normal life' (Kommers, 1989, p. 320).

The 'objective right' of inviolability, and more broadly the protection of personality, allow assertion of a third more nuanced value of *reputation*. In the *Lebach* judgment of 1973,[22] the fundamental principle of human dignity, and the importance of reputation, are given priority over another right, less fundamentally related to personality, i.e. freedom of expression. Damage to reputation can augment, and therefore render disproportional, punishment: '[T]he interest in receiving information [concerning soon to be ex-convicts] is not absolute. The central importance of the right to personality requires not only vigilance on behalf of the inviolable, innermost personal sphere [of the accused] but also a strict regard for the principle of proportionality' (Kommers, 1989, p. 416, latter parenthetical remark in original). The decision goes on to talk about the 'radiating effect' of the right of personality, which, inter alia, puts limits on the publicity that can be afforded to wrongdoing and wrongdoers. Together, inviolability, and the relationship between society and personality, and the preservation of reputation, 'radiate', via human dignity, through the Constitution:

> '[T]he dignitarian radiation of the Basic Law necessitates a reaching out and nurturing of the weaker members of society, such as rehabilitated criminals or tortured souls. [. . .] Dignity, in other words, acts as a 'higher law' by which individuals and society are judged and guided. Thus, it is appropriate to prefer the interests of rehabilitated persons as they readjust to their place in society.' (Eberle, 2002, p. 97)

19 (1960) 12 BverfGE 1.

20 (1977) 45 BVerfGE 187.

21 (1973) 35 BVerfGE.

22 *Ibid.*

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What then, can we say of the contextual particularities of German discourses of human dignity which give rise to these three different but related functions? The German Constitution, the Basic Law, was created by the controlling powers and native jurists for postwar Germany as an interim 're-democratising' measure. The Basic Law has nevertheless been retained and remains largely unchanged even through the process of German reunification. The Basic Law has been interpreted by the Constitutional Court in a way which has drawn out strong philosophical currents (both latent and manifest) within the instrument. More particularly, Article 1 (human dignity) and Article 2 (concerning inviolability and personality) have meant that human dignity – understood in Kantian terms – is a key heuristic, a means of ordering the 'objective' values of the instrument. However, both Articles 1 and 2 are associated with the notion of the individual as a 'spiritual–moral' being (Kommers, 1989, p. 332), adding a communitarian element to the thin, Kantian, conception of the individual. Dignity is not simply a prohibition of treating individuals as a means to an end but concerns persons whose growth should be free and non-heteronomous (i.e. not shaped by external pressures). The person of the Basic Law is irredeemably social, but principally in a negative sense of potentially harmed by external heteronomous pressures.

The most important point is that Germany historically, and like other civilian systems, talks readily about core 'personality rights', which intertwine basic civil liberties with the public law defence of privacy, reputation and the integrity of the person. The civilian notion of a cluster of personality rights allows the thin moral import of dignity to be more easily appealed to. From a right to life to a right to self-creation, dignity and personality are treated as core demands at the heart of the species. A second distinctive feature of German jurisprudence is the invocation of Kant. In general a Kantian conception of the individual is 'thin' (characterised predominantly by rationality and autonomy) and a Kantian conception of rights is accordingly minimal, though strongly peremptory. As such Kant's work is difficult to apply directly to complex constitutional questions: 'The Kantian view tends to assume a juridical space divided into non-overlapping domains of liberty: the enforcement of rights consists in policing the boundaries between distinct domains' (Simmonds, 2008, p. 294). In some respects the German Basic Law can be read as an attempt to synthesise this Kantian defence of the inviolable sphere of the person and their basic rights with a communitarian concretisation of the preconditions of rights claims (i.e. a 'thicker' conception of the person requiring, inter alia, social welfare and support). To that extent it fits with the general model of the German State as 'corporativist': 'The Basic Law has resolved the tension between the individual and society by postulating a community-related and community-bound individual, as the decisions of the Federal Constitutional Court have repeatedly stressed' (*Census Act Case*,[23] quoted in Kommers, 1989, p. 335). Less positively, we could say that there is a tension between liberal Kantianism and Hegelian communitarianism. While Kant may be the key to most readings of Article 1, the underlying conception of the Constitution is 'statist' in a Hegelian sense. The rational state – with clear separation of powers, recognition of equality, welfare as a precondition of the emergence of personality – is external to the individual's sphere of inviolability but nonetheless essential for their personhood. Dignity, within these competing forces, becomes a synecdoche: it is a substantive right itself, it symbolises respect for other human rights and it is also the limit-point of the constitution. Dignity performs the limits of the Constitution not only as a value but because of its ambiguity (it has no settled jurisprudential function, it is conceded to be polymorphous) and because it invokes the person as the absolute limit of the reach of the state.

23 (1983) 65 BVerfGE 1.

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2.4 United States' constitutional law

Detention, both its quantity and quality, has been considered in dignitarian terms by the United States Supreme Court in the light of both the Eighth Amendment (cruel and unusual punishment) and the Fourteenth Amendment (due process). It plays a distinctive role in discussions of the extent to which hard penalties can be imposed because of recidivism ('three strike rules') and in capital cases other than those involving murder (Van Zyl Smit, 2002, p. 58f.; *Coker v. Georgia*[24]). With respect to quantity of punishment, life imprisonment without parole is constitutional but has to be proportionate: the Constitution prohibits a punishment 'although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity' (*Re Lynch*[25]). In terms of quality, human dignity, like discussion of 'cruel and unusual', acts at the limits of the forms of punishment, delimiting acceptability. Other cases point to the importance of dignity as a key limiting principle in the preconditions of the punitive; *Skinner v. Oklahoma*[26] treats dignity as important in delineating where punishment is acceptable, marking a line between acceptable and unacceptable consequences of punishment. The discussion of standards of *decency* and dignity within *Furman v. Georgia*[27] was a narrow one of popular will rather than general standards of humanity. Only the latter, it was contended, would have directly invoked notions of human dignity: 'by the time the decision in *Furman v. Georgia* was being taken, 'standards of decency' had evolved in most Western countries to the point that capital punishment was seen as an inherent infringement of human dignity' (Van Zyl Smit, 2002, p. 63).

The essential features of the United States' Constitution are its relative antiquity (which entails interpretative ambiguity but also a certain immutability), its self-contained status (it is interpreted by the Supreme Court with a set of distinctive interpretative positions) and its being a substantively minimal document (it is short and difficult to amend). The last characteristic points to the more fundamental normative dimension of the Constitution: it is founded upon an ideology of safeguarding liberty through curtailing the power of the federal state. Accordingly, unlike its French counterpart, the US Constitution largely implies its core value – liberty – rather than vaunts it in strongly rhetorical terms. The absence of any clear commitment to 'solidarity' or 'fraternity' in the US Constitution entails a far thinner libertarian reading of dignity. Certainly a 'zone' or 'sphere' of privacy and self-creation is implied and isolated from calculations concerning the 'Common Good'. But the aggregate benefits of liberty, and the maximisation of that liberty, mean that the status and worth of the individual are ultimately self-creations rather than dependent upon political recognition and positive actions by the state. Note in this respect that while Germany gives its Constitutional Court robust power of judicial review which protects the individual from executive fiat (*Elfes Case*[28]), the Supreme Court has varied considerably in the extent to which it has been an effective counterweight to the executive (Eberle, 2002).

Dignity for the most part has to be extrapolated from a systemic, and largely negative, constitutional protection of liberty, autonomy and self-determination. While there are some explicit fundamental rights (due process, rule of law), clear substantive constitutional rights have evolved slowly (e.g. the right to privacy is a recent innovation; *Griswold v. Connecticut*[29]), which in turn has rendered the evolution of the Eighth Amendment slow and unpredictable. An 'inner sphere' of privacy and

24 (1977) 433 US 458.

25 (1973) 105 Cal Reptr 217 424.

26 (1942) 316 US 535.

27 (1972) 1 408 US 238.

28 (1957) 6 BverfGE 32.

29 (1965) 381 U.S. 479.

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autonomy is generally protected by the Fourteenth Amendment, but is generally realised in the systemic exclusion of the state from the home and general 'interference'. At the same time, human dignity is not a wholly alien presence within constitutional discussion (*New York Times*, 2009). It has been held to be the 'basic concept underlying the Eighth Amendment' (*Trop v. Dulles*[30]) and has been held to be an authentic element, like freedom, of the American value system: 'These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity' (*Roper v. Simmons*[31]). As such, dignity is not wholly incompatible with an 'original intent' interpretation of the Constitution.

In sum, the 'importation' of human dignity into US Constitutional interpretation retains a core ambiguity concerning whether dignity remains an interpretative tool which can be construed from popular opinion and popular will to have become a constitutional principle, or whether it remains merely a rhetorical component of Supreme Court discourse. The Supreme Court has not been opposed to the language of international human rights law, and has expanded the clarity of liberty through judicial review, but this is a narrow construal of dignity and certainly not one amenable to strict 'originalist' emphasis on the text of the Constitution. This fundamental ambiguity highlights an important element of the use of dignity across legal spheres. Is it an internal heuristic which locates and delimits the normative, or is it a notion essentially external to law with which external critique is possible?

2.5 Discussion: internal or external to law?

The case-studies demonstrate not only that the concept of dignity varies between, at the very least, minimal and maximal claims, but also in its status as norm. It has the normativity afforded by positive law; it is a heuristic that interprets norms by the standard of holistic person-preservation; sometimes it is closer to a peremptory norm which acts as a total limit on further normative analysis. In the latter case it is not simply a legal norm: it is the limit of the constitutional order (e.g. Germany) or an explicit origin of normativity (international law). Dignity is accordingly a powerful tool for those detained at the mercy of the state because it can transcend its positive textual form (as in Germany, where dignity is always non-definitive) and can point beyond values found through textual interpretation (as in the United States). Most interestingly, the otherwise innocuous invocation of 'inherent' dignity (as in ECtHR jurisprudence) indicates the origin of normativity in something conceptualised in, but nonetheless external to, positive law: the individual and their integrity as a person. In the light of this we can not only separate dignity as a positive norm and as a normative heuristic, but even more fundamentally, as a normativity located within and without law. Such a division is no doubt conceptually problematic, but it does serve to distinguish functions and phenomena which themselves point to an origin which is not legal normativity or legal positivity.

In a way which is predominantly internal to law, dignity can be said to be a positive norm and a normative heuristic. As a positive norm it is flexible: depending upon context it can take on minimal or maximal normative roles. As a heuristic, bridging rights, and prioritising the integrity of the individual, it functions well for both the 'situated' individual (viewed holistically within a social milieu) and for 'outsiders', those outside the polity or civility, like detainees, for whom these minimal claims of integrity are powerful, if not always conclusive in concrete terms. Concretely, minimal standards of treatment, integrity and personhood are important, but there is normative uncertainly beyond this, certainly with respect to what positive obligations these place upon a state. This uncertainty is partly mirrored in prevalent uses of Kant as a heuristic. That is, it is clear that we should not use others merely as a means to an end, but beyond this there are large areas of normative

30 (1958) 356 U.S. 86.

31 (2005) 543 U.S. 551.

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uncertainty. (Tellingly, for Kant, prisoners have invited punishment upon themselves, as such they are not merely means to an end; Kant, 1797/1996, p. 104.) Many other examples could be offered where a minimal Kantian prohibition on reduction to mere objectivity offers a starting-point for problem-solving, but is by no means exhaustive or complete (Hill, 2000). Dignity nevertheless offers a powerful route of internal critique. It can be used, adopted and abstracted from basic constitutional defences, or basic liberties and equalities, in order to explore the limits of those claims. In this sense dignity is shorthand for the autonomy and inviolability (as well as, negatively, non-instrumentality) which constitutional protections broadly protect, but which can be lost within the midst of other concrete constitutional and administrative activities.

Whilst being a heuristic useful for outsiders, it is also, in some respects, outside law. Importantly, as a discussion of value *inherent* in the *person*, it indicates a point of normative certainty external to positive law. It often introduces the *body* into normative discussion through invocation of individuals' inherent vulnerability and their need for protection from the afflictive. Moreover, it can be used to connote persons' conceptions of *the good* (the object or ends of personality) which are excluded from law (by emphasis on autonomous choice of those ends), or included by law to delineate the limit-points of law (an individual's good is not exhausted by their relationship with the state). In these respects it can be seen as a way of introducing *external critique* into legal discourse: despite positive legal analysis of human dignity, the invocation of dignity is often a way of pointing to the limits of normativity and of value external to law. At this point, questions of anteriority and interiority become problematic: a 'zone of indecision' lies around law's own decisions concerning what it does or does not include within itself (Agamben, 2005), and legal discourse concerning values external to law remains legal discourse. Nonetheless, in terms of the clarification of debate, it is important to acknowledge that discussions of dignity's normativity are not exhausted by norms within positive law. Nor can the function of dignity be confined to what is textually or normatively internal to constitutional orders. As a discourse of the human, human dignity in particular is equivocal and plural: it indicates what cannot be wholly reduced to positive law, and inevitably generates a plurality of positions.

The notion of externality also brings us back to the specific comparative question we commenced with: to what extent is 'Nazi dignity' meaningful and to what extent can we exclude this from consideration of 'human dignity'? Roger Cotterrell has engaged directly with Whitman not so much in fundamental normative terms but in terms of Whitman's situatedness as a scholar, bringing to bear assumptions and basic presuppositions of equality (Cotterrell, 2007). Accordingly, Whitman's position is called into question not simply because it is normatively problematic but because background assumptions concerning the nature of civility and polity fundamentally colour his reading. 'European understandings of civility may be coloured by a sense of human dignity as a value, while American understandings of civility may be coloured by a corresponding sense of liberty and of social equality (of opportunity needed to enjoy it)' (p. 151). By extension, we can say that, specifically, Whitman does not acknowledge the related functions of personality and dignity in modern German constitutional law. With clear constitutional priority, personality rights locate the individual at the heart of law. Individuals are afforded substantive rights and 'objective values', both of which, viewed in context, are diametrically opposed to degradation of any and all individuals, and which, furthermore, have no relationship with aristocracy. But more specifically, we can say that Whitman has blurred the boundary between dignity as a heuristic and as an external critique. In the former sense dignity may (or may not) contribute to explicating and augmenting fundamental notions like liberty or personality. More fundamentally, dignity functions in a way which can be external to a constitution, stressing both the body and the personality and the inviolability and indivisibility of the two. Thus, dignity is not wholly captured by the substantive, or even the contextual, peculiarities of a sphere of law, but is always potentially external to them, offering a source of critique in particular for those excluded, 'outside' or degraded. Precisely because those who

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were excluded from 'Nazi dignity' could intelligibly and powerfully appeal to *their* dignity, the 'extension of honour claims within Nazi law' fails to capture the force of dignity's pointing to what is external to the legal order.

III Conceptual analysis

3.1 Meaning: duality, circularity, performativity

What is the meaning of 'dignity'? The foregoing analysis has established some comparative and historical variations concerning the use of dignity. Some are contextual (the historical origins of a legal field, or textual approaches to a constitution). Some are conceptual (the normative status of heuristic tools, or the extent to which personhood is explicated within a legal field). The following conceptual analysis intends to build upon the foregoing account, looking for the possibility of constants – be they historical, axiological, or otherwise – in the use of dignity. It proceeds with the assumptions that, first, juridical use of dignity is not wholly separable from dignity in ordinary language. Second, following from the first, it also assumes that even if, *ex hypothesi*, human dignity functioned within a closed system of legal meaning, the historical origins of dignity (as term, as principle) still have some explanatory role in articulating the presence of that term or principle within legal discourse. In sum, it assumes that meaning is, for the most part, *use*, and that constants are to be found in the usage of a term. It concludes that there is a limiting grammar of dignity – linked to, but not over-determined by, its genealogy – that the division of ontology and epistemology remains useful in discerning this grammar, and that there are a number of recurrent problems in the use of dignity generated in most part by blurring epistemology and ontology.

If meaning is linked to the common language we use, then the meaning of dignity remains dual. It is still intelligible to talk about its aristocratic connotations like nobility, as it is possible to read 'dignity' in a very narrow formal, Kantian, way. Are these two different meanings? Stipulating a division between dignity *simpliciter* and human dignity in order to demark a distinction is tempting but misleading. Not only are they treated as interchangeable in many contexts, but the assumption of difference is question-begging. On the one hand, human dignity quantifies but does not qualify: it indicates the range of possessors but not necessarily what they possess. (Appeal to distinctive, Renaissance-based, discourses of human dignity and man as *imago dei* only defers the problem to an earlier point: man's being God-like does not explain why dignity is God-like.) On the other hand, dignity *simpliciter* is applied predominantly to humans: if we apply it to animals, or indeed any other specific group, we are extending by analogy, not expanding the concept.

The duality that we have inherited is related to a more fundamental duality in terms of the factual and the normative at work in anthropology and metaphysics. Dignified behaviour (understood as non-animal behaviour) and dignified status (elevation of individuals or of the species) remain irreducibly linked: dignified behaviours evidence our distance from animals; our distance from animals demands dignified behaviours. As such, the duality of dignity cannot be synthesised into a univocal concept. Appeal to human dignity only brings to light the equivocation between fact and norm at work in dignity *simpliciter*. This goes some way towards explaining the equivocation between minimal and maximal readings that we find in legal contexts. Dignity has minimal behavioural correlates distinguishing us from animals; it also has a more fulsome relationship with our conception of what it is to be human. In short, dignity retains a circle of related factual, behavioural and normative meanings, and a range of functions, that cannot, without further argument and justification, be reduced to a single notion of 'intrinsic worth' or 'elevation'.

One other important equivocation in legal discourse is between dignity as a peremptory norm and as a conclusory norm. It should be conclusory (it should, given its definitive universality, be the end point of all normative debate); but it is more often better viewed as peremptory (no derogation from it is permitted, but it does not delimit all possible questions). It is a norm which is decisive, and

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from which derogation and dissent would call into question commitment to legality or morality per se. But to question the interpretive or heuristic value of dignity is certainly intelligible (we can question the usefulness of appeal to dignity without abandoning commitment to the moral value and status of either individuals or collectives). In the light of this it is better, for the purposes of clarifying the use, and not simply the legal contestation, of dignity, to move away from the designation 'norm' altogether and treat dignity as in many respects as a *performative* (Austin, 1962). One way or another, through clear and opaque argument, through normative stability and instability, dignity performs the limitation of debate. This despite the fact that countless interlocutors deploy dignity with different synonyms in mind and with different intentions at work. For instance, we could compare a human rights lawyer discussing the right to a fair trial and a conservative bioethicist appealing to the human dignity of an embryo. In common is the belief that this term marks a limit-point to discussion and, conversely, the implication that dissent draws into question the possibility of intelligible or legitimate debate. As such, dignity has force even where its normative credentials are unclear or questionable. The extent to which this force is premised upon ambiguity (merely 'rhetorical force') is clearly significant, and it remains true that the question of ambiguity is important: to characterise dignity as a performative is not to forsake further conceptual discussion. The source of ambiguity lies, as I have suggested, in lack of clarity in distinguishing epistemology and ontology. These now require direct attention.

3.2 Epistemology: the body and the person

We know dignity predominantly through the body. Dignity is manifest in certain behaviours, and the 'upright gait' is a key trope for linking dignity-as-aristocracy with dignity as the absence of degradation (Bloch, 1961/1988). Dignity asserts the inviolability of the body, and although it intersects with principles like autonomy, which assert the inviolability of the mind or will, the dignified body tends to be a point of prohibition rather than positive obligations (i.e. the objective conditions for autonomous decision-making). However, if we know dignity predominantly through the body, it is not purely the biological individual, but the body as a site of normativity. This is captured in the language of the person: a person is minimally an individuated human being, but it is also the individual who possesses legal status (Daube, 1943). A person is necessarily within juridical and political relations. Accordingly, actions which tear person and human apart – i.e. torture and inhuman treatment – expose the diminution of dignity. We know and see dignity in the contexts where there is degradation because we see the destruction of personhood. It is possible to deny this appearance of dignity: we could insist that what is taking place be articulated in other terms, or that 'personhood' is reducible to other factual or normative phenomena. Nonetheless, to the extent that we accept the possibility of a person, with a distinct integrity, and as a distinctive source of normative claims, dignity remains a way of articulating the factual and normative qualities of that personhood.

The combination of discourses of personhood and dignity have allowed dignity to become a point of resistance to the *individuation* which is said to be characteristic of modern forms of political and ethical philosophy. If liberalism entails an anomic individuation of persons, communitarian uses of dignity assert the embeddedness of the person within a sociolinguistic community (Taylor, 1992). In parallel, the 'scientific' 'hedonistic calculus' of utilitarianism individuates persons as tokens within sociopolitical calculations; dignitarian ethics is broadly located within deontological opposition to utilitarianism precisely in this resistance to scientific individuation. Thus, personhood and dignity have remained points of resistance to these individuating tendencies. Many deployments of dignity in these debates are not well-formed articulations of personhood. But they do tend to perform opposition to individuating discourses even where prevailing ('scientific') tendencies are inimical to such assertions.

The body is, in sum, inseparable (normatively) from the person, not wholly internal to positive law, and generates normative debates in terms of integrity and inviolability which are articulated via

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dignity. The body should not be separated from the person. Accordingly, we can add to the clarity of conceptual debate by insisting that the association of dignity and minimal protections is important. The foundational status, or the axiological stability, of dignity as a value is less important in this context than its articulation of the appearance or disappearance of personhood.

3.3 Ontology: history and axiology

The more basic question of the preconditions of dignity, as a phenomenon and as a value, is a rather more historical question. The basis, or the being, of dignity can be divided into two different, but contiguous, narratives: historical dissemination of the term 'dignity', then axiological clarification of the term. These exhibit distinct processes of reification, codification, universalisation and democratisation. In essence, *dignitas* has, from its Latinate origins, undergone a process of *generalisation*, but the source and nature of this generalisation is complex.

Building upon the etymological history of *dignitas* previously adumbrated, a historical narrative can be drawn from the Renaissance to modern codification. The Renaissance reception and use of dignity can be characterised as a process of reification of 'humanity' and the attribution of characteristics to humanity as a distinct entity (Kristellar, 1979). The use of dignity is bound up with the assertion of man's dominion over Creation and its elevated relationship flowing from that dominion. Humanity is located uneasily between Creation and God (in whose image it is made), with humanity as corporate entity ultimately located close to God, while individual men could remain close to nature (physically and morally). We have inherited this reification, and discourses of the dignity of man and human dignity retain this reifying tendency, allowing us to laud humanity as a whole while challenging individuals' temptations toward inhumanity. This generalisation of humanity's dignity is one which is familiar and which remains part of dignitarian discourse, but one far from immune to philosophical critique or ethical problematisation (Glover, 2001). A second historical trend which arguably pre-dates, but principally post-dates the Renaissance is codification, and dignity has a well-charted relationship with both natural law and positive law through appeal to the rights of man and human rights discourse (Bloch, 1961/1988). This too is a form of reification, albeit one which equivocates uneasily between appeals to immanence (understood as ubiquitous and immutable law) and transcendence (understood as normative force independent of the state). In sum, reification and codification tend to pull in two directions: humanity and natural law towards a generalisation of dignity premised on intrinsic properties (humanity's properties); positive law towards generalisation premised on extrinsic recognition (how we treat people with humanity).

The second narrative concerns more directly axiological developments in discussion of dignity. The first, located in the Enlightenment, stressed the universalisation of dignity, asserting the moral equivalence of persons. The second, in the Revolutionary era, stressed democratisation, asserting the political equivalence of persons. Kant clearly inherited the Renaissance's conception of humanity, and took the reification of humanity to its logical conclusion, calling upon us to acknowledge and respect humanity *in ourselves* as a distinct, noumenal, dimension of our being (Kant, 1785/1948). However, the axiological thrust of Kant's position is universalisation as the basis of rational, moral action. Dignity plays a key, but complex, role within this axiology, working as a synecdoche for Kant's ethics as a whole, and more specifically as a normative constant from which moral decision-making is generated and regulated. In short, generalisation of dignity within Kant's work rests in part on a Renaissance inheritance of a reified humanity, and upon a more specific deployment of universalisation as a 'regulative' or 'constitutive' ideal (Caygill, 1995, pp. 129f.). The Enlightenment in turn fuelled the Revolutionary era's concern with emancipation – suffrage and political recognition – translating this into demand for universal political recognition. Discourses of 'The Rights of Man' drew broadly upon Enlightenment universalisation, but were also able to harness the aristocratic connotations of dignity in order to draw attention to both the material discrepancies between classes and the human reality that lay under the trappings of the dignitary

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(Paine, 1791/1969, p. 194; Burke, 1790/1969, p. 171). In this sense, the Revolutionary era sought a materialisation of dignity in order to assert its universality: there is no logical or moral reason why the common man should not share the material conditions of dignitaries.

Such a compressed narrative cannot capture the historical or the axiological subtleties that surround dignity, not least the recurrence of the honorific and aristocratic meaning of dignity which intimates the divide between man and animal (without the explicit need for reification), and which remain significant even for Kant, who was at ease discussing the inevitability of dignitaries and hierarchy in society (1797/1996, p. 103). What both these ontological narratives, and the recurrence of honorific notions of dignity, reflect is a tool or focus for human self-perception. The 'being' of dignity lies ultimately in human efforts to discern what is distinctive, and what is good, in humans, with dignity sitting at the intersection of metaphysical, anthropological, moral, legal and political discourses of human self-perception. While this does not secure its being in any strong foundational sense, it does begin to explain its resilience, as well as its performative potency in denoting the limits of debate.

3.4 Discussion: genealogy or grammar?

The foregoing analyses indicate that there is value in deploying a genealogical method: i.e. investigation of how a concept with contemporary currency may well have a complex relationship with, or even become wholly untethered from, its origins (Nietzsche, 1893/1998).[32] It has undoubtedly been part of collective human self-perception broadly allowing a demarcation between the human and the bestial. It has also been, in part, subverted in its relationship with the aristocratic, allowing (sometimes paradoxical) talk of individuals' inherent nobility or universal sovereignty. The significance of such an analysis is precisely that even a genealogy, an account of origins and the reception or mutation of origins, does not dictate or over-determine the use of a concept in discourse. Accordingly, I will suggest that genealogy explains much that is ostensibly contested in the discussions of dignity that I have been concerned with, but that the limits of genealogy demand, ultimately, prioritisation of meaning and use ('grammar'), rather than appeal to a single privileged account or narrative of origins.[33]

Neuman and Whitman's debate, it was suggested, had an obvious point of divergence insofar as Whitman centralised dignity *simpliciter* while Neuman championed a distinct reading of human dignity. It was also suggested that Neuman could neither stipulate, without further explanation, why dignity *simpliciter* was irrelevant, nor why human dignity demarked a qualitative difference (given dignity's intimate relationship with discourses of the human). In the light of the epistemology of dignity (with the body as a site of dignity) and the ontology of dignity (in human self-perception) it is clear that Neuman's position does privilege human dignity without engaging clearly in genealogy, and perhaps, implicitly by appealing to the conception of (normative and universal) humanity which is readily associated with human dignity. In short, appeal to humanity rightly undermines much that Whitman is saying – and appeal to the generalised (the human, humanity, shared basic norms) is far more perspicacious than Whitman's aristocratic honour – but isolating human dignity as a distinct discourse is question-begging. Conversely, Whitman certainly perceives a process of

32 'Genealogy' is intended broadly to indicate methodological approaches inspired by Nietzsche (1893/1998), and refined by Foucault (1966/2002), that are principally historical but question a linear approach to the development of institutions, practices and concepts. They seek rather to identify discontinuities, disruptions and fundamental changes of function in the emergence of practices and concepts.

33 'Grammar' is intended broadly to indicate methodological approaches inspired by Wittgenstein (1953/2005) that attend to ordinary language and the structuring tendencies that are found in ordinary language. The language of 'grammar' is also found in Foucault (1966/2002). Common to Wittgenstein and Foucault are first, attention to how the structures of language determine expression and classification, and, second, rejection of ontological commitments beyond those determined by social activity (Wittgenstein) and social forces (Foucault).

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generalisation – conceived in terms of the generalisation of honour within Nazi legality – and within narrow bounds he could well treat dignity, in this context, as a synonym of honour. But by making the further claim that this dignity intersects with dignity outside this honorific context, the narrow equivalence of Nazi honour and other *generalised* discourses of dignity is broken, and Whitman has to concede, and indeed does concede, that this dignity is generalised in a very specific way: namely, from his perspective, through Kantian universalisation. As such, Whitman's position is misleading in indicating commonalities where two different genealogies are at work: one of dignity's generalisation, one of narrowly particularised honour claims. Concretely, Nazi honour applied to Aryans and other persons already classified within a specific group; dignity, as it is understood at least from the Revolutionary era through to today, is generalised to the extent that such specificity is categorically incorrect.

Carozza and McCrudden are located within a more genealogically determined space of discourse. Despite the complexities of ontological and epistemological claims with respect to dignity and human dignity, post-war jurisprudence provides a large but relatively well-determined sphere of functioning for human dignity. Nonetheless, comparative analysis and debate reveals an interesting uncertainty concerning the nature of dignity as a univocal norm. As a heuristic, and as a holistic invocation of the embodied person, dignity is not simply a positive norm but something with a more complex legal function. Neither McCrudden nor Carozza are insensitive to this, but attention to the genealogy of dignity is more likely to allow this to become explicable: positive law does not explain attempts to *limit* or point to a source of normativity *beyond* positive law. (Carozza's echoing of Neuman's term 'suprapositivity' (2008, p. 932) indicates precisely a discourse of positive law pushing against its own limits; but the term obscures the doubtless difficult question of normativity external to law.) Moreover, there is a danger, particularly with respect to Carozza's delineation of a *ius commune*, in moving from this eminently dialogical account of the cross-fertilisation of legal discourse (2008, p. 943), to a kind of functionalism which suggests that for the most part dignity has a *stable meaning*, which in turn gives rise to a *stable role* in legal discourse. Rather, it is possible to invert this picture and suggest that the emergence of certain minimal values, demands and normative claims have generated a common 'form of life' within which dignity has come to play a role (Wittgenstein, 1953/2005, sec. 241). No doubt dignity is able to do this because of its rich etymology and its ontology of generalisation. But the driver in cross-jurisdictional dialogue can be seen, in the first instance, as a shared set of practices, and not perception of the categorical force of dignity. This, in sum, indicates the importance of the grammar of dignity: the practice of its use, arising from other practices and activities, which give it meaning. Genealogy may indicate why a particular term is particularly resilient or malleable, but its meaning is ultimately its use.

In the light of this, McCrudden's defence of unlimited conceptions remains best positioned to explain both dignity's commonality in legal discourse and its polymorphous nature. Nonetheless, this is not well served by the language of 'concepts versus conceptions'. The identification of a core of commitments within the concept – cashed-out into different, even competing, conceptions – demands too much of its conceptual core. This core not only privileges post-1945 legal discourses of human dignity, and intimates that they have a prima facie force in legal discourse (2008, pp. 712f.), but requires further clarification in terms of how the core concept functions. Are claims of 'inherent' dignity, or demands for limitation to state action, anterior or exterior to law? Are these claims more likely to generate change amongst and within 'conceptions' than the other, value-recognising component of the core concept? More tellingly, by aligning his analysis, in part, with the notion of 'essentially contested concepts', McCrudden posits a conceptual and normative stability based on the possibility of conceptual resolution and closure (2008, p. 679, n. 170). Premised upon the gradual working out and clarifying of notions containing value judgements, 'essentially contested notions' are those which generate contestation, but also contain the conditions of limited, mutually intelligible ('reasonable') debate (Gallie, 1956). This is correct insofar as, for the most part, dignity generates

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debate that is sufficiently focused and bounded for interlocutors not to be mutually unintelligible. But this also implies that conceptual stability and consensus could be won on the basis that parties and interlocutors can ultimately come to see the force of the values and judgements that are contested (pp. 196f.). I would suggest, conversely, that contestation concerning dignity will continue, that unlimited conceptions are likely to be generated, but also that these conceptions – i.e. the uses made of dignity – should take priority over the identification of a stable concept. McCrudden is, in short, attempting to combine, without prioritising, both a (genealogically determined, and therefore stable) concept, with an account of (grammatically predictable, but unstable) polymorphous conceptions. I would suggest it is possible to *prioritise* the grammar of dignity, without thereby abandoning any appeal to genealogy.

Conclusion

This article has attempted to intervene in two debates, isolating one from the other in some respects, but ultimately linking the nature of their contestation to wider divisions between dignity's epistemology and ontology, and more specifically to division between, and the priority between, its genealogy or grammar. As such, comparative and conceptual debates are mutually illuminating. Comparison compels us to deny quick attribution of conceptual commonalities; conceptual analysis delineates the conditions and boundaries of comparative enquiry. No doubt analysis of dignity is not unique in this. Any comparative study requires a priori decisions of relevance, and conceptual analysis demands that we in some way 'set down the appearances'. But dignity has the peculiarity of being at the heart of a number of, very different, ways of considering what is general in human being. While other terms in the social sciences and law unpack and distinguish what is particular in human life and activity, dignity points to what is most general in factual and in normative terms. As such it has a strong intuitive appeal – there, it seems, must be something that plays this role at the limits of factual and normative debate – and as such it performs the limits of contestation by invoking those limits. But as a consequence of this it is also one of the most unstable of concepts, susceptible to attack in terms of the logic of universals, the deconstruction of anthropology, the groundlessness of normativity and the vacuity of metaphysics. Even a phenomenology of dignity, a charting of its appearances, commits us to categorical decisions concerning the prioritisation of the body and its behaviours, or the person and its integrity. Above all, as a discourse of the human, dignity attempts to articulate a perspective external to a whole within which we, as humans and as scholars, remain a part. In that respect alone, conceptual and comparative debates share a common limitation: that by asserting claims about humans as a whole we are attempting to raise our vantage point above the human, by at times pulling on our own perceptual and conceptual bootstraps.

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